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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KONIAG, INC., an Alaska corporation, Plaintiff, v. ANDREW AIRWAYS, INC., an Alaska corporation, DEAN T. ANDREW, an individual, and ALICIA L. REFT, individually and as President of the Karluk IRA Tribal Council, Defendants	Case No.: 3:13-cv-00051-SLG KONIAG, INC.'S OPPOSITION TO REFT'S SECOND MOTION TO DISMISS

I. INTRODUCTION

Alicia L. Reft, individually and as President of the Karluk IRA Tribal Council (Reft), has for a second time moved to dismiss Koniag, Inc.'s (Koniag) Complaint (Second Motion to Dismiss). Reft now alleges the Court lacks subject matter jurisdiction because only Koniag's claim for declaratory judgment involves a federal question and the Declaratory Judgment Act does not confer federal jurisdiction. But this is a "classic case for declaratory relief. Rather than stand fast and await a lawsuit, [Koniag] has asked the [C]ourt to decide the dispute before [Koniag] commits an [alleged] … breach of the other

party's rights."[1] The Court has federal question jurisdiction over Koniag's declaratory judgment claim in such circumstances, as well as because the Alaska National Interest Lands Conservation Act (ANILCA), which Koniag invokes in its Complaint, completely preempts state law. The Court has supplemental jurisdiction over Koniag's other claims. Reft's Second Motion to Dismiss therefore should be denied.

II. BACKGROUND

As set forth in the Complaint, the defendants – including Reft – unlawfully built "Mary's Creek Cabin" (Cabin) on Koniag's land (Lands).[2] More recently, they rejected Koniag's requests that they quit the Lands.[3]

In fact, the Native Village of Karluk, which is also referred to as the Karluk IRA Tribal Counsel, filed a lawsuit against Koniag in Karluk Tribal Court on August 24, 2012 (Tribal Court Litigation). In the Tribal Court Litigation, the Native Village of Karluk sought to litigate, among other matters, the validity of the Karluk Native Corporation's 1980 merger with Koniag (1980 Merger) and its rights to the Lands.[4] As part of the Tribal Court Litigation, the Native Village of Karluk sought and obtained an emergency restraining order from the Karluk Tribal Court addressing the fact that it had "elected to retroceded [sic] from Public Law 280 and … assumed exclusive jurisdiction over the Karluk Lands."[5]

On August 29, 2012, five days after filing the Tribal Court Litigation, the Karluk IRA Tribal Council sent Koniag a letter. In it, the Karluk IRA Tribal Council

[1] *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1180-81 (9th Cir. 1997) (*Saklad*).
[2] Dkt. 1 at 6 (¶¶ 34-35).
[3] Dkt. 1 at 7 (¶¶ 39-40).
[4] Dkt. 1 at 7 (¶ 40).
[5] Dkt. 1 at 7 (¶ 42).

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asserted that the 1980 Merger was "legally flawed" such that Koniag had not legally acquired title to the Lands, that it was entitled to the Lands under the doctrine of adverse possession, and that removal of the Cabin by Koniag or any disturbance of the area would be in "direct violation of [NAGPRA]" (August 29 Letter).[6]

Given this history, including the threat – explicit or implicit – of potential future claims against it, Koniag filed this lawsuit on March 15, 2013, against several defendants, including Reft individually and as President of the Karluk IRA Tribal Council. In addition to asserting state law claims for intentional trespass, for ejectment, and to quiet title in the Lands in order to address Reft's ongoing violation of Koniag's property rights,[7] Koniag also seeks, along with prospective relief, a declaratory judgment. It asks the Court to hold that:

- The Lands are not "Federal lands" or "tribal land" as defined in 25 U.S.C. § 3001(5) or (15) and accordingly are not subject to the Native American Graves Protection and Repatriation Act (NAGPRA);
- Removal of the Cabin, which was unlawfully constructed by, upon the authorization of, or in active concert with the defendants on the Lands, will not violate NAGPRA or any other law;
- Ownership of the Lands is not affected by Public Law No. 83-280,[8] (Public Law 280) or any claim of retrocession made under it by Reft or persons acting in concert with her;

[6] Dkt. 1 at 7-8 (¶¶ 43-48).
[7] *Id.*
[8] 67 Stat. 588 (1953).

