THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE NOOKSACK INDIAN TRIBE, Plaintiff, v. KEVIN "JACK" HAUGRUD, in his official capacity as Acting Secretary of the Interior; the U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs; WELDON "BRUCE" LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs, Department of the Interior; STANLEY M. SPEAKS, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs; MARCELLA L. TETERS, in her official capacity as Superintendent, Puget Sound Agency, Bureau of Indian Affairs; TIMOTHY BROWN, in his official capacity as Senior Regional Awarding Official for the Bureau of Indian Affairs, Northwest Region; and THE UNITED STATES OF AMERICA, Defendants.	Case No. 2:17-cv-00219 **MOTION OF 271 NOOKSACK TRIBAL MEMBERS TO INTERVENE** Note for Motion Calendar: March 24, 2017

Intervenors are 271 members[1] of the Nooksack Indian Tribe ("Tribe"), each of whom are directly affected by U.S. Department of the Interior ("Interior") decisions to not recognize any

[1] *See* Appendix A.

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

actions of the Nooksack Indian Tribal Council ("Holdover Council") taken since March 24, 2016.

Among other rejected Holdover Council actions, Interior specifically refused to recognize "orders of eviction" against certain Intervenors; a "'referendum election' . . . claiming to disenroll" Intervenors; a Tribal Council election in which Intervenors were not allowed to vote; and "any other action" against Intervenors "inconsistent with the plain language of the Tribe's laws." Declaration of Gabriel S. Galanda ("Galanda Decl."), Exs. A-C. Each of Interior's decisions, like each precipitating Holdover Council action, *per se* concern and affect Intervenors.

Because Plaintiff, by and through the Holdover Council, challenges those federal decisions in this suit, Intervenors move to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2) or, alternatively, Fed. R. Civ. P. 24(b).

Intervenors are entitled to intervene as a matter of right: They have significant protectable, including economic, interests in this litigation. The Holdover Council's claims will actually affect them, including related litigation.[2] Neither the Holdover Council nor the Federal Defendants[3] adequately represent Intervenors' interests. Indeed, only Intervenors fully know the other side of Plaintiff's story. Alternatively, Intervenors should be permitted to intervene under Fed. R. Civ. P. 24(b). U.S. Supreme Court precedent favors intervention in this matter because the disposition of this litigation will directly and substantially affect Intervenors' welfare.

This Motion is timely. Intervention will not prejudice any parties, and participation of Intervenors will aid in this Court's full consideration of the factual and legal issues presented.

I. FACTS

The Holdover Council desires above all else to maintain absolute control of the Tribe, and

[2] *See Rabang v. Kelly*, No. 17-0088-JCC, Dkt. No. 7 (W.D. Wash. Feb. 2, 2017).
[3] Intervenors collectively refer to Defendants Kevin "Jack" Haugrud, the U.S. Department of the Interior, Michael S. Black, Weldon "Bruce" Loudermilk, Stanley M. Speaks, Marcella L. Teters, Timothy Brown and the United States of America, as the "Federal Defendants."

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

the vast personal wealth that comes with that authority. The only way they can maintain that "exclusive power" is to disenfranchise, and in turn, eliminate Intervenors. *See* Complaint, Dkt. No. 1, ¶ 54. For every economic benefit deprived from Intervenors, there is an equal or greater benefit derived by the Holdover Council. Indeed, this suit, ostensibly on behalf of "the Tribe," is a thinly-veiled attempt by a small group of individuals to maintain political power and wealth, as described vis-à-vis the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, litigation in *Rabang v. Kelly*, No. 17-0088-JCC, Dkt. No. 7 (W.D. Wash. Feb. 2, 2017).

As members of the Tribe, Intervenors are eligible for numerous tribal, state and federal programs that confer substantial economic, health and cultural benefits. Intervenors can reside and find employment on the reservation, "lease to own" homes on tribal lands, receive health care and other social services, participate in tribal governance, and exercise Treaty fishing, hunting and other rights consistent with the 1855 Treaty of Point Elliott, 12 Stat. 927 (1855). Each of these rights are implicated by Interior's decisions, and thus by this suit.

In its Complaint, Plaintiff fails to advise this Court of the following various material facts:

A. Holdover Council Contrives Plan To Forgo Elections, In Order To Maintain Power.

Since 2012, the Holdover Council, as a faction of the Nooksack Indian Tribal Council ("NITC"), has sought to remove Intervenors from the Tribe. To that end, since 2012 the Holdover Council has relentlessly sought to overcome the Intervenors by, for instance, purportedly firing the Chief Judge of the Nooksack Tribal Court ("NTC"); disbarring or refusing to license multiple attorneys for Intervenors; suing its own Nooksack Tribal Court of Appeals ("NTCA"); creating a "Nooksack Supreme Court" ("NSC") to which they appointed themselves justices and in turn vacated numerous NTCA decisions; flouting a stay before the federal Interior Board of Indian Appeals ("IBIA"); and, disenfranchising Intervenors from voting in tribal

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

elections. *See generally* Galanda Decl., Exs. A-C. Interior has rebuffed these illegal maneuvers. *Id.*

In December 2016, after nearly four years of unsuccessful attempts to eliminate, through disenrollment, Intervenors, the Holdover Council realized that in order to maintain control of the NITC they needed to maintain a majority of its seats in an upcoming election scheduled for March of 2016. Only with a voting majority could the Holdover Council accomplish their plan to disenroll Intervenors. Realizing they could not win the election for four of the eight NITC seats, the Holdover Council simply refused to call the election. Declaration of Michelle Roberts ("Roberts Decl."), ¶ 3. By March 24, 2016, those four seats expired. CONST. OF THE NOOKSACK INDIAN TRIBE OF WASH. ("Nooksack Const."), Art. IV, § 4; Galanda Decl., Exs. A-C.

