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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

PAUL GRONDAL, a Washington
resident and THE MILL BAY
MEMBERS ASSOCIATION, INC.,
a Washington Non-Profit
Corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT
OF THE INTERIOR, *et. al.*

Defendants.

CASE NO. CV-09-0018-RMP

**WAPATO HERITAGE, LLC'S
RESPONSE TO
CONFEDERATED TRIBES OF
THE COLVILLE
RESERVATION'S
SUPPLEMENTAL BRIEF (ECF
571) IN SUPPORT OF MOTION
TO DISMISS (ECF 274) WAPATO
HERITAGE, LLC'S CROSS-
CLAIMS (ECF 228)**

Oral Argument Requested

INTRODUCTION

The Confederated Tribes of the Colville Reservation (the "Tribe") argue that all of Wapato Heritage, LLC's claims against them were either based on in rem jurisdiction,

WAPATO'S RESPONSE TO TRIBE'S SUPPLEMENTAL
BRIEF (ECF 571) ISO MOTION TO DISMISS (ECF 274)
WAPATO'S CROSS-CLAIMS (ECF 228) - 1

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1 and as such barred by the Court's holding that MA-8 is Indian trust land, or are barred by
 2 sovereign immunity. The Tribe fails to inform the Court that they waived sovereign
 3 immunity as to Wapato Heritage's claim for damages under the Casino Sublease. As to
 4 that claim, the Tribe's motion should be denied. The Tribe further failed to inform the
 5 Court that it waived sovereign immunity in the Casino Replacement Lease, which goes
 6 directly to Wapato Heritage's requested declaratory relief. And although the Court
 7 determined that MA-8 is Indian Trust land, the Government concedes that Wapato
 8 Heritage's life-estate interest in that property is a fee interest. Therefore, based on the
 9 Tribe and Federal Defendants' own theory, the federal courts have in rem jurisdiction
 10 over Wapato Heritage's declaratory relief claims, as well as other claims, as to its rights
 11 as holder of that life-estate interest.¹

12 **RESPONSE STATEMENT OF FACTS**

13 After William Evans, Jr. died in 2003, his 24% interest in MA-8 became the subject
 14 of probate litigation. Under a settlement agreement amongst his designated heirs, the

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 21 ¹ The Court should take note, however, that it is undisputed that large portions of the
 22 underpayment by the Tribe, and overpayment by Mr. Evans and his entities, occurred
 23 during Mr. Evans' life, and during open probate, when the Federal Defendants
 24 unquestionably did have a fiduciary duty to Mr. Evans.
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1 Tribe, and the BIA, Wapato Heritage received a life estate in the late Mr. Evans' interest,
 2 with the remainder in the Tribes. The Government has taken the position that this life
 3 estate is in the nature of a fee interest, not a trust interest. ECF ECF No. 186, p. 4.
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5 As alleged in Wapato Heritage's First Amended Answer and Cross Claims, ECF
 6 No. 228:

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 8 248. Prior to December 29, 2005, the Colville Agency of the
 9 BIA retained the Sells Group to conduct an accounting review of the
 10 historical accounting by Evans under the Master Lease and the
 11 Sublease (as Amended). The Sells Group provided a written report to
 CTCR c/o the Colville Agency dated December 29, 2005 (the "Sells
 Report").

12 249. The Sells Report concluded that (a) Evans had overpaid
 13 the MA-8 allottees under the Master Lease by the sum of \$751,285;
 14 And, (b) CTCR's affiliate Colville Tribal Enterprises, Inc. had
 15 underpaid under the Casino sublease (as amended) by the sum of
 \$866,248.

16 250. The Colville Agency and CTEC failed to meet their
 17 fiduciary duties upon receipt of the Sells Report. First they did not
 18 advise any MA-8 owner, neither the individual allottees or Wapato
 19 Heritage, of the Sells Report or its conclusions. Second they took no
 20 steps to collect from CTEC the amount of the deficiency in the
 payment of rent, and distribute it in accordance with the Sub-Lease
 or the Master Lease.

21 251. Some years after its receipt, the BIA produced a copy of
 22 the Sells Report in response to a Freedom of Information Act Request
 23 from Wapato Heritage dated June 22, 2007, by letter dated July 19,
 24 2007.

