No. 21-35507

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAPATO HERITAGE, LLC,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

,

On Appeal from the United States District Court,
For the Eastern District of Washington,
No. 2:09-cv-00018-RMP,
Hon. Rosanna Malouf Peterson

OPENING BRIEF OF APPELLANT WAPATO HERITAGE, LLC

Tyler D. Hotchkiss
Dale M. Foreman
Foreman, Hotchkiss, Bauscher & Zimmerman, PLLC
124 N. Wenatchee Ave., Suite A
Wenatchee, WA 98801
(509) 662-9602

Bruce Johnston
Nathan Arnold
Emanuel Jacobowitz
Arnold & Jacobowitz PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
(206) 769-3759

Attorneys for Defendant-Appellants Wapato Heritage, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Wapato Heritage, LLC states that it is a Washington Limited Liability Company that has no no parent corporation and that no publicly held corporation owns 10% or more of Wapato Heritage, LLC's units.

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I. INTRODUCTION

Appellant, Wapato Heritage, LLC ("Wapato Heritage"), is a family investment vehicle for descendants of the late William Wapato Evans, Jr., an enrolled member of the Confederated Tribes of the Colville Reservation. As such, Wapato Heritage holds a life estate in a 23.8% interest in fractionated land in Eastern Washington known as Moses Allotment 8 ("MA-8"). MA-8 is administered as Indian trust land by Appellee Bureau of Indian Affairs ("BIA").

Mr. Evans and Wapato Heritage leased MA-8, to the great benefit of all the fractional owners, until its casino sub-lessee, Appellee Confederated Tribes of the Colville Reservation (the "Tribe"), staged a successful takeover with the connivance of the BIA, which then and later favored the Tribe's interests over all the other Landowners'. The circumstances of Wapato Heritage's loss of its lease are no longer at issue, but the BIA's continued favoritism to the Tribe, and the harm it caused to Wapato Heritage, were very much at issue in the proceedings below.

The BIA leased MA-8 to the Tribe at below market value, benefiting the Tribe at the expense of Wapato Heritage. The BIA refused to collect underpayments made by the Tribe to Wapato Heritage's predecessor in interest under the former lease and sublease. The BIA and the other landowners refused to return overpayments made inadvertently by Wapato Heritage's predecessor under

the former lease. And the BIA ejected the Plaintiff below, a good-paying licensee, from MA-8, exposing Wapato Heritage to a potentially ruinous indemnity claim by the Plaintiff.

The District Court not only dismissed all of Wapato Heritage's claims arising from those acts, with prejudice and without leave to amend, it also refused to let Wapato Heritage participate in the trial against the Plaintiff on the BIA's claim for trespass damages, all based on strained, formalistic, and erroneous subject-matter jurisdiction grounds. This Court should remedy those errors.

II. JURISDICTIONAL STATEMENT

This is an appeal from final judgment. This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the final judgment and all interlocutory orders and rulings which produced or merged into the final judgment. This Court has subject-matter jurisdiction, as discussed further below, under 28 U.S.C. § 1331, 28 U.S.C. § 1346(f), and, as to claim to quiet title in allotment land, 28 U.S.C. § 2409A, and 28 U.S.C. § 345.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err by:

(1) Rejecting, on the ground that Appellant lacked sufficient injury-in-fact to support standing, Appellant's request to remain as an active participant for trial on damages, where the Plaintiff below, against

whom damages were eventually awarded, had made clear its intent to pursue a claim against Appellant for indemnification?

(2) Dismissing Appellant's claim for declaratory relief that a lease of Indian allotment lands to Appellee Confederated Tribes of the Colville Reservation, was void as being far below market value in violation of BIA regulations, on the ground that said Appellee had not waived its tribal sovereign immunity, where the Appellee had actively participated in litigation, and on the ground that the claim was moot after the lease expired, where the lease had been replaced by another with the same unfair terms and fair-market-rent could subsequently have been recouped from Appellee or BIA if the lease had been declared to have been void?

(3) Dismissing Appellant's claims, as a non-Indian holder of a life estate in a fractionated interest in Indian allotment land, and as a lessee of the said land, to require Appellee Bureau of Indian Affairs to collect underpayments from sub-lessee, and to require the other interest holders to return unintentional overpayments by Appellant, on the ground that subject matter jurisdiction was lacking?

(4) Dismissing Appellant's other claims on the ground that by prior order the District Court had established that a necessary predicate of

the claims was lacking, where that prior order was in error as argued in a related pending appeal, Appellate No. 20-35694?

IV. STATEMENT OF THE CASE[1]

A. The Parties and the Property.

Appellant, Wapato Heritage is a family investment vehicle for descendants of the late William Evans, Jr., who was an enrolled member of the Tribe until his death in 2004. 4-ER-1005–06. Among the assets which Wapato Heritage received under Mr. Evans' will after his death, was a large interest in Moses Allotment No. 8 ("MA-8"). MA-8 is fractionated Indian land near the banks of Lake Chelan in Washington State, originally granted to Evans's great-grandfather Wapato John.[2] 1-ER-103. Wapato John has many descendants, who own undivided interests in MA-8 (the

[1] The facts underlying Assignment of Error No. 4 are summarized *infra* at 36–40. Because the relevant facts and legal issues as to that error were fully briefed on pending appeal from the same case, No. 20-35694 in this Court, and the resolution of Assignment of Error No. 4 necessarily depends on the decision to be reached by the panel therein, a full re-briefing here of those facts and issues would waste the Court's time. They are summarized here, without additional argument, only in an abundance of caution to comply with 9th Cir. R. 28-1(b).

[2] In the District Court and in the pending appeal, No. 20-35694, Appellant along with the Plaintiff below challenge the assumption that MA-8 is still trust land. Here, for purposes of Assignments of Error Nos. 1–3, Appellant assumes that MA-8 is trust land. If MA-8 is not trust land, the issues as to those Assigned Errors remain essentially the same, because in all relevant ways, Appellee Bureau of Indian Affairs treated MA-8 as trust land, administered it as such, and voluntarily assumed fiduciary obligations in regards to it.

