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 RESPONSE TO PLAINTIFF'S MOTION TO REMAND

NOTE ON MOTION CALENDAR: MAY 28, 2021

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

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ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

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ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

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ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

Defendant Swinomish Indian Tribal Community submits this response to plaintiff Mary Carney's Motion to Remand (Doc. 21). Swinomish removed this case under 28 U.S.C. §§ 1441(a) and 1442(a)(2). Notice of Removal (Doc. 1) at 2. Plaintiff argues removal was improper because the case does not arise under federal law, defeating removal under § 1441(a), but does not address § 1442(a)(2). We show removal was proper under both statutes.[1]

I. Removal Was Proper under § 1441(a).

Section 1441(a) authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Under 28 U.S.C. § 1331, district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A civil action arises under federal law if plaintiff's well-pleaded complaint establishes either that federal law creates the cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *See*, *e.g.*, *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-13 (2005). "Federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

"[T]he presence of even one claim 'arising under' federal law is sufficient to satisfy the requirement that the case be within the original jurisdiction of the district court for removal." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 386 (1998), citing *Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 180 (1997); *accord Franchise Tax Bd. v. Constr. Laborers*

[1] Under 28 U.S.C. § 1446(b)(2)(A), all defendants must join in or consent to removal when an action is removed solely under § 1441(a). It is undisputed that the other defendant, the Washington State Parks and Recreation Commission, consented to removal and that the Tribe's removal notice was timely under 28 U.S.C. § 1446(b)(1). *See* Notice of Removal (Doc. 1) at 2; *see also* State Parks Response Supporting Motion to Dismiss (Doc. 16) at 1.

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

Vacation Trust, 463 U.S. 1, 13 (1983). Here, plaintiff's Amended Complaint makes at least two claims that arise under federal law.[2]

A. Plaintiff's Claim to an Easement on Trust Lands Arises under Federal Law.

The Amended Complaint asserts that plaintiff owns an easement burdening lands held by the United States in trust for the Tribe and seeks damages for defendants' alleged interference with that easement and an injunction preventing future interference with it. Am. Comp. (Doc. 1-2) at p. 2 ¶ 3 (acknowledging the Tribe's interest in the Preserve Property is held in trust by the United States); p. 7 ¶ 25 (alleging plaintiff possesses an easement burdening the Preserve Property, either under a "recorded easement … or in the alternative … by prescription"); p. 9 ¶¶ 36-40 (asserting cause of action for blocking plaintiff's claimed easement burdening the Preserve Property); pp. 12-13 ¶ A (seeking injunction requiring defendants "to not otherwise interfere with plaintiff's easement burdening the Preserve Property"); p. 13 ¶ B (seeking damages for loss of "access to the Carney Property"); *see also* Motion to Remand (Doc. 21) at 10 (asserting plaintiff possesses a "recorded easement burdening Preserve property").

Plaintiff's claim to an easement burdening property held in trust for the Tribe arises under federal law. A "state-law complaint that alleges a present right to possession of Indian tribal lands necessarily 'asserts a present right to possession under federal law,' and is thus *completely pre-empted and arises under federal law*[.]" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 n.8

[2] As discussed in the Tribe's Notice of Removal (Doc. 1 at 4-5), because all plaintiff's claims depend on her claim that she possesses an easement burdening lands held in trust for the tribe and/or her claim that she has title to all lands within what she describes as the "Carney property," they all present substantial questions of federal law. For example, an essential element of plaintiff's trespass claim is "an invasion of property affecting an interest in exclusive possession." *Grundy v. Brack Family Tr.*, 151 Wash. App. 557, 567, 213 P.3d 619, 624 (2009). Thus, the trespass claim necessarily rests on plaintiff's claim that she has a right of exclusive possession to the "Carney property." Nevertheless, because removal of the entire action requires only one claim arising under federal law, it is not necessary to review each of plaintiff's claims to determine whether removal was proper.

