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Hon. Rosanna Malouf Peterson

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; THE BUREAU OF INDIAN AFFAIRS, and FRANCIS ABRAHAM, CATHERINE GARRISON, MAUREEN MARCELLAY, MIKE PALMER, JAMES ABRAHAM, NAOMI DICK, ANNIE WAPATO, ENID MARCHAND, GARY REYES, PAUL WAPATO, JR.,

CASE NO. CV-09-0018-RMP

WAPATO HERITAGE, LLC'S RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS WAPATO HERITAGE, LLC'S REMAINING CLAIMS (ECF 570)

Hearing: December 10, 2020

Oral Argument Requested

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Defendants.

I. STATEMENT OF FACTS

Wapato Heritage, LLC is the successor in interest to the late William Wapato Evans, Jr., an enrolled member of the Colville Tribes. As a descendant of Wapato John, the original 19th-century allottee of MA-8, Mr. Evans owned a 23.8% interest in MA-8, by far the largest single ownership interest. Starting in 1984 Mr. Evans developed MA-8 under a Master Lease which was administered by the BIA on behalf of the Lessors-allottees. Mr. Evans, as Lessee, sublet a portion of MA-8 to the Colville Tribal

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Enterprise Corporation ("CTEC"), an instrumentality of the Confederated Tribes of the Colville Reservation, for a casino (the "Casino Sublease.")

In 2002 Mr. Evans transferred his MA-8 interests to Wapato Heritage, LLC. In 2003 Mr. Evans passed away. In his will, as eventually amended by settlement agreement among his heirs during probate, Wapato Heritage, LLC received a life-estate interest in the late Mr. Evans' MA-8 interests, and his heirs were devised interests in Wapato Heritage, LLC.

In 2005, the BIA, through the Sells Group, P.S., performed an agreed upon procedure on the Master Lease and Casino Sublease. Although the Government did not inform Wapato Heritage, the Government received a written report documenting that due to errors in bookkeeping, Mr. Evans had been very substantially shortchanged. Primarily from 1994–1998, he had been underpaid $886,248 by the Colville Tribes, and in 1984–2003, he had overpaid the BIA by $751,285.[1] This overpayment was paid to the allottees. The BIA did not inform Wapato Heritage of this until Wapato Heritage made a Freedom of Information Act request in 2007.

At about that time, in late 2007, another MA-8 allottee, at the behest of the Colville Tribes, prevailed upon the BIA to invalidate the Master Lease, on the ground

[1] Wapato Heritage now asserts a claim for $634,348 of this amount.

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that extension of the Master Lease past the year 2009 had not been properly noticed to the allottees. The BIA accepted this position and began ejection of Wapato Heritage and its licensees. This, along with the BIA's refusal to move forward on Wapato Heritage's proposal for a much more profitable development plan under a 99-year lease of MA-8, led to an action in this Court, Wapato Heritage, LLC v. United States of America, United States Department of the Interior, and United States Bureau of Indian Affairs, Cause No. 08-cv-177-RHW ("*Wapato I*").

In *Wapato I*, this Court determined in November 2008, and the Court of Appeals affirmed on interlocutory appeal in 2011, that the Master Lease had failed of renewal and would expire as of February 2009. In November 2009 in that action, this Court also determined that the BIA had not breached any fiduciary duty to Wapato Heritage by failing to move forward on the 99-year lease proposal for MA-8. Cause No. 08-cv-177-RHW, ECF No. 82. The Federal Defendants did not bring any counterclaims against Wapato Heritage in *Wapato I*.

