

HONORABLE BRIAN MCDONALD
Hearing Date: Thursday, April 30, 2020
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GALANDA BROADMAN, PLLC, a
Washington professional limited liability
company,

Plaintiff,

v.

KILPATRICK TOWNSEND & STOCKTON
LLP, a foreign limited liability company; ROB
ROY EDWARD STUART SMITH, an
individual; and RACHEL SAIMONS, an
individual,

Defendants.

No. 19-2-16870-6 SEA

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER AS TO
CERTAIN PRIVILEGED
DOCUMENTS**

I. INTRODUCTION / RELIEF REQUESTED

This dispute arises from Defendants' (collectively "KTS") intentional interference with Plaintiff Galanda Broadman's engagement as outside counsel for the Nisqually Indian Tribe (the "Tribe," which is governed by its "Tribal Council"). Under the guise of a Special Prosecutor investigating the actions of Tribal Attorney Leona Colegrove, KTS conveyed a false and misleading report to the Tribal Council that Galanda Broadman had engaged in unethical and unprofessional conduct. KTS did not interview Galanda Broadman as part of their "investigation," nor did KTS share with the Tribal Council that, at the same time they were disparaging Galanda Broadman, they were battling with Galanda Broadman in separate, highly

1 contentious litigation. In response to KTS's report, the Tribe terminated its Services Agreement
2 with Galanda Broadman on December 7, 2018.

3 Several members of the Tribal Council disapproved of KTS's investigation and report.
4 Shortly after KTS presented its findings to the Tribal Council, Councilmember William Frank
5 III voluntarily sent a copy of the Special Prosecution Report (the "SPR") to attorney Gabe
6 Galanda. According to Mr. Frank, "what [Defendant Rob Roy Smith] said about Gabe, in
7 particular, was intended to harm him and to interfere with his firm's business and his
8 relationship with the Tribe." Similarly, Councilmember Brian McCloud condemned KTS's
9 actions: "In late 2018, Kilpatrick Townsend served as a special prosecutor for the Tribal
10 Council. I disagreed with that investigation process then and I disagree with it now."

11 On June 3, 2019, counsel for Galanda Broadman notified KTS of their grievance
12 regarding the interference and invited a discussion. Several days later, Tribal Attorney Nate
13 Cushman, purporting to write on behalf of the Tribe, demanded the return of the SPR. KTS
14 was copied on the message. It turns out, however, that Mr. Cushman was not acting at the
15 direction of the Tribe. The Tribal Council's Vice Chairperson, Antonette Squally, has clarified:
16 "[Mr. Cushman's letter] was not presented to the full Tribal Council before it was sent out, and
17 Nate did not have authority to issue the letter or take those legal positions without getting input
18 and authorization from the full Tribal Council. I do not agree with those positions, which have
19 yet to be brought before the full Tribal Council for consideration and adoption." She continued:
20 "I have seen no indication that the Tribal Council intended for Kilpatrick Townsend's
21 investigation or the Special Prosecution Report to be privileged or confidential. To the contrary,
22 my expectation is that an investigation of this type should have been conducted with
23 transparency." Councilmember McCloud echoed this sentiment: "That special prosecutor's
24 report is not privileged or confidential. The public, especially our Nisqually People, deserve to
25 know what happens within our Tribal government and to see what we are spending our Tribe's
26 money on."

1 Based on the lack of privilege, Galanda Broadman did not respond to Mr. Cushman's
2 letter and filed this lawsuit. Ten months have passed since Mr. Cushman purported to assert the
3 attorney-client privilege and the Tribe has taken no further action on the subject.

4 This is the context for the KTS's motion for protective order. KTS has refused to
5 produce relevant documents or make its witnesses available to testify unless and until the Court
6 rules on the privilege. Their rationale is that (a) the SPR is privileged because—and only
7 because—they included the words "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED
8 DOCUMENT"; and (b) there has been no "unanimous" vote of the Tribal Council to relinquish
9 the attorney-client privilege. Here is why the Court should deny the Motion:

10 1. **KTS has not established that the Tribe has at any point invoked the**
11 **attorney-client privilege with regard to the SPR.** The Tribal Council has not spoken in favor
12 of the Motion. KTS does not currently represent the Tribe and they make no claim to be acting
13 at the Tribe's direction. Their motion rests on the premise that only the Tribal Council, not any
14 individual Councilmember or Tribal Attorney, can act on behalf of the Tribe—which extends
15 to invoking privilege. Aside from Mr. Cushman's June 9, 2019 letter, which the Tribal Vice
16 Chairperson has disavowed for lack of consensus by the Tribal Council, the Tribe has not
17 asserted privilege over the SPR or KTS's work related thereto. To the contrary, several current
18 Councilmembers have attested that the SPR and KTS's work related thereto was never intended
19 to be privileged in the first instance. KTS has not established any invocation of the attorney-
20 client privilege and the Motion should be denied.

