No. 21-35507

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington resident; MILL BAY MEMBERS ASSOCIATION, INC., a Washington non-profit corporation, et al., Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; et al., Defendants-Appellees

v.

WAPATO HERITAGE LLC, Defendant-Appellant,

and

GARY REYES; et al., Defendants.

Appeal from the United States District Court for the
Eastern District of WA
No. 2:09-cv-00018-RMP
The Honorable Rosanna Malouf Peterson
United States District Court Judge

Answering Brief of Appellee the Confederated Tribes of the Colville Reservation in Opposition to Appellant's Opening Brief

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I. INTRODUCTION

From 2009 until 2020, an RV resort occupied in trespass the waterfront portion of a parcel of Indian trust land abutting Lake Chelan known as Moses Allotment No. 8 (MA-8), of which the Confederated Tribes of the Colville Reservation (Colville Tribes or Tribes) are the majority beneficial owner. That trespass was facilitated by the actions and omissions of Wapato Heritage, LLC (Wapato), a non-Indian company and devisee of a minority life estate interest in MA-8. As lessor, Wapato failed to renew the lease under which the RV resort operated. *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011). Through this litigation, Wapato continued to incite the RV resort's trespass for years after the lease expired, in contravention of this Court's express holding.

Here, Wapato appeals a series of orders and a judgment in the long-running case initiated by the RV resort. The defendants named in this action were Wapato, the United States, and the numerous Indian allottee-owners of MA-8, including the Colville Tribes. Wapato asserted an array of crossclaims against the United States and the Tribes, all of which the district court eventually dismissed. *See* 1-ER-60—100 (Jan. 19, 2021 Orders).

The district court correctly held that the Tribes' sovereign immunity barred Wapato's crossclaims against the Tribes, including the crossclaim Wapato appeals here for declaratory relief as to a 2009 lease of MA-8, which the district court also

concluded was moot. Furthermore, the district court dismissed Wapato's crossclaims premised on challenging the trust status of MA-8, which challenge the district court had previously rejected on the merits, correctly establishing as the law of the case that MA-8 has continuously remained Indian land held in trust by the United States for the benefit of the Indian owners, including the Colville Tribes for whom MA-8 is culturally and spiritually significant ancestral land.

Because the Tribes never waived sovereign immunity and because MA-8 remains held in trust, this Court should affirm dismissal of Wapato's crossclaims.[1]

II. JURISDICTIONAL STATEMENT

Wapato appeals an amended judgment and several orders by the district court. *See* 5-ER-1210—11; 1-ER-2—and 3 (May 17, 2021 Judgment in a Civil Action, and June 4, 2021 Judgment in a Civil Action (amended)); 1-ER-41—59 (Feb. 2, 2021 Order Denying as Moot Wapato Heritage's Motion to Compel); 1-ER-60-100 (Jan. 19, 2021 Order Granting Confederated Tribes of the Colville Reservation's Motion to Dismiss, Order Denying Wapato Heritage's Motion to Transfer or for Partial Summary Judgment, and Order Granting Federal Defendants' Motion to Dismiss Wapato Heritage's Remaining Claims).

This Court has appellate jurisdiction as to the judgment because it is a final

[1] Wapato abandons all but one of its crossclaims against the Tribes on appeal. *See* Appellant's Brief (App's Br.) at 10-11, 22-36. Nevertheless, sovereign immunity bars all of Wapato's crossclaims against the Tribes.

judgment under 28 U.S.C. § 1291. *See* 6-ER-1383. "An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984).

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

The Colville Tribes address herein only the subset of issues presented for review in which the Tribes' interests are directly implicated:

(1) Did the district court properly dismiss Wapato's crossclaim against the Tribes for declaratory relief regarding a 2009 lease of MA-8 because the Tribes' sovereign immunity, which was not waived, bars that crossclaim, and furthermore because that crossclaim is moot?

(2) Did the district court properly dismiss Wapato's crossclaims that were premised on MA-8 being other than Indian trust land because the law of the case has confirmed MA-8 is Indian land held in trust by the United States for the Indian allottee-owners, an issue being separately appealed?

IV. STATEMENT OF THE CASE

The facts and procedural history of this case for purposes of this appeal are relatively narrow.[2] This litigation was initiated in 2009 by the Mill Bay Members

[2] A summary of facts regarding the trust status of MA-8 is provided at VI.C, *infra*; further detail is available in the pleadings of the parallel appeal, *Grondal et*

Association (Mill Bay), members of a seasonal RV resort that occupied the waterfront portion of MA-8 pursuant to a lease executed in 1984 (the Master Lease). *See* 5-ER-1159—1203 (Complaint). Mill Bay alleged a right to continue occupying the RV resort until 2034 under the Master Lease and equitable claims. Mill Bay named as defendants Wapato, which is the successor in interest to the lessor, the United States and the numerous Indian allottee-owners of MA-8, including the Colville Tribes. Wapato is a non-Indian limited liability company formed under Washington State law that holds merely a life estate interest in MA-8 that does not include the special rights of Indian beneficiaries. *See* 3-ER-640 ¶ 222; 2-ER-456. In March 2009, the Tribes entered into a lease of MA-8 from its fellow Indian allottees for a term of five years. 3-ER-660—99. In 2010, Wapato filed its first answer to Mill Bay's complaint, alleging eight crossclaims (including subparts) against the United States and the allottees, including the Tribes. SER 229-30, 237-43. Thus, the Tribes were not a voluntary participant in the case.

