Albert N. Kennedy, OSB #821429
al.kennedy@tonkon.com
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204
Tel: 503.802.2013

Josh Newton, OSB #983087
jn@karnopp.com
Tyler J. Moore, OSB #172544
tjm@karnopp.com
Karnopp Petersen LLP
360 SW Bond Street, Suite 400
Bend, Oregon 97702
Tel: 541.382.3011

Of Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

The Confederated Tribes of the Warm Springs Reservation of Oregon, a federally-recognized Indian tribe,

Plaintiff,

v.

Vanport International, Inc., an Oregon corporation,

Defendant.

Civil No. 3:17-cv-01649

REPLY MEMORANDUM In Support of Plaintiff's Motion for Summary Judgment

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INTRODUCTION

This action is premised on the Tribe's federal common law right to enforce its aboriginal property rights in the proceeds derived from the sale of Tribal Timber,[1] the legal title to which is held in trust by the United States for the benefit of the Tribe. The Tribe's right to maintain this action is supported by the Constitution, the 1855 Treaty, federal statutes and regulations, and United States Supreme Court precedent spanning more than a century.

Vanport ignores that controlling federal law. Vanport instead seeks to re-characterize the nature of Tribe's claim into something that Vanport believes it can successfully defend. Vanport offers a misdirected legal analysis supported by ostensible "facts" that are largely immaterial and that are, at times, supported only by self-serving, conclusory declarations. Vanport's strategy seems designed to confuse and exhaust the Court in hopes of surviving summary judgment so that it can present to a jury its defense to a conjured state law tort claim as opposed to the Tribe's federal common law trust claim presented here.[2]

The Tribe does not attempt to reply to each and every argument and purported fact offered by Vanport. The Tribe focuses this reply on the nature of its claim for relief and the undisputed material facts relevant to that claim. Viewed through that lens, the Tribe is entitled to judgment as a matter of law because there is no genuine issue of material fact that (a) Vanport

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[1] Unless otherwise specified, all capitalized terms in this memorandum have the meaning ascribed to them in the Tribe's motion for summary judgment. *See* Dkt. 54. This reply memorandum is supported by the Court file, including the Second Declaration of Josh Newton ("Second Newton Dec.") filed together herewith.

[2] While Vanport has demanded a jury trial, the Tribe does not concede Vanport has a right to one in this case.

received the proceeds derived from the sale of the forest products manufactured from Tribal Timber, and (b) the Tribe remains the beneficial owner of those proceeds until the United States, as the Tribe's trustee, receives payment for the Tribal Timber. *See* Fed. R. Civ. P. 56(a).

ARGUMENT

I. The Tribe's Claim for Relief is Legally Cognizable under Federal Common Law.

Vanport mistakenly asserts that the Tribe has failed to articulate a cognizable claim for relief. Dkt. 65, pp. 31 – 37. The Tribe's sovereignty and its trust relationship with the United States give rise to a federal common law right to enforce its aboriginal property rights in the proceeds derived from the sale of the Tribal Timber. *See Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 235 (1985) ("Indians have a federal common-law right to sue to enforce their aboriginal land rights"); *United States v. Cook*, 86 U.S. 591, 593 (1873) (holding that "timber [on Indian land] while standing is a part of the realty, and it can only be sold as the land could be"); *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138, 1142 (1994) (tribe entitled to proceeds from the sale of logs where title to logs remained with the United States as the tribe's trustee).[3]

The United States Supreme Court has long recognized that Indian tribes have a "federal common-law right to sue to enforce their aboriginal land rights." *Oneida*, 470 U.S. at 235. The Court has observed that "[b]y the time of the Revolutionary War, several well-defined principles had been established governing the *nature of a tribe's interest in its property and how*

[3] Both tribal sovereignty and the federal-tribal trust relationship are themselves the products of federal common law arising from judicial precedent. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (origin of tribal trust doctrine); *Worcester v. Georgia*, 31 U.S. 515 (1832) (origin of tribal sovereignty doctrine).

those interests could be conveyed." *Id.* at 234 (emphasis added). "Aboriginal title" and the "doctrine of discovery" are two of those well-defined principles. *Id.* Indian tribes hold aboriginal title to lands that they have inhabited from time immemorial. *Id.* Discovering nations hold fee title to those lands subject to the Indians' right of "occupancy and use." *Id.* No person or entity can acquire or otherwise terminate aboriginal title without the consent of the discovering nation. *Id.*

On the adoption of the Constitution, Indian relations became the "exclusive province of federal law." *Id.* The Supreme Court recognizes that the Indian right of occupancy to lands is as "'sacred as the fee simple of the [non-Indians]'." *Id.* at 234-35 (quoting *Mitchel v. United States*, 9 Pet. 711, 746, 9 L.Ed. 283 (1835)). In short, the Indian possessory right of occupancy to lands is a "*federal* right," and Indian tribes can maintain an action for "violation of their possessory rights based on federal common law." *Id.* at 235-236 (emphasis in original). The gravamen of this action is a violation of the Tribe's possessory rights based on federal common law to the proceeds derived from the sale of Tribal Timber for which the Tribe has not received payment.

