THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY M. CARNEY,

Plaintiff,

v.

STATE OF WASHINGTON, WASHINGTON STATE PARKS AND RECREATION COMMISSION, and SWINOMISH INDIAN TRIBAL COMMUNITY, a federally recognized Indian tribe,

Defendants.

No. 2:21-cv-00415 MJP

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO REMAND TO STATE COURT

NOTE ON MOTION CALENDAR: May 28, 2021

INTRODUCTION

Mary Carney's complaint anticipated that the Swinomish Indian Tribal Community (the "Tribe") would assert, in defense of its trespass on her property, that some portion of Mary's property is federal tidal lands. The Tribe's contention in this regard is wrong; the Tribe's "tidelands" assertion is without merit, both because it is contrary to the United States' surveys and otherwise based on speculative conclusions of its expert witness. But that is not the question the Court must address in resolving the motion to remand.

The question is whether the Court has jurisdiction to resolve this dispute. It does not. The Tribe's primary argument is that removal was proper because Mary's claims require the

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resolution of a substantial question of federal law. But *Mary's* claims do not present federal law questions—only the Tribe's meritless defenses do. Removal under 28 U.S.C. § 1441(a) therefore was not proper. The Tribe's secondary argument, based on 28 U.S.C. § 1442(a)(2), is also without any merit. Mary's claims do not "affect[] the validity of any law of the United States." If anything, Mary's claims are supported by federal law, rather than calling into question the validity of any federal law. Mary's motion to remand should be granted.

ARGUMENT

A. Mary's claim regarding the Preserve's interference with the easement arises under state, not federal law.

The Tribe contends that, by asserting an interest in the recorded easement burdening Preserve property, Mary has necessarily raised a claim that arises under federal law. Swinomish Indian Tribal Cmtys. Resp. to Pl.'s Mot. to Remand 2, ECF No. 33 (hereinafter "SITC Resp."). According to the Tribe, under *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987), Mary's claim arises under and is completely preempted by federal law. SITC Resp. 2-3. The Tribe is incorrect.

Mary is not asserting a right in trust lands; she is asserting a right in the easement, which is plainly *not* in trust. When the United States took title to the Kukutali Preserve Property ("Preserve"), it took title *subject to* the recorded easement that benefits Mary's Property. MacLean Decl. In Supp. of Pl.'s Opp. to Mot. to Dismiss, Ex. O, ECF No. 25-15 ("Title to the land herein described shall be subject to any … rights of way of record"). As the Interior Board of Indian Appeals ("IBIA") has explained, because a "trust acquisition can only be an acquisition by the United States of a *tribe's* ownership interests," it cannot prevent others "from using or alienating any ownership interests they may hold in the easements." *Waldon G. Riggs, et al. v. Acting Pac. Reg'l Dir., BIA,* 65 IBIA 192, 202 (2021). The only interests the United States holds in trust are the interests *the Tribe* owned when the transfer occurred. While the enforceability of an easement can be tricky due to tribal sovereign immunity—an issue that is not a problem here due to the State's co-ownership of the Preserve—the trust acquisition of land burdened by a pre-

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existing easement does not "completely preempt" pre-existing ownership rights or convert them into federal claims.

The Tribe speculates that Mary amended her complaint to eliminate her claim to quiet title to an easement by prescription against the Preserve Property. SITC Resp. 4. Of course, it makes no difference *why* Mary amended her complaint; only the amended complaint is operative. *Lacey v. Maricopa County*, 693 F.3d 896, 925 (9th Cir. 2012). But in any case, the Tribe is wrong. Once Mary identified that the Tribe's interest in the Preserve Property had been transferred to the United States and that the United States accepted title *subject to the recorded easement*, it was apparent that it was unnecessary for Mary to quiet title to the easement.

Mary's claim that Defendants should be prevented from interfering with her easement rights, therefore, does not require her to establish the enforceability or validity of the easement vis-à-vis the United States. It merely requires her to establish her interest in a duly recorded easement, which is a straightforward question of state law.

