

1 William D. Hyslop
2 United States Attorney
3 Eastern District of Washington
4 Joseph P. Derrig
5 Timothy M. Durkin
6 Assistant United States Attorneys
7 Post Office Box 1494
8 Spokane, WA 99210-1494
9 Telephone: (509) 353-2767
10 FAX: (509) 835-6397

7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON

9 PAUL GRONDAL, a Washington
10 resident; and THE MILL BAY
11 MEMBERS ASSOCIATION, INC., a
12 Washington Non-Profit Corporation,

13 Plaintiffs,

14 vs.

15 UNITED STATES OF AMERICA, et al.,

16 Defendants.

No. 2:09-cv-00018-RMP

**FEDERAL DEFENDANTS’
REPLY IN SUPPORT OF
MOTION TO DISMISS WAPATO
HERITAGE, LLC’S REMAINING
CLAIMS (ECF No. 570)**

Hearing: 6:30 p.m. (w/o oral arg.)
December 10, 2020

17
18 **I. REPLY**

19 Preliminarily, the Federal Defendants’ focus on the legal arguments in this
20 reply should not be taken as agreement with Wapato Heritage, LLC (“WHL”) *in*
21 purported “statement of facts.” The Federal Defendants indeed take issue with
22 many of alleged facts or aspersions cast (e.g. who “administered” the Master Lease
23 under its terms and regulations at the time, or “usurpation” of Evans’s project).
24 Many of WHL’s unsupported factual assertions find no support in the record nor
25 are they even allegations in its First Amended Answer and Crossclaims (“FAAC”).
26 For example, WHL now claims Evans transferred his interest in MA-8 to WHL *in*
27 2002. Of course, if this was true, the BIA would have had to approve the transfer
28

1 of *trust interests* to a non-Indian entity such as WHL, which it did not do, and the
 2 Indian Probate proceedings would not have been necessary. *See* 90-13 at pp. 549,
 3 560 (transfer of MA-8 had not been approved yet in 2005). WHL had no interest in
 4 MA-8 until the order of the Indian Probate *became final on January 10, 2006*, and
 5 it then received a 23.8% life estate interest in MA-8. ECF No. 90-14 at p. 635;
 6 Derrig Decl. ¶ 2, Ex. A.¹ Notwithstanding these issues, WHL's remaining 'claims'
 7 must be dismissed as a matter of law for the reasons stated below.

8 **1. WHL's first crossclaim for declaratory relief must be dismissed.**

9 WHL makes no argument opposing the Federal Defendants' motion to
 10 dismiss its claims for declaratory relief. Indeed, it makes but a single reference to
 11 declaratory relief by stating, without citation to any authority, "Federal Courts
 12 retain jurisdiction over . . . claims for declaratory relief." ECF No. 589 at p. 18-19.
 13 This response is a non sequitur; the Declaratory Judgment Act, 28 U.S.C. § 2201,
 14 only creates a remedy and is not an independent basis for jurisdiction. *See Stock*
 15 *W., Inc. v. Confederated Tribes of the Colville Rsrv.*, 873 F.2d 1221, 1225 (9th Cir.
 16 1989) ("To obtain declaratory relief in federal court, there must be an independent
 17 basis for jurisdiction."). Regardless, WHL's failure to provide any argument why
 18 its *nine* claims for declaratory relief should not be dismissed is an implicit
 19 concession that these claims must all be dismissed for the following reasons.
 20

21 First, WHL's first six claims for declaratory relief all rely on its faulty
 22 premise that MA-8 is not held in trust. ECF No. 228, ¶¶ 267 (trust period), 268
 23 (request for fee patent), 269 (not Indian lands); 270 (State law should apply), 271
 24 (same), 272 (ejectment). The Court has already ruled, *again*, that MA-8 is held in
 25

26 ¹ The court can take judicial notice of this record. *See e.g., Intri-Plex Techs., Inc. v.*
 27 *Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (affirming district court order
 28 taking judicial notice on motion to dismiss).

1 trust. Accordingly, the premise upon which WHL's declaratory relief is sought has
2 been decided, and its requested declaratory relief is no longer available. *See, Lopez*
3 *v. Wells Fargo Bank, N.A.*, 727 F. App'x 425, 426 (9th Cir. 2018) (affirming
4 dismissal of declaratory relief where underlying claims dismissed).