In *United States v. Algoma Lumber Co.*, 305 U.S. 415 (1939), the Supreme Court construed the nature of Indian possessory rights in the context of tribal timber assets located on Indian reservations. The Court observed that the "*Indians are beneficial owners of the land and the timber standing upon it* <u>*and of the proceeds of their sale*</u>, subject to the plenary power of the United States, to be exercised for the benefit and protection of the Indians." 305 U.S. at 420 (emphasis added). The United States has no beneficial ownership in tribal lands, including timber, or their proceeds, because substantial ownership remains with the Indian owners. *Id.* at 421.

Before passage of the 1910 Act, 25 U.S.C. §§ 406-407, Indian tribes had no right to sell timber on reservation land. *United States v. Mitchell*, 463 U.S. 206, 219-20 (1983). The 1910 Act authorized the Secretary of the Interior ("Secretary") to provide for the harvesting of tribal timber "in such manner as to conserve the interests of the people on the reservations, namely, the Indians." *Id.* at 220 (internal quotation marks omitted). *Algoma* explains that:

> "[t]he action of Congress in authorizing the sale of the timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the *means chosen for the exercise of the power of the government to protect the rights and beneficial ownership of the Indians*. The means are adapted to that end."

305 U.S. at 421 (emphasis added). The "form of the contract *and* the procedure prescribed for its execution and approval" conform to the tribal trust relationship pursuant to which the "government has plenary power to take appropriate measures to *safeguard the disposal of property of which the Indians are the substantial owners*." *Id.* (emphases added).

In *Blue Lake Forest Products*, the Ninth Circuit expressly recognized an Indian tribe's right to bring an action to protect its ownership rights in the *proceeds* derived from the sale of logs held in trust for it by the United States. 30 F.3d 1138. Citing United States Supreme Court decisions and federal statutes, the court relied on federal common law as the source of the Indian tribe's right of action and trained its analysis on the "severance of timber and its removal without proper compensation, in contravention of the governing contract and federal regulations." *Id.* at 1141-42 (citing several Supreme Court decisions, including *Mitchell*, *Algoma, Pine River Logging,* and *Cook*).

The fact that *Blue Lake Forest Products* arose in the context of a bankruptcy action is not material, because the Indian tribe's ownership of the proceeds from the sale of logs held in trust

for it by the United States was not dependent on any provision of the Bankruptcy Code. *See, e.g. id* at 1142 (citing *Mitchell* for the proposition that "the United States, as trustee, has a fiduciary obligation to protect, manage and operate Indian lands, including Indian timber"). Rather, the source of the Indian tribe's substantive right to ownership of the proceeds from sale of the logs was federal common law, the contours of which are set forth in Supreme Court precedent and applicable treaties, statutes, and regulations. *See, e.g., Algoma*, 305 U.S. at 420 (Indians are beneficial owners of the standing timber and the "proceeds of their sale").

To the extent that the procedural setting of *Blue Lake Forest Products* within the bankruptcy context has any relevance to this action, it only reinforces the type of the federal common law right that the plaintiff-tribe sought to redress there, and that the Tribe seeks to remedy here. The species of claim is a property claim, and not, as Vanport incorrectly speculates, a tort claim. *See* Dkt. 65, pp. 32 – 37. We know this because the plaintiff-tribe and the bank asserted competing claims to the proceeds from the sale of the logs. 30 F.3d at 1140. The bank claimed a security interest in the debtor's after-acquired inventory and proceeds, while the plaintiff-tribe asserted that title to the logs never passed because of lack of payment. *Id.* According to the plaintiff-tribe, the logs never became the debtor's inventory to which the bank's security interest could attach. *Id.* The Ninth Circuit agreed with the plaintiff-tribe, concluding that "[t]itle to the logs remained with the United States as the tribe's trustee, and the tribe is entitled to the proceeds from the sale of the logs." *Id.* at 1143.

Because the nature of the Tribe's claim sounds in property, rather than tort, Vanport's arguments relating to conversion and trespass are not relevant. The Tribe does not address those arguments except to respond briefly to Vanport's reliance on *Chilkat Indian Village v. Johnson*,

870 F.2d 1469 (9th Cir. 1989). *Chilkat* is materially distinguishable from this action. In that case, the plaintiff-tribe brought an action for return of certain artifacts and monetary damages for their removal, alleging violation of tribal and federal law. *See generally Id.* The plaintiff-tribe did not allege the artifacts to be "trust property, nor property held pursuant to federal statute or federal common law." *Id.* at 1472. The court determined that whatever proprietary interest the plaintiff-tribe had in the artifacts, it was "wholly-unconnected with federal law." *Id.* The court contrasted *Chilkat* with the property right at issue in *Oneida*, in which the plaintiff-tribe sued on a possessory interest "shaped and protected by federal common law" and "reinforced by treaty and [federal statutes]." *Id.* Unlike *Oneida*, the Ninth Circuit concluded in *Chilkat* that the plaintiff-tribe's possessory interest in artifacts did not arise under federal law. *Id*. at 1472.

