

1 Timothy W. Woolsey, WSBA# 33208
2 Dana Cleveland, WSBA # 40285
3 COLVILLE TRIBES OFFICE OF THE RESERVATION ATTORNEY
4 P.O. Box 150; Highway 155 & Cache Creek Road
5 Nespelem, Colville Reservation, Washington 99155
6 (509) 634-2381
7 (509) 634-2387 (fax)
8 *Attorneys for Defendant Confederated Tribes of the Colville Reservation*

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 PAUL GRONDAL, ET AL.

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA;
15 ET AL.

16 Defendant

17 NO. CV-09-18-JLQ

18 **MEMORANDUM IN SUPPORT OF
19 MOTION TO DISMISS**

20 **I. INTRODUCTION**

21 Defendant Confederated Tribes of the Colville Reservation (hereafter, “Colville
22 Tribes”) has moved this Court for an order dismissing it as a defendant from all
23 remaining cross-claims arising in this case pursuant to Fed. Rul. Civ. P. 12(c). Since
24 this lawsuit was originally brought against the Confederated Tribes of the Colville
25 Reservation (“Colville Tribes”) and its interest in MA-8, the Colville Tribes has
26 asserted that this Court lacks jurisdiction over the Colville Tribes. See, e.g., ECF 187.

1 This Memorandum demonstrates that the remaining *in rem* claims against the Colville
2 Tribes must be dismissed.

3 4 **II. DISCUSSION**

5 **1. Remaining Claims**

6 On February 16, 2012, this Court dismissed the Colville Tribes from all *in*
7
8 *personam* claims pending against the Colville Tribes in this lawsuit. This Court
9 denied, with leave to renew, the Colville Tribes' Motion to Dismiss in regards to
10 possible remaining *in rem* claims by Cross-claimant Wapato Heritage, LLC, granting
11
12 leave for Cross-claimant to amend its non-compliant, untimely Answer and cross-
13 claims. ECF 227. Cross-claimant did so on March 5, 2012. ECF 228.

14
15 This Court stated in its Order that the only Cross-claimant cross-claims that
16 could

17 *arguably* be characterized as *in rem* (or *quasi in rem*, if there is a distinction)
18 are: 1) the first Cross-claim seeking a declaration of its own and all landowners'
19 respective rights in MA-8 (¶257) and a declaration that the MA-8 landowners
20 are tenants in common (¶260); 2) the second Crossclaim for "quiet title" 3) the
21 ejectment claim (fourth Crossclaim) against the Tribe; and 4) the seventh
Crossclaim for partition of the property. ECF 227 at 16 (footnote omitted).

22 After dismissing the Plaintiffs' remaining claim and Cross-claimant's *in personam*
23
24 claims, this Court denied the Colville Tribes' motion to dismiss with leave to renew
25 regarding these remaining *in rem* claims. These are the only claims remaining against
26 the Colville Tribes and the Colville Tribes' property interest in this case.

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Despite the amended Answer, Cross-claimant's alleged *in rem* claims against the Colville Tribes' ownership interest in MA-8 require dismissal because, as a matter of law, MA-8 is trust property. The remaining *in rem* claims are dependent on the proposition that MA-8 is not trust property because Cross-claimant seeks relief declaring it non-trust and a subsequent series of state law property remedies unavailable for trust land.¹ Since the law is clear that MA-8 is trust property, any relief sought by Cross-claimant against the Colville Tribes' ownership interest is unavailable because the United States holds title in trust for the Colville Tribes. The remaining *in rem* cross-claims against the Colville Tribes must be dismissed because of MA-8's trust status.

