No. 101384-1
SUPREME COURT
OF THE STATE OF WASHINGTON

MARGRETTY RABANG and ROBERT RABANG,

Petitioners,

v.

RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA, RAYMOND DODGE, and JOHN DOES 1–10,
Respondents.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONERS

Petitioners Margretty and Robert Rabang seek review of the Court of Appeals' affirmation of the trial court's dismissal of their emotional distress claims arising from the threatened taking of their home on off-reservation tribal lands.

B. DECISION BELOW

On August 15, 2022, the Court of Appeals affirmed the Superior Court's dismissal of Petitioners' emotional distress claims, albeit on different grounds ("Opinion"). On September 2, 2022, Petitioners sought reconsideration of that decision pursuant to RAP 12.4(c) because the Court of Appeals overlooked both Washington State and U.S. Supreme Court precedent regarding personal-capacity claims against tribal employees. Division I denied reconsideration on September 8, 2022. Petitioners seek review by this Court pursuant to RAP 13.4(b)(1), 13.4(b)(2), and 13.4(b)(4).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals impermissibly broadened

tribal sovereign immunity by ignoring U.S. Supreme Court and other federal precedent, in violation of *Long v. Snoqualmie Gaming Commission*, 7 Wn. App. 2d 672, 681 (2019), which instructs that "Washington courts must . . . apply federal law to resolve whether tribal sovereign immunity applies."

2. Whether Division I erred in concluding that tribal employees stand immune from tort suit when they act within their employment scope. That conclusion directly conflicts with the U.S. Supreme Court's decision in *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017), which holds: "That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity."

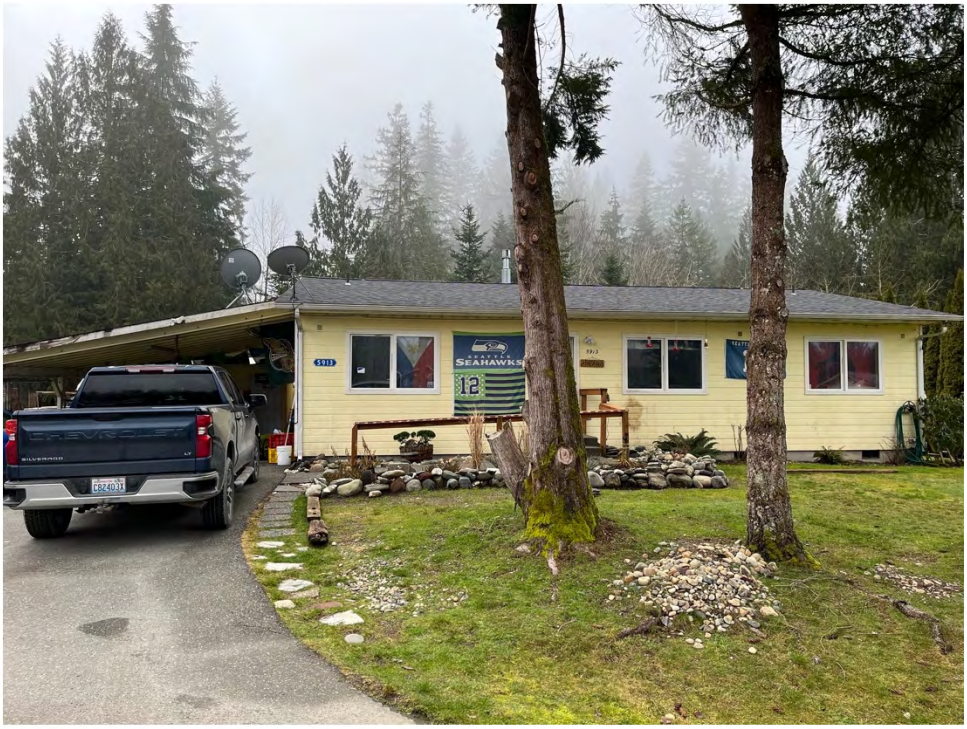
3. Whether Division I's expansion of tribal sovereign immunity to shield tribal employees from personal-capacity tort suits should stand without full consideration and briefing, given the significant public impact. That impact is to significantly limit the ability of individuals injured by tribal employees to obtain

any tort remedy, despite this Court's conclusion in *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 116 (2006) (en banc), that "tribal sovereign immunity would not protect [a tribal employee] from an action against him in his individual capacity."

D. STATEMENT OF THE CASE

This controversy concerns the emotional distress inflicted upon Margretty and Robert Rabang ("the Rabangs") over a four-month period from early October 2016 through early January 2017—particularly the Christmas weekend—when Respondents attempted to eject the Rabangs and take their home without due process in violation of a U.S. Department of the Interior ("Interior") directive to cease those efforts. A-0004-0008.

The Rabangs have lived at 5913 Johnny Drive in Deming, Washington, pictured below, for nearly thirty years. A-0026.



The Rabangs' home sits within the public housing project in Deming known as "Rutsatz" (because it adjoins Whatcom County's Rutsatz Road). *Cf. id.* The Rutsatz housing project, which has been developed and administered at Nooksack with U.S. Department of Housing and Urban Development ("HUD") and other federal low income housing funds, is located on tribal trust lands outside of the Nooksack Indian Reservation.[1] A-0049.

[1] Federal or state constitutional protections against property right deprivation or taking are inapplicable to tribal member or non-member homeowners on tribal trust lands, including along Puget

The Rabangs participate in HUD's Mutual Help home ownership program, through which they have regularly made "monthly equity" payments since 1996. A-0003, -0019. By no sooner than 2011 and no later than 2021—years fifteen to twenty-five of their federal "mortgage"—the Rabangs were eligible to apply their accrued equity towards a "purchase price . . . amortized over the course of [their] occupancy," and acquire their home. A-0019-20. By October 2016, the Rabangs needed to pay only an additional $9,326.69 to receive a deed to their home. A-0003.

On October 3, 2016, Respondent Rory Gilliland, the former Nooksack Tribal Police Chief, directed a John Doe Respondent-police officer to serve Mrs. Rabang with a notice to

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Sound and Lake Chelan shorefronts. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (federal bill of rights inapplicable in Indian country); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (same); *Worcester v Georgia,* 31 U.S. (6 Pet.) 515 (1832) (state law has "no force" in Indian country); *State v. Yallup*, 160 Wn. App. 500, 504 (2011) ("state law apply only to the extent authorized by Congress.").

vacate at her home. A-0004. Mrs. Rabang sought injunctive relief to prevent the taking in tribal court, but her lawyers' appearance notice was "REJECTED" and Respondent Ray Dodge refused to convene her lawsuit, in violation of her due process rights. *Id*.[2]

On December 14, 2016, Respondent Dodge ordered the Rabangs evicted from their home, which was tantamount to a

[2] At that time, Respondent Dodge was serving as "Chief Judge" and, according to multiple contemporaneous judicial accounts, openly subverting justice and violating litigants' due process rights. The National American Indian Court Judges Association rebuked "Mr. Dodge," explaining to him: "while you have occupied the position of Chief Judge at Nooksack, proceedings do not appear to have been conducted in compliance with the federal [Indian Civil Rights Act] or fundamental tenets of tribal due process at law." A-0027-28. Whatcom County Superior Court Debora Garrett likewise stated she was "very concerned about this situation including what the Court sees as serious procedural irregularities," explaining: "Clearly there's a problem here . . . in [the Court's] view, the Tribal Court is acting in a way that causes great question about the ability of this – this Tribe in this situation to manage a trial court that is truly fair and truly accords due process to Tribal members." A-0032. Similarly, Whatcom County Superior Court Ira Uhrig refused to "recognize as lawful or carrying any legal effect the actions or decisions of the Nooksack Tribal Court after March 24, 2016." *Id*.

taking of their vested home buyership rights,[3] including the home equity they accrued over the prior twenty years. A-0007; A-0019-20. Dodge directed Respondents Gilliland and Mike Ashby to "forcibly evict" the Rabangs from their home by December 28, 2016. A-0007-008.

On December 19, 2016, Dodge ordered the Rabangs to show cause why they "should not be held in contempt." *Id.* That same day, Respondent Andy Garcia arrived at the Rabangs' home along with a Doe Respondent-patrol officer, ostensibly for

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[3] *See In re Marriage of MacDonald,* 104 Wash.2d 745, 750 (1985) (recognizing a vested property right is entitled to due process protection, provided it is "more than a mere expectation . . . it must have become a title, legal or equitable, to the present or future enjoyment of property") (quoting *Godfrey v. State,* 84 Wn.2d 959, 963, 530 P.2d 630 (1975) (emphasis deleted); *Culmback v. Stevens*, 158 Wash. 675, 680 (1930) ("Whether the contract . . . did or did not vest in them the title to the property, or did or did not vest in them an interest therein, it did vest in them a right through which they could, on the performance of the contract, enforce a conveyance to them of the property . . .").

a home "inspection."[4] A-0008, -0046. Mr. Rabang denied them access to his home. *Id*.

On Thursday, December 22, 2016, Dodge issued his third eviction order in a week, further directing Gilliland and Ashby to "forcibly remove" the Rabangs over the Christmas weekend or otherwise within six days. A-0008. He also ordered the Rabangs to appear on January 11, 2017 and show cause why they should not be held in contempt of his eviction order. *Id.*

On Friday, December 23, 2016, the United States' then highest ranking Indian Affairs official, Interior's Principal Deputy Assistant Secretary ("PDAS") Lawrence Roberts,

[4] Nooksack routinely "mobilizes" armed officers to physically intimidate low income housing tenants and homebuyers at their doorsteps. Mike Baker, *A Tribe's Bitter Purge Brings an Unusual Request: Federal Intervention*, N.Y. Times, Jan. 2, 2022, at A1. Such strong-armed tactics at Nooksack have resulted in physical harm to both tribal members and non-members. *See, e.g.*, *Adams v. United States*, Case. No. 2:21-cv-01289-TSZ, ECF No. 14 (W.D. Wash. Sept. 15, 2022) (dismissal upon United States' settlement of assault and battery claims brought against Nooksack law enforcement officers, including Respondents Dodge and Ashby).

interceded; he took the extraordinary action of invalidating Dodge's eviction orders against the Rabangs, as well as other "so-called tribal court actions and orders." A-0057-58

Pursuant to the Interior Secretary's plenary authority over Indian affairs—which includes determining who has agency to act on behalf of an Indian tribe (25 U.S.C. § 2)— PDAS Roberts proclaimed:

> It has come to the Department's attention that orders of eviction may have been recently issued to be served by the Nooksack Chief of Police or could be issued and served in the near future. . . . [A]s explained to you above and in the previous letters to you, those orders are invalid and the Department does not recognize them as lawful . . . Enforcement of invalid or unlawful orders is outside of a law enforcement officer's duties . . . .

Id. As with two prior determinations issued by Interior, on October 17, 2016, and November 14, 2016, PDAS Roberts invalidated "any actions" taken in the name of the Nooksack Indian Tribe ("Tribe") from March 24, 2016, through December 23, 2016. *Id*.; A-0004-6. That included "any actions" taken by

Respondents against the Rabangs during that time period or relative to Dodge's "so-called" eviction orders.[5] *Id*.

The Rabangs filed suit in Whatcom County Superior Court on January 31, 2017. A-0001. Their complaint includes two causes of action for damages: intentional infliction of emotional distress, and negligent infliction of emotional distress. A-0009–11; *see Bly v. Field Asset Services*, No. 14-cv-0254, 2014 WL 2452755, at *5 (W.D. Wash. June 2, 2014) (recognizing

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[5] The Court of Appeals erred in suggesting that Interior could not "invalidate relevant Nooksack actions" because it lacks "authority over the Nooksack Tribe, a sovereign entity." A-0054. Interior's Secretary possesses plenary authority over "all Indian affairs and . . . all matters arising out of Indian relations" at Nooksack, including deciding whether actors duly represent an Indian tribe, or not. 25 U.S.C. § 2; *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012) ("we owe deference to the judgment of the Executive Branch as to who represents a tribe."); *see Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 WL 1957076, at *4–6 (W.D. Wash. May 11, 2017) (lacking Interior's recognition, the "Nooksack Tribe" lacked standing to challenge PDAS Roberts' three 2016 determinations).

emotional distress claims arising from illegal eviction efforts). The Rabangs did not plead any property rights claim. *Id.*

Pivotally, the Rabangs pleaded that "Tribal sovereign immunity does not bar Plaintiffs' personal capacity claims against Defendants for their own tortious conduct." A-0002 (citing, *inter alia*, *Wright*, 159 Wn.2d at 116; *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (citing *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013)). Moreover, they only prayed for emotional distress relief "against Defendants in their personal capacities." A-0011.

On September 8, 2021, the Superior Court dismissed the Rabangs' emotional distress claims without prejudice pursuant to CR 12(b)(1), holding that because the Rabangs alleged "injury stemming directly from the Nooksack Tribal Court's issuance of an eviction order and the Nooksack Tribal Police's execution of the same," it lacked subject-matter jurisdiction. A-0042. After the Rabangs timely sought reconsideration, the trial court found that Washington's Public Law 280 statute, RCW 37.12.060

prevented it from exercising subject-matter jurisdiction. A-0043. The trial court never ruled on tribal sovereign immunity. *Id.*

On August 15, 2022, the Court of Appeals disagreed with the trial court that RCW 37.12.060 precluded state court subject-matter jurisdiction, because the Rabangs' distress claims are "not dependent on the court assessing the validity of the tribe's eviction or property ownership proceedings." A-0051. But the appeals court affirmed the trial court's "conclusion that it did not have subject matter jurisdiction over the dispute" on other grounds, holding "that sovereign immunity precludes state court jurisdiction." *Id.* at 12. Division I concluded that Respondents' alleged actions were "squarely official in their scope," *id.*—an conclusion squarely in conflict with the U.S. Supreme Court's decision in *Lewis*, 137 S. Ct. at 1291, as well as this Court's conclusion in *Wright*, 159 Wn.2d at 116.

Because the Court of Appeals apparently overlooked *Lewis* and *Wright*, as well as the Ninth Circuit Court of Appeals' decision in *Pistor*, 791 F.3d at 1108, the Rabangs sought

reconsideration on September 2, 2022. *See* A-0056; *Long*, 7 Wn. App. 2d at 681 ("Washington courts must and do apply federal law to resolve whether tribal sovereign immunity applies."). The Rabangs' reconsideration request was denied on September 8, 2022. A-0056. This timely petition follows.

E. ARGUMENT

Review is necessary to correct the error committed by the Court of Appeals. First, review is warranted under RAP 13.4(b)(1) because the Court of Appeals Opinion stands in conflict with decisions by the Washington Supreme Court and the U.S. Supreme Court. Second, review is warranted under RAP 13.4(b)(2) because Division I's Opinion conflicts with its own published decisions. Finally, review is warranted under RAP 13.4(b)(4) because whether tribal sovereign immunity should be expanded as a result of the Opinion is a matter of substantial public interest; it not only affects the Rabangs, but dramatically limits the ability of any person injured by a tribal employee to pursue any manner of tort claim.

The Court of Appeals' Opinion stands in conflict with *Wright*, where this Court concluded that sovereign immunity does not protect tribal employees when sued in their individual capacities. 159 Wn.2d at 116; *see also* RAP 13.4(b)(1). The Opinion also conflicts with Division I's own published decisions in *Long*, 7 Wn. App. 2d 681, and *Young v. Duenas*, 164 Wn. App. 343, 348–349 (2011), which require its application of federal law such as *Lewis* and *Pistor* to tribal sovereign immunity questions. RAP 13.4(b)(2). In addition, this petition involves an issue of substantial public interest: whether, in accordance with the U.S. Supreme Court's *Lewis* decision, individuals injured by tribal employees can bring personal-capacity tort actions in Washington State.[6] RAP 13.4(b)(4).

[6] Respondents agree that due to "the expanding nature of Tribal commercial and governmental operations, and the frequency of nontribal contact with Tribal operations and their employees," as well as involvement between "members of the general public . . . with Tribes, Tribal members, or their aboriginal lands," this issue is of substantial public interest. *Rabang v. Gilliland*, No. 834865, Motion to Publish (Div. I Aug. 23, 2022) at 8–9.

The Court of Appeals correctly recognized that tribal sovereign immunity arises "[u]nder federal law." A-0051 (quoting *Young*, 164 Wn. App. at 348–349). Indeed, "Washington courts must and do apply federal law to resolve whether tribal sovereign immunity applies." *Long*, 7 Wn. App. 2d at 681. In particular, U.S. Supreme Court decisions bind this Court on questions of tribal sovereign immunity. *Id.; see also Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1110–1111 (Colo. 2010) (state court of appeals' sovereign immunity analysis was "contrary to federal law" because it "contradict[ed] U.S. Supreme Court precedent"). Division I relied heavily on its decision in *Young*, but overlooked the U.S. Supreme Court's decision in *Lewis* and related Ninth Circuit precedent regarding personal-capacity suits against tribal actors.

