THE HONORABLE JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MAKAH INDIAN TRIBE,

Plaintiff,

v.

EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, BP P.L.C., BP AMERICA INC., CHEVRON CORPORATION, CHEVRON USA, INC., SHELL PLC, SHELL OIL COMPANY, CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, and PHILLIPS 66 COMPANY,

Defendants.

SHOALWATER BAY INDIAN TRIBE,

Plaintiff,

v.

EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, BP P.L.C., BP AMERICA INC., CHEVRON CORPORATION, CHEVRON USA, INC., SHELL PLC, SHELL OIL COMPANY, CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, and PHILLIPS 66 COMPANY,

Defendants.

No. 2:24-cv-00157-JNW
No. 2:24-cv-00158-JNW

PLAINTIFFS' REPLY IN SUPPORT OF CONSOLIDATED MOTION TO REMAND

Hon. Jamal N. Whitehead

Noted for June 14, 2024

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The Makah Indian Tribe and the Shoalwater Bay Indian Tribe ("Tribes") reply to the Defendants' Response to Plaintiffs' Consolidated Motion to Remand ("Opp."). Defendants' central theory for removal is that under the Supreme Court's decisions in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) ("*Oneida I*"), and *County of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226 (1985) ("*Oneida II*") (collectively "*Oneida*"), any time "Indian tribes bring claims seeking damages for alleged injuries to tribal lands and property interests, . . . those claims are exclusively governed, and completely preempted, by federal law," specifically federal common law, Opp. at 1, *see also id.* at 2, 7–19. As the Tribes explained in their Consolidated Motion to Remand ("Mot."), Defendants' reasoning "misunderstands the scope and operation of complete preemption, the holdings in *Oneida*, and the allegations in the Tribes' complaints." Mot. at 12. Complete preemption cannot confer jurisdiction because the Ninth Circuit has held that only a federal statute can have complete preemptive force, not judge-made federal common law. *See* Mot. at 8–9; Part I.A, *infra*. Even if the body of federal common law Defendants seek to rely on could completely preempt some state law claims, it would not do so here because there is no federal common law cause of action for the claims the Tribes assert. Certain causes of action, principally trespass, ejectment, and accounting, have been found to arise under federal common law because they require prima facie proof of a right of exclusive possession that is in turn based on aboriginal title. Public nuisance and products liability claims are not among them. *See* Parts I.B, I.C, *infra*.

Defendants' alternative argument for jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), also fails. For the same reasons that the Tribes' state-law claims do not arise under federal common law, they do not present a substantial federal question. The rights at issue are creatures of state law, and while

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they do involve Indian lands, the Tribes need not prove any issue of federal law as a necessary element of their claims. *See* Part II, *infra*.

Defendants' creative theories would significantly expand district court jurisdiction over tribal matters, and that creativity cautions in favor of remand. There is a "'strong presumption' against removal jurisdiction [which] means that the defendant always has the burden of establishing that removal is proper." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir.1990)). "Where doubt regarding the right to removal exists, a case should be remanded to state court." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). The Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians," moreover, "even when those claims arose in Indian country." *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984). The Tribes' election to proceed under Washington law in Washington courts is itself an exercise of self-governance and self-determination that the well-pleaded complaint rule and federal Indian law and policy both support. Defendants cannot meet their burden and these cases must be remanded.

I. The Tribes' Claims Are Not Completely Preempted.

Defendants' complete preemption argument misunderstands three separate strands of controlling authority. It misconstrues precedent concerning application of the complete preemption doctrine, precedent concerning federal common law claims to vindicate aboriginal title, and the elements of the Tribes' claims under Washington law.

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A. Defendants' Arguments Mischaracterize Ninth Circuit Authority Concerning the Operation of Complete Preemption Jurisdiction.

Defendants ignore the Ninth Circuit's most recent authority discussing the scope and limits of the complete preemption doctrine. The Ninth Circuit has recently held—in cases to which some or all Defendants here were parties—that complete preemption occurs only in the extremely rare circumstance where "a federal *statute's* preemptive force is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim." *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 748 (9th Cir. 2022) (cleaned up) (emphasis added), *cert. denied*, 143 S. Ct. 1797 (2023); *City of Oakland v. BP PLC*, 969 F.3d 895, 905 (9th Cir. 2020). Defendants identify no such statute here, arguing instead that *Oneida* created an even rarer common law exception to the complete preemption exception. The Ninth Circuit has never adopted that view. Although it previously characterized *Oneida I* as "[a] *possible* additional instance of complete preemption," *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 n.3 (9th Cir. 1993) (emphasis added), the court's more recent cases make clear that complete preemption requires congressional intent expressed through a federal statute. There is none here, and federal common law might at most provide Defendants a preemption defense in state court.

