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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
(Portland Division)

THE CONFEDERATED TRIBES OF THE)	
WARM SPRINGS RESERVATION OF)	
OREGON,)	Case No.: 3:17-cv-0 1649-HZ
)	
Plaintiff,)	
)	
v.)	VANPORT INTERNATIONAL INC'S
)	RESPONSE TO PLAINTIFF'S MOTION
)	FOR SUMMARY JUDGMENT
VANPORT INTERNATIONAL, INC.,)	
)	
Defendant.)	

TABLE OF CONTENTS

INTRODUCTION..... 2

STATEMENT OF FACTS..... 6

1. Vanport's initial involvement with the Tribe 6

 a. 2008 WSFPI /Vanport Agreement..... 8

 b. 2014 WSFPI/Vanport Agreements..... 11

2. Applicable Federal Regulations..... 16

1 – VANPORT INTERNATIONAL INC'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

3. The Tribe, BIA, and WSFPI Disregarded the Cutting Contract.....	17
4. The BIA’s Oversight	22
5. Efforts to Work out WSFPI’s Tribal Timber Debt.....	23
6. WSFPI’s Business Model.....	25
7. The BIA Never Asserted Title to Lumber	26
8. The Tribe Contributed to WSFPI’s Failure.	29
ARGUMENT	31
1. The Tribe Has Failed to Articulate a Cognizable Claim for Relief.....	31
2. If the Tribe’s Claim is for Conversion, it Fails as a Matter of Law.	32
3. There is no Trespass Claim either	36
4. Blue Lake is Wholly Distinguishable.....	37
5. Blue Lake is Immaterial Because the Tribe was Not Paid.	47
6. Vanport has a Viable Defense of Consent.....	49
7. There is Legal and Factual Support for Vanport’s Equitable Defenses.	51
CONCLUSION	53

TABLE OF AUTHORITIES

Cases

<i>Adidas America, Inc.</i> , 324 F.R.D. 389 (2017).	7
<i>Bank of N.Y.</i> , 523 F.3d 902 (9th Cir. 2008).	50
<i>Chilkat Indian Vill.</i> , 870 F.2d 1469 (9th Cir. 1989)	33

<i>Confederated Tribes of Warm Springs Reservation of Oregon v. The United States</i> , Case No. 02-126L (Dec. 13, 2004).....	18
<i>Harris Rutsky & Co. Ins. Servs.</i> , 328 F.3d 1122 (9th Cir. 2003).....	49
<i>In re Blue Lake Forest Prod., Inc.</i> , 30 F.3d 1138 (9th Cir. 1994).	32, 38, 43
<i>In re Blue Lake Forest Prods., Inc.</i> , 143 B.R. 563 (1992).....	38, 40, 42
Indian Self-Determination and Education Assistance Act of 1975.....	18
<i>Jarrow Formulas, Inc.</i> , 304 F.3d 829 (9th Cir. 2002).	53
<i>Mustola</i> , 253 Or 658 (1969).....	50
<i>Ahtanum Irr. Dist.</i> , 236 F.2d 321 (9th Cir. 1956).....	51
<i>Ruby Co.</i> , 588 F.2d 697 (9th Cir. 1978).....	52
<i>United States v. Washington</i> , 853 F.3d 946 (9th Cir. 2017)	51, 52
<i>Waterbury</i> , 207 Or. 595 (1956).....	52
<i>Waterway Terminals Co.</i> , 242 Or. 1 (1965).....	53
<i>Wright</i> , 579 N.W.2d 7 (1998).	48

Statutes

25 C.F.R. § 163.19 (a).....	17
25 C.F.R. § 163.1	16
25 C.F.R. § 163.13(a).....	35
25 C.F.R. § 163.13(b)	35, 46
25 C.F.R. § 163.29(b)	36
25 CFR § 163.13(d).	17
25 CFR § 163.21	7
25 CFR § 163.21(a).....	17, 35
25 CFR § 163.22	7, 35
25 CFR § 163.22(b)	17, 43

25 CFR 163.15	40
25 U.S.C. 3107	43
Indian Self-Determination and Education Assistance Act of 1975.....	19, 46

Other Authorities

U.S. Dept. of Interior, Office of the Solicitor, Opinion of November 20, 1958 at 65 I.D. 484.... 47

Treatises

19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4518 33

INTRODUCTION

The Confederated Tribes of the Warm Springs Reservation of Oregon (the “Tribe”) created Warm Springs Forest Products Industries (“WSFPI”) as a wholly-owned enterprise of the Tribe. Beginning in 2008, Vanport International, Inc. (“Vanport”) entered into contracts with WSFPI to purchase logs from WSFPI and operate the WSFPI mill. In January 2014, a new contract was executed and Vanport no longer purchased logs from WSFPI or operated the mill. Instead, Vanport purchased export grade lumber, milled and sold by WSFPI. Although Vanport paid WSFPI for all lumber Vanport purchased from 2014 until the mill closed in April 2016, the Tribe asserts Vanport is nevertheless obligated to pay for it again. The Tribe asserts it is entitled to all proceeds received by Vanport from sales of lumber derived from Tribal Timber for which WSFPI did not pay the Tribe.

This Response establishes that the Tribe is not entitled to summary judgment either as a matter of law or on the basis of undisputed facts for reasons summarized as follows:

- *Blue Lake* was a bankruptcy case in which a tribe had priority over logs that were subject to a BIA cease and desist order after the debtor removed them from the reservation in violation of contract and statute. In this case the Tribe claims a right to Vanport’s proceeds from sales of lumber that Vanport purchased from the Tribe’s enterprise and re-sold in compliance with contract, regulations, and with the consent and approval of the Tribe and BIA.
- Unlike the non-tribal mill in *Blue Lake*, WSFPI was not only wholly owned, but fully controlled by the Tribe. Tribal Council acted as the WSFPI Board of Directors for almost

half the period Vanport was involved, including critical times when contracts were executed between Vanport and WSFPI. WSFPI's independence is a fiction. WSFPI was the Tribe, and it has already been paid.

- Unlike the contracts in *Blue Lake*, the Tribe and WSFPI entered into a unique Cutting Contract approved by the Department of Interior Bureau of Indian Affairs ("BIA"). The Cutting Contract imposed specific obligations on the BIA and Tribe for invoicing Tribal Timber and on WSFPI for payment. None of them complied with these obligations, which contributed to WSFPI's payment arrearages the Tribe now seeks from Vanport.
- The Tribe, acting as the WSFPI Board of Directors, entered into an agreement with Vanport that required Vanport to purchase all export lumber produced by WSFPI and provided that title would pass to Vanport free of all encumbrances. The BIA was aware of and involved in the negotiation of this agreement. The BIA and Tribe had approved earlier agreements between Vanport and WSFPI that specified Vanport would receive title as soon as it took possession of tribal forest products.
- Unlike the contracts in *Blue Lake*, the Cutting Contract allowed WSFPI to mill Tribal Timber and sell the resulting lumber to Vanport without requiring WSFPI to pay for the timber first. The Tribe and BIA gave WSFPI the right to possess and control the Tribal Timber; they never reclaimed that right.
- Unlike the "title" provision in *Blue Lake*, the "title" provision relied on by the Tribe was not attached to any of the six Timber Sale Contracts at issue in this lawsuit.
- This missing "title" provision that the Tribe relies on refers to "timber," not lumber. The parties in *Blue Lake* stipulated that the tribe's claim to the logs would attach to any proceeds from sales of lumber produced from those logs. There is no such stipulation here, and Vanport already sold all of the lumber to which the Tribe allegedly retains title.
- The Tribe's assertion that it retained title is contradicted by the Tribe's own representations and warranties in its dealings with Vanport, which induced Vanport's reliance, and by the BIA's position that its title interest in Tribal Timber extended only to logs and not to any of the lumber WSFPI sold to Vanport. The Tribe and BIA did not retain title to the lumber WSFPI produced and sold to Vanport. Any such right never existed, it was modified, it was waived, or the Tribe is estopped to assert it.
- The policies enunciated in *Blue Lake* have no application to a failure of a tribal subordinate to pay its principal. *Blue Lake* does not force a purchaser of lumber from a tribal enterprise to act as guarantor of the enterprise's obligations to the tribe that owns and controls it. The Tribe here allowed WSFPI to allocate forest products proceeds for the Tribe's benefit, paying millions for tribal logging contractors, mill payroll, and other mill operating expenses rather than paying the Tribe's inflated Tribal Timber charges. The Tribe and BIA knew this and consciously allowed it to happen. According to the BIA, the Tribe could use the Tribal Timber for whatever it wanted.
- The BIA eventually curtailed WSFPI's ongoing accrual out of concern that the government would get sued again by the Tribe by imposing on WSFPI a repayment plan. As a result of that plan, the Tribe and BIA make numerous decisions that caused WSFPI's insolvency. The mill closed because the Tribe limited its timber harvests, declined to invest in mill

upgrades, paid excessive rates to tribal loggers, and charged too much for the Tribal Timber; all factors unrelated to Vanport. Neither the Tribe nor the BIA contend Vanport caused or contributed to the mill shutdown, which left WSFPI owing Vanport over \$500,000 of the money WSFPI had borrowed from Vanport to finance its operations.

STATEMENT OF FACTS

1. Vanport's initial involvement with the Tribe.

WSFPI was created in 1967 to harvest timber, operate the Tribe's mill, located on the reservation, and sell the resulting lumber and other forest products to third parties.¹ WSFPI was governed by a Plan of Operation containing a number of provisions important to this case which will be referenced below.²

In August 2007, Tribal Council recognized that from 2005 to 2006 WSFPI's assets had decreased by \$4.2 million, working capital declined by \$3.3 million, lumber sales and revenues declined by seven to nine percent, and Timber payments to the Tribe were reduced by \$4.1 million.³ WSFPI had been unable to operate on a profitable basis, leading Tribal Council to order a conditional closure of the WSFPI mill.⁴

In light of WSFPI's financial status, the Tribe could have closed the mill and proceeded to sell Tribal Timber to non-tribal third parties while requiring pre-payment or bonds pursuant to federal regulations.⁵ Instead, the Tribe chose to continue running WSFPI with the goal that the WSFPI mill would generate benefits beyond the money received from selling Tribal Timber,

¹ See Plaintiff's Motion for Summary Judgment, Tsumpti Dec. Exh. 4 (Dkt. 55, p. 42) (stating the date of WSFPI's creation was April 11, 1967); Second Amended and Restated Plan of Operation (hereinafter, the "Plan of Operation"), Art. I, Sec. 2, Art. II C–E, H; Exh. 10.

² At all times pertinent to this lawsuit, the Plan of Operation was the Second Amended and Restated Plan of Operation. Exh. 9, 10.

³ Exh. 11.

⁴ Exh. 12.

⁵ 25 CFR § 163.22 (1996); 25 CFR § 163.21 (1996).

including social and community benefits such as tribal jobs and personnel training. As will be shown, that business model failed for a number of reasons unrelated to Vanport.

As of October 16, 2007, Tribal Council assumed the role of the WSFPI Board.⁶ This was in violation of WSFPI's Plan of Operation.⁷ Tribal Council removed the entire WSFPI Board for failure to make Tribal Timber payments (also known as "stumpage" payments).⁸ By the end of 2007, the Tribal Council WSFPI Board of Directors (the "Tribal Council WSFPI Board") had

⁶ Tribal Council may remove the WSFPI Board individually or wholesale. Plan of Operation, Art. IV, Sec. 5. Exh. 14 p. 1.

⁷ Because each member of the 11-member Tribal Council had to be members of the Tribe, any time Tribal Council became the WSFPI Board it violated WSFPI's Plan of Operation in two respects. Pursuant to the Plan of Operation, the WSFPI Board shall consist of four classes with seven directors. Plan of Operation Art. IV, Sec. 1, Art. IV, Sec. 2. Of those seven directors at least three, but no more than four, must be non-tribal members. Plan of Operation, Art. IV, Sec. 2. The Tribe acknowledges that any time the Tribe constituted the WSFPI Board it violated WSFPI's Plan of Operation. M. Stacona Dep. at 43:24–44:2, 44:15–23. Michelle Stacona was designated as the Tribe's Fed. R. Civ. P. 30(b)(6) witness to present the Tribe's position on approximately 51 topics noted by Vanport. For the purposes of a Fed. R. Civ. P. 30(b)(6) deposition, there is no distinction between Ms. Stacona and the Tribe itself – Ms. Stacona's testimony is the Tribe's testimony for which it is accountable. *Adidas America, Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 394 (2017). Ms. Stacona is a member of the Navajo Nation and married into the Tribe. She has a bachelor's degree in accounting. From January 1994 to June 2012, Ms. Stacona held different positions within the Tribe. She moved to Arizona in June 2012 and did not return to the Tribe until November 2016, when she became the Tribe's Secretary Treasurer/CEO. She had no involvement with the Tribe or WSFPI during the critical period in this case – 2012 to April 2016. To prepare for the Tribe's deposition, Ms. Stacona reviewed four binders with documents provided by her attorneys. She also reviewed the deposition testimony of Louise Katchia, Orvie Danzuka, and Austin Greene (referenced in later sections) and agreed with all of their testimony. M. Stacona Dep. at 6:12, 10:14–25, 14:6–7, 16:4–5, 20:25–21:4, 14:15–24, 15:21–16:1, 16:9–18, 16:22–25, 19:2–5, 19:7–20:3, 71:12–72:25.

