

Docket No. 10-35237(L), 10-35288, 10-35348

In the
United States Court of Appeals
For the
Ninth Circuit

WAPATO HERITAGE LLC, a Washington Limited Liability Company,
KENNETH EVANS, Individual Resident of Washington State,
JOHN WAYNE JONES, Individual Resident of Washington State,
and JAMIE JONES, Individual Resident of Washington State,

Plaintiffs-Appellees,

v.

SANDRA D. EVANS,
an Individual not a Resident of Washington State,

Defendant-Appellant.

*Appeal from a Decision of the United States District Court for the Eastern District of Washington,
No. 2:07-cv-00314-EFS · Honorable Edward F. Shea*

REPLY BRIEF OF APPELLANT

MARIO GONZALEZ, ESQ.
LAW OFFICES OF MARIO GONZALEZ
522 Seventh Street, Suite 202
Rapid City, South Dakota 57701
(605) 716-6355 Telephone

MARY T. WYNNE, ESQ.
WYNNE LAW OFFICE
3561 South Tumbleweed Court
Chandler, Arizona 85248
(480) 895-0642 Telephone

Attorneys for Appellant Sandra D. Evans



TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	1
I. THE FEDERAL DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THIS CASE	3
A. There Is No Federal Question Jurisdiction Because Wapato Heritage Alleges Only State Law Claims Of Breach Of Contract And Interference With Contract	3
B. There Is No Jurisdiction Under 29 U.S.C. § 1353 Because Wapato Heritage Did Not Allege A Right To An Allotment Of Land.....	8
C. There Is No Diversity Jurisdiction Because Evans Is A Citizen Of Washington State.....	9
II. THE SECRETARY OF THE INTERIOR MUST APPROVE THE ASSIGNMENTS AT ISSUE IN THIS CASE BECAUSE 25 U.S.C. § 410 APPLIES TO THIS CASE.....	12
A. 25 U.S.C. § 410 Applies To This Case Because Evans’ Purported Obligation To Initiate a B.I.A. Transfer of Evans’ Trust Fund Monies To Wapato Heritage In The Future Constitutes A Debt Or Claim Within The Meaning Of The Statute, as well as an Encumbrance on Trust Land	12
B. Wapato Heritage’s Claim That The ALJ’s Approval Of The Settlement Agreement Constitutes BIA Approval Of The Assignments Is Without Authority And Without Merit.....	19
III. THE COURT ERRED BY EXCLUDING THE TESTIMONY OF EVANS’ EXPERT WITNESS ON DAMAGES	20

IV. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT.....	22
V. WAPATO HERITAGE’S CLAIM THAT EVANS’ DEFENSE AGAINST ITS CLAIMS VIOLATES THE NO-CONTEST CLAUSE IN THE SETTLEMENT AGREEMENT IS BASELESS	23
A. Wapato Heritage’s Claim That The No-Contest Clause Was Violated Was Never Properly Before The Court.....	24
B. In Any Event, The Claim Is Without Merit Because Evans’ Defense Of The Claims Against Her Is Expressly Excepted From The No-Contest Clause	26
CONCLUSION	27
CERTIFICATE OF COMPLIANCE.....	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

CASES

A.K. Management Co. v. The San Manuel Band of Mission Indians,
789 F.2d 785 (9th Cir. 1986)16

Abbot Laboratories v. CVS Pharmacy, Inc.,
290 F.3d 854 (7th Cir. 2002)5, 7

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006).....2

*Barona Group of the Capitan Grande Band of Mission Indians v. American
Management & Amusement, Inc.*,
840 F.2d 1394 (9th Cir. 1987)16

Begay v. Kerr-McGee Corp.,
682 F.2d 1311 (9th Cir. 1982)4, 6

Bowen v. Monus (In re Phar-Mor, Inc. Securities Litig.),
172 F.3d 270 (3d Cir. 1999)7

Carver v. Holder,
606 F.3d 690, 2010 U.S. App. LEXIS 10830 (9th Cir. 2010)23

Caterpillar, Inc. v. Lewis,
519 U.S. 61 (1996).....10

Catskill Development, LLC v. Park Place Entertainment Corp.,
547 F.3d 115 (2d Cir. 2008)16

Edwards v. Wells Fargo & Co.,
606 F.3d 555, 2010 U.S. App. LEXIS 10201 (9th Cir. 2010)23

Gila River Indian Community v. Henningson, Durhan & Richardson,
626 F.2d 708 (9th Cir. 1980), *cert. denied*,
451 U.S. 911 (1981).....7, 8

Golden Gate Hotel Ass’n v. City and County of San Francisco,
18 F.3d 1482 (9th Cir. 1994) 11, 12

Kanter v. Warner-Lambert Co.,
265 F.3d 853 (9th Cir. 2001) 10

Kantor v. Wellesley Galleries, Ltd.,
704 F.2d 1088 (9th Cir. Cal. 1983) 10

Kennerly v. United States,
721 F.2d 1252 (9th Cir. 1983) 18

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994)..... 5, 7

Meadow v. Suntrust Bank,
225 Fed. Appx. 672 (9th Cir. 2007) 21

Miener by & Through Miener v. Missouri Department of Mental Health,
62 F.3d 1126 (8th Cir. 1995) 7

