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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v. LAKE COUNTY BOARD OF COMMISSIONERS and LORI LUNDEEN, Defendants.	Cause No. CV 19-90-M-DLC **CONFEDERATED SALISH AND KOOTENAI TRIBES' REPLY TO DEFENDANT LUNDEEN'S RESPONSE TO TRIBES' MOTION TO DISMISS**

The Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT" or "Tribes") moved to dismiss the counterclaims of the Lake County Board of Commissioners ("Lake County") and Ms. Lori Lundeen because "neither counterclaim properly invokes federal jurisdiction." Doc. 33 at 3. ("Tribes' Brief") Ms. Lundeen asserts that their counterclaims are proper under 28 U.S.C. § 1331 and should not be dismissed under the standards set out in Federal Rule of Civil Procedure 12(b)(1). Doc. 41 at 8-9. The Tribes offer this Reply to Ms. Lundeen's Response. Doc. 41 ("Lundeen's Response"). Citations in this brief will be to the ECF page numbering.

SUMMARY

The Tribes have not waived sovereign immunity to Ms. Lundeen's counterclaims. Ms. Lundeen has not brought "mirror-image" claims and she is not entitled to pursue her claims under a recoupment theory. Even if this Court finds that the Tribes have enacted a limited waiver of sovereign immunity for a mirror image counterclaim, this Court cannot grant any title to land that may be trust lands, since Ms. Lundeen is barred from making such a claim.

Ms. Lundeen has not asserted any statutory basis for the jurisdiction of this Court. She lacks standing to claim rights she presumes she has pursuant to Indian treaties. Ms. Lundeen cites the Flathead Allotment Act (FAA) as a basis for jurisdiction, but she is not entitled to any affirmative relief under the FAA. Her

arguments there are best raised as a defense. Ms. Lundeen also challenges the Tribes' aboriginal land claims, but the Tribes brought a claim to affirm their interest in Tribal trust land held by the United States, not claims for aboriginal title to alienated or off-reservation lands. Ms. Lundeen's counterclaims should be dismissed.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) addresses the Court's subject matter jurisdiction. Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007) (citing *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006)). Indian Tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity protects tribes from suit absent a clear waiver by the tribe or express authorization by Congress to abrogate tribal sovereign immunity. *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

Federal courts are courts of limited jurisdiction and are presumed to lack subject matter jurisdiction absent a statutory authorization. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (stating that party asserting jurisdiction has the burden of establishing jurisdiction). Even if there has been an

express waiver of a tribe's immunity, "the absence of immunity does not establish the presence of subject matter jurisdiction….Therefore, to establish that the district court ha[s] subject matter jurisdiction over their claims, [parties] must establish some form of statutory authorization for their claims." *Table Mountain Rancheria*, 509 F.3d at 1016 (citing *Vacek*, 447 F.3d at 1250). Once challenged by a Rule 12(b)(1) motion, the burden of establishing jurisdiction is on a plaintiff and no presumption of truthfulness applies to the allegations of the challenged complaint. *Flathead Irrigation Dist. V. Jewell*, 121 F.Supp.3d 1008 (D. Mont. 2015) (citing *Thomson v. Gaskill,* 315 U.S. 442, 446 (1942); *Thornhill Pub. Co., v. General Tel. & Electronics Corp.,* 594 F.2d 730, 733 (9th Cir. 1979)).

ARGUMENT

The Tribes submit that their Brief (Doc 33) sets out an adequate basis for this court to dismiss the defendants counterclaims. The Tribes offer this Reply to Ms. Lundeen.

A. The Federal Quiet Title Act Expressly Excludes Indian Trust Lands.

The federal Quite Title Act 28 U.S.C. § 2409a ("QTA") on its face does not apply to Indian trust lands. Thus, that Act's waiver of sovereign immunity does not apply to this case. The Ninth Circuit has been clear: "While the United States has consented to be sued in quiet title in most public lands, it has expressly excluded Indian trust lands from that waiver of immunity. *Imperial Granite Co. v.*

Pala Band of Mission Indians, 940 F.2d 1269, 1272 (n. 4) (9th Cir. 1991) citing QTA § 2409a(a) (upholding dismissal of plaintiff's claim of property interest in road closed by tribe).[1]

B. The Tribes Have Not Waived Sovereign Immunity.

Ms. Lundeen acknowledges that the Tribes sovereign immunity would bar her claims, but argues that the Tribes have waived that immunity by filing this suit. Lundeen's Response, Doc. 41 at 9. As explained in the Tribes' Brief, courts have consistently held that a tribe's initiation of a lawsuit does not waive its sovereign immunity. Tribes' Brief, Doc 33 at 3-5. Ms. Lundeen counters that the Tribes effected a limited waiver of sovereign immunity since the "Tribes are subject to counterclaims addressing the same issues they raised by filing their Complaint." Lundeens' Response, Doc 41 at 12. She also argues she is entitled to bring her claims under a theory of equitable recoupment. *Id.* 13. Ms. Lundeen is incorrect.