5 Second, WHL's seventh claim for declaratory relief seeks to void, in 2020, a
6 five-year lease entered into in 2009. ECF No. 228, ¶ 273. Since this lease ended
7 and was replaced in 2014, this claim is moot and must be dismissed. *See e.g., Pub.*
8 *Util. Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1459 (9th Cir. 1996) ("A
9 federal court cannot issue a declaratory judgment if a claim has become moot.").
10 Furthermore, as explained further in the paragraph below and in the Tribes' reply
11 (ECF No. 588 at p. 10-11), WHL's claims of "exclusion" from the lease,
12 "collusion," or the like related to the 2009 lease, appear to be, *at best*, a
13 *misinterpretation* by WHL of the pertinent regulations.

14 Third, WHL's eighth claim for declaratory relief that it is entitled to vote
15 and/or consent to any lease or action regarding MA-8 is a misinterpretation of the
16 statute and pertinent regulations. *See* ECF No. 228, ¶ 274. Congress has set out the
17 percentage of Indian landowners required to consent to approval of a lease – here,
18 "a majority" of the landowners of MA-8 must consent for a lease to be approved.
19 25 U.S.C. § 2218(b)(1)(D). The regulations do not require that every MA-8
20 landowner 'vote or consent' to a lease before approval, but rather only that over
21 fifty percent of the Indian landowners' consent. 25 C.F.R. § 162.012. Here, once
22 the BIA obtained the consent of the majority of the Indian landowners, no other
23 landowners need be contacted. Once BIA obtained the applicable consent, the
24 lease binds all other non-consenting landowners as if they consented to the lease.
25 25 C.F.R. 162.012(a)(4)(i). The regulations are clear that once the required consent
26 is reached, the other landowners are subject to the terms of the lease and not
27 entitled to "vote" on the lease. WHL's eighth claim for relief must be dismissed.
28

1 Finally, WHL's ninth claim for declaratory relief that "Wapato Heritage is
 2 entitled to receive distributions from the revenue received by the BIA in respect of
 3 MA-8 the capacity of Wapato Heritage as a life-tenant of MA-8, under, inter alia,
 4 25 C.F.R. § 179.101(b)(1)"² must be dismissed since WHL has not stated a claim
 5 for declaratory relief. *See* ECF No. 228, ¶ 275. Under the Declaratory Judgment
 6 Act, 28 U.S.C. § 2201, a federal court may only grant declaratory relief in a case of
 7 actual controversy. *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1091
 8 (9th Cir. 1992). For declaratory relief, there must be "a substantial controversy,
 9 between parties having adverse legal interests, of sufficient immediacy and reality
 10 to warrant issuance of a declaratory judgment." *Id.* at 1092 (quoting *Maryland*
 11 *Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). WHL makes
 12 no allegation in its FAAC that BIA is not following 25 C.F.R. § 179.101(b)(1) or
 13 has threatened to stop following 25 C.F.R. § 179.101(b)(1). At best, WHL alleges
 14 the CTEC was at one time failing to pay rents, but there is no controversy with
 15 BIA's compliance regarding 25 C.F.R. § 179.101(b)(1). Even assuming WHL's
 16 allegations are true, BIA cannot distribute under Section 179.101(b)(1), or
 17 otherwise, rents that are not paid to it. At bottom, there is no allegation or dispute
 18 that BIA will follow its regulations, including 25 C.F.R. § 179.101(b)(1).
 19

20 **2. WHL's fourth crossclaim for ejectment must be dismissed because**
 21 **federal law applies to trust land.**

22 WHL's fourth claim for ejectment is based on the *faulty* premise that MA-8
 23 is held in fee and subject to Washington State law. ECF No. 228 at ¶ 229 (alleging
 24 supplemental jurisdiction exists over its state law claim for ejectment). The Ninth
 25 Circuit and this Court have held that MA-8 is trust land and subject to federal law.
 26

27 ² The regulation cited is correct since Congress enacted AIPRA on October 27,
 28 2004 and made it effective after Evans passed in 2003. *See* 25 U.S.C. § 2206

1 *See Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1035, 1039 (9th Cir.
 2 2011) (holding federal law applies and ruling MA-8 is in trust); ECF No. 503 at p.
 3 64, 67, 68 (same). “Because Indian land claims are ‘exclusively a matter of federal
 4 law, state property laws are preempted.” ECF 503 at p. 64, 67-68 (citing *Cohen* §
 5 15.08[4] (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S.226, 241
 6 (1985))). Thus, WHL’s state law claims for trespass or ejectment cannot apply to
 7 MA-8 and its claim for ejectment must be dismissed.