The Tribe's sovereignty and its trust relationship with the United States give rise to a federal common law right to enforce its aboriginal property rights in the proceeds of the Tribal Timber that are the subject of this action. *See Oneida*, 470 U.S. at 235; *Cook*, 86 U.S. at 593; *Blue Lake Forest Products*, 30 F.3d at 1142. The Tribe has a substantial ownership interest in the Tribal Timber and the proceeds derived from their sale that is shaped and protected by federal common law, the 1855 Treaty, and applicable federal statutes and regulations relating to the sale and disposition of tribal timber. Thus, the Tribe has a cause of action under federal common law to vindicate the interest. Vanport's arguments to the contrary should be rejected.[4]

[4] In a footnote, Vanport asks the Court to consider granting summary judgment in its favor pursuant to Fed. R. Civ. P. 56(f). Dkt. 65, p. 32 n. 180. The Court should summarily reject Vanport's request. The Tribe served its amended and supplemental responses to interrogatories on March 26, 2019. *See* Dkt. 66-59. The Tribe's responses cite applicable legal authority and show a clear theory of the case that is consistent with the Tribe's motion for summary judgment.

II. The Tribe Is Entitled to Summary Judgment because There Is No Genuine Issue of Material Fact and because the Tribe Is Entitled to Judgment as a Matter of Law.

A. There Is No Genuine Issue of Material Fact with Respect to the Tribe's Claim, and the Tribe Is Entitled to Judgment as a Matter of Law.

A "material" fact is one that is "relevant to an element of a claim" and "whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). The materiality of a fact is determined by the substantive law governing the claim. *Id.* Disputes over irrelevant or unnecessary facts will not preclude summary judgment. *Id.* To avoid summary judgment, the nonmoving party, here Vanport, must do more than show "metaphysical doubt" as to the material facts. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Mere allegation and speculation do not create a factual dispute for purposes of summary judgment. *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016); *see accord DG Cogen Partners, LLC v. Lane Powell PC*, 917 F.Supp.2d 1123, 1132 (D. Or. 2013).

Pursuant the authority cited in Section I. of this memorandum, the Tribe has a federal common law right to enforce its aboriginal property rights in the proceeds from the sale of Tribal Timber, the legal title to which is held in trust for it by the United States until the federal government receives payment for the Tribal Timber. Before addressing what Vanport claims to be genuine issues of material fact, the Tribe briefly summarizes the material facts not in dispute. Vanport does <u>not</u> dispute that:

Vanport had until August 14, 2019, to file a motion for summary judgment and, for whatever reason, elected not to do so.

1. The Tribe is a federally-recognized, self-governing, sovereign Indian tribe and is the legal successor-in-interest to the Indian signatories of the 1855 Treaty. Dkt. 55, ¶ 4.

2. The Warm Springs Reservation is reserved pursuant to the 1855 Treaty for the exclusive use and occupation of the Tribe. *Id.* at ¶ 5.

3. The United States holds legal title in trust for benefit of the Tribe to Tribal Timber located on the Warm Springs Reservation before the timber is harvested and sold. *Id.* at ¶ 11.

4. The BIA Superintendent for the Warm Springs Agency approved each of the Timber Sale Contracts in accordance with federal law. Dkt. 59, Exs. 1 – 7.

5. All invoices for the payment of the Tribal Timber required that remittances be payable to the BIA, Warm Springs Agency. Dkt. 56, Ex. 2.

6. The United States has not received payment for the Tribal Timber that is subject to this action. *Id.* at ¶¶ 2, 3.

7. The unpaid balance of the stumpage value of the Tribal Timber is $2,416,731. *Id.* at ¶ 4.

Vanport confines its dispute to the title transfer element of the Tribe's claim, advancing alternative arguments. First, Vanport contends that there is a genuine issue of material fact as to whether legal title to the Tribal Timber and its proceeds remain in the United States in trust for the benefit of the Tribe in the absence of payment by the purchaser of the Tribal Timber to the United States. Second, even if title to the Tribal Timber does not transfer to the purchaser in the

absence of such payment, Vanport argues that, as a matter of law, its payment to the purchaser (WSFPI) constitutes payment to the Tribe, because WSFPI is a wholly-owned business enterprise of the Tribe. Vanport also asserts that the Tribe has a duty to trace the proceeds from the sale of the Tribal Timber.

1. The United States must receive payment for the Tribal Timber before legal title passes to WSFPI.

The title to Tribal Timber and the proceeds derived from its sale is governed by federal law. *See Oneida*, 470 U.S. 226; *Algoma*, 305 U.S. 415. The Tribe is the beneficial owner of the Warm Springs Reservation, including the Tribal Timber *and* the proceeds from the sale of the Tribal Timber. *Algoma*, 305 U.S. at 420 (Indians are beneficial owners of timber and "proceeds of their sale."). The Tribe's beneficial ownership interest in the Tribal Timber and its sale proceeds is subject to the plenary power of control by the United States, which is to be exercised for the Tribe's "benefit and protection." *Id.*

The Tribe's beneficial ownership interest in Tribal Timber does not include the right to sell the timber. *Mitchell*, 463 U.S. at 219. With the passage of the 1910 Act, 25 U.S.C. §§ 406-407, Congress empowered the Secretary to sell timber on reservation lands and "apply the proceeds for the benefit of the Indians." *Id*. at 220. The BIA's General Forestry Regulations, 25 C.F.R. Part 163, and the form contracts prescribed under those regulations are the "means" chosen by the Secretary for the "exercise of the power of the federal government to protect the rights and beneficial ownership interest of the Indians" with respect to the sale of timber. *Algoma*, 305 U.S. at 271. The Supreme Court has observed that the "form of the contract and the procedure prescribed for its execution and approval" are the means that the Secretary has chosen

to "safeguard the disposal of property of which the Indians are the substantial owners." *Id.* In so doing, the Supreme Court has expressly recognized that both substantive and procedural requirements apply to the lawful sale of tribal timber.

