

HONORABLE BARBARA J. ROTHSTEIN

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

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THE TULALIP TRIBES and THE)
CONSOLIDATED BOROUGH OF QUIL)
CEDA VILLAGE,)
)
Plaintiffs,)
)
and)
)
THE UNITED STATES OF AMERICA,)
)
Plaintiff-Intervenor,)
)
v.)
)
THE STATE OF WASHINGTON, Washington)
State Governor JAY INSLEE, Washington)
State Department of Revenue Director VIKKI)
SMITH, SNOHOMISH COUNTY, Snohomish)
County Treasurer KIRKE SIEVERS, and)
Snohomish County Assessor CINDY)
PORTMANN,)
)
Defendants.)
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Case No. 2:15-cv-00940
**THE UNITED STATES' MOTION
TO INTERVENE**
NOTE ON MOTION CALENDAR:
August 21, 2015

The United States respectfully moves to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b).

1 The United States seeks to intervene in this action on its own behalf and as trustee for the
2 Tulalip Tribes (“Tulalip” or “Tribe”) to protect the Tribe’s right under the United States
3 Constitution and federal law to collect tribal tax revenues within a tribally chartered municipality
4 designed, financed, built, regulated, and managed by the Tribe and the United States on land
5 within the Tulalip Reservation that the United States holds in trust for the Tribe, and to restrain
6 Defendants from taxing the economic activities on such lands in a manner inconsistent with
7 federal law.

9 The United States has substantial interests in this action by virtue of the Indian
10 Commerce Clause, U.S. Const. art. I, § 8, cl. 3; federal statutes and regulations designed to foster
11 tribal self-determination and economic independence; the United States’ trust ownership of the
12 land at issue; and the United States’ government-to-government relationship with the Tribe. The
13 United States also has substantial interests in the interpretation of its statutes and regulations, and
14 in the principles governing state and local taxation and regulation of activities on Indian
15 reservations.

17 This motion is timely; intervention will not prejudice any parties; and the present parties
18 do not adequately represent the United States’ interests. Participation by the United States will
19 also aid the Court’s full consideration of the legal issues presented.

21 **BACKGROUND**

22 Plaintiff Tulalip is a federally recognized Indian tribe organized under the Indian
23 Reorganization Act of 1934, 25 U.S.C. § 476. *See* Indian Entities Recognized and Eligible to
24 Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1946 (Jan.
25 14, 2015). Lands comprising the Tulalip Reservation were reserved by the 1855 Treaty of Point
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1 Elliott, 12 Stat. 927 (1859), as well as by Executive Order of President Grant on December 23,
2 1873, C. Kappler, Indian Affairs – Laws and Treaties 925-26 (1904).

