The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS LANDRETH, an individual,

Plaintiffs,

v.

THE UNITED STATES, and

QUINAULT INDIAN NATION, a federally recognized Indian tribe,

Defendants.

Case No.: 3:20-cv-05333-RBL

QUINAULT INDIAN NATION'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

NOTE ON MOTION CALENDAR: [July 17, 2020]

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

TABLE OF CONTENTS

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

TABLE OF AUTHORITIES

Cases

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Statutes

Rules

Other Authorities

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Motion of the Quinault Indian Nation to Dismiss Plaintiff's Complaint

Defendant Quinault Indian Nation ("Nation"), a federally-recognized sovereign Indian tribe, respectfully moves the Court to dismiss the Complaint filed by Plaintiff *pro se* Thomas G. Landreth pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The Nation enjoys immunity to unconsented suit, which deprives this Court of subject matter jurisdiction. Moreover, the other named defendant, the United States, is also immune to suit, and the Quiet Title Act ("QTA") (28 U.S.C. § 2409a) deprives this Court of subject matter jurisdiction over the United States and prohibits the relief Plaintiff seeks.

Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss

Statement of the Case

The Quinault Indian Nation ("Nation") is a federally recognized sovereign Indian tribe and is a signatory to the Treaty of Olympia (12 Stat. 971 (1856)) in which it reserved to itself certain rights and ceded certain lands in exchange for permanent settlement on the Quinault Indian Reservation and other rights. Acting pursuant to the Treaty of Olympia, President Grant signed the Executive Order on November 4, 1873 (I Kapp. 923 (1904)) setting aside 350 square miles of land that became known as the Quinault Indian Reservation. Lake Quinault, which is the subject of Plaintiff's Complaint, lies entirely within the boundaries of the area set aside by the Executive Order as the Quinault Indian Reservation.

As Plaintiff admits, the present case is the fourth lawsuit he has filed since 2014 seeking to challenge the Nation's ownership of, and jurisdiction over, Lake Quinault. (*See* ECF No. 1 at 23, lines 9-19, discussing the first three suits he has filed.) His first attempt came in 2014 when he, along with other plaintiffs, filed *North Quinault Properties LLC, et al. v. Quinault Indian*

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Nation, et al., 3:14-cv-06025 (W.D. Wash. Dec. 30, 2014) in this Court. In that action, Plaintiffs sought a "court determination as to the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake" and a "court determination as to the public's right to access of the Lake, its shore and lakebed." Complaint at 2. That case, which named both the Nation and the State of Washington as defendants, sought relief in the form of a declaration that the "United States and the Tribe have no right, title or interest in Lake Quinault," *Id*. at 26, ¶ 13.28, and an injunction prohibiting the Nation from regulating conduct on the Lake. *Id*. at 29-30, ¶ ¶ 15.12 & 15.13. This Court dismissed the case because neither the Nation nor the State had waived their immunity to suit. *North Quinault Properties*, 3:14-cv-06025-RBL (W.D. Wash. May 5, 2015).

Following this Court's dismissal of *Quinault Properties*, Plaintiff brought suit in state court with other plaintiffs against the State of Washington in *North Quinault Properties, LLC v. State of Washington,* No. 76017-3-1, 2017 WL 401397, at *1 (Wash. Ct. App. Jan. 30, 2017) (unpublished). Similar to the *North Quinault Properties* case, Plaintiffs sought a "court determination as to the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake," and a "determination as to the public's right to access of the Lake, its shore and lakebed." *Id*. at *1. The state court suit was also dismissed, *inter alia*, for failure to join the Nation and the United States, and Plaintiffs' appeal was unsuccessful. WL 401397 at *1.[1]

[1] Plaintiff asserts at 23 of ECF No. 1 that the state court case "acknowledge[d] that the lake bed of Lake Quinault is owned by the Federal Government and not the Quinault Indian Tribe." Plaintiff cites his Exhibit 4 in support of that