"Landowners").[3] 4-ER-912–26; 5-ER-1137. At his death, Evans held by far the largest interest, approximately 23.8%. 1-ER-62. Evans's living daughter, Sandra Evans, is an enrolled member of the Tribe. 4-ER-1010. But Evans's grandsons by his other child lacked the requisite blood percentage to be enrolled tribal members. 4-EER-1007–09. Under Evans's Will, Wapato Heritage was granted a life estate in 23.8% of MA-8 for the life of Evans' then-living descendants, with 1/8 transferring

[3] The other Landowner Defendants-Appellees are Francis Abraham, Catherine Garrison, Maureen Marcellay, Mike Palmer, James Abraham, Naomi Dick, Annie Wapato, Enid Marchand, Gary Reyes, Paul Wapato, Jr., Lynn Benson, Darlene Hyland, Randy Marcellay, Francis Reyes, Lydia W. Armeecher, Mary Jo Garrison, Marlene Marcellay, Lucinda O'Dell, Mose Sam, Sherman T. Wapato, Sandra Covington, Gabriel Marcellay, Linda Mills, Linda Saint, Jeff M. Condon, Dena Jackson, Mike Marcellay, Vivian Pierre, Soma Vanwoerkon, Wapato Heritage, Llc, Leonard Wapato, Jr, Derrick D. Zunie II, Deborah L. Backwell, Judy Zunie, Jaqueline White Plume, Denise N. Zunie, and the Confederated Tribes of the Colville Reservation.

to the Tribe. 3-er-484. Under a 2005 Settlement Agreement, approved by the Indian Probate Court, reversion was granted to the Tribe. 1-ER-109.[4]

For most of the 20th Century, MA-8 had lain vacant and unused. Evans changed this.

In 1984, with the BIA's assistance and approval, and with the consent of Landowners with 64% total interest in MA-8, Evans acquired a lease on MA-8 (the "Master Lease") to create a camping club resort, to provide good, reliable income to the landowners. 4-ER-928–30; 4-ER-935–36; 4-ER-939–42; 4-ER-953–54; 5-ER-1132, 1-ER-104; 5-ER-1137, 51; ECF 1 ¶51; *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1035 (9th Cir. 2011). BIA signed the Master Lease as "Lessor" on behalf of the Landowners. 4-ER-830. Evans created Mar-Lu, Ltd., and Chief Evans, Inc., the predecessor entity to Wapato Heritage, through which he conducted MA-8-related business. 1-ER-105. Under the Master Lease, Evans subleased part of MA-8 to create the Mill Bay RV Resort. *Id.* The Master Lease lasted 25-years with an option to renew for another 25-years. 4-ER-807.

Evans attempted to renew the Master Lease by letter to the BIA, which the BIA accepted. 4-ER-956; 1-ER-105–06. But 24 years later, after Evans's death and

[4] That Settlement Agreement has since been amended, as provided for therein, so that the reversionary interest is disposed of more consistently with Evans's intent in his Will. Any dispute as to those terms is not at issue in this appeal.

shortly before the renewal period expired, at the Tribe's urging, the BIA reversed course and announced that renewal had not been effective. 3-ER-761; 4-ER-1051. The BIA did not clearly explain why not, or how the defect could be cured. 4-ER-1051; 4-ER-794. As it turned out, the BIA now considered that this particular notice had to be sent directly to each of the Landowners as well as to the BIA. How Wapato Heritage was supposed to have known that, let alone gotten the service addresses, without BIA's cooperation, is unclear; at any rate, it did not, and subsequent litigation established that the Master Lease expired in 2009. *Wapato Heritage, LLC v. United States*, 637 F.3d 1033 (9th Cir. 2011) ("*Wapato I*").

Unfortunately, Wapato Heritage, the Tribe, the Landowners, and the BIA were not the only parties involved. In the 1980s and 1990s, As planned, Evans (more precisely, Mar-Lu), with the enthusiastic help of the BIA, had sold Mill Bay RV Resort memberships for MA-8 camping sites (the "RV Park") to some 183 people. 5-ER-1076–79; 3-ER-757. One might have expected that the BIA, in the best interests of the Landowners would maintain the highly-profitable RV Park. But by then, the Tribe had acquired MA-8 interests from small Landowners, and was leveraging that interest to pursue its own goals, largely to the detriment of the other Landowners.

B. The Casino Sublease and Replacement Leases.

In 1993, Evans sub-leased part of MA-8 to the Colville Tribal Enterprise Corporation ("CTEC"), an instrumentality of the Tribe, for construction and operation of a casino. 4-ER-841–61; 3-ER-757–78. They entered a second sublease in 1994 when the Casino opened(the "Casino Sublease"). 4-ER-831–72. Under applicable regulations, the BIA administers leases on Indian trust land, collects rents, and distributes the proceeds to the Landowners' Individual Indian Money accounts ("IIM accounts"). *See* 25 C.F.R. Parts 115, 179. As the District Court later found, to satisfy Lessee's accounting requirements under the Master Lease, the BIA agreed to hire an independent auditor, the Sells Group, which reviewed accounts under the Master Lease and the Casino Sublease. 1-ER-63. The Sells Group Report revealed hidden flaws in payments made under the complicated formula prescribed by the Casino Sublease. 2-ER-296–97; 3-ER-650. The upshot was, Evans had been underpaid by the Tribe in the total amount of $866,248, and he had also, separately, overpaid the Landowners, through the BIA, by $751,285. 2-ER-296–973-ER-706.

Evans' estate was still open, but the BIA took and has taken no action to recover the overpayments from the other Landowners for the estate or Wapato Heritage, or to collect the underpayments from the Tribe for distribution to the Landowners. ECF 574 ¶¶ 6, 7; 3-ER-706; 3-ER-618. The BIA did not even inform the estate and Wapato Heritage of these problems; Wapato Heritage made a Freedom of Information Act request and received a copy of the Sells Group Report in 2007,

after Evans's federal probate (relating to his Moses Allotment interests and IIM account) had closed. 3-ER-618; 2-ER-366.

In 2009, the Tribe acquired a lease on its casino site on MA-8 (the "Replacement Lease"). 3-ER-660–99, 3-ER-660–61. It did so without notice to Wapato Heritage, and without giving Wapato Heritage the opportunity either to vote its interest or to lobby other interest holders for a revival of the Master Lease. 2-ER-273. In 2014, the BIA and the Tribe, through its agency Colville Tribal Federal Corporation ("CFTC") expanded the lease, adding the rest of MA-8 for only a $100,000 per year base rent, for a 25-year period renewable at the Tribe's election, also without notice or opportunity for Wapato Heritage to vote or lobby. 2-ER-273; 2-ER-282, 284. The Replacement Lease, both versions, unlike the Master Lease, did not provide Wapato Heritage and the other Landowners fair market value, as it significantly reduced the rent despite the increased value of the property due to improvements made during the Master Lease term. *Id.*[5] Not only did the BIA and the Tribe collude to reduce the percentage paid (from 6% to 4.5%) but the basis for calculating that percentage is now slots and table games only, whereas previously it had been based on a percentage of revenue from all casino sales, including tobacco, food, beverages, and gasoline. *Id.*; *compare* 2-ER-272, 2-ER-282–84 . For this

[5] Under the Master Lease, improvements by Lessee or sublessees belong to Lessor. ECF 90-2 at 7-8.

much lower rent, the Tribe now has not just the casino site but all of MA-8, including the gas station and two hundred and fifty feet of waterfront. *Id.*

C. Proceedings Below.

On January 21, 2009, the Mill Bay Members Association, Inc. ("Mill Bay") brought this lawsuit against the United States and BIA, the Tribe, and the Landowners (including Wapato Heritage as allottee), for declaratory and injunctive relief to allow Mill Bay members to continue to use the RV Park through the expected renewed Master Lease term. 5-ER-1159–1203. The BIA counterclaimed to eject Mill Bay from MA-8, and for trespass damages. 5-ER-1154.

