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THE HONORABLE JUSTIN L. QUACKENBUSH

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 PAUL GRONDAL, a Washington) NO. 09-CV-00018-JLQ
9 resident; and THE MILL BAY)
10 MEMBERS ASSOCIATION, INC., a) PLAINTIFFS' RESPONSE TO
11 Washington Non-Profit Corporation,) DEFENDANT COLVILLE TRIBES'
12) MOTION TO DISMISS
13 Plaintiffs,)
14 vs.)
15 UNITED STATES OF AMERICA;)
16 UNITED STATES DEPARTMENT OF)
17 THE INTERIOR; THE BUREAU OF)
18 INDIAN AFFAIRS, and FRANCIS)
19 ABRAHAM, CATHERINE GARRISON,)
20 MAUREEN MARCELLAY, MIKE)
21 PALMER, JAMES ABRAHAM, NAOMI)
22 DICK, ANNIE WAPATO, ENID)
23 MARCHAND, GARY REYES, PAUL)
24 WAPATO, JR., LYNN BENSON,)
25 DARLENE HYLAND, RANDY)
MARCELLAY, FRANCIS REYES,)
LYDIA W. ARMEECHER, MARY JO)
GARRISON, MARLENE MARCELLAY,)
LUCINDA O'DELL, MOSE SAM,)

26 PLAINTIFFS' RESPONSE TO DEFENDANT COLVILLE
TRIBES' MOTION TO DISMISS

1 SHERMAN T. WAPATO, SANDRA)
 2 COVINGTON, GABRIEL)
 3 MARCELLAY, LINDA MILLS, LINDA)
 4 SAINT, JEFF M. CONDON, DENA)
 5 JACKSON, MIKE MARCELLAY,)
 6 VIVIAN PIERRE, SONIA)
 7 VANWOERKOM, WAPATO)
 8 HERITAGE, LLC, LEONARD)
 9 WAPATO, JR, DERRICK D. ZUNIE, II,)
 10 DEBORAH L. BACKWELL, JUDY)
 11 ZUNIE, JACQUELINE WHITE PLUME,)
 12 DENISE N. ZUNIE and)
 13 CONFEDERATED TRIBES OF THE)
 COLVILLE RESERVATION, Allottees of)
 MA-8 (known as Moses Allotment 8),)
 Defendants.)

I. INTRODUCTION

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 16 Plaintiffs seek an adjudication of their rights to the possession and use of a
 17 portion of Moses Agreement Allotment No. 8 (“MA-8”) known as the Mill Bay RV
 18 Resort (“Resort”). This Court has broad equitable powers to determine the rights of
 19 parties to use and possession of land within its jurisdiction. Plaintiffs ask this Court to
 20 exercise *in rem* jurisdiction over these proceedings and deny Defendant Confederated
 21 Tribes of the Colville Reservation’s (“Colville Tribes”) Motion to Dismiss.
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II. FACTS

The facts pertaining to this case can be found in ECF No. 88. Other facts pertinent to this response are set forth in the corresponding sections below.

III. LAW AND ARGUMENT

A. This motion is not ripe for determination.

1. Further discovery is necessary to determine this issue.

Unlike other beneficial landowners of MA-8, the Colville Tribes purchased most of its interest in MA-8 and did not begin acquiring interest in MA-8 until after Plaintiffs' members purchased their memberships to the Mill Bay Resort ("Resort"). Because the parties in this case have not yet conducted discovery, Plaintiffs are unable to determine exactly when and how the Colville Tribes began purchasing interests in MA-8. Documents provided pursuant to Defendant Wapato Heritage, LLC's Freedom of Information Act request demonstrate that, as of August 14, 1991, the Colville Tribes was not a beneficial landowner of MA-8. (Kristin Ferrera Decl. Ex. A.) Because Plaintiffs' members purchased their membership interests in the Resort from 1984 to 1994 (ECF No. 88 at 26, ¶ 111), it is likely that further discovery will demonstrate that the Colville Tribes purchased its interests in MA-8 subject to Plaintiffs' rights to

