

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARY M. CARNEY,

Plaintiff,

v.

STATE OF WASHINGTON,
WASHINGTON STATE PARKS AND
RECREATION COMMISSION, and
SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Defendants.

No.

NOTICE OF REMOVAL PURSUANT
TO 28 U.S.C. § 1441 AND 28 U.S.C.
§1442

(FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR
SKAGIT COUNTY, CASE NO. 21-2-
00126-29)

TO: The Judges and Clerk of the United States District Court in and for the Western
District of Washington at Seattle;

AND TO: Plaintiff and her attorney:

Defendant Swinomish Indian Tribal Community (“Swinomish” or “Tribe”) hereby
gives notice that this action is removed to the United States District Court for the Western
District of Washington at Seattle from Skagit County Superior Court of Washington. In
removing the action, Swinomish does not intend to and does not waive its sovereign immunity
from unconsented suit and does not waive any defense, including sovereign immunity and

1 related defenses. Removal is made pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. §
 2 1442(a)(2).¹ The other defendant in this case is the State of Washington. Counsel for the State
 3 of Washington (“State”) has represented to counsel for Swinomish that the State consents to
 4 removal.

5 **NOTICE OF REMOVAL**

6 **A. The Notice of Removal is Timely and Properly Filed.**

7 Swinomish and the Washington State Parks and Recreation Commission (State Parks)
 8 are named defendants in a civil action filed in Skagit County Superior Court, *Mary M. Carney*
 9 *v. State of Washington, et al.*, Case No. 21-2-00126-29. The action was commenced on
 10 February 25, 2021, when the Summons and Complaint were filed with the Skagit County
 11 Clerk. Swinomish agreed to accept email service of a copy of Plaintiff’s Complaint on
 12 February 26, 2021. As such, this notice has been filed within the 30-day time limit after the
 13 filing of the initial pleading, set forth in 28 U.S.C. § 1446(b)(1). Plaintiffs filed an Amended
 14 Complaint on March 17, 2021.

15 Subsequent to this filing, Swinomish will file a limited notice of appearance and a copy
 16 of this notice of removal in Skagit County Superior Court and provide all parties and the state
 17 court with a copy of this notice pursuant to 28 U.S.C. § 1446(d). In accordance with 28 U.S.C.
 18 § 1446(a) and Local Civil Rule 101(b)(1), a copy of the original Complaint and Amended
 19 Complaint and associated certificates of service are attached as separate “attachments” in the
 20 electronic filing system and labeled as the “complaint” and “amended complaint.” Under
 21 Local Rule 101(b)(2), the certificate of service included in this notice lists all counsel who

22 _____
 23 ¹ This Court has supplemental jurisdiction over claims against defendant State of Washington under 28
 U.S.C. § 1367. However, as will be set forth in a separate filing, Swinomish contends that all claims against both
 defendants must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), and 19.

1 have appeared in the state court action, along with their contact information. No jury demand
2 has been made. Local Rule 101(b)(3).

3 **B. Removal is Authorized Because Plaintiff Seeks Title to Lands Held by the**
4 **United States in Trust for Swinomish.**

5 The Tribe has owned and occupied the tidelands surrounding its Reservation since time
6 immemorial, and became a beneficial owner of the tidelands when the Reservation was created
7 pursuant to the 1855 Treaty of Point Elliott, 12 Stat. 927. In 2010, Swinomish and State Parks
8 acquired alienated fee lands on the Swinomish Indian Reservation and established Kukutali
9 Preserve, the first jointly owned and operated tribal/state park in the country. The Tribe gained
10 beneficial title to an undivided 50 percent interest in the uplands in Kukutali Preserve in 2014
11 when the United States accepted the Tribe's fee interest into trust.

12 One of the primary purposes of Kukutali Preserve is to actively preserve, protect, and
13 enhance natural ecological habitat for the benefit of native species and promote the healthy
14 functioning of important near-shore habitat corridors. To help carry out those goals, Kukutali
15 Preserve undertook a restoration project in August 2018 to remove an artificially elevated
16 access road to Kukutali Preserve (the Project). The roadway was an artificial – and unpermitted
17 – dam in the intertidal zone and needed to be removed in order to reestablish more natural
18 morphology in the area (including improved water, wood, and sediment transport), to improve
19 fish and wildlife forage and migration, and to facilitate Tribal members' subsistence and
20 cultural practices such as gathering shellfish.

