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

REPLY BRIEF OF APPELLANT WAPATO HERITAGE, LLC

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I. REPLY ARGUMENT

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

The Government argues that Wapato Heritage's motion to remain in the case, if considered as a motion to intervene, is moot because the case has been resolved by final judgment. The Government's reliance on *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017) and *W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) is misplaced. In *Sprint Communications*, this Court held that settlement of the remaining parties' claims did not moot a motion to intervene, because it "does not appear *impossible*" to award meaningful relief to the appellant, who, if allowed to intervene appellant, "might be able to object to the settlement or otherwise seek his share of the proceeds from the Government." *Sprint Communications*, 855 F.3d at 990 (emphasis in original). Similarly, in *West Coast Seafood*, this Court distinguished *Canatella v. California*, 404 F.3d 1106, 1109 (9th Cir. 2005), as a case "holding that entry of judgment in the underlying litigation does not moot an appeal from a denial of a motion to intervene, if one of the parties keeps the underlying litigation live by pursuing an appeal." *West Coast Seafood Processors Ass'n*, 643 F.3d at 704. Here, Wapato Heritage was itself a party to the underlying litigation and has kept the case alive by pursuing this appeal from dismissal of its

claims.[1] If this Court remands for further proceedings on any of Wapato Heritage's claims, it should also allow Wapato Heritage to present evidence in the District Court to reduce the damages award. Wapato Heritage concedes that it lacks standing to appeal on behalf of the plaintiff below, so that any reduction in the damages award could not benefit Mill Bay, but reduction would decrease the maximum amount of potential liability of Wapato Heritage in any future action brought against Wapato Heritage for indemnification.

If, however, this Court agrees with the Government's argument that by failing to cross-claim against Wapato Heritage or even object to the dismissal of Wapato Heritage, Mill Bay waived or forfeited any claim for indemnification, then this Court can grant no further meaningful relief to Wapato Heritage on this issue.

B. Sovereign Immunity Does Not Bar Wapato Heritage's Claims under the Master Lease, and the Government had a Fiduciary Duty.

The Government argues that sovereign immunity shields it from Wapato Heritage's claim for an order for the Government to seek to recoup overpayments from the other allottees or to collect underpayments from CTEC, but the Government concedes that the Administrative Procedure Act includes a waiver of sovereign immunity for suits for relief other than monetary damages for failure to

[1] Mill Bay also appealed, but its appeal was resolved, after the filing of Appellees' Briefs, by this Court's decision affirming the District Court's orders at issue therein. ECF No. 82-1 in Appeal No. 20-35694 in this Court.

act in an official capacity, and that this waiver, at 5 U.S.C. § 702, applies to causes of action beyond those provided for by the APA itself. Dkt. No. 18 at 48. The Government's contention that Wapato Heritage failed to invoke this provision below cannot prevail, where the Government itself invoked the provision below—in the Government's motion to dismiss granted by the District Court, from which this appeal is taken, the Government argued that Wapato Heritage had failed to exhaust administrative remedies as required under 25 C.F.R. § 2.6, a regulation which expressly interprets 5 U.S.C. § 702. In other words, the premise of the Government's motion to dismiss was that Wapato Heritage was invoking 5 U.S.C. § 702. The Government should not now be heard to argue otherwise.

The Government further argues that 5 U.S.C. § 702 does not apply because "[a]ctions to compel the payment of rent under a lease…are effectively claims for 'monetary damages,' even if expressed in terms of injunctive relief." Dkt. No. 18 at 48. Why so? The Government does not explain this notion, merely citing it to *Great-West Life & Annuity Ins. Co. v. Knudson*. 534 U.S. 204, 211–12 (2002). *Knudson* does affirm the obvious, that a claim for damages against the United States cannot be shoehorned into 5 U.S.C. § 702 by characterizing it as a claim for specific performance of a payment obligation, because "specific performance of a contract to pay money was not available in equity." *Knudson*, 534 U.S. at 211. But *Knudson* did not hold that a suit to require the Government to collect from a

third party must be viewed as a claim for damages; it did not address the issue at all. Indeed, *Knudson* distinguished *Bowen v. Massachusetts*, 487 U.S. 879 (1988), a case which the *Knudson* Court described as holding that a suit to require a certain calculation method to be used for Medicare reimbursements sought equitable relief, and could be brought under 5 U.S.C. § 702. *Knudson*, 534 U.S. at 212. Just so, a claim seeking to require the BIA to collect from a third party is a claim for injunctive relief, not a claim for damages.

The Government's argument that the Sells Report does not sufficiently demonstrate that underpayments by the Tribe under the Casino Sublease were passed along to Evans as allottee (and the other allottees) raises a factual issue which cannot justify dismissal on the pleadings. Wapato Heritage alleged that CTEC and BIA had not made up the shortfall to the allottees. 3-ER-651. The Government does not appear to deny that it owed a fiduciary duty to Evans as allottee.

The Government does dispute that it owed a fiduciary duty to Wapato Heritage. As explained in Wapato Heritage's opening brief in this appeal, Wapato Heritage acted as trustee of the claims of Evans's estate. True, Evans was already deceased when the Government's duty to act was triggered by the Sells Report in 2005, but the Government concedes that his estate had not yet passed to his heirs. Surely the duty to administer an Indian trust does not lapse while the Indian's

estate is being settled. And afterwards, if the Government allows its Indian allottees to grant life estates in allotment interests, but, after the allottee's death, will not protect the life-estate holder from being cheated by the Government or other allottees, the right to grant a life-estate is a sham. To interpret its regulations in this manner after Evans's death, when Evans can no longer revise his will, betrays the decedent Indian landowner.

