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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and the MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, et al.,

Defendants.

Case No. CV-09-0018-JLQ

UNITED STATES' SUPPLEMENTAL BRIEFING RE TRUST STATUS

From the time the trust patents were issued to Wapato John until today, the efforts of the executive and legislative branches of the Federal Government have consistently been directed to keeping the Moses allotments in trust status. MA-8 remains trust land.

Allotments were created from one of two different classifications of land. The most common was from a reservation where the land had previously been set aside for the communal benefit of all the Indians residing on the reservation. These reservations could have been established by treaty, by agreement in the post-treaty era, and by executive action. Indian allotments were also created from the public domain, pursuant to either the Act of July 4, 1884, 23 Stat. 76 (Indian Homestead

Act), or Section 4 of the General Allotment Act, 25 U.S.C. § 334. The public domain refers to land owned by the Federal Government that has not yet been set aside or reserved for specific purposes.

The Moses allotments were created out of the Moses or Columbia Reservation. The Reservation was initially established by executive order in1879 and added to in 1880. I Charles J. Kappler, Indian Affairs Laws and Treaties, 904 (1904). In furtherance of an 1883 agreement, Congress provided for allotments on the Reservation to Indians in the Act of July 4, 1884, 23 Stat. 79. The Act also provided that thereafter "the remainder of said reservation" shall be restored to the public domain, *id.*, and in 1886 the President issued such an order. Kappler at 905-915. Formal trust patents were issued to Wapato John and others beginning in 1906, and the trust period for the Moses allotments specifically was extended in two executive orders to March 1936.[1]

By the 1930's federal policy had shifted entirely to embrace the continuance of the trust periods on all Indian land to prevent the trust status from expiring by operation of law. Cohen's Handbook of Federal Indian Law (2005 ed.) § 16.03[2][c] at 1042-1043. Federal policy was expressed in three ways. First, for those allotments on the public domain, Executive Order 3365 in 1920 extended the trust period for an additional 25 years. Second, Congress enacted the Indian Reorganization Act (IRA) and provided in section 2 of the IRA that the trust period

[1] The President's authority to issue these and other subsequent orders extending the trust periods is clear. ECF No. 306 at 4.

for all allotments on a reservation subject to the IRA was extended indefinitely. 25 U.S.C. § 462. Third, for those reservations that opted out of the IRA, 25 U.S.C. § 478, Congress quickly amended the IRA to extend trust periods on such land for an additional 18 months. Act of June 15, 1935, 49 Stat. 378. Thereafter, through various executive orders the trust period on all Indian lands was extended until Congress acted in 1990 to comprehensively and indefinitely extend the trust period for all Indian lands. *See* 25 C.F.R. Appendix to Chapter I; 25 U.S.C. § 478-1.

The first question is whether the Moses allotments fall within the purview of a reservation for purposes of the IRA and the 1935 Act. Wapato Heritage LLC and Plaintiffs assert without authority that the 1884 Act and the subsequent executive order terminated the Moses Reservation. If that is the case, as of 1886 the Moses allotments were located on the public domain and the President's 1920 Executive Order 3365--that extended the trust period for 25 years—applied to the Moses allotments.

Alternatively, and consistent with Supreme Court precedent, the Moses allotments remained a part of a reservation. Only Congress can diminish a reservation. *United States v. Celestine*, 215 U.S. 278 (1909). "Congress's intent to terminate must be clearly expressed and there is a presumption in favor of the continued existence of a reservation." *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010), *cert. denied, Nation v. Irby*, 2011 U.S. LEXIS 4986 (2011), *citing South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) and *Solem v. Bartlett*, 465 U.S. 463, 472 (1984). The language in the 1884 Act—directing the

restoration of the "remainder" of the reservation to the public domain—is not a clear expression of Congress's intent to terminate the reservation with respect to all lands located within it. Thus, even if the unalloted lands were severed from the reservation, the allotted trust lands remained reservation land. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 358.