The Secretary authorized the sale of the Tribal Timber at issue in this action pursuant to the 1910 Act (as amended) and 25 C.F.R. Part 163. Brunoe Dec., Exs. 1 – 6 (Dkt. 59). The Secretary utilized form contracts prescribed under 25 C.F.R. Part 163, *i.e.* the Timber Sale Contracts. Dkts. 59-1, 59-2. Each of the Timber Sale Contracts expressly provides that the "contract is made under the authority of [1910 Act (as amended)] and in accordance with the regulations of the 25 CFR 163." Dkt. 59-1, pp. 1, 53, 135; Dkt. 59-2, pp. 1, 10, 59. Each Timber Sale Contract identifies the Tribe as the "Seller(s)," WSFPI as the "Purchaser," and the Superintendent of the Warm Springs Agency as the "Approving Officer." *Id.*

All of the Timber Sale Contracts contain the following provision: "The Seller agrees to sell to the Purchaser and the Purchaser agrees to buy, in accordance with the terms and conditions of this contract and the attached Part B, Standard Provisions, which are made a part hereof, all merchantable timber * * *." *Id.* Each Timber Sale Contract also contains payment terms and provisions relating to transfer of title to the Tribal Timber.

The Timber Sale Contracts contain identical payment provisions, which state:

> "A8. Payment for Timber. The Purchaser shall pay for all timber covered by this contract in accordance with the provisions of Section 4.0 of the Standard Provisions or Section 6a & 6b of the [Cutting Contract]."

Dkt. 59-1, pp. 3, 55, 77; Dkt. 59-2, pp. 3, 12, 61. Section 6.a. of the Cutting Contract contains the payment provisions for Tribal Timber. Dkt. 55, p. 110. That section provides that payment for Tribal Timber shall be in accordance with 25 C.F.R. 163.22 unless otherwise provided in the

timber sale contract pursuant to 25 C.F.R. 163.19. *Id.* The remainder of Section 6.a. addresses the invoicing process.[5] *Id.* The Cutting Contract does not address to whom WSFPI is to make payment for the Tribal Timber. Section B4.1 of the Standard Provisions fills that gap, providing that payments shall be "payable to the Bureau of Indian Affairs." Dkt. 59-2, p. 97; *see accord* 25 C.F.R. 163.19(b) (proceeds from sale of tribal forest products may be paid by remittance drawn to the BIA and transmitted to the Superintendent). Consistent with those provisions, the BIA required that WSPFI make payment for the Tribal Timber to the BIA's Warm Springs Agency. Dkt. 56, pp. 11 – 65.

With respect to the transfer of title to Tribal Timber, Section B2.1 of the Standard Provisions conditions the passage of title on the happening of three events, all of which must occur in order for title to the Tribal Timber to pass to the Purchaser. Section B2.1 provides:

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

Dkt. 59-2, p. 96 (emphasis added). For title to the Tribal Timber to pass to WSFPI, it must be scaled, paid for, *and* removed from the contract area. If any of those three conditions does not occur, title does not pass to WSFPI.

Vanport does not dispute that WSFPI has not paid the BIA for the Tribal Timber in accordance with the Timber Sale Contracts and 25 C.F.R. Part 163. Vanport, instead, argues that

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[5] 25 C.F.R. 163.22 excuses Indian tribal forest enterprises from any advance payment obligation, as long as the payment process allows the "Secretary to maintain trust responsibility through written verification that all * * * payments * * * have been made."

there is a genuine issue of material fact as to whether the Part B Standard Provisions are part of the Timber Sale Contracts. Dkt. 65, pp. 40 - 42.

Vanport first observes that there is no evidence that the Part B Standard Provisions were, in fact, "attached" to the Timber Sale Contracts. Vanport does not cite any legal authority supporting the proposition that failure to attach copies of those standard provisions to the Timber Sale Contracts would somehow affect their inclusion in the Timber Sale Contracts. Vanport also ignores the undisputed fact that the Part B Standard Provisions were expressly incorporated by reference into each of the Timber Sale Contracts. Dkt. 59-1, pp. 1, 53, 135; Dkt. 59-2, pp. 1, 10, 59 (Section A4. provides that the Part B Standard Provisions are "made a part hereof"). Specific sections of the Part B Standard Provisions were incorporated into the Timber Sale Contracts. *See, e.g.*, *id.* (Section A5. references Section B2.5 of the Standard Provisions, and Section A8. references Section B4.0 of the Standard Provisions). The Tribe's General Manager of its Branch of Natural Resources has also submitted a declaration stating that the Part B Standard Provisions are "part of each and every" Timber Sale Contract. Dkt. 59, ¶ 9. The parties' course of performance also shows that the Part B Standard Provisions are a part of the Timber Sale Contracts. For example, the parties expressly relied on Section B2.5 of the Standard Provisions to extend the duration of the County Line 2 Timber Sale Contract. Dkt. 59-2, pp. 92, 93.