Meanwhile, in March 2009, the BIA and the Colville Tribe completed their usurpation of Mr. Evans' project by entering a lease for MA-8 (the "Colville Lease") on terms substantially more favorable to the Colville Tribes and less favorable to the allottees. They gave Wapato Heritage no notice or opportunity to vote on the grant of

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that lease. The Colville Tribes and the BIA sought to eject Wapato Heritage's licensees on MA-8, the Mill Bay RV Park Association. The RV Park, in April 2009, therefore brought this action against the allottees including Wapato Heritage, and the Colville Tribes and the Federal Defendants. Having been dragged into this action, Wapato Heritage asserted cross-claims for, among other things:

A declaration that MA-8 was no longer Indian trust land and/or that fee patents should issue, and a related claim to quiet title;

A declaration that the Colville Lease was void *ab initio*, due to the BIA and Colville Tribes deceptive and collusive misconduct and to failing to give Wapato Heritage notice and an opportunity to withhold consent to the lease;

A declaration that Wapato Heritage was entitled to vote on any lease of MA-8;

Recovery of Mr. Evans' overpayment from the BIA and/or allottees;

Ejecting CTEC and the Colville Tribes or alternatively requiring them to pay back rent and rent going forward based on the fair market value established by the Casino Sublease;

Recovery from the allottees and the government of the overpayments accidentally paid to the allottees;

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Requiring BIA, as administrator of the Master Lease, to collect from CTEC/Colville Tribes its underpayment of Casino Sublease rent.

II. AUTHORITY

A. Res Judicata Does Not Bar Wapato Heritage's Claims

Starting with the most obvious point, res judicata does not bar Wapato Heritage's claims for declaratory judgment that it had the right to vote on the 2009 Replacement Lease to the Colville Tribes and that said lease is void *ab initio* or its claim to eject the Colville Tribes from MA-8. "For purposes of federal common law, claim preclusion does not apply to claims that accrue after the filing of the operative complaint." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017). "The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events; plaintiff may simply bring a later suit on those later-arising claims." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000). Wapato Heritage's complaint in *Wapato I* was filed on June 9, 2008, before the Colville Tribe's application for a replacement lease was considered after the original 25-year term of the Master Lease expired in 2009. ECF No. 1 in Cause No. 08-cv-00177-RHW. Thus, claims as to the replacement lease are not barred.

Wapato Heritage's claim to recover the Colville Tribes' underpayment, and its

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claim to recover overpayments made to BIA for the allottees, although based on facts preceding the Wapato I complaint, are not barred by res judicata either. Res judicata requires "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Howard*, 871 F.3d at 1039 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003)). To determine whether claims are identical, a federal court asks:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. (quoting *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012)).2 These criteria are not applied "mechanistically." *Id.* (quoting *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir. 2016)). They are, however, applied with caution: "when considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Orff v.*

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2 The Federal Defendants allude in passing to the anti-claim-splitting doctrine; to the extent that they rely on that doctrine, the same analysis applies. *Adams v. California Dep't of Health Servs.*, 487 F.3d 684, 688–89 (9th Cir. 2007).

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United States, 358 F.3d 1137, 1144 (9th Cir. 2004), *aff'd*, 545 U.S. 596 (2005) (quoting *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002)).

Wapato Heritage's claims in *Wapato I* were for declaratory and injunctive relief and inverse condemnation, based on the theory that the Master Lease had been renewed by notice to the BIA, and that BIA had acted wrongly in failing to approve Wapato Heritage's 99-year lease proposal after it was approved by the allottees in 2006. See ECF No. 1 in Cause No. 08-cv-00177-RHW. The operative facts involved the BIA's right to accept notice for or bind the allottees and the BIA's decision making process about the proposed replacement lease. Wapato Heritage's claims in this case also involve the BIA and MA-8, but that is where the similarity ends: Wapato Heritage now seeks damages for inadequate payments under a sublease and to recover overpayments under the Master Lease while it was unquestionably in effect.