⁸ A. Greene Dep. at 41:20–42:4. Austin Greene served on Tribal Council from May 2007 through May 2019 and as Chairman of Tribal Council from May 2013 through May 2019. Mr. Greene simultaneously served as Chairman of Tribal Council and Chairman of the WSFPI Board from June 2013 through the fall of 2014. Mr. Greene had no experience in logging, the manufacture of forest products, mill operations, accounting, or timber sales. Exh. 13; A. Greene Dep. 28:3–9; 30:5–8, 26:2–27:8.

knowledge of and contributed to an accrual of almost \$1.4 million in Tribal Timber payment obligations.⁹

Vanport's headquarters are located in Boring, Oregon.¹⁰ Vanport International was founded in 1994 to handle the sales and marketing of lumber, produced from Vanport Manufacturing, Inc.'s mill and other companies, to the Japanese export market.¹¹ Vanport does not have a sawmill and focuses its business solely on sales and marketing of high-grade lumber product in international and domestic markets.¹²

a. 2008 WSFPI /Vanport Agreement

In the fall of 2007, the Tribal Council WSFPI Board engaged in negotiations with Vanport for Vanport to operate the WSFPI mill.¹³ Tribal Council approved a preliminary Term Sheet outlining key terms to be used in negotiation of a final agreement with Vanport and appointed as its negotiating agent the Secretary Treasurer of the Tribe, who was also acting as CEO of WSFPI.¹⁴ The Term Sheet contained the following pertinent terms relating to logs and lumber:

- Vanport will pay for **logs** delivered to WSFPI at agreed upon market prices; and
- Vanport **will hold title to all logs purchased by Vanport, and the lumber, residuals, and products derived therefrom**, including cash and accounts receivable.¹⁵

The term sheet led to a one-year agreement between WSFPI and Vanport commencing July 1, 2008 ("2008 Agreement").¹⁶ The resulting 2008 Agreement was signed by the Tribe's Secretary

⁹ Exh. 14.

¹⁰ P. Owen Decl. ¶4.

¹¹ P. Owen Decl. ¶5.

¹² P. Owen Decl. ¶5.

¹³ Exh. 15.

¹⁴ Exh. 12.

¹⁵ Exh. 16 p.2 (emphasis added); Exh. 17 p.18.

¹⁶ When entering into the 2008 Agreement, Vanport expressed an interest in establishing an export lumber operation employing tribal members and then transferring operation of the mill

Treasurer.¹⁷ It was entered into pursuant to the previously approved Term Sheet and contained the following paraphrased key terms regarding logs, lumber, and title:

- Recital D. The current WSFPI Board was placed in abeyance by the Tribe and the Tribe assumed the duties of the WSFPI Board. The CEO of WSFPI reported to the Tribe through the Secretary Treasurer of the Tribe.
- WSFPI would harvest logs and deliver them to the mill.
- Article 2.1: **“Title to all Tribal Timber purchased by Vanport shall pass at the Mill, and all products and derivatives relating to the purchased Tribal Timber (including but not limited to lumber, residuals and chips) shall thereafter be the property of Vanport.”**
- Article 3.1: Vanport would serve as the mill manager during the term of the 2008 Agreement
- Article. 5.1: Vanport would pay WSFPI on the 10th of each month the market price for all Tribal Timber purchased by Vanport between the 16th and the final day of the preceding month. Vanport would pay WSFPI on the 25th of each month the market price for all logs purchased by Vanport between the 1st and 15th day of the current month.¹⁸

In mid-2009, the Tribal Council WSFPI Board extended the 2008 Agreement via an Operations Agreement with Vanport effective June 30, 2009 (“2009 Agreement”).¹⁹ The 2009 Agreement contained the same key provisions as the 2008 Agreement and extended to June 30, 2014.²⁰ There is no allegation that Vanport did not perform its obligations pursuant to the 2008 and 2009 Agreements.

back to WSFPI or the Tribe while continuing to market WSFPI’s export lumber. Vanport never intended to operate the WSFPI mill on a long-term basis. C. Ketcham Decl. ¶4-5.

¹⁷ Exh. 15.

¹⁸ Exh. 17 (emphasis added).

¹⁹ Exh. 18.

²⁰ Exh. 18.

Tribal Council appointed a new WSFPI Board on December 14, 2010.²¹ That WSFPI Board lasted until June 3, 2013, when it was dismissed wholesale by Tribal Council.²² Tribal Council again assumed the role of the WSFPI Board.²³ Tribal Council intended to act as the WSFPI Board on an interim basis for 60 days,²⁴ but continued to do so for over a year.

From 2011 to 2013, certain Tribal Council members were voicing opposition to continuing WSFPI operations due to concerns about its financial viability.²⁵ By the end of 2013, the Tribal Council WSFPI Board had allowed WSFPI to accrue \$1.15 million in Tribal Timber payment obligations beyond WSFPI's previous balance and had committed WSFPI to an additional \$341,000 in Tribal Timber payment obligations.²⁶ The Tribe acknowledges that by the end of 2013,

²¹ Pursuant to the Plan of Operation, Tribal Council shall appoint the WSFPI Board. Plan of Operation Art. IV, Sec. 3. This new WSFPI Board did not have the requisite number of board members or number of non-tribal members, in violation of WSFPI's Plan of Operation. A. Greene Dep. at 61:8-25 (referencing the five WSFPI Board members Tribal Council appointed).

²² Exh.19.

²³ Exh. 19.

²⁴ A. Greene Dep. at 74:20-75:22.

²⁵ B. Shaw Dep. at 109:3-18. Mr. Shaw was one of the BIA's designated Fed. R. Civ. P. 30(b)(6) witness. Mr. Shaw testified to the BIA's position on approximately 35 topics noticed by Vanport. Mr. Shaw is the Deputy Regional Director of Trust Services of the BIA. In his position, Mr. Shaw is responsible for federal trust services for 45 tribes (including the Tribe) in Oregon, Washington, Idaho, and Montana. He is a member of the Tribe. He has an associate's degree in forest technology, a bachelor's degree in forest management, and a master's degree in forest science. He worked for the Tribe as a forest technician where he prepared requests for proposals and won contracts with the Tribe on behalf of the BIA. Later, from 1997 to 2001, he worked for the Tribe as a forest manager where he provided oversight, direction, and administration of the federal functions of the BIA including making decisions on behalf of the BIA for Tribal Timber valuation. B. Shaw Dep. at 9:10, 10:25-11:17, 15:11, 45:2-7.16:20-25, 17:6-11, 17:22-24, 18:22-25, 21:4-18, 26:9-16, 26:21-25, 27:1-8, 19:1-21, 21:16-25, 22:10-16, 27:4-8, 27:22-24.

²⁶ A. Greene Dep. at 118:13-119:21. Exh. 20. One reason these Tribal Timber payment obligations accrued was because in the latter half of 2013 the Tribe didn't invoice WSFPI, in violation of the Cutting Contract, as in later sections.

there were Tribal Timber payments of \$1,456,500 owed to the Tribe.²⁷ The Tribe was aware that WSFPI operated at a loss of \$2.4 million in 2013.²⁸

In late 2013, despite being again aware of WSFPI's dire financial status, Tribal Council, voted unanimously to continue WSFPI operations²⁹ to preserve jobs for tribal members and tribal logging companies and take over control of milling operations³⁰ rather than earn more for Tribal Timber by putting the timber out for bid to the public³¹

b. 2014 WSFPI/Vanport Agreements

The Tribe supported and approved the key terms of an early termination between WSFPI and Vanport via Tribal Resolution 11,803.³² Vanport also wanted this.³³ As of January 1, 2014, Vanport would no longer purchase logs from WSFPI. Vanport would market export lumber milled by WSFPI. The pertinent terms of this Resolution included:

²⁷ M. Stacona Dep. p. 143:1-17.

²⁸ The Tribal Council was responsible for the audit of WSFPI operations and conditions. Plan of Operation, Art. IX, Sec. 7. Exh. 20, p.10, M. Stacona testimony p. 143:14-17. Tribal Council Chairman Greene testified that he could not identify what steps the Tribal Council WSFPI Board took to control these accruing Tribal Timber payment obligations in the second half of 2013 after Tribal Council assumed the role of the WSFPI Board, six months earlier. A. Greene Dep. at 119:1-5.

²⁹ A. Greene Dep. at 21:15-21:25. Vanport had previously notified Tribal Council that it did not desire to continue acting as WSFPI mill manager and was interested in an early termination of the 2009 Operations Agreement, which had a termination date of June 30, 2014. C. Ketcham Decl. ¶4-5.

³⁰ M. Stacona Dep. at 169:24-170:2, M. Stacona Dep. at 169:3-23.

³¹ O. Danzuka Dep. at 62:14-62:5. Mr. Danzuka is a member of the Tribe. He has a degree in Natural Resources from Oregon State University and experience as a forestry technician, forester, and senior forester for other tribes and programs. Mr. Danzuka held various forestry related positions with the Tribe including Area Forester, Assistant Timber Manager, and Forest Manager. He was a member of Tribal Council from May 2013 to May 2016. During his time on Tribal Council, Mr. Danzuka simultaneously served as a member of the WSFPI Board from June 3, 2013 to the Fall of 2014. O. Danzuka Dep. 7:15-16, 15:14-16:2, 69:2-7, 25:6-18, 66:23-25, 29:7-12, 31:8-12.

³² Exh. 21.

³³ C. Ketcham Decl. ¶5.

- Vanport would cease purchasing Tribal Timber on or before December 31, 2013;
- **Vanport would transfer and sell to WSFPI all log and lumber products on site at the mill** for their inventoried book value (lower of cost or market) as of December 31, 2013;
- Vanport would become the export marketing agent on January 1, 2014, and provide WSFPI with lumber sales and marketing services, earning 5% of the gross export sales receipts.³⁴

Effective January 1, 2014, WSFPI and Vanport entered into the Operations Restructure Agreement, which terminated the existing 2009 Operations Agreement.³⁵ The Operations Restructure Agreement included the following related agreements: Revolving Loan Agreement, Security Agreement and a Promissory Note, Termination of Operations Agreement, Sales and Marketing Services Agreement (“2014 Sales & Marketing Agreement”), and Bill of Sale for the Assets (collectively the “2014 Agreements”).³⁶

For the negotiation of the 2014 Agreements, the Tribe and WSFPI used the same legal counsel.³⁷ Tribal Council Chairman Greene, acting as the WSFPI Board Chairman, executed the 2014 Agreements.³⁸

WSFPI represented in the Operations Restructure Agreement that the 2014 Agreements were “duly authorized and approved,” with “all necessary consents from the Tribe,” including “the agreement by the Tribe...to allow Vanport to...remove and or sell the Collateral at the Mill as provided in the Security Agreement.”³⁹ The Tribe **and** WSFPI signed and granted to Vanport a

³⁴ Exh. 21 p. 4 (emphasis added).

³⁵ Exh. 22.

³⁶ Exh. 22.

³⁷ A. Greene Dep. at 110:15-111:25; M. Stacona Dep. at 173:3-10.

³⁸ Exh. 22. The Chairman of the WSFPI Board of Directors was to sign any contract or instrument which the WSFPI Board of Directors authorized. Art. VI, Sec. 5 Plan of Operation. Although Chairman Greene opposed the continued operation of WSFPI, he signed the 2014 Agreements on behalf of WSFPI to keep mill operations going after January 2014 and provide jobs for its 80 to 90 employees. A. Greene Dep. at 20:6-21:4.

³⁹ Exh. 22 (emphasis added).

separate Irrevocable Entry License authorizing Vanport to secure, sell, and remove the Collateral from the reservation pursuant to the Security Agreement.⁴⁰

Pertinent terms of the Sales and Marketing Services Agreement relating to logs, lumber, and title included the following:

- 2.1(a): Vanport would purchase and market all **export lumber** products manufactured by WSFPI at the Mill (“Export Lumber”) on an exclusive basis.
- 2.1(b): Vanport would provide on-site sales, marketing, and quality control assistance at the Mill relating to milling, grading, packaging, and shipping quality in order to maximize selling value for export markets.
- 3.1(a): Vanport would earn **five percent (5%)** of the final selling price for Export Lumber.
- 3.1(b): **All prices for purchase of Export Lumber were FOB Mill, and Vanport assumed all risk of damage/loss upon delivery of Export Lumber to a carrier;**
- 3.1(c): Payment terms were net 15 days of the date of WSFPI’s invoice.
- **3.4(d): WSFPI warranted that all title to the lumber sold hereunder was unencumbered when title passed to Vanport.**⁴¹

The pertinent terms of the Security Agreement and Promissory Note, which secured a \$4 million line of credit Vanport granted to WSFPI in connection with the Revolving Loan Agreement, included the following:

- The “Collateral” included all log inventory,⁴² **lumber inventory** (in whatever state of processing), and accounts receivable;
- **WSFPI represented and warranted that the Collateral was in WSFPI’s “possession and control;”**
- WSFPI represented and warranted that it had good title to the Collateral, free from all Encumbrances except Permitted Encumbrances, if any; and
- “Permitted Encumbrances” meant only: (a) the lien created by the Security Agreement; (b) Encumbrances arising by operation of law for taxes, assessments, or government charges

⁴⁰ Exh. 66.

⁴¹ Exh. 22 (emphasis added).

⁴² At a November 12, 2013 Tribal Council meeting, the Tribal Council WSFPI Board discussed their understanding and intent that Vanport’s collateral would not include logs or trees in the forest but it would include log inventory on site at the mill. O. Danzuka Dep. at 147:10-148:10.

not yet due; and (c) A security interest granted to a third party which is junior in right of Secured Party and for which a Subordination Agreement had been signed.

It was Chairman Greene's intention, when signing the 2014 Agreements, that all representations made by WSFPI in the 2014 Agreements were true.⁴³ The Tribal Council WSFPI Board was aware of these representations.⁴⁴ When entering into the 2014 Agreements, the Tribal Council WSFPI Board recognized the risk that WSFPI would not be able to pay for all of the Tribal Timber obligations it would incur to the Tribe.⁴⁵ Despite this risk, the Tribal Council WSFPI Board authorized and approved⁴⁶ WSFPI obtaining a secured line of credit from Vanport for up to \$4 million.⁴⁷

During the first two quarters of 2014, under the direction and control of the Tribal Council WSFPI Board, WSFPI suffered a net income loss of \$1.8 million.⁴⁸ By the end of the second quarter of 2014, the Tribal Council WSFPI Board had allowed to accrue almost \$2.3 million in Tribal Timber payment obligations.⁴⁹ The Tribal Council WSFPI Board had not come up with any

⁴³ A. Greene Dep. at 126:6-12.

⁴⁴ M. Stacona Dep. at 174:8-176:5, Exh. 21 p.3-4. According to Mr. Danzuka, under the 2014 Agreements, Vanport had a contractual obligation to purchase and market all export lumber products produced by WSFPI at the mill. O. Danzuka Dep. at 148:19-149:5. Mr. Danzuka understood that Section 3.4D of the 2014 Sales and Marketing Agreement meant that lumber title passed to Vanport upon payment to WSFPI. *Id.* at 159:7-18. Mr. Danzuka recalled discussion in tribal chambers of the WSFPI representations contained in the 2014 Security Agreement and Promissory Note. *Id.* at 156:2-21. Mr. Danzuka understood that Vanport's collateral, as defined in the Security Agreement and Promissory Note, included all log inventory and lumber inventory in whatever state of processing, including all inventory at the WSFPI mill and in WSFPI's possession. *Id.* at 155:7-25.