In *Lewis*, two individuals filed a negligence claim in state court against a tribal employee that, as here, arose off the reservation. 137 S. Ct. at 1289. In an opinion authored by Justice Sonia Sotomayor, the Supreme Court held that tribal sovereign

immunity "is simply not in play" because the tribal employee, not a tribal agency, "is the real party in interest." *Id.* at 1291. The *Lewis* court distinguished between "an official-capacity claim," where "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself," and personal-capacity suits, which "seek to impose *individual* liability upon a government officer for actions taken under color of state law." *Id.* (original emphasis; citation, internal quotations omitted). While defendants in official-capacity actions may assert sovereign immunity, that defense "does not erect a barrier against suits to impose individual and personal liability." *Id.* (internal quotations omitted); *see also Wright*, 159 Wn.2d at 116 ("Of course, tribal sovereign immunity would not protect [a tribal employee] from an action against him in his individual capacity.").

Here, the Rabangs' claims were mischaracterized as official-capacity claims by the Court of Appeals. *See* A-0052. Because the Rabangs expressly pleaded personal-capacity claims

against Respondents, tribal sovereign immunity is not a defense. *See* A-0002, -0011 (pleading claims and praying for relief against Respondents "in their personal capacities").

As in *Lewis*, Respondents here are alleged to have committed state torts on off- reservation lands while working for an Indian tribe. *See* A-0002; *see also Lewis*, 137 S. Ct. at 1289. Also as in *Lewis*, the Rabangs claims do not seek any relief from the Tribe; instead, they seek to impose "individual and personal liability" on the individual Respondents. *Id.; see* A-0002, -0011. According to *Lewis*, the Rabangs' distress claims are personal-capacity claims and not official-capacity claims. *See Lewis*, 137 S. Ct. at 1291. As such, sovereign immunity does not shield Respondents from those claims. *See id; see also Maxwell*, 708 F.3d at 1089 ("our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities.").

The Court of Appeals considered whether "the activities complained of . . . are squarely official in their scope." A-0052.

But that is not the appropriate inquiry under *Lewis*. 137 S. Ct. at 1291; *see also Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 910 (9th Cir. 2021) (holding the district court erred by focusing on whether "the defendants were functioning as the Tribe's officials or agents when the alleged acts were committed"). The focus must be on the relief that is sought. *Id.* Division I understood the Rabangs sought only emotional distress remedies. A-0051 (the Rabangs' claims are "not dependent on the court assessing the validity of the tribe's eviction or property ownership proceedings."). But the appeals court erred by focusing on Respondents' employment scope rather than the relief the Rabangs sought. A-0052; *Lewis*. 137 S. Ct. at 1291.

The U.S. Supreme Court's analysis in *Lewis* tracks with the Ninth Circuit Court of Appeals' approach. In *Pistor v. Garcia*, which preceded *Lewis*, patrons alleged tort claims against tribal police officers after they were handcuffed and seized of money at a casino. 791 F.3d at 1108. The Ninth Circuit held that tribal sovereign immunity did not bar the claims against

the officers because "the defendants were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe." *Id.*

Here, the Rabangs conceded in their complaint that any recovery for emotional distress will run against the individual Respondents, not the Tribe. *See* A-0002, -0011. Even if the Tribe defends or indemnifies Respondents, federal law makes clear that any recovery is deemed to come from the individuals and, therefore, sovereign immunity does not apply. *Id.* at 1114; *see also Lewis*, 137 S. Ct. at 1293 (noting indemnification "does not somehow convert the suit . . . into a suit against the sovereign").

The Court of Appeals failed to consider *Lewis*, *Pistor*, or *Wright*. *See* A-0051-52. It was error to determine that "the activities complained of . . . are squarely official in their scope," especially under a Rule 12(b)(1) standard. *Id.* Because Respondents are sued in their personal capacities and any remedy would expressly not operate against the Tribe, sovereign immunity does not apply. *Lewis*, 137 S. Ct. at 1291.

F. CONCLUSION

As the Ninth Circuit wrote in summarizing *Lewis*: "True, Clarke crashed into the Lewises while performing his job as a tribal employee." *Acres Bonusing*, 17 F.4th at 909. Here, even if it could be said that any Respondent was performing their job when threatening to forcibly take the Rabangs' home over a Christmas weekend, that is not "sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis*, 137 S. Ct. at 1288. Because the Court of Appeals ignored controlling state and federal law, and this jurisdictional question of tribal sovereign immunity is one of substantial public interest, this Court should grant discretionary review.

This document contains 4,061 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 30th day of September, 2022.

s/ Gabriel S. Galanda

Gabriel S. Galanda, WSBA #30331

No.
SUPREME COURT
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MARGRETTY RABANG and ROBERT RABANG,

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APPENDIX TO PETITION FOR DISCRETIONARY REVIEW

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CERTIFICATE OF SERVICE

I, Emmerson Donnell, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Oregon, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I served the foregoing document, via the court's CM/ECF filing system, on counsel of record.

The foregoing is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Bend, Oregon this 30th day of September, 2022.

s/ Emmerson Donnell
Emmerson Donnell

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

17 2 00163 1

MARGRETTY RABANG, and ROBERT RABANG,

Plaintiffs,

v.

RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA, RAYMOND DODGE, and JOHN DOES 1-10,

Defendants.

NO.

COMPLAINT FOR INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Deborra E. Garrett

COMES NOW Plaintiffs Margretty Rabang and Robert Rabang (collectively, "Rabangs" or "Plaintiffs"), by and through their attorneys of record, Gabriel S. Galanda and Bree R. Black Horse of Galanda Broadman, PLLC, and, upon their own personal knowledge and upon information and belief, allege and claim as follows:

I. PARTIES

1. Plaintiff MARGRETTY RABANG is a 55-year-old woman who resides at 5913 Johnny Drive in Deming, Washington. Margretty Rabang is married to Robert Rabang.

2. Plaintiff ROBERT RABANG is a 72-year-old man who resides at 5913 Johnny Drive in Deming, Washington. Robert Rabang is married to Margretty Rabang.

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3. Defendant RORY GILLILAND is a resident of the State of Washington who is not a member of the Nooksack Indian Tribe.

4. Defendant MICHAEL ASHBY is a resident of the State of Washington who is not a member of the Nooksack Indian Tribe.

5. Defendant ANDY GARCIA is a resident of the State of Washington who is not a member of the Nooksack Indian Tribe.

6. Defendant RAYMOND DODGE is a resident of the State of Washington who is not a member of the Nooksack Indian Tribe.

7. Defendants JOHN DOES 1 – 10 (hereinafter "Defendants Doe") are similarly situated to Defendants Gilliland, Ashby, Garcia, and Dodge.

II. JURISDICTION AND VENUE

8. Jurisdiction and venue are proper in this Court because the acts alleged herein occurred in Whatcom County. All parties also are situated in Whatcom County.

9. No Defendant is a member of the Nooksack Indian Tribe. *Maxa v. Yakima Petroleum, Inc.*, 83 Wn.App. 763 (1996); *Powell v. Farris*, 94 Wn.2d 782 (1980).

10. This matter arises in part from Indian lands outside the established Nooksack Indian Reservation. RCW 37.12.010; *State v. Cooper*, 130 Wn.2d 770, 775-76 (1996) (en banc).

11. Tribal sovereign immunity does not bar Plaintiffs' personal capacity suit against Defendants for their own tortious conduct. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 116 (2006) (en banc); *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (citing *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013)); *Pearson v. Dir. of the Dep't of Licensing*, No. 15-0731, 2016 WL 3386798, at *4 (W.D. Wash. June 20, 2016).

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III. STATEMENT OF FACTS

12. The Rabangs have resided at 5913 Johnny Drive in Deming, Washington ("Plaintiffs' Home" or "Home"), for over twenty years. The Rabangs' youngest daughter and single mother, Rachel Rabang, as well as the Rabangs' two grandsons, Jaxson and Jaydon—ages 1 and 3, respectively—also reside at the Home.

13. The Rabangs participate in a lease-to-own program for the Home pursuant to the U.S. Department of Housing and Urban Development's ("HUD") Mutual Help Occupancy Program ("MHOP") administered by the Nooksack Indian Housing Authority ("NIHA"). The NIHA is a subordinate body of the Nooksack Tribal Council. The Rabangs have been making payments towards the purchase of the Home since 2006. As of October 1, 2016, the Rabangs needed to pay off only $9,326.68 before they own their Home outright under the terms of the HUD MHOP.

14. As of March 24, 2016, the Nooksack Tribal Council's refusal to comply with its own laws, for want of the quorum required by the Constitution and Bylaws of the Nooksack Indian Tribe, rendered it defunct; and any post-March 24, 2016 acts of the now Holdover Tribal Council or its subordinate governmental entities or agents are *ultra vires* and void *ab initio*, according to a final agency decision of the U.S. Department of the Interior. The torts alleged in this lawsuit arose after March 24, 2016.

15. On March 28, 2016, the Holdover Tribal Council terminated Nooksack Tribal Court Chief Judge Susan Alexander. The Holdover Tribal Council, lacking a quorum, purportedly replaced Judge Alexander with Nooksack Tribal Attorney Ray Dodge on June 13, 2016. Defendant Dodge's appointment as "Chief Judge" is *ultra vires* and *void ab initio*.

16. On April 29, 2016, Mrs. Rabang, having been threatened with disenrollment by the Holdover Tribal Council—despite having been enrolled Nooksack since 1984—filed suit in

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Nooksack Tribal Court ("Tribal Court") for prospective equitable relief, including "declaratory judgment that Defendants have no authority to act on any matter, including [her] disenrollment." Defendant Dodge, "Chief Judge" of the Tribal Court, refused to convene Mrs. Rabang's *pro se* lawsuit.

17. On June 3, 2016, the Holdover Tribal Council, still lacking a quorum, passed Tribal Council Resolution No. 16-83 to disenroll Mrs. Rabang from the Tribe.

18. On August 19, 2016, the NIHA informed Mrs. Rabang by a document titled "Notice of Eviction" that it would unilaterally terminate her HUD MHOP based on Mrs. Rabang's purported disenrollment from the Tribe effective September 18, 2016. At Defendant Gilliland's behest, Defendant Jane Doe Nooksack Tribal Police Officer served this illegal and unlawful Notice of Eviction on Mrs. Rabang at her Home that same day.

19. On October 3, 2016, also at Defendant Gilliland's behest, Defendant John Doe Police Officer personally served another illegal and unlawful Notice to Vacate on Mrs. Rabang at her Home.

20. On October 11, 2016, Mrs. Rabang attempted to file a second lawsuit in Tribal Court against the NIHA Executive Director for prospective equitable relief, likewise seeking a "declaratory judgment that Defendant has no authority to act on any matter, including Plaintiff's housing," because of the Tribe's defunct status since March 24, 2016. Mrs. Rabang's chosen alternate attorneys, Gabriel S. Galanda and Ryan D. Dreveskracht of Galanda Broadman, PLLC, filed the Complaint on Mrs. Rabang's behalf, which the Tribal Court "REJECTED" that same day at the direction of Defendant Dodge. The Tribal Court also did not convene Mrs. Rabang's lawsuit, again, at the direction of Defendant Dodge.

21. On October 17, 2016, Lawrence S. Roberts, Principal Deputy Assistant Secretary of Indian Affairs for the United States Department of the Interior ("AS-IA"), issued a decision

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to Nooksack Tribal Chairman Robert Kelly and the "remaining [Holdover Tribal] Council members," confirming that they have no authority to act as or in any way represent themselves as the Nooksack Indian Tribe.

22. AS-IA Roberts determined that "[The United States Department of the Interior] will only recognize those actions taken by the [Nooksack Tribal] Council prior to March 24, 2016, when a quorum existed, and **will not recognize any actions taken since that time** . . . ."[1] This includes the Holdover Council's purported disenrollment of Mrs. Rabang's from the Tribe on June 3, 2016, the appointment of Defendant Dodge as "Chief Judge" of the Tribal Court, as well as the actions of the NIHA, Defendants Gilliland, Ashby, Garcia and Dodge towards the Rabangs since March 24, 2016.

23. On November 2, 2016, the NIHA, through Nooksack Tribal Attorney and counsel of record for the Holdover Tribal Council Rickie Armstrong, filed a Complaint for Unlawful Detainer against Mrs. Rabang in Tribal Court based on the Holdover Council's purported disenrollment of Mrs. Rabang from the Tribe. Defendant Dodge decided to convene this unlawful and invalid lawsuit.

24. Galanda Broadman, PLLC, attempted to enter a Notice of Appearance and file an answer to NIHA's unlawful detainer suit in Tribal Court on behalf of Mrs. Rabang. The Tribal Court "REJECTED" Mrs. Rabang's counsel's appearance notice and answer on November 7, 2016, at the direction of Defendant Dodge. Mrs. Rabang also attempted to file a *pro se* answer to NIHA's Complaint, but the Tribal Court likewise "REJECTED" Mrs. Rabang's responsive pleading on November 7, 2016, at the direction of Defendant Dodge.

25. On November 10, 2016, Messrs. Galanda and Dreveskracht attempted to attend Mrs. Rabang's "trial" before the Tribal Court along with Mrs. Rabang, but Defendants Gilliland

[1] At this point, the Holdover Tribal Council essentially became a more organized "sovereign citizens" group—an affiliated assembly of private citizens who believe that the state and federal governments "have no authority to regulate their behavior." *United States v. Ulloa*, 511 F. App'x 105, 106 n.1 (2d Cir. 2013).

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and Ashby physically denied them access to the Tribal Courthouse. Mrs. Rabang obtained a trial continuance *pro se*, in part to obtain other counsel.

26. On November 14, 2016, AS-IA Roberts issued a second decision the Holdover Council, which in pertinent part provides:

> I want to reiterate that pursuant to our Nation-to-Nation relationship, the Department of the Interior (Department) **will not recognize actions by you and the current Tribal Council members without a quorum consistent with the Nooksack Tribe's (Tribe) Constitution** . . . . As I stated in my October 17, 2016 letter, the Department **will only recognize those actions taken by the Tribal Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time because of a lack of quorum**.

AS-IA Roberts specified decisions "claiming to disenroll current tribal citizens or any other action inconsistent with the plain language of the Tribe's laws" as decisions and actions of the Holdover Tribal Council that the United States will not recognize. Also, AS-IA Roberts cited only to decisions issued by the Nooksack Tribal Court of Appeals, and the Nooksack Tribal Court before late March 2016, as Nooksack judicial decisions "recognized by the Department." In other words, Interior does not recognize any Tribal Court decisions issued by Defendant Dodge as lawful or valid.

27. On December 5, 2016, Defendant Dodge refused to delay Mrs. Rabang's "trial" to allow Mrs. Rabang further time to retain counsel, despite her plea for a continuance: "I would like to [continue the trial]. I mean, this is the holiday season. I don't want to be stressed out. I got these two babies. You know they should be able to have Christmas in their own home."

28. Defendant Dodge conducted the "trial" even after Mrs. Rabang further explained: "We have not been able to retain a lawyer because nobody wants to work with the Nooksack Indian Tribe because of their reputation. I finally got ahold of Northwest Justice but it was too late for them to be able to get me any help. They've been looking for the last week. She called me back today. She said they probably would be able to get me someone in a few days." Since

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June 13, 2016, Defendant Dodge has refused to admit lawyers who are adverse to the Holdover Council to practice law before the Nooksack Tribal Court.

29. On December 13, 2016, this Superior Court accorded "substantial deference to the October 17, 2016 and November 14, 2016 decisions of Lawrence S. Roberts, Principal Deputy Assistant Secretary of Indian Affairs for the United States Department of the Interior, **not to recognize as lawful or carrying any legal effect the actions or decisions of the Nooksack Tribal Court after March 24, 2016 . . . ."** *In re Gabriel S. Galanda, et al. v. Nooksack Tribal Ct.*, No. 16-2-01663-1, Dkt. No. 55 (emphasis added). This Superior Court, therefore, "does not recognize any such post-March 24, 2016 actions of decisions of the Nooksack Tribal Council" and also refuses to recognize, *e.g.*, a "November 17, 2016 Order issued by [the] Nooksack Tribal Court." *Id.* This Court has also refused to recognize an order issued by Nooksack Tribal Court "Judge Pro Tempore" Milton G. Rowland, who was purportedly appointed to the Nooksack Tribal Court after March 24, 2016. *Id.*

30. On December 14, 2016, Defendant Dodge conducted a hearing on NIHA's Writ for Restitution and entered an "Order Allowing Entry Order of Eviction and Writ of Restitution" ("Eviction Order"), which "ORDERED evicted" Mrs. Rabang and her family from their HUD MHOP Home. The Eviction Order also directed Defendants Gilliland and Ashby to evict Mrs. Rabang and all her family from the Home by December 28, 2016.

31. Defendant Dodge's Eviction Order was based on his assertion that Mrs. Rabang was "[w]ithout a signed lease." In the Tribal Court proceeding, Defendant Dodge overlooked that NIHA and Mr. Armstrong omitted the signature page to Mrs. Rabang's HUD MHOP lease and otherwise misrepresented that the lease was not fully signed. Through the Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.*, however, Mrs. Rabang obtained a complete copy of her HUD MHOP lease from HUD, which includes a signature page.

