The Confederated Tribes of the Colville Reservation
Colville Business Council
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June 8, 2022

Agenda Item C.7.a
Supplemental Tribal Report 3
June 2022

Pacific Fishery Management Council
Attn: Marc Gorelnik, Chair
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220-1384

Dear Pacific Fishery Management Council:

The Confederated Tribes of the Colville Reservation ("Colville Tribes") consists of twelve tribes whose homelands covered much of Eastern Washington. The twelve tribes which compose the Confederated Tribes of the Colville Reservation include: šč̓əl̓ámxəxʷ (deep water) or Chelan; wal̓wáma (Wallowa people) or Chief Joseph Band of Nez Perce; sx̌ʷyʔiłp (sharp pointed trees) or Colville; šnt̓iyátkʷəxʷ (grass in the water) or Entiat; snʕáyckst (speckled fish) or Lakes; mətxʷu (blunt hills around a valley) or Methow; škwáxčənəxʷ (people living on the bank) or Moses-Columbia; nspilm (prairie) or Nespelem; uknaqin (seeing over the top) or Okanogan; palúšpam (people from Palouse) or Palus; sənpʕʷilx (grey mist as far as one can see) or San Poil, and šnp̓əšqʷáẃsəxʷ (people in between) or Wenatchi. Today there are more than 9,500 members of the Colville Tribes and we have federally recognized and protected fishing rights to fisheries that are impacted by the management of the Pacific Fisheries Management Council (PFMC). These rights are protected by federal executive order and statute. They were affirmed by the U.S. Supreme Court and the federal 9th Circuit Court of Appeals (depending on the fishery).

The Colville Tribes are one of only 2 Columbia River Tribes whose reservation includes the Columbia River. The Reservation was established July 2, 1872. The western boundary of the Reservation is the west bank of the Okanogan River and the southern and eastern boundaries of the Reservation is the midpoint of the original channel of the Columbia River.[1] The rights are found in executive orders, statutes, and case law. The Colville Tribes have federally protected rights not only on the reservation but also in traditional territories. The courts affirmed these rights in multiple cases.[2] The 9th Circuit in *Colville Confederated Tribes v. Walton* stated "Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation. The Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."[3] Every year the Colville Tribes receives a specific allocation of salmon from the fisheries managed by the PFMC, and thus clearly have an acknowledged protectable interest.

[1] Attachment 1: Executive Order establishing the Colville Reservation; Attachment 2: Solicitor Opinion affirming the southern and eastern boundaries of the Reservation is the midpoint of the original channel of the Columbia River; Attachment 3: Executive Order establishing the Moses-Columbia Reservation

[2] Attachment 4: *United States v. Confederated Tribes of the Colville Reservation*, 606 F.3d 698 (9th Cir. 2010); Attachment 5: *Antoine v Washington*, 420 U.S. 194 (1975); Attachment 6: *Grondal v. United States,* 21 F.4th 1140 (9th Cir. 2021); Attachment 7: *Grondal v. Mill Bay Members Association, Inc.*, 471 F. Supp. 3d 1095 (E.D. Wash 2020); Attachment 8: *Colville Confederated Tribes v. Walton*, 647 F 2.d 42 (9th Cir. 1981)

[3] Attachment 8: *Colville Confederated Tribes v. Walton*, 647 F 2.d 42, at 48.

The completion of the Grand Coulee Dam in the 1940s, and later the Chief Joseph Dam by the federal government irrevocably altered the Colville Tribes way of life and significantly impacted our access to traditional foods, including the salmon. The Colville Tribes do not have access to the salmon above these dams, but their right to access this important food along the Columbia River and its tributaries have been fought for and upheld. Even though promises continue to be made by the federal government that they will help mitigate the damage caused by these dams to the Colville Tribes, promises are not enough. The only way for the Colville Tribes to continue to protect our way of lives and our rights is to actively participate in processes that have significant impacts. The allocation of salmon received each year by the Colville Tribes is not sufficient to support the memberships ceremonial and subsistence needs.

The 12 tribes of the Confederated Tribes of the Colville Reservation are all salmon peoples. Salmon are extremely important for our culture, spiritual needs, and subsistence. We have been fishing the waters of eastern Washington since time immemorial and salmon make up an important part of our religion, spirituality, and culture. Exercising our fishing rights and protecting the health and welfare of our people, including the culture, is critical to the Tribes. To that end, the Colville Tribes have taken the policy position that they may participate in processes related to the PFMC.[4] Additionally, we seek to increase the populations of salmon throughout the system, including seeking passage through Chief Joseph and Grand Coulee Dams and reintroduction in the blocked area behind the Grand Coulee Dam.[5]

The Colville Reservation is located at the terminus of anadromous salmon migration on the Columbia River. Our waters include both healthy runs of summer-fall Chinook and sockeye salmon, as well as ESA-listed stocks of spring Chinook salmon and steelhead trout. The salmon runs that used to support our subsistence and cultural needs were nearly lost and are currently a fraction of what they were, due in part to the construction and operation of the Chief Joseph and Grand Coulee Dams. The number of fish available to all of the groups and individuals who use this resource needs to be increased. One way to do this is to increase the amount of habitat available for spawning by expanding fish distribution into currently blocked areas. The Colville Tribes have participated in many salmon recovery forums, are actively engaged in salmon restoration actions, and have commented in a variety of venues about the importance of the fisheries, and how salmon occupy a central role in the lives of the Tribes and Tribal members. The hatchery operations from Chief Joseph Hatchery produce approximately three million (3,000,000) Chinook for the system when at full production, and many of these fish are intercepted in the PFMC fisheries each year.

The PFMC was created by the Magnuson-Stevens Act, 16 U.S.C. 38 §1801 et. seq. The Act requires that the Secretary appoint to the PFMC one representative of "an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho." Nothing in this provision makes a distinction between the type of tribe (Treaty or Executive Order). The PFMC Operating Procedures mirrors this language and states that it will include one voting member representing "an Indian Tribe with federally-recognized fishing rights from California, Oregon, Washington, or Idaho." Nothing in these provisions makes a distinction between the type of tribe (Treaty or Executive Order). Nothing in the Act or provisions would limit the ability of any tribe that has federally protected interests

[4] Attachment 9: Resolution 2022-51 Policy Statement regarding participation in Pacific Fisheries Management Council
[5] Attachment 10: Resolution 2020-538 Policy to actively support fish passage and reintroduction

from participating in the process or holding a seat on the Committees, subcommittees, subpanels, advisory boards, etc.

The Confederated Tribes of the Colville Reservation is a Columbia River tribe. We are one of only two tribes whose reservation includes a portion of the Columbia River (the Spokane Tribe of Indians is the other). As noted above, we have federally protected rights to fisheries that are managed as part of the PFMC processes. The federal courts, including the 9th Circuit held that there is no difference between a right affirmed by executive order, statute, or treaty.[6] As such, pursuant to the Magnuson-Stevens Act and the PFMC operating procedures, the Tribes have the right to participate fully in the process. The Tribes are entitled to meaningful participation in the PFMC process as a recognized Columbia River Tribe, at all levels, and to assert otherwise is contrary to the statutes establishing this body and the operating procedures of this body.

The Habitat Committee has not had a tribal representative for many years and advertised for a Columbia River tribe to fill the seat in November of 2021. The Colville Tribes nominated Casey Baldwin for the position in November of 2021. The PFMC did not appoint Mr. Baldwin to the committee despite having no other candidates and instead reopened the position. In March 2022, Mr. Baldwin was again the only nominee and again the PFMC took no action and reopened the position. The PFMC provided no reasoning for why it failed to consider the Colville Tribes nomination when Mr. Baldwin was qualified and eligible for the position. In June 2022, Mr. Baldwin has again been nominated by the Colville Tribes for the habitat committee position. Mr. Baldwin would be an asset to the Habitat Committee as a representative for Columbia River tribal interests. Casey is a Research Scientist with a Master's degree in Fisheries and 19 years of experience working on salmon recovery and habitat restoration in the Columbia River Basin.

The Colville Tribes wishes to thank the other co-managers and members of the Salmon Advisory Subcommittee for their willingness to work with the us toward common goals and taking the our views and concerns into consideration. We look forward to the opportunity to continue participating fully in the PFMC processes to protect the Colville Tribes' federally recognized and protected rights, but also to improve the stocks for all users in the future. We appreciate the Council's consideration of our request that you accept the Tribes right to participate fully and nominate qualified representatives in the same manner as other Columbia River Tribes and those tribes with federally protected interests.

Sincerely,

Andy Joseph, Chair
Colville Business Council

[6] Attachment 10: *Parravano v. Babbitt,* 70 F.3d 539 (9th Cir. 1995)

September 17, 1889, Julius Larabee filed D. S. No. 2326 for NW. ¼ NE. ¼, E. ½ NE. ¼ sec. 19, and SW. ¼ NW. ¼ sec. 20, T. 27 N., R. 23 E., all in the State of Washington, and notified the register and receiver of the Waterville local land office, said State, to make proper annotations on their records:

Now, therefore, I, Hoke Smith, Secretary of the Interior, in accordance with the provisions of the said agreement, ratified and confirmed by the said act of Congress, and under the said decision of the General Land Office, affirmed by the Department, do hereby set apart for the exclusive use and occupation of said Indians the following-described lands, namely:

For Chelan Bob the NW. ¼, N. ½ SW. ¼, and lots 1, 2, and 3 of sec. 20, T. 27 N., R. 23 E., Willamette meridian, containing 337.60 acres;

For Cultus Jim the SE. ¼ SE. ¼ of sec. 19, the S. ½ SW. ¼ and lot 4 of sec. 20, and lots 2 and 3 of sec. 29 of the same township and range, containing 209.40 acres; and

For Long Jim the NE. ¼, NE. ¼ SE. ¼, and lot 1 of sec. 11, W. ½, sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, containing 525.30 acres; all in the State of Washington.

HOKE SMITH, *Secretary.*

APRIL 11, 1894.

The departmental order of April 11, 1894, setting aside certain lands under the Moses agreement concluded July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79–80), for the exclusive use and benefit respectively of the Indians therein named (Chelan Bob, Cultus Jim, and Long Jim), is hereby modified and changed so as to eliminate from the allotment made to Long Jim the following described lands: The E. ½ of the SW. ¼ and NW. ¼ of the SW. ¼ of sec. 12, T. 27 N., R. 22 E., Willamette meridian, Washington, the said lands being embraced in the entry of Thomas R. Gibson, No. 1586, which said entry remains intact upon the records of the General Land Office under Department decision of September 23, 1893, modifying Department decision of January 6, 1893, so as to omit from affirmance that part of General Land Office decision dated July 9, 1892, wherein that office suspended the commuted entry of said Gibson, the allotment to said Indian, Long Jim, as corrected, embracing the following described lands: The NE. ¼ the NE. ¼ of the SE. ¼ and lot 1 of sec. 11, the NW. ¼ and SW. ¼ of the SW. ¼ of sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, Washington.

HOKE SMITH, *Secretary.*

APRIL 20, 1894.

EXECUTIVE MANSION, *January 19, 1895.*

It is hereby ordered that the tract of land embraced in allotment No. 37, located in the State of Washington, made to an Indian named John Salla-Salla, by the Acting Secretary of the Interior, April 12, 1886, under the Moses agreement entered into July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79, 80), lying within the following-described boundaries, viz:

"Commencing at the junction of Johnston Creek and the Okanagan (Okinakane) River; thence by Johnston Creek (variation 22° 15′) south 69° 45′ west 40 chains; built monument of stone on the south bank of Johnston Creek station —; 8° 15′ west 91.54 chains; built monument of basaltic stone, station —; north 69° 45′ east 117.50 chains to the Okanagan (Okinakane) River; set balm stake 4 inches square, 4 feet long, marked Station 3, north 45° 30′ west 86.53 chains to the place of beginning, the mouth of Johnston Creek. Area 630 acres," and set apart by Executive order of May 1, 1886, for the exclusive use and occupation of said allottee, be, and the same is hereby, restored to the public domain, upon the cancellation of said allotment, which is hereby directed.

GROVER CLEVELAND.

COLVILLE RESERVE.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, D. C., April 8, 1872.

SIR: I have the honor to invite your attention to the necessity for the setting apart by Executive order of a tract of country hereinafter described, as a reservation

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for the following bands of Indians in Washington Territory, not parties to any treaty, viz:

The Methow Indians, numbering	316
The Okanagan Indians, numbering	340
The San Poel Indians, numbering	538
The Lake Indians, numbering	230
The Colville Indians, numbering	631
The Calispel Indians, numbering	420
The Spokane Indians, numbering	725
The Cœur d'Alene Indians, numbering	700
And scattering bands	300
Total	4,200

* * * Excluding that portion of the tract of country referred to found to be in the British possessions, the following are the natural boundaries of the proposed reservation, which I have the honor to recommend be set apart by the President for the Indians in question, and such others as the Department may see fit to settle thereon, viz: Commencing at a point on the Columbia where the Spokane River empties in the same; thence up the Columbia River to where it crosses the forty-ninth parallel north latitude; thence east, with said forty-ninth parallel, to where the Pend d'Oreille or Clark River crosses the same; thence up the Pend d'Oreille or Clark River to where it crosses the western boundary of Idaho Territory, the one hundred and seventeenth meridian west longitude; thence south, along said one hundred and seventeenth meridian, to where the Little Spokane River crosses the same; thence southwesterly, with said river, to its junction with the Big Spokane River; thence down the Big Spokane River to the place of beginning.

The papers hereinbefore referred to are respectfully submitted herewith.

Very respectfully, your obedient servant,

F. A. WALKER, *Commissioner.*

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 9, 1872.

SIR: I have the honor to submit herewith a communication, dated the 8th instant, from the Commissioner of Indian Affairs, and accompanying papers, representing the necessity for the setting apart, by Executive order, of a tract of country therein described for certain bands of Indians in Washington Territory not parties to any treaty.

The recommendation of the Commissioner in the premises is approved, and I respectfully request that the President direct that the tract of country designated upon the inclosed map be set apart for the Indians referred to, and such others as this Department may see fit to settle thereon.

I am, sir, very respectfully, your obedient servant,

B. R. COWEN, *Acting Secretary.*

The PRESIDENT.

EXECUTIVE MANSION, *Washington, April 9, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Acting Secretary of the Interior, and designated upon the accompanying map, be set apart for the bands of Indians in Washington Territory named in communication of the Commissioner of Indian Affairs dated the 8th instant, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

EXECUTIVE MANSION, *Washington, July 2, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

RESERVATION BOUNDARIES--REGULATION OF HUNTING AND FISHING--COLVILLE AND SPOKANE RESERVATIONS

To: Secretary of the Interior
From: Solicitor
Subject: Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Indian Reservations

This opinion sets forth my conclusions with respect to the following issues: (1) the present boundaries of the Colville and Spokane Indian Reservations in the reservoir area created on the Columbia River by Grand Coulee Dam; (2) the

nature of title to certain portions of the original riverbed within those reservations and to the so called "Indian zone" established in the reservoir area within lands taken in aid of construction of the dam; and (3) the jurisdiction of the Confederated Colville Tribes and Spokane Tribe to regulate hunting, fishing, and boating in that Indian zone.

The Colville and Spokane Indian Reservations were established in 1872 and 1877 respectively, on lands which were later included within the state of Washington. The Colville Reservation was created by an executive order issued by President Grant. Executive Order of July 2, 1872. Some confusion regarding creation of the Spokane Reservation has existed, but the Supreme Court has specifically held that that reservation was established on August 18, 1877, the date of an agreement between agents of the United States and certain Spokane chiefs. *Northern Pac. Ry.* v. *Wismer,* 246 U.S. 283 (1918). A subsequent executive order issued by President Hayes was held by the Court merely to have confirmed the earlier reservation. Executive Order of January 18, 1881.[1]

The Columbia River, taking a westerly turn from its initially southward flow, forms first the eastern and then the southern boundary of the Colville Reservation. The Spokane Reservation lies eastward across the Columbia from the Colville Reservation, just before the river turns west and just north of the Spokane River, a tributary of the Columbia; the Spokane River, flowing essentially from east to west at this point, forms the southern boundary of the Spokane Reservation.

In 1940 construction of Grand Coulee Dam, a federal reclamation project, was completed on a portion of the Columbia where it forms the southern boundary of the Colville Reservation. In an Act dated June 29, 1940 (54 Stat. 703), 16 U.S.C. § 835d, Congress required the Secretary of the Interior to designate the Indian lands to be taken in aid of the project, and granted "all right, title, and interest" in such designated lands to the United States, "subject to the provisions of this Act."[2] The following is the full text of this portion of the Act as originally passed by Congress:

> "In aid of the construction the Grand Coulee Dam Project, authorized by the Act of August 30, 1935, 40 Stat. 1028, there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the Spokane and Colville Reservations, including sites of agency and school buildings and related structures and unsold lands in the Klaxta town site, as may be designated therefore by the Secretary of the Interior from time to time: *Provided,* that no lands shall be taken for reservoir purposes above the elevation of one thousand three hundred and ten feet above sea level as shown by General Land Office surveys, except in Klaxta town site; and (b) such other interests in or to any such lands and property within these reservations as may be required and as may be designated by the Secretary of the Interior from time to time for the construction of pipelines, highways, railroads, telegraph,

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telephone, and electric-transmission lines in connection with the project, or for the relocation or reconstruction of such facilities made necessary by the construction of the project."

The area designated by the Secretary pursuant to this provision and thus taken by the United States in aid of the project extends from the original bed of the river (which was not designated) to the nearest contour line indicating an elevation of 1310 feet above sea level.[3]

Another provision of the Act requires the Secretary to set aside approximately one-fourth of the reservoir area above the dam for the "paramount" use of the Colville and Spokane Tribes for hunting, fishing, and boating. (The reservoir, Lake Roosevelt, extends approximately 150 miles up stream from the dam into Canada, or about twice as far as the northern boundary of the Colville Reservation.) This provision of the Act reads as follows:

"The Secretary of the Interior, in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act, shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing,

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[1] The 1945 Solicitor's opinion referred to *infra* (59 I.D. 147), dealing with certain of the subjects considered herein, refers only to the 1881 executive order.

[2] Grand Coulee Dam was authorized to be constructed by the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 1039), but no provision was included therein authorizing the taking of Indian lands. Some Indian lands were actually inundated prior to the 1940 Act. See 59 I.D. 147, 155 (1945).

[3] The 1940 Act was amended by the Act of December 16, 1944 (58 Stat. 813), to authorize a taking of some of the Indians' interest in the lands above the 1310 contour line to protect against the danger of slides in the areas around the reservoir.

and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife; *Provided,* That the exercise of the Indians' rights shall not interfere with project operations. The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands."

Pursuant to this provision, the Secretary in 1946 designated an area--the so-called "Indian zone"--which comprises essentially all of the "freeboard," "drawdown,"[4] and water area inside the original boundaries of the reservations (except immediately around the dam).[5] The zone extends to the center line of Lake Roosevelt from the Colville side except where the Colville and Spokane Reservations are adjacent to one another across the Lake. There, the zone includes the entire reservoir with the exception of a strip in the center of the Lake half a mile wide, which was preserved by the Secretary as a navigation lane. In addition, the zone extends from the Spokane side to the center line of a separate arm of the Lake formed by the backup of the Spokane River. The Colville Reservation does not border this arm of the Lake.

Pursuant to a tri-party agreement among the National Park Service, the Office of Indian Affairs, and the Bureau of Reclamation, dated December 18, 1946, the Bureau of Reclamation has primary responsibility for overseeing administration of the reservoir area.[6] The general public is presently permitted to have equal use of the Indian zone with the Indians, under the supervision of the National Park Service.

The 1946 tri-party agreement reflects the views expressed a year earlier in an opinion by Solicitor Gardner, dealing with, *inter alia*, certain of the questions considered herein. 59 I.D. 147 (1945). Solicitor Gardner indicated in that opinion that portions of the original, pre-1940 riverbed in this area had been within the

boundaries of the reservations, which had not been altered by the taking pursuant to the 1940 Act; and he appeared to suggest that since the original riverbed was not designated by the Secretary, title to the bed was unaffected by the Secretarial designation made pursuant to the Act. 59 I.D. at 152, 166-67, 175 n.60.

I adopt these conclusions, and hold that the tribes do in fact hold the equitable title to those portions of the original riverbed within the boundaries of their reservations. I differ, however, with the 1945 opinion insofar as it dealt with the extent of the tribes' additional interests in the reservoir area. I hold that the tribes' hunting, fishing and boating rights in the zone set aside by the Secretary for their paramount use are reserved rights, preserved by Congress in the 1910 Act, and that those rights are exclusive of any such rights of non-Indians in that zone, although they do not encompass interference with project purposes and are subject to regulation by the Secretary to conserve fish and wildlife. In addition, I hold that the tribes have the power to regulate hunting, fishing, and boating by non-Indians in the Indian zone (which is almost entirely within the boundaries of the reservations).[7] To the extent that the 1945 opinion conflicts with any of these conclusions, it is hereby overruled.

1. The Boundaries of the Colville and Spokane Reservations along the River

A public land decision dated May 29, 1914, *J. H. Seupelt,* 43 I.D. 267, held that the Colville Reservation boundary was located at the middle of the channel of the Columbia River where it bordered the reservation. In my view this issue was correctly decided in *Seupelt* (which was followed in the subsequent 1945 Solicitor's Opinion, see 59 I.D. at 152).

An apparent conflict between the boundaries established for the Spokane and Colville Reservations along the Columbia should be noted, however. The boundary of the Spokane Reservation is described in the executive order ratifying crea-

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[4] "Freeboard" area is that land within the area taken for reservoir purposes which is above the high water mark of the reservoir and must be crossed to gain access to the water area. "Drawdown" area comprises the exposed land between the high-water mark and the actual water level.

[5] The zone is really two zones--one including lands taken from within the Colville Reservation, and the other including areas taken from within the Spokane Reservation. For convenience, however, these areas are referred to jointly as the "Indian zone."

[6] It was the tri-party agreement (which was approved by the Assistant Secretary) that formally set aside the Indian zone. The agreement speaks of a "Colville Indian Zone" and a "Spokane Indian Zone," and the map annexed as an exhibit to the agreement shows the navigation lane referred to above as being a separate area not included within either zone.

[7] The only locations in which the boundaries of the Indian zone might extend beyond those of either reservation would appear to be in places where, because of the meander of the original river or a difference in elevation on the two sides of the river, the center line of the original riverbed differs perceptibly from the center line of Lake Roosevelt. Such differences in fact have relevance only to the Colville Reservation, since the presence of the navigation lane in the middle of the Lake prevents the Spokane portion of the zone from approaching the center line of the original riverbed. (In addition, as set forth in the text *infra*, the Spokanes claim--not without support--that their reservation includes the entire riverbed.)

tion of the reservation as being located on the west bank of the Columbia River, thus evidently overlapping with the Colville boundary. While I am cognizant of this conflict and of the consequent possibility that an area of joint rights may have been created in the area of overlap, I do not resolve this question herein, because both tribes, by a joint resolution dated September 17, 1973, have requested that I refrain from doing so. In their resolution, the tribes agree that the Secretary may establish a boundary line between the Colville and Spokane portions of the Indian zone at the center of the reservoir despite the overlap,[8] and that the question of title to the underlying riverbed should be reserved for future determination. Determination of that narrow question is not necessary for decision of the remaining issues considered herein.

With respect to the effect of the 1940 Act, it is my conclusion that the boundaries of the reservations along the Columbia (and, in the case of the Spokanes, along the Spokane River), wherever their precise location, were unchanged by the Act. It is clear from the line of authority founded on *United States* v. *Celestine,* 215 U.S. 278, 285 (1909), that once the boundaries of an Indian reservation are established, neither those boundaries nor the status of title to the tracts included within them may be changed, except upon a clear statement of an intent by Congress to change them. See *Mattz* v. *Arnett,* 412 U.S. 481 (1973); *City of New Town* v. *United States,* 454 F.2d 121, 125, 126 (8th Cir. 1972); 25 U.S.C. § 398d. The Supreme Court concluded in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), that the boundaries of the Colville Reservation have not been affected by allotments, patents and other dispositions of land within the reservation made subsequent to its establishment. The current boundaries of that reservation thus remain as discussed in *J. H. Seupelt, supra,* and for similar reasons the boundaries of the Spokane Reservation remain unchanged by the Act.[9] This holding is in accord with the position taken in the 1945 Solicitor's opinion. See 59 I.D. at 175 n.60.

2. The Indians' Interest in the Original Riverbed and the Indian Zone[10]

Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation, see *United States* v. *Pelican,* 232 U.S. 442, 445 (1914); and similar recognition has been extended with respect to the Spokane Reservation.[11] Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress.[12] The following two subsections of this opinion deal, in light of this principle, with the nature of the tribes' interest in

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[8] The Secretary is directed by the 1940 Act to set aside "approximately one-quarter of the entire reservoir area" as an Indian zone. Thus the zone must at a minimum be close to that one-quarter standard. If, however, in the exercise of his discretion the Secretary should decide to expand the present zone-which may well encompass less than one quarter of the entire reservoir area--it would appear that he could do so; and an expansion of the zone in the area where the Colville and Spokane Reservations are adjacent to one another could raise the problem of delineating the Colville and the Spokane portions of the zone.

[9] An argument against the conclusion set out above conceivably could be based on *United States* v. *Oklahoma Gas and Elec. Co.,* 318 U.S. 206 (1943); *Ellis* v. *Page,* 351 F.2d 250 (10th Cir. 1965); and *Tooisgah* v. *United States,* 186 F.2d 93 10th Cir. 1950). *Oklahoma Gas* and *Tooisgah,* however, were decided prior to the Supreme Court's decisions in *Seymour* v. *Superintendent, supra,* which reaffirmed the analysis of *Celestine* and applied it to a statute opening the Colville Reservation to white settlement and ownership, and *Mattz* v. *Arnett, supra,* in which the Court indicated that a congressional intent to alter reservation boundaries can be found only if such an intent is made express in the language of the statute in question or can be clearly perceived from its legislative history and other surrounding circum stances. *(DeMarrias* v. *South Dakota,* 319 F.2d 845 (9th Cir. 1963), a case similar to *Tooisgah,* was explicitly overruled in *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (8th Cir. 1973), on the ground that its rationale had become untenable in light of recent decisions such as *Seymour* and *Mattz.*) And in any event, all three cases--*Oklahoma Gas, Ellis,* and *Tooisgah*--involved statutes which, unlike the 1940 Act, conveyed to the United States *all* of the lands within the reservations in question. The courts in those cases professed to perceive in such circumstances a clear congressional intent to dissolve tribal governments on those reservations. Plainly, no such intent can be imputed to Congress in connection with the 1940 Act. Indeed, as to that Act, *Seymour* clearly governs; for if, as *Seymour* holds, continued tribal jurisdiction is not inconsistent with ownership by non-Indians of certain lands in fee within a reservation, then such jurisdiction is *a fortiori* not inconsistent with similar ownership, for purposes of a reclamation project such as the one involved here, by the Indians' trustee.

[10] The bed of a river is that area covered by water during flood stage up to the normal high water mark. With most rivers, much of this area is dry during the greater portion of the year, during which time it must be traversed to obtain access to the stream for fishing, hunting, boating, or other purposes. *United States* v. *Kansas City Life Ins. Co.,* 339 U.S. 799 (1950). See also *United States* v. *Cress,* 243 U.S. 316 (1917).

[11] Congressional enactments concerning the Colville Reservation such as the Act of June 21, 1906 (34 Stat. 325, 378), which provided for the payment of $1.5 million compensation for the lands taken by virtue of the Act of July 1, 1892 (27 Stat. 62), and the Act of March 22, 1906 (34 Stat. 80), which provided compensation for lands taken by settlement and entry, were statutes in which Congress recognized tribal ownership of the equitable title to reservation lands. With respect to the Spokane Reservation, see, in addition to the 1940 Act, the Act of May 29, 1908 (35 Stat. 458), authorizing, *inter alia,* the allotment of land within that reservation.

[12] *Mattz* v. *Arnett,* 412 U.S. 481, 504 (1973); *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); *United States* v. *Celestine,* 215 U.S. 278 (1909).

(a) the pre-1940 riverbed, and (b) the Indian zone.

a. *Title to the pre-1940 Riverbed.*

The bed of the river (i.e., of the Columbia and of its tributary the Spokane) was not designated by the Secretary pursuant to the 1940 Act, and the tribes were not compensated for any taking with respect to the riverbed. Accordingly, the action taken by the Secretary pursuant to the 1940 Act has not changed the tribes' title, and I hold that each tribe has full equitable title to that part of the riverbed which is within the exterior boundaries of its reservation.[13]

It could conceivably be argued that the lands in the riverbed are owned by the state of Washington because lands underlying navigable waters in territories of the United States are, as a general rule, held by the United States for the benefit of future states under the "equal footing" doctrine; and both the Colville and Spokane Reservations were created while what is now the state of Washington was still a territory. Some authority in this regard for a claim of ownership by the state might be found in *United States* v. *Holt State Bank,* 270 U.S. 49, 55 (1925), which indicates that "disposals by the United States during the territorial period are not lightly to be inferred." *Holt State Bank* held that the bed of Mud Lake had not been reserved for the use of the Indians on the Red Lake Reservation, land that title thereto consequently had passed to the state of Minnesota when that state entered the union. The Supreme Court has recently made clear, however, that *Holt State Bank* turned on its particular facts, and has indicated that the focal question is the intent of the United States with respect to the land in question. In *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1969), the Court held that the bed of the Arkansas River in Oklahoma had been conveyed to the Cherokees, Choctaws, and Chickasaws prior to Oklahoma's becoming a state. The opinion emphasized that

> "nothing in the *Holt State Bank* case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor." 397 U.S. at 634.

Thus if the intent of the United States in administering lands now comprising a state was clearly to reserve the bed of a river for some particular purpose, then that intent, if embodied in an appropriate legislative or administrative act, would result in an exclusion of the riverbed from the lands passing to the state.

I find that the executive order creating the Colville Reservation and the agreement and executive order establishing the Spokane Reservation sufficiently embody such an intent. Particularly on point in this respect is a recent decision by the Court of Appeals for the Ninth Circuit. In *United States* v. *Alaska,* 423 F.2d 764 (9th Cir. 1970), that court held that although Alaska was admitted on an equal footing with other states, the state did not own a lakebed within a wildlife refuge previously created by executive order. The court stated that the equal footing doctrine

> "does not mean that the President had no power to previously promulgate the executive order here under scrutiny. If, as we now hold, the language of the order is sufficiently clear to withdraw the water of the lake and the submerged land the state's rights, if any, are subsequent in time and inferior in right. . . . [T]he United States had all the powers of a sovereign and, if it saw fit, it might even grant rights in and titles to lands which normally would go to a state on its admission. . . ." 423 F.2d at 768.

Similarly, I conclude that the bed of the Columbia and Spokane Rivers in the area presently being considered were reserved for the use and benefit of the Colville and Spokane Tribes and therefore were not acquired by the state of Washington when it entered the union. This Department determined in *J. H. Seupelt, supra,* that the land out to the middle of the Columbia River had been reserved to protect the fishing interests of the Colville Indians, who relied upon the fish as a source of subsistence. This aspect of the opinion in *Seupelt,* which was cited with

approval in the 1945 Solicitor's opinion, 59 I.D. at 152, is now reaffirmed. Nor is there any basis for distinguishing in this regard between the Colville and Spokane Tribes,[14] or between the Columbia and Spokane Rivers.

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[13] But see page 7, *supra.* That title of course confers no rights conflicting with the provisions of the 1940 Act.

The principle articulated at page 8, *supra,* seems to me clearly to overcome the possible argument to the contrary noted by Solicitor Gardner in his 1945 opinion. See 59 I.D. at 167 n.48. That argument is based on the "ordinary rule" that absent the expression of a contrary intention, "the con veyance of title to the upland carries with it the title to the bed of the stream." As the 1945 opinion acknowledged, however, in the present instance title was taken rather than conveyed. And in any event, the broad principles underlying *United States* v. *Celestine,* 215 U.S. 278 (1909), and its progeny would make inappropriate the application of any such rule here, since title to the riverbed was not clearly and specifically taken.

[14] See 59 I.D. at 153.

Indeed, by placing the boundary of the Spokane Reservation on the far (west and south) banks of those rivers, the executive order confirming creation of that reservation makes it doubly clear that the lands reserved for the use of the Indians included the river bed.[15]

b. *The Tribes' Interest in the Indian Zone*

As outlined above, the Secretary designated all lands between the original riverbed and the nearest 1310-foot contour line to be taken in aid of the Grand Coulee project. Under the Act, accordingly, the United States was granting all of the "right, title, and interest" of the Indians in and to all Indian lands so designated and taken, "subject to the provisions of this Act. . . ." And one of those provisions specified that the Secretary should "set aside" approximately one-quarter of the reservoir area for the "paramount use of the Indians" for hunting, fishing, and boating purposes.

The question to which I now turn concerns the precise nature of the Indians' interest in the so called Indian zone designated by the Secretary pursuant to that provision. Solicitor Gardner concluded in 1945 that that interest was not necessarily an exclusive one. I am constrained to disagree with this position in view of my conclusion with respect to an issue not specifically considered in the 1945 opinion. In my view the Indians have a reserved and therefore exclusive interest in the Indian zone under the 1940 Act.[16]

Solicitor Gardner viewed the word "paramount" in the Act as reflecting a congressional purpose to create a "flexible scheme" giving the Secretary discretion to determine whether exclusive use of the zone by the Indians is "necessary to ensure the realization of their privilege." 59 I.D. at 170. Standing alone, however, the term "paramount" clearly does not determine :the issue of whether exclusivity was intended. As Solicitor Gardner himself pointed out, congressional "reliance upon the adjective 'paramount' alone in this context was probably unfortunate," *id,* at 169, since the word is ambiguous with respect to connotations of exclusivity. The relevant legislative history, however, while not altogether consistent, serves in my view to resolve the question along lines somewhat different from those articulated the 1945 Solicitor's opinion.

The legislative history of the Act concededly does not point unequivocally in a single direction. In its report to Congress with regard to the proposed legislation, for example, the Department suggested that "the rights of the Indians to use this area for hunting, fishing, and boating will not necessarily be exclusive rights." H.R. Rep. No. 2350, 76th Cong., 3d Sess. 2 (1940). This suggestion represents the strongest support for the position taken in

the 1945 opinion. On the other hand, the bill which became the 1940 Act was drafted in its final form by the Office of Indian Affairs jointly

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[15] The outcome of *Holt State Bank* was in large part dependent on the fact that the Red Lake Reservation, which was involved in that case, had been created by means which did not constitute an "express" setting aside of the lands in question. See *United States* v. *Pollman,* 364 F. Supp. 995, 999 (D. Mont. 1973). As the opinion in *Holt* pointed out,

> "The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. . . . There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. . . . There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." 270 U.S. at 58-59 (footnote omitted).

The Court in fact noted in *Holt* that "[o]ther reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it." *Id.* at 58 n. These aspects of *Holt,* which distinguish that case from *United States* v. *Alaska, supra,* and from the situation now before me, were emphasized in the *Pollman* decision, *supra.* That decision held that title to the bed of the south half of Flathead Lake, within the Flathead Reservation, did not pass to Montana when that state joined the union; instead, the court concluded, since the reservation clearly had been set aside for Indian use prior to Montana's becoming a state, the bed continued to be equitably owned by the tribes in question. See also *Montana Power Co.* v. *Rochester,* 127 F.2d 189 (9th Cir. 1942).

It should also be noted that in *United States* v. *Big Bend Transit Co.,* 42 F. Supp. 459 (E.D. Wash. 1941), the court held that the bed of the Spokane River was part of the Spokane Reservation. The opinion observed that "[t]he State of Washington specifically disclaimed all title to all lands held by any Indian or Indian Tribes provided that the Indian lands should remain under the absolute jurisdiction and control of the Congress." 42 F. Supp. at 467 (citing Enabling Act, Rem. Ret. Stats. of Wash. Vol. 1. pp. 332, 333; 25 Stat. 676, 677, sec. 4, par. 2).

[16] This opinion concerns only the boundaries of the Colville and Spokane Reservations in the reservoir area, the title to certain portions of the riverbed in that area, the right of tribal members to use the Indian zone designated by the Secretary pursuant to the 1940 statute for hunting, fishing. and boating purposes, and the power of the tribes under that statute to control the use of that zone for those purposes by others. The opinion does not affect or change any of the governmental and institutional arrangements under which Grand Coulee Dam and the Third Power plant connected therewith are now being operated and maintained.

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with the Bureau of Reclamation shortly after the Assistant Commissioner of Indian Affairs had indicated that he contemplated the "setting aside of a particular part or parts of the reservoir *for the exclusive use of the Indians* in exercising their rights, subject, of course, to the primary use of the reservoir for reservoir purposes." 59 I.D. at 157 (Emphasis added). Indeed, the very memorandum which set forth that contemplation of "exclusive" use expressed the notion in proposed statutory language utilizing the word "paramount." *Id.*

Early drafts of the Act prepared within the Department provided that the title to be granted to the United States should be "subject to the reservation for the Indians of an easement to use such lands for hunting, fishing, boating, and other purposes." 59 I.D. at 156. The Bureau of Reclamation resisted this approach, not only out of opposition to the open-ended reservation of easements for unspecified "other purposes," but also on the basis of a concern that administration of the project should not be made unduly complicated. The Indian lands to be taken were not contiguous, but rather were arranged in a "checkerboard" pattern extending, in fact, upriver beyond the boundaries of the reservations.[17] This situation obviously would have rendered the simple reservation of an easement with respect to the particular lands taken difficult to oversee and administer. Indeed, it was feared that a scheme under which the Indians retained scattered "rights in all parts of the reservoir area . . . would interfere with the proper development of its recreational facilities." *Id.*

Thus the scheme of the Act was modified, and the present statutory language, authorizing the creation of a contiguous Indian zone, was agreed upon. There is no persuasive evidence of any determination at the time of this modification that the *nature* of the Indians' rights was to be different than had originally been contemplated when the reservation of an easement was specified, nor is there any apparent reason or basis for such a determination. In this context, given the background outlined above and the limited purpose that the change in approach evidently was designed to accomplish, the soundest inference is that only the *location* of the areas to which such rights were applicable was changed.[18] It is the failure of Solicitor Gardner to draw this inference, or even to deal with the question of whether the Indians' rights were reserved rights, which represents the chief point of departure between his analysis of the Act and mine.

This view of the Act also comports more closely with an agreement dated June 14, 1940, between the Office of Indian Affairs and the Bureau of Reclamation, relating to acquisition of Indian lands for the project. Paragraph 7 of that agreement, which was concluded only fifteen days prior to the date of the Act, reflects an understanding that "existing" rights of hunting and fishing in the areas to be taken were to be "satisfied" by the Act, thus arguably, at least, suggesting a reservation of preexisting rights.[19]

The above analysis is reinforced by the language of the Act. The Secretary is directed to "set aside" an Indian zone from the lands taken for project purposes--terminology that at least is consistent with, and may well be indicative of, a contemplation that already existing Indian rights to the lands designated were being preserved. More-

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[17] Congress had opened both the Spokane and Colville Reservations to entry and settlement by non-Indians. See the Acts of June 19, 1902 (32 Stat. 744) (Spokane), March 22, 1906 (34 Stat. 80) (Colville), and May 29, 1908 (35 Stat. 458) (Spokane). See also the title opinion dated May 2, 1973, issued by the Title Plant, Portland Area Director's Office, Bureau of Indian Affairs, which includes 11 color-coded maps depicting the boundaries of the Colville Reservation and the source of title for each parcel of land in the designated area. That title opinion and all related documents are on file in the above office.

As for the area upriver from the reservations, the Colville Reservation originally extended considerably north of its present northern boundary but was diminished by the Act of July 1, 1892 (27 Stat. 62), which provided for allotments to Indians living in the severed portion. See 59 I.D. at 151.

[18] Since the Indian zone is located almost totally within the exterior boundaries of the Colville and Spokane Reservations, there is no geographical anomaly involved in the conclusion that the Indians' rights in the zone are reserved rights.

[19] The 1945 Solicitor's opinion includes the following passage:

> "It is important to realize that the acquisition of Indian allotted lands for the reservoir began long in advance of the passage of the act of June 29, 1940, and that some of these lands were inundated prior to their acquisition. The plan at this time was to reserve easements to the Indian owners which would enable them to make use of the reservoir without any limitation upon these uses, and therefore the riparian factor of severance damage was not taken into consideration in appraising the Indian lands, either at this time or subsequently, the lands of the Indians and non-Indians alike being appraised upon the same basis. The Indian allotted lands were acquired under memoranda of understanding between the Indian Office and the Bureau of Reclamation approved by the Department on April 6, 1939, and June 14, 1940. Paragraph 7 of the latter memorandum of understanding provided: 'Nothing in this agreement shall affect *existing* hunting and fishing rights of the Indians in the Columbia River Reservoir area *intended to be satisfied* by the enactment into law of the provisions of the second paragraph of Section 1 of S. 3766 and H.R. 9445, * * * (76th Congress, 3d Session).' " 59 I.D. at 155 (emphasis added; footnotes omitted).

over, the directive is to set aside the zone "in lieu of" reserving to the Indians hunting, fishing, and boating rights "in the areas granted under this Act"--language which would appear to suggest the notion outlined above, to the effect that the Act merely imposed a geographical shift of those preexisting rights. Indeed, the Indians are

specifically said to have "rights" in the zone set aside, which rights are "subject only" to (a) the Secretary's authority to promulgate conversation regulations, and (b) the overriding proviso that the rights "shall not interfere with project operations."[20] The implication thus is that those rights are not "subject" to any concurrent rights of other persons in the Indian zone.[21]

The conclusion that the Act contemplates retention by the Indians of preexisting (and therefore reserved and exclusive) right is, in addition, strongly supported by the principle that enactments permitting a taking of Indian property are to be construed narrowly, as giving congressional consent only to the most limited extinguishment of Indian proprietary rights necessary for fulfillment of the purpose of the taking. *Mattz* v. *Arnett, supra,* 412 U.S. at 504; *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968); *United States* v. *Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941); *Seymour* v. *Superintendent, supra*; *United States* v. *Nice,* 241 U.S. 591 (1916); *United States* v. *Celestine, supra.* There is no provision in the 1940 Act for any non-Indian use of areas included within the Indian zone.

Similar support for this view of the Act stems from the well-established principle that statutes affecting Indian interests are, where ambiguous, to be construed most favorably to the Indians involved. E.g., *Squire* v. *Capoeman,* 351 U.S. 1, 6-9 (1956); *Carpenter* v. *Shaw,* 280 U.S. 363, 367 (1930); *United States* v. *Santa Fe Pac. R. Co., supra,* 314 U.S. at 353-54; *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912); *Cherokee Inter-marriage cases,* 203 U.S. 76, 94 (1906).

Accordingly, although neither the Act nor the legislative history underlying it is crystal clear, I am compelled by the above considerations to hold that the Indians' rights to "paramount use" of the Indian zone are reserved rights held by the United States in trust for them, and that those rights are therefore exclusive (except as limited by the prohibition against interference with project operations and by the Secretary's explicitly conferred power to prescribe conservation regulations). Those rights are a condition to and a burden upon whatever title the United States received pursuant to the 1940 Act. Cf. *Seufert Bros.* v. *United States,* 249 U.S. 194 (1919).

3. The Jurisdiction of the Tribes to Regulate Fishing, Hunting, and Boating in the Indian Zone

Given my holding in the preceding section, the question arises whether in addition to having exclusive hunting, fishing, and boating rights in the Indian zone, the tribes also have the authority to regulate the use of that area by others for such purposes. It is my conclusion that they do.

With respect to hunting and fishing, such a right is clearly inferable from 18 U.S.C. § 1165, which, as was held in *Quechan Tribe* v. *Rowe,* 350 F. Supp. 106, 110 (S.D. Cal. 1972), "makes it a crime for any person to enter an Indian Reservation for the purpose of hunting, fishing, or trapping unless such person has tribal permission to do so."[22] *Quechan* held that section 1165 "confirmed" the right of tribes to "control, regulate and license hunting and fishing" within their reservations.[23] See also *United States* v. *Pollman,* 364 F.

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[20] The existence of these two limitations on the Indians' rights may well explain why the term "paramount" rather than "exclusive" was used in the Act, and may also perhaps underlie the comment in the Department's report quoted on page 15, *supra.*

[21] I do not mean to suggest that this analysis of the language of the Act is conclusive of the questions considered herein; indeed, my construction of that language is not the only plausible construction. I do, however, believe that my reading of the language is the soundest of the various possible readings, and that in combination with the analysis of the history and purposes of the Act set out above and the rules of statutory interpretation referred to in the text *infra,* it provides a sound basis for my ultimate conclusions.

[22] Section 1165 reads as follows:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish and peltries in his possession shall be forfeited."

[23] In theory there may be some question about whether the tribes enjoy regulatory power in those few portions of the Indian zone which are not within the boundaries of the reservations, and whether 18 U.S.C. § 1165 would be applicable to those areas in view of the general principle that criminal statutes are to be strictly construed. I am inclined, on the basis of the reasoning set out in the text at note 26, *infra,* toward the view that the tribes do have jurisdiction in those areas; and I am similarly inclined to conclude that the language of section 1165--which speaks of "lands of the United States that are reserved for Indian use"--is applicable to all portions of the Indian zone, in light of my holding above that the tribes' hunting, fishing, and boating rights in the zone are reserved rights. (With respect to the latter point, I note that section 1165 requires that the substantive terms of the statute be violated "knowingly and willfully," so that my view of the statute would not operate to ensnare the unwary. See *United States* v. *Pollman, supra.*) These questions probably are of no realistic significance, however, in view of the minimal extent of such geographical discrepancies and the practical difficulty of ascertaining their location.

Supp. 995, 1001-02 (D. Mont. 1973). Thus any tribal ordinances properly enacted to regulate hunting and fishing in the Indian zone must be regarded as valid and may be enforced by the Colville and Spokane tribal courts so long as the requirements of all pertinent federal statutes, such as 25 U.S.C. §§ 1301 *et seq.,* are observed.[24] See *Alaska Pac. Fisheries* v. *United States,* 248 U.S. 78 (1916); *Morris* v. *Hitchcock,* 194 U.S. 384 (1904); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). Such ordinances may also, of course, in effect be enforced in the federal courts through application of section 1165.

The right to regulate boating in the Indian zone is not specifically conferred upon the tribes by section 1165, which speaks only of hunting and fishing. In my view, however, the tribes' regulatory authority in the zone extends to boating as well.

It has long been settled that Indian tribes, bands, and nations originally possessed all aspects of sovereignty, and that those groups today retain such sovereignty, at least in terms of power over their internal affairs, except as limited by act of Congress. *Williams* v. *Lee,* 358 U.S. 217, 220, 223 (1959); *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir. 1965); *Iron Crow* v. *Oglala Sioux Tribe, supra,* 231 F.2d at 91-94, 98; *Oliphant* v. *Schlie,* --F. Supp. --, No. 51 1-73C2 (W.D. Wash., filed March 21, 1974); see 55 I.D. 14 (1934). In *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 172-73 (1973), the Supreme Court recently emphasized the pertinence of these principles to questions such as the one now before me:

> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of [such] issues . . ., but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, nor as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside.' *United States* v. *Kagama,* 118 U.S. at 381-382." (Footnotes omitted.)[25]

On the basis of this approach, the 1940 Act's reservation of exclusive boating rights to the tribes provides in my view a sufficient basis for tribal jurisdiction to regulate that activity in the Indian zone."[26] The conferral of such exclusive rights would be futile unless there existed some appropriate means of enforcing those rights. It is reasonable, therefore, especially absent any other clearly effective mechanism for the enforcement of such rights, to conclude that a concomitant enforcement authority rests in the tribes themselves.

The Indian zone is, as I have noted, almost entirely within the boundaries of the reservations. A properly drafted tribal ordinance could provide that anyone entering the reservation subjects himself to tribal regulations dealing with activities as to which the Indians have exclusive rights, and to the jurisdiction of the tribal courts in such respects. See, e.g., *Buster* v. *Wright,* 135 F. 947 (8th Cir. 1905), *app. dismissed,* 203 U.S. 599 (1906); cf. *Oliphant* v. *Schlie, supra,* --F. Supp. at --:

> "[A]n Indian tribe's powers of local self-government originally included the power to enact

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[24] The Colville Constitution, which has been approved by the Secretary, provides in Article V, section I (a), that the elected tribal council has the responsibility and authority "to protect and preserve the tribal property, wildlife and natural resources. . . ." A similar provision appears in Article VII, Section I (c) of the Spokane Constitution.

[25] While decisions concerning the recognition and preservation of tribal sovereignty have basically dealt with reservations established by treaty, I can perceive no reason for any different conclusion where an executive order reservation is involved, at least so long as the executive order does not clearly and specifically indicate that the reservation was created for an exceptional purpose incompatible with ordinary notions of tribal sovereignty.

[26] I see no sound basis or reason for distinguishing commercial navigation from pleasure boating in this regard. The Act is not in terms limited to rights of the latter sort; indeed, excessive or unregulated commercial navigation might well interfere with the Indians' hunting and fishing as well as boating rights. In this connection I note that navigation rights exist from one end of the Lake to the other in the non-Indian zone (including the "navigation lane" established by the Secretary between the Colville and Spokane portions of the Indian zone).

> criminal laws pertaining to non-Indians and to confer upon its tribal court jurisdiction over the person of a non-Indian to enforce such laws on those lands reserved for such Indians within the established boundaries of their reservation. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government, i.e., the United States Government."[27]

Nor is the tribal authority outlined above undercut by the regulatory authority of the State of Washington under its criminal law and Public Law 280, 18 U.S.C. § 1162. It is immaterial, in fact, whether the state has full jurisdiction over the Colville and Spokane reservations in the respects authorized by that statute; for 18 U.S.C. § 1162 (b) in any event precludes state regulation of Indian trust property "in a manner inconsistent with any Federal . . . statute," and likewise prevents the state from

> "depriv[ing] . . . any Indian tribe, band or community of any right, privilege, or immunity afforded under any federal . . . statute with respect to hunting, trading, or fishing or the control, licensing, or regulation thereof."