With only four members legally occupying their offices, the NITC fell into holdover status. *See* Nooksack Const.. Art. III, § 2. That is because the NITC cannot legally transact any Tribal business without a quorum of at least five members. *Id*. Art. II, § 4. The Holdover Council has since lacked, and continues to lack, the quorum necessary to take any official action on behalf of the Tribe. *See id.;* Galanda Decl., Exs. A-C. As a result, any acts of the Holdover Council or its surrogates are fraudulent, particularly pursuant to the three Interior determinations that the Holdover Council—masquerading here as the "Tribe"—challenge in this action. Galanda Decl., Exs. A-C.

The lengths to which the Holdover Council has gone to forgo the election, and maintain power, are astonishing—and wholly unlawful. *Id*.

B. Holdover Council Eliminates Impediment Posed By Tribal Court Judge.

After falling into holdover status, the Holdover Council acted quickly to eliminate any possible threats to their absolute rule, most notably the Nooksack Judiciary. On March 28, 2016,

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

the Holdover Council terminated NTC Chief Judge Susan Alexander—who was lawfully appointed by the NITC effective as of June 1, 2015—as she was in the final stage of preparing a ruling to compel the Holdover Council to call the election for the four expired NITC seats.[4] *See* Roberts Decl., Ex. 2. Previously, in January and February of 2016, Judge Alexander had issued several rulings that upheld the voting rights of Intervenors and publically admonished the acts of the Holdover Council to deprive Intervenors of their constitutional right to vote and their due process right to counsel of their choosing. *See id*. Chief Judge Alexander especially criticized the Holdover Council's banishment or disbarment of Intervenors' longtime counsel, Galanda Broadman, PLLC. Galanda Decl., ¶ 6.

On or about June 13, 2016, the Holdover Council, still lacking a quorum, replaced Chief Judge Alexander with former in-house Nooksack Tribal Attorney, Raymond Dodge. Mr. Dodge appeared as counsel of record for the Holdover Council in the voting rights proceedings before Judge Alexander earlier in 2016, before "resigning" as Nooksack Tribal Attorney in May 2016. *Id.* ¶ 7. As "Chief Judge," Mr. Dodge refused to convene or even accept lawsuits that Intervenors filed with the Tribal Court to prevent various injustices; and refused to allow Intervenors' chosen civil counsel to appear for Intervenors. *Id.* ¶ 8, Exs. D-F. Interior has since determined that the Holdover Council's appointment of Mr. Dodge as "Chief Judge" of the NTC was invalid and that any "orders" issued by Mr. Dodge are unlawful. *See* Galanda Decl., Exs. A-C.[5]

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[4] Memorandum from Susan M. Alexander to Samantha Wohlfeil, Reporter, The Bellingham Herald (Apr. 21, 2016) *available at* http://media.bellinghamherald.com/static/downloads/AlexanderMemo.pdf; *see also* Samantha Wohlfeil, *Nooksack Tribe fires judge handling disenrollment case*, THE BELLINGHAM HERALD (Apr. 22, 2016) *http://www.bellinghamherald.com/news/local/article73366262.html.*

[5] Likewise, on December 13, 2016, the Whatcom County Superior Court, according "substantial deference to the October 17, 2016 and November 14, 2016 decisions of Lawrence S. Roberts, Principal Deputy Assistant Secretary of Indian Affairs for the United States Department of the Interior," refused to "recognize as lawful or carrying any legal effect the actions or decisions of the Nooksack Tribal Court after March 24, 2016 . . . ." Galanda Decl., Ex. G. The Superior Court "therefore, d[id] not recognize any such post-March 24, 2016 actions of decisions of the Nooksack Tribal Council" and also refused to recognize, e.g., a "November 17, 2016 Order issued by [the] Nooksack Tribal Court." *Id.*

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

C. Intervenors Implore Interior To Intercede And Conduct The Election At Nooksack.

On March 28, 2016, Intervenor Michelle Roberts wrote to Defendant Bureau of Indian Affairs ("BIA") Northwest Regional Director Stanley Speaks:

> It is now plain that a faction of current and holdover Nooksack Tribal Councilpersons led by Bob Kelly ("Kelly Faction") is orchestrating a coup d'état. They have refused to hold an election for four open Council seats by March 19, 2016, as required by the Nooksack Constitution. As of last Thursday, March 24, 2016, when the four-year terms for those seats lapsed by way of their swearing-in date in 2012, there is no Tribal Council that can obtain a five-person quorum in order to transact any governmental business.
>
> All facets of the Nooksack government—executive, legislative and judicial—and all notions of Nooksack democracy have been eviscerated by the [Holdover Council]. We, therefore, implore the BIA to intervene now, and convene an election for the four Tribal Council seats that should have been conducted on March 19, 2016.
>
> The absence of a legitimate and functioning Nooksack tribal government warrants BIA intercession, and immediately so. The BIA must now exercise its trust responsibility [to] intervene on the behalf of all Nooksack people. We, therefore, ask the BIA to remedy the [Holdover Council]'s Nooksack Constitutional and ICRA violations against the Nooksack People by urgently facilitating a tribal election for the four illegally occupied Tribal Council seats, in a manner consistent with the Nooksack Constitution. We humbly implore your intersession.

Roberts Decl., Ex. 1 (emphasis in original).

