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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CONFEDERATED SALISH AND
KOOTENAI TRIBES,

Cause No. 9:19-cv-00090-DLC

Plaintiff,

v.

LAKE COUNTY BOARD OF
COMMISSIONERS; and LORI
LUNDEEN,

Defendants.

LAKE COUNTY’S RESPONSE
BRIEF TO MOTION TO DISMISS
COUNTERCLAIMS OF LORI
LUNDEEN AND LAKE COUNTY

Lake County Board of Commissioners (“Lake County”) submits this response to the Confederated Salish and Kootenai Tribes’ (“CSKT’s”) Motion to Dismiss Counterclaims of Lori Lundeen and Lake County [Doc. No. 33] (“Motion”).

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I. INTRODUCTION

The Motion must be denied. CSKT's Motion takes the inconsistent position that CSKT can sue to quiet title in the property identified in CSKT's Complaint (the "Disputed Property"), but that Lake County is barred by CSKT's immunity from suit from obtaining the same relief against CSKT. When, as here, CSKT invokes the Court's jurisdiction to resolve a particular controversy, CSKT consents to the Court's jurisdiction and waives its immunity from suit for mirror image counterclaims¹ raised by Lake County.

The fundamental dispute in this case, as framed by CSKT, is whether the roads, alleys, and public reserves in the Big Arm Townsite are tribal property or are owned by and under the administration of Lake County. *See, e.g.*, Complaint ¶ 18 ("The roads, alleys and public parks within the proposed town site have remained in trust for the CSKT."); *id.* ¶ 59 ("Pursuant to 28 U.S.C. § 2409a, CSKT seek a determination quieting title to the roads, alleys and public parks within the proposed town site."); Complaint Prayer For Relief ¶ A (CSKT requests "[j]udgment quieting Plaintiff's beneficial interest to the real property (held in trust by the United States for the benefit of the CSKT), and determining that Defendants have no right, title, or interest in or to the real property").

¹ Lake County is filing contemporaneously herewith an Amended Counterclaim.

CSKT has placed the dispute over title squarely before this Court by filing this lawsuit. In so doing, CSKT has waived sovereign immunity for the counterclaims filed by Lake County which request mirror image relief: that the Court quiet title in Lake County and declare that CSKT has no right, title, or interest in or to the Disputed Property. Consequently, CSKT's Motion to Dismiss is an exercise in futility. This Court has jurisdiction to decide the merits of CSKT's Complaint, *i.e.*, to finally resolve the dispute between CSKT and Lake County over ownership of the Disputed Property, and CSKT will be bound by that determination.

There is no question that Lake County has the right to advance factual and legal defenses including alternative interpretations of the Treaties, historical and contemporary facts, and legal arguments to refute CSKT's assertions. To hold otherwise would frustrate long-established principles of jurisdiction.

II. STANDARD FOR MOTION TO DISMISS

The Motion does not identify the Federal Rule of Civil Procedure upon which it is based. CSKT states, correctly, that Lake County identified 28 U.S.C. Section 1331² for subject matter jurisdiction, that Lake County identified two waivers of

² Other than this passing reference to Section 1331, CSKT advances no arguments or case law suggesting that Lake County did not properly invoke Section 1331, and consequently has not properly invoked this Court's ruling on that subject. In any event, such an argument lacks merit. Section 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Lake County's counterclaim arises under, in part, the Treaties between CSKT and the United States, and also under the laws of the United States, including the Flathead Allotment Act, the Indian Reorganization Act, and federal Indian law. To the extent CSKT makes a further argument based on Section 1331, Lake County reserves the right to seek to file a sur-reply.

sovereign immunity (the filing of this lawsuit, and committing a depredation in violation of the Lame Bull Treaty³), and bases its counterclaim on the Montana Quiet Title Act. *See* Motion at 2-3. CSKT then argues, incorrectly, that Lake County’s counterclaim does not “properly invoke[] federal jurisdiction and...must be dismissed.” Motion at 3. For purposes of this Response, Lake County assumes that CSKT intended to move for dismissal under either Fed. R. Civ. P. 12(b)(1) as a facial jurisdiction challenge or Fed. R. Civ. P. 12(b)(6).⁴ In either case, this Court must assume that all of Lake County’s factual assertions are true, and must construe those facts in the light most favorable to Lake County. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (for 12(b)(1) (when ruling on facial jurisdictional challenges, a court must assume all “allegations [in a counterclaim] to be true and draw all reasonable inferences in [the counterclaimant’s] favor”); *Daniels–Hall v. National Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (stating that when reviewing a 12(b)(6) motion to dismiss, a court “accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light most favorable to the non-moving party.”).