Moore-Thomas v. Alaska-Airlines, Inc.,
553 F.3d 1241 (9th Cir. 2009) 4

O’Connor v. Colvin,
70 F.3d 530 (9th Cir. 1995) 5, 7

Oregon v. Legal Servs. Corp.,
552 F.3d 965 (9th Cir. 2009) 2

Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978)..... 10

Peabody Coal Co. v. Navajo Nation,
373 F.3d 945 (9th Cir. 2004), *cert. denied*,
543 U.S. 1054 (2005) 5, 6

Pinkham v. Lewiston Orchards Irrigation Dist.,
862 F.2d 184 (9th Cir. 1988) 9

Porter v. Osborn,
546 F.3d 1131 (9th Cir. 2008)23

Pretty Paint v. Rocky Mountain Regional Director,
BIA, IBIA 02-123-A, 2002 I.D. LEXIS 147 (I.D. 2002).....15, 18, 19

Research Corp. v. Westport Ins. Corp.,
289 Fed. Appx. 989 (9th Cir. 2008)25

Sackett & Kvan, Inc. v. Beaman,
399 F.2d 884 (9th Cir. 1968)2, 22

Sadat v. Mertes,
615 F.2d 1176 (7th Cir. 1980)10

Singelton v. Wulff,
428 U.S. 106 (1976).....11

Smith v. Marsh,
194 F.3d 1045 (9th Cir. 1999)25

Toumajian v. Frailey,
135 F.3d 648 (9th Cir. 1998)4

Turner v. City of Memphis,
369 U.S. 350 (1962).....11

*U.S. v. Acting Area Director, Aberdeen Area Office & Celina Young Bear
Mossette and U.S. v. Acting Area Director, Aberdeen Are Office,
BIA & Geraldine Van Dyke*,
IBIA 81-7-A and 81-38-A, 89 I.D. 49, 50-50 (1982).....18

United States Dominator, Inc. v. Factory Ship Robert E. Resoff,
768 F.2d 1099 (9th Cir. 1985)2, 22

United States ex rel. Kishell v. Turtle Mountain Housing Authority,
816 F.2d 1273 (8th Cir. 1987)9

United States v. Coleman,
208 F.3d 786 (9th Cir. 2000)21

United States v. Mottaz,
476 U.S. 834 (1986).....8

United States v. Twin Falls,
806 F.2d 862 (9th Cir. 1986).....21

Valles v. Ivy Hill Corp.,
410 F.3d 1071 (9th Cir. 2005).....4

West v. Schlumberger Tech. Corp.,
2000 U.S. App. LEXIS 21016 (9th Cir. 2000).....21

Woods v. First Nat’l Bank,
16 F.2d 856 (9th Cir. 1926).....10

STATUTES AND RULES

25 U.S.C. § 410.....*passim*

28 U.S.C. § 1331.....4

28 U.S.C. § 1332.....11

28 U.S.C. § 1353.....1, 3, 9

Fed. R. Evid. 401.....21

SUMMARY OF ARGUMENT

The District Court lacked subject matter jurisdiction in this case because there is no federal question jurisdiction, no diversity jurisdiction, and no jurisdiction under 28 U.S.C. § 1353. The assignments at issue in this case required approval from the Secretary of the Interior because 25 U.S.C. § 410 applies to this case. The trial court erred in excluding the relevant expert evidence proffered by Evans on the issue of damages. Genuine issues of material fact preclude summary judgment in Wapato Heritage's favor. Accordingly, the judgment appealed from should be reversed as against Evans.

Wapato Heritage's claim that Evans should be disinherited should not be considered by this Court because it was not properly before the District Court. In any event, the claim is without merit because Evans' defense of the claims against her is expressly exempted from the purported no-contest clause relied upon by Wapato Heritage. Accordingly, the cross-appeal should be denied.

ARGUMENT

At the outset, it must be noted that Wapato Heritage's contention that Evans may not seek review of the District Court's prior orders in this case, and has therefore conceded certain matters (Wapato Heritage Brief at pp. 6-7, 39-40, 48), is both contrary to Ninth Circuit law and utterly without merit. "All interlocutory rulings merged in the final judgment and are reviewable on the appeal therefrom."

Sackett & Kvan, Inc. v. Beaman, 399 F.2d 884, 889 (9th Cir. 1968). “In reviewing a final judgment, [this Court has] jurisdiction to review interlocutory rulings that may have affected the outcome of the proceedings in the district court.” *United States Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1103 (9th Cir. 1985). Here, the prior orders and rulings raised by Evans in her brief are merged into the final judgment, and are therefore reviewable. *Sackett, supra*. Moreover, they all affected the outcome of the proceedings before the District Court, and are therefore reviewable. *Dominator, supra*. Accordingly, any claim that Evans cannot raise issues from the District Court’s prior rulings or orders on this appeal, and has therefore conceded certain issues, is without merit.

In addition, Wapato Heritage’s and the District Court’s contention that Evans purportedly raised the District Court’s lack of subject matter jurisdiction “at nearly the last possible moment” and “at the eleventh hour” (Wapato Heritage Brief at pp. 27, 30) is also contrary to the law and without merit. “The objection that a federal court lacks subject-matter jurisdiction...may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). “An objection that a federal court lacks subject matter jurisdiction may be raised at any time, even after trial and the entry of judgment.” *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009), *citing Arbaugh, supra*. Accordingly, any claim

that Evans did not timely raise the issue of the District Court's lack of subject matter jurisdiction is meritless, and should be rejected by this Court.

