THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARY M. CARNEY,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Case No. C21-cv-00415 MJP

PLAINTIFF'S OPPOSITION TO SWINOMISH INDIAN TRIBAL COMMUNITY'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR: May 7, 2021

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

CASES

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TABLE OF AUTHORITIES
(continued)

Page(s)

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TABLE OF AUTHORITIES
(continued)

Page(s)

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TABLE OF AUTHORITIES
(continued)

Page(s)

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In 2018, the Kukutali Preserve trespassed on Mary Carney's property (Mary's Property), excavated a portion of her land, damaged her fence, and created conditions that resulted in the periodic flooding of her property. The Swinomish Indian Tribal Community (SITC), a co-manager of the Preserve with the Washington Parks and Recreation Commission (State), initially promised to repair the damage, but it abandoned that commitment in favor of another strategy. SITC now contends that Mary cannot pursue her claims because it believes the damaged portions of her property might be artificially filled tribal tidelands held in trust by the United States. And SITC further asserts that Mary's case must be dismissed because the United States is an indispensable party that cannot be joined under the Quiet Title Act (QTA), 28 U.S.C. § 2409a, because Mary is trying to quiet title to Indian trust land. The State embraces SITC's filled tidelands theory—despite previously disagreeing with it—arguing that it too cannot be held accountable.

SITC's tidelands theory collapses because the United States does not have any legal interest in Mary's Property—as over 140 years of its official surveys and the federal patent to the land confirm. The United States' official or cadastral surveys are "the highest form of boundary evidence available to the Federal Government, *providing legal evidence of the geographic limits of the Federal interest in land*."[1] In 2011, the United States filed a survey of the mean high tide line surrounding the Preserve. By operation of law, the mean high tide line is the upper boundary of any tidelands the United States might hold in trust for SITC, and the 2011 Survey is the United States' "formal decision" regarding both the location of tidelines surrounding the Preserve and geographic limits of its interest.[2]

SITC did not protest the United States' 2011 Survey when it was filed, as was its right. To the contrary, it incorporated it into the Kukutali Preserve's Survey of Record, which the

[1] Bureau of Land Management Manual of Surveying Instructions ("2009 Manual), at ¶ 1-5 (2009), available at https://www.blm.gov/sites/blm.gov/files/Manual_Of_Surveying_Instructions_2009.pdf (last visited May 2, 2021) (emphasis added).
[2] *Id.*

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Preserve promptly recorded with Skagit County in 2012. SITC's tidelands theory only arose after Mary sought repairs for the damages the Preserve caused. Regardless, because the 2011 Survey is the United States' formal decision regarding the location of the mean high tide line and thus any tidelands it holds in trust, SITC's argument that Mary cannot obtain recourse for the trespass to her property because that land is actually trust lands is legally foreclosed. Therefore, the QTA does not bar Mary's action, and the United States is not a necessary party, let alone an indispensable one.

Nor is Mary's action barred by the doctrine of tribal sovereign immunity. Under the immovable property exception, the Court has *in rem* jurisdiction to resolve property disputes involving land within the State's jurisdiction—including to quiet title to Mary's Property. Whatever immunity that SITC might enjoy in its co-management of a State Park, it certainly does not prevent Mary's suit against the State. As the owner of an undivided half interest in the Preserve and co-manager, the State is jointly and severably liable for the damages the Preserve caused to Mary and her property. Even in the absence of SITC, the Court can grant complete relief, and because SITC and the State are in privity, there is no chance of inconsistent obligations. On the other hand, dismissal of the action would be highly prejudicial to Mary, who would be left without any forum to vindicate her rights.

BACKGROUND

A. Mary Carney's Property

Mary Carney is the record owner of beachfront property located on Fidalgo Island in Skagit County, Washington. The property at 15466 Snee-Oosh Road is "THE NORTH 99.3 FEET OF GOVERNMENT LOT 3, SECTION 21, TOWNSHIP 34 NORTH, RANGE 2 EAST, W.M., EXCEPT THE EAST 30 FEET THEREOF FOR ROAD."[3] *See* Decl. of J. MacLean (MacLean Decl.), Exs. A, B.

[3] Public record of Mary's Property is available at https://skagitcounty.net/search/property/.

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Mary traces chain of title to her property to a patent issued by the United States on April 1, 1855, to a Swinomish Indian, Chu-ba-huod (or Clark), for approximately 138.4 acres of land, pursuant to Article VII of the Treaty of January 22, 1855, 12 Stat. 927 (1859). MacLean Decl., Ex. C (listing Government Lots 2, 3, 5, 6, 7, 8, and 9). In 1929, the Secretary of the Interior approved the sale of Government Lots 2 and 3 from Chu-ba-huod's heirs to Mill and Mine Supply Company of Seattle, Washington, subject to:

> A right of way and easement upon and over the south 30 feet of Government Lot 2, Sec. 21, T. 34 N., R. 2 E., W.M., for the common benefit of the owners of Government Lots 2, 3, . . . as a road for ingress and egress to the public road, said road to be by the Grantee established by the reservation of the East 30 feet of Government Lots 2 and 3 … and to connect with present road at or beyond the South extremity of said Government Lot 3, together with the right to construct, lay and maintain water pipe lines beneath the surface of the ground, and telephone and power lines along said right of way easement.

