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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, )

*Plaintiffs,*

vs.

THE UNITED STATES OF  
AMERICA, *et al.*,

*Defendants.*

CONFEDERATED TRIBES OF  
THE COLVILLE RESERVATION'S  
REPLY IN SUPPORT OF MOTION  
TO DISMISS (ECF 274) WAPATO  
HERITAGE, LLC'S CROSS-  
CLAIMS (ECF 228)

**I. INTRODUCTION**

By this Court's prior order and Wapato Heritage LLC's (Wapato's) prior admission, the cognizability of Wapato's remaining cross-claims as against the Confederated Tribes of the Colville Reservation (Tribes) rested upon the status of MA-8. ECF 227 at 17; *see* ECF 293. Because it is now the law of the case that MA-8 is Indian trust land, Wapato's cross-claims against the Tribes fail as a matter of law. *See* ECF 571 at 6-11. Based on a plainly inaccurate reading of the factual

1 record, Wapato has attempted a series of arguments to try to salvage its cross-  
2 claims. However, because the Tribes never waived sovereign immunity in any  
3 manner and because Wapato's cross-claims are misdirected against the Tribes and  
4 lack merit, the Tribes' motion to dismiss Wapato's cross-claims against the Tribes  
5 should be granted.

## 6 II. ARGUMENT

### 7 A. Wapato Heritage's Cross-Claims Warrant Dismissal Under *Either* the 8 Failure to State a Claim or Summary Judgment Standards.

9 No matter which standard is applied, Wapato's cross-claims fail as a matter  
10 of law and should be dismissed as against the Tribes because: (1) Wapato's  
11 remaining *in rem* cross-claims are incognizable due to MA-8's status as Indian trust  
12 land; and (2) any alleged *in personam* cross-claims are incognizable due to the  
13 Tribes' fully-preserved sovereign immunity. *See Balisteri v. Pacifica Police Dep't*,  
14 901 F.2d 696, 699 (9th Cir. 1988). Though Wapato argues that the Court should  
15 review the Tribes' motion to dismiss Wapato's cross-claims against the Tribes  
16 under a summary judgment standard of review (ECF 577 at 13), "a 12(b)(6) motion  
17 need not be converted to a motion for summary judgment when matters outside the  
18 pleadings are introduced, provided that nothing in the record suggests reliance on  
19 those extraneous materials." *Keams v. Tempe Tech. Inst.*, 110 F.3d 44, 46 (9th Cir.  
20 1996) (internal quotation omitted).

1 Here, nothing outside the pleadings need be relied upon because, as the Court  
2 previously observed, “Wapato Heritage admits ... that its *in rem* claims would only  
3 involve the Tribe if MA-8 is freely alienable, privately owned ... land held in fee  
4 simple.” ECF 227 at 17. This Court has since expressly held that MA-8 is not fee  
5 land. In light of the law of the case, the pleadings are sufficient basis to dismiss  
6 Wapato’s cross-claims for failure to state a claim upon which relief can be granted.

7 Even if the summary judgment standard were applied, however, dismissal of  
8 Wapato’s cross-claims is nonetheless proper because there is no genuine issue of  
9 material fact that either (1) MA-8 is Indian trust land or (2) that the Tribes’  
10 sovereign immunity remains fully preserved as to Wapato’s cross-claims.

11 **B. Because Waiver Was Never Effected by Contract or Participation in**  
12 **This Action, the Tribes’ Sovereign Immunity Remains Fully Preserved**  
13 **as to Wapato’s Cross-Claims.**

14 “It is settled that a waiver of sovereign immunity cannot be implied but must  
15 be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58  
16 (1978) (internal quotation omitted). “[T]o relinquish its immunity, a tribe’s waiver  
17 must be clear.” *C&L Enters. v. Citizen Band Potawatomi Indians*, 532 U.S. 411,  
18 418 (2001) (internal quotation omitted). “There is a strong presumption against  
19 waiver of tribal sovereign immunity.” *Demontiney v. United States*, 255 F.3d 801,  
20 811 (9th Cir. 2001).

1 At no point did the Tribes waive tribal sovereign immunity by contract  
2 because the Tribes were not a party to the 1993 casino sublease and the 2009 casino  
3 ‘replacement lease’ contains no provision for even a limited waiver of sovereign  
4 immunity. Nor have the Tribes waived sovereign immunity by implication in the  
5 course of this litigation because the Tribes never repudiated the instant motion to  
6 dismiss Wapato’s cross-claims in narrowly defending the Tribes’ interest as the  
7 majority beneficial owner of MA-8.