2. FRCP 12(c) Dismissal Standard

Rule 12(c) of the Federal Rules of Civil Procedure states, "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on

¹ As a general matter, federal courts do not have jurisdiction to review competing claims to Indian trust lands—these claims must be made through the Department of the Interior. Kicking Woman v. Hodel, 878 F.2d 1203 (9th Cir. 1989). Federal Courts only have jurisdiction over the United States through one of the United States' limited waivers of sovereign immunity—such as the APA, 5 U.S.C. 500 *et seq.*

the pleadings.” The standard governing a Rule 12(c) motion for judgment on the pleadings is “functionally identical” to that governing a Rule 12(b)(6) motion. United States ex rel. Caffaso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n. 4 (9th Cir.2011). For a Rule 12(c) motion, the allegations of the nonmoving party are accepted as true, while the allegations of the moving party that have been denied are assumed to be false. See Hal Roach Studios v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir.1989). A court evaluating a Rule 12(c) motion must construe factual allegations in a complaint in the light most favorable to the nonmoving party. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir.2009). “Judgment on the pleadings under Rule 12(c) is proper when the moving party establishes on the face of the pleadings that there is no material issue of fact and that the moving party is entitled to judgment as a matter of law.” Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934, 937 n. 1 (9th Cir.2011). “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” Fed. R. Civ. Proc. 12(d).

When adjudicating a Rule 12(c) motion, a court may consider matters subject to judicial notice without converting the motion to one for summary judgment.

See Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n. 18 (9th

1 Cir.1999) (“When considering a motion for judgment on the pleadings, this court may
 2 consider facts that are contained in materials of which the court may take judicial
 3 notice.” (quotation marks omitted)).
 4

5 **3. Burden of Proof *in rem* Claims With Indian Defendants**

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 7 The burden of proof for *in rem* claims where title to Indian land is being
 8 challenged by a non-Indian lies with the non-Indian. 25 U.S.C. 194 provides:
 9

10 “In all trials about the right of property in which an Indian may be a party on
 11 one side, and a white person on the other, the burden of proof shall rest upon
 12 the white person, whenever the Indian shall make out a presumption of title in
 himself from the fact of previous possession or ownership.”

13 With 25 U.S.C. 194, Congress has codified the canons of Indian law in cases
 14 challenging Indian title. This provision applies when an Indian tribe’s title is being
 15 challenged. Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664 (1979). The canons of
 16 Indian law construction demand that all legal ambiguities be interpreted in favor of
 17 Indian tribes. See e.g., Choctaw Indian Nation v. U.S., 318 U.S. 423, 431-32 (1943);
 18 McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 174 (1973). Here, Cross-
 19 claimant, a state chartered, non-Indian LLC is challenging Indian title—the title of the
 20 Colville Tribes. The burden of proof on the remaining *in rem* claims against the
 21 Colville Tribes lies squarely on Cross-claimant.
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2 **4. As a Matter of Law, MA-8 is Trust Property**

3 As a matter of law, MA-8 is trust property. This is not a matter of factual
4 dispute. United States statutes, duly authorized executive orders, and executive actions
5 pronounce that MA-8 is trust property. This law is on the record before this Court.
6

7 The Colville Tribes asks this Court to take judicial notice of the applicable law. The
8 United States provided extensive history of legislative and executive action that has
9 extended the trust status of MA-8 to today. ECF 186. The history of MA-8's trust
10 status under the laws of the United States is presented in the following timeline:
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12
13 • 1884- Ratified Moses Agreement

14 In 1884, the Act of July 4, 1884, 23 Stat. 79-80 ratified the Moses Agreement,
15 permitting Indians living on the Columbia-Moses Reservation to take
16 allotments within the reservation as it was returned to the public domain.
17

18 Attachment A.

19
20 • 1902- Joint Resolution No. 31

21 On June 19, 1902, Joint Resolution No. 31, 32 Stat. 744, Attachment B, was
22 passed into law, ensuring that all allotted Indian lands would be subject to the
23 terms of the General Allotment Act and any amendments or supplements to the
24 General Allotment Act. That Act relevantly provides:
25

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled “An Act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,” [the General Allotment Act] and the general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto. (emphasis added).

This law makes the terms of the General Allotment Act and all other amendments of supplemental acts applicable to all other allotments. Therefore, the General Allotment Act, and any subsequent Congressional and Executive actions pertaining to Indian allotments are applicable to MA-8.

- 1906- 25 U.S.C. § 391

Similarly, the Act of June 21, 1906, 34 Stat. 325, 25 U.S.C. § 391, Attachment C, states as follows:

prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best... (emphasis added).