(1987) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974) (emphasis added).[3] For jurisdictional purposes, there is no difference between plaintiff's claim that she has a present right to use an easement on Indian trust lands and a claim to "a present right to possession" of such lands since both implicate federal law protecting Indian trust lands. This is made clear by 28 U.S.C. § 1360(b), under which state courts have no jurisdiction "to adjudicate, in probate proceedings *or otherwise*, the ownership or right to possession of [Indian trust] property *or any interest therein*" (emphasis added). *See Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011) (in § 1360(b), "Congress reserved for the federal courts jurisdiction over questions involving 'the ownership or right to possession' of [Indian trust] property").[4]

Plaintiff argues that, by dropping her request to quiet title to the easement as pled in her original Complaint, the Amended Complaint "requires no resort to federal law because it does not concern title." Motion to Remand (Doc. 21) at 9. However, the Amended Complaint expressly alleges that plaintiff possesses an easement burdening trust lands and seeks both damages and injunctive relief based on claims that defendants interfered with the easement. "It is basic that one may not successfully move for a restraining order to prevent obstruction of an easement if one does not have proper title to or rights in the easement." *Heffle*, 633 P.2d at 269. And, although the well-pleaded complaint rule makes plaintiff the master of her complaint, "[i]t

[3] The "complete pre-emption" doctrine is a corollary to the well-pleaded complaint rule, under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393, quoting *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987).

[4] Plaintiff asserts § 1360(b) has no application here because she "is not seeking to adjudicate ownership or right of possession to trust property." Motion to Remand at 14. However, as the Amended Complaint makes clear, she is asserting an "interest" in Indian trust property—specifically, an easement burdening trust property—and is seeking relief based on alleged interference with that interest. *See Boisclair v. Superior Court*, 51 Cal.3d 1140, 1152, 801 P.2d 305, 312 (Cal. 1990) (under § 1360(b), state courts lack jurisdiction to adjudicate rights to an easement on trust lands); *Heffle v. State*, 633 P.2d 264, 269 (Alaska 1981) (same as to an easement on a Native allotment).

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

is an independent corollary of the … rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22.[5] Because the Amended Complaint continues to claim an interest in Indian trust property and seek relief based on alleged interference with that interest, it is completely preempted by and arises under federal law. *Caterpillar*, 482 U.S. at 393 n.8.[6]

Plaintiff argues that *Oneida* is distinguishable because, in that case, the plaintiff was a tribe alleging violations of federal law and, in this case, plaintiff's claims rest solely on state law. Motion to Remand at 13.[7] However, as *Oneida* and *Caterpillar* make clear—and plaintiff apparently recognized when she dropped her claim to quiet title to the easement—*any* claim to an interest in Indian trust lands, regardless of which party advances the claim, is completely preempted by and arises under federal law. Because plaintiff's Amended Complaint continues to make such a claim with respect to the alleged easement, it arises under federal law and was subject

[5] In a pre-*Franchise Tax Board* ruling, a federal court remanded the State of Alaska's complaint for "obstruction of a state highway under state law," even though the highway was on a native allotment. *See Heffle*, 633 P.2d at 269. We have been unable to locate the complaint or remand order in that case, but the Amended Complaint here arises under federal law for the reasons explained in the text.

[6] Plaintiff's suggestion that her "cause of action to prevent interference with her access rights … does not even require [the Tribe's] involvement in the suit," Motion to Remand (Doc. 21) at 10, does not demonstrate otherwise. First, as set forth in the Amended Complaint, plaintiff's cause of action for interference with her claimed easement *does* involve the Tribe—she seeks both damages from and an injunction against the Tribe based on that cause of action. As plaintiff notes, removal jurisdiction must be analyzed based on the operative complaint at the time of removal, not a hypothetical complaint that plaintiff might have filed. *See* Motion to Remand (Doc. 21) at 10, citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537-38 (1939). Second, regardless of whether plaintiff named the Tribe, she is claiming an easement burdening Indian trust property, as her Motion to Remand confirms, *see id*. (asserting that plaintiff possesses a "recorded easement burdening Preserve property"), and it is that claim that is completely pre-empted by and arises under federal law. *Caterpillar*, 482 U.S. at 393 n.8.

[7] Contrary to plaintiff's assertion that her claims rest solely on state law, the State has *disclaimed* jurisdiction to adjudicate the ownership, right to possession, or "any interest" in property held in trust for an Indian tribe. RCW 37.12.060. Accordingly, plaintiff's claim to an easement burdening trust property cannot arise under state law. The same is true of her tort claims. *See*, *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959) (state courts lack jurisdiction over claims by non-Indians against Indians arising in Indian country); *Outsource Servs. Mgmt. LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 276-77, 333 P.3d 380, 382 (2014) (describing State's "limited jurisdiction over civil disputes involving Indians that arise on Indian reservations").

