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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
LAKE COUNTY’S AMENDED
COUNTERCLAIM

Lake County Board of Commissioners (“Lake County”) submits this response to the Confederated Salish and Kootenai Tribes’ (“CSKT’s”) Motion to Dismiss Lake County’s Amended Counterclaims [Doc. No. 51] and Brief in Support [Doc. 52] (cites to CSKT’s Brief in Support are referred to hereafter as cites to the “Renewed Motion”).

I. INTRODUCTION

CKST’s Renewed Motion must be denied. Like its original Motion and Brief in Support [Docs. 32 and 33],¹ CSKT’s Renewed Motion ignores the basis of the counterclaim, in respect to substance and jurisdiction. CSKT again takes this inconsistent, and frankly unfair, position that it 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. CSKT’s Renewed Motion, like its First, ignores the fact that CSKT has waived its immunity from this suit, by virtue of the Lame Bull Treaty and by filing this suit. By invoking this Court’s jurisdiction to resolve the title to the Disputed Property, CSKT has consented to the Court’s jurisdiction for the Lake County’s counterclaims.

¹ Lake County incorporates by reference Lake County’s Response to CSKT’s original Motion. Lake County’s Response is Document Number 40.

II. STANDARD FOR MOTION TO DISMISS

Contrary to CSKT's assertions, when analyzing CSKT's Motion, 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) (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").

The standard set forth in *Flathead Irrigation District v. Jewell*, 121 F.3d 1008, 1016-17 (D. Mont. 2015), cited Renewed Motion at 3, does not apply when, as here, a Rule 12(b)(1) motion raises a facial challenge, rather than a factual challenge. *See Flathead Irrigation Dist.*, 121 F.3d at 1016 (setting out the standard for "substantive challenge[s] to jurisdiction" as opposed to facial challenges); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (cited *Flathead Irrigation Dist.*, 121 F.Supp.3d at 1017) (setting out standard for "factual attack[s] on subject matter jurisdiction"). CSKT's Renewed Motion primarily raises a legal question regarding CSKT's waiver, i.e., whether by filing the Complaint in this case, CSKT waived its immunity from suit for Lake County's counterclaim.

With respect to the treaty-based waiver, the language of the Lane Bull Treaty speaks for itself. It states, in relevant part: The treaty Tribes “promise to be friendly with all citizens [of the United States] and to commit no depredations or other violence upon such citizens....and are held responsible, in their tribal capacity, to make reparation for depredations....” Lane Bull Treaty, Art. XI. Consequently, CSKT’s Renewed Motion, like its original Motion, is a facial attack and the presumption of truthfulness applies to the allegations in Lake County’s amended counterclaim.

CSKT’s Renewed Motion, like its original 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 counterclaim and that the counterclaim states a claim for relief that is plausible on its face.

III. ARGUMENT

A. Federal Jurisdiction Exists Over Lake County’s Counterclaim.²

CSKT’s Renewed Motion misses the mark. Contrary to CSKT’s Renewed Motion, Lake County is not relying on the federal or state quiet title acts or the

² CSKT’s Renewed Motion asserts “[t]here is no federal jurisdiction for Plaintiff’s counterclaim.” Renewed Motion at 4 (Emphasis added.) This is likely a typographical error and is likely intended to read “Lake County’s”.

federal Declaratory Judgment Act for subject matter jurisdiction.³ *See* Renewed Motion at 4. Rather, like CSKT, Lake County relies on 28 U.S.C. § 1331 for federal court jurisdiction. 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 (like CSKT’s complaint) arises under 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.

CSKT’s assertion that Lake County cannot rely on 28 U.S.C. § 1331 because of CSKT’s immunity from suit is also misplaced. *Flathead Irrigation Dist.*, 121 F.Supp.3d at 1017, cited Renewed Motion at 6, is inapplicable because Lake County does not contend that either the Declaratory Judgment Act or Section 1331 waive CSKT’s immunity from suit. Rather, for subject matter jurisdiction, Lake County is relying on Section 1331, which clearly applies, and on CSKT’s own unequivocal actions for the waiver of sovereign immunity.