Such rights are granted both by the 1940 Act and by 18 U.S.C. § 1165, so that state regulatory law of the sort referred to above can in no way undermine the Indians' exclusive right to hunt, fish, or boat in the Indian zone or their right to regulate those activities there. Any state law conflicting with tribal ordinances in these areas, or purporting to undercut such tribal jurisdiction, would be invalid. See *United States* v. *Pollmann, supra,* 364 F. Supp. at 1002; *Quechan Tribe* v. *Rowe, supra.* [28]

KENT FRIZZELL,
Solicitor.

of Sand Island, to the post on the right bank of the river, being the corner to fractional sections 1 and 2; thence north on the line between sections 1 and 2, 73.94 chains to the place of beginning.

It is further ordered that the south half of section 3 and the northwest quarter of section 10, township No. 15 north, of range 4 west of the Willamette meridian, Washington Territory, be, and the same is hereby, withdrawn from sale or other disposition, and set apart for the use and occupation of the Chehalis Indians.

GROVER CLEVELAND.

COLUMBIA OR MOSES RESERVE.

EXECUTIVE MANSION, *April 19, 1879.*

It is hereby ordered that the tract of country in Washington Territory lying within the following-described boundaries, viz: Commencing at the intersection of the forty-mile limits of the branch line of the Northern Pacific Railroad with the Okinakane River; thence up said river to the boundary line between the United States and British Columbia; thence west on said boundary line to the forty-fourth degree of longitude west from Washington; thence south on said degree of longitude to its intersection with the forty-mile limits of the branch line of the Northern Pacific Railroad; and thence with the line of said forty-mile limits to the place of beginning, be, and the same is hereby, withdrawn from sale and set apart as a reservation for the permanent use and occupancy of Chief Moses and his people, and such other friendly Indians as may elect to settle thereon with his consent and that of the Secretary of the Interior.

R. B. HAYES.

EXECUTIVE MANSION, *March 6, 1880.*

It is hereby ordered that the tract of country in Washington Territory lying within the following-described boundaries, viz, commencing at a point where the south boundary line of the reservation created for Chief Moses and his people by Executive order dated April 19, 1879, intersects the Okinakane River; thence down said river to its confluence with the Columbia River; thence across and down the east bank of said Columbia River to a point opposite the river forming the outlet to Lake Chelan; thence across said Columbia River and along the south shore of said outlet to Lake Chelan; thence following the meanderings of the south bank of said lake to the mouth of Shehekin Creek; thence up and along the south bank of said creek to its source; thence due west to the forty-fourth degree of longitude west from Washington; thence north along said degree to the south boundary of the reservation created by Executive order of April 19, 1879; thence along the south boundary of said reservation to the place of beginning, be, and the same is hereby, withdrawn from sale and settlement and set apart for the permanent use and occupancy of Chief Moses and his people, and such other friendly Indians as may elect to settle thereon with his consent and that of the Secretary of the Interior, as an addition to the reservation set apart for said Chief Moses and his people by Executive order dated April 19, 1879.

R. B. HAYES.

EXECUTIVE MANSION, *February 23, 1883.*

It is hereby ordered that the tract of country in Washington Territory lying within the following-described boundaries, viz, commencing at the intersection of the forty-fourth degree of longitude west from Washington, with the boundary line between the United States and British Columbia; thence due south 15 miles; thence due east to the Okinakane River; thence up said river to the boundary line between the United States and British Columbia; thence west along said boundary line to the place of beginning, being a portion of the country set apart for the use of Chief Moses and his people by Executive orders of April 19, 1879, and March 6, 1880, be, and the same is hereby, restored to the public domain.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *May 1, 1886.*

It is hereby ordered that all that portion of country in Washington Territory withdrawn from sale and settlement, and set apart for the permanent use and occupation of Chief Moses and his people, and such other friendly Indians as might elect to settle thereon with his consent and that of the Secretary of the Interior, by the Executive orders dated April 19, 1879, and March 6, 1880, respectively, and not restored to the public domain by the Executive order dated February 23, 1883, be, and the same is hereby, restored to the public domain, subject to the limitations as to disposition imposed by the act of Congress, approved July 4, 1884 (23 Stats., pp. 79–80), ratifying and confirming the agreement entered into July 7, 1883, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville Reservations in Washington Territory.

And it is hereby further ordered that the tracts of land in Washington Territory surveyed for and allotted to Sar-sarp-kin and other Indians in accordance with the provisions of said act of July 4, 1884, which allotments were approved by the Acting Secretary of the Interior April 12, 1886, be, and the same are hereby, set apart for the exclusive use and occupation of said Indians, the field-notes of the survey of said allotments being as follows:

[Allotments Nos. 1, 2, 3, and 4, in favor of Sar-sarp-kin, Cum-sloct-poose, Showder, and Jack, respectively.]

Set stone on N. bank of Sar-sarp-kin Lake for center of S. line of claim No. 1. Run line N. 78° W. and S. 78° E. and blazed trees to show course of S. line of claim. Then run N. 12° E. (var. 22° E.) in center of claim. At 80 chains set temporary stake and continued course. At 20 chains came to brush on right bank of Waring Creek and offset to the right 9.25 chains. Thence continued course to 65 chains and offset to right 13.25 chains to avoid creek bottom and continued course. At 80 chains set temporary stake and continued course. At 37.50 offset 4.50 chains to right to avoid creek bottom and continued course. At 55.50 chains offset to right 4.77 chains to avoid creek bottom and continued course. At 80 chains set temporary stake and continued course to 32.60 chains. Then run S. 78° E. 8.23 chains and set stone 10 by 10 by 24 inches for NE. corner of claim. Then retraced line N. 78° W. 12 chains and set stone 6 by 6 by 18 inches to course of N. line of claim No. 1, and S. line of claim No. 2, and for center point in S. line of claim No. 2 (claim No. 1, Sar-sarp-kin's, contains 2. 180.8 acres). Thence run N. 12° E. 80 chains. Blazed pine 20 inches diameter on 3 sides on right bank of Waring Creek for center of N. line of claim No. 2, and center of S. line of claim No. 3. Set small stones N. 78° W. and S. 78° E. to show course of said line. Thence run N. 12° E. in center of claim No. 3. At 10.50 chains offset to right 3 chains to avoid creek bottom and continued course. At 71 chains offset to left 4.23 chains to avoid creek bottom and continued course. At 76.25 chains crossed Waring Creek 20 links wide. At 80 chains offset to right 1.23 chains and set stone 8 by 8 by 16 inches for center of N. line of claim No. 3, and center of S. line of claim No. 4. Run N. 78° W. and S. 78° E. and set stake to show course of said line. Then from center stone offset to left 1.23 chains and run thence N. 12° E. At 28 chains offset to left 2 chains to avoid creek bottom and continued course. At 80 chains offset to right 3.23 chains and set stone 10 by 10 by 16 inches on left bank of creek for center of N. line of claim, and set stones N. 78° W. and S. 78° E. to show course of line.

[Allotment No. 5, in favor of Ka-la-witch-ka.]

From large stone, with two small stones on top, as center of N. line of claim near left bank of Waring Creek, about 1¾ miles down stream from claim No. 4, and about 1 mile up stream from Mr. Waring's house, run line N. 80½° W. and S. 80½° E., and set small stones to show course of N. line of claim. Then run S. 9½° W. (var. 22° E.), at 79.20 chains crossed Cecil Creek 15 links wide. At 80 chains blazed pine 24 inches diameter on four sides, in clump of four pines for center of S. line of claim. Thence run N. 80½° W. and S. 80½° E., and blazed trees to show course of S. line of claim.

[Allotment No. 6, in favor of Sar-sarp-kin.]

From stone on ridge between Toad Coulee and Waring creeks run N. 88° E. (var. 22° E.). At 18.50 chains enter field. At 24.50 chains enter brush. At 30.10 chains cross Waring Creek 25 links wide. At 47.60 chains cross Waring's fence. At 65 chains set stone for corner 12 by 12 by 12 inches, from which a pine 24 inches diameter bears N. 88° E. 300 links distant. Thence N. 4° W. 10.50 chains set stone to corner 8 by 8 by 18 inches. Thence N. 16° W. At 29.20 chains pine tree 30 inches diameter in

line. At 55 chains set stone for corner. Thence S. 66½° W. to junction of Toad Coulee and Waring creeks, and continue same course up Toad Coulee Creek to 81 chains blazed fir, 18 inches diameter on four sides for corner, standing on right bank of Toad Coulee Creek on small island. Thence S. 38° E. At 52 links cross small creek—branch of Toad Coulee Creek—and continued course. At 42 chains point of beginning. The above-described tract of land contains 379 acres.

[Allotment No. 7, in favor of Quo-lock-ons, on the headwaters of Johnson Creek.]

From pile of stone on south side of Johnson Creek Cañon—dry at this point—125 feet deep, about 1 chain from the west end of cañon, from which a fir 10 inches diameter bears N. 25° W. 75 links distant, run S. 55° W. (var. 22° E.). At 80 chains made stone mound for corner, from which a large limestone rock 10 by 10 by 10 bears on same course S. 55° W. 8.80 chains distant. From monument run N. 35° W. At 72.50 chains crossed Johnson brook 4 links wide, and continued course E. 80 chains. Made mound of stone, and run thence N. 55° E. 80 chains. Made stone monument, and run thence S. 35° E. 80 chains to beginning.

[Allotment No. 8, in favor of Nek-quel-e-kin, or Wa-pa-to John.]

From stone monument on shore of Lake Chelan, near houses of Wa-pa-to-John and Us-tah, run north (var. 22° E.).

10.00 chains, Wa-pa-to John's house bears west 10 links distant.
12.50 chains Catholic chapel bears west 10 links distant.
32.50 chains, fence, course E. and W.
80.00 chains, set stake 4 inches square, 4 feet long in stone mound for NE. corner of claim. Thence run W.
30.00 chains, cross trail, course NW. and SE.
80.00 chains, made stone monument for NW. corner of claim. Thence run S.
35.60 chains, crossed fence, course E. and W.
77.00 chains, blazed cottonwood tree 12 inches in diameter on 4 sides for corner on shore of Lake Chelan, marked W. T. on side facing lake. Lake Chelan forms the southern boundary of claim, which contains about 640 acres.

[Allotment No. 9, in favor of Us-tah.]

This claim is bounded on the west by Wa-pa-to John's claim, and on the south by Lake Chelan. From Wa-pa-to John's NE. corner, which is a stake in stone mound, run south 64½° east (var. 22° E.).

88.56 chains, set stake in stone mound for corner of claim. Thence run S.
55.50 chains, trail, course NW. and SE.
80.00 chains, shore of Lake Chelan; set stake in stone mound for corner of claim, which contains about 640 acres.

[Allotment No. 10, in favor of Que-til-qua-soon, or Peter.]

This claim is bounded on the E. by Wa-pa-to John's claim, and on the S. and W. by Lake Chelan. The field notes of N. boundary are as follows: From NW. corner of Wa-pa-to John's claim, which is a stone monument, run W. (var. 22° E.).

113.00 chains shore of Lake Chelan. Blazed pine tree at the point 20 inches diameter on four sides for NW. corner of claim. This claim contains about 540 acres.

[Allotment No. 11, in favor of Tan-te-ak-o, or Johnny Isadore.]

From Wa-pa-to John's NE. corner, which is a stake in stone mound, run W. (var. 22° E.) with Wa-pa-to John's N. boundary line to stone monument.

80.00 chains, which is also a corner to Wa-pa-to John's and Peter's land. Thence on same course with Peter's N. line.
33.00 chains, made stone monument in said line for SW. corner of claim, and run thence N. (var. 22½° E.).
80.00 chains, made stone monument on W. side of shallow lake of about 40 acres, and continued course to
113.35 chains, made stone monument for N. corner of claim, and run thence S. 45° E.
160.00 chains, point of beginning. This claim contains 640 acres.

[Allotment No. 12, in favor of Ke-up-kin or Celesta.]

This claim is bounded on the south by Peter's and on the E. by Johnny's claim. From Peter's NW. corner, which is a pine, 20 inches diameter, blazed on four sides, on shore of Lake Chelan, run E. with Peter's N. line.

80.00 chains, stone monument, previously established, which is also a corner to Johnny's land. Thence N. with Johnny's land.

80.00 chains, stone monument, previously established on W. shore of shallow lake. Thence run W. (var. 22¼° E.)

80.00 chains. Set stake in stone mound for NW. corner of claim, from which a blazed pine 24 inches in diameter bears S. 50° W., 98 links distant. A blazed pine 20 inches diameter bears N. 45° E. 110 links distant. Thence north through open pine timber.

80.00 chains, point of beginning.

[Allotment No. 13, in favor of Ta-we-na-po, or Amena.]

From Johnny's NW. corner, which is a stone monument, run S. with Johnny's line.

33.35 chains, stone monument previously established, the same being Celesta's NE. corner. Thence W. with Celesta's line.

80.00 chains, stone monument previously established, the same being the NW. corner of Celesta's claim. Thence N. (var. 22° E.)

85.50 chains, small creek 4 links wide, course E. and W.

126.70 chains, made stone monument for NW. corner of claim, from which a blazed pine 12 inches in diameter bears S. 10° W. 59 links distant. Thence run S. 40½° E.

123.00 chains, point of beginning. This claim contains 640 acres.

[Allotment No. 14, in favor of Pa-a-na-wa or Pedoi.]

From NW. corner of Ameno's claim, which is a stone monument, from which a blazed pine 12 inches in diameter bears S. 10° W. 59 links distant, run N. 75° W.

43.50 chains, shore of Lake Chelan, blazed pine tree 6 inches in diameter on 4 sides for NW. corner of claim, from which a blazed pine 14 inches in diameter bears N. 45° E. 13 links distant. Thence returned to point of beginning and run S. with Ameno's line.

46.70 chains offset on right, 70.00 chains to Lake Chelan.

86.70 chains offset on right, 62.00 chains to Lake Chelan.

101.20 chains, made stone monument from which a blazed pine 30 inches in diameter bears N. 40° W. 95 links distant, a blazed pine 30 inches in diameter bears 40° W. 72 links distant. Thence run W.

62.00 chains shore of Lake Chelan. Made stone monument for SW. corner of claim, from which a blazed pine 10 inches in diameter bears N. 30 links distant. Lake Chelan forms the western boundary of claim, which contains 640 acres.

[Allotment No. 15 in favor of Yo-ke-sil.]

From SW. corner of Pedoi's claim, which is a stone monument, from which a blazed pine 10 inches diameter bears N. 30 links distant, run east with Pedoi's line.

62.00 chains, stone monument, previously established, from which a blazed pine, 30 inches diameter, bears N. 40° W. 95 links distant. A blazed pine, 30 inches diameter, bears S. 40° W. 72 links distant, the same being Pedoi's SE. corner. Thence run south with Ameno's W. line.

25.50 chains, stake in stone mound, previously established for corner to Ameno's and Celesta's claim. Thence continued course S. with Celesta's W. line to 105.50 chains, pine tree 20 inches in diameter, on shore of Lake Chelan, previously blazed on four sides for corner to Peter and Celesta's claims. Thence with the shore of lake in a northwesterly direction to point of beginning. This claim contains about 350 acres.

[Allotment No. 16 in favor of La-kay-use or Peter.]

From stone monument, on bunch grass bench; about 1½ miles in a northeasterly direction from Wapato John's house, run N. 61½° E. (var. 22° E.)

51.00 chains, enter small brushy marsh.

52.50 chains, leave marsh.

56.00 chains, made stone monument for corner of claim and run thence S. 28½° E.

11.60 chains, cross small irrigating ditch—small field and garden lie on right.

114.30 chains, made stone monument for corner and run thence S. 61½° W.

56.00 chains, made stone monument for corner of claim and run thence N. 28½° W.

114.30 chains, stone monument—point of beginning. This claim contains 640 acres.

[Allotment No. 17, in favor of Ma-kai.]

Field notes of Ma-kai's allotment on the Columbia Reservation. It is bounded on the west by Ustah's allotment and on the south by Lake Chelan. From Ustah's NE. cor., which is a stake in stone mound, run S. 64½° E. (var. 22°)

80.00 chains, built monument of stone, running thence S.

80.00 chains, to the bank of Lake Chelan, built monument of stone; thence N. 64½° W. along Lake Chelan.

80.00 chains, to the SE. cor. of Ustah's allotment.

The above described figure contains 507.50 acres.

[Antwine Settlement.]

This settlement, consisting of three claims in the same vicinity, though not adjoining, is located on or near the Columbia River, about seven miles above Lake Chelan, and about eight miles below the mouth of the Methow River, on the Columbia Reservation.

[Allotment No. 18, in favor of Scum-me-cha or Antoine.]

From stone monument about 2 miles north from the Columbia, from which a blazed fir 20 inches in diameter bears S. 80° W. 60 links distant, run S. 35½° E. (var. 22° E.)

30.00 chains, summit of mountain spur, about 50 feet high. Antwine's house N. 35° E. about 20 chains distant.

80.00 chains, made stone monument for corner, from which a blazed pine 8 inches in diameter bears S. 45° W. 32 links distant. Thence run N. 55½° E. (var. 22½°).

58.00 chains, bottom of dry cañon 100 feet deep, course NW. and SE.

80.00 chains, made stone monument for corner about one-quarter mile from Columbia River, and run thence N. 34½° W.

80.00 chains, made stone monument for corner, and run thence S. 55½° W.

80.00 chains, stone monument, point of beginning.

[Allotment No. 19, in favor of Jos-is-kon or San Pierre.]

This claim lies about 3 miles in a northwesterly direction from Antoine's claim and consists of a body of hay land of about 100 acres, surrounded by heavy timber. From stone monument on hillside, facing SE., from which a blazed pine 8 inches diameter bears S. 60° E. 56 links distant, from which a blazed pine 8 inches diameter bears west 76 links distant, run S. 23¼° E. (var. 22° E.)

6.50 chains, enter grass lands.

25.00 chains, leave grass lands.

80.00 chains, made stone monument for corner, from which a blazed pine 20 inches diameter bears N. 85° E. 20 links distant. A blazed pine 20 inches diameter bears N. 15° E. 27 links distant. Thence run N. 66¾° E.

80.00 chains, made stone monument on steep little hillside for corner. Thence run N. 23¼° W.

80.00 chains, made stone monument on mountain side for corner, from which a blazed pine 18 inches diameter bears N. 40° E. 105 links distant. From which a blazed pine 20 inches diameter bears S. 10° E. 127 links distant. Thence run S. 66¾° W. along mountain side.

80.00 chains, to point of beginning.

[Allotment No. 20, in favor of Charles Iswald.]

This claim lies about 2 miles in a northeasterly direction from Antoine's claim. It contains no timber, but is mostly fair grazing land, with about 100 acres susceptible of cultivation. No improvements. From pine tree on right bank of Columbia River, blazed on 4 sides, where rocky spur 200 feet high comes down to near bank, forming narrow pass, from which a blazed pine 36 inches in diameter bears north 177 links distant, run S. 13° W. (variation 22° E.).

102.25 chains, made stone monument for corner on hillside in view of main trail. Thence run south 5¾° west.

78.00 chains, made stone monument for corner. Thence S. ¼° W.

25.65 chains, made stone monument on bank of Columbia River for corner. Thence with said river to point of beginning, containing 640 acres of land.

The three following claims are all adjoining. They are located on and near the Columbia River, about 12 miles above Lake Chelan and about 3 miles below the mouth of the Methow River.

[Allotment No. 21, in favor of In perk skin, or Peter No. 3.]

From pine 12 inches diameter blazed on 4 sides on right bank of Columbia River, from which a blazed pine 10 inches diameter bears S. 40° E. 46 links distant, run N. 69¼° W. (var. 22° E.).

3.50 chains, enter corner of small field.
7.50 chains, leave field.
8 chains, cross trail.
80 chains, made stone monument for cor. on mountain side about 500 feet above river. Thence run N. 20¾° E.
24.00 chains, summit of rugged little mountain 700 feet high.
80.00 chains, made stone monument for corner on top of small rocky hill about 40 feet high. Thence S. 69¼° E.
80.00 chains, erected stone monument for corner about 15 chains from river bank. Thence S. 20¾° W.
80.00 chains, point of beginning.

[Allotment No. 22, in favor of Tew-wew-wa-ten-eek or Aeneas.]

From NW. corner of Peter's claim, which is a stone monument on summit of small hill, run N. 20¾° E. (var. 22½° E.).

80.00 chains, made stone monument for corner, and run thence N. 69¼° W. (var. 23° E.).
80.00 chains, made stone monument for corner, and run thence S. 20¾° W. (var. 22½° E.).
39.00 chains, summit of steep hill 100 feet high.
80.00 chains, made stone monument for corner of claim on rolling hillside facing west. Thence S. 69¼° E. (var. 23½° E.).
80.00 chains, point of beginning.

[Allotment No. 23, in favor of Stem-na-lux or Elizabeth.]

From NW. corner of Peter's claim, the same being the SE. corner of Aeneas' claim, which is a stone monument on top of small hill, run N. 69¼° W. with Aeneas' S. line (var. 22½° E.).

80.00 chains, stone monument, previously established for SW. corner of Aeneas' claim. Thence N. 20¾° W. (var. 23½° E.).
65.00 chains, summit of hill.
80.00 chains, made stone monument for corner from which a blazed pine 24 inches diameter bears south 70 links distant. A blazed pine 24 inches diameter bears S. 20° W. 84 links distant. Thence S. 69¼° E.
80.00 chains, monument previously established for SW. corner of Peter's claim. Thence S. 20¾° E. with Peter's west line.
80.00 chains, point of beginning.

The five following claims are all adjoining. They are located along the southern bank of the Methow and the western bank of the Columbia on the Columbia Reservation.

[Allotment No. 24, in favor of Neek-kow-it or Captain Joe.]

From stone monument on right bank of Methow River, about three-fourths mile from its mouth, from which a pine 24 inches in diameter bears N. 37° W. on opposite bank of Methow, for witness corner to true corner, which is in center of Methow River, opposite monument 1.50 chains distant, run S. 37° W. (var. 22° E.) (distances given are from true corner)

7.00 chains, enter garden.
12.00 chains, leave garden.
39.00 chains, top of bench 400 feet high.
116.50 chains, Cañon Mouth Lake, containing about 80 acres. Set stake in stone mound on shore of lake for witness corner to true corner, which falls on side of impassable mountain beyond lake 160 chains from point of beginning. Returned to witness corner previously set on bank of Methow, and run thence N. 53° W.
40.00 chains, offset on right 2 chains to bank of Methow, and made stone monument for witness to true corner, which falls in center of Methow, opposite monument, 1 chain distant. Thence run S. 37° W. (Distances given are from true corner.)
42.00 chains, top of bench 400 feet high.

113.00 chains, marked tree with two notches fore and aft, and blazed one tree on each side to show course of line.
115.00 chains, impassable mountain. True corner falls in course on mountain side 160 chains distant from true corner at other end of line in the Methow River.

GENERAL DESCRIPTION OF BOUNDARY.

From point first described in center of Methow River S. 37° W. 160 chains; thence N. 52° 39′ W. 40.20 chains; thence N. 37° E. 160 chains to point previously described in middle of Methow; thence with middle of Methow River to point of beginning. Claim contains 640 acres.

[Allotment No. 25, in favor of Hay-tal-i-cum or Narcisse.]

From stone monument on right bank of Methow River, previously described as witness corner, to point of beginning to survey of Captain Joe's claim, said monument being a true corner to this claim, run S. 37° W. with Captain Joe's line (var. 22° E.)
45.60 chains, set stake in stone mound for corner and run thence S. 53° E.
80.00 chains, set stake 8 in. square for corner; thence run N. 37° E.
73.10 chains, made stone monument for corner on right bank of Columbia. Near opposite bank of river a black rock protrudes from water. Thence with right bank of Columbia River to mouth of Methow River. Thence with right bank of Methow River to point of beginning. This claim contains 640 acres of land.

[Allotment No. 26, in favor of Kleck-hum-tecks.]

From stake in stone mound previously set in Captain Joe's SE. line, the same being the SW. corner to Narcisse's claim, run S. 53° E. (var. 22° E.), with Narcisse's line,
80.00 chains, corner previously established, thence run S. 37° W.
80.00 chains, set stake for corner, and run thence N. 53° W.
73.80 chains, set stake marked W. C., on shore of Cañon Mouth Lake, from which a blazed aspen, 6 inches diameter, bears N. 5° W. 94 links distant for witness corner to true corner, which falls on line 6.50 chains further in lake, in Captain Joe's SE. line. Thence with said line N. 37° E. 80 chains to point of beginning. This claim contains 640 acres.

[Allotment No. 27, in favor of Ki-at-kwa, or Mary.]

From witness corner previously established on Methow, in Captain Joe's NW. line, the same being taken as a true corner to this claim, run S. 37° W. (var. 22° E.) with Captain Joe's line,
80.00 chains, made stone monument for corner; then returned on line, and from point 1.50 chains from corner run N. 53° W.
64.00 chains, offset to left 22 chains to avoid bend in river and continued course.
80.00 chains, bank of Methow river. Made stone monument for corner, and run thence S. 37° W.
12.00 chains top of bench 400 feet high.
24.00 chains, foot of perpendicular basaltic cliff offset to right 2 chains.
31.50 chains, offset to left 2 chains and continued course.
40.00 chains, made stone monument and continued course.
45.00 chains, impassable mountain. True corner falls 11.50 chains further on line on side of mountain.

General description by boundary.—From point of beginning S. 37° W. 80 chains; thence N. 53° W. 80 chains; thence N. 37° E. 56.50 chains to corner on Methow; thence with right bank of Methow to point of beginning, containing about 640 acres.

[Allotment No. 28, in favor of Ta-tat-kein, or Tom.]

From NW. corner of Mary's claim, which is a stone monument on the right bank of the Methow, run S. 27° W. (var. 22° E.) with Mary's line
40.00 chains, corner previously established, stone monument; thence N. 53° W.
80.00 chains, made stone monument in aspen thicket for corner; thence N. 27° E.
106.50 chains, right bank of Methow River; made stone monument for corner; thence with right bank of Methow River to point of beginning. This claim contains about 640 acres.

Downing Creek Settlement.—This settlement consists of two adjoining claims on Downing Creek, on the right bank of the Columbia River on the Columbia Reservation, about 7 miles below the mouth of the Okinakane River, and about 3 miles above the mouth of the Methow River.

[Allotment No. 29, in favor of La-la-elque.]

From stone monument on right bank of Columbia River, about one-half mile above mouth of Downing Creek, run N. 25° W. (var. 22° E.),
42.75 chains, point on hill about 500 feet high, 30 links to right of old stone mound on top of hill.
79.30 chains, large flat-topped stone 5 links to right.
80.00 chains, made stone monument for corner and run thence S. 65° W.
80.00 chains, made stone monument for corner on hillside near top of hill and run thence S. 25° E.
78.00 chains, bank of Columbia River. Made stone monument for corner. Thence with Columbia River to point of beginning. This claim contains about 640 acres.

[Allotment No. 30, in favor of Snain-Chucks.]

From NE. corner of La-la-elque's claim, which is a stone monument, run N. 25° W.
80.00 chains, made stone monument for corner and run thence S. 65° W.
80.00 chains, made stone monument for corner and run thence S. 25° E.
80.00 chains, stone monument previously established, the same being La-la-elque's NW. corner; thence N. 65° E.
80.00 chains, point of beginning. This claim contains 640 acres of land.

[Allotment No. 31, in favor of Edward, near Palmer Lake, Toad Coulee.]

Commencing at a prominent rock 7 feet by 3 feet by 4 inches and unknown length, the above dimensions projecting above the surface. Running thence (var. 22° 15′) N. 82° E. 80 chains. At 57.70 Thorn Creek, 80 links wide, NE. At 80 set willow stake 5 inches square and 5 feet long, marked sta. 1, N. 8° W. 80 chains. A lime-juice tree 18 inches diameter at 80, set basaltic stone 2 feet by 8 inches by 6 inches with monument of stone on the side of bluff on the east side of the valley, sta. 2, S. 82° W. 80 chains. At 6 chains Thorn Creek 80 links wide bears NE. at 8 chains the Smilkameen (Similkameen) River, 100 links wide, bears NE. At 39, on the same river, bears SW. At 80 set quaking aspen stake 4 inches square, 4 feet long, marked sta. 3. S. 8° E. 80 chains to the place of beginning. The terminus. 640 acres.

[Allotment No. 32, in favor of Dominec.]

Commencing on a slough of the Smilkameen (Similkameen) River, on the forty-ninth parallel (the British line) set quaking aspen stake 4 inches square and 4 feet long, 18 inches in the earth, marked C. C., from which a pine tree 42 inches in diameter bears N. 79° 45′ W. 2 chains, marked C. C. B. T., facing post; thence (var. 22° 15′ E.) W. 31 chains to a point from which the parallel monument bears W. 4.77 chains; built monument of granite stone. S. 134 chains. At 42.50 chains a spring branch, 5 links wide, bears E. At 134 chains built monument of stone at foot of bluff. E. 61.53 chains to a balm tree, 30 inches in diameter, marked sta. 3, facing W., from which the Smilkameen (Similkameen) River bears W. 2.43 chains. N. 12° 30′ W. 137.43 chains. At 10 chains the Smilkameen (Similkameen) River bears SE.; at 120 the same river W. of S. At 137.43 intersect the place of beginning.
Terminus. 620.26 acres.

[Allotment No. 33, in favor of Ko-mo-dal-kiah.]

Commencing on the west bank of the Okanagan (Okinakane) River at the north end of an island, set stake 4 inches square, 4 feet long, marked C. C., with mound; running thence (var. 22° 15′) S. 86° 45′ W., 150 chains, set balm stake 4 inches square, 4 feet long, and 18 inches in the earth, with monument of washed bowlders covered with mound of earth, 4 pits, and marked sta. 1. S. 3° 15′ E., 42.66 chains, set balm stake 4 inches square, 4 feet long, marked sta. 2, with monument of granite stones. N. 86° 45′ E. 138.21 chains. A balm tree on the west bank of the Okanagan (Okinakane) River, marked sta. 3, facing west, the true corner falling in the Okanagan (Okinakane) River, 11.79 chains further on in the same line at the east bank of an island, N. 3° 15′ W. 42.66 chains, intersect the north line from which the place of beginning bears N. 86° 5′ E., 11.79 the terminus. Area, 639.90 acres.

[Allotment No. 34, in favor of Paul.]

Commencing at the SW. corner (sta. 3) of Ko-mo-dal-kiah's allotment; running thence (var. 22° 15′) S. 3° 15′ E. 42.66 chains; built monument of basaltic stone, sta. 1. N. 86° 45′ E. 142.87 chains, intersect the Okanagan (Okinakane) River. Set balm stake 4 inches square 4 feet long, and 18 inches in the ground, marked (sta. 2). N. 9° 45′ W. 42.70 chains, Ko-mo-dal-kiah's bearing corner a balm tree 12 inches in diameter marked sta. C. C. on the S. side, the terminus. Area, 599.55.

[Allotment No. 35, in favor of Que-lock-us-soma.]

Commencing at the SE. corner of Paul's allotment, running thence (var. 22° 15′) S. 86° 45′ W. 43.87 chains; built monument of washed granite bowlders (sta. 1). S. 3° 15′ E. 80 chains; built monument of washed granite bowlders (sta. 2). N. 86° 45′ E. 96.42 chains; intersect the Okanagan (Okinakane) River, set balm stake 4 inches square, 4 feet long, and 18 inches in the ground, marked (sta. 3); thence up the Okanagan (Okinakane) River, N. 45° 30′ W. 76 chains to a curve in the river. N. 3° 15′ W. 25 chains intersect the place of beginning, the terminus. Area, 495.47 acres.

[Allotment No. 36, in favor of Se-cum-ka-nallux.]

Commencing on the west bank of Okanagan (Okinakane) River at a little pine tree 4 inches in diameter; running thence down the river (var. 22° 15′) S. 3° W. 45.65 chains to a pine tree on the bank of the Okanagan (Okinakane); thence down the river N. 57° 45′ W. 22 chains, intersect the old Indian trail built monument of stone. S. 15° W. 124.50 chains, to a pine tree 25 inches in diameter, marked "Sta. 3;" thence N. 51° 45′ W. 82.75 chains; at 22 chains a small lake 5 chains wide; at 82.75 built monument of stone, N. 50° E. 167.55 chains, to the place of beginning—the terminus. Area, 637.44 acres.

[Allotment No. 37, in favor of John Salla-Salla.]

Commencing at the junction of Johnston Creek and the Okanagan (Okinakane) River; thence by Johnston Creek (var. 22° 15′) S. 69° 45′ W. 40 chains; built monument of stone on the S. bank of Johnston Creek, Sta. —; 8° 15′ W. 91.54 chains; built monument of basaltic stone, Sta. —; N. 69° 45′ E. 117.50 chains to the Okanagan (Okinakane) River; set balm stake 4 inches square 4 feet long, marked "Sta. 3," N. 45° 30′ W. 86.53 chains to the place of beginning, the mouth of Johnston Creek. Area, 630 acres.

GROVER CLEVELAND.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, D. C., January 25, 1894.

SIR: On August 1, 1893, I received, by reference from the General Land Office, a letter dated July 17, 1893, from the register of the local land office at Waterville, Wash., stating that an Indian named Alfred appeared at his office on the date of the said letter with copy of an allotment numbered 20 in the name of Charles Iswald, an Indian, for lands near the Methow River in Okanogan County, said State; that Indian Alfred stated that Iswald had gone to the Colville Indian Reservation in Washington, abandoning his wife and three children, and had not returned, having been absent for the period of six months; that his wife desired to hold the land embraced within the said allotment, and asked to know if she could do so; that said Iswald remarried after going to the Colville Reservation.

The register adds in his said letter that some action should be taken in the premises to protect the interests of the abandoned wife and her children.

In connection with this matter I have the honor to state that on November 25, 1893, I directed Capt. J. W. Bubb, U. S. A., acting Indian agent of the Colville Agency, said State, to ascertain whether the said Indian Iswald had removed to his reservation and married a second time, and, if there, whether he intended to remain upon the reservation or return to his allotment referred to and care for his first wife and children.

The opinion was expressed in said office letter that it would be well for the agent to correspond with Mrs. Charles Iswald, then in occupancy of the said allotment, and ascertain from her all the facts in her possession in relation to the allotment, its abandonment by the allottee, and her desire to remain thereon and cultivate the same for the use and benefit of herself and children.

The agent was advised that the allotment referred to contained 640 acres and was made to Charles Iswald under the provisions of the Moses agreement, entered into July 7, 1883, and ratified by act of Congress approved July 4, 1884 (23 Stats., 79 and 80), and that the same, with other allotments surveyed for and made to Sar sarp kin and other Indians, was approved by the Acting Secretary of the Interior April 12, 1886.

It was suggested that if the said Charles Iswald intended to remain upon the Colville Reservation and make it his home in the future he should relinquish to the United States his allotment under the said agreement, and the agent was instructed, in the event that the said Indian had so determined, to obtain from him his voluntary relinquishment of his said allotment in order that steps might be taken to allot the lands embraced therein to his wife and children.

The agent was further instructed to make a full report of his action in this matter and forward to this office for its consideration the relinquishment of the allotment mentioned should the Indian execute same.

I am now in receipt of a communication dated January 7, 1894, from the said acting Indian agent, stating that he recently visited the vicinity of Lake Chelan, Washington, and made an effort to see Mrs. Charles Iswald, but that for some reason she failed to be at the place appointed for the meeting (Antoine's house); that he had previously informed her that he desired to confer with her about her husband's claim to the allotment above referred to; that she sent him word by Antoine, a relative, that she would be glad to have the claim for herself and child (only one child now living); that she had not lived on the land for some time and that there were no improvements of any kind on the same.

The said agent further states that he experienced considerable difficulty in finding Charles Iswald under that name; that he claims his correct name is Kis wal a kin; that at Lake Chelan, among Wapato John's people, Iswald is known by the name of Il le acke; that he judges that name would be the best to give his wife in assigning her the allotment, her church name being Rose Marie; that Charles Iswald, now known as Kis wal a kin, lives at present on the Colville Indian Reservation, near Moses Crossing of the Columbia River, with another woman, by whom he has three children; that he states that he does not want his allotment on the old Columbia Reservation, above referred to, and has no intention of ever going back there to live with his former wife, for reasons which the Indian deemed satisfactory to himself.

The agent inclosed the relinquishment of the said Charles Iswald of his allotment No. 20, containing 640 acres, on the Columbia River, in the vicinity of Lake Chelan, State of Washington, granted to him under the provisions of the Moses treaty and act of Congress above referred to, executing same on January 2, 1894, in the presence of John W. Bubb, acting Indian agent of the Colville Agency, and C. R. Bubb, and transferring thereby to the United States all his right, title, and interest in and to the lands embraced therein.

There is given on the sheet embracing the relinquishment a certificate executed by Robert Flett, interpreter, dated January 2, 1894, to the effect that he was present and witnessed the signing of the relinquishment by the said Charles Iswald, and that he clearly explained its nature to him, and is satisfied that he fully understood the same.

The said Moses agreement entered into July 7, 1883, copy of which may be found by reference to page 70 of the Report of the Commissioner of Indian Affairs for the year ending 1883, provided that all Indians belonging to the band of Chief Moses, then living on the Columbia Reservation, in the State of Washington, not removing to the Colville Reservation within two years from the date of said agreement, should be entitled to 640 acres or 1 square mile of land, to each head of a family or male adult, in the possession and ownership of which they should be guaranteed and protected.

On May 1, 1886, the President issued an Executive order, which may be found on page 75 of Executive Orders relating to Indian Reserves, issued prior to April 1, 1890 (copy herewith), to the effect that the tracts of land in then Washington Territory (now State) surveyed for and allotted to Sar sarp kin and other Indians, in accordance with the provisions of the said act of July 4, 1884 (23 Stats., pp. 79 and 80), which allotments were approved by the Acting Secretary of the Interior April 12, 1886, be set apart for the exclusive use and occupation of said Indians.

The allotment referred to and relinquished by the said Charles Iswald is No. 20, which may also be found on page 79 of said Executive Order pamphlet.

The right and title which the said Indian allottee had in the lands described in said allotment No. 20 was that of possession, use, and occupation; and as he has relinquished whatever right and title he had in and to the land referred to, it would seem that the entire title thereto is vested now in the United States; and as he has abandoned his first wife and ceased to provide for her comfort and welfare

and as she desires to retain possession of and use and occupy the said allotment, it would seem that the same should be reserved to her and her child for that purpose.

As the lands embraced within said allotment are reserved by Executive order of date May 1, 1886, above mentioned, it would appear that proper action in the case would be to present the matter to the President for his approval of the reservation for the purpose indicated. This matter, however, is submitted to you for your determination.

I have prepared and inclose herewith a draft of an order reserving the lands referred to for the purpose indicated, which, if you deem executive action necessary, may be forwarded to the President for his approval.

The papers in the case and copy of this report are herewith inclosed.

Very respectfully, your obedient servant,

D. M. BROWNING, *Commissioner.*

The SECRETARY OF THE INTERIOR.

[Inclosure.]

I, Charles Iswald (correct name Kis-wal-a-kin), do hereby relinquish to the United States all my right, title, and interest in and to the land contained under allotment No. 20 (containing 640 acres), on the Columbia River, in the vicinity of Lake Chelan, in the State of Washington, granted to me under the provisions of the "Moses Treaty," entered into July 7, 1883, and ratified by act of Congress approved July 4, 1884.

Done at Colville Indian Agency, Wash., this 2d day of January, A. D. 1894.

CHARLES ISWALD (his x mark).

In the presence of—

JNO. W. BUBB, *Captain, U. S. A., Agent.*

C. R. BUBB.

I, Robert Flett, interpreter, hereby certify on honor that I was present and witnessed the signing of this instrument by the said Charles Iswald; that I fully explained its nature, and am satisfied he fully understands the same.

ROBERT FLETT, *Interpreter.*

COLVILLE AGENCY, WASH., *January 2, 1894.*

DEPARTMENT OF THE INTERIOR,
Washington, February 19, 1894.

The PRESIDENT:

By Executive order of May 1, 1886, the following lands in the Moses Reservation, Washington Territory, were set apart for the exclusive use and occupation of Charles Iswald, a member of said tribe:

"This claim lies about 2 miles in a northeasterly direction from Antoine's claim. It contains no timber, but is mostly fair grazing land, with about 100 acres susceptible of cultivation. No improvements. From pine tree on right bank of Columbia River, blazed on four sides, where rocky spur 200 feet high comes down to near bank, forming narrow pass, from which a blazed pine 36 inches in diameter bears north 177 links distant, run south 13 degrees west (variation 22 degrees east).

"102.25 chains, made stone monument for corner on hillside in view of main trail. Thence run south 5¾ degrees west.

"78.00 chains, made stone monument for corner. Thence south ¼ degree west.

"25.65 chains, made stone monument on bank of Columbia River for corner. Thence with said river to a point of beginning, containing 640 acres of land."

The accompanying letter from the Commissioner of Indian Affairs, dated 25th ultimo, and its inclosures, show that Charles Iswald (Kis wal a kin) abandoned his wife and child some six years ago and moved to the Colville Reservation, Washington, and is now living there with another woman, by whom he has three children, and that, on January 2, 1894, he relinquished his said allotment to the United States.

The wife has made application to the register of the land office at Waterville, Wash., to have the lands in question reserved for her and her child, and the Commissioner is of the opinion that the same should be so reserved.

I have therefore the honor to recommend that the lands set apart by Executive order of May 1, 1886, for the exclusive use and occupation of Charles Iswald, and by him relinquished to the United States, be reserved for the exclusive use and occupa-

tion of Mrs. Charles Iswald, or Rose Marie, and her child, and that said authority be indorsed hereon.

I have the honor to be, very respectfully, your obedient servant,

HOKE SMITH, *Secretary.*

[Indorsement.]

EXECUTIVE MANSION, *March 9, 1894.*

Approved:

GROVER CLEVELAND.

Whereas the records show that on the 28th day of November, 1890, Chelan Bob, (an Indian) filed in the local land office at Waterville, Wash., his application for the NW. ¼, the N. ½ of the SW. ¼, and lots 1, 2, and 3 of sec. 20, T. 27 N., R. 23 E., Willamette meridian, containing 337.60 acres;

That on December 1, 1890, Cultus Jim (an Indian) filed in said local land office his application for the SE. ¼ of the SE. ¼ of sec. 19, the S. ½ of the SW. ¼, and lot 4 of sec. 20 and lots 2 and 3 of sec. 29 of the said township and range, containing 209.40 acres;

That on December 1, 1890, Long Jim (an Indian) filed in said local land office his application for the NE. ¼ of the NE. ¼ of the SE. ¼ and lot 1 of sec. 11, the W. ½ of sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E. Willamette meridian, containing 525.30 acres, under the agreement entered into July 7, 1883, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in then Washington Territory, now State, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats. pp. 79, 80); and

Whereas all of the land filed for by Chelan Bob, all filed for by Cultus Jim except 40 acres, and all filed for by Long Jim except 80 acres was claimed adversely to said Indians by white settlers, as follows:

A. W. La Chapelle, C. H. Abercrombie, Charles A. Barron, Enos B. Peaslee, Harrison Williams, Thomas R. Gibson, Julius Larabee, and Christopher Robinson, who respectively made separate entries of certain tracts of land; and

Whereas the Commissioner of the General Land Office, on July 9, 1892, decided that said Indian applicants are entitled to have allotments of the lands made to them in severalty in the quantities and manner provided in the said agreement of July 7, 1883, and that the right of several white claimants above-named to the lands claimed by them is subordinate and subject to the prior and superior right of said Indians, denying the application of said Robinson, holding for cancellation the filing of said Larabee, and suspending and holding for cancellation the entries of said La Chapelle, Abercrombie, Barron, Peaslee, and Williams in so far as they might include any tract of land which might be allotted by the proper authorities to said Indians, and suspending the entry of said Gibson, to await such action as might be deemed just and proper in the premises; and

Whereas the Secretary of the Interior, on January 6, 1893, affirmed the said decision of the Commissioner of the General Land Office, appeal having been taken to him by the said white entrymen from the decision of that office; and

Whereas the Secretary of the Interior, on September 23, 1893, denied the motion of said white entrymen for a rehearing in the case; and

Whereas, the Commissioner of the General Land Office, on March 20, 1894, canceled on that day on the records of that office the entries made by said white entrymen, as follows:

No. 1157, by A. W. Chapelle, for the NE. ¼ SW. ¼ and lots 3 and 4, sec. 20, lots 2 and 3, sec. 29, T. 27 N., R. 23 E., made March 15, 1889.

No. 1163, by C. H. Abercrombie, for E. ½ NW. ¼ and lots 1 and 2, sec. 20, T. 27 N., R. 23 E., made March 15, 1889.

No. 1513, by Charles A. Barron, for NW. ¼ NW. ¼ sec. 20, SW. ¼ SW. ¼ sec. 17 and S. ½ SE. ¼ sec. 18, T. 27 N., R. 23 E., made July 5, 1890.

No. 1526, by Enos B. Peaslee, for lot 1, NE. ¼ SE. ¼ and S. ½ NE. ¼ sec. 11, T. 27 N., R. 22 E., made July 14, 1890.

No. 1528, by Harrison Williams, for E. ½ SE. ¼ sec. 19 and W. ½ SW. ¼ sec. 20, T. 27 N., R. 23 E., made July 16, 1890.

No. 1586, by Thomas R. Gibson, for E. ½ SW. ¼, NW. ¼ SW. ¼, and SW. ¼ SE. ¼ sec. 12, T. 27 N., R. 22 E., made October 17, 1890.

Christopher Robinson (date and number not given) made homestead application for SW. ¼ SW. ¼ sec. 12, and lots 1, 2, and 3, sec. 13, T. 27 N., R. 22 E.

September 17, 1889, Julius Larabee filed D. S. No. 2326 for NW. ¼ NE. ¼, E. ½ NE. ¼ sec. 19, and SW. ¼ NW. ¼ sec. 20, T. 27 N., R. 23 E., all in the State of Washington, and notified the register and receiver of the Waterville local land office, said State, to make proper annotations on their records:

Now, therefore, I, Hoke Smith, Secretary of the Interior, in accordance with the provisions of the said agreement, ratified and confirmed by the said act of Congress, and under the said decision of the General Land Office, affirmed by the Department, do hereby set apart for the exclusive use and occupation of said Indians the following-described lands, namely:

For Chelan Bob the NW. ¼, N. ½ SW. ¼, and lots 1, 2, and 3 of sec. 20, T. 27 N., R. 23 E., Willamette meridian, containing 337.60 acres;

For Cultus Jim the SE. ¼ SE. ¼ of sec. 19, the S. ½ SW. ¼ and lot 4 of sec. 20, and lots 2 and 3 of sec. 29 of the same township and range, containing 209.40 acres; and

For Long Jim the NE. ¼, NE. ¼ SE. ¼, and lot 1 of sec. 11, W. ½, sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, containing 525.30 acres; all in the State of Washington.

HOKE SMITH, *Secretary.*

APRIL 11, 1894.

The departmental order of April 11, 1894, setting aside certain lands under the Moses agreement concluded July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79–80), for the exclusive use and benefit respectively of the Indians therein named (Chelan Bob, Cultus Jim, and Long Jim), is hereby modified and changed so as to eliminate from the allotment made to Long Jim the following described lands: The E. ½ of the SW. ¼ and NW. ¼ of the SW. ¼ of sec. 12, T. 27 N., R. 22 E., Willamette meridian, Washington, the said lands being embraced in the entry of Thomas R. Gibson, No. 1586, which said entry remains intact upon the records of the General Land Office under Department decision of September 23, 1893, modifying Department decision of January 6, 1893, so as to omit from affirmance that part of General Land Office decision dated July 9, 1892, wherein that office suspended the commuted entry of said Gibson, the allotment to said Indian, Long Jim, as corrected, embracing the following described lands: The NE. ¼ the NE. ¼ of the SE. ¼ and lot 1 of sec. 11, the NW. ¼ and SW. ¼ of the SW. ¼ of sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, Washington.

HOKE SMITH, *Secretary.*

APRIL 20, 1894.

EXECUTIVE MANSION, *January 19, 1895.*

It is hereby ordered that the tract of land embraced in allotment No. 37, located in the State of Washington, made to an Indian named John Salla-Salla, by the Acting Secretary of the Interior, April 12, 1886, under the Moses agreement entered into July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79, 80), lying within the following-described boundaries, viz:

"Commencing at the junction of Johnston Creek and the Okanagan (Okinakane) River; thence by Johnston Creek (variation 22° 15′) south 69° 45′ west 40 chains; built monument of stone on the south bank of Johnston Creek station —; 8° 15′ west 91.54 chains; built monument of basaltic stone, station —; north 69° 45′ east 117.50 chains to the Okanagan (Okinakane) River; set balm stake 4 inches square, 4 feet long, marked Station 3, north 45° 30′ west 86.53 chains to the place of beginning, the mouth of Johnston Creek. Area 630 acres," and set apart by Executive order of May 1, 1886, for the exclusive use and occupation of said allottee, be, and the same is hereby, restored to the public domain, upon the cancellation of said allotment, which is hereby directed.

GROVER CLEVELAND.

COLVILLE RESERVE.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, D. C., April 8, 1872.

SIR: I have the honor to invite your attention to the necessity for the setting apart by Executive order of a tract of country hereinafter described, as a reservation

606 F.3d 698
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff,
v.
CONFEDERATED TRIBES OF the COLVILLE INDIAN RESERVATION, Respondent–Appellee,
and
State of Oregon; State of Washington, Defendants,
v.
Confederated Tribes and Bands of the Yakama Indian Nation, Plaintiff–intervenor–Appellant.
United States of America, Plaintiff–Appellee,
v.
Confederated Tribes of the Colville Indian Reservation, Respondent–Appellant,
and
State of Oregon; State of Washington, Defendants,
v.
Confederated Tribes and Bands of the Yakama Indian Nation, Plaintiff–intervenor–Appellee.