This law is Congress’ delegation of discretionary authority to the Executive to extend the trust period of trust lands for lands patented beyond those issued under the General Allotment Act if they are issued under any law or treaty. The

Supreme Court has determined that the sweeping “any law or treaty” language in 25 U.S.C. § 391 applies to trust lands allotted pursuant to laws other than the General Allotment Act of February 8, 1887, 24 Stat. 388. United States v. Jackson, 280 U.S. 183 (1930) (holding that lands taken into trust pursuant to a law other than the General Allotment Act are subject to the sweeping language of 25 U.S.C. § 391). Similarly here, though MA-8 was allotted pursuant to an act other than the General Allotment Act, the sweeping “any law or treaty” language of 25 U.S.C. § 391 applies and makes MA-8 subject to subsequent Congressional or Executive action. Because the MA-8 trust patent was issued pursuant to the law (as required by 25 U.S.C. § 391) known as the Act of July 4, 1884, 23 Stat. 79-80 (the Congressionally ratified Moses Agreement), Attachment A, MA-8 is subject to this act and the authority delegated. Therefore, any subsequent, all-encompassing trust period extensions by the Executive apply to MA-8.

- 1907, 1908- MA-8 Trust Patents Issued

Moses Allotment No. 8 was set aside for Wapato John by two trust patents in 1907 and 1908 pursuant to the Act of July 4, 1884, 23 Stat. 79-80 (the Congressionally ratified Moses Agreement), Attachment A. Those trust patents required the United States to hold MA-8 in trust for 10 years.

1 • 1914- Executive Order 2109

2 Pursuant to his discretionary authority, On December 23, 1914, with Executive
3 Order 2109, Attachment D, the President extended the MA-8 trust period a
4 further ten years to March 8, 1926.
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6 • 1920- Executive Order 3365
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8 On December 7, 1920, by Executive Order 3365, Attachment E, the President
9 extended the period of trust on all allotments on the public domain for 25 years
10 from the date the trust would otherwise expire. This extended the trust period
11 for MA-8 to March 8, 1951.
12

13 • 1950- Executive Order 10191
14

15 On December 13, 1950, by Executive Order 10191, 15 Fed. Reg. 8889,
16 Attachment F, the President extended for an additional 25 years the trust period
17 for any allotment whose trust period would expire in calendar year 1951. This
18 extended the trust period for MA-8 to March 8, 1976.
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2 • 1973- Deputy Assistant Secretary of the Interior Order, 38 Fed. Reg. 34463

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4 On December 7, 1973, the Deputy Assistant Secretary of the Interior² extended

5 the trust period for any allotment whose trust period would expire during 1974

6 through 1978 until January 1, 1979. 38 Fed. Reg. 34463, Attachment I. This

7 extended the trust period for MA-8 to January 1, 1979.

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9 • 1978- Secretary of the Interior Order, 43 Fed. Reg. 58368

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11 On November 24, 1978, the Secretary of the Interior extended the trust period

12 for any allotment whose trust period would expire during 1979 through 1983 to

13 January 1, 1984. 43 Fed. Reg. 58368, Attachment J. This extended the trust

14 period for MA-8 to January 1, 1984.

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16 • 1983- Secretary of the Interior Order, 48 Fed. Reg. 34026

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18 On July 20, 1983, the Secretary of the Interior extended the trust period for any

19 allotment whose trust period would expire during 1984 through 1988 to January

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21 ² The President delegated authority to extend trust periods to the Secretary of the

22 Interior through Paragraph (e) of Executive Order 10250 in 1951. 16 Fed. Reg. 5385,

23 Attachment G. In 1957, Executive Order 10732 further amended Executive Order

24 10250 to authorize the Secretary of the Interior to re-delegate that trust extension

25 authority to the Assistant Secretary of the Interior. 22 Fed. Reg. 8135, Attachment H.

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1 1, 1989. 48 Fed. Reg. 34026, Attachment K. This extended the trust period for
 2 MA-8 to January 1, 1989.