On April 11, 2016, Intervenor Roberts again wrote to Director Speaks informing him that the Holdover Council had fired Judge Alexander and "shut down the Nooksack Tribal Court, after the Judge issued two orders in late March critical of the [Holdover Council]." *Id*. at Ex. 2. She again "implor[ed] the BIA to intercede by simply convening the election for the four holdover seats occupied by the Kelly Faction." *Id.* Although Interior would never intercede and convene that election, demonstrating its restraint, Interior would repeatedly offer to technically assist the Tribe in conducting that election, as discussed *infra*. Galanda Decl., Exs. A-C.

On April 25, 2016, Intervenors' counsel contacted Director Speaks seeking a meeting

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

regarding the state of the Nooksack government, writing: "Please let me know if/when my Nooksack folks and I can meet with you and yours in Portland—now that the Nooksack tribal government has completely broken down, and there's no tribe for you all to currently interface with inter-governmentally." *Id*. at Ex. H.

Between June 3, 2016, and June 6, 2016, the Holdover Council, still lacking a quorum, purported to pass NITC Resolutions to disenroll four Intervenors ("June 2016 Disenrollment Resolutions"). Roberts Decl., ¶ 6, Ex. 4. The Holdover Council, through its subordinate government entities, also sought to illegally deprive Intervenors of their residential properties and their investments in those properties without compensation or any semblance of due process. *Id.* at ¶¶ 9-13, Exs. 5-7. By July 27, 2016, Intervenor Elizabeth Oshiro was evicted from her federally subsidized home, and deprived of the equity she invested in that home. *Id.* at ¶ 10, Ex. 4. The Holdover Council started its illegal eviction proceedings against Intervenor Margretty Rabang on August 11, 2016. *Id.* at Ex. 5. Such Intervenors were illegally deprived of money and property. *Id*. at ¶¶ 10, 12.

On July 25, 2016, and August 16, 2016, counsel for Intervenors further implored the BIA to intercede and facilitate an election for the four expired NITC seats. Galanda Decl., Exs. I, J. Citing a legitimate order issued by the NTCA vis-à-vis the Northwest Intertribal Court System ("NICS"), on July 25, 2016, Intervenors' counsel informed Director Speaks that "the entire Nooksack Tribe [had] 'cease[d] to operate under the rule of law and as a result it forfeits . . . any right to demand . . . that other sovereign governments deal with it government to government, and . . . its legal authority to govern the Tribe.'" *Id.* at Ex. J, 2.

D. The Holdover Council Sues Its Own Appeals Court; Appoints Themselves Justices To Brand-New Supreme Court And Vacates the Appeals Court's Decisions.

On September 21, 2016, the Nooksack Tribal Court of Appeals reversed the Holdover

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Council's banishment/disbarment of Intervenors' counsel. *Id.* Ex. K. On September 30, 2016, the Holdover Council then sued its own Tribal Court of Appeals vis-à-vis NICS in the NTC, where a hand-picked pro-tem judge enjoined the Appeals Court from further functioning or issuing orders against the Holdover Council. *Id.* Ex. L. On October 7, 2016, the Holdover Council created a "Nooksack Supreme Court" and appointed themselves its "Justices," and in turn vacated over a dozen orders issued against the Holdover Council by the Appeals Court between March of 2016 and September 22, 2016. *Id.* ¶ 18, Exs. M, N.

On October 11, 2016, Intervenor Margretty Rabang attempted to file a lawsuit in NTC, seeking a "declaratory judgment that Defendants has no authority to act on may matter, including [the Intervenor's] housing, because of the Tribe's defunct status since March 24, 2016." Roberts Decl., Ex. D. The Holdover Council Mr. Dodge, as "Chief Judge," caused the NTC Clerk to "REJECT" the Complaint and the NTC refused to convene the lawsuit. *Id.* at ¶ 9, Ex. D.

It was at that point when Interior had seen enough.

E. Interior Finally Acts, With Restraint.

On October 17, 2016, Interior Assistant Secretary of Indian Affairs Lawrence Roberts ("AS-IA Roberts"), issued his first decision, which in pertinent part provides:

> As you know, the Nooksack Tribal Council (Council) lacks a quorum to conduct tribal business as required by the Nooksack Tribe's (Tribe) Constitution and Bylaws. Four Council members' terms expired in March 2016, and an election was never held to fill their seats. The Council currently consists of four members.
>
> [P]ursuant to the plain language of the Tribe's Constitution and Bylaws, the Council must have five duly elected officers to take any official action.
>
> **In rare situations where a tribal council does not maintain a quorum to take action pursuant to the Tribe's Constitution, the Department of the Interior (Department) does not recognize actions taken by the Tribe. <u>This is one of those exceedingly rare situations</u>. Accordingly, I am writing to inform you and the remaining Council members that the Department will only recognize those actions taken by the Council prior to March 24, 2016, when a quorum**

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

> **existed, and will not recognize any actions taken since that time because of a lack of a quorum.**
>
> The BIA stands ready to provide technical assistance and support to the Tribe to carry out elections open to "all enrolled members of the Nooksack Tribe, eighteen years of age or over" regardless of county residency, to vote to fill the vacant Council seats. Please be advised that elections inconsistent with Nooksack law will not be recognized by the Department. ("Interior Decision I").

Galanda Decl., Ex. A (emphasis added). AS-IA Roberts, the highest-ranking U.S. Indian official in the Nation, was the primary federal authority responsible for "maintaining the Federal-Tribal government-to-government relationship" and determining who is and who is not allowed to carry out acts on behalf of tribal governments.[6] The Holdover Council ignored Interior Decision I and continued with their "at-any-cost" plot to disenroll the other 267 Intervenors.