25 252. Wapato Heritage subsequently supplied copies of the
 Sells Report to some of the allottees.

1 253. Neither the BIA nor CTEC have paid to Wapato Heritage
2 or any other allottee any of the sums due under the Sells Report.

3 254. CTCR, through its affiliate CTEC, has continuously
4 operated its casino located on MA-8 without the payment of any rent
5 therefore to Wapato Heritage since February 1, 2009.

6 255. The Colville Agency informed Wapato Heritage by letter
7 dated March 4, 2010 that it would disregard its consent based on its
8 life tenancy to the pending 99 year lease proposal.

9 In 2009, without notice to Wapato Heritage, and without giving Wapato Heritage
10 the opportunity either to vote its interest or to lobby other interest holders, the BIA
11 granted a five-year lease of MA-8 to the Tribe, through its agency Colville Tribes
12 Enterprise Corporation (“CTEC”). Declaration of Jeffery Webb (“Webb Dec.”), Exh. 1
13 (hereafter the “Replacement Lease”). In 2014, the BIA and the Tribe renewed the lease
14 for a renewable 25-year period, also without notice or opportunity for Wapato Heritage
15 to vote or lobby. *Id.* ¶ 3. The Replacement Lease, short of providing all allottees with fair
16 market value, reduced the amount paid by CTEC. *Id.* ¶ 4. Not only did the BIA and the
17 Tribe collude to reduce the percentage paid (from 6% to 4.5%) but it now calculated the
18 amount from slots and table games only, removing the allottees’ prior right to receive
19 revenue from all activities, including tobacco sales, gasoline sales, food and beverage
20 sales. *Id.* Further, the new lease tied-up all of MA-8, including two-hundred and fifty feet
21 of waterfront, further excluding the allottees from being able to receive fair market value
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1 of their fractionated interests. Webb Dec. ¶ 5. Ironically, the Tribe also immediately
 2 executed their option to extend this agreement, just as Mr. Evans had; and, just like Mr.
 3 Evans, they did so without providing notice to all allottees, the very thing the Federal
 4 Defendants, joined by the Tribe, have argued was Mr. Evans fatal mistake in this
 5 litigation. Webb Dec. ¶ 6.

7 In its Amended Crossclaims, Wapato Heritage asks for a declaration that, among
 8 other things, the improperly granted replacement lease for the casino was void *ab initio*.
 9 ECF No. 228 ¶ 273. Wapato Heritage also seeks damages for overpayments made to
 10 allottees pursuant to Evans' former Master Lease as found by the Sells Report, and to
 11 recover underpayments by the Tribe under the Casino Sublease. ECF No. 228 ¶¶ 283–
 12 86.

13 **AUTHORITY**

14 A. The Tribe Twice Waived Sovereign Immunity in Contract

15 In the Casino Sublease, the Tribe expressly waived sovereign immunity for
 16 damages claims:

17 CTEC, solely for the purpose of this sublease, hereby waives
 18 sovereign immunity with respect to the enforcement of all of the
 19 terms of this sublease by Evans and consents to the entry of a money
 20 judgment and payment of the same if such would be appropriate
 21 under the facts.

22 ECF 90-4 at 130 ¶ 36.1.

1 The Casino Sublease also provides “Both Evans and CTEC consent and agree that
 2 any disagreement or controversy as between the parties that they are unable to settle
 3 between themselves shall be submitted and tried to the Colville Tribal Court.... Both
 4 parties agree that said Colville Tribal Court shall have exclusive jurisdiction of said
 5 dispute.” ECF 90-4 at 130 ¶ 36.2. This section, however, does not purport to modify or
 6 constrain the waiver of sovereign immunity in ¶ 36.1 of the Sublease. Section 36 of the
 7 Sublease, in which both provisions appear, is entitled “Applicable Law – Waiver of
 8 Sovereign Immunity – Forum,” and it includes one section on each of those three topics.