The difference between the two actions here is greater than the difference that the Court of Appeals held was material in *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 690–91 (9th Cir. 2005). In that case, as in this one, there was no question that the claim could have been brought in a prior action between the same parties, yet the Court of Appeals reversed dismissal, holding that res judicata did not apply. *Hells Canyon*, 403 F.3d at 691. The plaintiff environmentalists had, before judgment in the

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first action, dismissed without prejudice a claim that the Forest Service's new trail was within a protected area, which was essentially the same claim brought in the later case. *Id.* at 685. Nonetheless, where the only claim previously adjudicated was based on the Forest Service's decision to build the trail without filing an EIS, the transactional nucleus of facts was different, and the new action was not barred. *Id.* at 690–91. As in *Hells Canyon*, *Wapato I* and this case concern the same site, and the claims in the first action and the second action relate to a common underlying document, but the nature of the claims, the rights involved, and most of the relevant facts and evidence differ sharply between the two actions. Moreover, a decision on Wapato Heritage's wrongful-payment claims will not affect the rights and interests adjudicated in *Wapato I*.

B. Wapato Heritage was not Required to Exhaust Non-Existent Administrative Remedies.

The Federal Defendants argue that Wapato Heritage could not come to Court to recover money overpaid to BIA for the allottees until going through a supposed administrative remedy process under 25 C.F.R. § 115.600–.620. But those subparts provide rights to an allottee whose Individual Indian Money account ("IIM account") has been frozen ("restricted") by the BIA, not to such an allottees' creditor. When the BIA restricts the account, the allottee may demand a notice and hearing, and if the

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decision remains adverse to the allottee, he or she may appeal. 25 C.F.R. §§ 115.607, 115.619. But this section provides no means for an unsecured third-party creditor such as Wapato Heritage to participate. On the contrary, the BIA gives notice of its decision to restrict the account only to the allottee. 25 C.F.R. § 115.605. Even when the BIA must publish the notice because it cannot find the allottee, the BIA does not include in the published notice any information as to why the account is being restricted. *Id.*

One reason the BIA may restrict an account is that it "[i]s provided documentation showing that BIA or OTFM caused an administrative error which resulted in a deposit into your IIM account, or a disbursement to you." 25 C.FR. § 115.604(b)(4). But a third party to whom the money rightfully belongs will not normally know that the BIA made an administrative error. Instead, as here, the BIA is provided with documentation of its error by its own internal processes; in this case, the Sells Group Report.

When it received the Sells Group Report, the BIA could have and should have frozen the allottees' IIMs and consulted with the allottees to arrange a payment plan to reimburse Wapato Heritage. 25 C.F.R. §§ 115.617, 115.618. Instead, the BIA ignored the problem and buried the Sells Group Report. ECF No. 228 at 25–26. Even after Wapato Heritage received the Sells Group Report under a Freedom of Information Act

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request, *id.*, and brought its cross-claims in this action to recover the money, the BIA never froze the allottees' IIM accounts, so they never had occasion to seek a hearing. And if they had, Wapato Heritage would never have heard about it or had the opportunity to participate or appeal.

Now, BIA argues that Wapato Heritage should somehow use the procedure which BIA failed to use. Even if that were possible, it is not required, for several reasons. First, laches bars federal defendants from such an argument. "[O]ne who seeks the help of a court of equity must not sleep on his rights." *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 939 (7th Cir. 1984). WHL filed its Amended Answer, Defenses, and Cross-claims in 2012. ECF No. 228. Federal defendants must not be allowed to ignore their responsibility and then wait eight years, until according to them, a statute of limitations has run, *see* ECF No. 570 at 8 n.3, to raise this issue and prevent the merits from being heard.

Furthermore, "[u]nless statutorily mandated, application of the doctrine [of exhaustion of administrative remedies] is in the sound discretion of the courts." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 500 (9th Cir. 1980). Courts use a balancing test to determine whether exhaustion of administrative remedies should be required: "the court should balance the litigant's need for judicial resolution against the