Vanport also relies on excerpts of deposition testimony from two former WSFPI representatives, John Katchia, Jr. and Claude Smith III. Viewed in the light most favorable to Vanport, the most that can be drawn from Mr. Katchia's testimony is that: (a) the Part B Standard Provisions were not attached to the Timber Sale Contracts; (b) he did not obtain copies of the provisions; and (c) he did not have knowledge of the contents of those provisions.

Mr. Katchia did not testify that the standard provisions were not a part of the Timber Sale Contracts. The only reasonable conclusion to be drawn from his testimony is that Mr. Katchia understood that the Part B Standard Provisions were a part of the Timber Sale Contract but that he had not seen those provisions and had little or no knowledge of their contents.[6]

Mr. Smith's testimony is similarly limited. Vanport cites his testimony for the speculative proposition that Section B2.1 of the Standard Provisions may have been "crossed out." Dkt. 65, p. 41. Mr. Smith's response to a question calling for speculation does not create a genuine issue of material fact. *See Loomis*, 836 F.3d at 997. That is especially the case given the additional statutory burden of persuasion imposed by Congress on Vanport to give Indian tribes the "benefit of the doubt as to the questions of fact * * * relating to their welfare." 34 Op. U.S. Atty. Gen. 439, 444 (1925) (citing 25 U.S.C. § 194).

The Secretary has provided that the form timber sale contracts may be modified only with approval of the approving officer. 25 C.F.R. 163.19(c). Consistent with that regulation, Section B2.3 of the Standard Provisions provides that the Timber Sale Contracts could be modified "only through written agreement between the Seller and Purchaser" and that no modification is "effective until approved by the Approving Officer." Dkt. 59-2, p. 96. The Timber Sale Contracts contain written modifications. Dkt. 59-1, pp. 51, 52, 134, 209, 210;

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[6] The Tribe notes that 25 C.F.R. 1.10 provides that BIA forms are available for inspection and that the Part B Standard Provisions (Form 5-5323) are available on the BIA website. https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/dfwfm/pdf/idc-022542.pdf [last visited on September 22, 2019]. The April 2017 revisions of Form 5-5323 are also available online. https://www.bia.gov/sites/bia.gov/files/assets/public/raca/online_forms/pdf/BIA%205-5323%20Timber%20Sale%20Contract%20Part%20B%20Stnd%20Provisions_508.pdf [last visited on September 22, 2019].

Dkt. 59-2, pp. 54, 55, 56, 58, 92, 93, 94. While none relate to Section B2.1 of the Standard Provisions, those modifications show a course of performance that has fidelity to both Section B2.3 of the Standard Provisions and to 25 C.F.R. 163.19(c). *Id.*

Section B2.1 of the Standard Provisions is a part of each and every Timber Sale Contract that is the subject of this action. And, there is no evidence that Section B2.1 has ever been modified by the parties and approved by the BIA.[7] In order for WSFPI to obtain title to the Tribal Timber, the timber must be scaled, paid for, and removed from the contract area. Because WSFPI has never paid the United States for the Tribal Timber, it never obtained title, which remains in the United States in trust for the Tribe. *See In re Blue Lake*, 30 F.3d 1138.

2. Vanport's payments to WSFPI do not constitute payments to the United States as trustee for the Tribe for purposes of title transfer of the Tribal Timber.

There is no genuine issue of material fact that the Tribe formed WSFPI in 1967 pursuant to its Tribal Corporate Charter, which the Secretary issued to the Tribe in 1938 pursuant to Section 17 of the IRA. Dkt. 55, ¶¶ 6, 10. Vanport nonetheless asserts that "[t]here are significant questions of material fact" as to whether the Tribe has been paid for the Tribal Timber, because, in Vanport's view, a "reasonable factfinder could conclude that the Tribe was paid because it owned, controlled, directed, and was responsible for the actions of WSFPI." Dkt. 65, p. 47. Vanport appears to raise a corporate alter ego argument and invites the Court to

[7] Vanport cites to Tribal Council Resolution No. 11,797 as evidence supporting the proposition that title to logs could pass to WSFPI without reference to payment. Dkt. 65, p. 41. That resolution is not relevant because it does not address the Tribal Timber that is the subject of this action and because Vanport concedes that WSFPI paid for those logs. *Id.* Whatever legal effect that resolution may or may not have had on title transfer of the logs at issue in that circumstance, it is not relevant to the Tribal Timber at issue in this case.

disregard WSFPI's existence as a separate legal entity for purposes of this action. The Court should resist that invitation for the following reasons.