In 2011, the Tribes filed a motion to dismiss Mill Bay's single claim against the Tribes and Wapato's eight crossclaims against the Tribes for lack of jurisdiction. 5-ER-1346. In 2012, the district court dismissed Mill Bay's sole claim against the Tribes and two of Wapato's crossclaims against the Tribes,

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al. v. United States et al., Ninth Cir. No. 20-35694, currently pending before this Court.

concluding those claims were barred by the Tribes' sovereign immunity. SER-212-13. The court did not rule on the Tribe's motion to dismiss Wapato's remaining claims.

In the meantime, in a parallel appeal of a case filed by Wapato to determine whether the Master Lease had been validly renewed, this Court held that the Master Lease expired in February 2009 because "Wapato's option to renew the Lease was not effectively exercised[.]" *Wapato Heritage*, 637 F.3d at 1040. The Court pointedly observed, "Wapato could have obviated the issues before us had it taken the steps necessary to do so." *Id*. at 1036.

In 2012, Wapato filed an amended answer in this case below reciting the same eight crossclaims (*see* 3-ER-651—56), and the Tribes once again moved to dismiss. 5-ER-1350. Due to circumstances outside of the Tribes' control, that motion remained pending for nearly a decade. Between 2012–2019, the case languished amid cycles of supplemental briefing regarding the trust status of MA-8, which Wapato and Mill Bay had only first begun to attack in 2010. In 2014, the Colville Tribal Federal Corporation, a federally chartered tribal corporate entity, entered into a lease of MA-8 from the requisite percentage of allottee-owners for a term of 25 years with the option to renew for an additional 25 years. 2-ER-281, -292, -282; *see also generally* 2-ER-279—94

In September 2019, a new district judge was assigned to the case (5-ER-

1356); Judge Peterson managed the case by ordering the parties to address the trust status and Mill Bay trespass issues prior to the Tribes' motion to dismiss Wapato's remaining crossclaims. *See* 3-ER-478. The district court ruled in July 2020 that MA-8 remains trust land and that Mill Bay had been in trespass for more than 11 years by continuing to occupy the RV resort after expiration of the Master Lease. 1-ER-101—71. Following Mill Bay's ejectment from MA-8 in September 2020, the district court took up the Tribes' motion to dismiss and Wapato's remaining crossclaims, only a subset of which Wapato sought to revive. SER 61-64. Wapato conceded at oral argument that several of its crossclaims were barred by the law of the case doctrine. 1-ER-89.

In January 2021, the district court granted the Tribes' motion to dismiss, ruling that Wapato's outstanding crossclaims were not colorable against the Tribes because the Tribes had not waived sovereign immunity by contract or litigation conduct, and therefore "the Colville Tribes' sovereign immunity dictates its dismissal as a defendant[.]" 1-ER-66—73, -98.

In March 2021, the district court held trial on the sole remaining issue of trespass damages. *See* 1-ER-2—5. The Tribes, having been granted dismissal from the case, did not participate in trial. *Id*. The district court issued its trespass

damages judgment in May 2021.[3] 1-ER-2—3. Subsequently, Wapato filed this appeal of the district court's January 2021 orders dismissing Wapato's remaining claims, a February 2021 order denying a motion to compel by Wapato, and the May 2021 judgment. On appeal, Wapato seeks to revive only one crossclaim against the Tribes, for declaratory judgment regarding the 2009 lease of MA-8. *See* App's Br. at 22-36 (*compare* § VI.D *with* § VI.C).

V. SUMMARY OF ARGUMENT

This Court should affirm that the Tribes' sovereign immunity barred Wapato's crossclaim regarding the 2009 lease of MA-8 because the Tribes were made party to this case involuntarily and consistently sought dismissal of Wapato's crossclaims, including the single crossclaim Wapato seeks to revive against the Tribes on appeal.[4] Until the lower court dismissed the Tribes based on sovereign immunity, the Tribes participated pursuant to the district court's requests for briefing from the parties, solely to request prompt resolution and narrowly defend the Tribes' interests as the majority beneficial interest owner of MA-8. Under well-established precedent, a tribe's participation in litigation does not constitute a

[3] That judgment was amended in June 2021 to resolve a clerical error. *See* 1-ER-2—3.

