HON. MARSHA J. PECHMAN

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. 21-cv-00415-MJP

SWINOMISH INDIAN TRIBAL COMMUNITY'S REPLY IN SUPPORT OF MOTION TO DISMISS

NOTE ON MOTION CALENDAR: MAY 7, 2021

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Swinomish moved to dismiss this case in its entirety (Doc. 10) based on sovereign immunity, Rule 19, and the Quiet Title Act (QTA). Plaintiff's opposition (Doc. 27-1) presents a merits argument regarding the alleged absence of artificially filled tidelands on the disputed lands. However, the merits are not at issue here. Tribal sovereign immunity protects the Tribe from suit "'irrespective of the merits of the claims asserted against [it].'" *Wendt v. Smith*, 273 F. Supp. 2d 1078 (C.D. Cal. 2003) (quoting *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983)); *accord Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). The Tribe is a necessary party under Rule 19 because complete relief is not available on *plaintiff's* quiet title action without the Tribe (against whom plaintiff seeks to quiet title), and because the Tribe has multiple substantial legally protected interests in this case, as confirmed by plaintiff's Amended Complaint (Doc. 1-2). And the Tribe's QTA argument requires only a colorable claim that the disputed lands are trust lands, a requirement that is satisfied here, plaintiff's merits argument notwithstanding.

I. The Claims Against Swinomish Should Be Dismissed Because Swinomish Is Immune from Suit.

A. The Tribe Is Immune from Plaintiff's Quiet Title Action.

The claims against the Tribe should be dismissed because the Tribe is immune from suit. Motion to Dismiss (Doc. 10) at 10-13. Plaintiff argues the Tribe's immunity does not bar her quiet title action because: (1) states have in rem jurisdiction over actions involving title to land; and (2) "a sovereign may not assert immunity in the court of another sovereign when the claim relates to immovable property that it owns outside of its own forum." Pls. Opp. (Doc. 27-1) at 13-16. However, there is no in rem exception to tribal sovereign immunity, *see Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018); *Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, No. CV 15-02463-RGK (MANx), 2015 U.S. Dist. LEXIS 181545 at

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*6-7, (C.D. Cal. 2015), and the "immovable property" exception does not apply to tribal immunity and, even if it did, is inapplicable here given the facts of this case.

The only court that has addressed the issue held the "immovable property" exception does not apply to tribal immunity. *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 216-22, 274 Cal. Rptr. 3d 255 (2021), *review denied*, 2021 Cal. LEXIS 2910 (Cal., Apr. 28, 2021).[1] The court carefully distinguished the exception as it has been applied to states and foreign sovereigns. Unlike states, tribes were not parties to the constitutional compact and "did not surrender any aspect of their sovereignty as part of the constitutional plan." *Id*. at 216-217 (distinguishing *Georgia v. Chattanooga*, 264 U.S. 472, 479-80 (1924)). Moreover, unlike the commercial transaction in *Chattanooga*, land acquisition has a "strong[] nexus to tribes' sovereign interests." *Id*. at 217. As to foreign sovereigns, the court found no common law "immovable property" exception. *Id*. at 217-18. "Rather, the courts deferred to the political branches—first the executive branch and then Congress after the Foreign Sovereign Immunities Act of 1976." *Id*. at 218. Even if there were a common law exception to foreign sovereign immunity, it would not apply to tribes, which are not foreign sovereigns. *Id.*

There are three additional reasons "to defer to Congress to decide whether [an "immovable property" exception] should apply to tribes." *Id*. at 219. First, "[d]eferring to Congress on tribal immunity has been the Supreme Court's practice for decades." *Id*. Second, deference to Congress is appropriate because "supporting tribal land acquisition is a key feature of modern federal tribal policy, which Congress adopted after its prior policy divested tribes of [90 million] of acres of land." *Id*. at 219-20. The 1934 Indian Reorganization Act (IRA)

[1] This issue was left undecided in *Upper Skagit*, 138 S. Ct. at 1664-65. *See Oneida Indian Nation v. Phillips*, 981 F.3d 157, 169 (2nd Cir. 2020); *Self*, 60 Cal. App. 5th at 217.