Wapato Heritage brought cross-claims against the Landowners, the Tribe as sublessee, the United States, and the BIA. Wapato Heritage's claims were:

1) For declarations that (a) MA-8 is fee land not subject to Indian trust, and (b) the 2009 Replacement Lease is void ab initio because obtained and approved collusively against the interests of the Landowners other than the Tribe, in violation of applicable BIA regulations;
2) Quiet Title to MA-8, as fee property;
3) Estoppel/Laches against the Government or Allottees asserting the Master Lease had expired;
4) Ejectment of the Tribe and its agency CTFC from MA-8, or payment of fair-market rent to be determined;

5) Recovery of overpayment from the other Landowners;

6) Requiring BIA to collect underpayments from CTEC;

7) Partition of MA-8 as fee property.

ECF 228 at 26–35.

The Tribe actively litigated throughout the proceedings below, making successful substantive arguments for relief related to Wapato Heritage' claims. The Tribe submitted briefs arguing that the BIA adequately represented the Landowners' conflicting interests with regard to ejection of Mill Bay and the Tribe's takeover of MA-8, and that BIA owed them no duty to provide independent counsel. 2-ER-461. The Tribe also submitted briefs and received relief adverse to Wapato Heritage regarding the trust or fee status of MA-8 and the ejectment of the Plaintiff. 2-ER-441–42(arguing for ejectment), 2-ER-423 (Tribe's opposition to Plaintiff's motions for default and for summary judgment), 2-ER-404–05 (Tribe's successful argument against a stay of execution) and 2-ER-388–89 (asking the court to deny equitable relief related to an alleged agreement between the Tribe, the Government and Mill Bay). On July 9, 2020, the District Court resolved cross-motions for summary judgment between Mill Bay and the BIA, finding among other things that MA-8 was trust land, as the Tribe had argued. 1-ER-150. That issue is the subject of a separate pending appeal, discussed *infra*. The District Court also

held that Mill Bay was trespassing on MA-8 and ordered ejectment, leaving the issue of damages for trial.

On January 5, 2021, Wapato Heritage and Mill Bay jointly moved to compel critical discovery related to trespass damages. Among other things, the BIA and the Tribe had refused to answer Wapato Heritage's requests for information and documents regarding lease terms and valuation of comparable Indian trust land, appraisals of MA-8, and whether and for what purpose the Tribe would allow any commercial use of MA-8 beyond the casino boundaries. 2-ER-236–39, 2-ER-203–13, 2-ER-221-228.

On January 19, 2021, while Wapato Heritage's discovery motion was pending, the District Court dismissed Wapato Heritage's claims on grounds discussed below. This left for trial only the United States and BIA's (the "Government") claim against Wapato Heritage, and trespass damages against Mill Bay. The Government swiftly moved to voluntarily dismiss its claim against Wapato Heritage. 2-ER-187–89. Wapato Heritage did not object, but did seek to remain in the case to protect its interests at trial on trespass damages, because Mill Bay had repeatedly made clear its intent to bring suit against Wapato Heritage to recover, on various theories, any damages incurred by Mill Bay by way of judgment for trespass in this action. 2-ER-179–81; 2-ER-174. On February 2, 2021, the District Court denied Wapato Heritage's request, on the ground that Wapato Heritage lacked direct interest in the

outcome of the trial on trespass damages. 1-ER-49–53. The District Court therefore also denied Wapato Heritage and Mill Bay's motion to compel discovery as moot. 1-ER-53–55

Trial proceeded without Wapato Heritage, without its expert witness, and without the information Wapato Heritage had sought to discover as to comparables and as to what commercial use of MA-8 could be made if any. The District Court, based on the BIA's and Mill Bay's expert testimony as to the value of the RV Park portion of MA-8 if used as a resort campground, awarded damages against Mill Bay of $1,411,702. 1-ER-18–22; 1-ER-2–3. The District Court also, in Wapato Heritage's absence, accepted Mill Bay's argument that pre-judgment interest should not be awarded because "Mill Bay's trespass was a direct result of the misrepresentations and flowed from the failure to renew the Master Lease by Evans and later by Wapato Heritage." 1-ER-23.

Notably, the BIA, which had leased all of MA-8 to the Tribe for $100,000 base rent plus a smaller share of Casino revenue than the Tribe had been willing to accept when bargaining at arm's length, 2-ER-284, argued at trial for the District Court to use an even more inflated value of only the RV Park portion of MA-8 for the period of trespass, more than $1.67 million, approximately $139,000 per year. ECF 694 at 15. Neither that figure nor the one the District Court awarded is

remotely compatible with rent of only $100,000 per year for the RV Park site plus all the rest of the non-Casino portion of MA-8.

Wapato Heritage timely noticed an appeal from final judgment. 5-ER-1319.

V. SUMMARY OF ARGUMENT

The BIA, in its eagerness to help the Tribe, has mishandled the Landowners' valuable asset, MA-8. In particular, the BIA ignored at all fronts the interests of Wapato Heritage, holder of a life estate in a 23.8% interest in that property. The District Court, by a series of overly technical decisions, prevented Wapato Heritage from getting any remedy. This Court should reverse and remand for further proceedings.

The District Court prevented Wapato Heritage from participating in trial, on the ground that its interest in minimizing damages assessed against Mill Bay, Wapato Heritage's alleged indemnitee, was too speculative as a matter of law to support standing. Courts have often allowed alleged indemnitors to intervene in cases for such a purpose. The District Court's decision prejudiced Wapato Heritage's interest.

The District Court held that it lacked subject matter jurisdiction over Wapato Heritage's claims for recovery of sums due to it under Evans's Master Lease. Contrary to the District Court's conclusions, Wapato Heritage did not waive or concede lack of jurisdiction; Wapato Heritage identified a federal question and a source of agency duty; Wapato Heritage had standing as real party in interest or at

least as trustee of real party in interest, the closely-related Estate of William Wapato Evans; and the BIA's duty runs to a life estate beneficiary such as Wapato Heritage, not only to Indian allottees and the Tribe.

The District Court also dismissed Wapato Heritage's claim to declare the collusive, far-below-market-value leases to the Tribe, as barred by tribal sovereign immunity. This too was error, given the Tribe's active, pervasive participation in the litigation.

