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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington	)	Case No. 2:09-CV-00018-RMP
Resident; and THE MILL BAY	)	
MEMBERS ASSOCIATION, INC., a	)	
Washington Non-Profit Corporation,	)	
	)	
<i>Plaintiffs,</i>	)	CONFEDERATED TRIBES OF
	)	THE COLVILLE RESERVATION'S
vs.	)	SUPPLEMENTAL BRIEF IN
	)	SUPPORT OF MOTION TO
THE UNITED STATES OF	)	DISMISS (ECF 274) WAPATO
AMERICA, <i>et al.</i> ,	)	HERITAGE, LLC'S CROSS-
	)	CLAIMS (ECF 228)
<i>Defendants.</i>	)	
	)	

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**I. INTRODUCTION**

This Court should grant the Confederated Tribes of the Colville Reservation's ("Colville Tribes") motion to dismiss the remaining cross-claims asserted by Wapato Heritage, LLC ("Wapato Heritage") as against the Colville Tribes because the law of the case confirming the trust status of Moses Allotment No. 8 ("MA-8") controls the outcome of the remaining *in rem* cross-claims.

1 Additionally, if Wapato Heritage attempts to argue that MA-8's trust status does  
 2 not mandate dismissal of one or more of the remaining cross-claims, sovereign  
 3 immunity bars any such cross-claim as against the Tribes. Accordingly, this Court  
 4 should dismiss Wapato Heritage's remaining cross-claims as against the Colville  
 5 Tribes.

## 6 II. FACTS & PROCEDURAL HISTORY

7 In March 2010, Wapato Heritage filed its first answer to Plaintiffs'  
 8 complaint, alleging eight cross-claims (including subparts) against the United  
 9 States, individual allottees, and the Colville Tribes. ECF 170 at 16-17, 24-30. In  
 10 September 2011, the Colville Tribes filed a motion to dismiss Plaintiffs' claims and  
 11 Wapato Heritage's cross-claims against the Tribes for lack of jurisdiction under  
 12 Federal Rule of Civil Procedure ("Rule") 12(b)(1). ECF 210; ECF 211  
 13 (memorandum in support of motion). In February 2012, this Court dismissed  
 14 Plaintiffs' sole claim and two of Wapato Heritage's cross-claims<sup>1</sup> as against the  
 15 Colville Tribes concluding those claims were actions *in personam* and therefore  
 16 barred by the Tribes' sovereign immunity. ECF 227 at 17-18.

17  
 18  
 19 <sup>1</sup> This Court dismissed Wapato Heritage's third cross-claim (estoppel from  
 20 denying Plaintiffs the right to occupy MA-8 until 2034) and fifth cross-claim  
 21 (alleged overpayment to the allottees under the Master Lease) as against the  
 Colville Tribes. *See* ECF 227 at 5-6; ECF 170 at 28-29.

1           Significantly, this Court noted in that order that “Wapato Heritage admits in  
2 its Response that its *in rem* claims would only involve the Tribe if MA-8 is freely  
3 alienable, privately owned (in part by the Tribe)[ ] land held in fee simple.” *Id.* at  
4 17 (emphasis added).

5           Though it was previously undisputed, whether MA-8 is fee land  
6 or held in trust by the United States is now in dispute in this case. ...  
7           The trust status and ownership of MA-8 will not be decided in the  
8 context of the Tribe’s sovereign immunity Motion to Dismiss. ...

9           ... [T]he United States’ interests in MA-8 must be determined in  
10 the context of the Government’s trespass and ejectment claims against  
11 the Plaintiffs.

12 *Id.* at 14.

13           In March 2012, Wapato Heritage filed an amended answer and cross-claims,  
14 reciting the same eight cross-claims, including the two cross-claims this Court had  
15 already dismissed as against the Tribes. *Compare* ECF 228 at 26-31, *with* ECF 270  
16 at 24-30. The only modification made by Wapato Heritage in its amended answer  
17 and cross-claims was to add an unsupported jurisdictional contention that “[t]his  
18 Court has *in rem* jurisdiction over these cross-claims.” ECF 228 at 16; *see id.* at 1  
19 n.1.

20           In October 2012, the Colville Tribes filed a motion to dismiss under Rule  
21 12(c), ECF 274, arguing that Wapato Heritage’s “remaining *in rem* claims against  
the Colville Tribes must be dismissed.” ECF 275 at 2. Specifically,

          The remaining *in rem* claims are dependent on the proposition that MA-

1 8 is not trust property because [Wapato Heritage] seeks relief declaring  
2 [MA-8] non-trust and a subsequent series of state law property  
3 remedies unavailable for trust land. ... [A]ny relief sought by [Wapato  
Heritage] against the Colville Tribes' ownership interest is unavailable  
because the United States holds title in trust....