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

to removal under § 1441(a). *See Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum); *Schroeder v. Trans World Airlines, Inc*., 702 F.2d 189, 191 (9th Cir. 1983) (finding removal jurisdiction despite attempt to avoid federal law through "[a]rtful pleading"); *Magnuson v. Burlington Northern, Inc*., 576 F.2d 1367, 1369 (9th Cir. 1978) (same).

B. Plaintiff's Quiet Title Action Arises Under Federal Law.

Plaintiff's quiet title action also arises under federal law. The Amended Complaint identifies two components of that action: (1) whether there are artificially filled tidelands on the "Carney property" held in trust for the Tribe, Am. Comp. (Doc. 1-2) at pp. 6-7 ¶ 23; and (2) whether the Tribe is the beneficial owner of the strip of land between the fence erected by plaintiff's predecessors and the lot line, *id.* at 7 ¶ 25.

As framed by the Amended Complaint, plaintiff's quiet title action arises under federal law because: (1) property disputes between upland and tideland owners arise under and are governed by federal law, *see*, *e.g.*, *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10 (1935); and (2) property disputes involving lands held by the United States in trust for an Indian tribe (such as the tidelands and strip of land along the fence) arise under and are governed by federal law, *see*, *e.g.*, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-71 (1979). Plaintiff does not dispute that the United States owns Reservation tidelands in trust for the Tribe. *See*, *e.g.*, Motion to Remand (Doc. 21) at 10 (acknowledging that tidelands are trust lands); *see also* Swinomish Motion to Dismiss (Doc. 10) at 2-3 & n.4. Nor does plaintiff dispute that the United States' ownership of the tidelands and uplands in trust for the Tribe is governed and protected by Federal law and that any action challenging the Tribe's ownership of such lands would arise under federal law. *See, e.g.*, *Omaha Tribe*, 442 U.S. at 670-71.

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

Instead, plaintiff asserts her quiet title action arises under and is governed by state law because she seeks to quiet title to land within the federal patent issued to her predecessor-in-interest. Motion to Remand at 2, 3-4, 8. Conversely, plaintiff argues that her quiet title action does not arise under federal law because she is not seeking to quiet title to tidelands or trust lands. *See*, *e.g.*, Motion to Remand (Doc. 21) at 11-12 (asserting, on the merits, that plaintiff's claimed lands do not include tidelands). However, these arguments assume plaintiff is right on the merits and do not demonstrate that plaintiff's action arises under state and not federal law. As we show below, by expressly seeking an adjudication of the Tribe's competing claims of ownership, plaintiff's quiet title action arises under and is governed by federal law. We begin by summarizing the law governing such an action and then address plaintiff's counterarguments.

In *Borax*, Los Angeles filed suit in federal court to quiet title to land claimed to be tideland in Los Angeles Harbor. *Id*. at 12. Like Ms. Carney, Borax claimed the land under a federal patent issued to its predecessor. *Id.* at 13. "The District Court found that the boundaries of 'lot one,' as … conveyed [to Borax's predecessor by the General Land Office], were those shown by the plan and field notes of the survey; that all the lands described in the complaint were embraced within that lot; and that no portion of the lot was or had been tideland or situated below the line of mean high tide of the Pacific Ocean or of Los Angeles Harbor." *Id.* at 13-14.

The Ninth Circuit reversed. It held "the Federal Government had neither the power nor the intention to convey tideland to [Borax's predecessor], and that his rights were limited to the upland." *Id*. at 14. It "regarded the lines shown on the plat as being meander lines and the [true] boundary line of the land conveyed as the shore line …." *Id*. It remanded for a judicial determination of the true boundary between the uplands and tidelands. *Id*.

The Supreme Court affirmed. It first held that, "if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850" and that "the Federal Government had no power to convey tidelands, which had thus vested in a State …." *Id*. at 16. The Court then addressed Borax's argument—like Ms. Carney's merits argument here—"that the General Land Office had authority to determine the location of the boundary between upland and tideland and did determine it through the survey in 1880 and the consequent patent to [Borax's predecessor], and that this determination is conclusive against collateral attack; in short, that the land in controversy has been determined by competent authority not to be tideland and that the question is not open to reexamination." *Id*. The Court disagreed:

> [T[he 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*.