MacLean Decl., Ex. D. Mary's parents purchased the land from the Mill and Mine Supply Company on April 28, 1931. Am. Compl. ¶ 7. Although Mary's family sold other portions of the land it purchased in 1931, her family held on to a portion of Government Lot 3 continuously since, with the exception of a brief period decades ago. Am. Compl. ¶¶ 1, 7.

Mary's family has used Kiket Island Road—the easement described in Exhibit D to the MacLean Declaration—for decades to access Mary's Property. *Id*. ¶ 10. In 1979, Mary's family built a fence parallel to Kiket Island Road. *Id*. ¶ 12. For reasons of local topography and to avoid interference with the road, they located the fence approximately four to five feet south of the property line, rather than on the road edge. *Id*. The fence was not installed to demarcate the property line, but for other purposes. *Id.*

B. Federal Surveys of the Area

Over the last 150 years, the United States has prepared a number of cadastral surveys of the Swinomish Reservation. In 1874, it filed an original survey, which designated the Reservation boundaries, subdivisions, and meanders. MacLean Decl., Ex. E. In 1883, the United States prepared a survey of the Swinomish Reservation, for the purpose of assigning allotments.

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Id., Ex. F. In 1919, the United States filed a resurvey of the Reservation, designating the south boundary of the Reservation, subdivisions, and connections. *Id.*, Ex. G. And in 2011, the United States filed a survey of the Project area, which included a dependent resurvey of a portion of the subdivision lines and a survey of the mean high tide line. *Id.*, Ex. H.

C. The Kukutali Preserve and Beach Restoration Project

On June 16, 2010, the State and SITC jointly acquired several parcels of land, as tenants in common, for the purpose of creating a public park—the Kukutali Preserve. Am. Compl. ¶ 9; MacLean Decl., Ex. I. Among the parcels acquired is a portion of Government Lot 2, the property located immediately north of Mary's Property and burdened by the easement described above. Am. Compl. ¶ 10; *see also* MacLean Decl., Ex. I at 33 (listing Government Lot 2, "TOGETHER WITH a non-exclusive easement . . . over the South 60 feet of Government Lot 2 . . ."). SITC and the State jointly manage the Kukutali Preserve; the United States has no involvement in its management. Am. Compl. ¶ 15. In 2014, the United States acquired SITC's one-half undivided fee interest in the Preserve in trust at SITC's request; SITC retains the beneficial interest. *Id.* ¶ 3.

After a period of study, the Preserve embarked on a beach restoration project (Road Project) in 2018, ostensibly to return a specific area of the Preserve to its native condition by removing about 800 cubic yards of material from Kiket Island Road at a location approximately 160 feet west of Mary's Property. *Id.* ¶¶ 16, 17; *see* Decl. of Walter F. Crampton (Crampton Decl.) ¶ 14. The Project was intended in part to allow periodic tidal flooding over a portion of Kiket Island Road near Kiket Island. Am. Compl. ¶ 16. Without study or permit, the Preserve regraded additional areas of Kiket Island Road, removing material approximately 540 feet east of the specific "restoration" area. *Id.* ¶ 17; Crampton Decl. ¶ 14. In the process, the Preserve trespassed onto the strip of Mary's Property that lies between her fence and Kiket Island Road, removing the natural rise and several property markers and damaging her fence. Am. Compl. ¶¶ 17, 18. By removing this material from Mary's Property, the Preserve caused runoff, high tides

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during storms, and the highest tides to inundate Mary's Property. *Id*. ¶ 17. Mary's Property now suffers flooding from the Preserve, where before flooding only occurred during the most rare, significant storm events.

D. Legal Proceedings

Mary approached the Preserve about the damage, and initially, SITC offered to repair the damage, including constructing a new fence on the legal boundary. *Id*. ¶ 21. But after more than two years passed without this happening, Mary filed suit in Skagit County Superior Court (No. 21-2-00126-29). On March 17, 2021, Mary amended her complaint to eliminate a cause of action to quiet title to the easement that benefits Mary's Property and burdens the Preserve's property. Thus, the Amended Complaint seeks to quiet title to Mary's Property only, to remedy past trespass, and to prevent future interference with her easement.

ARGUMENT

SITC moves to dismiss this action, pursuant to Federal Rules of Civil Procedure 12(b)(1), (b)(6), (b)(7), and 19. Mot. to Dismiss, ECF No. 10. The State filed a response in support of SITC's motion. Resp. in Support, ECF No. 16.