1. Ms. Lundeen has asked this Court for declarations that go far beyond the scope of the Tribes' suit. The Tribes have not asked this Court to make any interpretations of the Hellgate Treaty of 1855, 12 Stat. 975, ("Hellgate Treaty") nor have the Tribes cited to additional treaties. Ms. Lundeen seeks broad declarations

[1] The Tribes' Compliant (Doc 1) initially cited to the QTA as one of several jurisdictional basis for their complaint, but have withdrawn their reliance on that Act since the QTA is inapplicable to Indian trust lands. *See* Tribes' Brief, Doc. 33 at 7, n. 1.

regarding the meaning of the Hellgate Treaty, and alleged rights under that treaty she has no standing to bring. *See infra*, pp. 9-12. Irrespective of her standing problem, Ms. Lundeen's treaty-based claims provide no express waiver of the Tribes' sovereign immunity.

2. Even if this Court found a limited waiver of the Tribes' immunity, this Court cannot grant Ms. Lundeen a title interest in the lands at issues since the QTA statutorily bars a plaintiff from claiming a property right when the United States has a colorable interest in Indian lands. *See,* Section A above, and Tribes' Brief, Doc 33 6-7 (citing *Alaska Department of Natural Resources v. United States,* 816 F.3d 580, 585 (9th Cir. 2016). While the Tribes can proceed with this case in order to protect their interest in tribal lands, as the trustee holding legal title to the disputed property, the United States "obviously has an interest in this litigation and it will not be bound by any decree ensuing from this litigation unless it is formally joined as a party." *Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251, 1254 (9th Cir. 1983). Any judgment from this Court granting Ms. Lundeen (or any other party) a property interest in the contested lands would be unenforceable against the United States, and could require the United States to bring a subsequent quite title action.[2]

[2] Aside from the QTA statutory bar to Indian lands (discussed above) the Tribes question whether Ms. Lundeen would have a sufficient "interest" under the QTA

The cases Ms. Lundeen cites suggesting the Tribes' waived sovereign immunity don't deal with tribal trust land claims; are cases where the United States was already a party; or cases where the tribe's lawsuit effected a waiver, but the claim for land title was nonetheless barred absent the United States. See, e.g. *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989); *Washoe Tribe of Nevada and California v. Brooks*, 175 F.Supp.2d 1255 (2001); *Round Valley Indian Tribes v. McKay*, 2005 WL 552545 (2005) (unreported).

Ms. Lundeen quotes extensively from *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) implying the Ninth Circuit has held Indian tribes waive immunity for adverse judicial rulings when initiating lawsuits. Lundeen's Response, Doc 41 at 10-11. But *Oregon* involved judicially retained control of the Columbia River fisheries, and the tribe there acknowledged the court's continuing jurisdiction when it expressed its unequivocal consent to the federal court hearing ongoing matters concerning those fisheries. The Ninth Circuit has hesitated to apply *Oregon* to distinguishable cases, stating it "tested the outer limits" of the Supreme Court's "admonition against implied waivers" *Pan Am v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989); *see also, McClendon*, 885 F.2d at 631 (distinguishing *Oregon* because the tribe in *McClendon* "merely sought a

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since members of the public cannot claim title to an alleged public road. *See, Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978).

declaration of land ownership" and initiation of that suit "in and of itself, does not manifest broad consent to suit over collateral issues").

While not cited in Ms. Lundeen's brief, the Ninth Circuit did allow a non-Indian claim for an easement across tribal land to proceed absent the United States in *Lyon v. Gila River Indian Community*, 626 F.3d 1059 (9th Cir. 2010). However, *Lyon*'s application here is limited. There, the bankruptcy trustee sought to maintain access to non-Indian property using a pre-existing road that was established and in use prior to becoming part of the Gila Indian Reservation. More importantly, the *Lyon* court noted that the trustee was not barred from bringing his claim against the Community because he was not seeking to quiet title and "does not contest the federal government's 'title' to the roads or claim a property interest in them." *Id.* at 1076.