8 **1. The Tribes never waived sovereign immunity (or the forum**  
9 **selection clause) by contract; Wapato relies on blatantly**  
10 **erroneous facts in arguing otherwise.**

11 Wapato commits two significant and fatal errors in its attempt to argue that  
12 the Tribes waived sovereign immunity via the leases for the casino on MA-8. First,  
13 Wapato erroneously conflates the Confederated Tribes of the Colville Reservation,  
14 a federally recognized sovereign Indian nation, with the Colville Tribes Enterprise  
15 Corporation (CTEC), a Tribally chartered corporate entity. CTEC – not the Tribes  
16 – was the signatory to, contracting party, and lessee under the original 1993 casino  
17 sublease. *See* ECF 90-4 at 30 (listing CTEC as the “Lessee” and showing contract  
18 signed by the “Vice president of Business Development[,] Colville Tribal  
Enterprise Corporation”).

19 A tribal corporation is not coextensive with the sovereign tribal government  
20 under which it is chartered. Quite simply, while “the settled law of our circuit is

1 that tribal corporations acting as an arm of the tribe enjoy the same sovereign  
2 immunity granted to a tribe itself,” that does not mean a tribal corporation *is* the  
3 tribe. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

4       Rather, CTEC was incorporated pursuant to Chapter 7-1 of the Colville  
5 Tribal Law & Order Code (CTC), which provides for the creation of “corporations  
6 and limited liability companies which will be agencies and instrumentalities of the  
7 Colville Tribal Government.” CTC 7-1-1.<sup>1</sup> As the Washington State Supreme  
8 Court observed in *Wright v. Colville Tribal Enterprise Corporation*, 159 Wn.2d  
9 108, 110, 147 P.3d 1275 (2006), “CTEC [is a] tribal governmental corporation[]  
10 created by the [Colville Business] Council under chapter 7-1 CTC. CTEC is  
11 wholly-owned by the Council.” The *Wright* court, in holding that tribal sovereign  
12 immunity protected CTEC from suit, noted “Chapter 7-1 CTC neither waives the  
13 immunity of tribal government corporations *nor permits tribal government*  
14 *corporations to waive their own immunity.*” 159 Wn.2d at 115 (emphasis added).

15       It follows that CTEC certainly never had authority to waive the sovereign  
16 immunity of its enabling principal, the Tribes, as Wapato circuitously contends.

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18  
19 <sup>1</sup> CTC Chapter 7-1 is available at:  
20 <https://static1.squarespace.com/static/572d09c54c2f85ddda868946/t/5824b1ae197aea06e0c01930/1478799791309/7-1%2BGvt%2Bcorp%2Band%2BLLC.pdf> (last  
21 visited Nov. 9, 2020).

1 Indeed, “[i]t is a corollary to immunity from suit on the part of ... the Indian Nations  
 2 ... that this immunity cannot be waived by officials.” *United States v. United States*  
 3 *Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). Rather, “the waiver must not  
 4 only be an absolutely unequivocal expression, it must also be made by the tribal  
 5 government itself.” Dao Lee Bernardi-Boyle, *State Corporations for Indian*  
 6 *Reservations*, 26 AM. INDIAN L. REV. 41, 47 (2001). Therefore, Wapato’s argument  
 7 that the Tribes somehow waived sovereign immunity as to Wapato’s cross-claims  
 8 via the 1993 casino sublease fails because the Tribes were not party to that sublease  
 9 and the Tribes’ subsidiary, CTEC, was not empowered to waive the Tribes’  
 10 sovereign immunity.<sup>2</sup>

11 Second, although Wapato filed its cross-claims in first in 2010 and again in  
 12 amended form in 2012, Wapato inexplicably relies on the 2014 casino lease to  
 13  
 14

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15 <sup>2</sup> For the same reasons, the Tribes cannot be said to have waived, as to Wapato’s  
 16 cross-claims, the forum selection clause in the 1993 casino sublease expressly  
 17 providing for resolution of all disputes in Colville Tribal Court. *See* ECF 90-4 at  
 18 29 (“Both Evans[] and CTEC consent and agree that any disagreement or  
 19 controversy as between the parties that they are unable to settle between  
 20 themselves shall be submitted and tried in the Colville Tribal Court” (emphasis  
 added)). Furthermore, even if the Tribes had been party to the 1993 casino  
 sublease, “at best, these [tribal court forum selection] provisions establish only the  
 Tribe’s willingness to face suit in tribal court and not an explicit waiver of tribal  
 immunity.” *Demontiney*, 255 F.3d at 812 (internal quotation omitted,  
 modifications normalized). The burden was on Wapato to plead any claims it had  
 against the proper party and in the proper forum, or risk dismissal.