1 occupy and use the Resort until 2034. Plaintiffs have had no opportunity to conduct
2 discovery to determine the terms and conditions the Colville Tribes purchased its
3 interest in MA-8 or whether any such purchase contained a waiver of sovereign
4 immunity that would be applicable to Plaintiffs' claims here. Plaintiffs must have an
5 opportunity to conduct discovery before the Court determines whether Colville Tribes
6 has waived sovereign immunity. Additionally, as stated below, the trust status of MA-
7 8 may significantly impact issues of jurisdiction in this case. The Colville Tribes'
8 Motion to Dismiss, therefore, is not ripe for review at this time.

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13 2. The Court must determine whether the MA-8 landowners own MA-8 in
14 trust or fee simple before dismissing the Colville Tribes from this case.

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16 As the Court has previously noted, MA-8 may have been improperly
17 characterized as restricted property held in trust by the United States. This issue
18 directly impacts whether sovereign immunity protects the Colville Tribes from suit.

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20 The history of MA-8 and the other Moses Agreement allotments is discussed in
21 detail in *United States v. La Chappelle*, 81 F. 152, 153 (C.C.D. Wash. 1897), *United*
22 *States v. Moore*, 161 F. 513 (9th Cir. 1908), and *Starr v. Long Jim*, 227 U.S. 613
23 (1913). Prior to 1884, a large Indian reservation called the Columbia Reservation
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1 existed on the shores of Lake Chelan. In 1884, the officers of the Indian Department
2 (now the Bureau of Indian Affairs, hereinafter the "BIA") reached an agreement with
3 Chief Moses. Under the agreement, the United States would provide the Columbia
4 Indians a large sum of money if they removed to the Colville Reservation and
5 relinquished their rights to the Columbia Reservation. The agreement allowed
6 Columbia Indians who chose to remain on the lands within the Columbia Reservation
7 and not remove to the Colville Reservation to select 640 acres for each head of the
8 family as an allotment. An act of Congress ratified and approved that agreement on
9 July 4, 1884 (23 stat. 79, 80).

14 In *Starr v. Long Jim*, 227 U.S. 613 (1913), the Supreme Court of the United
15 States accurately summarized the various statutes and agreements surrounding
16 ownership and patents of the Moses Agreement allotments:
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18 By the act of March 8, 1906, chap. 629, 34 Stat. at L. 55, a
19 general provision was made for the issuance of patents for
20 the lands allotted to Indians under the Moses agreement and
21 the act ratifying it, the patents to 'be of legal effect and
22 declare that the United States does and will hold the lands
23 thus allotted for the period of ten years from the date of the
24 approval of this act, in trust for the sole use and benefit of the
25 Indian to whom such allotment was made, or, in case of his
26 decease either prior or subsequent to the issuance of such

1 patent, of his heirs, according to the laws of the state of
2 Washington, **and that at the expiration of said period the**
3 **United States will convey the same by patent to the said**
4 **Indian, or his heirs, as aforesaid, in fee, discharged of**
5 **said trust, and free of all charge or encumbrance**
6 **whatsoever.'** The same act provided that an allottee holding
7 such a trust patent might sell the lands covered thereby,
8 except 80 acres, under rules and regulations prescribed by the
9 Secretary of the Interior; and provided that any conveyance
10 or contract of sale made within the trust period, except as
11 provided by the act, should be absolutely null and void.

12 *Starr*, 227 U.S. at 621-624 (emphasis added).

13 Under the statute of 1906, the United States was to issue trust patents to the
14 Moses Agreement allottees, including Wapato John, and issue fee patents for those
15 allotments ten years from the date that the United States issued a trust patent to the
16 allottee for that same land.