Nos. 08–35961, 08–35963.
|
Argued and Submitted March 2, 2010.
|
Filed May 27, 2010.

Synopsis

Background: United States brought action against states on behalf of Native American tribes to define treaty fishing rights. Confederation of tribes intervened as defendant. The United States District Court for the District of Oregon, Malcolm F. Marsh, Senior District Judge, dismissed confederation's claim on behalf of constituent tribe and confederation appealed. The Court of Appeals, Hug, Circuit Judge, 470 F.3d 809, reversed and remanded. Following remand and trial, the District Court, Garr M. King, J., 2008 WL 3834169, entered findings of fact and conclusions of law regarding joint fishing rights of constituent tribe and plaintiff-intervenor tribe. Plaintiff-intervenor tribe appealed, and confederation cross-appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:

[1] 1894 agreement provided constituent tribe with non-exclusive fishing rights at fishery;

[2] confederation did not relinquish all fishing rights held in fishery when it signed 1894 agreement; and

[3] constituent tribe did not have primary rights at fishery.

Affirmed.

West Headnotes (10)

[1] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general
Federal Courts
Treaty questions in general
Federal Courts
Procedural Matters
Court of Appeals reviews the district court's interpretation of treaties, statutes, and executive orders de novo.
Cases that cite this headnote

[2] **Federal Courts**
"Clearly erroneous" standard of review in general
Federal Courts
Indians and Indian lands
Court of Appeals reviews findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, for clear error.
Cases that cite this headnote

[3] **Indians**
Construction and operation

Treaties, agreements, and executive orders negotiated with Native Americans must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Native Americans' favor.

Cases that cite this headnote

[4] **Indians**
Construction and operation

In determining the sense in which treaties would naturally be understood by Native Americans, the courts look beyond the written words to the larger context that frames the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Cases that cite this headnote

[5] **Indians**
Place or station;off-reservation activity

Native Americans present at negotiations understood 1894 agreement between confederation of tribes and United States as providing constituent tribe with non-exclusive fishing rights at specific fishery, regardless of its purported ambiguity, and thus, under principle that agreement was to be interpreted as Native Americans understood it, agreement secured those fishing rights for constituent tribe; transcripts of relevant negotiations indicated desire to protect tribe's fishing rights on part of all parties.

Cases that cite this headnote

[6] **Indians**
Place or station;off-reservation activity

Confederation of Native American tribes did not relinquish all fishing rights held in specific fishery when it signed 1894 agreement with United States; while agreement may have terminated confederation's right to exclude others from fishing at fishery, as provided for in one article of 1855 treaty, it did not change confederation's non-exclusive usual and accustomed fishing rights at that location, as provided in another article of 1855 treaty.

3 Cases that cite this headnote

[7] **Indians**
Treaties in General

Where a Native American tribe cedes a right through a treaty or agreement, the instrument is not a grant of rights to the tribe, but a grant of rights from them, a reservation of those not granted.

Cases that cite this headnote

[8] **Indians**
Place or station;off-reservation activity

Constituent Native American tribe did not have primary rights at specific fishery, and instead both confederation of tribes and constituent tribe retained non-exclusive fishing rights at fishery; confederation's rights were derived from 1855 treaty with United States, whereas constituent tribe's rights were derived from 1894 agreement, which did not reserve constituent tribe's pre-1855 fishing rights, but rather granted new fishing rights independent of 1855 treaty.

Cases that cite this headnote

[9] **Indians**
Indians and tribes holding rights

A "primary right" is the power to regulate or prohibit fishing by members of other treaty tribes.

1 Cases that cite this headnote

[10] **Indians**
Place or station;off-reservation activity

When two tribes claim "usual and accustomed" fishing rights at the same location under two separate treaties signed with the United States at a common "treaty time," the tribe that controlled the fishing ground at treaty time, to the exclusion of other tribes, enjoys primary rights.

1 Cases that cite this headnote

Attorneys and Law Firms

***700** Thomas Zeilman, Esq., (argued) Law Offices of Thomas Zeilman, Yakima, WA, for plaintiff-intervenor-appellant, Confederated Tribes and Bands of the Yakama Indian Nation.

Robert Lundman, Esq., (argued) United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for plaintiff United States of America.

Donald J. Simon, Esq., (argued) Sonosky Chambers Sachse Endreson & Perry, Washington, D.C., for respondent-appellee Confederated Tribes of the Colville Indian Reservation.

Appeal from the United States District Court for the District of Oregon, Garr M. King, Senior District Judge, Presiding.

Before: RICHARD A. PAEZ, RICHARD C. TALLMAN, and MILAN D. SMITH, JR., Circuit Judges.

Opinion

TALLMAN, Circuit Judge:

This appeal is the latest chapter in the saga of Pacific Northwest Native American treaty fishing rights; a saga that has spanned many generations and over forty years of federal litigation. If history is our guide, it will not be the last chapter written. After a 2006 remand from this court, the district court conducted a trial primarily based on expert anthropological opinions, century-old documents, and reliable hearsay. The Confederated Tribes and Bands of the Yakama Indian Nation ***701** ("Yakama") appeal, and the Confederated Tribes of the Colville Indian Reservation ("Colville") cross-appeal on behalf of their Wenatchi Constituent Tribe ("Wenatchi"), the district court's finding that they share joint fishing rights at the "Wenatshapam Fishery" on Icicle Creek—a tributary to the Wenatchee River which flows into the Columbia River—under an 1894 agreement between the United States and the Yakama. We have jurisdiction pursuant to 28 U.S.C. § 1291.

For over a century—as the result of broken and forgotten promises—the Wenatchi's fishing rights at their aboriginal home and fishing station have been in doubt. We hold that the district court's ruling is supported by historical evidence establishing that it was the intent of the 1894 negotiators to grant the Wenatchi fishing rights at Wenatshapam, that the Yakama did not sell all of their fishing rights at Wenatshapam, and that both tribes' fishing rights are non-exclusive. We therefore affirm the judgment of the district court.

I

A

Before the arrival of Anglo–American settlers, the Wenatshapam Fishery was the aboriginal salmon fishing ground of the Wenatchi.[1] More than any other place, the Wenatshapam Fishery was the hub around which the Wenatchi's cycle of life rotated. The center of the Wenatshapam Fishery was the confluence of Icicle Creek and the Wenatchee River in north central Washington State near the modern-day town of Leavenworth.

In 1855, the United States began "a hasty effort to clear land occupied by Indians for development by settlers" in Washington Territory. *United States v. Oregon,* 29 F.3d 481, 484 (9th Cir.1994) ("*Oregon I* "), *as amended,* 43 F.3d 1284 (9th Cir.1994). Territorial Governor Isaac Stevens, "under pressure to extinguish Indian title to all lands, consolidated small tribes or bands into larger tribal entities for the purposes of the treaties." *Id.* "The Wenatchi Tribe was one of the fourteen tribes represented at the negotiation of the Yakama Treaty. The treaty specified that tribes for the purposes of this treaty, are to be considered as one nation, under the name of Yakama."[2] *United States v. Oregon,* 470 F.3d 809, 811(9th Cir.2006) ("*Oregon II* ") (quoting Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1855) [hereinafter 1855 Treaty]) (internal quotation marks omitted).

Under the 1855 Treaty "the tribes gave up most of their lands in return for a specific reservation with set boundaries." *Oregon II,* 470 F.3d at 811. The land for the reservation was subsequently surveyed and "set apart as

provided in the treaty." *Id.* With regard to fishing rights, Article III of the Treaty provided,

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of ***702** taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

1855 Treaty at 953. In addition, tribal leader Kamiakin —the spokesman for the fourteen tribes that would constitute the Yakama Nation—insisted on a reservation at Wenatshapam "where the Indians take many fish." This was done at the request of—among others—the Wenatchi leader Tecolekun. Accordingly, Article X of the 1855 Treaty set aside a second reservation, providing,

> That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Id. at 954.

B

Despite the promise made in Article X of the 1855 Treaty, "no attempt was made by the United States to survey the six-square-mile reservation for almost forty years. The Wenatchi remained at this Wenatshapam Fishery Reservation and fished there during this time, firmly believing that a survey would be made and they would be secure in this reservation." *Oregon II,* 470 F.3d at 811.

The Wenatchee Valley remained difficult to reach by settlers for much of the late 1800s, but by 1892, the Great Northern Railroad reached the area, laying tracks up the Wenatchee River and through the Wenatshapam Fishery —which had never been taken out of the public domain— to Leavenworth, a townsite developed by the railroad.

In July 1892, Yakama Reservation Indian Agent Jay Lynch contacted the Commissioner of Indian Affairs, D.M. Browning, inquiring as to whether or not the Wenatshapam Fishery Reservation had "ever been definitely located and what disposition ha[d] ever been made of it, if any." Letter of July 11, 1892, from Jay Lynch to Comm'r of Indian Affairs, *reprinted in* S. Exec. Doc. No. 67 at 5 (1894)[hereinafter Senate Doc. 67]. As a result of this letter, the Acting Secretary of the Interior, William H. Sims, authorized a survey of the reservation in 1893. Senate Doc. 67 at 6–7. However, before the survey commenced, Agent Lynch was removed from his post.

The survey went forward, slowly setting out an area at the confluence of the Wenatchee River and Icicle Creek. *Oregon II,* 470 F.3d at 812. This prompted several settlers in the Wenatchee Valley to complain that "to form a new reservation across this valley from mountain to mountain, as is proposed, it not only embraces the Great Northern Railway, but many settlers." Senate Doc. 67 at 8. Commissioner Browning responded,

> In reply you are advised that the Wenatchee is not established as a *new reservation,* but as the fulfillment of a treaty obligation, which had been heretofore overlooked or neglected by the Government since the ratification of the Yakima treaty in 1869. It is now as much Indian land as the Yakima Indian Reservation itself, the only difference being that the one had distinct boundaries named and described in the treaty, while the ***703** other was referred to as a tract of land not exceeding in quantity

> one township of 6 miles square, situated at the forks of the Pisquause or Wenatchapam River, which the Government stipulated and agreed should be surveyed and marked out whenever the President might direct. This was not done until last fall when the President ordered the survey and the location of this tract, which is now being made.

Id. Commissioner Browning suggested that the settlers petition the President to enter into negotiations with "the Indians" for the purchase of the Article X reservation, which they did. *Id.*

Before the survey could be completed, "the newly appointed Yakima Indian Agent, Lewis T. Erwin, ordered [the surveyor] to stop the surveying and [to] destroy all the monuments and trees that had markings. Instead, he directed the surveyor to survey an area some distance away in the mountains next to a lake, but not near the river." *Oregon II,* 470 F.3d at 812. Shortly thereafter, settler James H. Chase, Esq., contacted Commissioner Browning. Significantly, he observed,

> I am convinced there are quite a number of Indians old in years who were born and have always lived on the Wenatchee River, and on the very land which they now claim should be the reservation, and who at the time helped build and owned a part in all the fisheries on the Wenatchee River....

Senate Doc. 67 at 11. He concluded, "There is no doubt in my mind but what the intention was to secure the reserve to the Indians who owned the fisheries and that while the contract or treaty of 1855 mentioned the Yakimas it really intended to give the land to the Indians who owned the fisheries...." *Id.* at 11–12.

Once former Agent Lynch learned that the proposed location of the Wenatshapam Fishery Reservation had now been moved far above the confluence, he wrote a letter decrying "a great injustice done to the Yakima Indians by reason of a recent survey of the boundary line of a reservation ... known as the Wenatchapam fishery." *Id.* at 20. In the letter he quoted an "old Indian" who protested,

> Does our Great Father at Washington think a salmon is an eagle that lives on top of a mountain, or does he think a salmon is a deer that lives in the woods and hills, or does he think a salmon is a mountain goat that lives among the rocks of the snow covered mountains?
>
> Tell our Great Father the Indian does not care for the little trout in the lake, but wants the salmon that lives in the rocky places in the river where the Indian can find him. Our fishery is in the river where you saw it, and was destroyed by white men and the Indians driven away. We want our fishery in the river where Governor Stephens gave it to us a long time ago.

Id.

Secretary Sims subsequently authorized Commissioner Browning to enter into negotiations to purchase the Wenatshapam reservation, specifically noting, "It seems from letters submitted with your communication that there are Indians other than the Yakimas living in the neighborhood of this reservation who have, or claim, some rights therein. The rights of such Indians in land or fishing privileges should be taken into consideration and protected." *Id.* at 15.

On October 13, 1893, Commissioner Browning authorized Agent Erwin to enter into negotiations. *Id.* He reiterated Secretary Sims' observation that "Indians other than the Yakimas" were living at Wenatshapam and the Secretary's express instruction that "the rights of such Indians ***704** in lands or fishing privileges should be taken into consideration and protected." *Id.* at 16. He also instructed Agent Erwin to take great care in recording the proceedings, which prompted the agent in 1893 to hire a stenographer to produce a transcript of the negotiations. The district court heavily relied on that transcript in rendering its factual findings supporting the decision we review here.

C

Agent Erwin convened a tribal council at the Yakama Reservation on December 18, 1893, to open negotiations for the purchase of the Article X reservation. *Id.* at 24. Four Wenatchi leaders, including Chief John Harmelt,

made the 150 mile journey from Wenatshapam to attend. Agent Erwin began the negotiations by reading Commissioner Browning's letter offering to purchase the land, but promising not to deprive "the Indians" of the use of the fisheries. *Id.*

Agent Erwin proposed that the council sell the incorrectly located mountain reservation and that the Wenatchi take allotments in the Wenatchee Valley where they resided. *Id.* Importantly, he stated, "I have something further that I want to say about the fishery privilege and that is that even if you should agree to sell, the Department says that you shall have the lawful use of the fisheries in common with the white people." *Id.*

Chief Harmelt did not initially agree to the sale. He stated, "I myself alone have heard what you said; and if all the Indians over at Wenatchee would hear what you said, then they would decide on this land. I think those people out [ought] to know about this matter, then let the decision come afterwards." *Id.* at 30 (alteration in original). Chief Harmelt suggested he return to Wenatshapam to inform the Wenatchi of the proposal. *Id.* After the Yakama proposed a price of $1.50 per acre, however, Chief Harmelt stated, "I am well satisfied between you two. Whatever they ask for the land that is my same price." *Id.* at 32.

On December 20, 1893, Special Agent John Lane informed the council that he would telegraph the Department of the Interior to see if the price was agreeable, and would reconvene the council when he received a reply. He then stated, "If the Wenatchee Indians are not here then we will send a letter over there to notify them of the condition of affairs." *Id.* The council adjourned. *Id.* The Wenatchi representatives returned to their homes.

The agents reconvened the council at the Yakama Reservation on January 6, 1894, without Wenatchi representatives present. *Id.* at 33. The agents rejected the Yakama proposal of $1.50 per acre and proposed a lump sum of "$10,000 or $15,000." *Id.* Yakama members protested the fact that the Wenatchi were not present. Charley Skummit said,

> I will not sell this piece of land away from the Wenatchee Indians that owns the land. We all heard what you said when these Indians said they would sell; you said you would allot them other lands. These Wenatchee Indians said they wanted land where they lived. It was the land of his fathers and he wanted to stay there.... We are having another council here to-day and I feel that I have no right to take this land away from the Indians because they are the right owners of it.

Id. Agent Erwin promised in reply, "Just what we said to those Wenatchee Indians we will carry out." *Id.*

Tom Simpson, speaking for the Yakama, then counter-offered, "All the headmen agree to finishing this matter up .... We ***705** will relinquish all our rights to the Wenatshapam fishery for $20,000...." *Id.* at 34.

D

The 1894 Agreement was ultimately signed by 246 members of the Yakama Nation in person, and seven by proxy. *Id.* at 3. In relevant part, the agreement provided,

> Article I.
>
> The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of [,] in, and to all their right of fishery, as set forth in article 10 of said treaty aforesaid, and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.
>
> Article II.
>
> In consideration of the foregoing cession and relinquishment the United States hereby agrees to pay or expend through their Indian Agent, Yakima Agency, twenty thousand dollars, which said sum is to be deposited in a United States depository for their use and benefit as soon as approved by Congress, and subject to their order, the Indians reserving the right to dispose of said money as they may decide in general council to be held by them and for that purpose. After

> the ratification of this agreement by Congress and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law. [3]

Agreement with the Yakama Nation of Indians in Washington, Act of Aug. 15, 1894, ch. 290, § 13, 28 Stat. 320, 320–21 (1894) [hereinafter 1894 Agreement].

Despite the promise in the 1894 Agreement to provide allotments to the members of the Wenatchi still living at the fishery, "the government again failed to fulfill its promise, as it never made the allotments available to the Wenatchi." *Oregon II,* 470 F.3d at 813. "The Wenatchi remained and fished on their aboriginal lands at the Wenatshapam Fishery until they were moved by the federal government in 1902 and 1903 to the Colville Reservation." *Id.* at 811. Chief Harmelt never enrolled at the Colville Reservation, located some 150 miles east of Wenatshapam, although he attended several Wenatchi enrollment hearings. He continued to reside in the Wenatchee Valley and advocated for Wenatchi rights at Wenatshapam by traveling to Washington, D.C., twice before his death.

II

A

"The United States initiated the underlying litigation in 1968 on behalf of certain Indian tribes in Oregon and against the State of Oregon to define, at least in part, the Indians' treaty rights to take fish at 'all usual and accustomed places' on the Columbia River and its tributaries." *Oregon I,* 29 F.3d at 482–83(citing *Sohappy v. Smith,* 302 F.Supp. 899, 903–04 (D.Or.1969)).

Originally, four tribes asserted treaty fishing rights: The Yakama Indian Nation, ***706** The Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, The Confederated Tribes of the Umatilla Reservation, and The Nez Perce Tribe of Idaho. *Id.* at 483. In 1969, the district court ruled that the tribes were entitled to treaty rights providing them a "fair share" of the Columbia River salmon. *Sohappy,* 302 F.Supp. at 911.

In 1974 and 1983, the states of Washington and Idaho intervened. *Oregon I,* 29 F.3d at 483. In 1988, the District of Oregon adopted a "comprehensive fish management plan." *Id.*

In 1989, the Colville sought to intervene on behalf of five constituent tribes that they maintained were parties to the Yakama Treaty of 1855: the Wenatchi, the Entiat, the Chelan, the Columbia, and the Palus. *Id.* Colville has never "explained why it waited over twenty years after *United States v. Oregon* was initiated and why it did not seek to intervene while the district court was considering the comprehensive management plan adopted in 1988." *Id.* "After considering voluminous exhibits, stipulations and evidence presented during a three-day court trial, the district court denied Colville's intervention motion, finding that Colville could not assert treaty fishing rights reserved to its constituent tribes." *Id.* at 482.

In 1994, we affirmed the district court's denial of Colville's motion to intervene and as a result foreclosed the Wenatchi from exercising 1855 Treaty fishing rights at the Wenatshapam Fishery. *See id.* at 486. We reasoned, "[r]ights under a treaty vest with the tribe at the time of the signing of the treaty," *id.* at 484(citing *United States v. Washington,* 384 F.Supp. 312 (W.D.Wash.1974) (Boldt, J.), *aff'd,* 520 F.2d 676, 692 (9th Cir.1975) ("*Washington I* "), *cert. denied,* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976)), but "Indians later asserting treaty rights must establish that their group has preserved its tribal status," *Oregon I,* 29 F.3d at 484(citing *United States v. Washington,* 641 F.2d 1368, 1372–73 (9th Cir.1981) ("*Washington II* "), *cert. denied,* 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982)).

We ruled that the constituent tribes—including the Wenatchi—had not "maintained political cohesion with the tribal entities created by the [1855] treaties and receiving fishing rights." *Oregon I,* 29 F.3d at 485. We relied upon the district court's factual "findings relating to the history of the bands who [sought] to trace their cultural and political lineage to the tribes that signed the 1855 treaty," and we concluded that "the tribes, prior to being subsumed in the Colville Confederacy, were separate bands who disengaged from the Yakima Nation by refusing to relocate to the reservation established by the 1855 treaty." *Id.* at 486.

We subsequently amended our opinion to note that the "[f]ailure to move onto [a] reservation is not the determinative factor in deciding whether a group has retained treaty rights." *United States v. Oregon*, 43 F.3d 1284 (9th Cir.1994). Instead, we reasoned, "it is only one consideration relevant to an essentially factual inquiry—*i.e.*, whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe." *Id.*

B

Throughout this litigation, whether they were permitted or not by the terms of any treaty, descendants of the Wenatchi have fished at their aboriginal Wenatshapam Fishery. In 2003, the Yakama Nation sought and obtained an injunction preventing these Wenatchi from fishing at Wenatshapam. The Wenatchi opposed the injunction by arguing that they had the right ***707** to fish at Wenatshapam under the 1894 Agreement. The district court concluded res judicata prevented the Wenatchi from asserting this claim. The Wenatchi appealed.

In 2006 we reversed, concluding, "Through unfulfilled promises and procedural rulings, [the Wenatchi] would, under [the district court's] ruling, lose both the land they were guaranteed adjacent to the fishery and their fishing rights." *Oregon II*, 470 F.3d at 813. We further reasoned,

> The 1894 Agreement was not set forth as an amendment to the 1855 Treaty. Rather, it was an agreement for the sale of the Wenatshapam Fishery that had been given to the tribes of the Yakama Nation by the 1855 Treaty, with specific benefits being reserved for the Wenatchi Tribe, which had continued to reside and fish there.

Id. at 816. We then held, "Colville is not precluded by res judicata from asserting the claim of the Wenatchi Tribe to fishing rights at the Wenatshapam Fishery based on the 1894 Agreement." *Id.* at 818. We remanded for a trial on the merits to determine fishing rights under that agreement. *Id.*

C

Following a three-day bench trial primarily relying on expert testimony and the transcript of the 1893 and 1894 negotiations, both parties submitted extensive post-trial briefing. The United States also filed a post-trial brief addressing only one issue: the government argued that the 1894 Agreement did not in any way limit Yakama from taking fish at usual and accustomed places under Article III of the 1855 Treaty. The United States took no position on whether the Wenatshapam Fishery is a usual and accustomed fishing place of the Yakama, or whether the Wenatchi obtained fishing rights at Wenatshapam under the 1894 Agreement. The district court found,

> The events leading up to the 1894 Agreement, and the negotiations themselves, demonstrate that Yakama tribal members were concerned about protecting the Wenatchi right to the fishery. As a result, the agents promised Yakama that the government would provide fishing rights and land to the Wenatchi in exchange for the sale of the Article X reservation.

United States v. Oregon, No. 68–513–KI, 2008 WL 3834169, at *12 (D.Or. Aug.13, 2008). It cited the letter exchange between the Secretary of the Interior, the Commissioner of Indian Affairs, Agent Erwin, Special Agent Lane, and the settlers living at Wenatshapam, as well as the statements made during the negotiations, as evidencing a conscious effort to protect Wenatchi fishing rights at the Wenatshapam Fishery. *Id.*

The court found the evidence "establishes an agreement that the Wenatchi were to have the right to fish at the Wenatshapam Fishery." *Id.* at *14. It reasoned that the Yakama are entitled to usual and accustomed Article III fishing rights at Wenatshapam under the 1855 Treaty, because the tribe only sold its exclusive on-reservation fishing rights at that location. *Id.* at *18. Finally, the court determined that Wenatchi fishing rights at Wenatshapam are not superior to those of the Yakama, but are instead of the same character. *Id.* at *22. In effect, the district court's ruling formally recognized that the Wenatchi have the legal right to fish at their aboriginal home and fishing station.

Yakama now argues that the district court erred in finding an "implied agreement" to provide the Wenatchi with fishing rights at Wenatshapam. On cross-appeal, the Wenatchi argue the district court ***708** erred in finding that Yakama has fishing rights at Wenatshapam, and, in the alternative, erred in failing to find Wenatchi fishing rights superior to Yakama fishing rights.

III

[1] **[2]** We review the district court's interpretation of treaties, statutes, and executive orders *de novo*. *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir.2000). "Findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, are reviewed for clear error." *Id.* at 1072–73. "We therefore review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions. We then review *de novo* whether the district court reached the proper conclusion as to the meaning of the [1894 Agreement] given those findings." *United States v. Washington*, 157 F.3d 630, 642 (9th Cir.1998).

IV

A

As a preliminary matter, we consider whether our analysis should be limited to the four corners of the 1894 Agreement itself—as Yakama suggests—or whether we should also consider the document introduced in the Senate prior to ratification that contains the transcript of the negotiations and the letters exchanged regarding the agreement. *See* Senate Doc. 67.

The 1894 Agreement contains two articles relevant to our inquiry. As we noted in our 2006 opinion,

> Both provisions appear to be ambiguous in light of the context in which the agreement took place, the statements of the parties concerning the meaning of the terms of the agreement, and the recognition that this was an agreement drafted by the Government to reflect the understanding of the Indians, who had a lesser familiarity with the legal technicalities involved.

Oregon II, 470 F.3d at 817.

The Supreme Court has repeatedly instructed us that when interpreting a treaty or agreement between the United States and Native Americans, it must always be borne in mind,

> that the negotiations for the treaty [were] conducted, on the part of the United States ... by representatives skilled in diplomacy ..., understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty [was] drawn up by them and in their own language; that the Indians, on the other hand ... [were] wholly unfamiliar with all the forms of [Anglo–American] legal expression, and whose only knowledge of the terms in which the treaty [was] framed [was] that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899). With regard to treaties negotiated between the United States and the Yakama, we have observed, "[t]he inadequacy of the treaties is further exacerbated by the fact that the Indians signing the treaties generally did not speak English, and the Indian argot into which the treaty provisions were translated was inadequate to convey the meaning of the treaties." *Oregon I*, 29 F.3d at 484 (citing *Washington I*, 520 F.2d at 683).

***709** **[3]** The Supreme Court "has often held that treaties with the Indians must be interpreted as they would

have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970) (internal citation omitted). This principle has been applied to treaties, agreements, and executive orders negotiated with Native Americans. *See United States v. Washington*, 235 F.3d 438, 442 (9th Cir.2000) (noting that the "time-honored principle that ambiguities in agreements and treaties with Native Americans are to be resolved from the native standpoint ... extends to executive orders").

[4] In determining the sense in which treaties would naturally be understood by Native Americans, the Supreme Court has looked "beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943)); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351–52, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (considering the "manner in which the transaction was negotiated," the "negotiations themselves," and the "tenor of legislative Reports presented to Congress" (internal quotation marks omitted)); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (considering "the face of the Act, the surrounding circumstances, and the legislative history" (internal quotation and citation omitted)).

The 1894 Agreement is silent as to the Wenatchi's fishing rights. As previously noted, "[b]oth provisions [of the 1894 Agreement] appear to be ambiguous." *Oregon II*, 470 F.3d at 817. Given the 1894 Agreement's ambiguity as to the fishing rights of the Wenatchi and the Supreme Court's direction to construe Native American treaties in the "sense in which they would naturally be understood by" the Native Americans, we consider the transcript of the agreement negotiations in order to ascertain how those present at the council understood the agreement. *Jones*, 175 U.S. at 11, 20 S.Ct. 1.

B

[5] The district court found that the Native Americans present at the negotiations understood the 1894 Agreement as providing the Wenatchi with non-exclusive fishing rights at Wenatshapam. The record supports that finding.

The Wenatchi and Yakama disagree as to whether the district court's determination is a finding of fact reviewed for clear error, or a conclusion of law reviewed *de novo*. A finding as to what a negotiator understood involves the same kind of factual analysis as a finding of intent —including for example the consideration of the events leading up to a negotiation, statements made during a negotiation, and the overall context of the negotiation —which is entitled to deferential clear error review. See *Idaho*, 210 F.3d at 1072–73. We accordingly review for clear error the district court's findings as to the understanding of the Native Americans present at the negotiations. [4]

The transcript of the 1893 and 1894 negotiations is helpful in discerning the ***710** motivations and understandings of those present. It is evident from the transcript that, as the district court found, the Yakama were concerned about protecting Wenatchi rights over Wenatshapam. Captain Eneas, a Yakama, said,

> I am not going over to my friends house and throw him off his place and tell him I would get rich and fat off of his place. It is for the Government to treat these Wenatchee Indians right. You talk to these Wenatchee Indians and ask them what they want for that land, but not the Yakimas.

Senate Doc. 67 at 25. Joe Stwire, a Yakama, said, "There are [four] men here from Wenatchee. Whatever the [four] men from Wenatchee decide, the Yakimas will decide as soon as we know what they say." *Id.* at 26. Thomas Simpson said, "It is true you all know that I am not fit to talk about the Wenatchee lands. My desire is not to throw the Wenatchee out of this land so that I may fill up myself out of it." *Id.* at 28.

In addition, the transcript reveals a desire on the part of the United States to negotiate not only with the Yakama, but with the Wenatchi as well. Agent Erwin specifically addressed Chief Harmelt and asked, "Can we arrive at

any agreement by which your lands are to be allotted to you and you relinquish your claims in the Wenatshapam fishery for ten or fifteen thousand dollars?" *Id.* at 25. The agents also expressed to both parties—in accordance with their instructions from Commissioner Browning—that the rights of the Wenatchi in their land and fishery were to be protected. Agent Erwin explicitly stated,

> There is one thing I want to impress on these Indians from the Wenatchee, and this is that they are not to be robbed of an acre of land, but on the contrary, the Government proposes to give them land where they now are. The selling of this fishery does not interfere with their rights at all.

Id. at 15. Agent Erwin repeatedly read the letter from Commissioner Browning and Secretary Sims providing that the "rights of such Indians [living near Wenatshapam] in land or fishing privileges should be taken into consideration and protected." *Id.* Most importantly, Agent Erwin promised, "you shall have the lawful use of the fisheries in common with the white people." *Id.* at 28.

Finally, the district court correctly observed that after the agents reconvened the negotiations in January 1894 without the Wenatchi present, the Yakama were hesitant to consummate an agreement. Charley Skummit said, "We are having another council here to-day and I feel that I have no right to take this land away from the [Wenatchi] Indians because they are the right owners of it." *Id.* at 33. When the Yakama were uncomfortable proceeding without the Wenatchi, Agent Erwin reassured them, stating, "Just what we said to those Wenatchee Indians we will carry out." *Id.* Only then did the Yakama agree to sell their rights in the Article X reservation.

In sum, the Yakama instructed the agents, "It is for the Government to treat these Wenatchee Indians right," *id.* at 25, Agent Erwin promised the Wenatchi, "you shall have the lawful use of the fisheries in common with the white people," *id.* at 28, and the Yakama would only agree to the sale after Agent Erwin reiterated his promises to the Wenatchi. Based on this record, the district court correctly held that the evidence establishes the Native Americans present at the negotiations understood the 1894 Agreement to provide the Wenatchi with the right to fish at their aboriginal home and fishing station—the Wenatshapam Fishery—as consideration ***711** for the Yakama's sale of the Article X reservation.

Although the written 1894 Agreement is ambiguous as to the fishing rights of the Wenatchi, agreements "with the Indians must be interpreted as they would have understood them," and applying that principle, we must interpret the 1894 Agreement as securing the non-exclusive rights of the Wenatchi to fish at Wenatshapam. [5] *Choctaw Nation,* 397 U.S. at 631, 90 S.Ct. 1328; *see also Iowa Tribe of Indians v. United States,* 68 Ct.Cl. 585, 17 (1929) ("[T]he evidence taken in connection with the circumstances of the case clearly establishes the existence of an agreement, the terms of which are not expressed in the written contract.").

C

[6] On cross-appeal, the Wenatchi do not challenge the district court's conclusion that Wenatshapam can be considered a "usual and accustomed" fishing station of the Yakama under Article III of the 1855 Treaty. Instead, the Wenatchi contend that—from 1855 to 1894—the only fishing rights the Yakama possessed at Wenatshapam were exclusive on-reservation fishing rights through Article X of the 1855 Treaty, and that when the Yakama signed the 1894 Agreement ceding "all their right of fishery, as set forth in article 10," they relinquished every fishing right they possessed at Wenatshapam. We disagree.

1

The Wenatchi correctly note that Yakama derives all of its fishing rights at Wenatshapam from Article III of the 1855 Treaty. Contrary to the Wenatchi's assertions, however, that Article reserved to the Yakama two distinct fishing rights at Wenatshapam.

First, the Yakama had the "exclusive right of taking fish in all the streams, where running through or bordering" reservations. 1855 Treaty at 953. This Article III right entitled the Yakama to exclusive fishing rights at the reservation established in Article X. Second, the Yakama had the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Id.* This Article III right entitled the Yakama to an in-common

share of fish at all usual and accustomed fishing stations. The exclusive Article III fishing right depended on the existence of the Article X reservation, whereas the non-exclusive fishing right existed independently of Article X and depended on whether or not Wenatshapam could be considered a "usual and accustomed" fishing ground.

Evidence in the record indicates that two 1855 Treaty signatory tribes—the Wenatchi and the Kittitas—customarily fished at Wenatshapam both at and before treaty time. It is well established that,

> every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

Washington I, 384 F.Supp. at 332. As the Yakama Nation communally possesses the fishing rights of the Kittitas, *see Oregon I,* 29 F.3d at 484, Wenatshapam can be considered ***712** a usual and accustomed fishing ground of the Yakama for the purposes of Article III fishing rights.

The Wenatchi's argument—that from 1855 to 1894, the only fishing rights that Yakama possessed at Wenatshapam were exclusive Article III fishing rights dependent on the existence of the Article X reservation—presupposes that a tribe cannot possess both exclusive fishing rights and in-common usual and accustomed fishing rights at the same location, at the same time. When the Yakama entered the 1893 negotiations, the Wenatchi argue, any cession of their exclusive right to fish at Wenatshapam would have constituted a cession of all their rights to fish at Wenatshapam, as they were incapable of reserving a distinct non-exclusive fishing right that could not exist "at the same time" as their exclusive right.

While we recognize that the existence of both exclusive and non-exclusive fishing rights at the same location, at the same time, could be construed as redundant or unnecessary, we cannot conclude that the Yakama's reservation of an exclusive Article III right to fish at Wenatshapam renders inoperable their separate and distinct reservation of a non-exclusive Article III right to fish at the same location. One need only consider the present scenario—in which the Yakama subsequently ceded their exclusive right to fish at Wenatshapam—in order to ascertain the utility of reserving such a separate and distinct non-exclusive fishing right.

Ultimately, we need not—and do not—resolve the question inherent to Wenatchi's presupposition, because whether or not Yakama possessed both exclusive and non-exclusive Article III rights at Wenatshapam "at the same time," we agree with the district court's conclusion that non-exclusive fishing rights can and do exist on former reservations. Indeed, courts have observed that a tribe's fishing rights on a former reservation "cannot be exclusive when that reservation no longer exists, but such fishing must be 'in common with' non-treaty right fishermen." *Washington I,* 384 F.Supp. at 339. That is, once an 1855 Treaty tribe sells a reservation—and with it the exclusive right to fish at that location—it is free to exercise non-exclusive fishing rights at its usual and accustomed fishing grounds pursuant to Article III, absent an agreement to extinguish those rights. *See id.; see also Mille Lacs Band of Chippewa Indians,* 526 U.S. at 200–01, 119 S.Ct. 1187(holding that non-exclusive usufructuary rights survived the sale of a reservation where the instrument terminating the reservation was silent as to those rights).

The cession of a reservation does not change the fact that the rivers, streams, and lakes on the reservation may have been where a tribe "customarily fished from time to time at and before treaty times." *Washington I,* 384 F.Supp. at 332. It follows that while the 1894 Agreement's provision for the sale of the Article X reservation may have terminated Yakama's right to exclude others from fishing there, the Agreement did not change Yakama's non-exclusive Article III usual and accustomed fishing rights at that location unless it expressly provided for a cession of those rights.

2

No such provision exists in the 1894 Agreement. Yakama's cession—with regard to fishing rights—is limited to its rights under Article X of the 1855 Treaty. Article I of the 1894 Agreement provides,

> The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of [,] in, and to all their right of fishery, as set ***713** forth in article 10 of said treaty aforesaid and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.

1894 Agreement at 320. The Yakama therefore expressly sold "all their right of fishery, *as set forth in article 10* " of the 1855 Treaty. *Id.* (emphasis added). The Agreement does not implicate or extinguish the Yakama's non-exclusive Article III fishing rights under the 1855 Treaty, but rather references fishing rights derived from Article X. *See id.* As the only Yakama fishing rights derived from Article X are exclusive rights under Article III, those are the only rights Yakama ceded.

Nevertheless, the Wenatchi would have us interpret the language ceding Yakama's "right, title, interest, claim, or demand of, in, and to said land above described" as impliedly ceding Yakama's on-reservation fishing rights. The Wenatchi argue that such an interpretation would render the qualifying language "as set forth in article 10 of said treaty aforesaid" mere surplusage if it were construed as limiting the cession of fishing rights to on-reservation rights—a disfavored reading. *See United States v. Bendtzen,* 542 F.3d 722, 727(9th Cir.2008) ("legislative enactments should not be construed to render their provisions mere surplusage" (citation and internal quotation omitted)). The Wentachi therefore urge us to view the language "as set forth in article 10" as a description of the location of the fishery instead of a limitation on the fishing rights sold by the Yakama.

We decline to adopt such a strained interpretation. A plain reading of the language, "and to all their right of fishery, as set forth in article 10 of said treaty aforesaid," indicates that the qualifying language, "as set forth in article 10," identifies what "right of fishery" is being ceded, not the location of the fishery itself. The only right of fishery derived from Article X is an exclusive right pursuant to Article III. The Wenatchi's suggestion that we employ the rule of construction disfavoring surplusage depends on an implied cession of fishing rights supplementing the plainly worded express cession, which contravenes our obligation to refrain from interpreting the agreement "according to the technical meaning of its words to learned lawyers." *Jones,* 175 U.S. at 11, 20 S.Ct. 1.

We must interpret the words of the 1894 Agreement "in the sense in which they would naturally be understood by the Indians." *Id.* We cannot conclude that the Native Americans present throughout the negotiations would somehow discern an implied cession of exclusive on-reservation fishing rights accompanying their cession of land, therefore rendering their separate express cession of "all their right of fishery" a cession of non-exclusive Article III fishing rights at their usual and accustomed fishing places, despite the qualifying language, "as set forth in article 10." We instead reason that the language, "all their right of fishery, as set forth in article 10," does not implicate the Yakama's non-exclusive Article III rights.

[7] Where a Native American tribe cedes a right through a treaty or agreement, courts must be mindful that the instrument is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans,* 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The 1894 Agreement sold all exclusive fishing rights reserved by the Yakama through the establishment of the Article X reservation. However, because the Yakama did not agree to sell their non-exclusive Article III fishing rights—as evidenced by the transcript of the negotiations and the 1894 ***714** Agreement itself-the Yakama reserved them. *See id.*

We accordingly decline to construe the 1894 Agreement as ceding the Yakama's non-exclusive Article III fishing rights at Wenatshapam. *See Choctaw Nation,* 397 U.S. at 631, 90 S.Ct. 1328.

D

[8] **[9]** **[10]** The Wenatchi argue that, should we conclude the Yakama retain non-exclusive fishing rights at Wenatshapam, Wenatchi fishing rights should be "primary" rights. "A primary right is the power to regulate or prohibit fishing by members of other treaty tribes." *United States v. Skokomish Indian Tribe,* 764 F.2d 670, 671 (9th Cir.1985). We have held that when two tribes claim

"usual and accustomed" fishing rights at the same location under two separate treaties signed with the United States at a common "treaty time," the tribe that controlled the fishing ground at treaty time—to the exclusion of other tribes—enjoys primary rights there. *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143(9th Cir.1981). We conclude the Wenatchi do not have primary rights at Wenatshapam because we find the "primary" rights analysis contained in *Skokomish Indian Tribe* and *Lower Elwha* inapplicable to the present dispute.

Our cases addressing primary fishing rights have analyzed pre-treaty "control" over a fishing ground because the treaties in those cases were intended to preserve fishing rights as they existed at and before "treaty time." *See Skokomish Indian Tribe*, 764 F.2d at 671("The treaties reserved to the signatory tribes their pre-treaty fishing rights in relation to one another."); *Lower Elwha*, 642 F.2d at 1144 ("[T]he tribes reasonably understood themselves to be retaining no more and no less of a right vis-a-vis one another than they possessed prior to the treaty."). Thus, if one tribe had the right to exclude another tribe from fishing at a particular fishing ground at "treaty time," the applicable treaty reserved that "primary" right. *Skokomish Indian Tribe*, 764 F.2d at 673; *Lower Elwha*, 642 F.2d at 1144.

Importantly, *Lower Elwha* determined fishing rights arising under two treaties signed at virtually the same time. 642 F.2d at 1142. The Elwha Indians signed the Treaty of Point No Point on January 26, 1855, and the Makah Indians signed the Treaty with the Makah five days later on January 31, 1855. *Id.* When both tribes claimed the same location as a usual and accustomed fishing station under treaties signed at the same "treaty time," we considered four factors to determine which tribe controlled the location "at treaty time." [6] *Id.*

In *Skokomish Indian Tribe*, we applied the same analysis to determine fishing rights between two tribes that also signed treaties with the United States in 1855. 764 F.2d at 673. Here, however, the Wenatchi's fishing rights exist pursuant to the 1894 Agreement and the Yakama's rights exist pursuant to the 1855 Treaty. Thus, unlike in *Lower Elwha* and *Skokomish Indian Tribe*, we are presented with a treaty and an agreement signed almost forty years apart. As a result, there is no ***715** common "treaty time" at which to determine control over Wenatshapam.

Moreover, the 1894 Agreement did not reserve the pre–1855 Treaty fishing rights of the Wenatchi, but instead granted them new fishing rights independent of the 1855 Treaty. *See Oregon II*, 470 F.3d at 816("The 1894 Agreement was not set forth as an amendment to the 1855 Treaty."). While the Wenatchi's traditional presence at Wenatshapam undoubtedly played a large part in the decisions of the Yakama and the United States to convey these rights, the conveyance itself was not a preservation of fishing rights as they existed in 1855. Whether or not the Wenatchi can establish that they controlled Wenatshapam in 1855, they do not have 1855 Treaty fishing rights. *See Oregon I*, 29 F.3d at 486. We therefore conclude the Wenatchi do not have primary fishing rights at Wenatshapam. [7]

V

In sum, both the Yakama and the Wenatchi retain non-exclusive federal fishing rights at Wenatshapam. Article III of the 1855 Treaty reserves to the Yakama the right of taking fish at Wenatshapam "in common with citizens of the Territory." 1855 Treaty at 953. In 1894, as consideration for Yakama's sale of the Article X reservation, the United States promised—and conveyed to —the Wenatchi the right of taking fish at Wenatshapam "in common with the white people" and assured them of their right to fish at Wenatshapam "in common with the white people of the State." Senate Doc. 67 at 28. We accordingly construe the 1855 Treaty and the 1894 Agreement as conferring on the parties similar non-exclusive fishing rights at Wenatshapam that they share "in common with" non-treaty and non-agreement fishermen.

AFFIRMED.

All Citations

606 F.3d 698, 10 Cal. Daily Op. Serv. 6629, 2010 Daily Journal D.A.R. 7865

Footnotes

1 The Wenatchi have also been referred to as "Wenatchee" and "Wenatshapam Indians." The facts recited in this opinion are adopted from our prior opinions addressing this dispute or adopted from the district court's findings of fact, which we hold to be plausible in light of the record viewed in its entirety and not clearly erroneous. *See Husain v. Olympic Airways,* 316 F.3d 829, 835 (9th Cir.2002).

2 The spelling of the name was changed from "Yakima" to "Yakama" in 1994 to reflect the native pronunciation. "Yakama" is used in this opinion, except where historical accuracy requires that "Yakima" be used.

3 "The Wenatshapam Indians referred to in the 1894 Agreement are the same as the Wenatchi Indians." *Oregon II,* 470 F.3d at 813 n. 4.

4 We add, however, that even reviewing the record *de novo,* we would reach the same conclusion as the district court.

5 Because we interpret the negotiations in conjunction with the 1894 Agreement as providing the Wenatchi with fishing rights at Wenatshapam, we decline to address Colville's argument that the provision of allotments in the agreement carried with it an implied promise of fishing rights.

6 Four factors were presented by an expert witness to determine "whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers, (2) frequency of use and relative importance to the tribe, (3) contemporary conceptions of control or territory, and (4) evidence of behavior consistent with control." *Lower Elwha,* 642 F.2d at 1143 n. 4. We subsequently noted that our opinion in *Lower Elwha* did not consider these factors "a rigid formula or test, but rather, indicated they were useful as an analytical tool." *Skokomish Indian Tribe,* 764 F.2d at 673.

7 We note that, were the Wenatchi able to establish they controlled Wenatshapam at "treaty time," applying the primary rights analysis would potentially prejudice their present fishing rights. We have held that the Wenatchi do not possess 1855 Treaty fishing rights, and that the "treaty time" fishing rights of all 1855 Treaty signatories—including the Wenatchi—vested in the Yakama Nation at the time of signing the treaty. *See Oregon I,* 29 F.3d at 486. If the Wenatchi were able to demonstrate that they controlled Wenatshapam in 1855, their primary rights would theoretically be vested in the Yakama Nation through the 1855 Treaty. *See id.; Lower Elwha,* 642 F.2d at 1143. The Yakama could then exclude the Wenatchi from fishing at Wenatshapam using the very rights gained as a result of the Wenatchi's aboriginal control of the fishery. *See Oregon I,* 29 F.3d at 486. The possibility of such an inequitable result further persuades us that the primary rights analysis is inapplicable to the present dispute.

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95 S.Ct. 944
Supreme Court of the United States

Alexander J. ANTOINE et ux., Appellants,
v.
State of WASHINGTON.

No. 73—717.
|
Argued Dec. 16, 1974.
|
Decided Feb. 19, 1975.

Indians were convicted before the Superior Court, Ferry County, Washington, of hunting and possession of deer during closed season in violation of state statutes and they appealed. The Supreme Court of Washington, 82 Wash.2d 440, 511 P.2d 1351, affirmed and probable jurisdiction was noted. The Supreme Court, Mr. Justice Brennan, held that supremacy clause precluded application of state game laws to Indians hunting in area ceded to the United States by an agreement which was executed by the Executive Branch and Indian tribe, which was ratified and implemented by Congress and which provided that rights of Indians to hunt and fish on the ceded land in common with other persons would not be taken away or abridged, even though state was not a party to the agreement and Congress had abolished 'contract by treaty' method of dealing with Indian tribes prior to execution of the agreement.

Reversed and remanded.

Mr. Justice Douglas concurred specially and filed opinion.

Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Justice Stewart joined.

West Headnotes (9)

[1] **Indians**
Purpose and construction
Indians
Construction and operation

Wording of treaties and statutes ratifying agreements with Indians is not to be construed to their prejudice.

20 Cases that cite this headnote

[2] **Indians**
Hunting, Fishing, and Similar Rights
Indians
Fishing Rights

Statute enacted to "carry into effect" agreement by which Indian tribe ceded land to the United States and which provided that Indians' rights to hunt and fish in common with others on the ceded land would not be taken away or abridged and subsequent statutes "ratifying the agreement" constituted ratification by Congress of the agreement. Act July 1, 1892, 27 Stat. 62; Act June 21, 1906, 34 Stat. 377.

5 Cases that cite this headnote

[3] **Indians**
Treaties in General
Indians
State regulation

Legislative ratification of an agreement between Executive Branch and an Indian tribe is a "[Law] of the United States... made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is binding upon affected states by the supremacy clause. U.S.C.A.Const. art. 2, § 2, cl. 2; art. 6, cl. 2.

13 Cases that cite this headnote

[4] **Indians**
State regulation in general
Indians
State regulation in general

Supremacy clause rendered agreement, which was executed by Indian tribe and Executive Branch, which ceded portion of Indian reservation to the United States and which provided that Indians' rights to hunt and fish

Attachment: 5

on the ceded land would not be taken away or abridged, binding upon state which was not a party to the agreement and precluded application of state game laws to Indians hunting on the ceded area, even though ratification of agreement had been effected by legislation passed by House and Senate rather than by concurrence of two-thirds of the Senate, and Congress had abolished "contract by treaty" method of dealing with Indian tribes prior to execution of the agreement. RCWA 37.12.060, 77.16.020, 77.16.030; Act Mar. 28, 1867, 15 Stat. 7; Act Aug. 19, 1890, 26 Stat. 355; Act July 1, 1892, 27 Stat. 62; Act June 21, 1906, 34 Stat. 377; U.S.C.A.Const. art. 2, § 2, cl. 2; art. 6, cl. 2; 25 U.S.C.A. § 71.

31 Cases that cite this headnote

[5] **Indians**
Authority over and regulation of tribes in general
Indians
Construction and operation

Statute abrogating "contract by treaty" method of dealing with Indian tribes did not affect Congress' plenary powers to legislate on problems of Indians or to legislatively ratify contracts which had been executed by Executive Branch with Indian tribes and to which affected states were not parties. 25 U.S.C.A. § 71.

10 Cases that cite this headnote

[6] **Indians**
State regulation in general

State game laws were inapplicable to Indian beneficiaries of agreement by which Indian tribe ceded portion of reservation to the United States even though federal statutes ratifying the agreement made no reference to provision of the agreement that Indians' right to hunt and fish in the ceded area would not be taken away or abridged, as no congressional purpose to subject preserved right to state regulation was to be found and state qualification of the rights was, therefore, precluded by force of the supremacy clause. RCWA 37.12.060, 77.16.020, 77.16.030; Act Mar. 28, 1867, 15 Stat. 7; Act Aug. 19, 1890, 26 Stat. 355; Act July 1, 1892, 27 Stat. 62; Act June 21, 1906, 34 Stat. 377; U.S.C.A.Const. art. 2, § 2, cl. 2, art. 6, cl. 2; 25 U.S.C.A. § 71.

9 Cases that cite this headnote

[7] **Indians**
State regulation in general
Indians
State regulation in general

Provision of agreement whereby Indian tribe ceded portion of Indian reservation to the United States that Indians' rights to hunt and fish in common with all other persons on the lands ceded would not be taken away or abridged was not merely a promise by the United States that Indians would be allowed to hunt on the land only so long as it retained the land and allowed others to hunt thereon but exempted Indians from state control of hunting rights in the ceded area. RCWA 77.16.020, 77.16.030.