⁴⁵ M. Stacona Dep. at 173:21-174:6.

⁴⁶ The Tribal Council and Tribal Secretary/Treasurer shall approve any financial commitments made by WSFPI. Plan of Operation, Art. X, Sec. 1.

⁴⁷ M. Stacona Dep. at 177:14-23.

⁴⁸ A. Greene Dep. at 136:2-20, Exh. 23.

⁴⁹ A. Green Dep. at 139:17-140:10, Exh. 24.

plan to achieve repayment of any Tribal Timber payment obligations.⁵⁰ The Tribal Council WSFPI Board failed to bring these Tribal Timber payment obligations current and allowed WSFPI to operate at a loss without the ability to meet its financial obligations.⁵¹

By the end of the second quarter of 2014, Tribal Council WSFPI Board member Danzuka knew WSFPI was operating at a loss and that a proposed mill retrofit was not going to happen.⁵² By mid-2014, Mr. Danzuka thought the mill would probably fail and reported this to the Tribal Council WSFPI Board.⁵³ The Tribal Council WSFPI Board took no action.⁵⁴ This was because Tribal Council had many family members that worked at the mill.⁵⁵

On June 23, 2014, Tribal Council appointed the Warm Springs Composite Products (“WSCP”)⁵⁶ Board of Directors to also be the WSFPI Board (the “replacement Board”).⁵⁷ By that time, the Tribal Council WSFPI Board had not improved WSFPI’s financial condition, which had

⁵⁰ A. Greene Dep. at 126:10-23.

⁵¹ M. Stacona Dep. at 162:7-25.

⁵² O. Danzuka Dep. at 46:7-13. See Statement of Facts Sec. 8 for details on the mill retrofit.

⁵³ O. Danzuka Dep. at 50:15-20.

⁵⁴ O. Danzuka Dep. at 50:21-23.

⁵⁵ O. Danzuka Dep. at 51:1-7.

⁵⁶ WSCP was another wholly owned enterprise operated by the Tribe.

⁵⁷ Exh. 25. This replacement Board was also in violation of WSFPI’s Plan of Operation – in both number, non-tribal member status, and required expertise. A. Greene Dep. at 132:22-134:25. Thereafter, until the Tribe closed the WSFPI mill, the composition of the replacement Board never conformed to the Plan of Operation. J. Katchia Dep. at 87:2-88:8. Mr. Katchia worked for the WSFPI mill from 1989 until the time the mill closed in April 2016. Mr. Katchia had worked in the WSFPI plywood division, lumber planing and grading division, and timber quality control division and was Operations Manager until he was appointed WSFPI CEO in July 2014. The Tribal Council WSFPI Board of Directors hired Mr. Katchia as CEO due to his knowledge and long-time experience with the WSFPI mill. J. Katchia Dep. at 20:14-29:13, 20:14-29:13, 31:11-19, 43:19-44:11.

Although Tribal Council assigned WSCP as the new replacement Board on June 25, 2014, it hadn’t notified the WSCP Board of that fact until after July 18, 2014. M. Stacona Dep. at 70:17-71:5; Exh. 26. As of September 4, 2014, the replacement Board had held only one meeting that was mostly informational and had no strategic plans. *Id.* at 71:6-11. Exh. 26.

deteriorated under its watch.⁵⁸ The Tribal Council WSFPI Board had saddled the replacement Board with almost \$2.8 million of debt.⁵⁹ Chairman Greene did not know what this replacement Board could do that Tribal Council hadn't done.⁶⁰

The replacement Board and WSFPI management presented recommendations to Tribal Council to make WSFPI successful on two separate occasions in latter 2014.⁶¹ Tribal Council took no action.⁶² Chairman Greene did not feel the replacement Board could have prevented the WSFPI mill shutdown.⁶³ In his mind, the Board had its hands tied already.⁶⁴ According to Mr. Danzuka, the replacement Board did not do anything to cause the shutdown of the mill.⁶⁵

2. Applicable Federal Regulations

The Code of Federal Regulations requires that in sales of forest products⁶⁶ with an appraised stumpage value⁶⁷ exceeding \$15,000, contract forms approved by the Secretary must be used unless a special form is approved by the Secretary.⁶⁸ Pursuant to 25 CFR § 163.22 (a), "with the exception of Indian tribal forest enterprises pursuant to § 163.13 of this part, payment for forest products will be required in advance of cutting for timber, or removal for other forest products." Except for tribal forest enterprises, purchasers of forest products shall make advance

⁵⁸ O. Danzuka Dep. at 52:17-25.

⁵⁹ J. Katchia Dep. at 121:25-122:25.

⁶⁰ A. Greene Dep. at 142:11-16.

⁶¹ Exh. 27; Exh. 28.

⁶² A. Greene Dep. at 147:23-148:2.

⁶³ A. Greene Dep. at 176:20-25.

⁶⁴ A. Greene Dep. at 176:20-25.

⁶⁵ O. Danzuka Dep. at 61:22-62:1.

⁶⁶ Forest products means marketable products extracted from Indian forests, including timber and timber products such as lumber, logs, and pulpwood. 25 C.F.R. § 163.1

⁶⁷ "Stumpage value means the value of a forest product prior to extraction from Indian forest land." 25 C.F.R. § 163.1

⁶⁸ 25 C.F.R § 163.19 (a).

deposits into accounts designated by the tribe prior to the cutting of timber and performance bonds are required.⁶⁹

25 CFR § 163.22 exempts tribal forest enterprises from advanced payments pursuant to 25 CFR § 163.13. Under 25 CFR § 163.13(a), “Authorized tribal enterprises may enter into formal agreements with tribal representatives for the **use** of tribal forest products.”⁷⁰ Under 25 CFR § 163.13(b) “Authorized officials of tribal enterprises, operating under approved agreements for the **use** of Indian-owned forest products pursuant to this section, **may sell the forest products produced according to generally accepted trade practices.**”⁷¹ Payment for Tribal Timber utilized by tribal enterprises shall be “in accordance with § 163.22 unless the Secretary of the Interior issues special instructions for payment.”⁷²

Under 25 CFR § 163.19(c), “By mutual agreement of the parties to a contract, contracts may be extended, modified, or assigned subject to approval by the approving officer, and may be terminated by the approving officer upon completion or by mutual agreement.”

3. The Tribe, BIA, and WSFPI Disregarded the Cutting Contract

On May 24, 2004, pursuant to 25 CFR § 163.22 and 25 CFR § 163.19, the Tribe and WSFPI had entered into a Timber Allocation and Sales Agreement (“Cutting Contract”), approved by the Secretary of Interior, which included modifications to advance payment requirements under 25 CFR § 163.22.⁷³ The Cutting Contract provides,

6. Payment for Timber

a. Tribal Timber

⁶⁹ 25 CFR § 163.22(b); 25 CFR § 163.21(a).

⁷⁰ (emphasis added).

⁷¹ (emphasis added).

⁷² 25 CFR § 163.13(d).

⁷³ Exh. 29.

Payment for Tribal timber shall be in accordance with 25 CFR § 163.22 unless other provisions are stipulated within the timber sale contract as provided in 25 CFR § 163.19. Not later than the twenty-fifth day of each month, the Bureau shall submit a bill for collection for timber harvested during the immediately preceding month. Enterprise shall pay for Tribal timber monthly, within five (5) business days of receipt of the bill for collection. Any discrepancy in the bill for collection shall be addressed in following month bills for collection.

In violation of this provision, there were months of delay in invoicing and payments delayed over a year.⁷⁴

During the 2008 Agreement, Tribal Timber invoices were prepared and issued for the BIA by tribal personnel whose services were reimbursed by the BIA.⁷⁵ On October 10, 2009, as the result of a \$66 million lawsuit settlement between the BIA and the Tribe,⁷⁶ the Tribe entered into an Indian Self-Determination Agreement⁷⁷ with the BIA and the Tribe assumed the invoicing and collection responsibility.⁷⁸ The invoicing procedures previously followed did not change after the Self-Determination Agreement.⁷⁹

⁷⁴ S. Javier Decl. ¶¶5-7.

⁷⁵ M. Stacona Dep. at 105:6-106:4

⁷⁶ *Confederated Tribes of Warm Springs Reservation of Oregon v. The United States*, Case No. 02-126L (Dec. 13, 2004); K. Borchert Dep. at 132:13-14. Mr. Borchert was the other Fed. R. Civ. P. 30(b)(6) witness designated by the BIA. Mr. Borchert is a member of the Cowlitz Tribe. He has a forest management degree from Oregon State University. He worked for the Tribe from approximately 1995 to 2009 with brief breaks in between. In October 2011, Mr. Borchert began working for the BIA as the Regional Timber Sales Forester and Regional Forest Development Officer. Mr. Borchert's responsibilities include providing technical assistance to the tribes and BIA superintendents such as by answering questions related to timber sales, contractors, or policies. K. Borchert Dep. at 17:15-18, 14:8-23, 17:8-27:12, 28:19-29:10, 48:24-49:10.

⁷⁷ This agreement was entered into pursuant to the Indian Self-Determination and Education Assistance Act of 1975, PL 93-638 (S 1017), PL 93-638, January 4, 1975, 88 Stat 2203. Exh. 30.

⁷⁸ B. Shaw Dep. at 96:18-97:2; Exh. 31.

⁷⁹ L. Katchia Dep. at 30:10-31:7. Ms. Katchia is a member of the Tribe and has issued Tribal Timber invoices and processed Tribal Timber payments as a Timber Sales Accountant in the Tribal Forestry Department for 23 years, either on behalf of the BIA or the Tribe. Her job responsibilities include tracking all logs and Tribal Timber volume removed from the reservation. Ms. Katchia referred to the Cutting Contract when performing her Tribal Timber

Violation of the timing obligations for invoicing under Section 6(a) of the Cutting Contract had occurred prior to the October 2009 Indian Self-Determination Agreement⁸⁰ and continued after the Tribe assumed invoicing responsibilities.⁸¹ Timely payment by WSFPI was likewise not enforced, even after the invoice was delinquent.⁸²

Louise Katchia issued invoices, on behalf of the BIA and later the Tribe, from 2007 until the mill closed in April 2016.⁸³ Invoicing for Tribal Timber was haphazard, and WSFPI never knew when it would receive an invoice from the Tribe.⁸⁴ Invoicing for Tribal Timber occurred six to 16 months after logging, and multiple invoices were issued at once.⁸⁵ This late invoicing was a problem until WSFPI closed, creating a strain on WSFPI's profitability.⁸⁶

The BIA provided the Tribe with a computer program used to manage Tribal Timber accounting, which provided information on the amount of a Tribal Timber invoice, the due date, date and amount of payment, any running balance, and delinquency status for any invoice.⁸⁷ The Tribe had the ability to generate an aging report showing the lateness of Tribal Timber receivables,

invoicing duties. L. Katchia Deposition 8:10, 9:22-24, 18:11-13, 19:18, 22:16-23:5, 23:19-24:9, 29:4-16, 25:1-14, 44:15-45:14; 49:1-50:6.

⁸⁰ Even before Vanport's involvement in 2008, the BIA acknowledged that section 6(a) of the Cutting Contract was not followed. B. Shaw Dep. at 75:22-76:1; Exh. 14; Exh. 32. The BIA agreed late billings were problematic. K. Borchert Dep. at 118:8-14.

⁸¹ B. Shaw Dep. at 153:17-155:8; K. Borchert Dep. at 153:3-7.

⁸² Exh. 14; B. Shaw Dep. at 153:17-155:8.

⁸³ L. Katchia Dep. at 29:4-16, 36:15-18; Exh. 33.

⁸⁴ J. Katchia Dep. at 45:13-46:6.

⁸⁵ J. Katchia Dep. at 189:16-24, 189:25-190:3.

⁸⁶ J. Everett Decl. ¶11, Exh. 2; L. Katchia Dep. at 85:9-19. J. Katchia Dep. at 189:16-21;

⁸⁷ B. Shaw Dep. at 49:15-19; L. Katchia Dep. at 118:13-120:4.

but never did.⁸⁸ The BIA had access to this program and could check the status of invoicing and payments at any time.⁸⁹

Tribal Timber payment arrearages were of concern to the Tribe only if they existed at the end of a given year.⁹⁰ The Tribe did not put any pressure on WSFPI management to pay Tribal Timber arrearages because these arrearages did not have to be reconciled until the end of each fiscal year.⁹¹

When the Tribal Council WSFPI Board was in charge, there were Tribal Timber invoices that should have gone out in the summer of 2013 that did not go out until the spring of 2014.⁹² These same late invoices were not paid at times until eight months later.⁹³

Paragraph 6A of the Cutting Contract was never complied with at any time that Mr. Katchia was CEO of WSFPI or prior.⁹⁴ There was no penalty imposed for late payments.⁹⁵ No one had ever

⁸⁸ M. Stacona Dep. at 108:25-109:17, 112:11-18. Ms. Stacona testified that the Tribe's position on its responsibilities is as follows: The Tribe did not monitor WSFPI's Tribal Timber payment account or whether WSFPI had paid for Tribal Timber within five business days of receiving each bill for collection and that the duty to monitor and issue timely Tribal Timber invoices was solely the BIA's responsibility, not the Tribe's. *Id.* at 113:11-15, 114:2-12. Accordingly, if an invoice was late, only the BIA was responsible for that, not the Tribe. It was the BIA, not the Tribe, that accepted any late payments made by WSFPI for tribal timber between July 1, 2008 and April 30, 2016. *Id.* at 137:6-16. The Tribe maintains that collection of the Tribal Timber debt was also the BIA's responsibility and the Tribe took no steps to require it to be paid. M. Stacona Dep. at 114:2-12, 114:19-24. At no time did Tribal Council complain to the BIA that the BIA was not fulfilling its obligation to ensure WSFPI made timely Tribal Timber payments pursuant to the Cutting Contract. *Id.* at 182:20-183:7.