³ Because Lake County is not relying on the Declaratory Judgment Act or the federal or state Quiet Title Act s for jurisdiction, the cases CSKT cites and the Renewed Motion’s discussion of those cases is irrelevant. *See* Renewed Motion at 4-6.

B. CSKT Has Waived Its Immunity from Suit for Lake County's Counterclaim

CSKT had waived its immunity from suit for Lake County's counterclaim by CSKT's own actions. First, CSKT waived its immunity from suit in the Lane Bull Treaty by agreeing to be "held responsible, in [its] tribal capacity, to make reparation for depredations...." Lane Bull Treaty, Art. XI. In addition, in both the Hell Gate Treaty and the Lane Bull Treaty, CSKT made binding, relevant promises that it has violated here. 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. In the Lane 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 specifically "promise[d] to be friendly with all [United States'] citizens." Lane Bull Treaty Art. XI.

Unlawfully barricading a public road, with the intent to injure and in fact resulting in injury to Ms. Lundeen, and asserting that passage over that road is only available to Defendants (and all other County residents and U.S. citizens apparently) if they submit to CSKT's jurisdiction violates CSKT's promise to allow United States' citizens to live in and pass unmolested through the Reservation, and constitute depredations for which CSKT is responsible in its tribal capacity. 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. Consequently, CSKT's claim of immunity from this suit fails when viewed against the obligations and promises CSKT agreed to in the Lane Bull Treaty. Simply put, this Court has subject matter jurisdiction over this matter under Section 1331 because this case involves, in part, two treaties and their interpretation, and CSKT is not immune.

In addition, CSKT's litigation conduct establishes a clear and unmistakable waiver of sovereign immunity. Contrary to the Renewed Brief, Lake County's counterclaim fits within CSKT's waiver of immunity from suit. As CSKT has acknowledged, "filing a lawsuit can constitute a limited waiver with respect to issues the sovereign itself put at issue." Renewed Motion at 7. By filing this suit, CSKT 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.

The cases CSKT cites are not to the contrary. In *Quinault Indian Nation v. Pearson for the Estate of Comenout*, 868 F.3d 1093 (9th Cir. 2017), the Estate not only sought a declaratory judgment resolving the issue of whether Mr. Comenout had violated the Cigarette Sales and Tax Code, it "also asked for an order compelling

the grant of building and business permits and for mandamus relief, lost profits, and damages due to an alleged antitrust and price-fixing scheme perpetrated by the Nation.” *Id.* at 1096. Lake County is not asking this Court to compel any action by CSKT and is not seeking mandamus relief or damages. In other words, unlike in *Quinault Indian Nation*, Lake County is not asserting “counterclaims in excess of [CSKT’s] original claims,” *id.* at 1097, and therefore the Ninth Circuit’s holding in *Quinault Indian Nation* is inapposite.

Similarly, *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), is distinguishable because in that case, unlike here, the California State Board of Equalization counterclaimed for the amount of taxes allegedly due, *i.e.*, counterclaimed for damages. *Id.* at 1050. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991), is also distinguishable because in that case, 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. Interestingly, however, the Supreme Court went on to reach Oklahoma’s 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). Here, whether Lake County, as

opposed to CSKT, has title to the Disputed Property is “fairly subsumed” in CSKT’s request that this Court resolve the title dispute.

CSKT’s Renewed Motion attempts to characterize factual and legal disputes going to the heart of CSKT’s claimed ownership of the Disputed Property as “claims.” *See* Renewed Motion at 8-9. This Court should reject CSKT’s sleight of hand—the facts and legal arguments Lake County advances are not “claims” but rather go to the CSKT’s strength of CSKT’s title, and, the mirror image of that title, Lake County’s title. 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 assertion of title, regardless of Lake County’s counterclaim.