Lastly, the District Court dismissed multiple claims of Wapato Heritage's based on its independently-appealable prior interlocutory order finding that MA-8 is trust land in which the Landowners lack any fee interest. If that prior order is overturned on pending appeal, these dismissals too should be reversed.

VI. ARGUMENT

A. Standard of Review

The Court reviews *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Rattlesnake Coalition v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007). Factual findings relevant to subject matter jurisdiction are reviewed for clear error. *Id.* Tribal sovereign immunity is a matter of subject matter jurisdiction and is reviewed de novo. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015 (9th Cir. 2007). Dismissal under Fed. R. Civ. P. 12(c) for failure to state a claim is likewise reviewed de novo. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d

877, 883 (9th Cir. 2011). For purposes of such motions, the Court takes as true all well-pled allegations in the complaint (or in this case, in the cross-claims). *Id.* And to the extent the District Court dismissed under Fed. R. Civ. P. 56, the court reviews such decision de novo as well, viewing the facts in the light most favorable to the nonmoving party and drawing all inferences in that party's favor, asking whether there was any basis on which a rational factfinder could find for the non-moving party. *S.R. Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019). The District Court's denial of Wapato Heritage's request for leave to further develop and present evidence and arguments at trial is substantively similar to a denial of a request for intervention as of right under Fed. R. Civ. P. 24(a); such motions are reviewed de novo. *Silver v. Babbitt*, 68 F.3d 481 (9th Cir. 1995).

B. Wapato Heritage should have been Allowed to Participate in the Case to Mitigate Its Potential Liability to Mill Bay.

Wapato Heritage and Plaintiff Mill Bay worked together in the proceedings below, at arm's length, to the extent that they had similar interests. Mill Bay threatened (and still threatens) to bring a new action against Wapato Heritage based on any judgment against Mill Bay in this action, which impelled Wapato Heritage to try to keep any damages award against Mill Bay low. 2-ER-174. Therefore, Mill Bay joined Wapato Heritage's motion to compel the Tribe and the Government to answer certain key discovery requests as to trespass damages.

By unexpectedly dismissing its own claim against Wapato Heritage while that motion to compel was pending, and shortly before trial, the Government effectively evaded discovery and helped the Tribe evade discovery. It also eliminated opposition from a party with a material interest in countering its evidence. Wapato Heritage could not even introduce its own damages expert, a Mr. Vining, who was extremely skeptical of key assumptions made by the Government's expert witness. 2-ER-192–94. By rejecting Wapato Heritage's request to remain in the case to protect its own interests, the District Court enabled the Government and the Tribe's discovery evasion and prevented Wapato Heritage from developing or introducing evidence to reduce the damages award against Mill Bay and therefore from reducing Wapato Heritage's own exposure.

The District Court reasoned that Wapato Heritage had no standing as an "Indian allottee" of MA-8, because Wapato Heritage's interest was merely a life estate. 1-ER-46–47. As discussed further *infra*, Wapato Heritage, as a life estate holder of the allotment interest of an enrolled Indian, with some reversionary interest to the Tribe, stands for the interests of Indian allottees, even though it is not itself an Indian. Furthermore, Sandra Evans, Mr. Evans's surviving child, is entitled to and receives 20% of the revenue from that life estate interest, and she is an enrolled Indian member of the Tribe. 4-ER-1008; 4-ER-1032.

More to the point, Wapato Heritage was brought into the action as a defendant on the basis of its life estate, so the District Court's focus on whether it met the statutory definition of an "Indian allottee" was misplaced: the question for standing purposes is whether the party has an interest, not whether it has the same interest as other parties. Where the Government denied that it had any fiduciary duty to Wapato Heritage, Wapato Heritage lacked representation and should have been allowed to keep litigating. And where Wapato Heritage, as holder of 23.8% of the interest which would benefit from the damages award, believed in good faith that the damages were being inflated by the remaining parties, it should have been allowed to present its evidence of the actual, smaller damages amount.

Moreover, the District Court erred in holding that Wapato Heritage's exposure to litigation by Mill Bay was not enough in itself to create standing. For practical purposes, once the last claim by or against Wapato Heritage was dismissed, its request to remain a part of the case was effectively a request to intervene as of right. A party must be allowed to intervene, and has standing, who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. Rule 24(a). On facts such as those in this case, reduction of the amount of a claim over by the existing

defendant, can be enough of an interest and enough injury-in-fact to satisfy Rule 24(a) and create standing.

For instance, courts have generally allowed excess insurers to intervene in lawsuits to protect their interests in actions against a primary insurer. In *Everest Indem. Ins. Co. v. Jake's Fireworks, Inc.*, 335 F.R.D. 330, 334 (D. Kan. 2020), the district court reasoned that "resolution of the action could impact the excess insurers by triggering coverage obligations," and even though the excess insurer would not be precluded from asserting coverage defenses, their "interest could be further impaired if they were forced to relitigate issues decided in the action regarding primary-insurance coverage." The intervenor could not rely on the defendant to protect its interests either, even though both wanted to keep damages low, because their over-all interests are different and their legal strategies may differ. *Everest Indemn. Inc. Co.*, 335 F.R.D. at 335; *and see, e.g., Liberty Mutual Fire Insurance Co. v. Lumber Liquidators, Inc.*, 314 F.R.D. 180, 185 (E.D. Va. 2016) (excess insurer has interest in not being "forced to attempt to re-litigate issues from this action."); *Felman Prod., Inc. v. Indus. Risk Insurers*, No. CIV.A. 3:09-0481, 2009 WL 5064058, at *3 (S.D.W.Va. Dec. 16, 2009) ("a judgment favorable to Felman would force Mt. Hawley into the compromising position of needing to attack this Court's decision on both legal and factual grounds, a possibility which provides sufficient grounds" for intervention.)

Similarly, many courts have recognized the right of the principal of a surety bond to intervene in an action against the surety. *Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 272 F.R.D. 26, 29–30 (D.D.C. 2010) (collecting cases). In such cases, the potential indemnitor "should not be forced to rely on the defendant to raise defenses in a case where its own liability is at stake," if "he intends to raise claims or arguments that would not otherwise be raised." *Id.* at 30.

The facts here show even more clearly Wapato Heritage's need to participate in final discovery and trial. Wapato Heritage is not an excess insurer or a surety principal, and it has defenses against Mill Bay's claim for indemnification which would not be available to such parties. But, like such parties, in a future trial on indemnification, Wapato Heritage would be prejudiced by having to relitigate damages issues.

The District Court, when dismissing Wapato Heritage from the case, decided that its motion to compel discovery was therefore moot, and denied that motion as well. Thus, as a direct result of Wapato Heritage's dismissal, Mill Bay went into trial without knowing how much money the Government and Tribe received from similar property, or whether the Tribe, as Lessor, would have allowed the kind of use of MA-8 which the Court presumed was possible for purposes of calculating damages.