11 The Tribe unequivocally waived sovereign immunity a second time, in the
 12 Replacement Lease. Webb Dec. Exh. 1 p. 9, ¶ 8.8: “The Tribe and [the BIA] hereby waive
 13 their respective sovereign immunity....” This clear waiver covers Wapato Heritage’s
 14 claims for declaratory relief relied to the Replacement Lease, which include: that the
 15 Replacement Lease is void (*Id.* at ¶ 273); that Wapato Heritage is entitled to vote their
 16 life estate share. (*Id.* at ¶ 274); and, that Wapato Heritage is entitled to a pro-rata
 17 distribution of revenues generated from MA-8. (*Id.* at ¶ 275).

21 To the extent that the Court held otherwise in its February 16, 2012 Order (ECF
 22 No. 227), respectfully, the Court was clearly in error and until final judgment on all issues,
 23 the Court can and should correct its errors. *Lahiri v. Universal Music & Video*
 24 *Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010). While tribal waiver of
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1 sovereign immunity must be express, here it unequivocally was waived in the plain
2 language of the two contracts.

3 B. The Tribe has Waived its Sovereign Immunity by its Conduct in this Litigation
4 since December 2019.

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6 Even if the Court were to disregard the Tribe's two clear and unequivocal
7 waivers in contract, its conduct forms an additional basis for waiver. The Ninth Circuit
8 has been progressive in its approach to waiver of Tribal Sovereign Immunity by litigation
9 conduct. The circuit, in *United States v. Oregon*, was one of the first courts to hold that
10 waiver of sovereign immunity can occur through litigation conduct. In that case, the court
11 held that a tribe waived its sovereign immunity by seeking equity and successfully
12 intervening in a dispute regarding fishing rights. 657 F.2d 1009, 1014 (9th Cir. 1989)
13 ("By successfully intervening, a party makes himself vulnerable to complete adjudication
14 by the federal court of the issues in litigation between the intervenor and the adverse
15 party."). The court held that "[b]y seeking equity, this Tribe assumed the risk that an
16 equitable judgment secured could be modified if warranted by changed circumstances.
17 By intervening, the Tribe assumed the risk that its position would not be accepted and
18 that the Tribe itself would be bound by an order it deemed adverse." *Id.* at 1015; *See*
19 *also, Confederated Tribes of the Colville Reservation Tribal Credit v. White*, 139 F.3d
20 1268 (9th Cir. 1998) (holding that filing a claim in a Chapter 11 bankruptcy waived
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1 sovereign immunity to that claim even after that claim was transferred to a Chapter 7
2 bankruptcy and discharged).

3 Recently, the Sixth Circuit found that “actually or constructively” filing a
4 bankruptcy petition likewise waives sovereign immunity, *Buchwald Capital Advisors,*
5 *LLC, v. Sault Ste. Marie Tribe of Chippewa Indians*, 917 F.3d 451, 455, 464 (6th Cir.
6 2019), and cited a trend of “circuits willing to accept that some litigation conduct may
7 constitute sufficiently clear waiver” of tribal sovereign immunity while specifically
8 citing the Ninth Circuit. *Id.* at 464 (citing *Oregon*, 657 F.2d 1009 and *Bodi v. Shingle*
9 *Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016)). In *Bodi*, the court held
10 that a “tribe’s exercise of its right to remove a case to federal court, *standing alone*, does
11 not effect a waiver of its immunity from suit.” *Id.* at 1015-1016 (emphasis added). The
12 court, however, implied that litigation conduct, if clear enough, may be the basis for a
13 waiver. *Id.*; *see also*, *Buchwald*, 917 F.3d at 464. Limited waiver is traditionally found
14 where parties affirmatively request relief as it pertains to specific claims before the
15 court. *Id.*; *see also*, *Oregon*, 657 F.2d 1009; and, *White*, 139 F.3d 1268.
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21 The court, however, has continued to expand the doctrine beyond those
22 affirmative requests for relief. In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992),
23 a criminal defendant served a subpoena on the Quinault Indian Nation seeking
24 “documents related to the victim’s alleged alcohol and drug problems” and records
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1 “related to disturbances resulting from the victim’s occupancy of a Housing Authority
2 residential unit.” *Id.* at 1319. The tribal nation’s Department of Social and Health
3 Services and Housing Authority, respectively, had possession of those documents.
4 *Id.* The Ninth Circuit noted that the tribe was “an uninvolved witness” that happened to
5 be “the holder of possibly relevant documents” and absent nothing more was entitled to
6 sovereign immunity. *Id.* at 1320. The Ninth Circuit found, however, that the tribe had
7 waived its tribal sovereign immunity because it had previously provided similar,
8 relevant documents to the prosecution. *Id.* The Court held that the tribe “cannot
9 selectively provide documents and then hide behind a claim of sovereign immunity
10 when the defense requests different documents from the same agency.” *Id.*