I. THE FEDERAL DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THIS CASE.

Contrary to the assertions' in Wapato Heritage's brief, none of the three bases of jurisdiction asserted by it confer subject matter jurisdiction on the District Court in this case. There is no federal question jurisdiction in this case because, as confirmed by controlling Supreme Court precedent, Wapato Heritage's complaint, seeking damages for an alleged breach of the parties' Settlement Agreement, does not provide an independent basis for federal jurisdiction. There is also no jurisdiction under 28 U.S.C. § 1353 because Wapato Heritage's claims do not involve the issuance of an allotment or the rights in an allotment after it is acquired. There is no diversity jurisdiction because Wapato Heritage's complaint fatally fails to meet its burden of establishing complete diversity, and because Evans is indisputably a citizen of Washington State for diversity jurisdiction purposes. Accordingly, the judgment appealed from should be reversed, and Wapato Heritage's claims dismissed for lack of subject matter jurisdiction.

A. There Is No Federal Question Jurisdiction Because Wapato Heritage Alleges Only State Law Claims Of Breach Of Contract And Interference With Contract.

Wapato Heritage acknowledges in its brief that District Courts are courts of limited jurisdiction, and have only the authority granted to them by the

Constitution and acts of Congress. (Wapato Heritage Brief at pp. 27).

Nevertheless, it persists in attempting to make their claims that Evan has violated the Settlement Agreement and that it should be enforced against her – a breach of contract claim – into the proverbial “federal case”. But these futile efforts are unavailing, because controlling United States Supreme Court authority establishes that enforcement of a settlement agreement is a state-court matter absent an independent basis for federal jurisdiction.

To determine whether an action arises under federal law, the Court must apply the “well-pleaded complaint rule.” *Moore-Thomas v. Alaska-Airlines, Inc.*, 553 F.3d 1241, 1243 (9th Cir. 2009); *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998). Under this rule, a claim arises under federal law “only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Moore-Thomas.*, 553 F.3d at 1243; *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1075 (9th Cir. 2005). Moreover, a case does not arise under federal law within the meaning of § 1331 if the complaint merely anticipates or replies to a probable defense which would be based on federal law. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1314 (9th Cir. 1982); *see also Valles*, 410 F.3d at 1075 (“A federal law defense to a state-law claim does not confer jurisdiction on a federal court, even if the defense is that of federal preemption and is anticipated in the plaintiff’s complaint.”). Indeed, as conceded by Wapato Heritage (Wapato

Heritage Brief at pp. 27-28), a case does not "arise under" federal law unless the plaintiff's well-pleaded complaint establishes either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law. *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 1054 (2005).

The United States Supreme Court has held that enforcement of a settlement agreement – even where the agreement was reached in a federal case controlled by federal law – “is for state courts, unless there is some independent basis for federal jurisdiction.” *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 382 (1994).

Federal courts do not have inherent or ancillary jurisdiction to enforce a settlement agreement merely because the subject of the settlement was a federal lawsuit; once the initial action is concluded, federal jurisdiction terminates and there must be an independent basis for jurisdiction to enforce the settlement agreement. *O'Connor v. Colvin*, 70 F.3d 530, 531-532 (9th Cir. 1995). “[T]he settlement is just a contract, so a suit *on the settlement* needs an independent basis of federal jurisdiction.” *Abbot Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 857 (7th Cir. 2002).

Notwithstanding Wapato Heritage’s desperate attempts to convince this Court otherwise, its claims are nothing more than breach of contract and tortious

interference claims under Washington State law. All that is alleged in the complaint is that Evans purportedly failed to make a loan that she had agreed to make, and that Gargan somehow interfered with its contractual rights. Wapato Heritage concedes in its brief that its claims are not created by federal law. (Wapato Heritage Brief at pp. 28). Accordingly, federal question jurisdiction only exists in this case if Wapato Heritage's asserted right to relief depends on the resolution of a substantial question of federal law. *Peabody*, 373 F.3d at 949.

It manifestly does not. Wapato Heritage's asserted right to relief depends on the interpretation of the terms of a contract – the Settlement Agreement – and not on the resolution of a substantial question of federal law.

The fact that Evans has asserted a federal statute as a defense to the claim she breached the Agreement is insufficient as a matter of law to confer jurisdiction. *Begay*, 682 F.2d at 1314; *Valles*, 410 F.3d at 1075. Moreover, while Wapato Heritage claims that whether or not Evans allegedly breached the agreement cannot be determined without resort to federal law (Wapato Heritage Brief at pp. 28), it focuses on the events and court proceedings that occurred prior to the Settlement Agreement being consummated. The validity of the Agreement is not at issue; whether Evans breached it is the question. That question is resolved by looking to the Agreement itself and the form by which Wapato Heritage insisted that the loans be made, not by looking to federal law. Indeed, Wapato Heritage and the District

Court acknowledged that Washington law – not federal law – controlled Evans’ duties and obligations under the Settlement Agreement. (Wapato Heritage Brief at pp. 32). The District Court here specifically held that “[t]o resolve this breach of contract dispute, the Court applies Washington contract law.” (ER 118). The court itself characterized the matter as a breach of contract dispute.