Wapato Heritage reserves the right to show in future litigation that Mill Bay should not have relied upon Wapato Heritage for essential factfinding. But that sort of difference in litigation strategy is exactly why an applicant's burden to demonstrate a lack of adequate representation "should be treated as minimal." *Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). Different parties' interests almost never perfectly align and they did not here. Mill Bay had an interest in maintaining leverage over Wapato Heritage, in maintaining for appeal the argument that it had lost valuable rights by ejection, and most of all, in casting blame on Wapato Heritage. These goals were at odds with Wapato Heritage's simpler goal of reducing damages.

For instance, at trial, the District Court accepted Mill Bay's argument that pre-judgment interest should not be awarded because "Mill Bay's trespass was a direct result of the misrepresentations and flowed from the failure to renew the Master Lease by Evans and later by Wapato Heritage." 1-ER-23. This finding is not preclusive as against Wapato Heritage, and it stops short of holding Wapato Heritage legally responsible for Mill Bay's trespass. Nonetheless, such a statement by a federal judge could easily harm Wapato Heritage in a future action by Mill Bay. Wapato Heritage should have had the chance to oppose the finding.

Similarly, Wapato Heritage is not precluded from arguing that the damages awarded in this lawsuit should have been lower, and that Mill Bay failed to mitigate its damages. But even apart from the question of judicial economy, *see* Fed. R. Civ. P. 1, it is always harder to prove that sort of counterfactual scenario after a trial, than to simply get all the facts and arguments before the trial court in the first place. The District Court's order unduly prejudiced Wapato Heritage's upcoming defense.

In short, the District Court erred by holding that an interest in reducing exposure for liability based on damages to be awarded in this case, was *per se* insufficient for standing. It can be sufficient and it was in this case. Wapato Heritage should have been allowed to protect itself.

The District Court's alternative ground for denying the motion to compel discovery, as to the Tribe, tribal sovereign immunity, 1-ER-58, is addressed *infra*.

C. The District Court Erred by Holding It Lacked Subject Matter Jurisdiction Over Wapato Heritage's Claims Arising from the BIA's Mismanagement of the Master Lease.

The District Court dismissed Wapato Heritage's claims against the BIA to recover overpayments (made by Wapato Heritage to the BIA for the Landowners under the Master Lease) and underpayments (from the Tribe to Wapato Heritage and thence to BIA for the Landowners under the Casino Sublease and the Master

Lease) for lack of subject matter jurisdiction. The District Court reasoned that Wapato Heritage, by moving to transfer its remaining claims to the Court of Claims, had necessarily admitted the District Court lacked jurisdiction. 1-ER-91–92. But as the District Court also noted, Wapato Heritage had reserved the right, if the District Court found that the Court of Claims lacked jurisdiction and transfer would be improper, to proceed in the District Court. 1-ER-92. The District Court did indeed rule that the Court of Claims lacked jurisdiction, 1-ER-89, and Wapato Heritage's rejected legal theory for Court of Claims jurisdiction, should not have been deemed as an admission that no court had jurisdiction. Under that reasoning, no litigant would ever dare move to transfer a claim to the Court of Claims, for fear of falling between two horses.

The District Court further noted that federal question jurisdiction under 28 U.S.C. § 1331 may exist. 1-ER-94. Indeed, the basis for those two claims was BIA's failure to properly administer, under BIA regulations, a lease, authorized and approved by the BIA under BIA regulations, of lands held in trust for Indians by the federal government under federal statutes and regulations. 3-ER-657; 25 C.F.R. Part 162. Federal law and federal agency action were vital to these claims, which thus raise substantial questions of federal law.

Despite this, the District Court held subject matter jurisdiction was lacking, for several reasons, none of which stand up to close examination. First, that if

viewed as a contract claim, the BIA was not a party to the contract and therefore no federal agency action was involved. 1-ER-94. That is a non-sequitur. The BIA was not a party, but it was trustee for the Lessors and acted as their agent to administer leases on MA-8, as it was authorized to do by the Master Lease and the Casino Sublease which it expressly approved, and by its own regulations. 2-ER-313–60; 25 C.F.R. §§ 162.108, 162.614 (2001); 25 C.F.R. § 162.467 (2015). Indeed, the BIA conceded below that it had a process for recovering overpayments from Indian trust land allottees' IIM accounts. 2-ER-380–81. Clearly, federal agency action or failure to act was vital to the claim.

Second, the District Court reasoned that, viewed as a breach of trust claim, Wapato Heritage had failed to identify a substantive source of agency duty for the BIA to recover the underpayments, at the time of the underpayments. 1-ER-95. True, it was under subsequent regulation, 25 C.F.R. § 162.108 (2001), that the BIA took on the duty of enforcing full payment obligations, but having done so, the BIA was not free to ignore the request of its allottee, Wapato Heritage (acting in part for the interests of enrolled Indian Sandra Evans), to recover the money which the Tribe, as sublessee, had failed to pay. The money was still owed to Wapato Heritage. Having given itself regulatory authority to pursue such a debt, the BIA should have pursued it.

Lastly, the District Court reasoned that the BIA's duty was owed only to Mr. Evans, and Wapato Heritage was not the real party in interest and lacked standing. 1-ER-95. The District Court reasoned that although Wapato Heritage was the heir of Mr. Evans under a will which passed federal probate in 2005, the state probate proceedings did not conclude until a state-court-approved amendment to a 2011 Settlement Agreement under Washington's Trusts and Estates Dispute Resolution Act in 2013. ECF 1-ER-85–86. In that amendment, to ensure that every asset of the estate was encompassed, the state court decreed that choses in action were only then being distributed, and that when Wapato Heritage had pursued such claims it should be deemed to have done so as an agent of the Estate and "for property of the Estate." 2-ER-255; 2-ER-257. Based on this event, the District Court concluded that when the cross-claims were filed, Wapato Heritage lacked standing as the real party in interest, and held as a matter of law that subsequent assignment could not cure the defect. 1-ER-85–89.