1 further allege that the Tribes waived sovereign immunity as to those cross-claims.  
 2 *See* ECF 170; ECF 228; ECF 577 at 6. This is nonsensical. It is unclear why  
 3 Wapato relies on (and filed as an exhibit, ECF 578-1) the 2014 casino lease, which  
 4 is inapposite here because it was executed two years after Wapato filed its amended  
 5 cross-claims. Even if the Tribes had waived sovereign immunity under the 2014  
 6 lease, which they did not, the 2014 lease does not ‘relate back’ to the amended  
 7 cross-claims filed by Wapato in 2012. Moreover, even if it were relevant, Wapato  
 8 misrepresents and overstates in its response brief the very limited scope of the  
 9 sovereign immunity waiver provisions in the 2014 casino lease. *See* ECF 578-1 at  
 10 11-12.<sup>3</sup>

11 The actual casino ‘replacement lease’ that is relevant to the Tribes’ motion  
 12 to dismiss Wapato’s cross-claims was executed in early 2009 and provided for a  
 13 five-year term concluding February 2, 2014. ECF 200 at 11, 14 (2009 casino  
 14 lease).<sup>4</sup> In contrast to the 1993 casino sublease, the Tribes were the lessee under  
 15

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16 <sup>3</sup> *Compare* § 8.1 (“Except as expressly provided in this Article, the Tribes and  
 17 Lessee do not waive their respective sovereign immunity regarding any asserted  
 18 claims, controversies, demands, or disputes (collectively, ‘claims’) arising out of  
 19 or relating to this Lease.”) *with* § 8.8 (“The Tribes and Lessee hereby waive their  
 20 respective sovereign immunity *for the purpose of enforcing compliance with these*  
*dispute resolution provisions* and enforcing or confirming any such aware, *but for*  
*no other purpose, and excluding any consequential, incidental, or punitive*  
*damages.*” (emphasis added)).

<sup>4</sup> The 2009 casino lease is found, out of order, at ECFs 199-200 and 202-203.

1 the 2009 casino lease. *Id.* at 13. However, the 2009 casino lease did not include  
 2 any provision for waiver of sovereign immunity. *See id.* at 13-15; ECF 202 at 1-  
 3 11.

4 **2. The Tribes' limited role in this action is insufficient to waive**  
 5 **sovereign immunity as to Wapato Heritage's cross-claims.**

6 "It is settled that waiver of sovereign immunity cannot be implied." *Santa*  
 7 *Clara Pueblo*, 436 U.S. at 58. Even where a tribe affirmatively sues a defendant  
 8 entity, sovereign immunity bars cross-actions against the tribe:

9 [A] tribe does not waive its sovereign immunity from actions that could  
 10 not otherwise be brought against it merely because those actions were  
 11 pleaded in a counterclaim to an action filed by the tribe. Possessing  
 12 immunity from direct suit, we are of the opinion the Indian nations  
 13 possess a similar immunity from cross-suits.

14 *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 509 (1991)  
 15 (internal quotation and citation omitted, modifications normalized). As Wapato  
 16 itself notes, "[W]hile participating in litigation is not a one-way street ... the length  
 17 of the street extends only so far as the Tribe's participation." *Miccosuckee Tribe of*  
 18 *Indians of Fla. v. Lewis Tein, P.L.*, 227 So.3d 656, 664 (Fla. Dist. Ct. App. 3d Dist.,  
 19 August 9, 2017).

20 Here, the Tribes' participation in this litigation has been limited to defending  
 21 its interest as the majority beneficial owner of MA-8 against longstanding trespass  
 by Plaintiffs and against Plaintiffs' and Wapato's attempts to undermine the trust



1 status of MA-8. Wapato's cross-claims "could not otherwise be brought against"  
2 the Tribes due to sovereign immunity, and are not cognizable against the Tribes  
3 "merely because those actions were pleaded in a [cross-]claim to an action" –  
4 particularly where, as here, the Tribes did not affirmatively initiate the action but  
5 were named as an alleged defendant. *Oklahoma Tax Comm'n*, 498 U.S. at 509.