The fact that the underlying action involved the will of an Indian, and required federal court approval, is insufficient as a matter of law to confer federal jurisdiction because federal courts lack jurisdiction to enforce settlement agreements merely because the subject of the settlement was a federal lawsuit. *Kokkonen*, 511 U.S. at 382; *O’Connor*, 70 F.3d at 531-532; *Abbot Laboratories*, 290 F.3d at 857; *Bowen v. Monus (In re Phar-Mor, Inc. Securities Litig.)*, 172 F.3d 270, 274-275 (3d Cir. 1999); *Miener by & Through Miener v. Missouri Department of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995). Wapato Heritage’s attempts to dismiss these controlling Supreme Court and Ninth Circuit precedents, and the highly persuasive concurrent precedents from sister Circuits, as “unremarkable” are unavailing. Wapato Heritage’s claims that the Settlement Agreement raises a substantial question of federal law because it is a contract between Indians regarding an Indian’s estate is similarly without merit. This Court has previously held that federal common law does not extend to cover all contracts entered into by Indians. *Gila River Indian Community v. Henningson, Durhan &*

Richardson, 626 F.2d 708, 714-715 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). This policy is sound; otherwise, the federal district courts are converted to “small claims court for all such disputes.” *Id.*

There is simply nothing on the face of Wapato Heritage’s complaint that invokes federal law or requires the resolution of a substantial question of federal law. The claims for relief in the complaint against Evans are for failure to perform under the terms of the Settlement Agreement and “breach of contract”. The claim against Gargan is for tortious interference with the contract. Accordingly, no federal question jurisdiction exists in this case.

B. There Is No Jurisdiction Under 29 U.S.C. § 1353 Because Wapato Heritage Did Not Allege A Right To An Allotment Of Land.

Wapato Heritage fails to even address Evans’ arguments on this issue beyond its self-serving claim that the contention “ignores the language of the Complaint.” (Wapato Heritage Brief at pp. 39). As detailed in Evans’ opening brief, there are two types of cases that fall under this statute: (1) suits seeking the issuance of an allotment, and (2) suits involving the interests and rights of the Indian in his allotment or patent after he has acquired it. *United States v. Mottaz*, 476 U.S. 834, 845 (1986). The claims asserted by Wapato Heritage do not fall within either of these categories.

Wapato Heritage’s claims do not fall within the first category because the underlying case is not an action seeking the issuance of an allotment. Its claims

also fail to meet the criteria for the second category because they do not relate to its rights in land that was once allotted. *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184 (9th Cir. 1988) (no jurisdiction under this statute where allegations were essentially a tort claim, even though allotment was involved); *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1275 (8th Cir. 1987). Here, Wapato Heritage's claims are for recovery of damages for breach of contract and tortious interference with that contract. The request for relief seeks damages and specific performance of the duties and obligations under the Settlement Agreement, as well as injunctive relief against Defendants from interfering with future payments. (ER 206-208). No property rights to an allotment were ever requested, and it is not alleged that Evans' life interest in the allotment is improper. Accordingly, there is no jurisdiction under 28 U.S.C. §1353.

C. There Is No Diversity Jurisdiction Because Evans Is A Citizen Of Washington State.

Wapato Heritage does not dispute Evans' contention that there is no basis for diversity jurisdiction in this case on the merits. (Wapato Heritage Brief at pp. 38-39). Rather, it contends generally that it disagrees with the uncontested facts establishing that Evans – like the Plaintiffs – is domiciled in Washington State. This contention, however, ignores Wapato Heritage's fatal failure to adequately plead diversity jurisdiction.

Diversity jurisdiction requires “complete diversity of citizenship.” *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996). “[D]iversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). The party asserting diversity jurisdiction bears the burden of proof. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-858 (9th Cir. 2001). To meet this burden, Wapato Heritage’s allegations must establish that Evans is a citizen of a state other than Washington. *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980); *Woods v. First Nat’l Bank*, 16 F.2d 856, 857 (9th Cir. 1926). “To show state citizenship for diversity purposes under federal common law a party must (1) be a citizen of the United States, and (2) be domiciled in the state.” *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. Cal. 1983), citing *Sadat supra*. The failure of the record to show what state the parties are citizens of is fatal to a claim of diversity jurisdiction. *Woods*, 16 F.2d at 857.

Wapato Heritage fails to meet this burden here. It alleges merely that Evans is either a resident (no mention of citizenship) of the United Kingdom or another unidentified state. Failure to adequately plead a diversity action is grounds for dismissal. *Kantor*, 704 F.2d at 1090; *Woods*, 16 F.2d at 857.

Evans is a citizen of the United States. Moreover, the following facts establishing Evans’ domicile in Washington State cannot be disputed:

- Evans grew up in Washington and has always maintained that it is her home. (ER 53).
- Evans is an enrolled member of the Confederated Tribes of the Colville Indian Reservation, which is located in Washington. (ER 53).
- Evans is registered to vote in Washington. (ER 89).
- When Evans is required to pay income taxes, Washington is where she would pay. (ER 89).