3 Pursuant to a federally approved tribal law, Tulalip chartered its own municipality, the
4 Consolidated Borough of Quil Ceda Village (“Quil Ceda” or the “Village”), which encompasses
5 approximately 2,163 acres of land within the Tulalip Reservation. The United States holds these
6 lands in trust for the benefit of the Tribe. In 2001, the Village received formal written approval
7 to be treated as a political subdivision of the Tribe for certain tax purposes after an additional
8 review by the United States Internal Revenue Service and the United States Department of the
9 Interior under the Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2601
10 (codified as amended at 26 U.S.C. § 7871).
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13 With financial support and other assistance from the federal government, Tulalip
14 designed and constructed the infrastructure necessary to support a major entertainment,
15 commercial, and tourism destination, including a hotel, resort, gaming facilities, amphitheater,
16 retail stores, restaurants, and cultural center on its trust lands at Quil Ceda Village. The Tribe
17 and the federal government contributed tens of millions of dollars to this project, and provided
18 other infrastructure and support to construct the Village. The leasing of Village trust lands, and
19 the activities on those lands, continue to be regulated by provisions of a federally approved tribal
20 code and tribal ordinances. Pursuant to the Indian Trader Statutes, 25 U.S.C. § 261 *et seq.*, and
21 their implementing regulations, all non-Indian businesses at Quil Ceda hold a federal Indian
22 trader’s license issued by the United States Bureau of Indian Affairs, which is obtained only after
23 submitting to a federal background check, including personal and corporate financial status,
24 capital to finance the business, prior business experience, and criminal and licensing history.
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26 The United States Bureau of Indian Affairs and Tulalip, among others, entered into a
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1 memorandum of agreement to memorialize procedures for reviewing and acting upon
2 applications for Indian trader's licenses at a portion of the Village site to provide certainty that
3 potential subtenants will be able to obtain Indian trader's licenses prior to negotiating subleases.
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5 The Tribe provides the vast range of governmental services necessary for the Village's
6 operation, including police protection; fire protection; emergency medical and 911 services;
7 water supply and transmission services; sewer, stormwater, and wastewater services; garbage
8 and debris collection and disposal; road and sidewalk maintenance; snow removal;
9 environmental protection; landscaping and maintenance of common areas; pest control; phone,
10 internet, and cable television services; utility maintenance and planning; crowd, security, and
11 traffic control; parking design and construction; and a civil court system for the resolution of
12 disputes arising at Quil Ceda. The governmental services at Quil Ceda Village are provided
13 primarily – if not exclusively – by the Tribe and the federal government.
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15 Federal statutes, treaties, and regulations demonstrate the United States' significant
16 interests in building and maintaining vigorous and self-sufficient tribal economies; providing
17 Tulalip, in particular, more control over its property to attract development; regulating both
18 licensed Indian traders and the leasing of tribal trust lands within the Village; encouraging
19 economic development through business partnerships and trade and tourism; and assisting
20 Tulalip to secure maximum economic benefits through the leasing of tribal trust lands. Relevant
21 federal interests in this case are also demonstrated by the federal government's substantial
22 financial investment in the Village's commercial development, and in the ongoing provision of
23 federal regulatory and government services at Quil Ceda.
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26 Defendants State of Washington and Snohomish County, to the exclusion of Tulalip and
27 the Village, collectively impose approximately \$40 million annually in sales and use taxes,
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1 business and occupation (B&O) taxes, and personal property taxes on the retail sales, services,
2 businesses, personal property, and economic activities occurring on the Tribe's leased trust lands
3 within Quil Ceda Village. Neither the State of Washington nor Snohomish County, however,
4 contributed in any significant respect to the design, planning, financing, or construction of Quil
5 Ceda Village. Nor do the State or County contribute in any significant manner to the leasing,
6 retail activities, governmental services, or other on-reservation activities at Quil Ceda Village.
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8 On June 12, 2015, the Tribe and Village filed suit against the Director of the Washington
9 State Department of Revenue, as well as against Snohomish County and County officials,
10 seeking declaratory and injunctive relief against the administration and enforcement of State and
11 County sales and use, B&O, and personal property taxes in connection with the economic
12 activities at Quil Ceda Village. The legal claims in this case, however, squarely implicate federal
13 interests and potentially impair the ability of the United States to protect its interests. For these
14 reasons and those set forth below, the United States respectfully seeks permission to assert and
15 protect its interests in this case, and requests that the Court grant its motion to intervene.
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18 ARGUMENT

19 **I. THE UNITED STATES IS ENTITLED TO INTERVENE AS OF RIGHT.**

20 Federal Rule of Civil Procedure 24(a)(2) provides that upon timely motion, the Court
21 must permit anyone to intervene who "claims an interest relating to the property or transaction
22 that is the subject of the action, and is so situated that disposing of the action may as a practical
23 matter impair or impede the movant's ability to protect its interest, unless existing parties
24 adequately represent that interest." Under Ninth Circuit case law, an applicant is entitled to
25 intervene as a matter of right when:
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- 28 (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

1 matter, impair or impede the applicant's ability to protect its interest; (3) the
2 application is timely; and (4) the existing parties may not adequately represent the
3 applicant's interest.

4 *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *United States v. City of*
5 *Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002).

6 In determining whether to grant intervention, the Court must accept the nonconclusory
7 allegations of the motion and proposed complaint as true. *Sw. Ctr. for Biological Diversity v.*
8 *Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

9 Moreover, courts are to be "guided primarily by practical and equitable considerations,
10 and the requirements for intervention are broadly interpreted in favor of intervention." *Alisal*
11 *Water*, 370 F.3d at 919. As shown below, the United States satisfies each of the requirements for
12 intervention as of right under Rule 24(a).

13
14 **A. THE UNITED STATES HAS SIGNIFICANT PROTECTABLE**
15 **INTERESTS IN THIS LITIGATION.**

16 "An applicant has a 'significant protectable interest' in an action if (1) it asserts an
17 interest that is protected under some law, and (2) there is a 'relationship' between its legally
18 protected interest and the plaintiff's claims." *California ex rel. Lockyer v. United States*, 450
19 F.3d 436, 440-41 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.
20 1998)). To merit intervention as of right, the interest must be "direct, non-contingent,
21 substantial and legally protectable." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir.),
22 *modified by* 307 F.3d 943 (9th Cir. 2002) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157
23 (9th Cir. 1981)).
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26 Two fundamental principles guide the law regarding American Indian tribes. First, tribes
27 are "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 559
28 (1832), that retain all aspects of tribal sovereignty not specifically withdrawn by Congress,