Mary respectfully suggests that the Court should reach this motion only if it denies her Motion to Remand, ECF No. 21, both to save judicial resources and to avoid issuing a decision on a matter for which it lacks jurisdiction. If the Court reaches this motion, it should deny it. Neither the United States nor SITC are indispensable parties to this proceeding, and tribal sovereign immunity does not bar Mary's quiet title claim. The Court can accord complete relief to the parties.

A. This action is not barred by the Quiet Title Act or Rule 19 because the United States has no interest in Mary's Property.

Mary is seeking to quiet title to her own patented property only. Am. Compl. ¶ 60. SITC and the State contend, however, that Mary is seeking to quiet title to lands the United States owns in trust. *See, e.g.,* Mot. to Dismiss, at 6 (SITC "contends that both the strip of land and the

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inunated lands are owned by the United States in trust for the Tribe"). They maintain that the United States is an indispensable party, but because it has not waived its immunity under the QTA, the case must be dismissed. Resp. in Support, at 4 (agreeing with SITC's argument that the United States is a required party).

That argument has no basis in law or fact and should be rejected.

1. The United States' official records refute SITC's claim.

The damaged portions of Mary's Property are not trust lands. SITC's claim to the contrary is refuted by the United States' cadastral surveys, which SITC has not contested.

"A cadastral survey creates or reestablishes, marks, and defines boundaries in tracts of land." 2009 Manual, at ¶ 1-4; *see also* 25 U.S.C. § 176 (directing Indian lands to be surveyed in conformity with rules established by the U.S. Bureau of Land Management (BLM)).[4] The BLM follows a 14-step process in creating cadastral surveys that includes reviewing historical records, interviewing landowners and local residents, visiting other surveyors, and reviewing other sources of evidence.[5] The Director must approve a plat, field notes, and survey, and the survey must be filed before it becomes official. It is "the highest form of boundary evidence available to the Federal Government, *providing legal evidence of the geographic limits of the Federal interest in land*." 2009 Manual, at ¶ 1-5 (emphasis added). Because a cadastral survey is "a formal decision by the Federal Government," it is subject to appeal under 43 C.F.R. part 4. *Id*.

The United States prepared a cadastral survey of the land in and around the Project area, including a survey of the mean high tide line in 2010, presumably in conjunction with the creation of the Kukutali Preserve. MacLean Decl., Exs. H, J. The cadastral surveyor relied on the historic surveys of the area, corner descriptions, and other relevant information. *Id.* Ex. J, at 1,

[4] 25 U.S.C. § 176 provides: "Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."

[5] *See BLM Cadastral Surveys*, Bureau of Land Management, https://sites.google.com/site/1corpsofdiscovery/bureau-of-land-management/blm-cadastral-surveys.

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42. The survey meanders the mean high tide line around the Preserve area, using the standard methods prescribed by the National Oceanic and Atmospheric Administration. *Id.* at 42. A vertical control was established using two tidal zones and 29 tidal reference stations were installed. *Id*. The United States published notice in 2011 that it would officially file a plat of survey with the BLM. *See* Filing of Plats of Survey: Oregon/Washington, 76 Fed. Reg. 64101-01 (Oct. 17, 2011). The notice states that "[a] person or party who wishes to protest against a survey must file a notice that they wish to protest" with the BLM. *Id.* The entire process took well over a year. MacLean Decl., Ex. J, at 1.

SITC did not protest the 2011 Survey. Neither did the State, which never believed any tidelands were under Kiket Island Road, let alone on Mary's Property. *See* MacLean Decl., Ex. I, at 2 n.1. To the contrary, they used it for the Kukutali Preserve's Record of Survey, incorporating the mean high tide line meandered by the United States throughout. *Id.*, Ex. K. SITC cannot now claim that this survey was wrong. *Cf. De Boe v. Prentice Packing & Storage Co.,* 172 Wash. 514, 521, 20 P.2d 1107, 1110 (1933) ("The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted and benefit.").

There is no question that the damaged portions of Mary's Property are not tidelands. That federal survey establishes the western boundary of Mary's Property, which is ambulatory and controlled by the mean high tide line. *See United States v. Milner*, 583 F.3d 1174, 1187 (9th Cir. 2009) ("Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume.") (citations omitted). It also establishes the upper boundary of any tidelands the United States holds in trust. By definition, tidelands are "all coastal areas that are situated above mean low tide and below mean high tide, particularly as such areas are alternately uncovered and covered by

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the ebb and flow of the ordinary daily tides."[6] Mary's fenceline and the area the Preserve caused to be flooded below the fence are all above the mean high tide line and have been for over 140 years. MacLean Decl., Ex. L. The 2011 Survey shows the high tide line near Mary's Property fundamentally the same as every cadastral survey before it, dating back to 1874. MacLean Decl., Exs. E–H.