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- Section 907 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1636(d)(1)(A)(i), bars adverse possession of lands acquired by Koniag under the 1980 Merger; and
- Reft's challenges to the 1980 Merger that vested ownership rights in the Lands to Koniag are barred by either or both Alaska and federal law. [9]

Rather than answer the Complaint, Reft has so far filed, in addition to her Second Motion to Dismiss, a Notice of Removal on April 1, 2013,[10] her First Motion to Dismiss on May 20, 2013, and a Notice of Amended Removal on June 3, 2013.[11] In her First Motion to Dismiss, Reft moved to dismiss Koniag's claims alleging that Koniag had failed to state a valid claim against her for two reasons (First Motion to Dismiss).[12] She alleged: (1) that the Native Village of Karluk uses the property in dispute for "religious and cultural activities" – an apparent invocation of the Religious Freedom Restoration Act of 1993; and (2) that Koniag failed to name a party – apparently an argument that Koniag's claims are against the Karluk IRA Tribal Council, not her individually. The Court denied the First Motion to Dismiss on July 29, 2013.[13]

III. STANDARDS FOR DECISION

Challenges to subject matter jurisdiction can be either facial or factual.[14] The challenger in a facial attack asserts that the allegations contained in a complaint are

[9] Dkt. 1 at 2.
[10] Dkt. 6.
[11] Dkt. 14; Dkt. 16 at n.35.
[12] Dkt. 14.
[13] Dkt. 28.
[14] *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (*citing Safe Air for Everyone v . Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)).

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insufficient on their face to invoke federal jurisdiction.[15] In reviewing a facial attack, the court is limited to the pleadings.[16] The challenger in a factual attack, by contrast, disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.[17] Here, Reft appears to be making a facial attack on the Court's subject matter jurisdiction.[18]

Further, as the Court noted in its July 28, 2013 Order, Koniag is entitled to have all inferences drawn in its favor. In ruling on Reft's First Motion to Dismiss, this Court held that "the court must accept as true all of the allegations contained in a complaint."[19]

IV. ARGUMENT

A. The Court Has Jurisdiction over Koniag's Complaint Because Reft Could Assert Her Own Claims in Federal Court.

Reft argues that none of Koniag's claims give rise to federal jurisdiction. She asserts that whether there is a federal question that could be the basis for federal

[15] *Id.*

[16] *See Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (*citing St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

[17] *Id.*

[18] Reft makes various defamatory statements regarding the 1980 Merger in her Second Motion to Dismiss and submits a document in support of the same. But she never argues that Koniag's relevant representations in its Complaint regarding the 1980 Merger are false. Rather, her arguments appear intended for a purpose other than addressing the merits of her Second Motion to Dismiss. Moreover, Reft states that the "well-pleaded complaint rule" governs her motion, signaling that she is pursuing a facial attack on the Complaint. *See* Dkt. 36 at 2. If the Court concludes otherwise, Koniag requests leave under Rule 56(d) to supplement this opposition after it has had an opportunity to conduct discovery. *See* Fed. R. Civ. P. 56(d); *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) ("Because additional discovery would be useful to establish federal subject matter jurisdiction, and because the extent of federal involvement in the challenged transactions is contested, we reverse the district court's decision not to permit discovery."), *cited in Jordan v. Atlas Air, Inc.*, No. A03-220, 2005 WL 1079309, at *2 n.18 (D. Alaska May 5, 2005) (where the court observed "further discovery is appropriate when jurisdictional questions require developing additional facts").

[19] Dkt. 28 at 1 (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted)).

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jurisdiction is governed by the "well-pleaded complaint rule."[20] Reft further asserts that the Declaratory Judgment Act is not an independent source for federal question jurisdiction.[21] Reft concludes that the only potential federal questions alleged in Koniag's Complaint are not viable causes of action against Reft but instead are "nothing more than defensive allegations raised to defeat Reft's claims before any such claim has even been asserted."[22] But Reft misrepresents the relevant law as to when a court has subject matter jurisdiction over claims for declaratory judgment involving questions of federal law.