On October 31, 2016, Intervenor's counsel informed AS-IA Roberts that "the holdover Nooksack Tribal Council has ignored" Interior Decision I, and

> has attempted to disenfranchise all Nooksack voters who are either non-Whatcom County residents, or proposed for disenrollment. It has further ignored the Northwest Intertribal Court System (NICS) and other legitimate Nooksack judicial rulings. It has continued to deprive enrolled Nooksack tribal members of federally funded social services, housing and medical care, and access to the Tribal Court for redress.

Id. Ex. O.

On November 11, 2016, Intervenors' counsel further apprised AS-IA Roberts "of the lengths the holdover Nooksack Tribal Council has gone, and continues to go, in rejection of [his] letter dated October 17, 2016." *Id.* Ex. P. This letter detailed the Holdover Council's denial of social and medical services to Intervenors, and the Holdover Council's illegal disenrollment "referendum election" and 10-minute telephonic hearings against Intervenors. *Id.*

On November 14, 2016, AS-IA Roberts issued a second decision to Holdover Council:

[6] U.S. Dep't of Indian Affairs, Assistant Secretary – Indian Affairs, Brief Summary of the Office of the Assistant Secretary – Indian Affairs, http://www.bia.gov/WhoWeAre/AS-IA (last accessed Mar. 1, 2017); *Newtok Traditional Council v. Acting Alaska Reg'l Dir.*, 61 IBIA 167, 169, 2015 WL 4946232 (2015)..

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

> I want to reiterate that pursuant to our Nation-to-Nation relationship, **the Department of the Interior (Department) will not recognize actions by you and the current Tribal Council members without a quorum consistent with the Nooksack Tribe's (Tribe) Constitution . . . . As I stated in my October 17, 2016 letter, the Department will only recognize those actions taken by the Tribal Council prior to March 2016, when a quorum existed, and will not recognize any actions taken since that time because of the lack of quorum.** Accordingly, until a Council is seated through an election consistent with tribal law and the decisions of the Northwest Intertribal Court System, we will not recognize any "referendum election" including the purported results posted on the Tribe's Facebook page on November 4, 2016, claiming to disenroll current tribal citizens or any other action inconsistent with the plan language of the Tribe's laws.

("Interior Decision II") *Id.* Ex. B (emphasis added). Interior again offered to provide the Holdover Council technical assistance for a valid tribal election. *Id.* The Holdover Council ignored Interior Decision II as well, and continued to aggressively persecute Intervenors.

Between November 10, 2016, and November 22, 2016, the Holdover Council purportedly authorized over 289 individual NITC Resolutions ("November 2016 Disenrollment Resolutions") to remove the Intervenors' status as Native Americans. Complaint, Dkt. No. 1, ¶ 43. As a result of the November 2016 Disenrollment Resolutions, Intervenors were unlawfully deprived of, e.g., TANF assistance; health care services, Roberts Decl., ¶ 16, Ex. 8, ¶ 18, Ex. 9, Galanda Decl., Exs. H, J; and education benefits. Roberts Decl., ¶ 20, Ex. 9. At least two Intervenors have been subject to eviction proceedings, as discussed *supra*. Roberts Decl., ¶ 10, 12, Exs. 4, 6.

On November 18, 2016, U.S. Department of Health and Human Services ("HHS") Portland Area Indian Health Service ("IHS") Director Dean M. Seyler, according deference to Interior Decision I, wrote to the Holdover Council:

> The IHS and the Nooksack Tribe (Nooksack or Tribe) entered into a contract, authorized by the Indian Self-Determination Act and Education Assistance Act (ISDEAA) that requires the Nooksack Tribe to provide services to all eligible beneficiaries. It is our understanding that the [NICS] issued an order on March 22, 2016, ruling that the 331 members[7] in question are still enrolled members of the

[7] While as many as 350 Nooksack members have been threatened with disenrollment or disenfranchisement, Intervenors comprise 271 of the 293 Nooksacks who were purportedly disenrolled in June 2016 and November 2016,

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

> Nooksack Tribe. Furthermore, it appears that subsequent actions to disenroll these members by the Nooksack Tribal Council lacked a sufficient quorum and were done in violation of the Tribe's own Constitution and bylaws. *See* [Interior Decision I].
>
> The IHS is not interpreting the Tribe's Constitution or interfering in internal Tribal matters, but rather ensuring all eligible beneficiaries receive health care benefits in accordance with both Federal and Tribal law. Accordingly, until the Tribe has a sufficient quorum and a final decision is reached regarding the status of the 331 members in question, Nooksack must ensure that they receive access to health care services. Failure to comply with the eligibility provisions of the Tribe's contract with IHS, and with IHS' eligibility regulations, may require [HHS] to take necessary measures to ensure health services are provided in accordance with applicable federal law.

Galanda Decl., Ex. Q.

On November 23, 2016, Intervenors' counsel informed AS-IA Roberts of the Holdover Council's disregard for Interior Decision I, detailing illegal disenrollment "hearings"; an invalid injunction issued against the Nooksack Tribal Court of Appeals by the Holdover Council's hand-picked pro-tem judge; and the Holdover Council's attempt to conduct the controversial tribal election without Intervenors being able to vote. *Id.* Ex. R.