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Plaintiff's third bite at the apple came in 2018 when he filed a complaint in the United States Court of Federal Claims. That case was dismissed due to a lack of subject matter jurisdiction because none of the claims he alleged were against the United States and because he sought equitable relief (a declaration as to his rights to Lake Quinault) that the Court of Federal Claims is without jurisdiction to grant. *See Landreth v. United States*, 144 Fed.Cl. 52, 55 (2019). The Court of Federal Claims' dismissal was upheld by the Federal Circuit. *See Landreth v. United States*, 797 Fed.Appx. 521 (2020) (unpublished).[2]

The present Complaint represents Plaintiff's fourth bite at the apple. Although the Complaint is drafted on form pleading paper as a Complaint for Conversion of Property, Plaintiff cites many legal authorities, including, but not limited to, the Equal Footing Doctrine, Public Trust Doctrine, the Indian Civil Rights Act, Equal Protection Amendment, and 16 U.S.C. § 474 pertaining to national forest surveys. ECF No. 1 at 3-4, lines 22-5. In the caption, Plaintiff also styles the Complaint as, in part, a quiet title action, and lists 28 U.S.C. § 2409a, the QTA, as a relevant statute. He also refers to his Exhibit 36 at ECF No. 1 at 22, line 19, which is a copy of the QTA. Plaintiff also asks for $250,000 in damages, though it is not clear on what basis. *See* ECF No. 1 at 5, line 5 (citing it as the amount in controversy even though jurisdiction is based on

---

assertion, an excerpt from the transcript of the hearing on the motion to dismiss. The portion underlined, apparently a statement by the Nation's counsel, states that the Lake "is owned by the United States for the beneficial use of the Nation." Rather than refuting the Nation's ownership of the Lake, this statement confirms the Nation's beneficial title to the Lake.

[2] Plaintiff states that "the court's opinion acknowledged a taking did occur." Neither the Court of Federal Claims nor the Federal Circuit opinions contain such an acknowledgement.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

federal question and not diversity), and at 27, lines 23-24 (requesting the court to order the Nation to "pay redress in the amount of 250,000 dollars" from Treaty of Olympia annuities).

Plaintiff requests several forms of relief from the Court. He unequivocally seeks the remedy of quieting title, informing the Court that he "seek[s] removal of the cloud of ownership of the 75 by 40 feet of shore land below the High Water Mark, abutting my lake front property on the north sure of Lake Quinault." ECF No. 1 at 24, lines 1-3. He also states that he wants "redress for the crimes committed by the Quinault Indian Tribe,"[3] and "redress in the amount of 250,000 dollars." ECF No. 1 at 27, lines 20-24. He also asks the Court to "consider re-negotiation of the 1856 Treaty of Olympia." ECF No. 1 at 28, line 2. Finally, he asks the Court to review *United States v. Washington,* 294 F. 2d 830 (9th Cir. 1961) regarding the doctrine of accretion. ECF No. 1 at 30, lines 13-16.[4] In short, on its face, the gravamen of Plaintiff's Complaint is less than clear.

As a result of the confusing nature of the Complaint, on May 15, 2020, the Nation filed a motion seeking an extension of time to respond to Plaintiff's Complaint until 14 days after the Court's decision on Plaintiff's motion to amend his Complaint by adding additional exhibits, which was noted for May 29, 2020. *See* ECF No. 14. Plaintiff objected to the Nation's motion

---

[3] In addition to attaching criminal statutes (EFC No. 1 at 3-4) and accusing the Nation of committing crimes, he also accuses the Nation of "malicious, willful, oppressive, wanton and grossly reckless" conduct. EFC No. 1 at 25. He also alleges that the Nation has harassed and bullied him, and that it "blatantly" violates Art. 8 of the Treaty of Olympia because it is not "friendly with all citizens." EFC No. 1 at 26. If this case was not subject to dismissal under Fed. R. Civ. P. 12(b)(1), these allegations would be the proper subject of a motion to strike pursuant to Fed. R. Civ. P. 12(f) because they are impertinent and scandalous.

