The Honorable John C. Coughenour

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

THE DUWAMISH TRIBE, et al.,

Plaintiffs,

vs.

DEB HAALAND, et al.,

Defendants.

No. 2:22-cv-00633-JCC

MUCKLESHOOT INDIAN TRIBE'S MOTION TO INTERVENE OR FOR LEAVE TO APPEAR AS AMICUS CURIAE

NOTE ON MOTION CALENDAR
August 19, 2022

ORAL ARGUMENT REQUESTED

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MOTION

The Muckleshoot Indian Tribe ("Muckleshoot") moves to intervene as a defendant, as a matter of right pursuant to Rule 24(a)(2). Alternatively, permissive intervention pursuant to Rule 24(b)(1)(B) is sought. The Muckleshoot Tribe's proposed Answer accompanies this Motion.

Should the Court deny intervention, Muckleshoot requests leave to participate as *amicus curiae* on the same terms previously permitted in *Hansen v. Kempthorne*, No. C08-0717-JCC, i.e., with access to the administrative record on the same terms as the parties, the opportunity to brief motions initiated by the parties, and reservation to a later date of the question of participation in any oral argument allowed by the Court.[1]

INTRODUCTION

In this case, Plaintiff Duwamish Tribe[2] ("Duwamish plaintiff"), seeks review of two distinct issues. First, it seeks judicial review of the Department of the Interior's administrative decision declining to acknowledge the Duwamish plaintiff as an Indian tribe after remand from this Court's judgment in *Hansen v Kempthorne*, No. C08-717-JCC. In addition to that issue, the Duwamish plaintiff also seeks to litigate the issue of its treaty status, an issue that was previously decided in *United States v. Washington*, 476 F.Supp. 1101, 1104 (W.D.Wash. 1979) ("*Washington II*"), *aff'd.*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). In its Complaint,

[1] This Court previously denied Muckleshoot leave to intervene in *Hansen v. Kempthorne*, while addressing the concerns raised by allowing Muckleshoot to participate as *amicus curiae*. See, *Hansen v. Kempthorne*, No. C08-0717-JCC, 2008 WL 11508392 (W.D. Wash. Oct. 7, 2008) (denying intervention); *Hansen v. Kempthorne*, No. C08-0717-JCC, 2009 WL 10725425 (W.D. Wash. Apr. 21, 2009) (granting *amicus* status). As discussed below, unlike *Hansen v. Kempthorne*, in this case the plaintiffs both assert and seek relief on a claim to treaty status.

[2] The Duwamish plaintiff has at various times denominated itself the Duwamish Tribal Organization, *see* 66 FR 49966, the Duwamish Tribe of Indians, *United States v. Washington*, 476 F.Supp. 1101, 1104 (W.D.Wash. 1979), and the Duwamish Tribe. *See* First Amended Complaint. However denominated, the use of the word "tribe" in identifying the Duwamish plaintiff does not signify that the plaintiff is a tribe in either a political or ethnological sense. *See, United States v. Washington*, 476 F.Supp.1101, n.1 at 1104.

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the Duwamish plaintiff seeks a declaration that it is a continuation of and the present day successor in interest to the historic Duwamish Tribe that was party to the Treaty of Point Elliott, as well as an order requiring the federal defendants to acknowledge the Duwamish plaintiff as such, contrary to the decisions of this Court and the Court of Appeals in *Washington II*. In seeking relief on the Duwamish plaintiff's treaty successorship claim, as well as contesting applicant for intervention Muckleshoot Tribe's right to ownership and control of certain cultural items under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et. seq. ("NAGPRA"), the plaintiffs have placed significant protectable interests of the Muckleshoot Tribe directly at issue.

Unlike *Greene v. United States*, 996 F.2d. 973 (9th Cir.1993) ("*Greene I")*, *Evans v. U.S. Dep't of Interior*, 604 F.3d 1120 (9th Cir. 2010), and *Hansen v. Kempthorne*, No. C08-0717-JCC, 2008 WL 11508392 (W.D. Wash. Oct. 7, 2008), where the interests of the Tulalip and Muckleshoot Tribes were found to be too speculative to warrant intervention because no relief with respect to Tulalip or Muckleshoot's protectable interests was directly at issue, intervention in this action as a matter of right can and should be granted.