First, the well-pleaded complaint rule provides that jurisdiction exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint.[23] A well-pleaded complaint will be deemed to present a federal question if at least one of two alternatives is true. Either (1) federal law must create a cause of action that is pled or, as is the case here, (2) the plaintiff's asserted right to relief must depend on the resolution of a substantial question of federal law.[24]

Koniag's right to declaratory judgment on several of the issues raised in its Complaint necessarily depends "on the resolution of a substantial question of federal law."[25] Koniag sets out in paragraph 58 of the Complaint the issues on which it seeks declaratory judgment, including subparagraph (b), which requires the interpretation and

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[20] Dkt. 36 at 3.
[21] Dkt. 36 at 7.
[22] Dkt. 28 at 1.
[23] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (*citing* 28 U.S.C. §§ 1331, 1441; *Gully v. First Nat'l Bank*, 229 U.S. 109, 112-13 (1936)).
[24] *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1029 (9th Cir. 2011) (*citing Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004)).
[25] Dkt. 1 at ¶ 58.

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application of NAGPRA; subparagraph (c), which involves the interpretation and application of ANILCA; subparagraph (d), which involves the interpretation and application of Public Law 280; and subparagraph (e), which involves the interpretation and application of federal common law regarding tribal jurisdiction over non-member Koniag.[26]

As to the Declaratory Judgment Act,[27] Koniag agrees that it does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint. But as the Ninth Circuit has held, if "the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights," then a court has subject matter jurisdiction over the plaintiff's claim.[28] That is the case here.

The Supreme Court first recognized the coercive action doctrine in the context of a removal action in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*.[29] The Court noted:

> Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.[19]
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> [19] For instance, federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal

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[26] *Id.*
[27] 28 U.S.C. § 2201.
[28] *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985).
[29] 463 U.S. 1, 27-28 (1983).

> question over which the federal courts have exclusive jurisdiction.[30]

In *Saklad,*[31] the Ninth Circuit stated the test more plainly:

> As we said in *Janakes v. United States Postal Serv*., 768 F.2d 1091, 1093 (9th Cir. 1985), "[i]f . . . the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction. . . ." *In other words, in a sense we can reposition the parties in a declaratory relief action by asking whether we would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy*.[32]

Here it is manifest that, as explained below, Reft could bring an action, either individually or as President of the Karluk IRA Tribal Council, based on any and all of the four bodies of federal law discussed below, each of which Koniag specified in its request for declaratory relief. And it makes no difference if Reft represents that she would not bring such an action.[33] Koniag does not have to "stand fast and await a lawsuit, [but can instead] … ask[] the court to decide the dispute before it commits an [alleged] … breach of the other party's rights."[34]

1. Native American Graves Protection and Repatriation Act.

In its Complaint, Koniag explains that the August 29 Letter alleges that "removal of the cabin by Koniag or disturbance of the area around the Cabin 'will be a direct violation of [NAGPRA]'."[35] In the same letter, Karluk Tribal Attorney Kurt

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[30] *Id*. at 19 & n.19.

[31] 127 F.3d at 1180-81.

[32] *Id.* at 1081 (emphasis added); *see also Chevron U.S.A. Inc. v. M & M Petroleum Servs, Inc.*, 658 F.3d 948, 951 (9th Cir. 2011).

[33] Dkt. 36 at 6.

[34] *Saklad*, 127 F.3d at 1181.

[35] Dkt. 1 at 8 (¶ 48). NAGPRA addresses in part "sacred objects" defined to mean "specific ceremonial objects which are needed by traditional Native American religious

(continued . . .)

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Kanam asserted that the Karluk IRA Tribal Council "have [*sic*] asked me to take action to protect the land under the Native American Protection and Repatriation Act, 25 USC 3001."[36] Koniag's complaint seeks a determination that NAGPRA does not apply to its non-tribal, non-federal Lands.

Under NAGPRA, 25 U.S.C. § 3013, "[t]he United States district courts shall have jurisdiction over *any action brought by any person alleging a violation of this chapter* and shall have authority to issue such orders as may be necessary to enforce provisions of this chapter." (Emphasis added.) Thus Reft, either individually or as President of the Karluk IRA Tribal Council, could bring a coercive action in this Court to enforce NAGPRA.[37]

Applying the *Saklad* Court's test, there is no question but that if the parties here were repositioned, this Court would have jurisdiction "had [Reft] the declaratory relief defendant been a plaintiff seeking a federal remedy" under NAGPRA. Because Reft

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(. . . continued)
leaders for the practice of Native American religions by their present day adherents" and "cultural patrimony" defined to mean "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . . considered inalienable by such Native American group at the time the object was separated from such group." 25 U.S.C. §§ 3001(3)(C), (D).