21 Plaintiff Mary Carney owns alienated fee land on the Swinomish Indian Reservation
22 immediately to the south of Kukutali Preserve. She alleges that she owns the southern portion
23 of the old roadway (despite the fact that the entire roadway was north of a boundary fence

1 between the properties that was built in 1979) and that by removing the road, the Project
 2 trespassed upon her land. *See* Amended Complaint ¶¶ 17, 30-31. She alleges that the Project
 3 increased inundation on certain lands south of the fence that she contends she owns,
 4 constituting another trespass upon her property. *See* Amended Complaint ¶¶ 17, 19, 32-33.
 5 And she alleges that she owns an easement along the old roadway that the Project improperly
 6 interfered with. *See* Amended Complaint ¶¶ 18, 25, 37-38. Based on her allegations, Ms.
 7 Carney seeks to quiet title to disputed property rights, Amended Complaint ¶¶ 59-60 and
 8 Prayer for Relief E, and asserts a prescriptive easement, Amended Complaint ¶¶ 25 and Prayer
 9 for Relief A.

10 The Tribe contends that some of the property Ms. Carney seeks to quiet title to or have
 11 an easement declared over is owned by the United States in trust for the Tribe. Portions of the
 12 road were built upon illegally filled tidelands that continue to be owned by the United States in
 13 trust for the Tribe, and those portions of the old roadway which are not tidelands beneficially
 14 owned by the Tribe are uplands owned by State Parks and the United States in trust for the
 15 Tribe. The Tribe also contends that if areas south of the boundary fence experience increased
 16 inundation under post-Project conditions, those areas are also illegally filled tidelands that
 17 continue to be owned by the United States in trust for the Tribe. And the Tribe contends that
 18 Ms. Carney cannot acquire rights over the property in dispute via prescription because under
 19 well-settled federal law, lands beneficially owned by the Tribe cannot be acquired through
 20 prescription.

21 Thus, the fundamental issue in this case is a title dispute between Plaintiff and the
 22 United States and Tribe. As a general matter applicable to both 28 U.S.C. § 1441(a) and 28
 23 U.S.C. § 1442(a)(2), the entirety of this action may be heard in federal court because Plaintiff

1 seeks to have the court declare she owns rights in tidelands and uplands that are owned by the
 2 United States in trust for the Tribe, and the court cannot resolve whether that relief may be
 3 granted without determining the extent of ownership by the United States in trust for the Tribe
 4 and the legal effect of that ownership. Because Plaintiff's state law tort claims turn on
 5 ownership of the lands in dispute, those also cannot be decided without the court resolving the
 6 underlying title dispute between the Plaintiff and the United States and Tribe.

7 The face of Plaintiff's Complaint and Amended Complaint acknowledges that this case
 8 involves a title dispute between Ms. Carney and the United States and Tribe and alleges facts
 9 and seeks relief that gives rise to a federal question and this Court's removal jurisdiction. The
 10 Amended Complaint acknowledges that:

11 The Swinomish Indian Tribal Community ("Tribe") is a federally recognized
 12 Indian tribe and owned, as one of two tenants-in-common with equal and
 13 undivided interests, the Preserve Property, until it transferred its undivided 1/2
 14 interest in the Preserve Property (subject to all easements) to the United States of
 American [sic] in Trust for the Tribe. The Tribe continues to be the beneficial
 owner of its undivided 1/2 interest and manages the Preserve Property with the
 Commission.

15 Amended Complaint ¶ 3.

16 The Amended Complaint further alleges that "[The Tribe] suggested that the Tribe
 17 might own portions of the Carney Property that was [sic] flooding, if it were determined that
 18 that area was artificially filled tidelands, and the Tribe voiced concerns that Ms. Carney may
 19 be trespassing on its property. The Tribe has since repeated such claim of potential ownership.
 20 Ms. Carney disputes this assertion." Amended Complaint ¶ 23. The Amended Complaint
 21 acknowledges that "[t]he Tribe also has asserted that some portions of Kiket Road are located
 22 on artificially filled tidelands. Ms. Carney disputes this assertion." Amended Complaint ¶ 26.
 23 The Amended Complaint seeks to resolve the referenced disputes with the Tribe by seeking to

1 quiet title over property owned by the United States in trust for the Tribe, Amended Complaint
 2 ¶¶ 59-60 and Prayer for Relief E, and further asserts a prescriptive easement over portions of
 3 the old roadway that are owned in whole or part by the United States in trust for the Tribe.
 4 Amended Complaint ¶ 25 and Prayer for Relief A.

5 It is well-settled that disputes over ownership of Indian lands are questions of federal
 6 law. The “rudimentary propositions that Indian title is a matter of federal law and can be
 7 extinguished only with federal consent apply in all of the States.” *Oneida Indian Nation v.*
 8 *County of Oneida*, 414 U.S. 661, 670 (1974). “[F]ederal law, treaties, and statutes protect[]
 9 Indian occupancy [and] its termination [is] exclusively the province of federal law.” *Id.*
 10 Conversely, state courts may not adjudicate the ownership or right to possession of property or
 11 any interest therein belonging to an Indian tribe that is held in trust by the United States. *See*
 12 28 U.S.C. § 1360(b). Accordingly, removal is appropriate here, “where a state law claim
 13 alleges a present right to possession of Indian tribal lands.” *Robinson v. Michigan*
 14 *Consolidated Gas Co., Inc.*, 918 F.2d 579, 585 (9th Cir. 1990) (citing *Oneida*, 441 U.S. at
 15 670).