³ Lake County previously referred to the Lame Bull treaty as the “Treaty with the Blackfoot Indians.” In this Response, Lake County has adopted the naming convention used by CSKT in its briefing to avoid confusion.

⁴ Because CSKT did not identify the appropriate dismissal standard, CSKT could not have and did not demonstrate that dismissal is warranted under those standards. If CSKT raises a different basis for its dismissal in its Reply, Lake County reserves the right to seek to file a sur-reply.

CSKT's Motion must be dismissed because, viewing the facts in Lake County's counterclaim as true and in the light most favorable to Lake County, Lake County has demonstrated that this Court has jurisdiction over Lake County's claims and the counterclaim states a claim for relief that is plausible on its face.

III. ARGUMENT

A. CSKT's Immunity From Suit Does Not Bar Lake County's Counterclaim.

CSKT asserts that it is immune from Lake County's counterclaims because "a tribe's decision to go to court doesn't automatically open it up to counterclaims—even compulsory ones." Motion at 5 (quoting *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (9th Cir. 2015)). CSKT's argument ignores the facts of this case and law establishing that Tribes do waive sovereign immunity for counterclaims directly related to the claims in a Tribe's complaint. The facts of this case make clear that CSKT has consented to Lake County's counterclaim by virtue of CSKT's invocation of this Court's jurisdiction. CSKT's Complaint explicitly invites this Court to resolve the dispute between CSKT and Lake County regarding ownership of the Disputed Property. By filing this suit, the "Tribe [has] accepted the risk that it [will] be bound by an adverse determination of ownership of the disputed land" See *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). For these reasons and the waiver of CSKT's immunity by Treaty,

CSKT's contention that it is immune from Lake County's counterclaim fails and must be rejected.

1. CSKT clearly and unmistakably consented to this Court's jurisdiction to determine title to the Disputed Property.

Lake County does not dispute that, as a general matter, Indian tribes are immune from suit unless Congress has abrogated tribal sovereign immunity or the Tribe waives its immunity. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of OK*, 498 U.S. 505, 509 (1991); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribal immunity from suit "extends to suits for declaratory and injunctive relief"). Lake County also does not dispute that such waiver must be made in "'clear' and unmistakable terms." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)). As the Supreme Court has noted, however, "the terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 540 U.S. 584, 586 (1941)).

Courts in the Ninth Circuit have acknowledged that Tribes may unequivocally express a waiver of sovereign immunity by conduct, for example, by initiating a lawsuit. For example, the Ninth Circuit has held: "Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular

controversy. By initiating the 1972 action [to decide ownership of the land in question], the Tribe accepted the risk that it would be bound by an adverse determination of ownership of the disputed land.” *McClendon*, 885 F.2d at 630. Similarly, in *Bodi*, the Ninth Circuit confirmed: “By filing a lawsuit, a tribe may of course consent to the court’s jurisdiction to determine the claims brought and thereby agree to be bound by the court’s decision on those claims.” 832 F.3d at 1017 (alterations and quotation marks omitted) (citing *McClendon*, 885 F.2d at 630 and *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (“When the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts. Moreover, requesting equitable relief from the federal district court constitutes an appeal to the sound discretion of the court . . . To hold that the district court could exercise its discretion to quiet title in favor of the plaintiff (the Tribe) but not the defendant (Rupp and Henderson) would be anomalous and contrary to the court's broad equitable powers.”)).

Based upon these principles, courts have held that a Tribe waives sovereign immunity for counterclaims to quiet title or for declaratory judgment when those counterclaims request mirror-image relief. *See, e.g., Rupp*, 45 F.3d at 1245; *Round Valley Indian Tribes v. McKay*, 2005 WL 552545, *2 (N.D. Cal. Mar. 8, 2005) (holding that a Tribe waived its sovereign immunity with respect to a determination regarding the Tribe’s and a private landowner’s dispute over land ownership);

Wyandotte Nation v. City of Kansas City, Kansas, 200 F. Supp. 2d 1279, 1285 (D. Kan. 2002) (holding that “the tribe's action in filing a quiet title suit necessarily places before the court the issue of whether plaintiff or defendants hold title to the land,” which constituted a waiver of the Tribe’s sovereign immunity for the defendant's quiet title counterclaim); *accord Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (noting that a Tribe’s filing of suit affecting petroleum corporation’s interests in oil and gas leases would have waived tribal immunity with regard to the petroleum company’s intervention in that suit, even if it did not waive sovereign immunity for subsequent actions related to the same leases).⁵