In addition to this lack of clear Congressional intent, contemporary historical context and subsequent congressional and administrative references support a conclusion that the Moses allotments continued to be reservation land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 351; *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (repeated recognition of reservation status by Department of the Interior and Congress further supports conclusion). Moreover, the allotments were administered as reservation land and as a part of the Colville Reservation. For example, in a matter relating to a grant of a right of way over three of the Moses allotments in 1938, Interior's Assistant to the Commissioner of Indian Affairs described the land as "three restricted Indian allotments on the Colville Reservation." The attached right of way grant also describes the three allotments as being "allotted Indian land, Colville Indian Reservation, Washington" Exhibit A attached.[2] Also, when the

[2] As noted by Plaintiffs, ECF No. 312 at 2-3, the Ninth Circuit has held that the Colville Tribes cannot assert treaty rights under the 1855 Treaty with the Yakamas on behalf of its constituent bands. However, inherent in that decision was a finding that such bands, including the Columbia, were subsumed within the Confederated

Department of the Interior published the chart addressing the very issue before the court—extension of trust status—the Moses allotments were identified as reservation allotments not subject to the IRA but subject to the extension granted by the 1935 Act. ECF. No 307-5 at 99. That the 1935 Act was intended to cover all other trust land for which the trust period had not previously been extended is reflected in the Hearings held by House of Representatives on H.R. 7781. Exhibit B (Collier describing Department's intent in proposing amendment to the IRA that the trust periods for all Indian trust lands should not be terminated). Finally, this position that the trust period for the Moses allotments was extended was reaffirmed by Congress in 1980 and 2006 when it took action that expressly depended upon the allotments still being trust land. Act of March 27, 1980, 94 Stat. 125 and Act of May 12, 2006, 120 Stat. 340.

The Court also asks that we address the issue of whether it can order the United States to issue fee patents if it finds that ownership interests in MA-8 are no longer held in trust status. In response we note that the only motions pending before the Court are two: the Federal Defendants' motion for an ejectment order against Plaintiffs and the Tribe's motion to dismiss the remaining claims asserted against it by WHLLC. The only party who has sought any relief against the United States concerning fee patents is WHLLC in its First (Declaratory Judgment) and Second (Quiet Title) Cross-Claims, ECF No. 228 at ¶¶ 268 & 278. To the extent these

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Tribes of the Colville Reservation. *United States v. Oregon*, 29 F.3d 481, 486 (9th Cir. 1994).

claims seek the issuance of fee patents by the United States they are not at issue in either pending motion. Moreover, although the United States concedes that Plaintiffs may challenge the property's trust status as a defense to the United States' motion, the United States has not waived any of its defenses, including sovereign immunity, statute of limitations and standing,[3] with respect to any cross-claim asserted by WHLLC that seeks the issuance of fee patents with respect to ownership interests that are currently held in trust status.

Finally, there is nothing in the record and the Bureau of Indian Affairs has no knowledge or reason to believe that any Indian owner of a trust interest in MA-8 desires a fee patent for her or his interest. Current regulations provide a process through which individual Indian beneficial owners may submit a request for a fee patent with respect to their interest. *See* 25 C.F.R. §§ 152.4 and 152.5. No such requests are pending with respect to MA-8. Consequently, the United States is confident that its representation of the Department of the Interior and the Bureau of Indian Affairs as trustee for the Indian beneficial owners of MA-8 fulfills its duties

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[3] WHLLC's Cross-Claims with respect to the issuance of fee patents lack any citation to a jurisdictional basis for its claims against the sovereign United States. To the extent its quiet title claims rest upon the provisions of the Quiet Title Act, 28 U.S.C. § 2409a, they should be barred by both the 12 year statute of limitations (§ 2409a(g)) or the Indian lands exception (§ 2409a(a)). Moreover, WHLLC lacks standing to assert a right to a fee patent on behalf of any other owner of MA-8.

under the law, and there is no need for personal representation with respect to this issue.

Plaintiffs assert repeatedly in their Supplemental Memorandum, ECF No. 312, that there exists a "conflict of interest" between the Indian landowners and the United States. But they have not and cannot describe what that conflict is. Unlike the case cited by Plaintiffs[4], there is no allegation here or any facts to support a claim that the United States is representing any interests other than those of the beneficial landowners when it takes action to eject Plaintiff trespassers. Its only goal is to protect the assets it holds in trust for the Indian landowners.

RESPECTFULLY SUBMITTED this 22nd day of January, 2013.

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[4] In the case cited by Plaintiffs, the court did not order the United States to provide alternative counsel; it merely refused to dismiss a claim. Ultimately, the court held that the United States did not breach its trust duty. *Fort Mohave Indian Tribe v. United States*, 32 Fed. Cl. 29 (1994), *aff'd per curiam*, 64 F.3d 677 (Fed Cir. 1995).

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, 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:

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