⁸⁹ B. Shaw Dep. at 49:15-21; L. Katchia Dep. at 34:6-8.

⁹⁰ L. Katchia Dep. at 121:21-122:9.

⁹¹ O. Danzuka Dep. at 47:9-24.

⁹² J. Everett Decl. ¶11, Exh. 2; Exh. 33.

⁹³ J. Everett Decl. ¶11, Exh. 2; Exh. 33.

⁹⁴ J. Katchia Dep. at 116:5-117:5. Mr. Katchia was CEO of WSFPI from August 2014 until the mill closed in April 2016.

⁹⁵ J. Katchia Dep. at 143:8-20.

showed up and fined WSFPI or shut WSFPI down before April 2016, despite any Tribal Timber payment arrearages, non-payments or late payments.⁹⁶

The Tribal Council WSFPI Board encouraged payment, but never enforced it.⁹⁷ The Tribe always supports a tribal enterprise, because it is one of their own, so both will make certain allowances back and forth.⁹⁸ Since the tribal Forestry Department was slow in getting invoices out, WSFPI was not pressed on its contractual deadline to pay because there were times when it would need the money for other reasons.⁹⁹ Although it was never written down that an invoice could be weeks delayed, it was understood.¹⁰⁰ The Tribe and WSFPI had an ongoing agreement whereby the rules of the Cutting Contract were not followed.¹⁰¹ Their mutual allowance of late invoicing and payments was a “gentleman’s agreement” between WSFPI and the Tribe.¹⁰²

In early 2014, Tribal Council, still acting as the WSFPI Board, granted WSFPI management’s request to defer Tribal Timber payments for the months of March, April, and May 2014.¹⁰³ WSFPI hoped to pay for the remainder of its 2013 Tribal Timber payment obligation as cash flow stabilized in October to December 2014.¹⁰⁴ At a September 30, 2014 Tribal Council

⁹⁶ J. Katchia Dep. at 143:8-20.

⁹⁷ O. Danzuka Dep. at 86:2-6.

⁹⁸ L. Katchia Dep. at 111:4-13.

⁹⁹ O. Danzuka Dep. at 88:13-89:13.

¹⁰⁰ L. Katchia Dep. at 111:4-13.

¹⁰¹ J. Katchia Dep. at 11:23-12:9, 12:24-13:16.

¹⁰² L. Katchia Dep. at 111:25-112:12; 112:11-15. According to Mr. Danzuka, from a business standpoint you do not let someone take a product and pay for it when they could, but that had been going on for a number of years. O. Danzuka Dep. at 84:16-85:6, 85:9, 85:14.

¹⁰³ O. Danzuka Dep. at 115:16-23; J. Katchia Dep. at 50:6-12.

¹⁰⁴ A. Greene Dep. at 131:11-24, 132:5-9; Exh. 34.

meeting, WSFPI management informed Tribal Council that the Tribe had yet to invoice Tribal Timber from June to December 2013¹⁰⁵ and that WSFPI would pay when it had enough cash.¹⁰⁶

4. The BIA's Oversight

The BIA was aware of and had approved the terms of the Cutting Contract.¹⁰⁷ The BIA was aware that there were periods of time where the Tribe and WSFPI were not meeting the deadlines set out in the Cutting Contract¹⁰⁸ According to the BIA, the Tribe was free to modify the terms of the Cutting Contract with WSFPI¹⁰⁹ and when to insist upon Tribal Timber payments was up to the Tribe because the Cutting Contract was between the Tribe and WSFPI.¹¹⁰ The Tribe was well within its rights to pass a resolution deferring Tribal Timber payments.¹¹¹ But the BIA had an obligation to make sure that Tribal Timber was invoiced and paid timely and that WSFPI was not incurring significant Tribal Timber payment arrearages.¹¹²

In February 2014, the BIA expressed concern about facing another lawsuit by the Tribe and reliving its past dispute with the Tribe that resulted in the \$66 million settlement.¹¹³ As a result, the BIA became cautious with its decisions so as not to put it in another bad position.¹¹⁴ In

¹⁰⁵ Exh. 35, p. 2-3. In September 2014, Ms. Katchia's supervisor instructed her to hold off on issuing a number of Tribal Timber invoices past the date under the Cutting Contract. L. Katchia Dep. at 102:6-13.

¹⁰⁶ Exh. 35, p. 2-3.

¹⁰⁷ K. Borchert Dep. at 42:2-23, 93:9-11, 160:21-161:1.

¹⁰⁸ K. Borchert Dep. at 67:23-68:3, 54:8-14.

¹⁰⁹ B. Shaw Dep. at 35:14-18.

¹¹⁰ K. Borchert Dep. at 146:4-19; O. Danzuka Dep. at 48:15-49:7.

¹¹¹ B. Shaw Dep. at 100:11-14.

¹¹² Shaw Dep. at 39:25-40:9. The BIA could not identify any documents that outlined the BIA's trust responsibilities. K. Borchert Dep. at 137:9-13. However, the BIA had a hand-in-hand management relationship and strong presence with the Tribe even after the October 2009 Indian Self-Determination Agreement. Shaw Dep. at p. 28:25-29:9.

¹¹³ K. Borchert Dep. at 138:4-14.

¹¹⁴ K. Borchert Dep. at 138:4-14.

September 2014 the BIA inquired and learned that WSFPI was six months behind on Tribal Timber payments.¹¹⁵ The Tribe informed the BIA that it had stopped invoicing WSFPI for Tribal Timber because WSFPI had stopped paying.¹¹⁶ In December 2014, the BIA was aware of obstacles WSFPI was facing, including political challenges affecting WSFPI's viability and serious and potentially dire financial and operational conditions.¹¹⁷ By the end of December 2014, the BIA was also aware of large Tribal Timber payment arrearages.¹¹⁸ The BIA agreed that the Tribe did not issue a single timely invoice to WSFPI in 2014.¹¹⁹

As of January 12, 2015, the BIA was informed that WSFPI had no money to pay Tribal Timber invoices.¹²⁰ The BIA concluded it needed to step in and oversee and insist on the timely issuance and payment of Tribal Timber invoices.¹²¹ But the BIA was aware of the late invoicing and payments long before this point.¹²²

5. Efforts to Work out WSFPI's Tribal Timber Debt

Prior to April of 2015, neither the BIA nor the Tribe ever demanded all Tribal Timber payments be made current.¹²³ In January 2015, the BIA advised Tribal Council to get WSFPI on a payment plan to pay its Tribal Timber debt.¹²⁴ Tribal Council had never put together a Tribal

¹¹⁵ K. Borchert Dep. at 141:6-13.

¹¹⁶ K. Borchert Dep. at 161:25-162:3.

¹¹⁷ Exh. 36.

¹¹⁸ K. Borchert Dep. at 153:10-25, 155:15-24.

¹¹⁹ K. Borchert Dep. at 160:21-161:19; Exh. 33; J. Everett Decl. ¶11, Exh. 2.

¹²⁰ K. Borchert Dep. at 162:14-162:25.

¹²¹ K. Borchert Dep. at 163:1-164:2.

¹²² B. Shaw Dep. at 195:18-196:12.

¹²³ J. Katchia Dep. at 208:13-20.

¹²⁴ A. Greene Dep. at 153:7-154:19.

Timber repayment plan before.¹²⁵ The BIA's position was that the Tribe was free to make the repayment plan with any terms it wanted, but the BIA's approval was required.¹²⁶

The BIA did not have any established procedures for determining the appropriateness of a repayment plan or how and when Tribal Timber arrearages would have to be paid.¹²⁷ That did not stop the BIA from rejecting the Tribe's preliminary version of the repayment plan.¹²⁸ The BIA insisted that the Tribe include certain provisions in the repayment plan¹²⁹ even though it was not following any formula, directive, or regulation.¹³⁰ The BIA's role was more involved now because of the prior lawsuit between the Tribe and the BIA.¹³¹

The Tribe maintains that it inquired with the BIA about forgiveness of WSFPI Tribal Timber debt and was told, "No," even though the BIA allowed another tribe to do that on a previous occasion.¹³² The BIA also rejected WSFPI's request to use "return to log" pricing methodology

¹²⁵ O. Danzuka Dep. at 91:13-20. The BIA provided the Tribe with an example of a sample repayment plan that had been used for the Yakima Tribe in Washington for its tribal forest enterprise to repay its Tribal Timber debt. K. Borchert Dep. at 196:7-17.

¹²⁶ B. Shaw Dep. at 189:24-190:5; K. Borchert Dep. at 187:5-10.

¹²⁷ K. Borchert Dep. at 188:6-10; B. Shaw Dep. at 188:2-8.

¹²⁸ K. Borchert Dep. 186:9-13; B. Shaw Dep. at 184:6-18.

¹²⁹ The BIA insisted that the Tribe: (1) charge interest on the Tribal Timber debt even though this was not required by any regulation; (2) limit the number of years that WSFPI could repay the debts; and (3) include WSFPI's accrued debt for mainline, road and slash payments of over \$800,000 as part of the repayment plan even though these were not trust assets overseen by the BIA. K. Borchert Dep. at 187:25-188:5, 192:17-19, 187:15-24, 193:12-24.

¹³⁰ K. Borchert Dep. at 188:6-10, 194:3-9.

¹³¹ Exh. 37 p. 16.

¹³² A. Greene Dep. at 172:13-173:6, Exh. 37 p. 9. Yet the BIA had no parameters establishing that the Tribe could not turn Tribal Timber arrearages into long-term debt or forgive it all together. B. Shaw Dep. at 188:5-11. This is also contrary to the BIA's position that the Tribe could choose to defer payments or to receive nothing for its Tribal Timber. Shaw testimony p. 138:12-14, 100:11-14. Several years ago, Yakama Forest Products had a large unpaid Tribal Timber debt to the Yakama Nation tribe. K. Olney Dep. at 28:20-29:6. The Yakama Nation forgave some of that debt. K. Olney Dep. at 32:24-33:11. This is also contrary to the BIA's refusal to forgive some of WSFPI's debt.

even though it allowed another tribe's forest enterprise to do so and that would have provided WSFPI more ability to pay for Tribal Timber.¹³³

Two later versions of the repayment plan, Tribal Resolution 11,991A and 11,991B, were drafted to satisfy the BIA's requirements.¹³⁴

6. WSFPI's Business Model

Up until the closure of WSFPI in 2016, WSFPI sold logs and lumber to third parties before WSFPI had paid for those logs.¹³⁵ At no time until WSFPI's closure had Tribal Council or the Tribal Council WSFPI Board ever directed WSFPI management not to mill logs or sell forest until WSFPI had paid for all the timber used to create those forest products.¹³⁶ According to Chairman Greene, that would have been a bad way to run a business.¹³⁷ The Tribe never asked Vanport to pay the Tribe directly for any lumber Vanport purchased from WSFPI.¹³⁸

The BIA agrees that WSFPI was obtaining logs before they were invoiced and paid for, unlike a non-tribal timber purchaser.¹³⁹ There was nothing in the Cutting Contract that restricted WSFPI from reselling or milling logs and selling the resulting lumber before the logs were paid for.¹⁴⁰

¹³³ K. Borchert Dep. at 198:25-199:19. The Yakama Nation and the BIA allowed Yakama Forest Products to purchase tribal timber at "return to log" (a.k.a., "residual log value") pricing. This pricing strategy sets log values at a level that Yakama Forest Products could afford to pay after milling and selling tribal timber and paying its operating expenses, ensuring its continued operation. K. Olney Dep. at 25:4-26:22.

¹³⁴ Exh. 38; Exh. 39.

¹³⁵ C. Smith Dep. at 120:4-23; J. Katchia Dep. at 211:6-18.

¹³⁶ A. Greene Dep. at 178:6-11, 178:13; M. Stacona Dep. at 26:16-21, 27:1-3 (explaining that Ms. Stacona did not disagree with any of Chairman Greene's deposition testimony).

¹³⁷ A. Greene Dep. at 126:24-127:4.

¹³⁸ A. Greene Dep. at 178:22-179:3.

¹³⁹ B. Shaw Dep. at 66:17-67:11.

¹⁴⁰ An example of this lack of restrictions is as follows. In 2008, before Vanport's involvement, while the BIA was handling invoicing and payment receipts, WSFPI had arrearages for unpaid

WSFPI's standard operating procedure was to pay Tribal Timber invoices after the logs in the yard were processed into lumber and turned into cash.¹⁴¹ WSFPI needed to sell the lumber first to generate revenue and keep the mill operating, with payment to the Tribe thereafter.¹⁴² WSFPI CEO Katchia understood that title passed to WSFPI once WSFPI paid the logging contractor to cut the timber.¹⁴³ After that, the Tribal Timber became WSFPI's property and WSFPI could mill and sell the logs without further payment to anyone until after the sale to the ultimate buyer was complete.¹⁴⁴

7. The BIA Never Asserted Title to Lumber

In September 2014, despite knowing WSFPI was six months behind in Tribal Timber payments, the BIA did not issue any directive to WSFPI or the Tribe prohibiting WSFPI from milling or selling any logs in the yard.¹⁴⁵ In December 2014, the BIA was aware that WSFPI was accruing large Tribal Timber payment arrearages, but the BIA continued approving new timber contracts with WSFPI and the Tribe.¹⁴⁶ The BIA took no action to prevent WSFPI from milling logs in the mill or selling that milled lumber to third parties.¹⁴⁷

Tribal Timber and other obligations in excess of \$1.3M. Exh. 14. At that time, the BIA curtailed log harvest operations in the forest to address WSFPI's inability to pay for Tribal Timber. *Id.* However, the BIA did not prohibit WSFPI from selling any logs already at the mill or milling the logs and selling the resulting lumber. B. Shaw Dep. at 101:15-18.

¹⁴¹ J. Katchia Dep. at 13:12-21, 47:11-48:5.

¹⁴² J. Katchia Dep. at 201:9-16.

¹⁴³ J. Katchia Dep. at 200:5-12.

¹⁴⁴ Sky testimony at 200:5-12.

¹⁴⁵ K. Borchert Dep. at 145:10-146:3.

¹⁴⁶ K. Borchert Dep. at 156:16-157:1; Plaintiff's Motion, R. Brunoe Decl., Exh. 1-6, p. 9.

¹⁴⁷ K. Borchert Dep. at 156:16-157:1.