[4] We assume that Plaintiff sites this case as legal precedent supporting his claims rather than offering it as a form of relief even though he asks for this in the Relief section of the Complaint.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

by ECF No. 18 even though the Court had already granted the Nation's motion. *See* ECF No. 16. In Plaintiff's objection, he seeks to clarify the nature of his complaint and unequivocally states that his "complaint is a quiet title action to remove the cloud of ownership placed upon my legally obtained . . . property on the north shore of Lake Quinault by the Quinault Indian Tribe/Nation." ECF No. 18 at 1. He further explains that he used the Conversion of Property form because that is the only *pro se* complaint form that he could find on the Court's website "that allows for my complaint to be submitted" to the Court. *Id.* at 3.

Plaintiff also explains that he "listed" items that he believes support his claim and the "removal of the cloud of ownership placed upon" his property. *Id.* Apparently referring to the Nation's closure of the Lake in 2013, he states that the "closure and enforcement of [the Nation's] claim of ownership included the claim of ownership to the bed of the lake." *Id.* at 5. He then argues that his claim is "ripe" because his family has owned the land "since 1953/1943." *Id.* He next asserts that his "complaint for quiet title action" is within the statute of limitations established by the QTA.[5] *Id.* at 6. Finally, he concludes that "I here attempt to clarify my complaint to include the removal of the cloud of ownership placed upon my privately owned shore land property by the Quinault Indian Tribe/Nation."[6] *Id.*

---

[5] When Plaintiff's claim accrued is immaterial because, as explained *infra* in Sections II and III, his suit is barred by the Nation's sovereign immunity to suit and by the United States' immunity to suit under the QTA.

[6] Plaintiff also states that "[t]he perception, that other, violations of law and possible additional claims as noted by the Quinault Indian Tribe/Nation, may, or should be addressed by proper authorities or a separate complaint(s)." *Id.* at 2. While this statement lacks clarity, it appears that the Plaintiff is saying that he considers his assertions about the violation of his civil rights through the alleged criminal and other wrongful conduct to be tangential or peripheral to his quiet title action and do not form the basis of the relief he seeks—to quiet title to the land between the low and high water marks that he believes he owns.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Plaintiff's clarification is consistent with the Nation's initial parsing of the original Complaint.[7] Indeed, the granting of relief under the QTA is the only form of relief that this Court could grant if it were not for the Indian land exception of the QTA, discussed *infra* at 18-21. Plaintiff has no authority to prosecute the crimes allegedly committed by the Nation, and he has not pleaded any facts with sufficient specificity that could give rise to tort claims against the Nation from said alleged conduct.[8] Furthermore, he has not pleaded any claims—whether sounding in tort, contract, or otherwise—through which he could prove $250,000 in damages. The Court is clearly without jurisdiction to re-negotiate the 1856 Treaty of Olympia, or to order the Government to do so.

In short, when all the chaff is blown away, the only thing that remains is a quiet title

---

[7]Although ECF No. 18 helped to clarify the nature of Plaintiff's claims, his original Complaint, standing alone, does not meet the standards of Fed. R. Civ. P. 8(a)(2), which requires that "the complaint must say enough to give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd,* 551 U.S. 308, 319, 127 S.Ct. 2499, 2507, 168 L. Ed 2d 179 (2007) (quoting *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)). The Complaint was not "presented with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of what it is the plaintiff asserts." *Vicom, Inc. v. Harbridge Merchant Services, Inc*., 20 F.3d 771, 775 (7th Cir. 1994) (citation and internal quotation marks omitted). As the analysis set forth in the text demonstrates, that is precisely what the Nation was required to do, sift through its pages and scurrilous allegations in order to determine the nature of Plaintiff's claim(s). The Nation has a right "to be free from this costly and harassing litigation" that also affects "the rights of litigants awaiting their turns to have other matters resolved." *Nevijel v. North Coast Life Ins. Co*., 651 F.2d 671, 675 (9th Cir. 1981).