21 2. **Privilege, if it was invoked, was waived.** If the Court determines the Tribe
22 invoked the attorney-client privilege, the Court should find that any such privilege has been
23 waived. The Tribe and KTS have known since June 2019 that (a) Councilmember Frank
24 voluntarily disclosed the SPR and the details of KTS's work thereto; (b) Galanda Broadman
25 disputed the privilege claim and declined to return its copy of the SPR; and (c) Galanda
26 Broadman incorporated the findings of the SPR in its lawsuit. Despite this, the Tribe has taken
27 no further action to protect privilege. Instead, three Councilmembers have acknowledged the

1 voluntary disclosure of the SPR and confirmed their beliefs that KTS's investigation was not
2 intended to be privileged. If the Court makes a finding of privilege, these circumstances support
3 a finding of waiver.

4 **3. The Court should decline to make a legal interpretation of Tribal law.** The
5 Court should also refrain from making legal interpretations of Tribal law. KTS claims that
6 common law principles of waiver, which would otherwise apply in this case, cannot be applied
7 due to a Tribal Resolution limiting when the privilege can be waived. Disputed issues over the
8 waiver of privilege in connection with Tribal law are not appropriate for resolution in state court
9 proceedings, particularly when the Tribe is not participating in this action.

10 **4. The Tribal Council intends to address the alleged privilege of the SPR.**
11 After KTS filed this motion, counsel for Galanda Broadman reached out to Councilmember
12 Frank to inquire whether the Tribal Council would take up the privilege issue. Mr. Frank, in a
13 message copied to Vice Chairperson Squally, confirmed that: (a) he does "not support what was
14 done to Mr. Galanda by any means," (b) due to the global health pandemic, the Tribal Council
15 will not have a scheduled meeting for the next one or two months; but (c) he will "bring the
16 question to the tribal council in regards to the [privilege] issue."¹ Based on the Tribal Council's
17 intention to take up the privilege issue when it next convenes, it would be premature for the
18 Court to resolve the privilege issue at this time.²

19 For all of these reasons, the Court should deny the Motion for Protective Order based
20 on lack of standing and/or waiver, or, alternatively, delay ruling on the Motion until the Tribal
21 Council has resolved the privilege issue in the coming weeks.

24 ¹ KTS wrongly claims the Tribal Council can only waive privilege by a unanimous vote. Tribal Council Resolution
25 No. 78 states that a waiver of privilege can be approved based on "a consensus of the Tribal Council."

26 ² The Court should pause before interpreting Nisqually law on issues of privilege, as KTS urges, or public
27 disclosure. *Cf. Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) ("Because a determination of this issue
will require a careful study of the application of tribal laws, and tribal court decisions, the district court should
have stayed its hand until after the Colville Tribal Courts have the opportunity to resolve the question"); CR
82.5(c). The Tribal Council should instead be allowed that opportunity in the first instance. *Id.*

1 **II. EVIDENCE RELIED UPON**

2 This Opposition is supported by the Declaration of Charles P. Rullman (“Rullman
3 Decl.”), as well as all exhibits attached thereto, and all documents on file in this action.

4 **III. STATEMENT OF FACTS**

5 **A. Galanda Broadman Represented the Tribe Under a Professional Service**
6 **Agreement and a Contingency-Fee Agreement.**

7 Galanda Broadman is an American Indian-owned boutique law firm specializing in
8 tribal legal rights and Indian business interests. (Complaint, Dkt. 1, ¶ 8.) Founded in 2010 by
9 Gabe Galanda and Anthony Broadman, the firm currently employs approximately eight
10 attorneys. (*Id.*) On June 25, 2015, Galanda Broadman entered into a written Contract for
11 Professional Services with the Tribe. (Complaint, ¶ 12.) The parties renewed the Services
12 Agreement on January 1, 2017 with a clause stating that it would automatically renew annually
13 unless terminated in accordance with its terms. (*Id.*) Leona Colegrove, the Tribe’s Legal
14 Director, oversaw the Services Agreement.³ (*Id.*)

