No. 21-35507

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington Resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL.
Defendants-Appellees,

v.

CONFEDERATED TRIBES OF COLVILLE RESERVATION,
Defendant-Appellee,

v.

WAPATO HERITAGE, LLC; and GARY REYES
Defendants-Appellants,

Appeal from the United States District Court
For the Eastern District of Washington
No. 2:09-cv-00018-RMP

ANSWERING BRIEF FOR FEDERAL APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
CFC	United States Court of Federal Claims
CTEC	Colville Tribal Enterprise Corporation
Evans	William Wapato Evans, Jr.
IRA	Indian Reorganization Act
MA-8	Moses Allotment Number 8
Mill Bay	Mill Bay Members Association
RV	recreational vehicle
QTA	Quiet Title Act
Tribes	Confederated Tribes of the Colville Reservation
Wapato	Wapato Heritage LLC

INTRODUCTION

This is the third appeal concerning the consequences of an expired business lease (or "Master Lease") that was held by Wapato Heritage, LLC ("Wapato") on Indian trust land known as Moses Allotment Number 8 ("MA-8"). The United States holds MA-8 in trust for a highly-fractionated group of Indian allottees and for the Confederated Tribes of the Colville Reservation ("Tribes"), which acquired their interest from individual allottees. Plaintiff Mill Bay Members Association ("Mill Bay") is an association of persons (including Plaintiff Paul Grondal) who purchased camping memberships in a recreational vehicle park developed under the Master Lease. As affirmed by this Court in a separate case, the Master Lease expired in 2009. See *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011).

Mill Bay initiated this suit—against Defendants Wapato, the United States, the named allottees, and the Tribes—for injunctive and declaratory relief that would allow Mill Bay's members to remain in possession of MA-8 through 2034, notwithstanding the expiration of the Master Lease. The United States filed a counterclaim to eject Mill Bay and for trespass damages. Two appeals in this case already have been briefed and argued and are awaiting decision: an appeal from the district court's interlocutory order declining Wapato's motion to compel the United States to obtain private counsel for the named allottees (No. 20-35357); and

an appeal from the district court's order granting summary judgment to the United States on its ejectment claim and directing Mill Bay's ejectment from MA-8 (Ninth Cir. No. 20-35694).

In the meantime, during the pendency of the above appeals, the district court held a trial on trespass damages and entered a final judgment in the case. In the present appeal (from the final judgment), Wapato challenges the district court's pretrial orders dismissing Wapato's cross-claims against the Bureau of Indian Affairs ("BIA"), the named allottees, and the Tribes, and denying Wapato's motion to compel discovery and to participate in the trial on trespass damages. As relevant here, Wapato's cross-claims sought: (1) to recover rental amounts that Wapato allegedly overpaid the beneficial owners of MA-8 under the Master Lease; (2) to compel BIA to collect unpaid rents allegedly owed to Wapato by the Colville Tribal Enterprise Corporation ("CTEC") under a sublease for a tribal casino; (3) to have a 2009 "replacement" lease for the tribal casino (granted to CTEC after Wapato's Master Lease expired) declared void; and (4) to obtain a declaration expunging the United States' trust interest and declaring MA-8 to be held in fee. As explained herein, the district court correctly dismissed each of these cross-claims for lack of jurisdiction or for failure to state a valid claim for relief. The district court also properly exercised its discretion to deny Wapato's motions to participate in the trial on trespass damages and to compel discovery.

JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

Plaintiff Mill Bay brought an action for declaratory and injunctive relief against the United States, named Indian allottees, the Tribes, and Wapato, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 1361, and 1367, and 5 U.S.C. § 701 et seq. 5-ER_1166-67, 1192-1201. The district court dismissed Mill Bay's claims for lack of subject matter jurisdiction. 4-ER_774, 788. The United States filed a counterclaim against Mill Bay, seeking ejectment and trespass damages. 5-ER_1154-55. The district court had jurisdiction over the counterclaim under 28 U.S.C. § 1345.

Defendant Wapato filed cross-claims against BIA, the named allottees, and the Tribes, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346(f), 1353, and 2409a, and 25 U.S.C. § 345. 3-ER_640-44. The district court dismissed all of the cross-claims, either for lack of jurisdiction, for failure to state a claim, or because the claims had been resolved by the court's earlier summary judgment ruling, which is the subject of an appeal pending before this Court (No. 20-35694). 1-ER_58, 66-100. For reasons explained herein, the district court correctly determined that it lacked subject matter jurisdiction over Wapato's cross-claims.

B. Appellate Jurisdiction

The district court issued a final judgment on June 4, 2021. *See* 1-ER_2. This court has jurisdiction under 28 U.S.C. § 1291.

C. Timeliness of appeal

This appeal is timely under Fed. R. App. P. 4(a)(1)(B)(i). Wapato filed a notice of appeal on June 16, 2021, 5-ER_1209-12, within 60 days of the district court's final judgment, 1-ER_2.

ISSUES PRESENTED

1. Whether the district court correctly dismissed—for lack of jurisdiction and/or failure to state a claim—Wapato's cross-claims:
   a. to recover $751,285 in alleged overpayments it made under the Master Lease between 1996 and 2005;
   b. to compel BIA to collect $866,248 in unpaid rent allegedly owed by CTEC to Wapato under the casino sublease, primarily for the period from 1994 to 1998;
   c. for injunctive and declaratory relief to void leases that the MA-8 owners issued to CTEC, with BIA approval, after Wapato's Master Lease expired; and
   d. to quiet title to MA-8 (by expunging the United States' trust title) and partition MA-8 among the fractionated owners; and
2. Whether the district court properly exercised its discretion
   a. in denying Wapato's motion to participate in the trial of trespass damages against Mill Bay; and
   b. in denying Wapato's motion to compel discovery.

STATEMENT OF THE CASE

A. Factual Background

1. Moses Allotment Number 8

In 1879, President Rutherford B. Hayes created the Columbia Reservation in eastern Washington for several bands of Indians that had refused to move to the Yakima Reservation. *See United States v. Oregon*, 29 F.3d 481, 484-85 (9th Cir. 1994). But Chief Moses, a leader among those bands, never settled on the Columbia Reservation, and the parties quickly grew dissatisfied with the arrangement. *See United States v. Oregon*, 787 F. Supp. 1557, 1563 (D. Or. 1992).

In 1883, Moses entered a new agreement to move his followers to the nearby Colville Reservation, on the condition that individual Indians who had settled on the Columbia Reservation could remain there. *Oregon*, 29 F.3d at 486; *Oregon*, 787 F. Supp. at 1564; 3-ER_715-16. Consistent with that agreement, Congress enacted an 1884 statute authorizing the selection of lands from the Columbia Reservation for the "exclusive use and occupation" of such Indians. *See* Act of July 4, 1884, ch. 180, 23 Stat. 76, 79-80; 3-ER_718-19. Under this authority, the Department of the Interior created the "Moses Allotments," including MA-8 for Wapato John. 3-ER_591-97; 3-ER_721-23. MA-8 includes approximately 175 acres of land on the shores of Lake Chelan in Washington. 3-ER_752-53.

In 1906, Congress directed the Secretary of the Interior to issue patents for the Moses Allotments on the following terms: (1) the United States would "hold the lands . . . for [a] period of ten years . . . in trust for the sole use and benefit" of the named allottee; and (2) at the expiration of the trust period, the United States would "discharge[]" the trust and convey the land to the named Indian or his heirs in "fee." Act of Mar. 8, 1906, ch. 629, 34 Stat. 55; 3-ER_725-26. The United States issued trust patents to Wapato John for MA-8 in 1907 and 1908. 3-ER_647 (¶ 243); 3-ER 728-32.

Around the same time, Congress enacted legislation authorizing the President to extend the period of trust on any Indian allotment. Act of June 21, 1906, ch. 3504, 34 Stat. 326. Citing this authority, Presidents Wilson and Coolidge issued executive orders extending the trust period on all Moses Allotments first through March 8, 1926, 3-ER_607-08 (1914 executive order), and then through March 8, 1936. SER_180 (1926 executive order). In 1934, Congress enacted the Indian Reorganization Act, which "extended and continued" the "existing periods of trust placed upon any Indian lands and any restriction on alienation thereof" indefinitely. *See* 25 U.S.C. § 5102; *see also* 25 U.S.C. § 5126.

Since Wapato John's death, the United States has held MA-8 in trust for his heirs and devisees. 3-ER_753. Over the years, and with the passing of multiple

generations, the beneficial ownership in MA-8 became highly fractionated. 1-ER_6.

2. 1984 Master Lease

In 1979, William Wapato Evans, Jr. ("Evans"), a descendant of Wapato John, held a 5.4 percent interest in MA-8. 1-ER_103. In order to generate income from the land, Evans proposed to obtain a long-term lease from his fellow beneficial owners. 1-ER_104. Under federal law, such a lease requires BIA approval. 25 U.S.C. § 415(a). Under BIA's leasing regulations, when the ownership of an allotment is fractionated, BIA may approve a lease with the consent of a specified majority or supermajority of the Indian landowners (depending on the number of owners). *See* 25 C.F.R. § 162.012 (current regulations). After garnering the support of approximately 63 percent of the beneficial owners, Evans sought BIA approval to lease MA-8 for use as a recreational vehicle ("RV") park. 4-ER_928-931. On February 2, 1984, BIA approved the Master Lease for this purpose. 2-ER_314-339; *see also* 4-ER_805-830.

The Master Lease authorized Evans to use MA-8 "exclusively for the purpose of a recreational development" under a site development plan to be approved by BIA. 2-ER_319, 321-22. The lease specified that Evans was to pay rent to BIA for disbursal to the allottee owners, as follows: (a) an annual "base

rent"; (b) a monthly "ground rent" per camping membership sold; (c) a "percentage rent" three-and-one-half percent on retail sales; and (d) an alternative annual "minimum rent." 2-ER_316-17.

Consistent with statutory restrictions, the Master Lease had a term of 25 years beginning February 2, 1984, with an option to renew for another 25 years. 2-ER_316; *see also* 25 U.S.C. § 415(a).[1] The lease specified that Evans could exercise the option by providing notice at least one year prior to the lease's expiration "by certified mail" to the "Lessor and the Secretary." 2-ER_316, 337. To enable such notice, the lease specified that BIA would "furnish" Evans with the "current names and addresses of Lessor upon . . . request." 2-ER_337. On January 30, 1985, Evans purported to exercise the option by sending a letter to BIA, *see* 4-ER_896, but Evans did not seek the names and addresses of the allottee owners or provide them personal notice as required in the lease, *see Wapato Heritage*, 637 F.3d at 1036. For these reasons, this Court held that the renewal option was never exercised. *Id.* at 1040.