[4] To the degree that Wapato may aver that it seeks to reassert against the Tribes its dismissed crossclaim for alleged underpayment and/or its denied motion to compel discovery, tribal sovereign immunity bars both that crossclaim and motion as against the Tribes as well. *See* 1-ER-66—73, -55—56.

waiver of sovereign immunity. Accordingly, the Tribes' sovereign immunity remained fully preserved.

Dismissal of Wapato's crossclaim regarding the 2009 lease as moot should also be affirmed because the subject lease expired in 2014 and Wapato did not amend its crossclaim to extend to the ensuing lease, under which the Tribes were not lessor in any event.

Finally, this Court should affirm dismissal of Wapato's crossclaims alleging MA-8 is not trust land because that issue was correctly decided and separately appealed, and the historical record demonstrates that MA-8 was and remains without lapse Indian land held in trust by the United States for the benefit of the Indian allottee-owners.

VI. ARGUMENT

A. Standard of Review

This Court reviews *de novo* dismissals under Federal Rule of Civil Procedure 12(c). *Fajardo v. Cnty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999). Dismissal under Rule 12(c) is "properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Id*. Similarly, dismissals under Rule 12(b)(6) for failure to state a claim and under Rule 12(b)(1) for lack of subject matter jurisdiction are also reviewed *de novo*. *Lipton v. Pathogenesis Corp.*, 284

F.3d 1027, 1035 (9th Cir. 2002); *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir 2000). "Sovereign immunity is an important limitation on the subject matter jurisdiction of federal courts." *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). This Court "may affirm the district court's dismissal on any ground supported by the record." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

B. Dismissal of Wapato's Crossclaim Against the Tribes for Declaratory Relief Regarding the 2009 Lease Should Be Affirmed on Tribal Sovereign Immunity and Mootness Grounds.

1. The Tribes' Sovereign Immunity Remains Fully Preserved, Barring Wapato's Crossclaim.

a. Sovereign Immunity Is a Well-Recognized Doctrine That Applies Even When a Tribe Participates in Suit.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "The common law sovereign immunity possessed by the Tribe[s] is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). "Suits against Indian tribes are thus barred by sovereign immunity[.]" *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991).

"[A]n Indian tribe is subject to suit only where Congress has authorized the

suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfr. Techs.*, 523 U.S. 751, 754 (1998); *see also Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir. 1993). "[A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation omitted); *see also C&L Enters. v. Citizen Band Potawatomi Indians*, 532 U.S. 411, 418 (2001); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001).

Notably, tribal sovereign immunity extends to crossclaims, and such immunity is not waived when a tribe otherwise participates in an action. This Court has "consistently … held that a tribe's participation in litigation does not constitute consent to counterclaims[.]" *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) (emphasis added). "By consenting to the court's jurisdiction … a tribe does not automatically waive its immunity as to claims that could be asserted against it, even as to related matters arising from the same set of underlying facts." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017 (9th Cir. 2016) (internal quotation omitted). For example, in the administrative context, this Court held that a tribe's participation in an administrative review proceeding did not waive the tribe's sovereign immunity in an action filed by another party seeking review of the agency's decision. *Quileute*

Indian Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir. 1994). A tribe's "voluntary participation before the [tribunal] is not the express and unequivocal waiver of tribal immunity that [this Court] require[s]." *Id*.

Indeed, a tribe's immunity is not waived as to crossclaims even where the tribe affirmatively initiates suit as a plaintiff.

> [A] tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. Possessing immunity from direct suit, we are of the opinion the Indian nations possess a similar immunity from cross-suits.

Okla. Tax Comm'n, 498 U.S. at 509 (internal quotation omitted); *see also United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). "The Supreme Court has thus emphasized that a tribe's initiation of a lawsuit for injunctive relief does not waive its immunity to counterclaims, including compulsory ones." *Bodi*, 832 F.3d at 1017. For example, this Court has repeatedly held that a state's counterclaim for taxes due was barred by sovereign immunity where a tribe initiated suit for injunctive relief and, pursuant to the preliminary injunction granted, continued to sell products which the state sought to tax. *Squaxin Indian Tribe v. Wash.*, 781 F.2d 715, 723 (9th Cir. 1986); *Chemehuevi Indian Tribe v. Cali. State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985).

b. The Colville Tribes Did Not Waive Immunity.

The Colville Tribes never waived its sovereign immunity or in any way consented to the sole remaining crossclaim Wapato seeks to resurrect on appeal. To the contrary, the Tribes twice moved for and prevailed in seeking dismissal of Wapato's crossclaims. That the motions to dismiss were not promptly ruled upon does not diminish the Tribe's immunity defense. The Tribes' participation in the litigation while the second motion was pending was limited to responding to Mill Bay's futile attempts to justify its continuing trespass and attacks on the trust status of MA-8. In fact, much of the Tribes' participation was requested by the district court. The Tribes cannot be said to have 'opened the door' to Wapato's crossclaim by defending itself from the claims cast against it and its interests as the majority beneficial interest owner of MA-8. The Tribes' participation in the litigation as an involuntarily named defendant "is not the express and unequivocal waiver of tribal immunity that [this Court] require[s,]" *Quileute*, 18 F.3d at 1460, and therefore "does not constitute consent to counterclaims[.]" *McClendon*, 885 F.2d at 630.