A review of CSKT’s Complaint demonstrates that the “particular controversy” to which CSKT has consented to suit is resolution of the dispute regarding title of the Disputed Property as between CSKT and Lake County. CSKT, in its Complaint, states that “an actual controversy exists concerning the property rights of the parties within the jurisdiction of the Court.” Complaint ¶ 5. Count 1 of

⁵ The Supreme Court has also held that a Tribe can waive its sovereign immunity, even without using specific waiver language, when the “clear import” of an agreement to which a tribe is a party is to agree to state court suit. *See C & L Enterprises*, 532 U.S. at 414; *id.* at 422 (stating that the arbitration agreement at issue had a “real world objective; it is not designed for regulation of a game lacking practical consequences”). CSKT’s decision to seek a declaration from this Court over title to the Disputed Property has “a real world objective”, *i.e.*, to quiet title to the Disputed Property, whether in CSKT or the County. CSKT is now bound by its decision to invoke this Court’s jurisdiction, including this Court’s jurisdiction over the Counterclaim. Allowing CSKT to assert its rights and interests while simultaneously prohibiting Lake County from doing the same would be contrary to fairness and justice. *See, e.g., Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980) (“There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy.”). Fairness and justice require that this Court hear Lake County’s counterclaim, particularly when CSKT took affirmative action in erecting the gate across E Street.

the Complaint is to quiet title and states: “An actual and substantial controversy exists concerning the title of the land in question.” Complaint, ¶ 49. CSKT’s Prayer for Relief requests that this Court enter a judgment “quieting [CSKT’s] beneficial interest to the real property...and determining that [Lake County and Ms. Lundeen] have no right, title, or interest in or to the real property.” Complaint, Prayer for Relief, ¶ A. CSKT’s Complaint outlines CSKT’s basis for its assertion of title to the Disputed Property and also identifies CSKT’s discussions with Lake County regarding Lake County’s assertion of ownership and regulatory authority, and includes allegations refuting County ownership and regulatory authority. Clearly, then, CSKT voluntarily and expressly asked this Court to decide the issue of title to the Disputed Property. In other words, and consistent with the law discussed above, by initiating this lawsuit, CSKT consented to this Court’s jurisdiction with respect to this issue, and accepted the risk that CSKT would be bound by a determination against it. *See Bodi*, 832 F.3d at 1017 (stating that when a Tribe files a lawsuit, the Tribe consents to the court’s jurisdiction over the claims brought and agrees to be bound by the court’s resolution of those claims).

Despite this clear consent, CSKT argues that it did not waive its immunity from suit for Lake County’s counterclaim, despite the fact that Lake County seeks the same relief, albeit the opposite result, that CSKT seeks in its Complaint. CSKT appears to take the position that a Tribe never waives its immunity from suit with

respect to counterclaims. The cases CSKT cites, however, do not support that broad proposition. Certainly, the Ninth Circuit cases CSKT cites set out the general rule that simply by filing a lawsuit, a Tribe does not “automatically” waive its immunity from suit for counterclaims. *See* Motion at 5. Lake County is not asserting that the mere filing of this lawsuit automatically waived CSKT’s immunity from suit for any counterclaim Lake County may have—rather it is the substance of CSKT’s claims, and CSKT’s act of invoking this Court’s jurisdiction to determine title that has waived CSKT’s immunity for the specific claims advanced by Lake County. For purposes of this particular controversy, CSKT consented to resolution by this Court of all issues in this case touching on ownership of the Disputed Property, including Lake County’s quiet title counterclaim.

The cases CSKT cites are not to the contrary. *Bodi*, 832 F.3d 1011 (cited Motion at 13), involves the question of whether a Tribe waives its immunity from suit by removing a state court action to federal court, which is not at issue here. To the extent *Bodi* is relevant, it confirms that CSKT has waived its immunity from suit as to Lake County’s counterclaims. *Id.* at 832 F.3d at 1017. The procedural posture of *McClendon* (cited Motion at 5), like *Bodi*, is distinguishable. In *McClendon*, the Colorado River Indian Tribe apparently requested that the United States bring suit on the Tribe’s behalf against McClendon’s predecessors in interest to quiet title, which the Ninth Circuit characterizes as the Tribe “initiating” the lawsuit. *See* 885