The District Court misunderstood the point of the state court order, which was to complete a distribution by the estate's Personal Representative, Jeffrey Webb, who was also the manager of Wapato Heritage LLC. Mr. Evans's heirs had resolved their disputes in a settlement agreement in 2005, reflected in a BIA administrative probate order. 3-ER-501–19; 4-ER-1002–43. The BIA created an IIM-life estate account in the name of Wapato Heritage and distributed to that

account the proceeds from the Moses Allotments which had formerly gone to Mr. Evans. 2-ER-261–62. In the end, after further disputes among the heirs were settled in state court probate proceedings, the choses in action associated with MA-8 and the leases thereon were likewise distributed to Wapato Heritage. 2-ER-248. Meanwhile, consistent with the BIA's establishment of the IIM account, Mr. Webb arranged for Wapato Heritage to pursue any claims of the estate related to Moses Allotment properties, such as a claim in the *Cobell* class-action proceedings, and the claims in this action. 2-ER-262. And until distribution was authorized by the state court, Mr. Webb considered those claims to be held in trust by Wapato Heritage for the benefit of the estate. 2-ER-262–63 ("To the extent that any claims or accounts were in the name of Wapato Heritage, LLC, but contained or related to assets of the above entitled estate, I have considered them, and administered them, as assets of the above entitled estate, subject to control by the above entitled court.") As he further explained to the state court: "my duties as personal representative of the above entitled estate have primacy over, govern and control any duties or responsibilities I may have as manager of Wapato Heritage, LLC, a company formed only as a part of the estate planning of William Wapato Evans." 2-ER-262.

The trustee of an express trust may "sue in their own name" without joining the beneficiary. Fed. R. Civ. P. 17(a)(1)(E). An "express trust means simply "one

created by the act of the parties," rather than imposed by law upon ill-gotten gains, "and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists." *Smith v. Fitch*, 25 Wash.2d 61, 626–27, 171 P.2d 682 (1946) (quoting *Tucker v. Brown*, 199 Wash. 320, 92 P.2d 221, 225 (1939). No trust instrument is required, if the evidence of a trust established by parol is clear, cogent, and convincing. RCW § 11.98.014. Here, the only evidence of the intent of the settlor, trustee, and beneficiary is Mr. Webb's description of his intent, which plainly matches the requirements of an express trust.

The District Court attached undue importance to the state court's use of the word, "agent." The state court was not attempting to make fine distinctions going to standing or lack of standing in another action, it was simply establishing that Wapato Heritage had acted as the estate's fiduciary. The more detailed and precise description by Mr. Webb, 2-ER-262–63, shows a trust relationship.

Indeed, even if Wapato Heritage were deemed a mere agent in 2011–2012, the District Court's opinion elevated form over substance. Generally speaking, standing is determined based on the facts at the time the complaining party filed its claims. *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007). But when a party who "may not technically have had standing at the time

he filed suit," but who for all practical purposes had a "strong…monetary interest in the cause of action," acquires, post-filing, an assignment of a right sufficient for standing, a court should not subsequently dismiss based on the technical defect at the time of filing. *Winn v. Ameritite, Inc.*, 731 F. Supp. 2d 1093, 1099 (D. Idaho 2010). In *Winn*, the plaintiff had financed a third party's transaction at issue with the defendant; after the plaintiff filed the action, the third-party and the plaintiff signed a stipulation clarifying that they had intended to assign the third-party's rights to the plaintiff. *Id.* The district court in that case distinguished the situation from one in which the plaintiff had "no interest" at all until assignment, and held that because there was no prejudice to the defendant and Rule 17(a) was otherwise satisfied, standing was sufficiently shown. *Id.* Similarly, in *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614, 620 (N.D. Ga. 1993), where (much like here) an assignment had failed to transfer the cause of action, but the defect had been cured by a second assignment after filing, the district court held that Rule 17(a) and standing were both satisfied: "an assignment of interest should be recognized provided the assignment occurs before trial, the plaintiff is a real party in interest in at least one other claim, and the defendant suffers no prejudice from its recognition." Here, similarly, Wapato Heritage and the Evans estate had or thought they had transferred the legal interest, decided they needed to confirm the transfer by court order, and did so, curing the defect without any prejudice to

the Government or the Tribe before any motion to dismiss on that ground was filed. Under those circumstances, both Fed. R. Civ. P. 17(a) and the standing requirement should be deemed satisfied.

The District Court mistakenly relied on *United States for Use and Benefit of Wulff v. CMA Inc.*, 290 F.2d 1070, 1074–75 (9th Cir. 1989) for the proposition that "real party in interest is determined at the time the complaint is filed," without exception. That is not what *Wulff* says. In *Wulff*, the plaintiff filed an amended complaint asserting a new claim which had been assigned to the plaintiff after the statute of limitations had passed, and this Court held that the amended complaint could not relate back under Fed. R. Civ. P. 15(c) because the original complaint asserted claims based on different facts and law entirely. *Wulff*, 290 F.2d at 1074. Here, there was no after-the-fact amendment, and none was necessary, because Wapato Heritage did not add a new claim based on new facts but merely firmed up its ownership of the claim it had brought in the first place.

The District Court separately held that Wapato Heritage had failed to state a "colorable claim" to require the BIA to collect underpayments, because the BIA's regulatory duties supposedly run only to Indian Landowners, not to a non-Indian life-estate holder such as Wapato Heritage. 1-ER-85. Although this point was addressed in the context of Wapato Heritage's request for transfer to the Court of Claims, a request not renewed on appeal, Wapato Heritage addresses the District

Court's reasoning to show that it is mistaken and would not be an alternative ground for dismissal of that claim.

The BIA has a duty to provide for periodic, timely reconciliations to assure the accuracy of an IIM account, 25 U.S.C. § 162a(d)(3), and to provide for adequate management of IIM accounts, 25 U.S.C. § 162a(d)(6)-(7) and audits to ensure the accuracy of the IIM account. 25 U.S.C. §4011; *see also* 25 C.F.R. § 115.709. The BIA has a fiduciary duty to verify that allottees are being paid the full amount of rent they are contractually obligated to receive. *Osage Tribe v. United States*, 68 Fed. Cl. 322, 333-34 (2005). Breach of these duties is actionable under federal law. *Goodeagle v. United States*, 122 Fed. Cl. 292, 295 (2015); *see also Fletcher v. United States*, 730 F.3d 1206, 1208-14 (10th Cir. 2013).

In regard to these necessary fiduciary duties, there is no difference between an Indian allottee, and the Indian's life estate beneficiary. The BIA defines "IIM accounts" to include "estate accounts," which are defined as "an account for a deceased IIM account holder." 25 C.F.R. § 115.002. The BIA's regulations group accounts for life estate beneficiaries in with "estate accounts." 25 C.F.R. 115.501–504. When an Indian allottee's estate's trust-land revenue is assigned under a probate court order, the BIA is obliged to deliver it to the decedent's "beneficiaries" via his, her, or its "IIM-life estate account." 25 C.F.R. §§ 115.502, 115.504. The Secretary "shall distribute all rents and proceeds, as income, to the

life tenant." 25 C.F.R. § 179.101(b)(1). Any funds remaining in the decedent's account shall also be delivered to the life estate account. 25 C.F.R. § 115.502.