SITC's motion and the State's response depend on the Court ignoring the United States' formal decision regarding "the geographic limits of the Federal interest in land." 2009 Manual, at ¶ 1-5. But "[i]t is undoubtedly true that the official surveys of the public lands of the United States are controlling." *Gleason v. White*, 199 U.S. 54, 55 (1905) (citations omitted). There is no basis for concluding that the United States has any interest in Mary's Property.

2. SITC cannot attempt to "correct" the 2011 Survey in this action.

"[T]he power to make and correct surveys of the public lands belongs to the political department of the government . . . ." *Cragin v. Powell*, 128 U.S. 691, 698–99 (1888); *see also Lane v. Darlington*, 249 U.S. 331 (1919) (holding that the government may resurvey its own lands). Survey decisions, such as the 2011 Survey, "are unassailable by the courts, except by a direct proceeding." *Cragin*, 128 U.S. at 699. SITC did not appeal the 2011 Survey; had it done so, it could have raised the arguments it now asserts. But it cannot collaterally attack the 2011 survey in this action.

SITC appears to believe that, under *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999), it need only present a "colorable claim" that tidelands are present to bar Mary's claims. *See* Mot. to Dismiss, at 28. But *Alaska* does not support SITC's argument. That case involved an Administrative Procedure Act (APA) challenge to a BLM decision granting an Indian allotment of land previously granted to the State for a right of way—not a collateral attack on a cadastral survey. 182 F.3d at 673–74. After the Interior Board of Land Appeals (IBLA) denied the State's

[6] Bureau of Land Management, Glossaries of BLM Surveying and Mapping Terms, at 125 (1980), https://www.blm.gov/or/gis/geoscience/files/BLMglossary.pdf.

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administrative appeal, the BLM successfully invoked the QTA to bar Alaska's suit. The Ninth Circuit reversed, holding that the QTA did not bar the State's action because there was "no colorable basis for application of the Indian lands exception" after the IBLA reinterpreted the BLM's allotment authority. *Id.* at 676; *but see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (holding that the QTA does not bar APA challenges to trust land). Nothing in *Alaska* remotely suggests that SITC can, by mere allegation, create a federal interest in lands the United States does not believe it has that is sufficient to bar an action to quiet title in patented land.

Moreover, SITC has not come close to making a colorable claim. SITC relies on the expert opinion of Karen Mitchell for the proposition that there are artificially filled tidelands somewhere within the boundaries of Mary's Property. Mot. to Dismiss, at 13. Mitchell attests that "there are filled Tribal tidelands in and around the Project area, including south of the fence and adjacent to Ms. Carney's parcel." Decl. of Karen Mitchell (Mitchell Decl.) ¶ 15, ECF No. 11. She concedes that she does not know "the precise location of all of the filled Tribal tidelands under the old roadway, around the lagoon, and south of the fence," yet nevertheless concludes that the "available information demonstrates the presence of filled tidelands in these areas to a high degree of scientific probability." *Id.* Mitchell completely ignores the federal surveys, which show no significant changes to Mary's shoreline between 1874 and 2011.[7] *See* MacLean Decl., Exs. E–H. Nor do the historic air photos Mitchell cites. *See* Mitchell Decl. ¶ 7.

More importantly, Mitchell fundamentally misinterprets the evidence she cites. *See generally* Crampton Decl. For example, Mitchell relies on the Kukutali Preserve Tombolo Restoration Design Report, Mitchell Decl. ¶¶ 6, 9, but that report shows *accretion* along the sandy beach on the south side of the tombolo. Crampton Decl. ¶ 7. When compared to topographic maps, the foreshore in front of Mary's Property is around +11 feet NAVD88, or well

[7] While Mitchell identifies changes to the shoreline and tidal lagoon to the *north* of Kiket Road, she fails to identify any on Mary's Property. *See* Mitchell Decl. ¶ 8.

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above the tidelands boundary.[8] *Id*. ¶ 8. Similarly, the May 2014 Kukutali Preserve Tombolo and Lagoon Restoration Feasibility Report indicated that the historic top elevation of the tombolo was approximately +11 feet NAVD88, which would indicate that the top of the tombolo was almost two feet above mean high high water (MHHW), and therefore certainly above mean high water (MHW). *Id*. ¶ 9. And the May 2016 Kukutali Preserve Tombolo Restoration Design Report also assesses the natural tombolo top at an elevation of +11 feet. *Id.* ¶ 10. Based on the elevations set forth in each of the reports, one can only conclude that there are no artificially filled tidelands within the recorded boundaries of Mary's Property. *Id.* ¶¶ 11, 12.