17 The General Allotment Act (*Statutes at Large* XXIV, 388-391) Section 5
18 provided that allotments were to be entered to individual Indians under that act for a
19 period of 25 years in trust at which time the United States would convey the land
20 allotted in fee simple “provided, that the President of the United States may in any case
21 in his discretion extend the period.” Because of this provision, the President and
22 Congress continued to extend the trust periods of certain allotments and by 1934
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1 passed the Burke Act which extended the trust period of allotments indefinitely. The
2 validity of this extension has been upheld in higher courts because Congress expressly
3 reserved the right to extend the trust period.
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6 MA-8 was to pass in fee simple absolute to the heirs of Wapato John no later
7 than 1924. (ECF No. 175-1 at 32.) Contrary to the parties' belief when filing this
8 lawsuit, the Moses Agreement allotments were not conveyed under the General
9 Allotment Act and therefore this act does not apply to MA-8. Furthermore, nothing in
10 the Moses Agreement, the subsequent acts of Congress, or the trust patents issued to
11 the Moses Agreement allottees provided the President or Congress with authority to
12 extend the trust period for these allotments. On May 20, 1924, in 43 Stat., 133,
13 Congress released the restrictions on alienation for the lands covered by the Moses
14 Agreement stating, "That any allottee to whom a trust patent has heretofore been or
15 shall hereafter be issued by virtue of the agreement concluded on July 7, 1883 with
16 Chief Moses and other Indians of the Columbia and Colville Reservations . . . may sell
17 and convey any or all the land covered by such patents . . ." Despite this act and the
18 MA-8 trust patent language promising that the United States would issue Wapato John
19 or his heirs a fee patent in 1917, the United States did not provide these patents to the
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1 majority of the heirs. Inexplicably, the United States did issue certain MA-8 heirs a
2 fee interest in the land (K. Ferrera Decl. Ex. B) and other Moses Agreement allottees
3 also received a stamp on their trust patent evidencing the patent's transition into a fee
4 patent (K. Ferrera Decl. Ex. C.)
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7 The above history raises a serious question as to the nature of the property and
8 its qualification as trust land. This issue directly implicates the application of the
9 Colville Tribes' sovereign immunity in this action and other jurisdictional issues and,
10 therefore, the Colville Tribes' Motion to Dismiss is not ripe for review until the Court
11 determines MA-8's status as trust or fee land.
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14 **B. Sovereign immunity does not preclude adjudication of Plaintiffs' claims.**

15 1. This Court has *in rem* jurisdiction over this action.
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17 Plaintiffs have filed this declaratory judgment action to determine their rights to
18 use and possess a portion of MA-8. Plaintiffs do not seek money damages or any other
19 personal judgment against the MA-8 landowners and, therefore, this action is an *in rem*
20 proceeding.
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23 Washington State maintains civil jurisdiction over Indian allotments outside an
24 established Indian reservation. RCW 37.12.010. MA-8 is outside of the boundaries of
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1 the Colville reservation. RCW 37.12.010 thereby requires application of Washington
2 State law in determining the Plaintiffs' rights to use and occupy the Resort.
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4 In Washington, *in rem* proceedings do not implicate the doctrine of sovereign
5 immunity. Therefore, if a court has *in rem* jurisdiction over the property, then the
6 tribe's sovereign immunity is not an obstacle to judgment. *Smale v. Noretap*, 150
7 Wash.App. 476 (2009). *See also Anderson & Middleton Lumber Co. v. Quinault*
8 *Indian Nation*, 130 Wash.2d 862 (1996).
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11 Plaintiffs seek to determine their rights to possession and use of the Resort until
12 2034. Plaintiffs have a property interest in their rights to use and possession of the
13 Resort. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002). The
14 United States, as the original owner and trustee of the land, bound the beneficial
15 landowners to the Plaintiffs' tenancies. Additionally, William Evans, Jr., as a tenant-
16 in-common, bound his co-owners to the terms of Plaintiffs' membership agreements.
17 *McGill v. Shugarts*, 58 Wash.2d 203, 204 (1961). Because the Court's determination
18 in this action will affect all owners of MA-8, including future owners, this proceeding
19 is *in rem*. *See Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76, 55 N.E.
20 812, 814 (1900)("If...the object is to bar indifferently all who might be minded to
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1 make an objection of any sort against the right sought to be established...the
2 proceeding is *in rem*."); *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982) (*citing Tyler*
3 *v. Judges of the Court of Registration* and holding that continued residence of a
4 leasehold property is a valid property interest).
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7 In Washington, tribal sovereign immunity is not a basis for dismissing a tribe
8 from an *in rem* proceeding:
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10 It is not disputed that the trial court had proper jurisdiction
11 over this action when it was filed. The subsequent sale of an
12 interest in the property to an entity enjoying sovereign
13 immunity (Quinault Nation) is of no consequence in this case
14 because the trial court's assertion of jurisdiction is not over
15 the entity *in personam*, but over the property or the "res" *in*
rem...