15 On March 1, 2018, the Tribe entered into a contingency fee-based Representation
16 Agreement with a Minneapolis law firm, Robins Kaplan LLP, and Galanda Broadman, to
17 represent the Tribe in Multi-District Litigation in the Northern District of Ohio against certain
18 manufacturers and distributors of opioids (the “MDL Action”). (Complaint, ¶ 13.) Under the
19 Representation Agreement, Galanda Broadman would receive five percent (5%) of Robin
20 Kaplan LLP’s twenty percent (20%) gross recovery, if any. (*Id.*)

21 **B. KTS Intentionally Interfered with Galanda Broadman’s Contracts with the Tribe.**

22 In May 2018, Ms. Colegrove separated her employment from the Tribe. (Complaint,
23 ¶ 14.) Galanda Broadman continued to provide legal services under the Services Agreement
24 under the direction of two successors to Ms. Colegrove. (*Id.*)

25
26 ³ KTS suggests that there is something untoward about Ms. Colegrove’s work with Galanda Broadman as outside
27 counsel for the Tribe given that Ms. Colegrove and Mr. Galanda worked together at the Williams Kastner firm and
have remained professionally affiliated. The notion that a pre-existing professional relationship, without more,
renders subsequent professional affiliations “questionable” is baseless.

1 On June 6, 2018, the Tribe posted a Request for Proposal (the “RFP”) for a Special
2 Prosecutor to investigate the circumstances surrounding Ms. Colegrove’s departure from the
3 Tribe. (Complaint, ¶ 15.) KTS submitted a response to the RFP, but made no disclosure
4 regarding their participation in a lawsuit involving the Nooksack Indian Tribe in a federal
5 lawsuit, *Margretty Rabang, et al. v. Robert Kelly, Jr., et al.*, Case No. 2:17-CV-00088-JCC (the
6 “*Rabang Action*”). (*Id.*, ¶¶ 11, 15.) Galanda Broadman and KTS represent adverse parties in
7 the *Rabang Action*, which has become highly contentious between the parties and their counsel.
8 (*Id.*) The Tribe awarded the Special Prosecutor contract to KTS. (*Id.*)

9 On November 13, 2018, KTS completed its investigation of Ms. Colegrove without
10 interviewing Ms. Colegrove, Mr. Galanda or anyone at Galanda Broadman. (Complaint, ¶ 17.)
11 KTS issued a report to the Tribe that included irrelevant, false and misleading claims that
12 Galanda Broadman had engaged in unethical conduct in connection with the departure of Ms.
13 Colegrove. (*Id.*) In addition, KTS gave a presentation to the Tribal Council where it continued
14 to defame Galanda Broadman and recommended that the Tribe file an ethics complaint against
15 Galanda Broadman to the Washington State Bar Association (“WSBA”). (*Id.*)

16 On December 7, 2018, the Tribe terminated its Services Agreement with Galanda
17 Broadman. (Complaint, ¶ 18.) Galanda Broadman was forced to withdraw its representation of
18 the Tribe in actions pending in the U.S. District Court for the Western District of Washington
19 and the MDL Action in the Northern District of Ohio. (*Id.*)

20 On December 19, 2018, the Tribe filed an ethics complaint with the WSBA against Ms.
21 Colegrove, which KTS prepared for the Tribal Chairman’s signature. (Complaint, ¶ 19.) In
22 footnote 3, KTS made further false and misleading allegations against Galanda Broadman,
23 including that Galanda Broadman had drafted Ms. Colegrove’s severance agreement and failed
24 to review the agreement with the Tribal Council. (*Id.*) Both statements are demonstrably false,
25 as KTS either knew or would have known had they conducted a proper investigation rather than
26 use their role as a Special Prosecutor to malign Galanda Broadman. (*Id.*)
27

1 **C. Councilmember William Frank III Voluntarily Disclosed the SPR to Galanda**
2 **Broadman and Reported the False and Disparaging Comments Made by KTS.**

3 In mid-2018, Gabe Galanda of Galanda Broadman contacted Councilmember William
4 Frank to inquire about the Tribe's support for legislation that Galanda Broadman was helping
5 to introduce in Olympia regarding the religious rights of Native prisoners. (Rullman Decl., Ex.
6 A.) The Tribe had previously supported Mr. Galanda's work on behalf of Native prisoners.
7 (*Id.*) Mr. Frank responded by discouraging Mr. Galanda from seeking the Tribe's support
8 because his Service Agreement had been jeopardized by the false and misleading information
9 KTS had delivered in connection with their investigation. (*Id.*) Mr. Frank volunteered to send
10 a copy of the SPR to Mr. Galanda, which he did, and encouraged Mr. Galanda to share the
11 report with Ms. Colegrove. (*Id.*)