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32. On December 19, 2016, Defendants Garcia and John Doe Officer attempted to "inspect" the Home under the guise of Defendant Dodge's illegal and invalid Eviction Order. Defendants Garcia and John Doe Officer confronted Mr. Rabang, but Mr. Rabang denied them access to the Home. That very same day, Defendant Dodge granted an "Ex Parte Motion: filed by Mr. Armstrong and issued an "Order to Show Cause" ("First Show Cause Order"), ordering Mrs. Rabang to **"show cause why (1) [she] should not be held in contempt and (2) an order requiring forcible entry . . . should not be granted"** (emphasis added).

33. Three days before Christmas, on December 22, 2016, Defendant Dodge issued an "Order Following Show Cause Hearing" ("Second Show Cause Order"), which amended the Eviction Order "to require [Mrs. Rabang] and all members of her household to vacate the property located at 5913 Johnny Drive, Deming Washington 98224 no later than December 28, 2016 at 5:00 p.m." Defendant Dodge's Show Cause Order also directed Defendants Gilliland and Ashby to forcibly evict the Rabangs and their family from the Home, and directed Mrs. Rabang to appear before Defendant Dodge in a contempt posture on January 11, 2017.

34. On December 23, 2016, AS-IA Roberts issued a third decision to the Holdover Council:

> On October 17, 2016, and November 14, 2016, I sent letters to you regarding the status of the [NITC Council]. The letters explained that, pursuant to [the Tribe's] constitution and laws, as of April 2016, the Tribal Council is no longer operating with a quorum and therefore lacks authority to conduct business on behalf of the Tribe. The letter stated further that the Department of the Interior (Department) will recognize only those actions taken by the Tribal Council prior to March 24, 2016, when a quorum existed, and would not recognize any subsequent actions by the Tribal Council until a valid election, consistent with the Tribe's constitution and the decisions of the Tribe's Court of Appeals, the Northwest Intertribal Court System, is held and a quorum of council members is achieved.
>
> It has come to the Department's attention that orders of eviction may have been recently issued to be served by the Nooksack Chief of Police or could be issued and served in the near future. **It appears that such orders are based on actions taken by the Tribal Council after March 24, 2016. Therefore, as explained to you above and in the previous letters to you, those orders are invalid and the**

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Department does not recognize them as lawful . . .

35. Upon information and belief, on January 11, 2017, Defendant Dodge convened another "hearing" against Mrs. Rabang. Given Defendant Dodge's recent hostile and outrageous acts toward Ms. Rabang, she did not attend.

36. Per federal law, the Nooksack Tribal Council is defunct and any post-March 24, 2016, acts of the Nooksack Tribal Council or its subordinate governmental entities or agents are *ultra vires* and void *ab initio*, including the appointment of Mr. Dodge as "Chief Judge" of the Nooksack Tribal Court; actions taken by NIHA—the Holdover Council's subordinate governmental entity—to evict Mrs. Rabang; and all actions taken by Defendants that facilitate any eviction of the Rabangs and their family from their Home of twenty-two years.

37. The Tribal Court proceedings against Mrs. Rabang remain ongoing and the Rabangs are in constant, debilitating fear. Defendant Dodge has been undeterred by Interior's decisions. Defendants Gilliland and Ashby, along with the other similarly situated John Doe Defendants, have and will continue to enforce and abide by Defendant Dodge's unlawful and invalid "orders" as "chief judge" of the Tribal Court.

IV. FIRST CAUSE OF ACTION – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

38. Plaintiffs reallege and incorporate by reference those paragraphs set forth above as if fully set forth herein.

39. Defendants Dodge's conduct towards Plaintiffs was extreme and outrageous. Defendant Dodge intentionally caused Plaintiffs emotional distress by: (a) refusing to convene Mrs. Rabang's lawsuit filed on April 29, 2016, in the Tribal Court; (b) refusing to convene Mrs. Rabang's lawsuit filed on October 11, 2016, in the Tribal Court; (c) convening the NIHA's unlawful and invalid lawsuit against Mrs. Rabang filed on November 2, 2016, in the Tribal Court; (d) rejecting Mrs. Rabang's responsive pleadings to NIHA's unlawful detainer suit filed

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with the Tribal Court on November 7, 2016; (e) refusing to delay Mrs. Rabang's "trial" in NIHA's unlawful detainer action so she could retain counsel; (f) issuing the unlawful and invalid Eviction Order on December 14, 2016; (g) issuing the unlawful and invalid First Show Cause Order on December 19, 2016; (h) issuing the unlawful and invalid Second Show Cause Order on December 22, 2016; (i) threatening Mrs. Rabang with contempt or holding her in contempt; and (j) threatening Plaintiffs that their Home would be forcibly entered. Defendant Dodge took the aforementioned actions, over the Christmas and New Year holidays, with reckless disregard of Plaintiffs' emotional well-being. As a result of Defendants Dodge's conduct, Plaintiffs suffered legally compensable emotional distress damages.

40. Defendants Gilliland and Ashby's conduct towards Plaintiffs was extreme and outrageous. Defendants Gilliland and Ashby intentionally caused Plaintiffs emotional distress by: (a) directing tribal police to serve Mrs. Rabang with unlawful and invalid orders on August 19, 2016; (b) directing tribal police to serve Mrs. Rabang with unlawful and invalid orders on October 3, 2016; (c) denying Mrs. Rabang counsel access to her "trial" on NIHA's unlawful detainer action November 10, 2016; (d) enforcing and/or attempting to enforce the Eviction Order and Show Cause Order; and (e) directing tribal police officers to illegally "inspect" Plaintiffs' Home on December 19, 2016. Defendants Gilliland and Ashby took the aforementioned actions, over the Christmas and New Year holidays, with reckless disregard of Plaintiffs' emotional well-being. As a result of Defendants Gilliland's and Ashby's conduct, Plaintiffs suffered legally compensable emotional distress damages.

41. Defendant Garcia's conduct towards Plaintiffs was extreme and outrageous. Defendant Garcia intentionally caused Plaintiffs emotional distress by: (a) enforcing and/or attempting to enforce the Eviction Order and Show Cause Order; and (b) attempting to illegally "inspect" Plaintiffs' Home on December 19, 2016. Defendant Garcia took the aforementioned

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actions with reckless disregard of Plaintiffs' emotional well-being. As a result of Defendant Garcia's conduct, Plaintiffs suffered legally compensable emotional distress damages.

V. SECOND CAUSE OF ACTION – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

42. Plaintiffs reallege and incorporate by reference those paragraphs set forth above as if fully set forth herein.

43. Defendants' owed a duty to Plaintiffs to act as reasonable, prudent persons. This duty includes an obligation to act in a careful, lawful, and prudent manner and in full compliance with applicable federal law.

44. Defendants' conduct toward plaintiffs resulted in a breach of Defendants' duties to act as reasonable, prudent persons.

45. Emotional distress was a field of danger that Defendants should reasonably have anticipated and guarded against.

46. As a result of Defendants' breach of their duties, Plaintiffs suffered legally compensable emotional distress damages.

VI. JURY DEMAND

Plaintiffs hereby demand a jury.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows against Defendants in their personal capacities:

1. For a temporary restraining order, a preliminary and a permanent injunction, which enjoins permanently and restrains during the pendency of this action, Defendants and other persons acting in concert with them from intentionally or negligently inflicting further emotional distress on Plaintiffs;

2. For damages according to proof;

3. An award of reasonable attorneys' fees and costs; and

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4. For such additional relief as the Court may deem just and proper.

DATED this 31st day of January, 2017.

GALANDA BROADMAN, PLLC

Gabriel S. Galanda, WSBA #30331
Bree R. Black Horse, WSBA #47803
Attorneys for Plaintiffs
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Email: bree@galandabroadman.com

Superior Court ----- Whatcom County ----- Washington State

Margretty Rabang, and Robert Rabang vs. Rory Gilliland, Michael Ashby, Andy Garcia, Raymond Dodge, an John Does 1-10,	GR-17 Declaration

I DECLARE THAT:

1. I am over the age of 18 years, competent to be a witness, and not a party to this action.
2. I received, by electronic means, a document for filing in the above captioned case.
3. I have examined said document, found it clear and discernible, and attached this Declaration thereto.
4. I received said document on: **01/31/2017**
5. The name of said document was: **Complaint For Intentional And Negligent Infliction Of Emotional Distress**
6. The number of pages in said document, including this Declaration, was: **13**

I declare under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

Signed on **01/31/2017**

Stephanie Huff
324558

4th Corner Network, Inc.
110 Prospect St.
Bellingham, WA 98225
360-671-2455

ORIGINAL

Mutual Help
Homeownership Opportunity
Program

Mutual Help and Occupancy Agreement

and Urban Development
Office of Public and Indian Housing

Margaretty Rabang

OMB Approval No. 2577-0114 (Exp.8/31/93)

This revised form of MHO Agreement shall be used for all Mutual Help Projects placed under ACC on or after October 1, 1992. This MHO Agreement should be used in conjunction with 24 CFR, Part 905, Indian Housing: Revised Consolidated Regulations; Rule. When a unit is converted to the Mutual Help program, the participant shall execute this form of Mutual Help and Occupancy Agreement.

Contents

Article I Parties: Definitions

1.1 Parties.

This Mutual Help and Occupancy Agreement ("Agreement") is entered into by and between

_____

("IHA") and the Homebuyer whose signature(s) appears below. The IHA has entered into an Annual Contributions Contract ("ACC") with the U.S. Department of Housing and Urban Development ("HUD") under which the IHA will develop a Project under the HUD Mutual Help Homeownership Opportunity Program in compliance with HUD requirements. Under this Agreement, the IHA will give the homebuyer an opportunity to achieve ownership of a home in the Project in return for fulfilling the homebuyer's obligations to make a contribution to the development of the Project, to make monthly payments based on income, to provide all maintenance of the home and to satisfy all other program requirements including an annual certification of income and family composition. The terms and conditions of this Agreement are attached hereto and made a part hereof. This Agreement has been executed in duplicate original, and the Homebuyer hereby acknowledges receipt of one such original.

IHA: _____

By: _____

(Official Title) _____

_____
(Homebuyer)

_____
(Homebuyer's Spouse)

_____ _____
(Project #) (Unit #)

☐ Initial Homebuyer
☐ Subsequent Homebuyer

Date: _____

1.2 Definitions.

In addition to the definitions listed below, certain Construction Contract terms as used herein shall have the same meaning as in the Construction Contract.

Administration Charge. The amount budgeted by the IHA for monthly operating expenses covering the following categories (and any other operating expense categories included in the IHA's HUD-approved operating budget for a fiscal year or other period, excluding any operating cost for which operating subsidy is provided): (a) administrative salaries, payroll, taxes, etc; travel, postage, telephone and telegraph, office supplies; office space, maintenance and utilities for office space; general liability insurance or risk protection costs; accounting services; legal expenses; and operating reserves requirements; and (b) General expenses, such as premiums for fire and related insurance, payments in lieu of taxes, if any, and other similar expenses.

Construction Contract. The contract for construction in the case of the Conventional method, or the Contract of Sale in the case of the Turnkey method.

Home. The dwelling unit covered by this MHO Agreement.

Homebuyer. The person(s) who has executed this MHO Agreement and who has not yet achieved homeownership.

Homeowner. A former homebuyer who has achieved ownership of his or her home and acquired title to the home.

HUD. The U.S. Department of Housing and Urban Development.

HUD Field Office. The HUD Offices in Chicago, Oklahoma City, Denver, Phoenix, Seattle, and Anchorage, which have been delegated authority to administer programs under the United States Housing Act of 1937 for the area in which the IHA is located.

IHA. Indian Housing Authority. An entity that is authorized to engage in or assist in the development or operation of low income housing for Indians that is established either (1) by exercise of the power of self-government of an Indian Tribe independent of State law; or (2) by operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

IHA Homeownership Financing. IHA financing for purchase of a home by an eligible homebuyer who gives the IHA a promissory note and mortgage for the balance of the purchase price.

MEPA. Monthly Equity Payments Account. A homebuyer account in the Mutual Help Homeownership Opportunity Program credited with the amount by which each required monthly payment exceeds the administration charge.

MH. Mutual Help.

MH Contribution. Land, labor, cash materials or equipment - or a combination of these - contributed toward the development cost of a project in accordance with a homebuyer's MHO Agreement, credit for which is to be used toward purchase of a home.

MHO Agreement. A Mutual Help and Occupancy Agreement between the IHA and a homebuyer. The MHO Agreement constitutes a lease-option agreement. The homebuyer is a lessee during the term of the Agreement and acquires no equitable interest in the home until the option to purchase is exercised.

MH Program. The MH Homeownership Opportunity Program.

Project. Housing developed, acquired, or assisted by an IHA under the Act and the improvement of this housing.

Subsequent Homebuyer. Any homebuyer other than the homebuyer who first occupies a home pursuant to an MHO Agreement.

VEPA. Voluntary Equity Payment Account. A homebuyer account in the MH Program credited with the amount of any periodic or occasional voluntary payments in excess of the required monthly payments.

Article II Special Provision.

2.1 This Agreement shall be subject to revocation by the IHA if the IHA or HUD decides not to proceed with the development of the project in whole or in part. In such event, any contribution made by the homebuyer or Tribe shall be returned. If the contribution was a land contribution, it will be returned to the contributor.

Article III Change in Income.

3.1 If a family's income changes after the MHO Agreement is executed but before the unit is occupied so that it no longer qualifies for the program, the IHA may reject the family for this program. If it becomes evident that a family's income is inadequate to meet its obligations, the IHA may counsel the family about other housing options, such as its rental program. Inability of the family to meet its obligations under the homebuyer Agreement is grounds for termination of the Agreement.

Article IV MH Contribution

The MH contribution may consist of land, labor, cash materials, equipment, or any combination thereof. Contributions other than labor may be made by an Indian tribe on behalf of a family. The value of the contribution must be $1,500.

4.1 Land Contributions.

Land contributed to satisfy this requirement must be owned in fee simple by the homebuyer or must be assigned or allotted to the homebuyer for his or her use before application for an MH unit. Contributions of land donated by another person on behalf of the homebuyer will satisfy the requirement for an MH contribution.

Land as identified in Exhibit A of this Agreement has been leased or conveyed to the IHA, or will be so leased or conveyed before execution of the Construction Contract, as a contributed site for the home. This land is valued at $_____. The IHA shall determine the market value of the land, but in no case will the land credit exceed $1,500 per homesite.

4.2 MH Work Contribution.

(a) Amount. The homebuyer shall provide work of a total value of $_____as a contribution to the development of the Project.

(b) Homebuyer's Work Obligation.

(1) The homebuyer shall provide the work obligation under the direction of the construction contractor on jobs assigned to the homebuyer by the contractor. The work shall be performed in a diligent and workmanlike manner. The work obligation of the homebuyer may be performed by members of the family. The work may also be performed by an arrangement for others (relatives or friends, for example) to work on the homebuyer's behalf, but only with the approval of the IHA and the contractor.

(2) Prior to the submission of a proposal or a bid for construction of the Project, or prior to execution of the Construction Contract, the bidder or contractor shall be permitted to review information relating to the ability and capacity of the homebuyer to provide MH work, and to interview those who are to perform the work, with regard to this information.

(c) Assignment and Valuation of Jobs.

(1) The specific jobs to be performed by homebuyers, and the value of each job, shall be listed in an appendix to the Construction Contract, which shall be available for inspection by the homebuyer. The homebuyer may be assigned to any of the listed jobs, and may be reassigned from one job to another during the course of construction. However, the total value of the jobs assigned to the homebuyer's credit will not exceed $1500 per homesite of the MH work the homebuyer is required to provide as stated in Section 4.2(a) of this Agreement.

(2) The homebuyer shall provide as many hours of work, recorded in accordance with the contractor's system approved by the IHA, as necessary to complete the assigned jobs. The credit (not to exceed $1500 per homesite) given the homebuyer shall be the value of the assigned jobs, regardless of the number of hours actually worked to perform the jobs.

3) As an alternative, the contractor may make assignments to the homebuyer in terms of numbers of hours of work. In that event, the homebuyer shall be credited (not to exceed $1500 per homesite) with the full MH work contribution when the number of hours of work assigned to the homebuyer has been completed.

(d) Failure to Provide MH Work.

(1) The IHA may terminate this Agreement if the homebuyer is unable or unwilling to provide, or for any other reason fails to provide, the MH work obligation.

(2) If in the judgment of the contractor a homebuyer is not meeting his/her MH work obligations, the contractor may request the assistance of the IHA. Where the deficiency cannot otherwise be remedied, the contractor may request the IHA to terminate this Agreement and select another homebuyer to provide the MH work.

(3) If the contractor calls upon the IHA to terminate this Agreement and the contractor furnishes to the IHA sufficient proof of the alleged nonperformance by the homebuyer, the IHA shall then take the action called for by the contractor.

(e) Workmen's Compensation Insurance. The contractor shall provide Workmen's Compensation Insurance for members of the homebuyer's family or others who perform MH work. If such insurance is not available, the contractor shall obtain private insurance of substantially comparable coverage.