B. Mary is not seeking to quiet title against any property owned by the United States.

The Tribe next claims that Mary's quiet title action is necessarily federal because it involves the extent of federal "tidelands." SITC Resp. 5. That is also incorrect. Mary is seeking to quiet title to her own patented property only, as confirmed by federal survey. Mary's property includes the strip of land that the Tribe argues that it has obtained by adverse possession—this claim that arises under and relies entirely on state law. The Tribe tries to obfuscate this issue through its reference to the tidelands issue, but that is completely separate from whether state law supports the Tribe's claim that it has adversely possessed a portion of Mary's property. Likewise, Mary points out that the Tribe has *claimed* her land contains filled tidelands, and that she disputes that claim. Am. Compl. ¶ 23. But that observation does not turn her state law claim for trespass into a federal law claim. The tidelands issue, therefore, only is raised by the Tribe's defense that it owns the property that it damaged by its trespass.

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The cases the Tribe cites do not support that Mary's trespass claim is magically transformed into a federal question because her pleading anticipated the Tribe's defense. SITC Resp. 8-11. Each of those cases involved the plaintiff specifically seeking to quiet title to land claimed to be federal and/or the complaint itself asserted a federal law claim. In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 656 (1979), the tribe that initiated the action sought a ruling that certain property to be part of reservation lands created under an 1854 treaty; in *Hughes v. Washington*, 389 U.S. 290, 291 (1967), the petitioner brought suit against Washington, tidelands owner, to "determine whether the right to future accretions" remained subject to federal law; in *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 12-13 (1935), the city brought suit to quiet title to land owned by Borax Consolidated and the complaint alleged a federal claim; and in *United States v. Milner*, 583 F.3d 1174, 1181 (9th Cir. 2009), the United States, with Lummi Nation as intervenors, brought suit against waterfront homeowners alleging trespass and federal law violations stemming from ambulatory tideland property. Those cases do not support the Tribe's contention that *any* dispute involving lands that *the defendant* contends are federal is governed by federal law.

The Tribe argues that *Borax* stands for the general proposition that Mary's quiet title action arises under federal law because "property disputes between upland and tideland owners arise under and are governed by federal law." SITC Resp. 5. *Borax* neither says this, nor stands for such a broad proposition. Rather, the *Borax* Court stated something more specific (which the Tribe partially quotes in its Response):

> The question as to *the extent of this federal grant*, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.

296 U.S. at 22; *see* SITC Resp. 7. *Borax* does not support the assertion that any property dispute where the land at issue is bordered by trust land raises a federal question.

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Although it goes to the merits of the Tribe's defense to Mary's trespass claim, and thus is irrelevant to the removal jurisdiction issue, it is also worth noting that the Tribe's reliance on *Borax* is wrong in another respect. Contrary to the Tribe's argument, *Borax* does not broadly undermine the United States' ability to determine the physical extent of tidelands. SITC Resp. 6-7. *Borax* involved, and is limited to, a party that was seeking to challenge the United States from definitively setting the tidal line against that party. That adverse party here would be Mary; not the Tribe. In other words, *Borax* might allow Mary to challenge the United States' survey as incompetent, but the Tribe may not. Of course, Mary is not challenging the survey; she in fact is relying on it.

C. The Court Should Decline the Tribe's Invitation to Consider the Record from the Pending Motion to Dismiss.

In a lengthy footnote, the Tribe contends that Mary set forth an incomplete statement of the Tribe's defense that there are tidelands on her property, and the Tribe urges the Court to consider the record from the pending motion to dismiss. SITC Resp. 12 n.11. Mary did not attempt to set forth a complete statement of the Tribe's defense, because it is not relevant to the motion to remand. For this same reason, the Court should decline the Tribe's invitation to consider the entire motion to dismiss record.

The Court can consider material submitted after the filing of the notice of removal as amending the notice of removal. *Cohn v. Petsmart, Inc*., 281 F.3d 837, 840 n.1 (9th Cir. 2002); *see also Willingham v. Morgan*, 395 U.S. 402, 405 n.3(1969) ("[I]t is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits"). But the declarations to which the Tribe directs the Court are not material to whether there is federal court jurisdiction. Through its surveys, the United States has set forth its position as to the boundaries of Mary's property. The Tribe has offered evidence that it contends establishes that there may be tidelands within the boundaries of Mary's property. Even if that evidence is considered reliable and can overcome the survey, all it does is establish a possible

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defense to the trespass that the Tribe hopes to develop through further investigation. And, this Court would not even be the proper forum to address this issue, assuming that the Tribe could establish such a defense: The Tribe did not protest the 2011 Survey and cannot now collaterally attack the survey in this action. *Cragin v. Powell*, 128 U.S. 691, 698–99 (1888). This is too thin a reed to permit removal jurisdiction.