3. Mill Bay RV Park

Shortly after obtaining the MA-8 leasehold in 1984, Evans constructed 33 RV spaces, a dock, and other facilities, 4-ER_973, 5-ER_1095, and began

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[1] Congress amended the statute in 2006 to allow a 99-year lease on MA-8 and other named Indian lands. Pub. L. 110-453, title II, § 202(a)(5), 120 Stat. 339, 340 (2006).

advertising and selling park memberships, 3-ER_755-56; 5-ER_1175 (¶ 77). For a one-time membership fee (beginning around $5,995) and annual dues, members received a "contractual license to use" the RV spaces and other facilities (clubhouse, pools, tennis courts, and beaches) on a "first come first serve" basis. 4-ER_966; 5-ER_1095-96, 1100. Evans sold approximately 160 memberships to share the 33 RV spaces. *See* 4-ER_976; SER_264.

Evans planned to construct and market 750 RV spaces, which would occupy most of the leasehold. 4-ER_973. But by the late 1980s, he determined that this plan was no longer economically feasible. *Id*. Accordingly, he sought BIA approval to change the site development plan to add 24 RV spaces to be sold as "expanded memberships," and to add a 9-hole golf course. 4-ER_973-74. In 1991, following BIA approval of these changes, 4-ER_971, Evans began selling expanded memberships. *See* 3-ER_757; 4-ER_960-67; *see also* 5-ER_1092-1102 (prospectus). Like the regular memberships, the expanded memberships provided only a "contractual license to use." 4-ER_966. However, for a higher initial fee ($25,000), purchasers of the expanded memberships received a dedicated RV space for their "exclusive[]" use within the camping season under "posted rules" to be promulgated by Evans. *See* 4-ER_963; 5-ER_1103, 1106. The membership agreements assumed Evans had exercised the option in the Master Lease for a second 25-year term. 5-ER_1108. On that basis, the agreements stated a term

"coextensive with the fifty (50) year term" of the Master Lease. 4-ER_966. Evans sold 23 expanded memberships. SER_264.

4. Casino Sublease

In addition to the above changes to the leasehold development plans, in August 1993 Evans entered a sublease ("Casino Sublease") with the Colville Tribal Enterprise Corporation ("CTEC"), a corporate instrumentality of the Tribes, to enable CTEC to construct and operate a gaming facility on a five-acre portion of the MA-8 leasehold. 4-ER_841-861; *see also* 2-ER_341-61; 4-ER_976. The Casino Sublease stated a term through 2034, again assuming the renewal option had been exercised. 4-ER-842. In addition to a "base" rent of $1,000 per year, CTEC agreed to pay Evans a "percentage rental" equal to five percent of retail sales, which CTEC was to report quarterly on a "form to be prescribed by Evans." 4-ER_843. The parties agreed that any dispute under the Casino Sublease would be "submitted and tried in the Colville Tribal Court" and subject to that court's "exclusive jurisdiction." 4-ER_859. CTEC agreed to waive tribal sovereign immunity with respect to any such action. *Id*.

In 1994, upon the casino's opening, Evans and CTEC amended the sublease. 2-ER_363-67; *see also* Wapato Brief at 8. Through the amendment, Evans agreed to allow CTEC to use an additional four acres of the MA-8 leasehold, and CTEC

agreed to pay increased rent, namely, a base rent of $2,500 per year and a total of six percent of retail sales. 2-ER_364.

5. Wapato Heritage, LLC

Evans died in September 2003. 3-ER_513. About one year earlier, in July 2002, Evans incorporated "Wapato Heritage, LLC" for conducting his business interests. 1-ER_8, 109. In his will, Evans granted his non-trust business assets to Wapato. 1_ER_8, 109. Evans also granted Wapato a life estate in his beneficial ownership (as allottee) in MA-8, which by then had grown to 23.8 percent. 1-ER_109; 3-ER_492-93, 513, 522. This life estate is measured by the life of Evans's last surviving grandchild. 3-ER_522. The Tribes hold the reversionary interest that vests upon expiration of the life estate. 1-ER_109; 3-ER_523.

6. Litigation and Settlement over RV Park

In 2001, Evans threatened to permanently close the Mill Bay RV Park for financial reasons. 1-ER_109. In 2002, Plaintiff Paul Grondal and other Mill Bay members filed a class action suit in state court, seeking injunctive relief to prevent a closure. 5-ER_1080, 1112. After Evans's death, the suit proceeded against Evans's estate. *See* 5-ER_1111-12. In September 2004, the parties reached a mediated settlement. *See* 5-ER_1111-26. Under the 2004 settlement, the Mill Bay members agreed to pay increased "rents" to Evans (in place of annual membership fees) in exchange for "use of the Park" through 2034. 5-ER_1113-16.

7. Sells Report

In 2005 (approximately two years after Evans's death), BIA retained the Sells Group, an accounting firm, to conduct a review under agreed procedures of payments made by and to Evans and Wapato under the Master Lease and the casino sublease. 1-ER_63. The Sells group completed its report on December 29, 2005, 2-ER_301-312 ("Sells Report"). BIA received the report in January 2006. 1-ER_63.

The Sells Report determined that, between 1996 and 2005, Evans (and later Wapato) overpaid rents due to the MA-8 owners under the Master Lease in the total amount of $751,285. 2-ER_302. According to the report, Evans (and Wapato) paid the alternative rent under the Master Lease in addition to other rents and at times when it was not due; and, for a period of approximately three years (1999 to 2001), Evans paid more than 3.5% of retail sales from the casino. 2-ER_302-03.[2]

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[2] Under the Casino Sublease, CTEC agreed to pay Evans 5% of retail sales from the casino, 4-ER_843; under the 1994 amendment, CTEC agreed to pay Evans 6% of such sales, 2-ER_364. Under the Master Lease, Evans was to pass a portion of this income—namely, 3.5% of casino retail sales—to MA-8's beneficial owners. 2-ER_316-17. Accordingly, Evans owed MA-8's owners 70% of the percentage rent he received from CTEC, if and when CTEC owed Evans 5% of casino retail sales (3.5% divided by 5%); and Evans owed MA-8's owners 58% of the percentage rent he received from CTEC, if and when CTEC owed Evans 6% (3.5% divided by 6%). The Sells Report determined that Evans paid MA-8's owners 70% of the percentage rent received from CTEC from the last quarter of 1998 through 2001, when Evan should have paid only 58%. 2-ER_302-03.

The Sells Report also determined that CTEC underpaid rent due to Evans under the Casino Sublease in the amount of $866,248. 2-ER_302. According to the report, between 1994 and the 1998, CTEC paid Evans 5% of retails sales instead of the 6% prescribed in the 1994 amendment. 2-ER_302, 306.

8. Expiration of Master Lease

Around the time of the Sells Report, Wapato was engaged in discussions with MA-8 owners in an effort to obtain a 99-year lease to replace the Master Lease, which would enable Wapato to pursue a residential development on unoccupied portions of the land.[3] 4-ER_776. Wapato's efforts and questions from allottee owners prompted BIA to undertake a review of the status of the Master Lease. 3-ER_761; *see also* 4-ER_978-79.

On November 30, 2007, BIA alerted Wapato in writing that the lease renewal option had not been exercised. 4-ER_1051. BIA explained that Evans "purported to exercise" the option in the 1985 letter, but that BIA had no record that Evans notified the allottee owners as required by the Master Lease. *Id.* BIA concluded:

> As a consequence, it is now our position that *Lessee's option to renew has not been exercised effectively to date*. If your records indicate otherwise please provide us with copies as soon as possible.

[3] *See supra*, p. 9, n.1.

Id. At this time, there were two months remaining within which Wapato could have renewed the Master Lease, merely by providing written notice by certified mail to the landowners. *See* 2-ER_316, 337.

Instead of taking such steps, Wapato sent a letter to BIA disagreeing with BIA's lease interpretation and arguing that BIA was bound by the statement in the Casino Sublease that the Master Lease already had been extended to 2034. 4-ER_1059-60. In August 2008, after the deadline for renewal passed, BIA reiterated its determination that the Master Lease had not been renewed and notified Wapato that the lease would expire in February 2009. *See Wapato Heritage*, 637 F.3d at 1036. Wapato promptly filed suit in federal district court to challenge BIA's action. *Id.* The district court upheld BIA's interpretation and this Court affirmed. *Id.* at 1040.

9. 2009 & 2014 Leases to CTEC

In March 2009, after the expiration of the Master Lease, the allottee owners granted and BIA approved a short-term (five-year) replacement lease to allow CTEC to continue operating on the nine-acre site previously governed by the Casino Sublease. *See* 1-ER_64; 3-ER_660-99. Thereafter, in January 2014, BIA approved a new long-term site-development lease, granting CTEC development

rights on nearly all of MA-8. *See* 2-ER_273 (¶ 2), 278-294.[4] Like the 1984 Master Lease, the 2014 lease has a term of 25 years with an option to renew for a second 25-year period. 2-ER_282. Under the 2014 lease, CTEC is obligated to pay an annual base rent of $100,000 and an additional rent of 4.5% of gaming revenue multiplied by the current percentage of trust ownership in MA-8. 2-ER-_284.

B. Course of Proceedings

1. Complaint and counterclaim

Mill Bay filed the present action in January 2009, asserting its members' right to remain on the leasehold through 2034—notwithstanding Wapato's failure to renew the leasehold—based on the following theories: (1) "estoppel," (2) "waiver and laches," (3) contract "modification," (4) BIA's alleged "arbitrary and capricious" conduct, and (5) the alleged lack of an "adequate compensatory remedy" for the alleged Fifth Amendment taking that would occur if Mill Bay's possessory rights were denied. 5-ER_1192-1202. Mill Bay named as defendants the United States, the Department of the Interior, and BIA, as well as all beneficial owners of MA-8, including Wapato, the Tribes, and individual Indian allottees. 5-ER_1165-66. The United States filed a counterclaim against Mill Bay, seeking

[4] The 2014 lease excludes use of the Mill Bay RV Park area, pending resolution of the present litigation, unless allowed by court order. 2-ER_282.

an order of ejectment and damages for Mill Bay's ongoing trespass. 5-ER_1154-55.

2. 2010 summary judgment ruling

In January 2010, in an order on cross-motions for summary judgment, the district court (Judge Quackenbush) granted partial summary judgment rejecting all of Mill Bay's affirmative claims against the federal defendants. 4-ER_774, 788. The court held that it lacked jurisdiction over Mill Bay's claims due to the absence of an applicable waiver of sovereign immunity, and that most of the claims (if asserted as affirmative defenses to trespass) lacked merit. 3-ER 766-771; 4-ER_774, 777-86.