[8] While Plaintiff's argument that he is not barred from seeking relief in this action because it is an *in rem* proceeding is lacking in merit, *see infra* at 15-18, a claim sounding in tort would clearly be barred by the Nation's sovereign immunity because any relief granted for such claims would operate against the Nation and would, as a result, qualify as an *in personam* judgment. *See Chapman v. Duetsche Bank Nat. Trust Co.,* 651 F.3d 1039, 1046 (9thth Cir. 2011) (*in personam* judgments operate between and are binding upon the parties*). See also Rigdon v. Bluff City Transfer and Storage Comp.,* 649 F. Supp. 263, 267 (D. Nev. 1986) (a claim sounding in tort subjected a non-resident corporation to the *in personam* jurisdiction of a federal district court that was sitting in diversity because the foreign corporation had the requisite minimum contacts with the state of Nevada).

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

action, and Plaintiff's various statements in ECF No. 18 now make this abundantly clear. As demonstrated in Section IV of the Argument section, this Court does not have subject matter jurisdiction over a quiet title action against the United States when the property at issue is land that the United States holds in trust or restricted fee status on behalf of an Indian tribe.

ARGUMENT

I. Standard of Review.

Federal courts are courts of limited jurisdiction, and the party seeking to invoke a federal court's jurisdiction bears the burden of establishing that it exists when challenged by a motion to dismiss under Rule 12(b)(1). *See Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Thomson v. Gaskill,* 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942). In reviewing a motion to dismiss under Rule 12(b)(1), a court accepts all facts alleged in the complaint as true and construes them in the light most favorable to a plaintiff. *See DaVinci Aircraft, Inc. v. United States, 926 F.3d 1117*, 1122 (9th Cir. 2019). A court should dismiss a complaint for lack of subject matter jurisdiction if the complaint, considered in its entirety, fails to allege facts on its face that are sufficient to establish subject matter jurisdiction. See *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*., 546 F.3d 981, 984-85 (9th Cir. 2008) (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1990)).

Courts hold *pro se* pleadings, however inartfully pleaded, "to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (internal quotation marks omitted). However, that leniency does not relieve a *pro se* plaintiff from the burden to meet jurisdictional requirements. *Jenson v.*

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

F.A.A., 2011 WL 2491428 at *2 (E.D. Wash. 2011). Cf. *Jordan v. United States*, 128 Fed.Cl. 46, 51 (2016); *accord Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995) ("The fact that [the plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures, if such there be."). Further, with regard to motions to dismiss, such leniency does not give a court license to serve as de facto counsel or rewrite a deficient pleading on behalf of a *pro se* plaintiff. *Poursaied v. Reserve at Research Park LLC*, 379 F.Supp.3d 1182 (N.D. Ala. 2019). Cf. *Fullard v. U.S.*, 78 Fed.Cl. 294, 299 (2007) (Confirming that no duty is created to construct a claim where a *pro se* plaintiff's complaint is so vague that it "'makes it difficult for the defendant to file a responsive pleading and makes it difficult for the trial court to conduct orderly litigation.'").

Nor can a court waive the requirement of subject matter jurisdiction or the government's sovereign immunity from suit. *Simmons v. Revenue Officers, Steve Daniels, Keith Farrar, and Cory Armstrong*, 865 F.Supp. 678, 697 (D. Idaho 1994). In the present matter, Plaintiff has failed to establish that this court has subject matter jurisdiction because, for the reasons discussed *infra* at 13-21, both the Nation and the United States are immune to this suit.

II. The Court Lacks Subject Matter Jurisdiction Because the Nation Enjoys Sovereign Immunity to Suit That Has Not Been Waived.