Id. at 18-19 (emphasis added). Thus, "the State was not bound by the survey and patent, and … its grantee was entitled to show, if it could, that the land in question was tideland." *Id*. at 21.[8]

More importantly for present purposes, the question "as to the extent of this federal grant [to Borax's predecessor], that is, as to the limit of the land conveyed, *or the boundary between the upland and the tideland, is necessarily a federal question.*" *Id*. at 22 (emphasis added). That question "concern[ed] the validity and effect of an act done by the United States [and] it involved

[8] Because the survey and patent were not controlling, it was not necessary for the Court "to consider whether the lines designated in the plat of the … survey as 'meander' lines were intended as boundaries." *Id*. However, because plaintiff references the meander lines of the surveys in this case (*see* Motion to Remand (Doc. 21) at 3), it should be noted that there is substantial authority that meander lines are not boundaries. *See*, *e.g.*, *Railroad Co. v. Schurmeir,* 74 U.S. 272, 286-87 (1868); *accord, Whitaker v. McBride,* 197 U.S. 510, 512-13 (1905); *Mitchell v. Smale,* 140 U.S. 406, 414 (1891); *Hardin v. Jordan,* 140 U.S. 371, 380-81 (1891); *Jefferis v. East Omaha Land Co.,* 134 U.S. 178, 196 (1890); *Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co.,* 45 Pub. Lands Dec. 330, 1916 I.D. LEXIS 99 at *26-27 (1916).

the ascertainment of the essential basis of a right asserted under federal law." *Id*. The Court further held that, as a matter of federal law, the boundary between the uplands and the tidelands was the line of mean high tide calculated over a full tidal cycle or 18.6 years. *Id*. at 26-27.[9]

The Court followed *Borax* in *Hughes v. Washington*, 389 U.S. 290, 290-91 (1967), where it held that federal law controls the ownership of land gradually deposited by the ocean on upland property conveyed by the United States before statehood. According to the *Hughes* Court, *Borax* held "that the extent of ownership under the federal grant is *governed by federal law*." *Id*. at 292 (emphasis added). The *Hughes* Court also noted that *Borax* and many other cases make clear that "a dispute over title to lands owned by the Federal Government is governed by federal law." *Id*.

The Court limited the reach of *Borax* in a case involving title to a riverbed, holding state law governed the dispute even though title to the riverbed had passed to a state upon statehood. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The Court explained that *Borax's* holding that "the boundary between the upland and tideland was to be determined by federal law" required a "determination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law." *Id*. at 376. However, "that determination [was] solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State." *Id*.

[9] Plaintiff acknowledges that the boundary between uplands and tidelands is the line of mean high tide measured over a full tidal cycle but notably fails to acknowledge that this rule is derived from federal law, which governs title disputes between uplands and tidelands owners. *See* Motion to Remand (Doc. 21) at 11.

Corvallis is not controlling here for two reasons. First, *Corvallis* expressly declined to reconsider *Hughes*, which "dealt with oceanfront property, a fact which the [*Hughes*] Court thought sufficiently different from the usual situation so as to justify a 'federal common law' rule of riparian proprietorship." *Id*. at 377 n.6. Thus, disputes between uplands and tidelands owners in saltwater harbors (as in *Borax*) and on oceanfront property (as in *Hughes*) continue to be governed by federal law. Because this case involves tidal lands similarly situated to those in *Borax* and *Hughes* it is controlled by those cases, not *Corvallis.*

Second, two years after *Corvallis*, the Court considered a dispute over a tract of land on the east bank of the Missouri River, which the Omaha Tribe claimed as part of a reservation created for it under an 1854 treaty. *Omaha Tribe*, 442 U.S. at 656. Iowa and others claimed that past movements of the Missouri River washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners. *Id*. at 657. Distinguishing *Corvallis*, the Court held the dispute was governed by *federal* law:

> The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal-footing origin of the State's title.
>
> As the Court of Appeals held, however, the general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest. The area within the survey was part of land to which the Omahas had held aboriginal title and which was reserved by the Tribe and designated by the United States as a reservation and the Tribe's permanent home. The United States continues to hold the reservation lands in trust for the Tribe ….
>
> In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation v. County of Oneida*, 414 U.S., at 667. It is rudimentary that "Indian title is a matter of federal law and can be extinguished only with federal consent" and that

> the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is "exclusively the province of federal law." *Id*., at 670. Insofar as the applicable law is concerned, therefore, the claims of the Omahas are "clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." *Id*., at 684 (Rehnquist, J., concurring).