16 *Anderson*, 130 Wash. 2d at 873-74.
17

18 Plaintiffs request the Court to determine the parties' respective rights to use and
19 possession of MA-8. The Colville Tribes purchased its interest in MA-8 after
20 Plaintiffs purchased their memberships agreements. This action does not seek to
21 deprive the Colville Tribes of a property interest it rightfully owns, but seeks to
22 determine what rights in the land the owners acquired. Tribal sovereign immunity
23 does not prevent Plaintiffs' action against the Colville Tribes here:
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1 But unlike the foreclosure action in *Oneida*, a successful
2 adverse possession action here would not deprive the Tribe
3 of its land. If the Smales adversely possessed the portion of
4 the disputed property that originally fell within their fence
5 line, their possession ripened into original title after 10 years
6 of possession. And if the Smales acquired title before the suit
7 was filed and Norettep attempted to convey the land, Norettep
8 had no title to convey. Thus, the Tribe never had any
9 property to lose.

10 *Smale*, 150 Wash. App. at 480-81 (footnotes omitted).

11 Plaintiffs seek the same remedy as the Plaintiffs in *Anderson*:

12 ...A & M's action in this case involves no taking of property.
13 It merely seeks a judicial determination of the cotenants'
14 relative interests in real property and a division of that
15 property according to those interests. The Quinault Nation
16 would lose no property or interest for which it holds legal
17 title.

18 *Anderson*, 130 Wash. 2d at 872-73 (footnotes omitted).

19 Because this action is an *in rem* proceeding, Plaintiffs are not asserting claims against
20 the Colville Tribes' sovereignty and, therefore, the Colville Tribes' Motion to Dismiss
21 should be denied:

22 Instead, *Anderson* holds that the *in rem* nature of partition
23 meant that Anderson & Middleton Lumber was not asserting
24 claims against the Quinault Nation's sovereignty. The quiet
25 title action in *Anderson* is similar to the quiet title action here

1 in two crucial ways: both are proceedings in rem to
2 determine rights in the property at issue and neither has the
3 potential to deprive any party of land they rightfully own.

4 *Smale*, 150 Wash. App. at 483 (footnotes omitted).

5 This is the second lawsuit that Plaintiffs have been forced to bring to assert their
6 rights to the Resort. In 2004, Plaintiffs rightfully believed these issues had been
7 resolved. Now, again, Plaintiffs face ejection by the BIA, despite the BIA's
8 involvement in the settlement discussions in 2004. In order to prevent further
9 litigation on this issue, Plaintiffs request this Court exercise its equitable powers and
10 bind all MA-8 landowners to its decision here. A declaratory judgment is necessary to
11 eliminate the possibility of future lawsuits and the expenses Plaintiffs will incur in
12 defending their rights to the Resort.
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17 Because Plaintiffs seek a determination regarding all parties' respective rights to
18 the possession and use of MA-8, the Colville Tribes' sovereign immunity does not
19 deprive this Court of jurisdiction over the Colville Tribes in this case. In the interests
20 of judicial economy, the Court should exercise its *in rem* jurisdiction over these
21 proceedings and deny the Colville Tribes' Motion to Dismiss.
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1 2. Sovereign Immunity does not preclude the Court from determining
2 claims for prospective equitable relief against the Tribe.
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4 The United States Supreme Court has indicated that sovereign immunity will not
5 protect a tribe from a plaintiff's claims similar to those of Plaintiffs in this case:
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7 Nevertheless, I am not sure that the rule of tribal sovereign
8 immunity extends to cases arising from a tribe's conduct of
9 commercial activity outside its own territory, cf. 28 U.S.C. §
10 1605(a) ("A foreign state shall not be immune from the
11 jurisdiction of courts of the United States or of the States in
12 any case ... (2) in which the action is based upon a
13 commercial activity carried on in the United States by a
14 foreign state ..."), or that it applies to claims for prospective
15 equitable relief against a tribe, cf. *Edelman v. Jordan*, 415
16 U.S. 651, 664-665, 94 S.Ct. 1347, 1356-1357, 39 L.Ed.2d
662 (1974) (Eleventh Amendment bars suits against States
for retroactive monetary relief, but not for prospective
injunctive relief).