The Ninth Circuit stated clearly in *Oakland* and *San Mateo* that "complete preemption applies when *Congress* '(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action,'" and "[o]nce a federal *statute* completely preempts an area of state law, then any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *San Mateo*, 32 F.4th at 748 (cleaned up) (emphasis added); *see also Oakland*, 969 F.3d at 906 (same). Defendants ignore the complete preemption discussion in *San Mateo* and *Oakland* entirely, and do not attempt to

identify a statute that completely preempts the Tribes' claims. The Court must reject removal based on complete preemption for that reason alone.

Defendants admit that "in non-tribal circumstances, the Supreme Court has looked to federal statutes to find complete preemption," but nonetheless contend that "the underpinnings of complete preemption in this context may look different from other contexts" such that it operates here with no underlying statute and no direction from Congress. Opp. at 16. The Ninth Circuit has never adopted that reasoning, which is wholly inconsistent with the court's most recent precedent on the subject. To the contrary, the court in *Oakland* reversed the district court's "conclu[sion] that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the [plaintiffs' state-law public nuisance] claim was 'necessarily governed by federal common law,'" and focused its complete preemption inquiry analysis exclusively on the Clean Air Act. *Oakland*, 969 F.3d at 902, 907–08.

Multiple other district and circuit courts in analogous cases have recently considered whether federal common law can have complete preemptive effect, moreover, and have either declined to adopt it or rejected it outright. *See Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 710 (8th Cir. 2023), *cert. denied sub nom. Am. Petroleum Inst. v. Minnesota*, 144 S. Ct. 620 (2024) ("Because Congress has not acted, the presence of federal common law here does not express Congressional intent of any kind—much less intent to completely displace any particular state-law claim."); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1262 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023) ("Because federal common law is created by the judiciary—not Congress—Congress has not 'clearly manifested an intent' that the federal common law for transboundary pollution will completely preempt state law." (citation omitted)).

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In the specific context of claims for violations of aboriginal title, the Ninth Circuit previously speculated that the *Oneida* line of cases might append the complete preemption framework. In *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 n.3 (9th Cir. 1993), for example, the court stated that "[a] *possible* additional instance of complete preemption may be found in [*Oneida I*]" (emphasis added), with the caveat that the decision turned on the Supreme Court's review of "over two centuries of legislation and caselaw holding that federal law governed disputes over title to Indian lands" rather than a clear expression of congressional intent. *See also K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1030 (9th Cir. 2011) (same); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 n.3 (9th Cir. 2002) (same); *see also* Mot. at 12–16. Today, courts recognize that complete preemption requires clear congressional action.

Defendants' position that federal common law can completely preempt state law, and that the Tribes' claims "are governed, and completely preempted, by federal law," Opp. at 8, asks this Court to adopt a radical, unprecedented extension of a jurisdictional doctrine the Ninth Circuit has taken pains to cabin. But the Ninth Circuit has "long held that 'removal statutes should be construed narrowly in favor of remand to protect the jurisdiction of state courts,'" and "the Supreme Court has repeatedly affirmed its 'deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes.'" *San Mateo*, 34 F.4th at 764 (citations omitted). The Court should resist the invitation and grant remand.

B. The *Oneida* Cases Do Not Create an Exclusive Cause of Action for the Claims the Tribes Assert.

Even assuming arguendo that the federal common law Defendants seek to rely on could completely preempt state law in the abstract, it would not completely preempt the Tribes' claims here because there is no exclusive federal common law cause of action that could replace them,

under *Oneida I* or otherwise. As noted, complete preemption operates only when "Congress '(1) intended to displace a state-law cause of action, *and* (2) *provided a substitute cause of action*.'" *San Mateo*, 32 F.4th at 748 (emphasis added). There is no substitute cause of action here because the imposition on aboriginal title recognized in *Oneida I* and *II* is not the injury the Tribes allege. Defendants criticize the Tribes for taking a "cramped approach, and a myopic focus on particular causes of action," Opp. at 19, but determining whether federal law provides a remedy for a plaintiff's specific claims is indispensable to the complete preemption analysis.