Indeed, Wapato's appealed crossclaim is not "even … related [to] matters arising from the same set of underlying facts" as Mill Bay's suit. *Bodi*, 832 F.3d at 1017. Wapato's theory that the 2009 lease between the Tribes and the individual Indian allottees was void is tangential to plaintiff Mill Bay's action seeking to allow it to continue to occupy the waterfront portion of MA-8.

Wapato relies heavily on *United States v. Oregon*, 657 F.2d 1009, 1014-15 (9th Cir. 1981), and *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), in arguing that the Tribes' sovereign immunity should be construed as waived for purposes of Wapato's crossclaim. Wapato stretches to an unintended extreme the inapposite premise that "broad, equitable requests for relief will serve as the basis for waiver of all issues pertinent thereto," App's Br. at 33, while ignoring the readily distinguishable facts of both cases. In contrast to the circumstances in *Oregon* and *Rupp*, the Colville Tribes did not initiate or foment this litigation in any way.

In *Oregon*, a tribe affirmatively intervened shortly after the United States initiated an adjudication of tribal fishing rights in the Columbia River basin and the tribe signed an agreement that, *inter alia*, "tender[ed] to the Oregon district court any dispute incapable of a negotiated resolution." 657 F.2d at 1011. It follows that "this Tribe assumed the risk that … the Tribe itself would be bound by an order it deemed adverse." *Id*. at 1015. "By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation[.]" *Id*. at 1014 (emphasis added) (internal quotation omitted).

In *Rupp*, a tribe initiated a quiet title action and in its complaint "affirmatively requested the district court to order the defendants to assert any claims in the disputed lands[.]" 45 F.3d at 1244. Notably, "the Tribe conceded

that it consented to the [defendants'] counterclaims during the pendency of its suit." *Id*. The appeals court concluded that "the Tribe's act of filing suit … combined with explicit language found in its complaint and its explicit waiver of immunity with respect to the counterclaims during the pendency of its suit, constitutes an express and unequivocal waiver of the Tribe's sovereign immunity." *Id*.[5] The test that waivers of sovereign immunity are strictly construed and cannot be implied was "satisfied by the Tribe's affirmative request that [the defendants] assert their claims[.]" *Id*. at 1245.

In contrast, here the Colville Tribes were involuntarily named as one of many defendants, neither initiating suit as in *Rupp* nor intervening as in *Oregon*. Additionally, unlike in *Oregon*, the Tribes never signed an agreement to submit related disputes to the district court, and never requested that opposing parties assert their claims, as in *Rupp*. Rather, the Tribes repeatedly moved to dismiss Wapato's crossclaims which, when granted, would and did release the Tribes from the case. Despite protracted delay in receiving a ruling on the second motion to dismiss, the Tribes consistently defended and never repudiated that motion.

Attempting to apply *Oregon* and *Rupp* to this case, Wapato incorrectly

[5] Furthermore, the *Rupp* appeals court noted that an "especially egregious" "history of abuses by the Tribe and its attorney leading to the dismissal of the Tribe's complaint" – described elsewhere as "a series of flagrant acts of misconduct," *id*. at 1243 – constituted "special circumstances" weighing in favor of holding that sovereign immunity had been waived. *Id*. at 1246.

asserts that the Colville Tribes made "broad, equitable requests for relief" from the district court. App's Br. at 33. The Tribes' involuntary participation in the litigation has been strictly limited to defending its interests as the majority beneficial owner of MA-8, a parcel of culturally and spiritually significant ancestral land located on the shores of Lake Chelan.[6] Those interests were stymied and compromised for more than a decade while Mill Bay, aided and abetted by Wapato,[7] continued to occupy in trespass the waterfront portion of MA-8.

Despite the Tribes' profound stake in MA-8 and the longstanding, illicit obstruction of Tribal access and use by Mill Bay and Wapato, the Tribes took a

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[6] *See* SER 109 ¶ 8, Declaration of former Colville Tribes Chairman Rodney Cawston:

> As the original inhabitants of the area that includes Moses Allotment 8, the Colville Tribes … have been able to maintain their close connection to the Lake Chelan area by securing allotments and handing down those land rights through the generations. We have buried our people there, consistently used those lands for ceremonies, gathered there with our children, and taught them about the past and our way of life.