4.3 Cash Contribution.

(a) The homebuyer agrees to make a cash contribution to the project in the amount of $_____ which shall be paid in full to the IHA not later than the date the home is available for occupancy in accordance with the following schedule:

Dates for Payment	Amounts

If a cash contribution to the Project is to be made by the tribe, as evidenced by a tribal resolution given to the IHA, the homebuyer's share (MH credit) of this contribution is $_____.

4 Materials or Equipment Contribution.

any part of the Contribution is to be provided by furnishing materials equipment to the Project, such contribution shall be provided and counted for in accordance with the special provisions of the onstruction Contract covering such contribution. In accordance with e special provisions of the Construction Contract, the amount of the H Contribution credit to the homebuyer is $_____

5 Disposition of Contributions on Termination Before Date of Occupancy.

this Agreement is terminated by the IHA or the homebuyer before ie date of occupancy, the homebuyer may receive reimbursement of ie value of the MH contribution made plus other amounts contributed y the homebuyer in accordance with Article IX.

Article V Commencement of Occupancy

5.1 Notice.

(a) Upon acceptance by the IHA from the contractor of the home as ready for occupancy, the IHA shall determine whether the homebuyer has met all requirements for occupancy, including meeting the MH Contribution requirements and fulfillment of mandatory homebuyer counseling requirements. In the event of an affirmative determination, the homebuyer shall be notified in writing that the home is available for occupancy as of a date specified in the notice ("Date of Occupancy").

(b) If the IHA determines that the homebuyer has not fully provided the MH Contribution or met any of the other conditions for occupancy the homebuyer shall be so notified in writing. The Notice:

(1) must specify the date by which all requirements must be satisfied; and

(2) shall advise the homebuyer that the MHO Agreement will be terminated and a substitute homebuyer selected for the unit if the requirements are not satisfied.

5.2 Lease Term.

The term of the homebuyer's lease under this Agreement shall commence on the first day of the calendar month following the Date of Occupancy and shall expire when the Initial Purchase Price has been fully amortized in accordance with the homebuyer's Purchase Price Schedule (see Sections 10.2(b) and 10.3(b)) unless this Agreement is previously terminated or the homebuyer previously acquires ownership of the Home.

5.3 Credits to MH Accounts and Reserves.

Promptly after the date of occupancy, the IHA shall credit the amount of the MH contributions to the appropriate reserves and accounts in accordance with Article IX and shall provide the homebuyer a statement of the amounts so credited.

Article VI Inspections: Responsibility for Items Covered by Warranty.

6.1 Inspection before Move-In and Identification of Warranties.

(a) To establish a record of the condition of the home on the date of occupancy, the homebuyer (including a subsequent homebuyer) and the IHA shall make an inspection of the home as close as possible to, but not later than, the date the homebuyer takes occupancy. (The record of this inspection shall be separate from the certificate of completion, but the inspections may, if feasible, be combined.) After the inspection, the IHA representative shall give the homebuyer a signed statement of the condition of the home and equipment and a full written description of all homebuyer responsibilities. The homebuyer shall sign a copy of the statement, acknowledging concurrence or stating objections; and any differences shall be resolved by the IHA and a copy of the signed inspection report shall be kept at the IHA.

(b) Within 30 days of commencement of occupancy of the home, the IHA shall furnish the homebuyer with a list of applicable contractors', manufacturers' and suppliers' warranties indicating the items covered and the periods of the warranties, and stating the homebuyer's responsibility for notifying the IHA of any deficiencies that would be covered under the warranties.

6.2 Inspections during contractors' warranty periods, responsibility for items covered by contractors', manufacturers' or suppliers' warranties.

In addition to inspection required under Section 6.1(a), the IHA will inspect the home regularly in accordance with paragraph 8.3(a). However, it is the responsibility of the homebuyer, during the period of the applicable warranties, to promptly inform the IHA in writing of any deficiencies arising during the warranty period (including manufacturers' and suppliers' warranties) so that the IHA may enforce any rights under the applicable warranties. If a homebuyer fails to furnish such a written report in time, and the IHA is subsequently unable to obtain redress under the warranty, correction of the deficiency shall be the responsibility of the homebuyer.

6.3 Annual Inspections.

The IHA shall perform inspections annually in accordance with Section 8.3(a).

6.4 Inspection Upon Termination of Agreement.

If this Agreement is terminated for any reason after commencement of occupancy, the IHA shall inspect the home, after notifying the homebuyer of the time for the inspection, and shall give the homebuyer a written statement of the cost of any maintenance work required to put the home in satisfactory condition for the next occupant (see Section 12.4(a)(1)).

6.5 Homebuyer Permission for Inspections; Participation in Inspections.

The homebuyer shall permit the IHA to inspect the home at reasonable hours and intervals during the period of this Agreement in accordance with rules established by the IHA. The homebuyer shall be notified of the opportunity to participate in the inspection made in accordance with this section.

Article VII Homebuyer Payments

7.1 The amount of the required monthly payment for a homebuyer admitted to occupancy in an existing or converted project is determined in accordance with Section 7.2 through 7.4 below.

7.2 Establishment of Payment.

(a) Each homebuyer shall be required to make a monthly payment ("required monthly payment") as determined by the IHA and approved by HUD. The payment will provide that the minimum required monthly payment equal the administration charge.

(b) Subject to the requirement for payment of at least the administration charge, each homebuyer shall pay an amount of required monthly payment computed by:
(1) Multiplying adjusted income by a specified percentage; and
(2) Subtracting from that amount the utility allowance determined for the unit. The specific percentage shall be no less than 15 percent and no more than 30 percent, as determined by the IHA and approved by HUD.

(c) The IHA's schedule shall provide that the required monthly payment may not be more than a maximum amount. The maximum shall not be less than the sum of:
(1) The administration charge; and
(2) The monthly debt service amount shown on the homebuyer's purchase price schedule.

(d) If the "required monthly payment" exceeds the administration charge, the amount of the excess shall be credited to the homebuyer's Monthly Equity Payments Account (MEPA) (see Section 9.2(a)).

7.3 Administration Charge.

The administration charge should reflect differences in expenses attributable to different sizes or types of units. It is the amount budgeted by the IHA as defined in Section 1.2.

7.4 Adjustments in the Amount of the Required Monthly Payment.

(a) After the initial determination of the homebuyer's required monthly payment, the IHA shall increase or decrease the amount of such payment in accordance with HUD regulations to reflect changes in adjusted income (pursuant to a reexamination by the IHA), adjustment in the administration charge or in any of the other factors affecting the computation of the homebuyer's required monthly payment.

(b) In order to accommodate wide fluctuations in required monthly payments due to seasonal conditions, an IHA may agree with any homebuyer for payments to be made in accordance with a seasonally adjusted schedule which assures full payment of the required amount for each year.

7.5 Homebuyer Payment Collection Policy.

Each IHA shall establish and adopt written policies, and use its best efforts to obtain compliance to assure the prompt payment and collection of required homebuyer payments. A copy of the policies shall be posted prominently in the IHA office, and shall be provided to the homebuyer upon request.

Article VIII Maintenance, Utilities, and Use of Home

8.1 Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and homebuyers. A copy of such written policies shall be posted prominently in the IHA office, and shall be provided to an applicant or homebuyer upon entry into the program and upon request.

8.2 Provision for MH projects.

For a MH Project, the written maintenance policies shall contain provisions on at least the following subjects:

(a) The responsibilities of homebuyers for maintenance and care of their dwelling units and common property;

(b) Procedures for providing advice and technical assistance to homebuyers and to enable them to meet their maintenance responsibilities;

(c) Procedures for IHA inspections of homes and common property;

(d) Procedures for IHA performance of homebuyer maintenance responsibilities (where homebuyers fail to satisfy such responsibilities), including procedures for charging the homebuyer's proper account for the cost thereof;

(e) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(f) Procedures for charging homebuyers for damage for which they are responsible.

8.3 IHA Responsibility in MH Project.

(a) The IHA shall enforce those provisions of this Agreement under which the homebuyer is responsible for maintenance of the home. The IHA has overall responsibility to HUD for assuring that the housing is being kept in decent, safe, and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and tear excepted. Failure of a homebuyer to meet the obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the homebuyer's obligations under this Agreement. The IHA may inspect the home once every three years, in lieu of annual inspection where the homebuyer:
(1) Is in full compliance with the original terms of this Agreement, including payments, and
(2) The home is maintained in decent, safe, and sanitary condition, as reflected by the last inspection by the IHA. However, if at any time the IHA determines that the homebuyer is not in compliance with this Agreement, it must reinstitute annual inspections.

8.4 Homebuyer's Responsibility in MH Program.

(a) The homebuyer shall be responsible for routine and nonroutine maintenance of the home, including all repairs and replacements (including those resulting from damage from any cause). The IHA shall not be obligated to pay for or provide any maintenance of the home other than the correction of warranty items reported during the applicable warranty period.

homebuyer's Failure to Perform Maintenance.

1) Failure of the homebuyer to perform the maintenance obligations constitutes a breach of this Agreement and grounds for its termination. Upon a determination by the IHA that the homebuyer has failed to perform its maintenance obligations, the IHA shall require the homebuyer to agree to a specific plan of action to cure the breach and to assure future compliance. The plan shall provide for maintenance work to be done within a reasonable time by the homebuyer, with such use of the homebuyer's account as may be necessary, or to be done by the IHA and charged to the homebuyer's account. If the homebuyer fails to carry out the agreed-to plan, this Agreement shall be terminated in accordance with Sections 12.1 and 12.2.

(2) If the IHA determines that the condition of the property creates a hazard to the life, health or safety of the occupants, or if there is a risk of damage to the property if the condition is not corrected, the corrective work shall be done promptly by the IHA with such use of the homebuyer's accounts as the IHA may determine to be necessary, or by the homebuyer with a charge of the cost to the homebuyer's accounts in accordance with Section 9.3(a).

(3) Any maintenance work performed by the IHA shall be accounted for through a work order stating the nature of and charge for the work. The IHA shall give the homebuyer copies of all work orders for the home.

8.5 Homebuyer's Responsibility for Utilities.

The homebuyer is responsible for the cost of furnishing utilities for the home. The IHA shall have no obligation for the utilities. However, if the IHA determines that the homebuyer is unable to pay for the utilities for the home, and that this inability creates conditions that are hazardous to life, health or safety of the occupants, or threatens damage to the property, the IHA may pay for the utilities on behalf of the homebuyer and charge the homebuyer's accounts for the costs in accordance with Article IX. When the homebuyer's accounts have been exhausted, the IHA shall pursue termination of the homebuyer Agreement and may offer the homebuyer a transfer into the rental program if a unit is available.

8.6 Obligations with Respect to Home and Other Persons and Property.

(a) The homebuyer shall agree to abide by all provisions of this Agreement concerning homebuyer responsibilities, occupancy and use of the home.

(b) The homebuyer may request IHA permission to operate a small business in the unit. An IHA shall grant this authority where the homebuyer provides the following assurances and may rescind this authority upon violation of any of the following assurances:

(1) The unit will remain the homebuyer's principal residence;

(2) The business activity will not disrupt the basic residential nature of the housing site; and

(3) The business will not require permanent structural changes to the unit that could adversely affect a future homebuyer's use of the unit. The IHA may rescind such authority whenever any of the above assurances are violated.

8.7 Structural Changes.

(a) A homebuyer shall not make any structural changes in or additions to the home unless the IHA has determined that such change would not:

(1) Impair the value of the home, the surrounding homes, or the project as a whole; or

(2) Affect the use of the home for residential purposes.

(b) Additions to the home include, but are not limited to, energy-conservation items such as solar panels, wood-burning stoves, flues and insulation. Any changes made in accordance with this section shall be at the homebuyer's expense, and in the event of termination of this Agreement the homebuyer shall not be entitled to any compensation for such changes or additions.

(c) If the homebuyer is in compliance with the terms of this Agreement, the IHA may agree to allow the homebuyer to use the funds in the MEPA for betterments and additions to the MH home. In such event, the IHA shall determine whether the homebuyer will be required to replenish the MEPA or if the funds are to be loaned to the homebuyer at an interest rate determined by the IHA. The homebuyer cannot use MEPA funds for luxury items, as determined by the IHA.

Article IX Homebuyer Reserves and Accounts

9.1 Refundable and Nonrefundable MH reserves ("Reserves").

The IHA shall establish separate refundable and nonrefundable reserves for each homebuyer effective on the date of occupancy.

(a) The refundable MH reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's cash MH contribution or the value of the labor, material or equipment MH Contribution.

(b) The nonrefundable MH Reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's share of any credit for land contributed to the project and the homebuyer's share of any credit for non-land contributions by a terminated homebuyer.

9.2 Equity Accounts.

(a) Monthly Equity Payments Account ("MEPA"). The IHA shall maintain a separate MEPA for each homebuyer. The IHA shall credit this account with the amount by which each required monthly payment exceeds the administration charge. Should the homebuyer fail to pay the required monthly payment, the IHA may elect to reduce the MEPA by the amount owed each month towards the administration charge, until the MEPA has been fully expended. The MEPA balance must be comprised of an amount backed by cash actually received in order for any such reduction to be made.

(b) Voluntary Equity Payments Account ("VEPA"). The IHA shall maintain a separate VEPA for each homebuyer. The IHA shall credit this account with the amounts of any periodic or occasional voluntary payments (in excess of the required monthly payment) that the homebuyer may desire to make to acquire ownership of the home within a shorter period of time. The IHA may amend an individual homebuyer's MHO Agreement to permit a more flexible use of the VEPA for alterations of the unit, cosmetic changes, additions, betterments, etc.

(c) Investment of Equity Funds. Funds held by the IHA in the equity accounts of all homebuyers in the project shall be invested in HUD-approved investments. Income earned on the investments

of such funds shall periodically, but at least annually, be prorated and credited to each homebuyer's equity accounts in proportion to the amount in each such account on the date of proration.

9.3 Charges for Maintenance.

(a) If the IHA has maintenance work done in accordance with Section 8.4(b)(2), the cost thereof shall be charged to the homebuyer's MEPA.

(b) At the end of each fiscal year, the debit balance, if any in the MEPA shall be charged, first to the VEPA; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in that account and those reserves.

(c) In lieu of charging the debit balance in the MEPA to the homebuyer's refundable MH reserve and/or nonrefundable MH reserve, the IHA may allow the debit balance to remain in the MEPA pending replenishment from subsequent credits to the homebuyer's MEPA.

(d) The IHA shall at no time permit the accumulation of a debit balance in the MEPA in excess of the sum of the credit balances in the homebuyer's refundable and nonrefundable MH reserves, unless the expenditure is required to alleviate a hazard to the life, health or safety of the occupants, or to alleviate risk of damage to the property.

9.4 Disposition of Reserves and Accounts.

When the homebuyer purchases the home, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with Section 10.5(c) and (d). If this Agreement is terminated by the homebuyer or the IHA, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with Section 12.4.

9.5 Use of Reserves and Accounts; Nonassignability.

The homebuyer shall have no right to receive or use the funds in any reserve or account except as provided in this Agreement, and the homebuyer shall not, without the approval of the IHA and HUD, assign, mortgage or pledge any right in this Agreement or to any reserve or account.

Article X Purchase of Home

10.1 General.

The IHA provides the family an opportunity to purchase the dwelling under this Agreement (a lease with an option to purchase), under which the purchase price is amortized over the period of occupancy, in accordance with a purchase price schedule. For acquisition under this Agreement see Section 10.5. If a homebuyer wants to acquire ownership in a shorter period than that shown on the purchase price schedule, the homebuyer may exercise the option to purchase the home on or after the date of occupancy, but only if the homebuyer has met all obligations under this Agreement. The homebuyer may obtain financing, from the IHA or an outside source, at any time, to cover the remaining purchase price. The financing may be provided using such methods as a mortgage or a loan agreement. If the homebuyer is able to obtain financing from an outside source, the IHA will release the homebuyer from this Agreement and terminate the homebuyer's participation in this program. For acquisition under methods other than under this Agreement, see Section 10.4 and Article XI.

10.2 Purchase Price and Purchase Price Schedule.

(a) Initial Purchase Price. The IHA shall determine the initial purchase price of the home for the homebuyer who first occupies the home, pursuant to this Agreement as follows (unless the IHA, after consultation with the homebuyer, has developed an alternative method of apportioning among the homebuyers, the amount determined in Step 1 and the alternative method has been made a part of the HUD-approved development program):

Step 1:
From the estimated Total Development Cost (TDC) (including the full amount for contingencies as authorized by HUD) of the project as shown in the development cost budget in effect at the time of execution of the construction contract, deduct the amounts, if any, not directly attributable to the dwelling cost and equipment, including, but not limited to:
(1) Relocation costs,
(2) Counseling costs,
(3) The cost of any community, administration or management facilities, including the land, equipment and furnishings attributable to such facilities as set forth in the development program for the project, and
(4) the total amount attributable to land for the project,
(5) Off-site water and sewer,
(6) Other administrative costs associated with the development of the project.

Step 2:
Multiply the amount determined in Step 1 by a fraction of which the numerator is the development cost standard for the size and type of home being constructed for the homebuyer, and the denominator is the sum of the unit development cost standards for the homes of various sizes and types comprising the project.