Ms. Lundeen's claim is not for access to her private property through a pre-existing road. She intends to develop an access road for the public to enter and exit a subdivision. "Lundeen's Counterclaim challenges the land rights asserted by the Tribes. She asks this Court to quiet title in a manner 'reflecting the interests of Lake County and Ms. Lundeen, as well as the public at large.'" Lundeen's Response, Doc 41 at 25 (quoting Lundeen's counterclaims, Doc. 16 at 14).[3] Thus *Lyon* has no application here.

[3] But see note 2, p. 6.

3. Ms. Lundeen's claim does not sound in recoupment, and there has been no waiver of the Tribes' sovereign immunity for a recoupment claim. Ms. Lundeen cites to *Tohono O'odham Nation v. Ducey*, 174 F.Supp.3d 1194 (D. Az 2016) and argues that a "sovereign's filing of a lawsuit can constitute a limited waiver with respect to issues the sovereign itself put at issue." Lundeen's Response, Doc 41 at 10 (i.e. "mirror image" claims). However, the Ninth Circuit holding in *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093 (9th Cir. 2017) does not support that kind of limited waiver. The Ninth Circuit found the Quinault Indian Nation did not wave its immunity even as to a counterclaim that did not "go beyond the contours of the Nation's suit" because the tribe "did not consent to any counterclaims." *Id.* at 1098 (holding the Comenout estate "could assert affirmative defenses against the Nation's claims but could not bring counterclaims absent a waiver of sovereign immunity"). Equally important here, the *Quinault* court held that a claim only sounds in recoupment as a financial remedy to offset a plaintiff's monetary award, something Ms. Lundeen recognizes but asks this Court to ignore. Lundeen's Response, Doc 41 at 18. Ms. Lundeen cannot bring a recoupment based counterclaim.

C. There is No Jurisdiction to Hear Ms. Lundeen's Counterclaims.

Ms. Lundeen claims jurisdiction under 28 U.S.C. § 1331 citing treaties and federal law. Lundeen's Response, Doc. 41 at 19. None of these authorities provide this Court with jurisdiction.

1. The Tribes detailed the reasons why Ms. Lundeen has no individual right to enforce provisions of the Hellgate Treaty of 1855, 12 Stat. 975. Tribes' Brief, Doc 33 at 9-18.

The Tribes' Complaint states that through Article 2 of the Hellgate Treaty the Tribes reserved a homeland for their exclusive use and benefit. Doc. 1 at 3, ¶ 8. The creation of the Flathead Reservation caused no break in the chain of title, which simply converted from aboriginal Indian title to trust title held by the United States. *Id.* In the two times the Tribes' Complaint references the Hellgate Treaty it is for that unremarkable fact. Doc. 1 at 3, ¶ 8; at 13 ¶ 51. The fact that through a treaty an Indian tribe reserves for itself part of its aboriginal lands as a homeland to be held in trust by the United States is hardly a contested point. It is recognized in countless cases under the most basic tenants of federal Indian law. The Tribes have not asked this Court to interpret any substantive right or obligation under the Hellgate Treaty.

Regardless, Ms. Lundeen points to the Tribes citation to the Hellgate Treaty as an opportunity to allege rights under the Hellgate Treaty and 1855 Treaty with

the Blackfeet 11 Stat. 657 ("Lame Bull Treaty"). Ms. Lundeen's claims are unsupported by any precedent. More importantly, Ms. Lundeen has no standing to bring any affirmative claim under a theory of individual Hellgate Treaty rights.

2. Ms. Lundeen has no third party beneficiary rights under the Hellgate Treaty. "Lundeen's Counterclaim claims rights and asks this Court to interpret rights given to [her] under treaties." Lundeen's Response, Doc 41 at 21. Contrary to her assertions, the Hellgate Treaty conferred no third-party beneficiary status upon Ms. Lundeen. She cites no authority for her assertion that non-Indians are third party beneficiaries to United States' treaties with Indian nations. The Tribes have found no federal Indian case law dealing with common law claims for enforcement of treaty "rights" conferred upon non-Indians. Instead, Ms. Lundeen argues by analogy, including citing to third party rights under government contracts. Doc. 41 at 26-27.