F.2d at 628, 629, & n.1. That suit resulted in a settlement whereby title was quieted in the United States and the Tribe, and the Tribe agreed to issue a long-term lease to McClendon's predecessor in interest. *Id.* at 628. McClendon then brought a second, different suit against the United States asserting that the Tribe breached the lease agreement. *Id.* at 629. McClendon argued that the Tribe waived its immunity by initiating the earlier lawsuit, which the Ninth Circuit rejected. *Id.* at 631. Unlike in McClendon, Lake County has asserted its counterclaim in the same suit that CSKT initiated, and the counterclaim is "inextricably linked" with the "particular controversy" CSKT raises before this Court. *See McClendon*, 885 F.2d at 630 (initiation of a lawsuit "necessarily establishes consent to the court's adjudication of the merits of that particular controversy"; *id.* at 631 (rejecting argument that "disputes over interpretation of the 1984 lease agreement are collateral disputes, and are not so inextricably linked which the 1972 suit that the initiation of the latter, in itself, constitutes consent to suit over the former"). *McClendon* confirms that CSKT, by filing its Complaint, consented to the Court's "jurisdiction to decide ownership of the land in question," *McClendon*, 885 F.2d at 631, which necessarily includes Lake County's counterclaim.

2. Lake County's counterclaims do not go beyond the issues CSKT raised.

Contrary to the assertion in the Motion, Lake County's counterclaims do not seek relief beyond that CSKT seeks. Motion at 9. Lake County, like CSKT, seeks

to have title to the Disputed Property quieted in itself as to the parties to this lawsuit. Because Lake County seeks the same relief CSKT seeks, just the mirror image, the cases CSKT cites regarding tribal immunity from counterclaims are inapposite. CSKT, in its Prayer for Relief, has invoked this Court's jurisdiction over all of the Big Arm Townsite. For example, CSKT's request for preliminary injunctive relief, now mooted by the Stipulation, requested that this Court enjoin Lake County from "developing or constructing new roads within the proposed town site"; using rights-of-way for utility installation, and "exercising regulatory authority over the roads, alleys or public parks within the proposed town site." Prayer for Relief, ¶ B. CSKT also seeks a permanent injunction enjoining Defendants from trespassing or regulating the use of "Indian trust land within the proposed town site." In other words, in its Prayer for Relief, CSKT did not limit its relief to only a resolution of title as to E Street, but included all of the "roads, alleys, or parks" within the Big Arm Townsite. Faced with this broad request for relief, Lake County requested that the Court quiet title in the streets, alleys, and public reserves in Big Arm Townsite.⁶

⁶ CSKT, in its Response to Lake County's Motion for Preliminary Injunction, said that it would abide by the Court's decision, which demonstrates that CSKT has accepted the risk that it would be determined to not have any regulatory authority over the Disputed Property. *See* Exhibit A to Tribe's Response to Motion for Preliminary Injunction (Doc.29), filed July 1, 2019 at ¶ 4 ("Should the County ultimately prevail, the Tribes assure Ms. Lundeen that the CSKT will abide by any decision of the court."). Consequently, CSKT accepted the risk that this Court could rule in Lake County's favor, and accepted the risk that the Court could enjoin CSKT from trespassing on or regulating the use of the roads and alleys within the Big Arm Townsite.

See Counterclaim, Prayer for Relief. Lake County’s requested relief is the mirror image of CSKT’s requested relief.

While *Potawatomi*, 498 U.S. at 511, *Ute Indian Tribe*, 790 F.3d 1000, and *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511 (1940) (all cited Motion 5) set out the general proposition that the mere filing of a lawsuit does not amount to *an automatic waiver of immunity from suit for counterclaims*, those cases do not foreclose a conclusion that waiver has occurred here because the relief sought in the counterclaims at issue in those cases is distinguishable, and that difference has legal significance. For example, in *Potawatomi*, 498 U.S. at 507-08, the Tribe filed suit to enjoin the Tax Commission’s assessment for taxes on cigarette sales, and Oklahoma counterclaimed to enforce the assessment *and* to enjoin the Tribe from selling cigarettes in the future without collecting state taxes.⁷ In *Ute Indian Tribe*, 790 F.3d at 1011, the Tribe’s suit sought to bar relitigation of earlier cases and enjoin prosecuting Indians for offenses committed on tribal lands, whereas the counterclaims sought an injunction barring the Tribe from bringing lawsuits against county officials in federal court. In *United States Fidelity & Guaranty*, 309 U.S. at 511, the United States filed suit on behalf of the Tribes for royalties due under coal leases and the defendants cross-claimed for monetary credits against the Tribes.