4 *Id.* at 3.

5 Thereafter, also in October 2012, this Court ordered supplemental briefing  
6 on the issue of MA-8's trust status, noting that "[t]he status of MA-8 is a threshold  
7 issue which must eventually be resolved." ECF 279 at 3. In late October 2012, the  
8 Colville Tribes filed supplemental briefing regarding the trust status of MA-8 per  
9 the Court's order. ECF 280. Later, in January 2013, this Court ordered still further  
10 supplemental briefing on the trust status issue. ECF 308. In late January 2013, the  
11 Colville Tribes and Wapato Heritage filed additional supplemental briefing on the  
12 trust status of MA-8. ECF 315, 316.

13 Nevertheless, the issue of the trust status of MA-8 remained unresolved until  
14 July 9, 2020, when this Court granted the United States' motion for summary  
15 judgment re ejectment. ECF 503. This Court held "Plaintiffs are judicially  
16 estopped from arguing that MA-8 is not held in trust," and "even if judicial estoppel  
17 did not apply here, the Court concludes that MA-8 is trust land." *Id.* at 27; *see id.*  
18 at 28-50 (analyzing statutes, executive order, regulations and precedent relied upon  
19 to conclude that MA-8 remains in trust).

20 On August 10, 2020, all parties filed a joint status report, in which Wapato

Heritage asserted just five of its original eight cross-claims remained as against the Colville Tribes. ECF 534 at 2. Namely, Wapato Heritage asserted against the Colville Tribes its:

1) First cross-claim for declaratory relief, but only subparts pertaining to:

- a) Partition of MA-8 (*see* ECF 228, ¶ 271);
  - b) Ejectment of any tenant, including the Colville Tribes (*id.*, ¶ 272);
  - c) 2009 casino replacement lease void *ab initio* (*id.*, ¶ 273);
  - d) Entitlement to vote and/or consent to any lease of MA-8 (*id.*, ¶ 274);
  - e) Entitlement to receive revenue distributions from BIA (*id.*, ¶ 275);
- 2) Fourth cross-claim for ejectment of the Colville Tribes and affiliated casino (*id.*, ¶ 282);
- 3) Sixth cross-claim for alleged underpayment (*id.*, ¶ 286);
- 4) Seventh cross-claim for partition (*id.*, ¶ 288) ; and
- 5) Eighth cross-claim for attorney fees and costs (*id.* at 31, ¶ 290).

*See* ECF 534 at 2.

On October 5, 2020, this Court issued a scheduling order calling for supplemental briefing in support of the Colville Tribes’ motion to dismiss Wapato Heritage’s cross-claims against the Tribes. ECF 566 at 4. This supplemental brief fulfills that order.

### III. STANDARD OF REVIEW

A motion to dismiss under Rule 12(c) is “functionally identical” to a motion

1 to dismiss under Rule 12(b)(6), therefore “the same standard of review ... applies.”  
 2 *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989); *see also*  
 3 2 Moore’s Federal Practice - Civil § 12.38 (“Because a motion for failure to state a  
 4 claim under Rule 12(b)(6) is an analog to the motion for judgment on the pleadings  
 5 under Rule 12(c), most of the voluminous authority on Rule 12(b)(6) applies to Rule  
 6 12(c).”).

7 Claims should be dismissed under Rule 12(c) or Rule 12(b)(6) if ““it appears  
 8 beyond doubt that the [claimant] can prove no set of facts in support of his claim  
 9 which would entitle him to relief.”” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d  
 10 696, 699 (9th Cir. 1988) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).  
 11 “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
 12 sufficient facts alleged under a cognizable legal theory.” *Id.* In other words, a court  
 13 must assess “whether the [claimant’s] factual allegations, together with all  
 14 reasonable inferences, state a plausible claim for relief.” *Cafasso v. Gen. Dynamics*  
 15 *C4 Sys.*, 637 F.3d 1047, 1054 (9th Cir. 2011) (citing *Ashcroft v. Iqbal*, 129 S. Ct.  
 16 1937, 1949-50 (2009)).

#### 17 IV. ARGUMENT

##### 18 A. Because MA-8 Is Indian Trust Land, Wapato Heritage’s Cross-Claims 19 Lack Cognizable Legal Theories, Thereby Failing to State Any Plausible 20 Claims for Relief.