The Supreme Court has explained that in the three statutory contexts "where th[e] Court has found complete preemption, . . . the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). That requirement is satisfied only when "it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered," and "removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one." *Hunter v. United Van Lines*, 746 F.2d 635, 643 (9th Cir. 1984). The federal claim "need not provide the same remedy as the state cause of action," but "must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Boulder Cnty.*, 25 F.4th at 1256–57 (citations omitted); *see also Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1036–38 (9th Cir. 2014) (consumer protection claims alleging "marketing misrepresentations" to credit card customers not completely preempted by National Bank Act because claims were based on credit card providers' "independent state law obligations to obtain consent from and not to deceive consumers," not interest rates governed by the Act).

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Defendants badly distort the aboriginal title right protected by federal common law under *Oneida* and try to bring the Tribe's nuisance and product defect claims within its scope, but neither *Oneida* nor Ninth Circuit case law support their position. Aboriginal title encompasses "the right to exclusive occupation of the land and use of resources attending the land until that property right is extinguished," RESTATEMENT OF LAW OF AM. INDIANS § 77 (AM. L. INST. 2022), or "a right of occupancy" conferred by and "extinguishable only by the United States." *Oneida I*, 414 U.S. at 667. As discussed at length in the Tribes' Motion, *see* Mot. at 9–16, the *Oneida* cases held that a tribe can "maintain [an] action for violation of their [aboriginal] possessory rights based on federal common law," which is within the federal question jurisdiction of the district courts. *Oneida II*, 470 U.S. at 236. Many prior decisions "recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights," through traditional common law claims sounding in property law, such as ejectment and accounting actions against trespassers. *Id.* at 235–36.

Federal question jurisdiction exists over those claims because "[t]he threshold allegation required of such a well-pleaded complaint—the right to possession—[i]s plainly enough alleged to be based on federal law," namely the aboriginal title which only the federal government can extinguish or alienate. *Oneida I*, 414 at 666. Based on the *Oneida* cases, the Ninth Circuit has stated that "federal law controls an action *for trespass* on Indian land," *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 & 1551 (9th Cir. 1994) (emphasis added). Courts have thus held that there is a federal common law claim for trespass for the same reason there are federal common law claims for ejectment and accounting: The right of exclusive possession that a trespass action vindicates flows from aboriginal title, which is conferred by, and terminable only by, the United States. Unsurprisingly, the cases Defendants rely on that

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applied *Oneida* to uphold federal question jurisdiction *all* involved claims that put the right of possession at issue, such as trespass, claims to quiet title, and claims to enforce an easement. *See Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 338 (10th Cir. 1974) (trespass); *County of Mono v. Liberty Utils. Calpeco Elec., LLC*, No. CV 21-769-GW-JPRx, 2021 WL 3185478, at *4 (C.D. Cal. May 6, 2021) (trespass); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1151 (9th Cir. 2020) (trespass); *Carney v. Washington*, 551 F. Supp. 3d 1042, 1052 (W.D. Wash. 2021) (action to quiet title and enforce easement); *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300, 302 (10th Cir. 1978) (plaintiff tribe "ha[d] the requisite standing to bring a trespass action," and "rights similar to those which are present here were also present in *Oneida*"). As argued in the Tribes' Consolidated Motion, the *Mescalero Apache Tribe*, *Pueblo of Isleta*, and *County of Mono* decisions were wrongly decided on their own terms because they misapply the *Oneida* decisions and their jurisdictional analyses were flawed. *See* Mot. at 19–23. The Court need not hold that those decisions are bad law to grant remand, however, or determine whether a tribe's state-law trespass claim will always arise under federal law because it necessarily pleads possessory rights based on aboriginal title, because there simply are no similar causes of action in this case. The Tribes have not pleaded claims for trespass, ejectment, or any similar possessory claim.