12 **D. Galanda Broadman Disclosed That it Had Received the SPR.**

13 On June 3, 2019, counsel for Galanda Broadman sent a letter to KTS regarding their
14 intentional interference and other unlawful acts. (Rullman Decl., Ex. D.) The letter included a
15 draft complaint that made explicit reference to the SPR and its contents, as well as the other
16 false and defamatory communications made by KTS in connection with its investigation. (*Id.*)

17 On June 7, 2019, Nate Cushman, as Tribal Attorney for the Tribe, wrote to counsel for
18 Galanda Broadman, with a copy also sent to KTS. (Rullman Decl., Ex. E.) Mr. Cushman
19 claimed not to have known "how or why" Galanda Broadman had received the SPR, reflecting
20 the fact that he had not queried the Tribal Councilmembers on their prior disclosures of the
21 Report. (*Id.*) Mr. Cushman's letter was more focused on defending KTS's interference than
22 conveying the full Tribal Council's position on the issue of privilege surrounding the SPR. (*Id.*)

23 Based on the prior, voluntary waiver of privilege relating to the SPR, neither Galanda
24 Broadman nor its counsel responded to Mr. Cushman's letter. (Rullman Decl. ¶ 6.) Galanda
25 Broadman filed this lawsuit on June 26, 2020. (*Id.* ¶ 7) Neither Mr. Cushman nor the Tribal
26 Council has made any further efforts to claim privilege relating to the SPR or KTS's actions in
27 connection thereto. (*Id.*)

1 **E. Members of the Tribal Council Have Condemned the SPR and Refuted Its**
2 **Confidentiality.**

3 Antonette “Maui” Squally is a Tribal Councilmember and the current Vice Chairperson
4 for the Tribal Council. (Rullman Decl., Ex. C.) She served on the Tribal Council from 2013
5 to 2016 and again from May 2019 to the present. (*Id.*) Regarding the SPR, she has attested:

6 I sought out Kilpatrick Townsend’s “Special Prosecution Report,” which is a
7 public record for all of our Nisqually People to see. I have seen no indication
8 that the Tribal Council intended for Kilpatrick Townsend’s investigation or the
9 Special Prosecution Report to be privileged or confidential. To the contrary,
10 my expectation is that an investigation of this type should have been conducted
11 with transparency.

12 I have also learned that our Tribe’s new in-house Tribal Attorney, Nate
13 Cushman, sent a letter on June 7, 2019 to the attorneys representing Galanda
14 Broadman PLLC. [...] The letter asserted various legal positions about
15 Kilpatrick Townsend’s investigation and the Special Prosecution Report. This
16 letter was not presented to the full Tribal Council before it was sent out, and
17 Nate did not have authority to issue the letter or take those legal positions
18 without getting input and authorization from the full Tribal Council. I do not
19 agree with those positions, which have yet to be brought before the full Tribal
20 Council for consideration or adoption.

21 (*Id.*, Ex. C; emphasis added.) Brian McCloud is also a Tribal Councilmember and he has served
22 in that position for the last 15 years. (Rullman Decl., Ex. B.) Mr. McCloud has registered his
23 disagreement with KTS’s investigation and the claim that the SPR is privileged:

24 In late 2018, Kilpatrick Townsend served as a special prosecutor for the Tribal
25 Council. I disagreed with that investigation process then and I disagree with it
26 now. It resulted in two of the top Native American legal minds in our state,
27 Leona Colegrove and Gabe Galanda, being harmed, and for no good reason.
Leona was subject to a bar complaint and Gabe’s firm was fired as the Tribe’s
outside counsel.

I recall that Kilpatrick Townsend issued a “Special Prosecution Report” to the
Tribal Council regarding Leona and Gabe. That special prosecutor’s report is
not privileged or confidential. The public, especially our Nisqually People,
deserve to know what happens within our Tribal government and to see what
we are spending our Tribe’s money on.

(*Id.*, Ex. B; emphasis added.)