On December 1, 2016, Intervenors' counsel informed AS-IA Roberts of the Holdover Council's continued disregard for both Interior Decisions I and II, informing him, as well as HHS, that the Holdover Council was acting "in violation of each of your decisions and much other law," and thus Intervenors were "being denied medical care, prescription refills, and [TANF] assistance." *Id.* Ex. S. Counsel for Intervenors "urgently implore[d] each of [their] agencies' further, and more direct, intercession." *Id.*

On December 13, 2016, IHS Principal Deputy Director Mary Smith, according deference to Interior Decision II, wrote to the Holdover Council:

> If the Nooksack Tribe continues to deny HIS services to individuals who were not

respectively. Undersigned counsel represent 331 Nooksack members altogether, including 50 members who are not threatened with disenrollment or disenfranchisement (yet), but simply want an election.

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

> properly disenrolled and/or may still be eligible regardless of Tribal membership, the IHS will take necessary measures to ensure health benefits are provided in accordance with applicable Federal law. This may include an audit to determine non-compliance with the Tribe's ISDEAA contract and may result in deductions from the Tribe's ISDEAA contract to ensure those eligible beneficiaries receive health care benefits.

Id. Ex. T. Director Smith "request[ed] evidence supporting the position that the disenrolled members are not eligible" for IHS contract health care" and for a "meeting . . . to give us the opportunity to discuss the position of the Nooksack Tribe," *id*., but the Holdover Council "has not responded to either request." *Id.* at Ex. U.

On December 23, 2016, AS-IA Roberts issued a third decision to the Holdover Council, extending the prior decisions to "recognize only those actions taken by the Tribal Council prior to March 24, 2016" to "so-called tribal court actions and orders":

> It has come to the Department's attention that orders of eviction may have been recently issued to be served by the Nooksack Chief of Police or could be issued and served in the near future. **It appears that such orders are based on actions taken by the Tribal Council after March 24, 2016. Therefore, as explained to you above and in the previous letters to you, those orders are invalid and the Department does not recognize them as lawful . . . .** ("Interior Decision III").

Id. at Ex. C. The Holdover Council likewise ignored Interior Decision III, and continued to deprive Intervenors of money, property and other economic interests. The Holdover Council's oppression of Intervenors is ongoing.

On January 17, 2017, IHS Director Seyler wrote the Holdover Council:

> On November 18, 2016, and December 13, 2016, the [IHS] sent you letters [] regarding the need for the Nooksack Indian Tribe (Tribe) to continue to provide health care services for the enrolled members the Tribe was disenrolling. As indicated in the December 13, 2016, it appears that subsequent actions to disenroll these members by the Nooksack Tribal Council lacked a sufficient quorum and were done in violation of the Tribe's own Constitution and bylaws. The [Holdover] Council's lack of a quorum has also interfered with the Agency's ability to negotiate and enter into a new annual funding agreement under the Tribe's [ISDEAA] contract.

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Id. Ex. U. IHS also notified the Holdover Council of its intent to rescind the Tribe's ISDEAA funding contract. *Id.*

On February 24, 2017—after this action was filed—the Holdover Council appealed the "declination of the Tribe's proposed Annual Funding Agreement for calendar year 2017." Order Referring Appeal to the Departmental Cases Hearings Division for Assignment to an Administrative Law Judge in *Nooksack Indian Tribe v. Director, Portland Area, Indian Health Service*, Dkt. No. IBIA 17-045. *Id.* Ex. V.[8] As a threshold matter, the IBIA has questioned "the authority of the Tribal Council to represent the Tribe, or to bring an appeal in the name of the Tribe," and allowed Intervenors to establish themselves as "'interested parties' to this appeal" to help answer that question. *Id*. at 1, n.3, 3.

Meanwhile last month, Intervenors Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato and Elizabeth Oshiro (collectively, "RICO Plaintiffs") filed suit in this Court against the Holdover Council and their surrogates, alleging RICO violations.[9] *See Rabang v. Kelly*, No. 17-0088, Dkt. No. 7 (W.D. Wash. Feb. 2, 2017).

II. ARGUMENT

A. Intervenors Are Entitled To Intervene As Of Right.

Intervenors are entitled to intervene in this action as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Courts must permit an applicant to intervene as a matter of right when:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the

[8] Plaintiff failed inform the court that it also filed an appeal with the IBIA the funding contract on which its claims in this action are based. *See, e.g.*, Complaint, Dkt. No. 1, ¶ 70. It remains unclear whether Plaintiff has also pursued administrative appeal of the Federal Defendants' denials set forth at Paragraphs 65-80 of its Complaint.

[9] *Stillaguamish Tribe of Indians v. Nelson*, Case No. 2:10-cv-00327-RAJ, Dkt. No. 407 (W.D. Wash. Apr. 17, 2013) (order granting in part and denying in part motion for summary judgment on RICO claims against tribal officials); *S.W. Casino and Hotel Corp. v. Flyingman, et al*., Case No. 5:07-cv-00949-C, Dkt. No. 43 (W.D. Okla. Oct. 27, 2008) (order denying motion to dismiss RICO claims against tribal officials).

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

> application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004); Fed. R. Civ. P. 24(a)(2).

The test for intervention as a matter of right does not establish "a clear-cut or bright-line rule," and "[n]o specific legal or equitable interest need be established." *Alisal Water Corp.*, 370 F.3d at 919. Instead, courts make "a practical, threshold inquiry" designed to "involve as many apparently concerned persons" in a suit "as is compatible with efficiency and due process." *Id.* Courts are "guided primarily by practical and equitable considerations, and the requirements necessary for intervention are broadly interpreted in favor of intervention." *Id*.

Here, Intervenors clearly meet these requirements to intervene as a matter of right.