Because Evans and the Plaintiffs are citizens of Washington, there is no diversity of citizenship, and 28 U.S.C. § 1332 does not confer jurisdiction on the District Court.

Here, Wapato Heritage's complaint is fatally defective because it does not sufficiently plead what is required to meet its burden to establish diversity jurisdiction. Moreover, even if this matter were remanded as Wapato Heritage requests, the record would confirm the above stated indisputable facts that have already been established. This fact is amply demonstrated by Wapato Heritage's failure to identify even one fact concerning Evans' domicile in Washington State that is in dispute. This Court has the discretion to resolve a question for the first time on appeal, particularly where, as here, the proper resolution is beyond any doubt. *Singelton v. Wulff*, 428 U.S. 106, 121 (1976); *citing Turner v. City of Memphis*, 369 U.S. 350, 353 (1962); *Golden Gate Hotel Ass'n v. City and County*

of San Francisco, 18 F.3d 1482, 1487 (9th Cir. 1994). Accordingly, there is no basis to remand this matter on this issue, and this Court should conclude that no diversity jurisdiction exists.

II. THE SECRETARY OF THE INTERIOR MUST APPROVE THE ASSIGNMENTS AT ISSUE IN THIS CASE BECAUSE 25 U.S.C. § 410 APPLIES TO THIS CASE.

Contrary to Wapato Heritage's claims, 25 U.S.C. § 410 applies to this case because Wapato Heritage's judgment against Evans constitutes a "debt of" or "claim against" protected funds within the meaning of the statute. Wapato Heritage's claim that the ALJ's approval of the Settlement Agreement satisfies § 410's requirement that the Secretary of the Interior approve debts of or claims against protected funds – unsupported by any authority – is also without merit. Accordingly, the judgment appealed from should be reversed.

A. 25 U.S.C. § 410 Applies To This Case Because Evans' Purported Obligation To Initiate a B.I.A. Transfer of Evans Trust Fund Monies To Wapato Heritage In The Future Constitutes A Debt Or Claim Within The Meaning Of The Statute, as well as an Encumbrance on Trust Land.

Wapato Heritage goes to great lengths in its brief to argue that Evans' purported obligation to pay it money pursuant to a judgment obtained in a lawsuit is not a "debt or claim" within the meaning of 25 U.S.C. § 410. (Wapato Heritage Brief at pp. 39-46). This contention – patently absurd on its face – is premised on

mere semantics and is contrived to avoid the clear and unequivocal applicability of § 410 to this case.

There can be no genuine dispute that 25 U.S.C. § 410 applies to this case. The money in dispute here is the income generated from the MA-10 trust allotment (“MA-10”) that was owned by Evans’ father, William Wapato Evans. 25 U.S.C. § 410 provides that:

No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

(emphasis supplied). It is undisputed that this is a trust allotment held in trust by the United States. It is undisputed that the monies in Evans’ IIM account accrue from the lease of those trust lands. It is also undisputed that the Secretary of the Interior has never approved the payment of those funds to Wapato Heritage, or any other person or entity. Accordingly, approval from the Secretary of the Interior was required before the funds sought by Wapato Heritage could be assigned to it.

Recognizing the applicability of § 410 and the futility of its claims in light of the statute’s plain language, Wapato Heritage contrived an argument that the judgment directing Evans to pay it money from these protected funds for an alleged breach of contract is not a “debt of” or “claim against” Evans. Wapato Heritage contends that its *claim against* Evans seeking to enforce her alleged

breach of her promise to lend it money is not a “*claim against*” Evans within the meaning of the statute. This contention insults this Court’s intelligence.

No matter how many times Wapato Heritage repeats this specious argument like a mantra, its absurdity is exposed at even the slightest scrutiny. Wapato Heritage alleges that it had a contract with Evans, under which she agreed to lend it protected funds from her IIM account. It further alleges that she breached that agreement. It then asserted claims against Evans, seeking damages, payable from those protected funds in Evans’ IIM account. The District Court issued a judgment in Wapato Heritage’s favor, a decree which recognizes a legal obligation on Evans’ part to pay that judgment from the protected funds; i.e., a “debt”. It could not be more clear that § 410 applies to this case, because Wapato Heritage is seeking to make protected funds liable for a debt of Evans (the judgment) resulting from its claim against her.

Wapato Heritage correctly asserts that Evans is free to withdraw funds from her IIM account and use them as she sees fit, including lending the funds out. The fact that she has that choice, however, does not mean that the funds in her IIM account may become liable for the payment of a claim against her – such as the one asserted by Wapato Heritage here – that she has violated a promise to lend money. Indeed, the very purpose of the statute is to prevent third parties from compelling an Indian to use protected funds to honor broken promises, whether

they are contractual or not. The plain language of § 410 expressly states that protected funds cannot “become liable for the payment” of an obligation incurred by an Indian without approval from the Secretary of the Interior. Accordingly, money for Evans’ obligations from her IIM account that she does not transfer herself must be approved by the Secretary.

Wapato Heritage is claiming that it can obtain a judgment after asserting claims against Evans, and then use that judgment to compel her to pay it protected funds, but that the judgment is not a “debt of” or “claim against” Evans. This claim defies logic. Whatever consequences there may be for Evans renegeing on her alleged promise to loan Wapato Heritage money, 25 U.S.C. § 410 states that the protected funds in her IIM may not be made liable for renegeing on that promise absent approval of the Secretary of the Interior, which is absent from this case.