25 **F. The Tribal Council Intends to Address the Privilege Issues Raised by this Motion.**

26 Counsel for the parties have conferred at length on how to deal with the disputed issues
27 of privilege in this case. (Rullman Decl. ¶ 8.) Rather than take the issue to the Tribal Council

1 for guidance (as the holder of the purported privilege), KTS has conditioned such a request on
2 the Tribe waiving privilege both to the SPR and all work performed by Galanda Broadman for
3 the Tribe. (*Id.*) However, Galanda Broadman's unrelated work for the Tribe has no bearing on
4 the defamatory claims made by KTS in the SPR, which made no reference to the competency
5 or quality of Galanda Broadman's legal services. Moreover, there is no evidence that the
6 Tribe's termination of Galanda Broadman's Services Agreement was motivated by any failure
7 of performance. This is why Galanda Broadman refused to request a blanket waiver of all
8 privileged communications in relation to its work for the Tribe.

9 On April 17, 2020, counsel for Galanda Broadman approached Councilmember Frank
10 with a request:

11 While these are hectic and uncertain times, I am hopeful you can help us resolve
12 this issue. If you are willing, we are asking that the Tribal Council consider a
13 resolution confirming that Mr. Smith's work as special counsel was not
privileged. We would never presume to influence the vote and we will, of
course, abide by the Tribal Council's decision.

14 (Rullman Decl., Ex. F; emphasis added.)

15 On April 22, 2020, Mr. Frank sent two responses:

16 (4:38 PM) Thank you for reaching out. Yes we are in some crazy times right
17 now. I do not know when Tribal Council will have a actual meeting again. It
may be a month or two before the next scheduled meeting. We have been busy
protecting our Nisqually Community. I do not support what was done to Mr
18 Galanda by any means. It is unfortunate that politics comes into play in regards
19 to decisions that were made. Thank you!

20 (4:47 PM) I can bring the question to the tribal council in regards to the issue.
It may be a month out or so.

21 (Rullman Decl., Ex. F; emphasis added.)

22 **IV. STATEMENT OF ISSUES**

23 1. Has KTS established that the Tribe invoked the attorney-client privilege over
24 the SPR and KTS's work related thereto? No.

25 2. If the Court determines that the SPR and KTS's actions related thereto were
26 privileged, do the circumstances support a finding of waiver. Yes.

3. Should the Court decline to make legal interpretations of Tribal law concerning the invocation and waiver of the attorney-client privilege? Yes.

4. Should the Court defer to the Tribal Council to determine whether it has invoked the attorney-client privilege over the SPR and KTS' work related thereto? Yes.

V. ARGUMENT

A. KTS Has Not Established That the Tribe Invoked the Attorney-Client Privilege Over the SPR.

The party seeking to assert the privilege bears the burden of proving the existence of the attorney-client relationship or other protected relationship. *Dietz v. Doe*, 131 Wash. 2d 835, 851, 935 P.2d 611, 619 (1997); *see also* RCW 5.60.060(2). An attorney’s bare claim of the privilege is not dispositive. *Id.* The client must also prove the privilege extends to the communication at issue. *Id.* Here, Galanda Broadman is not disputing the existence of an attorney-client relationship between the Tribe and KTS, but this is not the dispositive point. The attorney-client privilege “only applies to communications that are intended by the party to be confidential.” *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 742, 812 P.2d 488 (1991) (emphasis added). On this point, KTS lacks evidence that the Tribal Council intended the SPR to be privileged in the first instance. To the contrary, the current Vice Chairperson Squally has clearly stated that she has “seen no indication that the Tribal Council intended for Kilpatrick Townsend’s investigation or the Special Prosecution Report to be privileged or confidential” and “to the contrary, [her] expectation is than investigation of this type should have been conducted with transparency.” (Rullman Decl., Ex. C.) Similarly, Councilmember McCloud has stated that the “special prosecutor’s report is not privileged or confidential. The public, especially our Nisqually People, deserve to know what happens within our Tribal government and to see what we are spending our Tribe’s money on.” (*Id.*, Ex. B.) Indeed, Councilmember Frank disclosed the SPR directly to Mr. Galanda because it was not a privileged document. (*Id.*, Ex. A.)