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agency's interests in having an opportunity to make a factual record and exercise its discretion without the threat of litigious interruption, in discouraging the frequent flouting of the administrative process, and in correcting its own mistakes to obviate unnecessary judicial proceedings." *Id.*; *see also McKart v. United States*, 395 U.S. 185, 193–94 (1969). Therefore, "exhaustion is not required if administrative remedies are inadequate or not efficacious…where pursuit of administrative remedies would be a futile gesture." *Aleknagik Natives Ltd.*, 648 F.2d. at 499–500. Federal Defendants have already made plain that in their view the individual allottees are not responsible for overpayment. ECF No. 570 at 8:8-9, 8:6-7. BIA has known about the overpayments and underpayment since 2005 and done nothing about it—receiving another copy of the same documentation from Wapato Heritage will not make any difference. And so many years into this action, after discovery has closed, it would not be more efficient to remand for the creation of an agency record (even if there were a procedure for such). There is no pending administrative process to be interrupted; rather, the Federal Defendants want to interrupt this court's proceedings for a futile administrative request. Agency autonomy is not threatened by the court resolving these claims here where the agency has previously chosen not to act on them, nor is any institutional expertise required to determine these straightforward accounting issues. These factors, especially

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futility, point strongly against requiring administrative exhaustion, even if there were a process to exhaust.

C. Overpayments and Acceptance of Underpayments were Not "Voluntary"

A "voluntary payment" is a term of art, meaning a payment not actually due but freely paid, which in equity may not be recovered, under a waiver or estoppel theory. *Morgan Guar. Tr. Co. of New York v. Am. Sav. & Loan Ass'n*, 804 F.2d 1487, 1494 (9th Cir. 1986). Like any other waiver, it must be made by the principal's intent, not by an accountant's error. *Id.* Thus, the "voluntary payment" doctrine is extremely constrained:

> In a business setting, it is at least paradoxical to suppose that the overpayment of an asserted (or any payment of a nonexistent) liability could ever be "voluntary," and the proper operation of the voluntary payment rule must be realistic rather than artificial. The rule does not, for example, impute knowledge of relevant circumstances of which the payor is not in fact aware, describing as "voluntary" a payment that was actually the consequence of negligence or inadvertence. When properly employed, a reference to "voluntary payment" is judicial shorthand for a truth of common experience: that a person must often choose to act on the basis of inadequate knowledge, assuming the risk that further information may reveal the choice to have been less than optimal. A more appropriate statement of the voluntary payment rule, therefore, is that money voluntarily paid *in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient* may not be recovered, on the ground of "mistake," merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation.

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Restatement (3d) of Restitution and Unjust Enrichment § 6 com. (e) (2011). Simply paying out too much money on a contract by mistake, in contrast, unjustly enriches the payee, and restitution should properly be awarded. *Id.* "The fact that the person to whom the money was paid under a mistake of fact was not guilty of deceit or unfairness, and acted in good faith, does not prevent recovery of the sum paid, nor does the negligence of the payor preclude recovery." *Bank of Naperville v. Catalano*, 86 Ill. App. 3d 1005, 1008 (Ill. App. Ct. 1980). This principle extends to overpayments by a tenant to a landlord under a lease. *McDonald's Corp. v. Moore*, 237 F. Supp. 874, 876–77 (W.D.S.C. 1965) (tenant whose accountant inadvertently doubled the amount of each monthly rent payment for years was awarded restitution).

D. The Federal Defendants had a Fiduciary Duty directly to Bill Evans and his Estate during the Accrual of these Claims.

The Federal Defendants deny that they have a fiduciary duty to Wapato Heritage, and argue that without such a duty, they do not have to collect money due from the Master Lease and from CTEC under the Casino Sublease. By statute the Federal Government owes duties to Indians with Individual Indian Money ("IIM") accounts. 25 U.S.C. § 162a(d), 4001, 4011-12; *see also* Cohen's Handbook of Federal Indian Law § 16.04[2]-[4] (Nell Jessup Newton ed., 2017). These duties include explicit trust

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standards regarding accounting, controls, reconciliations, audits, written procedures and statements to account holders. *Id*. Of course, Bill Evans, an enrolled member of the Colville Tribe, was an Indian and was paid under an IIM account. Declaration of Webb in Support of Wapato Heritage, LLC's Response to Federal Defendants Motion to Dismiss at ¶ 5-11.

