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 REPLY IN SUPPORT OF MOTION TO INTERVENE OR FOR LEAVE TO APPEAR AS AMICUS CURIAE

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INTRODUCTION

The Muckleshoot Tribe seeks to intervene in this case because the Duwamish plaintiffs collaterally attack the judgment of this Court in *Washington II*, *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979), *aff'd*., 641 F.2d 1368 (9th Cir. 1981), which held that the plaintiff Duwamish Tribe is not a continuation of nor the political successor in interest to the historic Duwamish Tribe that signed the Treaty of Point Elliott. The Muckleshoot Tribe, as a successor in interest to Duwamish bands that were party to the Treaty of Point Elliott, *see United States v. Washington,* 384 F.Supp. 312, 366 (W.D. Wash. 1974), 80 Interior Decisions 222, 225 (1973)[1] and a party to the judgment in *Washington II*, has a clear interest in protecting the finality of the judgment in *Washington II* that justifies intervention.

The oppositions' arguments to intervention, that plaintiffs are not seeking a determination of treaty tribe status contrary to *Washington II,* is simply inconsistent with the first and second claims for relief in the First Amended Complaint. See, Dkt. 2 ¶¶1, 56, 88-105, 142, 143. The Duwamish plaintiffs claim that they "merely seek to demonstrate that the present-day Duwamish Tribe is the political continuation of, or otherwise evolved from, the 'historic' Duwamish Tribe that signed the Treaty in 1855." Dkt. 18 at 6. But, as plaintiffs admit, in 1979 "Judge Boldt concluded that the Duwamish Tribe was not the successor in interest to the tribe that signed the Treaty." Dkt. 2 at 24 ¶56. That is the basis for the determination in *Washington II* that the plaintiff Duwamish have no treaty rights, and for that reason the issue before the Court on the Muckleshoot Motion to Intervene is not the same as in *Hansen v. Kempthorne*, or the binding Ninth Circuit precedent discussed by parties. *See, Snoqualmie Indian Tribe v. Washington*, 8

[1] Plaintiffs' argument, Dkt. 18 at 10, that Muckleshoot is not the successor to certain downriver villages of the historic Duwamish Tribe is irrelevant to both the present Motion and the underlying action.

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F.4th 853, 864-65 (9th Cir. 2021) (Snoqualmie Tribe seeking declaration that "it is a signatory to the Treaty of Point Elliott" precluded from relitigating its treaty tribe status because *Washington II* decided the "exact issue.").

As for the arguments that the Duwamish plaintiffs raise in opposition to *amicus* status, they were addressed and rejected by the Court in its Order granting Muckleshoot *amicus* status in *Hansen v. Kempthorne*. No. C08-0717-JCC, 2009 WL 10725425 (W.D. Wash. Apr. 21, 2009) (granting *amicus* status). Similarly, the Court of Appeals in *Greene I* and this Court in *Evans v. Kempthorne* have held that the *amicus* status similar to that sought by Muckleshoot is appropriate and warranted in cases in which tribal recognition alone was the issue. *Greene v. United States ("Greene I"),* 996 F.2d 973, 978 (9th Cir. 1993); *Evans v. Kempthorne*, No. C08-0372-JCC, 2010 WL 11565129 (W.D. Wash. May 11, 2010).

ARGUMENT

In claiming that Muckleshoot is improperly seeking to interject treaty rights into this case, the Duwamish plaintiffs seek to deflect attention from the fact that it was their decision to include claims that collaterally attack the judgment in *Washington II* that Duwamish plaintiff is not a political successor in interest to the historic Duwamish Tribe and therefore not a treaty tribe. *See,* Dkt. 2, ¶¶ 1, 56, 88-105, 142, 143. It was also their decision to inject a challenge to the Muckleshoot Tribe's rights to cultural properties recovered from historic Duwamish villages. *Id*. ¶ 84. As Muckleshoot acknowledges in its Motion, had the Duwamish plaintiffs not made such claims controlling law would preclude intervention.

Contrary to the claims of the parties, the Duwamish plaintiffs do not simply seek APA review of the Department's decision that plaintiff Duwamish Tribe does not qualify for recognition as an Indian tribe under 25 CFR Part 83, and remand to the Department in the event

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they are successful. They also seek a declaration under the Federally Recognized Tribes List Act, 25 U.S.C. §5131, that they are a continuation and successor in interest to the Duwamish Tribe that signed the Treaty of Point Elliott. They do so arguing that "Congress alone has the constitutional authority to repudiate a treaty or terminate a tribe" and because they claim "Congress has never abrogated its recognition of the Duwamish Tribe or otherwise limited its rights under the Treaty of Point Elliott." *Id*. ¶¶ 92, 94, 95. Plaintiffs further seek mandamus relief under the List Act, claiming "Defendants' improper attempt to terminate the Duwamish Tribe's recognition and treaty rights violates separation of powers principles" and that "Defendants' termination of the Tribe's recognition and treaty rights threatens the Tribe's political and cultural survival." *Id*. ¶104.

These claims and the relief which plaintiffs seek in ¶¶ 142 and 143 of the First Amended Complaint bely the oppositions' assertion that treaty status and rights are not at issue and are directly contrary to the determination in *Washington II* which plaintiffs acknowledge held that the "Duwamish Tribe was not the successor in interest to the tribe that signed the Treaty." See *id*. ¶ 56. Under well-established principles of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982).