Specifically, the waterfront portion of MA-8 site occupied by Mill Bay is immediately adjacent to a Tribal cemetery, which "houses the remains of upwards of about 100 Tribal ancestors, including the reinterred remains of Tribal ancestors who were displaced from their original resting places due to hydroelectric development or other disturbances. … MA-8 is an area that the Colville Tribes consider sacred enough to be used for this purpose." SER 98 ¶ 6.

[7] Wapato affirmatively obstructed monitoring of Tribal archaeological sites that lie within the RV resort, rejecting a 2017 BIA request to conduct routine monitoring and stating it would "'require a court order before allowing any inspection[.]'" SER 100-01 ¶ 9; *see also* SER 103-05.

conservative approach to engaging in the instant litigation, consistent with the Tribes' status as a sovereign, involuntary defendant. Between 2012, when the Tribes filed its second motion to dismiss Wapato's crossclaims, and 2019, when the new district court judge was assigned to the case, the Tribes filed only one substantive pleading not directly related to its motion to dismiss, and that sole pleading was only two pages long. 5-ER-1356 (ECF 356); *see* 5-ER-1350-56. Since fall 2019, the Tribes complied with the district court's express requests for supplemental briefing from the parties, consistently emphasizing that prompt resolution of this protracted dispute was the Tribes' primary objective. *See, e.g.*, 2-ER-464 (supplemental brief leading with the argument that "As Majority Owner of MA-8, the Colville Tribes Request that This Matter Be Resolved Swiftly"); SER-114 (2020 district court order reciting that "Colville suggested a consolidated briefing schedule …. [and] will forgo oral argument if it were to result in additional delay").[8]

Wapato argues that the Tribes ought to have been muzzled by its sovereign immunity: "instead of declining to participate due to its sovereign immunity, the Tribes voluntarily submitted itself to the jurisdiction of the Court on all issues."

[8] The Tribes' repeated entreaties for timely conclusion of the case are markedly contrastable with Mill Bay and Wapato's maneuvers to, as the district court characterized, "perpetuate this litigation *ad infinitum*, relitigating the same issues over and over while attempting to add new claims, prolonging the litigation unnecessarily[.]" SER 89.

App's Br. at 35. But that is decidedly not how the doctrine of tribal sovereign immunity operates. As this Court observed in *Bodi*, "[b]y consenting to the court's jurisdiction … a tribe does not automatically waive its immunity as to claims that could be asserted against it[.]" 832 F.3d at 1017 (emphasis added). "[V]oluntary participation before the [tribunal] is not the express and unequivocal waiver of tribal immunity that [this Court] require[s]." *Quileute*, 18 F.3d at 1460. Wapato posits a false dichotomy that tribes must either hold their peace or forfeit all immunity from suit and crossclaims. The law clearly does not so command.

Far from having "gratuitously ask[ed] for specific relief involving matters outside their limited role in the case" (App's Br. at 35), the Tribes as a named defendant and the majority controlling beneficial owner of MA-8 sought only to see the issue of Mill Bay's longstanding trespass punctually resolved pursuant to the motions of the United States as trustee, and to dismiss Mill Bay's claims and Wapato's crossclaims against the Tribes. The Tribes' posture in the litigation was at all times responsive, not enterprising.

Finally, the Tribes ceased to participate in the case entirely once its dismissal motion was granted, abstaining from participation in the ensuing trial regarding the amount of trespass damages owed by Mill Bay. *See* 1-ER-5. Unlike Wapato, which seeks to insert itself into that trial retroactively despite its preceding dismissal from the case, the Tribes have no interest in participating in a trial to

which it was not a party.

The Colville Tribes respectfully submit that this Court should apply its "consistent[]" precedent to affirm the district court in holding that the Tribes' measured and proportionate "participation in litigation does not constitute consent to counterclaims[,]" and therefore affirm the district court's dismissal of Wapato's crossclaim for declaratory relief as to the 2009 lease. *McClendon*, 885 F.2d at 630.

2. Wapato's Crossclaim for Declaratory Relief Is Moot.

Even if tribal sovereign immunity were not at issue here, the Court should also affirm the district court's dismissal of Wapato's crossclaim regarding the 2009 lease as moot because the lease is long expired, Wapato did not amend its crossclaim to challenge the 2014 lease, and even if it had the Tribes would not be the proper target of such a challenge because the Tribes are not the lessee under the 2014 lease.

It is undisputed that the 2009 lease expired in February 2014. *See* 3-ER-698 ("[t]he Term of this Lease shall be five (5) years beginning on February 2, 2009"). Wapato avers that it "plainly meant to extend the claim to the expanded 2014 lease," citing "ECF 578 at 4" (App's Br. at 32), which is the signature page of a 2020 declaration by Jeffrey Webb, the "executor of the Estate of William Evans and Manger [sic] of Wapato Heritage, LLC." 2-ER-274, -272. Elsewhere in Mr. Webb's declaration he makes a handful of assertions about the 2014 lease. *See* 2-

ER-273. However, Mr. Webb's declaration does not state or imply that Wapato amended its crossclaim regarding the 2009 lease to extend the same contentions to the 2014 lease; nor does Wapato assert on appeal that it so amended its crossclaim. *See* App's Br. at 32. And indeed, the record reflects that Wapato did not amend its crossclaim to extend it to the 2014 lease.