In fact, the evidence does not support the claim that any of the western portion of the tombolo where the roadwork was originally planned to occur was tidelands, let alone at the location adjacent to Mary's Property. The April 27, 2016, Kukutali Preserve Restoration plans show the existing surface elevation of the Kukutali Preserve Road to range from a low of about elevation 12.8 feet to a high of around 14.6 feet. *Id.* ¶ 13 and Ex. 4. The proposed restoration was limited to a 200-foot section where the Preserve would excavate the 200-foot section of road down to a target elevation of +11 feet NAVD88—the pre-anthropic top elevation of the tombolo *above the intertidal zone*. *Id.* ¶ 13. The planned excavation was not to reach closer than approximately 160 feet west of the boundary to Mary's Property, but the Preserve excavated 540 feet east of the planned construction limits, lowering the grade of the roadway down to an elevation of 10.5 feet, which caused Mary's Property to flood during the highest tides and from runoff. *Id.* ¶ 14.

SITC relies heavily on a sediment boring study it conducted after the Project lowered the elevation of the Kiket Island Road. Mitchell Decl. ¶ 12. The conclusions it seeks to draw from the boring data, however, are contradicted by the data and the geomorphology of the area. Crampton Decl. ¶¶ 21–24. For example, boring hole 1 (BH-1), which is located along the

[8] The North American Vertical Datum of 1988 (NAVD 88) is the vertical control datum established in 1991. It holds fixed the height of the primary tidal bench mark.

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westernmost location on Kiket Island Road, was reported to have 10 feet of material characterized as gravelly fill overlying 6.5 feet of gravelly materials characterized as beach deposits. *Id*. ¶ 22. But the roadway elevation at that location is less than +11 feet. *Id.* Based on the boring report's determination that there are 10 feet of fill, beach deposits would occur at not less than +1 feet, which is error. *Id.* ¶¶ 21–22. Any coastal geomorphologist would agree that the elevation of the pre-anthropic top of the tombolo at that location would be around +10 to +11 feet, and not less than +1 feet as opined by Ms. Mitchell. *Id*. In addition, the May 2016 Tombolo Restoration Design Report concludes that the "top of the tombolo has been elevated by 3 to 4 feet along the length of the restoration area by the placement of fill," *id.* ¶ 24, not the 10 feet the boring study indicates.

The data and evidence Mitchell relies on do not support the conclusion that there are any filled tidelands in Mary's Property. To the contrary, they show that Kiket Island Road was built on the portion of the tombolo above MHT and thus, not on tidelands. Flooding across the tombolo during certain seasons or periodic flooding during the highest tides or storm events do not establish the location of tidelands, *see* Mitchell Decl. ¶¶ 13–14, because tidelands fall below the mean high tide line, which is calculated as the average high tide over 18.6 years. *See Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26–27 (1935)..

Mitchell does not identify any abrupt change in the location of the shoreline in front of Mary's Property that would be associated with fill, because there has been none. Crampton Decl. ¶¶ 15–17; *see also* MacLean Decl., Ex. M. SITC's evidence would not have been sufficient, had it protested BLM's survey. *See, e.g., Crow Indian Agency*, 78 IBLA 7, 11 (1983) (stating that the burden in protesting "the acceptance of a dependent resurvey" as inaccurate is "clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey"); *see also Faulker*, 189 IBLA 294, 295 (2017) (in protesting the filing of an original survey, appellant must establish that the survey is erroneous). It is certainly not enough to block Mary's suit.

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3. Because the 2011 Survey is "legal evidence" of the location of tidelands, it is clear that the United States has no interest at stake in this proceeding.

The United States is not a necessary party—let alone indispensable one. A party is necessary if (1) complete relief is unavailable in the party's absence; or (2) resolving the case would impede the absent party's practical ability to protect his legal interests or subject an existing party to inconsistent obligations. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1155 & n.5 (9th Cir. 2002) (citation omitted).

Because the United States has no interest in Mary's Property, there is no reason the Court cannot accord Mary, SITC, and the State complete relief. Mary does not contest the western boundary set forth in the 2011 Survey; she is aware that the mean high tide line is dispositive of her property boundary. *See also Milner*, 583 F.3d at 1187 (riparian boundaries determined by mean high tide). The United States has never made any claim with respect to Mary's Property. The only threat to Mary's Property comes from SITC and the State via a defensive claim that the Preserve acquired a strip of Mary's Property through adverse possession and SITC's tidelands defense, which is legally foreclosed.

Nor will resolution of Mary's Amended Complaint impair the United States' ability to protect its interests because it does not have any in this dispute. Even if the Court determined that the Preserve had acquired a portion of Mary's Property through adverse possession, that would not create any federal interest. Just as SITC had to request that the United States acquire its undivided half interest in the Preserve in trust, it would have to do the same with respect to any interest the Preserve claims. Acquiring land through adverse possession does not render the strip of Mary's Property trust land. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 (2005).