14 District Courts have taken notice and likewise held that litigation conduct beyond
15 affirmative requests will suffice to establish limited waiver of sovereign immunity.
16 In *Knox v. United States Department of the Interior*, 2012 WL 465585 (D. Idaho
17 February 13, 2012), the Shoshone and Bannock Tribes sought to prevent the depositions
18 of three tribal officers in their official capacity. See *Knox*, 2012 WL 465585 at 1. The
19 trial court had previously determined that the tribes could not be added as defendants
20 due to tribal sovereign immunity. *Id.* The tribes, however, had asked for, and been
21 granted, the opportunity to file an amicus brief, and the amicus brief included
22 declarations from the three men regarding their official duties. *Id.* Applying the Ninth
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1 Circuit's reasoning in *James*, the district court found that, by inserting themselves into
 2 the litigation through an amicus brief and the accompanying declarations, the tribes had
 3 given a limited waiver of sovereign immunity. *Id.* The district court ruled that it would
 4 compel the depositions of the three tribal officials. *Id.* at 2. See also, *United States v.*
 5 *Velarde*, 40 F.Supp.2d 1314 (D.N.M. 1999) (Applying the reasoning in *James*, held that
 6 the tribe waived sovereign immunity as to documents previously provided to another
 7 party); See also generally, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d
 8 656 (and *Miccosukee Tribe of Indians of Florida v. Bermeduz*, 92 So.3d 232 (3rd Dist.
 9 2012) (tribe waived sovereign immunity by litigation conduct over a five year period).

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 13 “Without authorization from Congress, [a tribe cannot be] sued in any court; at
 14 least (not) without its consent.” *Oregon*, 657 F.2d at 1013 (internal quotations and
 15 citations omitted). Consent is a sovereign “power” of “self-determination” held by each
 16 and every federally recognized tribe and waiver is a part of that right. *Id.* at 1014. The
 17 road through waiver extends every bit as far as a tribe's consent. *Id.*; See also,
 18 *Miccosukee*, 227 So.3d at 664 (“While participating in litigation is not a one-way
 19 street...the length of the street extends only so far as the Tribe's participation.”).

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 22 Since December of 2019, the Tribe's role in this litigation has been pervasive and
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1 present in each issue before the court.² The Tribe has sought and received benefit from
 2 this court regarding all issues before it. Specifically, since December of 2019, the Tribe
 3 has sought and obtained affirmative relief in this case directly related to the CTEC
 4 underpayment issue – they prevented the allottees from getting counsel, which
 5 benefitted the Tribe, by not having attorneys force them to pay amounts due to the
 6 allottees – it also obscured the fraud issues around acquiring allotment interest – it also
 7 obscured the declaratory relief sought by Wapato Heritage. The Tribe has also sought,
 8 and received, relief adverse to Wapato Heritage regarding the trust or fee status of MA-
 9 8 and the ejectment of the Plaintiff. *E.g.* ECF Nos. 399 (Tribe’s opposition to individual
 10 allottees being provided counsel), 441 (arguing for ejectment), 469 (Tribe’s opposition
 11 to Plaintiff’s motions for default and for summary judgment), 537 (Tribe’s successful
 12 argument against a stay of execution) and 561 (asking the court to deny equitable relief
 13 related to an alleged agreement between the Tribe, the Government and Mill Bay).
 14 Many of these affirmative requests are requests for remedies equitable in nature and, as
 15 in *Oregon*, have the possibility to be back before the court at a later time. Likewise,
 16 similar to *Oregon*, *Buckwald* and *White*, *inter alia*, the Tribe has requested affirmative
 17 relief explicitly at issue in all claims. As such, the Tribe has explicitly consented to the
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 25 ² Contrasted to the non-activity of the Tribe before December 1, 2019.