As for the United States' trespass action against Mill Bay, the Court found it "may be premature." 4-ER_775-76. Under then-applicable BIA regulations, when a tenant or licensee refused to vacate Indian trust land upon the termination or expiration of a lease, BIA would treat the holdover as a trespass and take action to recover possession for the Indian landowners, "unless" BIA had "reason to believe that the tenant [was] engaged in negotiations with the Indian landowners to obtain a new lease." *See* 4-ER_775 (quoting 25 C.F.R. § 162.623 (2001)); *see also* 25 C.F.R. § 162.471 (current provision). The court observed that Wapato had engaged the allottee owners in discussions over a potential 99-year lease. 4-ER_776. And the court determined that the record was lacking as to whether

BIA had consulted with the allottee owners on their desire to issue such a lease (under which Wapato presumably would allow the Mill Bay RV Park to remain). 4-ER_776-77.

3. Cross-Claims Between Wapato and United States

Thereafter, Defendant Wapato filed an answer to Mill Bay's complaint, along with a cross-complaint against all defendants. SER_214-55; *see also* 3-ER_626-659 (first amended complaint). Wapato asserted eight cross-claims: (1) a claim for declaratory judgment with respect to the ownership status of MA-8 and the validity of the 2009 lease issued to CTEC after the expiration of the Master Lease; (2) a claim to quiet title to MA-8 by declaring it to be held in fee, free of any trust restriction; (3) a claim to estop the United States and allottee owners from asserting that the Master Lease was not renewed in 2009 for the 25-year period through 2034; (4) a claim to eject CTEC from MA-8 absent the payment of adequate rent consistent with the 1993 Casino Sublease as amended in 1994; (5) a claim for a monetary judgment against the allottee defendants in the amount of $751,285—the alleged overpayment of rent under the Master Lease as determined in the Sells Report—plus prejudgment interest; (6) a claim to compel BIA "as fiduciary for the MA-8 owners" to collect rent payments allegedly due from the

Tribes under the 1993 Casino Sublease, plus prejudgment interest;[5] (7) a claim to partition MA-8 (predicated on a claim to fee title); and (8) a claim for attorney fees and costs. 3-ER_651-57.

In its answer to Wapato's cross-complaint, the United States asserted a cross-claim against Wapato, on behalf of the Indian owners of MA-8, for rent due on retail sales from casino operation for the months of January and February 2009. 3-ER_621-22.

4. Ruling on Allottee Representation

The United States renewed its motion for summary judgment on the trespass claim in 2012. *See* 1-ER_118. The United States reported that it had consulted with allottee owners, that there were no ongoing negotiations between the owners and Wapato over a replacement lease, and that the allottee owners supported ejectment of Mill Bay. 1-ER_118-19. The district court determined, in light of Wapato's cross-claim, that the ownership status of MA-8 was now a "key" issue in the case. 1-ER_120-121. The court directed the United States to take specified steps to ensure that individual allottees who wanted counsel received independent

[5] Citing the Sells Report, the cross-claim alleged $751,285 was "due" from the Tribes. 3-ER_655. As explained *supra*, the Sells Report actually determined that CTEC failed to pay $866,248 in rent due under the Casino Sublease. 2-ER_302.

representation on this issue. 1-ER_121.[6] The United States ultimately sent personal notice to all allottees to inquire about their desire for representation, and the United States helped secure pro bono representation for all allottees who wished such representation. *See* SER_142. All allottees who appeared in this case (through counsel or pro se) supported the United States' trust title and action for ejectment. *Id.*

In September 2019, the case was transferred from Judge Quackenbush to Judge Peterson. 1-ER_122. By memorandum order dated March 26, 2020, Judge Peterson held that the United States had no legal obligation to obtain independent counsel for the allottee defendants and that no further action by the United States to provide allottee representation was required. SER_144. Wapato appealed from this interlocutory order. *Grondal v. United States*, Ninth Cir. No. 20-35357. That appeal has been fully briefed, was argued on August 9, 2021, and remains pending.

5. Ruling on Ejectment

On July 9, 2020, Judge Peterson issued a memorandum order granting the United States' renewed motion for summary judgment on ejectment. 1-ER_101-171. The court accepted Mill Bay's view that the trust status of MA-8 is relevant

[6] Federal counsel did not appear in this case on behalf of the individual allottees. The United States undertook the trespass action pursuant to its regulatory authority to act on behalf of the Indian owners of MA-8. *See* 25 C.F.R. § 162.471; *see also id.* § 162.023.

for determining the United States' "standing" to prosecute the trespass claim. 1-ER_121, 124, 150. But the court determined that Mill Bay is judicially estopped from denying MA-8's trust status, as Mill Bay asserted the opposite view in earlier pleadings. 1-ER_124-27. And the court held that MA-8 remains trust land in any event. 1-ER_127-150. The court rejected Mill Bay's additional defenses, found Mill Bay to be in trespass, and ordered Mill Bay's ejectment. 1-ER_170-71. Mill Bay and Wapato both appealed from the ejectment order. *See Grondal v. United States*, Ninth Cir. No. 20-35694. That appeal also has been fully briefed, was argued on August 9, 2021, and remains pending.

C. Orders in Present Appeal

1. Order Dismissing Wapato's Cross-Claims

Following the order granting Mill Bay's ejectment, the defendants filed various motions on Wapato's remaining cross-claims. As relevant here, the Tribes moved to dismiss all of Wapato's cross-claims (as against the Tribes) on the grounds of tribal sovereign immunity. 6-ER_1373 (Dkt. No. 571). The United States moved to dismiss all of Wapato's cross-claims for lack of jurisdiction (lack of an applicable waiver of federal sovereign immunity) and failure to state valid claims. 6-ER_1373 (Dkt. No. 570). And in an apparent concession that the district court lacked jurisdiction over its cross-claims seeking money judgments against the United States, Wapato moved to transfer those claims to the United

States Court of Federal Claims ("CFC") per 28 U.S.C. § 1631, or, in the alternative, to have the court "entertain" the cross-claims as affirmative defenses or "setoffs" against the United States' claim for nonpayment of rent against Wapato. SER_58.

By order dated January 19, 2021, the court dismissed Wapato's cross-claims and denied Wapato's motion for transfer. 1-ER_63-100; *see also* SER_27 (judgment of dismissal).[7] The court held that Wapato lacked viable claims against the United States in the CFC or in the district court for various reasons, including: (1) because the United States, as a non-party to the Master Lease, had no contractual liability under the Master Lease; and (2) because Wapato identified no substantive duty owed to Wapato (a non-Indian corporation) under BIA's regulations. 1-ER_74-98. The court further held that the Tribes were immune from Wapato's cross-claims to enforce the Casino Sublease and to void the replacement leases, because their express waiver of tribal sovereign immunity (in the sublease) was limited to enforcement in tribal court, and because the Tribes' participation as defendants in the present case did not constitute a waiver of tribal sovereign immunity. 1-ER_66-73.

[7] The order did not expressly address cross-claims two and three. After the court's order on ejectment, Wapato stipulated that these claims were no longer before the court. SER_92.

2. Order Denying Motion to Compel Discovery and Denying Wapato's Request to Participate in Trial

On January 5, 2021, Wapato and Mill Bay filed a joint motion to compel discovery and to postpone the trial on trespass damages until the completion of such discovery. 2-ER_229-245. Thereafter, to simplify the remaining issues for trial, the United States moved to voluntarily dismiss, with prejudice, its cross-claim against Wapato. 2-ER_187-90. By order dated February 2, 2021, the district court granted the United States' unopposed motion. 1-ER_41-59.

In the absence of any remaining claims by or against Wapato, the district court also ordered Wapato dismissed as a party. 1-ER_59. Wapato argued that it had "standing" to participate either: (1) as an "allottee" defendant "injured" by Mill Bay's trespass; or (2) in light of its potential liability (in a future suit) for trespass damages awarded against Mill Bay. MA-8. 1-ER_46, 58. The district court held that Wapato is not an "allottee" to whom BIA owed fiduciary duties, and that Wapato could not claim injury from Mill Bay's trespass, in light of its litigation position (asserted jointly with Mill Bay) that there was no trespass. 1-ER_46-52. The district court further determined that the mere possibility of a future indemnification claim by Mill Bay against Wapato did not give Wapato standing to defend against the trespass claim. 1-ER_58-59.

Given Wapato's dismissal as a party, the district court determined that the "joint" motion to compel discovery was moot as to Wapato. 1-ER_54. In

addition, because the motion concerned discovery requests by Wapato (as opposed to requests by Mill Bay), the court determined that Mill Bay lacked "standing" to pursue the motion. 1-ER_54-55. Finally, the court determined that, even if Mill Bay had standing to move to enforce Wapato's discovery requests, the requests were overbroad and constituted a "fishing expedition" unrelated to the "discrete issue" of trespass damages in this case. 1-ER_57-58.

D. Trial on Trespass Damages and Final Judgment

Trial on Mill Bay's trespass damages was held on March 30-31, 2021. 1-ER_5. The parties presented competing expert evidence on the fair market rent owed to the MA-8 owners for the portion of the leasehold occupied by Mill Bay during the trespass period. 1-ER_16-20. Based on a determination that the "highest and best use" was residential development, the United States' expert estimated that the lost fair market rent was $1,674,600. 1-ER_16-18. Based on a determination that the "highest and best use" was the actual use as an RV park, Mill Bay's expert testified that the lost fair market rent was $1,411,742. 1-ER_18-19. The court adopted Mill Bay's estimate. 1-ER_22-23. After finding pre-judgment interest to be inappropriate, but rejecting other arguments by Mill Bay for reducing damages, the court entered judgment against Mill Bay in the amount of fair market rent determined by Mill Bay's expert. 1-ER_39-40; *see also* 1-ER_2 (final judgment).

SUMMARY OF ARGUMENT

A. Dismissal of cross-claims

1. Cross-claims five and six

The district court correctly dismissed Wapato's cross-claims five and six. Based on findings in the Sells Report, cross-claim five sought a "money judgment" to recoup $751,285 in rent that Evans allegedly overpaid under the Master Lease, and cross-claim six sought to "compel" BIA to collect $866,248 in unpaid rents that CTEC allegedly owed to Evans (Wapato) under the Casino Sublease.[8] Unlike cross-claim five, cross-claim six explicitly sought an injunction as opposed to damages. Nonetheless, because cross-claim six sought to compel the collection of money, it was effectively a claim for damages. Because both cross-claims sought amounts in excess of $10,000 from the United States, both are outside of the sovereign immunity waiver within the Little Tucker Act, 28 U.S.C. § 1346(a). Further, because no other waiver of federal sovereign immunity applies, both cross-claims (as against the United States) were outside of the district court's jurisdiction.