Whether the Court possesses jurisdiction to decide the merits of a case is a threshold matter that is "'inflexible and without exception.'" *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884)). Without subject matter jurisdiction, the Court cannot proceed in a case. *Id*. "'Jurisdiction is power to declare the law,

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Id.* (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). The Plaintiff bears the burden of establishing the Court's jurisdiction when faced with dismissal under Fed. R. Civ. P. 12(b)(1). *Kokkonen* 511 U.S. at 377; *Grondal v. U.S.,* 2012 WL 523667, *4 (E.D. Wash. 2012). The Court lacks subject matter jurisdiction in this case because the Nation is protected from Plaintiff's suit by the well-settled doctrine of tribal sovereign immunity. Tribal sovereign immunity precludes subject matter jurisdiction. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007). Sovereign immunity is not a discretionary doctrine because it is a bar to suit and in the absence of any waiver of it, dismissal is proper. *Powelson v. United States,* 150 F.3d 1103, 1104-1105 (9th Cir. 1998); *California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir.1979).

Among the long-recognized core aspects of sovereignty that Indian tribes possess is "'common-law immunity from suit traditionally enjoyed by sovereign powers'" *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L.Ed.2d 1071 (2014) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986). It shields Indian tribes, for both on- and off-reservation conduct, from suit absent unequivocal and express authorization by Congress or clear waiver by the tribe. *Bay Mills Indian Community*, 572 U.S. at 789. Courts will not assume such an abrogation lightly. *Id*. at 790.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

Plaintiff cannot point to any express waiver of the Nation's immunity to this suit, whether by the Nation or by Congress because neither has done so. Nonetheless, having been down this road at least twice before, Plaintiff acknowledges the need to "overcome the issue of sovereign immunity." Compl. p. 28, lines 6-7. He contends that the Nation "cannot assert sovereign immunity because the suit relates to *in rem* immovable property," and refers to "*Upper Skagit Indian Tribe v. Lundgren*, 'in rem' *Anderson Middleton V. Quinault Indian Tribe* [sic]'" Compl. p. 29, lines 1-3.

Plaintiff apparently seeks to rely on the Washington Supreme Court's decision in *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash.2d 857, 389 P.3d 569 (2017). His reliance is misplaced because this decision was vacated and remanded by *Upper Skagit Indian Tribe v. Lundgren*, ---- U.S. ---- , 138 S.Ct. 1649, 200 L.Ed.2d 931 (2018). That case involved a quiet title action to settle a dispute between the Lundgrens and the Upper Skagit Indian Tribe ("Tribe") over the boundary of land within the Tribe's ceded area. *Id*. at 1652. The Supreme Court of Washington rejected the Tribe's defense of sovereign immunity, reasoning "that sovereign immunity does not apply to cases where a judge 'exercis[es] in rem jurisdiction' to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise *in personam* jurisdiction over the Tribe itself." *Id*. The Washington Supreme Court incorrectly relied on *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) in reaching this conclusion.

The U.S. Supreme Court accepted certiorari because reliance on *Yakima* was incorrect. The *Yakima* case, noted the Court, "did not address the scope of tribal sovereign immunity." *Id*. Instead, it addressed whether the General Allotment Act rendered allottees and their fee-patented

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

land subject to state regulations and taxes. *Id*. at 1653. The Court concluded that *Yakima* "resolved nothing about the law of sovereign immunity." *Id*. At oral argument, the Lundgrens advanced an alternative ground—that "the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in 'the [sic] character of a private individual.'" *Id*. at 1653-54. Because this argument was not raised until oral argument, the Court declined to use its discretion to answer this specific question, leaving it to be resolved by the Washington Supreme Court upon remand.[9]

Those courts that have directly considered whether tribal sovereign immunity bars *in rem* actions have concluded that it does. *See Cayuga Indian Nation v. Seneca County, N.Y*., 761 F.3d 218, 221 (2d Cir. 2014), declining to draw a distinction between *in rem* and *in personam* proceedings, and therefore, finding no implied abrogation of tribal sovereign immunity. *See also Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, 2015 WL 12552060, at *3 (C.D. Cal. July 2, 2015), rejecting the argument that there is an *in rem* exception to the defense of sovereign immunity.[10]

Moreover, when the Supreme Court has been asked to limit the application of tribal sovereign immunity, it has emphatically refused to do so. Most recently, the Court refused to

---

[9] The U.S. District Court of Alaska noted that the Washington court had no opportunity to consider this issue on remand because subsequent to this decision, the Tribe transferred the disputed acre to the Lundgrens. *Oertwich v. Traditional Village of Togiak*, 413 F.Supp.3d 963, 969 (D. Alaska 2019).