Bill Evans died on September 11, 2003. Approximately ninety percent (90%) of the amounts at issue were due before his death. The remaining ten percent (10%) occurred while the estate was open prior to the 2005 settlement agreement. Most, if not all, of these claims occurred while Bill Evans was alive when fiduciary duties were clearly owed. Regardless, even if they had not, fiduciary duties extend to the estate of an Indian decedent. *U.S. v. Mason*, 412 U.S. 391 (1973) (holding that a fiduciary duty existed in the estate context but reversing the 6th Circuit's decision that the fiduciary duty was breached by the payment of Oklahoma estate tax).[3]

[3] Due to these factors Judge Whaley's decision regarding fiduciary status in *Wapato I* related to the post 2005 settlement agreement decision not to enter into a ninety-nine (99) year lease is entirely inapplicable.

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The federal government had a duty to provide for periodic, timely reconciliations to assure the accuracy of the IIM account, 25 U.S.C. § 162a(d)(3), to provide for adequate management of the IIM account, 25 U.S.C. § 162a(d)(6)-(7) and audits to ensure the accuracy of the IIM account. 25 U.S.C. §4011; *see also* 25 C.F.R. § 115.709. Moreover, the federal government had a fiduciary duty to verify that the allottees were being paid the full amount of rent they were contractually obligated to receive. *Osage Tribe v. United States*, 68 Fed. Cl. 322, 333-34 (2005). Breach of these duties is actionable under federal law. *Goodeagle v. United States*, 122 Fed. Cl. 292, 295 (2015); *see also Fletcher v. United States*, 730 F.3d 1206, 1208-14 (10th Cir. 2013).

Demonstrating the extent the federal government will go to avoid fulfillment of any obligation to Mr. Evans, Wapato Heritage or his Estate, the government argues that it owes no duty because Wapato Heritage only holds a life estate. First, the claims accrued when Bill Evans was alive and then to his estate thereafter. Even if this were not the case, however, when trust estate revenue is due to a remainder interest during the period of a life estate, it must be paid to the life estate holder under the BIA's own regulations. 25 C.F.R. § 115.504; see also, 25 CFR § 179.101. Cases likewise make clear that life estate recipients are treated almost identical to

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any other interest holder. *W. Ref. Sw., Inc. v. U.S. Dep't of the Interior*, 450 F. Supp. 3d 1214, 1220 (D.N. M. 2020) (assuming a life estate beneficiary has right to vote an interest); *Fredericks v. B.I.A.*, 63 IBIA 274, 277 (2016) (right to consent belonged to life estate holder).

The federal government becomes so cavalier in its brief as to not only ignore its duties, but to go so far as to say that no individual allottee was harmed because of the underpayment, ECF No. 570 at 11; that is, no individual allottee except for Bill Evans who lost more than $1.5 million dollars before his death due to these underpayment and overpayment errors. The federal government goes on to say that the debts cancel out. This is simply untrue: the debts compound. The government is once again advocating a position that benefits the Tribe to the disadvantage of Bill Evans, Wapato Heritage and his estate.

Simply put, the BIA failed to carry out its duty to Mr. Evans when he was alive. It cannot outlive its beneficiary and then ignore its debt to him. The government's approach smacks of self interest and is in direct violation to the duties owed to Bill Evans while he was alive and to his estate thereafter. The BIA owes Wapato Heritage for breach of its fiduciary duties related to both the underpayment and overpayment claims.

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E. In the Event that the Court Does not Transfer this Matter to the Court of Claims it has Jurisdiction to Decide Set-Off.

The action should be transferred to the Court of Claims. See ECF No. 572. If the Court disagrees, then this Court should entertain Wapato Heritage's claims for overpayment and underpayment as a setoff or recoupment to the claims brought by the Federal Defendants. *See United States v. U. S. Fid. & Guar*. Co., 309 U.S. 506, 511 (1940) (citing *Bull v. United States*, 295 U.S. 247, 261 (1935) ("recovery of money so held may not only be the subject of a suit in the Court of Claims … but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction")).