1 *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Second, the Constitution vests the United
2 States “with exclusive authority over relations with Indian tribes.” *Montana v. Blackfeet Tribe*,
3 471 U.S. 759, 764 (1985). Moreover, “long continued legislative and executive usage and an
4 unbroken current of judicial decisions have attributed to the United States . . . the power and the
5 duty of exercising a fostering care and protection over all dependent Indian communities.”
6 *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). As part of the United States’ exercise of
7 this political relationship with Indian tribes such as Tulalip, the United States is firmly
8 committed to promoting self-government and the economic self-sufficiency of tribes, *New*
9 *Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983), including through the
10 economic development of tribal lands and the ability of tribes to provide fundamental
11 governmental services on those lands. The United States has a significant government interest in
12 protecting both of these fundamental principles from incursion.
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15 The State’s and County’s taxation of economic activities occurring in Quil Ceda Village
16 conflicts with the principles of tribal sovereignty and the exclusive role of the United States, as
17 well as with the federal goals of tribal self-determination and self-sufficiency.
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19 In granting intervention as of right, the Ninth Circuit has also recognized that government
20 agencies have significant protectable interests in cases involving the application of laws that the
21 agencies are tasked with administering and enforcing. *See, e.g., Smith v. Pangilinan*, 651 F.2d
22 1320, 1324-25 (9th Cir. 1981). Disposition of this case involves a wide range of federal statutes,
23 treaties, and regulations, including but not limited to the Indian Reorganization Act of 1934, 48
24 Stat. 984, as amended, 25 U.S.C. § 461 *et seq.*; the Tulalip Leasing Act of 1970, Pub. L. No. 91-
25 274, 84 Stat. 302, *amended by* Act of Oct. 18, 1986, Pub. L. 99-500, 100 Stat. 1783 (codified at
26 25 U.S.C. § 415(b)); the Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat.
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1 2601 (codified as amended at 26 U.S.C. § 7871); the Native American Business Development,
2 Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-447, 114 Stat. 1934 (2000)
3 (codified at 25 U.S.C. § 4301 *et seq.*); the Indian Self Determination and Education Assistance
4 Act of 1975, 25 U.S.C. § 450 *et seq.*; the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et*
5 *seq.*; the Indian Trader Statutes, *see* 25 U.S.C. § 261 *et seq.*; and the United States Department of
6 the Interior's leasing regulations, 25 C.F.R. Part 162.
7

8 As part of its trust obligations to the Tribe, the United States has a legal interest in
9 protecting the Tribe's rights and sovereignty under the United States Constitution and federal
10 law, and in enforcing federal statutes and regulations regarding Indian interests. The United
11 States also has a substantial interest in this case by virtue of its trust ownership of the land at
12 issue. Finally, the United States has a strong interest in the viability and continued application of
13 the legal principles governing state and local taxation and regulation of property and activities on
14 Indian reservations. Plaintiffs' claims, and Defendants' actions, directly implicate these
15 interests.
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18 **B. DISPOSITION OF THIS CASE WITHOUT PARTICIPATION OF THE**
19 **UNITED STATES MAY IMPAIR THE UNITED STATES' ABILITY TO**
20 **PROTECT ITS INTERESTS.**

21 Disposition of this case without the United States' participation may impair the United
22 States' ability to protect its ownership, governmental, and trust interests with respect to the
23 Tulalip Tribes and the Tulalip Reservation. Moreover, this litigation has the potential to impact
24 the United States' ownership and management of federal lands, and its implementation of and
25 interests in federal statutes and regulations. The potential outcomes of this case, including the
26 potential for appeals by existing parties, warrant the United States' intervention.
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1 **C. EXISTING PARTIES DO NOT ADEQUATELY REPRESENT THE**
2 **UNITED STATES' INTERESTS.**

3 The Ninth Circuit has consistently followed the Supreme Court's statement in *Trbovich v.*
4 *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972), that "[t]he requirement of
5 [Rule 24(a)(2)] is satisfied if the applicant shows that representation of his interest 'may be'
6 inadequate; and the burden of making that showing should be treated as minimal." *See, e.g.,*
7 *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("The
8 burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can
9 demonstrate that representation of its interests 'may be' inadequate.") (quoting *Arakaki v.*
10 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

11 Three factors are relevant here: "(1) whether the interest of a present party is such that it
12 will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is
13 capable and willing to make such arguments; and (3) whether a proposed intervenor would offer
14 any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at
15 1086; *see also Pangilinan*, 651 F.2d at 1325 ("[t]he burden of demonstrating the inadequacy of
16 representation is not a heavy one"); *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303,
17 307 (E.D. Cal. 2011) ("Any doubt as to whether the existing parties will adequately represent the
18 intervenor should be resolved in favor of intervention.").