6 Cases that cite this headnote

[8] **Indians**
State regulation in general

Non-Indians were not beneficiaries of hunting and fishing rights and preserved in agreement by which Indian tribe ceded land to the United States and state, therefore, remained free to regulate non-Indian hunting and fishing in the ceded area.

9 Cases that cite this headnote

[9] **Indians**
State regulation in general

For state regulation affecting Indian hunting rights to be valid, state must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to Indians is necessary in the interest of conservation.

37 Cases that cite this headnote

**945 Syllabus [*]

*194 Appellant Indians were convicted of state statutory game violations that had allegedly been committed in an area of a former Indian reservation that the tribe had ceded to the Government by an Agreement made in 1891, later ratified and implemented by Congress, one of whose provisions (Art. 6), relied upon as a defense by appellants, specified that the hunting rights of Indians in common with other persons would not be taken away or abridged. The State Supreme Court, upholding the lower court's rejection of appellants' defense, held that Congress was not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract, to which as here the State was not a party between the Executive Branch and an Indian tribe; that in any event the federal implementing statutes (which did not mention Art. 6) did not render the State's game laws inapplicable to the Indian beneficiaries of the Agreement; and that Art. 6 was merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians also would be permitted to hunt there. Held:

1. The ratifying legislation must be construed in the light of the longstanding canon of construction that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. Pp. 948—949.

2. The Supremacy Clause precludes application of the state game laws here since the federal statutes ratifying the 1891 Agreement between the Executive Branch and the Indian tribe are 'Laws **946 of the United States . . . made in Pursuance' of the Constitution and therefore like all 'Treaties made' are made binding upon affected States. Nor does the fact that Congress had abolished the contract-by-treaty method of dealing with Indian tribes affect Congress' power to legislate on the problems of Indians, including legislation ratifying contracts between the Executive Branch with Indian tribes to which affected States were not parties. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; Perrin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691. Pp. 948—950.

3. In ratifying the Agreement pursuant to its plenary constitutional powers Congress manifested no purpose of subjecting the *195 rights conferred upon the Indians to state regulation, and in view of the unqualified ratification of Art. 6 any state qualification of those rights is precluded by the Supremacy Clause. Pp. 950—951.

4. Although the State is free to regulate non-Indian hunting rights in the ceded area, the ratifying legislation must be construed to exempt the Indians from like state control or Congress would have preserved nothing that the Indians would not have had without the legislation, which would have been 'an impotent outcome to (the) negotiations.' United States v. Winans, 198 U.S. 371, 380, 25 S.Ct. 662, 49 L.Ed. 1089. Pp. 951—952.

82 Wash.2d 440, 511 P.2d 1351, reversed and remanded.

Attorneys and Law Firms

Mason D. Morisset, Seattle, Wash., for appellants.

Joseph Lawrence Coniff, Jr., Olympia, Wash., for appellee.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians. They were convicted in the Superior Court of the State of Washington [1] of the offenses of hunting and possession *196 of deer during closed season in violation of Wash.Rev.Code ss 77.16.020 and 77.16.030 (1974). [2] The offenses occurred on September 11, 1971, in Ferry County on unallotted non-Indian land in what was once the north half of the Colville Indian Reservation. [3] The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted Agreement, dated May 9, 1891. Article 6 of that ratified Agreement provided expressly that 'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall **947 not be taken away or in anywise abridged.' [4] Appellants' defense was that congressional *197 approval of Art. 6 excluded from the cession and retained and preserved for the Confederated Tribes the exclusive, absolute, and

unrestricted rights to hunt and fish that had been part of the Indians' larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application to them of Wash.Rev.Code ss 77.16.020 and 77.16.030. The Supreme Court of Washington held that the Superior Court had properly rejected this defense and affirmed the convictions, 82 Wash.2d 440, 511 P.2d 1351 (1973). We noted probable jurisdiction, 417 U.S. 966, 94 S.Ct. 3169, 41 L.Ed.2d 1137 (1974). We reverse.

I

President Grant established the original Colville Indian Reservation by Executive Order of July 2, 1872. Washington became a State in 1889, 26 Stat. 1552, and the next year, by the Act of Aug. 19, 1890, 26 Stat. 355, Congress created the Commission that negotiated the 1891 Agreement.[5] By its terms, the Tribes ceded the ***198** northern half of the reservation in return for benefits which included the stipulations of Art. 6 and the promise of the United States to pay $1,500,000 in five installments. The Agreement was to become effective, however, only 'from and after its approval by Congress.' Congressional approval was given in a series of statutes. The first statute was the Act of July 1, 1892, 27 Stat. 62, which 'vacated and restored (the tract) to the public domain . . .,' and 'open(ed) . . . (it) to settlement . . ..' The second statute came 14 years later, the Act of June 21, 1906, 34 Stat. 325, 377—378. That statute in terms 'carr(ied) into effect the agreement,' and authorized the appropriation of the $1,500,000. Payment of the $1,500,000 was effected by five subsequent enactments from 1907 to 1911, each of which appropriated $300,000 and recited in substantially identical language that it was part payment 'to the Indians on the Colville Reservation, Washington, for the cession of land opened to settlement by the Act of July first, eighteen hundred and ninety-two . . . being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act of June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one . . ..' (Emphasis supplied.) 34 Stat. 1015, 1050—1051 (1907); 35 Stat. 70, 96 (1908); 35 Stat. 781, 813 (1909); 36 ****948** Stat. 269, 286 (1910); 36 Stat. 1058, 1075 (1911).[6]

***199** **[1]** **[2]** The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832). See also Kansas Indians, 5 Wall. 737, 760, 18 L.Ed. 667 (1867); ***200** United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); Choctaw Nation v. United States, 119 U.S. 1, 28, 7 S.Ct. 75, 30 L.Ed. 306 (1886); United States v. Winans, 198 U.S. 371, 380—381, 25 S.Ct. 662, 663—664, 49 L.Ed. 1089 (1905); Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 50 L.Ed. 941 (1912); Menominee Tribe v. United States, 391 U.S. 404, 406 n. 2, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968). In Choate v. Trapp, supra, also a case involving a ratifying statute, the Court stated: 'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.' 224 U.S., at 675, 32 S.Ct. at 569. See also Seminole Nation v. United States, 316 U.S. 286, 296, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942); Morton v. Ruiz, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974). Thus, even if there were doubt, and there is none, that the words '(t)o carry into effect the (1891) agreement,' in the 1906 Act, and the words 'ratifying the (1891) agreement,' in the 1907—1911 laws, ratified Art. 6, application of this canon would require that we construe the series of statutes as having ratified that article.

II

[3] **[4]** Although admitted to statehood two years earlier, the State of Washington was not a party to the 1891 Agreement. The opinion of the State Supreme Court relies upon that fact to attempt a distinction for purposes of the Supremacy Clause[7] between the binding ****949** result upon ***201** the State of ratification of a contract by treaty effected by concurrence of two-thirds of the Senate, Art. II, s 2, cl. 2, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. The opinion states that '(o)nce ratified, a treaty becomes the supreme law of the land' (emphasis supplied), but that the ratified 1891 Agreement was a mere contract enforceable 'only against those party to it,' and 'not a treaty . . . (and) not the supreme law of the land.' 82 Wash.2d, at 444, 451, 511 P.2d, at 1354, 1358. The grounds of this attempted distinction do not clearly emerge from the opinion. The opinion states, however:

'The statutes enacted by Congress in implementation of this (1891) agreement . . . are the supreme law if they are within the power of the Congress to enact . . ..' Id., at 451, 511 P.2d at 1358. In the context of the discussion in the opinion we take this to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a '(Law) of the United States . . . made in Pursuance' of the Constitution and, therefore, like 'all Treaties made,' is made binding upon affected States by the Supremacy Clause.

The opinion seems to find support for the attempted distinction in the fact that, in 1891, the Executive Branch was not authorized to contract by treaty with Indian tribes as sovereign and independent nations. Id., at 444, 511 P.2d, at 1354. Twenty years earlier, in 1871, 16 Stat. 544, 566, Congress had forbidden thereafter recognition of Indian nations and tribes as sovereign independent nations, and thus had abrogated the contract-by-treaty ***202** method of dealing with Indian tribes.[8] The Act of 1871 resulted from the opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians 'by and with the Advice and Consent of the Senate,' Art. II, s 2, cl. 2. Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing 'all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes,' Act of Mar. 29, 1867, 15 Stat. 7, 9, but this was repealed a few months later, Act of July 20, 1867, 15 Stat. 18. After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties. United States Department of the Interior, Federal Indian Law 211 (1958). Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871. Federal Indian Law, supra, at 138.[9]

***203** ****950** **[5]** This meant no more, however, that that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty. Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884); In re Heff, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905). The change in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court have long settled that proposition. In Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 50 L.Ed. 941 (1912), the Court held that tax exemptions contained in an 1897 agreement ratified by Congress between the United States and Indian tribes as part of a cession of Indian lands were enforceable against the State of Oklahoma, which was not a party to the agreement. In Perrin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), the Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement. The Court expressly rejected the contention that the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State. Rather, because Congress was empowered, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, 'it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme.' Id., at 483, 34 S.Ct., at 389. See also ***204** Dick v. United States, 208 U.S. 340, 28 S.Ct. 399, 52 L.Ed. 520 (1908). These decisions sustained the ratified agreements as the exercise by Congress of its 'plenary power . . . to deal with the special problems of Indians (that) is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation.' Morton v. Mancari, 417 U.S. 535, 551—552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); see also Morton v. Ruiz, 415 U.S., at 236, 94 S.Ct., at 1075, 39 L.Ed.2d 270.

Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land. Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the terms and conditions in the 1891 Agreement, even if that Agreement had never been made. Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The decisions in Choate, Perrin, and Dick, supra, settle that Congress, by its legislation ratifying the

1891 Agreement, constituted those provisions, including Art. 6, 'Laws of the United States . . . made in Pursuance' of the Constitution, and the supreme law of the land, 'superior and paramount to the authority of any State within whose limits are Indian tribes.' Dick v. United States, supra, at 353, 28 S.Ct., at 403. [10]

III

[6] The opinion of the State Supreme Court also holds that in any event ****951** the implementing statutes cannot be ***205** construed to render Wash.Rev.Code ss 77.16.020 and 77.16.030 inapplicable to Indian beneficiaries of the Agreement since the implementing statutes 'make no reference to the provision (Art. 6) relied upon by the appellants.' 82 Wash.2d, at 451, 511 P.2d, at 1358. The opinion reasons: '(I)f it was thought that state regulation but not federal regulation would constitute an abridgement, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained.' Id., at 448, 511 P.2d, at 1357. This reasoning is fatally flawed. The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly appellants acquired such rights. Congress exercised its plenary constitutional powers to legislate those federally protected rights into law in enacting the implementing statutes that ratified the Agreement. No congressional purpose to subject the preserved rights to state regulation is to be found in the Acts or their legislative history. Rather, the implementing statutes unqualifiedly, 'carr(ied) into effect' and 'ratif(ied)' the explicit and unqualified provision of Art. 6 that 'the right to hunt and fish . . . shall not be taken away or in anywise abridged.' State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result.

IV

[7] **[8]** Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to ***206** hunt there. 82 Wash.2d, at 449—450, 511 P.2d, at 1357—1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed 'in common with all other persons,' does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing. The ratifying legislation must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For consistency with the canon that the wording is not to be construed to the prejudice of the Indians makes it implementing Acts as 'an impotent out-congressional expression, to construe the implementing acts as 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.' United States v. Winans, 198 U.S., at 380; 25 S.Ct., at 664, 49 L.Ed. 1089; Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 397—398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968). Winans involved a treaty that reserved to the Indians in the area ceded to the United States 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.' 198 U.S., at 378, 25 S.Ct. at 663. Puyallup I considered a provision that '(t)he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . ..' 391 U.S., at 395, 88 S.Ct., at 1726. The Court held that rights so preserved 'may, of course, not be qualified by the State . . ..' Id., at 398, 88 S.Ct., at 1728; 198 U.S., at 384, 25 S.Ct. 662. Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right 'shall not be taken away or in anywise abridged.'

***207** V

[9] In Puyallup I, supra, at 398, 88 S.Ct., at 1728, we held that although, these rights 'may . . . ****952** not be qualified by the State, . . . the manner of fishing (and hunting), the size of the take, the restriction of commercial fishing (and hunting), and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.' The 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and

necessary conservation measure, Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); Tulee v. Washington, 315 U.S. 681, 684, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942), and that its application to the Indians is necessary in the interest of conservation.

The United States as amicus curiae invites the Court to announce that state restrictions 'cannot abridge the Indians' federally protected rights without (the State's) demonstrating a compelling need' in the interest of conservation. Brief for United States as Amicus Curiae 16. We have no occasion in this case to address this question. The State of Washington has not argued, let alone established, that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer. See Hunt v. United States, 278 U.S. 96, 49 S.Ct. 38, 73 L.Ed. 200 (1928). [11]

***208** The judgment of the Supreme Court of the State of Washington sustaining appellants' convictions is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Mr. Justice DOUGLAS, concurring.

I agree with the opinion of the Court that Congress ratified the cession Agreement together with all the rights secured by the Indians, thus putting the Agreement under the umbrella of the Supremacy Clause.

In 1872 President Grant, by Executive Order, [1] established a reservation for Indian tribes which came to be known as the Colville Confederated Tribes. By the Act of Aug. 19, 1890, [2] a Commission was appointed by the President to negotiate with the Tribes for 'the cession of such portion of said reservation as said Indians may be willing to dispose of . . ..' On May 9, 1891, the Commission entered into an Agreement with the Tribes by which the latter ceded to the United States 'all their right, title, claim and interest in' a tract of land constituting approximately the northern half of the reservation. Article 6 of the Agreement, however, provided that 'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.' (Italics added.)

In 1892 the Congress passed an Act restoring the northern tract to the public domain and opening it to settlement. [3] The Agreement had promised the Indians ***209** payment of $1,500,000 in cash by installments. The 1892 Act made no reference to this promise or to the rights to fish and hunt. Therefore there ****953** was agitation for further action by Congress. In 1906 and succeeding years, Congress eventually acted, authorizing and appropriating the money in five installments. [4] Each Act is essentially the same, appropriating the sum of $300,000:

'In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by (the 1892 Act), . . . being a part of the full sum set aside . . . in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one . . ..' [5] (Italics added.)

The Agreement and its ratification were made after the practice of making treaties with Indian tribes ended. [6] Yet 'the Laws of the United States' as well as 'all Treaties' are covered by the Supremacy Clause of the Constitution, Art. VI, cl. 2. We so held recently in ***210** Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). And see Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 50 L.Ed. 941 (1912); Perrin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914).

The pressures on Congress to live up to its Agreement were great and are discussed in S.Rep.No.2561, 59th Cong., 1st Sess., 134—140 (1906). Would Congress stand by the 'Agreement' of 1891? The head of the Commission that negotiated the Agreement with the Indians was Mark A. Fullerton, who in 1904 was Chief Justice of the Supreme Court of Washington. He stated his views:

'I can not understand why the right of the Indians to this land is not just as sacred as it would have been had it been awarded to them under the most solemn treaty. When they entered upon the reservation they gave up forever land to which they had title as absolute as any band of Indians ever had to any land; and even though the exchange was a forced one, yet exchange it was, and

the Government was, under its promise, as I believe, in all honor and right bound to respect it as an exchange and protect the Indians in their title accordingly. Legally, therefore, I can see no difference between the rights of these Indians to compensation for the land taken and the rights of the Puyallup, the Wyakimas, and the Nez Perces to the lands on their reservations which the Government has taken, and which the right to compensation was not even questioned; and, morally, certainly it would be hard to make a distinction.

'It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not ***211** to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling of bitterness ****954** when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation.'[7]

The 'right to hunt and fish in common with all other persons on lands not allotted to said Indians' plainly covers land ceded and held as public lands and also land ceded and taken up by homesteaders, for the reservation of the 'right' contains no exception. As to all such lands the 1891 Agreement seems clear—the hunting and fishing right 'shall not be taken away or in anywise abridged.' As the Solicitor General says, that is 'strong language.' It has long been settled that a grant of rights—in the first case, fishing rights—on an equal footing with citizens of the United States would not be construed as a grant only of such rights as other inhabitants had. As stated in United States v. Winans, 198 U.S. 371, 380, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); 'This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more.' That was our view in Puyallup Tribe v. Department of Game, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968). A 'right' which the Federal Government grants an Indian may 'not be qualified or conditioned by the State,' Id., at 399, 88 S.Ct., at 1729.

I agree with the Court that conservation measures, applicable to all, are available to the State, id., at 398—403, 88 S.Ct., at 1728—1730, but discrimination against the Indians by conservation measures is not permissible, Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 48, 94 S.Ct. 330, 333, 38 L.Ed.2d 254 (1973). In any event no conservation interest has been tendered here. ***212** The record in this case is devoid of any findings as to conservation needs or conservation methods. The State boldly claims that its power to exact a hunting license from all hunters qualifies even the Indians' right to hunt granted by Congress, irrespective of any conservation need. A State may do that when it comes to non-Indians or to Indians with no federal hunting rights, Lacoste v. Department of Conservation, 263 U.S. 545, 549, 44 S.Ct. 186, 187, 68 L.Ed. 437 (1924). But Indians with federal hunting 'rights' are quite different.

An effort is made to restrict these hunting rights to public lands, not to tracts ceded by this Agreement and taken up by private parties. The Agreement, however, speaks only of the ceded tract, not the ultimate disposition of the several parts of it. We would strain hard to find an implied exception for parcels in the ceded tract that ended in private ownership. The general rule of construction governing contracts or agreements with Indians is apt here:

'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . ..' Choate v. Trapp, 224 U.S., at 675, 32 S.Ct., at 569.

Whether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached. We have here only an issue involving the power of a State to impose a regulatory restraint upon a right which Congress bestowed on these Indians. Such an assertion of state power must fall by reason of the Supremacy Clause.

***213** Mr. Justice REHNQUIST, with whom Mr. Justice STEWART joins, dissenting.

I do not agree with the Court's conclusion, ante, at 947, that '(c)ongressional ****955** approval was given' to the provisions of Art. 6 of the Agreement of May 9, 1891.

The Supremacy Clause of the Constitution specifies both 'Laws' and 'Treaties' as enactments which are the supreme law of the land,' any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' If the game laws enacted by the State of Washington, containing customary provisions respecting seasons in which deer may be hunted, are invalid under the Supremacy Clause, they must be so by virtue of either a treaty or a law enacted by Congress. Concededly the Agreement of 1891, between Commissioners appointed by the President and members of the Colville Confederated Tribes was not a treaty; it was not intended to be such, and Congress had explicitly provided 20 years earlier that Indian tribes were not to be considered as independent nations with which the United States could deal under the treaty power. Washington's game laws, therefore, can only be invalid by reason of some law enacted by Congress.

The Court's opinion refers us to the Act of Congress of June 21, 1906, which authorized monetary compensation to the Colvilles for the termination of the northern half of their reservation, and to a series of appropriation measures enacted during the following five years. There is, however, not one syllable in any of these Acts about Indian hunting or fishing rights, and it is fair to say that a member of Congress voting for or against them would not have had the remotest idea, even from the most careful of readings, that they would preserve Indian hunting and fishing rights. But because the language in the Act of 1906 states that it was enacted for the purpose of ***214** 'carrying out' the Agreement of 1891, and because language in subsequent appropriations Acts described the Act of 1906 as 'ratifying' the Agreement of 1891, the Court concludes that Congress enacted as substantive law all 12 articles of the agreement.

The Court relies on three earner decisions of this Court as settling the proposition that Congress could legislatively ratify the 1891 Agreement, and that once accomplished, the 'legislation ratifying the 1891 Agreement, constituted those provisions . . . 'Laws of the United States . . . in Pursuance' of the Constitution, and the supreme law of the land.' Ante, at 950. Congress could undoubtedly have enacted the provisions of the 1891 Agreement, but the critical question is whether it did so. Far from supporting the result reached by the Court in this case, the decisions of this Court in Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912), Perrin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), and Dick v. United States, 208 U,.s. 340, 28 S.Ct. 399, 52 L.Ed. 520 (1908), show instead how virtually devoid of support in either precedent or reason that result is.

Each of those cases did involve an agreement negotiated between Commissioners representing the United States and Indian bands and tribes. Each of the agreements was held to have been ratified by Congress, and its substantive provisions to have thereby been made law. But the contrast with the manner in which Congress accomplished ratification in those cases, and the manner in which it acted in this case, is great indeed.

Choate involved the Atoka Agreement negotiated between the Dawes Commission and Choctaw and Chickasaw representatives in 1897. The following year, Congress enacted the Curtis Act, 30 Stat. 495, the relevant provisions of s 29 of which are as follows:
'That the agreement made by the Commission to the Five Civilized Tribes with commissions representing ***215** the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed . . ..' 30 Stat. 505.

****956** The section then proceeds to set out in haec verba the full text of the Atoka Agreement.

Perrin v. United States, supra, involved the sale of liquor on ceded land, contrary to a prohibition contained in the cession agreement negotiated with the Sioux Indians in December 1892. That agreement was ratified by Congress in an Act of Aug. 15, 1894, 28 Stat. 286, 314, in which Congress used much the same method as it had employed in Choate:

> 'Sec. 12. The following agreement, made by . . . is hereby accepted, ratified, and confirmed.'

Then followed, within the text of the Act of Congress itself, the articles of agreement in haec verba. Likewise ratification of the agreement involved in Dick, supra, was accomplished by explicit statutory language and in haec verba incorporation of the articles of agreement.

The Court today treats the Act of June 21, 1906, as simply another one of these instances in which Congress exercised its power to elevate mere agreements into the supreme law of the land. But it has done so with little attention to the

critical issue, that of whether Congress actually exercised this power. Whereas the exercise was manifest in Choate, Perrin, and Dick, it is evidenced in the present case by nothing more than little scraps of language, ambiguous at best, in several Acts of Congress which contain not a word of the language of Art. 6 of the 1891 Agreement. I think consideration of all of the legislative materials, including the actual language used by Congress on the occasions when it spoke, rather than the elided excerpts relied upon by the Court, show that there was no ratification of Art. 6.

***216** The original Colville Reservation was created by Executive Order in 1872. It consisted of over three million acres lying between the Okanogan and Columbia Rivers in the northern part of the State of Washington. In 1890 Congress created a Commission to 'negotiate with said Colville and other bands of Indians on said reservation for the cession of such portion of said reservation as said Indians may be willing to dispose of, that the same may be open to white settlement.' 26 Stat. 336, 355. The following year Commissioners appointed by the President met with representatives of the Colville Confederated Tribes. The Agreement of May 9, 1891, was executed to 'go into effect from and after its approval by Congress.'

Article 1 of the Agreement provided that the northern half of the Colville Reservation, as it existed under the Executive Order of 1872, should be vacated. Article 5 provided that 'in consideration of the cession surrender and relinquishment to the United States' of the northern half of the reservation, the United States would pay to the members of the tribe the sum of $1,500,000. Article 6, quoted in the opinion of the Court, contained provisions respecting tax exemption and Indian hunting and fishing rights.

The Agreement was presented to the 52d Congress for ratification, but that body adamantly refused to approve it. The characterization in the Court's opinion of the Act of July 1, 1892, 27 Stat. 62, as the 'first' in a series of statutes in which congressional approval was given to the Agreement of May 9, 1891, is a bit of historical legerdemain. Doubts were expressed as to whether the Indians had title to the reservation, since it had been created by Executive order, thus again highlighting disagreement between the Executive and Legislative Branches as to how best to deal with the Indian tribes.

***217** The Act of July 1, 1892, vacated the northern half of the Colville Reservation, as it had been established by President Grant, 'notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians,' and declared that 'the same shall be ****957** open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.' 27 Stat 63. Section 4 of the Act tracked Art. 2 of the agreement, providing that each Indian then residing on the ceded portion of the reservation should be entitled to select 80 acres of the ceded land to be allotted to him in severalty. Section 5 of the Act tracked Art. 3 of the agreement, providing that Indians then residing in the ceded portion of the reservation should have a right to occupy and reside on its remaining parts, if they chose that in preference to receiving an allotment. Section 6 of the Act tracked Art. 4 of the agreement, and concerned various school and mill sites within the ceded portion.

But conspicuous by their absence from the Act of July 1, 1892, were any provision for the payment of the $1,500,000, and any reference whatsoever to the Agreement's provisions dealing with hunting and fishing rights and immunity from taxation. Far from being the 'first' of a series of Acts ratifying the entirety of the 1891 agreement, the Act provided, in s 8:
'That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation, whether that hereby restored to the public domain or that still reversed by the Government for their use and occupancy.' 27 Stat. 64.

The Act of July 1, 1892, became law without the signature ***218** of President Harrison. Members of the Colville Federated Tribes became justifiably alarmed that it had terminated the northern half of the reservation without authorizing the compensation for which they had bargained. After a 14-year campaign, described in detail in the report of Butler and Vale v. United States, 43 Ct.Cl. 497 (1908), they obtained congressional relief. But the relief embodied in the statutes enacted in 1906 and subsequent years did not amount to a full adoption and ratification of the 1891 Agreement. Rather, the description of the efforts to obtain relief, as well as the legislation which resulted, demonstrates that the Indians

were concerned only with the compensation promised by the 1891 agreement, and not with whatever ancillary rights were accorded by its Art. 6.

The following excerpts from the Court of Claims opinion, which would appear to have the added authenticity that is given by contemporaneity, describe some of the events:
'In pursuance of the (1891) agreement the lands so ceded were by act of Congress thrown open to public settlement; but no appropriation of money was made, and that part of the agreement providing for its payment was never complied with until the passage of the act of June 21, 1906. The Indians became anxious and, justly, quite solicitous. Their appeals to the Congress subsequent to their agreement was met in 1892 by an adverse report from the Senate Committee on Indian Affairs, in which their right to compensation as per agreement was directly challenged by a most positive denial of their title to the lands in question.

'In May, 1894, the said Colville Indians entered into a contract with Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorneys and ***219** counselors at law, by the terms of which the said attorneys were to prosecute their said claim against the United States and receive as compensation therefor 15 per cent of whatever amount they might recover. . . . Nothing was accomplished for the Indians under the Maish-Gordon contract. Notwithstanding its expiration, however, a number of attorneys claim to have rendered efficient services and to have accomplished, by the permission and authority of the Congress and the committees thereof, the final compliance with the agreement of 1891 and ****958** secured by the act of June 21, 1906, an appropriation covering the money consideration mentioned in said agreement.' 43 Ct.Cl., at 514—515 (emphasis added).

The agreement which formed the basis of the suit in Butler and Vale was, as just described, entered into between the Colvilles and two attorneys whom they retained to press their claim. It, too, recites that the Indians' concern was directed to the Government's failure to compensate them for the northern half of the reservation:
"And whereas the principal consideration to said Indians for the cession and surrender of said portion of the reservation was the express agreement upon the part of the United States Government to pay to said Indians 'the sum of one million five hundred thousand dollars ($1,500,000) . . .;'

"And whereas the United States Government has failed to comply with the terms of said agreement, and no provision has been made to pay said Indians the amount stipulated in the said agreement for the cession of said lands;

'And whereas the said Indians entered into said agreement with an implicit trust in the good faith ***220** of the United States Government, and now most earnestly protest that their lands should not be taken from them without the payment of the just compensation stipulated in said agreement;

". . . The purpose of this agreement is to secure the presentation and prosecution of the claims of said Indians for payment for their interest in said ceded lands and to secure the services of said Maish and Gordon as counsel and attorneys for the prosecution and collection of said claims." Id., at 502 (emphasis added).

Similarly, the letter of protest by the Chairman of the Colville Indian Commission, ante, p. 948 n. 6, focused solely on Congress' failure to provide the Indians 'the solace of compensation.'

As a result of the efforts of the Indians, their friends, and their attorneys, Congress ultimately acceded to their claim for compensation. It did so in the Act of June 21, 1906, which is the Indian Department Appropriations Act of 1906. With respect to the Colville Confederated Tribes, the Act provided as follows:
'To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, . . . there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand (1,500,000) acres of land opened to settlement by the Act of Congress, . . . approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars ($1,500,000) . . ..' 34 Stat. 377—378.

***221** This Act is surely the major recognition by Congress of the claims of the Colvilles, and even with the most liberal construction I do not see how it can be read to do more than authorize the appropriation of $1,500,000 to effectuate the compensation article of the

1891 Agreement. Not a word is said about tax exemption, nor about hunting and fishing rights.

The Court also relies on language in the Indian Department Appropriations Act of 1907, 34 Stat. 1015, and substantially identical language in each of the succeeding four annual Indian Department Appropriation Acts. After the usual language of appropriation, the Act goes on to provide:
'In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to **959 settlement by an Act of Congress . . . approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars . . ..' 34 Stat. 1050—1051.

Thus the Court rests its decision in this case on two legislative pronouncements. The first is the 1906 Act authorizing payment of money to the Colvilles and reciting that the authorization was made to 'carry into effect' the 1891 Agreement. The second is the series of Acts appropriating funds to cover the 1906 authorization and referring to the authorization as 'ratifying the agreement ceding said land.' On the basis of these Acts, both of which are part of the mechanism by which Congress expends *222 public funds, the Court has concluded that provisions of the 1891 Agreement utterly unrelated to the payment of money became the supreme law of the land, even though there is no indication that the Colvilles sought any relief other than with respect to the Government's failure to pay compensation, or that Congress intended any relief affecting the use of land it quite plainly had determined should be returned to the public domain.

A far more reasoned interpretation of these legislative materials would begin by placing them in the context of the Executive/Legislative dispute over Indian policy and authority. A year after the signing of the 1891 Agreement, Congress clearly indicated its doubt as to whether President Grant was justified in setting aside three million acres for the Colvilles, and as to whether his executive Order actually conveyed title. In the Act of July 1, 1892, Congress chose to take what the Indians had expressed a willingness to surrender, but to give only part of what the Commissioners had agreed the Government should give in return. The Colvilles, after a 14-year battle in and around the legislative halls of Congress, obtained the monetary relief which they sought. Sympathy with their plight should not lead us now to distort what is on its face no more than congressional response to demands for payment into congressional enactment of the entire 1891 Agreement.

I would affirm the judgment of the Supreme Court of Washington.

All Citations

420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Tribes that formed the Confederated Tribes included the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane, and Coeur d'Alene. Appellant wife is a Canadian Indian and is not enrolled in the United States. We do not deal, however, with whether her case is for that reason distinguishable from her husband's since the State Supreme Court drew no distinction between them. Moreover, appellee State conceded at oral argument in this Court that reversal of the husband's conviction would require reversal of the wife's conviction. Tr. of Oral Arg. 22.

2 Wash.Rev.Code s 77.16.020 provides in pertinent part:
'It shall be unlawful for any person to hunt . . . game animals . . . during the respective closed seasons therefor. . . .
'Any person who hunts . . . deer in violation of this section is guilty of a gross misdemeanor . . ..'
Section 77.16.030 provides in pertinent part:
'It shall be unlawful for any person to have in his possession . . . any . . . game animal . . . during the closed season . . .

'Any person who has in his possession . . . any . . . deer . . . in violation of the foregoing portion of this section is guilty of a gross misdemeanor . . ..'

3 The original reservation was over 3 million acres 'bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions.' Executive Order of July 2, 1872, 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904); see also Seymour v. Superintendent, 358 U.S. 351, 354, 82 S.Ct. 424, 426, 7 L.Ed.2d 346 (1962).

4 Article 6 provides in full:

'It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.'

The status of the southern half of the Colville Reservation was considered in Seymour v. Superintendent, supra. At issue in this case are the residual rights to hunt and fish on the northern half preserved by the above Art. 6.

5 The Colville Indian Commission was composed of Chairman Fullerton and Commissioners Durfur and Payne. The Commission first met on May 7, 1891, with representatives of the Confederated Tribes at Nespelem, Wash., on the reservation to discuss 'a sale of a part of Reservation. . . .' During succeeding days, Ko-Mo-Del-Kiah, Chief of the San Poil, strongly opposed the sale of any part of the reservation, but Antoine, Chief of the Okanogan and great-grandfather of appellant Alexander Antoine, Moses, Chief of the Columbia, and Joseph, Chief of the Nez Perce, favored the proposed 1891 Agreement as fair. At a later meeting on May 23 at Marcus on the reservation, Barnaby, Chief of the Colville, and the Chief of the Lake agreed to the proposed sale. Minutes of Colville Indian Commission Concerning Negotiation for the 1891 Agreement of Sale, National Archives Document 21167.

6 The delay in approval was occasioned by the initial reluctance of the House to ratify the agreement without certain changes, 23 Cong.Rec. 3840 (1892), and by doubts raised in the Senate whether the Indians had title to the reservation, since it was created by Executive Order. See S.Rep.No.664, 52d Cong., 1st Sess., 2 (1892). The Interior Department reported some years later that the doubts were unfounded. S.Rep.No.2561, 59th Cong., 1st Sess., 137, 139 (1906). A bill passed by the House in 1891 replaced the $1,500,000 lump sum with a payment of $1.25 per acre, to be paid from the proceeds of sales of land opened for homesteading. The Senate disagreed, however, and passed a bill that ultimately became the Act of July 1, 1892. That Act makes no mention either of the consideration to be paid, or of the hunting and fishing rights preserved. Many protests were thereupon made that Congress had failed to live up to the terms of the Agreement. These included protests from the Department of the Interior, S.Rep.No.2561, supra, at 137, 139, and from Chairman Fullerton, who had become Chief Justice of the Supreme Court of Washington. In a letter, id., at 140, the Chief Justice said:

'It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation.'

The many protests finally bore fruit and Congress enacted the Act of June 21, 1906, and the five subsequent installment Acts. The Colville claims required the services of 16 lawyers from the States of Washington, Pennsylvania, and Georgia, and the District of Columbia. They recovered judgments against the United States for their services in the Court of Claims. Butler and Vale v. United States, 43 Ct.Cl. 497 (1908).

7 Article VI, cl. 2, of the Constitution, the Supremacy Clause, provides:

'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

8 The Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U.S.C. s 71, provides:

'No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.'

9 Former Commissioner of Indian Affairs Walker summarized the struggle as follows:

'In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the executive, all questions of Indian right

and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion, for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles, of the declaration . . . that 'hereafter no Indian nation or tribe within the territory of the United States shall shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty." Federal Indian Law, citing 211—212, Walker, The Indian Question (1874).

10 Washington Rev.Code s 37.12.060, which assumes limited jurisdiction over Indians, expressly provides that the law shall not deprive any Indian of rights secured by agreement.
'Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.' (Emphasis added.)

11 Appellants apparently claim no right to hunt on fenced private property. The State Supreme Court stated:
'Counsel . . . conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right . . ..' 82 Wash.2d 440, 448, 511 P.2d 1351, 1356 (1973).
A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

1 Exec. Order of July 2, 1872; 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904).

2 26 Stat. 355.

3 27 Stat. 62.

4 The authorization appears at 34 Stat. 325, 377—378. The appropriations appear at 34 Stat. 1015, 1050—1051; 35 Stat. 70, 96, 781, 813; 36 Stat. 269, 286, 1058, 1075.

5 The quoted language is from the 1907 Appropriations Act, 34 Stat. 1050—1051.

6 See Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U.S.C. s 71:
'No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.'

7 S.Rep.No.2561, 59th Cong., 1st Sess., 140 (1906).

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21 F.4th 1140
United States Court of Appeals, Ninth Circuit.

Paul GRONDAL, a Washington resident; Mill Bay Members Association, Inc., a Washington non-profit corporation Plaintiffs-Appellants,

v.

UNITED STATES of America; U.S. Department of the Interior; Bureau of Indian Affairs; Confederated Tribes of the Colville Reservation, Defendants-Appellees,

v.

Wapato Heritage LLC; Gary Reyes, Defendants-Appellants,

and

Francis Abraham; Paul G. Wapato, Jr.; Kathleen Dick; Deborah Backwell; Catherine Garrison; Mary Jo Garrison; Enid T. Wippel; Leonard Wapato; Annie Wapato; Judy Zunie; Jeffrey M. Condon; Vivian Pierre; Sonia W. Vanwoerkom; Arthur Dick; Hannah Rae Dick; Francis J. Reyes; Lynn K. Benson; James Abraham; Randy Marcellay; Paul G. Wapato, Jr.; Catherine L. Garrison; Maureen M. Marcellay; Leonard M. Wapato; Mike Marcellay; Linda Saint; Stephen Wapato; Marlene Marcellay; Dwane Dick; Gabe Marcellay; Travis E. Dick; Hannah Dick; Jacqueline L. Wapato; Darlene Marcellay-Hyland; Enid T. Marchand; Lydia A. Arneecher; Gabriel Marcellay; Mike Palmer; Sandra Covington, Defendants.

No. 20-35694
|
Argued and Submitted August 9, 2021 Seattle, Washington
|
Filed December 30, 2021

Synopsis

Background: Purchasers of 50-year memberships to use lakeside recreational vehicle (RV) park located on Native American land allotments subject to seller's 25-year lease with allottees that was approved by Bureau of Indian Affairs (BIA) brought action against seller's successor-in-interest, allottees, Confederated Tribes of the Colville Reservation, and BIA seeking declaratory judgment that they had right to use park after seller failed to renew lease. BIA counterclaimed for trespass and ejectment. The United States District Court for the Eastern District of Washington, Justin L. Quackenbush, Senior District Judge, 682 F.Supp.2d 1203, dismissed purchasers' claims and denied BIA's motion for summary judgment on its counterclaim as premature, and Rosanna Malouf Peterson, J., 471 F.Supp.3d 1095, granted summary judgment in favor of BIA on its counterclaim. Owners appealed, and seller's successor-in-interest appealed with respect to issue of whether BIA held legal title to land as trustee.

Holdings: The Court of Appeals, Bea, Circuit Judge, held that:

[1] purchasers were not judicially estopped from arguing that BIA lacked standing as trustee to seek ejectment;

[2] landlord-tenant estoppel did not apply to prevent purchasers from arguing that BIA lacked standing;

[3] issuance of patents in trust, rather than in fee, for allotments did not deprive BIA of standing;

[4] Presidential executive order extended trust period for allotments;

[5] amendment to Indian Reorganization Act (IRA) extended trust period for allotments;

[6] state court settlement agreement did not bar, under res judicata, BIA from seeking ejectment; and

[7] provision of expired lease that required allottees to honor any sublease or subtenant agreements after lease terminated "by cancellation or otherwise" did not apply to memberships.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Supplement the Record; Motion for Summary Judgment.

West Headnotes (27)

[1] **Federal Courts** Summary judgment

The Court of Appeals reviews a district court's grant of summary judgment de novo.

Attachment: 6

[2] **Estoppel** Claim inconsistent with previous claim or position in general

Judicial estoppel is not a substitute for subject matter jurisdiction.

2 Cases that cite this headnote

[3] **Federal Courts** Necessity of Objection; Power and Duty of Court

Court of Appeals, like any other federal court, must assure itself of its jurisdiction to entertain a claim regardless of the parties' arguments or concessions.

[4] **Federal Courts** Determination of question of jurisdiction

The Court of Appeals must always examine whether a claimant has legal authority to prosecute the claim before turning to the merits.

[5] **Estoppel** Claim inconsistent with previous claim or position in general

Purchasers of 50-year memberships to use lakeside recreational vehicle (RV) park located on Native American land allotments subject to seller's 25-year lease with allottees that was approved by Bureau of Indian Affairs (BIA) were not judicially estopped from arguing that BIA lacked standing because it did not hold legal title to land as trustee to bring trespass-and-ejectment counterclaim against purchasers in their action seeking declaratory judgment that they had right to use park after seller failed to renew lease, even though purchasers previously argued that BIA managed land "in trust," since standing argument raised legitimate Article III jurisdictional issue that could not be dodged on judicial estoppel grounds. U.S. Const. art. 3, § 2, cl. 1.

[6] **Estoppel** Claim inconsistent with previous claim or position in general

"Judicial estoppel" is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.

[7] **Landlord and Tenant** Operation of Estoppel Against Tenant

Under the general landlord-tenant estoppel rule, a tenant in peaceful possession is estopped to question the title of his landlord.

[8] **Landlord and Tenant** Operation of Estoppel Against Tenant

The general landlord-tenant estoppel rule, under which a tenant in peaceful possession is estopped to question the title of his landlord, is designed to prevent a tenant from defending a suit for rent by challenging his landlord's right to put him into possession.

[9] **Landlord and Tenant** Operation of Estoppel Against Tenant

Tenants are never allowed to deny title of their landlord, nor set up title against him, acquired by tenant during tenancy, which is hostile in its character to that which he acknowledged in accepting demise.

[10] **Landlord and Tenant** Estoppel of Tenant

Landlord-tenant estoppel did not apply to prevent purchasers of 50-year memberships to use lakeside recreational vehicle (RV) park located on Native American land allotments subject to seller's 25-year lease with allottees that was approved by Bureau of Indian Affairs (BIA) from arguing that BIA lacked standing because it did not hold legal title to land as trustee to bring trespass-and-ejectment counterclaim against purchasers in their action seeking declaratory judgment that they had right to use park after seller failed to renew lease, since BIA was not purchasers' landlord, and purchasers were challenging BIA's trustee relationship to allottees, not beneficial or equitable title of allottees, who were lessors under subject lease.

[11] **Indians** Allotments
Indians Standing

Issuance of patents in trust, rather than in fee, pursuant to the Act of March 8, 1906 to Native Americans for land allotments that were later used for lakeside recreational vehicle (RV) park was not contrary to the Act of July 4, 1884 which established such allotments, and thus, did not strip Bureau of Indian Affairs (BIA) of its standing as trustee of allotments to seek ejectment of purchasers of 50-year memberships to use park after seller failed to renew 25-year lease with allottees; language in Act of July 4, 1884 stating that allottees would be entitled to certain area of land "in the possession and ownership of which they shall be guaranteed and protected" did not guarantee title in fee, but instead permitted United States to hold legal title to allotments in trust.

[12] **Indians** Allotments
Indians Standing

Act of June 21, 1906 provided sufficient statutory authority for Presidential executive order extending trust period for Native American land allotments that were later used for lakeside recreational vehicle (RV) park, and thus, Bureau of Indian Affair's (BIA's) status as trustee of allotments continued on such basis, as required for BIA to have standing on behalf of allottees to seek ejectment of purchasers of 50-year memberships to use park after seller failed to renew 25-year lease with allottees; Act's authorization for the President to continue "restrictions on alienation" included power to continue period of trust, given that a trust itself was a restriction on alienation. 25 U.S.C.A. § 391.

[13] **Indians** Allotments
Indians Standing

Act of June 15, 1935, which amended Indian Reorganization Act (IRA) to extend trust period for American Indian lands with trust periods that had not been extended to date subsequent to December 31, 1936 and if reservation containing such lands had voted to exclude itself from IRA, extended trust period for land allotments that were later used for lakeside recreational vehicle (RV) park, and thus, Bureau of Indian Affair's (BIA's) status as trustee of allotments continued on such basis, as required for BIA to have standing on behalf of allottees to seek ejectment of purchasers of 50-year memberships to use park after seller failed to renew 25-year lease with allottees; Confederated Tribes of the Colville Reservation voted to opt out of IRA, and such vote applied to subject allotments. 25 U.S.C.A. §§ 5102, 5111.

[14] **Administrative Law and Procedure** Contemporaneous or subsequent construction in general

Contemporary agency interpretations have great weight when it comes to determining the meaning of statutes at the time they were enacted.

[15] **Judgment** Persons not parties or privies

Settlement agreement in state court action challenging proposed closure of lakeside recreational vehicle (RV) park located on Native American land allotments that provided for increased rent by purchasers of 50-year memberships to use park and stated that purchasers had right, subject to seller's 25-year lease with allottees, to use park though end of memberships did not bar, under res judicata, Bureau of Indian Affairs (BIA) from seeking ejectment of purchasers after seller failed to renew lease; BIA was not party to state court litigation or settlement agreement, BIA attended mediation but did not participate, BIA was not in privity with seller's successor-in-interest, and BIA was not "interested in" seller's estate within meaning of Washington's Trust Estate Dispute Resolution Act. Wash. Rev. Code Ann. §§ 11.96.030(6), 11.96.220.

[16] **Judgment** Matters which were not or could not have been adjudicated

Federal Court of Appeals' decision that renewal option in lease agreement for Native American land allotments used as lakeside recreational vehicle (RV) park was not properly exercised did not collaterally estop purchasers of 50-year memberships to use park subject to seller's 25-year lease with allottees from arguing, as defense to ejectment claim by Bureau of Indian Affairs (BIA), that their settlement agreement with seller in prior state court action challenging proposed closure of park extended lease past its expiration; Court of Appeals' decision did not address whether settlement agreement extended lease.

[17] **Federal Courts** Conclusiveness; res judicata and collateral estoppel

District court judgments as to issue and claim preclusion are reviewed de novo.

[18] **Res Judicata** Claims or Causes of Action in General

Res Judicata Claims or causes of action in general

"Res judicata," also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.

1 Cases that cite this headnote

[19] **Res Judicata** Res Judicata

For res judicata to apply there must be identity of claims, final judgment on merits, and identity or privity between parties.

[20] **Res Judicata** Who are privies; what constitutes privity

For two parties to have privity, for purposes of res judicata, they must be so identified in interest that they represent precisely the same right on the relevant issues.

[21] **Res Judicata** Claims or Causes of Action in General

Res Judicata Act, occurrence, or transaction

Claim preclusion prevents parties from relitigating the same claim, and suits involve the same claim if the later suit arises from the same transaction as does the first suit.

1 Cases that cite this headnote

[22] **Indians** Assignment, subletting, or other transfer

Provision of expired lease agreement for Native American land allotments used as lakeside recreational vehicle (RV) park that required allottees to honor any sublease or subtenant agreements after lease terminated "by cancellation or otherwise" did not apply to purchasers' 50-year memberships to use park; lease was not cancelled, but instead expired after seller failed to properly exercise renewal option, and term "cancellation" helped define phrase "or otherwise," such that phrase "or otherwise" did not expand types of termination contemplated by lease to include normal expiration.

[23] **Federal Courts** Contracts

Under federal law, interpretation and meaning of contract provisions are questions of law reviewed de novo.

[24] **Statutes** General and specific terms and provisions; ejusdem generis

The canon of ejusdem generis refers to the inference that a general term in a list should be understood as a reference to subjects akin to those with specific enumeration.

[25] **Federal Courts** Estoppel and waiver

A district court's decision to apply or reject an estoppel defense is reviewed for abuse of discretion but the district court's legal conclusions as to the availability of that defense are reviewed de novo.

[26] **Trusts** Possession, use, and care of property

To administer, preserve, and maintain trust property is a quintessential trustee function.

[27] **Estoppel** United States government, officers, and agencies in general

The rule that the United States is not subject to equitable estoppel when it acts in its sovereign capacity as trustee for Native American lands is broad, clear, and admits no exception for instances where alienation is not at issue.

***1144** Appeal from the United States District Court for the Eastern District of Washington, Rosanna Malouf Peterson, District Judge, Presiding, D.C. No. 2:09-cv-00018-RMP

Attorneys and Law Firms

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Before: Carlos T. Bea, Daniel A. Bress, and Lawrence VanDyke, Circuit Judges.

OPINION

BEA, Circuit Judge:

Decades ago, a group of recreational vehicle ("RV") owners purchased fifty-year ***1145** memberships to a lakeside RV park. But as it turns out, the park's management had validly leased the park's land from its landowners for only twenty-five years. This case embodies the efforts of those RV owners to maintain access to their vacation getaway after the end of the twenty-five-year lease term. Complicating matters, the land in question is American Indian land: It is fractionally owned by the heirs of American Indian Wapato John and is currently held in trust by the United States' Bureau of Indian Affairs ("BIA"), although that trust status is very much in dispute.

In the litigation below, the RV owners sued to retain their rights to remain on the RV park through 2034; the BIA is a defendant by dint of its now-challenged status as trustee of the at-issue land. But once sued, the BIA quickly took the offensive with a counterclaim for trespass and ejectment against the RV owners who have admittedly continued to possess the RV park, even after the lease expired.

In this appeal, we consider the district court's grant of the BIA's motion for summary judgment on that counterclaim. To rule, we must delve into the 19th-century origins of Wapato John's trust land; interpret 20th-century executive orders and treaties; apply 21st-century estate statutes; and consider the barrage of legal arguments presented to us. After considering all that, and more, we affirm.

I. BACKGROUND

A. The Land at Issue

Moses Allotment Number 8 ("MA-8") is a plot of land in eastern Washington; the RV park is on that land. In the 1900s, the United States originally issued title to this land to American Indian Wapato John, a member of the Moses Band of the Columbia Tribe, as an "allotment" in trust: a distinct plot of land set aside for Wapato John. According to the federal statute establishing this particular trust, the land's legal title vested in the United States, which was to hold the land in trust for ten years for Wapato John's sole use and benefit. The land's beneficial title (*i.e.*, the land's equitable title) vested in Wapato John. During the ten-year trust period, the land was to be managed by the Department of the Interior (now the BIA) and was subject to restrictions on alienation, encumbrance, and state taxation. That trust period for MA-8 has been repeatedly extended over the years (and these trust extensions correspondingly extended the restrictions as well) such that to this day, the United States continues to hold legal title to the land, in trust for Wapato John's heirs.

Today, beneficial ownership in MA-8 is rather fractionated. Twenty-seven heirs of Wapato John—here, referred to as the individual allottees ("IAs")—own separate, undivided beneficial interests in the land. Wapato Heritage, LLC ("Wapato Heritage") and the Confederated Tribes of the Colville Reservation (the "Tribe") also hold undivided, beneficial interests in MA-8. [1] The BIA retains legal title as trustee to all such beneficial interests held by the IAs, Wapato Heritage, and the Tribe.