Step 3:
Determine the amount chargeable to development costs, if any, for acquisition of the homesite.

Step 4:
Add the amount determined in Step 3 to the amount determined in Step 2. The sum determined under this step shall be the initial purchase price of the home.

(b) Purchase Price Schedule. Promptly after execution of the construction contract, the IHA shall furnish to the homebuyer a statement of the initial purchase price of the home and a purchase price schedule that will apply, based on amortizing the balance (purchase price less the MH contribution) over a period, not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA, provided that the rate does not exceed the prevailing interest rate for Veterans Administration (VA) guaranteed mortgage loans at the time the schedule is established. The IHA may choose to forego charging interest and calculate the payment with interest rate of zero.

10.3 Purchase Price Schedule for Subsequent Homebuyer.

(a) Initial Purchase Price. When a subsequent homebuyer executes this Agreement, the purchase price for the subsequent homebuyer shall be determined by the IHA based on one of the following procedures:
(1) The current appraised value;
(2) The current replacement cost of the home or;
(3) The remaining purchase price of the unit.

Purchase Price Schedule. Each subsequent homebuyer shall be provided with a purchase price schedule, showing the monthly declining purchase price over the term of this Agreement, commencing with the first day of the month following the effective date of this Agreement.

.4 Notice of Eligibility for Financing.

the IHA offers IHA homeownership financing in accordance with rticle XI and has funds available for that purpose, it shall determine, the time of each examination or reexamination of the family's rnings and other income, whether the homebuyer is eligible for that ancing. If the IHA determines that the homebuyer is eligible, the IA shall notify the homebuyer in writing that IHA homeownership ancing is available to enable the homebuyer to purchase the home, the homebuyer wishes to do so and, that if the homebuyer chooses ot to purchase the home at that time, all the rights of a homebuyer shall ntinue (including the right to accumulate credits in the equity counts) and all obligations under this Agreement shall continue cluding the obligations to make monthly payments based on come). The IHA shall convey ownership of the home when the mebuyer exercises the option to purchase and has complied with all e terms of this Agreement. The homebuyer can exercise the option purchase only by written notice to the IHA, in which the homebuyer ecifies the manner in which the purchase price and settlement costs ill be paid.

0.5 Conveyance of Home.

(a) Purchase Procedure. In accordance with this Agreement, the IHA shall convey title to the homebuyer when the balance of the purchase price can be covered from the amount in the two equity accounts (MEPA and VEPA). The homebuyer may supplement the amount in the equity accounts with reserves or any other funds of the homebuyer.

(b) Amounts to be Paid. The purchase price shall be the amount shown on the purchase price schedule for the month in which the settlement date falls.

(c) Settlement Costs. Settlement Costs are the costs incidental to acquiring ownership, including, the costs and fees for credit report, field survey, title examination, title insurance, inspections, attorneys other than the IHA's attorney, closing, recording, transfer taxes, financing fees and mortgage loan discount. Settlement costs shall be paid by the homebuyer who may use equity accounts or reserves available for the purchase in accordance with Section 9.4.

(d) Disposition of Homebuyer Accounts and Reserves. When the homebuyer purchases the home, the net credit balances in the homebuyer's equity accounts (MEPA and VEPA) as described in Article IX, supplemented by the nonrefundable MH reserve and then the refundable MH reserve, shall be applied in the following order:
  (1) For the initial payment for fire and extended coverage insurance on the home after conveyance, if the IHA finances purchase of the home in accordance with Article XI;
  (2) For Settlement costs, if the homebuyer so directs;
  (3) For the purchase price; and
  (4) The balance, if any, for refund to the homebuyer.

(e) Settlement. A home shall not be conveyed until the homebuyer has met all the obligations under this Agreement, except as provided for in (h) below. The settlement date shall be mutually agreed upon by the parties. On the settlement date, the homebuyer shall receive the documents necessary to convey to the homebuyer the IHA's right, title and interest in the home, subject to any applicable restrictions or covenants as expressed in such documents. The required documents shall be approved by the attorneys representing the IHA and by the homebuyer or the homebuyer's attorney.

(f) IHA Investment and Use of Purchase Price Payments. After conveyance, all homebuyer funds held or received by the IHA from the sale of a unit in a project financed with grants shall be held separate from other project funds, and shall be used for purposes related to low-income housing use, as approved by HUD. Homebuyer funds held or received by the IHA from the sale to a homebuyer of a unit in a project financed by loans are subject to loan forgiveness. Homebuyer funds include the amount applied to payment of the purchase price from the equity accounts (MEPA and VEPA), any cash paid by the homebuyer for application to the purchase price and, if the IHA finances purchase of the home in accordance with Article XI, any portion of the mortgage payments by the homeowner attributable to payment of the debt service (principal and interest) on the mortgage.

(g) Removal of the Home from MH Program. When a home has been conveyed to the homebuyer, whether or not with IHA financing, the unit is removed from the IHA's MH project under its ACC with HUD. If the IHA has provided financing, its relationship with the homeowner is transformed by the conveyance to that of lender, in accordance with documents executed during settlement.

(h) Homebuyers with delinquencies. If a homebuyer has a delinquency at the end of the amortization period, the unit is no longer available for assistance from HUD or the IHA, even though the unit has not been conveyed. The IHA must take action to terminate this Agreement or to develop a repayment schedule for the remaining balance to be completed in a reasonable period, but not longer than three years. The payment should be equal to a monthly pro-rated share of the remaining balance owed by the homebuyer, plus an administrative fee consisting of the cost of insurance and the IHA's processing cost. If the homebuyer fails to meet the requirements of the repayment schedule, the IHA should proceed immediately with eviction.

Article XI IHA Homeownership Financing

11.1 Eligibility.

If the IHA offers homeownership financing, the homebuyer is eligible for it when the IHA determines that:

(a) The homebuyer can pay (from the balance in the homebuyer's reserves or accounts, or from other sources):
  (1) The amount necessary for settlement costs; and
  (2) The initial payment for fire and extended coverage insurance carried on the home after conveyance; and
  (3) Maintenance reserve (at the option of the IHA).

(b) The homebuyer's income has reached the level, and is likely to continue at such level, at which 30 percent of monthly adjusted income is at least equal to the sum of the monthly debt service amount shown on the homebuyer's purchase price schedule and the IHA's estimates of the following monthly payments and allowances:

(1) Payment for fire and extended coverage insurance;
(2) Payment for taxes and special assessments, if any;
(3) The IHA mortgage servicing charge;
(4) Amount necessary for maintenance of the home; and
(5) Amount necessary for utilities for the home.

(Additional information relative to IHA Financing will be provided to homebuyer upon request.)

Article XII Termination of MHO Agreement

12.1 Termination Upon Breach.

(a) In the event the homebuyer fails to comply with any of the obligations under this Agreement, the IHA may terminate the Agreement by written notice to the homebuyer, enforced by eviction procedures applicable to landlord-tenant relationships. Foreclosure is an inappropriate method for enforcing termination of this Agreement, which constitutes a lease (with an option to purchase). The homebuyer is a lessee during the term of this Agreement and acquires no equitable interest in the home until the option to purchase is exercised.

(b) Misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a breach of the homebuyer's obligations under this Agreement. "Termination," as used in this Agreement, does not include acquisition of ownership by the homebuyer.

12.2 Notice of Termination of MHO Agreement by IHA, Right of Homebuyer to Respond.

Termination of this Agreement by the IHA for any reason shall be by written notice of termination. Such notice shall be in compliance with the terms of this Agreement and, in all cases, shall afford a fair and reasonable opportunity to have the homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act, if applicable, and shall incorporate all the steps and provisions needed to comply with State, local, or Tribal law, with the least possible delay.

12.3 Termination of MHO Agreement by Homebuyer.

The homebuyer may terminate this Agreement by giving the IHA written notice in accordance with the Agreement. If the homebuyer vacates the home without notice to the IHA, the homebuyer shall remain subject to the obligations of this Agreement including the obligation to make monthly payments, until the IHA terminates the Agreement in writing. Notice of the termination shall be communicated by the IHA to the homebuyer to the extent feasible and the termination shall be effective on the date stated in the notice.

12.4 Disposition of Funds Upon Termination of the MHO Agreement.

If this Agreement is terminated, the balances in the homebuyer's accounts and reserves shall be disposed of as follows:

(a) The MEPA shall be charged with:
(1) Any maintenance and replacement costs incurred by the IHA to prepare the home for the next occupant;
(2) Any amounts the homebuyer owes the IHA, including required monthly payments;
(3) The required monthly payment for the period the home is vacant, not to exceed 60 days from the date of receipt of the notice of termination, or if the homebuyer vacates the home without notice to the IHA, for the period ending with the effective date of termination by the IHA; and
(4) The cost of securing a vacant unit, the cost of notification and associated termination tasks, and the cost of storage and/or disposition of personal property.

(b) If, after making the charges in accordance with Section 12.4(a), there is a debit balance in the MEPA, the IHA shall charge that debit balance, first, to the VEPA; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in these reserves and accounts. If the debit balance in the MEPA exceeds the sum of the credit balances in these reserves and accounts, the homebuyer shall be required to pay to the IHA the amount of the excess.

(c) If after making the charges in accordance with Section 12.4(a) and (b), there is a credit balance in the MEPA, this amount shall be refunded, except to the extent it reflects the value of land donated on behalf of the family. Similarly, any credit balance remaining in the VEPA after making the charges described above shall be refunded.

(d) Any credit balance remaining in the refundable MH reserve after making the charges described above shall be refunded to the homebuyer.

(e) Any credit balance remaining in the nonrefundable MH reserve after making the charges described above shall be retained by the IHA for use by the subsequent homebuyer.

12.5 Settlement Upon Termination.

(a) Time for Settlement. Settlement with the homebuyer following a termination shall be made as promptly as possible after all charges provided in Section 12.4 have been determined and the IHA has given the homebuyer a statement of such charges. The homebuyer may obtain settlement before determination of the actual cost of any maintenance required to put the home in satisfactory condition for the next occupant, if the homebuyer is willing to accept the IHA's estimate of the amount of such cost. In such cases, the amounts to be charged for maintenance shall be based on the IHA's estimate of the cost thereof.

(b) Disposition of Personal Property. Upon termination, the IHA may dispose of any item of personal property abandoned by the homebuyer in the home, in a lawful manner deemed suitable by the IHA. Proceeds, if any, after such disposition, may be applied to the payment of amounts owed by the homebuyer to the IHA.

12.6 Responsibility of IHA to Terminate.

(a) The IHA is responsible for taking appropriate action with respect to any noncompliance with this Agreement by the homebuyer. In cases of noncompliance that are not corrected as provided further in this section, it is the responsibility of the IHA to terminate this Agreement in accordance with the provisions of this section and to institute eviction proceedings against the occupant.

(b) As promptly as possible after a noncompliance comes to the attention of the IHA, the IHA shall discuss the matter with the homebuyer and give the homebuyer an opportunity to identify any extenuating circumstances or complaints which may exist. A plan of action shall be agreed upon that will specify how the homebuyer will come into compliance, as well as any actions by the IHA that may be appropriate. This plan shall be in writing and signed by both parties.

(c) Compliance with the plan shall be checked by the IHA not later

than 30 days from the date thereof. In the event of refusal by the homebuyer to agree to such a plan or failure by the homebuyer to comply with the plan, the IHA shall issue a notice of termination of this Agreement and evict the homebuyer in accordance with the provisions of this section on the basis of the noncompliance with this Agreement.

d) A record of meetings with the homebuyer, written plans of action agreed upon and all other related steps taken in accordance with Section 12.6 shall be maintained by the IHA for inspection by HUD.

2.7 Subsequent Use of Unit.

After termination of a homebuyer's interest in the unit, it remains as part of the MH project under the ACC. The IHA must follow its policies for selection of a subsequent homebuyer for the unit under the MH program.

Article XIII Succession upon Death or Mental Incapacity

13.1 Definition of "Event".

Event means the death or mental incapacity of all of the persons who have executed this Agreement as homebuyers.

13.2 Designation of Successor by Homebuyer.

(a) A homebuyer may designate a successor who, at the time of the event would assume the status of homebuyer, provided that at that time he or she meets the conditions stated in Section 13.3. The designation shall be made at the time of execution of this Agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

(b) The designated successor as of the date of execution of this Agreement is:

(b)(6)

First Name: Initial: Last Name:

(b)(6)

Street & Number:

(b)(6)

City State:

(b)(6)

Relation

(b)(6)

13.3 Succession by Person Designated by Homebuyer.

(a) Upon occurrence of an "event," the person designated as the successor, in Section 13.2(b), shall succeed to the former homebuyer's rights and responsibilities under this Agreement if the designated successor meets the following conditions:

(1) The successor is a family member and will make the home his or her primary residence;

(2) The successor is willing and able to pay the administration charge and to perform the obligations of a homebuyer under this Agreement;

(3) The successor satisfies program eligibility requirements; and

(4) The successor executes an assumption of the former homebuyer's obligations under this Agreement.

(b) If a successor satisfies the requirements of Section 13.3(a), except for 13.3(a)(3), the successor may execute an outright purchase of the home.

13.4 Designation of Successor by IHA.

If at the time of the event there is no successor designated by the homebuyer, or if any of the conditions in Section 13.3 are not met by the designated successor, the IHA may designate, in accordance with its occupancy policy, any person who qualifies under Section 13.3.

13.5 Occupancy by Appointed Guardian.

If at the time of the event there is no qualified successor designated by the homebuyer or by the IHA in accordance with the foregoing provisions of this Article, and a minor child or children of the homebuyer are living in the home, the IHA may, in order to protect their continued occupancy and opportunity for acquiring ownership of the home, approve as occupant of the home an appropriate adult who has been appointed legal guardian of the children with a duty to perform the obligations of this Agreement in their interest and behalf.

13.6 Succession and Occupancy on Trust Land.

In the case of a home on trust land subject to restrictions on alienation under federal (including federal trust or restricted land and land subject to trust or restriction under State law), or under State or Tribal law where such laws do not violate federal statutes, a person who is prohibited by law from succeeding to the IHAs interest on such land may, nevertheless, continue in occupancy with all the rights, obligations and benefits of this Agreement, modified to conform to these restrictions on succession to the land.

13.7 Termination In Absence of Qualified Successor or Occupant.

If there is no qualified successor in accordance with the IHA's approved policy, the IHA shall terminate this Agreement and select a subsequent homebuyer from the top of the waiting list to occupy the unit under a new MHO Agreement. If a new homebuyer is unavailable or if the home cannot continue to be used for low-income housing in accordance with the Mutual Help program, the IHA may submit an application to HUD to approve a disposition of the home.

Article XIV Miscellaneous

14.1 Annual Statement to Homebuyer.

The IHA shall provide an annual statement to the homebuyer that sets forth the credits and debits to the homebuyer's equity accounts and reserves during the year and the balance in each account at the end of each IHA fiscal year. The statement shall also set forth the remaining balance of the purchase price.

14.2 Insurance Before Transfer of Ownership, Repair or Rebuilding.

(a) Insurance. The IHA shall carry all insurance prescribed by HUD, including fire and extended coverage insurance upon the home.

(b) Repair or Rebuilding. In the event the home is damaged or destroyed by fire or other casualty, the IHA shall consult with the homebuyers as to whether the home shall be repaired or rebuilt. The IHA shall use the insurance proceeds to have the home repaired or rebuilt unless there is good reason for not doing so. In the event the IHA determines that there is good reason why the home should not be repaired or rebuilt and the homebuyer disagrees, the matter shall be submitted to the HUD field office for final determination. If the final determination is that the home should not be repaired or rebuilt, the IHA shall terminate this Agreement, and the homebuyer's obligation to make required

monthly payments shall be deemed to have terminated as of the date of the damage or destruction.

(c) Suspension of Payments. In the event of termination of this Agreement because of damage or destruction of the home, or if the home must be vacated during the repair period, the IHA will use its best efforts to assist in relocating the homebuyer. If the home must be vacated during the repair period, required monthly payments shall be suspended during the vacancy period.

14.3 Notices.

Any notices by the IHA to the homebuyer required under this Agreement or by law shall be delivered in writing to the homebuyer personally or to any adult member of the homebuyer's family residing in the home, or shall be sent by certified mail, return receipt requested, properly addressed, postage prepaid. Notice to the IHA shall be in writing, and either delivered to an IHA employee at the office of the IHA, or sent to the IHA by certified mail, return receipt requested, properly addressed, postage prepaid.

Article XV Counseling of Homebuyers

15.1 General.

The IHA shall provide counseling to homebuyers in accordance with this section. The purpose of the counseling program shall be to develop:

(a) A full understanding by homebuyers of their responsibilities as participants in the MH Program.

(b) Ability on their part to carry out these responsibilities, and

(c) A cooperative relationship with the other homebuyers. All homebuyers shall be required to participate in and cooperate fully in all official pre-occupancy and post-occupancy counseling activities. Failure without good cause to participate in the program shall constitute a breach of this Agreement.

ACC. Sec. 1.1.

Administration Charge. Sec. 1.2., 7.3

Agreement. Sec. 1.1.