1 court's jurisdiction on all issues. The tribe cannot "selectively" participate in each claim
 2 and "hide behind a claim of sovereign immunity" related thereto when the possibility
 3 of an adverse result is at hand. *James*, 980 F.3d at 1320.
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5 The road through the tribe's consent in this case leads to all claims. Based upon
 6 its conduct in this litigation the Tribe has consented to suit on all claims advanced in
 7 this litigation, including all claims of Wapato Heritage.
 8

9 C. The Tribe Waived the Forum Selection Clauses by Conduct

10 Although sovereign immunity is a subject-matter jurisdictional issue, forum
 11 selection is not; See *Kamm v. ITEX Corp.* (568 F.3d 752, 754 ("[T]he Supreme Court has
 12 held that a forum selection clause does not deprive a federal court of subject matter
 13 jurisdiction."), citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907
 14 (1972); second, unlike subject-matter jurisdiction, a forum-selection clause can be
 15 waived by both failure to timely assert the objection and by conduct in litigation. *Neirbo*
 16 *v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (holding that the right to
 17 object to forum "may be lost by failure to assert it seasonably, by formal submission in a
 18 cause or by submission through conduct"); *Libby, McNeill, & Libby v. City Nat'l Bank*,
 19 592 F.2d 504, 510 (9th Cir. 1978) (venue is not jurisdictional and any impropriety is
 20 waived if there is no timely objection).
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25 For the same reasons outlined above, the Tribe has waived the diverse forum

1 selection clauses in the two leases. In addition, Wapato Heritage's claims have been
 2 active in the Federal Courts for over a decade. The Tribe has made no attempt to remove
 3 Wapato Heritage's contract claims under the Sublease to Tribal Court nor has it made
 4 any attempt to compel Wapato Heritage's requests related to the Replacement Lease to
 5 arbitration.
 6

7 B. Standard of Review Under Fed. R. Civ. Pro. 12(b)(6)
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9 A Rule 12(b)(6) motion will be denied unless it is "clear that no relief could be
 10 granted under any set of facts that could be proved consistent with the allegations."
 11 *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 (9th Cir. 2002) (citing *Swierkiewicz v.*
 12 *Sorema N.A.*, 534 U.S. 506 (2002)). The court is to take all material allegations in the
 13 complaint as true and construes them in the light most favorable to the plaintiff. *NL*
 14 *Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Here, the parties have filed
 15 declarations and exhibits in support of briefing, the Court should therefore treat this
 16 matter as a motion for summary judgment and apply that standard of review. *San Pedro*
 17 *Hotel, Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). Under Fed. R. Civ.
 18 Pro. 56, the court draws all reasonable inferences in favor of the nonmoving party,
 19 including questions of credibility and of the weight that particular evidence is accorded.
 20 *Massons v. New Yorker Magazine, Inc.* 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447
 21 (1992). Summary judgment is not appropriate where the non-moving party's facts,
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1 coupled with the disputed background or contextual facts, are such that a reasonable jury
 2 might return a verdict in the non-moving party's favor. *T.W. Elec. Serv. v. Pac. Elec.*
 3 *Contractors*, 809 F.2d 626, 631 (9th Cir. 1987); *Anders v. Liberty Lobby, Inc.*, 477 U.S.
 4 242, 248 (1986).

6 C. Wapato Heritage has Stated a Claim for Underpayment by the Tribe

7 Wapato Heritage has put forth facts to support its claim that the Tribe has
 8 underpaid pursuant to the same sublease in which it waived sovereign immunity. ECF
 9 No. 228, ¶ 253 ("Neither the BIA nor CTEC have paid to Wapato Heritage or any other
 10 allottee any of the sums due under the Sells Report") & Webb Dec. ¶ 7.
 11