19 Although Plaintiffs and the United States share common goals in tribal economic
20 development and self-sufficiency through the leasing of Tulalip trust lands at Quil Ceda Village,
21 and although both the Tribe and the United States contributed to the financing, development, and
22 management of the Village, none of the current parties adequately represent the United States'
23 own sovereign interests in these activities, or the manner in which applicable federal statutes and
24 regulations should be construed. This case will require the Court to balance the federal interests
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1 (along with tribal interests) in the economic activities at Quil Ceda Village to determine whether
2 they outweigh the State's interests in taxing those activities. The federal government is uniquely
3 situated to best present its interests in this analysis. Adequate representation and articulation of
4 those federal interests warrant full participation by the United States.
5

6 **D. THE APPLICATION FOR INTERVENTION IS TIMELY.**

7 In the Ninth Circuit, three factors are weighed in determining whether a motion for
8 intervention is timely: "(1) the stage of the proceeding in which an applicant seeks to intervene;
9 (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County of*
10 *Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). "Mere lapse of time alone is not
11 determinative." *Id.* Rather, as the Supreme Court has emphasized, "[t]imeliness is to be
12 determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see*
13 *Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007) (granting state intervenor's motion where it
14 could not "be said that the state ignored the litigation or held back from participation to gain
15 tactical advantage" and noting that "all the circumstances of the case must be considered in
16 ascertaining whether or not a motion to intervene is timely") (quoting *Legal Aid Soc'y of*
17 *Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980)). In this case, all three prongs of the
18 timeliness analysis weigh in favor of granting the United States' motion to intervene.
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22 Regarding the first factor, this case is only in its beginning stages. So far, Plaintiffs'
23 Complaint is the only substantive pleading that has been filed. There have been no responsive
24 pleadings, scheduling orders, discovery, or other motions. The United States is filing this motion
25 shortly after this case was first initiated, long before the Court has "substantively — and
26 substantially — engaged the issues in [the] case." *League of United Latin Am. Citizens v.*
27 *Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997).
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1 Regarding the second factor, prejudice, the United States' intervention in this litigation
2 will not burden or prejudice the current parties in any legally cognizable manner. Because the
3 United States is in the best position to articulate its federal interests, the United States'
4 participation in this case will aid the Court's full consideration of the legal issues involved, and
5 will serve the interests of judicial efficiency by resolving all related controversies in a single
6 action, rather than forcing the United States to bring its own separate claim on substantially
7 related issues.
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9 Regarding the third factor, there is no delay. The United States has worked diligently and
10 expeditiously to prepare its motion and complaint in intervention in this matter, and is filing this
11 motion at the earliest practicable date.
12

13 **II. ALTERNATIVELY, THE UNITED STATES IS ENTITLED TO PERMISSIVE**
14 **INTERVENTION.**

15 Alternatively, the United States requests permission to intervene under Fed. R. Civ. P.
16 24(b), which provides that the Court may permit a federal officer or agency to intervene if an
17 existing party's claim or defense is based upon "a statute or executive order administered by the
18 officer or agency; or . . . any regulation, order, requirement or agreement issued or made under
19 the statute or executive order." Fed. R. Civ. P. 24(b)(2). An expansive, liberal standard for
20 permissive intervention by the government, set forth explicitly in Rule 24(b), has long been
21 judicially applied. *See, e.g., SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460
22 (1940) (recognizing the government's "interest in the maintenance of its statutory authority and
23 the performance of its public duties"). Here, Rule 24(b) is easily satisfied.
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25 Under 25 U.S.C § 2,
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27 [t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the
28 Interior, and agreeably to such regulations as the President may prescribe, have the
management of all Indian affairs and of all matters arising out of Indian relations.

1 As previously noted, a number of federal statutes, treaties, and regulations are pertinent to this
2 case. Under these federal laws, the United States Department of the Interior, in consultation with
3 the United States Department of Justice, and in keeping with the United States' trust obligation
4 to the Tribe, has determined the propriety of seeking intervention in this case. This intervention,
5 therefore, falls squarely within the language of Rule 24(b)(2), as relating to an existing party's
6 claim based upon federal treaties, statutes, executive orders, and regulations administered by the
7 United States Department of the Interior. Fed. R. Civ. P. 24(b)(2).
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9 Rule 24(b)(1)(B) also states that "[o]n timely motion, the court may permit anyone to
10 intervene who . . . has a claim or defense that shares with the main action a common question of
11 law or fact." Fed. R. Civ. P. 24(b)(1)(B). Here, as discussed above, the United States'
12 application for intervention is timely and there are common questions of law and fact between
13 the United States' claims in intervention and the Tribe's existing claims.
14

15 Finally, Rule 24(b)(3) instructs courts to "consider whether the intervention will unduly
16 delay or prejudice the adjudication of the original parties' rights." As discussed above, the
17 United States' participation would not cause undue delay or prejudice.
18

19 CONCLUSION

20 For the foregoing reasons, the United States respectfully requests that this Court grant its
21 Motion to Intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil
22 Procedure or, in the alternative, permissively under Rule 24(b).
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Respectfully submitted this 4th day of August 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2015, I electronically filed the foregoing Motion to Intervene with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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