[10] *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 873, 929 P.2d 379 (1996), another case relied upon by Plaintiff for his argument that sovereign immunity does not bar an *in rem* quiet title action, is inapplicable to the case at bar. The land in *Anderson & Middleton* was fee patented land subsequently acquired by the Quinault Nation whereas in the present matter, the bed of Lake Quinault is unquestionably land held in trust by the United States. Whatever the efficacy of that case, when land is held in fee by a tribe—and the Nation asserts that it has no validity even under those circumstances—it holds no weight when the land is held in trust by the United States.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

find that the Bay Mills Indian Community's sovereign immunity was not applicable to its off-reservation commercial conduct. *Bay Mills Indian Community*, 572 U.S. at 791 (holding that "[u]nless Congress has authorized Michigan's suit, our precedents demand that it be dismissed"). The Court reviewed its jurisprudence on the issue, noting that it has upheld tribal immunity to suit in suits brought by individuals and states, even when a state sought to sue a tribe to enforce its laws regarding the taxation of the sale of cigarettes. *Bay Mills Indian Community*, 572 U.S. at 789 (citing *Puyallup Tribe, Inc. v. Department of Game of Wash*., 433 U.S. 165, 167–168, 172–173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509-510, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)). The Court further noted that in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc*., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), it had declined a nearly identical invitation to find tribal immunity inapplicable to off-reservation, commercial activity, refusing to depart from its precedents that have "established a broad principle, from which we thought it improper suddenly to start carving out exceptions." *Bay Mills Indian Community*, 572 U.S. at 790 (quoting *Kiowa Tribe of Okla.,* 523 U.S. at 758). Indeed, the Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismiss[es] any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills Indian Community*, 572 U.S. at 789.

Plaintiff has not established subject matter jurisdiction in this case because he cannot point to any waiver by the Nation or Congress. His reliance on the *Lundgren* case for the proposition that tribal sovereign immunity does not apply in *in rem* cases is misplaced because the United States Supreme Court overruled the Washington Supreme Court decision upon which he relies. A near-exhaustive review of the case law shows that all courts that have taken up the

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

issue since the Supreme Court's decision have rejected the *in rem* exception to tribal sovereign immunity as meaningless. This Court, therefore, lacks subject matter jurisdiction over the Nation and the claims against it must be dismissed.

III. The Relief Plaintiff Seeks is Barred by the Quiet Title Act ("QTA").

Regardless of whether Plaintiff's suit can be characterized as an *in rem* proceeding, the land in question is held in trust for the Nation by the United States, and that means that Plaintiff can only achieve the relief he seeks if he can sue the United States. Of course, he cannot because, like the Nation, the United States is immune from suit absent a waiver of that immunity. With regard to suits to quiet title to land in which the United States claims an interest, that waiver comes in the form of the QTA. *See Block v. North Dakota,* 461 U.S. 273, 280, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). The QTA is "the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Id.* at 286. Nonetheless, the waiver of the United States' immunity effected by the QTA, "does not apply to trust or restricted Indian lands." *See* 28 U.S.C. § 2409a(a). *See also United States v. Mottaz*, 476 U.S. 834, 842, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), noting that the Indian land exception "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." "[W]hen the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *Id.* at 843. Congress included the Indian land exception based on the recommendation of the Solicitor for the Department of the Interior because:

> excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

> abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent.

Id. at 842, n. 6 (citing H.R.Rep. No. 92–1559, p. 13 (1972)).