[36] Dkt. 1 at 7 (¶ 43, Ex. E). Additionally, in her First Motion to Dismiss, Reft asserts: "The cabin in question is used for religious and cultural activities and is protected by Article IV section 1 of the Native Village of Karluk Constitution." Dkt. 14 at 1. Reft's reference to the Cabin allegedly being used for "religious and cultural activities" may be an invocation of the Religious Freedom Restoration Act of 1993 (RFRA).[36] *See* Dkt. 16 at 1 (Reference to RFRA in Reft's "Notice of Amended Removal"). Indian tribes may affirmatively raise RFRA issues in federal court. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008). It also may be, however, a further reference to NAGPRA.

[37] *See also Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) (holding scientists had standing to bring an action to determine that ancient human remains found on federal land were not subject to NAGPRA; multiple Indian tribes claimed the ancient human remains were subject to NAGPRA).

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"could have brought a coercive action in federal court to enforce [her] rights [under NAGPRA], then [this Court has] jurisdiction."[38]

2. Public Law 280.

As mentioned, the Native Village of Karluk brought an action against Koniag in Karluk Tribal Court in August 2012. In that litigation, the Native Village of Karluk asserted that the "Plaintiff's have elected to retrocede from Public Law 280 and assumed exclusive jurisdiction over the Karluk Lands Attachment C."[39] Attachment C to the tribal court petition includes two Reft affidavits, one describing her efforts to notify "eligible Karluk voters" of an "election to retrocede Karluk from Public Law 280" and reporting the result of that election as "10 for and 0 against," and the second affidavit setting forth her own election vote marking "X" for the proposition "I hereby elect to retrocede from Public Law 280 . . . ." Koniag seeks a declaratory judgment holding that Public Law 280 is inapplicable here.

By its terms, Public Law 280 applies only to "Indian country."[40] Consistent with the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government,*[41] Koniag seeks a determination that the Lands are not "Indian country" and therefore not subject to "retrocession" or any other matter under Public Law 280.[42] The application of Public Law 280 here involves the interpretation of federal law, which is a federal question. Federal courts have jurisdiction over federal questions under 28 U.S.C. § 1331.

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[38] *Janakes,* 768 F.2d at 1093.
[39] Dkt. 1 at 7 (¶ 42) (emphasis in original).
[40] 28 U.S.C. § 1360(a).
[41] 522 U.S. 520 (1998).
[42] Dkt. 1 at 7 (¶¶ 45-46).

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Reft – either individually or as President of the Karluk IRA Tribal Council – could bring a coercive action in this Court to determine the applicability of Public Law 280. Other individuals and Indian tribes have initiated actions to determine Public Law 280 issues.[43] Applying the *Saklad* Court's test again, there is no question but that if the parties here were repositioned, this Court would have jurisdiction "had [Reft] the declaratory relief defendant been a plaintiff seeking a federal remedy" under Public Law 280. Because Reft "could have brought a coercive action in federal court to enforce [her] rights [under Public Law 280], then [this Court has] jurisdiction."[44] This Court has subject matter jurisdiction over Koniag's declaratory judgment claim as to Public Law 280.

3. Federal Common Law of Tribal Jurisdiction.

Koniag also seeks declaratory judgment holding that neither Reft nor the Native Village of Karluk acting through Reft may exercise Native Village of Karluk tribal governmental or proprietary control over Koniag, the Lands or the Cabin.[45] Doing so would violate federal common law and would be *ultra vires*.

An Indian tribe or tribal official asserting tribal authority likewise could bring a coercive action based on federal Indian common law to determine the nature and extent

[43] *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (action by a Yakima Indian Nation); *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976) (action by an Indian resident on an Indian reservation); *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (action by the Colville Tribes).
[44] *Janakes*, 768 F.2d at 1093.
[45] Dkt. 1 at 9 (¶ 58).

of tribal jurisdiction over non-members.[46] Thus, Koniag has properly pled a federal question declaratory judgment claim on its federal Indian common law claim.

4. The Authorities Reft Relied upon Are Distinguishable or Were Misrepresented.

Reft is correct that federal jurisdiction cannot hinge on affirmative defenses or counterclaims, whether they are actual or anticipated. The majority of cases that address this issue, however, involve attempts by defendants to try to remove a state court case to federal court on the basis of an affirmative defense.[47] That is not this case.