On March 17, 2015, the BIA circulated a draft Notice to Cease and Desist cutting of logs and severing green trees from the stumps.¹⁴⁸ The Notice terms did not restrict WSFPI in any manner from milling any logs then in the yard or selling any lumber derived from those milled logs.¹⁴⁹ The BIA agrees that the draft Cease and Desist did not apply to milling logs and selling lumber.¹⁵⁰ On September 4, 2015, the BIA issued a Notice to Cease and Desist Cutting of Forest Products to WSFPI.¹⁵¹ The BIA issued this notice as a result of WSFPI failing to make a timely payment pursuant to its Tribal Timber arrearage repayment plan.¹⁵² Again, this Notice did not restrict any milling of logs or selling of lumber.¹⁵³

In September 17, 2015, the BIA drafted a “Contingency Plan” regarding the appropriate course of action for the BIA to take if WSFPI failed to keep current on its repayment plan.¹⁵⁴ The draft “Contingency Plan” provided that

“3. If WSFPI is unable to pay within two weeks of due date of invoice, BIA will seize all on-site forest products in *round wood or chip form in the yard and on landings*, and will begin collecting information from WSFPI *to sell logs* on the open market to capture the fair market value.”¹⁵⁵

The September 17, 2015 draft Contingency Plan did not mention finished lumber.¹⁵⁶

¹⁴⁸ Exh. 40; The BIA does not have any specific regulations regarding issuing a Notice to Cease and Desist Cutting of Forest Products, and when the non-payment issues arose in late 2014 and early 2015, Mr. Borchert called another BIA regional office that had dealt with Tribal Timber payment arrearages who advised that was the appropriate action. K. Borchert Dep. at 122:13-123:7.

¹⁴⁹ Exh. 40.

¹⁵⁰ B. Shaw Dep. at 180: 13-181:1.

¹⁵¹ Exh. 41.

¹⁵² B. Shaw Dep. at 200:15-23.

¹⁵³ Exh. 41; B. Shaw Dep. at 201:3-10.

¹⁵⁴ Exh. 42; K. Borchert Dep. at 213:10-214:2

¹⁵⁵ Exh. 42; K. Borchert Dep. at 214:3-14.

¹⁵⁶ Borchert Dep. at 214:3-14

On September 30, 2015, the BIA issued a Memorandum to WSFPI's CEO saying it had come to the BIA's attention that WSFPI was starting to work on bankruptcy.¹⁵⁷ The Memorandum asserted that all **logs in the woods and in the WSFPI yard** would remain the property of the Tribe if they had not been paid for.¹⁵⁸ There was no reference whatsoever in the Memorandum to finished lumber.¹⁵⁹

As of October 19, 2015, the BIA had a copy of Vanport's 2014 Security Agreement and Promissory note, which identified the collateral as logs and lumber at the mill.¹⁶⁰ On December 4, 2015, the BIA circulated a third draft Contingency Plan without modifying paragraph three quoted above.¹⁶¹ As of February 2016, the BIA believed it would have first position with regard to the logs at the mill in any WSFPI bankruptcy, but made no mention about priority concerning milled lumber.¹⁶² On March 28, 2016, the BIA denied WSFPI's request for Tribal Timber payment deferment¹⁶³ and informed the Tribe that the BIA would issue a Notice to Cease and Desist that made no reference to finished lumber.¹⁶⁴

On April 1, 2016, at least one-and-a-half-years after the BIA became aware of WSFPI's Tribal Timber arrearages, the BIA issued its final Notice to Cease and Desist which, for the first time, called for WSFPI to stop milling logs and selling the resulting lumber, resulting in the closure

¹⁵⁷ Exh. 43.

¹⁵⁸ Exh. 43; K. Borchert Dep. at 215:13-25.

¹⁵⁹ K. Borchert Dep. at 216:10-25.

¹⁶⁰ Exh. 44.

¹⁶¹ Exh. 45.

¹⁶² K. Borchert Dep. at 236:13-237:5; Exh. 46.

¹⁶³ Despite the BIA's inconsistent that the Tribe would be well within its right to defer Tribal Timber payments. Shaw Dep. at 100:11-14.

¹⁶⁴ K. Borchert at 242:22-243:4.

of the mill and the Tribe putting WSFPI into Receivership.¹⁶⁵ At no time did the BIA ever order Vanport to cease selling any of the lumber it had purchased from WSFPI.

The Tribe put WSFPI into Receivership on April 21, 2016.¹⁶⁶

8. The Tribe Contributed to WSFPI's Failure.

The Tribe admitted Vanport did not cause the shutdown of the WSFPI mill. Instead, it resulted from a number of factors for which the Tribe was substantially or entirely responsible. These factors included the following:

- 1) The annual allowable cut was insufficient to sustain the mill.¹⁶⁷
- 2) The Tribe failed to follow third-party recommendations that would have helped WSFPI succeed.¹⁶⁸
- 3) The Tribe failed to update the mill to meet changing needs and smaller log sizes.¹⁶⁹

¹⁶⁵ Exh. 47.

¹⁶⁶ Exh. 48.

¹⁶⁷ WSFPI required 48 million board feet of lumber to run the mill efficiently. O. Danzuka Dep. at 19:2-9. Despite WSFPI's concerns, the Tribe decided to reduce the annual allowable cut to 35 million board feet starting in 2012. *Id.* at 20:14-23. Tribal Council member Danzuka did not feel that even 35 million board feet would be sufficient for the mill to run efficiently and expected that WSFPI would likely fail because of Tribal Council's decision. *Id.* at 21:10-11, 21:16-19, 24:14-16, 24:24-25:1. When the replacement WSFPI Board raised the concern that the volume WSFPI was receiving was too small for WSFPI to be financially successful, Tribal Council took no action. A. Greene Dep. at 145:9-16.

¹⁶⁸ The Tribe hired an accountant in early 2015 to assist in strategies for WSFPI's continued success who recommended to Tribal Council, in May 2015, that a new WSFPI Board was needed because the replacement Board members had limited knowledge of the business operation for a mill and a lumber company. Exh. 49. Tribal Council did not follow this recommendation. A. Greene Dep. at 166:24-167:2

¹⁶⁹ In 2014, WSFPI management informed the Tribal Council WSFPI Board that it needed \$4 million to upgrade the mill and establish a micro mill to process the smaller logs coming to the mill. O. Danzuka Dep. at 40:25-43:20. To generate the needed \$4 million for this mill retrofit, WSFPI management proposed an option to postpone Tribal Timber payment obligations and use it as capital to fund the retrofit. *Id.* at 44:3-13. Tribal Council refused this option. *Id.* at 43:3-7. Had the Tribe upgraded WSFPI's infrastructure years ago, WSFPI would have brought in revenue for the Tribe every month and employed fewer people but for a longer period of time. J. Katchia Dep. at 182:8-19; Exh. 50.

- 4) The Tribe allowed WSFPI to incur overly high logging costs.¹⁷⁰
- 5) The Tribe charged WSFPI overly high log prices, causing a negative impact on WSFPI's profit.¹⁷¹
- 6) The Tribe withheld requested information from the BIA relating to Tribal Timber payment arrearages.¹⁷²
- 7) The April 2015 repayment plan forced WSFPI to pay off Tribal Timber debt that had accrued when Tribal Council was the WSFPI Board.¹⁷³

¹⁷⁰ Mr. Danzuka brought up concerns about the high logging costs with the Tribal Council, but Tribal Council did nothing. O. Danzuka Dep. at 81:2-22, 100:4-22, 100:25-102:22. Political interests governed this choice – one Tribal Council member was a logger and others had family members who were vocal about their tribal logging jobs being taken away. *Id.* at 101:16-102:16. There was a lot of push from tribal membership to keep logging costs high to benefit the tribal loggers. *Id.* at 102:4-16. The BIA was aware that tribal logger logging costs were much higher at WSFPI than on other reservations, which impacted the Tribe's return on Tribal Timber. K. Borchert Dep. at 173:19-175:4. Despite this lower rate of return, the Tribe wanted its loggers to harvest Tribal Timber to provide tribal employment and jobs in the community. *Id.* at 175:1-4.

¹⁷¹ Tribal Council was aware that Tribal Timber prices were too high compared to export lumber prices in Japan and China. Exh. 51; J. Katchia Dep. at 54:17-25. The Tribe's method of setting log prices was to use an export price for all logs. Exh. 52, p. 16; J. Katchia Dep. at 135:4-136:6. In reality, only 12% of the volume of Tribal Timber was export-quality. J. Katchia Dep. at 135:15-21. WSFPI made Tribal Council aware of this on several occasions, but took no action. *Id.* at 135:15-136:6. WSFPI performed a real market experiment to compare prices the Tribe alleged were fair market value to the actual sales value of the logs. *Id.* at 124:4-13; C. Smith Dep. at 104:12-105:18. Claude Smith III has a degree in Forestry Engineering from Oregon State University. Mr. Smith started working at WSFPI in 2007 as an assistant timber manager. Mr. Smith held the timber manager position from 2008 until the WSFPI mill closed in April 2016. Mr. Smith signed most of the timber sales contracts at issue in this lawsuit. Smith Deposition p. 6:9, 34:20-35:4; Tribe's MSJ, Decl. of Robert A. Brunoe, Exh. 1-6 (Dkt. 59, 59-1, 59-2). The results of the above experiment showed that the actual sales value was much less than what the Tribe was charging WSFPI. J. Katchia Dep. at 124:14-16. When these results were presented to Tribal Council, Tribal Council took no action. *Id.* at 124:17-22. In addition, much of the 2014-2016 Tribal Timber sold to WSFPI was burnt and damaged by bugs. *Id.* at 110:21-111:4; C. Smith Dep. at 64:1-7. Despite this low-quality Tribal Timber, Tribal Council directed WSFPI to accept it at overly high prices. C. Smith Dep. at 64:1-7; J. Katchia Dep. at 111:5-12. Forcing WSFPI to take these salvage logs had a negative impact on WSFPI's profit. J. Katchia Dep. at 112:2-13.

¹⁷² The BIA began making inquiries about the Tribal Timber payment arrearages in September 2014. K. Borchert Dep. at 181:8-11. The Tribe had that information but withheld it from the BIA until December 2014, three months after it was requested. Exh. 53; K. Borchert Dep. at 149:4-10, 150:11-14. By the time the Tribe provided the requested information, WSFPI was severely in the red in payments. Exh. 54; K. Borchert Dep. at 153:10-17.

¹⁷³ L. Katchia Dep. at 199:19-25; O. Danzuka Dep. at 126:13-17.

- 8) The Tribe allowed and approved WSFPI entering into the Revolving Loan Agreement without knowledge of how WSFPI would pay for this debt.¹⁷⁴
- 9) The Tribe chose to direct lumber revenue generated from Tribal Timber to fund WSFPI mill employment and tribal logger employment, reducing monies available for Tribal Timber payments.¹⁷⁵
- 10) The Tribe did not operate WSFPI within established minimum financial standards or ensure WSFPI performed within acceptable business parameters customary in the forests products industry as required by the Plan of Operation.¹⁷⁶

ARGUMENT

1. The Tribe Has Failed to Articulate a Cognizable Claim for Relief.

The Tribe's Complaint does not identify a claim for relief. It merely alleges that Vanport "exercised dominion or control of the Tribal Timber in which the Tribe maintained a beneficial interest."¹⁷⁷ This is likewise true in the Tribe's Answers to Vanport's Interrogatories. The Tribe

¹⁷⁴ M. Stacona Dep. at 177:6-9, 177:14-23, 178:6-9. The Tribe knew, based on the key terms approved in Tribal Council resolution 11,803, that Vanport would be relying on its first position security interest when making loans to WSFPI pursuant to the line of credit. *Id.* at 174:23-175:1, 175:10-176:5. The Tribe allowed WSFPI to carry a balance of \$1.4 million on the line of credit from December 2014 until the end of 2015. Exh. 59.

¹⁷⁵ All earnings made by WSFPI shall be made available to the Tribe for the use and purpose the Tribe considered appropriate. Plan of Operation, Art. X, Sec. 2. Tribal Council had the authority to have a tribal forest enterprise, and, as voiced by the Tribe on numerous occasions to the BIA, that is what the Tribe wanted. K. Borchert Dep. at 76:25-77:10. The BIA's position, is that since it was the Tribe's timber, the Tribe could use it for whatever the Tribe wanted. B. Shaw Dep. at 138:8-11. This included providing jobs through the Tribal Timber via a tribal forest enterprise such as WSFPI and even getting nothing in exchange for the Tribal Timber resource. K. Borchert Dep. at 77:11-17; B. Shaw Dep. at 138:11-14. The Tribe wanted the mill for employment purposes because it provided many benefits to tribal employees. K. Borchert Dep. at 76:25-77:10; C. Smith Dep. at 54:4-7. The WSFPI mill was really an employment program and job center. K. Borchert Dep. at 76:25-77:10; C. Smith Dep. at 55:9-13. The Tribe chose to utilize the value of the Tribal Timber both as a monetary resource for the general fund and to fund mill employment. K. Borchert Dep. at 77:11-15. Despite the Tribe not receiving all Tribal Timber payments, the mill brought about \$17 million dollars flowing into the local tribal economy. C. Smith Dep. at 55:5-8.

¹⁷⁶ The Tribal Council shall establish minimum financial standards for WSFPI to ensure WSFPI performed within acceptable business parameters customary in the forest products industry. Plan of Operation, Art. IX, Sec. 5.

¹⁷⁷ Compl. ¶19 (Dkt. 1).

was specifically requested to identify “the legal basis [and] . . . theory of the claim(s),” but failed to do so.¹⁷⁸ The Tribe does not allege a breach of contract or tort committed by Vanport or a statutory claim for relief.¹⁷⁹ The legal authority the Tribe asserts to be its “claim for relief” is a bankruptcy appellate decision, *In re Blue Lake Forest Prod., Inc.*, 30 F.3d 1138 (9th Cir. 1994). That decision did not create a new common law claim for relief. It is axiomatic that a particular appellate decision, addressing a particular set of facts and issues, is not in and of itself a claim for relief. The Tribe cannot obtain summary judgment on a claim where none has been asserted.¹⁸⁰ Moreover, there are myriad reasons why *Blue Lake* is distinguishable, as set forth below.