Importantly, the Ninth Circuit has repeatedly held that claims involving Indian land but unrelated to aboriginal title do *not* inherently give rise to a federal right of action against private tortfeasors and *are* cognizable under state law. Two cases are especially instructive. First, in *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 509–10 (9th Cir. 2005), the Ninth Circuit sitting en banc heard an appeal concerning the Skokomish Indian Tribe's claims against the United States, the City of Tacoma, and Tacoma Public Utilities, alleging that a city-owned

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hydroelectric project "caused flooding of the Tribe's reservation, failure of septic systems, contamination of water wells, blocking of fish migration," and other "impact[s] on tribal lands and fisheries, alleging both state and federal causes of action." The court held in relevant part that the Skokomish could not assert treaty-based claims against the City or utility, specifically distinguishing *Oneida*. *Id.* at 514. The court held that *Oneida* stands for the proposition that "plaintiff tribes c[an] assert a federal common law damages claim for unlawful possession of land" based on "well-established federal common law principles regarding aboriginal possessory rights in land." *Id.* The Skokomish's treaty-based claims, by contrast, were "seeking to collect damages for violation of fishing rights reserved to it by treaty," and *Oneida* was thus "inapposite" and did not provide a cause of action. *Id.* Equally importantly, the court considered the Skokomish's state law claims for "inverse condemnation, trespass, tortious interference with property, conversion, negligence, negligent misrepresentation, private and public nuisance," and waste, with no comment or apparent consideration that those claims might be cognizable only under federal law. *Id.* at 516. The court found that the statutes of limitations for each of the Washington law claims had lapsed, and affirmed summary judgment for the defendants. *Id.* at 516–18. Defendants' insistence that "federal law governs claims by Indian tribes for damages to tribal lands" in every circumstance, *see* Opp. at 10, is irreconcilable with *Skokomish.*

Second, in *K2 America Corp.*, 653 F.3d at 1026, the court held that state law claims between two non-Indian parties "arising from a dispute over lands held by the United States in trust for various Indian allottees" were not completely preempted, again distinguishing *Oneida*. The court noted that *Oneida I* was inapposite both because neither plaintiff nor defendant were tribes or tribal citizens, and because the plaintiff did not "claim ownership of the Allotment Lease under a federal constitutional provision, treaty, or statute, or under federal common law." *Id.* at

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1030–31. While the plaintiff sought "an interest in real property held in trust by the United States, its alleged entitlement to the Allotment Lease turn[ed] only on state common law and statutory claims; it d[id] not require interpretation of a federal right," and the complaint was thus outside "the handful of extraordinary situations where even a well-pleaded state law complaint will be deemed to arise under federal law for jurisdictional purposes." *Id.* (cleaned up). *Cf. Cnty. of Mono*, 2021 WL 3185478, at *6 ("agree[ing] with Plaintiffs that they primarily rely upon the California Constitution and the California Code of Civil Procedure in bringing their inverse condemnation claim," which could have been brought in state court, but holding that because plaintiff also alleged Fifth Amendment violation, claim presented "a disputed question of federal law on the face of the Complaint").

The same is true here—the Tribes' claims seek to vindicate rights conferred by the State of Washington, not their aboriginal right of exclusive possession and occupancy or any other federal right. Defendants' contention that *K2* is distinguishable because "Plaintiffs are Indian tribes who claim ownership of their tribal land under federal law," Opp. at 16, obfuscates the dispositive point that "federal jurisdiction attaches only when resolution of the case requires *interpretation* of a federal right of possession," *Owens Valley Indian Hous. Auth. v. Turner*, 185 F.3d 1029, 1033 (9th Cir.). The Tribes' claims do not turn on or require a court to interpret any title, right of possession, or claim of ownership to Indian land.

C. The Tribes' State-Law Claims Do Not Seek to Vindicate Aboriginal Title or Require Proof Concerning Aboriginal Title as a Necessary Element.

Defendants' contention that the Tribes' public nuisance claims are completely preempted also mischaracterizes Washington nuisance law. The Tribes' nuisance claims do not require the Tribes to plead or prove specific property rights, let alone rights arising from aboriginal title. Defendants bury a key assertion on page 22 of their Opposition, claiming that the Tribes "seek

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to protect their right to 'enjoy . . . property'" and that under Washington law "[n]uisance claims seeking to vindicate such rights require interference with existing 'property rights.'" Opp. at 22 (citing *Animal Legal Def. Fund v. Olympic Game Farm, Inc.*, 1 Wash. 3d 925, 934–37 (2023)). That statement severely misrepresents the holdings in *Olympic Game Farm*.