See also Pretty Paint v. Rocky Mountain Regional Director, BIA, IBIA 02-123-A, 2002 I.D. LEXIS 147 (I.D. 2002) (“[p]ayment of a judgment with funds in an IIM account, even though payment was ordered by a court of competent jurisdiction, is thus not mandatory.”). Accordingly, while Wapato Heritage may be able to enforce the purported promise against other non-protected assets belonging to Evans, it cannot enforce the promise against the funds in her IIM account without the Secretary of the Interior’s approval. To adopt the interpretation advanced by Wapato Heritage renders the protections afforded by § 410 meaningless.

Indeed, courts have long eschewed traditional contract concepts when dealing with Indian contracts that, by statute, require approval of the Secretary of the Interior, holding that the failure to obtain the required approval renders the agreements void ab initio. *See, e.g. Catskill Development, LLC v. Park Place Entertainment Corp.*, 547 F.3d 115, 129 (2d Cir. 2008) (contracts subject to the IGRA that lack the required Secretary approval are void ab initio, notwithstanding general contract principals to the contrary); *A.K. Management Co. v. The San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986) (holding that contract requiring Secretary's approval was null and void because the required approval was not obtained); *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987) (same). In doing so, the courts have demonstrated that, where the law requires the Secretary's approval, the law will be strictly enforced, regardless of any countervailing principles. This was so even though the other parties to the contract had tendered performance and were damaged. There is no reason for a different result under § 410. The statute requires approval by the Secretary of the Interior before the funds in Evans' IIM account may be made liable for her purported obligation to Wapato Heritage. No such approval was obtained here. Accordingly, regardless of any countervailing principles, § 410 precludes the relief sought by Wapato Heritage here.

Wapato Heritage's claim that the Settlement Agreement "says nothing about BIA approval" ignores the fact that it was Wapato Heritage that insisted that the loans be funded via assignment, the form for which required a signature of approval from the BIA. Evans offered to write checks for the loan amount to Wapato Heritage on a quarterly basis, but that offer was refused. (ER 126). Instead, Wapato Heritage demanded that Evans complete 20 assignments from her Individual Indian Money account ("IIM") for the Bureau of Indian Affairs ("BIA") to distribute the money quarterly. At Wapato Heritage demand, the form used to effect the assignments was obtained from the BIA, and was approved by all parties' attorneys, including the attorney for Wapato Heritage. (ER 167). The form had a section requiring the BIA to sign off and approve each assignment. Evans agreed to this arrangement, believing that if the BIA approved the loan, the BIA might be more easily persuaded in the future to seek repayment of this loan from Wapato Heritage's other allotment income. (ER 126). Evans completed the assignments, but the BIA never approved them. (ER 126). Wapato Heritage insisted that BIA approval be part of the process by demanding the use of the assignments and language in the contract which expressly requires the B.I.A. to calculate the amount of each quarterly payment due and the expressly requiring that payment to be initiated by the B.I.A., not Evans, and then insisting on using BIA forms to ensure that the payment is both calculated and made by the B.I.A.,

who has physical and legal control over the trust income, not Evans. Accordingly, Wapato Heritage should not now be heard to complain that the absence of BIA approval and the B.I.A. refusal to cut the checks confers a legal duty on Evans to calculate the amount of quarterly payment due and then have Evans initiate each transfer of trust funds.

Wapato Heritage's reliance upon the unrestricted status of Evans' IIM account is also misplaced, because that status has no bearing on the applicability of § 410 to the case or its preclusive effect against the relief Wapato Heritage seeks here. As detailed in Evans' opening brief, it is irrelevant to the application of § 410 whether or not the subject IIM account is restricted or unrestricted. *Pretty Paint, supra*; *U.S. v. Acting Area Director, Aberdeen Area Office & Celina Young Bear Mossette and U.S. v. Acting Area Director, Aberdeen Area Office, BIA & Geraldine Van Dyke*, IBIA 81-7-A and 81-38-A, 89 I.D. 49, 50-50 (1982) (When funds are generated, they are placed in an IIM account and then "are available to the Indian owner" but no claims of indebtedness may be paid without the approval of the Secretary of the Interior.); *Kennerly v. United States*, 721 F.2d 1252, 1254-1255 (9th Cir. 1983) (upholding payments via assignment from an IIM because the written assignments had been approved as required by the BIA). Rather, the only relevant factor is whether the money in the IIM was generated from trust income.

If so, then § 410 applies to Evans' IIM account. In the facts before the bar, it is undisputed that the Evans funds are generated by a lease of trust land.

B. Wapato Heritage's Claim That The ALJ's Approval Of The Settlement Agreement Constitutes BIA Approval Of The Assignments Is Without Authority And Without Merit.

Appreciating the absurdity of the contention that its claim against Evans and the resulting judgment against her are not a "debt of" or "claim against" Evans for the purposes of § 410, Wapato Heritage also claims that the ALJ's approval of the Settlement Agreement constitutes the approval required under § 410. Wapato Heritage fails to cite any authority for this novel contention, because there is none. Indeed, as noted above and detailed in Evans' opening brief, the "[p]ayment of a judgment with funds in an IIM account, even though payment was ordered by a court of competent jurisdiction, is thus not mandatory." *Pretty Paint, supra*. Accordingly, the fact that a court of competent jurisdiction – in this case the ALJ – approved the Settlement Agreement does not constitute compliance with the strict requirements of § 410.