⁷ Interestingly, however, the Supreme Court went on to reach the counterclaim’s question “whether the Tribe can be assessed for taxes on its sales of cigarettes...by reasoning that the issue of the Tribe’s prospective liability ‘is fairly subsumed’ in the Tribe’s main action.” 498 U.S. at 515 (Stevens, J. concurring).

The courts in these cases concluded that no waiver of immunity had occurred because the counterclaims sought relief that was different from the relief requested in the complaint, which is not the situation here.

CSKT specifically identifies Lake County's citations to the Treaties and the depredation clauses as proof that Lake County's counterclaims exceed the issues raised by CSKT. *See* Motion at 9. This argument ignores CSKT's own reliance on these same Treaties and CSKT's invocation of the Court's jurisdiction to adjudicate a dispute which requires interpretations of these Treaties. First, CSKT itself raised the Hell Gate Treaty in its Complaint, and as a basis for its assertion of title. *See* Complaint ¶¶ 1, 8, 51. Second, even if Lake County had not filed a counterclaim, Lake County would still have the right to raise the Treaties and their included depredation clauses to refute CSKT's claim to title, and as part of the entire picture that needs to be considered in addressing the merits. Having invoked these treaties as part of its request for relief, CSKT cannot pick and choose the parts of the Hell Gate Treaty that favor it, and cannot entirely ignore the Lane Bull Treaty. Instead, this Court can, and indeed must, consider the entirety of these Treaties because they form the basis both for CSKT's claims and for the claims and defenses of Lake County.

B. CSKT Misconstrues Lake County's Reliance On The Treaties

CSKT's Motion misconstrues Lake County's citations to the Hell Gate and Lame Bull Treaties. *See* Motion at 9-17. It is true that Lake County asserts the non-depredation clauses in the Treaties as an additional or alternative basis for this Court to find a waiver of sovereign immunity. *See* Counterclaim ¶ 5. This Court need not reach that issue, however, because as discussed above, CSKT's litigation conduct establishes a clear and unmistakable waiver of sovereign immunity. Lake County's primary reliance on the Treaties, however, is to highlight historical facts relevant to both CSKT's and Lake County's claims.

1. The Treaties contain mutual obligations.

Lake County and CSKT agree that Treaties are the supreme law of the land. *See* Motion at 10. CSKT's position appears to be that non-members (non-Indians) cannot base claims on the Treaties, even though, as Lake County's counterclaim establishes, the Treaties contain promises running from CSKT directly to U.S. citizens. For example, in the Hell Gate Treaty, CSKT "promise[d] to be friendly with all [United States'] citizens, and pledge[d] themselves to commit no depredations upon the property of such citizens." Hell Gate Treaty Art. VIII. CSKT agreed that the Hell Gate Treaty would be obligatory upon it once it was ratified. Art. XII. In the Lame Bull Treaty, CSKT "agree[d] that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by

them.” Lane Bull Treaty Art. VII. CSKT also agreed and consented to the United States “construct[ing] roads of every description” “[f]or the purpose of establishing travelling thoroughfares through [its] country,” Art. VIII. CSKT specifically “promise[d] to be friendly with all [United States’] citizens..., and to commit no depredations...upon such citizens.” Art. XI. As with the Hell Gate Treaty, CSKT agreed that the Lane Bull Treaty would be obligation upon it as soon as it was ratified. Art. XVI; *see also* Counterclaim ¶¶ 17, 18, 23-33 (citing Treaties’ language that provide that 1) public roads could be run through the Reservation and 2) access across and over the Reservation on those roads was to be available to both the Tribes and U.S. citizens). As the Treaty language makes clear, these promises flow from CSKT to U.S citizens, including Ms. Lundeen and other members of the public. *See County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009) (internal citations and quotation marks omitted) (noting the general rule that a third party can recover under a contract if it can show that “the contract was made for its direct benefit—that it is an intended beneficiary of the contract.”), *rev’d sub nom. Astra USA, Inc. v. Santa Clara County, Cal.*, 563 U.S. 110 (2011); *see also Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (“A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a

nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”).