Even if SITC could establish that the United States had some inchoate interest in Mary's Property, that would not require dismissal of Mary's claims. Under Rule 19(b), which SITC never actually cites, failure to join a necessary party does not require dismissal. Rather, it

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requires the Court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). To make that determination, the Court considers four factors: "(1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum." *Dawavendewa*, 276 F.3d at 1161–62. "[I]f no *alternative forum* is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

The United States would not be prejudiced; after all, it stands gain territory, not lose it. SITC's and the State's attack on Mary's Property is substantially analogous to the type of quiet title action courts allow tribes to maintain without joining the United States. Tribes can bring actions to quiet title in tribal lands in the absence of the United States because "the United States will not be bound by any determination made in a suit to which it is not a party." *Fort Mojave Tribe v. Lafollettee*, 478 F.2d 1016, 1017–18 (9th Cir. 1973) (citations omitted). While SITC is not the plaintiff in this case, its claim that there are filled tidelands is in the nature of an affirmative claim to dispossess Mary of a portion of her property. Good conscience demands that Mary be able to remove the cloud on her title. Indeed, the purpose of RCW 7.28.010 is to authorize property owners to bring a quiet title action "to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination." There is no reason this action cannot proceed in the United States' absence.

B. Tribal sovereign immunity does not bar Mary's quiet title action.

SITC and the State maintain that the Court must dismiss this action because of tribal sovereign immunity, but that is not so. As an initial matter, the State is not immune from suit. The State has attacked title to Mary's Property by expressly supporting SITC's motion, contending it to be "comprehensive, well-articulated, and in congruence with the law." Resp. in Support, at 1. The State did not disclaim SITC's argument that the Preserve owns the strip of

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land north of Mary's fence through adverse possession. *See* Mot. to Dismiss, at 11 n.6. The State must answer Mary's quiet title action, regardless of SITC's participation.

Second, tribal sovereign immunity does not bar quiet title actions. It is well established that states have *in rem* jurisdiction over actions involving title to land within its sovereign territory. *See Shaffer v. Heitner*, 433 U.S. 186, 208 (1997) ("The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction."). The Supreme Court has recognized that "[t]he well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." *Arndt v. Griggs*, 134 U.S. 316, 321 (1890). To that end, a state may exercise *in rem* jurisdiction "over property within its limits" and may provide that "the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." *Id.* at 320–21.

As a Washington court has explained, Washington law authorizes property owners to maintain a quiet title action "to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination." *Kobza v. Tripp*, 105 Wash. App. 90, 95, 18 P.3d 621 (2001); *see also* RCW 7.28.010. "Another and more colorful way of stating the same proposition is that the object of the statute is to authorize proceedings for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property." *Kobza,* 105 Wash. App. at 95 (citations and quotations omitted).

A sovereign may not assert immunity in the court of another sovereign when the claim relates to immoveable property that it owns outside of its own forum. As early as 1812, the Court observed that "[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual."

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Schooner Exch. v. McFaddon, 11 U.S. 116, 145 (1812). A century later, the Court reached the same conclusion with respect to states. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924) ("The sovereignty of Georgia was not extened into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity."). The immovable property limitation recognizes that, in order to protect the security of title to real estate, foreign sovereigns who hold title to land outside of their own forum "must follow the same rules as everyone else." *City of New York v. Permanent Mission of India*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd*, 551 U.S. 193 (2007); *see Shaffer*, 433 U.S. at 208.

The immovable property exception applies to SITC, just as it would to any other sovereign. While the Supreme Court declined to reach the precise question in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018), its prior decisions dictate that outcome. That is because tribal sovereign immunity "is no broader than the protection offered by state or federal sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017). In a concurring decision joined by Justice Kennedy, Chief Justice Roberts warned that if the immovable property exception did not apply, the application of sovereign immunity more generally would require review. *Lundgren*, 138 S. Ct. at 1656 (Roberts, J., concurring) (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 n.8 (2014)). Justice Thomas, joined by Justice Alito, went further, stating that the immovable property exception "is settled, longstanding, and *obviously applies to tribal immunity*— as it does to every other type of sovereign immunity that has ever been recognized." *Id.* (Thomas, J., dissenting) (emphasis added).

To the extent that SITC believes that the location of Mary's Property within Reservation boundaries alters application of that rule, it does not. Mary's Property is fee property fully subject to the authority of the State. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.") Further, a contrary rule would leave tens

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of thousands of property owners with insecure title. Because the immovable property exception to sovereign immunity applies, Mary's quiet title action can proceed against both SITC and the State.

C. Mary's trespass claims can proceed.

SITC and the State also claim that the Court must dismiss Mary's trespass claims under the doctrine of tribal sovereign immunity and Rule 19. *See* Mot. to Dismiss, at 17–18, 24; Resp. in Support, at 9. They are incorrect.