While not controlling in a tribal treaty context, the Ninth Circuit's interpretation of third party rights in federal government contracting does not help Ms. Lundeen. "Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (citing to Restatement (Second) of Contracts § 313(2)). "Government contracts often benefit the public, but

individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Id.* (quoting Restatement § 313). The Ninth Circuit examines the "precise language of the contract for a 'clear intent' to rebut the presumption that the [third parties] are merely incidental beneficiaries." *GECCMC 2005-C1 Plummer Street Office Ltd. Partnership v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033-34 (9th Cir. 2012) (quoting *Orff v. United States*, 358 F.3d 1137, 1145-47 (9th Cir. 2004). The "clear intent hurdle is a high one. It is not satisfied by a contract's recitation of interested constituencies." *Id.* (citing *Klamath*, 204 F.3d at 1212).

Under the canons of Indian treaty construction this hurdle is even higher. Because there is a unique trust relationship between the United States and Indian tribes the Supreme Court will "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them," *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), and "construe[] [them] liberally in favor of the Indians with ambiguous provisions interpreted for their benefit." *City of Oneida v. Oneida Indian Nations*, 470 U.S. 226, 247 (1985). There is no evidence that by signing the Hellgate Treaty the Tribal leaders believed they would be subjecting themselves to future lawsuits brought by non-Indians alleging rights on land the Tribes had just reserved for their exclusive use an occupancy. Moreover, if the United States believed Indian treaties served as a basis for

common law treaty-based claims such as depredation, Congress would not have subsequently enacted the Indian Depredation Act, 25 U.S.C. § 229. Ms. Lundeen has no standing to assert any affirmative claims against the Tribes under the Hellgate Treaty. This Court should dismiss her counterclaim for lack of jurisdiction.

3. The Flathead Allotment Act of 1904 33 Stat. 302 ("FAA") provides no substantive basis for this Court to grant Ms. Lundeen's remedy. Even if well-pled, Ms. Lundeen alleges that the "FAA did not reserve lands for the exclusive use of the [Tribes], and that the Big Arm Townsite platted pursuant to the FAA confirms that tribal ownership of the roads is inconsistent with the dedication to public use." Lundeen's Response, Doc 41 at 23 (quoting Lundeen's Counterclaim, Doc. 16, at 12-13 ¶¶ 21, 24). As discussed supra, p. 4, 5, any request for affirmative relief regarding the title to the disputed land parcel is statutorily barred when title to Indian trust land is at issue. Ms. Lundeen's remedy requests as much, barring her FAA based claim. If anything from Ms. Lundeen's FAA claim has merit, it is best brought as a defense.

4. Ms. Lundeen's challenge to the Tribes' present-day interest in its aboriginal lands is misplaced. "Whether a tribe has *aboriginal* title to occupy land is an inquiry entirely separate from the question of who holds *fee* title to the land." *Lyon*, 626 F.3d at 1068 (emphasis in original). The Tribes have not brought a claim

for recognition of aboriginal land rights. The Tribes asked this Court for a *Puyallup* based declaration that the contested land parcel is held in trust by the United States for the benefit of the Tribes. Ms. Lundeen's challenge to aboriginal title, and the case law she cites are off point, and cannot form a basis for jurisdiction.

Finally, Ms. Lundeen argues that it is unjust for the Tribes to have a forum for their claims while she has none. Ms. Lundeen could possibly argue her case through affirmative defenses. While this Court will not be able to render a judgement that binds the United States, this case will be heard and decided. If the Tribes lose, the Tribes accept they are bound by the decision of the federal courts absent a follow-on case by the United States rendering a different outcome (and presumably would have the precedent of this case to overcome). Ms. Lundeen is not caught in some uniquely unfair circumstance. "McClendon argues that allowing the Tribe to sue without exposing itself to suit for subsequent related matters is unfair. However, the Supreme Court has noted '[t]he perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interest in these circumstances." *McClendon,* 885 F.2d at 631 (quoting *Three Affiliated Tribes v. Wold Eng'g,* 476 U.S. 877, 893 (1986).

CONCLUSION

The Tribes respectfully request that this Court dismiss Ms. Lundeen's counterclaims.

Respectfully submitted this 12th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that the foregoing document is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word and excluding the Caption and this Certificate, is 3,212.

Dated this 12th day of August, 2019.

/s/ John T. Harrison
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