And as to *Janakes*,[48] which Reft cites and which does involve a motion to dismiss brought by a declaratory judgment defendant, Reft misrepresents the holding in the case. In the paragraph after the one from which Reft quotes, the Ninth Circuit states:

> If, however, the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense. The coercive action, however, must "arise under" federal law, and not be based merely on diversity of citizenship or another, nonsubstantive jurisdictional statute.[49]

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[46] *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 419 (1989) (Indian tribe brought federal court action seeking declaratory relief that it had exclusive authority to zone non-member land and injunctive relief barring any action on the land inconsistent with its land use regulations; the district court exercise jurisdiction based on federal Indian common law); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1201, 1202 (C.D. Cal. 1998) (action brought by Cabazon Band "and Paul D. Hare, in his capacity as Director, Cabazon Public Safety Department" against county sheriff), *decision following remand*, 388 F.3d 691 (9th Cir. 2004).

[47] *See Caterpillar, Inc.*, 482 U.S. at 392.

[48] 768 F.2d at 1093.

[49] *Id.* (citations omitted).

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In short, the Ninth Circuit's decision in *Janakes* is entirely consistent with the Court's later decisions cited above, and actually supports this Court's subject matter jurisdiction over this action. Koniag is attempting to address through declaratory judgment claims that Reft, whether in her individual capacity or as President of the Karluk IRA Tribal Council, could otherwise pursue in this Court. Koniag does not have to "stand fast and await a lawsuit." It may ask "the court to decide the dispute before it commits an [alleged] … breach of the other party's rights."[50]

B. The Court Also Has Jurisdiction over Koniag's Complaint Because ANILCA Completely Preempts State Law.

As Koniag's Complaint states, the August 29 Letter also asserts a claim of adverse possession to the Lands.[51] Koniag therefore seeks declaratory judgment holding that the Lands may not be adversely possessed by Reft, either individually or as President of the Karluk IRA Tribal Council, because their adverse possession is barred by ANILCA.[52] This Court has jurisdiction over this claim because ANILCA completely preempts state law.

ANILCA provides in relevant part:

> Notwithstanding any other provision of law or doctrine of equity, all land and interests in land in Alaska conveyed by the Federal Government pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. § 1601, *et seq*.] to a Native individual or Native Corporation or subsequently conveyed . . . to a Native Corporation . . . pursuant to other applicable law shall be exempt, so long as such land and interests are not developed or leased or sold to third parties,

[50] *Saklad*, 127 F.3d at 1180-81.
[51] Dkt. 1 at 7 (¶ 47).
[52] *Id*. at 9 (¶ 58).

> from … adverse possession and similar claims based upon estoppel[.][53]

Accordingly, ANILCA completely preempts, as a matter of federal substantive law and federal jurisdiction, Alaska state law, notwithstanding the fact that state law would provide a cause of action in the absence of ANILCA.[54]

"Congressional intent is the 'ultimate touchstone' guiding [complete] preemption analysis."[55] Under the Alaska Native Claims Settlement Act (ANCSA),[56] the federal government conveyed title and possession of what was then federal land to Alaska Natives and Alaska Native Corporations, such as Koniag. Prior to that conveyance, the federal government's title and possession to federal land was governed purely by federal law. ANILCA preserves those federal characteristics of land so conveyed until it is "developed or leased or sold."

ANILCA §§ 1636(d)(1)(A)(i) and (g) reveal a complete, unequivocal congressional intent, "[n]otwithstanding any other provision of law or doctrine of equity," to preempt state law adverse possession claims. These subsections establish unique federal law definitions and criteria for exclusions and reattachment of exemptions secured under subsection (d), and "expressly" except subsection (d), in accordance with its terms, from subsection (g), which otherwise provides that "no provision of this section shall be construed as affecting civil or criminal jurisdiction of the State of Alaska." By

[53] 43 U.S.C. § 1636(d)(1)(A)(i).
[54] *Vezey v. Green*, 35 P.3d 14 (Alaska 2001), *appeal following remand*, 171 P.3d 1125 (2007).
[55] *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (finding complete preemption under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, and discussing other complete preemption cases (citation omitted)).
[56] 16 U.S.C. §§ 1601-1628.

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these terms, Congress manifested its intent to completely immunize Alaska Native Corporation land, including the Lands here, from adverse possession claims under Alaska law or in Alaska courts.