16 **1. Removal is proper pursuant to 28 U.S.C. § 1441(a).**

17 28 U.S.C. § 1441(a) provides in pertinent part that:

18 (a) any civil action brought in a State court of which the district courts of the
 19 United States have original jurisdiction, may be removed by the defendant
 20 or the defendants, to the district court of the United States for the district
 21 and division embracing the place where such action is pending.

22 Relatedly, 28 U.S.C. § 1446(b)(2)(A) mandates that “[w]hen a civil action is removed solely
 23 under section 1441(a), all defendants who have been properly joined and served must join in or
 consent to the removal of the action.”

As set forth *supra*, the face of the Amended Complaint recognizes that this case turns on Plaintiff's claim of title over areas where the United States and Tribe assert ownership. In this respect, the action presents a fact pattern closely analogous to the facts presented in *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009). *Milner* concerned whether non-Indian homeowners who maintained riprap and other fill on tidelands held in trust for the Lummi Tribe by the United States were entitled to maintain them in violation of various laws. This Court exercised jurisdiction, and on appeal the Ninth Circuit Court of Appeals observed that "Federal common law governs an action for trespass on Indian lands." *Id.* at 1182 (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994), *Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-36 (1985)). Plaintiff's actions to quiet title and gain a prescriptive easement over Indian lands likewise raise issues of federal common law that should be decided by a federal court. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991) ("The whole purpose of trust land is to protect the land from unauthorized alienation; [Plaintiff] cannot acquire property rights in trust property by prescription."). The Complaint and Amended Complaint squarely present issues of federal law, and the State of Washington consents to removal. See 28 U.S.C. § 1446(b)(2)(A). Removal is therefore proper under 28 U.S.C. § 1441(a).

Even if the face of the Complaint and Amended Complaint did not make plain the underlying federal nature of Plaintiff's claims, removal would be proper because Indian title is solely governed by federal law. One of the limited areas where the complete preemption doctrine allows for removal is "where a state law claim alleges a present right to possession of Indian tribal lands." *Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d at 585; see

Amended Complaint ¶¶ 59-60 and Prayer for Relief E and Complaint ¶ 25 and Prayer for Relief A. Moreover, federal removal jurisdiction lies because the federal issue of title to Indian lands is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005). Indeed, as noted above, a state court cannot adjudicate the ownership or right to possession of property belonging to an Indian tribe and held in trust by the United States. *See* 28 U.S.C. § 1360(b).

2. Removal is proper pursuant to 28 U.S.C. § 1442(a)(2).

28 U.S.C. § 1442 provides in pertinent part that:

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

Here, 28 U.S.C. § 1442(a)(2) is satisfied because the Tribe received beneficial title to the tidelands at issue in the action from an officer of the United States, through the Treaty of Point Elliott and 1873 confirmation of the Tribe's ownership of the tidelands surrounding its reservation by the Executive Order of President Ulysses S. Grant.² The Tribe also gained beneficial title to the uplands at issue by putting its share of uplands in the Kukutali Preserve into trust pursuant to the Indian Reorganization Act, 25 U.S.C. § 5108 *et seq.* Because the

² The Tribe disputes the effect of certain aspects of this order relating to Reservation boundaries.

United States continues to own the property in question and serves as trustee for the benefit of the Tribe, this action affects the validity of Federal laws under which the United States has a continuing obligation to protect Swinomish's possessory rights. *See Landi v. Phelps*, 740 F.2d 710, 713 (9th Cir. 1984); *cf. Virgin v. Cty. of San Luis Obispo*, 201 F.3d 1141, 1144 (9th Cir. 2000) ("This case does not involve a continuing federal interest in the possessory rights of Indian tribes. Therefore, the narrow exception that the Supreme Court carved out in *Oneida* is inapplicable here."). Plaintiff's relief, if awarded, would cause Plaintiff to obtain rights currently held by the United States for the Tribe. This would affect the validity of the federal treaty and laws granting rights to the Tribe, the United States' continuing ownership rights, and the United States' continuing trust responsibility to the Tribe to protect the Tribe's rights. *See, e.g., Benitez Bithorn v. Rosello-Gonzalez*, No. 01-2053 (DRD), 2002 U.S. Dist. LEXIS 15614, at *28 (D.P.R. Mar. 15, 2002). Removal under 28 U.S.C. § 1442(a)(2) is therefore appropriate.

INTRADISTRICT ASSIGNMENT

Pursuant to Local Rule 3(e), this case should be assigned to the Western District, Seattle division because the claim arose in Skagit County.

RESPECTFULLY SUBMITTED this 26th day of March, 2021.

ZIONTZ CHESTNUT

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on March 26, 2021 by e-mail as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 26th day of March, 2021.

/s Wyatt Golding
Wyatt Golding