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"returned to the policy of supporting tribal self-determination and self-governance." *Id*. at 220 (citation omitted). The Act "advances tribes' sovereign interests by helping them restore land they lost" and "advances Congress's goals of tribal self-sufficiency and economic development." *Id.* These goals "further distinguish[] tribal land acquisition from that of states and foreign sovereigns." *Id*.

Third, Congress has directly addressed whether sovereign immunity should protect trust land and concluded it should. *Id.* at 220-21 (discussing exclusion for Indian trust lands from the Government's waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a(a)). Moreover, Congress has preserved tribal sovereign immunity in connection with tribal land in specific instances and, on occasion, has provided for limited waivers of such immunity; that history "weighs strongly in favor of deferring to Congress" to determine whether to adopt an immovable property exception to tribal immunity. *Id*. at 221.

This Court should likewise decline to hold that there is an "immovable property" exception to tribal immunity. However, even if the Court were inclined to so hold, the exception would not apply here. Plaintiff seeks to quiet title to *on-reservation* lands as against the Tribe's claims that the lands are: (1) tidelands owned by the Tribe since time immemorial, reserved for the Tribe in the Treaty of Point Elliott, and now held in trust for the Tribe; and (2) uplands re-acquired by the Tribe to establish Kukutali Preserve and which are now held in trust for the Tribe under the IRA. *See* Amended Complaint (Doc. 1-2) at 6-7, ¶¶ 23, 25 (discussing Tribe's claims of ownership of "artificially filled tidelands" and strip of land between fence and lot line). Neither claim involves lands the Tribe acquired off-reservation and holds in fee.

The "immovable property" exception relates to property acquired by a sovereign "in the dominions of another." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting) (citation

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omitted); *see also id.* at 1655 (Roberts, C.J., concurring) (asserting that "it has been a settled principle of international law that a foreign state holding real property *outside its territory* is treated just like a private individual") (citation omitted; emphasis added); *see also Oneida*, 981 F.3d at 169-70. Plaintiff herself describes the exception as applying to property owned by a sovereign "outside of its own forum." Pls. Opp. (Doc. 27-1) at 14. Because the disputed property is within the territory reserved to the Tribe in the Treaty of Point Elliott, the immovable property exception has no application here. *See* 18 U.S.C. § 1151 (defining Indian country to include "all land within the limits of any Indian reservation … *notwithstanding the issuance of any patent*) (emphasis added); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Plaintiff seeks to avoid this result by arguing her property is "fully subject to the authority of the State." Pls. Opp. (Doc. 27-1) at 15, citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). However, whatever authority the State may have over plaintiff or her fee land, it has no authority to waive the Tribe's sovereign immunity or adjudicate the plaintiff's quiet title action as against the Tribe's claims that the lands are held in trust. *See* 28 U.S.C. § 1360(b) (State has no authority "to adjudicate… ownership … of [Indian trust] property or any interest therein").

B. The Tribe Is Immune from Plaintiff's Tort Claims.

Plaintiff argues the Tribe is not immune from her trespass claims because the Tribe's relationship with State Parks is "unprecedented" and application of sovereign immunity to tort claims can lead to unjust results. Pls. Opp. (Doc. 27-1) at 16-17. However, tribal sovereign immunity is not limited to a subset of tribal activities:

> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." That immunity … is "a necessary corollary to

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> Indian sovereignty and self-governance." … Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed ***any*** suit against a tribe absent congressional authorization (or a waiver).

Michigan v. Bay Mills Cmty., 572 U.S. 782, 788-89 (2014) (citations omitted; emphasis added). Under this precedent, nothing in the Tribe's partnership with State Parks, no matter how unique, limits the Tribe's immunity.