8 Furthermore, the doctrine of judicial estoppel, which WHL does not address,
 9 bars WHL’s claims based on the faulty premise that MA-8 is not held in trust.
 10 Prior to the Court’s ruling on the first round of summary judgment motions (ECF
 11 No. 144), WHL argued in *Wapato I*,³ and in other prior litigation that MA-8 was
 12 held in trust. It is only after WHL lost *Wapato I*, and after the first round of
 13 summary judgment motions was decided against Mill Bay, that WHL decided to
 14 change its position. Judicial estoppel should apply.

15 Additionally, the Ninth Circuit and this Court’s prior rulings holding that
 16 MA-8 is in trust and federal law applies to trust land is the law of the case. Thus,
 17 the law of case doctrine further mandates dismissal of WHL’s claim. *United States*
 18 *v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

19 Finally, the federal regulations that must be applied clearly state: a legal
 20 entity that is not an individual Indian⁴ (even including an entity owned by a tribe)
 21
 22
 23

24 ³ 2:08-cv-00177-RHW ECF No. 15 at p. 3, 8 (WHL stating: “In this case, federal
 25 contract law will control the determination of the validity of the exercise of the
 26 option to renew” and “the Federal Government holds [MA-8] in trust”)

27 ⁴ The regulations also required an “Indian landowner” to obtain a lease for
 28 possession of fractionated Indian land. WHL, however, is not a “Indian

1 must have a lease “to *possess* Indian land.” 25 CFR 162.005(a). Since the Master
 2 lease expired *in 2009* as held by the Ninth Circuit in 2011, WHL has no right to
 3 *possession* of MA-8. Thus, WHL cannot maintain, and has not stated, a claim for
 4 ejectment. *See* ECF No. 228, ¶ 282 (not alleging any right to possession).

5 **3. WHL’s fifth crossclaim for overpayment under written leases must,**
 6 **at minimum, be dismissed for failure to state a claim, failure to name**
 7 **the real party in interest, and failure to exhaust tribal remedies.**

8 WHL’s fifth claim for alleged overpayments to the Defendant Allottees
 9 (Lessors) under the Master Lease is a breach of contract claim directed at
 10 Defendant Allottees. ECF No. 228 at p. 30 (seeking a money judgment for the
 11 alleged amounts *due to it “under the terms of the Master Lease”*) (emphasis
 12 added). A breach of contract claim fails because WHL cannot establish a critical
 13 element where it has not alleged any facts showing Defendant Allottees actually
 14 breached the contract terms through their passive receipt of lease payments. *See*
 15 ECF No. 228. Per the terms of the Master Lease, Defendant Allottees were under
 16 no contractual obligation to verify annual payments or to verify the supporting
 17 receipts. *See* ECF 90-2 at p. 5-6. Rather, it was Evans’s obligation to have an
 18 independent Certified Public Accountant to annually audit the lease payments and
 19 provide an accounting with receipts and supporting documents, *id.*, which he failed
 20 to do. *See* ECF No. 73-3 at p. 11. Instead, Evans’s own “bookkeeper” apparently
 21 made mistakes that resulted in the alleged overpayments. WHL cannot now claim
 22 that Defendant Allottees somehow breached a contractual obligation to verify the
 23 accuracy of Evans’s payments and are liable when the lease terms did not impose
 24 such an obligation. Thus, WHL fails to state a claim.
 25

26
 27
 28 landowner,” which is defined as “a tribe or individual Indian who owns an interest
 in Indian land.” 25 CFR § 162.003.

1 Moreover, WHL's claim still fails because it is not asserted by the proper
2 party: the personal representative of Evans's estate. Throughout its response, WHL
3 accuses the BIA of failing its fiduciary duties to Evans and implies that it is the
4 representative of Evans's estate. However, WHL is not Evans's estate, nor is
5 WHL the estate's personal representative—it is a beneficiary of Evans's estate that
6 received an interest in MA-8 in 2005. Derrig Decl. ¶ 2, Ex. A (distributing to WHL
7 “[a] life estate in the decedent's interest in [MA-8]” for the life of the survivor of
8 Evans's great-grandchildren)); *see also e.g.*, ECF No. 90-13 (“A review of William
9 Evans will and the intermittent order by Administrative Law Judge Hammitt,
10 indicate the Bureau of Indian Affairs has never recognized Wapato Heritage LLC
11 as Mr. Evans representative.”). WHL thus is not the real party in interest for any
12 alleged overpayments from 1994 to 2005.

13 WHL attempts to keep a portion of its “overpayment” claim alive by
14 claiming it obtained Evans's interest in MA-8 in 2002 or that WHL is Evans's
15 estate once he passed, and therefore it is the real party in interest for any
16 overpayments between 2002/2003 and 2005. ECF No. 589 at pp. 1, 2, and 15. But
17 WHL did not have any interest in MA-8 until the Federal Probate Order
18 distributing a life-estate in MA-8 to WHL became final in 2006. ECF No. 90-14 at
19 p. 635; Derrig Decl. ¶ 2, Ex. A. WHL is not the real party in interest for any
20 alleged claims of overpayment.