Counseling of Homebuyers. Sec. 15

Date of Occupancy. Sec. 5.1

Event. Sec. 13.1

Home. Sec. 1.2

Homebuyer. Sec. 1.2

Homeowner. Sec. 1.2

HUD. Sec. 1.2

HUD Field Office. Sec. 1.2

IHA. Sec. 1.1, Sec. 1.2

IHA Homeownership Financing. Sec. 1.2, Sec. 11.1

Initial Purchase Price. Sec. 10.2(a), 10.3(a)

Maintenance Credit. Sec. 8.4

Maintenance Reserve. Sec. 9.3(a)

MEPA. Sec. 1.2, 9.2(a)

MH. Sec. 1.2.

MH Contribution. Sec. 1.2, Sec. 4

MHO Agreement. Sec. 1.2

MH Program. Sec. 1.2

Nonrefundable MH Reserve. Sec. 9.1(b)

Notice of Termination. Sec. 12.2

Project. Sec. 1.2

Purchase Price Schedule. Sec. 10.2(b), 10.3(b)

Refundable MH Reserve. Sec. 9.1(a)

Required Monthly Payment. Sec. 7

Settlement Costs. Sec. 11.5(c)

Subsequent Homebuyer. Sec. 1.2, Sec. 10.3(a)

Succession. Sec. 13

Termination. Sec. 12.1

Utilities. Sec. 8.5

Utility Allowance . Sec. 7.2

Voluntary Equity Payments Account. Secs. 1.2, 9(b)

Work Order. Sec. 8.4(b)(3)

Exhibit A
Land Description

The Lessor (the Homebuyer) hereby leases to the Lessee (the IHA) the following real property situated

_____

described as follows:

The above property will comprise approximately _____ dwelling site(s).

IHA _____

by: (Name) _____

(Official Title) _____

(Homebuyer) _____

(Homebuyer's Spouse) _____

IHA Seal)

Nooksack Indian Housing Authority

AMENDMENT TO THE MUTUAL HELP AND OCCUPANCY AGREEMENT

Section 7.2(b) of the Mutual Help and Occupancy (MHO) Agreement is amended to read as follows:

"If the Purchase Price Schedule is to be revised, the Homebuyer agrees to accept a Revised Purchase Price Schedule computed on the basis of a ZERO Interest Rate, covering the balance of the 25-Year Term remaining under the prior Amortization Schedule."

(b)(6)

Signature of Head of Household

12-3-96
Date Signed

(b)(6)

Signature of IHA Representative

12-3-96
Date Signed

ROBERT R. RABANG WA 56-6 # 10 4-BEDROOM

REVISED PURCHASE PRICE AS OF JULY 1, 1994 - $ 87,446

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NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION
SERVING TRIBAL JUSTICE SYSTEMS SINCE 1969

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A 501(c)(3) Non-Profit Association

March 24, 2017

Certified Mail – Return Receipt Requested

Mr. Raymond Dodge
Nooksack Indian Tribe – Tribal Court
4971 Deming Road
Deming, WA 98244

Re: **NOTICE**. Request for Membership Resignation, or Notice of Due Process Regarding Termination from NAICJA Membership

Dear Mr. Dodge:

You were previously accepted into membership with the National American Indian Court Judges Association (NAICJA). Since then, NAICJA's Board of Directors has become aware that your judicial appointment may not qualify under our membership criteria. The Board has observed that while you have occupied the position of the Chief Judge of the Nooksack Tribe, since June 2016, proceedings in the Nooksack Tribal Court appear starkly inconsistent with the federal Indian Civil Rights Act of 1968 and fundamental notions of tribal due process. These events are of grave concern to the NAICJA, as they threaten the integrity of all Tribal Courts.

On or about June 13, 2016, the holdover council, lacking a quorum, purportedly replaced Judge Alexander with you, immediate past Nooksack Tribal Attorney and the council's lawyer in the election dispute. It appears that while you occupied the position of Chief Judge, you allegedly directed the clerk of the Nooksack Tribal Court to reject notices of appearances and answers to complaints responsive to unlawful eviction proceedings initiated by the holdover Tribal Council; otherwise denied tribal members their due process right to civil counsel of their choosing; and refused to convene hearings in proceedings initiated by the holdover council's opponents.

By July 25, 2016, the Nooksack Appeals Court/Northwest Inter-tribal Court System (NICS) proclaimed that on your watch, the Nooksack Tribe and its Judiciary "ceases to operate under the rule of law and as a result it forfeits . . . any right to demand . . . that other sovereign governments deal with it government to government, and . . . its legal authority to govern the Tribe." On August 15, 2016, the Appeals Court proclaimed, "that at Nooksack the rule of law is dead." These are astonishing judicial proclamations, which erode the rule of law for all tribes.

On October 17, 2016, the U.S. Department of the Interior issued a decision that it would only recognize "those actions taken by the Nooksack Tribal Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time," which appears to include your purported appointment as Chief Judge (and perhaps also Chief Judge Alexander's termination).

On December 23, 2016, the Department of Interior issued a decision of the Nooksack Tribal Council that directly addressed the validity of your "orders" as Chief Judge:

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

In sum, NAICJA does not view your Nooksack Tribal Court judicial appointment as valid. Further, while you have occupied the position of Chief Judge at Nooksack, proceedings do not appear to have been conducted in compliance with the federal ICRA or fundamental tenets of tribal due process at law.

NAICJA is devoted to strengthening tribal justice systems. An integral part of NAICJA's mission is to ensure that tribal courts are forums where fundamental due process rights are honored. NAICJA can only support members who are legitimate and comport with that core tenet of tribal democracy and judicial integrity.

Accordingly, pursuant to Article III, Section 5 of the NAICJA Bylaws (Termination of Membership), NAICJA requests your resignation from our membership. If you do not wish to immediately resign your membership, NAICJA will offer you the opportunity to present your defense to these findings via a telephonic hearing before we terminate you from NAICJA membership.

Please submit your written response, no later than April 3, 2017. If we do not hear from you, we will consider the matter closed and your membership terminated.

Respectfully,

Richard Blake

Richard Blake, President
Board of Directors

cc: Nooksack Indian Tribal Council
Washington State Bar Association
Bureau of Indian Affairs as follows:
- Michael Black, Acting Assistant Secretary, Washington, D.C.
- Stanley Speaks, Director, Portland, OR
- Marcella Teters, Superintendent, Everett, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARGRETTY RABANG, and ROBERT RABANG, Plaintiffs, v. RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA, RAYMOND DODGE, and JOHN DOES 1-10, Defendants.	NO. 17-2-00163-1 **RESPONSE TO DEFENDANT RAYMOND DODGE'S MOTION TO DISMISS**

Plaintiffs Margretty Rabang and Robert Rabang respond to Defendant Raymond Dodge's Motion to Dismiss pursuant to CR 12(b)(1) and 12(b)(6). This Court possess subject matter jurisdiction. Defendant Dodge, sued in his individual capacity, is not a real judge and therefore is not entitled to assert any immunity from suit. His CR 12(b)(1) motion must be denied.

Plaintiffs also have sufficiently pled their intentional and negligent infliction of emotional distress claims. Defendant Dodge has played a pivotal role in purportedly disenrolling Plaintiffs from the Nooksack Tribe ("Tribe"). He has purportedly evicted them, their daughter, and their grandchildren from house and home—which Plaintiffs have rented-to-own and lived in for seventeen years—and over the Christmas holiday no less. He has done so without affording Plaintiffs due process of law or civil defense counsel of their choosing. What Defendant Dodge has done to Plaintiffs is jarring, and shocking. His CR 12(b)(6) motion must be denied.

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Seattle, Washington 98115

I. FACTUAL BACKGROUND

Defendant Dodge is the former in-house attorney and defense counsel for the Nooksack Tribal Council—former Tribal Councilmembers who no longer represent the Nooksack Tribe ("Tribe") or possess any authority to take governmental action. *See generally* Dkt. # 7 at ¶¶ 14, 21-22, 26, 29, 34, 36. After purporting to fire Nooksack Tribal Court ("Tribal Court") Chief Judge Susan Alexander for upholding Plaintiff Robert Rabang and his extended family's voting rights, the holdover Tribal Council purported to replace her with Defendant Dodge on June 13, 2016. *Id*. at ¶ 15; *see also id.* at ¶¶ 21-22, 26, 29, 34, 36. But neither the firing of Judge Alexander, nor Defendant Dodge's "appointment," was dispensed by legitimate government actors. *See id.* at ¶¶ 21-22, 26, 29, 34, 36; Declaration of Bree Black Horse in Support of Response to Defendant Dodge's Motion to Dismiss ("Black Horse Decl."), Exs. A-D.[1]

After the holdover Tribal Council illegally disenrolled Mrs. Rabang on June 3, 2016, the Nooksack Indian Housing Authority ("NIHA"), at the direction of the holdover Tribal Council, then sought to illegally evict Mr. and Mrs. Rabang from their home of seventeen years. Dkt. # 7 at ¶ 12, 17-18. On October 11, 2016, Mrs. Rabang sought to fight this illegal eviction in the Tribal Court, but the holdover Tribal Council's hand-picked "Chief Judge," Defendant Dodge, rejected Mrs. Rabang's complaint and refused to convene her lawsuit. *Id.* at ¶ 20.

On October 17, 2016, the U.S. Department of the Interior ("Interior") issued a decision to the holdover Tribal Council stating that it would only recognized "those actions taken by the Tribal Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time . . . ." Dkt. # 7 at ¶¶ 21-22; Black Horse Decl., Ex. A. This

[1] Plaintiffs' complaint references Exhibits A-D. Dkt. # 7 at ¶¶ 21, 22, 26, 29, 34. The Court may properly consider these Exhibits. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975). If needed, given the impropriety of Defendants' exhibit evidence, this Court can take judicial notice of Plaintiffs' Exhibits pursuant to ER 201(b) and (d). *Rogstad v. Rogstad*, 74 Wn.2d 736, 741, 446 P.2d 340 (1968). The accuracy of those exhibits cannot be reasonably questioned; indeed, some have been admitted previously by this Court in other proceedings involving some of the same defendants. ER 201(b); *In re Gabriel S. Galanda et al. v. Nooksack Tribal Ct.*, No. 16-2-01663-1, Dkt. # 12, Ex. A, Dkt. # 31, Ex. A; *Rabang v. Gilliland*, No. 16-2-02029-8, Dkt. # 6, Exs. A, B.

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includes the Tribal Council's appointment of Defendant Dodge as Tribal Court "Chief Judge." Dkt. # 7 at ¶¶ 14, 36. **Pivotally, Defendant Dodge is not a judge.** The U.S. government has already made this decision, and the decision is final and binding. Black Horse Decl., Exs. A-C.

On November 2, 2016, Defendant Dodge chose to convene an eviction lawsuit filed by the NIHA against Mrs. Rabang. Dkt. # 7 at ¶ 23. Both Mrs. Rabang and her counsel attempted to file responsive pleadings on November 7, 2016, but the Tribal Court rejected these pleadings at Defendant Dodge's direction. *Id.* at ¶ 24. On November 10, 2016, Mrs. Rabang's lawyers were prevented from attending her "trial" a mere seven days into the eviction matter. *Id*. at ¶ 25.

On November 14, 2016, Interior issued a second decision, recognizing only orders issued by Chief Judge Alexander and the Nooksack Court of Appeals, and thereby refusing to recognize any "decision" made by Defendant Dodge. Black Horse Decl., Ex. B, at 2.

On December 5, 2016, Defendant Dodge refused to delay Mrs. Rabang's "trial" to allow her time to retain counsel, even after she plead: "I would like to [continue the trial]. I mean, this is the holiday season. I don't want to be stressed out. I got these two babies. You know they should be able to have Christmas in their own home." Dkt. # 7 at ¶ 27. Defendant Dodge conducted the "trial" even after Mrs. Rabang further explained: "We have not been able to retain a lawyer because nobody wants to work with the Nooksack Indian Tribe because of their reputation." *Id*. at ¶ 28. Since his invalid appointment, Defendant Dodge has refused to admit lawyers who are adverse to the holdover Tribal Council to practice law in the Tribal Court. *Id*.

On December 13, 2016, this Superior Court accorded "substantial deference to the October 17, 2016 and November 14, 2016 decisions of Interior, **not to recognize as lawful or carrying any legal effect the actions or decisions of the Nooksack Tribal Court after March 24, 2016 . . . ."** *In re Gabriel S. Galanda, et al. v. Nooksack Tribal Ct.*, No. 16-2-01663-1, Dkt. # 55 (Whatcom Cty. Sup. Ct. Dec. 13, 2016) (emphasis added); Black Horse Decl., Ex. D. This

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Court, therefore, "does not recognize any such post-March 24, 2016 actions of decisions of the Nooksack Tribal Council" as valid, including the holdover Tribal Council's appointment of Defendant Dodge in June.

The very next day, on December 14, 2016, Defendant Dodge ordered Defendants Gilliland and Ashby to evict Mrs. Rabang and her family over Christmas and by no later than December 28, 2016. Dkt. # 7 at ¶ 30. Three days before Christmas, on December 22, 2016, Defendant Dodge again illegally ordered Mrs. Rabang and her family be evicted by December 28, 2016. Dkt. # 7 at ¶ 33.

The very next day, on December 23, 2016, Interior issued a decision to the holdover Tribal Council that directly addressed the illegal nature of Defendant Dodge's "appointment" and the invalidity of his "orders" as Tribal Court "Chief Judge." Dkt. # 7 at ¶ 34; Black Horse Decl., Ex. C. Interior informed the holdover Tribal Council:

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

Id. (emphasis added).

On January 27, 2017, after reviewing Tribal Court proceedings involving Mrs. Rabang while Defendant Dodge occupied the position of "Chief Judge," this Court stated that it was

> very concerned about this situation including what the Court sees as serious procedural irregularities . . . Clearly there's a problem here . . . in [the Court's] view, the Tribal Court is acting in a way that causes great question about the ability of this – this Tribe in this situation to manage a trial court that is truly fair and truly accords due process to Tribal members.

Rabang v. Gilliland, No. 16-2-02029-8, Preliminary Injunction Hearing Transcript (Whatcom Cty. Sup. Ct. Jan. 27, 2017); Black Horse Decl., E; *see also id*., Ex. F (NAICJA to "Mr. Dodge": "on your watch, the Tribe and its Judiciary 'cease[d] to operate under the rule of law . . .'").

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Most recently, March 24, 2017, the National American Indian Court Judges Association ("NAICJA")[2] sent Defendant Dodge a letter that requested his resignation. Black Horse Decl., Ex. F. The NAICJA Board of Directors, asking for Defendant Dodge's resignation, observed:

> You were recently accepted into membership with National American Indian Court Judges Association ("NAICJA"), but NAICJA's Board of Directors has become aware that your appointment by the Nooksack Indian Tribal Council as Chief Judge of the Nooksack Tribal Court was invalid. The Board has observed that while you have occupied that position, since June 2016, proceedings in the Nooksack Tribal Court appear starkly inconsistent with the federal Indian Civil Rights Act of 1968 and fundamental notions of tribal due process. These events are of grave concern to the NAICJA, as they threaten the integrity of all Tribal Courts. . . .
>
> **NAIJCA does not view your Nooksack Tribal Court judicial appointment as valid. Further, while you have occupied the position of Chief Judge at Nooksack, proceedings do not appear to have been conducted in compliance with the federal ICRA or fundamental tenets of tribal due process at law.**

Id. (emphasis added). In other words, again, Defendant Dodge is not a judge. *See id*. The U.S. government, this Court, and the national association of Tribal Court judges all agree.

II. ARGUMENT

This Court possesses subject matter jurisdiction because Defendant Dodge is not entitled to judicial immunity, and he is not an Indian. Plaintiffs also have sufficiently pled both intentional and negligent infliction of emotional distress. Accordingly, the Court must deny Defendant Dodge's motions to dismiss, as well as his request for attorneys' fees.

As a threshold matter, the Court should exclude Exhibits A and B to the Declaration of Defendant Dodge. Dkt. # 18, Exs. A-B. Exhibits A and B are other invalid "orders" Defendant Dodge issued in a Tribal Court case involving non-party Elizabeth Oshiro. *Id.* No where in Plaintiffs' Complaint are these invalid orders referenced. Dkt. # 7. They are therefore inappropriate for this Court's consideration and must be excluded. *Brown*, 86 Wn.2d at 279.

[2] NAIJCA, which was founded in 1969, operates much like the Washington State Superior Court Judges' Association. *Compare* https://naicja.wildapricot.org/about, with *http://wascja.org/*.

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A. This Court Possesses Subject Matter Jurisdiction.

As the Washington Supreme Court previously remarked in reference to the Nooksack Tribe, there exist "few limitations on the subject matter jurisdiction of superior courts in Washington." *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp*., 181 Wn.2d 272, 276, 333 P.3d 380 (2014) (en banc). This Court may freely exercise jurisdiction over Plaintiffs' claims against Defendant Dodge, a non-Indian. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984). Indeed, "[i]t is well settled that even without the jurisdiction conferred by Congress in Public Law 280, the state may exercise some jurisdiction over some reservation conduct." *Powell v. Farris*, 94 Wn.2d 782, 785, 620 P.2d 525 (1980).[3]

1. Defendant Dodge Is Not Entitled To Judicial Immunity—He Is Not A Judge.

Defendant Dodge has moved to dismiss this action pursuant to CR 12(b)(1) based on his claim that he has absolute immunity as purported "Chief Judge." Dkt. # 17 at 3-4. Defendant Dodge is not, however, a "judge; he is not entitled to invoke the defense of judicial immunity. Dkt. # 7 at ¶¶ 14-15, 21- 22, 26, 29, 34, 36; *see also* Black Horse Decl., Exs. A-D, H. .

