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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 PAUL GRONDAL, ET AL.

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA;
15 ET AL.

16 Defendant

NO. CV-09-18-JLQ

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

17 **I. INTRODUCTION**

18 Defendant Confederated Tribes of the Colville Reservation (hereafter, “Colville
19 Tribes”) has moved this Court for an order dismissing it as a defendant from all claims
20 and cross-claims arising in this case pursuant to Fed. Rul. Civ. P. 12(b)(1). Since this
21 lawsuit was originally brought against the Confederated Tribes of the Colville
22 Reservation (“Colville Tribes”), the Colville Tribes has asserted that this Court lacks
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jurisdiction over the Colville Tribes. See, e.g., ECF 187, p. 7. This Memorandum demonstrates that the Colville Tribes must be dismissed for lack of jurisdiction.

The Plaintiffs' Complaint and Defendant Wapato Heritage, LLC's Cross-Complaint have fatal jurisdictional shortcomings that require dismissal.

II. DISCUSSION

1. **The Colville Tribes' Sovereign Immunity from Suit Deprives the Court of Subject-Matter Jurisdiction over the Colville Tribes.**

The Colville Tribes is a sovereign Indian tribe recognized by the United States with authority over its members and territory. U.S. Const. Art. I, §8, cl. 3.; 75 Fed. Reg. 60810 (2010). Longstanding case law is clear, consistent, and unanimous that Indian tribes are immune from suit in the same manner as other sovereign governments. Kiowa tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998); Oklahoma Tax Commission v. Potawatomi Tribe of Oklahoma, 498 U.S. 50, 509 (1991); Wright v. Colville Tribal Enterprise Corp., 147 P.3d 1275 (2006); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977). When tribal sovereign immunity exists, federal jurisdiction does not exist. Alvarado v. Table Mt. Rancheria, 509 F.3d 1008, 1015-16 (9th Cir. 2007). Sovereign immunity applies to activities of an Indian tribe whether on or off reservation, and whether the activity is deemed governmental or commercial. See, Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006). Tribal

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1 sovereign immunity extends to claims for declaratory and injunctive relief, not merely
2 damages. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th
3 Cir. 1991). Even in cases where plaintiffs may have difficulty obtaining relief if the
4 case is dismissed, when tribal sovereign immunity is at stake, that factor has little
5 weight. See, American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir.
6 2002). In order to establish jurisdiction, Plaintiffs are required to sufficiently plead
7 that there is jurisdiction for the action—otherwise the court is compelled to dismiss
8 Plaintiffs’ suit. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994);
9 Smith v. Dulles, 236 F.2d 739 (D.C. Cir. 1956), cert. denied 77 S.Ct. 329 (holding
10 complaints containing no statement of grounds of federal court jurisdiction are
11 deficient).

12 Plaintiffs’ lawsuit and Cross-Claimant’s cross-claims are explicitly filed against
13 the Colville Tribes and seek various forms of relief against the Colville Tribes. The
14 Colville Tribes possess sovereign immunity. The Colville Tribes has not waived its
15 immunity in any way and the Plaintiffs’ complaint and Cross-Claimant’s cross-
16 complaint do not allege any basis for this Court’s jurisdiction over the Colville Tribes.
17 On their face, the complaint and cross-claims have failed to sufficiently plead a basis
18 for jurisdiction. The complaint and cross-claims do not even provide the required
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1 FRCP 8(a)(1) jurisdictional statement. This action and cross-claims against the
 2 Colville Tribes is thus barred by the Colville Tribes' sovereign immunity.