In addition, even if cross-claim six (as a suit to compel agency action) can be seen to fall within the sovereign-immunity waiver of the Administrative Procedure Act—an argument Wapato does not make—Wapato failed to state a valid cause of

[8] See p. 19, n.5, *supra*.

action for such relief. Cross-claim six is in the nature of a petition for writ of mandamus. Wapato failed to meet the requirements for such a suit. Wapato identified no source of law establishing a nondiscretionary duty on BIA's part to collect rent for Indian owners of leased Indian lands, much less for non-Indian corporations, like Wapato. And Wapato had a perfectly adequate remedy—other than a suit to compel official action—for collecting rent allegedly owed by CTEC, namely, a suit against CTEC in tribal court.

Finally, Wapato abandoned cross-claims five and six as against the other defendants (the named allottees and the Tribes) in the proceedings below and in its opening brief. Accordingly, as against the other defendants, cross-claims five and six are forfeited.

2. Cross-claim one (concerning replacement leases)

The district court also lacked jurisdiction over Wapato's cross-claim for declaratory relief to void CTEC's 2009 replacement lease. That cross-claim was rendered moot when the allottee owners of MA-8 granted CTEC the 2014 lease. Wapato contends that it "meant" to extend its cross-claim regarding the 2009 lease to the 2014 lease, but the circumstances and terms of the two leases are different and Wapato seeks to challenge the 2014 lease on grounds not asserted in its cross-complaint, namely: the alleged failure to provide fair market rent. Wapato raised this new claim without exhausting administrative remedies and after the six-year

limitations period for a claim under the APA had passed. Moreover, Wapato never moved for leave to amend its cross-complaint to include a challenge to the 2014 lease. Because Wapato did not make such a motion, the district court never addressed it and it is not properly before this Court.

3. Cross-claims regarding ownership status of MA-8

Wapato asserted three cross-claims (cross-claims one, two and seven) that collectively sought declaratory relief on the ownership status of MA-8 and the remedy of partition. In its order on ejectment, the district court determined that MA-8 remains in trust status. That ruling is the subject of an earlier appeal by Mill Bay and Wapato, which has been briefed and argued in this court (Ninth Cir. No. 20-35694). If this Court affirms the district court's title determination on the merits, Wapato's related cross-claims necessarily fail.

But as the Federal Defendants/Appellants explained in the earlier appeal (20-35694), the district court lacked jurisdiction to address the title issue. The court mistakenly addressed the title issue on the view that proof of trust title was necessary to confirm the United States' "standing" to sue to eject Mill Bay. To the contrary, because Mill Bay acquired possession of MA-8 *pursuant* to federal trust title and because Mill Bay claims no title interest of its own, the United States did not need to prove federal trust title to bring the ejectment action.

In any event, even if this Court determines that the United States had to prove trust title to establish standing on the ejectment counterclaim and that the United States lacked both, the only remedy now available is an order vacating the judgment on ejectment and remanding for dismissal of the counterclaim. Wapato's cross-claims for declaratory judgment under the Quiet Title Act (28 U.S.C. § 2409a) are foreclosed by the plain terms of that statute: it does not apply to trust or restricted lands and precludes all claims that are not brought within twelve years of the earliest date on which a claimant or its predecessor knew or should have known of the United States' claim. Because Evans expressly acknowledged federal trust ownership when seeking BIA's approval of the Master Lease in 1984, and because Wapato asserts fee ownership based on events that occurred prior to 1984, Wapato's cause of action accrued no later than 1984. Wapato's cross-complaint was not filed until 2010 and is plainly precluded.

B. Order dismissing Wapato as a party and denying Wapato's motion to compel discovery.

For the reasons stated above, the district court correctly dismissed all cross-claims asserted *by* Wapato. The district court also granted the United States' unopposed motion to voluntarily dismiss its cross-claim *against* Wapato, and the district court dismissed all claims asserted by Mill Bay as against all defendants (including Wapato). Having thus dismissed all claims by and against Wapato, the district court properly denied Wapato's request to participate in the trial on trespass

damages (owed by Mill Bay), and properly denied Wapato's associated motion to compel discovery. Wapato asserts that it had the right to participate in the trial as an intervenor-defendant. But Wapato could have brought an immediate appeal from the order excluding it from trial. Now that the trial is complete and a final judgment has been entered, Wapato's request is moot. Mill Bay has not appealed the final judgment on trespass damages and Wapato concedes that the judgment is not binding on it, even if Mill Bay were to seek indemnification.

Nor does Wapato itself allege error in the trespass judgment or show that its participation at trial would have made any difference in the trespass judgment. Because Wapato never promised to indemnify Mill Bay and never conceded liability to Mill Bay, Mill Bay shared Wapato's objective of minimizing trespass damages. Significantly, while Mill Bay joined Wapato's pretrial motion to compel discovery, Mill Bay does not now join Wapato's appeal from the denial of the motion. The reason for Mill Bay's decision is self-evident: because the district court adopted Mill Bay's evidence of fair rental value based on MA-8's actual use during the trespass period, the discovery request concerning potential alternative uses of MA-8 is irrelevant. Nothing sought in the discovery requests could have led to a lower valuation of trespass damages. Wapato fails to show otherwise.

ARGUMENT

I. The District Court correctly dismissed Wapato's cross-claims.

A. Standard of Review

Whether a claim was properly dismissed for lack of jurisdiction or for failure to state a claim are questions of law that this Court reviews de novo. *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, 5 F.4th 997, 1007 & n.3 (9th Cir. 2021).

B. The district correctly dismissed Wapato's claims alleging BIA mismanagement of the Master Lease.

Wapato asserted two cross-claims—claims five and six—based on findings in the Sells Report. 3-ER_655. Wapato describes both cross-claims as involving BIA "mismanagement" of the Master Lease. *See* Brief at 22. And Wapato makes one argument (*id*. at 22-31) in favor of both. But cross-claims five and six arose on different facts, sought different relief, and require separate discussion.

1. Cross-claim five was properly dismissed for lack of jurisdiction.

Cross-claim five sought a "money judgment" to recover alleged overpayments under the Master Lease that Wapato made to BIA and BIA disbursed to MA-8's owners. 3-ER_655 (¶ 284). On its face, cross-claim five sought such judgment only against the named "Defendants allottees." *Id.* It did not seek a judgment against the Tribes (which also held an ownership interest in

the alleged overpayments) or against BIA for its role in disbursing the overpayments. *Id*; s*ee also* 3-ER_650 (¶ 259) (factual allegation); 3 ER_657 (¶ 6) (prayer for relief). Wapato reframed the claim when moving to transfer it to the CFC. In its transfer motion, Wapato argued that the district court's entry of judgment on the United States' ejectment claim (against Mill Bay) "sever[ed]" the "remaining monetary claims." SER_50. And Wapato represented that it had brought "money damages claims against the Federal Government." SER_56. This change, however, raised an obvious jurisdictional defect in the district court.

a. Cross-claim five is barred by federal sovereign immunity.

As the district court observed (1-ER_76-77, 92-93), the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives federal sovereign immunity and provides district court jurisdiction over claims for monetary damages against the United States founded on the constitution, federal statutes, or contracts, but only if the amount in controversy does not exceed $10,000. *Id.*; *McGuire v. United States*, 550 F.3d 903, 910-911 (9th Cir. 2008). In contrast, under the Tucker Act, the CFC possesses concurrent jurisdiction over such claims, without any constraint regarding the amount in controversy. 28 U.S.C. § 1491(a). Because cross-claim five (as recast) sought a monetary judgment against the United States in excess of $751,285, the district court plainly lacked jurisdiction over it. *See McGuire*, 550 F.3d at 910-911. Accordingly, Wapato moved to transfer the claim to the CFC

under 28 U.S.C. § 1631, which applies when there is a "want of jurisdiction" in the district court. *Id.*; *see also* SER_49.

In the proceedings below, Wapato suggested—in the event the district court declined to transfer the case—that the district court could "entertain" jurisdiction over claim five as an affirmative defense to or "setoff" against the United States' claim for unpaid rent against Wapato. SER_58 (citing *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 511 (1940)). But the United States moved to voluntarily dismiss, with prejudice, its cross-claim against Wapato, and the district court granted that motion, without opposition from Wapato. 1-ER_45, 58. Thus, there is no remaining basis on which Wapato might assert cross-claim five as a "setoff" defense.

Moreover, Wapato does not appeal from the district court's ruling denying the motion to transfer. Rather, in its opening brief, Wapato expressly declined to "renew[]" its "request to transfer." *See* Brief at 29. Accordingly, any challenge to the denial of transfer has been waived. *See Avila v. Los Angeles Police Dept.*, 758 F.3d 1096, 1101 (9th Cir. 2014) (claims not raised in opening brief are forfeited).

To be sure, Wapato does challenge the district court's determination (in the order denying transfer) that cross-claim five failed to state a claim against the federal defendants. Among other things, the district court held that Wapato lacks a contract claim against the United States to recover overpayments under the Master

Lease because BIA is not a party to and has no contractual obligations under that lease. 1-ER_78-79. Wapato now counters (Brief at 24) that its "overpayments" claim was founded not in the contract but on BIA's fiduciary obligations to the allottee owners. This argument is a non sequitur. BIA's fiduciary obligation to the Indian landowners of MA-8 cannot plausibly extend to supporting Wapato's claim to recoup money *from* them. In any event, because Wapato no longer seeks transfer to the CFC, the relevant issue is simply whether Wapato can pursue its overpayment claim against the United States in district court. On this question, the Little Tucker Act is dispositive. See 28 U.S.C. § 1346(a)(2).

Wapato's attempt to base district court jurisdiction on 28 U.S.C. § 1331 (Brief at 2, 23) is misplaced. That statute gives the district court jurisdiction over actions arising under the laws of the United States. 28 U.S.C. § 1331. But it does not waive federal sovereign immunity. *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009). Without such a waiver, there is no subject matter jurisdiction over claims against the United States or its agencies. *Id.*

b. Wapato abandoned claim five as against the allottee defendants and Tribes.

Nor may Wapato belatedly seek to reassert cross-claim five against the individual allottees or the Tribes. As just noted, Wapato originally asserted cross-claim five *only* against the allottees. ER_650 (¶ 259), 655 (¶ 284), 657 (¶ 6); *see also* 1-ER_78-79. Nonetheless, on the Tribes' motion, the district court expressly

dismissed cross-claim five as against the Tribes, citing tribal sovereign immunity, SER_211, 213; *see also* 1-ER_66 (referencing dismissal). Thereafter, Wapato recast the claim to redirect it toward the United States and moved to transfer it to the CFC. *See* SER_48-59. As the district court observed, even if cross-claim five (as against the United States) were subject to transfer to the CFC, the CFC lacked jurisdiction to hear the claim against the allottees. 1-ER_78-79. This is so because the CFC's jurisdiction is limited to claims against the United States. 28 U.S.C. § 1491(a). Yet in moving to transfer the claim, Wapato made no effort to preserve it against the allottees. *Id.* Accordingly, in the order declining to transfer the claim, the district court ordered it dismissed as to all defendants. 1-ER_99-100; *see also* SER_27.