2. If the Tribe’s Claim is for Conversion, it Fails as a Matter of Law.

If any claim for relief is purportedly articulated by the Tribe, it is conversion. Paragraph 19(c) of the Tribe’s Complaint alleges that “Vanport exercised dominion or control of the Tribal Timber in which the Tribe retained a beneficial interest . . . including interfering with the Tribe’s interest in, rights to, and control of the Tribal Timber before the Tribe had received payment from WSFPI for the Tribal Timber.”¹⁸¹ Pursuant to the 2014 Agreements, Vanport exercised dominion or control over the lumber it purchased from WSFPI, not logs the Tribe sold to WSFPI. Yet the

¹⁷⁸ Exh. 56.

¹⁷⁹ The applicable federal regulations relating to Tribal Timber do not provide for the type of claim the Tribe asserts. The title provision relied upon by the Tribe is contractual, but Vanport was not a party to that contract.

¹⁸⁰ In Vanport’s Answer, ¶33 Vanport alleges Plaintiff failed to state a claim in which relief can be granted. Vanport did not file a Motion for Summary Judgment because the nature of the Tribe’s claim was not clear from the Complaint or Interrogatory Answers. The Tribe’s Motion reveals that it has no claim for reasons set forth below and Vanport requests the Court consider granting summary judgment in favor of Vanport pursuant to Fed. R. Civ. P. 56(f).

¹⁸¹ Compl. ¶19 (Dkt 1).

Tribe asserts it is entitled to all proceeds received by Vanport from its sale of lumber that was derived from Tribal Timber for which WSFPI did not pay the Tribe.¹⁸²

Oregon law applies to a claim for conversion. In *Chilkat Indian Vill. v. Johnson*, the Ninth Circuit explained:

“We also agree with the district court that the Village's first and fifth causes of action amount to claims for conversion, and **that they do not arise under federal law**. Both claims are based upon allegations that the Village has a ‘paramount possessory interest’ in the artifacts, and that the defendants took the artifacts without the Village's permission.”¹⁸³

But even if federal conversion law were to apply, it would incorporate Oregon law, making them one and the same.¹⁸⁴ Under Oregon law, a claimant “must be entitled to immediate possession of a chattel before he can successfully contend that the actor's failure to yield possession constitutes conversion.”¹⁸⁵ Some Oregon court decisions refer to the right of immediate possession as the “right to control the disputed property.”¹⁸⁶

¹⁸² Tribe's Motion, p. 2 (Dkt. 54).

¹⁸³ 870 F.2d 1469, 1472–73 (9th Cir. 1989) (emphasis added). To the extent the Tribe may argue that Tribal Timber is different from artifacts because it is tribal trust property, the claim against Vanport is for the proceeds from the sale of forest products that derive from Tribal Timber, not for the Tribal Timber itself.

¹⁸⁴ Federal common law generally incorporates the common law of the forum state. *See* 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4518, at 572–573 (“In recent years, the Supreme Court has put increasing emphasis on the notion that when determining what should be the content of federal common law, the law of the forum state should be adopted absent some good reason to displace it.”).

¹⁸⁵ *See, e.g., Artman v. Ray*, 263 Or. 529, 531–32, 501 P.2d 63, 64, *decision clarified on denial of reh'g*, 263 Or. 529, 502 P.2d 1376 (1972), *quoted by Willamette Quarries, Inc. v. Wodtli*, 308 Or. 406, 413, 781 P.2d 1196, 1201 (1989).

¹⁸⁶ *See, e.g., W. Radio Servs. Co. v. Verizon Wireless*, 297 Or App 446, 451–52, 442 P3d 218, 221 (2019) (citing *Mustola v. Toddy*, 253 Or 658, 663, 456 P2d 1004 (1969) (adopting definition of conversion from Restatement (Second) of Torts §222A(1) (1965)).

The Tribe argues that the BIA retained “title” to the Tribal Timber sold to WSFPI. This is disputed, as will be shown. But even if it were true, the Tribe and the BIA did not retain a right to immediate possession of any of the export lumber that Vanport purchased from WSFPI and re-sold to customers.¹⁸⁷ Under the BIA-approved Cutting Contract, the Timber Sale Contracts, and the applicable regulations, WSFPI could harvest Tribal Timber, take possession and control it, mill it, and sell the resulting lumber to Vanport without first paying the Tribe for any of it. The Tribe and BIA never took any steps to divest WSFPI of that right. Neither the Tribe nor BIA ever objected to WSFPI selling any lumber to Vanport or any other purchaser when both knew WSFPI had substantial Tribal Timber arrearages. The Tribe and BIA had every opportunity to modify this aspect of the Cutting Contract, change WSFPI’s business practices, or repossess specific forest products, but they chose not to.

Under 25 C.F.R. § 163.13(b), WSFPI was permitted to “sell the forest products produced according to generally accepted trade practices.” It is generally accepted trade practice in the lumber industry to purchase lumber “free on board mill” or “FOB mill,” as provided in the 2014 Sales & Marketing Agreement.¹⁸⁸ “FOB mill” means the buyer takes possession and obtains title when it loads the lumber onto its truck at the point of purchase.¹⁸⁹ In the 2014 Sales & Marketing Agreement WSFPI warranted that title to all lumber sold was unencumbered when title passed to Vanport.¹⁹⁰ The BIA charged with interpreting and enforcing 25 C.F.R. § 163.13(b), and with knowledge of the 2008 Agreement, 2009 Agreement, and 2014 Agreements, never objected to the

¹⁸⁷ Vanport’s Answer, ¶¶ 21, 24.

¹⁸⁸ Sec. 3.1(b).

¹⁸⁹ C. Ketcham Decl. ¶¶ 6-7.

¹⁹⁰ Sec. 3.4(d).

FOB mill term or to WSFPI transferring possession of lumber to Vanport at the mill when both invoicing and payment were not timely, and in violation of the Cutting Contract.¹⁹¹

The applicable federal regulations also allowed the Tribe to give WSFPI the right to possess and control the Tribal Timber, regardless of whether stumpage had been paid or title transferred.¹⁹² WSFPI possessed these rights pursuant to its Cutting Contract with the Tribe.

The federal regulations included procedures the BIA or Tribe could have used to assert a right to immediate possession and control of forest products not paid for but possessed by WSFPI or milled and sold to Vanport. The BIA and Tribe never attempted to utilize those procedures. 25 C.F.R. 163.29(e) authorized the BIA or Tribe to “seize and take possession of the forest products involved in [a] trespass if the products [were] located on reservation.” The BIA and Tribe never attempted to locate, seize, or take possession of the lumber or any other products they allowed WSFPI to sell to Vanport and others. They made no such effort when the products were on the reservation; and they made no such effort after the products left the reservation. Instead, the Tribe (acting independently of the BIA) chose to bring this action in which it belatedly attempts to make Vanport pay twice for lumber Vanport purchased from WSFPI under the approving watch of the

¹⁹¹ The BIA superintendent signed the tribal resolution noting the 2008 term sheet agreement relating to title passing to Vanport. Exh. 15. The BIA had the 2009 Agreement in its file with the provision underlined “Vanport will hold title to all logs purchased by Vanport, and the lumber, residuals, and products derived therefrom...” Exh. 55. The BIA assisted the Tribe in negotiating the terms of the 2014 Agreements and signed as noted the tribal resolution regarding the 2014 Agreements. Exh. 21; Exh. 60; Exh. 61. The BIA had the 2014 Agreements in its file at the time it prepared its final Contingency Plan referenced above, which was limited to repossessing Tribal Timber in round wood or chip form with no reference to finished lumber.

¹⁹² 25 C.F.R. § 163.13(a) and 25 C.F.R. § 163.13 (c) authorized WSFPI, a tribal enterprise, to use Tribal Timber pursuant to a formal agreement with tribal representatives approved by the BIA. 25 C.F.R. § 163.22, 163.13(c), and 163.21(a) allowed WSFPI to harvest the Tribal Timber without pre-paying for stumpage or providing a bond to secure payment of stumpage which would have otherwise been required. 25 C.F.R. § 163.13(b) authorized WSFPI to sell the forest products it produced from Tribal Timber pursuant to generally accepted trade practices.

Tribe and BIA. Because the Tribe and the BIA relinquished and never reclaimed the right to possession and control of the forest products in question, there could be no conversion by Vanport.

Because the Tribe did not (and cannot) provide admissible, undisputed evidence showing it is entitled to relief under a claim of conversion, its motion should be denied.

3. There is no Trespass Claim either

The Tribe's Complaint did not allege a claim for trespass. The Tribe's Interrogatory Answers did not assert a claim for trespass. Neither referenced 25 C.F.R. § 163.29(b) as a basis for the Tribe's claim. Yet in its Motion for Summary Judgment, the Tribe cites 25 C.F.R. § 163.29(b) to assert, without further explanation, that its claim follows the proceeds from its sale of Tribal Timber.¹⁹³

The Tribe cannot obtain summary judgment on a statutory trespass claim when the Tribe did not allege that claim. Moreover, "trespass" in this context means the removal of forest products from, or damaging forest products on, "**Indian forest land**, except when authorized by law and applicable federal or tribal regulations."¹⁹⁴ Vanport's purchase of lumber from WSFPI's mill was not the removal of forest products from Indian forest land.

If there was "reason to believe that Indian forest products" were "involved in trespass" and that the products had left the reservation, 25 C.F.R. 163.29(f) required the BIA or Tribe to notify the "owner of the land" where the products were located or "the party in possession of the trespass products" that the products "could be Indian trust property involved in a trespass" and that their "removal or disposition" could result in "criminal and/or civil action by the United States or tribe." 25 C.F.R. 163.29(g) then *required* the BIA or Tribe to "promptly determine if a trespass

¹⁹³ Tribe's Motion, p. 18 (Dkt. 54).

¹⁹⁴ 25 C.F.R. § 163.29(b) (emphasis added).

ha[d] occurred.” If the determination was that a trespass had occurred, then 25 C.F.R. 163.29(g) *required* the BIA or Tribe to “issue an official Notice of Trespass to the alleged trespasser and, if necessary, the possessor or potential buyer of any trespass products.” There is no evidence the BIA or Tribe ever issued any of the required notices.

Since the Tribe did not plead a claim for trespass and failed to present admissible, undisputed evidence showing it is entitled to relief under a claim of trespass, its motion for summary judgment must be denied.

4. Blue Lake is Wholly Distinguishable.

As noted above, the Tribe pins its claim for relief on the *Blue Lake* decision. The gist of the Tribe’s argument is that pursuant to *Blue Lake*, this Court must ignore everything that led up to the significant payment arrearages, including their cause, the Tribe’s conduct, the BIA’s conduct, the course of dealing and interpretation of the Cutting Contract and Timber Sale Contracts, and the agreements Vanport relied on when doing business with the Tribe’s subordinate agent, WSFPI. According to the Tribe, because its enterprise did not pay the Tribe for the logs, regardless of why, title did not pass and Vanport is liable to the Tribe for all proceeds received by Vanport that derived from the sale of Tribal Timber for which WSFPI did not pay the Tribe for. Nothing else matters. Vanport disagrees. If *Blue Lake* somehow creates a cause of action that would not otherwise exist, this Court must still decide whether the facts of and policies enunciated in *Blue Lake* are so like the present case in every operative way that the Tribe’s motion for summary judgment must be granted. They are not.

There are remarkable and significant factual distinctions between the circumstances of *Blue Lake* and the instant case. *Blue Lake* was a dispute in bankruptcy court over whether the Hoopa Tribe or the Hong Kong and Shanghai Banking Corporation (“Bank”) had superior rights to

identified logs located in the mill yard that Blue Lake, a non-tribal mill located off the reservation, had not paid for when it filed for bankruptcy.

On the day Blue Lake filed for bankruptcy, it received a notice from the BIA demanding that it cease processing the logs.¹⁹⁵ The next day, the parties stipulated to an order in bankruptcy court that the Tribe's claim to the subject logs would follow (i.e., attach to) the proceeds of those logs, which Blue Lake was authorized to mill.¹⁹⁶ This order meant the value and priority of the tribe's claim to the logs would not be affected by their processing or sale. It also allowed purchasers of the resulting lumber to receive it free and clear of any potential claim by the Tribe. This was all the product of a **stipulation**, not a court ruling.

In *Blue Lake*, the logs at issue were branded and identified. The stipulated order permitted Blue Lake to process the logs and deposit the proceeds with the Bank.¹⁹⁷ The proceeds were to be held by the Bank subject to determination of the priority of the competing claims to the logs.¹⁹⁸ The trial court decision in *Blue Lake* stated that the Hoopa Tribe was "entitled to recover value of **those logs**, now held by the bank in the form of proceeds..."¹⁹⁹ The root claim of the tribe was **for the logs**, not the proceeds, and not for damages.

In contrast, this case involves no order or stipulation that the Tribe's claim against Vanport follows or attaches to any proceeds of sales by Vanport. There is no evidence that Vanport still possesses any logs or lumber for which the Tribe claims payment or any proceeds from their sale. There was no BIA order for Vanport to cease buying or selling lumber. The Tribe's motion cites

¹⁹⁵ *In re Blue Lake*, 30 F.3d at 1140; *In re Blue Lake Forest Prods., Inc.*, 143 B.R. 563, 566 (1992). The BIA may have issued its notice pursuant to the tribal timber trespass regulations discussed above.

¹⁹⁶ *In re Blue Lake*, 30 F.3d at 1140; *In re Blue Lake*, 143 B.R. at 566.

¹⁹⁷ *In re Blue Lake*, 143 B.R. at 566.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 569.

no legal authority that would subject Vanport's proceeds from long past lumber sales to the Tribe's claim absent the type of stipulation the parties entered into in *Blue Lake*. Without such authority, there is no basis for the Tribe to obtain summary judgment.

If *Blue Lake* is to be superimposed onto the facts of this case, then Vanport stands not in the shoes of the Blue Lake mill but in the shoes of its customers, who received title to the lumber they purchased free and clear of the Tribe's claim. *Blue Lake* does not authorize a claim to any of the lumber sale proceeds received by Vanport.