BACKGROUND

The Muckleshoot Indian Tribe is a federally recognized Indian tribe, 87 FR 4636, 4638 (Jan. 28, 2022), and party to *United States v. Washington*, with treaty rights secured under the Treaties of Point Elliott and Medicine Creek. *United States v. Washington*, 384 F.Supp. 312, 365-67 (W.D.Wash. 1974) ("Washington I"), *aff'd*., 520 F.2d 676, 692 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In *Washington I* this Court found that Indians who were consolidated on the Muckleshoot Reservation were included with the Duwamish and represented by Chief Seattle in the negotiation of the Treaty of Point Elliott, 12 Stat. 927. *Id*. at 366. The Court further found the Muckleshoot Tribe to have fishing rights under the Treaty of Point Elliott at fishing places located

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throughout the Duwamish River drainage and in the saltwater of Puget Sound. *Id*. at 367. "These fishing grounds overlap with some of the usual and accustomed [fishing] places of the treaty-time Duwamish." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 n.8 (9th Cir. 1990).

In the late 1970's, the plaintiff Duwamish Tribe, together with four other groups that were also unrecognized at that time, sought to intervene in *United States v. Washington* to assert treaty fishing rights. This Court rejected the groups' claims finding that, "[n]one of the five Intervenor entities whose status is considered in these Findings is at this time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott." *Washington II*, 476 F.Supp. at 1104. With respect to the Duwamish plaintiff the Court specifically found that "members of the Intervenor Duwamish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community," that "the Intervenor Duwamish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott" and that "[t]he citizens comprising the Intervenor Duwamish Tribe have not maintained an organized tribal structure in a political sense." *Id*. at 1105. The Court of Appeals affirmed. *United States v. State of Wash.*, 641 F.2d 1368, 1371 (9th Cir. 1981). Recently, the Court of Appeals held that *Washington II* conclusively resolved the treaty status of the groups that it addressed and "no issue preclusion exception applies." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 868 (9th Cir. 2021), *cert. denied sub nom. Samish Indian Nation v. Washington*, 142 S. Ct. 1371 (2022) and *cert. denied*, 142 S.Ct. 2651 (2022).

In this action, the Duwamish plaintiff not only continues to assert that it is the present day tribal successor to the historic Duwamish Tribe which was party to the Treaty of Point Elliott, it seeks relief on that claim in a collateral attack on the judgment in *Washington II.* First Amended

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Complaint ¶¶ 1, 56, 88-105, 142-43. The Duwamish plaintiff seeks a declaration that the plaintiff "has been recognized by Congress and federal authorities as an Indian tribe within the meaning of the List Act and as the successor to the Tribe that signed the Treaty" and an order compelling the Department to acknowledge and list the Tribe as such. *Id.* ¶¶ 142, 143.

This Court and the Court of Appeals have made clear that tribal recognition for the purpose of statutory benefits and tribal treaty status are separate issues. *See e.g., United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) ("*Washington IV*"); *Greene v. United States*, 996 F.2d 973 (9th Cir.1993) ("*Greene I")*; *Hansen v. Kempthorne,* No. C08-0717-JCC, 2008 WL 11508392. And, under the current law of the circuit, interested treaty tribes are generally not entitled to intervene in actions for judicial review of an administrative decision denying tribal recognition because recognition, according to the Court of Appeals, may serve valuable purposes other than treaty rights, and administrative findings with respect to recognition raise only "the speculative possibility" of an impact on future treaty litigation, in light of *Washington IV*. *See*, *Evans*, 604 F.3d 1120, 1124.

Significantly, these Court of Appeals decisions acknowledge that interested treaty tribes do have a protectable interest that justifies participation in actions where treaty status is at issue, and that *amicus* participation is appropriate with respect to judicial review of administrative acknowledgment determinations under the APA. *See e.g., Greene I,* 996 F.2d at 977-78. In *Greene I*, the Court emphasized that interested treaty tribes would necessarily have the opportunity to participate in treaty status determinations that affect them because the appropriate forum, if any, to relitigate the decision in *Washington II* is *United States v. Washington* where the interested treaty tribes are already parties, rather than in administrative proceedings addressing tribal recognition. *Id.* If plaintiffs were not seeking relief with respect to treaty claims and contesting Muckleshoot's interest in cultural items under NAGPRA here, the law of the circuit would

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preclude intervention. But, they are. Plaintiffs having chosen to seek relief on their treaty claims and contest Muckleshoot's rights to cultural items have made intervention appropriate.