First, tribal corporations formed pursuant to IRA Section 17 are legal entities separate from tribal governments and having different powers, privileges, and responsibilities; it is immaterial that the Section 17 business corporation is "composed of the same members" as the tribal government; the corporate body remains a "separate entity." Second Newton Dec., Ex. 1 (attaching copy of U.S. Department of the Interior, Office of the Solicitor, Opinion of November 20, 1958, M-36515, 65 I.D. 483). Section 17 corporate charters are also to be liberally construed in favor of Indian tribes and all doubtful expressions resolved in their favor. *See Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966). The United States protects tribes engaged in commercial transactions, because the history of "intercourse between the Indian tribes * * * with [non-Indians] demonstrates such need." *Id.*

Second, the BIA's General Forestry Regulations recognize the independent legal status of "tribal forest enterprises," which are "initiated and organized by a reservation's recognized tribal government." *See* 25 C.F.R. 163.1 (definition of "Tribal forest enterprises"). Those regulations authorize the sale of tribal forest products to Indian tribal forest enterprises. 25 C.F.R. 163.13. And, while they make some allowances for tribal forest enterprises, the regulations consistently adhere to the notion that tribal forest enterprises are separate legal entities from the tribal owner of timber. *See, e.g.,* 25 C.F.R. 163.13(c) (tribal forest enterprises may contract for the purchase of forest products on Indian land).

Third, the Timber Sale Contracts and the Cutting Contract reinforce the separateness of WSFPI. The Cutting Contract is made under the authority of the 1910 Act, 25 U.S.C. §§ 406-

407, and expressly requires that the Tribe and WSFPI enter into "formal agreements for the purchase of tribal timber on the Warm Springs Reservation." Dkt. 55, pp. 100, 104. The Cutting Contract also requires that tribal timber be sold to WSFPI pursuant to a "Contract Form" approved by the United States. *Id.* at 107. The Timber Sale Contracts uniformly identify the Tribe as "Seller(s)" and WSFPI as "Purchaser" of the Tribal Timber. Dkt. 59-1, pp. 1, 53, 135; Dkt. 59-2, pp. 1, 10, 59. If WSFPI is not a separate legal entity, why did the Tribe, WSFPI, and the United States enter into the Cutting Contract and the Timber Sale Contracts? Vanport never answers that question.[8]

Fourth, the proof of claim that the BIA filed in the receivership action confirms the conclusion that WSFPI must pay the United States for the Tribal Timber in order to obtain title. Dkt. 57, Ex. 1. The BIA recognizes that WSFPI is an entity separate from the Tribe, otherwise there would be no reason to file a proof of claim.

The legal authority on which Vanport relies for its alter ego argument is not applicable. Vanport first cites to *Wright v. Prairie Chicken*, 579 N.W.2d 7 (Sup. Ct. S.D. 1998), which is a South Dakota Supreme Court case addressing the sovereign immunity of tribal members. That case does not involve the relationship between IRA Section 16 tribal governments and Section 17 tribal corporations. *Id.* *Wright* is not relevant to this action. Vanport's reliance on *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.2d 1122 (9th Cir. 2003), is similarly flawed. *Harris Rutsky* is not an Indian law case; rather, it is an insurance case applying

[8] Vanport also never addresses the fact that the Cutting Contract provides that the "proceeds from the sale of Tribal timber * * * shall always be guaranteed to the [Tribe] and shall not be pledged or invaded for the purpose of paying any loans in connection with [WSFPI]." Dkt. 55, p. 116.

California law. The Ninth Circuit in *Harris Rutsky* never confronted the legal issues presented here and its decision there provides no guidance for the Court.

Despite the arguments in its response brief, Vanport has long understood the distinction between the Tribe and WSFPI. Second Newton Dec., Ex. 2. For example, in a June 18, 2013, internal email to other Vanport representatives, Chris Ketcham reported on a meeting with Tribal Council. Mr. Ketcham advised his colleagues that Tribal Council

> "confirmed that their main issue is to *ensure that the Tribe is getting full value for their timber. This is especially important as other programs are laying off employees and reducing work hours due to budget shortfalls*.
>
> "I am sure that they are getting heat because of Vanport's presence. We are viewed as highly profitable, thereby *taking money that would otherwise be available for programs that are being cut*."

Id. (emphases added). Vanport plainly understood that the Tribe relied on revenue from the sale of Tribal Timber by its legally independent timber enterprise to fund the Tribe's governmental services.

The 2014 Agreements further manifest Vanport's awareness that WSFPI is a legal entity separate from the Tribe. Dkt. 66-22; Dkt. 66-69. Except for the Irrevocable Entry License, WSFPI and Vanport are the only parties to 2014 Agreements. *Id.* Each of those agreements contains a limited waiver of WSFPI's sovereign immunity, expressly providing that the limited waiver "applies only to WSFPI and this Agreement and to no other parties, entities (including the Tribe and other Tribal enterprises), transactions, contracts, or associated agreements." Dkt. 66-22, pp. 11, 23, 35, 44, 46-47, 52, 56. The Tribe is a party only to Irrevocable Entry

License, which gives Vanport limited entry rights on to the Warm Springs Reservation.[9] Dkt. 66-69. The 2014 Agreements distinguish between the Tribe and WSFPI, which confirms that Vanport understood the legal separateness of WSFPI from the Tribe.