21 Finally, if the overpayment claim was brought by Evans, an Indian allottee,
22 against Defendant Allottees, which include individual Indians and the Tribes, it
23 would have had to have been brought in Tribal court. In civil cases arising between
24 Indians, or against an Indian defendant in an action arising in Indian country, tribal
25 jurisdiction usually will be exclusive. *Fisher v. District Court*, 424 U.S. 382
26 (1976); *Williams v. Lee*, 358 U.S. 217, 223 (1959). Civil jurisdiction over such
27
28

1 activities presumptively lies in the tribal courts unless affirmatively limited by a
2 specific treaty provision or federal statute.

3 Mr. Webb and/or his counsel decided to bring this counterclaim in WHL's
4 name here to avoid Tribal court and *to try to create conflicts in this case*, which has
5 unnecessarily prolonged this litigation. *See* ECF No. 315 at pp. 8-10 (R. Bruce
6 Johnston letter discussing filing crossclaims to create conflicts). WHL did not
7 assert this overpayment claim because of any exception to tribal court exhaustion,
8 nor is one plead in its FAAC.

9 In light of these litigation tactics, WHL's "overpayment" claim should *at the*
10 *very least*⁵ be dismissed for lack of jurisdiction arising from WHL's failure to
11 exhaust tribal remedies (let alone for failure to be the real party in interest). *Magee*
12 *v. Shoshone Paiute Tribes of Duck Valley Reservation*, 460 F. Supp. 3d 1073, 1079
13 (D. Nev. 2020); *See also Acres v. Blue Lake Rancheria*, 692 Fed. Appx. 894 (9th
14 Cir. 2017) ("The district court properly dismissed Plaintiff's action because
15 Plaintiff did not exhaust tribal court remedies and failed to demonstrate that
16 exhaustion was excused."); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513
17 F.3d 943, 948 (9th Cir. 2008) (discussing tribal exhaustion and exceptions when
18 affirming dismissal based on failure to exhaust tribal court remedies).

19
20 **4. WHL's sixth crossclaim for underpayment and failure to collect**
21 **must be dismissed because WHL is not the real-party in interest.**

22 Again, WHL is not the real party in interest to any purported breach of trust
23 claim belonging to Evans's estate for alleged underpayments between 1994 and
24 1998. ECF No. 589 at p. 3 (noting purported underpayments primarily from 1994-
25 1998). This argument has been addressed at length previously at ECF No. 592 at
26 p. 8-11 and without repeating is incorporated here.

27
28

⁵ *See* 28 U.S.C. § 1927; *U.S. v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

1 What has not been discussed previously is WHL's newly raised reliance on
2 statutes and regulations regarding IIM accounts. *See* ECF No. 589 at p. 16. These
3 regulations are irrelevant to WHL's purported "overpayment" claim.

4 WHL's FAAC does not make any allegation that the BIA failed to account
5 for monies in an IIM account. *See* ECF No. 228. Indeed, the WHL's FAAC does
6 not even as much as mention IIM accounts. *Id.* WHL's curious citation to these
7 regulations appears designed for no other reason than to sow confusion.

8 WHL's "overpayment" claim as asserted in the FAAC is a claim for breach
9 of trust against BIA for failing to administer a sublease between Evans and the
10 Tribes, or otherwise ensure that the sublease payment terms were followed. The
11 relevant regulations are those applying to lease administration *in 1994* and this is
12 where, even if the real party in interest had brought the claim, it would crumble.

13 The regulations in effect in 1994-1998 did not require the BIA to monitor,
14 manage, or ensure lease payments were correct. The BIA only had an obligation to
15 act to cancel a lease if breach or violation of its terms was brought to the
16 Secretary's attention. 25 C.F.R. § 162.14 (1982). The obligations BIA had from
17 1994-1998 with respect to 'administering' the sublease was limited to (1) requiring
18 the rent set for a leased property be no less than *fair annual rental*, *see* 25 C.F.R. §
19 162.5 (1982), and (2) make inspections and evaluations of the *equities* to ensure
20 *fair annual rental*, *see* 25 C.F.R. § 162.8 (1982). The regulations that applied did
21 not obligate BIA to ensure were correct payments; that fell to his "bookkeeper."