1. Intervenors Have Significant Protectable Interests In This Litigation.

Intervenors possess a significant protectable interest in this litigation because resolution of the Tribe's claims actually will affect them. An applicant for intervention possesses adequate interests in a suit where "the resolution of the plaintiff's claims *actually will affect* the applicant." *S. Cal. Edison Co. v. Lynch*, 37 F.3d 497, 803 (9th Cir. 2002) (emphasis added) (citing *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998)). Whether this Court affirms Interior's decisions not to recognize actions taken by the Holdover Council since March 24, 2016, will actually—and dramatically—affect Intervenors': (i) tribal membership; (ii) tribal voting rights; (iii) rights to services funded through the federal funding contracts at issue here[10]; (iv) eligibility for tribal, state, and federal health care, housing, education, and other assistance; (v) residential property investments; (vi) employment opportunities; and (viii) Tribal treaty fishing, hunting and other rights ("Intervenors' Affected Rights"). *See, e.g.*, Roberts Decl., ¶¶ 9-20, Exs. 4-10; Galanda Decl., Exs. H, J. Additionally, whether this Court affirms Interior's decisions will affect whether

[10] *See* Complaint, Dkt. No. 1, ¶¶ 27-29, 45, 48, 65-83, 102-104, 106-107, 111, 116-117.

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Intervenors are further subjected to the issuance and enforcement of "invalid" and "unlawful" NTC orders. *See* Galanda Decl., Ex. C; Roberts Decl., ¶¶ 10, 12, Exs. 4, 6. Because resolution of the Tribe's claims will actually and directly affect Intervenors, they are entitled to intervene by right. *S. Cal. Edison Co.*, 37 F.3d at 803.

In addition, Intervenors have a significant protectable interest because they possess a non-speculative, economic interest in this litigation. A non-speculative, economic interest is sufficient to support intervention. *Alisal Water Corp.*, 370 F.3d at 919. If this Court invalidates Interior's decisions, Intervenors' economic interests will be harmed, including various of Intervenors' Affected Rights which are economic in nature. *See* Roberts Decl., ¶¶ 9-20, Exs. 4-10; Galanda Decl., Exs. H, J. In particular, if this Court invalidates Interior's decisions, Intervenors will be ejected from their homes and forced to forfeit investments in those homes. *See, e.g.*, Roberts Decl., ¶¶ 10, 12, Exs. 4, 6; Galanda Decl., Ex. H. Therefore, Intervenors should be allowed to intervene by right. *Alisal Water Corp.*, 370 F.3d at 919.

Intervenors also have a significant protectable interest in this litigation because the outcome of the Tribe's claims will affect related litigation, specifically *Rabang v. Kelly*, No. 17-0088 (W.D. Wash.), and *Nooksack Indian Tribe v. Director, Portland Area, Indian Health Service*, Dkt. No. 17-045(IBIA). An applicant possesses a protectable interest in the outcome of a suit that might, "as a practical matter, bear significantly on the resolution [its] claims" in a "related action." *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom*. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)). The RICO Plaintiffs are among the Intervenor applicants; all Intervenors will seek to establish themselves as interested parties in "the Tribe's" IBIA appeal. Both proceedings, as with this lawsuit, are predicated on Interior's decisions not to recognize any actions taken by the Holdover

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Council since March 24, 2016. In particular, if the Tribe prevails here, it may be impossible, or at the least very difficult, for the RICO Plaintiffs to prevail on their RICO claims. *See Stringfellow*, 783 F.2d at 826. Intervenors therefore possess a cognizable interest in preventing that result, and thus are entitled to have a "voice" when "th[e] decision is made." *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981). The court should permit Intervenors to intervene by right. *Stringfellow*, 783 F.2d at 826.

2. Disposition Of This Case Without The Participation Of Intervenors Impairs Their Ability To Protect Their Interests.

This factor is satisfied when the suit "may as a practical matter impair or impede [an applicant's] ability to safeguard [its] protectable interest." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016). Disposition of this action will impair or impede the Intervenors' ability to protect their interests, discussed *infra* at Section II(A)(1). *See Sierra Club v. McLerran*, No. 11-1759, 2012 WL 12846102, at *1 (W.D. Wash. Mar. 28, 2012); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee's notes) ("Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'"). If the court grants the relief sought by the Holdover Counsel, Intervenors' Affected Rights will be deprived. *See, e.g.*, Roberts Decl., Exs. 1-2, 4-10. Those rights also are financial in nature and would be harmed if Plaintiff were to prevail in this action. *See Trident Seafoods Corp. v. Bryson*, No. 12-0134, 2012 WL 1642214, *4 (W.D. Wash. May 10, 2012). Therefore, Intervenors are entitled to intervene as a matter of right.

3. Existing Parties Do Not Adequately Represent Intervenor's Interests.

The Ninth Circuit has consistently followed the Supreme Court's statement in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972), that "[t]he requirement of [Rule

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

24(a)(2)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Although the objectives of Federal Defendants and Intervenors are similar—i.e., validation of Interior's decisions and related actions—their interests do differ: Federal Defendants are interested in following and enforcing federal law, while Intervenors are interested in maintaining Intervenors' Affected Rights, particularly their tribal membership.

Further, the burden on Intervenors to demonstrate the "inadequacy of representation is not a heavy one." *Smith*, 651 F.2d at 1325; *see also Trbovich*, 404 U.S. at 538 n.10. Courts evaluate three factors to determine the adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. Here, Intervenors have satisfied their "minimal" burden of demonstrating that "representation of [their] interests [by the current litigants] 'may be' inadequate" and Intervenors are thus entitled to intervene as a matter of right. *Id*.