21 Prior to ruling that MA-8 remains in trust, this Court observed that Wapato

1 Heritage's alleged remaining *in rem* cross-claims could only be cognizable against  
2 the Colville Tribes if MA-8 were held in fee simple. ECF 227 at 17 (stating Wapato  
3 Heritage's "*in rem* claims would only involve the Tribe if MA-8 is freely alienable,  
4 privately owned (in part by the Tribe)[<sup>1</sup>] land held in fee simple"). Indeed, Wapato  
5 Heritage's 2012 response to the Colville Tribes' instant motion to dismiss was  
6 devoted to arguing against dismissal solely on the basis that "MA-8 is fee property  
7 free of restrictions." ECF 293 at 3.

8 The parties and this Court have since resolved the "threshold issue" of MA-  
9 8's trust status, ECF 279 at 3, in precisely the manner this Court dictated the issue  
10 "must be determined": that is, "in the context of the Government's trespass and  
11 ejectment claims" – "not ... in the context of the Tribe's sovereign immunity  
12 Motion to Dismiss." ECF 227 at 14.

13 It is now the law of the case that "MA-8 is Indian land held in trust by the  
14 United States for the benefit of the allottees." ECF 503 at 50; *see Arizona v.*  
15 *California*, 460 U.S. 605, 618 (1983) (the law of the case "doctrine posits that when  
16 a court decides upon a rule of law, that decision should continue to govern the same  
17 issues in subsequent stages in the same case"). Accordingly, the confirmed trust  
18 status of MA-8 controls the outcome of Wapato Heritage's cross-claims as a matter  
19 of law. This Court should dismiss all of Wapato Heritage's cross-claims as against  
20 the Colville Tribes because they are premised on Wapato Heritage's erroneous

1 proposition – rejected by this Court – that “MA-8 is not trust land.” ECF 445 at 4.  
2 As recently as just five months ago, Wapato Heritage once again reiterated its same  
3 singular line of argument that “[b]ecause MA-8 is not trust land, the Government  
4 and the Tribe’s motions must be denied.” *Id.* (Supp. Br. of Wapato Heritage in Opp.  
5 to USA Mot. for Partial Sum. Judg. and Colville Mot. to Dismiss, May 17, 2020).

6 Wapato Heritage’s cross-claims “lack ... legally cognizable theor[ies],” and  
7 are thus fatally flawed, because they directly subvert express federal regulations  
8 that occupy the field governing Indian trust property. *Balistreri*, 901 F.2d at 699.  
9 For example, Wapato Heritage seeks in the first remaining subpart of its first cross-  
10 claim and its seventh cross-claim a partition of its interest in MA-8 based on state  
11 law, chapter 7.52 RCW. ECF 228, ¶ 271, ¶ 288. Yet state partition law is plainly  
12 inapplicable to Indian trust property. Rather, partitioning of Indian trust property  
13 is governed by a distinct federal administrative process under 25 C.F.R § 152.33.

14 Similarly, in the fourth remaining subpart of its first cross-claim, Wapato  
15 Heritage seeks a declaration that “even if the trust status of MA-8 were valid, ...  
16 Wapato Heritage is entitled to vote and/or consent to any lease or other disposition  
17 or material action regarding MA-8.” ECF 228, ¶ 274. However, Wapato Heritage’s  
18 baseless cross-claim runs directly counter to express federal regulation governing  
19 consent requirements for leasing of fractionated Indian trust property: 25 C.F.R §  
20 162.012(a) plainly states that where, as here, there are 20 or more owners of an



1 undivided trust parcel, consent of more than 50 percent of the ownership interest is  
2 required to approve a lease. Accordingly, as owner of 56 percent undivided interest  
3 in MA-8<sup>2</sup>, the Colville Tribes are the only interest-holder “entitled to vote and/or  
4 consent to any lease.”

5 Likewise, Wapato Heritage’s fourth cross-claim and the second remaining  
6 subpart of its first cross-claim must be dismissed because federal regulation  
7 provides that actions for trespass and ejectment from Indian trust land lie solely  
8 within the purview of the United States and Indian landowners. 25 C.F.R. §  
9 162.023. In those cross-claims, Wapato Heritage seeks ejectment of the Colville  
10 Tribes and affiliated casino<sup>3</sup> from MA-8. ECF 228, ¶ 282, ¶ 272. Lacking any  
11 cognizable legal theory, Wapato Heritage fails to “state a plausible claim for relief,”  
12 therefore this Court should dismiss Wapato Heritage’s cross-claims. *Cafasso*, 637  
13 F.3d at 1054.

14 Furthermore, of the cross-claims Wapato Heritage has now attempted to  
15 revive against the Colville Tribes, only two were recognized by this Court as being  
16 even “arguably” characterizable as *in rem* and therefore potentially falling outside  
17

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18 <sup>2</sup> See ECF 441 at 12.