3 4 5 **2. The Colville Tribes Has Not Waived its Immunity From Suit.**

6 The core of the doctrine of tribal sovereign immunity is clear—this Court lacks
 7 jurisdiction over the Colville Tribes without a tribal waiver or Congressional
 8 abrogation. Modern case law primarily addresses the scope of tribal waivers and
 9 Congressional abrogations, and is consistent that any waiver of sovereign immunity
 10 must be explicit. Potawatomi Tribe, 498 U.S. at 509; Santa Clara Pueblo, 436 U.S. at
 11 58; Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993) (“Absent express
 12 and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by
 13 Congress, tribes cannot be sued”); Cook v. AVI Casino Enterprises, Inc., 548 F.3d
 14 718, 725 (9th Cir. 2008) (“Tribal sovereign immunity protects Indian tribes from suit
 15 absent express authorization by Congress or clear waiver by the tribe,” citing Kiowa
 16 Tribe, 523 U.S. 751); Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (“[W]aivers
 17 of tribal sovereign immunity may not be implied,” citing Santa Clara Pueblo);
 18 Demontiney v. United States, 255 F.3d 801, 811 (9th Cir. 2001). (“There is a strong
 19 presumption against waiver of tribal sovereign immunity.”); See Pan American Co. v.
 20 Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) (“Indian sovereignty,

1 like that of other sovereigns, is not a discretionary principle subject to the vagaries of
2 the commercial bargaining process or the equities of a given situation”) citing United
3 States v. United States Fidelity & Guaranty Co. 309 U.S. 506, 513 (1940); People of
4 State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians,
5 595 F.2d 1153, 1155 (9th Cir. 1979). Similarly, congressional abrogation of sovereign
6 immunity may not be implied and must be “unequivocally expressed” in “explicit
7 legislation.” Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir.
8 2004). The canons of Indian law construction demand that all legal ambiguities
9 (including sovereign immunity waivers) be interpreted in favor of Indian tribes. See
10 e.g., Choctaw Indian Nation v. U.S., 318 U.S. 423, 431-32 (1943); McClanahan v.
11 Arizona State Tax Comm’n, 411 U.S. 164, 174 (1973). The plaintiff bears the burden
12 of showing a waiver of tribal sovereign immunity. Vulgamore v. Tuba City Regional
13 Healthcare Corp., 2011 WL 3555723 (D.Ariz. 2011). “Unless [Plaintiff] satisfies the
14 burden of establishing that [his] action falls within an unequivocally expressed waiver
15 of sovereign immunity by Congress [or the Nation], it must be dismissed.” Dunn &
16 Black, P.S. v. United States, 492 F.3d 1084, 1088 (9th Cir.2007). The general rule
17 governing pleading federal jurisdiction requires more than a simple allegation that
18 jurisdiction exists or citation of a federal statute; rather, it is required that the
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1 complaint clearly set out the basic facts necessary to support the conclusion that there
2 is federal jurisdiction. Lopes v. Vieira, 488 F.Supp.2d 1000 (E.D.Cal. 2007).

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4 The Colville Tribes has not waived its immunity in any way, much less through
5 an “unequivocal expression,” for Plaintiffs and Cross-complainants to demonstrate
6 jurisdiction in this Court. As discussed above, Plaintiffs and Cross-Claimant do not
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8 clearly allege any facts that the Colville Tribes has explicitly and unequivocally
9 waived its immunity from suit, as required by law.¹ No such explicit, unequivocal
10 waiver exists. Similarly, Congress has not abrogated the Colville Tribes’ sovereign
11 immunity for this case to continue in this Court. Plaintiffs and Cross-Claimant cite to
12 no facts demonstrating Congressional abrogation—probably because none exists.
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14 Plaintiffs and Cross-Claimant have not, in any way, met their burden that this action
15 and the cross-claims fall within an explicit unequivocal tribal waiver or Congressional
16 abrogation. This action and cross-claims against the Colville Tribes are thus barred
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18 by the Colville Tribes’ sovereign immunity. It must be dismissed.

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¹ Compare this with the several citations to federal statutes presumably alleging
24 waiver of federal sovereign immunity by the federal Defendant in the complaint and
25 cross-claims.
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I. CONCLUSION

The action and cross-claims against the Colville Tribes must be dismissed.

DATED: September 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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