Plaintiff suggests that by agreeing to establish a "public park" the Tribe somehow waived its immunity. Pls. Opp. (Doc. 27-1) at 16.[2] However, waivers of immunity must be "unequivocally expressed," *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1097 (9th Cir. 2017) (citation omitted), and the Tribe's agreement with State Parks contains no waiver of the Tribe's immunity from plaintiff's claims. Paragraph 6 states the agreement "does *not* waive, limit, or modify the sovereign immunity of the State of Washington or the Tribe from unconsented suit except as specifically provided in this Paragraph." MacLean Exh. I (Doc. 25-9) at pdf p. 14 (emphasis added). Paragraph 6 contains mutual limited waivers of immunity for certain claims between the Tribe and State Parks, which are "applicable solely to claims by the other Party to [the] Agreement, and *not to claims by any other person* …." *Id*. (emphasis added).

Plaintiff's suggestion that the Tribe's immunity does not extend to tort claims, Pls. Opp. (Doc. 27-1) at 16-17, is foreclosed by binding Ninth Circuit precedent that plaintiff fails to cite. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n.8 (9th Cir. 2016) ("We have held

[2] We are aware of no authority that "public parks" are legal entities capable of suing or being sued under Washington law, and plaintiff cites none. Also, contrary to plaintiff's assertion, the Tribe did not "commit[] to co-managing the Preserve as a public park *under State law*." Pls. Opp. (Doc. 27-1) at 17 (emphasis added). The parties explicitly recognized that there may be conflicts between tribal and state law; agreed that tribal law generally applies to the Tribe and state law generally applies to the State; specifically identified provisions of state law the Tribe agreed to apply and provisions of tribal law the State agreed to apply; and created a dispute resolution process to resolve disputes, including disputes about applicability of tribal or state law. *See, e.g.,* Co-Management Agreement (Exh. A in Doc. 25-9), ¶¶ 3.4, 6.1.3, 6.2, 6.3, 6.4 and Exh. 1 and 2; Right of Way and Access Agreement (Exh. B in Doc. 25-9), ¶¶ 9, 22.

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that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law.") (citing *Cook v. AVI Casino Enters. Inc.*, 548 F.3d 718, 725 (9th Cir. 2008)); *accord Quinault Indian Nation*, 868 F.3d at 1101; *Oertwich v. Traditional Vill. of Togiak*, 413 F. Supp. 3d 963, 968 (D. Alaska 2019) (*Tohono O'odham* "is binding precedent" that "tort claims [are] barred by tribal sovereign immunity").[3] These cases address and reject each argument plaintiff advances in support of a tort-claims exception to tribal sovereign immunity.

II. This Action Should Be Dismissed Under Rule 19.

A. The Tribe and the United States Are Necessary Parties under Rule 19(a).

The Tribe and the United States are necessary parties under Rule 19(a)(1)(A), in part because plaintiff seeks to quiet title to property the Tribe claims is owned by the United States in trust for the Tribe and, in a quiet title action, the court cannot accord complete relief among the parties without joining all parties claiming an interest in the property. *E.g. Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1069 (9th Cir. 2010); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n. 4 (9th Cir. 1991)). The Tribe is also a necessary party under Rule 19(a)(1)(B) because it has substantial, legally protected interests in this action that would be impaired in its absence, including ownership interests, *see Gila River Indian Cmty.*, 626 F.3d at 1069, sovereign and treaty rights respecting its Reservation, *see Skokomish Indian Tribe v. Forsman*, 738 F. App'x 406, 408 (9th Cir. 2018), and management interests under the Co-Management Agreement, *see Idaho v. Coeur d'Alene*, 521 U.S. 261, 281 (1997); *Jamul Action Comm. v. Simermeyer*, 974

[3] *See also Jones v. Alabama-Coushatta Tribe of Tex.*, No. 9:20-CV-RC-ZJH, 2020 U.S. Dist. LEXIS 247306 at *6-7 (E.D. Tex. Oct. 19, 2020), *report adopted*, 2021 U.S. Dist. LEXIS 6225 (E.D. Tex. Jan. 13, 2021); *Mitchell v. Bailey*, No. 5:17-CV-411-DAE, 2019 U.S. Dist. LEXIS 234942 at *11-14 (W.D. Tex. Feb. 14, 2019).