Id. at 670-71. The Court added that *Omaha Tribe* was "not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees' incidents of ownership to determination by the applicable state law." *Id*. at 671. Rather, the issue was "whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established[,]" a question that, "under *Oneida*, [was] a matter for the federal law to decide." *Id.* Although plaintiff in this case claims under a patent from the United States, her dispute is with the Tribe, which, like the Omaha Tribe, claims beneficial ownership "of an area that in the past was concededly part of the reservation as originally established." Thus, just as Iowa's ownership of the land on its side of the river did not transform the case into one arising under state law, neither does plaintiff's claim of title under a federal patent do so here.

More recently, the Ninth Circuit applied federal law to define the boundary between uplands and tidelands on the Lummi Reservation, holding the boundary is ambulatory, changing "when the water body shifts course or changes in volume." *United States v. Milner*, 583 F.3d 1174, 1187 (9th Cir. 2009). Under this federal rule, the uplands owner loses title in favor of the tidelands owner when land is lost to the sea by erosion or submergence, while the upland owner gains when land is gradually added through accretion or reliction. *Id*. at 1182, 1187. "Given that the Lummi [the tidelands owners] have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the [upland owners] do not

have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation." *Id*. at 1189-90. Thus, under federal law, the upland-tideland boundary must be determined by the location of the line of mean high tide measured over 18.6 years *and* must account for any man-made structures that have prevented the natural movement of that line.

Under these decisions, plaintiff's quiet title action depends on resolution of substantial questions of federal law—the location of the uplands-tideland boundary on the property to which plaintiff seeks to quiet title and the Tribe's right to possession of areas within its reservation—and thus arises under federal law for purposes of 28 U.S.C. § 1331. All four *Gunn* requirements for the existence of a substantial federal question are present here. First, the location of the uplands-tidelands boundary and the Tribe's right to possession of reservation lands are "necessarily raised" by plaintiff's claim. *Gunn*, 568 U.S. at 258. Second, as the Amended Complaint alleges, the location of the uplands-tidelands boundary and the Tribe's right to possession of reservation lands are "actually disputed." *Id.* Third, these federal questions are "substantial," *id*., as *Borax, Hughes* and *Omaha Tribe* attest. And, fourth, these questions are "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. This conclusion follows from *Borax* and *Omaha Tribe*, in which such claims were litigated in federal court, and from 28 U.S.C. § 1360(b) and RCW 37.12.060, under both of which Washington State courts have *no* jurisdiction to adjudicate "the ownership or right to possession of [Indian trust] property or any interest therein."

Plaintiff's arguments do not show otherwise. First, plaintiff argues "[t]here is no legal or factual basis" for the Tribe's claims that portions of the property she claims are tidelands held by the United States in trust for the Tribe. Motion to Remand (Doc. 21) at 10. Specifically, she claims that inundation of the property is not evidence of the existence of tidelands under the

federal rule defining tidelands; that the Amended Complaint alleges she never placed any artificial fill on the property and is unaware of any other party having done so; and that federal surveys show that the United States does not assert ownership over any portion of the property she claims. *Id*. at 11-12. However, these arguments go to the *merits* of plaintiff's quiet title action; they provide no grounds for concluding that the action does not arise under federal law.[10] Indeed, by relying on the *federal* rule defining the uplands-tidelands boundary and *federal* surveys, plaintiff implicitly recognizes the important federal questions presented here.[11]

[10] The requirement that a federal issue be "substantial" is not an invitation to litigate the merits on a motion to remand but "looks instead to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. The importance of defining upland-tideland boundaries under federal law is attested by *Borax* and *Hughes,* and the importance of uniform federal law protecting Indian possessory rights in reservation lands is attested by *Oneida, Omaha Tribe*, 28 U.S.C. § 1360(b) and RCW 37.12.060.

[11] Plaintiff's merits argument rests on an incomplete statement of the bases for the Tribe's position that portions of the disputed land are tidelands held by the United States in trust for the Tribe. For a more complete discussion of the bases for the Tribe's position, including aerial photographs, soil samples and other evidence of artificial fill south of the lagoon, *see* Motion to Dismiss (Doc. 10) at 8; Decl. of K. Mitchell (Doc. 11) at pp. 4-8, ¶¶ 7-15; Second Decl. of K. Mitchell (Doc. 30) at pp. 2-12, ¶¶ 4-21.