Throughout most of 20th century, MA-8 was left unimproved. But in 1979, William Wapato Evans, Jr. (an heir of Wapato John and then-holder of an approximately 5% beneficial interest in MA-8) sought to ***1146** improve MA-8 and thereby generate income for himself and the other IAs. At that time, the IAs between them owned the vast majority of the beneficial interest in MA-8, and per BIA regulation, Evans obtained approval from a majority of those IA interests to lease the entirety of MA-8 to develop a recreational vehicle park (the "Mill Bay RV Park"). With approvals in hand, Evans negotiated and signed the "Master Lease." [2]

Under the terms of the Master Lease, signed in 1984, the IAs leased use of MA-8 to Evans for a term of twenty-five years, but Evans retained an option to renew the lease for another twenty-five years. To exercise this option, the Master Lease required Evans to provide written notice to both the Lessors (the IAs) and the BIA twelve months prior to the expiration of the original twenty-five-year term. The Master Lease permitted Evans to sublease the property upon written approval of the BIA and provided that such subleases would be assigned to the Lessors, rather than cancelled, if the Master Lease itself was terminated "by cancellation or otherwise." Evans subleased most of MA-8 to his corporation, Mar-Lu, Ltd. [3] He also subleased a portion of MA-8 to a development corporation owned by the Tribe for the operation of a casino.

Thereafter, Evans, through Mar-Lu, developed and sold "regular memberships" to the Mill Bay RV Park. These "regular memberships" allowed purchasers to use and park their vehicles on the RV park on a first-come, first-served basis under the site plan of the Master Lease. [4] Later, in 1989, Evans obtained approval from the BIA to modify the site plan so that Evans could sell "expanded membership[s]." These expanded memberships, expressly subject to the terms of the Master Lease, granted members the "right to use" the Mill Bay RV Park and guaranteed them each a designated spot in the RV park.

B. Earlier Litigation

Two earlier lawsuits are relevant to this one. First is the *Grondal* state court litigation between Evans and some of the RV owners who had purchased regular or expanded memberships at his park. By 2001, the Mill Bay RV Park was losing money fast, and Evans notified RV owners who had purchased either a regular membership or an expanded membership that he would be closing the park. Some of those members—Paul Grondal and the Mill Bay Members Association, Inc. ("Mill Bay")—sued in Washington state court to prevent the park closure. [5] Evans died during the pendency of the litigation, at which point much of his assets were distributed by will to his company Wapato Heritage, including his rights under the Master Lease. The personal representative for Evans' estate requested mediation of the *Grondal* state litigation.

At mediation, the parties settled and executed the 2004 Settlement Agreement, ultimately deciding that the RV park would not be closed. The BIA was not named a party to the litigation and did not ***1147** intervene as a party to the action; the BIA attended the mediation at the request of the parties but did not participate. Under the terms of the 2004 Settlement Agreement, Mill Bay and Wapato Heritage agreed that Mill Bay would have the right, subject to compliance with

the Master Lease, to continued use of the Mill Bay RV Park through 2034. But it turned out that the Master Lease would not last near that long.

The second lawsuit was a federal court case concerning the Master Lease, which eventually reached this Court. Back in 1985, and shortly after signing the Master Lease, Evans had sent a letter to the BIA purporting to exercise the option to renew the Master Lease for 25 years through 2034. All parties to the Master Lease, as well as non-party the BIA, apparently assumed for the next twenty-two years that Evans' letter was sufficient to exercise that option. The BIA never corrected Evans' or Mill Bay's understanding that the Mill Bay RV Park was properly leased through 2034, and Mill Bay made significant financial expenditures and commitments based on that understanding.

Upon later investigation, however, the BIA came to believe that Evans' letter was insufficient. Recall that per the Master Lease, Evans could renew only by giving notice to both "the Lessor"—the MA-8 IAs—and to the BIA. But Evans had given notice only to the BIA, so in the BIA's view, Evans (and Wapato Heritage, who took over as Lessee on the Master Lease after Evans' death) had yet to successfully renew the Lease. In November 2007, the BIA sent a letter to Wapato Heritage that explained its position but noted that Wapato Heritage had two more months to notify the Lessor IAs and thereby properly exercise the renewal option. But instead of following that suggestion and so notifying the IAs, Wapato Heritage sent a response letter to the BIA disagreeing with the BIA's interpretation of the Master Lease renewal provision.

In 2008, and after the end of the period in which Wapato Heritage could correct the insufficient 1985 lease renewal, Wapato Heritage filed suit against the United States, arguing that Evans's 1985 letter had actually or substantially complied with the renewal notice terms of the Master Lease, or alternatively, that the BIA had approved the renewal and extended the lease's length. The district court ruled for the BIA, dismissing all of Wapato Heritage's claims either on a motion to dismiss or on summary judgment, and confirmed the BIA's understanding of the Master Lease: The IAs, not the BIA, were the "Lessors" and Evans had failed properly to notify the Lessor IAs of his intention to exercise the renewal option. *See Wapato Heritage, LLC v. United States*, No. CV-08-177, 2009 WL 3782869, at *3, *5 (E.D. Wash. Nov. 6, 2009) (granting the BIA's motion to dismiss for lack of subject-matter jurisdiction and motion for judgment on the pleadings); *Wapato Heritage, LLC v. United States*, No. CV-08-177, 2008 WL 5046447, at *5, *8 (E.D. Wash. Nov. 21, 2008) (granting in part the BIA's motion for summary judgment). We affirmed. *See Wapato Heritage, LLC v. United States (Wapato Heritage I)*, 637 F.3d 1033, 1040 (9th Cir. 2011). The Master Lease expired in 2009, leaving unexercised the option to extend, and our 2011 decision has since become final as the Supreme Court has denied review.

C. The Present Lawsuit

After Wapato Heritage lost its lawsuit challenging the interpretation of the Master Lease, Grondal (Wapato Heritage's purported sublessee under the Master Lease) and Mill Bay filed this lawsuit, seeking a declaratory judgment that would recognize their right to remain on MA-8 ***1148** through 2034.[6] Here, Grondal and Mill Bay named as defendants the fractionated owners of MA-8 (*i.e.*, the IAs, Wapato Heritage, and the Tribe) as well as the BIA, which acts on behalf of the United States as trustee for American Indian lands. This appeal pertains to two separate orders from this lawsuit: (1) the district court's ruling of January 12, 2010; and (2) the district court's ruling of July 9, 2020.

In January 2010, the district court handed down the first order here on appeal. This order dealt with cross-motions for summary judgment by plaintiff Mill Bay, which claimed the right to retain possession of the MA-8 land used by its membership for their RVs, and by defendant the BIA, which counterclaimed in trespass and sought Mill Bay's ejectment. The BIA argued in its counterclaim that Grondal and Mill Bay no longer had any right to occupy MA-8 after the expiration of the Master Lease; on that basis, the BIA sought their ejectment from the MA-8 property.

In that 2010 order, the district court rejected Mill Bay's attempt to remain on MA-8 and denied Mill Bay's claims for estoppel, waiver and acquiescence, and modification.[7] The district court also reconstrued those three claims as affirmative defenses to the BIA's trespass counterclaim, a characterization that appellants do not challenge, and took the opportunity to deny two of these affirmative defenses, namely: (1) that a provision of the Master Lease, paragraph 8, requires the Lessor (the IAs) to permit Mill Bay as "sublessees" to remain on the property because the Master Lease was ended by "cancellation or otherwise," and (2) that the 2004 Settlement Agreement precluded the BIA from ejecting Mill Bay under principles of res judicata. Finally,

the district court denied as premature the BIA's motion for summary judgment on trespass and ejectment. [8]

After the district court's 2010 ruling, Wapato Heritage and Mill Bay changed litigation strategy. As part of the 2010 ruling on the BIA's counterclaim, the district court had concluded that the BIA had authority as trustee for the MA-8 land to bring a trespass counterclaim on behalf of the IAs but lacked contractual authority under the Master Lease to do so because the BIA was not a party to that lease. Seeing an opening, Wapato Heritage then decided to challenge for the first time the trust status of MA-8. This issue is important, because the BIA's standing to pursue a trespass action against Wapato Heritage and Mill Bay depends on its status as holder of legal title as trustee to the MA-8 land. So when Wapato Heritage filed its answer to Grondal and Mill Bay's lawsuit, it also filed a cross-complaint against the ***1149** United States that challenged the BIA's standing. Wapato Heritage argued that the trust period for MA-8 had expired at some point during the chain of trust period extensions that occurred throughout the 20th century. [9] Even though Mill Bay named Wapato Heritage as defendant in its original complaint, Mill Bay soon took up Wapato Heritage's trust argument in an effort to defend against the BIA's 2020 renewed motion for summary judgment, and Wapato Heritage and Mill Bay are now aligned on the trust issue. [10]

Finally, in July 2020, [11] the district court handed down the second ruling here on appeal. In this 2020 order, the district court granted the BIA's motion for summary judgment for trespass (reconsidered its concerns as to prematurity) and ordered Mill Bay removed from MA-8. Mill Bay had argued in its defense that the BIA lacked standing to bring its trespass claim because the trust period for MA-8 had expired, depriving the BIA of its trustee status over MA-8 and thus of any injury-in-fact tied to Mill Bay's presence on MA-8. On this standing argument, the district court found: (1) that Mill Bay was judicially estopped from arguing that MA-8 was not held in trust because that argument contradicted Mill Bay's prior positions in the litigation; and (2) even if judicial estoppel did not apply, the trust period of MA-8 had not expired and the United States still held MA-8 in trust, thus giving the BIA standing. On the merits of the BIA's counterclaim, the district court found Mill Bay to be trespassers, denied Mill Bay's other defenses (including equitable estoppel), granted the BIA's motion for summary judgment, and ordered Mill Bay ejected.

While the district court's 2020 order left pending several crossclaims not at issue in this appeal, [12] the order resolved all claims involving Mill Bay, so pursuant to Federal Rule of Civil Procedure 54(b), the district court found no just reason for delay and directed entry of final judgment against Mill Bay, allowing for immediate appeal. Mill Bay challenges two issues from each of the district court's orders [13] and Wapato Heritage joins the appeal because our resolution of the trust status of MA-8 has ***1150** preclusive effect upon its own crossclaims below. From the 2010 order, Mill Bay appeals the district court's decision to reject its defenses based on Master Lease paragraph 8, and res judicata per the 2004 Settlement Agreement. And from the 2020 order, Mill Bay appeals the district court's decision to reject its defenses based on equitable estoppel, and on the BIA's standing to represent the IAs as trustee of the MA-8 land. Wapato Heritage joins the challenge to the BIA's standing.

The ejectment order against Mill Bay was in the nature of an injunction so we have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). We affirm.

II. STANDARD OF REVIEW

[1] "We review the district court's grant of summary judgment de novo." *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). Any deviations from this standard are noted below when applicable.

III. DISCUSSION

Despite the considerable cast of characters just introduced and the extensive backstory just presented, this episode's plot is relatively straightforward. In the district court's 2020 order, it granted the BIA's motion for summary judgment on the BIA's counterclaim for trespass and ejectment. We are asked to examine the district court's decision to deny four of Mill Bay's defenses against that counterclaim. These defenses are: (1) the BIA lacks standing to bring a trespass claim as trustee on behalf of the IAs because the MA-8 property is not in fact held in trust by the BIA, (2) res judicata precludes the BIA from relitigating Mill Bay's right to possess MA-8 because the BIA was involved in the *Grondal* state litigation that allegedly decided that same issue, (3) paragraph 8 of the Master Lease required Mill Bay's purported subleases to be preserved and assigned rather than cancelled because of the termination of

the Master Lease, and (4) the BIA is bound under equitable estoppel from reversing its previous alleged representations that Mill Bay would be permitted to remain on MA-8 through 2034. We address each in turn.

A. The BIA's Standing As Trustee of the MA-8 Land

First, both Mill Bay and Wapato Heritage appeal the district court's conclusion that MA-8 remains held in trust by the United States. At the outset, they dispute the district court's preliminary finding that Mill Bay is precluded from advancing this argument due to judicial and landlord-tenant estoppel. And on the merits, Mill Bay and Wapato Heritage reject the district court's ruling that the United States still holds MA-8 in trust. As Mill Bay and Wapato Heritage would have it, MA-8 is no longer trust land, depriving the BIA of standing to bring a trespass claim on the IA's behalf and seek Mill Bay's ejectment from MA-8. We deal first with the estoppel issue and then proceed to the merits of Mill Bay and Wapato Heritage's argument that MA-8 is no longer held in trust.

1. Estoppel Is No Substitute for Subject Matter Jurisdiction: This Court Must Determine the BIA's Standing

[2] **[3]** **[4]** Judicial estoppel is "not a substitute for subject matter jurisdiction." *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012). We, like any other federal court, must assure ourselves of our "jurisdiction to entertain a claim regardless of the parties' arguments or concessions." *Id.* We must always examine whether the claimant has legal authority to prosecute the claim before turning to the merits. *See* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). Accordingly, estoppel ***1151** cannot prevent us from analyzing the BIA's standing.

[5] **[6]** "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). The district court concluded Mill Bay deliberately changed its legal arguments in the middle of litigation to gain an advantage. [14] But regardless the merits of that determination, Mill Bay's theory—that the BIA lacks standing to bring its counterclaim because it does not hold legal title to MA-8 in trust—raises a legitimate Article III jurisdictional issue that we must examine; judicial estoppel does not permit us to dodge the question. On that basis, the district court erred in finding Mill Bay was estopped from arguing the trust period for MA-8 had expired.

[7] **[8]** **[9]** In addition to its judicial estoppel argument, the BIA argues that Mill Bay cannot contest the BIA's authority to bring a trespass action under landlord-tenant estoppel. Under the general landlord-tenant estoppel rule, "a tenant in peaceful possession is estopped to question the title of his landlord. This doctrine is, of course, designed to prevent a tenant from defending a suit for rent by challenging his landlord's right to put him into possession." *Richardson v. Van Dolah*, 429 F.2d 912, 917 (9th Cir. 1970). In other words, "[t]enants are never allowed to deny the title of their landlord, nor set up a title against him, acquired by the tenant during the tenancy, which is hostile in its character to that which he acknowledged in accepting the demise." *Williams v. Morris*, 95 U.S. 444, 455, 24 L.Ed. 360 (1877).

[10] Landlord-tenant estoppel does not apply here, however, because the BIA is not Mill Bay's landlord: the IAs are. Mill Bay seeks to annul the BIA's power to retake the MA-8 property after the expiration of the Master Lease, and thus challenges the BIA's trustee relationship to the IAs, not the beneficial or equitable title of the IAs, who are the lessors under the Master Lease. [15] In other words, Mill Bay disputes the BIA's status as a manager between the IAs and Mill Bay's members; Mill Bay does not challenge the IAs' underlying property rights over MA-8. So Mill Bay's claim is not hostile to the ultimate character of the contractual relationship between lessor (here, the IAs) and lessee (here, Mill Bay) in the same way that a tenant's direct challenge would be hostile to a landlord's title. Moreover, to the extent the BIA seeks to use landlord-tenant estoppel to preclude arguments implicating standing and federal court jurisdiction, that position is incorrect. *Cf.* *Terenkian*, 694 F.3d at 1137 ("[J]udicial estoppel is not a substitute for subject matter jurisdiction ....").

We hold that Mill Bay cannot be estopped from arguing that the BIA lacks standing to bring its trespass claim. [16] We thus proceed and examine whether the ***1152** United States holds the MA-8 land in trust.

2. An Abridged History of MA-8

To ground the forthcoming discussion of MA-8's trust status, we begin with an abridged history of the MA-8 land. [17] Recall that this case concerns an allotment of land to Wapato John, a member of the Moses Band of the Columbia Tribe. The relevant history starts in 1855, when the United States entered into the Yakama Nation Treaty, which required members of the Columbia Tribe (along with three other tribes) to relocate to the Yakama Reservation in what is now eastern Washington state. But the tribes did not relocate; they continued to remain on their ancestral lands. Instead, Chief Moses of the Columbia Tribe negotiated a new treaty for his followers, resulting in the Executive Order of April 19, 1879, and the creation of the Moses Columbia Reservation, just west of the already established Colville Reservation, itself located in north-central Washington. Yet again, and treaty notwithstanding, Chief Moses and most of his followers still did not relocate to the newly established Columbia Reservation but stayed on the ancestral lands of the Columbia Tribe. [18]

In 1883, Chief Moses, along with chiefs of the Colville Reservation, negotiated a third agreement with the United States: the "Moses Agreement." The Moses Agreement again stipulated that the members of the Moses Band would relocate to a reservation—this time the Colville Reservation—but the agreement also provided for the issuance of allotments of individual parcels on the Columbia Reservation for those American Indians who wished to stay on that reservation. The remainder of the Columbia Reservation not parceled out as allotments to American Indians would be "restored to the public domain." [19] Congress ratified the Moses Agreement in the Act of July 4, 1884. Thereafter, Chief Moses led most of his people to the Colville Reservation, where their descendants largely remain to this day.

To address those American Indians who did not choose to relocate to the Colville Reservation and instead chose to stay on the Columbia Reservation, Congress passed the Act of March 8, 1906. [20] That Act provided that the United States would issue trust "patents" to each American Indian who stayed on the Columbia Reservation. These patents, the equivalent of modern-day property deeds, vested legal title to each land allotment in trust to the United States and beneficial title (*i.e.*, equitable title) in the American Indian holder for a period of ten years, and provided that thereafter the land would pass to the American Indian in fee. [21] Wapato John was one such American Indian who elected to stay on the Columbia Reservation and, in 1907 and 1908, he was issued trust patents for the MA-8 allotment, to be held by the United States in trust until 1916.

But the MA-8 trust patents were not to expire and convert to fee simple deeds in ***1153** 1916 after all. As it happens, many American Indians had received trust patents that had expired before MA-8's planned 1916 expiry and many of them had sold their allotments as soon as their periods of trust had ended. (The end of the trust period meant that the restrictions on alienation that accompanied trust status also ended.) Many of these land sales were "unwise or even procured by fraud," *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (internal citations omitted), and so the sales became a matter of some significant public concern. To prevent further unwise or fraudulent sales, the United States settled on a policy in the early 20th century that sought to extend the trust period for all American Indian allotments and thus continue indefinitely to restrict alienation by requiring trustee approval of sales or other possessory interests. [22] In accord with that policy, President Wilson issued Executive Order 2109 in 1914, which purported to extend the trust period on the Moses Allotments for an additional ten years through 1926. In 1926, President Coolidge issued another executive order again extending the trust period for ten years through March 8, 1936.

Recognizing the perceived failure of the allotment system given the many American Indians who had lost their allotted land through unwise or fraudulent transactions, Congress in 1934 enacted the Indian Reorganization Act ("IRA"), which indefinitely extended the trust period for all "Indian lands," which includes MA-8. [23] 25 U.S.C. § 5102. However, the IRA contained an opt-out provision, which allowed reservations to choose not to be subject to the IRA (including the indefinite extension of the trust period) upon a vote of a majority of adult American Indians in the reservation. *Id.* § 5125. Congress amended the 1934 IRA the next year in the Act of June 15, 1935, which extended the trust period through December 31, 1936, for all those reservations that opted out of the IRA.

By the time Congress enacted the 1935 Amendment, the Moses Allotments were scheduled to fall out of trust status in March 1936, when the 10-year trust extension enacted by President Coolidge's 1926 executive order would expire. But the Colville Reservation, including Chief Moses, [24] voted to exclude itself from the IRA. And because the Moses

Band was part of the Colville Tribe, and some of the Moses Allotments' beneficial owners, Wapato John included, were members of the Moses Band, the BIA understood the Colville Reservation's vote to exclude the Moses Allotments from the IRA too. Relying on this vote, the government applied the 1935 Amendment to the Moses Allotments also, ***1154** thereby extending MA-8's trust period through the end of 1936.[25]

President Roosevelt then extended the Moses Allotments' trust period further by Executive Order 7464 in September 1936, and the Allotments' trust period was further extended without controversy by additional executive orders and administrative action. Finally, in 1990 Congress indefinitely extended the trust period of all lands held in trust by the United States for American Indians. *See* 25 U.S.C. § 5126.

3. The Legal Status of MA-8 and the BIA's Standing to Sue on the IA's Behalf

The issues here involve interpretation of statutes and executive orders and are therefore reviewed de novo. *See United States v. Youssef*, 547 F.3d 1090, 1093 (9th Cir. 2008).

Of the complex chain of trust period extensions and property transactions described above, Mill Bay and Wapato Heritage challenge three, and argue that legal deficiencies in each of these three steps independently deprive MA-8 of trust status, vest legal title in the IAs in fee simple, and strip the BIA of its powers as trustee and of its standing to seek ejectment in this suit.

i. Challenge One: Whether MA-8's Trust Patent Was Issued Contrary to Law

[11] Mill Bay and Wapato Heritage first argue that the Moses Agreement and its implementing legislation, the Act of July 4, 1884, promised patents in fee, not patents in trust.[26] So, they argue, the trust patents given to the IAs under the Act of March 8, 1906, were issued contrary to the Moses Agreement. The Supreme Court in 1913 examined this issue as to allotments under the Moses Agreement. *See Starr v. Long Jim*, 227 U.S. 613, 621–22, 33 S.Ct. 358, 57 L.Ed. 670 (1913). Justice Pitney, on behalf of a unanimous Court, held that the Moses Agreement's language did not guarantee title in fee but instead permitted the United States to hold the allotments in trust. *See id.* at 623–25, 33 S.Ct. 358. So we reject Mill Bay and Wapato Heritage's claim that the MA-8 allotments were vested in fee simple rather than in trust by the Moses Agreement and the Act of July 4, 1884.

ii. Challenge Two: Whether President Wilson Had Statutory Authority to Extend MA-8's Trust Period with his 1914 Executive Order

[12] Mill Bay and Wapato Heritage's second argument is that when President Wilson extended the trust period for MA-8 until 1926 through his 1914 executive order, he did so without statutory authority. The 1914 executive order relied on two statutes to extend the trust period of MA-8: Section 5 of the Act of February 8, 1887 (the "General Allotment Act"), and the Act of June 21, 1906. Mill Bay and Wapato Heritage argue that neither of the two statutes granted the President the authority to extend MA-8's trust period. We need not address the General Allotment Act because we conclude that the 1906 Act provided a sufficient basis for President Wilson's 1914 executive order.

The Act of June 21, 1906 provides:

> ***1155** Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall lie issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best ....

25 U.S.C. § 391. Mill Bay and Wapato Heritage argue that this act cannot support the 1914 executive order because it grants the President only the authority to extend "restrictions on alienation." They argue that the authority to extend a "trust period" is different. The BIA responds that "restrictions on alienation" and "trust[s]" are not distinguishable from one another, and that the power to extend one should be read to be coextensive with the power to extend the other.

Mill Bay and Wapato Heritage's position has some initial appeal. From a textual standpoint, a "restriction[ ] on alienation" and a "trust period" are different concepts.

While both can be "continued," *i.e.*, extended in time, "restrictions on alienation" are substantive limitations on a trust beneficiary's property rights but a "trust period" merely delineates when a trust expires. A second textual clue also points in Mill Bay and Wapato Heritage's favor. The statute discusses "other patent[s] containing restrictions upon alienation," which contemplates that a patent can be in a form other than a trust but still contain restrictions on alienation; if so, the restrictions on alienation applicable to those non-trust patents can be extended without the corresponding extension of any trust period. And a long-standing truth of federal Indian law aids Mill Bay and Wapato Heritage too. Historically, American Indian land held in trust generally had three main components: a restriction on alienation, a restriction on encumbrances, and a restriction on being subject to state taxation. *See* *United States v. Mitchell*, 445 U.S. 535, 544, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (noting that the 1887 General Allotment Act was meant to "prevent alienation of [American Indian] land and to ensure that allottees would be immune from the state taxation"); 25 U.S.C. § 348; 25 U.S.C. § 349 ("At the expiration of the trust period ... the Secretary of the Interior may ... cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."). The restriction on alienation by itself is thus just one component of trust status. So when the Act of June 21, 1906, grants the authority to extend only "such restrictions on alienation"—but not the other restrictions typically placed on trust lands—the language could imply that the President was not granted the authority to extend the trust period as a whole.

While Mill Bay and Wapato Heritage's position is thus not without some force, the points supporting the BIA's position are stronger still. Put simply, a trust is itself a restriction on alienation. The trustee, as holder of legal title, is the required grantor of any conveyance of legal title. And trust patents like those given to Wapato John inherently contained restrictions on how the American Indian allottee could sell their property. Indeed, the Supreme Court has recognized that restricting alienation was the very point of trust status. *See* *Mitchell*, 445 U.S. at 544, 100 S.Ct. 1349 (noting that Congress extended trust status to American Indian allotments "not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land"). As described above, Congress repeatedly extended the trust period of many allotments for the precise purpose of preventing American Indians from selling their land. *See* *Yakima*, 502 U.S. at 251, 112 S.Ct. 683 (describing how Congress sought to prevent American ***1156** Indians from selling their land by ensuring that "each allotted parcel would be held by the United States in trust"). And if a trust is, itself, a restriction on alienation, then the power to "continue such restrictions on alienation" includes the power to continue the period of a trust.

Several textual clues in the 1906 Act support the BIA's view. First, the relevant provision of the Act begins: "Prior to the expiration of the trust period of any Indian allottee ...." This preface indicates that the provision deals primarily with trust patents (like MA-8). The preface thus suggests that the operative portion of the provision—the portion authorizing an extension in time—applies to the period of trusts. Second, the provision discusses both "trust[s]" and "other patent[s] containing restrictions upon alienation" and authorizes the President to "continue such restrictions on alienation." As just explained, one "such" restriction on alienation is the trust itself that the provision identifies as its primary subject. And third, the series qualifier canon demands that when we interpret "a trust or other patent containing restrictions upon alienation," we construe "containing restrictions upon alienation" to modify both "trust" and "other patent,"[27] reinforcing that American Indian trusts both contain and inherently are restrictions on alienation of land. These clues all suggest that the statute's authorization to extend restrictions on alienation authorizes the President to extend, for trust patents, both the trust period and the restrictions on alienation inherent in trust patents, and for non-trust patents, to extend any restriction on alienation.[28]

Consistent with the BIA's view that American Indian trusts were, themselves, restrictions on alienation, numerous historical sources indicate that at and around the time when Congress passed the Act of June 21, 1906, the terms "trusts" and "restrictions on alienation" were historically conflated, used interchangeably, or treated identically. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* § 16.03 (2012) ("Allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ('trust' allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ('Restricted' allotment).... In practice, the Department of the Interior has treated the two forms of tenure identically for virtually all purposes."); *West v. Oklahoma Tax Comm'n*, 334 U.S. 717, 726, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948) ("We fail to see any substantial difference for estate tax

purposes between restricted property and trust property."); *United States v. Ramsey*, 271 U.S. 467, 470, 46 S.Ct. 559, 70 L.Ed. 1039 (1926) ("[A] trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment ***1157** as Indian country, was not regarded as important."); 18 U.S.C. § 1162 ("Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real ... property, ... that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."); 43 C.F.R. § 4.201 ("Restricted property means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the Secretary's consent. For the purposes of probate proceedings, restricted property is treated as if it were trust property."); Executive Order No. 3365 (December 7, 1920) ("It is hereby ordered, under authority found in the act of June twenty-first, nineteen hundred and six ..., that the trust or other period of restriction against alienation contained in any patent heretofore issued to any Indian for any lands on the public domain be, and the same is hereby, extended ...."); 25 C.F.R. ch. I app. (1998) (citing executive orders that continued the trust period of American Indian land under the Act of June 21, 1906).

The relationship between restrictions on alienation and the other two restrictions that historically comprised trust status —the restrictions on encumbrance and on state taxation— also supports the BIA's interpretation. At first glance, the restriction on alienation is just one of the three distinct restrictions that characterize trust status over American Indian land. This provides some support for the argument that "restrictions on alienation" and "trusts" are different, and correspondingly, that the 1906 Act's grant of power to extend the former does not authorize extensions of the latter. But in fact, the Supreme Court has explicitly tied the restriction on alienation to the restrictions on encumbrances and on state taxation. In *Goudy v. Meath*, the Supreme Court determined that removal of the restriction on alienation also removes the restrictions on encumbrance and state taxation— even if the statute did not expressly remove those restrictions. *See* 203 U.S. 146, 149, 27 S.Ct. 48, 51 L.Ed. 130 (1906); *see also* *County of Yakima*, 502 U.S. at 263–64, 112 S.Ct. 683 ("Thus, when [the General Allotment Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes."). And *Yakima* itself found that the "alienability of the allotted lands" was "of central significance" in determining whether the lands were taxable, 502 U.S. at 251, 112 S.Ct. 683, a connection this court has already recognized, *see* *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1357 (9th Cir. 1993) ("In *Yakima Nation*, the [Supreme] Court found an unmistakably clear intent to tax fee-patented land ... concluding ... that the land's alienable status determines its taxability."). If the three trust restrictions —alienation, encumbrance, and state taxation—all begin and end simultaneously, then the power to extend the restriction on alienation also impliedly confers the power to extend the restrictions on encumbrance and taxation. And if the power to extend the restriction on alienation confers the power to extend all three restrictions, then that power most reasonably also confers the power to extend the trust period, which comprises and determines the expiration of those same three restrictions.

The BIA's interpretation has one more advantage: It keeps the restriction on alienation in parallel with the restrictions on encumbrances and on state taxation. Indeed, the Supreme Court has recognized that it would be "strange" to decouple the restriction on alienation inherent in a trust patent from the other aspects of the trust, including the restriction preventing state taxation. *See* *Goudy*, 203 U.S. at 149, 27 S.Ct. 48. And that decoupling would be doubly strange given that many American Indians who owned fee-simple allotments ***1158** that passed out of trust status were often driven to sell those allotments precisely because of their newfound tax burden. *See* Cohen, *Handbook of Federal Indian Law* § 1.04 (offering a generalized description of how individual American Indians lost allotments); Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 610 (2006) (noting that after trust restrictions wore off, many American Indians "could not meet state tax payments [and either] lost their allotments in foreclosures" or "sold their property outright to generate cash for food and necessary goods").

With all these reasons in mind, it should come as no surprise that every other interpretation of the Act of June 21, 1906, that we have found—from the Supreme Court all the way down to unpublished agency legal opinions —has stated that the Act granted the President this dual authority to extend trust periods on trust patents and periods of restrictions on alienation on other types of patents. *See* *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 443 n.29, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) ("Congress has several

times authorized extensions of trust relations with respect to Indian tribes, *e.g.*, Acts of June 21, 1906, 34 Stat. 326 ...."); Cohen, *Handbook of Federal Indian Law* § 16.03[4][b][ii] ("The President ... was authorized to extend the trust period [of trusts formed under the General Allotment Act of 1887, and in [the Act of June 21,] 1906, Congress broadened the presidential power to include all allotments."); Department of Interior, Opinion Regarding the Status of the Bed of the Clearwater River Within the 1863 Treaty Boundaries of the Nez Perce Reservation (Idaho), 2016 WL 10957295, at *23 n.74 (January 15, 2016) ("Section 5 of the [General Allotment] Act directed the Secretary to hold in trust ... patents to the allotments for a period of twenty-five years before transferring fee title to the allottees [and] also allowed the President discretion to extend this trust period. Following an Attorney General opinion narrowly construing that discretion, 25 Op. Att'y Gen. 483 (1905), Congress enacted a statute [(the Act of June 21, 1906)] explicitly authorizing broad discretion in extending trust periods. 25 U.S.C. § 391."); 25 U.S.C. 415(a) (2006) (amended in 2006 to recognize that MA-8 remains held in trust); *cf.* *United States v. Bowling*, 256 U.S. 484, 488, 41 S.Ct. 561, 65 L.Ed. 1054 (1921) (noting that "Congress has treated and construed [a separate provision similar to that at issue here] as including both trust and restricted allotments").

All told, virtually everything favors the BIA's interpretation of the 1906 Act: the structure of the relevant provision of the Act; the fact that trust patents and other patents containing restrictions on alienation were historically treated identically or conflated; and the combined weight of over one hundred years of interpretations that the 1906 Act authorized trust period extensions. We thus conclude that the better interpretation of the 1906 Act is that it did grant the President the authority to extend the period of a trust patent, not just the authority to extend the restriction on alienation imposed on a trust patent.

Even acknowledging, however, that Mill Bay and Wapato Heritage presented a reasonable alternative construction to this ambiguous statutory phrase, deference to the BIA counsels us against choosing that alternative. We assume that the BIA would only be entitled deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and not *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Skidmore*, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the ***1159** degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing *Skidmore*). Here, the BIA's expertise and the persuasiveness of its reasoning entitles it to some measure of deference under *Skidmore*.

In sum, although the Act of June 21, 1906, lends itself to multiple interpretations, the best interpretation is that it afforded the President the authority to extend the trust period of trust allotments created by trust patents, not just the authority to extend restrictions on alienation for patents other than trust patents. We reach this conclusion based on our own reading of the text of the statute, our understanding of the original meaning given the statute's terms, and the consistency and persuasiveness of the interpretation of the statute by the President and the BIA. We hold that the Act of June 21, 1906, gave President Wilson the lawful authority to extend the trust period of the Moses Allotments through his 1914 executive order.

iii. Challenge Three: Whether MA-8's Trust Period Was Extended by the Act of June 15, 1935

[13] Finally, Mill Bay and Wapato Heritage argue that MA-8's trust period was not properly extended in 1936 after the passage of the 1934 IRA. At issue is the six-month period between March 1936, when the trust extension enacted by President Coolidge's executive order expired, and September 1936, when President Roosevelt's executive order extended MA-8's trust period yet again. Recall that the 1934 IRA indefinitely extended the trust period of all "Indian lands," 25 U.S.C. § 5102, but excluded "Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter," 25 U.S.C. § 5111. Recall further that the IRA also excluded reservations that affirmatively voted to opt out of the act, *see* 25 U.S.C. § 5102, but that the Act of June 15, 1935, amended the IRA and extended through December 31, 1936, the trust period for certain other American Indian lands. To fall under this 1935 Amendment, land must have met two criteria: (1) the land's "period of trust or of restriction" must not have "been extended to a date subsequent to December 31, 1936"; and (2) "the reservation

containing such lands" must have voted to exclude itself from the IRA.

Reviewing these provisions, the district court confirmed the BIA's long-standing position: The Colville Reservation voted to opt out of the 1934 IRA; this vote applied to the Moses Allotments; and the 1935 Amendment extended the trust period of the Moses Allotments until December 1936. The 1935 Amendment's trust extension thus bridged the six-month gap between March and September of 1936, when neither President Coolidge's nor President Roosevelt's executive order applied to MA-8. Mill Bay and Wapato Heritage disagree and contend that neither the 1934 IRA nor the 1935 Amendment applied to the allotments. In their view, the Moses Allotments' trust period expired in March 1936; the further trust period extension enacted by President Roosevelt's September 1936 executive order was ineffective as by then the allotments' trust period had already expired.

We reject Mill Bay and Wapato Heritage's view. Assume for a moment, as the district court found and as the BIA has maintained for nearly a century, that the Colville Tribe's vote to exclude itself from the 1934 IRA did apply to the Moses Allotments. Under this assumption, the allotments' trust period was not extended by the 1934 IRA, and the allotments meet the ***1160** 1935 Amendment's first criterion: When the 1935 Amendment was passed, the allotments' "period of trust or of restriction" had not yet "been extended to a date subsequent to December 31, 1936."[29] This leaves the second criterion, whether "the reservation containing [the Moses Allotments]" voted to exclude itself from the IRA.

Mill Bay and Wapato argue that the Moses Allotments fail this second criterion for two reasons. First, they argue that the Moses Allotments are not "reservation" land. In their view, the allotments thus fall outside the scope of the 1935 Amendment, which is limited to "lands" "contain[ed]" on a "reservation."[30] And second, they argue that the Colville Reservation's vote to exclude itself from the 1934 IRA cannot be imputed to the Moses Allotments.

The district court drew its conclusion that the Moses Allotments' land was (and is) "reservation" land from several sources. The district court pointed to: (1) multiple BIA annual reports from near the time the 1935 Amendment was passed which listed the "Columbia (Moses agreement)" as a "reservation belonging to the Moses Band," (2) historical descriptions from the Colville Agency that listed the Moses Tribe as living on the Moses Allotments and the Colville Reservation, and (3) an 1891 map that labeled the Moses Allotments, not as public domain, but as "Indian" land—the same as the Colville Reservation.

The district court also noted that these same sources ruled out alternative understandings of the allotments' status. If the allotments were not reservation land, they must have been either "allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation," 25 U.S.C. § 5111, the two types of land expressly excluded from the 1934 IRA. But the BIA reports never listed the Moses Allotments as public domain or homestead allotments, and Mill Bay and Wapato Heritage point to no historical evidence supporting their understanding.[31]

Further, and as the BIA notes, the Moses Allotments' unique history is a poor fit for the IRA's description of non-reservation land, again either "allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation." 25 U.S.C. § 5111. The Moses Allotments are admittedly "outside the geographic boundaries" of the Colville Reservation. But the allotments were originally selected from land *inside* the "geographic boundaries" of the Columbia Reservation, a reservation that has yet to be disestablished, and were not taken from land "upon the public domain." Further, the BIA points to other types of land that fit the terms of the IRA's description of ***1161** non-reservation land far more cleanly. At the time Congress enacted the IRA, it commonly allotted lands from the public domain to individual American Indians who did not reside on reservations. The IRA's description of non-reservation land "upon the public domain outside of the geographic boundaries of any Indian reservation" reads more naturally to refer to that land—land that was taken from the public domain and was never part of any reservation whatsoever—than to the Moses Allotments, which, again, were formed from the Columbia Reservation rather than from the public domain.

Mill Bay and Wapato Heritage disagree. In their view, because the Moses Allotments were held not in trust on behalf of a tribe but held for individual American Indians, they are not reservation land. They base their argument in the Supreme Court's statement that "tribal ownership was a critical component of reservation status." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). But properly read in context, that passage does not support their argument. Both

Yankton Sioux and the case that *Yankton Sioux* cited for its "tribal ownership" language drew a distinction between ownership by American Indians and ownership by non-Indians, not between ownership by tribes and ownership by individual American Indians. *See id.* (describing the Yankton Sioux's decision to sell some of its territory to "non-Indian homesteaders"); *Solem v. Bartlett*, 465 U.S. 463, 468, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) ("Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, *individual allotments*, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.") (emphasis added). *Yankton Sioux* thus lends no support to Mill Bay and Wapato Heritage's argument that allotments for individual American Indians are non-reservation land under the IRA.

[14] Mill Bay and Wapato Heritage also argue that the contemporary reports cited by the district court are not entitled to evidentiary weight because they do not analyze the question whether MA-8 is reservation land, but merely assume it. We disagree. Contemporary agency interpretations have "great weight" when it comes to determining the meaning of statutes at the time they were enacted. *Cruz v. Zapata Ocean Res., Inc.*, 695 F.2d 428, 431 (9th Cir. 1982). Here, the BIA's evidence shows that the agency consistently applied the provisions of the 1935 Amendment to the Moses Allotments, referred to them as reservation allotments, and did not treat the Moses Allotments as homestead or public domain allotments. This evidence has significant probative value and supports the district court's conclusion below and our conclusion on appeal.

Last, Mill Bay and Wapato Heritage argue that the 1935 Amendment does not apply to the Moses Allotments because the 1935 Amendment covers only reservations that rejected the 1934 IRA and the Secretary of the Interior did not call a vote for the Columbia Reservation or the Moses Allotments. But again, the Colville Reservation rejected the 1934 IRA and this vote does apply to the Moses Allotments. The Moses Band of American Indians—the tribe of which the original Moses Allotment allottees were members—could and did participate in that vote, and the Colville Agency, which held the vote, also administered the Columbia Reservation that contains the Moses Allotments.[32] The ***1162** Moses Allotments needed no separate vote. And even if Mill Bay and Wapato Heritage were correct that the Colville Reservation's vote did not apply to the Moses Allotments, the allotments would still be reservation land within the scope of the 1934 IRA because of all the compelling reasons just given above. So if Mill Bay and Wapato Heritage's argument were correct, then because the Colville Reservation's vote against the IRA did not apply to the Moses Allotments, the Moses Allotments never voted against the application of the IRA and the IRA would have indefinitely extended MA-8's trust status regardless.

Based on the well-reasoned conclusion of the district court and the weight of the evidence in the record, including contemporary interpretations and consistent treatment for nearly a century, we reject Mill Bay and Wapato Heritage's argument that the Moses Allotments were non-reservation land outside of the scope of the 1934 IRA and its 1935 Amendment. We thus affirm the district court's conclusion that the 1935 Amendment extended the Moses Allotments' trust status.

* * *

To summarize, we hold that of the three transactions and trust extensions in MA-8's history that Mill Bay and Wapato Heritage challenge, none were legally deficient. The MA-8 land remains held in trust by the United States, and the BIA, as holder of legal title to the land, had and has standing to bring its claim for trespass and ejectment against Mill Bay.

B. Res Judicata

[15] **[16]** Mill Bay's second defense is that the BIA should be precluded from seeking ejectment due to the BIA's involvement in the 2004 *Grondal* state litigation between Mill Bay, Wapato Heritage, and Evans' estate[33] that resulted in the 2004 Settlement Agreement.[34] Recall that this agreement renegotiated certain requirements and dues under the Regular and Expanded Membership Agreements (between Mill Bay and Wapato Heritage), and because the *Grondal* state litigation concerned Evans' estate, the settlement was entered pursuant to Washington's Trust Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A. The settlement included provisions that increased rent due by Mill Bay to Wapato Heritage (with a schedule through 2034) and described the nature of Mill Bay's interest: "Mill Bay Members have a right to use the property ... pursuant to the Prior Documents and this Agreement through December 31, 2034, subject to the terms of this Agreement and the Prior Documents."[35] The settlement was "equivalent to a final

court order binding on all persons interested in the estate or trust." RCW § 11.96A.230.

[17] Mill Bay believes that the settlement's guarantees —for instance, Mill Bay's "right to use the property ... through December 31, 2034"—preclude the ***1163** BIA from seeking to eject Mill Bay in this litigation. The district court disagreed. Mill Bay appeals the finding of the district court, arguing that the BIA and the IAs were parties under TEDRA, thus precluding the BIA from relitigating the terms of the settlement agreement. District court judgments as to issue and claim preclusion are reviewed de novo. *See* *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019).

[18] **[19]** "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. For res judicata to apply there must be: (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997) (cleaned up). Mill Bay fails to show that this litigation and the 2004 Settlement Agreement involved the same claims or the same parties (or involved parties in privity with one another).

The BIA was not itself a party to the *Grondal* state litigation or the 2004 Settlement Agreement. Mill Bay concedes as much: the BIA was asked to intervene in the suit but never did; the BIA attended mediation between the parties but did not participate; the BIA received notice of the settlement but did not object; and no such notice was sent to the IAs.

[20] Nor was the BIA in privity with Wapato Heritage, concededly one of the parties to the *Grondal* state litigation. For two parties to have privity, they must be "so identified in interest ... that [they] represent[ ] precisely the same right" on the relevant issues. *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (quoting *Sw. Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir. 1977)). But after Evans' death, Wapato Heritage obtained Evans's interest under the Master Lease as the lessee of the MA-8 land. And Wapato Heritage's interest as the lessee under the Master Lease is quite different from the BIA's interest as trustee for the lessors under the same lease. So Wapato Heritage and the BIA did not "represent[ ] precisely the same right." *In re Schimmels*, 127 F.3d at 881.

To show identity another way, Mill Bay argues that the BIA was an interested party under TEDRA and was required to object to the terms of the 2004 Settlement Agreement, which Mill Bay argues revised the Master Lease. TEDRA acts to bind "all persons interested in the estate or trust" to a settlement involving that estate. RCW § 11.96.220. "Persons interested in the estate" means:

> all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.

RCW § 11.96.030(6).

Mill Bay does not argue that the BIA was beneficially interested in Evans' estate or was a personal representative of Evans. Mill Bay argues only that the BIA held power over an estate asset—Evans' interest as a lessee of the MA-8 land under the Master Lease—because the BIA held authority under the Master Lease to withhold approval of any assignment of Evans' lease interest. Mill Bay provides no Washington caselaw defining "persons holding powers over estate assets" to include those persons who possess certain contingent rights pursuant to a contractual lease agreement. The available caselaw suggests instead that "powers" refers to more direct control over assets. *See Paunescu v. Eckert*, 193 Wash. App. 1050, 2016 WL 2868924 at *3 (2016) (unpublished) (likening ***1164** "persons holding powers over the trust assets" to the trustee); *In re Est. of Whitehead*, 139 Wash. App. 1038, 2007 WL 1884650 at *5 & n.39 (2007) (unpublished) (likening "persons holding powers over estate assets" to a personal representative). Mill Bay does not argue that the BIA's status as trustee of and legal titleholder to MA-8 gave the BIA any "power" over any asset in Evans' estate, and the argument that Mill Bay does make finds no support in Washington caselaw. We accordingly decline to find that the BIA was "interested in" Evans' estate under TEDRA.

Moreover, Mill Bay points to no authority showing the United States waived its sovereign immunity. Thus, Mill Bay and the IAs could not have employed TEDRA to compel the United States to participate in the state estate proceeding, which forecloses the argument that TEDRA could somehow bind the BIA to the 2004 Settlement Agreement. *See* *Sisseton–Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) ("The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress ....").

[21] Even setting aside that different parties were involved in the *Grondal* state litigation and in this lawsuit, the two cases also involved different claims, *i.e.* lacked identity of issue. "Claim preclusion prevents parties from relitigating the same claim," and suits "involve the same claim ... if the later suit arises from the same transaction" as does the first suit. *Brownback v. King*, —— U.S. ——, 141 S. Ct. 740, 747 n.3, 209 L.Ed.2d 33 (2021) (cleaned up). Here, the *Grondal* state litigation and this appeal do not involve the same transaction. The *Grondal* state litigation pertained to the membership agreements between Evans/Wapato and Mill Bay but this suit pertains to the Master Lease between the IAs/BIA and Evans/Wapato. Nothing in the *Grondal* state litigation ever claimed to address or resolve whether the Master Lease was renewed. Further, claim preclusion does not apply here because Wapato still had time to renew the Master Lease even after the 2004 Settlement Agreement, and the Master Lease's expiry is the entire premise of this lawsuit. *See* *Media Rts. Techs., Inc.*, 922 F.3d 1014, 1021 (9th Cir. 2019) ("[C]laim preclusion does not apply to claims that accrue after the filing of the operative complaint in the first suit." (quotation marks and citation omitted)).

For all these reasons, we reject Mill Bay's argument that the IAs and the BIA are precluded under res judicata from ejecting Mill Bay.

C. Assignment of the Expanded Membership Agreements under Master Lease Paragraph 8

[22] Mill Bay's third defense relates to a provision of the expired Master Lease. Although prior litigation resolved that Wapato Heritage failed to renew the Master Lease, Paragraph 8 of the Master Lease requires the Lessor-IAs to honor sublease or subtenant agreements even after the Master Lease is terminated "by cancellation or otherwise." Paragraph 8 (entitled "Status of Subleases on Conclusion of Lease") states:

> Termination of this Lease, by cancellation or otherwise, shall not serve to cancel subleases or subtenancies, but shall operate as an assignment to Lessor of any and all such subleases or subtenancies and shall continue to honor those obligations of Lessee under the terms of any sublease agreement that do not require any new or additional performance not already provided or previously performed by Lessee.

The Expanded Membership Agreements, signed by individual Mill Bay purchasers and Chief Evans, Inc. (predecessor-in-interest to Wapato Heritage), stated ***1165** that "[t]he duration of this membership is coextensive with the fifty (50) year term" of the Master Lease. Mill Bay argues that the Expanded Membership Agreements issued by Wapato Heritage and the 2004 Settlement Agreement should be assigned to the IA lessors under the terms of Paragraph 8.

[23] The district court rejected this argument in its 2010 order. The court concluded that Paragraph 8 did not apply to the Mill Bay members because (1) under both the Expanded Membership Agreements and the 2004 Settlement Agreement, the Mill Bay members were mere licensees, not sublessees or subtenants; and (2) the Master Lease was terminated by normal expiration, not unexpectedly terminated. Federal law applies to the interpretation of the Master Lease. *Wapato Heritage I*, 637 F.3d at 1039 ("We also apply federal law because the BIA's role and obligations under the contract are in contention."). Under federal law, "[t]he interpretation and meaning of contract provisions are questions of law reviewed de novo." *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003). We hold that Paragraph 8 of the Master Lease does not apply at all because the Master Lease was not terminated "by cancellation or otherwise."[36]

[24] The Master Lease was not "cancelled." The Master Lease expired after Wapato Heritage failed properly to exercise the renewal option. Mill Bay argues "or otherwise" expands the type of termination contemplated beyond cancellation and that this phrase should be read instead

to mean termination for any reason whatsoever, including normal expiration. That interpretation contravenes the canon of *ejusdem generis*, which "refers to the inference that a general term in a list should be understood as a reference to subjects akin to those with specific enumeration." *In re Pangang Grp. Co., LTD.*, 901 F.3d 1046, 1056 (9th Cir. 2018) (internal quotation marks and citation omitted). So "cancellation" helps define the phrase "or otherwise." Black's Law Dictionary defines cancellation to mean: "An annulment or termination of a promise or an obligation; specif., the purposeful ending of a contract because the other party has breached one or more of its terms." *Cancellation, Black's Law Dictionary* (11th ed. 2019). "Cancellation or otherwise" thus most naturally refers to methods of a lease's termination other than the natural course of time, such as termination due to some action by a party that ends the lease before the contract term concludes. In contrast, termination by normal expiration contemplates that no party breached the terms and the Master Lease ran its full course and simply expired. So Paragraph 8 applies only if the lease was terminated by a party's breach and another party's action in response to that breach, not when, as here, the lease expired on its intended expiration date.