The Tribes allege public nuisance claims under RCW 7.48, which defines nuisance broadly, to include:

> unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120. A public nuisance "is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." *Id.* at 7.48.130. Here, the Tribes allege Defendants' conduct created nuisance conditions that "caus[e] harms to public health and property, as well as the ability of the [Tribes] and [their] citizens to enjoy life and property," and that the Tribes have suffered "damages to infrastructure, governmental services facilities, Tribal residences, and reservation roads." Compl. at 94–95, ¶¶ 5.4, 5.6.

In *Olympic Game Farm*, the Washington Supreme Court accepted a certified question from a court of this district to determine whether an animal rights organization could bring a public nuisance claim against a private zoo for alleged violations of state and federal animal welfare laws "in the absence of a showing that the conduct . . . interferes with the use and enjoyment of property, *or is injurious to public health or safety*?" 1 Wash. 3d at 929 (emphasis added). The court answered in the negative, ultimately holding that both statute and case law "established the rule applicable to nuisance claims, limiting claims to property infringement *or threats to health and safety*." *Id.* at 937 (emphasis added). The court repeatedly emphasized that

public nuisances can arise from interference with property rights *or* public safety, health, and comfort. *See id.* at 933 ("Our case law has limited nuisances to actions that interfere in the use and enjoyment of property or threaten public health and safety."); 934 ("ALDF reaches far back in Washington case law for evidence that we have allowed interferences unrelated to property rights or public health and safety to constitute public nuisances."). The Tribes allege both interference with enjoyment of property and threats to public safety and security, and recovery would be available independently under either theory. Nothing in *Oneida* or its progeny, by contrast, suggests that a plaintiff proceeding on a federal common law aboriginal title claim could state a claim based on alleged threats to public safety.

If the Tribes brought ejectment claims under Washington law, by contrast, they would be required to prove "a valid subsisting interest in real property, *and a right to the possession thereof*," among other elements, in an action "against the tenant in possession." RCW 7.28.010 (emphasis added). A Washington ejectment plaintiff is required to "set forth in his or her complaint the nature of his or her estate, claim, or title to the property." *Id.* at 7.28.120. If the Tribes asserted a right of possession flowing from aboriginal title, the case would likely present a federal question under *Oneida* because the claim of aboriginal title would appear in the well-pleaded complaint. There is no such claim here, and a plaintiff suing in nuisance or products liability is not required to plead or prove a similar title or possessory right.

II. The Defendants Cannot Satisfy *Grable*.

In asserting that they can satisfy federal-question jurisdiction, Defendants fail to delineate and apply *Grable*, *see* Opp. at 20–23, leaving things muddled, consistent with their description of *Grable* as applying "common-sense" to "kaleidoscopic situations," Opp. at 7. The test for the *Grable* exception to the well-pleaded complaint rule is specific and concrete: "whether the state-

law claim [1] necessarily raise a stated federal issue, [2] actually disputed and [3] substantial, which a [4] federal forum may entertain without disturbing a congressionally approved balance of federal and state judicial responsibilities." *Grable,* 545 U.S. at 308. "All four requirements must be met for federal jurisdiction to be proper." *Oakland,* 969 F.3d at 904–05.

A. The Defendants Do Not Satisfy the *Grable* Factors.

Little more needs to be said about why the Defendants cannot satisfy *Grable* beyond what the Tribes already pointed out in their opening brief. *See* Mot. at 16–18. Because they fail to state and apply *Grable*'s four factors, the Defendants fail to address the key reasons why they gain no support from that exception to the well-pleaded complaint rule. To briefly reiterate:

1. The Tribes' complaints do not "necessarily raise" any federal issue as an essential element of their Washington law claims.

2. Even if the complaints' references to interests in lands and resources (or, in the case of Makah, its treaty) could be seen as stating federal issues, they are not disputed. The complaints reference no dispute whatsoever about the Tribes' valid possession of their lands and resources or their status under a federal law or treaty, and do not allege their possessory rights have been violated.

3. Further, under *Grable*, whether or not a federal issue is "substantial" turns on whether the issue is "to the federal system as a whole," such as "the interpretation or validity of a federal statute," rather than being "fact-bound and situation-specific." *Oakland*, 969 F.3d at 905. Even if the complaints "necessarily raised a stated federal issue" that was "actually disputed" with respect to the Tribes' rights to their lands and resources—and they do not—that issue would be "fact-bound and situation-specific" as to each tribe and thus not substantial.