In its opening brief, Wapato does not argue that the district court erred in precluding Wapato from pursuing cross-claim five against the allottees. *See* Brief at 22-31. Nor does Wapato appeal the district court's ruling on tribal sovereign immunity as to cross-claim five. *Id.* at 31-36 (challenging ruling on tribal sovereign immunity only as to declaratory judgment claim). Having effectively abandoned this claim in district court (against the allottee defendants) and having failed to attempt to resurrect the claim against the allottees or the Tribes in its

opening brief, Wapato has forfeited it.[9] *See Avila*, 758 F.3d at 1101; *Ridgeway v. Walmart, Inc.*, 946 F.3d 1066, 1076 (9th Cir. 2020).

2. Cross-claim six was properly dismissed.

a. Cross-claim six is barred by federal sovereign immunity.

Construed as a claim for money damages, cross-claim six is foreclosed for the same reason that cross-claim five is foreclosed: it seeks damages greater than $10,000, 3-ER_655 (¶ 286), and thus falls outside of the sovereign-immunity waiver in the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Unlike cross-claim five, cross-claim six did not expressly seek a "money judgment." *Cf.* 3-ER_655 (¶ 284) (cross-claim five). Instead, cross-claim six purported to seek a sort of injunctive relief, namely: an order to "compel[] BIA, in its capacity as a fiduciary for the MA-8 owners, to immediately collect . . . the sum of $751,285 from the [Tribes]" for disbursal to the MA-8 owners. 3-ER_655 (¶ 286); *see also* 3-ER_657 (¶ 7) (prayer for relief). This language suggests possible reliance on a different sovereign-immunity waiver.

[9] The United States does not concede that Wapato had standing to assert its overpayment claim. Evans's right (if any) to recoup overpayments that he made prior to Wapato's incorporation belongs to his estate, not to Wapato. The district court correctly held that Wapato lacked authority to assert the estate's claim. *See* 1-ER_85-89.

Specifically, the Administrative Procedure Act ("APA") contains a waiver of sovereign immunity for suits that seek "relief other than monetary damages" and that involve claims "that an agency or an officer or employee thereof acted or failed to act in an official capacity." 5 U.S.C. § 702. Although Wapato did not assert an APA cause of action—either to set aside a final agency action, 5 U.S.C. § 706(2), or to "compel agency action unlawfully withheld," 5 U.S.C. § 706(1)—this Court has held that § 702's sovereign immunity waiver is not limited to causes of action provided by the APA. *See Navajo Nation v. United States Department of the Interior*, 876 F.3d 1144, 1167-1172 (9th Cir. 2017).

Nonetheless, this Court need not consider the applicability of § 702 to cross-claim six. Wapato bore the burden of demonstrating district court jurisdiction. *See Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 944 (9th Cir. 2021). Wapato did not invoke § 702 in its cross-complaint or rely on it in district court or in its opening brief on appeal. Thus, any jurisdictional argument based on § 702 is forfeited. See *Ridgeway*, 946 F.3d at 1076. In any event, § 702 does not apply. Actions to compel the payment of rent under a lease or the payment of other sums due under a contract are effectively claims for "monetary damages," even if expressed in terms of injunctive relief. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211-12 (2002). However denominated, cross-claim six is a claim for "monetary damages" and thus excluded from the scope of § 702.

b. Cross-claim six fails to state an actionable claim.

Even if subject matter jurisdiction is presumed, cross-claim six is readily dismissed for failing to state an actionable legal obligation. In seeking to compel BIA to carry out an alleged official duty on behalf of MA-8 owners, cross-claim six is essentially a petition for writ of mandamus. *See* 3-ER_655 (¶ 286), 657 (¶ 7).[10] To state such a claim, Wapato must show: (1) a "clear and certain" right to relief; (2) that BIA's duty was "nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt," and (3) that "no other adequate remedy is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir.1998)). Wapato cannot make this showing.

To begin with, Wapato cannot show a "nondiscretionary duty." *See Patel*, 134 F.3d at 931. In attempting to establish such a duty (Brief at 24), Wapato principally relies on 25 C.F.R. § 162.108 (2001). Under that provision, BIA committed to

> ensur[ing] that tenants [of trust or restricted lands] meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of *appropriate* collection and enforcement actions . . .

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[10] As noted *supra* (p. 36), Wapato did not bring an action under the APA to compel agency action "unlawfully withheld." *See* 5 U.S.C. § 706(1). But jurisdiction over actions "in the nature of mandamus to compel a . . . [federal] agency to perform a duty owed" is also granted under 28 U.S.C. § 1361. In both cases, the pleading requirement is "essentially the same." *Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019); *see also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63–64 (2004).

Id. (emphasis added). The term "appropriate" plainly admits enforcement discretion. And an agency's discretion "is at its height when the agency decides *not* to bring an enforcement action." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (emphasis added). Indeed, such a decision is "presumptively unreviewable." *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 760 (9th Cir. 2021) (citing *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985)).

Moreover, under a regulatory revision completed in 2012, the above provision (§ 162.108) applies only to *agricultural* leases. *See* 77 Fed. Reg. 72,440, 72,474 (Dec. 5, 2012). The current provision for *business* leases—also cited by Wapato (Brief at 24)—states only that BIA "*may* take action to recover unpaid compensation" under leases of allotted lands "[f]ollowing consultation . . . where feasible, with Indian landowners." 25 C.F.R. § 162.467(b) (emphasis added); *see also* 25 C.F.R. § 162.008 (amendments apply retroactively unless in conflict with existing lease). Plainly, this is not a "nondiscretionary duty."

In addition, Wapato had a perfectly adequate remedy—other than suing to compel BIA to take action against CTEC—for obtaining unpaid rent from CTEC. *See Patel*, 134 F.3d at 931. Under the terms of the Casino Sublease, Wapato could have simply brought an action directly against CTEC in tribal court. *See* 4-ER_859.

Indeed, even if that negotiated remedy was somehow unavailable and a suit against BIA was Wapato's only recourse, Wapato could have brought a Tucker Act claim for damages in the CFC, as amply demonstrated by Wapato's motion to transfer.[11] It is true the district court denied transfer to the CFC on the grounds that BIA lacked any legal obligation to collect rent on behalf of MA-8 owners. 1-ER_75-76. But if there were such a federal obligation—as distinguished from CTEC's contractual obligation under the sublease—a suit for damages against the United States presumably would have been available in the CFC and would have provided full relief to Wapato. As already noted, Wapato chose in this appeal not to challenge the district court's denial of transfer. *See* Brief at 29. Wapato cannot rely on its own voluntary waiver of an "adequate remedy" as a predicate for seeking the extraordinary remedy of mandamus. *See Kildare*, 325 F.3d at 1084.

c. Cross-claim six is factually unsupported.

In addition, even if BIA had a nondiscretionary duty to collect unpaid rent owed to the MA-8 owners, cross-claim six is readily dismissed for failing to allege a factual basis for triggering that duty. The gravamen of cross-claim six is the assertion that the Tribes failed to pay rent owed to Evans (as lessor to the Tribes)

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[11] Although claim six does not explicitly seek a judgment against the Tribes, 3-ER_655 (¶ 286), the Tribes asserted tribal sovereign immunity on that claim and the district court agreed, 1-ER_67-69, dismissing the claim as to all defendants. 1-ER_100. Wapato does not challenge that ruling on appeal. *See* Brief at 22-31 (challenging dismissal only as to claims against BIA).

under the Casino Sublease. *See* 3-ER_650 (¶ 259). Based on that alleged underpayment, Wapato seeks an order to compel BIA to collect the underpaid amount for the "MA-8 owners." 3-ER_655 (¶ 286).[12] But that claim presumes facts never alleged or existing. Wapato relies on the Sells Report. 3-ER_650 (¶ 259). That report concludes that CTEC underpaid Evans and Wapato under the Casino Sublease; it does not show that the cited underpayment (or any other) was owed to the MA-8 owners. *See* 2-ER_302-03, 306.

In particular, the Sells Report indicates that CTEC underpaid Evans by paying 5% of retail sales from casino operations at times (between 1994 and 1998) when CTEC owed Evans 6% of such sales, assuming the applicability of the 1994 amendment. 2-ER_302, 306. Had CTEC paid the greater amount, Evans would have received greater income under the Casino Sublease. *Id.* But Evans's obligation to MA-8's owners under the Master Lease would have remained unchanged. *Id.* As stated in the Sells Report, Evans owed 3.5% of retail sales from the casino to the MA-8 owners, without regard to whether Evans received 5% or 6% of such sales under the Casino Sublease. *Id.* Wapato does not allege, and the Sells Report does not show, that Evans failed to pay the 3.5% of retail sales

[12] As noted (pp. 19, n.5, supra), cross-claim six references the sum of $751,285, 3-ER_655 (¶ 286), which is the amount that Evans allegedly overpaid the MA-8 owners, 3-ER_650 (¶ 259). The cross-complaint alleges an underpayment (amount due from CTEC) of $866,248. *Id.*

owed to MA-8's owners, along with other rent due under the Master Lease. *See supra*, p. 13, n.2; *see also* 3-ER_650 (¶ 259). To the contrary, the Sells Report concluded that Evans substantially *overpaid* the MA-8 owners. 2-ER_302-03.

In short, while the Sells Report suggests that Wapato—as lessor of the Casino Sublease—had a claim for unpaid rent against CTEC, *see* 2-ER_302, 306, it does not show that the *MA-8 owners* had any claim to that allegedly unpaid rent. *See* 2-ER_302-03. Yet Wapato brought cross-claim six specifically in its capacity as a partial owner of MA-8 and purportedly "for . . . the MA-8 owners," and not in its capacity as lessor of the Casino Sublease. 3-ER_655 (¶ 286). Cross-claim six fails because Wapato has not alleged or shown a factual basis for a cause of action by the MA-8 owners.

d. Wapato lacks standing to pursue claim six.

Finally, even if the MA-8 owners had a factual basis for seeking unpaid rent from CTEC (which they did not), Wapato lacked standing to represent the Indian owners of MA-8 in a suit against BIA. As the holder of a life estate in MA-8, Wapato has a right to a proportional share of rent or other income derived from the lease of MA-8. *See* 25 C.F.R. § 179.101(b). Nonetheless, it does not follow that BIA owed fiduciary duties to Wapato with respect to lease enforcement. Under its leasing regulations, BIA exercises trust duties for any "Indian landowner," *see* 25 C.F.R. §§ 162.021, 162.022, a term defined to mean any "tribe or individual Indian

who owns an interest" in land held in "trust or restricted status," *see id.* § 162.003 (definitions of "Indian land" and "Indian landowner"). The regulatory provisions that Wapato seeks to enforce (Brief at 24) specifically refer to "Indian landowner[s]." *See id.* §§ 162.108; 25 C.F.R. § 162.467. As the district court observed below, and as this Court observed in a prior appeal, Wapato is a limited liability corporation, not a tribe or an individual Indian to whom BIA owes fiduciary duties. 1-ER_85; *Wapato Heritage, L.L.C. v. United States,* 423 F. App'x 709, 711 (9th Cir. 2011).