ARGUMENT

I. The Muckleshoot Indian Tribe Should Be Granted Intervention as of Right under Federal Rule of Civil Procedure 24(a)(2).

Federal Rule of Civil Procedure 24(a)(2) provides in pertinent part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a)(2). Under FRCP 24(a) an applicant for intervention of right must meet four conditions: "(1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), *cert. denied*, 540 U.S. 1017 (2003). "Rule 24 traditionally receives liberal construction in favor of applicants for intervention. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.1998). Courts are guided primarily by practical and equitable considerations. *Id.*

A. The Muckleshoot Tribe's Motion to Intervene is Timely.

This case is at an early stage. The Complaint in this matter was filed on May 11, 2022. Although the federal defendants have filed an Answer, the Administrative Record has not yet been filed, and no proceedings of substance have occurred. There is no prejudice to the parties, nor any

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delay in bringing this motion. Muckleshoot's Motion to Intervene is therefore timely. *See e.g. U.S. ex rel. McGough v. Covington Techs. Co*., 967 F.2d 1391, 1394 (9th Cir. 1992)

B. The Muckleshoot Tribe has a Significant Legal Interest in this Action.

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly,* 159 F.3d at 409. The relationship requirement is met "if the resolution of the plaintiff's claims actually will affect the applicant." *U.S. v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (Citation omitted). It is sufficient that the applicant for intervention's asserted interest is protectable under some law, and that a relationship exists between the asserted interest and the claims at issue. *Wilderness Soc. v. U.S Forest* Service, 630 F.3d 1173, 1179 (9th Cir. 2011). The interest is sufficient for purposes of intervention, if the applicant establishes, that "it will suffer practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

In this action, plaintiffs seek more than judicial review of the federal defendants' acknowledgment determination - they seek declaratory and mandamus relief on a claim that the Duwamish plaintiff is the tribal successor to the historic Duwamish Tribe, and a holder of treaty rights under the Treaty of Point Elliott, contrary to the judgment entered against the Duwamish plaintiff in *Washington II*. *See* First Amended Complaint ¶¶ 1, 56, 88-105, 142-43. This action, therefore, differs from *Hansen v. Kempthorne*, where the Duwamish plaintiffs alleged treaty successorship in seeking judicial review of the Department's denial of tribal recognition, but did not seek relief on their treaty status allegations.

Muckleshoot, as a party to *United States v. Washington*, and a successor to Duwamish bands that signed the Treaty of Point Elliott, has a clear interest in the finality of the *Washington*

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II determination that the Duwamish plaintiff is not a treaty tribe, and in the efforts by the Duwamish to collaterally attack that determination. Muckleshoot has a related interest in protecting its exclusive tribal access to fresh water fishing places in the Duwamish River drainage and Lake Washington, and its treaty right to a share of fish available for harvest in the Duwamish River, Lake Washington, and other Muckleshoot fishing places which overlap those of the historic treaty time Duwamish Tribe. This treaty right is more than a mere economic expectation; it is a legally protected property interest. *See, Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1511 - 13 (W.D.Wash. 1988). Muckleshoot's interests in protecting the finality of a prior judgment and its treaty fishing rights satisfy the interest requirement for intervention of right under Rule 24(a). *See, U.S. v. City of Los Angeles, supra*; *United States v. Oregon*, 839 F.2d 635, 638 (1988).

In addition to its interest in protecting its treaty rights from dilution and the finality of the judgement in *Washington II*, the Muckleshoot Tribe has a statutorily recognized property interest in certain cultural property and resources which the Duwamish plaintiff affirmatively places at issue in its Complaint. First Amended Complaint ¶84. Specifically, the Duwamish plaintiff contests the entitlement of the Muckleshoot Tribe to ownership and control under NAGPRA, 25 U.S.C. § 3001 et. seq., of cultural items recovered from Duwamish village sites. *Id.*

C. Impairment of the Muckleshoot Tribe's Ability to Protect its Interests.

The Ninth Circuit follows, "the guidance of 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.'" *Southwest Center for*

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Biological Diversity v. Berg 268 F.3d 810, 822 (9th Cir. 2001) (Citation omitted). Muckleshoot's treaty rights and property rights would be substantially affected by a determination in this action.