Wapato's contention that it "meant to extend the claim to the expanded 2014 lease" is the not the same as actually extending it. *See* Fed. R. Civ. P. 15(a)(2) ("a party may amend its pleading only with the opposing party's written consent or the court's leave"). Wapato was able to file amended pleadings at other times in this case (*see, e.g.*, 3-ER-626), but failed to follow the procedural rules to amend and extend its crossclaim for declaratory relief to address the 2014 lease.

Even if Wapato had amended its crossclaim to challenge the 2014 lease, that crossclaim would still fail as a matter of law against the Tribes because the Tribes would not be the appropriate party in interest. The Colville Tribal Federal Corporation (CTFC) is the lessee under the 2014 lease. 2-ER-281, -292. CTFC is a federally chartered Tribal corporation. 2-ER-281. The Tribes own and control all Tribal corporations, including CTFC, under chapter 7-1 of the Colville Tribal Code.[9] However, a tribal corporation is not coextensive with the sovereign tribal

[9] Chapter 7-1 of the Colville Tribal Code is available at: https://static1.squarespace.com/static/572d09c54c2f85ddda868946/t/611c1488e02

government that owns and controls it. Because CTFC is not a party to this action, Wapato could not assert even a hypothetically amended crossclaim against it in this action.

Additionally, neither the 2009 nor the 2014 lease presents any defect meriting a declaration of invalidity. Both leases were obtained and executed in adherence to the applicable federal regulations governing leasing of Indian lands. *See* 25 C.F.R. Part 162, Subpart A. Specifically, all Indian landowners were notified (*see* 25 C.F.R. § 162.010(a)), and the requisite percentage of allottees consented to each lease. *See* 25 C.F.R. § 162.012(a)(1)[10]; 3-ER-665 (2009 lease); ER-291—94 (2014 lease). As a non-Indian entity and mere life estate holder, Wapato has no role in that process. Thus, both leases were facially valid and bound "all non-consenting owners to the same extent as if those owners also consented[.]" 25 C.F.R. § 162.012(a)(4)(i)

In sum, Wapato's crossclaim against the Colville Tribes as to the 2009 lease fails based on both sovereign immunity and mootness grounds.

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d5100c81b4434/1629230217933/7-1+Final+Oct+2020.pdf. *See also Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108, 110, 147 P.3d 1275 (2006).

[10] 25 C.F.R. § 162.012(a)(1) states that, where the number of owners of "undivided trust or restricted interests in a fractionated tract of Indian land" is "20 or more," the required percentage of undivided interests that must consent to a lease is "[o]ver 50 percent."

C. MA-8 Has Continuously Remained Indian Trust Land.

Although already fully briefed and argued in another appeal of this case pending before this Court, Wapato revives its attack on the trust status of MA-8. Wapato "concedes" that its "claims cannot survive" if the prior order confirming that MA-8 remains Indian trust land is upheld, and acknowledges that this Court has already taken that issue under consideration in a separate pending appeal, *Grondal et al. v. United States et al.*, Ninth Cir. No. 20-35694. App's Br. at 36.

For a comprehensive review of the history of MA-8 and chain of title verifying that MA-8 remains held in trust by the United States for the Indian allottees, the Colville Tribes point the Court to the extensive analysis and briefing already devoted to this issue: the district court's 2020 order concluding MA-8 remains in trust (1-ER-127—50); the United States' appeal No. 20-35694 answering brief (Dkt. No. 43 at 60-75) and supplemental brief (Dkt. No. 74); and the Tribes' appeal No. 20-35694 answering brief (Dkt. No. 46 at 50-71) and supplemental brief (Dkt. No. 75).[11] The Tribes also offer the following, abridged summary of the long history of MA-8.

Constituent bands of the Confederated Tribes of the Colville Reservation have occupied and utilized the area of land now known as MA-8 since time

[11] The Tribes also explained in its appeal No. 20-35694 answering brief why Wapato should be estopped as a matter of law from challenging MA-8's trust status based on the doctrine of landlord-tenant estoppel. *See* Dkt. No. 46 at 53-55.

immemorial as part of their ancestral homelands. *See* SER 97 ¶ 4. As noted, *supra* n.6, MA-8 is culturally and spiritually important land for the Tribes. Within the waterfront area alone, there are at least seven identified historic properties, including pre-contact lithic scatters, and at least two named places of great significance to the Colville Tribes. SER 98 ¶ 5.