Wapato responds by pointing to a different set of regulations (Brief at 31) that authorize and direct BIA to establish and utilize "individual Indian money" or "IIM" accounts for non-Indians who hold life estates in trust or restricted lands. *See* 25 C.F.R. § 115.504; *see also* 25 C.F.R. § 179.101(b). But those regulations only concern the distribution of rent and income derived from trust or restricted lands. *Id.* Contrary to Wapato's suggestion (Brief at 31), these regulations do not establish specific "lease-enforcement duties" to non-Indians. *Id.*

Nor is there merit to Wapato's suggestion (Brief at 25-31) that it inherited cross-claim six as a "chose in action" (right of suit) from Evans and therefore stands in the same shoes as Evans with respect to duties that BIA owes, under its leasing regulations, to Indian landowners. Cross-claim six alleges that BIA failed to take official action upon receipt of the Sells Report. *See* 3-ER_650 (¶¶ 259-

260). As the district court correctly observed (1-ER_87), this alleged cause of action arose after Evans's death and could not have been inherited from him. To state a cause of action against BIA for failing to take official action in response to the Sells Report, Wapato had to identify a regulatory duty that BIA then owed to Wapato (as a non-Indian owner of a life estate in MA-8).

Wapato suggests (Brief at 17, 24) that BIA owed such a duty (to collect unpaid rent owed to Wapato by CTEC) because Sandra Evans—Bill Evans's daughter and member of the Tribes—is presently entitled to 20 percent of the revenue from Wapato's life estate. But Sandra Evans held no interest in Wapato at the time of the Sells Report.[13] And any interest in the corporation that she presently holds does not make her an allottee owner of MA-8. The corporation holds the life estate and is not an Indian allottee. 1-ER_8, 46-49. Moreover, BIA owed no obligation to Wapato as the *lessee* of MA-8, even if it were an Indian. As explained above, BIA's trust obligations for lease approval, administration, and enforcement are to the "Indian landowners" of trust and restricted lands, not to the

[13] To show Sandra Evans's interest, Wapato cites two pages from a September 2005 settlement of Bill Evans's estate. *See* Brief at 17 (citing 4-ER_1008, 1032). But those pages are inapposite. In the relevant provisions of the 2005 settlement, Sandra Evans expressly *disclaimed* any interest in Wapato and MA-8. 4-ER_1010, 1019, 1026, 1029. Wapato has not alleged how or when Sandra Evans came to hold an interest in the corporation or the nature of that interest, and Wapato made no argument relating to Sandra Evans's interest in district court. Wapato's present argument, made for the first time on appeal, may be disregarded. *See Padgett v. Wright,* 587 F.3d 983, 985 n.2 (9th Cir. 2009).

lessees. 25 C.F.R. §§ 162.021-162.022, 162.467; *see also* 25 C.F.R. § 162.108 (2001).

Finally, it bears noting that any right to income under the Master Lease that Bill Evans possessed as an allottee owner of MA-8 was a right that Evans possessed against himself as holder of the Master Lease. It was Evans's duty, as sub-lessor, to collect rent from its sub-lessee CTEC. And it was Evans's duty to pay rent to the MA-8 owners, including rent owed on income derived from the Casino Sublease. Thus, Evans and Wapato (as Evans's successor) were responsible for every transaction and for every transactional error cited in the Sells Report, for which Wapato now seeks to hold BIA liable. *See* 2-ER_302 (Sells Report) (attributing accounting errors to Evans's "bookkeeper.") In this regard, Wapato does not stand in the same shoes as the Indian allottee owners, whose interests Wapato purports to represent (through cross-claim six).

C. The district court correctly dismissed Wapato's claim for declaratory relief on the "replacement" leases.

The district court also correctly dismissed Wapato's cross-claim (part of cross-claim one) for declaratory relief concerning the 2009 "replacement lease." As explained *supra* (p. 15), the 2009 lease was issued by the allottee owners of MA-8 to replace the Casino Sublease after Wapato's Master Lease (and right to sublease) expired. Wapato sought a declaration that the 2009 lease was "void ab initio" on multiple grounds. 3-ER_652-53 (¶ 273). As relevant here, Wapato

alleged: (1) that the Tribes and BIA colluded against the interests of the allottee owners and failed to properly acquire the allottee owners' consent for the 2009 lease; and (2) that the Tribes and BIA excluded Wapato from the negotiations over the 2009 lease. *Id*; *see also* Brief at 9-10, 31-32. The district court correctly dismissed these allegations as moot because the 2009 lease is no longer in effect, having been replaced by the 2014 lease. 1-ER_97. Wapato's purported claim against the 2014 lease (Brief at 32) is not properly before the Court.

1. Wapato's challenge to the 2009 lease is moot.

Under Article III of the Constitution, "a live controversy [must] persist throughout all stages" of a case. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc). If intervening events deprive a court of its ability to grant effectual relief, the court loses jurisdiction to render a judgment on the relevant claim. *Bayer v. Neiman Marcus Group*, 861 F.3d 853, 862 (9th Cir. 2017). Because the 2009 lease has no ongoing effect, *see* 2-ER_273, any order declaring it void for reasons alleged by Wapato would provide Wapato no meaningful relief.

In response, Wapato summarily asserts (Brief at 32) that a claim to recover "fair market value for the Tribe's occupation" under the 2009 lease is "not too late." But Wapato never alleged—in its cross-complaint or briefs before the district court—that the 2009 lease failed to provide fair market rent. *See*

3-ER_652-53 (¶ 273) (cross-complaint). In response to the Tribes' motion to dismiss, Wapato proffered the 2014 lease and argued that it failed to provide fair market rent. SER_31, 43-44. But Wapato did not then make the same allegation regarding the 2009 lease. *Id.* Wapato makes that allegation (and an implied claim for damages) for the first time on appeal. *See* Brief at 3, 32. That new claim (regarding the 2009 lease) plainly is too late. *Padgett v. Wright,* 587 F.3d 983, 985 n.2 (9th Cir. 2009). And the claim Wapato actually stated against the 2009 lease plainly is moot. *See Bayer*, 861 F.3d at 862.

2. Wapato failed to properly assert a claim concerning the 2014 lease.

Alternatively, Wapato argues (Brief at 32) that the district court should have allowed its cross-claim—originally asserted as a challenge to the 2009 lease—to proceed as a challenge to the 2014 lease. Wapato represents (Brief at 3) that both leases had the "same unfair terms" and contends (*id.* at 32) that it "plainly meant to extend" its declaratory-relief claim "to the expanded 2014 lease." This argument suffers from multiple flaws.

First, as just noted, Wapato's cross-complaint did not even disclose, much less challenge, the financial "terms" of the 2009 lease. 3-ER_652-53 (¶ 273).[14]

[14] The financial terms of the 2009 lease are not in the record. *See id* (complaint); 3-ER_661 (2009 lease with financial terms redacted); *see also* 2-ER_273 (allegations regarding 2014 lease).

Instead, Wapato objected to being excluded from the *negotiation* of the 2009 lease. *Id.* While Wapato now reiterates this same *procedural* objection with respect to the 2014 lease (Brief at 9), there is no legal basis for the objection. Under BIA's leasing regulations, CTEC was required to negotiate with, provide notice to, and obtain the necessary majority consent from the "Indian landowners" of MA-8. *See* 25 C.F.R. §§ 162.010(a)(1), 162.012. CTEC was not required to negotiate with Wapato, a non-Indian owner of a life estate. *Cf. id.* § 162.010(a)(1). Moreover, assuming that the requisite consent is obtained and other terms are met, BIA may approve a lease over the objection of any minority fractional owner, Indian or non-Indian. *Id.* §§ 162.010, 162.012, 162.441.

Second, although leases of lands held in trust for individual Indians (as opposed to tribes) generally must provide "fair market rental," *id.*, § 162.421(a), the 2009 and 2014 leases are for fundamentally different tracts of land that command different fair-market rents. The 2009 lease was limited to the nine acres of MA-8 occupied by the tribal casino. 3-ER_660. In contrast, the 2014 lease was an "expanded lease" covering nearly all of MA-8, or close to 175 acres. *See* Brief at 9; 2-ER_281. Accordingly, even if Wapato had challenged the fairness of the financial terms of the 2009 lease, that challenge would not translate to the 2014 lease.

Third, Wapato's present (belated) challenge to the financial terms of the 2014 is misleading. Wapato contends (Brief at 9) that the 2014 lease *reduced* to 4.5% the percentage rent (on casino sales) owed to MA-8's owners. *See also* 2-ER_273. But this contention confuses the relevant leases. While the 1993 Casino Sublease (as amended in 1994) provided for a higher percentage rent of 6% of casino sales, that percentage rent was due to Evans, not to the MA-8 owners. *See* 2-ER_364. Under the 1984 Master Lease, Evans (and Wapato) owed the MA-8 owners a percentage rent of only 3.5% of retail sales. 2-ER_302, 316-17. In relation to the Master Lease—the immediately preceding lease of MA-8 as a whole—the 2014 lease *increased* the percentage of retail sales due to the MA-8 owners to 4.5%. 2-ER_284.

Fourth, Wapato's arguments concerning the 2014 lease were not timely. The Superintendent of BIA's Colville Agency approved the 2014 lease on January 28, 2014. 2-ER_292. Wapato did not file an administrative appeal from that approval decision, as provided for in BIA regulations. *See* 25 C.F.R. § 162.025; *see also id.*, §§ 2.2, 2.6. And Wapato did not make any argument in the present proceedings concerning the 2014 lease until Wapato filed its November 2020 response to the Tribes' motion to dismiss. *See* 2-ER_273; SER_31, 43-44. By that time, the six-year period for challenging BIA's lease-approval decision under the APA had already run. *See* 28 U.S.C. § 2401.

Finally, Wapato never formally moved to amend its cross-claim to challenge the 2014 lease. *See* SER_28-47. Wapato proffered the lease evidently to argue a different point: to demonstrate a waiver of sovereign immunity. *Id.* The district court addressed the 2014 lease only in that context. *See* 1-ER_69-71. A district court's decision whether to allow leave to amend a complaint is discretionary. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011); *see also Doe v. Garland*, 17 F.4th 941, 944 (9th Cir. 2021). Here the district court never specifically considered the propriety of adding Wapato's purported new claim at the late stages of this case, or whether amendment would have been "futile"—*e.g.*, because the challenge to the 2014 lease was barred by the statute of limitations, because Wapato failed to exhaust administrative remedies, or because the allegations failed to state a valid claim for relief—precisely because Wapato never sought leave to amend. *Cf. Cafasso*, 637 F.3d at 1058. The district court cannot be held to have abused its discretion by effectively denying a motion that Wapato never filed. *See Padgett,* 587 F.3d at 985 n.2 (Court does not consider allegations raised for the first time on appeal).