C. Wapato Heritage's Claim that the Tribe's 2009 Lease was Obtained Collusively and in Bad Faith Extended to the Tribe's Worse 2014 Replacement Lease, and the Government and Tribe's Jurisdictional Arguments Lack Merit.

Wapato Heritage alleged in 2011 that the lease to the Tribe should have been declared void due to, among other things, "the lack of good faith and/or collusive conduct of the BIA and CTCR in reaching the said replacement lease." 3-ER-652–53. The Government concedes that in 2014, when the 2009 Casino Lease was due to expire, the Tribe and the BIA promptly rammed through a 25-year Replacement Lease, extending the 9-acre casino leasehold to the entire 175 acres of MA-8, for the same annual rent. Appellee's Br. at 47. Obviously, if Wapato Heritage objected to the 2009 version of the lease for favoring the Tribe's interests over the landowners' in bad faith, making the lease last 5 times as long for 1/20th the per-acre rent did not resolve the problem. The Government's argument that it had no

notice that Wapato Heritage's claim extended to the even more abusive replacement lease to the same lessor, was disingenuous.

The Government's argument that Wapato Heritage failed to exhaust administrative remedies as to the 2014 Lease should not prevail. The BIA's position in this lawsuit was a clear expression of opposition to any change in its decision to favor the Tribe over the allottees in regards to leasing MA-8. Futility is a well-established exception to the requirement for administrative exhaustion. *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 862 F.2d 195, 200 (9th Cir. 1988). Admittedly, the exception generally requires some effort to make use of the administrative remedy first, *id.*, but to require Wapato Heritage to go through a new administrative process where the battle had already been joined over the same issues as to the predecessor 2009 Lease, and the Government had every opportunity to consider the issue in the course of this action and had made its position clear, would be even more pointless.

The Government's argument that the Tribe is a necessary and indispensable party as to this claim, so that this claim must be dismissed under Fed. R. Civ. P. 19, cannot be reconciled with the Government's position that it can speak for the Tribe and represent its interests with regard to MA-8. Moreover, the Government's conclusion that tribal sovereign immunity bars even a suit for declaratory relief against the Tribe lacks merit, for the reasons discussed in Wapato Heritage's

opening brief. The Tribes' effort to distinguish United States v. Oregon and Rupp v. Omaha Indian Tribe misreads those cases. Contrary to the Tribe's Answering Brief, in *United States v. Oregon*, this Court's conclusion that the Yakima Indian Nation had waived sovereign immunity by participation in the lawsuit did not depend on the tribe's signed agreement; the signed agreement was an independent waiver of sovereign immunity. *United States v. State of Or.*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("The parties have advanced two theories of consent. Under the first, it is asserted that the Tribe's intervention constitutes consent. The second posits that the Tribe consented by agreeing in 1977 to submit all disputes over fishing to the Oregon district court. Both theories are sound.") Similarly, in the *Rupp* case, this Court held that even aside from the Tribe's less-than-explicit waiver, "[t]o hold that the district court could exercise its discretion to quiet title in favor of the plaintiff (the Tribe) but not the defendant (Rupp and Henderson) would be anomalous and contrary to the court's broad equitable powers." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995).

Lastly on this claim, the Government, which opposed Wapato Heritage's motion for transfer to the Court of Claims below, now argues that an after-the-fact damages award if the 2009 lease were adjudged to have been wrongfully granted, would have to be transferred to the Court of Claims. The Government should not be allowed to switch litigation positions. But if the Government does now agree

that this claim should be transferred to the Court of Claims, this Court may properly remand for further proceedings to allow Wapato Heritage to move unopposed for reconsideration of the District Court's order denying transfer.

D. Appeal is Moot as to MA-8 Trust-or-Fee Land Status.

Wapato Heritage noted in its opening brief that it already had an appeal pending from the District Court's interlocutory order which determined that MA-8 was Indian trust land. Wapato Heritage conceded that if that appeal was resolved against it, this Court would necessarily also have to affirm the District Court's subsequent dismissal of Wapato Heritage's claims which were premised on MA-8 losing its Indian trust status. After the Appellees' briefs were filed, this Court did decide the interlocutory appeal against Wapato Heritage, affirming the District Court's order that MA-8 was Indian trust land. Dkt. No. 82-1 in Appeal No. 20-35694. Without conceding that the District Court, or, respectfully, this Court, were correct on that point, Wapato Heritage respects that the decision has been made, and therefore, no further argument regarding the dismissal of these claims is appropriate in this appeal.

II. CONCLUSION

For the foregoing reasons and those set forth in Appellant's opening brief in this appeal, the District Court's dismissal of Wapato Heritage's fifth and sixth claims and claim for declaratory relief as to the Tribe's leases, and of Wapato

Heritage from the damages trial, should be reversed, and the case remanded for further proceedings.

Respectfully submitted this 12th day of January, 2022.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature /Emanuel Jacobowitz **Date** January 12, 2022

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 January 12, 2022. 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.

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