Other provisions of the Master Lease only confirm our interpretation of Paragraph 8.[37] Mill Bay's construction of Paragraph 8 would extend Wapato Heritage's purported sublease to Mill Bay to 50 years, beyond the life of the actual lease ***1166** between Wapato Heritage and the IAs. But that would contradict Paragraph 7, which states: "No part of the premises shall be subleased for a period extending beyond the life of this [Master] Lease ...." Mill Bay's response is that Paragraph 7's "life of this Lease" phrase meant the full fifty-year potential for the lease, not the valid twenty-five-year lease term. But that reading of Paragraph 7 is in turn contradicted by Paragraph 3 of the Master Lease, which states: "The term of this lease shall be twenty-five (25) years."[38] The way we read Paragraph 8—that this paragraph requires the Lessor-IAs to honor sublease or subtenant agreements only if the Master Lease is terminated before its natural expiration—harmonizes all of these provisions.

Indeed, if the parties intended Paragraph 8 to apply when the lease terminated for any reason, including normal expiration, it is unlikely they would have included language that is naturally read as being limited to premature termination. Paragraph 30 ("Delivery of Premises") of the Master Lease, just a few pages away, proves that the parties could author expansive language when they desired. Paragraph 30 requires the lessee to deliver possession "at the termination of this lease, by normal expiration or otherwise ...." Paragraph 30's scope is broad: "normal expiration or otherwise" covers just about everything. But in comparison, and as just described above, the natural reading of Paragraph 8 is more restrictive. To give effect to the precise text in each provision, we must more probably give "termination ... by cancellation or otherwise" a different, more restrictive interpretation than "termination ... by normal expiration or otherwise." *See United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 797 (9th Cir. 2017) ("[I]f possible, every word and every provision is to be given effect ....").

For all of these reasons, we reject Mill Bay's interpretation of Paragraph 8 of the Master Lease: Paragraph 8 does not apply when the Lease expires by the passage of time, as happened here.

D. Equitable Estoppel

[25] Mill Bay's fourth and final defense against ejectment pertains to the BIA's alleged prior representations that Mill Bay would be able to remain on MA-8 through 2034.[39] Mill Bay argues that, based on those statements, the court should apply equitable estoppel to prevent the BIA from seeking Mill Bay's ejectment. Below, the district court concluded the equitable estoppel defense is not available under *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003), in which we held that the United States is not subject to equitable estoppel when it acts in its sovereign capacity as trustee for Indian land. A district court's decision to apply or reject an estoppel defense is reviewed for abuse of discretion but the district court's legal conclusions ***1167** as to the availability of that defense are reviewed de novo. *See United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc) ("[T]he first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested.").

In *City of Tacoma*, the BIA brought a suit in the 1990s to invalidate Tacoma's 1921 condemnation of land allotted to American Indians in trust patents, land which Tacoma used to build a hydroelectric power project. 332 F.3d at 576–78. At the time of the condemnation, the United States had acceded to the process as trustee, writing in a 1921 letter that it viewed the proceedings as "in all respects legal," and accepted the compensation for the taking of the land on behalf of the American Indian allottees. *Id.* However, in

1939, the Supreme Court interpreted a federal statute (which was on the books in 1921) to require that the United States be named as an indispensable party for all condemnation proceedings concerning trust allotments, which Tacoma had failed to do in its condemnation suit. *Id.* at 579–80. Some fifty years later, the BIA, at the behest of the local tribe, filed a claim against Tacoma to invalidate the 1921 condemnation based on that procedural infirmity. Tacoma, in defending itself against invalidation, argued that the BIA was foreclosed from seeking invalidation under the principles of equitable estoppel. Because the government approved the legitimacy of the condemnation proceedings, as evidenced in the 1921 letter, Tacoma argued the court should not permit the BIA to reverse itself decades later. *Id.* at 581. We denied Tacoma's argument for equitable estoppel, holding that "when the government acts as trustee for an Indian tribe, it is not at all subject to [an equitable estoppel] defense. *Id.* at 581–82.

Here, Mill Bay similarly seeks to use equitable estoppel against the BIA to deny the BIA's claim to possession of land the BIA holds in trust to American Indian allottees. However, Mill Bay argues *City of Tacoma* does not apply. Mill Bay claims that the BIA is not acting as trustee for American Indian land but rather is acting to further its own sovereign and proprietary interests. Mill Bay further claims the BIA has a conflict of interest and is violating its duty as trustee by favoring the Tribe over the IAs. [40]

Mill Bay relies primarily on *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011), where the Supreme Court described the holding of one of its own prior cases, *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912). In *Heckman*, the government sued as trustee on behalf of American Indian allottees (who impermissibly sold their allotments) to nullify those same conveyances. *See id.* at 417, 32 S.Ct. 424. The Court in *Jicarilla* said that in *Heckman*, the government "was formally acting as a trustee [but] was in fact asserting its own sovereign interest in the disposition of Indian lands." ***1168** *Jicarilla*, 564 U.S. at 176, 131 S.Ct. 2313. Mill Bay suggests that *Jicarilla* stands for the proposition that when the BIA acts as a trustee on behalf of American Indians but contrary to their interests, it furthers its own sovereign interests and is thus not immune to equitable estoppel.

We reject Mill Bay's argument. To begin, Mill Bay cannot claim that the BIA acted outside of the scope of the trustee relationship contemplated in *City of Tacoma*. The BIA's trespass suit is brought pursuant to 25 C.F.R. § 162.471, which expressly states that "[i]f a lessee remains in possession after the expiration, termination, or cancellation of a business lease," the BIA "may take action to recover possession on behalf of the Indian landowners." Even under Mill Bay's interpretation of *Jicarilla* and *Heckman* (neither of which involved a claim for equitable estoppel), ejection of a trespasser is a statutory function not at odds with the traditional trustee-beneficiary relationship. Rather, ejectment is a traditional exercise of a trustee's duty to protect the trust property on behalf of the trustees (here, the allottees).

[26] Nor did the BIA act outside the trustee relationship when it helped draft and execute the Master Lease. To administer, preserve, and maintain the trust property is a quintessential trustee function. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) ("[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets ....' " (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985))).

And even if we take as true Mill Bay's accusation that, whether or not the BIA was acting within its powers as trustee, the agency had a conflict of interest, Mill Bay still does not explain how this conflict would convert the BIA's interest as a trustee in ejecting Mill Bay from MA-8 into a proprietary interest of the United States. None of the dues or rent from the property go to the BIA, which retains title on behalf of the IAs in trust in any event. *See Wapato Heritage I*, 637 F.3d at 1039 ("Neither did the BIA become a party to the Lease by acting in its approval capacity or in its limited role as proxy for the 64% of the Landlords who had given their express authority to sign on their behalf, or with respect to the remaining 36% of the Landowners, for whom it signed as authorized by § 162.2(a)(4).").

Alternatively, Mill Bay argues that we should cabin *City of Tacoma*'s holding that equitable estoppel is *never* applicable against the United States when acting as trustee for American Indian allottees. We see no reason to do so. The rule —in its broadly stated form—is well-grounded and dates back decades. *See* *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) ("No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses."); *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) ("[T]he well-established rule [is] that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses." (citing *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1083–84 (2d Cir. 1982))).

[27] Last, Mill Bay argues the United States should be granted immunity from equitable estoppel only when full alienation of the allottees' land is at issue. But the rule as stated in *City of Tacoma* is broad, ***1169** clear, and admits no exception for instances where alienation is not at issue. Moreover, we have previously applied the rule to a case where alienation was not at issue. In *Ahtanum*, non-American Indian landowners located near a reservation sought to bind the government by estoppel to a 1908 agreement (between the BIA and the non-American Indian landowners) that entitled the landowners to 75% of a reservation river's water. 236 F.2d at 329. We applied the rule as stated in *City of Tacoma*, concluding that the landowners could not enforce the 1908 agreement based on the government's "subsequent conduct or approval" of the agreement because "[n]o defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses." *Id.* at 334. There, as here, the government was granted immunity from estoppel that would have limited by contract the American Indians' use of their land.

We conclude that *City of Tacoma* is not distinguishable and that Mill Bay is barred from asserting its defense of equitable estoppel against the BIA. [41]

IV. CONCLUSION

For the reasons stated above, we **AFFIRM** the district court's grant of the BIA's motion for summary judgment on its counterclaim for trespass.

All Citations

21 F.4th 1140, 22 Cal. Daily Op. Serv. 117, 2022 Daily Journal D.A.R. 16

Footnotes

1 The Tribe owns a 32.2% interest in the land and Wapato Heritage (owned by the grandsons of a deceased individual allottee by the name of William Wapato Evans, Jr.) holds a 23.8% interest as a life estate; this estate reverts to the Tribe after the death of Evans' last living great grandchild. Separately, around 4.5% of the land is held in fee.

2 The Master Lease defines the "Lessee" as Evans, and the "Lessor" as individuals named in "Exhibit A." As it happens, Exhibit A could not be located and may not exist, but, per prior litigation, the parties here agree that the individuals listed in Exhibit A are the IAs who owned the fractionated interests in MA-8 at the time the Master Lease was signed. The BIA, as trustee, signed the Lease on behalf of the IA Lessors.

3 Evans also used his company "Chief Evans, Inc." to conduct business.

4 Mill Bay's motion to supplement the record dated December 16, 2020, is **GRANTED**.

5 Mill Bay's motion to take judicial notice dated May 21, 2021, is **GRANTED**.

6 Mill Bay asserted six claims: estoppel; waiver and acquiescence; modification; agency abuse of discretion under the Administrative Procedures Act ("APA"); violation of the Fifth Amendment (namely, that the BIA's determination that the tenancy expired in 2009 "deprives Plaintiffs of their property rights without due process of the law"); and declaratory judgment.

7 The district court dismissed these three claims several reasons, including for failure to state a claim, issue preclusion, and lack of subject matter jurisdiction because of sovereign immunity. Separately, the district court granted the BIA's motion for summary judgment on Mill Bay's APA claim because there was no "final agency action" and on Mill Bay's Fifth Amendment claim because the United States did not waive its sovereign immunity. Here, Mill Bay does not challenge the district court's order granting the BIA's motion for summary judgment on Mill Bay's APA and Fifth Amendment claims.

8 Ten years later in 2020, the district court reconsidered its concerns as to prematurity, granted the BIA's motion for summary judgment for trespass, and ordered Mill Bay removed from MA-8. This 2020 order is the second order here on appeal.

9 Wapato Heritage's crossclaims—declaratory judgment, quiet title, and partition—all rely on the theory that MA-8 is no longer in held in trust but instead is owned outright in fee by the IAs.

10 This argument contradicts Mill Bay's prior arguments, including assertions in Mill Bay's complaint that the BIA "manages [MA-8] in trust." It also contradicts an understanding evident in our prior decision in *Wapato Heritage I*. *See* 637 F.3d at 1035 ("The United States holds MA-8 in trust for Wapato John and his heirs ....").

11 After the district court's 2010 order, proceedings were significantly delayed due to concerns the court had with the IA-defendants' lack of legal representation. These representation issues are the subject of this case's companion appeal, *Wapato Heritage LLC v. United States*, No. 20-35357 (9th Cir. 2021), which we decide by separate memorandum disposition.

12 The district court left pending crossclaims including Wapato Heritage's crossclaims against both the BIA and Wapato Heritage's fellow defendants and the BIA's crossclaim against Wapato Heritage. Wapato Heritage's crossclaims sought equitable relief while the BIA's crossclaim alleged that Wapato Heritage had failed to pay rent. Those claims are not raised on this appeal, and in any event, Wapato's crossclaims concerning MA-8's trust status were dismissed based on the district court's finding that MA-8 remained held in trust by the BIA. *See Grondal v. United States*, 513 F. Supp. 3d 1262, 1281 (E.D. Wash. 2021).

13 The district court's 2010 order merges here with the 2020 order. *See United States v. 475 Martin Lane*, 545 F.3d 1134, 1141 (9th Cir. 2008) ("[I]nterlocutory order[s] merge[ ] in the final judgment and may be challenged in an appeal from that judgment." (quoting *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976))).

14 Mill Bay originally argued that the BIA "manages [MA-8] in trust." Its current position is the opposite: "MA-8 is not Indian-trust land," depriving the BIA of any "authority to evict" Mill Bay.

15 Contrary to the BIA's assertion, Mill Bay's claimed right to possess MA-8 is not due solely to agreements predicated on federal trust title. Mill Bay's membership agreements were made under the Master Lease which, although approved by the BIA, originated by obtaining majority consent of the interests held by the lessor IAs.

16 We need not address whether Wapato Heritage's crossclaims are barred by sovereign immunity per the Quiet Title Act, 28 U.S.C. § 2409a.

17 A more thorough history was compiled by Judge Peterson in the 2020 order below. *See* *Grondal v. Mill Bay Members Ass'n*, 471 F. Supp. 3d 1095, 1100–10 (E.D. Wash. 2020).

18 A small group did relocate.

19 In other words, the land of the Columbia Reservation that was not allotted to American Indians who had decided to stay became owned by the federal government.

20 The record sheds little light on what happened to the MA-8 land between 1884 and 1906, and in any event, no party brings any legal arguments pertaining to that 22-year period.

21 As mentioned earlier, the patents also subjected the allotted land to restrictions on alienation and encumbrance during the trust period.

22 The Supreme Court has described why the trust restrictions became an enduring feature of United States policy:

> Because allotted land could be sold soon after it was received, many of the early allottees quickly lost their land through transactions that were unwise or even procured by fraud. Even if sales were for fair value, Indian allottees divested of their land were deprived of an opportunity to acquire agricultural and other self-sustaining economic skills, thus compromising Congress' purpose of assimilation.

County of Yakima, 502 U.S. at 254, 112 S.Ct. 683 (internal citations omitted).

23 Excluded from the definition of "Indian lands" was "Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." 25 U.S.C. § 5111. As discussed in more detail below, MA-8 does not fall within this exclusion.

24 Chief Moses, along with members of other tribes, would all soon form the Confederated Tribes of the Colville Reservation, defendants-appellees here.

25 The government's basis for applying the 1935 Amendment to the Moses Allotments is analyzed in more detail below.

26 The Act of July 4, 1884, stated that the allottees would be "entitled to 640 acres, or one square mile of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected."

27 *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.").

28 Further evidence to this effect can be found in the 1934 Indian Reorganization Act. In that Act, Congress extended indefinitely the trust period for allotments: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 25 U.S.C. § 5102. Although Congress referenced both concepts, Congress did not decouple the trust period and the restriction on alienation. Instead, Congress took special pains to highlight that the restrictions on alienation are included within the trust by referencing the "restriction[s] on alienation thereof [the trust]" as opposed to "thereon the land." This offers some measure of additional evidence that the restriction on alienation is a primary attribute of the trust status.

29 While Mill Bay and Wapato Heritage argue that the Colville Tribe's vote to exclude itself from the 1934 IRA did not apply to the Moses Allotments, they agree that as of the enactment of the 1935 Amendment, the Moses Allotments' trust period had not been extended past December 31, 1936. And in any event, we will soon turn to Mill Bay and Wapato Heritage's argument about the Colville Tribe's vote.

30 Mill Bay and Wapato Heritage also argue that the Moses Allotments are non-reservation land and thus fall outside the scope of the 1934 IRA, given its exclusion for "Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation." 25 U.S.C. § 5111.

31 They cite a single 2009 document that describes the MA-8 allotments as "Colville Public Domain," but that record does not suggest that the allotments are on land that is the "public domain" of the United States. Rather, it shows that the United States understands the land to be on the "Public Domain" of the Colville Tribes.

32 Even today, the MA-8 individual allottees are virtually all members of the Confederated Tribes of the Colville Reservation.

33 Evans died during the pendency of the *Grondal* state litigation.

34 On this issue, the BIA offers its own res judicata argument: that Mill Bay was in privity with Wapato Heritage at the time of the 2004 Settlement and is thus bound by the 2011 Ninth Circuit's decision in *Wapato Heritage I*. The district court rejected BIA's collateral estoppel argument below because there was no identity of issue, and we affirm that holding. The government seeks to preclude Mill Bay from arguing that the 2004 Settlement extended the Master Lease, but *Wapato Heritage I* did not decide that question. *See* 637 F.3d at 1037–40. Even so, our conclusion here is fully consistent with the result in *Wapato Heritage I*.

35 "Prior documents" included the Master Lease, Evans' sublease to Mar-Lu, and both the Regular and Extended Membership Agreements.

36 Because Paragraph 8 does not apply, we need not examine whether the Expanded Membership Agreements or the 2004 Settlement Agreement created mere sublicenses rather than subleases.

37 *Cf.* *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole.").

38 Mill Bay's reading here also requires the Court to reach not one but two unlikely conclusions: that a sublessor can grant a sublessee more rights than he holds himself and that the parties meant to allow Wapato Heritage to issue subcontracts beyond the twenty-five-year term regardless whether Wapato Heritage ever actually exercised the lease renewal option.

39 Specifically, Mill Bay cites: (1) the BIA's receipt of and nonresponse to Evans' 1985 letter purportedly exercising the renewal option (later found to be ineffective), (2) the BIA's receipt of the Expanded Membership Agreements which were marketed to be valid through 2034 and the BIA's approval of the Site Plan modification, (3) the BIA's statement on a form affidavit provided to Washington State Liquor Control Board stating "[Master] Lease expiration date: 2-2-2034," and (4) the BIA's failure to object to the 2004 Settlement Agreement, which assumed the renewal of the lease through 2034.

40 Wapato Heritage asserts that the BIA is acting at the behest of the Tribe, which favors the ejectment of Mill Bay and expiration of the Master Lease (supposedly because the Tribe can maintain low sublease and rental rates for its casino or because the Tribe wishes to relocate the casino to the waterfront, where the Mill Bay

RV Park is located). Wapato Heritage suggests that the BIA is favoring the Tribe's interests over the interests of the IAs, which are to recoup the most amount of rent money possible. Wapato Heritage also points to the fact that the BIA's district superintendent through 2017 was an enrolled member of the Tribe (who left in 2017 for a position with the Tribe). Wapato Heritage further points to the BIA's approval of the Tribe's purchases of some of the IA's interests in MA-8 at below market value since the start of this litigation.

41 Under 25 C.F.R. § 162.471, after consultation with the American Indian landowners, the BIA has authority to remove trespassers even without majority consent from the IAs. Thus, Mill Bay's claim for equitable estoppel against IAs would not grant Mill Bay any relief and we need not address it in this appeal.

End of Document

KeyCite Yellow Flag - Negative Treatment
Order Clarified by Grondal v. Mill Bay Members Association, Inc., E.D.Wash., July 28, 2020

471 F.Supp.3d 1095
United States District Court, E.D. Washington.

Paul GRONDAL, a Washington resident, Plaintiff,

v.

MILL BAY MEMBERS ASSOCIATION, INC., a Washington non-profit corporation; United States of America; United States Department of Interior; Bureau of Indian Affairs; Francis Abraham; Catherine Garrison; Maureen Marcellay, Mike Palmer, also known as Michael H. Palmer; James Abraham; Naomi Dick; Annie Wapato; Enid Marchand; Gary Reyes; Paulwapato, Jr.; Lynn Benson; Darlene Hyland; Randy Marcellay; Francis Reyes; Lydia W. Armeecher; Mary Jo Garrison; Marlene Marcellay; Lucina O'Dell; Mose Sam; Sherman T. Wapato; Sandra Covington; Gabriel Marcellay; Linda Mills; Linda Saint; Jeff M. Condon; Dena Jackson; Mike Marcellay; Vivian Pierre; Sonia Vanwoerkon; Wapato Heritage, LLC; Leonard Wapato, Jr.; Derrick D. Zunie, II; Deborah L. Backwell; Judy Zunie; Jaqueline White Plume; Denise N. Zunie; Confederated Tribes Colville Reservation; and Allottees of MA-8, also known as Moses Allotment 8, Defendants.

NO: 2:09-CV-18-RMP
|
Signed 07/09/2020

Synopsis

Background: Non-Indians who purchased camping memberships for recreational use of highly fractionated reservation allotment land that was on banks of Lake Chelan, was leased by seller from lessor Indian allottees, and was held in trust by United States for Indian allottees who were predominantly members of Confederated Tribes of Colville Reservation, filed suit against seller's successor in interest, federal government, and Indian allottees, seeking declaratory relief that allottees were equitably, collaterally, or otherwise estopped from denying purchasers their right to occupy and use land even though seller's master lease had expired due to failure to renew it. Government counterclaimed for trespass, requesting ejectment of purchasers. Parties cross-moved for summary judgment, and purchasers moved for default judgment against non-appearing allottees.

Holdings: The District Court, Rosanna Malouf Peterson, J., held that:

[1] purchasers were judicially estopped from arguing land was not held in trust;

[2] allotment land was Indian trust land held by United States for benefit of allottees;

[3] entry of default judgment was not warranted; and

[4] purchasers' right to use land expired along with lease.

Plaintiffs' motion denied; defendants' motion granted.

Procedural Posture(s): Review of Administrative Decision; Motion for Summary Judgment; Motion for Default Judgment/Order of Default.

West Headnotes (42)

[1] **Estoppel** Claim inconsistent with previous claim or position in general

The "judicial estoppel doctrine" prevents a party who takes one position from later assuming a second, contradictory position on the same issue, either in the same litigation or in subsequent litigation.

[2] **Estoppel** Claim inconsistent with previous claim or position in general

The doctrine of judicial estoppel applies to both assertions of fact and arguments about the law.

[3] **Estoppel** Claim inconsistent with previous claim or position in general

The circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formula or principle.

Attachment: 7

[4] **Estoppel** Claim inconsistent with previous claim or position in general

The purpose of the doctrine of judicial estoppel is to preserve the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts.

[5] **Estoppel** Claim inconsistent with previous claim or position in general

Because the doctrine of judicial estoppel was created to prevent a party from deliberately manipulating the courts, courts may not apply the doctrine when a party's change in position is based on a mistake or inadvertence.

[6] **Estoppel** Claim inconsistent with previous claim or position in general

When a party takes a contrary position to its former position on a particular issue in order to gain an unfair advantage in the litigation or to impose an unfair detriment on the opposing party, application of judicial estoppel is appropriate.

[7] **Federal Courts** Estoppel and waiver

A court's use of judicial estoppel is reviewed for abuse of discretion.

[8] **Estoppel** Claim inconsistent with previous claim or position in general

Purchasers of camping memberships to use allotment land leased by seller from lessor Indian allottees were judicially estopped from arguing that land was not held in trust by United States for Indian allottees; purchasers' complaint asserted that land was held in trust for Indian allottees, purchasers' claim for declaration that they were entitled to occupy land was asserted against Bureau of Indian Affairs (BIA) for actions in administering allotment land as trust land, district court had already ruled on claim which could not have been asserted if land were not held in trust, and purchasers began arguing their new contradictory position two years after filing complaint and only after their claim against BIA failed.

[9] **Statutes** Clarity and Ambiguity; Multiple Meanings

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.

[10] **Indians** Allotments

Land allotments held in trust by United States for benefit of Indian allottees were not removed from trust status by Act of May 20, 1924, providing that "any allottee to whom a trust patent has heretofore been or shall hereafter be issued" by virtue of agreement with tribe's chief "may sell and convey any or all the land covered by such patents, or if the allottee is deceased the heirs may sell or convey the land, in accordance with the provisions of the Act of Congress of June 25, 1910," which applied to Indian allotments held under trust patents.

[11] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

When courts interpret a statute, if the statutory language provides a clear answer, then the court's task comes to an end.

[12] **Statutes** Purpose and intent; determination thereof

Statutes Plain, literal, or clear meaning; ambiguity

When a statute's terms are ambiguous, the court may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent.

[13] **Statutes** What constitutes ambiguity; how determined

A statute is ambiguous if it gives rise to more than one reasonable interpretation.

[14] **Statutes** Intent

The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute.

[15] **Indians** Purpose and construction

The standard principles of statutory construction do not have their usual force in cases involving Indian law.

[16] **Indians** Purpose and construction

The canons of statutory construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.

[17] **Indians** Purpose and construction

One relevant Indian law canon of construction is that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

[18] **Indians** Allotments

Land allotments held in trust for benefit of Indian allottees had their trust status extended by Act of June 15, 1935, amending Indian Reorganization Act (IRA) and providing that if period of trust "on any Indian land" had not, before Act's passage, been extended to date subsequent to December 31, 1936, and if reservation containing such lands had voted to exclude itself from IRA, "period of trust of such lands are hereby extended to December 31, 1936"; government considered allotments to be Indian trust land on date of Act's passage, period of trust would have expired prior to December 31, 1936, and Colville Tribes' vote to exclude themselves from IRA extended to allotments as allottees were members of Colville Tribes, even though allotments were not geographically in voting reservation. 25 U.S.C.A. § 5125.

[19] **Indians** Land held in trust in general

In addition to promoting tribal self-governance, protecting the trust status of Indian land was a primary purpose of the Indian Reorganization Act (IRA). 25 U.S.C.A. § 5101.

[20] **Administrative Law and Procedure** Administrative Powers and Proceedings

Administrative Law and Procedure Legislative acquiescence, approval, or other response in general

Congress ratifies an agency's interpretation or practice when it is aware of that interpretation or practice, legislates in an area covered by that interpretation or practice, and does not refer to or change that interpretation or practice.

[21] **Administrative Law and Procedure** Administrative Powers and Proceedings

Absent some special circumstance Congress's failure to change or refer to an agency's existing practices is reasonably viewed as ratification thereof.

[22] **Indians** Standing

Land allotments held in trust by United States for benefit of Indian allottees had their trust status extended periodically up until Congress enacted legislation that comprehensively extended trust period indefinitely for "all lands held in trust by the United States for Indians," and thus, federal government had standing to assert trespass counterclaim against purchasers of camping memberships to use allotment land leased by seller from lessor Indian allottees, after seller's

master lease had expired due to failure to renew it. 25 U.S.C.A. § 5126.

[23] **Federal Civil Procedure** By Default

Once the clerk enters default against a party, the well-pleaded allegations of the complaint are taken as true, except for allegations related to damages. Fed. R. Civ. P. 55.

[24] **Federal Civil Procedure** By Default

The decision to grant default judgment lies within the discretion of the trial court. Fed. R. Civ. P. 55.

[25] **Federal Civil Procedure** By Default

Generally, default judgments are disfavored; cases should be decided upon their merits whenever reasonably possible. Fed. R. Civ. P. 55.

[26] **Federal Civil Procedure** By Default

In deciding whether default judgment is appropriate, district courts consider the following factors: (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong public policy underlying the Federal Rules of Civil Procedure favoring decision on the merits. Fed. R. Civ. P. 55.

[27] **Federal Civil Procedure** By Default

Courts may not grant default judgment against a defendant if the plaintiff's claims are legally insufficient. Fed. R. Civ. P. 55.

[28] **Estoppel** Nature and Application of Estoppel in Pais

Under Washington law, equitable estoppel may not be asserted as an affirmative cause of action; in other words, equitable estoppel must be used as a shield, not a sword.

[29] **Estoppel** Contracts relating to real estate

Under Washington law, purchasers of camping memberships to use allotment land held in trust by United States and leased by seller from lessor Indian allottees lacked cause of action for equitable estoppel barring allottees from preventing purchasers from occupying land after seller's master lease had expired due to failure to renew it.

[30] **Federal Civil Procedure** Defenses and objections

Default judgment against non-appearing Indian allottees would not be appropriate, in action by purchasers of camping memberships to use allotment land leased by seller from lessor Indian allottees, seeking declaratory relief that purchasers were entitled to occupy land even though seller's master lease had expired due to failure to renew it; factors weighed heavily against granting default judgment, including that purchasers would not be prejudiced by decision not to enter default judgment, there was possible dispute concerning material facts, allottees' failure to appear constituted excusable neglect, and public policy favored decision on merits. Fed. R. Civ. P. 55.

[31] **Federal Civil Procedure** Burden of proof

When the moving party will have the burden of proof at trial, she must demonstrate on summary judgment that no reasonable trier of fact could find other than for her. Fed. R. Civ. P. 56(a).

[32] **Federal Civil Procedure** Request

Purchasers of camping memberships to use allotment land leased by seller from lessor Indian allottees failed to timely submit requests for admission (RFAs) to allottees, pursuant to scheduling order, and thus, RFAs could not be used against non-answering allottees to grant summary judgment for purchasers on claims that allottees were equitably, collaterally, or otherwise estopped from denying purchasers their right to occupy and use land even though seller's master lease had expired. Fed. R. Civ. P. 6(a)(2) and (d), 36(a)(3), 56(a).

[33] **Estoppel** Essential elements

Under Washington law, the elements of equitable estoppel are: (1) a party's admission, statement, or act inconsistent with its later claim, (2) action by another party in reliance on the first party's act, statement, or omission, and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or omission.

[34] **Indians** Trespass

Federal common law allows the government to bring a trespass claim, acting in its sovereign capacity as trustee, to remove trespassers from Indian land.

[35] **Indians** Supervision by federal officers

Indians Trespass

Under the regulations governing the Bureau of Indian Affairs' (BIA) management of leases on allotted land, the government is required to obtain majority consent of Indian landowners to approve a new lease; however, the regulations do not require the government to obtain majority consent to eject trespassers. 25 C.F.R. §§ 162.012, 162.023.

[36] **Indians** Recovery of possession of demised premises

Purchasers of camping memberships to use Indian trust land leased by seller from lessor Indian allottees were subject to ejectment by federal government for trespass, after seller's master lease expired due to failure to renew it, since purchasers were presently in possession of land, allottees were out of possession thereby unable to utilize land, and there was no evidence that allottees informed Bureau of Indian Affairs (BIA) they were engaged in good faith negotiations with purchasers for new lease. 25 U.S.C.A. § 162.471.

[37] **Estoppel** United States government, officers, and agencies in general

The defense of equitable estoppel does not apply to the government when it acts in its sovereign capacity as trustee for Indian land.

[38] **Indians** Preemption

Because Indian land claims are exclusively a matter of federal law, state property laws are preempted.

2 Cases that cite this headnote

[39] **Indians** Adverse possession and improvements by intruders

Indians Limitations and laches

State statutes of limitations and adverse possession doctrines do not apply to tribal lands.

[40] **Indians** Preemption

State-law based defenses to possessory claims to tribal lands, such as estoppel and laches, are preempted by federal law.

2 Cases that cite this headnote

[41] **Specific Performance** Inadequacy of remedy at law

Specific Performance Form of remedy

Under Washington law, specific performance is an equitable remedy available to an aggrieved

party for breach of contract where there is no adequate remedy at law.

[42] **Indians** Construction and operation in general

There was no evidence of contract between Indian allottees and purchasers of camping memberships to use Indian trust land leased by seller from lessor Indian allottees, as would be required to support purchasers' claim, under Washington law, for specific performance allowing them to remain on land after expiration of seller's lease.

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ORDER DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT, DENYING PLAINTIFFS'

MOTION FOR SUMMARY JUDGMENT, AND GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT RE EJECTMENT

ROSANNA MALOUF PETERSON, United States District Judge

***1100** This case involves an eleven-year dispute over land on the banks of Lake Chelan known as Moses Allotment No. 8, or "MA-8." MA-8 is highly fractionated allotment land, held in trust by the United States Government for Indian allottees who are predominantly members of the Confederated Tribes of the Colville Reservation. Plaintiffs in this case are non-Indians who represent a group of individuals who purchased camping memberships to use MA-8 for recreational purposes allegedly through 2034. Plaintiffs purchased these camping memberships from William Evans Jr., who had leased MA-8 from the Indian allottees in accordance with federal regulations, in order to sell camping memberships to Plaintiffs. The problem is that Evans' lease of MA-8 expired in 2009, not 2034, due to his failure to renew it. Because Plaintiffs' right to use MA-8 flowed from Evans' lease, that right expired in 2009 along with the lease.

The Court acknowledges that Plaintiffs in this case did not receive what they expected from Evans and his successor in interest, Wapato Heritage, LLC. However, Plaintiffs may not continue to occupy Indian trust land without legal authority to do so.

BACKGROUND

The Moses Allotments [1]

As described in more detail below, the ***1101** Moses Allotments are reservation allotments that the Government created consistent with the Moses Agreement for individual Indians that the Government recognized as members of the "Moses Band" of Indians. In 1907, pursuant to the Moses Agreement, MA-8 was allotted to Wapato John via a trust patent, issued by the United States. After Wapato John died, his interests in MA-8 passed to his heirs, and the land became fractionated.

Evans, the Master Lease, and the Development of MA-8

It is undisputed that, by 1979, William Evans, Jr., an heir of Wapato John, owned approximately 5.4% of the beneficial ownership in MA-8. *See* *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1035 (9th Cir. 2011). Evans wanted to use MA-8 to generate a profit for himself and the other allottee landowners. However, as he only owned a small fraction of the beneficial interest in the land, he could not control the land. *See* ECF No. 90-6 at 9 ("Mr. Evans is very much aware of the Lake Chelan-Manson Area and feels strongly that an R.V. Development would provide good solid monies to the landowners."). Thus, Evans began communicating with the other allottee landowners, to lease MA-8 from them and control the property. *See id.* Although it is now contested, at that time it was agreed that MA-8 was trust land. Therefore, any lease of MA-8 had to be approved by the Secretary of the Interior through the BIA. *See* 25 U.S.C. § 415.

Eventually, Evans obtained approval for his proposed lease from 64% of the Indian allottee landowners with an interest in MA-8. *Wapato Heritage, L.L.C.*, 637 F.3d at 1035. On February 2, 1984, the Colville Agency, on behalf of the BIA, approved the lease of MA-8 to Evans. *See* *id.*; ECF No. 90-6 at 23–24. Pursuant to federal regulations, the BIA consented to the lease on behalf of the remaining 36% of the trust interest. *Wapato Heritage, L.L.C.*, 637 F.3d at 1035.

This "Master Lease" granted use of MA-8 to Evans for a period of twenty-five years, beginning in 1984. The Master Lease defined Evans as the "Lessee" and the individual Indian landowners as "Lessor." *Wapato Heritage, L.L.C.*, 637 F.3d at 1040 (holding that "the BIA was not the lessor" to the Master Lease); *see* ECF No. 90-2 at 1. These individual landowners' names and addresses purportedly were listed in an Exhibit to the Master Lease. [2] *Id.*

The Master Lease contained a renewal option, which would allow Evans to renew the lease for up to 25 years. ECF No. 90-2 at 3. To renew the Master Lease, Evans was required to give notice to the "Lessor" and the Secretary in writing one year prior to the expiration of the initial 25-year lease term. [3] *Id.* Thus, Evans would have ***1102** needed to give notice of renewal to the Lessor by 2008.

On January 30, 1985, Evans sent a letter to the Colville Agency, referencing the Master Lease. *See* ECF No. 90-6 at 25. The language of the letter indicates that Evans intended to exercise his option to renew the Master Lease. *See id.* The letter stated:

> In accordance with paragraph three (3) of the subject lease dated February 2, 1984, you are notified by receipt of this letter that Mar-Lu, Ltd. [Evans's company] hereby exercises its option to renew the subject lease for a further term of twenty five (25) years to be effective at the expiration of the original twenty five (25) year term. This notice extends the total term for the subject lease to February 1, 2034.

Id. Although Evans stated an intent to renew the Master Lease, he did not notify any of the Indian Landowners in writing of his intent to renew, nor did he send any notice through certified mail, as required by the Master Lease. *Wapato Heritage, L.L.C.*, 637 F.3d at 1040.

The BIA never communicated with Evans to notify him about the status of the lease renewal, or to offer a formal opinion about whether the lease was effectively renewed. As Judge Whaley found in related litigation about the Master Lease and MA-8, "The issue [of the Master Lease's renewal] simply never arose, formally, because the BIA was never asked to make such an administrative decision until 2007." ECF No. 30 at 4 in Case No. 2:08-cv-177-RHW. However, the BIA approved and signed documents after receiving the letter from Evans, indicating that the Agency assumed that the lease had been renewed and thus would expire in 2034. *See e.g.*, ECF No. 90-4 at 10–31.

After obtaining the Master Lease, Evans began developing an RV park on MA-8, the Mill Bay RV Resort. "The original plan Evans envisioned included 750 RV sites that would occupy the entire parcel of MA-8 but [sic] changed the plan and decided to construct a golf course and limit the number of RV sites." ECF No. 1 at 5; ECF No. 90-6 at 42. Evans sold camping memberships to those interested in using the Mill Bay Resort for recreational purposes.

In 1989, "Evans submitted a plan to revise the RV Resort plan in order to provide members with 'expanded memberships.' " ECF No. 1 at 5; *see also* ECF No. 90-6 at 42. These expanded memberships allowed purchasers to use a designated RV space at Mill Bay Resort for recreational purposes, consistent with the "Expanded Membership Sale Agreement," until 2034. *See* ECF No. 16-3; *see also* ECF No. 90-6 at 42 (twenty-four sites to be marketed as "Expanded Memberships"). The agreements were executed between the interested purchasers (the "Purchasers") and Evans's company, Chief Evans, Inc. (the "Seller"). ECF No. 16-3 at 1. The Expanded Membership Sale Agreement describes the nature of the expanded membership as follows:

> This membership constitutes only a contractual license to use such facilities as may be provided by Seller from time to time. Such facilities are subject to change and this membership therefore has no application to, does not constitute an interest in, is not secured by, and does not entitle the Purchaser to any recourse against any particular real property facilities. This contract does not entitle the Purchaser to participate in any income or distribution of Seller or of any of its facilities, ... or to vote or ***1103** participate on any aspect relating to the business of Seller. The duration of this membership is coextensive with the fifty (50) year term commencing February 2, 1984, of Seller's lease for the Mill Bay property, which lease was entered into between the United States Department of the Interior, Bureau of Indian Affairs, and William W. Evans, Jr., on February 2, 1984, and subsequently assigned by William W. Evans Jr., to Seller.

ECF No. 16-3 at 6.

The BIA approved the requested modification of the Master Lease, which allowed Evans to sell these expanded memberships. When it approved the modification, the BIA did not address whether the Master Lease had been properly renewed, even though the expanded memberships indicated that the Master Lease had been renewed. *See* ECF No. 90-6 at 26–45 (Master Lease modification materials).

Paul Grondal was among the first individuals to purchase an expanded membership from Evans. Regarding these memberships, Grondal asserts, "Evans and his sales staff represented to all prospective purchasers, both verbally and with documentation, that his agreement with the BIA and his long-term land lease on 'trust land' was good for the full 50 year term of the lease until 2034." ECF No. 16 at 3.

The value of MA-8, and thus the value of the expanded memberships, has increased significantly since 1989. Under the Expanded Membership Sale Agreement, the purchasers were allowed to sell their memberships at an increased price. Plaintiffs plead, "Upon information and belief, new members have paid up to three times that of the original price in order to purchase a camping membership valid until 2034." ECF No. 1 at 21.

In 1993, Evans entered into a sublease with Colville Tribal Enterprise Corporation, allowing the Corporation to build a casino on a portion of MA-8 that is not part of the Mill Bay Resort. *See* ECF No. 90-4 at 10–31. The BIA approved the sublease, which also indicated that the Master Lease would expire in 2034. *Id.* at 12 (sublease "Term" provision).

Evans Attempts to Cancel the Mill Bay Memberships and Litigation Ensues

In 2001, members of the Mill Bay Resort ("Mill Bay Members"), including Grondal, received a letter from Evans' company, Chief Evans, Inc., stating that the park was closing at the end of 2001 and all membership contracts would be cancelled at that time. ECF No. 16 at 5.

The Mill Bay Members sued Evans in state court over the potential cancellation of their camping memberships/ contracts. *Id.* at 5–6. Before the litigation was resolved, Evans died. However, prior to his death, Evans established Wapato Heritage, LLC, and, when he died, his leasehold interest as the lessee of MA-8 was acquired by Wapato Heritage, LLC. ECF No. 144 at 9 (Court's prior Order). Presently, Wapato Heritage possesses a life estate in Evans' MA-8 allotment interest (approximately 23.8% of MA-8) with the remainder reverting to the Confederated Tribes of the Colville Reservation. *Id.* at 9 n.3. Because Wapato Heritage is Evans's successor in interest, it participated in the state-court litigation with the Mill Bay Members after Evans' death. Wapato Heritage resolved the state-court litigation with the Mill Bay Members through mediation and a Settlement Agreement. *See* ECF No. 16-5 (Settlement Agreement).

The Settlement Agreement between Wapato Heritage and the Mill Bay Members expressly recognized the extension of the Master Lease through 2034. ECF No. 16-5 at 7. As this Court previously stated, "A key issue involved in the mediation was the RV Park Members' desire to remain on MA-8 through 2034. ECF No. 144 at 9–10. The settlement proposals and the final ***1104** agreement explicitly recognized the Mill Bay Members' 'right to continued use of the Park until December 31, 2034,' though it also recognized that this right was subject to the terms of 'the Master Lease with the BIA.' " *Id.* at 9 (quoting the Settlement Agreement).

To remain on the land, Plaintiffs agreed to pay Wapato Heritage, Evans' successor in interest, increased "rent" through 2034. ECF No. 16-5 at 7 (rent rate schedule through 2034). The BIA did not intervene in the mediation formally, but its agents were aware of the mediation and attended hearings. The nature of the BIA's involvement, and the extent to which its agents informally participated in the settlement negotiations, is disputed. *See* ECF No. 144 at 10. The individual allottee landowners were not parties to the settlement, and there is no evidence that they were involved in the settlement negotiations whatsoever. *See* ECF No. 16-5 at 1.

Review of the Master Lease's Purported Renewal

The BIA did not examine or question the legal efficacy of the purported renewal of the Master Lease until 2007. In its Order at ECF No. 144, this Court detailed numerous instances in which the BIA was asked to address the terms of the Master Lease but did not do so. For instance, in 2004, Evans' daughter asked whether the extension of the master lease had any effect on the renewal of the RV Park sublease. ECF No. 144 at 11 (citing ECF No. 90-10 at 29–31). However, it appears that the BIA did not undertake such a review until 2007.

Plaintiffs allege that the BIA began to question the status of the Master Lease renewal in response to a letter from the Confederated Tribes of the Colville Reservation. *See* ECF No. 144 at 12. [4] In 2007, the BIA sent a letter to Wapato Heritage, stating its position that Evans never had exercised his option to renew the Master Lease. ECF No. 90-15 at 8. The BIA asserted that Evans had failed to provide notice of his intent to renew the Master Lease to the allottee landowners, who were the "Lessor." Instead, Evans only provided notice to the Colville Agency. *See id.* Because this action was insufficient to renew the Master Lease, the lease would expire in 2009, rather than 2034. The letter noted that the Agency's review

was ongoing, and that, if Wapato Heritage had any record supporting renewal of the Master Lease, it should provide a copy of such record to the Colville Agency. *Id.*

When Wapato Heritage received notice that Evans had not effectively renewed the Mater Lease, there were two months remaining during which Wapato Heritage could have renewed the Master Lease by providing notice to the landowners. *See* ECF No. 90-15 at 15 (letter dated Dec. 18, 2007). As the Court already has pointed out, the process for renewal was simple; it only required that notice be given to the landowners and did not require the landowners' approval or consent. Instead of properly exercising the option to renew the Master Lease in those two months, Wapato Heritage's counsel sent the BIA a letter, disagreeing with the BIA's decision. *Id.* at 15–17.

1105** ***Wapato Heritage, LLC v. United States

On June 9, 2008, Wapato Heritage filed an action in the Eastern District of Washington against the United States challenging the BIA's decision that Evans had not renewed the Master Lease. *See Wapato Heritage LLC v. United States*, No. 08-cv-177-RHW. In that case, Wapato Heritage argued that the Master Lease had been renewed. In the alternative, Wapato Heritage asserted that the BIA's repeated approvals of Evans' exercise of the option to renew extended the Master Lease to February 2, 2034. Additionally, Wapato Heritage argued that a balance of the equities required finding that the Master Lease had been renewed. The Court rejected Wapato Heritage's arguments, found that Evans had never renewed the Master Lease, and eventually dismissed Wapato Heritage's case against the Government.

Wapato Heritage appealed, and the Ninth Circuit affirmed the district court's decision, stating:

> [W]e hold that the Lease is not ambiguous and that the BIA was not the Lessor. Because the BIA was not the Lessor, the Lease terms required that Wapato [Heritage] notify the BIA and the landowners directly via certified mail, which it did not do ... Moreover, there is no evidence in the record that the Lessee requested that the BIA furnish it with the current names and addresses of the Landowners, as it was permitted to do under Section 29 of the Lease. Accordingly, we hold that Wapato [Heritage]'s option to renew the Lease was not effectively exercised by Evans, or later by Wapato [Heritage], and that the Lease terminated upon the last day of its 25-year term.

Wapato Heritage, L.L.C. v. United States, 637 F.3d 1033, 1040 (9th Cir. 2011). Thus, the Ninth Circuit found that the Master Lease was not renewed and that it expired in 2009, on the last day of its 25-year term.

Initiation of the Instant Litigation

Before the Ninth Circuit reached its decision in *Wapato Heritage, L.L.C. v. United States*, Plaintiff Grondal and the Mill Bay Members Association filed the instant action in this Court. The Complaint in this matter was filed on January 21, 2009. ECF No. 1. Plaintiffs' Complaint asserts claims against Wapato Heritage, the Federal Government (United States, Department of Interior, and Bureau of Indian Affairs), and individual allottee landowners with interests in MA-8. The issues raised in the present litigation are similar to those raised in *Wapato Heritage, L.L.C. v. United States*: Plaintiffs advance various arguments as to why they are entitled to occupy MA-8 until 2034, even though the Master Lease was not renewed. In its Answer to the Complaint, the Government asserts a counterclaim of trespass, requesting ejectment of Plaintiffs from MA-8. ECF No. 42 at 24–25. The Government asserts that Plaintiffs, who have camping membership contracts with Wapato Heritage, have no right to remain on MA-8, as the Master Lease of MA-8 between Evans and the allottee landowners has expired.

Defendant Wapato Heritage filed several cross claims against all Defendants requesting equitable relief. *See* ECF No. 170. The Government filed a crossclaim against Wapato Heritage, alleging that Wapato Heritage has failed to pay rent under the Master Lease. *See* ECF No. 198 at 11. The Court does not address the merits of these crossclaims in this Order, as the parties have not addressed them in the motions presently before the Court.

Court's 2010 Memorandum Opinion at ECF No. 144

The Court addressed Plaintiffs' claims and the Government's trespass counterclaim in its Order at ECF No. 144. Plaintiffs' first three causes of action requested declaratory relief based on the equitable defenses of estoppel, waiver and acquiescence, ***1106** and modification. The Court dismissed Plaintiffs' first three claims for lack of subject matter jurisdiction. The Court also found those claims were barred by issue preclusion due to the district court decision in *Wapato Heritage, L.L.C. v. United States.* (At the time of that Order, the Ninth Circuit had not yet affirmed the district court's decision.) Similarly, the Court dismissed Plaintiffs' fourth and fifth causes of action, which requested relief under the Administrative Procedures Act and the Fifth Amendment of the Constitution, for lack of subject matter jurisdiction.

However, the Court found that it has subject matter jurisdiction over the Government's trespass counterclaim, which requests Plaintiffs' ejectment from MA-8.

The Court then construed language in Plaintiffs' Complaint as a claim for declaratory relief against the individual allottee landowners, to prevent them from denying Plaintiffs' right to occupy MA-8. ECF No. 144 at 24. This request for declaratory relief is Plaintiffs' only remaining claim, and the Court has characterized it as follows:

> Plaintiffs' (The Mill Bay Members Association and Paul Grondal) claim against the MA-8 landowner Defendants, other than the Tribe, to declare them "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use Mill Bay Resort until February 2, 2034."

ECF No. 329 at 23 (quoting ECF No. 1 at 43; ECF No. 197 at 2).

In its Order at ECF No. 144, the Court also addressed the merits of the Government's trespass counterclaim, as the Government had moved for summary judgment on that claim. ECF No. 144 at 24. The Court denied the Government's motion for summary judgment, with leave to renew, finding that the ejectment of Plaintiffs potentially was premature at that time. *Id.* The Court explained that, because the Government was not a party to the Master Lease, it has no contractual right to seek the ejectment of Plaintiffs from MA-8. Rather, any right that the Government has to eject Plaintiffs from the land stems from the land's trust status. The Court explained, "The Government holds the allotment in trust for the allottees and has the power to control occupancy on the property and to protect it from trespass." *Id.* at 25 (citing *United States v. West*, 232 F.2d 694, 698 (9th Cir. 1956)).

The Court then examined the federal regulations governing the BIA's responsibilities in administering and enforcing leases on trust land, in order to decide if the BIA was acting consistent with those regulations in seeking Plaintiffs' ejectment. Those regulations have since been revised, and the provisions upon which the Court relied have been removed. Prior to the revision of the applicable regulations, the Court identified 25 C.F.R. § 162.623 as relevant to the Government's trespass claim in this case. It stated:

> If a tenant remains in possession after the expiration or cancellation of a lease, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

25 C.F.R. § 162.623, *removed*, 77 FR 72440, 72494, Dec. 5, 2012. Finally, the Court explained that, pursuant to 25 C.F.R. § 162.619, the BIA must "consult with the Indian landowners, as appropriate," to determine whether the holdover tenants should be given additional time to cure. 25 C.F.R. § 162.619, *removed*, 77 FR 72440, 72494, Dec. 5, 2012. The Court found that these "regulations make clear that the entire purpose of the authority ***1107** and remedies provided to the BIA for lease violations is to ensure that the landowners' property and financial interests are protected." ECF No. 144 at 25.

When the Court addressed the Government's 2009 motion for summary judgment on its trespass counterclaim, it was unclear from the record whether the BIA had consulted with the Indian landowners. There was no evidence that the Government brought the trespass action in response to the landowners' concerns. Accordingly, the Court found that the ejectment action was premature.

Additionally, when the Court first ruled on the Government's trespass counterclaim, it appeared from the record that Wapato Heritage was attempting to negotiate a new lease with the landowners. If Wapato Heritage had managed to negotiate a new lease with the landowners, the Court reasoned that the ejectment action by the Government would have been improper, as it would have been contrary to the allottee landowners' interests and desires.

Thirdly, the Court reasoned that the ejectment action was premature because the Ninth Circuit had accepted review of, but had not yet decided, *Wapato Heritage, L.L.C. v. United States*, the related case decided by Judge Whaley. Therefore, at that time, it was possible that the Ninth Circuit would conclude that the Master Lease had been renewed and would remain in effect until 2034.