Blue Lake awarded a creditor tribe a priority over a creditor bank to logs possessed by a non-tribal debtor in bankruptcy because that debtor had failed in its contractual duty to pay for those logs. *Blue Lake* did not make a buyer of finished lumber from a tribal enterprise a guarantor of that enterprise's obligations to the tribe that owned and controlled it.²⁰⁰

By the Tribe's logic here, every party that ever purchased any products made from Tribal Timber would be subject to the Tribe's claim. Its claim would extend to the Japanese importers and their contractor customers who used the lumber to build homes. It would extend even to the buyers of those homes, on the grounds that they now possess lumber for which the federal government still holds title in trust. Every transporter or middle-man could also be exposed to these claims—such are the implications of the Tribe's extreme position.

Other distinctions abound. In *Blue Lake*, the Hoopa Tribe and its enterprise Hoopa Forest Industries ("HFI") entered into a standard BIA Form S5324 contract that related to the Pine Creek L timber sale, consisting of 318 acres to be harvested over a one-and-a-half-year period.²⁰¹ In *Blue*

²⁰⁰ *Blue Lake* did not decide the Bank had to disgorge debt payments derived from lumber sale proceeds it had previously received from Blue Lake before the Tribe and BIA asserted any claim.

²⁰¹ Exh. 57 p.1,2.

Lake, there was no dispute the Standard B Provisions were attached to that contract.²⁰² Section A8 of the timber sales contract in *Blue Lake* referenced B4.0 of the Standard B Provisions for payment, and B4.0 provided that “the purchaser (HFI) shall pay for timber in advance of cutting...”²⁰³

In contrast, WSFPI and the Tribe entered into a Cutting Contract applicable to all timber sales contracts after 2004. The Cutting Contract ended up governing a number of contract, issued at different times over different years, involving a number of different logging units. The Cutting Contract did not require advance payment.

The Standard B Provisions relied upon by the Tribe states:

“B2.1 Title and Risk of Loss. Title to the timber covered by the contract shall not pass to the Purchaser until it has been scaled, paid for, and removed from the contract area.”²⁰⁴

The Standard B Provisions were not part of the Cutting Contract, and they were not attached to any of the six timber sales contracts submitted by the Tribe in support of its motion.²⁰⁵

WSFPI CEO Katchia testified that the Standard B Provisions, including B 2.1 relating to title, were not in any of the timber sales contracts he reviewed.²⁰⁶ He inquired about the missing Standard B Provisions with Tribal Council and the BIA.²⁰⁷ Neither the Tribe nor the BIA provided him any response.²⁰⁸ WSFPI Timber Manager Smith, responsible for executing most of the Timber Sale Contracts for WSFPI, never reviewed section B2.1 relating to title.²⁰⁹ The Standard B

²⁰² *In re Blue Lake*, 143 B.R. at 565.

²⁰³ 25 CFR § 163.15; Exh. 57, p. 3, 46.

²⁰⁴ Exh. 62.

²⁰⁵ Tribe’s MSJ, Decl. of Robert A. Bruno, Exh. 1-6 (Dkt 59-1, 59-2).

²⁰⁶ J. Katchia Dep. at 118:24-119:10.

²⁰⁷ J. Katchia Dep. at 118:24-119:10.

²⁰⁸ J. Katchia Dep. at 118:24-119:10.

²⁰⁹ C. Smith Dep. at 121:23-122:2.

Provisions he used in carrying out his duties as WSFPI Timber Sales Manager had many provisions crossed out as inapplicable to WSFPI.²¹⁰ Section B2.1 may have been crossed out.²¹¹

That the BIA and Tribe did not consider the Standard B Provision B2.1 to be applicable to WSFPI is demonstrated in Tribal Council Resolution 11,797 dated September 30, 2013, signed by the BIA as noted.²¹² The Resolution specified that title to certain logs would pass to WSFPI on January 15, 2014, without any reference to payment. The Tribe did not invoice WSFPI for the logs until April 30, 2014, and WSFPI did not pay for them until the end of December 2014, so WSFPI received title long before it paid for the logs.²¹³

In spite of Standard B Provision B2.1, and even though the BIA was aware of WSFPI's Tribal Timber arrearages, the BIA never took action to enforce provision B2.1 by restricting WSFPI from milling logs or selling finished lumber.²¹⁴ The BIA also did not direct any purchaser of logs or lumber to pay the Tribe or the BIA directly on account of WSFPI's arrearages.²¹⁵ The BIA was not aware whether it had ever enforced the Standard B Provisions, specifically B.2.1 relating to title passing for unpaid logs, against any third-party who had purchased any logs or wood products from WSFPI.²¹⁶

²¹⁰ C. Smith Dep. at 122:3-10.

²¹¹ C. Smith Dep. at 122:11-13.

²¹² Exh. 63.

²¹³ J. Everett Decl. ¶11, Exh. 2.

²¹⁴ K. Borchert Dep. at 125:15-19, 170:13-22, 181:8-25.

²¹⁵ K. Borchert Dep. at 231:10-232:7.

²¹⁶ Shaw Dep. at 210:13-16, 210:20-21. The BIA also expressly approved of the WSFPI Mill Lumber and Log Agreement executed during the receivership that allowed the Receiver to operate the mill, process all the unfinished lumber and sell that lumber to Vanport without first requiring the Tribe to receive any payment for the Tribal Timber. B. Shaw Dep. at 223:21-224:16, 224:21-22; Exh. 64

Whether the Standard B Provision B2.1 was ever part of any of the Timber Sale Contracts or considered a part of them is a disputed fact. Therefore, whether the Tribe retained any title interest in any of the logs harvested by WSFPI is also factually disputed.

In *Blue Lake*, the non-tribal mill located off of the Hoopa Reservation entered into a Log Purchase Agreement with tribal enterprise HFI just four days after the Hoopa Tribe and HFI entered into the timber sales contract for the same logging unit.²¹⁷ That Log Purchase Agreement set the log price to be paid by Blue Lake in relationship to the price HFI paid the Hoopa Tribe.²¹⁸ The 2014 Agreements in this case were not tied to any specific Timber Sale Contracts, logging units, or log prices. WSFPI contracted to pay a certain price to the Tribe for logs it harvested from the forest, Vanport contracted to pay WSFPI a final selling price for export lumber, a price that could only be determined after Vanport sold the lumber to export customers. Vanport never contracted to pay for lumber at prices that corresponded to sums WSFPI agreed to pay the Tribe for logs.

Vanport's contract with WSFPI was not limited to lumber produced from Warm Springs Tribal Timber, as there was no limitation on who could supply WSFPI with timber for the mill and WSFPI did purchase timber from other sources.²¹⁹ Vanport's contract with WSFPI was only for export-grade lumber, and WSFPI sold a percentage of logs, lumber, and other products derived from every timber harvest to domestic purchasers.²²⁰ The close relationship between the Blue Lake

²¹⁷ Exhibit 58 (hereinafter "Log Purchase Agreement"); *In re Blue Lake*, 143 B.R. at 565.

²¹⁸ Log Purchase Agreement p. 1, 10-11, 24-25.

²¹⁹ C. Ketcham Decl. ¶8.

²²⁰ If the Tribe had a claim, it would be required to trace specific logs and their value to the specific lumber purchased and re-sold by Vanport and the specific proceeds received. Vanport received only five percent of the proceeds for the export lumber it sold, while WSFPI received the remainder.

contract with HFI and HFI's contract with the Hoopa Tribe to pay for Tribal Timber does not exist in this case.

Paragraph 2 of the Blue Lake Log Purchase Agreement stated that “[n]o provision of this Agreement will be interpreted or enforced in a manner that violates...Part 163 of Title 25, Code of Federal Regulations, which laws and regulations are incorporated herein.” There is no equivalent term in Vanport's Sales & Marketing Agreement with WSFPI. When Blue Lake agreed to this term, it knew the terms of the timber sale contract, including the provision that title would not pass until the timber was paid for.²²¹ The Tribe, here, presents no evidence, let alone undisputed evidence, that Vanport had ever seen the “title . . . shall not pass” language in the Standard B Provisions before entering into the 2014 Agreements.²²²

Vanport had a contractual obligation to purchase all export lumber produced by WSFPI, and the contract required Vanport to pay WSFPI, not the Tribe or BIA, for that lumber.²²³ In contrast, Blue Lake's Log Purchase Agreement required it to make payment by certified check jointly to HFI *and the BIA*.²²⁴ The Log Purchase Agreement even used the term “stumpage” to

²²¹ *In re Blue Lake*, 30 F.3d at 1140.

²²² The Tribe's Compl., ¶11, (Dkt 1), states “Based on information and belief, Vanport knew the terms of the timber sale contracts pursuant to which Tribal Timber was sold to the Sawmill.” The cited testimony of Vanport representatives Mr. Everett and Mr. Ketcham does not come close to proving that Vanport had knowledge of the Standard B Provision B2.1 regarding title. Plaintiff's Motion, A. Kennedy Decl. ¶7-8, Exhs. 6-7 (Dkt. 57). The Tribe was a signatory to the subject six Timber Sale Contracts. Mr. Danzuka informed the Tribe about Standard B Provision B2.1 in 2014 when he was on the Tribal Council WSFPI Board, but WSFPI was not then restricted from selling any forest products before it had paid for Tribal Timber. O. Danzuka Dep. at 106:25-109:15.

²²³ Pursuant to 25 U.S.C. 3107 and 25 C.F.R. 163.22(b), the Sales & Marketing Agreement could have required Vanport to make its lumber payments to a tribal account, but it did not. After that contract was formed, the Tribe could have asked Vanport to modify it to provide for such payments, but the Tribe never did that.

²²⁴ Log Purchase Agreement, p. 12.

describe part of Blue Lake's payment obligation.²²⁵ Vanport's contract required it to pay for lumber.

Blue Lake's contract also prohibited it from taking logs away from the reservation without first paying the BIA and HFI.²²⁶ When Blue Lake took the logs at issue to its off-reservation mill without paying for them, it violated the contract, which the Ninth Circuit emphasized in its opinion. The Tribe does not allege nor prove that Vanport's possession of any of the lumber produced by WSFPI was ever in breach of the 2014 Agreements.

Blue Lake described "the essential conduct at issue as the severance of timber and its removal [from the reservation] without proper compensation, in contravention of the governing contract and federal regulations." This case is fundamentally different because the Tribe has not shown that Vanport's purchase and re-sale of lumber produced by the Tribe's subordinate agent from Tribal Timber was ever in contravention of the 2008 Agreement, 2009 Agreement, or 2014 Agreements or prohibited by the applicable federal regulations. It was WSFPI, not Vanport, that took possession of Tribal Timber and turned it into proceeds. Vanport simply purchased export lumber from WSFPI without regard for whether it was made from Tribal Timber or from another source. The proceeds held by WSFPI were controlled by the Tribe.

Neither the Tribe's Complaint nor the Tribe's Motion for Summary Judgment include any allegations of any wrongdoing or overreaching on the part of Vanport. The Tribe, Chairman Greene, Council member Danzuka, and WSFPI's CEO Katchia all agreed that Vanport did not

²²⁵ Log Purchase Agreement, p.12.

²²⁶ Paragraph 26 of Blue Lake's Log Purchase Agreement required title to pass within the reservation boundaries. Paragraph 23 required Blue Lake to pay for timber immediately upon passage of title. Log Purchase Agreement, p.13, 12.

cause or contribute to the WSFPI mill closure.²²⁷ It was Vanport that did not receive “proper compensation” because the Tribe’s decision to put WSFPI into receivership left WSFPI owing Vanport approximately \$567,000 on the line of credit Vanport extended to WSFPI under the 2014 Agreements.

The policies expressed in *Blue Lake* are inapplicable. The federal policy affording heightened protection to Indian trust timber enunciated in *Blue Lake* is designed to protect tribal resources from non-tribal entities. In *Blue Lake*, a non-tribal entity did not pay for Tribal Timber when it took possession of that timber. Application of the federal policy protecting trust timber resulted in the Hoopa Tribe having superior rights over specific logs to which Blue Lake’s Bank claimed a security interest. The federal policy acted as a shield to prevent the loss of valuable timber taken from the reservation in violation of contract and regulation.

The federal policy is not a sword that this Tribe can wield against Vanport where Vanport acted in compliance with both contract and regulation obligations when purchasing lumber from the Tribe’s subordinate entity according to generally accepted trade practices and reselling it to export customers with approval of the Tribe and BIA. The federal policy described in *Blue Lake* does not make a lumber purchaser responsible for intra-tribal decisions regarding how to spend lumber proceeds received by a tribal enterprise. With the Tribe’s consent, WSFPI spent its proceeds on tribal benefits (mill and logger employment, etc.) instead of allocating them to Tribal Timber payments. Because *Blue Lake* is fundamentally distinct from the present matter, this Court should decline the Tribe’s invitation to treat *Blue Lake* as authorizing the Tribe to bring an otherwise non-existent cause of action or claim for relief against Vanport.

²²⁷ J. Katchia Dep. at 110:4-7; O. Danzuka Dep. 61:1-3, 61:6; A. Greene Dep. 194:5-9, M. Stacona Dep. at 23:24-24:6, 24:10-15 (explaining that Ms. Stacona agreed with everything in Chairman Greene and Mr. Danzuka’s deposition transcripts).

In this context, Vanport's various arguments and defenses alleged herein are not inconsistent with federal policy. The balancing of federal, state, and tribal interests referenced in *Blue Lake* as the test for federal preemption weighs in favor of allowing Vanport to assert its defenses. These defenses, discussed below, create genuine issues of material fact that preclude summary judgment for the Tribe.

The federal policy of encouraging tribal self-determination,²²⁸ instituted with this Tribe in 2010, would be thwarted if tribal enterprises could not sell "forest products produced according to generally accepted trade practices."²²⁹ Non-tribal purchasers who paid the tribal enterprise for those products would face exposure as a thief or converter if the enterprise did not perform its obligation to its tribe – a performance the non-tribal purchaser did not control. That status should not be determined by whether a tribe allows its enterprise to prioritize other payments and accrue a balance on its Tribal Timber payment obligations.