With regard to the first factor, the interests of Federal Defendants are not such that they will undoubtedly make all of Intervenors' arguments. *Id.* Federal Defendants possess an interest in following and enforcing federal law and policy, which in this case imposes "a duty [on Interior] to ensure that tribal trust funds, Federal funds for the benefit of the Tribe, and our day-to-day government-to-government relationship is with a full quorum of the [Nooksack Tribal] Council as plainly stated in the Tribe's Constitution and Bylaws." Galanda Decl., Ex. A; *see also id.*, Exs. B-C. In contrast are Intervenors' Affected Rights. *See* Roberts Decl., ¶¶ 9-20, Exs. 4-10; Galanda Decl., Exs. H, J. It is, therefore, unlikely the Federal Defendants will make all of the

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Intervenors' arguments, or be willing to do so. *Trident*, 2012 WL 1642214, at *4. Intervenors have therefore met the minimal burden establishing inadequacy of representation. *Arakaki*, 324 F.3d at 1086.

With regard to the second factor, it is unlikely that the Federal Defendants are capable and willing to make arguments that defend the interests of Intervenors. *Id*. Interior Decision I demonstrates that Federal Defendants are committed to supporting Interior's "day-to-day government-to-government relationship" with the Tribe and maintaining "any self-determination contracts or funding agreements it has with the Tribe to ensure the Tribe's compliance with all contract provisions." Galanda Decl., Ex. A. Interior Decisions I, II and III do not specifically mention Intervenors' Affected Rights, which have been denied to Intervenors as a result of the Holdover Council's invalid actions (although IHS's decisions do). Instead, Interior's three decisions indicate that in this action Federal Defendants will make arguments that relate to Interior's government-to-government relationship and funding contracts with the Tribe. It is therefore unlikely that Federal Defendants will make arguments that serve all of Intervenors' interests. *Arakaki*, 324 F.3d at 1086. Only Intervenors can defend their vital interests.

Third, and most significantly, Intervenors would offer necessary elements to the proceeding that other parties would likely neglect. *Id*. Intervenors and their counsel have regularly corresponded with Federal Defendants regarding the Holdover Council's rampant illegality and have thoroughly documented these communications. Roberts Decl., Exs. 1, 2; Galanda Decl., Exs. H-J, O, P, R, S. Plaintiff's Complaint details administrative and IBIA rulings regarding the Holdover Council's initial unlawfulness—it was Intervenors who filed those federal appeals. Dkt. No. 1, ¶¶ 30-45. The Complaint also details litigation in the NTC, NTCA, and Whatcom County Superior Court—it was Intervenors who brought these suits against the

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Holdover Council. *Id.* at ¶¶ 33, 35, 76. It also was Intervenors who notified Federal Defendants of the Holdover Council's failure to call the tribal election and who kept them apprised as the Holdover Council incessantly violated Interior Decisions I, II, and III. Roberts Decl., Exs. 1, 2; Galanda Decl., Exs. H-J, O, P, R, S.

Intervenors are thus in the best position to offer the court information necessary to the proceeding; information the Federal Defendants may not know and information that Plaintiff is likely to neglect to share with the Court. *Arakaki*, 324 F.3d at 1086.

4. Intervenors' Application For Intervention Is Timely.

Courts weigh three factors in determining whether a motion for intervention is timely: "(1) the stage of the proceeding in which an applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay." *Cty. of Orange v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986). In this case, all three factors indicate that Intervenors' motion is timely and thus the court should grant Intervenors' motion to intervene as a matter of right.

The first factor favors intervention because the stage of the proceeding in which Intervenors seek to intervene is early. *Id.* at 537. The Complaint is the only substantive pleading that has been filed; no responsive pleadings or other motions have yet been filed. *See Sierra Club*, 2012 WL 12846102, at *1. Intervenors have filed this motion long before this Court has "substantively—and substantially—engaged in the issues in [the] case." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997).

The second factor also favors intervention because intervention will not prejudice anybody. *Cty. of Orange*, 799 F.2d at 537. Again, this action is in the beginning stages; Federal Defendants have yet to even answer or seek dismissal. *See Wilson*, 131 F.3d at 1303-04. Intervenors are in the best position to articulate their interests and underlying facts. Intervenors'

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

participation in this case will aid in this Court's full consideration of the legal issues involved, and will serve the interests of judicial efficiency by providing this Court with a full and accurate depiction of the background of this case. *See generally* Galanda Decl., Exs. H-J, O, P, R, S.

No delay in seeking intervention exists here, thus the third factor likewise favors intervention. *Cty. of Orange*, 799 F.2d at 537. Intervenors have worked diligently and expeditiously to prepare this Motion and an accompanying proposed Answer, and to file this motion at the earliest practicable date—before this Court has "substantively—and substantially—engaged in the issues in [the] case." *League of United Latin Am. Citizens*, 131 F.3d at 1303.

B. ALTERNATIVELY, THIS COURT SHOULD EXERCISE DISCRETION TO ALLOW INTERVENORS TO PERMISSIVELY INTERVENE.

Federal Rule of Civil Procedure 24(b)(1)(B), provides "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Courts liberally construe Rule 24 in favor on intervention. *See, e.g., Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1986) (liberal construction); *Glickman*, 159 F.3d at 409 ("[The Ninth Circuit] generally interpret[s] the requirements broadly in favor of intervention."). As discussed *supra*, at Section II(A)(4), Intervenors' application for intervention is timely.