Plaintiff's argument that the Court cannot consider these materials but must instead confine itself to the Amended Complaint and Notice of Removal is misplaced. *See* Motion to Remand (Doc. 21) at 7, citing *Touch Networks, Inc. v. Gogi Design, LLC*, No. C07-1686MJP, 2007 WL 9775634 at *2 (W.D. Wash. Dec. 20, 2007). *Touch Networks* relies upon *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d at 191, which states that "[i]t is proper to use the petition for removal to clarify the action plaintiff presents and to determine if it encompasses an action within federal jurisdiction." Where the facts are disputed between a complaint and a motion to remand, courts routinely consider later-filed declarations in opposition to removal, as such evidence can be construed as an amendment to the notice of removal. *See Cohn v. Petsmart, Inc*., 281 F.3d 837, 840 n.1 (9th Cir. 2002) (citing *Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) ("it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits")); *Wang v. Asset Acceptance, Ltd. Liab. Co.*, 680 F. Supp. 2d 1122, 1125 (N.D. Cal. 2010); *Olig v. Xanterra Parks & Resorts, Inc.*, Civ. No. CV 13-15-BLG-DLC-RKS, 2013 U.S. Dist. LEXIS 106637, at *5 (D. Mont. July 30, 2013) ("In ruling on a motion to remand, district courts may consider evidence outside the pleadings, such as affidavits, documents, or even a limited evidentiary hearing, to resolve disputed jurisdictional facts."). Here, plaintiff's motion to remand presents materials—the federal surveys—that are not part of the Amended Complaint to support an argument that plaintiff will prevail on the federal cause of action alleged in the Amended Complaint. Having done so, plaintiff cannot reasonably object to the Tribe's use of materials outside the Amended Complaint to demonstrate that its claim of ownership—the very claim plaintiff seeks to litigate—is, at a minimum, colorable. *See Boon v. Allstate Ins. Co.*, 229 F. Supp. 2d 1016, 1021 (C.D. Cal. 2002) (motion to remand denied based on defendants' declarations regarding disputed jurisdictional facts).

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

Plaintiff also argues that she "is not disputing ownership of Indian trust lands." Motion to Remand (Doc. 21) at 12. However, her quiet title action is aimed directly (and exclusively) at the Tribe's claim that portions of the property she claims are uplands or artificially filled tidelands held in trust for the Tribe. Where, as here, a plaintiff expressly seeks to quiet title as against a tribe's claims that the property in issue is held in trust by the United States for the tribe, the claim arises under federal law. *See Omaha Tribe*, 442 U.S. at 670-71; *cf. Boisclair*, 51 Cal.3d at 1156, 801 P.2d at 314-15 (under § 1360(b), state court must dismiss case if "one possible outcome … may be a finding that the property in dispute is Indian trust land").

For the same reason, plaintiff's assertion that questions of federal law are only present in this case "because [the Tribe] raises a federal question as a defense to [plaintiff's] action" is misplaced. *See* Motion to Remand (Doc. 21) at 13. As pleaded in the Amended Complaint, plaintiff's quiet title action seeks to adjudicate the Tribe's claim of ownership to portions of the property plaintiff claims to own. That claim—as expressly set forth in the Amended Complaint—arises under federal law without regard to any defenses the Tribe may assert.

II. Removal Was Proper under § 1442(a)(2).

As set forth in Swinomish's Notice of Removal, 28 U.S.C. § 1442(a)(2) provides an independent basis for removal of this case. Notice of Removal (Doc. 1) at 2, 8-9. Under § 1442(a)(2), a civil action commenced in a state court may be removed by "[a] property holder whose title is derived from any … officer [of the United States], where such action … affects the validity of any law of the United States."

Section 1442(a)(2) "permits removal by a property holder whose title is derived from *any* United States officer when the action affects the validity of any United States law." *Town of Stratford v. City of Bridgeport*, 434 F. Supp. 712, 714 n.1 (D. Conn. 1977) (emphasis added);

accord Ute Indian Tribe of the Uintah & Ouray Reservation v. Ute Distrib. Corp., 455 Fed. Appx. 856, 862 (10th Cir. 2012) (property holder's title was derived from an officer of the United States officer under § 1442(a)(2) because it was conveyed by the Secretary of the Interior under an act partitioning tribal assets); *Benitex Bithorn v. Rosello-Gonzalez*, No. 01-2053 (DRD), 2002 U.S. Dist. LEXIS 15614 at *28-29 (D.P.R. Mar. 15, 2002) (property holder's title was derived from an officer of the United States where title was conveyed by the Secretary of the Navy under congressional act), *adopted by* 200 F. Supp. 2d 26 (D. P.R. 2002).