6 Importantly, the Tribes have never repudiated the instant motion to dismiss  
7 Wapato's cross-claims and have consistently maintained the position that Wapato's  
8 cross-claims are incognizable against the Tribes. The 'length of the street' that the  
9 Tribes have traveled in case is not commensurate with Wapato's far-flung cross-  
10 claims, which are tangential to the core issues in this case (trespass and MA-8 trust  
11 status), resolution of which the Tribes have sought in good faith for the past year.

12 **C. Wapato's Cross-Claims For Underpayment, Declaratory Relief, and**  
13 **Ejectment & Partition Are Incognizable Against the Tribes.**

14 Though Wapato asserts in its response that its cross-claim for underpayment  
15 is against the Tribes, it is quite clear that Wapato pled its cross-claim for  
16 underpayment against the BIA, not the Tribes. ECF 228 at 30, ¶ 286 (requesting an  
17 order which "compels the BIA ... to immediately collect"). Furthermore, even if  
18 Wapato's cross-claim for underpayment was pled against the Tribes, it would share  
19 the same fatal flaw as Wapato's contention that the Tribes waived sovereign  
20 immunity under the 1993 casino sublease: CTEC, not the Tribes, was party as lessee

1 under the 1993 casino sublease, which governs the entire period of alleged  
2 underpayment from 1994 through 2005. *See* ECF 573 at 3, ¶ 7; ECF 574-1. Wapato  
3 expressly acknowledged as much, alleging “the Colville Tribal Enterprise  
4 Corporation ... had underpaid.” ECF 573 at 3, ¶ 7. As against the Tribes, Wapato’s  
5 cross-claim for underpayment is thus incognizable.

6 Similarly misplaced and incognizable is Wapato’s cross-claim for  
7 declaratory relief on the basis that it was ‘excluded’ from the negotiation of the  
8 current 2014 casino lease, which it refers to in its response brief as the  
9 “Replacement Lease.” *See* ECF 577 at 14-17, 4. Once again, as a matter of  
10 chronology and logic, none of Wapato’s 2012 amended cross-claims could have  
11 pertained to the current casino lease executed in 2014.

12 Additionally, if Wapato intended to attack the 2009 casino lease on the basis  
13 of exclusion, the record clearly belies that claim. For one, Wapato is a state-chartered  
14 limited liability company, not an Indian landowner, and therefore was never entitled  
15 to notice. 25 C.F.R. § 162.029(a)(2) (“For leases of individually owned Indian law,  
16 [BIA] will notify ... where feasible, the individual *Indian landowners* either by  
17 constructive notice or by mail.” (emphasis added)). Additionally, the 2009 lease  
18 contains documentation of affirmative approval by 17 allottee-owners and the  
19 Tribes, totaling consent by 63.12 percent of the undivided ownership interest – more  
20

1 than the simple majority required under 25 C.F.R. § 162.012(a)(1).<sup>5</sup> ECF 199 at 8-  
 2 15; ECF 200 at 1-10. Thus, Wapato's consent was not required as to either the 2009  
 3 or 2014 casino leases, and Wapato was not "entitled to vote their [*sic*] life estate  
 4 share," as it claims. ECF 577 at 6. As such, that cross-claim is incognizable not  
 5 only against the Tribes but against all defendants.

6 Finally, Wapato's cross-claim for ejectment and partition is plainly  
 7 incognizable in light of the law of the case holding MA-8 is Indian trust land. On  
 8 lands of such character, trespass and partition are federally preempted and governed  
 9 by regulations specific to trust lands. *See* 25 C.F.R. § 162.023; 25 C.F.R. § 152.33.

### 10 III. CONCLUSION

11 For the foregoing reasons, the Colville Tribes respectfully submit that the  
 12 motion to dismiss Wapato Heritage's cross-claims as against the Tribes should be  
 13 granted.

14  
 15 Dated this 9th day of November, 2020.

16 s/ Brian W. Chestnut  
 17 Brian W. Chestnut, WSBA #22453  
 18 Anna E. Brady, WSBA # 54323  
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19 <sup>5</sup> Similarly, the current 2014 casino lease was approved by more than the requisite  
 20 50 percent of the undivided ownership interest, excluding Wapato's 23.8 percent  
 life estate interest. *See* ECF 578-1 at 17; *see also* ECF 441 at 16; ECF 199 at 8.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 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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