3 • 1988- Secretary of the Interior Order, 53 Fed. Reg. 30673
 4

5 On February 23, 1988, the Secretary of the Interior extended the trust period for
 6 any allotment whose trust period would expire during 1989 through 1993 to
 7 January 1, 1994. 53 Fed. Reg. 30673, Attachment L. This extended the trust
 8 period for MA-8 to January 1, 1994.
 9

10 • 1990- 25 U.S.C. § 478-1
 11

12 On May 24, 1990, Congress enacted law to provide that section 462 of Title 25,
 13 Attachment M, shall apply to “all lands held in trust by the United States for
 14 Indians.” Section 3(a) of the Act of May 24, 1990, 25 U.S.C. § 478-1 See
 15 Attachment N. Section 462 provides that the existing periods of trust are
 16 extended and continued until otherwise directed by Congress. This extended
 17 and continued the trust period for MA-8 until otherwise directed by Congress.
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21 Therefore, the General Allotment Act, and any subsequent Congressional and
 22 Executive actions permitting the extension of trust periods on Indian trust lands are
 23 applicable to MA-8. The Executive actions and laws listed above have extended MA-
 24 8’s trust period to today. As a matter of law, with the facts construed in a light most
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1 favorable to the Cross-claimant, MA-8 is trust property.

2 **5. Dismissal is required because the remaining *in rem* claims are reliant on**
 3 **MA-8 lacking trust status.**

4 The remaining four *in rem* cross-claims against the Colville Tribes and its
 5 ownership interest must be dismissed because, as described above, MA-8 is trust
 6 property as a matter of law. The United States holds title to MA-8 in trust for the
 7 benefit of the Colville Tribes. Property held in trust for Indians and Indian tribes by
 8 the United States is subject to the elaborate administrative process required by Title 25
 9 of the United States Code and Interior Department regulations as a means for the
 10 United States to carry out its trust responsibility to Indians and tribes. William C.
 11 Canby, American Indian Law in a Nutshell 53 (5th ed. 2009) (“Management of lands
 12 and other resources, including mineral and water rights, is a very significant portion of
 13 Bureau [of Indian Affairs] activity.”) These administrative processes must be fully
 14 utilized prior to a federal court exercising jurisdiction as a fundamental principle of
 15 administrative law. Woodford v. Ngo, 548 U.S. 81 (2006); Anderson v. Babbitt, 230
 16 F.3d 1158 (9th Cir. 2000). Cross-claimants have failed to adhere to any such
 17 administrative process. This Court lacks jurisdiction to act due to those required
 18 administrative processes.

19 *a. First Cross-claim: Declaration of Fee*

20 The remaining first *in rem* cross-claim against the Colville Tribes seeks a
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1 declaration that Cross-claimant and the landowners have a fee interest in MA-8. This
 2 cross-claim must be dismissed, because, as a matter of law, MA-8 is trust property due
 3 to the law above.
 4

5 *b. Second Cross-claim: Quiet Title*

6 The second *in rem* cross-claim to quiet title is based on the premise that MA-8
 7 is not trust property and that title to issued fee patents should be quieted pursuant to
 8 Washington State law.³ ECF 228, ¶ 229. Again, because MA-8 is trust property
 9 pursuant to the law above, the quiet title Cross-claim against the Colville Tribes must
 10 be dismissed.
 11
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13 *c. Fourth Cross-claim: Ejectment*

14 The remaining fourth *in rem* cross-claim against the Colville Tribes seeks to
 15 eject the Colville Tribes and its “affiliate CTEC”⁴ from MA-8 pursuant to Washington
 16 state law. ECF 228, ¶ 229. Cross-claimant has pled a jurisdictional basis for the
 17 ejectment of the Colville Tribes is that “MA-8 is fee land” subject to inapplicable
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20
 21 ³ Because MA-8 is trust land as a matter of law, the only way for Cross-Claimant to
 22 attempt to quiet title would be against the title holder, the United States, not the
 23 Colville Tribes.
 24

25 ⁴ Colville Tribal Enterprise Corporation, a wholly separate legal entity pursuant to
 26 Chapter 7-1 of the Colville Tribal Code, has never been a party to this lawsuit.