19 <sup>3</sup> Wapato Heritage never named as a cross-claim defendant the Colville Tribal  
20 Federal Corporation (“CTFC”; formerly known as the Colville Tribal Enterprise  
21 Corporation), which manages and operates the casino on MA-8, nor has CTFC  
been named in this action at any point.

1 the scope of the Tribes' sovereign immunity. ECF 227 at 16 (emphasis in original).

2 This Court expressly stated in its order granting in part the Colville Tribe's initial  
3 motion to dismiss Wapato Heritage's cross-claims:

4 the only claims asserted by Wapato Heritage which could *arguably* be  
5 characterized as *in rem* ... are: 1) the first Cross-claim seeking a  
6 declaration of its own and all landowner's respective rights in MA-8 (¶  
7 257) and a declaration that the MA-8 landowners are tenants in  
common (¶ 260); 2) the second Crossclaim for "quiet title"[;] 3) the  
ejectment claim (fourth Crossclaim) against the Tribe; and 4) the  
seventh Crossclaim for partition of the property.

8 *Id.* at 16-17 (citing ECF 170). Of these potentially cognizable *in rem* cross-claims,  
9 pursuant to the recently filed joint status report, Wapato Heritage has abdicated all  
10 but the fourth cross-claim for ejectment and seventh cross-claim for partition. *See*  
11 ECF 534 at 2. To wit, Wapato Heritage did not assert: either subpart of its first  
12 cross-claim alleging that MA-8 is held in fee simple (ECF 170, ¶ 257; ECF 228, ¶  
13 267) or that all owners of MA-8 are tenants in common (ECF 170, ¶ 260; ECF 228,  
14 ¶ 270); or its second cross-claim for quiet title (ECF 170, ¶ 267; ECF 228, ¶ 277).  
15 And as discussed *supra*, Wapato Heritage's fourth cross-claim for ejectment and  
16 seventh cross-claim for partition are baseless because federal regulations occupy  
17 those fields as to Indian trust property.

18 Ultimately, all of Wapato Heritage's remaining cross-claims against the  
19 Colville Tribes flounder and fail because they are fundamentally premised on  
20 Wapato Heritage's debunked assertion about MA-8's trust status. The law of the

1 case that MA-8 is indeed Indian trust land controls the outcome of Wapato  
 2 Heritage's remaining cross-claims, which much be dismissed.

3 **B. Sovereign Immunity Would Bar Any Cross-Claim That Wapato**  
 4 **Heritage May Argue Is Not Controlled by MA-8's Trust Status.**

5 To the degree that Wapato Heritage may argue that any of its remaining live  
 6 cross-claims against the Colville Tribes can be characterized as not *in rem* and  
 7 therefore not determined as a matter of law by MA-8's trust status, tribal sovereign  
 8 immunity would operate to eliminate the legally cognizability of any such cross-  
 9 claims as against the Tribes, thereby requiring dismissal. *Santa Clara Pueblo v.*  
 10 *Martinez*, 436 U.S. 49, 56 (1978); *Imperial Granite Co. v. Pala Band of Mission*  
 11 *Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (stating tribal sovereign "immunity  
 12 extends to suits for declaratory and injunction relief" as well as damages). At no  
 13 point has the Colville Tribes' sovereign immunity from suit been waived in this  
 14 action. *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir. 1993) ("Absent  
 15 express and unequivocal waiver of immunity by the tribe or abrogation of tribal  
 16 immunity by Congress, tribes cannot be sued.").

17 Wapato Heritage can't have it both ways: either its remaining cross-claims  
 18 are by nature *in rem* and should be dismissed because MA-8's trust status controls;  
 19 or its remaining cross-claims are *in personam* and should be dismissed as to the  
 20 Colville Tribes because the Tribes are immune from suit.

1       **C. The Colville Tribes Adopt the United States' Arguments in Its Motion**  
2       **to Dismiss.**

3       In addition to the foregoing reasons for dismissal of Wapato Heritage's cross-  
4       claims, the Colville Tribes' adopt and incorporate as if set forth herein the  
5       arguments advanced in the United States' motion to dismiss Wapato Heritage's  
6       remaining claims, ECF 570.

7                               **V.     CONCLUSION**

8       Because this Court has confirmed that MA-8 is Indian land held in trust by  
9       the United States, the doctrines of the law of the case and tribal sovereign immunity  
10      should guide this Court to grant the Colville Tribes' motion to dismiss Wapato  
11      Heritage's remaining cross-claims as against the Tribes.

12               Respectfully submitted this 19th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which caused the following CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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