13 D. Wapato Heritage has Stated a Claim for Declaratory Relief

14 Wapato Heritage has claimed that it was excluded from the process of negotiation
 15 and acceptance of the Replacement Lease, and that the BIA and the Tribe failed to make
 16 necessary disclosures. ECF No. 228, ¶ 273. & Webb. Dec. 2-3, 6.
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18 25 CFR 162.012 (a)(1)(iv) requires 50% consent to enter into a binding lease
 19 when there are twenty or more fractionated owners. It is further undisputed that Wapato
 20 Heritage, LLC holds a life estate in MA-8. ECF No. 228, ¶ 14. Pursuant to 25 CFR
 21 162.010 (a)(1)(ii), prospective lessee must "For fractionated tracts, notify all Indian
 22 landowners and obtain the consent of the Indian landowners of the applicable
 23 percentage of interests" The BIA failed to so notify Wapato Heritage. ECF. No. 228, ¶
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273. 25 CFR 162.013 (c) states circumstances where the BIA can give the allottee's consent, but that is not the case here because there was no attempt to notify. *Id.* Without Wapato Heritage's consent, the BIA lacked authority to enter into the Replacement Lease.

"[W]here a life estate and remainder interest are both owned in trust or restricted status, the life estate and the remainder interest must both be leased under these regulations, unless the lease is for less than one year in duration." *Enemy Hunter*, 51 IBIA at 326 (alterations omitted) (quoting 25 C.F.R. § 162.102(b) (2010)). Because the regulations do not address the effect of consent by the holder of a life estate, the BIA applies general principles of property law. *See Adakai v. Acting Navajo Regional Director*, 56 IBIA 104, 108 (2013).

[A] life estate is "a present interest that terminates on the death of an individual whose life serves as the governing life." Restatement (Third) of Prop.: Wills and Other Donative Transfers § 24.5 (2003). A life estate holder "has the power to create any interest in land which includes any or all of the rights, privileges, powers and immunities which constitute the estate for life," but the life estate holder cannot convey any "right, privilege, power or immunity" greater than he or she holds. Restatement (First) of Prop. § 124 (1936).

Susan Fredericks, et. al. v. Bureau of Indian Affairs, 63 IBIA 274, 279–80, 2016 WL 4153788 (emphasis added).

Here, the Tribe does not have authority to vote Wapato Heritage's fractionated interest as if it were their own. In *Federicks*, a tribe "received [] a vested right in the

1 future enjoyment of their respective shares of the trust property now held in a full life
2 estate without regard to waste, created by the same operation of law, to the benefit of
3 the life tenant, Judy Fredericks. Appellants' ability to exercise their rights of ownership
4 will become effective with the expiration of the life tenancy.” *Id.* at 5. “While we do not
5 dispute that Appellants, as holders of remainder interests in trust land, are beneficiaries
6 of the trust under which the trust property is held, this does not give them the authority
7 to enter into a lease of the Allotments based upon their consent alone.” *Id.* (emphasis
8 added).

11 In addition to the validity of the lease itself, there is a triable question of fact
12 regarding whether or not the Replacement Lease provided fair market value to the
13 allottees.
14

15 The owners of a majority interest in any trust or restricted land are
16 authorized to enter into an agricultural lease of the surface interest of a
17 trust or restricted allotment, and such lease shall be binding upon the
18 owners of the minority interest in such land if the terms of the lease provide
19 such minority interests with not less than fair market value for such land.

20 *Fredricks* at 4. Wapato Heritage submits that the lease entered into by the Tribe
21 manifestly does provide the minority interests with less than fair market value, where
22 the Replacement Lease actually reduced the amounts paid to all allottees, including
23 Wapato Heritage. Furthermore, the government's decision to authorize a lease
24 benefiting only one heir, and not the remaining heirs, violates the statutory requirement
25

1 that leases be for the benefit of heirs. 24 U.S.C. § 415a; *see also Restatement (Second)*
 2 *of Trusts*, § 183 (“When there are two or more beneficiaries of a trust, the trustee is
 3 under a duty to deal impartially with them.”). *Fredericks v. United States*, 125 Fed. Cl.
 4 404, 420 (2016).