The relief sought by Duwamish would lead to the dilution of Muckleshoot's treaty rights. The fishing places of the historic Duwamish overlap those adjudicated for the Muckleshoot Tribe, *see United States v. Suquamish Tribe, supra*, and the treaty Indian share of the harvest is generally limited to 50% of the available harvest. Therefore, any right that the Duwamish plaintiff may obtain to share in the treaty Indian harvest in these areas necessarily will result in competition for tribal fishing locations now exclusively available to Muckleshoot fishers and will reduce the opportunity of the Muckleshoot Tribe to take fish. It would also undermine the finality of this Court's prior determination that the Duwamish plaintiff is not a treaty tribe. As the Court of Appeals noted in *Greene I*, "Intervention may be required when considerations of stare decisis indicate that an applicant's interest will be practically impaired." *Greene I,* 996 F.2d at 977 (*citing United States v. Oregon*, 839 F.2d 635, 638 (9th Cir.1988).

Greene I was an appeal from this Court's denial of an application for intervention by the Tulalip Tribe in an action similar to this matter. In *Greene*, the Tulalip Tribe sought to intervene to protect its interest in the finality of a prior judgment in *United States v. Washington* holding that the Samish were not a tribe and therefore not a holder of treaty fishing rights, and to prevent dilution of their treaty rights. The Court denied intervention of right, holding that Tulalip had not articulated an adequate "protectable" interest. Although the Court found that the Tulalip had expressed a "keen concern" in the outcome, it also denied permissive intervention. Instead, Tulalip was allowed to participate as *amicus curiae*. *Green v. Lujan*, No. C89-645Z, Order Denying Tulalip Tribes' Application to Intervene (March 15, 1991).

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The Court of Appeals affirmed. It rested its decision "on the ground that the issues of tribal recognition and treaty tribe status were fundamentally different." *Greene v. Babbitt,* 64 F.3d 1266, 1269 (9th Cir. 1995). Given this perceived difference, the Court found "the Tulalip's interest in preserving the favorable effects of *stare decisis* is too speculative to warrant intervention." *Greene I*, 996 F.2d. at 977. Similarly, intervention was denied in *Evans*, 604 F.3d 1120, and *Hansen v. Kempthorne*, No. C08-0717-JCC, 2008 WL 11508392.

However, *Greene*, *Evans*, and *Hansen v. Kempthorne* are distinguishable for the reason that no claim for relief with respect to treaty rights was before the Court when intervention was denied. In *Greene I,* the Court of Appeals held that denial of intervention was proper because Judge Zilly bifurcated the case and disposed of the Samish effort to relitigate treaty rights before addressing the Tulalip motion to intervene, leaving "no protectable interest warranting intervention." *Greene I*, 996 F.2d at 978. In *Evans*, while the Complaint alleged the unrecognized plaintiff Snohomish to be descended from a treaty party, this Court and the Court of Appeals observed that treaty rights were "no part of the relief sought by the Snohomish Tribe" in again denying intervention by the Tulalip Tribe. *Evans*, 604 F.3d at 1123. And, in *Hansen v. Kempthorne*, this Court emphasized that "[a]s in *Greene I*, this action is about federal tribal recognition, *not* treaty fishing rights," in denying Muckleshoot's motion to intervene, *Hansen v. Kempthorne*, No. C08-0717-JCC, 2008 WL 11508392, at *4. Unlike in *Hansen v. Kempthorne*, plaintiffs have chosen to seek relief on their claim for treaty rights here in this action rather than in *United States v. Washington*, in a transparent effort to relitigate the issue decided in *Washington II*, making this an action about treaty rights, in addition to tribal recognition, unless and until the Court disposes of the plaintiffs' treaty successorship claim.

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D. Federal Defendants Do Not Adequately Represent Muckleshoot's Interests.

An intervenor applicant's burden in showing inadequate representation "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." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972); *Western Watersheds Project v. Haaland*, 22 F.4th 828, 840 (9th Cir. 2022).

While Muckleshoot and the government share the view that the challenged government decision-making process was fair and complied with the requirements of due process and the APA, Muckleshoot's interests in the outcome of that process are interests that the government does not necessarily share.[3] And, in the event the plaintiffs were to prevail on their treaty claim, it is Muckleshoot that will suffer competition for treaty fishing places and loss of harvest, not the United States. The "parochial interests" that Muckleshoot seeks to protect thus differ from the broader public interest the federal defendants seek to vindicate. *See, Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011). Moreover, it is well established that in disputes involving conflicting tribal claims, the government cannot adequately represent the claims of any of the tribes. *See e.g., Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997) (holding the Department of the Interior could not adequately represent the interests of an absent tribe in an action seeking review of a recognition decision); *see also, Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994).