22 In short, even if this "underpayment" claim was brought by the real party in
23 interest, in the proper court, with the necessary parties, it would fail as a matter of
24 law. ECF No. 592 at pp. 8-10 (discussing additional reasons dismissal is
25 appropriate including failure to join a necessary party, jurisdiction, and that
26 transfer to the Federal Court of Claims is improper).
27
28

5. WHL's seventh crossclaim for partition must be dismissed because MA-8 is trust land and federal regulations control.

WHL, without citation to authority, simply argues that despite MA-8 being in trust, its partition claim is still valid. WHL is in error. State law does not apply here as MA-8 is held in trust for all the beneficiary owners of the land. Moreover, even if state law applied – it does not – a state law claim is wholly devoid of merit because an owner of a life estate cannot partition against the owner of a remainder even when held in fee. *See Easley v. Easley*, 78 Wash. 505 (1914).

Any partition of trust land is governed by federal regulations. *See* 25 C.F.R. § 152.33. Since WHL has not availed itself of the regulatory partitioning process clearly, the court should dismiss the claim.

6. WHL's eight claim for attorney's fees and costs is meritless.

WHL fails to respond at all the Federal Defendants motion to dismiss to its "claim" for attorney's fees and costs, which should be seen as a concession that this "claim" is wholly without merit. *See e.g., Torrent v. Ollivier*, 2016 WL 4596341, at *4 (C.D. Cal. Sept. 2, 2016) (dismissing claim for attorneys' fees with prejudice because there is no independent cause of action for attorneys' fees).

II. CONCLUSION

For the reasons set forth herein, the Federal Defendants respectfully request that all of WHL's remaining claims be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 23rd day of November 2020.

William D. Hyslop
United States Attorney

s/ Joseph P. Derrig
Joseph P. Derrig
Timothy M. Durkin
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, 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:

Franklin L. Smith:	frank@flyonsmith.com
R. Bruce Johnston:	bruce@rbrucejohnston.com
Dana Cleveland:	dana.cleveland@colvilletribes.com
Dale M. Foreman:	dale@daleforeman.com
Sally W. Harmeling:	sallyh@jdsalaw.com
Brian C. Gruber:	bgruber@ziontzchestnut.com
Nathan J. Arnold:	nathan@caoteam.com
Robert R. Siderius:	bobs@sdsalaw.com
Joseph Q. Ridgeway:	josephr@jdsalaw.com
Brian W. Chestnut:	bchestnut@ziontzchestnut.com
Tyler D. Hotchkiss:	tyler@fhbzlaw.com
Manish Borde:	mborde@bordelaw.com
Emanuel Jacobowitz:	manny@CAJlawyers.com
Jacob Knutson:	jacobk@jdsalaw.com
Anna E. Brady:	abrady@ziontzchesnut.com

and hereby certify that due to Covid restrictions I will mail by United States Postal Service the document to the following non-CM/ECF participants:

Catherine Garrison 3434 S 144th St Apt 124 Tukwila, WA 98168-4061	James Abraham 2727 Virginia Avenue Everett, WA 98201	Maureen Marcellay 7910 NE 61st Cir Vancouver, WA 98662
Darlene Hyland 16713 S E Fisher Drive Vancouver, WA 98683	Jeff M Condon PO Box 3561 Omak, WA 98841	Micheal F Marcellay P O Box 594 Brewster, WA 98812-0594
Deborah A Backwell 24375 SE Keegan Rd Eagle Creek, OR 97022	Judy Zunie P O Box 3341 Omak, WA 98841	Mike Marcellay P O Box 594 Brewster, WA 98812
Enid T Wippel P O Box 101 Nespelem, WA 99155	Linda Saint P O Box 3614 Omak, WA 98841-3614	Mike Palmer P O Box 466 Nespelem, WA 99155

Francis Abraham 11103 E Empire Avenue Spokane Valley, WA 99206	Lynn Benson P O Box 746 Omak, WA 98841	Paul Wapato, Jr 2312 Forest Estates Drive Spokane, WA 99223
Francis Reyes P O Box 215 Elmer City, WA 99124	Marlene Marcellay 1300 S E 116th Court Vancouver, WA 98683	Randy Marcellay P O Box 3287 Omak, WA 98841
Gabriel Marcellay P O Box 76 Wellpinit, WA 99040	Mary Jo Garrison P O Box 1922 Seattle, WA 98111	Sandra Covington P O Box 1152 Omak, WA 98841
	Sonia Vanwoerkon 810 19th Street Lewiston, ID 83501	Timothy Ward Woolsey Colville Tribes Office of Reservation Attorney PO Box 150 Nespelem, WA 99155

s/ Joseph P. Derrig

Joseph P. Derrig

Assistant United States Attorney