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F.3d 984, 996 (9th Cir. 2020).

Plaintiff's response largely ignores her quiet title claim and fails to mention controlling authority cited on that point. *Cf.* Pls. Opp. (Doc. 27-1) at 18 *with* Motion to Dismiss (Doc. 10) at 14.[4] As to her remaining claims, she argues complete relief can be afforded without the Tribe on the theory that any actions taken by the Tribe can be attributed to the State and the State can then be ordered to pay money damages and undertake repairs. *Id.* at 18-19. However, under the Co-Management Agreement, management of the Preserve is subject to consensus of the Tribe and the State. *See* Co-Management Agreement (Exh. A in Doc. 25-9), Part 4. Thus, absent the Tribe, an order directed to the State alone would be ineffective. Moreover, plaintiff fails to address Rule 19(a)(1)(B), under which the Tribe is a necessary party because of its substantial interests in this action, and the controlling Supreme Court and Ninth Circuit case law governing that Rule. *See* Motion to Dismiss (Doc. 10) at 15-17.

The Tribe's substantial interests in this action are evident in the Co-Management Agreement referenced the Amended Complaint (Doc. 1-2 at 5), which itself seeks to establish an easement on land plaintiff concedes is partially owned by the Tribe, ¶ 25, identifies Tribal claims of ownership to tidelands and uplands as being in dispute, ¶¶ 23-26, identifies the Tribe's dispute regarding the alleged easement, ¶ 38, seeks injunctive relief against the Tribe to prevent

[4] Plaintiff argues complete relief is available on her quiet title action because the Tribe is not immune under the immovable property exception. *Id*. As discussed above, that argument lacks merit. As to the United States, plaintiff argues it lacks an interest in the property at issue. Pls. Opp. (Doc. 27-1) at 6-8. However, Rule 19 requires only that an absent party have a non-frivolous "claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014) (citing *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992)). As discussed in § III below, the Tribe has colorable claim that the lands at issue are held by the United States in trust for the Tribe, which is sufficient to establish an interest under Rule 19. Plaintiff also argues the United States lacks an interest because the Tribe could have brought a quiet title action without joining the United States. Pls. Opp. (Doc. 27-1) at 13. However, where a tribe is the *defendant* in an action challenging title to tribal lands, the United States is both necessary and indispensable. *Gila River,* 626 F.3d at 1070. And, here, plaintiff seeks to proceed without the United States *or* the Tribe.

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interference with the alleged easement, ¶ 40, and seeks to quiet title as against the Tribe's assertion of complete or partial ownership, ¶¶ 59-60. Moreover, plaintiff seeks injunctive relief requiring Defendants to fill and grade Kiket Road to her specifications, *id.* at Prayer for Relief A, while acknowledging the Tribe partially owns the Preserve Property including Kiket Road, ¶ 3, and co-manages the Preserve with the State, ¶ 15. Because the Tribe's legally protected ownership and management interests are at issue, it has substantial, legally protected interests in this action that would be impaired in its absence. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Indian tribes are necessary parties to actions affecting their legal interests.") (citations omitted).

B. The Action Should Be Dismissed under Rule 19(b).

Because the Tribe and the United States are necessary parties under Rule 19(a) and cannot be joined, the case should be dismissed in "equity and good conscience" under Rule 19(b). Where, as here, necessary parties are immune from suit, there is little need for balancing the Rule 19(b) factors because "immunity itself may be viewed as the compelling factor." *Chehalis*, 928 F.2d at 1499. "[V]irtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." *White*, 765 F.3d at 1028 (citing many cases). Moreover, the State cannot adequately represent the Tribe's interests, and allowing the State to proceed alone would likely expose it to double, multiple, or inconsistent legal obligations. Motion to Dismiss (Doc. 10) at 17-18.