17 *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498
18 U.S. 505, 515 (1991).
19

20 Plaintiffs seek a declaratory judgment that all defendants are estopped from
21 ejecting them from the Resort prior to 2034. These circumstances are precisely those
22 which the Supreme Court has indicated would preclude a tribe's dismissal from suit
23 based upon sovereign immunity.
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1 **C. Even if the Court dismisses the Colville Tribes from this case, the Tribes’**
2 **rights can be represented by the United States.**
3

4 Although Plaintiffs assert that this action does not implicate the Colville Tribes’
5 sovereign immunity, Plaintiffs request this Court hold that any determination in this
6 action will bind the Colville Tribes due to the United States’ involvement in this case.
7 The United States may bring and defend claims on behalf of individual Indians and
8 Indian tribes, binding tribes and individuals to the results of that litigation:
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11 As a fiduciary, the United States had full authority to bring
12 the *Winters* rights claims for the Indians and bind them in the
13 litigation. *Heckman v. United States*, 224 U.S. 413, 32 S.Ct.
14 424, 56 L.Ed. 820 (1912).

15 *Arizona v. California*, 460 U.S. 605, 626-27 (1983) *decision supplemented*, 466 U.S.
16 144 (1984).

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18 The United States, as trustee of MA-8 and a fiduciary of the MA-8 landowners,
19 has authority to bind the landowners to the Court’s rulings in this case. *Heckman v.*
20 *U.S.*, 224 U.S. 413, 444-445 (1912). If the Court grants the Colville Tribes’ Motion to
21 Dismiss, this case may move forward and the Court may bind the Colville Tribes to its
22 orders.
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1 **D. Plaintiffs properly pled the bases for this Court's jurisdiction over these**
2 **proceedings.**
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4 The Colville Tribes claims that Plaintiffs have not provided the required FRCP
5 8(a)(1) jurisdictional statement. Plaintiffs' jurisdictional statement can be found in
6 paragraphs 16 through 24 of their Complaint. (ECF No. 1 at 8-9.) Furthermore, this
7 Court has already determined that it has jurisdiction over Defendant United States'
8 claims for trespass and ejection and Plaintiffs' defenses against those claims.
9 Additionally, as stated above, this Court has *in rem* jurisdiction over these proceedings
10 and Plaintiffs have requested declaratory judgment to determine the parties' rights to
11 MA-8 pursuant to 28 U.S.C. § 2201.
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15 **IV. CONCLUSION**
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17 This case is as unique as the land in dispute. Although sovereign immunity is
18 generally the rule, not the exception, that protects tribes from suit, sovereign immunity
19 does not apply here. Furthermore, the Colville Tribes' Motion is premature and not
20 ripe for review. For these reasons and the reasons stated above, Plaintiffs respectfully
21 request this Court deny the Colville Tribes' Motion to Dismiss.
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1 DATED this 7th day of October, 2011.

2
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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Notice of this filing is being sent this date via United States Postal Service First Class

1 Mail to the parties below at the addresses indicated below.
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16 DATED at Wenatchee, Washington this 7th day of October, 2011.

17
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