Accordingly, the Court held the following with respect to the Government's trespass counterclaim/ejectment action in its Order at ECF No. 144:

> If efforts to obtain approval on the [new] lease are actually ongoing, or the BIA has yet to consult with the Indian landowners in regards to the issue of Evans' failure to properly renew under the Master Lease, then the BIA's trespass action is inappropriate. Premature adjudication of the United States' trespass action is especially inappropriate in the circumstances of this case, where it seeks to displace Plaintiffs from their residence on the property. The ejectment remedy sought could all be for nothing, *if* the [new] lease proposal is granted or if appellate review should result in a different outcome in [*Wapato Heritage, L.L.C. v. United States*].

ECF No. 144 at 27. Consistent with the Court's reasoning that the ejectment action was premature in 2010, the Court denied the Government's motion for summary judgment on its trespass counterclaim with leave to renew. The Court warned that, if the Government opted to renew its motion, it needed to provide evidence showing that it had complied with the relevant federal regulations, and evidence showing that the action was otherwise ripe.

Government's Renewed Motion for Summary Judgment re Ejectment and the New Issue of MA-8's Trust Status

In March of 2012, the Government renewed its Motion for Summary Judgment re Ejectment, one of the motions pending before this Court. The Government argues that the ejectment action is timely for several reasons: (1) no new lease has been negotiated with the landowners, and no negotiations are ongoing; (2) the Government consulted with the Indian landowners after *Wapato Heritage, L.L.C. v. United States* was decided, and the landowners support ejectment; and (3) the Ninth Circuit ruled in *Wapato Heritage, L.L.C. v. United States* that the Master Lease had not been renewed and therefore had expired. ECF No. 232 at 12. Accordingly, the Government argues that there is no reason to delay a decision on its pending motion. [5]

***1108** In response to the Government's renewed Motion for Summary Judgment re Ejectment, Plaintiffs raised a new argument as to why the Government's ejectment action should fail: MA-8 is not trust land. As the Court previously explained in its Order at ECF No. 144, the Government's authority to seek ejectment was rooted in its trust obligation, not any contractual right related to the Master Lease. Accordingly, if the land is not trust land, then the Government has no authority to seek the ejectment of Plaintiffs on behalf of the landowners. Defendant/Cross-Claimant Wapato Heritage is aligned with Plaintiffs on this issue and argues that MA-8 fell out of trust status long before the Master Lease's inception.

The Court pauses in its recitation of the facts and procedural history of this case to note that the argument that Plaintiffs now assert regarding MA-8's trust status contradicts Plaintiffs' prior arguments and assertions in this matter. Indeed, Plaintiffs' very first allegation is:

> The Bureau of Indian Affairs ... is responsible for the management and control of Indian allotment lands. The Superintendent of the BIA's Colville Indian Agency (the "Colville Agency"), acting as an agent of the United States oversees and manages federal allotment land held in trust

> for Indian allottees known as Moses Agreement Number Eight ("MA-8").

ECF No. 1 at 2–3.

Moreover, Plaintiffs' claims against Defendants were premised on MA-8's status as trust land. For instance, in order to assert its estoppel claim against the BIA, Plaintiffs alleged, "The BIA was authorized to bind the United States in regards to the leasing of MA-8 as land owned by the United States in trust for the benefit of the Allottees." *Id.* at 34.

Additional Discovery Allowed

On April 12, 2012, Plaintiffs filed a Motion to Continue the Government's Summary Judgment Motion Pursuant to Fed. R. Civ. P. 56(d). ECF No. 246. In response, the Court found that Plaintiffs had not had a chance to conduct discovery and granted Plaintiffs' motion to continue. *See* ECF No. 267 at 9–10. Shortly thereafter, the Court issued a scheduling order governing discovery related to the Government's renewed Motion for Summary Judgment re Ejectment. ECF No. 272. The Court ordered, "All discovery *related to the Federal Defendants' Motion for Summary Judgment Re: Ejectment* shall be completed on or before November 1, 2012." *Id.* at 2 (emphasis in original). The Court also explained that it would set "further discovery/motion deadlines, as well as trial deadlines and dates, if required," after ruling on the Government's renewed Motion for Summary Judgment re Ejectment. *Id.* at 3.

Representation of Individual Indian Allottees and Transfer of Case

On August 1, 2014, this Court issued a ruling related to the dispositive motions pending before it, which included the instant Motion for Summary Judgment re Ejectment (ECF No. 231) and the Tribe's Motion to Dismiss the cross-claims of Wapato Heritage (ECF No. 274). ECF No. 329. The Court found that a key issue in deciding the pending motions was the legal status of MA-8. *Id.* at 2 ("The two pending dispositive motions hinge upon the Plaintiffs' and Defendant Wapato Heritage's contentions that MA-8's trust period has expired and that the United States therefore lacks standing to seek ejectment as trustee.").

Because many of the individual allottee landowner Defendants had not appeared in ***1109** the action, and because the action now raised the issue of MA-8's trust status, the Court became concerned about the landowners' lack of legal representation. The Court ordered the BIA to take steps to ensure that the individual landowners had legal representation, stating, "The Court desires to give all of the individual landowner Defendants the opportunity to inform the court of their positions in this case after consultation with legal counsel." *Id.* at 32–33. The Court indicated that it would not rule on the pending motions until all of the individual landowners were represented by counsel. *Id.*

On September 17, 2019, this case was transferred. Shortly thereafter, the parties submitted status reports, identifying the remaining issues, and a status conference was held. The Government and the Confederated Tribes of the Colville Reservation asked the Court to rule on the Governments' renewed Motion for Summary Judgment re Ejectment. Plaintiffs and Wapato Heritage, who have been aligned with respect to every motion since the case was transferred, argued that, because the Government had not furnished independent counsel for each individual allottee Defendant, the Court could not decide the Government's ejectment action.

In response to the parties' arguments, the Court set a briefing schedule to resolve the issue of representation for the individual allottee Defendants. The Court then resolved that issue in its Order at ECF No. 411, finding that, pursuant to Ninth Circuit precedent, the Government need not take additional steps to provide independent counsel to the individual allottee Defendants in this case. Accordingly, even though the Court previously stated that it would not rule on the pending motions until each individual landowner was represented, the Court concluded that, consistent with recent Ninth Circuit precedent, there simply was no legal basis to delay a resolution of this case on the grounds that the Government had failed to provide private attorneys to all of the landowners. Additionally, the Court found that the Government had taken steps to ensure that the landowners who requested representation would receive it and that some of the landowners had received *pro bono* representation due to the Government's efforts.

With the representation issue decided, the Court turned to the Government's pending renewed Motion for Summary Judgment re Ejectment, ECF No. 231. The Court acknowledged that the briefing on that motion was stale, and so it set a briefing schedule for supplemental briefing on that motion specifically. ECF No. 411 at 10. The Court directed the parties to file supplemental briefs identifying "any new, relevant precedent or facts that were not previously briefed"

related to the Government's pending Motion for Summary Judgment re Ejectment. *Id.* The parties filed supplemental briefing.

Plaintiff Files Dispositive Motions in 2020

In addition to their supplemental briefing on the Government's pending Motion for Summary Judgment re Ejectment, Plaintiffs filed two new dispositive motions. On April 14, 2020, Plaintiffs filed a Motion for Default Judgment Against Certain Allottee Defendants, requesting that the Court enter default judgment against non-appearing individual allottee Defendants. ECF No. 433. On April 17, 2020, Plaintiffs filed a Motion for Summary Judgment Against Certain Individual Allottees. ECF No. 439. Cross-Claimant Wapato Heritage supports both motions.

With respect to Plaintiffs' recently filed dispositive motions, the Court concluded that they raise issues related to the Government's Motion for Summary Judgment re Ejectment. Accordingly, the Court issued a consolidated briefing schedule for ***1110** the Plaintiffs' two dispositive motions, ECF Nos. 433 and 439. Additionally, the Court stated its intent to resolve the following motions in one, global resolution: the Government's Motion for Summary Judgment re Ejectment (ECF No. 321), the Plaintiffs' Motion for Default Judgment Against Certain Allottee Defendants (ECF No. 433), and the Plaintiffs' Motion for Summary Judgment Against Certain Individual Allottees (ECF No. 439).

DISCUSSION

I. MA-8's Trust Status

As described above, the parties dispute whether MA-8 is trust land. In stark contrast to their prior positions, Plaintiffs and Wapato Heritage now argue that the land is not trust land. The Government, the Confederated Tribes of the Colville Reservation ("CTCR"), and various individual allottee Defendants maintain that the allotment remains in trust. Whether MA-8 is Indian trust land is a threshold question that the Court must address, in part because if the land is not trust land, then the Government is not a proper party to this action and has no standing to eject Plaintiffs.

A. Judicial Estoppel

[1] **[2]** The Government argues that Plaintiffs should be precluded from asserting that MA-8 is not trust land under the doctrine of judicial estoppel. That doctrine prevents a party who takes one position from later assuming a second, contradictory position on the same issue, either in the same litigation or in subsequent litigation. *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997). The Ninth Circuit has made clear that the doctrine applies to both assertions of fact and arguments about the law. *Id.* at 535 ("The greater weight of federal authority [ ] supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.").

[3] **[4]** **[5]** **[6]** **[7]** The Supreme Court has explained that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formula or principle." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). However, the purpose of the doctrine is to "preserve the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts." *Helfand*, 105 F.3d at 534. Because the doctrine was created to prevent a party from deliberately manipulating the courts, courts may not apply the doctrine when a party's change in position is based on a mistake, or inadvertence. *See id.* at 536. However, when a party takes a contrary position to its former position on a particular issue in order to gain an unfair advantage in the litigation, or to impose an unfair detriment on the opposing party, application of judicial estoppel is appropriate. *See New Hampshire v. Maine*, 532 U.S. at 751, 121 S.Ct. 1808. A court's use of judicial estoppel is reviewed for abuse of discretion. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

[8] Plaintiffs have not responded to the Government's judicial estoppel argument, nor have they explained why they should be permitted to change positions with respect to the trust status of MA-8. While Plaintiffs once asserted that MA-8 was trust land and used the land's trust status as a basis to assert its claims against the BIA, Plaintiffs now maintain that MA-8 is not trust land. Presently Plaintiffs argue that, because MA-8 is not trust land, the United States should not be a party to this case and has no standing to bring any counterclaims against them.

***1111** The Court agrees with the Government's assertion that "Plaintiffs' change in position would remove the United States

from the litigation (if the land is not trust land), undercutting the very premise of Plaintiffs' Complaint." ECF No. 232 at 5. Indeed, Plaintiffs' very first assertion in their Complaint is:

> The [BIA], as an agency of the United States of America [ ] is responsible for the management and control of Indian allotment lands. The superintendent of the BIA's Colville Indian Agency [ ], acting as an agent of the United States oversees and manages federal allotment land held in trust for Indian allottees known as Moses Agreement Number 8 ("MA-8").

ECF No. 1 at 2–3. Moreover, the claims asserted in the Complaint's "Claims for Relief" section are asserted against the BIA for its actions in administering MA-8 as trust land, and the Court already has ruled on these claims. As a matter of law, Plaintiffs could not have asserted these claims if MA-8 is not held in trust, as Plaintiffs now argue.

Plaintiffs have changed position on this issue in rebutting the Government's trespass counterclaim.[6] Plaintiffs began arguing this new, contradictory position approximately two years after filing their Complaint, and only after their own claims against the BIA had failed. The Court finds that by changing position on such a fundamental issue so late in the litigation, and only after their own claims against the United States had been resolved, Plaintiffs attempt to gain an unfair advantage and have played "fast and loose" with this Court. *See* *Helfand*, 105 F.3d at 534. To protect the integrity of the judicial process, the Court refuses to allow Plaintiffs to alter their position of a fundamental issue at this point in the litigation and holds that Plaintiffs are judicially estopped from arguing that MA-8 is not held in trust.

B. MA-8 is Indian Trust Land

Given the Court's finding that Plaintiffs are judicially estopped from asserting the inconsistent position that MA-8 is not trust land, the Court need not decide whether MA-8 is held in trust to resolve the instant motions. However, even if judicial estoppel did not apply here, the Court concludes that MA-8 is trust land.

To determine whether MA-8 remains in trust, the Court has reviewed relevant statutes, executive orders, regulations, and precedent. Upon review of these sources, the Court finds that it must interpret certain statutory provisions pertaining to the Moses Allotments to determine whether MA-8 is trust land. To engage in this analysis, it is necessary to evaluate the history and development of the Columbia Reservation and the Moses Allotments, as well as the historical and legislative context surrounding the Act of June 15, 1935. Accordingly, the Court lays out the relevant history here, as has been described by many courts,[7] beginning with the creation of the Columbia Reservation, from which the Moses Allotments were derived.

Chief Moses and the ("Moses") Columbia Reservation

In 1855, the United States entered into the Yakama Nation Treaty, which created the Yakama Indian Reservation. ***1112** *United States v. Oregon*, 787 F. Supp. 1557, 1559 (D. Or. 1992). Following the ratification of the Yakama Nation Treaty, the United States tried to remove Indians within the territory ceded by the treaty onto the Yakama Reservation. 7 Ind. Cl. Comm. at 802 (1959). However, "There was no movement as a tribe by either the Chelan, Entiat, Wenatchee or Columbia on to the Yakama Reservation although individual members of each of the four tribes did remove to that reservation. Many of the members of the four tribes continued to live uninterrupted on their ancestral lands." *Id.*

After the Yakama Treaty's implementation, the Government understood Chief Moses to be leader of the Columbia. In a 1959 decision, the Indian Claims Commission explained that Chief Moses began leading the Columbia around 1862, and that he subsequently "grew in influence among the [other] Indians of that area." 7 Ind. Cl. Comm. at 802. According to the ICC, Moses's followers "included members of various bands or tribes within the area ceded by the Yakama Treaty including the Chelan, Entiat, and Wenatchee as well as individual Indians from other neighboring tribes." *Id.* The United States recognized Chief Moses as the spokesperson for the Wenatchi, Entiat, Columbia, and Chelan, although not all of them acknowledged Chief Moses as their leader. *United States v. Oregon*, 787 F. Supp. at 1580; *see also* 7 Ind. Cl. Comm. at 802–804 (Government acknowledged Chief Moses as capable of entering into agreement with the Government on behalf of his followers, who were made up of multiple tribes).

In 1879, Chief Moses negotiated directly with the United States to establish a new reservation for his followers. 7 Ind. Cl. Comm. at 802. This resulted in the creation of the Columbia Reservation, or the "Moses Columbia Reservation," by executive order in 1879. *Id.* at 803. The reservation was "withdrawn from sale and set apart as a reservation for the permanent use and occupancy of Chief Moses and his people, and such other friendly Indians as may elect to settle thereon with his consent and that of the Secretary of the Interior." *Id.*; *see* Exec. Order of April 19, 1879, *reprinted in* 1879 Report of the Commissioner of Indian Affairs: Papers Accompanying. The Columbia Reservation was established west of the Colville Reservation, which had been created by executive order just a few years prior. *United States v. Oregon*, 787 F. Supp. at 1564.

After the Columbia Reservation was set aside, Chief Moses did not live on it, and many of his followers remained off the reservation as well. 7 Ind. Cl. Comm. at 803; *United States v. Oregon*, 787 F. Supp. at 1563. In 1883, Chief Moses began negotiating with the Government again, along with Columbia Chief Sarsarpkin, and with Chiefs Lot and Tonasket of the Colville Reservation. Agreement with the Columbia and Colville, 1883 (ECF No. 305-2 at 17); *United States v. Oregon*, 787 F. Supp. at 1564. The negotiations culminated in the Agreement with the Columbia and the Colville of 1883, or the "Moses Agreement."

The Moses Agreement

The Moses Agreement provided for the allotment of individual parcels on the Columbia Reservation for Indian individuals and families who desired to "remain on the Columbia Reservation." ECF No. 305-2 at 17. Indians residing on the Columbia Reservation could take an allotment carved from that reservation, or they could relocate to the Colville Reservation with Chief Moses and the remainder of his followers. *Id.* at 17–18.

Congress ratified the 1883 Moses Agreement through the Act of July 4, 1884. 23 stat. 79 (1884) (filed at ECF No. 234-2). The Act of July 4, 1884 provided that the Indians residing on the Columbia Reservation with Sarsarpkin (those who had chosen not to go to the Colville Reservation ***1113** with Chief Moses) would receive allotments. Additionally, it provided that the "remainder" of the Columbia Reservation would be "restored to the public domain." *Id.*

On May 1, 1886, President Grover Cleveland issued an executive order to effectuate the Moses Agreement and the Act of July 4, 1884. Exec. Order of May 1, 1886, *reprinted in* Report of the Commissioner of Indian Affairs, 1886 Ann. Rep. Comm'r Off. Ind. Aff. Sec'y Interior 35, 362 (1886). According to the Annual Report of the Commissioner of Indian Affairs from 1886, after thirty-seven allotments were created, the remainder of the Columbia Reservation was restored to the public domain. 1886 Ann. Rep. Comm'r Off. Ind. Aff. Sec'y Interior 35, 234 (1886).

Indians who did not take allotments on the Columbia Reservation either relocated to the Colville Reservation or were removed there. The District Court of Oregon has described the movement of Indians from the Columbia Reservation after the Moses Agreement as follows:

> Members of the Wenatchi Tribe were moved to the Colville Reservation with funds provided by Congressional Acts in 1902 and 1904. Members of the Columbia and Entiat tribes moved to allotments on the Colville reservation, attempting to stay on allotments which fell within their traditional areas. However, the members of the Chelan tribe who already resided in areas within the Moses Columbia Reservation prior to 1883, and who refused to take allotments on the Columbia Reservation under the 1883 Moses Agreement, were moved to the Colville Reservation by U.S. military forces in 1890.

United States v. Oregon, 787 F. Supp. at 1564.

The Ninth Circuit affirmed the District of Oregon's analysis, finding that the Government "let Moses and his people relocate to the Colville Reservation." *United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994). Similarly, the Indian Claims Commission has found that "Chief Moses and his followers did, in fact, move onto the Colville Reservation and the members of his band or the decedents thereof have continued to reside on the reservation until the present date [of 1959]." 7 Ind. Cl. Comm. at 811.

Government's Treatment of Moses Allotments

After the Moses Allotments were created, consistent with the Moses Agreement, the Government referred to the allotted land as reservation land, and it associated that reservation land with the Columbia Tribe, the Moses Band of Indians, and/or the Moses Agreement. For instance, in the BIA's annual reports, the BIA listed the allotments as a "reservation" belonging to the "Moses Band" or set aside by the Moses Agreement. *See e.g.*, Report of the Commissioner of Indian Affairs, 1907 Ann. Rep. Comm'r Off. Ind. Aff. Sec'y Interior 7, 59 (1907) ("During the last year patents were issued and delivered to Indians, classified by reservations, as follows: ... Columbia (Moses agreement)."); Report of the Commissioner of Indian Affairs, 1909 Ann. Rep. Comm'r Off. Ind. Aff. Sec'y Interior 1, 140 (1909) (noting that the Columbia reservation was "[U]nder the Colville Agency," belonged to the Columbia (Moses band) "Tribe," and was allotted in its entirety).

Plaintiffs and Wapato Heritage have argued that the Moses Allotments do not fall within any reservation. However, if the allotments did not fall within any reservation, the Government would have considered them to be public domain, or homestead allotments. The Commissioner of Indian Affairs' reports in the nineteenth and early twentieth centuries did not list the Moses Allotments as public domain or homestead allotments. As explained ***1114** above, the Government referred to the allotments as a "reservation." The Government's treatment of the Moses Allotments as "reservation," rather than public domain or homestead, is consistent with the way the Government created the Moses Allotments. Public domain, or homestead allotments, as the name suggests, were created from land that was on the public domain. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, § 16.03[2][c], at 1076 (Nell Jessup Newton et al. eds., 2012) [hereinafter *Cohen's Handbook*].

As *Cohen's Handbook* explains, the Government allotted "public domain homesteads" to Indians who wanted to acquire land through the Homestead Act, or similar laws, but could not because they were not U.S. citizens at that time. *Id.* With respect to the Moses Allotments, the Government did not create them from land on the public domain. Rather, pursuant to the Moses Agreement, the Government sectioned off the Moses Allotments from the Columbia Reservation for individual Indians on that reservation, prior to returning the remainder of the reservation to the public domain.

The BIA administered the Moses Allotments, which it expressly considered to be "reservation" land, from the Colville Agency, on the neighboring Colville Reservation, where Chief Moses and the majority of his followers had settled. The Government recognized the Moses Band of Indians as living on both the Moses Allotments, and on the Colville Reservation, noting the presence of the Moses Band as an entity on the Colville Reservation as early as 1886. That year, the Colville Agent noted that "Moses" was a "tribe" "under [his] care," living on the Colville Reservation. He provided the following description of them:

> Moses and his people numbering some 200 have during the past year fenced in over 400 acres of land and cultivated fully one-half. They are living on the Nespelem, which is a beautiful valley situated in the southern part of the Colville Reserve. They are industrious, and will in time ... grow to be a prosperous and self-supporting tribe.

Reports of Agents, 1886 Ann. Rep. Comm'r Off. Ind. Aff. Sec'y Interior 35, 231–232 (1886).

Additionally, an 1891 map of the State of Washington from the Department of the Interior labels the Moses Allotments as "Indian," and does not distinguish them from the nearby Colville Reservation. *See* ECF Nos. 316-1–316-3. The connection that the Government apparently drew between the Moses Allotments and the Colville Reservation is not surprising, given the historical context, and the fact that individuals of the Moses Band resided on the allotments, while the remainder of the entity, including its recognized leader, resided on the Colville Reservation.

Trust Patents Issued to Wapato John for MA-8

In 1906, Congress passed the Act of March 8, 1906, which expressly provided for the issuance of trust patents to allottees to receive allotments, as contemplated by the Moses Agreement. 59 Pub. L. 37, 35 stat. 55 (1906) (filed at ECF No. 234-3). Pursuant to the Act, the allotments distributed were to be held in trust for ten years. *Id.* Unlike allotments issued under the General Allotment Act, trust patents issued consistent with the Act of March 8, 1906 allowed the allottees

to sell allotted lands during the trust period, but with the restriction that the allottees were required to keep 80 acres. *Id.* In 1907 and 1908, Wapato John received two trust patents for MA-8, having decided not to relocate to the Colville Reservation. ECF No. 175-1, Ex. E at 24–28; ECF No. 234-25.

1115** ***Presidents Wilson and Coolidge Extend Trust Period of MA-8 through Executive Orders

In 1914, President Woodrow Wilson issued an executive order extending the trust period of the allotments created under the Moses Agreement for ten additional years. Exec. Order 2109 (Dec. 23, 1914) *printed in* Charles J. Kappler, *Indian Affairs Laws and Treaties*, Vol. IV at 1050–51 (filed at ECF No. 234-5 at 1–2). On February 10, 1926, President Calvin Coolidge issued an executive order further extending the period of trust on allotments issued pursuant to the Moses Agreement, that had not already passed out of trust status, for ten years from the date of March 8, 1926. Exec. Order 4382 (Feb. 10, 1926) (filed at ECF No. 234-8 at 1). Thus, MA-8's trust status was extended again by executive order, and the trust period would not expire until March 8, 1936. *Id.*

Act of May 20, 1924 Does Not Alter Trust Status of Moses Allotments

In 1924, Congress passed an Act specific to the Moses Allotments, which permitted the sale and conveyance of an allotment in its entirety with the Secretary of the Interior's approval. The Act of May 20, 1924 states as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any allottee to whom a trust patent has heretofore been or shall hereafter be issued by virtue of the agreement concluded on July 7, 1883, with Chief Moses and other Indians of the Columbia and Colville Reservations, ratified by Congress in the Act of July 4, 1884 ... may sell and convey any or all the land covered by such patents, or if the allottee is deceased the heirs may sell or convey the land, in accordance with the provisions of the Act of Congress of June 25, 1910 ....

68 Pub. L. 122, 43 stat. 133 (1924) (filed at ECF No. 280-1 at 1–2) (emphasis in original). This provision references the Act of June 25, 1910, which granted the Secretary of the Interior authority to make rules and regulations regarding the sale and conveyance of allotments held in trust. 61 Pub. L. 313, 36 stat. 855 (1910).

[9] Plaintiffs and Wapato Heritage have argued that the Act of May 20, 1924 removes the Moses Allotments from trust status. The Court uses statutory interpretation to analyze that argument. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

[10] Here, the Court need not go further than the first step. The plain language of the Act of May 20, 1924 does not remove Moses Allotments from trust, return those allotments to the public domain, or issue fee patents to any of the trust patent holders. Additionally, while the Act provided a mechanism by which the allotments could be sold or conveyed, the Act specifies that any conveyance or sale would need to be done "in accordance with the Provisions of the Act of Congress of June 25, 1910." The express reference to the Act of June 25, 1910 illustrates that the Moses Allotments still were held in trust, as the provisions of that Act applied to Indian allotments held under trust patents. For these reasons, the Court finds that the statute is unambiguous, and that its enactment did not terminate the trust status of any Moses Allotment.

End of the Allotment Era and the Indian Reorganization Act

The executive orders that had extended the Moses Allotments' trust period were consistent with shifting federal policy in ***1116** the early 1900s, which started to recognize the dramatic, negative impact that allotment had on Indian Tribes, families, and individuals. "By the 1920s, federal officials acknowledged that the allotment policy had not only failed to serve any beneficial purpose for Indians, but had been terribly harmful." *Cohen's Handbook*, § 16.03[2][c], at 1074; *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 23–25 (6th ed. 2014) [hereinafter *Canby*]. Between 1887 (the

passage of the General Allotment Act) and the end of the allotment period in 1934, Indian land holdings were reduced from 138 million acres to 48 million acres. *Canby* at 23. Thus, "The executive branch and Congress began extending trust periods on most allotments ...." *Cohen's Handbook*, § 16.03[2][c], at 1074.

In 1934, Congress ended the nation's allotment policy through the Indian Reorganization Act ("IRA"). *Id.* (explaining that the IRA "officially ended the policy of allotting tribal holdings"). The IRA "prohibited any further allotment of tribal land, provided that allotments then held in trust would continue in trust until Congress provided otherwise, and authorized the Secretary of the Interior to take lands into trust for tribes and tribal members." *Id.* Accordingly, the trust period on the Indian lands covered by the IRA was extended indefinitely.

However, the IRA did not apply to "any reservation wherein a majority of the adult Indians ... [voted] against its application." 25 U.S.C. § 5125. Due to the language of this exemption, the Commissioner of Indian Affairs, John Collier, became concerned that the IRA's indefinite trust period extension would not apply to Indian land reserved for tribes that voted against the IRA. *See* ECF No. 329 at 14 (Court's prior Order citing Collier's statements to the House Committee on Indian Affairs). As one of the IRA's core purposes was to prevent Indian trust land from falling into non-Indian hands, Collier drafted an amendment to the IRA, to solve this problem. *Id.*; *see* *Stevens v. C.I.R.*, 452 F.2d 741, 748 (9th Cir. 1971) (explaining that "[o]ne of the purposes of the Reorganization Act was to put an end to the allotment system which had resulted in a serious diminution of Indian land base").

The amendment was adopted by Congress in the Act of June 15, 1935, and provided in relevant part:

> If the period of trust or of restriction on any Indian land has not, before the passage of this Act, been extended to a date subsequent to December 31, 1936, and if the reservation containing such lands has voted or shall vote to exclude itself from the application of the [IRA], the periods of trust or the restrictions on alienation of such lands are hereby extended to December 31, 1936.

Act of June 15, 1935, 74 Pub. L. 147, 49 stat. 378 (1935) (filed at ECF No. 234-10). Therefore, the period of trust "on any Indian land" was extended to December 31, 1936 if: (1) the trust period was set to expire prior to that date, and (2) "the reservation containing" the Indian land had voted to exclude itself from the application of the IRA, or would vote to do so by the deadline of June 18, 1936. *Id.*

In 1935, a vote was held on the Colville Reservation, which was made up of many tribes, including the "Moses" Indians who resided there due to the Moses Agreement. The tribes of the Colville Reservation voted against the application of the IRA, and soon after formed the Confederated Tribes of the Colville Reservation. The Moses-Columbia are members of the Confederated Tribes.

Application of the Act of June 15, 1935 to the Moses Allotments

It is disputed whether the Act of June 15, 1935 extended the trust period of the ***1117** Moses Allotments. Plaintiffs and Wapato Heritage argue that the statute does not apply and, as such, the Moses Allotments fell out of trust on March 8, 1936, the expiration date set by the last executive order extending their trust period.

[11] **[12]** **[13]** **[14]** The Court must engage in statutory interpretation to decide if the Act of June 15, 1935 applies to the Moses Allotments, including MA-8. When courts interpret a statute, if "the statutory language provide[s] a clear answer," then the court's task "comes to an end." *Woods v. Carey*, 722 F.3d 1177, 1180–81 (9th Cir. 2013) (quoting *United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011) (citation omitted)). However, when "the statute's terms are ambiguous, [ ] [the court] may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Id.* at 1181 (quoting *Jonah v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)). "A statute is ambiguous if it 'gives rise to more than one reasonable interpretation.' " *Id.* (quoting *DeGeorge v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 219 F.3d 930, 939 (9th Cir. 2000) (citation omitted)). "The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute." *Pacific Coast Federation of Fishermen's*

Associations v. Glaser, 945 F. 3d 1076, 1083 (9th Cir. 2019) (quoting *Robinson v. United States*, 586 F.3d 683, 686 (9th Cir. 2009) (citation omitted)).

[15] **[16]** **[17]** Additionally, while the standard principles of statutory construction apply here, the Supreme Court has explained that they "do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* (quoting *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)). One relevant Indian law canon of construction is that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912)).

[18] The Court begins with the language of the statute. The statute's trust extension applies to the broad category of "any Indian land" that satisfies the statute's two conditions. Neither the statute itself nor the IRA provides a definition of the term "Indian land."[8] However, the Government clearly considered the Moses Allotments to be "Indian land" in 1935. At that time, the Moses Allotments were recognized as Indian "reservation" land by the Government, were associated with the Moses Band of Indians, were administered from the Colville Agency, and were held in trust for the Indian allottees. Additionally, the Moses Allotments' trust period had been extended by two executive orders. Thus, on its face, the broad statutory ***1118** phrase "any Indian land" contemplates reservation allotments such as the Moses Allotments.

Next, the Court turns to the two conditions that the "Indian land" must meet for the Act's trust period extension to apply. Pursuant to the Act, the trust period on "any Indian land" was extended if:

> (1) "the period of trust or restriction ... ha[d] not, before the passage of th[e] Act, been extended to a date subsequent to December 31, 1936," and
>
> (2) "if the reservation containing such lands ha[d] voted ... to exclude itself from the application of the [IRA]."

Act of June 15, 1935, 74 Pub. L. 147, 49 stat. 378 (1935) (filed at ECF No. 234-10).

With respect to the first condition, the Moses Allotments' trust period would have expired on March 8, 1936, pursuant to President Coolidge's 1926 executive order. Thus, the first condition is applicable to the Moses Allotments; the trust period on the Moses Allotments would have expired prior to December 31, 1936.

The Court now turns to the language of the second condition, which states that the trust period on any Indian lands will be extended "if the reservation containing such lands has voted ... to exclude itself from the application of the [IRA]." Read in context with the remainder of the statute, the condition that the "reservation containing" Indian land must "vote[ ]" implies that "any Indian land" would have been "contain[ed]" by a reservation with a form of tribal entity that had the power to vote on the IRA's applicability. However, that is not the case with respect to the Moses Allotments, given their unique history.

While the U.S. Government consistently acknowledged the Moses Allotments as "Moses Band" reservation or "Columbia" reservation land, it is also clear that the land was made up entirely of reservation allotments; the rest of the Columbia Reservation had been restored to the public domain long before Congress passed the IRA or the 1935 Act. By nature of being allotted land, the Moses Allotments were held in trust for individuals.

Moreover, the band with which the Government associated those individual allottees resided on the Colville Reservation. While the Tribes on the Colville Reservation voted against the application of the IRA, it appears that the Secretary of the Interior did not facilitate any vote on the Moses Allotments, in which the allottees could vote separately regarding the trust status of those reservation allotments in particular.

Wapato Heritage argues that the plain language of the statute cannot apply to the Moses Allotments because the Moses Allotments are not geographically "contain[ed]" by a reservation that voted to exclude itself from the IRA. Similarly, Wapato Heritage further maintains that, to the extent that the Colville Tribes voted to exclude themselves from the IRA, that vote does not apply to the Moses

Allotments because the allotments are not geographically "contain[ed]" by the Colville Reservation.

On the other hand, the CTCR maintain that the Colville Tribes' vote to exclude themselves from the IRA extends to the Moses Allotments, because the allottees living on the Moses Allotments were members of the Colville Tribes and would have voted with the Colville Tribes. The CTCR explain:

> MCR [Moses Columbia Reservation] allotment Indians were and are members of the Colville Tribe and were so enrolled at the time of the IRA and the 1935 Act. [ ] Because the MCR allotments are reservation and the Colville Tribes voted against the IRA, the 1935 Act's trust extension applies.

***1119** ECF No. 316 at 2–3. The CTCR have provided documentation showing that at least some of the Indians on the Moses Allotments enrolled in the Colville Tribes prior to the Colville IRA vote in 1935. *See* ECF No. 316-4.

Due to the complex history surrounding the Moses Allotments, the Court finds that it is unclear from the language of the 1935 Act whether the trust extension would have applied to reservation allotments like the Moses Allotments, where: (1) the only reservation land remaining was allotted to individual Indians, and (2) the tribal entity with which the Government associated those individual Indians lived on a separate reservation, and would have voted on the IRA's applicability on that separate reservation. In light of the parties' competing interpretations of the 1935 Act's language, and the lack of guidance or definitions provided by the text of the statute, the Court finds that the statute is ambiguous.

When a statute's language is ambiguous, the court may turn to canons of construction, the legislative history, and the statute's overall purpose, to determine what Congress intended when it passed the statute. *Woods*, 722 F.3d at 1180–81.

The Court begins with the relevant Indian law canon of construction, requiring that "statutes [ ] be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See* *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766, 105 S.Ct. 2399. This canon supports the CTCR's and the Government's liberal reading of the statute because that reading results in the preservation of the Moses Allotments' trust status. No court ever has found that Indian land losing its trust status, thus becoming taxable, freely alienable to non-Indians, and otherwise losing its status as Indian land, is beneficial to the Indians. That idea would run contrary to the trust relationship, and the canon itself.

Moreover, in this case, many of the allottee Defendants have submitted signed statements which uniformly maintain: "The MA-8 Allottees affirm and support the 9th Cir. 2011 decision in Wapato Heritage, LLC v. United States, that the MA-8 Master Lease expired in 2009 and that the 'United States holds MA-8 in trust.' " *See, e.g.*, ECF No. 475. The Indian law canon of construction requiring the Court to liberally construe statutes in favor of the Indians demands finding that the 1935 Act applies to the Moses Allotments.

However, out of an abundance of caution, the Court also has considered the legislative history and overall purpose of the 1935 Act, to determine whether Congress intended reservation allotments like the Moses Allotments to be excluded from the Act's trust period extension. Prior to the 1935 Act, Mr. Collier, Commissioner of Indian Affairs, addressed the House Committee on Indian Affairs regarding the purpose of the Act. He explained the importance of keeping Indian land in trust so that it would not be alienated to non-Indians, through voluntary or forced sale. On behalf of the BIA, Mr. Collier testified in favor of the 1935 Act, stating:

> Our view is that the Indian lands should remain tax exempt for a good while; I do not say that they should remain so forever, but for a long time to come the Indian lands should remain tax exempt and the Government should continue to render useful services to the Indian. The Government should provide schools, health facilities, and so forth, for them.
>
> We believe that insofar as practicable control of Indian property should be given to the Indians. We shall continue to seek to do that.
>
> We do not, however, wish to see the trust period terminated because, first, ***1120** they then face taxation and in the second place, it means power to alienate. We believe that the destiny of the Indian is a destiny on his land and that he ought to keep it.

ECF No. 313-2 at 2.

As Mr. Collier testified, maintaining trust status on Indian lands was imperative because, without it, land could be sold voluntarily to non-Indians, further reducing Indian landholdings across the United States. Additionally, as Mr. Collier explained, non-trust land was subject to taxation. Frequently, Indians who could not afford to pay taxes on their allotments would lose them, either through voluntary or forced sale. *See* *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978) (citing 78 Cong. Rec. 11726 (1934) (remarks of Rep. Howard)).

[19] In addition to promoting tribal self-governance, protecting the trust status of Indian land was a primary purpose of the IRA, which the 1935 Act amended. As described *supra*, the IRA famously ended the allotment era and extended the trust period on a vast amount of Indian land indefinitely. *See* 25 U.S.C. §§ 5101 and 5102. Provisions of the IRA that protected Indian trust land were "[p]erhaps the most important and effective provision[s] of the Indian Reorganization Act." *See Canby* at 26.

The 1935 Act, when read in conjunction with the IRA, provided further reassurance that Indian land would not fall out of trust. Indeed, the 1935 Act served as a gap-filler, ensuring that, even if Indians voted against the IRA, the trust status of their land would be protected at least until December 31, 1936. It was the BIA's contemporaneous view that the 1935 Act extended the trust period on "all Indian lands outside of Oklahoma which would have otherwise expired" prior to December 31, 1936. ECF No. 307-4 at 5.

Nothing in the legislative history suggests that Congress intended to exclude reservation allotments such as the Moses Allotments from the trust period extension provided by the 1935 Act due to the fact that the allotments were not geographically "containe[ed]," or bounded, by the voting reservation. Moreover, to find that the Moses Allotments should be excluded from the trust period extension would run contrary to one of the fundamental purposes of the 1935 Act and the IRA, which was to protect and continue the trust status of "any Indian land." Thus, the legislative history and overall purpose of the statute support the CTCR's broader reading of the 1935 Act.

Notably, the CTCR's reading also comports with the BIA's interpretation, as issued in an Appendix to the 1949 Code of Federal Regulations. While it appears that the Secretary of the Interior did not hold a vote on the Moses Allotments specifically, the BIA concluded in an Appendix to the Code of Federal Regulations that the "Chief Moses Band" Reservation, comprised of the Moses Allotments, was a "reservation ... not subject to the benefits of such indefinite trust or restricted period extension" provided by the IRA. LIST OF FORMS, 25 CFR 1949 367–70 (Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands) (filed at ECF No. 307-5 at 4). The BIA further concluded that the 1935 Act applied to the Chief Moses Band Reservation, thus extending the trust period to December 31, 1936. *Id.*

[20] **[21]** Ever since the BIA issued trust patents for the Moses Allotments, the BIA has treated the Moses Allotments as trust land, and Congress has not interfered. Congress has even ratified the trust status of MA-8. Indeed, Congress acknowledged that MA-8 is trust land as recently as 2006, when it amended the Indian ***1121** Long-Term Leasing Act to add MA-8 to the list of Indian trust lands that could be leased by their owners for 99 years. Act of May 12, 2006, 109 Pub. L. 229, 120 Stat. 340 (2006). Congress ratifies an agency's interpretation or practice when it is aware of that interpretation or practice, legislates in an area covered by that interpretation or practice, and does not refer to or change that interpretation or practice. *See* *San Huan New Materials High Tech v. ITC*, 161 F.3d 1347 (Fed. Cir. 1999); *see also Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1171–72 (9th Cir. 2008). "[A]bsent some special circumstance [Congress's] failure to change or refer to [an agency's] existing practices is reasonably viewed as ratification thereof." 161 F.3d 1347 (9th Cir. 1999). Since the passage of the 1934 Act, the Executive and Congress continually have treated MA-8 as trust land.

For the foregoing reasons, the Court finds that the legislative history and overall purpose of the 1935 Act and the IRA, which the Act amended, reflect Congress's clear intent to preserve the trust status of any reservation land, including reservation allotments like the Moses Allotments. To the extent that there is any doubt that MA-8 remains in trust, Congress ratified the BIA's treatment of MA-8 as Indian trust land as recently as 2006.

Post-1935 Trust Period Extensions

[22] Since the 1935 Act, the trust period for the Moses Allotments has been extended periodically through the

present day. *See* Exec. Order 7464 (Sept. 30, 1936) printed in Charles J. Kappler, Indian Affairs Laws and Treaties, Vol. V at 643) (filed at ECF No. 234-11); Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands, 25 Fed. Reg. 13688–89 (Dec. 24, 1960) (filed at ECF No. 234-13); Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands, 28 Fed. Reg. 11630-31 (Oct. 31, 1963) (filed at ECF No. 234-14); Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands, 33 Fed. Reg. 15067 (Oct. 9, 1968) (filed at ECF No. 234-15); Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands, 38 Fed. Reg. 33463–64 (Dec. 14, 1973) (filed at 234-16); Appendix—Extension of the Trust or Restricted Status of Certain Indian Lands, 43 Fed. Reg. 58368–69 (Dec. 14, 1978) (filed at ECF No. 234-17); Extension of the Trust or Restricted Status of Certain Indian Lands, 48 Fed. Re. 34026 (July 27, 1983) (filed at ECF No. 234-18); Extension of the Trust or Restricted Status of Certain Indian Lands, 53 Fed. Reg. 30673–74 (Aug. 15, 1988) (filed at ECF No. 234-19). Most recently, Congress enacted legislation that comprehensively extended the trust period indefinitely for "all lands held in trust by the United States for Indians." 25 U.S.C. § 5126.

The Court concludes that MA-8 is Indian land held in trust by the United States for the benefit of the allottees. Accordingly, the Court rejects Plaintiffs' and Wapato Heritage's argument that the Government lacks standing to assert a trespass counterclaim against Plaintiffs.

II. Plaintiffs' Motion for Default Judgment against Certain Individual Allottee Defendants

[23] **[24]** Plaintiffs have moved for default judgment against certain, non-appearing allottee Defendants. Obtaining a default judgment is a two-step process. *See* Fed. R. Civ. P. 55. First, "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend ... the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Second, once the clerk has entered default against a party, the moving party may seek default judgment. *See* Fed. R. Civ. P. 55(b). Once the clerk enters default against a party, the well-pleaded allegations of the ***1122** complaint are taken as true, except for allegations related to damages. *See* *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). The decision to grant default judgment lies within the discretion of the trial court. *PepsiCo. Inc. v. Cal. Sec. Cans*, 238 F. Supp.2d 1172, 1174 (C.D. Cal. 2002) (citing *Draper v. Coombs*, 792 F.2d 915, 924–25 (9th Cir. 1986)).

[25] **[26]** **[27]** Generally, "default judgments are disfavored; cases should be decided upon their merits whenever reasonably possible." *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1189 (9th Cir. 2009). In deciding whether default judgment is appropriate, district courts consider the following factors:

(1) The possibility of prejudice to the plaintiff;

(2) The merits of the plaintiff's substantive claim;

(3) The sufficiency of the complaint;

(4) The sum of money at stake in the action;

(5) The possibility of a dispute concerning material facts;

(6) Whether the default was due to excusable neglect; and

(7) The strong public policy underlying the Federal Rules of Civil Procedure favoring decision on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). While the Ninth Circuit has instructed district courts to consider these factors when exercising their discretion, courts may not grant default judgment against a defendant if the plaintiff's claims are legally insufficient. *See* *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1992) (explaining that "claims which are legally insufficient [ ] are not established by default").

A. Equitable Estoppel as an Independent Cause of Action

The Government and the CTCR have argued that Plaintiffs' estoppel claim against the individual allottee Defendants is not legally cognizable under Washington law.[9] They argue that equitable estoppel is only cognizable as a defense, not as a cause of action. Accordingly, they maintain that default judgment is inappropriate here because Plaintiffs' claim against the allottees is legally insufficient. Plaintiffs respond that under Washington law they may assert equitable estoppel as a cause of action, not just as a defense. The Court assumes *arguendo*, without finding, that Washington law may be applied against the allottees in this case.

[28] At one time, it was an open question under Washington law as to whether a plaintiff could assert equitable estoppel as an affirmative cause of action. The Washington State Supreme Court left the possibility open in *Chemical Bank v. Washington Public Power Supply System*, refusing to rule on the issue. 102 Wash.2d 874, 691 P.2d 524, 541 (1984); *see also* *DigiDeal Corp. v. Kuhn*, No. 2:14-CV-227-JLQ, 2015 WL 5477819, at *3 (E.D. Wash. Sept., 6, 2015) (explaining after a consideration of Washington law that "the court cannot say equitable estoppel fails as an independent cause of action"). However, since then, Washington case law has developed, and now it is clear that equitable estoppel may not be asserted as an affirmative cause of action; in other words, equitable estoppel must be used as a "shield," not a "sword." ***1123** *Sloma v. Wash. State Dep't. of Retirement Systems*, 12 Wash.App.2d 602, 459 P.3d 396, 406 (2020) ("More importantly, equitable estoppel is not available for use as a "sword," or cause of action."); *Byrd v. Pierce Cty.*, 5 Wash.App.2d 249, 425 P.3d 948, 952–55 (2018) (discussing cases and explaining that equitable estoppel is a defense, not a separate action in equity) (citing *Motely-Motley, Inc. v. State*, 127 Wash.App. 62, 110 P.3d 812, 818 (2005)).

[29] Plaintiffs argue that they are not using their cause of action affirmatively, or as a "sword," against the individual allottees. They maintain, "Plaintiffs seek a defensive application—to estop the Allottees from taking a position inconsistent with their prior acts and omissions—like that endorsed [by Washington courts]." ECF No. 483 at 9. Plaintiffs argue that their cause of action is "defensive" because it does not "compel the allottees to do anything." *Id.* This argument makes little sense. The individual allottees have not asserted any counterclaims against Plaintiffs. With respect to the individual allottee Defendants, Plaintiffs have nothing against which to defend. They have no use for a shield.

Recent Washington precedent is clear that equitable estoppel is not a legally cognizable cause of action. *Sloma*, 459 P.3d at 406; *Byrd*, 425 P.3d at 952–955. Accordingly, even assuming *arguendo* that Washington law applies, Plaintiffs' Motion for Default Judgment is denied for failure to plead a cognizable claim against the defaulting Defendants.

B. *Eitel* Factors

[30] Moreover, even if Plaintiffs' claim were legally cognizable, the *Eitel* factors weigh heavily against granting Plaintiffs' Motion for Default Judgment. With respect to the first *Eitel* factor, Plaintiffs have not adequately explained the prejudice that they will encounter if the Court refuses to enter default judgment. Other similarly situated individual allottee Defendants have appeared in this action, and the case is proceeding on the merits with respect to those Defendants. Additionally, as Plaintiffs have put it, their equitable estoppel claim does not "compel the allottees to do anything." Therefore, it is not clear that Plaintiffs will suffer any prejudice if the Court refuses to grant their Motion for Default Judgment. Accordingly, the first *Eitel* factor weighs against entering default judgment.

Similarly, the fifth *Eitel* factor, which considers the possibility of a dispute concerning material facts, weighs against granting Plaintiffs' Motion for Default Judgment. Again, other similarly situated Defendants have appeared to defend this case. Because some allottees have appeared to defend against Plaintiff's estoppel claim, there is a possibility of dispute concerning material facts.

The sixth *Eitel* factor also weighs against entry of default judgment, as the individual allottees' failure to appear in this case constitutes excusable neglect. The Government holds MA-8 in trust for the allottees. Several of the defaulting allottees have signed and submitted a form response to the instant motion, which states that they did not appear in this action because they understood the United States to represent their collective interest in MA-8. The form response appears to have been circulated by allottee Defendants Marlene Marcellay, Darlene Marcellay-Hyland, and Maureen Marcellay to the remaining MA-8 allottees. *See* ECF Nos. 475–480. That response states:

> The MA-8 Allottees assert that many of the MA-8 Allottees assumed their interest and representation in the MA-8 legal proceedings were being managed by the BIA as "trustee" to the MA-8 Allottees, and therefore, did not respond to court proceedings resulting in default [ ] ***1124** against non-appearing MA-8 allottees/defendants. The non-appearing Allottees identified

> by the Court, and who have signed this document, now wish to affirm and assert their support of the declaration contained in this document ....

See ECF Nos. 475–80. Because MA-8 is trust land, the Court finds that the MA-8 allottees may have reasonably believed that they did not need to respond to Plaintiffs' Complaint after the Government had appeared in its trust capacity. Therefore, the sixth *Eitel* factor weighs against entry of default judgment.

Finally, for the reasons explained above, the seventh *Eitel* Factor, which considers the strong public policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits, weighs against entering default judgment. Upon consideration of the *Eitel* factors, the Court finds that default Judgment is not appropriate, even if Plaintiffs' claim against the defaulting Defendants were legally cognizable, which it is not.

III. Plaintiffs' Motion for Summary Judgment against Certain Individual Allottees

Plaintiffs have moved for summary judgment against nine allottee Defendants who did not respond to Plaintiffs' requests for admission ("RFAs"). They argue that, pursuant to Federal Rule of Civil Procedure 36(a)(3), the non-responding allottee Defendants have admitted to the matters contained in the RFAs by failing to respond. Therefore, Plaintiffs assert that the non-responding Defendants have admitted facts proving that those Defendants are "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to occupy and use the Mill Bay Resort until February 2, 2034." ECF No. 439 at 2.

[31] A court may grant summary judgment where "there is no genuine dispute as to any material fact" of a party's prima facie case, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the moving party will have the burden of proof at trial, she must demonstrate on summary judgment that no reasonable trier of fact could find other than for her. *Ryan v. Zemanian*, 584 Fed. App'x. 406, 406 (9th Cir. 2014) (citing *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548).

As explained above, assuming *arguendo* that state law applies to Plaintiffs' claims against the individual allottee Defendants, Plaintiffs' estoppel claim is not legally cognizable because equitable estoppel is not an affirmative cause of action under Washington law. *Sloma*, 459 P.3d at 406; *Byrd*, 425 P.3d at 952–955. Therefore, Plaintiffs are not entitled to judgment as a matter of law on that claim. Plaintiffs' motion for summary judgment fails for that reason alone.