All that is required to invoke the Indian land exception is that the United States has a colorable claim that the land in question is trust or restricted fee. *Alaska Dep't of Natural Resources v. United States*, 816 F.3d 580, 585 (9th Cir. 2016) (citing *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)). Indeed, the QTA Indian land exception applies "without regard to the ultimate validity of [the United States'] assertions" that the land is trust or restricted fee Indian land. *State of Alaska v. Babbitt,* 75 F.3d 449, 452 (9th Cir. 1995). The government's immunity "applies whether the government is right or wrong." *Id.* (citations and internal quotation marks omitted). Moreover, the QTA and its legislative history are void of anything that even "suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians." *State of Alaska v. Babbitt,* 38 F.3d 1068, 1073 (9th Cir. 1994) (citing *Wildman v. United States*, 827 F.2d at 1309). All that is necessary is that the government's claim not be arbitrary or frivolous. *See Alaska Dep't of Natural Resources,* 816 F.3d at 585.

Both the QTA and its Indian land exception apply even if a plaintiff claims less than a fee simple interest in the land in question. *See Id.* at 585 and *State of Alaska*, 38 F.3d at 1074. The exception also applies to claimants, who, "while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." *Id.* at

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

1074. The Indian land exception to the QTA's waiver of the United States' immunity creates an "insuperable hurdle" to suits to challenge the government's interest in Indian trust or restricted land. *Id.* at 1075. It also applies without regard to whether there is an alternate means of review and may leave a party with no forum for its claims. *Id.* at 1077 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)).

There can be no credible dispute about the status of Lake Quinault and that the United States holds title to the bed in trust for the Nation. Lake Quinault lies entirely within the boundaries of the area set aside by the Executive Order, by its plain language, as the Quinault Indian Reservation. It is also well-established that, contrary to Plaintiff's statements, Lake Quinault has long been recognized to lie within the Nation's Reservation boundaries. *See United States v. Washington*, 626 F. Supp. 1405, 1428 (W.D. Wash. 1981) (finding that the "Quinault Reservation . . . tapers to Lake Quinault about 21 miles inland, *which is contained within the reservation and represents its easternmost portion*."), *aff'd* 694 F.2d 188 (9th Cir. 1982) (Canby, J. concurring), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536 (Mem), 77 L.Ed.2d 1387 (1983) (emphasis added). *Quinaielt Tribe of Indians v. United States,* 102 Ct. Cl. 822, 835 (1945) (finding that northwest boundary point of the Reservation was such as to include the entire Lake within the Reservation). Dep't of Interior Sol. Op. at 2 (July 21, 1961) (concluding that the *"boundaries of the reservation include the entire lake [and] the United States holds title to the bed of the entire lake in trust for the Indians of the Quinault Reservation."*).[11] (Emphasis added.)

---

[11] A copy of the 1961 Solicitor's Office Opinion is attached for the convenience of the Court and the other parties.

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

In short, the United States' claim that it holds the bed of the Lake in trust for the Nation far exceeds the "not arbitrary or frivolous" standard and is, in fact, unassailable. Thus, the QTA and its Indian land exception deprive this Court of subject matter jurisdiction over this case and make the relief Plaintiff seeks—the quieting of title to himself and other similarly situated land owners to the bed of the Lake—unavailable.

IV. Conclusion.

This Court lacks subject matter jurisdiction over Plaintiff's Complaint because both the Nation and the United States are immune to suit, and there has been no waiver of the sovereign immunity of either Defendant that would allow this suit to proceed. For the reasons stated herein, the Complaint should be dismissed for a lack of subject matter jurisdiction.

/s/ Karen Allston
KAREN ALLSTON
Senior Assistant Attorney General
WSBA No. 25336
Office of the Attorney General
Quinault Indian Nation
PO Box 613
Taholah, WA 98587
Tel: (206) 713-8223
Fax: (360) 276-8127
Email: kallston@quinault.org
Attorney of Record for the Quinault Indian Nation

DERRIL B. JORDAN
Attorney General
WSBA No. 55054
Office of the Attorney General
Quinault Indian Nation

Tel: (360) 590-2327
Email: Derril.Jordan@quinault.org

OFFICE OF ATTORNEY GENERAL
QUINAULT INDIAN NATION
P.O. BOX 613
TAHOLAH, WA 98587
(360) 276-8211

O. S. ADDRESSES

Bureau of Indian Affairs (Realty) July 12, 1961

cc: BIA Files

Office of the Regional Solicitor, Portland

Whether Quinault Lake is within the boundary of the Quinault Reservation and what rights the Tribe has insofar as the lake is concerned

Reference is made to your memorandum of June 15 enclosing a copy of the June 14 letter from the Superintendent of Western Washington Agency, asking our opinion concerning the above subject.