1 KTS contends individual Councilmembers (who they brand as “leakers”) cannot waive
2 the attorney-client privilege absent action by the full Tribal Council. These Councilmembers
3 are not claiming to waive the privilege—they are attesting that the SPR was never intended to
4 be privileged in the first instance. Aside from labeling their report “confidential,” KTS has
5 offered no evidence that the Tribe concurred that the report would be privileged. In fact, KTS’s
6 contract says nothing about its work or report in the already-publicized Special Prosecutor
7 “investigation”⁴ being privileged or confidential.⁵

8 **B. The Voluntary Disclosure of the SPR to Galanda Broadman Waived Privilege.**

9 To the extent the Court determines that privilege applied to the SPR, it was waived
10 through intentional disclosure. *Dietz*, 131 Wn.2d at 849–50, 935 P.2d 611 (quoting 8 JOHN
11 HENRY WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961)); *State ex rel.*
12 *Sowers v. Olwell*, 64 Wn.2d 828, 833, 394 P.2d 681 (1964). Within days of receiving the SPR,
13 Councilmember Frank voluntarily sent a copy to attorney Mr. Galanda. A party waives the
14 attorney client privilege if that party discloses privileged documents to other persons with the
15 intention that a person outside of the attorney-client relationship can see the documents.
16 *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002). By sending the SPR to
17 Mr. Galanda, any privilege was waived.

18 Even if Councilmember Frank’s disclosure of the SPR was deemed to be inadvertent,
19 the waiver still occurs where the producing party fails to take action to rectify the disclosure.
20 *Harris v. Drake*, 152 Wn. 2d 480, 496, 99 P.3d 872, 879 (2004); *U.S. v. Rigas*, 281 F.Supp.2d
21 733, 738 (S.D.N.Y.2003). The Tribal Council was informed of the disclosure as early as June
22 2019, when KTS shared Galanda Broadman’s grievance with Tribal Attorney Nate Cushman.
23 Mr. Cushman, without the authority of the Tribal Council, made a single objection to the
24 disclosure of the SPR—presumably at the direction of KTS. That was 10 months ago and the
25

26
27 ⁴ See <https://turtletalk.blog/2018/06/08/friday-job-announcements-78/>.

⁵ See Declaration of Leslie Barron, Ex. 3.

1 Tribal Council has taken no further action. Moreover, as discussed above, several members of
2 the Tribal Council have refuted the notion that the SPR was ever privileged.

3 **C. The Court Should Refrain from Interpreting Tribal Law as It Relates to Waiver.**

4 KTS claims that common law principles of waiver should be disregarded because the
5 Tribe adopted a resolution that purports to limit the circumstances when privilege can be
6 waived. In this regard, KTS is inviting the Court to delve into the legal interpretation of Tribal
7 law and resolutions. The Court should refrain. The adjudication of such matters by non-tribal
8 courts has the effect of infringing tribal law-making authority through the interpretation and
9 application of tribal law. *See, e.g., Grand Canyon Skywalk Dev., LLC v. "SA' NYU WA*, No.
10 CV12-8030-PCT-DGC, 2012 WL 1207149, at *1 (D. Ariz. Mar. 26, 2012), *aff'd sub nom.*
11 *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013)
12 (describing the “the Federal Government’s longstanding policy of encouraging tribal self-
13 government[]” and tribal courts’ “vital role” in effectuating that self-governance). This concern
14 is aggravated by the fact that KTS—not the Tribe—is purporting to invoke the Tribe’s rights
15 under Tribal law. Under these circumstances, it is inappropriate for the Court to resolve the
16 apparent dispute between the common law principles of waiver and KTS’s self-serving effort
17 to limit waiver to a “unanimous” act of the Tribal Council.

18 **D. The Court Should Refrain from Ruling on the Disputed Issues of Privilege and**
19 **Waiver When the Tribal Council Intends to Take Up These Issues.**

20 KTS has not engaged the Tribal Council on the subject of privilege—but Galanda
21 Broadman has. The Tribal Council’s operations, including scheduled meetings, have been
22 significantly impacted by the COVID-19 virus outbreak. Nonetheless, Councilmember Frank
23 confirmed in a message copied to Vice Chairperson Squally that the Tribal Council will take
24 up the privilege issues when it convenes in the next one to two months. In light of the trial
25 continuance to October 12, 2020 and the extension of the discovery cut-off to August 24, 2020,
26 there is sufficient time for the parties to await a decision from the Tribal Council before asking
27 this Court to delve into such Tribal matters. Accordingly, if the Court does not deny the Motion

1 outright, the Court should deny the motion without prejudice subject to re-filing after the Tribal
2 Council has acted on the privilege issue in the near term.

3 **VI. CONCLUSION**

4 Galanda Broadman respectfully requests that the Court deny the Motion for Protective
5 Order filed by KTS.

6 DATED: April 24, 2020

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20 I certify that this memorandum contains 4,200
21 words, in compliance with the Local Civil Rules.