This case is like *Oneida Indian Nation of New York State v. Oneida County*.[57] There, the Supreme Court found a well-pleaded federal question when the Oneida Nation sued for rent, which necessarily meant that it asserted a "right to possession." Although the lower courts dismissed its complaint for lack of subject matter on the grounds that its claims sounded in state law, the Supreme Court reversed. It held that

> [t]he threshold allegation required of such a well-pleaded complaint – the right to possession – was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both 33 U.S.C. § 1331 and § 1362.[58]

The Supreme Court held in *Oneida* that "sustaining jurisdiction" in that case did not "disturb the well-pleaded complaint rule." It explained: "[H]ere the right to possession itself is claimed to arise under federal law in the first instance."[59] After

[57] 414 U.S. 661 (1974).
[58] *Id.* at 666-67 (citations omitted).
[59] 414 U.S. at 662.

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distinguishing cases that did not present a well-pleaded federal question involving title from the United States, the *Oneida* Court wrote:

> In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.[60]

Continuing, the *Oneida* Court added: "For the same reasons, we think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a 'dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.'"[61] Pointing to federal laws and treaties confirming a present right of possession to the Oneida Nation not terminable except by an act of the United States, the Court concluded: "To us, it is sufficiently clear that the controversy stated in the complaint arises under federal law within the meaning of the jurisdictional statutes and our decided cases."[62]

So too here. The conveyance of title and right of possession to undeveloped lands to Alaska Native Corporations was made at the direction of Congress to effect the purposes of ANCSA. That right of possession could be made meaningless if such lands could be taken away through adverse possession or other practices under state law. ANILCA §§ 1616(d)(1)(A)(i) and (g) manifest Congress' unequivocal intent to entirely

[60] *Id*. at 675 - 677.
[61] *Id.* at 677.
[62] *Id.* at 678.

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foreclose that risk. The Supreme Court's determination in *Oneida* that the Oneida Nation's "right to possession" claim is governed by federal law giving rise to a well-pleaded federal question, not in anticipation of a defense, informs the conclusion that Koniag's ANILCA-based claim – that its right to possession of its Lands may not be defeated by adverse possession – is a well-pleaded federal question, not in anticipation of a defense. Thus, Koniag has properly pled a federal question on its ANILCA claim.

C. This Court Should Exercise Its Supplemental Jurisdiction over Koniag's State Law Claims.

Because Koniag's complaint provides federal question jurisdiction, the Court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy."[63] "A state law claim is part of the same case or controversy when it shares a 'common nucleus of operative fact' with the federal claims and the state and federal claims would normally be tried together."[64]

In this case, all of Koniag's causes of action, including those relating to the 1980 Merger, stem from the same common nucleus of operative fact. There is no real distinction between the factual allegations for Koniag's claims against Reft for declaratory judgment versus its other causes of action against her. Thus, once this Court

[63] 28 U.S.C. § 1367(a); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558-59 (2005) (Supreme Court has emphasized that "[s]ection 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction" and cautioned against fashioning limitations on that grant without support in the statutory text).

[64] *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) (citation omitted).

confirms that Koniag has pled a federal question, Koniag asks that it exercise its supplemental jurisdiction over the remainder of Koniag's claims.[65]

D. Koniag's Claims Against Reft Are Not Precluded by Sovereign Immunity.

Reft argues that "[a]s a tribal official, the president of the Karluk IRA Tribal Council, Alicia Reft is indistinguishable from Karluk."[66] Reft then argues that Koniag's claims against her for prospective relief under federal law are precluded by tribal sovereign immunity.

The deficiencies in Reft's argument already have been thoroughly briefed by Koniag in its Opposition to Reft's First Motion to Dismiss.[67] That Opposition is incorporated herein. Moreover, the Court already adjudicated this issue in denying Reft's First Motion to Dismiss. The Court's July 29, 2013 Order is the law of the case on this issue and there is no basis for reversing that ruling.[68]

Moreover, Reft's sovereign immunity argument fails on its merits. The Complaint demonstrates Reft plainly sued in her individual capacity, as well as President of the Karluk IRA Tribal Council. The Complaint states, for example, that Reft "directed and purported to license, lease, authorize or permit the Andrew Defendants to build the Cabin on the Lands, and to use the Cabin and Lands."[69] Koniag also alleges that Reft, "in her individual capacity and purporting to act in her official capacity as a member of the Karluk IRA Tribal Council," not only "direct[ed] and purport[ed] to license, lease,

[65] *Id.*; *see also* 28 U.S.C. § 1367(a); *Exxon Mobil Corp.*, 545 U.S. at 558-59.
[66] Dkt. 36 at 1.
[67] Dkt. 22.
[68] Dkt. 28. Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. *See Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir.1997) (en banc).
[69] Dkt. 1 at 6, ¶¶ 34-35.