3. Wapato's challenge to the 2009 lease is foreclosed by the Tribes' sovereign immunity.

The district court also determined that Wapato's claims—for declaratory relief concerning the replacement leases—are barred by tribal sovereign immunity. 1-ER_69-73. This Court need not address Wapato's appeal of the district court's

ruling on tribal sovereign immunity (Brief at 32-36) for reasons already explained: (1) Wapato's claim for declaratory relief on the 2009 lease is moot; (2) Wapato's claim regarding the 2014 lease is not properly before the court, and (3) Wapato has not challenged (on appeal) the district court's dismissal of all damages claim as to the Tribes. *See* Brief at 22-31; *see also supra*, p. 39, n.11.

To the extent tribal sovereign immunity is relevant on appeal the United States defers to the arguments of the Tribes, with one observation: Wapato argues (Brief at 36) that the district court could have entered a declaratory judgment voiding the 2014 lease *as against BIA*, even if the Tribes enjoy immunity from suit. The United States agrees that BIA's final agency action approving a permit, lease, or other instrument ordinarily should be subject to review under the APA, notwithstanding the sovereign immunity of a tribal applicant. But Wapato did not bring an action for review of BIA's action approving the 2014 lease. And under this Court's precedent, such an action would be foreclosed by tribal sovereign immunity and the inability to join the Tribes under Federal Rule of Procedure 19. *See Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs,* 932 F.3d 843, 851-61 (9th Cir. 2019).

D. The district court correctly dismissed Wapato's cross-claims concerning MA-8's trust ownership.

In cross-claims one, two, and seven, Wapato sought a declaration that MA-8 is held in fee by the descendants of Wapato John (with no trust ownership by the United States) and an order of partition among the present owners. 3-ER_651-57. In its order ejecting Mill Bay from MA-8, the district court held that MA-8 remains in federal trust ownership and therefore that the United States had "standing" to bring the ejectment suit. 1-ER_127-50. Wapato joined Mill Bay in appealing that ruling (Ninth Cir. No. 20-35694). But the district court did not formally dismiss Wapato's cross-claims until its January 19, 2021 ruling (at issue in the present appeal). 1-ER_99-100. As Wapato now observes (Brief at 36), if this Court affirms (in the prior appeal) the district court's ruling that MA-8 remains in trust status, Wapato's cross-claims "cannot survive."

But Wapato errs in arguing (*id.*) that its cross-claims would be revived if this Court *reverses* the district court's ruling on federal title and standing. As a threshold matter, the United States does not concede it had to prove trust title to pursue the ejectment counterclaim against Mill Bay. A lessor of land does not put his or her title at issue when suing to eject a tenant, subtenant, or licensee who obtained possession under the lessor's title and claims no title interest. *Rector v. Gibbon*, 111 U.S. 276, 284 (1884); *Port of Willapa Harbor v. Nelson Crab & Oyster Co.*, 15 Wash.2d 515, 516, 131 P.2d 155, 156 (Wash. 1942); *see also*

Richardson v. Van Dolah, 429 F.2d 912, 917 (9th Cir. 1970). Nor does the United States concede any defect in federal trust title.[15]

Nonetheless, even if this Court agrees that the United States had to show trust title to establish standing on its counterclaim and *reverses* the district court on these issues, it does not follow that Wapato may maintain actions for a judgment of title against the United States and for partition of the land. In asserting these cross-claims against the United States, Wapato relies on the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, and on 28 U.S.C. § 1346(f), which grants district courts exclusive jurisdiction over QTA claims. 3-ER_643 (¶ 230); *see also* Brief at 2. Such reliance is misplaced for two reasons.

First, the QTA's waiver of sovereign immunity specifically "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). Because Wapato (a non-Indian corporation) challenges federal trust title, the QTA waiver does not apply. *United States v. Mottaz*, 476 U.S. 834, 843 (1986).

Second, under the QTA's statute of limitations, any suit to quiet title against the United States is precluded if not brought within twelve years of "the date the plaintiff or his predecessor in interest knew or should have known of the claim." *Id.* § 2409a(g). This limitation is "jurisdictional" and cannot be waived. *Block v.*

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[15] These issues are fully briefed in the Answering Brief for Federal Appellees, pp. 51-75, filed on March 31, 2021 (Dkt No. 43) (Ninth Cir. No. 20-35694).

North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 292 (1982); *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1195-96 (9th Cir. 2008); *Fidelity Exploration and Prod. Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir. 2007). Wapato's claim to fee title (free and clear of any federal trust restriction) is based on events that preceded the execution of the Master Lease in 1984. *See* Brief at 37-40. In seeking and accepting BIA approval for the Master Lease—which expressly references federal trust title, 2-ER_334-35—Wapato's predecessor in interest (Evans) plainly knew of the United States' claim to trust title. Therefore, Wapato's title claim expired by operation of the QTA's statute of limitations no later than 1996, well before the filing of the cross-complaint in 2010. 28 U.S.C. § 2409a(g).

Accordingly, if this Court finds that the United States lacked standing to assert its counterclaim against Mill Bay due to the absence of trust title or for any other reason, the proper and exclusive remedy is a remand to the district court for dismissal of the counterclaim. The district court had no jurisdiction to provide Wapato affirmative relief under the QTA.

II. The district court did not err or abuse its discretion in denying Wapato's request to participate in the trial of trespass damages and associated motion for discovery.

A. Standard of Review

A district court's decision to deny a motion, under Fed. R. Civ. P. 24(a)(1), to intervene as a matter of right is reviewed de novo. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 896 (9th Cir. 2011). A district court's decision to deny permissive intervention, under Fed. R. Civ. P. 24(a)(2), is reviewed for abuse of discretion, *Perry v. Schwarzenegger*, 630 F.3d 898, 905-06 (9th Cir. 2011). A district court's decision to deny a motion to compel discovery is also reviewed for abuse of discretion. *Branch v. Umphenour*, 936 F.3d 994, 1005 (9th Cir. 2019). Whether an appeal is moot is a question of law determined by this Court de novo. *Oregon Natural Desert Association v. United States Forest Service*, 957 F.3d 1024, 1031 (9th Cir. 2020).

B. The district court correctly denied Wapato's request to participate in trial on trespass damages.

Contrary to Wapato's argument (Brief at 16-22), the district court did not err or abuse its discretion in dismissing Wapato as a party, after dismissing all claims by and against Wapato. 1-ER_99-100; 4-ER_774, 788. Wapato concedes (Brief at 21-22) that it faced no direct liability at trial. In addition, because it was denied the right to participate at trial, Wapato concedes (*id.*) that it will not be bound by the judgment on the amount of trespass damages even if Mill Bay seeks

indemnification from Wapato in some later action. Nonetheless, Wapato contends (*id.*) that it had the right to intervene, under Fed. R. Civ. P. 24(a), to *limit* its exposure in such a future suit.[16] This argument fails for five reasons.

First, Wapato could have brought an immediate appeal from the order excluding it from trial (to the extent that order amounted to a denial of intervention). Now that the trial is over and a final judgment has been entered, Wapato's appeal is moot. *See West Coast Seafood Processors Ass'n v. Natural Resources Defense Council*, 643 F.3d 701, 705 (9th Cir. 2011); *see also United States v. Sprint Communications, Inc.*, 855 F.3d 985, 989 (2017). Mill Bay has not appealed from the district court's final judgment on the amount of trespass damages. Therefore, Mill Bay is bound by that judgment (notwithstanding Wapato's appeal), unless Mill Bay succeeds in its earlier appeal challenging the existence of trespass liability. For its part, Wapato is not bound by the judgment on trespass damages and faces no prospect of liability, unless and until Mill Bay brings a future suit for indemnification relating to the very judgment that Mill Bay cannot appeal.

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[16] Confusingly, Wapato also argues that its right to "benefit from the damages award," as a partial owner of MA-8, gives it standing to challenge the allegedly "inflated" damages claims. *See* Brief at 17-18; 2 ER_178-179. But as a potential beneficiary, Wapato had no interest in minimizing trespass damages. Wapato held that interest only in relation to its potential exposure to trespass liability.

In this context, this Court cannot grant Wapato any meaningful relief. *See West Coast Seafood Processors*, 643 F.3d at 705. Even if this Court determines that the district court should have allowed Wapato to participate in the trial on trespass damages, Wapato cites no precedent for the proposition that this Court—*as remedy for Wapato*—can relieve Mill Bay from the judgment on trespass damages (which Mill Bay cannot appeal) or compel Mill Bay to re-litigate that issue. *Id.* Significantly, in the present appeal, Wapato only seeks a remand for further proceedings. Brief at 40. Wapato does not seek to challenge the trial judgment on the merits. *See* Brief at 16-22; *see also DBSI/TRI IV Ltd. Partnership v. United States,* 465 F.3d 1031, 1037 (2006) (denial of intervention not moot where substantive relief remains available on appeal).

Second, setting aside mootness, Wapato fails to show that it faces an ongoing threat of litigation from Mill Bay. Mill Bay initiated the proceedings below and named Wapato as a defendant. But instead of asserting an indemnification claim along with its other claims against Wapato, Mill Bay acquiesced to Wapato's dismissal from the case. In so doing, Mill Bay arguably lost the ability to seek indemnification in some future suit.[17] *See generally Lucky*

[17] In February 2021, Wapato and Mill Bay moved in state court to reopen the 2004 settlement (*supra*, p. 12) to provisionally relieve Mill Bay of any obligation (to Wapato) under that settlement, in light of Mill Bay's ejectment from MA-8. *See* SER_22. In a stipulated "addendum" to the settlement, Wapato agreed to pay specified amounts to Mill Bay, including specified attorney fees to be incurred by

Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S.Ct. 1589, 1594 (2020) (general rule of res judicata).

Third, even if a potential indemnification suit by Mill Bay is not claim precluded, Wapato fails to show that the threat of a future suit by Mill Bay (*see* 2-ER_174) placed Wapato in a position to intervene at trial as a matter of right. The cases cited by Wapato are distinguishable. Those cases involved prospective intervenors that possessed acknowledged contractual obligations to insure or to indemnify an existing party for damages or losses to be litigated. *Insurance Company v. Jake's Fireworks, Inc.*, 335 F.R.D. 330, 335 (D. Kansas) (2020) (secondary insurer); *Atlantic Refinishing & Restoration, Inc. v. Travelers Casualty & Insurance Co.*, 272 F.R.D. 26 (2010) (surety). Here, Wapato denies any similar liability to Mill Bay. The mere prospect of liability on a claim reserved for future litigation is not the sort of "direct, non-contingent, substantial and legally protectable" interest that this Court generally requires for intervention as of right. *See Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir.1981)).