1. Intervention Will Not Unduly Delay Or Prejudice The Adjudication Of The Original Parties' Rights.

Intervention will not unduly delay or prejudice the rights of the original parties, but will instead facilitate the meaningful disposition of this action. In "exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Here, the case has not proceeded past the Complaint, and a proposed Answer accompanies the Intervenors' application for intervention.

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8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

Intervention would therefore not disrupt or delay the current schedule for resolving the case. *See Kootenai Tribe v. Veneman,* 313 F.3d 1094, 1111 n.10 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (intervenor's ability to meet pre-existing schedule supports decision to allow permissive intervention).

Nor would intervention unnecessarily complicate the case. To the contrary, Intervenors will provide an accurate depiction of the facts underlying this case, which will ease the Court's burden in understanding Plaintiff's claims and the Federal Defendants' defenses. *See* Galanda Decl., Exs. D-J; Roberts Decl., Exs. 1-2. Put simply, the court should permit intervention because Intervenors will make a unique contribution to the timely and equitable resolution of this matter. *See Kootenai Tribe,* 313 F.3d at 1111 (intervenor's ability to "contribute to the equitable resolution of the case" constitutes a "good and substantial reason" to grant permissive intervention); *see also Glickman*, 159 F.3d at 409 ("In determining whether intervention is appropriate, [courts] are guided primarily by practical and equitable considerations.").

2. Intervenors' Defenses Share Common Questions Of Law And Fact With The Main Action.

Permissive intervention is granted where an applicant's defense and the main action have a question of law or fact in common. Fed. R. Civ. P. 24(b). Here, the Plaintiff's challenges to Interior Decisions I, II, and III as well as Intervenors' defense of those decisions involve common facts. *Compare* Galanda Decl., Exs. H-J, O-P, R, S-V; Roberts Decl., Exs. 1, 2, *with* Complaint, Dkt. No. 1, ¶¶ 42-60. Again, it was Intervenors who appealed the Holdover Council's actions detailed at Paragraphs 33 through 41 to Federal Defendants and to the IBIA, and implored Federal Defendants to do something, which became Interior Decisions I, II, and III and in turn, this suit. Accordingly, the court should allow permissive intervention pursuant to Fed. R. Civ. P. 24(b).

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

3. Intervention Is Within This Court's Jurisdiction.

Although some courts suggest that "an independent showing of jurisdiction" also is a "prerequisite" to permissive intervention, where a party seeks permissive intervention for the sole purpose of asking the court to address existing claims, a demonstration of independent jurisdiction is not generally required. *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 473-74 (9th Cir. 1992), *cert. denied*, 506 U.S. 868 (1992). Intervenors are not attempting to intervene for the purpose of bringing new or different claims; rather, they wish to participate in the resolution of Plaintiff's existing claims. *Pueblo San Jose*, 2007 WL 578987, at *8. Intervenors thus need not display any independent showing of jurisdiction. *Id*.

4. Supreme Court Precedent Favors Permissive Intervention.

Courts generally exercise their discretion to permit Indian tribes to intervene in order to protect the interests and welfare of tribal members. *See, e.g., Idaho v. Dep't of Energy*, 945 F.2d 295, 296 (9th Cir. 1991) (tribal intervention in petition for review of administrative decision involving nuclear waste); *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th Cir. 1986) (concluding that "proper" approach is for tribe to intervene in litigation that affected welfare of its members); *see also Arizona v. California*, 460 U.S. 605 (1983) (intervention to protect water rights vital to tribal members); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008); *City of Roseville v. Norton*, 348 F.3d 1020, 1023 (D.C. Cir. 2003).

In fact, in *Arizona v. California*, 460 U.S. 605 (1983), the U.S. Supreme Court explicitly directed courts to allow Indian tribes to permissively intervene in litigation in order to defend the interests and welfare of their membership. Similar to the tribes allowed to intervene in *Arizona*, Intervenors here "only ask leave to participate in an adjudication of their vital rights." *Id.* at 614. Moreover, in upholding tribal intervention in *Arizona*, the Court explained that "it is obvious that

GALANDA BROADMAN PLLC
8606 35th Ave., NE, Suite L1
Mailing: PO Box 15146
Seattle, Washington 98115
(206) 557-7509

the Indian Tribes, at a minimum, satisfy the standards for permissive intervention," because "[t]he Tribes' interests . . . have been and will continue to be determined in this litigation." *Id.* at 614-15. Indeed, "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id.* Intervenors' interests will likewise be determined by the court's disposition of this litigation and that decision will affect their welfare. The court should, therefore, adhere to the U.S. Supreme Court's guidance on this issue and permit Intervenors to intervene pursuant to Fed. R. Civ. P. 24(b) to defend their own welfare.

III. CONCLUSION

Intervenors satisfy the requirements to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) or, alternatively, as a matter of permission under Fed. R. Civ. P. 24(b). This case is *all* about Intervenors. The disposition of this litigation will distinctly affect Intervenors' welfare as Nooksack tribal members, and neither the Tribe nor the Federal Defendants can adequately represent that profound concern.

A proposed Answer and proposed Order accompany this Motion.

DATED this 8th day of March, 2017.

GALANDA BROADMAN PLLC

/s/ Bree R. Black Horse

Gabriel S. Galanda, WSBA #30331
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
Bree R. Black Horse, WSBA #47803
P.O. Box 15416,
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
PH: 206-557-7509
gabe@galandabroadman.com
anthony@galandabroadman.com
ryan@galandabroadman.com
bree@galandabroadman.com

Attorneys for Intervenors