F. Where BIA Claims Wapato Heritage is A Fee-Interest Owner, Wapato Heritage has the Right to Partition.

Although the law of the case, subject to pending appeal, is that MA-8 is trust land, that does not, by itself, eliminate Wapato Heritage's right to its life estate rights. As outlined above and previously in this action, life estates are not meaningless, despite the Tribe and BIA's position in this litigation. The Federal Courts retain jurisdiction over the *in rem* claims for partition and ejectment, as well as claims for

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declaratory relief, if the Tribe is going to continue to fail to provide Wapato Heritage, and all other allottees, with below market lease revenue.

G. The United States, the Tribe and Individual Landowners have Waived Tribal Exhaustion and are Estopped from Asserting Comity. Even if Waiver and Estoppel are Inapplicable, Tribal Exhaustion was not Required.

Claims have been pending before this Court since January 21, 2009. Nearly twelve years after the initial involvement of the Tribe, the beneficial landowners and the federal government on those landowners' behalf, federal defendants assert comity and failure to exhaust tribal remedies. Tribal sovereignty is the "epicenter" of the tribal exhaustion doctrine. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33, (5th Cir. 2000) (citing *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). The tribe has exercised its tribal sovereignty and its right to self determination by litigation and allowing this case to be litigated in federal court and seeking and being granted affirmative relief herein. In so doing, they have made a deliberate decision to withhold the nonexhaustion defense as to the Tribe, the

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federal government and the beneficial landowners.[4] Both the Supreme Court and the Ninth Circuit have held that a court has "no discretion to raise nonexhaustion on its own initiative when a tribe strategically withholds this defense, chooses to relinquish it, makes a deliberate decision to proceed straightaway to the merits or deliberately steers the court away from the issue." *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016) (internal citations omitted) (citing *Wood v. Milyard*, 566 U.S. 463, 473 (2012)). The tribe appears to have made no such argument. Now it is too late.

This result is virtually required by the fact that the Tribe, the beneficial landowners and the federal government have all asked for and received affirmative relief and relief on the merits regarding claims similarly subject to tribal exhaustion. The federal government filed several motions for summary judgment on the Plaintiff's claims (by dismissal thereof) and the federal government's ejectment motion from this Court. Several beneficial landowners joined in these requests. The Tribe has likewise sought affirmative relief before this Court. *See* ECF No. 577 at 7-13. By doing so, they are estopped from seeking dismissal from failure to exhaust tribal remedies now.

[4] Tribal exhaustion is not a jurisdictional bar. See *Burlington North R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

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Finally, even if the federal government, the tribe and the beneficial landowners can escape waiver and estoppel, tribal exhaustion is not properly at issue. The federal government (who claims to be involved on behalf of the beneficial landowners), Wapato Heritage and many of the beneficial landowners are non-Indian. In civil disputes involving non-Indians and Indians arising on a reservation, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as…judicial decisions." *Nat'l Farmers Union Ins. Cas.*, 471 U.S. at 855-56; *see also Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905 (S.D. Miss. 1996). Tribal sovereignty here has been altered by the Tribe's seeking, and receiving, this Court's assistance in this matter for years. When the dispute involves non-Indian activity occurring outside the reservation the policies behind tribal exhaustion are not so obviously served. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997). Such is the case at hand.

"A dispute involving non-Indian activity occurring outside the reservation, but within Indian County, requires the court to assiduously examine the *National Farmers* factors to determine whether comity concerns invoke the tribal exhaustion doctrine." *South v. Navajo Nation*, 2000 WL 36739428 at *4 (D. N.M. September 19, 2000)

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(internal citations omitted). Those factors, which include an examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished and a detailed analysis of relevant statutes, weigh in favor of no requirement for tribal exhaustion in this case. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997).

III. CONCLUSION

This Court should deny Defendant's Motion to Dismiss and transfer the remaining claims at issue to the Federal Court of Claims. *See* ECF No. 572. If this Court is to retain jurisdiction, the Court should grant Wapato Heritage's Motion for Partial Summary Judgment. *Id.*

Submitted this 9th 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.

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