Muckleshoot as a party to *Washington II* has an interest protected under Rule 24 to intervene in this matter to argue that the first and second claims for relief set forth in the First Amended Complaint should be dismissed on grounds of issue preclusion. It does so not to complicate this action, but to protect its interest in the finality of *Washington II*, and to simplify

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this action by disposing of the plaintiffs' frivolous claims to be the continuation and political successor to the historic Duwamish Tribe which are precluded by the judgment in *Washington II,* and if cognizable at all must be made in *United States v. Washington. See, Greene I, 996 F.2d at 977-78.*

As the en banc decision in *United States v. Washington (Washington IV)*, 593 F.3d 790 (9th Cir. 2010) explained, the rule precluding intervention by treaty tribes in recognition proceedings established in *Greene I* protects against the complication of such proceedings "because of the speculative possibility that some administrative finding might have an impact on future treaty litigation." *Id*. at 801. Muckleshoot's concern in seeking intervention is not the impact of future administrative findings should this Court conclude that the Duwamish plaintiffs are entitled to further administrative proceedings. Rather as explained above, it is potential impact of plaintiffs' first and second claims and the declaratory and mandamus relief that plaintiffs seek from this Court, which if granted would obviate the need for further administrative proceedings, that gives rise to Muckleshoot's effort to intervene.

Nor are Muckleshoot's interests in this matter adequately represented by the federal defendants as is starkly represented by their failure to acknowledge that relief sought on the first two claims is a direct attack on the judgment in *Washington II* that seeks to undermine the interests of both the United States and the Muckleshoot Tribe in the finality of that judgment on the central issue of treaty successorship. The failure of federal defendants to adequately represent Muckleshoot's interests in this matter is further exemplified by the failure of federal defendants to file a brief in opposition to the merits of the Duwamish claims in connection with the Plaintiff Duwamish Tribe's Request for Reconsideration before the Interior Board of Indian Appeals in the administrative proceedings on remand, as will be apparent from the

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Administrative Record when it is filed. *See* Declaration of Richard Reich. While the Muckleshoot and Puyallup Tribes appeared as *amicus* before the IBIA and submitted briefs in opposition to the Request for Reconsideration, *In Re Federal Acknowledgment of the Duwamish Tribal Organization,* 66 IBIA 149, 167 (April 17, 2019), neither the Assistant Secretary whose decision was under review, nor any of the other federal defendants filed a brief on the merits in opposition to the Request for Reconsideration leaving it to *amici* to defend the Assistant Secretary's decision. Declaration of Richard Reich.

There is a reason for these differing positions. As pointed out in the Motion to Intervene, Dkt. 14 at 11, and not contested by the oppositions' arguments, while the positions of the federal defendants and the Muckleshoot Tribe align on the ultimate question of whether the decision of the Assistant Secretary denying acknowledgment should be upheld, the interests of Muckleshoot and the federal defendants in this matter differ. The federal defendants have a broad interest in the fair and impartial administration of the acknowledgment program; the Muckleshoot Tribe has more narrow parochial interests that lead it to oppose the Duwamish plaintiffs' claims. *Id.* Inadequacy of representation may be established even when the proposed intervenor's positions largely align with an existing party where that party "was 'required to represent a broader view than the more narrow, parochial interests' advanced by the intervenors.'" *Western Watersheds Project v. Haaland*, 22 F.4th 828, 842 (9th Cir. 2022), *citing*, *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc). *See also*, *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011).

Moreover, it is well established that "[i]n disputes involving intertribal conflicts, the United States cannot properly represent any of the tribes without compromising its trust

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obligation to all tribes," *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1460 (9th Cir.1994). S*ee also, Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1500 (9th Cir.1991); *Makah Indian Tribe v. Verity,* 910 F.2d 555, 560 (9th Cir.1990). Even if the federal defendants were to vigorously defend Muckleshoot's interests in the district court, they might choose not to prosecute an appeal of an unfavorable decision whether based on the merits or other considerations, as happened following this Court's 2013 decision in *Hansen v. Kempthorne*. As the D.C. Circuit has observed, in such circumstances the ability to participate as amicus is insufficient to protect the non-party tribe's interests. *Cherokee v. Babbitt, supra.* While these cases address adequacy of representation in connection with Rule 19, the parties fail to explain why the same considerations do not apply in connection with Rule 24.

Finally, in the event that intervention is denied, the Muckleshoot Tribe respectfully requests that the Court allow it to participate as *amicus curiae* for the same reasons and on the same terms as it did in *Hansen v. Kempthorne*. As noted in the introduction, the arguments raised by the Duwamish plaintiffs in opposition are the same arguments that the Court has previously rejected. *See*, *Hansen v. Kempthorne*. No. C08-0717-JCC, 2009 WL 10725425 (W.D. Wash. Apr. 21, 2009). Such amicus participation was similarly granted to the Tulalip Tribes in *Evans v. Kempthorne, supra*, and approved by the Circuit in *Greene I*. There is no reason for different treatment of Muckleshoot's participation here, if intervention is denied.

CONCLUSION

For the foregoing reasons the Motion to Intervene should be granted. But, in the event intervention is denied, the Muckleshoot Tribe should be granted permission to participate as *amicus curiae*.

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DATED this 18th day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 18 2022, I caused the foregoing Muckleshoot Reply in Support of Motion to Intervene or for 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 18th day of August, 2022.

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