1 Washington ejectment statutory law.⁵ Because MA-8 is trust land as a matter of law,
 2 this jurisdictional basis fails and this cross-claim against the Colville Tribes must be
 3 dismissed.
 4

5 *d. Seventh Cross-claim: Partition*

6 The remaining seventh *in rem* cross-claim against the Colville Tribes seeking
 7 partition of MA-8, again is based on the premise that MA-8 is not trust land and is
 8 subject to Washington State's partition statute. ECF 228, ¶ 229. As described above,
 9 MA-8 is trust land as a matter of law.⁶ The cross-claim for partition is dependent on
 10 MA-8 not being trust land. This cross-claim against the Colville Tribes' must be
 11 dismissed.
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17 ⁵ Ejectment otherwise would need to be made pursuant to BIA administrative process
 18 that must be exhausted prior to Federal Court jurisdiction. Cross-claimant has never
 19 utilized such process.
 20

21 ⁶ Because MA-8 is trust land as a matter of law, partition is only available through
 22 federal law. Partition of trust lands is only available through an administrative process
 23 that must be exhausted. 25 U.S.C. § 2204. Cross-claimant has never asserted this as a
 24 basis for partition and has never sought to utilize this available administrative process.
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III. CONCLUSION

As a matter of law, MA-8 is trust property. The remaining cross-claims against the Colville Tribes and its interest in MA-8 must be dismissed.

DATED: October 11, 2012

By: s/ Timothy W. Woolsey WSBA #33208
Timothy W. Woolsey

s/ Dana Cleveland WSBA # 40285
Dana Cleveland

Attorneys for Defendant Colville Tribes
COLVILLE TRIBES OFFICE OF THE RESERVATION ATTORNEY
Highway 155 & Cache Creek Road
P.O. Box 150
Nespelem, Colville Reservation, Washington 99155
(509) 634-2381
(509) 634-2387 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James M Danielson jimd@jdsalaw.com, jod@jdsalaw.com

Kristin Marie Ferrera kristinf@jdsalaw.com, beckyw@jdsalaw.com
Frank Smith Frank@Flyonsmith.com

Pamela Jean DeRusha USAWAE.PDeRushaECF@usdoj.gov,
deanna.collins@usdoj.gov, jeanne.mccarty@usdoj.gov,
kathy.devlin@usdoj.gov, mary.f.buhl@usdoj.gov, penny.pass@usdoj.gov

R Bruce Johnston bruce@rbrucejohnston.com
Dale Foreman dale@daleforeman.com
Joseph Finley jos.finley@yahoo.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Darlene Marcellay-Hyland
16713 SE Fisher Drive
Vancouver, WA 98683

Paul Wapato, Jr.
10216 North Sundance Drive
Spokane, WA 99208-9315

Sandra Covington
P.O. Box 1152
Omak, WA 98841

James Abraham
2727 Virginia Avenue
Everett, WA 98201

Lynn Benson
P.O. Box 746
Omak, WA 98841

Mike Marcellay
P.O. Box 594
Brewster, WA 98812

Randy Marcellay
P.O. Box 3287

Linda Saint
P.O. Box 1403

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Office of the Reservation Attorney
P.O. Box 150
Nespelem, Colville Reservation, WA 99155
(509) 634-2381 Fax (509) 634-2387

1 Omak, WA 98841

Libby, MT 59923-1403

2
3 Maureen Marcellay
12108 SE 7th, Apt. B
4 Vancouver, WA 98683

Francis Abraham
P.O. Box 9325
Spokane, WA 99209

5
6 Marlene Marcellay
1300 SE 116th Court
7 Vancouver, WA 98683

Mike Palmer
P.O. Box 466
Nespelem, WA 99155

8
9 Francis Reyes
P.O. Box 296 1521
10 Newman Lake, WA 99025

Gary Reyes
N Argonne Road, #C302
Spokane, WA 99212

11 Naomi Dick
12 P.O. Box 198
13 Nespelem, WA 99155

14
15 s/ Timothy Woolsey
TIMOTHY WOOLSEY, WSBA #33208
16 Attorney for Defendant Colville Tribes
17 OFFICE OF THE RESERVATION ATTORNEY
P.O. Box 150
18 Nespelem, Colville Reservation, WA 99155
19 (509) 634-2389
20 (509 634-2387 (Fax)

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