CSKT also misconstrues Lake County’s reliance on the Treaties. CSKT asserts that Lake County “goes far beyond the issues raised by the Tribes in their complaint...includ[ing] treaty-based claims and claims involving depredation.” Renewed Motion at 9. This argument lacks merit. First, in making this argument CSKT ignores that CSKT relies on the Hell Gate Treaty and requested that this Court adjudicate a dispute which requires interpretations of the Hell Gate Treaty. *See* Complaint ¶¶ 1, 8, 51. Second, as discussed above, Lake County has the right to raise the Treaties and their included promises regarding the right to travel through the Reservation and the depredation clause to refute CSKT’s claim to title. The

Treaties confirm that travel and access were important to accomplish the Treaties' purposes, which included commerce and permanent housing. *See, e.g.*, Hell Gate Treaty Art. VI (incorporating Article 6 of the Omaha Treaty).⁴ 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.

CSKT, in its Brief *Amici Curiae* filed in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, summarized the importance of the treaty-protected right to travel in a headnote: "THE TREATY'S EXPRESS PROTECTION OF THE RIGHT TO TRAVEL WAS HISTORICALLY SIGNIFICANT AND MEANINGFUL, AND REMAINS SO." *See* Brief of *Amici Curiae* Nez Perce Tribe and Confederated Salish and Kootenai Tribes in Support of Respondent and Affirmance at 12-28

⁴ The Flathead Allotment Act ("FAA") also demonstrates Congress' intent that access to townsites be provided, by authorizing townsites to be platted. *See* Flathead Allotment Act 34 Stat. 325, 354 (June 21, 1906 amendment); *see also* Order, Stipulations, 4(i) [Doc. 54]. In other words, the Treaties and FAA all evidence Congress' intent that access be allowed across roads within the Reservation, which CSKT thwarted by erecting the gate and which it continues to try to thwart by asserting jurisdiction over the roads, alleys, and public reserves within the Big Arm Townsite. CSKT's actions in contravention of the congressional purposes contained within the Treaties and FAA further support a conclusion by this Court that CSKT's immunity from suit does not shield it from Lake County's counterclaim which seeks to advance the Treaties' and the FAA's purposes.

(discussing the Hell Gate Treaty and the importance of the right to travel).⁵ 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.

CSKT also takes issue with Lake County's reliance on the federal Court of Claims case in which CSKT appears to have been compensated for the lands over which CSKT now asserts ownership, which CSKT itself cited in its Complaint and its original Motion. *See* original Motion at 11. CSKT contends that Lake County cannot state a claim based upon the Court of Claims' action. Again, CSKT's argument misses the mark. Lake County is not asserting a "claim" based on the Court of Claims' decision; rather that decision goes to the merits of CSKT's claim to title. Moreover, whether CSKT was compensated for the lands within the Big Arm Townsite is unrelated to and not dependent upon the parties to the case. In other words, if CSKT was compensated for those lands, that is a fact and is binding upon CSKT regardless of whether Lake County was a party to the Court of Claims case. CSKT is also barred by doctrines of preclusion, stare decisis, and CSKT is judicially estopped from taking a position inconsistent with its position in that case. *See New*

⁵Available at https://www.supremecourt.gov/DocketPDF/16/16-1498/64567/20180924164228927_Amici%20Brief%20of%20Nez%20Perce%20Tribe%20and%20Confederated%20Salish%20and%20Kootenai%20Tribes%20-%20Washington%20v.%20Cougar%20Den%20-%20US%20Supreme%20Court%20Case%20No.%2016-1498.pdf

Hampshire v. Maine, 532 U.S. 742, 742–43 (2001) (Judicial estoppel applies where a party assumes and succeeds in taking a certain position in a legal proceeding, to preclude that party from assuming a contrary position. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.).

Finally, as CSKT states, CSKT must base its quiet title claim on the strength of its own title, and whether CSKT was compensated for the Big Arm Townsite lands is directly relevant to the strength of CSKT's claim to title. Lake County's reliance on the Court of Claims' decision to test CSKT's strength of CSKT's title is simply not barred by CSKT's immunity from suit.

C. CONCLUSION

This Court should deny CSKT's Renewed 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, signature block, and certificate of service contains 2510 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 September 9, 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
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