WSFPI is a separate legal entity formed pursuant to federal law. The Tribe, WSFPI, and the United States have always understood and respected WSFPI's separate existence. And, Vanport has long been aware of that separateness. While it now disputes WSPFI's independent legal existence, Vanport offers no supporting and applicable legal authority. The law is clear: WSFPI is a separate legal entity, and the Timber Sale Contracts expressly require WSFPI to pay the United States for the Tribal Timber in order obtain title.

3. The Tribe has sufficiently traced to Vanport the proceeds derived from the sale of forest products manufactured from Tribal Timber.

25 U.S.C. § 194 provides that once Indians or Indian tribes make out a presumption of title, the burden of proof rests on the adverse party claiming title. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (applying statute for the benefit of an Indian tribe). In the preceding sections of this brief, the Tribe has made out a presumption of its title to the Tribal Timber and its proceeds.

The Tribe has also introduced evidence that between January 1, 2014, and April 30, 2016, WSFPI sold forest products manufactured from Tribal Timber in the domestic and export markets. Dkt. 58, Exs. 2 - 6. During that period, Vanport provided invoicing and collection

[9] The 2014 Agreements are not material to the Tribe's federal common law claim to enforce its aboriginal ownership rights to the proceeds of Tribal Timber because neither the Tribe nor the United States are parties to those agreements, except as noted with respect to the Irrevocable Entry License.

services for WSFPI's domestic sales and collected over $23,000,000. *Id.*, Ex. 2, p. 7. Vanport also purchased over $3,300,000 of domestic lumber from WSFPI. *Id.*, Ex. 4. At the same time, Vanport served as the exclusive sales and marketing agent for WSFPI's export sales for forest products manufactured from Tribal Timber. *Id.*, Ex. 5. Vanport purchased from WSFPI and re-sold to foreign buyers over $24,400,000 of export lumber, and Vanport paid itself over $1,200,000 in commissions. *Id.*, Ex. 6. In total, Vanport received more than $50,000,000 from the sale of lumber manufactured from Tribal Timber.

The Tribe has sufficiently traced to Vanport the proceeds derived from the sale of forest products manufactured from Tribal Timber. Vanport has the burden to show that the Tribe is not the beneficial owner of the proceeds; it has failed to do so. *See* 25 U.S.C. § 194. For purposes of summary judgment, there is no genuine issue of material fact that the Tribe has traced its Tribal Timber sale proceeds to Vanport.[10]

B. There Is No Genuine Issue of Material Fact with Respect to Any of Vanport's Affirmative Defenses, and the Tribe Is Entitled to Judgment as a Matter of Law.

Despite its obligation to set forth specific facts showing that there is (or are) genuine issue(s) for trial, Vanport largely abandons its affirmative defenses, summarily addressing only its affirmative defense of consent and equitable affirmative defenses. Dkt. 65, pp. 49 – 53. *See T.W. Elec. Serv.*, 809 F.2d at 630.

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[10] The Perishable Agricultural Commodities Act and the Packers and Stockyards Act provide useful analogues to the application of the tribal trust doctrine in these circumstances. *See, e.g., In re Richmond Produce Co., Inc.*, 112 B.R. 364, 368 (N.D. Cal. 1990); *In re Gotham Provision Company*, *Inc.* 669 F.2d 1000 (5th Cir. 1982). The Acts provide that buyers of identified commodities hold the commodities and related accounts receivable in trust for the benefit of the unpaid sellers, and the sellers are not required to trace. *Id.*

1. Vanport has not established a genuine issue of material fact showing that the United States consented to passage of title to the Tribal Timber in the absence of payment by WSFPI to the United States.

Vanport cursorily addresses its affirmative defense of "consent" by repeating that there is "ample evidence" supporting that defense. Dkt. 65, pp. 49 - 51. Vanport relies on excerpts from the deposition of Michele Stacona, the proof of claim that the BIA has filed in the receivership action, and a hearsay statement from 2006 attributed to then Warm Agency Superintendent Paul Young regarding the United States' trust duty to WSFPI.[11] *Id.* (footnotes 244, 247, 248). Even when viewed in the light most favorable to the Vanport, there is no inference that can be drawn from that evidence showing consent from the United States to the transfer of title to Tribal Timber in absence of payment to the United States by WSFPI.

Congressional intent to extinguish Indian title must be "plain and unambiguous" and will not be "lightly implied." *Oneida*, 470 U.S. at 247-48. The 1910 Act, 25 U.S.C. §§ 406-407, empowers the Secretary to sell timber on reservation lands and "apply the proceeds for the benefit of the Indians." *Mitchell*, 462 U.S. at 220. The BIA's General Forestry Regulations, 25 C.F.R. Part 163, and the form contracts prescribed under those regulations are the "means" chosen by Secretary for the "exercise of the power of the federal government to protect the rights and beneficial ownership interest of the Indian" with respect to the sale of timber. *Algoma*, 305 U.S. at 271. There is no genuine issue of material fact that both the substance of the Timber Sale Contracts and the procedures used to approve those contracts require that WSFPI pay the United States as a condition to obtaining title to the Tribal Timber.