6 E. Wapato Heritage has Stated a Claim for Ejectment & Partition

7 Although the law of the case, subject to pending appeal, is that MA-8 is trust
 8 land, that does not, by itself, eliminate Wapato Heritage’s right to its life estate rights.
 9 As outlined above, life estates are not meaningless, despite the Tribe and BIA’s position
 10 in this litigation. The Government, supported by the Tribe, takes the position that
 11 although MA-8 remains in trust as to the Indian landowners, the life estate is a “fee
 12 interest” not in trust. ECF 186 at 4. In other words, the Government and the Tribe want
 13 the Court to treat the life interest as if a fee patent had been issued, revocable upon the
 14 death of the measuring life. As the Court reasoned in its initial order denying in part
 15 the Tribe’s motion to dismiss, ECF 227, claims involving the rights of owners of real
 16 property interests not subject to Indian trust, may be brought *in rem*, and adjudicated
 17 whether or not the Tribe decides to participate. The Federal Courts retain jurisdiction
 18 over Wapato Heritage’s *in rem* claims for partition and ejectment, and these claims have
 19 a strong basis if the Tribe is going to continue to fail to provide Wapato Heritage, and
 20 all other allottees, with below market lease revenue.
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1 A life-estate holder has the rights of a landowner under state law, unless
 2 preempted by “Federal law...to the contrary.” 25 C.F.R. § 179.3(b). To the extent that
 3 the Court endorses the Tribe’s position that Wapato Heritage, even though it is part of
 4 the Indian-probated estate of an Indian landowner, the late William Evans, Jr., is not
 5 subject to trust protection and lacks voting power, then Wapato Heritage also cannot be
 6 bound by the will of the majority of fractionated trust interests, except to the limited
 7 extent that any co-tenant may be bound by the decision of the other co-tenants under
 8 state law.
 9

10
 11 Under Washington law, a co-tenant or lessee “must so exercise his right” to
 12 possession and enjoyment of the whole property “as not to interfere with the equal rights
 13 of his cotenant.” *De la Pole v. Lindley*, 131 Wash. 354, 358, 230 P. 144, 146 (1924).
 14 By refusing to allow Wapato Heritage to license use of the land, by overriding Wapato
 15 Heritage and exercising their supposed majority-voter power to consent to a sub-par
 16 lease in their own favor, occupying MA-8 to the exclusion of all others, the Tribe has
 17 ousted Wapato Heritage from MA-8. “Ouster occurs when a cotenant obtains sole
 18 possession of the land that is adverse to the other cotenants, where the cotenant
 19 repudiates or disavows the relation of the cotenancy or where the tenant without
 20 possession is aware of actions by the tenant in possession that signify his or her intention
 21 to hold, occupy, and enjoy the premises exclusively.... “where the property is not
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1 adaptable to double occupancy, the mere occupation of the property by one cotenant
 2 may operate to exclude the other.” *Yakavonis v. Tilton*, 93 Wash. App. 304, 308, 968
 3 P.2d 908, 910 (1998) (quoting *Cummings*, 94 Wash.2d 135, 145, 614 P.2d 1283 (1980)).
 4
 5 The co-tenant may at least be liable for damages for so trespassing on the co-tenant’s
 6 equal right to occupy, use, and enjoy the property. *Id.*

7
 8 Similarly, although the Government has provided means to partition “trust
 9 allotments,” 25 C.F.R. § 152.33, it has not extended that right to life estate holders, and
 10 the regulation on partition does not expressly state that it is exclusive or otherwise set
 11 itself up as “contrary” to state law, cf. 25 C.F.R. § 179.3. Therefore, state law on
 12 partition applies. As the Tribe has made clear, they consider that the Government may
 13 represent them in their role as holders of fractionated allotment interests, so they are not
 14 a necessary party to a partition action, but since they have an interest, they are certainly
 15 welcome to waive their sovereign immunity and participate.
 16
 17

18 CONCLUSION

19
 20 The Tribe, twice, waived its sovereign immunity. The Tribe’s more recent conduct
 21 in this case waived it again. That same conduct, and the passage of time, waived the
 22 Tribe’s right to remove to Tribal Court or compel arbitration. Wapato Heritage’s claims
 23 are further *in rem* where they deal with the disposition of MA-8 itself.
 24

25 Wapato Heritage has put forth facts upon which a finder of fact *could* rule in their

1 favor on their various claims. The Tribe has failed to completely foreclose this possibility
2 and its motion should therefore be denied.

3 **DATED** this 2d day of November 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused the foregoing document to be electronically filed with the Clerk of the above entitled Court using the CM/ECF system, which will send notification of such filing to all registered recipients of that system as of the date hereof.

Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I certify that I served the foregoing document on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants.

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DATED this 2d day of November 2020.



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