Plaintiff responds that the State's and the Tribe's interests are aligned, and that if relief is awarded against the State, the funding agreement contains a waiver of sovereign immunity such that the State could then pursue its claims against the Tribe separately. Pls. Opp. (Doc. 27-

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1) at 19-20. However, the State is "not the federal government, and thus [it has] no fiduciary duty or trust responsibility to protect treaty rights. Further, when a present party is not the federal government and has a 'broad obligation' to serve many people, that party generally does not share a sufficient interest with an absent tribe to satisfy the first *Shermoen* factor." *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 252 (D. Or. 2017) (citing *White*, 765 F.3d at 1027). The Tribe serves the Swinomish people, while the State serves the Washington public. The "different motivations of the two parties could lead to a later divergence of interests" such that the State cannot adequately represent the Tribe. *See White*, 765 F.3d at 1027. And, as a practical matter, because the restoration project was sponsored and carried out by the Tribe, the State is simply not in the same position as the Tribe to defend the project.

Plaintiff's indemnity argument is also mistaken. Plaintiff cites the restoration project's funding agreement, in which the Tribe agreed to indemnify "the funding board" from claims under the agreement. Pls. Opp. (Doc. 27-1 at 20 (citing MacLean Exh. N (Doc. 25-14) § 45.I.1). The indemnity agreement applies only to claims based on the acts or omissions of the Salmon Recovery Funding Board and/or Recreation and Conservation Office. *Id.* at p.1 ¶ A, and § 45.J. Because plaintiff makes no claim against those agencies in this case, the indemnity agreement has no application here. And, if it did, it would simply be additional evidence of the Tribe's interest in this matter, not a reason for proceeding in the Tribe's absence.

Finally, plaintiff suggests it would be unfair if the suit is dismissed and she is left without a forum to obtain relief. Pls. Opp. (Doc. 27-1) at 20-21. Although the absence of an alternative forum can be an important factor under Rule 19(b), it is not controlling when the absent party is an Indian tribe invested with sovereign immunity, as a "wall of circuit court authority" attests. *White*, 765 F.3d at 1028. Chief Justice Roberts' concurring opinion in *Upper Skagit*, 138 S. Ct.

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at 1655, on which plaintiff relies, did not overrule that authority. Unlike *Upper Skagit*, the dispute in this case arises from (1) a federally and tribally permitted project that (2) the Tribe undertook on its Reservation (3) to restore and protect the Reservation environment and its Treaty rights and as an exercise of (4) its inherent sovereignty and (5) its rights as a landowner and co-manager of the Preserve.[5] As in *Jamul Action Comm.*, 974 F.3d at 998, "[e]quity and good conscience do not permit an action disputing…the [Tribe's] ownership of land [and, here, its exercise of sovereign authority over its reservation] in a suit in which the [Tribe] cannot be joined." *See also Self*, 60 Cal. App. 5th at 219 ("recycle[d] argument[]" that tribal immunity could "leave [plaintiff] with no effective remedy" has been rejected by the Supreme Court).

III. This Action Should Be Dismissed for Failure to State a Claim.

Plaintiff's Amended Complaint fails to state a claim because the QTA expressly exempts "trust or restricted Indian lands." 28 U.S.C. § 2409a(a); *Alaska Dep't of Nat'l Resources v. United States*, 816 F.3d 580, 585 (9th Cir. 2016); *Imperial Granite,* 940 F.2d at 1272 n.4. There is no cause of action available where "the lands at issue are Indian lands, or at least colorably so." *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999).[6]

Plaintiff contends the QTA does not apply because "[t]he damaged portions of Mary's Property are not trust lands." Pls. Opp. (Doc. 27-1) at 6. As to the Tribe's claim that the strip of land between the fence and the lot line was acquired by the Tribe and State Parks, and that the

[5] Plaintiff's allegations that the Project exceeded what was authorized in the permits and that the Tribe failed to respond to her concerns or make promised repairs, *see, e.g.*, Pls. Opp. (Doc. 27-1) at 1, 4, are inaccurate. *See* Decl. of Todd Mitchell at ¶¶ 6-8.