In the mid-1800s, the United States sought to consolidate numerous Indian tribes of the Columbia Plateau region onto the then-newly established Yakama Indian Reservation, but many tribes refused, including a constituent Tribe of the Colville Confederated Tribes led by Chief Moses. *See United States v. Ore.*, 29 F.3d 481, 484-85 (9th Cir. 1994). In 1879, Chief Moses negotiated for and succeeded in reserving a portion of what is now north-central Washington State as the "Columbia or Moses Reserve[,]" which was established "for the permanent use and occupancy of Chief Moses and his people" via an Executive Order issued by President Hayes 3-ER-590; *see also* SER 97 ¶ 4. That Reservation encompasses MA-8. *Id*.

In 1883, as federal Indian policy shifted to favoring allotments for individual tribal members, Reservation leaders reached an agreement with the United States, known as the Moses Agreement, which provided, *inter alia*, that each family of "Indians now living on the Columbia Reservation shall be entitled to 640 acres" as allotments thereupon if they chose not to remove. 3-ER-715—16. Congress

ratified the Moses Agreement in 1884, expressly legislating that "said Indians [could] elect to remain on said Columbia reservation … to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain[.]" 3-ER-603—04 (23 Stat. 79). MA-8 was allotted to Wapato John via an 1886 Executive Order. 3-ER-592—93.

Congress provided for issuance of trust patents for the Moses Allottees in a March 1906 statute (3-ER-605—06 (34 Stat. 55)), and Wapato John was issued two trust patents for MA-8 in 1907-1908. 4-ER-905—07. Those patents expressly provided that the land was and would be held "in trust for the sole use and benefit of … Wa-pa-to John" by the United States "for the period of ten years[.]" *Id*.

In 1914, well before the trust period for either MA-8 trust patent was set to expire in March 1916, President Wilson exercised authority delegated to him under the General Allotment Act (24 Stat. 388) and a June 1906 Act (34 Stat. 325, 326, codified at 25 U.S.C. § 391) to affirmatively and unambiguously extend the trust period of the Moses Allotments for ten additional years beyond their respective expiration dates: "the ten-year period of trust on all allotments made to members of the Chief Moses Band of Indians … is hereby, extended for a further period of ten years." 3-ER-607—08 (E.O. 2109).

The 1906 Act states:

> Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been

> or shall be issued under any law or treaty the President may, in his discretion, continue such restrictions on alienation for such period as he may deem best[.]

(34 Stat. 325, 326, codified at 25 U.S.C. § 391). Wapato recently adopted the position – inconsistent with its prior representations[12] – that the 1914 Executive Order was invalid because, under Wapato's theory, the June 1906 Act permitted only extensions of restrictions on alienation, not trust status. *See* App's Br. at 38.

However, the Supreme Court has expressly interpreted the June 1906 Act as "provid[ing] that the Executive, in his discretion, might extend, before its expiration … the period of the trust with its resulting restrictions on alienation." *United States v. Jackson*, 280 U.S. 183, 189-90 (1930) (emphases added). This Court has confirmed that interpretation: "[T]he trust period was subject to extension by the President …. *See* Appropriations Act of June 21, 1906 … 34 Stat. 325, 326[.]" *Blackfeet Tribe of Indians v. Mont.*, 729 F.2d 1192, 1195 n.5 (9th Cir. 1984), *aff'd* 471 U.S. 759 (1985); *see also Crow Tribe of Indians v. Campbell Farming Corp.*, 828 F. Supp. 1468, 1470 (D. Mont. 1992) ("The Appropriations Act of June 21, 1906, gave the President discretion to extend the trust period of any allottee for as long as deemed necessary."), *aff'd* 31 F.3d 768 (9th Cir. 1994).

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[12] *See* SER 152 (2014 district court order observing that "[n]o party to the matters pending before this court contend this 1914 Executive Order did not apply to MA-8"); SER 122 (April 2020 Wapato brief stating "Wapato Heritage has carefully reviewed that Executive Order, and now sees that it failed to extend the alleged trust status of MA-8") (emphasis added).

Furthermore, executive actions are subject to a very strong presumption of validity. An "executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames v. Moore & Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)). An executive order must be "plainly and palpably inconsistent" with the authorizing statute to be overturned. *Levy v. Urbach*, 651 F.2d 1278, 1282 (9th Cir. 1981).

The June 1906 Act is exceedingly broad, expressly applying to "any Indian allottee" who holds a trust or other restricted patent "under any law or treaty." 25 U.S.C. § 391. The Act grants the President unfettered discretion to continue restricted patents "as he may deem best[.]" *Id*. President Wilson's 1914 Executive Order extending the trust period of MA-8 and the other Moses Allotments was plainly and palpably consistent with the June 1906 Act. Wapato fails to carry its heavy burden in attacking that executive action.

Accordingly, President Wilson's 1914 Executive Order extended the trust period of MA-8 and the other Moses Allotments through March 1926. In February 1926, President Coolidge issued a nearly identical executive order extending the trust period for another ten years, through March 1936. SER 180 (E.O. 4382).