1. The application of tribal sovereign immunity in this context is unresolved and should be rejected.

No court has ever addressed the application of tribal sovereign immunity in this context. The State and SITC are in an unprecedented State-Tribe partnership. As SITC noted, the Preserve is the "first jointly owned and operated tribal/state park in the country." Mot. to Dismiss, at 9. SITC and the State acquired "as tenants in common with equal undivided interests" the land for the Preserve using public funding from various state and federal agencies from private parties under Washington law. MacLean Decl., Ex. I at 7. One of the conditions the funding agencies imposed was the requirement that SITC and the State operate the Preserve as "a public park."[9] *Id.* Under Washington law, public parks are not immune from suit. SITC was acting, in partnership with the State, as a public park established under Washington law. *See id.* at 28 (attaching WAC 352-16-101) ("All areas dedicated for public park purposes, . . . and under the ownership and/or management of the Washington state parks and recreation commission, shall be defined as state park areas."). Under these circumstances, the Court should conclude that tribal sovereign immunity does not apply. Moreover, courts have repeatedly noted in the tort context that the application of immunity leads to unjust results and defeats a key purpose of tort law, which is to compensate those like Mary who have been injured. The Supreme Court has

[9] The U.S. National Ocean Service awarded the State a $6 million grant for the purchase of the Preserve Property, *see* https://grantsonline.rdc.noaa.gov/flows/publicSearch/showAwardDetails.do?awdNum=NA09NOS4190260.

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raised the same concerns. In *Bay Mills*, it noted that the Court has "never . . . specifically addressed . . . whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." 572 U.S. at 799 n.8. Applying immunity to torts undermines important state regulatory interests, because tort judgments are a means by which a State "enforce[s] its law on its own lands." *Id.* at 796. The Court has explained, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 521 (1992) (plurality opinion) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)); *see* Restatement (Second) of Torts § 901 (1979). These concerns are particularly pronounced when a public park acquired with public funds commits a tort during a publicly funded project.

In fact, the cases where the Court has held sovereign immunity to apply all involved circumstances where the injured party had the opportunity to negotiate for a waiver. *See Bay Mills*, 572 U.S. at 796–97 (discussing the State's options to negotiate a waiver in a gaming compact); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."). At least one state supreme court has held that tribal sovereign immunity does not bar tort claims. *See Wilkes v. PCI Gaming Auth*., 287 So.3d 330 (Ala. 2017).

Given that the doctrine of tribal sovereign immunity "developed almost by accident," there is no reason to extend it to allow SITC to escape liability for the Preserve's torts. *See Kiowa*, 523 U.S. at 756 (noting that the decision credited for establishing the doctrine—*Turner v. United States*, 248 U.S. 354 (1919)—"simply does not stand for that proposition"). SITC committed to co-managing the Preserve as a public park under State law. It should answer for the Preserve's torts.

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2. Mary's claims can proceed against the State in SITC's absence.

Regardless of SITC's immunity from Mary's trespass claims, her suit can proceed against the State. The Court can "accord complete relief" in SITC's absence and doing so would not prejudice the State. Fed. R. Civ. P. 19(a). As co-managers and co-owners of the Kukutali Preserve, and also by the terms of the Kukutali Agreement, the State and SITC are in privity, which arises, in part, from "legal relationships in which two parties have identical or transferred rights with respect to a particular legal interest, chiefly co-owners and co-tenants of property[.]" *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005). Their interests are aligned. Not only are they tenants in common and partners in the Preserve, the State has a strong interest in making the same arguments that SITC would make. Indeed, the State has no defense, other than to argue that the Preserve acquired the strip of Mary's Property through adverse possession and that Mary's Property is actually artificially filled tidelands. Of course, neither the State nor SITC can reasonably make that argument, given the 2011 Survey and the Record of Survey for the Preserve. They each clearly knew the geographic extent of the federal interests in and around the Preserve; they used it in their Survey of Record. MacLean Decl., Ex. K. Moreover, because SITC is not immune from Mary's quiet title claim under the immovable property exception, SITC can raise whatever arguments it might have in that context. As SITC and the State both note, the arguments underlying the claims against each are the same. Mot. to Dismiss, at 27; Resp. in Support, at 4. Moreover, the existence of tidelands is a basic fact question—to the extent that the Court can entertain it. The State can work with an expert to investigate the location of filled tidelands as easily as SITC.

Finally, complete relief can be accorded even if the State and Mary are the only parties, because as co-managers and owners of the Kukutali Preserve, any activities conducted by the individual members of the Preserve are imputed to the Preserve as a whole. *See*, *e.g.*, *Fitzpatrick v. Okanagan County*, 143 Wash. App. 288, 302–03, 177 P.3d 716 (2008) (finding that plaintiff raised a genuine issue of fact that both the county and the State were jointly involved in damage

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to plaintiff's property resulting from construction, improvement, and maintenance of a dike for which the county and State possessed an ownership interest), *aff'd*, 169 Wash.2d 598 (2010). To the extent that SITC and the State rely on the provision in the Preserve Agreement's making each party responsible for any tort claim arising from its performance of activities, *see* MacLean Decl., Ex. I at 61 of 87, how they allocate liability as between one another does not alter the application of general tort principles non-parties. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wash. 2d 274, 291, 313 P.3d 395 (2013) (en banc) (holding that, while partners are free to modify their contracts, they "are not permitted to modify their joint and several liability to third persons").