To the extent that the BIA considered a life estate holder less entitled to its protection than the decedent or remainderman, the BIA made the difference clear in its regulations: the BIA will not enforce the terms of a lease, entered into by a life estate holder, of only the interests subject to the life estate. 25 C.F.R. 162.004. But the BIA did not excuse itself from carrying out its lease-enforcement duties to the decedent Indian landowner after his death. In short, and unsurprisingly, the BIA's trustee duties towards an Indian allottee do not disappear between the Indian's death and the end of the life estate. *See U.S. v. Mason*, 412 U.S. 391, 394, 398 (1973) (decedent Indian's administrators were allowed to reopen her estate for the purpose of challenging BIA's decision in its "fiduciary capacity" to pay state estate tax).

D. The District Court Erred in Dismissing Wapato Heritage's Claim to Declare the Tribe's Replacement Leases Void.

The BIA may approve leases at below fair market value only when the BIA determines that would be "in the best interests of the landowners." 25 C.F.R. § 162.604(b)(3) (2001). Wapato Heritage claimed that the Replacement Lease obtained by the Tribe should be declared void, because it clearly favored the Tribe above all the other Landowners' interests, including Wapato Heritage's 23.8% life-

estate interest. Indeed, the BIA's later position at trial, once it no longer had to worry about this claim, that the RV Park sites alone had a rental value of $139,550 a year, see 1-ER-18, constitutes an admission that the Tribe's $100,000/year lease cheated the Landowners out of at least 40% of fair market value. The merits of the claim were never reached, because the District Court by then had dismissed this claim for lack of subject matter jurisdiction, based on supposed mootness and based on tribal sovereign immunity. 1-ER-96–97.

The claim was not moot: although litigation outlasted the 2009 lease itself, Wapato Heritage plainly meant to extend the claim to the expanded 2014 lease, see ECF 578 at 4, and even as to the 2009 lease, it was not too late to seek fair market value for the Tribe's occupation under an invalid lease. Nor should the District Court have held that tribal sovereign immunity barred the claim, in view of the Tribe's pervasive litigation activity in this case.

Courts have consistently held that litigation conduct, alone, may waive tribal sovereign immunity. *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1989) ("By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party."). The road through waiver by litigation conduct extends every bit as far as a tribe's consent. *Id.*; *see also Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So.3d 656 664 (3d Cir. 2017) ("While participating in

litigation is not a one-way street…the length of the street extends only so far as the Tribe's participation."). In *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1989), this Court held that waiver of sovereign immunity can occur through litigation conduct and that broad, equitable requests for relief will serve as the basis for waiver of all issues pertinent thereto: "By seeking equity, this Tribe assumed the risk that an equitable judgment secured could be modified if warranted by changed circumstances." *Id.* at 1015; *see also Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995) (when a Tribe requests equitable relief and calls for a Court to decide issues inherent to the nature of the litigation it waives Sovereign Immunity).

The Tribe's role in litigation before the District Court was pervasive. The Tribe's consent to the Court's jurisdiction extended to all issues before it. First, the Tribe sought and obtained affirmative relief directly related to the Tribal underpayment issue—it successfully joined in the Government's effort to prevent the allottees from getting counsel, which benefitted the Tribe. 2-ER-461. The Tribe also sought, and received, relief adverse to Wapato Heritage regarding the trust or fee status of MA-08, joined in the Government's successful claim for ejectment of Mill Bay, and successfully argued to speed the ejectment of Mill Bay. 2-ER-442; 2-ER-423; 2-ER-410; 2-ER-398.

The Tribe has requested affirmative relief explicitly at issue in all claims. Many of these affirmative requests are requests for remedies equitable in nature, as in *Oregon* and *Rupp v. Omaha*. 45 F.3d at 1243-47. "Requesting equitable relief from a federal district court constitutes an appeal to the sound discretion of the court [and is a basis for waiver of sovereign immunity]; that a tribe is the plaintiff is immaterial." *Rupp*, 45 F.3d at 1245 (*citing Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982) The Tribe, therefore, has essentially consented to the court's jurisdiction on all issues. The tribe cannot "selectively" participate in each claim and then "hide behind a claim of sovereign immunity" related thereto when the possibility of an adverse result is at hand. *United States v. James*, 980 F.3d 1314, 1320 (9th Cir. 1992).

The District Court relied on *In Re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019) and *Okla. Tax. Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) for the proposition that filing a lawsuit constitutes a limited waiver of sovereign immunity as to the claims brought but not as to separate, adversarial counterclaims brought against the tribe. 1-ER-72. Both of these cases are distinguishable in at least two important respects. The requests in both *Greektown* and *Oklahoma Tax Commission* did not include requests for equitable relief as are present here. *See Rupp*, 45 F.3d at 1245 (differentiating *Oklahoma Tax Commission* due to the broad nature of the relief requested). Nor

did the tribes in those two cases voluntarily submit themselves to the court's orders and gratuitously ask for specific relief involving matters outside their limited role in the case, as the Tribe did here.

The District Court reasoned that the Tribe's very active participation somehow did not really count because the District Court had "request[ed] supplemental briefing on the issue of individual representation to the individual allottees" (citing 2-ER-476–78) and that, in relation to the court "directed any party to submit supplemental briefing" on the Government's motion for summary judgment. 1-ER-73. But these orders did not command the Tribe by name to submit briefs. By submitting briefs, instead of declining to participate due to its sovereign immunity, the Tribe voluntarily submitted itself to the jurisdiction of the Court on all issues. It also showed its affirmative intent to advance its own interests in the proceedings below, far beyond defending itself.[6]

The Tribe's participation in the litigation with Wapato Heritage was pervasive. The Tribe must not be allowed to "selectively" participate in each claim and then "hide behind a claim of sovereign immunity" when the possibility of an

[6] The representation briefing dealt with whether the Government was required to provide counsel for individual allottees and whether the Motion for Summary Judgment dealt with whether the Government was entitled to eject Mill Bay. The Tribe's involvement in both motions was gratuitous.

adverse determination presents itself. *United States v. James*, 980 F.3d 1314, 1320 (9th Cir. 1992). The Court should hold that the Tribe waived its sovereign immunity through its litigation conduct and remand to the District Court for a determination of Wapato Heritage, LLC's claim on the merits.

Lastly on this issue, even if the Tribe had not waived immunity, the District Court could have at least entered findings on this claim as against the BIA, on the basis of which the BIA would have had an obligation to pursue appropriate remedies against the Tribe on behalf of the Landowners or the Landowners could have pursued a claim for breach of fiduciary duty against the BIA.

E. The District Court Erred in Dismissing Claims Predicated on MA-8's Status as Fee Land.

The District Court dismissed Wapato Heritage's claims for a declaration that MA-8 was fee land, for ejectment, and for partition, based on the District Court's prior order, 1-ER-101–71, that MA-8 was Indian trust land. 1-ER-94–95. That prior order was independently appealable, and was appealed, and that appeal is pending in this Court, No. 20-35694. Wapato Heritage concedes that if the prior order holds, those claims cannot survive. Conversely, if the prior order is reversed in 20-35649, the dismissal of those claims should be reversed and the case should be remanded for further proceedings on those issues.