The entire Quinault Lake is within the boundary of the Quinault Reservation. The Executive Order of November 4, 1873, establishing the Reservation describes the boundary thereof as follows:

"Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queet-shee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific Coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low water mark, along the Pacific to the place of beginning."

The above description begins at the southerly end of the lake and then proceeds "northerly around the east shore of said lake to the northwest point thereof". "Around the shore" includes the strip between high and low water mark, since the word "shore" means the land washed by any movement of the waters between high and low water mark. (Oakes v. DeLancey, 24 N.Y.S. 539, 540 (1893)). It is synonymous with the word "beach". (Elliott v. Stewart, 15 Ore. 259, 14 Pac. 416). The entire lake bed, including the land between high and low water mark, is therefore within the boundary of the reservation.

ATTACHMENT - D (P. 1 of 3)

The Quinault Reservation was established pursuant to treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855 and January 25, 1856 (12 Stat. 971). Executive Order reservations stand on the same basis as treaty reservations. (Gibson v. Anderson, 131 Fed. 39 at 42). In Montana Power Co. v. Rochester, (9th Cir., 1942), 127 F.2d 189, it was held that the southerly half of Flathead Lake was within the boundaries of the Flathead Reservation, and therefore the United States held title to the southerly half of the lake bed in trust for the tribe. So in the instant case, where the boundaries of the reservation include the entire lake, the United States holds title to the bed of the entire lake in trust for the Indians of the Quinault Reservation.

The letter from the Superintendent indicates that abutting upland owners (nontrust land) have constructed numerous boat ramps, floats, docks, bulkheads, and small buildings on piling along the shore. Obviously, inasmuch as the entire bed of the lake below the high water mark is tribal property, held in trust by the United States for the Indians of the Quinault Reservation, the upland owners have no right, title or interest in or to the bed of the lake which will permit said upland owners to construct any ramps, floats, docks, bulkheads or buildings resting upon, in whole or in part, any portion of the lake bed, unless constructed by permission of the tribe and the United States. No such right in the upland owners can be acquired as a result of adverse possession, laches, or the statute of limitations. They are not applicable to establish title adverse to the United States and its Indian wards. (See United States v. 7,405.3 Acres of Land, 97 F.2d 417 and cases therein cited; Stanley v. Schwalby, 174 U.S. 508, 376 L. Ed. 259; Board of County Commissioners of Jackson County v. United States, 308 U.S. 343, 84 L.Ed. 313). Nor do the allotments within the Quinault Reservation carry title to the low water mark of Quinault Lake. The allotments are "to the shore" of the lake. In Montana Power Company v. Rochester, supra, the court held that allotments within the Flathead Reservation extended to Flathead Lake within the reservation but did not grant any title to the bed of the lake below high water mark. The court pointed out that the United States rule is that patents to lands bordering waters grant to the allottee title only to the high water mark in order to reserve for the common use of the tribe the land between the low and high water marks.

The entire bed of Quinault Lake is therefore within the reservation and the title thereto is in the United States in trust for the Quinault Tribe and other Indians of the reservation entitled to the use thereof. Neither the allottees nor the upland owners have any right, title or interest in or to the bed of the lake below the line of high water, and the Quinault Tribe has the right, with the consent

ATTACHMENT - D (P 2 of 3)

of the United States, to lease all or any part of the lake bed.

For the Regional Solicitor

Johnston Wilson
Attorney

CSCohn:JH:ms

ATTACHMENT - D (P. 3 of 3)