If the Preserve trespassed and damaged Mary's Property while undertaking the State-funded beach restoration project, the State can pay the damages. If the Court concludes that Mary's Property should be repaired, the Court can order the State to repair it. That is "meaningful relief" as between the State, as co-manager of the Preserve, and Mary. *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013) (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc*., 375 F.3d 861, 879 (9th Cir. 2004)).

3. SITC is not an indispensable party to Mary's trespass claims.

Because SITC is not a necessary party, there is no need to consider whether it is indepensable. To the extent that the Court considers this question, "equity and good conscience" argue for the case to proceed. Fed. R. Civ. P. 19(b). This analysis "is a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa*, 276 F.3d at 1154.

No prejudice would result from SITC's absence because the State would adequately represent the SITC's interests. As partners in the Kukutali Preserve, the State and SITC agreed to jointly undertake a restoration project. They are in privity, and their interests are aligned. The Preserve Agreement requires the Management Board to "examine all proposals, initiatives, undertakings, activities, and other matters relating to the development, operation and maintenance of" the Preserve, and states that "[a]ll decisions of the Management Board and all

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actions of the Parties with respect to the development, operation and maintenance of [the Preserve] shall be subject to and consistent with the Kiket Island Agreement and applicable law." MacLean Decl., Ex. I at 19–21. Joint and several liability attaches to activities conducted by the Preserve members. *See*, *e.g.*, *Combes v. Snow*, 56 Wash. 2d 122, 125, 351 P.3d 419 (1960) ("[T]he joint right of control [that comes from being a co-owner] is not merely presumed, but is a legal incident of joint possession."); *see also ABCD Marine, LLC*, 179 Wash. 2d at 291 ("[A] single partner, acting in the ordinary business of the partnership, binds the entire partnership and subjects each partner to personal liability, joint and several, for the obligation incurred."). The State insists that the case turns on the location of tidelands and it cannot be held liable for what SITC did in its tidelands because they "are not subject to the Board's consensus decision-making." Resp. in Support at 7–8. But the State obviously knew the Preserve's boundaries from the 2011 Survey and the Preserve's Record of Survey. Moreover, the funding agreement between SITC and the State for the beach restoration project includes a waiver of tribal sovereign immunity and an indemnification provision pursuant to which SITC agreed to "defend, indemnify, and hold the funding board harmless from all claims, demands, or suits at law or equity arising in whole or in part from the actual or alleged acts, errors, omissions, or negligence in connection with this Agreement." MacLean Decl., Ex. N at § 45.I.1. The State would be able to crossclaim against SITC for any damages. In addition, regardless of any judicial determination, SITC is still free to pursue its tidelands claims with the BLM—which is the appropriate forum.

By contrast, the prejudice to Mary from dismissal would be severe. She would have to bear the costs of the damages the Preserve caused and would be left powerless to protect her property and title. There is no alternative forum for Mary to obtain relief, a factor that requires courts to be "'extra cautious' before dismissing the suit." *Dawavendewa*, 276 F.3d at 1162 (quoting *Makah*, 910 F.2d at 560. As Chief Justice Roberts questioned in *Lundgren*:

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> What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

Lundgren, 138 S. Ct. at 1655 (Roberts, J., concurring). Unlike in *Lundgren*, SITC has acted in concert with the State. The State should not be permitted to wield SITC's sovereign immunity as a sword too.

D. Mary's claim to prevent interference with the easement can proceed.

SITC contends that Mary's easement burdening the Preserve property is not valid, and that SITC maintains that Mary cannot pursue her cause of action to prevent the Preserve from interfering with the easement because the United States has interest in the Preserve property. *See e.g.*, Mot. to Dismiss at 12 n.9, 10. But the United States has never claimed that the easement is not valid. To the contrary, the trust deed acknowledges the existence of easements on the Preserve Property. MacLean Decl., Ex. O ("Title to the land herein described shall be subject to any existing easements for public roads and highway . . . and any other rights of way of record."). It is only the Preserve that previously interfered with the easement by excavating the road and placing a boulder in the middle of it.

As fully explained in her Motion to Remand, Mary does not seek to quiet title to an easement against the Preserve Property. ECF No. 21, at 6, 9. She merely seeks to prevent interference with the recorded easement. Neither SITC nor the State need the United States as a party to defend against that claim. Because the United States' interest in the Preserve property is "subject to any existing easements," the Court need only determine whether there are existing easements and whether Mary has a right of access. If the Court agrees that the easement is valid, it can order SITC and the State not to interfere with her access; if it disagrees, Mary has no such right. And, once again, if SITC has tribal sovereign immunity from Mary's cause of action to prevent interference with her access, the cause of action can still proceed against State which

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cannot make any similar claim of immunity. The Court can order the State—as co-manager—to ensure that Mary's access is not impaired.

CONCLUSION

For the foregoing reasons, SITC's motion to dismiss should be denied.

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