In this case, plaintiff does not dispute that the Tribe's beneficial interest in the Preserve property—over which plaintiff claims an easement—is derived from the Secretary of the Interior's acceptance of the Tribe's interest in the property in trust under 25 U.S.C. § 5108, or that the Tribe's beneficial interest in reservation tidelands is derived from President Buchanan's proclamation of the Treaty of Point Elliott and was confirmed by President Grant's Executive Order. *See* Notice of Remand at 8. Accordingly, the Tribe is a property holder whose beneficial title is derived from an officer of the United States under § 1442(a)(2).

Unlike § 1441(a), § 1442(a)(2) does not require that plaintiff's well-pleaded complaint plead a federal question; a federal defense is enough. The Supreme Court has held that, "[u]nder the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law." *Jefferson County v. Acker*, 527 U.S. 423, 430-31 (1999), citing *Mesa v. California*, 489 U.S. 121 (1989). "Although *Acker* and *Mesa* involved other subsections of § 1442, this reasoning has also been applied to suits removed pursuant to § 1442(a)(2)." *Town of Davis v. W. Va. Power & Transmission Co.*, 647 F. Supp. 2d 622, 627 (N.D. W.Va. 2007) (citing *Bithorn*, 2002 U.S. Dist. LEXIS 15614 at *26-30).

This case affects the validity of several federal laws. First, 25 U.S.C. § 5108 authorized the Secretary of the Interior to acquire the Tribe's interest in the Preserve property in trust and 28 U.S.C. § 1360(b) prohibits a state court from adjudicating "the ownership or right to possession of [Indian trust] property or any interest therein." Plaintiff's assertion of an easement burdening Indian trust property and her request for damages and injunctive relief premised on alleged interference with that easement in a state court affects the validity of these laws. Second, federal law protects the Tribe's beneficial ownership of tidelands by, among other things, withholding the United States' waiver of immunity from an action seeking to quiet title to Indian trust lands. *See* 28 U.S.C. § 2409a(a). Plaintiff's request to quiet title to lands claimed by the Tribe as tribal trust lands affects the validity of this law as well. Third, federal law recognizes and protects the Tribe's sovereign immunity from suit absent a waiver by Congress or the Tribe, *see*, *e.g.*, *Kiowa Tribe v. Mfg. Techs*., 523 U.S. 751, 754 (1998), and the Tribe's right to make its own laws and be governed by them, *see*, *e.g.*, *Williams v. Lee*, 358 U.S. at 220. Plaintiff's attempt to sue the Tribe for damages and injunctive relief affects the validity of these federal laws as well. *Cf. Watson v. Philip Morris Cos.*, 551 U.S. 142, 150-51, (2007) (federal officer removal statute enacted in part because "States [might otherwise] deprive federal officials of a federal forum in which to assert federal immunity defenses"); *Acker*, 527 U.S. at 447 (Scalia, J. concurring in part and dissenting in part) ("the main point" of the federal officer removal statute "is to give officers a federal forum in which to litigate the merits of immunity defenses"). Accordingly, this action was properly removed under § 1442(a)(2).

III. Conclusion

For the above reasons, plaintiff's motion to remand should be denied.

Respectfully submitted May 24, 2021.

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230

ZIONTZ CHESTNUT

s/ Marc Slonim
Marc D. Slonim, WSBA No. 11181
Wyatt F. Golding, WSBA No. 44412
Ziontz Chestnut
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121
wgolding@ziontzchestnut.com
(206) 448-1230 | Phone
(206) 448-0962 | Fax

s/ Emily Haley
Emily Haley, WSBA No. 38284
Weston LeMay, WSBA No. 51916
Office of Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
Tel: 360.466.3163
Fax: 360.466.5309

Attorneys for Swinomish Indian Tribal Community

CERTIFICATE OF SERVICE

I certify that on May 24, 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

ZIONTZ CHESTNUT
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121
TEL. (206) 448-1230; FAX (206) 448-1230