Presumably, the panel which hears this appeal will rely on the decision in Appeal No. 20-35694 rather than reviewing the District Court's order at 1-ER-101–71 again here. To the extent that 9th Cir. R. 28-1(b) may require a record in this appeal of the underlying basis for relief, however, the facts and arguments are sketched in here as follows.

MA-8 was created by Executive Order in 1886 to carry out the Act of July 4, 1884 (23 Stat.79, c. 180) which effected an 1883 agreement between the United States and a small band of Indians including Mr. Evans's ancestor Wapato John. 3-ER-589–97; 1-ER-131. The agreement, the statute, and the order let those Indians choose between moving to the Colville Reservation, and rejecting reservation life in favor of settling on the Moses Allotments, individually-owned parcels of land carved out of what had initially been intended as a separate reservation. 3-ER-724–25; 3-ER-603–04; 1-ER-130–31; 3-ER-589–97.

But soon afterwards, the United States began a policy of issuing so-called "trust patents" when allotting land to Indians, supposedly as an interim measure. *See* Felix S. Cohen, Handbook of Federal Indian Law §§ 1:04, 16:03 (2012). Thus, Congress unilaterally and retroactively changed the Moses Agreement in the Act of March 8, 1906, providing for ten-year trust patents to the allottees, with express restrictions on alienation, instead of fee patents. 3-ER-605–06. That Act, and the MA-8 trust patents, promised to convey the land in fee after ten years. Id.; 4-ER-

905–07. In 1914, however, President Wilson tried to extend the trust period for another ten years by Executive Order. 3-ER-607–08; 1-ER-135. Subsequent executive orders and statutes purported to further extend the trust period, to eternity.

The 1914 Executive Order failed to extend the trust period, because it was ultra vires. It relied on the authority of "Section 5 of the Act of February 8, 1887 (24 Stat. L. 388) [the Dawes Act] and the Act of June 21, 1906 (34 Stat. L. 325-66). 3-ER-607–08. But the Moses Allotments were beyond the scope of the Dawes Act on its face, and the Act of June 21, 1906 merely gave the President authority to extend the express restrictions on alienation, not the trust status of the land.. Because an executive order must be within the scope of authority granted by an act of Congress, "[w]hen an executive acts ultra vires, courts are normally available to re-establish the limits on his [or her] authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see also Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019).

The District Court failed to address this issue, and it compounded its error by classifying the Moses Allotments as Indian "reservation" land (1-ER-132–34), for purposes of the trust-period extension in the Indian Reorganization Act of 1934 ("IRA") as amended. 1-ER-138. The IRA exempted "Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any

Indian reservation now existing or established hereafter." 25 U.S.C. §§ 5102, 5111. "Indian" meant any member of any recognized tribe, and also their descendants then residing "within the present boundaries of any reservation," and "tribe" meant any "tribe, organized band, pueblo, or the Indians residing on one reservation." Act of June 18, 1934, c. 576, § 19, 48 Stat. 988; *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998) (during the time period when the Moses Agreement was made, "tribal ownership was a critical component of reservation status"). The Moses Allotments were not held in trust on behalf of a tribe; they were held by or on behalf of individual Indians whose ancestors did not want to be confined to dependency on the Colville Reservation. MA-8 was an "allotment . . . outside the geographical boundaries of any Indian reservation." 25 U.S.C. § 2511. As such, it was exempted from the extension of trust status under the IRA. *Id.*

In 1935, Congress amended the IRA to again remove power from allotment Indians, by extending the trust status even of allotment lands within any reservation which had voted to exclude itself from the application of the IRA. 49 Stat. 378 § 3 (3-ER-610). This Amendment did not affect the Moses Allotments either, because, as discussed above, they were not on a reservation on which the Secretary called a vote, and were not within a reservation anymore at all. The District Court's conclusion that a vote on the Colville Reservation somehow subjected the Moses Allotments to the 1935 amendment of the IRA, was error.

The Moses Allotments were created after, outside, and independently of the Colville Reservation, and for the purpose of letting Indians such as Wapato John avoid reservation life. Their relatives who chose to go to the Colville Reservation lacked any beneficial or legal interest in Moses Allotment land, by choice. Thus, the trust period on MA-8 was not legitimately extended past 1916, and fee patents should have been issued, and should be issued now.

If this argument, which is briefed in much greater detail and with additional support and authority in Appeal No. 20-35694, persuades the Court in that appeal, then in this appeal, the District Court's decision to dismiss claims of Wapato Heritage's on the sole ground that MA-8 is trust land, stands on sand and should be reversed.

VII. CONCLUSION

For the foregoing reasons, the District Court's dismissal of Wapato Heritage's claims and of Wapato Heritage from the damages trial, should be reversed, and the case remanded for further proceedings.

Respectfully submitted this 26th day of October, 2021.

s/ NATHAN J. ARNOLD
Nathan J. Arnold, WSBA No. 45356
Email: nathan@cajlawyers.com
Emanuel F. Jacobowitz, WSBA No. 39991
Email: manny@cajlawyers.com
R. Bruce Johnston, WSBA No. 4646
Email: bruce@cajlawyers.com

Arnold & Jacobowitz, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
(206) 769-3759

Dale M. Foreman, WSBA No. 6507
Tyler Hotchkiss, WSBA No. 40604
Email: tyler@fhbzlaw.com
Foreman, Hotchkiss, Bauscher & Zimmerman, PLLC
124 N. Wenatchee, Ave., Suite A
P. O. Box 3125
Wenatchee, WA 98807
(509) 662-9602

Attorneys for Appellant Wapato Heritage, LLC

STATEMENT OF RELATED CASES

Grondal v. United States of America, Appellate No. 20-35357, pending appeal from appealable interlocutory orders in same case (briefed and argued).

Grondal v. United States of America, Appellate No. 20-35694, pending appeal from appealable interlocutory orders in same case (briefed and argued).

Grondal v. United States of America, Appellate No. 21-35147, prior appeal from same case (voluntarily dismissed).

Wapato Heritage, LLC v. United States, 637 F.3d 1033 (9th Cir. 2011), prior appeal from related case between some of the same parties.

Date: October 26, 2021

s/Emanuel Jacobowitz
Emanuel Jacobowitz, WSBA #39991
Arnold & Jacobowitz, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
manny@cajlawyers.com
(206) 769-3759
Counsel for Appellant Wapato Heritage, LLC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I, counsel for Appellant Wapato Heritage, LLC, electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Emanuel Jacobowitz
Emanuel Jacobowitz, WSBA No. 3991