In 1934, Congress passed the Indian Reorganization Act (IRA) (48 Stat. 988,

codified at 25 U.S.C. § 5100 *et seq.*), which marked a major shift in federal Indian policy. "The policy of allotment came to an abrupt end in 1934 with the passage of the Indian Reorganization Act. … Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The 1935 amendment to the IRA (49 Stat. 378) expressly extended through December 31, 1936, the period of trust for any Indian land where the corresponding reservation Indian populace voted to not to adopt the IRA provisions regarding tribal government structure, as did the Colville Tribes.[13] *See* 49 Stat. 378 § 3.

In September 1936, once again relying on the June 1906 Act, President Franklin Roosevelt issued an executive order extending for 25 years the "periods of trust applying to any Indian lands." SER 181 (E.O. 7464). Thereafter, similar orders issued by various Secretaries of Interior extended the periods of trust through 1994. SER 184-94. And in May 1990, Congress amended the IRA so that

[13] *See Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 143 n.11 (1980) (noting the "Colville Tribes … voted in 1935 not to come under [the Indian Reorganization] Act"). The 1935 vote of the Colville Tribes regarding the IRA applied to the Moses Allotments because the Indians residing on the Moses Allotments were enrolled members of the Colville Tribes at and before the time of the vote. *See, e.g.*, SER 179 (approving enrollment of Nancy Wapato, "daughter of Peter Wapato, Mose[s] Agreement allottee No. 10" as of October 1910).

it mandatorily applies to all tribes and all Indian lands held in trust or subject to restrictions on alienation, thus extending the trust status of MA-8 in perpetuity. 104 Stat. 207, codified at 25 U.S.C. § 5126.

Though the reservation character of MA-8 is immaterial to its trust status, Wapato challenges that character to no avail. Even a brief review of the historical record and governing case law makes clear that the reservation character of the Moses Allotments was never disestablished by Congress. When Congress ratified the Moses Agreement in 1884, it expressly provided for allotments to be designated within the "Columbia reservation … and the remainder of said reservation to be thereupon restored to the public domain[.]" 3-ER-603—04 (23 Stat. 79) (emphasis added). The Supreme Court has held that lands so allotted from a reservation retain their reservation character: "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Hagen v. Utah*, 510 U.S. 399, 414 (1994). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *McGirt v. Okla.*, 140 S. Ct. 2452, 2464

(2020).

Thus, the record is clear that MA-8 has been continuously held in trust by the United States for the Indian allottee-owners, including the Colville Tribes. Presuming that finding is upheld in the parallel appeal where it was properly raised, this Court should affirm dismissal of Wapato's crossclaims premised on contentions that MA-8 is other than Indian trust land.

VII. CONCLUSION

Because the Colville Tribes' sovereign immunity remains fully preserved, the Tribes respectfully submit that this Court should affirm dismissal of Wapato's crossclaim for declaratory relief regarding the 2009 lease, as well as all other crossclaims Wapato alleged against the Tribes. This Court should likewise affirm dismissal of Wapato's crossclaims implicating the trust status of MA-8 because that issue, which is currently pending separate appeal, was also correctly decided below.

Respectfully submitted this 23rd day of December, 2021.

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STATEMENT OF RELATED CASES

The following cases are related to this matter under Circuit Rule 28-2.6:

1. *Grondal, et al. v. United States, et al.*, 9th Cir. No. 20-35357 (docketed April 28, 2020). Appeal by Plaintiffs-Appellants Paul Grondal and Mill Bay Members Association, Inc., Defendant-Appellant Wapato Heritage, L.L.C. and Defendant-Appellant Gary Reyes of the district court's Order Regarding Representation of Indian Allottees (ECF No. 411 – March 26, 2020).
2. *Grondal, et al. v. United States, et al.*, 9th Cir. No. 20-35694 (docketed August 10, 2020). Appeal by Plaintiffs-Appellants Paul Grondal and Mill Bay Members Association, Inc., Defendant-Appellant Wapato Heritage, L.L.C. and Defendant-Appellant Gary Reyes of the district court's Memorandum Opinion and Order on Dispositive Motions (ECF 144 – Jan. 12, 2010) and Order Denying Plaintiffs' Motion for Default Judgment, Denying Plaintiffs' Motion for Summary Judgment, and Granting Government's Motion for Summary Judgment re Ejectment (ECF No. 503 – July 9, 2020).
3. *Wapato Heritage, LLC v. United States*, 637 F.3d 1033 (9th Cir. 2011). Prior appeal of a related case between some parties involved in this matter.

UNITED STATES COURT OF APPEALS
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Answering Brief of Appellee the Confederated Tribes of the Colville Reservation in Opposition to Appellant's Opening Brief

Signature _____s/Cara Hazzard_____ **Date** ____Dec. 23, 2021_____
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