In asserting jurisdiction, the Court should accord substantial deference to Interior's decisions not to recognize Defendant Dodge as "Chief Judge," or to recognize orders issued by him as either lawful or valid. Dkt. # 7 at ¶¶ 21, 22, 26, 29, 34; Black Horse Decl., Exs. A-C; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Winnemucca Indian Colony v. United States ex rel. Dep't of Interior*, No. 3:11-cv-00622-RJC, 2011 WL 3893905, at * 5 (D. Nev. Aug. 31, 2011) (citing *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983)). The Court generally should not substitute its judgment for that of Interior; particularly not on a CR

[3] As Ninth Circuit Court of Appeals Senior Judge William C. Canby explains: "One might be tempted to conclude from *Williams [v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)] that the state if precluded from taking jurisdiction over claims by tribal members against non-Indians, when the claims arise in Indian country. That conclusion would be mistaken." William C. Canby, American Indian Law in a Nutshell 209 (5th ed. 2009).

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12(b)(1) motion; and especially while the underlying agency action is under review in another proceeding.[4] *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997); *see also Port of Seattle v. Pollution Control Hr'g's Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004) ("It is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency."). Interior's decision is final and binding. 25 C.F.R. § 2.6(c). Unless and until that changes, Defendant Dodge cannot be afforded the cloak of the judiciary. *See In re Gabriel S. Galanda*, No. 16-2-01663-1, Dkt. # 55; Black Horse Decl., Ex. D.

Further, Defendant Dodge has failed to carry his burden of proof. *Hafer v. Melo*, 502 U.S. 21, 29, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Defendant Dodge has presented no evidence that Interior's decisions not to recognize him or his "orders" as valid or lawful, have been withdrawn by Interior or overturned by any court. He has failed to show that the judicial immunity he seeks to invoke is justified under the circumstances. *Burns v. Reed*, 500 U.S. 478, 486-87, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). Accordingly, the Court must deny Defendant Dodge's request for judicial immunity and deny his motion to dismiss.

2. This Court May Exercise Jurisdiction Over Plaintiffs' Distress Claims.

Defendant Dodge argues that "Plaintiffs' [c]omplaint [r]equires [r]esolution of [t]ribal [l]aw [matters]," and that "state law does not apply and this Court lacks jurisdiction to enjoin or overturn" the actions Defendant Dodge took while illegally occupying the position of "Chief Judge." Dkt. # 17 at 7. To be clear, Plaintiffs are *not* asking this Court to "enjoin or overturn" any of Defendant Dodge's so-called "orders." Dkt. # 7 at 11-12.

This Court may exercise jurisdiction over Plaintiffs' claims against Defendant Dodge, even if those claims arose on Nooksack land. *Three Affiliated Tribes of the Ft. Berthold Reservation v. World Eng'g, P.C.*, 467 U.S. at 148 ("This Court, however, repeatedly has

[4] The Nooksack Indian Tribe has challenged Interior's final agency action(s) in *Nooksack Indian Tribal v. Zinke*, 2:17-cv-0219-TSZ (W.D. Wash.).

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approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country."). Defendant Dodge is not an Indian. Contrary to his claims, the U.S. Supreme Court has made clear that "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.* at 148-49.

Federal law also does not pre-empt exercise of this Court's jurisdiction in this matter. Washington State's Public Law 280 ("P.L. 280") does not explicitly prohibit this Court from exercising jurisdiction over Plaintiffs' emotional distress claims. *See* RCW 37.12.060. In particular, Plaintiffs' claims do not require the Court to exercise jurisdiction over matters involving the ownership or right to possession of Indian property. *Id.*

B. Plaintiffs Have Adequately Pled Negligent Infliction Of Emotional Distress.

Defendant Dodge also argues that Plaintiffs' claims should be dismissed under CR 12(b)(6), claiming that Plaintiffs have not pled adequately facts supporting intentional and negligent infliction of emotional distress. Dkt. # 17 at 7-8. As discussed *infra*, however, Plaintiffs have sufficiently pled both claims. The Court should therefore deny Defendant Dodge's CR 12(b)(6) motion. If, however, the Court finds Plaintiffs' allegations insufficient, they ask leave to amend pursuant to CR 15(a). The Court shall grant Plaintiffs' request for leave to amend "freely . . . when justice so requires." CR 15(a).

1. Plaintiffs Have Sufficiently Pled Facts Supporting Intentional Infliction Of Emotional Distress.

Plaintiffs have sufficiently alleged "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.'" *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015). Plaintiffs' intentional infliction of emotional distress claims therefore survive Defendant Dodge's motion to

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dismiss. *McVeigh v. Climate Changers, Inc.*, No. 16-5174, 2016 WL 4268939, at * 5 (W.D. Wash. Aug. 15, 2016) (citing *Trujillo*, 183 Wn.2d at 839).

a. Defendant Dodge's Conduct Is Extreme And Outrageous.

Extreme and outrageous conduct is that which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Defendant's conduct must be so egregious that a "recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'" *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003).

Bly v. Field Asset Services, No. 14-cv-0254, 2014 WL 2452755 (W.D. Wash. June 2, 2014), informs the Court's analysis. In *Bly*, the plaintiff asserted intentional infliction of emotional distress claims based on the defendant's illegal efforts to evict him. 2014 WL 2452755. Applying Washington law to plaintiff's claims, the district court found "it is plausible that illegally entering [plaintiff]'s house, taking his personal belongings, and then denying responsibility goes beyond mere 'insults, indignities, threats, annoyances, or petty oppressions' and may be regarded as 'utterly intolerable.'" *Id.* at * 5 (citing *Kloepfel*, 149 Wn.2d at 196). The district court concluded that the plaintiff had sufficiently pled outrageous conduct. *Id.*

Plaintiffs allege that Defendant Dodge issued illegal orders that purported to evict them from their home of seventeen years and would force them to forfeit their financial investment in their home; refused to convene their related lawsuits; rejected their responsive pleadings; denied them counsel and due process; unlawfully threatened them with contempt; and directed others to forcibly enter their home. Dkt. # 7 at ¶¶ 12, 39. Defendant Dodge remains unrelenting even after this Court admonished his failure to accord Plaintiffs any semblance of due process in Tribal

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Court. *See* Dkt. # 7 at ¶ 37; *see also* Dkt. # 17. Defendant Dodge's behavior clearly is "utterly intolerable" in a civilized society. *Grimsby*, 85 Wn.2d at 59.

No rational person, confronted with illegal eviction orders, systematic denial of due process, and unrelenting harassment because of their political status, would consider what they have experienced "to be the 'price of living among people.'" *Wingate v. City of Seattle*, 198 F. Supp. 3d 1221, 1231 (W.D. Wash. 2016) (citing *Brower v. Ackerley*, 88 Wn. App. 87, 100, 943 P.2d 1141 (1997)). Indeed, no rational person would think that the relentless persecution Plaintiffs have experienced was mere "indignity[], threat[], annoyance [], petty oppression[], or other triviality[y]." *Id*. (citing *Kloepfel*, 149 Wn.2d 192 at 196). Plaintiffs have sufficiently pled extreme and outrageous conduct by Defendant Dodge, masquerading as a judge.

b. Plaintiffs Have Plead Facts Supporting Emotional Distress.

Defendant Dodge states "simply alleging 'Plaintiffs suffered legally compensable emotional distress damages' is insufficient for the damages element" and "[t]he complaint is silent as to how Judge Dodge holding court and issuing orders intentionally and proximately caused harm to each of the plaintiffs, or what that emotional harm might be." Dkt. # 17 at 9.

Contrary to Defendant Dodge's claims, Plaintiffs' Complaint does detail how he intentionally and proximately caused them harm. Specifically, Plaintiffs allege that he caused them legally compensable emotional distress by refusing to convene their related lawsuits, rejecting their responsive pleadings, denying them counsel, issuing illegal orders, threatening them with contempt, and directing others to forcibly enter their home. Dkt. # 7 at ¶ 39. Plaintiffs have therefore sufficiently pled "intentional or reckless infliction of emotional distress." *Kloepfer*, 149 Wn.2d at 195. Plaintiffs also sufficiently explain that he harmed them in the form of "legally compensable emotional distress damages." Dkt. # 7 at ¶ 39. Plaintiffs

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have also sufficiently pled "actual result to plaintiff of server emotional distress." *Kloepfer*, 149 Wn.2d at 195.

2. Plaintiffs Have Sufficiently Pled Facts Supporting Negligent Infliction Of Emotional Distress.

Defendant Dodge argues that Plaintiffs have failed to satisfy the "objective symptomology requirement" of negligent infliction of emotional distress. Dkt. # 17 at 10. To satisfy the objective symptomology requirement, a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence. *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). Plaintiffs allege that as a result of his breach of his duties, they "suffered legally compensable emotional distress damages." Dkt. # 7 at ¶ 46.

Consider, for example, the understandable distress Plaintiffs' were under, and that which Mrs. Rabang expressed to Defendant Dodge, on December 5, 2016: "I mean, this is the holiday season. I don't want to be stressed out. I got these two babies. You know they should be able to have Christmas in their own home." Dkt. # 7 at ¶ 27. Contemplate the stress Plaintiffs were under when Defendant Dodge, again and again, not only deprived Plaintiffs of any recourse in Tribal Court, but continued to issue illegal orders that purported to evict them from their home of seventeen years over the holidays. *Id.* at ¶ 16, 20, 23-25, 27-28, 30-33, 35.

Plaintiffs' "[l]egally compensable emotional distress damages" necessarily include symptoms susceptible to medical diagnosis, which they shall prove as this case progresses. For now, however, Plaintiffs have alleged objective symptomology that allows their case to survive Defendant Dodge's CR 12(b)(6) motion to dismiss.

Defendant Dodge also claims that Plaintiffs have failed to sufficiently plead the damages element. Dkt. # 17 at 10. Plaintiffs allege that as a result of his breach of his duties, they "suffered legally compensable emotional distress damages." Dkt. # 7 at ¶ 46. Plaintiffs have

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therefore sufficiently pled the "damage" element. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 505, 325 P.3d 193 (2014).

Defendant Dodge further argues that Plaintiffs have failed to plead duty. Dkt. # 17 at 10. Plaintiffs do allege, however, that he owed them a duty. Dkt. # 7 at ¶ 43. Plaintiffs have therefore adequately alleged duty. *Kumar*, 180 Wn.2d at 505.

C. Defendant Dodge Is Not Entitled To An Award of Attorneys' Fees.

Defendant Dodge argues that he should receive an award of attorneys' fees pursuant to RCW 4.84.185. Dkt. # 17 at 11. The Court may award attorneys' fees pursuant if the claims are frivolous. RCW 4.84.185. A frivolous action is one that cannot be supported by any rational argument on the law or facts, *Hanna v. Margitan*, 193 Wn. App. 596, 373 P.3d 300 (2016), or if no debatable issues are presented upon which reasonable minds differ, *Alexander v. Sanford*, 181 Wn. App. 135, 325 P.3d 341 (2014). The Court cannot impose attorneys' fees "[i]f an action can be supported by any rational argument." *Rhinehard v. Seattle Times*, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990).

Here, Plaintiffs' claims are rationally supported by both the law and the facts at bar; their arguments present issues upon which reasonable minds can differ, as demonstrated in Sections A and B, *supra*. *Hanna*, 193 Wn. App. 596; *Alexander*, 181 Wn. App. 135. Accordingly, the Court must deny Defendant Dodge's fist-clenched motion for attorneys' fees.

III. CONCLUSION

This Court possesses subject matter jurisdiction. Defendant Dodge is not entitled to judicial immunity. This Court may exercise jurisdiction over this matter because he is not an Indian. Plaintiffs also have sufficiently pled each element of both intentional and negligent infliction of emotional distress. Accordingly, the Court must DENY Defendant Dodge's CR 12(b)(1) and 12(b)(6) motions to dismiss as well as his request for attorneys' fees.

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DATED this 31st day of March, 2017.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

MARGRETTY RABANG, and ROBERT RABANG **Plaintiff,** **vs.** **RORY GILLIAND, et al.,** **Defendants.**	**No. 17-2-00163-1** **ORDER GRANTING DEFENDANT'S MOTION TO LIFT STAY AND FOR ORDER OF DISMISSAL** Clerk's Action Required

BEFORE THIS COURT is the Defendant's Motion to Lift Stay and for Order of Dismissal. The matter was briefed by the parties and heard for oral argument on August 6, 2021.

THE COURT, having now considered the record and the arguments of counsel, issues the following findings and order:

1. The Plaintiff's Complaint alleges injury stemming directly from the Nooksack Tribal Court's issuance of an eviction order and the Nooksack Tribal Police's execution of the same.

2. As such, and as recognized by the federal court, the Complaint suffers from the need to resolve matters of tribal governance outside the subject matter jurisdiction of this Court.

3. Proceedings in this case are dismissed without prejudice.

Dated this 8TH day of SEPTEMBER, 2021.

JUDGE EVAN JONES

CM

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

MARGRETTY RABANG, and ROBERT RABANG **Plaintiff,** **vs.** **RORY GILLIAND, et al.,** **Defendants.**	**No. 17-2-00163-1** **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

BEFORE THIS COURT is Plaintiff's Motion for Reconsideration under CrR 59 of this Court's September 8, 2021Order of Dismissal. Having now considered the briefing and declarations provided, as well as the record and decision under reconsideration, the Court rules as follows.

> Plaintiff's tort claims originate from and depend upon (1) the plaintiff's right to continued residency in Tribal housing located on Tribal trust land, and (2) the propriety of the Tribe's manner of eviction.
>
> In adjudicating these claims, a state court would necessarily pass judgment on the Plaintiff's right to possession of real property belonging to the Nooksack Indian Tribe and held in trust by the United States. Such jurisdiction is flatly prohibited by RCW 37.12.060. It is for the Nooksack Tribe, not this Court, to resolve these claims.

Plaintiff's Motion for Reconsideration under CrR 59 is DENIED.

Dated this 26TH day of OCTOBER, 2021.

JUDGE EVAN JONES

FILED
8/15/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARGRETTY RABANG and ROBERT RABANG, Appellants, v. RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA, RAYMOND DODGE, and JOHN DOES 1-10, Respondents.	No. 83456-8-I DIVISION ONE UNPUBLISHED OPINION

SMITH, A.C.J. — The inherent authority of Native tribes and nations to govern themselves is recognized by the federal government, protected by the United States Constitution and treaties, and has been upheld by the United States Supreme Court. In 2016, the Nooksack tribe sought to evict Margretty and Robert Rabang[1] from their house on trust land situated outside the Nooksack Indian Reservation. The Rabangs sued, claiming intentional and negligent infliction of emotional distress stemming from the legal process leading up to the issuance of the eviction order and the attempted execution of the eviction. The trial court dismissed the case for lack of subject matter jurisdiction. The trial court also denied the Rabangs' motion for reconsideration, concluding that RCW 37.12.060 separately precluded subject matter jurisdiction. Because

[1] Because the Rabangs share a last name, we refer to them by their first names to provide clarity.

sovereign immunity denies state court jurisdiction, we affirm the decisions of the trial court.

FACTS

Margretty and Robert Rabang have resided in Deming, Washington, for over twenty years.[2] The property is located on Nooksack trust lands outside the Nooksack Indian Reservation. The Rabangs participated in a lease-to-own program under the U.S. Department of Housing and Urban Development's (HUD) Mutual Help Occupancy Program (MHOP), which is administered by the Nooksack Indian Housing Authority (NIHA). As part of that program, they began making payments toward the purchase of the house in 2006. The Rabangs have been enrolled members of the Nooksack Tribe since 1984.

In June 2016, the Tribal Council disenrolled Margretty from the tribe. On August 19, the NIHA notified Margretty that it would be terminating her lease-to-own program participation, effective September 2016, due to that disenrollment. Nooksack Tribal Officer Lynda Seixas served the notice on Margretty that same day. On October 3, by direction of Nooksack Tribal Police Chief Rory Gilliland, Officer Devin Cooper served a notice to vacate on the Rabangs at their residence. The Rabangs filed a complaint on October 11 with the Nooksack Tribal Court seeking a declaratory judgment, which was "rejected" by the Tribal Court on the same day.[3]

[2] This and many of the facts in this section are taken from the Rabangs' complaint. When reviewing the grant of a motion to dismiss for lack of jurisdiction, we accept the non-moving party's factual allegations as true. See State v. LG Elecs., Inc., 185 Wn. App. 394, 405, 341 P.3d 346 (2015).