Moreover, this claim is belied by the facts. It is undisputed that Evans initially executed the twenty assignment forms agreed to by the parties, but the BIA refused to approve the assignments. If, as the District Court speculated and Wapato Heritage claims, the ALJ's approval of the Settlement Agreement constituted the blanket BIA approval of the 20 assignments demanded by Wapato

Heritage, then the BIA would simply have signed off on the assignments and permitted them to proceed. Indeed, by refusing to approve the assignments, the BIA manifestly demonstrated that the ALJ's approval did not "constitute BIA agreement to take the necessary steps to electronically transfer 35% of the MA-10 proceeds from Defendant Evans; IIM account to Wapato Heritage's bank account." (Wapato Heritage Brief at pp. 45).

In sum, 25 U.S.C. § 410 applies to this case. By its plain language, it precludes the relief sought by Wapato Heritage. Accordingly, the judgment appealed from should be reversed, and Wapato Heritage's claims dismissed.

III. THE COURT ERRED BY EXCLUDING THE TESTIMONY OF EVANS' EXPERT WITNESS ON DAMAGES.

Wapato Heritage's claims that the District Court properly excluded Evans' damages evidence (Wapato Heritage Brief at pp. 46-47) are also without merit. Its claim that there is no evidence that the trial court did not evaluate this evidence in connection with the summary judgment motion is belied by the record; if the trial court had considered it, then it would necessarily have concluded that there were material issues of triable fact regarding the damages claimed by Wapato Heritage. Similarly, its contention that its performance was excused by Evans' purported breach – besides being incorrect – ignores that precluding the evidence gave Wapato Heritage an unwarranted windfall. The goal of contract damages is to place the non-breaching party in as good a position as if the contract had been

fully performed. *West v. Schlumberger Tech. Corp.*, 2000 U.S. App. LEXIS 21016 (9th Cir. 2000); *United States v. Coleman*, 208 F.3d 786, 792 (9th Cir. 2000); *United States v. Twin Falls*, 806 F.2d 862, 874 (9th Cir. 1986). By advancing the claim that its performance was excused by Evans alleged breach, but then seeking to enforce the Settlement Agreement against her, Wapato Heritage is seeking to be in a better position than it would have been had Evans performed, as it would get the benefit of Evans' performance without having tendered the consideration it owes. Accordingly, this contention is without merit.

Wapato Heritage's self-serving claim, again made without citation to authority, that Evans' expert evidence lacked foundation is also incorrect. Evans' expert based his testimony and conclusions on an evaluation of the relevant documents and data. To the extent that Wapato Heritage disagrees with his conclusion, that is an issue of fact for the jury to resolve. Moreover, Wapato Heritage notably never denied his conclusions, nor did it provide its own expert evidence to contradict him.

The evidence was highly relevant to the issue of damages and Evans' affirmative defense of offset. Fed. R. Evid. 401; *Meadow v. Suntrust Bank*, 225 Fed. Appx. 672, 674 (9th Cir. 2007). Evans' expert evidence indisputably would make it "more or less probable" that she owed Plaintiffs less than the amount they claimed, if anything. Moreover, it can hardly be deemed "unfair

prejudice” for Evans to point out that any amount she purportedly owed to Plaintiffs’ should be reduced by the money they owed to her. Accordingly, the District Court abused its discretion in precluding Evans’ expert testimony, and the order appealed from should be reversed.

IV. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT.

As noted above, Wapato Heritage’s claim that Evans has not challenged the trial court’s improper granting of summary judgment to Wapato Heritage is meritless. *Sackett*, 399 F.2d at 889; *Dominator*, 768 F.2d at 1103. The only other argument that Wapato Heritage advances on this issue in its terse response is the self-serving claim – unsupported by any legal authority – that Evans has failed to identify the material facts in dispute. (Wapato Heritage Brief at pp. 48-49). This contention is without merit. Throughout her opening brief, Evans detailed the disputed issues of fact in this case, including her status as a resident of Washington and whether she even breached the Settlement Agreement in the first instance. Evans contends that she complied with the Settlement Agreement because she executed the assignment forms requiring BIA approval – forms that were demanded by Wapato Heritage – and the BIA refused to approve the assignments. Evans demonstrated that she had initially offered to write quarterly checks for the loan, but that Wapato Heritage demanded the use of the BIA assignment forms requiring BIA approval. She further demonstrated that agreed to this demand

because the requirement of BIA approval assured her of some corroboration of Wapato Heritage's repayment of the loan, and that the BIA approval was critical to her acceptance of the demand.

The District Court was required to view the facts in a light most favorable to Evans, give her the benefit of all reasonable inferences, and resolve all doubts in her favor. *Carver v. Holder*, 606 F.3d 690, 2010 U.S. App. LEXIS 10830, *11-12 (9th Cir. 2010); *Edwards v. Wells Fargo & Co.*, 606 F.3d 555, 2010 U.S. App. LEXIS 10201, *5 (9th Cir. 2010); *Porter v. Osborn*, 546 F.3d 1131, 1133 (9th Cir. 2008). Instead, the District Court accepted Wapato Heritage's version of the facts and resolved all doubts in its favor. Accordingly, the judgment appealed from should be reversed, and the matter remanded for trial.