Mill Bay in the trial in this case. SER_22-23 (¶2.3). In exchange, Mill Bay agreed to release Wapato from any additional liability under any legal theory, with the following exception: Mill Bay reserved its rights "if any" to "seek indemnity from Wapato . . . for any trespass damages awarded against it at trial in the Federal case . . ." SER_23-24 (¶2.5).

Fourth, no movant may intervene as of right if its interests are "adequately represent[ed]" by an existing party. Fed. R. Civ. P. 24(a)(1). Where the movant and the existing party share the same "ultimate objective," adequacy of representation is presumed. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Wapato argues (Brief at 21) that its interests and Mill Bay's were not fully aligned, because Mill Bay had an interest in "casting blame" on Wapato, while Wapato had an interest in avoiding any such liability. But for this very reason—because Wapato never promised to indemnify Mill Bay[18]—both parties shared the "ultimate objective" of minimizing trespass damages. It is of no moment that Mill Bay avoided certain damages (prejudgment interest) by shifting blame to Wapato. *See* 1-ER_23. As Wapato acknowledges (Brief at 21), the district court's observation that Wapato's actions contributed to Mill Bay's trespass "are not preclusive as against Wapato" and do not amount to a determination of liability in any event. Moreover, the associated ruling *limited* Wapato's exposure.

Fifth, Wapato identifies no basis for believing that the trespass judgment was inflated as a result of Wapato's exclusion from trial. Wapato surmises (Brief at 20) that its discovery request—which the district court declined to enforce after dismissing Wapato from the case—would have provided evidence concerning the use of "similar" allotments, which could have influenced the Court's calculation of

[18] *See* pp. 56-57, n.17, *supra*.

trespass damages. In so arguing, however, Wapato fails to acknowledge that the district court adopted Mill Bay's expert evidence and calculated trespass damages based on MA-8's actual use as an RV park. *See* 1-ER_15-16, 22. Given that ruling, there is no prospect that evidence concerning other potential uses of MA-8—if presented at a new trial on remand—would *lower* trespass damages. This is so because the actual use of the RV Park is necessarily the "highest and best" use for determining fair market rental (and trespass damages) if other projected uses would result in lower income. *See id*.

In short, Wapato fails to show: (1) that it had any right to participate in the trial on trespass damages (owed by Mill Bay), (2) that it suffered any injury by being excluded from that trial, or (3) that the Court can grant meaningful relief via remand, even if some right to participate and injury were presumed.

C. Wapato lacks standing to appeal the denial of the motion to compel discovery (as to Mill Bay).

As explained (*supra*, pp. 23-24), shortly before trial, Wapato and Mill Bay moved to compel discovery and to postpone trial to allow time for such discovery. 2-ER_229-45. The district court denied the motion principally on the grounds that: (a) Wapato no longer was a party to the case, and (b) Mill Bay lacked standing to enforce interrogatories and document requests issued by Wapato. 1-ER_54-55. Wapato contends (Brief at 20) that this ruling left Mill Bay without evidence that it (Mill Bay) needed to challenge the United States' claim for trespass damages. But

if such evidence remained relevant after the district court adopted Mill Bay's method for determining trespass damages, *see* 1-ER_15-16, 22, Mill Bay presumably would have filed its own appeal. Wapato cannot bring an appeal on Mill Bay's behalf that Mill Bay chose not to bring. *See Pony v. Los Angeles*, 433 F.3d 1138, 1146-48 (9th Cir. 2006); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). For reasons already stated (*supra*), Wapato lacks grounds for seeking a retrial of the judgment on trespass damages, which is binding only as to Mill Bay.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The following are related cases under Circuit Rule 28 2.6 because they arise from the same district court proceeding (E.D.Wash. No. 2:09-cv-00018-RMP):

- *Grondal v. United States*, 9th Cir. No. 20 35357 (docketed Apr. 28, 2020). Defendants Wapato and Gary Reyes appealed an order issued on March 26, 2020 holding that the United States is not required to provide, at government expense, independent counsel to defendant allottee landowners. The appeal has been briefed and was argued on August 9, 2021.
- *Grondal v. United States*, 9th Cir. No. 20-35694 (docketed Aug. 10, 2020). Plaintiff Mill Bay and Defendants Wapato and Gary Reyes appealed from a certified final judgment on July 9, 2020 granting the United States' claim in ejectment and ordering defendant Mill Bay ejected from MA-8. The appeal has been briefed and was argued on August 9, 2021.

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ADDENDUM – TABLE OF CONTENTS

5 U.S. Code § 702 - Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S. Code § 706 - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S. Code § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code § 1346 - United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * *

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S. Code § 1491 - Claims against United States generally; actions involving Tennessee Valley Authority

(a) (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

28 U.S.C. § 2409a – Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

* * *

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

25 C.F.R. § 115.504 - If you have a life estate interest in income-producing trust assets, how will you receive the income?

If you have a life estate interest in income-producing trust assets, which is earning income, OTFM will open an IIM-life estate account for you and funds will be distributed after BIA has certified ownership of the trust funds.

25 C.F.R. § 162.003 – What key terms do I need to know?

Indian means:

(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land.

Individually owned Indian land means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

Indian tribe means an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

25 CFR § 162.008 - Does this part apply to lease documents I submitted for approval before January 4, 2013?

This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

(b) If you submitted a lease document but we did not approve it before January 4, 2013, then:

(1) We will review the lease document under the regulations in effect at the time of your submission; and

(2) Once we approve the lease document, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease document govern.

§ 162.010 – How do I obtain a lease?

(a) This section establishes the basic steps to obtain a lease.

(1) Prospective lessees must:

(i) Directly negotiate with Indian landowners for a lease; and

(ii) For fractionated tracts, notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, under § 162.012; and

(2) Prospective lessees and Indian landowners must:

(i) Prepare the required information and analyses, including information to facilitate our analysis under applicable environmental and cultural resource requirements; and

(ii) Ensure the lease complies with the requirements in subpart C for residential leases, subpart D for business leases, or subpart E for wind energy evaluation, wind resource, or solar resource leases; and

(3) Prospective lessees or Indian landowners must submit the lease, and required information and analyses, to the BIA office with jurisdiction over the lands covered by the lease, for our review and approval.

(b) Generally, residential, business, wind energy evaluation, wind resource, and solar resource leases will not be advertised for competitive bid.

25 C.F.R. § 162.012 – What are the consent requirements for a lease?

(a) For fractionated tracts:

(1) Except in Alaska, the owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract:

If the number of owners of the undivided trust or restricted interest in the tract is . . .	Then the required percentage of the undivided trust or restricted interest is . . .
(i) One to five,	90 percent;
(ii) Six to 10,	80 percent;
(iii) 11 to 19,	60 percent;
(iv) 20 or more,	Over 50 percent.

(2) Leases in Alaska require consent of all of the Indian landowners in the tract.

(3) If the prospective lessee is also an Indian landowner, his or her consent will be included in the percentages in paragraphs (a)(1) and (2) of this section.

(4) Where owners of the applicable percentages in paragraph (a)(1) of this section consent to a lease document:

(i) That lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document; and

(ii) That lease document will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the lease. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe.

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages in paragraph (a)(1) of this section based on our records on the date on which the lease is submitted to us for approval.

25 C.F.R. § 162.021 – What are BIA's responsibilities in approving leases?

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self–Determination and Education Assistance Act, as amended, 25 U.S.C. 450f et. seq.

(c) We will promptly respond to requests for BIA approval of leases, as specified in §§ 162.340, 162.440, 162.530, and 162.565.

(d) We will work to ensure that the use of the land is consistent with the Indian landowners' wishes and applicable tribal law.

25 C.F.R. § 162.022 – What are BIA's responsibilities in administering and enforcing leases?

(a) Upon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take

appropriate action, as specified in §§ 162.364, 162.464, and 162.589. Nothing in this part prevents an Indian landowner from exercising remedies available to the Indian landowners under the lease or applicable law.

(b) We will promptly respond to requests for BIA approval of amendments, assignments, leasehold mortgages, and subleases, as specified in subparts C, D, and E.

(c) We will respond to Indian landowners' concerns regarding the management of their land.

(d) We will take emergency action as needed to preserve the value of the land under § 162.024.

25 C.F.R. § 162.023 – What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

25 C.F.R. § 162.108 – What are BIA's responsibilities in administering and enforcing leases? (2001)

(a) We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations.

(b) We will ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.

25 C.F.R. § 162.108 – What are BIA's responsibilities in administering and enforcing agricultural leases?

(a) We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations.

(b) We will ensure that tenants comply with the operating requirements in their agricultural leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without an agricultural lease, and take other emergency action as needed to preserve the value of the land.

25 C.F.R. § 162.421 – How much monetary compensation must be paid under a business lease of individually owned Indian land?

(a) A business lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an individual Indian landowner;

(ii) The lessee is a co-owner in the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for religious, educational, recreational, cultural, or other public purposes;

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for payment of less than a fair market rental during the pre-development or construction periods, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section.

(e) If the owners of the applicable percentage of interests under § 162.012 of this part execute a business lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

25 C.F.R. § 162.441 – How will BIA decide whether to approve a business lease?

(a) We will approve a business lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

25 CFR § 162.467 - What will BIA do if the lessee does not cure a violation of a business lease on time?

(a) If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

25 CFR § 162.471 - What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

25 CFR § 179.101 - How does the Secretary distribute principal and income to the holder of a life estate?

(a) This section applies to the following cases:

(1) Where the document creating the life estate does not specify a distribution of proceeds;

(2) Where the vested holders of remainder interests and the life tenant have not entered into a written agreement approved by the Secretary providing for the distribution of proceeds; or

(3) Where, by the document or agreement or by the application of State law, the open mine doctrine does not apply.

(b) In all cases listed in paragraph (a) of this section, the Secretary must do the following:

(1) Distribute all rents and profits, as income, to the life tenant;

(2) Distribute any contract bonus one-half each to the life tenant and the remainderman;

(3) In the case of mineral contracts:

(i) Invest the principal, with interest income to be paid to the life tenant during the life estate, except in those instances where the administrative cost of investment is disproportionately high, in which case paragraph (b)(4) of this section applies; and

(ii) Distribute the principal to the remainderman upon termination of the life estate; and

(4) In all other instances:

(i) Distribute the principal immediately according to § 179.102; and

(ii) Invest all proceeds attributable to any contingent remainderman in an account, with disbursement to take place upon determination of the contingent remainderman.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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