Lake County relies on these mutual obligations for factual support indicating that, even as of the time of the Treaties, U.S. citizens were guaranteed the right to travel on roads constructed by the United States through the Reservation, which refutes CSKT’s arguments. In any event, CSKT cites no law that says that non-Indians or non-members cannot sue to enforce treaty provisions designed to benefit the non-Indian or non-member, and, in fact, as discussed below, the case law CSKT cites supports Lake County.⁸

In several places in its Motion, CSKT attempts to refute Lake County’s argument that the Treaties guaranteed to U.S. citizens the right to travel on roads through the Reservation. On page 11, the Motion takes issue with Lake County’s argument that the Hell Gate Treaty contemplated allotments and citizens residing on the Reservation, citing *Confederated Salish and Kootenai Tribes v. United States*, 437 U.S. 458 (Ct. Cl. 1971). At the outset, it is important to note that whether non-Indians could live on the Reservation is not at issue here, and so CSKT’s arguments regarding that statement in Lake County’s counterclaim are irrelevant. In any event, the Court of Federal Claims apparently did not have before it the language in the

⁸ The fact that the Treaties were intended to cede portions of land is uncontested and simply does not impact whether non-Indians can sue to enforce treaty provisions.

Lame Bull Treaty ratified before the Hell Gate Treaty, in which CSKT agreed that United States citizens could “*live in and* pass unmolested through the countries respectively occupied and claimed by them.” Art. VIII. Other language in the Lame Bull Treaty is also inconsistent with the notion of exclusive use, including the agreement that “navigation of lakes and streams shall forever be free to citizens of the United States.” *Id.*

CSKT’s Motion also discusses the right to travel clause in the Hell Gate Treaty, along with the history of that Treaty’s negotiations, in an attempt to call into question Lake County’s reliance on the right to travel clauses in the Hell Gate and Lame Bull Treaties. Motion at 14-16. CSKT argues that the Tribes would not have understood the Treaties as creating permanent non-Indian rights-of-way to construct roads across lands of the signatory tribes. Motion at 14-15. CSKT’s arguments fail because they are inconsistent with the *Treaties’* language. CSKT focuses only on the Hell Gate Treaty, and ignores the Lame Bull Treaty, which is binding.

While the Motion accurately quotes the Hell Gate Treaty negotiation minutes, *see* Motion at 15, Governor Stevens’ quoted statement is inconsistent with the Hell Gate Treaty’s terms, which expressly contemplated public highways, available for public travel, across and through the Reservation. This intent is further demonstrated by the Lame Bull Treaty, negotiated only a few months later and, importantly, ratified *before* the Hell Gate Treaty, in which CSKT promised that U.S. citizens

could live and “pass unmolested” through the Reservation, Art. VII, and that roads could be constructed through the Reservation. Art. VIII. Further, as Lake County has demonstrated, once a public road is constructed (and, as here dedicated), the Treaties guarantee to U.S. citizens an easement in gross, in common with tribal members. *Cf. United States v. Winans*, 198 U.S. 371, 382 (1905).

Second, while the Motion accurately quotes the Hell Gate Treaty negotiation minutes, *see* Motion at 15, Governor Stevens’ quoted statement is inconsistent with the Hell Gate Treaty’s terms, which clearly contemplated public highways, available for public travel, across and through the Reservation. This intent is further demonstrated by the Lame Bull Treaty, negotiated only a few months later and, importantly, ratified *before* the Hell Gate Treaty, where CSKT promised that U.S. citizens could live and “pass unmolested” through the Reservation, Art. VII, and that roads could be constructed through the Reservation. Art. VIII.

Lake County agrees that the Treaties’ terms have to be construed in the way CSKT would have understood at the time the Treaties were signed. Justice Gorsuch, in his concurrence in *Washington State Dep’t of Licensing v. Cougar Den*, ___ U.S. ___, 139 S.Ct. 1000 (2019) quoted from the findings of fact in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), with respect to how the Yakama Nation would have understood the phrase “in common with” at the time of the Treaty with the Yakama Indians of 1855. While CSKT and the Yakama Nation

may have had different understandings of that phrase, the language Justice Gorsuch quotes is instructive, given that the findings of fact relate to the Yakama Nation's understanding of the phrase "in common with" included in a treaty also negotiated by Isaac Stevens just prior to the negotiations regarding the Hell Gate Treaty. Justice Gorsuch quoted: "To the Yakamas, the phrase 'in common with' implied that the Indian and non-Indian use would be joint but did not imply that the Indian use would be in any way restricted." *Cougar Den*, 139 S.Ct. at 1016-1017 (Gorsuch, J concurring) (quoting *Yakama Indian Nation*, 955 F.Supp. at 1265) (alterations omitted). Justice Gorsuch also quoted the following: "[T]he most the Indians would have understood of the terms 'in common with' and 'public' was that they would share the use of the road with whites." *Id.* (quoting *Yakama Indian Nation*, 955 F.Supp. at 1265). This quoted language demonstrates that a Tribe, agreeing to a similar treaty, negotiated around the same time, understood this language to mean shared use of the roads with non-Indians.