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4. Finally, even if the Court were to address the fourth factor, it would not be met. As set forth above, the Tribes' decision to avail themselves of state law remedies in state court for the harms caused to their communities by the Defendants' tortious conduct exemplifies their exercise of tribal self-determination, which is fully consistent with Congress's long-standing policy goals for Indian tribes. Thwarting the Tribes' choice would, if anything, disturb Congress's goals.

The Defendants assertion that the Tribes' property rights are at issue because, under the law of Washington, "nuisance claims seeking to vindicate [the Tribes' rights to 'enjoy . . . property'] require interference with existing 'property rights,'" Opp. at 22 (citing *Olympic Game Farm*, 1 Wash. 3d at 934–37), illustrates their failure to satisfy *Grable*. They say "determination of the existence and scope of Plaintiffs' property rights turns on federal law." *Id.* The problem with this argument is that even if the Defendants' assertion were true, and it is not for the reasons discussed above, the second *Grable* factor is missing. There is no dispute whatsoever about the Tribes' possessory rights: the validity of their possession of their lands and resources or the status of those lands and resources under any federal statute, regulation, or treaty is simply not at issue. Nor is there any indication that even if the Tribes' federal possessory rights to their lands and resources were in dispute, that issue would meet *Grable*'s "substantiality" requirement. *Olympic Game Farm* does not support jurisdiction here.

Beyond this, the Defendants continue to err by asserting that, just because the Makah Tribe's complaint references its treaty rights to land, the *Grable* exception to the well-pleaded complaint rule is met. *See* Opp. at 22. The Makah Tribe's treaty rights are simply not in dispute, and the Tribe's state law claims cannot possibly be construed as claims to resolve treaty rights. *E.g., United States v. Washington*, 853 F.3d 946 (9th Cir. 2017) (upholding tribes' claims that

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Washington violated their treaty rights to take fish by failing to fix dilapidated culverts that blocked fish passage). Finally, as described in the Tribes' opening brief (Tribes' Mo at 25), *Gila River Indian Community v. Cranford*, 459 F. Supp. 3d 1246 (D. Ariz. 2020), does not assist the Defendants because, in that case, the scope of the Tribe's federal treaty-protected water rights was in dispute. *See id.* at 1249.

B. Defendants' Assertion that *Grable* Applies Because the Tribes Claim "Increased Costs Associated with Public Health Impacts" Lacks Merit.

This continuing assertion by the Defendants, based solely on the unpublished pre-*Grable* decision of the federal district court in *Acoma Pueblo v. American Tobacco Co.*, No. CIV 99-1049M/WWD, 2001 WL 37125252 (D.N.M. Feb. 20, 2001), suffers from the same infirmities as its general arguments above because the Defendants fail to apply *Grable*'s four factors.

As set forth in the Tribes' opening brief, Mot. at 26, the district court in *Acoma* left open the question of whether there was any actual dispute about a purported federal law issue: whether federal moneys provided to the Pueblos were subject to subrogation under the Indian Health Care Act. It is likewise speculation whether any such disputed issue will arise in this case, which appears nowhere on the face of the Tribes' complaints.

The Defendants accuse the Tribes of omitting the issue from their complaints and argue that the Tribes' assertions that their communities have suffered "health risks" and related "increased costs" is sufficient to meet the *Grable* standards because a "comprehensive federal regime concerning tribal health care" will "necessarily implicate federal health programs, federal funding, and the federal legal framework governing these matters." Opp. at 25. The Ninth Circuit rejected a similar argument in *Oakland*, where, "[r]ather than identify a legal issue," the defendants "suggest[ed] that the Cities' state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy." 969 F.3d at 906–07. The court

held that the case presented "no doubt an important policy question, but it does not raise a substantial question of federal law" that would satisfy *Grable*. *Id.* at 907. Identically here, Defendants gesture toward federal interests that might arise in the course of litigation, but do not identify any specific necessary, disputed, and substantial question of federal law. In any event, the fact that a comprehensive federal regulatory scheme may be implicated in a case supplies no basis for federal-question jurisdiction, including in cases arising on Indian land. *See K2 Am. Corp.*, 653 F.3d at 1031; *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 951 (9th Cir. 2004).

CONCLUSION

The Tribes' consolidated motion to remand should be granted.

The undersigned counsel certifies that this memorandum contains 4,993 words, in compliance with the Local Civil Rules and the parties' stipulation entered by the Court on March 19, 2024. *See* Dkt. 60.

Respectfully submitted,

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