[3] It is noteworthy that at one point in the process the government decision maker was prepared to issue a decision in favor of recognition of the Duwamish plaintiff. *See* First Amended Complaint ¶ 51. Although the proposed decision in favor of recognition was never actually issued, and ultimately the government decided against recognition, it is certainly possible that at some point in the future the government could once again reverse course.

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The federal defendants' inability to adequately represent Muckleshoot's interests is further demonstrated by Muckleshoot's proposed Answer which pleads several significant affirmative defenses not raised by the United States, including waiver and estoppel, and failure to exhaust administrative remedies. *See,* Answer of Applicant for Intervention Muckleshoot Indian Tribe at 28. By way of example, the administrative record will show that the Duwamish plaintiff failed to request that the Interior Board of Indian Appeals exercise its authority under 25 CFR §83.11(e)(4) (1994) to require an adjudicative hearing to resolve disputed issues of material fact or augment the record. Nonetheless, plaintiffs claim a denial of due process because federal defendants did not conduct a formal adjudicative hearing which plaintiffs could have, but did not request pursuant to the above cited regulation. Plaintiffs also seek to raise claims not presented to the Department based on the erroneous assertion that Duwamish people were a matrilineal society.

II. The Muckleshoot Tribe Should Be Granted Permissive Intervention Under Federal Rule of Civil Procedure 24(b)(1)(B).

Should the Court determine that the Muckleshoot Tribe is not entitled to intervene as a matter of right under Rule 24(a), the Court should nonetheless grant permissive intervention under Rule 24(b). Under Rule 24(b), a party need not have a "protectable interest" in the subject matter of the action that will be affected. All that is required is that the party seeking intervention assert defenses directly responsive to the plaintiff's claim. *See, Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1110 (9th Cir. 2002), *abrogated on other grounds by Wilderness Society v. U.S. Forest Service,* 630 F.3d 1173 (9th Cir. 2011).

> Rule 24(b)(2) provides that on timely application the court may allow an absentee to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." The language of the rule makes clear that if the would be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under Rule 24(b)(2) must be denied. But, if there is a common question of law or fact, the requirement of the rule has

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> been satisfied and it is then discretionary with the court whether to allow intervention.

Id. at 1111. Muckleshoot has fulfilled the requirements of Rule 24(b)(1)(B) by submitting a proposed Answer to plaintiffs' claims that poses questions of law and fact in common with those raised by the plaintiff and federal defendants. *See, Nooksack Indian Tribe v. Zinke*, 321 F.R.D. 377, 383 (W.D. Wash. 2017).

III. If the Court Denies Intervention, It Should Grant Muckleshoot Leave to Participate as *Amicus Curiae*.

In the event the Court denies intervention, it should grant Muckleshoot leave to participate as *amicus curiae* for the same reasons and on the same terms as the Court granted Muckleshoot *amicus* status in *Hansen v. Kempthorne*. *Hansen v. Kempthorne*, No. C08-0717-JCC, 2009 WL 10725425 (W.D. Wash. Apr. 21, 2009) (order granting amicus status). *See also*, *Evans v. Kempthorne*, No. C08-0372-JCC, 2010 WL 11565129 (W.D. Wash. May 11, 2010); *Greene I,* 996 F.2d at 978.

CONCLUSION

For the foregoing reasons, the Muckleshoot Indian Tribe requests that the Court grant its Motion to Intervene, or should it deny intervention, grant Muckleshoot leave to participate as *amicus curiae* on the same terms as it did in *Hansen v. Kempthorne*.

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DATED this 4th day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 4, 2022, I caused the foregoing Motion to Intervene or for Leave to Appear as Amicus Curiae, as well as, the Muckleshoot Tribe's Proposed Answer, Proposed Order Granting Muckleshoot Indian Tribe's Motion to Intervene, and Proposed Order Granting Muckleshoot Indian Tribe Leave to Appear as Amicus Curiae to be electronically filed with the Court's electronic filing system, which will electronically serve all counsel of record in this matter.

DATED this 4th day of August, 2022.

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