In sum, the language of the two Treaties establishes that CSKT promised to allow United States' citizens passage through the Reservation. CSKT violated that promise here.

2. Lake County does not seek damages.

CSKT's Motion argues that Lake County lacks standing to seek damages under the Treaties, while inconsistently (but correctly) stating that neither Lake

County nor Ms. Lundeen seek monetary damages. *Compare* Motion at 12 (County lacks standing to seek damages under Treaties) *with* Motion at 8 (County does not seek monetary damages).⁹ These arguments are irrelevant because Lake County is not seeking monetary damages in its counterclaim.

CSKT also asserts that the Treaties do not provide a private right of action. *See generally* Motion at 10-14. CSKT appears to misunderstand the import of *Skokomish v. United States*, 410 F.3d 506 (9th Cir. 2005). CSKT states that the case stands for the proposition that non-contracting parties cannot sue to enforce treaty promises. Motion at 12-13. *Skokomish*, however, deals with whether a contracting party (a Tribe) to the treaty can sue a non-contracting party (the City of Tacoma and Tacoma Public Utility) for breach of the treaty violations. Here, Lake County and Ms. Lundeen are counterclaiming against CSKT, which is a contracting party to these Treaties and is bound by *its* obligations thereunder. In addition, *Skokomish* itself acknowledged that a treaty can “provide rights of action for equitable relief against non-contracting parties.” 410 F.3d at 512. Thus, CSKT’s broad assertion that non-contracting parties do not have a jurisdictional basis to pursue treaty based affirmative relief from a treaty-Tribe is not supported by CSKT’s own authority. Finally, the treaty at issue in *Skokomish* has different language than that in the Hell

⁹ CKST contends that Lake County asserts equitable recoupment as a grounds by which CSKT’s immunity from suit has been waived. Motion at 7-8. Lake County did not assert equitable recoupment, Ms. Lundeen did, and so Lake County does not address that issue in this Response. In any event, as discussed above, CSKT waived its immunity from suit by filing this suit invoking this Court’s jurisdiction to resolve a competing dispute as to title.

Gate and Lame Bull Treaty, which compels a different conclusion. As established in Lake County's counterclaim, the Hell Gate and Lame Bull Treaties contain specific promises running from CSKT to U.S. citizens and specifically contemplate damages payable from CSKT's "annuities" or by CSKT itself. *See* Counterclaim ¶ 36; *see also* Hell Gate Treaty Art. VIII (if CSKT violates the non-depredation clause, and if that fact is satisfactorily proven to the agent, then "compensation may be made by the government out of the annuities"); Lame Bull Treaty Art. XI (if a treaty Tribe violates the non-depredation clause, and if that fact is satisfactorily proven to the President, then "compensation may be made by the government out of the annuities" and the treaty-Tribe is "held responsible in their tribal capacity[] to make reparation for depredations so committed"). In other words, unlike the treaty at issue in *Skokomish*, the Treaties relevant here have specific language supporting claims against CSKT, including claim for damages. Again, however, Lake County is not seeking monetary damages against CSKT.

Cree v. Waterbury, 873 F.Supp. 404, 427-29 (E.D. Wash. 1994), *see* Motion at 13-14, is distinguishable and does not support CSKT's contention that Lake County and Ms. Lundeen cannot pursue treaty-based relief against CSKT. In *Cree*, the Washington district court concluded that a Makah tribal member, employed by the Navajo Nation, did not have a right to enforce the Yakama Treaty. The court noted: "[T]he Court finds that no rights provided in the Treaty vest in the non-

member agent or employee,” *id.* at 428, and that the non-member was “attempt[ing] to exercise rights as a proxy....” *Id.* at 429. Here, to the contrary, the Treaties specifically vest rights in U.S. citizens, and Ms. Lundeen, a U.S. citizen, and Lake County, on behalf of the public, do not seek to exercise these Treaty rights as “proxies,” but rather as intended beneficiaries.