V. WAPATO HERITAGE'S CLAIM THAT EVANS' DEFENSE AGAINST ITS CLAIMS VIOLATES THE NO-CONTEST CLAUSE IN THE SETTLEMENT AGREEMENT IS BASELESS.

Wapato Heritage's claim on cross-appeal that Evan should be disinherited pursuant to the no-content clause purportedly incorporated from the underlying will into the Settlement Agreement should be rejected for two reasons. First, the claim was never properly before the District Court, and therefore cannot be raised before this Court. Second, even assuming for the sake of argument that the claim could properly be entertained on this appeal, it should be rejected because the

subject no-contest clause expressly exempts Evans' defense of the claims against her.

A. Wapato Heritage's Claim That The No-Contest Clause Was Violated Was Never Properly Before The Court.

The District Court correctly determined that Wapato Heritage never properly raised its claim that Evans' defense against its specious claims violated the no-contest clause purportedly incorporated into the Settlement Agreement. As noted by the District Court, Wapato Heritage's complaint makes no claim that Evans violated the alleged no-contest clause or that her rights in the estate should be forfeited. (ER 5-6). Although Wapato Heritage did briefly mention the alleged violation of the will's (not the Settlement Agreement's) purported no-contest clause, Wapato Heritage refused to comply with the court's March 2009 directive that the parties identify all claims that they intended to pursue at trial in a written notice. (ER 6). By failing to file the written notice as directed by the court, Wapato Heritage indicated that it intended to pursue only the claims stated in its Complaint. (ER 6). Accordingly, neither the court nor Evans were aware that it intended to pursue any claims beyond those in its Complaint. (ER 6).

Moreover, Wapato Heritage never formally raised the no-contest clause as an issue in the proceedings. (ER 6). The Complaint was filed in October 2007. (ER 5). Yet the first mention of the no-contest clause came in July 2009, less than two weeks before the trial was scheduled to commence. (ER 6). Even though the

trial was delayed until October 2009, Wapato Heritage never made any effort to notify the court or Evans that it intended to pursue any claims regarding the no-contest clause, as directed by the court. (ER 6). The District Court specifically noted that the purpose of the court-ordered Notice of To-Be-Adjudicated Claims/Defenses – for which the filing deadline occurred after the close of discovery – was to put both the parties and the District Court on notice of what claims the parties intended to pursue after the completion of discovery. (ER 6-7). By refusing to provide the court-directed notice, Wapato Heritage was declaring to the District Court and to Evans that the only claims it was pursuing were those asserted in its Complaint. (ER 7). In doing so, it deprived Evans of her right to conduct any last-minute discovery on the matter or engage in any motion practice on the issue. (ER 7). Accordingly, the issue of Evans’ alleged violation of the no-contest clause was never properly before the District Court, and may not now be raised on appeal. (ER 7); *see also Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]n appellate court will not consider issues not properly raised before the district court.”); *Research Corp. v. Westport Ins. Corp.*, 289 Fed. Appx. 989, 992 (9th Cir. 2008).

B. In Any Event, The Claim Is Without Merit Because Evans' Defense Of The Claims Against Her Is Expressly Excepted From The No-Contest Clause.

Even assuming for the sake of argument that Wapato Heritage could properly “sandbag” Evans and raise the issue of the no-contest clause after having refused to comply with the District Court’s order that it provide formal written notice of any such claim (thereby depriving her of the right to discovery and motion practice on the issue) – which it cannot – the claim nevertheless has no merit. The no-contest clause purportedly incorporated into the Settlement Agreement specifically states that any claims asserted in defending against the claims of other parties are exempted from the no-contest clause. Accordingly, Evans’ defense of the claims that she breached the Settlement Agreement cannot possibly constitute a basis that she violated the purported no-contest clause.

Indeed, it appears that, by improperly attacking Evans’ interest in the estate and seeking to deprive her of that interest, it is Wapato Heritage that has violated the very no-contest clause that it asserts against Evans. Accordingly, if this Court entertains this waived argument at all, it should conclude that Wapato Heritage – and not Evans – has violated the no-contest clause and has therefore forfeited its interest in the estate.

CONCLUSION

For the forgoing reasons, and for those stated in Evans' opening brief, the District Court's rulings should be reversed in favor of Evans, and the complaint dismissed, or in the alternative, remanded for a trial at which 25 U.S.C. § 410 is applied to any award and Evans' expert on damages is permitted to testify. The District Court's ruling as to Wapato Heritage's cross-appeal should be affirmed. And, both district court and appellate court attorney's fees should be granted to Evans because Evans' legal positions were adopted for the majority of the counts plead in the complaint; Evans' defenses were persuasive on the majority of the damages claimed in the complaint; and the failure of the Plaintiff to correctly plead this matter directly caused the outlay of legal fees by Evans on this case.

Dated: October 1, 2010

Respectfully submitted,

s/ Mary T. Wynne

Mary T. Wynne
Attorney for Appellant,
Sandra D. Evans

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,451 words.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/ Stephen Moore