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authorize or permit the Andrew Defendants to build" and "use the Cabin and Lands," but that her doing so was and is "outside the scope of Reft's lawful authority as a member or President of the Karluk IRA Tribal Council."[70] Further, Koniag alleged it is entitled to a declaratory judgment because Reft may not exercise "governmental authority or proprietary jurisdiction over Koniag, the Lands or Cabin, because doing so would exceed the Native Village of Karluk's lawful authority under federal common law."[71]

Koniag concededly cannot sue the Karluk IRA Tribal Council directly because it has sovereign immunity.[72] But the Supreme Court held in *Ex Parte Young* that a plaintiff may sue the officer of a sovereign government where the plaintiff alleges the officer's conduct violated federal law and seeks prospective injunctive relief.[73] In *Santa Clara Pueblo v. Martinez*,[74] the Supreme Court explained that *Ex Parte Young* applies to tribal officers. Thus, under longstanding federal law, Koniag may name Reft individually and in her official capacity as President or member of the Karluk IRA Tribal Council seeking prospective relief regarding actions by Reft in violation of federal Indian common law.[75]

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[70] *Id*. at ¶ 36.

[71] *Id.* at ¶ 58(e).

[72] *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998) (tribes possess immunity from suit in federal and state courts).

[73] 209 U.S. 123 (1908); *see also Salt River Project v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012).

[74] 436 U.S. 49, 115-16 (1978).

[75] *Salt River Project*, 672 F.3d at 1177 (suit against tribal officials permitted to enjoin violations of federal common law; also holding at 1179-82 that the Navajo Nation was not a necessary party under Fed. R. Civ. P. 19) (reversed and remanded back to district court for consideration of motion for injunction; on remand, the district court issued order granting permanent injunction on January 1, 2013. *See* Exhibit A); *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008) (Cherokee Nation of Oklahoma is immune from suit, but elected officials are not).

That is precisely the type of relief Koniag seeks here. Koniag's first cause of action against Reft in her individual capacity and in her capacity as a member and President of the Karluk IRA Tribal Council is for declaratory relief for her actions in excess of the Native Village of Karluk lawful authority under applicable federal common law.[76] Accordingly, Koniag has asserted well-pleaded claims against Reft in both her individual and official capacities. The relief Koniag seeks against Reft solely in her individual capacity, over which the Court may exercise supplemental jurisdiction, does not raise any sovereign immunity issues.[77] There is no basis to conclude that Koniag's claims against Reft for prospective relief regarding violations of federal common law of tribal jurisdiction are precluded under the doctrine of sovereign immunity. Reft's motion to dismiss Koniag's claims on this basis also is without merit.

V. CONCLUSION

For all the reasons set forth in this Opposition, Reft's Second Motion to Dismiss should be denied.

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[76] *Id.* at ¶ 58(e). *See Salt River Project*, 672 F.3d at 1177; *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (individual capacity suits against tribal officers are "generally permissible … because the powers they possess in [their official] capacities enable them to grant the plaintiffs relief on behalf of the tribe," but actions against tribal officers acting outside their authority are really suits against tribal officers in their individual capacities (citations omitted)); *Leelanau Transit Co. v. Traverse Band of Ottawa & Chippewa Indians*, No. 1:92:-CV-240, 1994 U.S. Dist. LEXIS 2220 (W.D. Mich. Feb. 1, 1994) (court allows an action against a tribal chair in his individual capacity for trespass for equitable relief and damages finding it unnecessary to join the tribe that the court recognized as having sovereign immunity because the tribal chair failed to come forward with evidence that the U.S. held the property in trust for the tribe).

[77] The doctrine of sovereign immunity does not apply to individual members of a tribe. *Puyallup Tribe of Indians v. Dep't of Game of Wash.*, 433 U.S. 165, 172-73 (1977).

DATED: October 4, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2013, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:13-cv-00051-SLG who are registered CM/ECF users will be served by the CM/ECF system.

/s/ James E. Torgerson
James E. Torgerson

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