D. Removal Is Not Proper Under 28 U.S.C. § 1442(a)(2).

The Tribe's argument based on 28 U.S.C. § 1442(a)(2) is misplaced. Simply put, Mary's claims do not "affect[] the validity" of any federal law. In order to affect the validity of a federal law, the claim must do more than merely raise the "possibility that a party will argue for a position inconsistent with federal law—it requires a claim that a federal law is *invalid*." *Veneruso v. Mt. Vernon Neighborhood Health Ctr.*, 933 F. Supp. 2d 613, 632 (S.D.N.Y. 2013). Mary does not assert that any federal law is invalid.

The Tribe argues that because Mary's claims may require evaluation of the breadth of tribal sovereign immunity, her claims affect the validity of federal law. SITC Resp. 13. The Tribe provides no support for this argument because there does not appear to be any case that suggests that a question about the breadth of tribal sovereign immunity "affects the validity" of federal law sufficient to sustain federal question jurisdiction. State courts regularly address the scope and application of tribal sovereign immunity. *See, e.g.*, *Upper Skagit v. Lundgren*, 138 S. Ct. 1649 (2018) (addressing whether tribal sovereign immunity bars actions *in rem* on petition from *the Washington Supreme Court*) ; *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (evaluating the scope of tribal sovereign immunity in an ordinary negligence action brought against a tribal employee under state law on petition from the *Connecticut Supreme Court*).

The Tenth Circuit's decision in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Ute Dist. Corp.* may be closest to the present case, and it rejected removal jurisdiction under 28 U.S.C. § 1442(a)(2). 455 F. App'x 856, 857 (10th Cir. 2012). In that case, the Ute Indian Tribe challenged certain amendments to the articles of incorporation of the Ute Distribution Company

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("UDC"). When the UDC shareholders adopted the amendments, the Tribe sued the UDC in state court. *Id.* at 858. The UDC removed the action to federal court on three grounds: (1) the complaint had alleged a violation of the Partition Act; (2) the Tribe alleged a Civil Rights Act violation (although this claim was subsequently withdrawn); and (3) "Congress had appointed the UDC as a representative of the mixed-bloods [the Tribe]," and therefore the case could be removed under 28 U.S.C. § 1442. Assessing UDC's argument under § 1442(a)(2), the court held that while the "UDC jointly holds assets with the Tribe, and that title is derived from a federal officer, the Secretary of the Interior[,] . . . the Tribe's state law claims do not affect the validity of any law of the United States." *Id.* (quoting 28 U.S.C. § 1442(a)(2)). To support this conclusion, the court explained that "one of the UDC's defenses might at most implicate the interpretation of a federal statute, not its validity." *Id.* The same is true here. Mary's state law trespass and quiet title claims do not affect the validity of any federal law.

The cases the Tribe cites [at 14-15] relate to federal law protection of federal officials and are therefore inapposite. *See Jefferson County v. Acker,* 527 U.S. 423, 427 (1999) (regarding an action stemming from "proceedings the county commenced to collect [a] tax from two federal judges"); *Mesa v. California*, 489 U.S. 121 (1989) (regarding a suit stemming from the actions of several United States Postal Service employees); *Town of Davis v. W. Va. Power & Transmission Co.*, 647 F. Supp. 2d 622, 624 (N.D. W.Va. 2007) (condemnation action brought by Town of Davis, a public municipal corporation, regarding tracts of land owned by respondents). A lawsuit that implicates whether a federal official has immunity is nothing like a lawsuit that implicates whether a tribe has sovereign immunity.

CONCLUSION

Mary Carney respectfully submits that this Court lacks jurisdiction and this matter should be remanded to the Washington Superior Court for Skagit County.

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