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[11] The Tribe objects to the admissibility of former Superintendent Young's statement.

2. Vanport has not established a genuine issue of material fact with respect to any of its equitable affirmative defenses.

Vanport's argues that there is "legal and factual support" for its equitable defenses of estoppel, waiver, and laches. Dkt. 65, pp. 51 – 53. Despite arguing that there is factual support for those defenses, Vanport cites to no evidence in the record. *See id.* (footnotes 249 – 255).

Vanport cites *United States v. Ruby*, 588 F.2d 697 (9th Cir. 1978), to support its estoppel defense. Vanport relies on *Ruby* for the proposition that the United States can be subject to the estoppel doctrine. While that may be true in cases not involving Indian tribes, the Tribe does not agree that *Ruby* stands for the proposition that the United States is subject to the estoppel doctrine when acting as trustee for Indian tribes. *Ruby* does not arise in the Indian law context and predates *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S.Ct. 1832 (2018), by almost 30 years. Given that the intent to extinguish Indian title must be "plain and unambiguous" and will not be "lightly implied," *Oneida*, 470 U.S. at 247-48, it cannot be assumed that the estoppel doctrine applies in these circumstances, where Indian property rights are at stake.

Even if the estoppel doctrine could apply against the United States in its capacity as trustee for an Indian tribe, Vanport must show an "affirmative misrepresentation" or "affirmative concealment" by the United States. *Ruby*, 588 F.2d at 703-04. Vanport does not even attempt to do so. Vanport appears to focus on the terms and conditions of the 2014 Agreements between it and WSFPI, drawing an inference about the Tribe's intent regarding title to the Tribal Timber. Vanport's reliance on the 2014 Agreements is misplaced because the Tribe is not a party to those agreements. Moreover, the Security Agreement between WSFPI and Vanport defines

"Collateral" as certain assets "presently owned *or subsequently acquired*" by WSFPI. Dkt. 66-22, p. 38 (emphasis added). Whether WSFPI acquired title to the Tribal Timber without payment to the United Sates is the crux of this action and cannot be assumed by Vanport.[12]

Vanport's reliance on *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002), for its laches defense is also unavailing. Like *Ruby*, the Ninth Circuit in *Jarrow Formulas* was not presented with the United States acting as trustee for an Indian tribe and pursuant to the 1910 Act, 25 U.S.C. §§ 406-407, and the BIA's General Forestry Regulations, 25 C.F.R. Part 163, with respect to the sale of timber located on an Indian reservation. *Jarrow Formulas* is inapposite and also contrary to directly applicable Ninth Circuit precedent relating to the aboriginal property rights of Indian tribes. *See United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (United States trust ownership of tribal property is not subject to the laches doctrine).

Vanport cites *Waterway Terminals Co. v P.S. Lord Merch. Contractors*, 242 Or. 1, 26, 406 P.2d 556 (1965), as support for its affirmative defense of waiver. Dkt. 65, p. 53. *Waterway Terminals* is an Oregon Supreme Court case applying state (not federal) common law. Vanport does not explain how or why Oregon common law applies to this action. It does not. Oregon has no civil jurisdiction within the Warm Springs Reservation. 28 U.S.C. § 1360(a).

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[12] Section 3.4(d) of Sales and Marketing Services Agreement between Vanport and WSFPI provides that when title passes to Vanport, it passes unencumbered. Dkt. 66-22, p. 51. That agreement is silent as to when title passes. Vanport attempts to fill that gap with a self-serving, conclusory declaration from Chris Ketcham. Dkt. 69, ¶¶ 6, 7. Mr. Ketcham's declaration does not create a genuine issue of material fact. *See Loomis*, 836 F.3d at 997. That is particularly so where Vanport fails to establish a genuine issue of material fact showing that WSFPI acquired title to the Tribal Timber from the United States.

And, federal law preempts state law with respect to the sale of timber on Indian reservations. *In re Blue Lake*, 30 F.3d at 1142.

Vanport has purposely availed itself of the "substantial privilege" of doing business on the Warm Springs Reservation. *See generally Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (internal quotation marks omitted). Vanport has benefitted from the Tribe's governmental services and from the "advantages of a civilized society" that are assured by the existence of the Tribal government. *See generally id.* (internal quotation marks omitted). Vanport must therefore abide the federal law governing the sale of Tribal Timber, which requires that WSFPI pay the United States in order to obtain title to that timber.

CONCLUSION

For the foregoing reasons, the Tribe requests that the Court enter an order granting its motion for summary judgment. Absent the payment, title to Tribal Timber remains with the United States for the benefit of the Tribe.

Respectfully submitted.

Dated: September 25, 2019

/s/ Albert N. Kennedy
Albert N. Kennedy, OSB #821429

/s/ Josh Newton
Josh Newton, OSB #983087
Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2019, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Oregon via the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

KARNOPP PETERSEN LLP

/s/ Josh Newton
Josh Newton, OSB #983087

Of Attorneys for Plaintiff