The BIA, charged with interpreting and implementing the federal regulatory scheme, and with knowledge and involvement in the negotiation of the 2014 Agreements, correctly understood that the Tribe could give WSFPI the right to sell lumber milled from Tribal Timber before WSFPI paid the Tribe whatever the Tribe chose to invoice.²³⁰ In *Blue Lake*, the BIA filed an Amicus Curiae brief in the Ninth Circuit in support of the Hoopa Tribe. Here, the BIA did not issue any recommendations to pursue Vanport for Tribal Timber arrearages.²³¹ The BIA could not identify any communications to Vanport wherein the BIA claimed a title interest in any lumber produced

²²⁸ Indian Self-Determination and Education Assistance Act of 1975, PL 93-638 (S 1017), PL 93-638, January 4, 1975, 88 Stat 2203.

²²⁹ 25 C.F.R. § 163.13(b)(1996).

²³⁰ Exh. 21; Exh. 60; Exh. 61.

²³¹ K. Borchert Dep. 239:19-240:2.

by WSFPI.²³² The BIA was not looking to Vanport to pay unpaid Tribal Timber arrearages.²³³ The over-riding federal interest that determined the outcome of *Blue Lake* will not be served by applying it, one-size-fits-all, to the facts of this materially distinguishable case.

5. Blue Lake is Immaterial Because the Tribe was Not Paid.

The Tribe's case is premised on the idea that it was not paid for the Tribal Timber. There are significant questions of material fact on the issue of whether the Tribe was in fact paid, making *Blue Lake* wholly immaterial. A reasonable factfinder could conclude the Tribe was paid because it owned, controlled, directed, and was responsible for the actions of WSFPI.²³⁴

The total revenue generated by WSFPI from the logs and lumber sold was more than the total Tribal Timber debt WSFPI accrued to the Tribe during the same period.²³⁵ Under self-governance and the Plan of Operation, the Tribe controlled WSFPI's finances and made decisions to apply revenue from lumber to other obligations that benefited the Tribe as opposed to payment for the Tribal Timber.²³⁶ The Tribe made little effort to distinguish WSFPI as a separate entity; and for the bulk of the relevant time period the Tribe was WSFPI, with Tribal Council acting as the WSFPI Board.

The Tribe asserts WSFPI was a separate legal entity, but that is a fact-dependent proposition.²³⁷ The independence of WSFPI was a fiction. The Tribe, as a political body, made

²³² B. Shaw Dep. at 216:19-23.

²³³ K. Borchert Dep. at 172:14-21

²³⁴ Vanport's Answer, ¶ 28 (Dkt. 8).

²³⁵ J. Everett Decl. ¶¶ 6, 9. WSFPI received a total of \$30,531,765 for the sale of domestic lumber and \$20,065,570 for the sale of export lumber.

²³⁶ All earnings made by WSFPI shall be made available to the Tribe for the use and purpose the Tribe considered appropriate. Plan of Operation Art. X. Sec. 2.

²³⁷ The Tribe cites U.S. Dept. of Interior, Office of the Solicitor, Opinion of November 20, 1958 at 65 I.D. 484 for the proposition that "WSFPI is a separate legal entity as a matter of federal law." The Solicitor's Opinion of course does not address WSFPI, which did not exist in 1958.

business decisions for WSFPI that turned out to be unsuccessful. The alleged WSFPI debt was due to a conscious decision by the Tribe, with the consent of the BIA, to allow significant Tribal Timber payment to accrue to keep the mill running. The Tribe and BIA did not correct the problem despite knowing of WSFPI's financial deterioration caused by a number of factors unrelated to Vanport. None of this was the backdrop in *Blue Lake*, which was a simple matter of a non-tribal entity defaulting on its contractual obligation to pay for Tribal Timber.

Case law on the issue of sovereign immunity for tribal business entities is instructive. In that context, courts look to a number of factors to determine whether the business entity is an "arm of the tribe" entitled to immunity or a independent entity. Those factors include:

- Whether the entity is organized under the tribe's laws or constitution rather than federal law;
- Whether the entity's purposes are similar to or serve those of the tribal government;
- Whether the entity's governing body is comprised mainly of tribal officials;
- Whether tribe has legal title or ownership of property used by the entity;
- Whether tribal officials exercise control over the administration or accounting activities of the entity;
- Whether the tribe's governing body has power to dismiss members of the entity's governing body; and
- Whether the entity has the power to bind or obligate the funds of the tribe.²³⁸

Case law describing the circumstances where one entity can be said to be the "alter ego" of another is also instructive. Alter ego can be found upon a prima facie showing:

(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice. The plaintiff must show that the parent exercises such control

Certainly Section 17 of the Indian Reorganization Act permits Tribe's to charter business corporations that function as separate entities. However, that does not mean that every purported tribal enterprise is in fact a separate entity. Here there is evidence that WSFPI was not a separate entity. WSFPI's true status presents triable issues of fact.

²³⁸ See, e.g., *Wright v. Prairie Chicken*, 1998 S.D. 46, 579 N.W.2d 7, 9–10 (1998).

over the subsidiary so as to “render the latter the mere instrumentality of the former.”²³⁹

There is ample evidence that WSFPI was not truly a separate entity but was instead an “arm” or “alter ego” of the Tribe.²⁴⁰ If WSFPI was not a separate entity, then Vanport’s payment to WSFPI by Vanport’s payments to WSFPI were payments to the Tribe and were sufficient for title to pass.

6. Vanport has a Viable Defense of Consent.²⁴¹

The Tribe’s Motion for Summary Judgment asserts that Vanport’s affirmative defense of consent²⁴² fails because there is “no evidence that the United States provided any consent in accordance with federal law that would have allowed title to the Tribal Timber to pass to WSFPI without payment to the Tribe.”²⁴³ The Tribe is simply incorrect. There is ample evidence in the record that both the Tribe and the BIA consented to the conduct the Tribe now alleges to have interfered with its interest in and rights to Tribal Timber.²⁴⁴ Their consent negates the Tribe’s

²³⁹ *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134–35 (9th Cir. 2003) (internal citations and quotations omitted).

²⁴⁰ The above factors correspond with the following articles of the Plan of Operation: Art. IV, Sec. 3, Sec. 5, Art. IX, Sec. 5, Sec. 7, Art. X, Sec. 1, Sec. 2.

²⁴¹ Section D of the Tribe’s Motion asserts that pursuant to 25 U.S.C. § 194 (“trials about the right of property in which an Indian may be a party”), Vanport “may not rely on the allegations of its answer to avoid summary judgment . . . [and] must set forth specific material facts to show there are genuine issues for trial.” Motion, p. 18-19. Regardless of whether 25 U.S.C. § 194 has applicability or not (Vanport does not concede that point), Vanport has no intention of relying on its allegations. Vanport has offered substantial evidence showing there are material facts requiring trial of the Tribe’s claim and Vanport’s consent and other defenses.

²⁴² Vanport’s Answer, ¶20, 28 (Dkt. 8).

²⁴³ Tribe’s Motion, p. 19 (Dkt. 54).

²⁴⁴ The Tribe expected the BIA to monitor WSFPI’s financial condition, monitor WSFPI’s cash flow, evaluate WSFPI’s ability to perform its contractual obligations, evaluate WSFPI’s ability to pay for Tribal Timber, evaluate WSFPI’s lumber sales price determination, evaluate WSFPI’s lumber sales and business transactions, evaluate the impact of the determined annual allowable cut on WSFPI’s profitability, and evaluate the impact of the determined log market value on WSFPI’s profitability. M. Stacona Dep. at 86:23-88:1.

affirmative claim that title did not pass and constitutes an absolute defense to conversion (if that is the Tribe's claim for relief).

Oregon law of conversion incorporates the Restatement (Second) of Torts.²⁴⁵ Restatement § 252 provides that “[o]ne who would otherwise be liable to another for trespass to a chattel or for conversion is not liable to the extent that the other has effectively consented to the interference with his rights.” According to Comment b, this rule “applies whenever the consent has been given by the person who is seeking recovery[.]” Similarly, under Restatement § 253, there is no liability for conversion to the extent a party “acted with the consent of a third person with power to give a consent effective as to the other.” A corollary of consent is ratification. No conversion exists where “an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property.”²⁴⁶

The Tribe bases its title argument on an alleged contract provision that is not required by any title retention regulation. Instead it is included in the standard contract forms approved by the BIA secretary pursuant to 25 C.F.R. 163.12, which can be modified. *Blue Lake* found it important that the then applicable 25 C.F.R. 163.12 provided that “essential departures from [required contract forms approved by the BIA secretary] the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary.” *Blue Lake*, at 1141. That provision was deleted by amendments in October 1995 reflected in renumbered regulation 25 C.F.R. 163.19. The previous language of 25 C.F.R. 163.12 was retained in renumbered 25 C.F.R. 163.19(c), which now states that timber sales contracts “may be . . . modified

²⁴⁵ See *Mustola v. Toddy*, 253 Or 658, 663, 456 P2d 1004 (1969).

²⁴⁶ See *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 914 (9th Cir. 2008).

subject to approval by the approving officer[.]” Thus, the applicable regulations allowed the “title” provision to be modified or omitted from the Tribe’s contracts with WSFPI.

There is ample evidence in the record that both the Tribe and BIA consented to Vanport’s receipt of lumber without regard to the alleged title provision.²⁴⁷ The BIA’s Cease & Desist orders and contingency plans outlined above recognized that any claim of title based on the Standard B Provisions was limited to timber, not finished lumber. The provision references “Title to timber...,” not its derivatives. Timber is defined as one type of forest product under 25 C.F.R. § 163.1. Lumber is another listed type of forest product in that same definition. Provision B2.1 did not use the term “forest products” which would have included lumber. As far back as 2006, the BIA represented that its trust responsibility ended at the mill.²⁴⁸

7. There is Legal and Factual Support for Vanport’s Equitable Defenses.

The Tribe lumps together Vanport’s equitable defenses²⁴⁹ and argues that the federal government as trustee for an Indian tribe is not subject to such defenses. The Tribe cites *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 735, 199 L. Ed. 2d 602 (2018) and *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) for this proposition. As to *United States v. Washington*, that case stated that “[t]he United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights.”²⁵⁰ The United States was the plaintiff and its conduct was at issue (Army Corps of Engineers, National Marine Fisheries Service, and U.S. Fish & Wildlife Service). The other case relied upon by the Tribe, *United States v. Ahtanum*, is the same. The United States was the plaintiff

²⁴⁷ The Tribe’s reference to the United States’ proof of claim against WSFPI in the Receivership in no way negates the BIA’s consent with regard to Vanport.

²⁴⁸ Exh. 65 P. 5.

²⁴⁹ Vanport’s Answer, ¶ 22 (Dkt. 8).

²⁵⁰ 853 F.3d at 967 (emphasis added).

and *Ahtanum* addressed conduct by “agents in the forestry service and other officers and employees of the government.” In this case, the Tribe is the plaintiff, not the United States. While the United States may have held the Tribal Timber in trust, the Tribe’s status as a trust beneficiary does not automatically shield the Tribe’s conduct from scrutiny and its conduct prevents the Tribe from asserting that title did not pass based on the Tribe’s arguments set forth in its Motion.²⁵¹

In addition, the Tribe’s reliance on *Ahtanum* for the proposition that the federal government is never subject to the defense of estoppel is misplaced. More recent Ninth Circuit case law has repudiated that purported absolute rule.²⁵²

Here, the United States is not the plaintiff; but if it were, there is sufficient evidence to conclude it is not immune from estoppel. The decisions cited by the Tribe do not protect it from an estoppel defense.

The elements of estoppel are:

- (1) the party to be estopped must know the facts;
- (2) the party to be estopped must either intend that its conduct will be acted upon or act in a manner that the party asserting the estoppel has a right to believe it so intended;
- (3) the party asserting estoppel must be ignorant of the true facts; and
- (4) the party asserting estoppel must rely on the conduct to its injury.²⁵³

There is evidence in the record that the Tribe knew about the “title” provision that was allegedly part of the timber sale contracts, that the Tribe intended Vanport to believe it was receiving good title, that Vanport was ignorant of the “title” provision or its alleged applicability and supremacy,

²⁵¹ See *Waterbury v. Nicol*, 207 Or. 595, 609, 296 P.2d 487, 493, *opinion modified on reh'g*, 207 Or. 595, 298 P.2d 211 (1956) (trust beneficiary’s acquiescence and lack of objection to circumstances resulted in her being “estopped by her conduct now to claim a breach of trust”).

²⁵² *United States v. Ruby Co.*, 588 F.2d 697, 701–03 (9th Cir. 1978) (internal citations omitted) (“we find that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case.”).

²⁵³ See *United States v. Ruby Co.*, *supra*, at 703.

and that Vanport would be harmed if the Tribe were allowed to enforce that provision against Vanport. This evidence presents fact questions about whether the Tribe is equitably estopped by its conduct from proceeding against Vanport. This same evidence creates a question of fact about waiver, which is the intentional relinquishment of a known right.²⁵⁴

Similarly, laches is an equitable time limitation resting on the maxim that “one who seeks the help of a court in equity must not sleep on his rights.”²⁵⁵ There is substantial evidence that the Tribe slept on its rights by allowing taking no action to demand direct payment from Vanport or to stop WSFPI from selling lumber to Vanport while WSFPI was accruing Tribal Timber arrearages. The Tribe’s conduct supporting laches includes not only the conduct of Tribal Council acting as such but also its conduct as the Tribal Council WSFPI Board.

The Tribe makes sweeping statements that it is entitled to summary judgment dismissing all affirmative defenses. The Tribe’s arguments include that “the Tribe is not aware of any duty under federal tribal trust law to mitigate its losses” and “is also unaware of any legal authority that . . . contributory fault or negligence of the plaintiff-tribe” would affects its claim. The Tribe’s arguments to this effect do not satisfy its burden to show it is entitled to dismissal of each of Vanport’s affirmative defenses as a matter of law and undisputed fact. There is certainly ample evidence in the record that the Tribe failed to reasonably mitigate its claimed losses that caused or contributed to those losses.

CONCLUSION

For the foregoing reasons, Vanport respectfully submits that the Tribe’s Motion for Summary Judgment be denied.

²⁵⁴ *Waterway Terminals Co. v. P. S. Lord Mech. Contractors*, 242 Or. 1, 26, 406 P.2d 556, 567 (1965).

²⁵⁵ *See Jarrow Formulas, Inc. Nutrician Now, Inc.*, 304 F.3d 829 (9th Cir. 2002).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing VANPORT INTERNATIONAL INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT upon the following attorney on the 11th day of September, 2019 via email by prior agreement of counsel.

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