For this same reason, CSKT’s argument on pages 16-17 regarding the non-depredation clause of the Treaties is irrelevant and incorrect. CSKT states that the non-depredation clauses “provide no remedy for the damage claims of the County and Ms. Lundeen.” Motion at 16. Because Lake County does not seek damages in its counterclaim, this argument is beyond the scope of this suit.¹⁰ Similarly, CSKT’s discussion of the Indian Depredation Act is irrelevant, as Lake County does not seek to use that act as a basis for jurisdiction in this Court. Finally, to the extent relevant, CSKT advances an overly narrow reading of the term “depredation” that is inconsistent with the treaty language. The Treaties discuss depredation in terms of property taken, injured, or destroyed. *See* Hell Gate Treaty Art. VII; Lame Bull Treaty Art. XI. In other words, and contrary to CSKT’s argument, the non-depredation clauses are not limited to property “absolutely lost, either by theft or destruction.” Motion at 17. Rather, as alleged here, the non-depredation clauses

¹⁰ Lake County has sought review through the BIA appeal process. *See* Answer ¶ 45.

represent a promise from CSKT to U.S. citizens to not take, injure, or destroy their property, a promise that was breached when CSKT installed the gate across E Street.

C. The Applicability of the Federal and Montana Quiet Title Acts

CSKT has conceded in its Motion that the Federal Quiet Title Act does not apply. CSKT has not, however, amended its Complaint.¹¹ CKST misinterprets the reason for which Lake County cited the Montana Quiet Title Act. Lake County, recognizing that the Federal Quiet Title Act did not apply, cited the Montana Quiet Title Act as law to guide this Court.

If this Court concludes that federal common law governs then there is no need to rely on the Montana Quiet Title Act. Because Lake County cited to the Montana Quiet Title Act for the limited purpose of providing a framework for advancing this lawsuit, and not as the exclusive substantive law that applies, the case law CSKT cites is irrelevant and does not demonstrate that Lake County's quiet title action is preempted.

Even if somehow relevant, *In re Big Spring Estate*, 255 P.3d 121 (Mont. 2011), and *Blaze Construction, Inv. v. Glacier Electric Coop.*, 928 P.2d 223 (Mont. 1996), discussed Motion at 6, do not compel the conclusion that “no state court

¹¹ CSKT, while stating that the federal Quiet Title Act, nevertheless states that the United States has a colorable claim to the land in dispute. This argument ignores the evidence that Lake County advanced in its counterclaim that the Department of the Interior specifically disclaimed any title to the roads and alleys in the Big Arm Townsite. *See* Counterclaim ¶¶ 60-65.

would have jurisdiction to hear a Montana quiet title action involving trust land located in the Reservation.” This statement in CSKT’s Motion presumes away the dispute at issue in this case, whether the Disputed Property is trust land. More importantly, *Big Spring* did not establish the *per se* rule CSKT advances, but instead clarified that a court analyzing a State’s claim to jurisdiction, must undertake the *Bracker* balancing test. *Big Spring*, 255 P.3d at 389. CSKT has not asked this Court to undertake that balancing test. Beyond that, the facts of *Big Spring*, which influenced the court’s balancing analysis, are distinguishable. *Big Spring*, 255 P.3d at 390-94. In *Big Spring*, unlike here, the land was undisputedly owned by a member of the Blackfeet Tribe, whom, unlike CSKT, had not consented to PL 280 jurisdiction. Additionally, *Big Spring* involved a tribal probate matter—and the Blackfeet Tribe had a tribal probate code that vested jurisdiction in tribal court. The indispensability analysis in *Blaze Construction* is equally inapplicable. CSKT is a party and has consented to this Court’s jurisdiction to determine title to the Disputed Property; thus there is no indispensability issue. Finally, CSKT’s attempt to project this case and its procedural posture onto a hypothetical, unfiled state court action should be rejected.

In any case, Lake County’s citation to state law, even if erroneous, does not mandate dismissal of this case where the requested relief is clear. *See Scott v. Mortgage Elec. Registration Sys., Inc.*, 605 Fed. Appx. 598, 599-600 (9th Cir. 2015)

(“The Scotts' failure to identify a specific “statutory basis or common law basis for the quiet title claim in their complaint was also not a proper ground for dismissal. A complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss.”).

IV. CONCLUSION

This Court should deny CSKT's Motion to Dismiss.

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CERTIFICATION OF COMPLIANCE

Under Civil Rule 7.1(d)(2) of the Local Rules of Procedure of the United States District Court for the District of Montana, I hereby certify that the foregoing brief excluding caption, certificate of compliance, table of contents, table of authorities, exhibit index, signature block, and certificate of service contains 6,485 words, as determined by the word count function of Microsoft Word.

By: /s/ Spencer L. Edelman
Spencer L. Edelman

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, the foregoing was filed electronically with the Clerk of Court using the CM/ECF System, which caused ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

By: /s/ Spencer L. Edelman
Spencer L. Edelman

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