[6] Plaintiff questions the Tribe's reliance on *Alaska v. Babbitt* for the "colorable" claim standard, Pls. Opp. (Doc. 27-1) at 8-9, but that standard is well-established. *See Alaska v. United States*, 201 F.3d 1154, 1165 (9th Cir. 2000) ("A 'colorable' claim that land is Indian trust or restricted land defeats [QTA] jurisdiction, but a claim that is not even 'colorable' does not."); *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). Plaintiff cites no authority that something more than a "colorable" claim is needed.

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Tribe's interest was subsequently transferred into trust, plaintiff argues that the acquisition of land by adverse possession does not render it trust land. *Id*. at 12. However, plaintiff ignores the Tribe's showing that the strip of land was acquired by the Tribe and State Parks' predecessors-in-interest, and thus was part of the property the Tribe and State Parks acquired in 2010 and which, as to the Tribe's 50% interest, was subsequently transferred into trust. *See* Motion to Dismiss (Doc. 10) at 6 n.6, 23. Because the trust status of those lands is, at a minimum, "colorable," plaintiff's attempt to adjudicate title to them is barred by the QTA. *See Alaska v. Babbitt*, 182 F.3d at 675.

As to the Tribe's claim that a portion of the disputed lands are tidelands held in trust by the United States, plaintiff submits a competing declaration, but that attempt to litigate the merits does not demonstrate the Tribe's assertion is not "colorable"—that is, that it lacks "some rationale" or was "undertaken in either an arbitrary or frivolous manner." *Id.* The Tribe submits with this reply a response from its expert, which demonstrates fundamental errors in the declaration submitted by plaintiff, including (1) failure to consider the best available data regarding the historic elevation of the tombolo, including data obtained during and after the restoration project, *see* Second Decl. of Karen Mitchell at ¶¶ 9-12; and (2) failure to address substantial evidence of the placement of fill south of the lagoon, including but not limited to documentary evidence, aerial photographs and boring data, which support the presence of tidelands south of the lagoon within the property claimed by plaintiff. *See id.* ¶¶ 2, 13-16, 18 and Exhs. 1-4.[7]

[7] The historic surveys on which plaintiff relies did not survey or otherwise depict the lagoon complex, and thus provide no evidence from which to compare historic and current conditions south of the lagoon. *See* MacLean Exh. A (Doc. 22-1) at 2; Exh. B (Doc. 22-2) at 2; Exh. D (Doc. 22-4) at 2; Second Decl. of K. Mitchell at ¶¶ 17.

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Plaintiff also argues a 2011 federal survey is controlling. However, in *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 18 - 19 (1935), the Supreme Court held that federal surveys did not control a dispute over the existence of or title to tidelands:

> Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? *Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers*. … [Emphasis added.]

Plaintiff cites *Gleason v. White*, 199 U.S. 54, 60 (1905), for the proposition that "official surveys of the public lands of the United States are controlling." Pls. Opp. (Doc. 27-1) at 8. However, *Gleason* did not involve a dispute over the presence of tidelands. As to such a dispute, the Supreme Court's subsequent decision *Borax* is controlling. Similarly, plaintiff's reliance on BLM's manual is misplaced; while it asserts that federal surveys are legal "evidence" of federal interests, *see* Pls. Opp. (Doc. 27-1) at 6, it cannot overrule *Borax* or preclude litigation to determine the presence of tidelands. Moreover, while the 2011 survey was based on a calculation of the then-current line of mean high water, *see* MacLean Exh. J (Doc. 25-10) at 42, there is no evidence the surveyor attempted to determine whether artificial fill had been placed on tidelands south of the lagoon or whether such fill had altered the location of the line of mean high water and, therefore, it does not address the issue in this case, let alone demonstrate the Tribe's claim is not "colorable."

IV. Conclusion.

For the reasons given here and in the Tribe's motion to dismiss, the Court should dismiss this case.

Respectfully submitted May 7, 2021.

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CERTIFICATE OF SERVICE

I certify that on May 7, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

s/ Wyatt Golding
Wyatt Golding, WSBA No. 44412

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