[3] The term "rejection" in this context is unclear because the rejection itself

In March, after the removal of Nooksack Tribal Court Chief Judge Susan Alexander, the Tribal Council appointed tribal attorney Raymond Dodge as the Chief Judge. In November, the NIHA filed a complaint for an unlawful detainer against the Rabangs. The Tribal Court, under the direction of Judge Dodge, then rejected the Rabangs' counsel's appearance notice and Margretty's attempted pro se responsive pleading. On December 5, Judge Dodge refused to delay the Rabangs' trial to allow Margretty to retain new counsel after members of the Nooksack Tribal Police Department, Chief Gilliland and Lieutenant Ashby denied their attorneys access to the courthouse.

On December 14, Judge Dodge entered an eviction order against the Rabangs. Nooksack Police Chief Gilliland and Lieutenant Ashby were directed to evict the Rabangs from the house by December 28.

On December 19, Andrew Garcia, a building inspector for the tribe, and an unidentified officer attempted to inspect the house. Robert confronted them and denied the two men access to the house.[4] Three days later, Judge Dodge issued an "Order Following Show Cause Hearing", which amended the eviction order and directed Gilliland and Ashby to forcibly evict the Rabangs from the house.

The Rabangs brought this lawsuit in Whatcom County Superior Court, claiming the torts of intentional infliction of emotional distress and negligent

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is not included in the record.

[4] Garcia, in a declaration submitted during the course of litigation, represents that he alone approached the residence but that he noticed a Nooksack Patrol Officer in the area when leaving. Because of the posture of the motion to dismiss, we disregard this minor dispute of fact.

infliction of emotional distress. Judge Dodge, Ashby and Gilliland, Garcia, and various John Does were named as defendants. The case was stayed pending the resolution of the federal case, Rabang v. Kelly, another attempt by the Rabangs to challenge their disenrollment and attempted eviction. On appeal from the district court's dismissal, the Ninth Circuit affirmed, holding that it was up to the Nooksack Tribe to resolve the claims because addressing the underlying evictions would require intervening in tribal member disputes. Rabang v. Kelly, 328 F. Supp. 3d 1164, 1168 (9th Cir. 2018).

After the federal court ruling in June 2021, the tribal defendants in this case moved to dismiss and the trial court dismissed the case without prejudice. It held that the court lacked subject matter jurisdiction because the Rabangs' tort claims stemmed "directly from the Nooksack Tribal Court's issuance of an eviction order and the Tribal Police's execution of the same."

The Rabangs moved for reconsideration, contending that the court's reasoning rests on errors of law and fails to achieve substantial justice. The trial court denied the motion, holding that the court lacked jurisdiction over the Rabang's tort claims because the claims:

> originate from and depend upon (1) the plaintiff's right to continued residency in Tribal housing located on Tribal trust land, and (2) the propriety of the Tribe's manner of eviction.
>
> In adjudicating these claims, a state court would necessarily pass judgment on the Plaintiff's right to possession of real property belonging to the Nooksack Indian Tribe and held in trust by the United States. Such jurisdiction is flatly prohibited by RCW 37.12.060. It is for the Nooksack Tribe, not this Court, to resolve these claims.

RCW 37.12.060 had not previously been briefed by the parties.

The Rabangs appealed.

ANALYSIS

The Rabangs contend that the trial court erred in dismissing the case and in denying their motion for reconsideration. Gilliland, Ashby, Dodge, and John Does 1-10 (collectively "Gilliland") contend that the dismissal and denial were valid because of judicial immunity, sovereign immunity, and the applicability of RCW 37.12.060. We conclude that sovereign immunity precludes subject matter jurisdiction.

Subject matter jurisdiction is a question of law reviewed de novo. Outsource Servs. Mgmt., LLC v. Nooksack Business Corp., 181 Wn.2d 272, 276, 333 P.3d 380 (2014). "Washington State courts generally have jurisdiction over civil disputes in Indian country if either (1) the State has assumed jurisdiction pursuant to Public Law 280[5] or (2) asserting jurisdiction would not infringe on the rights of the tribe to make its own laws and be ruled by them." Outsource Servs. Mgmt., 181 Wn.2d at 276-277.

Public Law 280 was enacted by Congress in 1953 to permit "states to assume jurisdiction over Indian country." State v. Cooper, 130 Wn.2d 770, 773, 928 P.2d 406 (1996). "Public Law 280 gave five states criminal jurisdiction over all Indian country with the exception of three reservations." Cooper, 130 Wn.2d at 773. It "gave the remaining states, including Washington, the consent of the United States to assume jurisdiction over Indian country by statute and/or amendment of their state constitutions." Id.

[5] Pub.L. No. 83–280, § 7, 67 Stat. 588, 590 (1953).

In 1962, pursuant to Public Law 280, Washington adopted RCW 37.12.010, which established that:

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians, and Indian territory, reservations, country, and lands within this state in accordance with [Public Law 280], but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
>
> (1) Compulsory school attendance;
>
> (2) Public assistance;
>
> (3) Domestic relations;
>
> (4) Mental illness;
>
> (5) Juvenile delinquency;
>
> (6) Adoption proceedings;
>
> (7) Dependent children; and
>
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

Through this statute, "Washington assumed full nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations." Cooper, 130 Wn.2d at 775-776.

"Allotted or trust lands are not excluded from full nonconsensual state jurisdiction unless they are 'within an established Indian reservation'." Id. at 776 (quoting RCW 37.12.010). Therefore, "Nooksack consent is not necessary for the continuing exercise of state jurisdiction over trust lands outside the boundaries of the Nooksack Reservation." Id. at 781.

The parties here agree that the property in this case is located on allotted land outside the established Nooksack Indian Reservation. RCW 37.12.010

exempts from state jurisdiction only matters occurring on reservation land. Since the events giving rise to the present case occurred off-reservation, we conclude that RCW 37.12.010 permits exercise of state jurisdiction absent some other applicable restriction.

RCW 37.12.060 does not preclude state jurisdiction

RCW 37.12.010 is not the only provision bearing upon considerations of state court jurisdiction in this case. The Rabangs assert that the trial court wrongly denied their motion for reconsideration when it held that RCW 37.12.060 precludes state court jurisdiction over the claims of this case. We conclude that the trial court incorrectly applied RCW 37.12.060, but nonetheless its conclusion was correct for reasons addressed below.

RCW 37.12.060 states that:

> Nothing in this chapter . . . shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property [belonging to any Indian tribe that is held in trust by the United States] or any interest therein.

The Rabangs claim that RCW 37.12.060 does not apply to the claims of intentional infliction of emotional distress and negligent infliction of emotional distress. We agree.

Although the cause of the Rabangs' tort claims is the 2016 eviction proceeding and attempted eviction, the Rabangs are not requesting that the court adjudicate "ownership or right to possession" over the house at issue in this lawsuit. Instead, they are requesting that the court acknowledge that the conduct was "outrageous" enough to support their tort claims.

If the court were being asked to make a legal determination about property ownership or rights, RCW 37.12.060 would preclude jurisdiction. Gilliland contend that RCW 37.12.060 applies because the Rabangs' "allegations all source back to [their] alleged right to continue to occupy Tribal Property." But the Rabangs do not request relief affecting ownership or property rights. While the Rabangs' tortious claims do stem from the eviction proceedings, the merit of their claims is not dependent on the court assessing the validity of the tribe's eviction or property ownership proceedings.

The Rabangs have urged this court to take judicial notice of the property lease entered into by the Rabangs under the lease-to-own program. They assert that "[t]aking judicial notice of the Lease will aid this Court in determining whether the trial court properly applied RCW 37.12.060." However, because we agree with the Rabangs that RCW 37.12.060 does not apply, consideration of that document is unnecessary.

Though we conclude that the court's analysis here was incorrect, its ultimate conclusion—that it did not have subject matter jurisdiction over the dispute—was in fact correct.

Sovereign immunity applies

"Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and unequivocal waiver or abrogation by congress." Young v. Duenas, 164 Wn. App. 343, 348-349, 262 P.2d 527 (2011). "Sovereign immunity extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged

misconduct arises while they are acting in their official capacity and within the scope of their authority." Young, 164 Wn. App. at 349.

The Nooksack Tribe is not being sued here, but employees and officials of the tribe are being sued. Dodge, Gilliland, Ashby, and John and Jane Does 1-10's acts (finalizing orders, serving documents, attempting to inspect the house, etc.) throughout the eviction process were performed within "their official capacity and within the scope of their authority." See Young, 164 Wn. App. at 349. Evidence submitted by the defendants—and not, as far as the record on appeal indicates, contested by the plaintiffs—establishes that the Nooksack Tribal Court and Nooksack Tribe Police Department have authority to issue eviction notices to tenants living in tribally-owned residences on trust land. The Rabangs instead contend that the State has assumed civil jurisdiction under Public Law 280. But, "RCW 37.12.010 and Public Law 280 do not extend the State's jurisdiction to sovereign tribal governments, their entities, or their employees." Young, 164 Wn. App. at 353.

The Rabangs contend that sovereign immunity "does not apply to these personal capacity claims against four non-members." But the court looks to the activity, not the pleaded defendant. Young, 164 Wn. App. at 349 (" 'Plaintiffs . . . cannot circumvent tribal immunity through a mere pleading device.' " (alteration in original) (internal quotation marks omitted) quoting Cook v. AVI Casino Enters., Inc., 548 F. 3d 718, 726-27 (9th Cir. 2008)). And here, the activities complained of—issuing and enforcing eviction orders—are squarely official in their scope.

In the context of Judge Dodge's argument about judicial immunity, the Rabangs contend that immunity did not apply because Judge Dodge was not properly appointed. At oral argument, the Rabangs expanded this claim by contending that the United States Department of Interior's (DOI) December 2016 letter "invalidated" all tribal decisions taken after March 24, 2016, and therefore that the DOI invalidated any authority possessed by Judge Dodge or the tribal police.[6] Because these arguments could also be made in the context of sovereign immunity—asserting that Judge Dodge and the tribal employees are not entitled to sovereign immunity because they were not acting in an official capacity—we address them here.

First, we cannot analyze the tribal process that was used to appoint Judge Dodge. "In general, Indian tribes possess inherent and exclusive power over matters of internal tribal governance." Rabang, 328 F. Supp. 3d at 1167. We cannot analyze if Judge Dodge was acting in his "official capacity" during the eviction proceeding without first considering whether he was appointed appropriately under Nooksack law. Determining whether a tribal official "had general authority to act on behalf of the tribe in a governmental capacity [is a] pure question[] of tribal law, beyond the purview of the federal agencies and the federal courts." Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927, 943 (8th Cir. 2010). That other tribal officials—most notably the Nooksack Council and police departments—viewed

[6] Wash. Ct. of Appeals oral argument, Rabang v. Gilliland, No. 83456-8-I (July 19, 2022), 18 min., 35 sec., video recording by TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?eventID=2022071054

Judge Dodge as acting under color of tribal law is as far as this court can or should inquire into the propriety of his appointment. State and federal courts have a long and shameful history of ignoring tribal sovereignty, and we will not add to that history today. See generally Oklahoma v. Castro-Huerta, ___ U.S. ___, 142 S. Ct., 2486, 2505-27, ___ L. Ed. 2d ___ (2022) (Gorsuch, J. dissenting) (summarizing history of American judicial interference in tribal affairs).

Second, the Rabangs' reliance on the DOI's December 2016 letter is misplaced. The DOI's 2016 letter stated that any actions taken by the tribal court after March 2016 were "not valid for purposes of Federal services and funding." In the letter, the DOI explained that evictions and other Nooksack government actions taken after March 2016 would not be recognized as lawful by the Department "pursuant to [their] government-to-government relationship." This language appears to relate only to the federal governments' provision of services to the Nooksack, it does not purport to invalidate relevant Nooksack actions for all purposes. Nor have the Rabangs demonstrated that the DOI even has such authority over the Nooksack Tribe, a sovereign entity. The Rabangs fail to provide evidence supporting their interpretation of the letter. The Department's decision to not recognize specific acts by the tribe should not be misinterpreted as a final ruling that "reverses" all preceding tribal actions. The DOI's letter does not have the effect of stripping Judge Dodge and the other tribal employees of their status as officials of the Nooksack tribe acting in their official capacity.

We therefore conclude that sovereign immunity precludes state court jurisdiction over these claims. We need not reach other arguments raised in the parties' briefs, including Judge Dodge's assertion of judicial immunity.

We affirm.

Smith, A.C.J.

WE CONCUR:

Coburn, J.

[illegible], J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARGRETTY RABANG and ROBERT RABANG, Appellants, v. RORY GILLILAND, MICHAEL ASHBY, ANDY GARCIA, RAYMOND DODGE, and JOHN DOES 1-10, Respondents.	No. 83456-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Margretty Rabang and Robert Rabang have moved for reconsideration of the opinion filed on August 15, 2022. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Smith, A.C.J.
Judge

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 23 2016

The Honorable Robert Kelly
Chairman, Nooksack Tribe
P.O. Box 157
Deming, Washington 98244

Dear Chairman Kelly:

On October 17, 2016, and November 14, 2016, I sent letters to you regarding the status of the Nooksack Tribal Council (Tribal Council). The letters explained that, pursuant to Nooksack Tribe's (Tribe) constitution and laws, as of April 2016, the Tribal Council is no longer operating with a quorum and therefore lacks authority to conduct business on behalf of the Tribe. The letter stated further that the Department of the Interior (Department) will recognize only those actions taken by the Tribal Council prior to March 24, 2016, when a quorum existed, and would not recognize any subsequent actions by the Tribal Council until a valid election, consistent with the Tribe's constitution and the decisions of the Tribe's Court of Appeals, the Northwest Intertribal Court System, is held and a quorum of council members is achieved. This lack of a quorum and inability to take official action puts all Federal funding to the Tribe at risk, as we can only contract Federal services with a duly authorized tribal council pursuant to Federal law and a Tribe's constitution.

As we previously notified you, the actions by you and two members who have exceeded their term of office on Tribal Council to anoint yourselves as the Tribe's Supreme Court were taken without a quorum and without holding a valid election consistent with the Tribe's constitution. Accordingly, the Department will continue to recognize, for purposes of our government-to-government relationship, only court decisions made by the Northwest Intertribal Court System. Pursuant to the plain language of the Tribe's constitution, the Tribal Council did not have authority to remove the Northwest Intertribal Court System or to establish an alternative Court. Any actions taken by the Tribal Council after March 2016, including so-called tribal court actions and orders, are not valid for purposes of Federal services and funding.

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

As you are aware, the Tribe is engaged in a Self-Determination, or "638," contract with the Bureau of Indian Affairs (BIA), which authorizes the Tribe to provide Federal law enforcement services on the reservation. Tribal law enforcement officers must act within the bounds of

Federal law. Only those actions determined to be within the scope of officers' professional duties are protected by the Federal Tort Claims Act (FTCA). Enforcement of invalid or unlawful orders is outside the scope of a law enforcement officer's duties, and, therefore, would not fall within the FTCA's protections.

In addition, such unlawful action would constitute a basis for the BIA Office of Justice Services to reassume the Tribe's law enforcement program. If the Tribe continues to pursue eviction actions stemming from actions taken by Tribal Council without a valid quorum, BIA is prepared to reassume jurisdiction.

We continue to urge the Tribe to hold elections for the vacant Tribal Council seats in accordance with the Tribe's Court of Appeals ruling in *Belmont v. Kelly*, issued on March 22, 2016. We do not view the recent primary election or the general election purportedly scheduled for January 21, 2017 as legitimate and we will not accept the results pursuant to our Nation-to-Nation relationship given that the primary election did not allow for votes by those allowed to vote under the Court of Appeals decision in *Belmont v. Kelly*. As the Tribe's Court of Appeals order clearly stated:

> The trial court found that to date the Respondents are enrolled members of the Tribe. Order Denying Defendants' Motion for Reconsideration at 16. Under the Nooksack Constitution, an enrolled member of the Tribe is eligible to vote in elections. Const. Art. IV, Sec. 1. Although Respondents may eventually face disenrollment proceedings—they are currently enrolled members. Neither the Constitution nor the Nooksack election code prohibits an enrolled member from voting even where the member is the target of disenrollment proceedings.

Order of March 22, 2016 in *Belmont v. Kelly*. Elections or actions inconsistent with the Tribe's Court of Appeals March 22, 2016 Order in *Belmont v. Kelly*, the trial court's decisions of January 26, 2016, and February 29, 2016, and Nooksack law will not be recognized by the Department.

BIA Director Loudermilk and Regional Director Speaks stand ready to assist the Tribe in electing a constitutional tribal council so that Federal services and funding are not interrupted. If the Tribe does not hold such elections by March 31, 2017, the Department will have no choice but to reassume the provision of Federal services.

Sincerely,

Lawrence S. Roberts
Principal Deputy Assistant Secretary –
Indian Affairs

cc: Regional Director Speaks
Northwest Intertribal Court System
Nooksack Tribal Council members
Heidi Frechette

GALANDA BROADMAN

September 30, 2022 - 10:12 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83456-8
Appellate Court Case Title:	Margretty Rabang, et ano, Appellants v. Rory Gilliand, et al, Respondents
Superior Court Case Number:	17-2-00163-1

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