[32] However, even if the claim were valid under Washington law, the Court finds that Plaintiffs' RFAs were untimely, and thus cannot support Plaintiffs' motion for summary judgment. *See* ECF No. 272 at 2 (Scheduling Order); *see also* *Baxter Bailey & Associates v. Ready Pac Foods, Inc.*, Case No. CV 18-08246 AB (GJSx), 2020 WL 1625257, at *1 (C.D. Cal. Feb. 26, 2020) (explaining that Defendants were not obligated to respond to untimely discovery requests, and their failure to respond could not be used by Plaintiffs to create an issue of material fact precluding summary judgment); *Dinkins v. Bunge Mill., Inc.*, 313 Fed. Appx. 882, 884 (7th Cir. 2009) (finding that a party need not respond to requests for admission when "the requests for admissions were mailed only nine days before ***1125** the close of discovery"). Defendants did not have an obligation to respond to untimely discovery requests. *See id.*

Plaintiffs argue that, pursuant to this Court's prior Scheduling Order, their RFAs were timely. The Scheduling Order at ECF No. 272 established deadlines for discovery related to the Government's Motion for Summary Judgment re Ejectment only. Plaintiffs contend that their RFAs were not propounded for the purpose of responding to the Government's Motion for Summary Judgment re Ejectment. However, Plaintiffs' own briefing belies that claim. For example, Plaintiffs' instant Motion for Summary Judgment, which relies entirely on the unanswered RFAs, asserts, "At the very least, the Allottees' admissions create issue of fact precluding the MSJ re ejectment." ECF No. 483 at 8 and 9.

Moreover, Plaintiffs' Motion for Summary Judgment, based upon the unanswered RFAs, was submitted on the parties' deadline to file supplemental briefing related to the Government's Motion for Summary Judgment re Ejectment. Considering the briefing, the record, and the nature of the remaining claims, the purpose of the RFAs appears to be an attempt to create issues of material fact precluding the Government's Motion for Summary Judgment re Ejectment. Therefore, the Court finds that the RFAs are discovery

related to the Government's Motion for Summary Judgment re Ejectment, filed in 2012, which is governed by this Court's prior Scheduling Order.

The Court's Scheduling Order required Plaintiffs to serve RFAs "sufficiently early that all responses [were] due before the discovery deadline" of November 1, 2012. ECF No. 272 at 2. Because Plaintiffs served the RFAs via mail on October 1, 2012, and because November 3, 2012 was a Saturday, the responses would have been due on November 5, 2012. *See* Fed. R. Civ. P. 6(a)(2) and (d); ECF No. 296-1 at 59–60. Accordingly, the RFAs were untimely and cannot be used now against the non-answering allottee Defendants.

[33] Finally, even if (1) the Court deemed the unanswered RFAs admitted, which it does not, and (2) found that equitable estoppel was a viable affirmative cause of action under Washington law, which it does not, Plaintiffs' Motion for Summary Judgment on its equitable estoppel claim still fails. Pursuant to Washington law, the elements of equitable estoppel are:

(1) a party's admission, statement, or act inconsistent with its later claim;

(2) action by another party in reliance on the first party's act, statement or omission; and

(3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or omission.

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wash.2d 738, 863 P.2d 535, 538 (1993).

The Court finds that the RFAs, even if deemed admitted, do not support the third prong of an equitable estoppel claim, nor does any other evidence on the record. Specifically, the unanswered RFAs do not support the contention that "injury will result" to Plaintiffs if the non-responding allottees are permitted to "contradict or repudiate the prior act, statement, or omission." *See id.* Plaintiffs assert, "[I]t is undisputed that Plaintiffs will be injured if Non-Responding Allottees are permitted now to deny Plaintiffs the right to occupy MA-8 until 2034 ...." However, Plaintiffs have not connected the dots with reasoning, law, or evidence. It is not clear how nine individual allottees could approve or deny Plaintiffs' use of MA-8, such that their positions would have any impact on ***1126** the outcome of this case, when there are many more allottees involved, as well as the Federal Defendants.

As explained in greater detail below, because MA-8 is Indian trust land, use of MA-8 is governed by extensive federal regulations. Pursuant to those regulations, the Government generally may remove trespassers from fractionated allotments without first obtaining majority consent from the allottees. While there are regulations in place to protect allottee interests, in this case, whether nine individual allottees support the Government's treatment of Plaintiffs as trespassers is not causally connected to the Plaintiffs' alleged harm: removal from MA-8 by the Government. Put another way, even if the Court granted Plaintiffs' motion, thus forbidding the non-responding Indian allottees from challenging Plaintiffs' use of their land for the next fourteen years, the Government still could seek the ejectment of Plaintiffs in its role as trustee.

Accordingly, Plaintiffs have not provided any evidence to support the third prong of estoppel against the allottees, specifically that injury will result if the Court refuses to estop the non-responding allottees. Therefore, even accepting *arguendo* the premise of Plaintiffs' Motion for Summary Judgment, Plaintiffs are not entitled to judgment as a matter of law on their estoppel claim against the non-responding allottee Defendants.

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is denied.

IV. Defendants' Motion for Summary Judgment re Ejectment

[34] The Government has asserted a counterclaim of trespass against Plaintiffs and renewed their motion for summary judgment on that claim, thereby seeking ejectment of Plaintiffs from MA-8. As this Court already has explained, Federal common law allows the Government to bring this trespass claim, acting in its sovereign capacity as trustee, to remove trespassers from Indian land. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994).

A. Consent of Allottees

Plaintiffs argue that the Government has "no authority to eject Plaintiffs from the property absent the express consent of a majority of the Allottees—*which is now impossible*

to obtain." ECF No. 438 at 12 (emphasis in original). First, the Court notes that Plaintiffs do not explain why it is now impossible for the Government to obtain consent of the landowners. However, more importantly, Plaintiffs cite absolutely no authority for their assertion that the Government must receive "express consent" from a majority of MA-8 allottees to proceed with this action, which seeks to eject an individual and a Washington State nonprofit corporation from Indian trust land.

The CTCR's briefing, on the other hand, directs the Court to relevant law, citing regulations that govern the BIA's management of leases on allotted land. Specifically, the CTCR cite 25 C.F.R. § 162.023, which describes what the BIA will do when an individual or entity takes possession or use of Indian land, without a valid lease:

> If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

25 C.F.R. § 162.023. Plaintiffs have cited no law, and the Court has found none, that requires the Government to obtain consent ***1127** from a majority of the allottees before removing trespassers from a highly fractionated allotment.

Importantly, this contrasts with the Government's responsibilities when approving a lease of highly fractionated trust land. When more than twenty allottees share an interest in a given allotment, the BIA must obtain majority consent before approving any lease of that land. 25 C.F.R. § 162.012. Notably, it is undisputed that the BIA had the requisite consent of the allottee landowners when it approved the Master Lease in the 1980s.

Additionally, federal regulations provide that the BIA will not act to evict a holdover tenant if "the Indian landowners of the applicable percentage of interests under § 162.012 have notified [the BIA] in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease." 25 U.S.C. § 162.471. Thus, the regulations provide a mechanism for allottee landowners to stop the eviction of holdover tenants, if the landowners want to negotiate a new lease with the holdover tenants. In this case, it is undisputed that the landowners are not presently engaged in discussions with Wapato Heritage, or with Plaintiffs directly, about a new lease.

Plaintiffs and Wapato Heritage consistently, and quite emphatically, argue that the Government cannot have it both ways; they claim that the Government cannot maintain that allottee approval is required in some instances and not in others. Again, Plaintiffs cite no law to support this assertion.

[35] The relevant regulations explain when allottee consent is needed for the Government to act. As stated above, here the regulations require the Government to obtain majority consent to approve a new lease; the regulations do not require the Government to obtain majority consent to eject trespassers. Accordingly, the Court rejects Plaintiffs' argument that the Government is somehow taking inconsistent positions, or acting in bad faith, simply by complying with relevant regulations. [10]

B. The Government's Trespass Counterclaim

The Court turns to the merits of the Government's trespass claim, to determine if the Government is entitled to summary judgment on that claim. The trespass claim is governed by federal common law. *Pend Oreille Public Util. Dist. No. 1*, 28 F.3d at 1549 n.8 (explaining that federal law controls an action for trespass on Indian land) (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (right of Indians to occupy lands held in trust by the United States for their use is "the exclusive province of federal law")); *see also* 25 C.F.R. § 162.023 (What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?).

To prevail at the summary judgment phase on its trespass claim, the Government must show that there are no genuine disputes of material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also* *Celotex Corp.*, 477 U.S. at 322–23, 106 S.Ct. 2548. Because the Government would have the burden of proof at trial on

its trespass counterclaim, in order to succeed on summary ***1128** judgment, it must show that no reasonable trier of fact could find for Plaintiffs with respect to that claim. *Ryan*, 584 Fed. App'x. at 406 (citing *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548).

[36] It is undisputed that Plaintiffs have no lease or express easement authorizing their use of MA-8. Plaintiffs first gained access to MA-8 via their camping memberships. These camping memberships are contracts between Plaintiffs and Evans/Wapato Heritage. There is no evidence that Plaintiffs have an agreement with the Government or the individual allottee Defendants to use or occupy MA-8.

Plaintiffs' camping memberships gave them the right to use MA-8 consistent with the Master Lease. The Ninth Circuit has held that the Master Lease expired as of February 2, 2009. *See* *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011). While Wapato Heritage attempted to negotiate a new lease of MA-8 at one point, it failed to do so.

There is no evidence demonstrating that the landowners have contacted the BIA, consistent with 25 U.S.C. § 162.471, to inform the BIA that they are engaged in good faith negotiations with Plaintiffs (or with Wapato Heritage) for a new lease. It is undisputed that Plaintiffs are presently in possession of a portion of MA-8, and that the allottees are out of possession, thereby unable to utilize that portion of MA-8. The Government has met its burden to justify ejectment.

Plaintiffs have asserted numerous defenses in an attempt to preclude the Government's Motion for Summary Judgment on its trespass claim. The Court addresses each defense in turn.

C. Plaintiffs' Estoppel Defense

[37] Plaintiffs raise the defense of equitable estoppel against the Government, to prevent it from ejecting them. They claim that there are issues of material fact with respect to their estoppel defense that prevent summary judgment in the Government's favor. However, the defense of equitable estoppel does not apply to the Government when it acts in its sovereign capacity as trustee for Indian land. *See* *United States v. City of Tacoma, Wash.*, 332 F.3d 574 (9th Cir. 2003) (explaining that the government "is not at all subject" to the defense of equitable estoppel when acting as trustee of tribal land); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir.) *cert. denied* 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957); *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1110 (10th Cir. 1976) (explaining that "[e]stoppel does not run against the United States when it acts as trustee for an Indian tribe").

Here, the Government is acting in its trust capacity by seeking the removal of Plaintiffs from Indian trust land. Accordingly, Plaintiffs, as a matter of law, cannot assert the defense of equitable estoppel to combat the Governments' trespass claim.

Plaintiffs have attempted to get around this legal principle by asserting their defense of equitable estoppel against the individual landowners directly, in addition to the Government. However, the Government acting in its trust capacity has filed the trespass counterclaim against Plaintiffs. Therefore, the defense raised against individual landowners is not applicable to the Government's counterclaim, as a matter of law, and Plaintiffs do not create any issues of material fact by asserting the defense.

D. Plaintiffs' Irrevocable License and Easement by Estoppel Defenses Raised in Plaintiffs' 2012 Briefing

Plaintiffs also defend against the Government's trespass claim by arguing that they have an "irrevocable license" under ***1129** Washington law to remain on the property until 2034. This argument was raised in Plaintiffs' briefing in 2012 and was not argued during the 2020 hearing.

The concept of an "irrevocable license" is not well-developed in Washington State, and Plaintiffs do little to explain how the concept has been applied by Washington courts in their briefing. However, Plaintiffs maintain that their purported irrevocable license may be better described as an easement by estoppel. In raising their "irrevocable license" and "easement by estoppel," defenses, Plaintiffs essentially reassert their equitable estoppel claim, which the Court has rejected as a matter of law.

[38] **[39]** **[40]** Even if these state property law defenses should be evaluated separately from Plaintiffs' equitable estoppel claim against the Government, they still are not applicable to this action, which is governed by federal law. As *Cohen's Handbook* explains, "Because Indian land claims are 'exclusively a matter of federal law,' state property laws are preempted." *Cohen* § 15.08[4] (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 241, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)). "This means, for example, that state statutes of limitations and adverse possession doctrines

do not apply to tribal lands. In addition, other state-law based defenses to possessory claims, such as estoppel and laches, are similarly preempted." *Id.* (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 241 n.13, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)); *see also* *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956) (explaining that no defense of laches or estoppel was available against the Government when the Government acted as trustee for an Indian tribe); *Seneca Nation of Indians, Tonawanda Bank of Seneca Indians v. New York*, No. 93-CV-688A, 1994 WL 688262, at *1 (W.D.N.Y. Oct. 24, 1994) (striking the state-law defenses of accord, satisfaction, unclean hands, estoppel, laches, and waiver because their assertion would "contravene established policy pertaining to Indians' ability to enforce their property rights").

These defenses, which are grounded in state law, are inapplicable here. Therefore, by asserting these defenses, Plaintiffs do not create any issues of material fact that preclude summary judgment on the Government's trespass counterclaim.

E. Plaintiffs' Specific Performance Argument Raised in Plaintiffs' 2012 Briefing

Plaintiffs also argue that summary judgment on the Government's ejectment counterclaim should be denied because Plaintiffs may be entitled to the equitable remedy of specific performance on either their camping contracts or on the 2004 Settlement Agreement, thus allowing them to remain on MA-8 until 2034. Again, Plaintiffs raised this argument in 2012 but did not address it at the hearing in 2020.

[41] "Specific performance is an equitable remedy available to an aggrieved party for breach of contract where there is no adequate remedy at law." *Kovanen v. FedEx Ground Package Systems, Inc.*, 2:17-CV-00360-SMJ, 2018 WL 660634, at *2 (E.D. Wash. Feb. 1, 2018) (quoting *Egbert v. Way*, 15 Wash.App. 76, 546 P.2d 1246, 1248 (1976)). Plaintiffs argue that they may have an enforceable oral contract with the individual allottee Defendants that entitles them to specific performance in this case.

Plaintiffs cite to *Canterbury Shores Associates v. Lakeshore Properties, Inc.*, 18 Wash.App. 825, 572 P.2d 742 (1977), to argue that a court may enforce an oral contract for the conveyance of an interest in real property under certain circumstances, even though such a contract usually must be in writing pursuant to the statute of frauds. ECF No. 295 at 19. In ***1130** that case, the Washington Court of Appeals explained that a court of equity may enforce a parol contract for the conveyance of an interest in land when there has been part performance, and when the contract can "be established by clear and unequivocal proof, leaving no doubt as to the character, terms, and existence of the contract." *Canterbury Shores Assocs.*, 572 P.2d at 744.

[42] Here, Plaintiffs have produced no evidence of a contract between them and the individual allottee Defendants. The contracts that Plaintiffs want to enforce, which are their camping memberships and the 2004 Settlement Agreement, are between them and Evans/Wapato Heritage, not the allottee Defendants.

Additionally, the Court notes the peculiar context in which Plaintiffs argue for specific performance, as Plaintiffs did not bring any contract claim against the individual allottee Defendants in this case. However, as the parties did not address or argue this issue, the Court makes no findings as to whether Plaintiffs appropriately raised their specific performance argument.

Because Plaintiffs have provided no evidence of a contract between them and the individual allottee Defendants, their specific performance argument does not preclude summary judgment on the Government's trespass counterclaim.

None of Plaintiffs' defenses raise issues of material fact precluding summary judgment on the Government's trespass counterclaim. Moreover, the undisputed material facts illustrate that the Government is entitled to judgment as a matter of law on that counterclaim.

Accordingly, **IT IS HEREBY ORDERED:**

1. For good cause shown, the individual Defendants' Motion and Memorandum Joining in the Federal Defendants' Motion for Summary Judgment re Ejectment, **ECF No. 344**, is **GRANTED**.

2. Plaintiffs' Motion for Default Judgment, **ECF No. 433**, is **DENIED**.

3. Plaintiffs' Motion for Summary Judgment, **ECF No. 439**, is **DENIED**.

4. The Government's Renewed Motion for Summary Judgment re Ejectment, **ECF No. 231**, is **GRANTED**.

5. Plaintiffs have had no right to occupy any portion of MA-8 after February 2, 2009. Plaintiffs are in trespass, and their removal from the subject property is authorized.

6. Judgment shall be entered for the Government (Federal Defendants) on its trespass counterclaim.

IT IS SO ORDERED.

All Citations

471 F.Supp.3d 1095

Footnotes

1 Except for the issue of MA-8's trust status, the historical background of this case is largely undisputed. The Court expressly notes disputed issues of fact in this Order.

2 According to Judge Whaley in the related case, *Wapato Heritage, L.L.C. v. United State*s, the exhibit attached to the lease also listed the BIA Superintendent of the Colville Agency as lessor to function as a "guardian" of the other Indian landowners not listed in the lease, due to the fractionated nature of the land. *See* ECF No. 30 at 3 in Case No. 2:08-cv-177-RHW. According to Judge Quackenbush, the previous judge presiding over this litigation, "There is no 'Exhibit A' of record and no evidence in the record whether 'Exhibit A' ever existed. The Master Lease contains just two signatures. It was signed by Evans as 'Lessee' and under 'Lessor' was the signature of George Davis, Secretary of the BIA." ECF No. 144 at 5.

3 Evans created two separate companies through which he conducted business related to MA-8, Mar-Lu, Ltd. and Chief Evans, Inc. Almost immediately after obtaining the Master Lease, Evans subleased a portion of MA-8 to Mar-Lu, Ltd. to develop the property and create Mill Bay RV Resort. The sublease stated that it would "expire on the date of the expiration of the Master Lease and exercised extension option, if any, whichever be later." ECF No. 90-4 at 4 (Mar-Lu Ltd. sublease). For clarity, the Court will consider the actions of Mar-Lu, Ltd. and Chief Evans, Inc. to be the actions of Evans. This is consistent with the Court's prior rulings and the parties' arguments.

4 Plaintiff Grondal suggests that the BIA and the Confederated Tribes of the Colville have colluded for years in an attempt to take MA-8 from Plaintiffs prematurely, so that the Tribes may expand their casino operations on MA-8 before 2034. *See* ECF No. 16 at 5 (Decl. of Paul Grondal explaining, "[R]umors began circulating that the Colville Tribe was planning on moving the Mill Bay Casino onto the Mill Bay Resort RV Park property"). At the hearing regarding the instant motions, Defendant/Cross-Claimant Wapato Heritage also argued that the Government is inappropriately favoring the Confederated Tribes of the Colville with respect to MA-8's use.

5 In 2012, certain individual allottees filed a motion to join the Government's renewed Motion for Summary Judgment re Ejectment. ECF No. 344.

6 The Court acknowledges that Plaintiffs also have argued that MA-8 may not be trust land in response to the CTCR's Motion to Dismiss, in order to rebut the CTCR's assertion of sovereign immunity, to postpone hearing on that motion, and to raise "other jurisdictional issues." *See* ECF No. 223 at 4.

7 *See e.g., Starr v. Long Jim*, 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913); *United States v. Oregon*, 787 F. Supp. 1557 (1992).

8 The IRA, which the 1935 Act amended, did not apply to "Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation ...." 25 U.S.C. § 5111. One could

argue that this restriction on the IRA's applicability should be used to inform the 1935 Act's use of the term "Indian Land," limiting the term's definition to exclude public domain, or homestead allotments located outside the geographic boundaries of a reservation. Even accepting that argument, for reasons this Court already has explained, the Moses Allotments were reservation allotments, not "holdings of allotments or homesteads upon the public domain." Accordingly, this provision does not help answer the question of whether the 1935 Act applies to the Moses Allotments.

9 There is also a dispute as to whether Washington law applies to Plaintiffs' claim against the individual allottees. *See* ECF No. 469 at 12. Because the Court's decision regarding Plaintiffs' claim against the individual allottees does not depend on resolving that issue, the Court assumes for the purposes of this Order, without finding, that Plaintiffs may assert a state law claim against the individual allottee Defendants.

10 At the hearing, counsel for individual Defendant Gary Reyes asserted that the Government had improperly approved a sale of his beneficial interest in MA-8 to the CTCR. While the Court acknowledges the seriousness of Mr. Reyes's allegation that the Government did not fulfill its trust obligation with respect to the sale of his beneficial interest in MA-8, Mr. Reyes's claim is not related to the claims of this case, which involve whether Plaintiffs have the right to occupy MA-8.

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647 F.2d 42
United States Court of Appeals,
Ninth Circuit.

COLVILLE CONFEDERATED TRIBES, Plaintiff-Appellant,
v.
Boyd WALTON, Jr., et ux, et al., Defendants-Appellees,
and
State of Washington, Intervening Defendant-Appellee.
UNITED STATES of America, Plaintiff-Appellee,
v.
William Boyd WALTON et ux, Defendants-Appellants,
and
State of Washington, Defendant.
UNITED STATES Of America, Plaintiff-Appellee,
v.
William Boyd WALTON, Jr., et ux, Defendants,
and
State of Washington, Defendant-Appellant.

Nos. 79-4297, 79-4309 and 79-4383.
|
Argued and Submitted June 6, 1980.
|
Decided June 1, 1981.

Synopsis

Action arose from dispute as to rights to water of creek and basin located entirely within boundaries of Indian reservation in the state of Washington. The United States District Court for the Eastern District of Washington, 460 F.Supp. 1320, Marshall A. Neill, Chief Judge, entered a judgment from which appeals were taken. The Court of Appeals, Wright, Circuit Judge, held that: (1) when Colville Indian Reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practically irrigable acreage on the reservation; furthermore, there was an implied reservation of water from creek for development and maintenance of replacement fishing grounds; (2) Indian allottee could sell his right to reserved water; and (3) state regulation of water in a nonnavigable water system located on Indian reservation was preempted by creation of the Indian reservation; thus state water permits of non-Indian purchaser of an Indian allotment were of no force and effect.

Reversed in part, affirmed in part, and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Water Law** Incident to Reservation or Withdrawal of Lands from Public Domain

Congress has power to reserve unappropriated water for use on appurtenant lands withdrawn from public domain for specific federal purposes and where water is needed to accomplish those purposes, a reservation of appurtenant water is implied.

7 Cases that cite this headnote

[2] **Water Law** Time of Vesting of Reserved Water Rights

United States acquires a water right vesting on date reservation of unappropriated water was created and superior to rights of subsequent appropriators.

6 Cases that cite this headnote

[3] **Indians** Water Rights and Management

An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill purposes of the reservation.

10 Cases that cite this headnote

[4] **Indians** Water Rights and Management

Water was reserved when the Colville Reservation was created.

10 Cases that cite this headnote

[5] **Water Law** Waters necessary for primary purpose of federal reservation

Where water is necessary to fulfill very purposes for which a federal reservation was created,

Attachment: 8

it is reasonable to conclude, even in face of Congress' express deference to state water law in other areas, that United States intended to reserve necessary water; however, where water is only valuable for a secondary use of the reservation, there arises a contrary inference that Congress intended, consistent with its other views, that United States would acquire water in same manner as any other public or private appropriator.

2 Cases that cite this headnote

[6] **Indians** Amount, measure, and allowable purposes

When Colville Indian Reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practically irrigable acreage on the reservation; furthermore, there was an implied reservation of water from creek for development and maintenance of replacement fishing grounds.

21 Cases that cite this headnote

[7] **Indians** Amount, measure, and allowable purposes

Where Indians had vested property right in reserved water, they could use it in any lawful manner and subsequent act of government, which provided necessary fingerlings, making historically intended use of the water unnecessary did not divest Indians of right to the water, which included right to permit natural spawning of trout.

3 Cases that cite this headnote

[8] **Indians** Water Rights and Management

Indian allottees have right to use reserved water. Indian General Allotment Act, § 7, 25 U.S.C.A. § 381.

4 Cases that cite this headnote

[9] **Indians** Status and disabilities of Indians in general

Generally, termination or diminution of Indian rights requires express legislation or a clear inference of congressional intent gleaned from surrounding circumstances and legislative history.

1 Cases that cite this headnote

[10] **Indians** Amount, measure, and allowable purposes

Full quantity of water available to Indian allottee may be conveyed to non-Indian purchaser, who acquires a right to water being appropriated by Indian allottee at time title passes and also a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after passage of title; however, non-Indian purchaser may not retain right to that quantity of water which is not maintained by continued use. Indian General Allotment Act, § 7, 25 U.S.C.A. § 381.

20 Cases that cite this headnote

[11] **Indians** State regulation

Indians Preemption

State regulatory authority over tribal reservation may be barred either because it is preempted by federal law, or because it unlawfully infringes on right of reservation Indians to self-government.

2 Cases that cite this headnote

[12] **Indians** Regulation of non-members by tribe or tribal government

A tribe's inherent power to regulate generally the conduct of nonmembers on land no longer owned by, or held in trust for tribe was impliedly withdrawn but tribe retains inherent power to exercise civil authority over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on health and welfare of the tribe.

11 Cases that cite this headnote

[13] **Indians** Water Rights and Management

Indians ⇦ Preemption

State regulation of water in a nonnavigable water system located on Indian reservation was preempted by creation of the Indian reservation; thus, state water permits of non-Indian purchaser of an Indian allotment were of no force and effect.

17 Cases that cite this headnote

Attorneys and Law Firms

***44** Richard B. Price, Nansen, Price & Howe, Omak, Wash., for Walton.

Charles B. Roe, Jr., Olympia, Wash., for State of Wash.

Sanford Sagalkin, Washington, D.C., argued; Robert M. Sweeney, Asst. U.S. Atty., Spokane, Wash., for U.S.A.

William H. Veeder, Washington, D.C., for Colville et al.

Appeal from the United States District Court for the Eastern District of Washington.

Before WRIGHT and SKOPIL, Circuit Judges, and CURTIS, * Senior District Judge.

Opinion

WRIGHT, Circuit Judge:

Rehearing has been granted. The opinion filed on August 20, 1980 is withdrawn and is replaced by this opinion.

The Colville Confederated Tribes initiated this case a decade ago. They sought to enjoin Walton, non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin. The State of Washington intervened, asserting its authority to grant water permits on reservation lands, and the case was consolidated with a separate suit brought by the United States against Walton.

I. BACKGROUND

A.

In 1871 the predecessors of the Colville Confederated Tribes had no treaty with the United States and no reservation. [1] These Indians were contemporaneously described as "good farmers, (who) raise extensive crops, make good improvements, and own stocks of cattle and horses." (1871) Report of the Commissioner of Indian Affairs, 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in charge at Fort Colville reported that violence was likely unless a reservation was established to protect Indian interests. Id. In response to a request from the Commissioner of Indian Affairs, President Grant created the Colville Reservation. Executive Order of July 2, 1872, reprinted in 1 Kapler, Indian Affairs, Laws and Treaties, 915-16. (2d ed. 1904). [2] Twenty years later, the northern half of the reservation was taken ***45** from the Indians and opened for entry and settlement. [3]

In 1906, Congress ratified an agreement with the Colvilles that provided for distribution of reservation lands to the Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and for disposition of the remainder by entry and settlement. Act of Mar. 22, 1906, Pub.L. No. 59-61, ch. 1126, 34 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916. [4] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894. He bought them in 1948 from an Indian, not a member of the Tribe, who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. Walton immediately procured a permit from the state to irrigate 65 acres by diverting up to 1 cubic foot per second "subject to existing rights." He now irrigates 104 acres and uses additional water for domestic and stock water purposes.

The United States holds the remaining allotments in trust for the Colville Indians. Allotments 526 and 892 are north of Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-term lease. Allotment 526 is beneficially owned by the Tribe. [5]

B.

The No Name Creek is a spring-fed creek flowing south into Omak Lake, which has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 802 and flows through Walton's allotments and the Indians' southern allotments.

C.

Salmon and trout were traditional foods for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahonton cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated No Name Creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

II. THE CASE BELOW

The trial court found that 1,000 acre feet per year of water were available in No Name Creek Basin in an average year. It calculated the quantity of the Colvilles' reserved water rights on the basis of irrigable acreage. The court excluded the northern-most allotment, number 526, because the evidence showed that it was formerly irrigated with the surface waters of Omak Creek, and the Tribe had not demonstrated that water to irrigate it was required from the No Name system.

The trial court determined the Indians had a reserved right to 666.4 acre feet per year of water from the No Name Creek Basin. It held that Walton was not entitled to share in the Colvilles' reserved water ***46** rights. The trial court found, however, that the Colvilles were irrigating only a portion of the irrigable acres included in its calculation.

Under the district court's findings, in an average year there are 333.6 acre feet per year of water not subject to the Indians' reserved right. There are an additional 237.6 acre feet per year of water to which the Indians have a reserved right, but which they are not currently using. This water is available for appropriation by non-Indians, subject to the Indians' superior right. The court held that Walton had a right to irrigate the 32 acres under irrigation at the time he acquired his land, with a priority date of the actual appropriation of water for that use.

The court also held that the Indians were potentially entitled to use water to propagate trout, but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that the state could regulate No Name water not reserved for Indian use.

Walton, the Tribe and the State appeal parts of the decision. Colville Confederated Tribes v. Walton, 460 F.Supp. 1320 (E.D.Wash.1978). [6]

III. THE TRIBE'S WATER RIGHTS

The Colvilles argue they have a right to use the waters of the No Name system under the implied-reservation, or Winters doctrine. We first consider the existence and the extent of that right.

A.

[1] **[2]** Congress has the power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for specific federal purposes. United States v. New Mexico, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978). Where water is needed to accomplish those purposes, a reservation of appurtenant water is implied. Id. at 700, 98 S.Ct. at 3014; Cappaert v. United States, 426 U.S. 128, 139, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators. Cappaert, 436 U.S. at 138, 96 S.Ct. at 2069.

[3] An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation. In United States v. Winters, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908), the Court found an implied reservation because the land of the Fort Belknap reservation would have been valueless without water. Similarly, an implied reservation was found where water was "essential to the life of the Indian people." Arizona v. California, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963).

[4] In those cases, if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it was reasonable to conclude that Congress intended to reserve water for them. [7]

The Colvilles were in a similar position when their reservation was created. As in *47 Winters, the Indians relinquished extensive land and water holdings when the reservation was created. Some gave up valuable tracts with extensive improvements. Note 2, supra.

Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. Arizona v. California, 373 U.S. at 600, 83 S.Ct. at 1497. We hold that water was reserved when the Colville Reservation was created.

B.

[5] The more difficult question concerns the amount of water reserved. In determining the extent of an implied reservation of water for a national forest, the Supreme Court held:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. at 702, 98 S.Ct. at 3015.

[6] We apply the New Mexico test here. The specific purposes of an Indian reservation, however, were often unarticulated. [8] The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. [9] We are mindful that the reservation was created for the Indians, not for the benefit of the government.

To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances. [10] See United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905).

These factors demonstrate that one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society. In a similar setting, the Supreme Court agreed with a Master's finding that water was reserved to meet future as well as present needs, and concluded "that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage." *48 Arizona v. California, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation. The Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. See Washington v. Washington State Commercial Passenger Fishing Vessel

Association, 443 U.S. 658, 665, 99 S.Ct. 3055, 3064, 61 L.Ed.2d 823 (1978); United States v. Winans, supra; (1871) Report of the Commissioner of Indian Affairs 277.

The Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout.

We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.

We note that the nature of a right to water for a replacement fishery is such that it cannot coexist with continuing rights to water for a fishery in the watershed where the fishery historically existed. Walton does not argue that the tribe has such rights. We affirm the district court's holding that the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery.

C.

[7] The district court held that water for spawning could not be awarded at this time because the federal government provides the necessary fingerlings. We reverse this holding.

The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout. When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.

We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. Until their extent is determined, state-created water rights cannot be relied on by property owners. See Laird, The Winters Cloud Over the Rockies: Water Rights and the Development of Western Energy Resources, 7 Am. Indian L.Rev. 15 (1979); Public Land Law Review Commission, One Third of the Nations Lands, 144 (1970).

Resolution of the problem is found in quantifying reserved water rights, not in limiting their use. The Special Master in Arizona v. California determined that the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water:

> This (method of quantifying water rights) does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report from Simon H. Rifkind, Special master, to the Supreme Court 265-66 (December 5, 1960) (emphasis added).

The Department of the Interior has taken the position that a change of use is permissible. See Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, February 1, 1964 (use of reserved water for recreation and housing development).

*49 Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life.

D.

We agree with the district court that water for Allotment 526 need not be included in its calculations, since such water is potentially available from Omak Creek. [11] The Indians have not demonstrated that water is unavailable from Omak Creek, or that its use involves significant disadvantages. [12]

> governmental activity (on the Indians' behalf).

IV. THE GENERAL ALLOTMENT ACT OF 1887

We next consider Walton's rights as the fee owner of allotted land, and reverse the district court's judgment that he has no right to reserved water.

A.

The General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. Remaining land was to be made available for homesteading by non-Indians. After holding allotted lands in trust for individual Indians for a 25-year period, the federal government could convey the land to the allottee in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. s 348.

Because the use of reserved water is not limited to fulfilling the original purposes of the reservation, Congress had the power to allot reserved water rights to individual Indians, and to allow for the transfer of such rights to non-Indians. Whether it did so is a question of congressional intent.

The General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society. Its primary sponsor, Senator Dawes, explained that "the quicker (the Indian) is mingled with the whites in every particular the better it will be." Report of the Secretary of the Interior, Proceedings of Mohonk Lake Conference, H.R. Exec. Doc. No. 75, 49th Cong., 2d Sess. 992 (1887).

The Act was designed to encourage Indians to become self-supporting citizens by making them landowners. See generally D. Otis, The Dawes Act and the Allotment of Indian Lands 8-32 (1973). Allotted lands were held in trust for a 25-year period because of

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of

F. Cohen, Handbook of Federal Indian Law 221 (1940); U.S. Department of Interior, Federal Indian Law 788-89 (1958).

The only reference to water rights in the Act is found in section 7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. s 381.

The Act was passed over 20 years before the Supreme Court announced the implied-reservation doctrine in Winters. There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights. To resolve this issue, we must determine what Congress would have intended had it considered it.

*50 B.

[8] It is settled that Indian allottees have a right to use reserved water. United States v. Powers, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939).[13] "(W)hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." Id. at 532, 59 S.Ct. at 346. We must determine whether non-Indian purchasers of

allotted lands also obtain a right to some portion of reserved waters.

(1)

[9] **[10]** The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. See Bryan v. Itasca County, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05, 93 S.Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1972). Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands. [14] But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right.

This conclusion is supported by our decision in United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). Ahtanum held that non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees in the use of reserved water. See ***51** United States v. Adair, 478 F.Supp. 336 (D.Ore.1979); United States v. Hibner, 27 F.2d 909 (D.Idaho 1928).

(2)

In determining the nature of the right acquired by non-Indian purchasers, we consider three aspects of an allottee's right to use reserved waters.

First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i. e., a "ratable share"). This follows from the provision for an equal and just distribution of water needed for irrigation.

A non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns.

Second, the Indian allottee's right has a priority as of the date the reservation was created. This is the principal aspect of the right that renders it more valuable than the rights of competing water users, and therefore applies to the right acquired by a non-Indian purchaser. In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately.

Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use. See United States v. Adair, 478 F.Supp. at 348-49; United States v. Hibner, 27 F.2d at 912.

C.

The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

V. STATE PERMITS

Finally, we consider Walton's claim to water rights based on state water permits. We hold that the state has no power to regulate water in the No Name System, and the permits are of no force and effect.

A.

[11] State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir., April 6, 1981). Although these barriers are independent, they are related by the concept of tribal sovereignty. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." Bracker, 100 S.Ct. at 2583.

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. ***52** Id.; United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978) (citations omitted).

[12] A tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status. Montana v. United States, — U.S. —, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981). Exceptions to this implied withdrawal exist. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. Id. This includes conduct that involves the tribe's water rights. See id. at n.15.

A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. Cf. Montana, — U.S. at —, 101 S.Ct. at 1259 (complaint did not allege peril to subsistence or welfare of tribe from non-Indian hunting and fishing on fee lands).

Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the pre-emption issue.

B.

[13] We hold that state regulation of water in the No Name system was pre-empted by the creation of the Colville Reservation. The geographic facts of this case make resolution of this issue somewhat easier than it otherwise

might be. The No-Name system is non-navigable and is entirely within the boundaries of the reservation. Although some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. Federal Power Commission v. Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955).[15] Thus, ***53** in creating the Colville Reservation, the federal government pre-empted state control of the No Name system.[16]

In United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1934), we held that state water laws are not controlling on an Indian reservation:

> (T)he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands within the limits of the state, 'shall remain under the absolute jurisdiction and control of the Congress of the United States.'

Identical language appears in the Washington Enabling Act, Ch. 180, 25 Stat. 676, 677 (1889).[17]

Second, Washington argues the purchase of allotted lands by a non-Indian "severed any special federal trust status." The lands are still part of the reservation, however. The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. s 381.

We adhere to this holding because we find no indication Congress intended the state to have this power. In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L.Ed.2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. United States v. New Mexico, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978). This deference is not applicable to water use on a federal reservation, at least where such use has no impact off the reservation.

FPC v. Oregon, 349 U.S. at 448, 75 S.Ct. at 840. The usual policy stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." California v. United States, 438 U.S. 645, 653-54, 668-69, 98 S.Ct. 2985, 2989-90, 2997-98, 57 L.Ed.2d 1018 (1978).

Neither rationale is applicable here. Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the No Name System is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.

Public Law 280, Act of August 15, 1953, 67 Stat. 588, did not delegate this regulatory power to the state. Nor do we perceive the McCarran Amendment, 43 U.S.C. s 666, as expanding the state's regulatory powers over water on a federal reservation.

Finally, we note that the state's interest in extending its water law to the reservation is limited in this case. Tribal or federal control of No Name waters will have no impact on state water rights off the reservation.

Thus, we conclude that Walton's state permits are of no force and effect.

I. CONCLUSION

On remand, the district court will calculate the respective rights of the parties. To the extent Walton's use of water exceeds his rights and interferes with the rights of the tribe, it will be enjoined.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED for proceedings in conformance with this opinion. The parties ***54** will bear their own costs on this appeal.[18]

All Citations

647 F.2d 42

Footnotes

* The Honorable Jesse W. Curtis, Senior District Judge for the Central District of California, sitting by designation.

1 The Colville Confederated Tribes included the Methow, Okanogon, Sampoil, Nespelem, Lake, and Colville Tribes. See Confederated Tribes of the Colville Reservation v. United States, 4 Ind.Cl.Comm. 151 (1956); I. Kappler, Indian Affairs and Treaties, 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

2 Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. (1872) Report of the Commissioner of Indian Affairs, 62.

3 Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

4 The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub.L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. See. H.R.Rep. No. 2080, 84th Cong., 2d Sess. 2 (1956).

5 We assume that none of the Colvilles' allotments ever passed from Indian ownership.

6 The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings sua sponte. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on U. S. v. Walton, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

7 The Winters doctrine applies to reservations created by treaty or executive order. Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963).

8 For example, the order creating the Colville reservation read:

> It is hereby ordered that the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, reprinted in 1 Kappler, Indian Affairs and Treaties, 916 (2d ed. 1904). Reservations were commonly created with similar language. See U.S. Dept. of the Interior, Federal Indian Law, 613-22 (1958). The President's orders responded to requests from officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

9 See United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). The rule of liberal construction should apply to reservations created by Executive Order. See Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963). Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. See, e. g., 11 Cong.Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

10 See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (exclusive right to fish implied because necessary for self-sustaining community); United States v. Shoshone Tribe, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); Menominee Tribe of Indians v. United States, 391 U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968) (reservation "for a home" includes hunting and fishing rights); and United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available.")

11 Omak Creek and No Name Creek have no surface connection.

12 The Indians may be deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

13 In Powers, the federal government had constructed an irrigation project on the Crow Reservation capable of irrigating 20,000 acres. Due to a drought and upstream diversions by respondents (non-Indian successors to Indian allottees), 8,000 acres within the project could not be irrigated.

The government sought an injunction against respondents' diversions. The irrigation project had been completed prior to allotment of respondents' lands. The government argued that the project served to "dedicate and reserve" water for irrigation of the 20,000 acres, and that the rights subsequently acquired by Indian allottees were subject to that reservation.

The Court stated the respondents "succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands." 305 U.S. at 531, 59 S.Ct. at 346. It then recited the government's argument and refuted it, relying in part on section 7 of the Allotment Act, by demonstrating that Indian allottees acquired a right to share in reserved water.

The Court held the government had shown no basis for the injunction, but did not consider "the extent or precise nature of respondents' rights in the waters." 305 U.S. at 533, 59 S.Ct. at 346.

If an Indian allottee's right to reserved water does not pass to his or her successor, there would have been a basis for the injunction. Walton therefore argues that Powers holds an allottee's right to reserved water is acquired by his non-Indian successor. The government, however, did not present that issue. The Court rejected the only argument made by the government, i. e., that Indian allottees did not acquire rights to reserved water.

14 The subsequent history of the General Allotment Act demonstrates that this protection was extraordinarily inadequate. By the 1930's approximately 90 million acres out of 140 million acres owned by Indian tribes in 1887 had passed into non-Indian ownership. American Indian Policy Review Commission, Final Report 66-70 (1977). This history, however, has no bearing on congressional intent with regard to water rights in 1887; if anything, it demonstrates Congress intended less protection for Indian rights than the rhetoric of the Act's sponsor would suggest.

15 The FPC had licensed construction of a dam on federal property. The lands that would have been flooded were held by the federal government. They had been reserved either as an Indian reservation or for power generation. The flow of the river would have been undiminished below the dam.

This court held the licensee had to obtain state approval because of the state's control over non-navigable waters on the public domain. 211 F.2d 347 (9th Cir. 1954).

The Supreme Court reversed. It held that congressional acts giving the states control of water on the public domain were inapplicable on a federal reservation.

> It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated for some other purpose (I)t is enough for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States.

349 U.S. at 448, 75 S.Ct. at 840 (citations omitted).

16 We need not consider what effect the opening of reservation lands for entry and settlement had on the control of water on or appurtenant to such lands. All of the lands here involved were allotted.

17 The state argues that McIntire is distinguishable for two reasons. First, it argues the court had already held the waters were reserved. It is clear, however, that the court did not rely on this in holding state water law inapplicable on the reservation.

18 We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

End of Document

2022-51

EMERGENCY RESOLUTION

WHEREAS, it is the recommendation of the Fisheries Committee to adopt the attached Policy Statement regarding the Tribes participation in the Pacific Fisheries Management Council Processes. The Chairman or designee is authorized to sign the statement.

THEREFORE, BE IT RESOLVED, that we, the Colville Business Council, **by authority of Resolution 1991-431 (10 affirmative signatures on this recommendation sheet, an emergency)** this **2nd day of February, 2022**, acting for and in behalf of the Colville Confederated Tribes, Nespelem, Washington, do hereby approve the above recommendation of the Fisheries Committee.

The foregoing was duly enacted by the Colville Business Council by a vote of **10 FOR 0 AGAINST 0 ABSTAINED**, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs in April 19, 1938.

ATTEST:

Andrew C. Joseph Jr., Chairperson
Colville Business Council

cc: Jarred-Michael Erickson, FISH Committee Chair
Peggy Circle, FISH Committee Secretary
Francis Somday, Executive Director
William Nicholson II, Chief Financial Officer
Dept. or Program: CBC

Attachment: 9

The Confederated Tribes of the Colville Reservation
Colville Business Council
P.O. Box 150, Nespelem, WA 99155
(509) 634-2200
FAX: (509) 634-4116

February 1, 2022

Whereas, it is the policy of the Confederated Tribes of the Colville Reservation to protect its rights and interests in all appropriate forums. The Pacific Fisheries Management Council (PFMC) is one such forum because PFMC fisheries intercept hatchery and natural-origin Chinook salmon generated on the Colville Reservation and the Colville Tribes harvest Chinook salmon managed by the PFMC.

Whereas, the PFMC was created by the Magnuson-Stevens Act, 16 U.S.C. 38 §1801 et. seq. The Act requires that the Secretary appoint to the PFMC one representative of "an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho." Nothing in this provision makes a distinction between the type of tribe (Treaty or Executive Order).

Whereas, the PFMC Operating Procedures mirrors this language and states that it will include one voting member representing "an Indian Tribe with federally-recognized fishing rights from California, Oregon, Washington, or Idaho." Nothing in these provisions makes a distinction between the type of tribe (Treaty or Executive Order).

Whereas, the federal courts have established that for purposes of determining whether a fishing right is "federally recognized" under the Magnuson-Stevens Act, there is not a legal difference between those protected by Treaty and those protected by Executive Order or Statute.

Whereas, the Confederated Tribes of the Colville Reservation has federally recognized fishing rights in Washington. The federal courts have upheld and affirmed these rights for both on and off reservation fisheries that are included in the PFMC scope.

Whereas, the language of the Magnuson-Stevens Act and the PFMC Operating Procedures clearly permit the Confederated Tribes of the Colville Reservation to participate as a member of the PFMC, or on the Committees and Subcommittees as they have federally recognized fishing rights in the state of Washington.

Therefore, the Confederated Tribes of the Colville Reservation are entitled to meaningfully participate in the PFMC process and are eligible to nominate and have selected individuals to any of the appropriate Committees and Subcommittees.

Andrew C. Joseph Jr
Andy Joseph, Jr
Chairman
Confederated Tribes of the Colville Reservation

2 2 22
Date

2020-538

RESOLUTION

WHEREAS, it is the recommendation of the Fisheries Committee that the Confederated Tribes of the Colville Reservation actively support fish passage and reintroduction of salmon in to the blocked area behind Chief Joseph and Grand Coulee Dams.

THEREFORE, BE IT RESOLVED, that we, the Colville Business Council, meeting in a **SPECIAL SESSION** this **23rd day of September, 2020** acting for and in behalf of the Colville Confederated Tribes, Nespelem Washington, do hereby approve the above recommendation of the Fisheries Committee.

The foregoing was duly enacted by the Colville Business Council by a vote of **12 FOR 0 AGAINST 0 ABSTAINED,** under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:

Rodney Cawston, Chairman
Colville Business Council

cc: Jarred Erickson, Committee Chair
Peggy Circle, Committee Secretary
Francis Somday, Executive Director
William Nicholson II, Chief Financial Officer
Dept. or Program: Colville Business Council

Attachment: 10

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by U.S. v. Washington, 9th Cir.(Wash.), December 13, 2000

70 F.3d 539
United States Court of Appeals,
Ninth Circuit.

Pietro PARRAVANO; Wayne Heikkila; Marguerite Dodgin; Earl Carpenter; David Bitts; Liz Henry; Norman L. De Vall; Pacific Coast Federation of Fishermen's Associations, Inc.; Humboldt Fishermens' Marketing Association; Caito Fisheries, Inc.; Golden Gate Fisherman's Association; Salmon Trollers Marketing Association, Plaintiffs–Appellants,
v.
Bruce BABBITT, Secretary of the United States Department of Interior; Ron Brown, Secretary, United States Department of Commerce, Defendants–Appellees,
and
Sue MASTEN, Intervenor–Appellee.

No. 94–16727.
|
Argued and Submitted Oct. 17, 1995.
|
Decided Nov. 16, 1995.

Synopsis

Commercial fishermen and commercial fishing associations brought action against Secretaries of Interior and Commerce alleging improper reduction of Klamath chinook ocean harvest rate for one fishing season. In separate orders, the United States District Court for the Northern District of California, Thelton E. Henderson, Chief Judge, 837 F.Supp. 1034, and 861 F.Supp. 914, granted partial summary judgment in favor of Secretaries and dismissed remaining claims. Fishermen appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) federally reserved fishing rights vested in Hoopa Valley and Yurok Tribes by executive orders and by 1988 Hoopa-Yurok Settlement Act constituted "other applicable law" within meaning of Magnuson Fishery Conservation and Management Act; (2) protection of upstream tribal fishing rights depended on coordinating regulation of ocean and river fishing; and (3) issuance of emergency regulations reducing ocean harvest limits of Klamath chinook were not arbitrary, capricious, or an abuse of discretion.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (16)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo.

2 Cases that cite this headnote

[2] **Federal Courts** Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews district court's interpretations of statutes and regulations de novo.

4 Cases that cite this headnote

[3] **Fish** Preservation and propagation

With respect to action taken by Secretary of Commerce under Magnuson Act, Court of Appeals has limited judicial review and may only invalidate the challenged action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A); Magnuson Fishery Conservation and Management Act, § 305(b), as amended, 16 U.S.C.A. § 1855(b).

8 Cases that cite this headnote

[4] **Indians** Authority in general
Indians Appeal or other review

Court of Appeals must assume that Department of Interior has been given reasonable power to discharge effectively its broad responsibilities in area of Indian affairs and, thus, although it reviews questions of statutory interpretation de novo, in reviewing secretary's actions, Court of Appeals gives substantial deference to

Attachment: 11

Secretary's interpretation of applicable statutes and executive actions that give rise to tribal rights.

4 Cases that cite this headnote

[5] **Federal Courts** Standing

Federal Courts Environment and health

Statutory interpretation and standing issues raised under claim of River Basin Fishery Resources Restoration Act and Trinity Basin Act are reviewed de novo. Klamath River Basin Fishery Resources Restoration Act, § 1, 16 U.S.C.A. § 460ss; Act, October 24, 1984, § 1 et seq., 98 Stat. 2721.

2 Cases that cite this headnote

[6] **Indians** Purpose and construction

Indians Construction and operation

Indians Reservations or Grants to Indian Nations or Tribes

Rule of construction applicable to executive orders creating Indian reservations is same as that governing interpretation of Indian treaties; executive orders, no less than treaties, must be interpreted as the Indians would have understood them and any doubtful expressions in them should be resolved in Indians' favor.

2 Cases that cite this headnote

[7] **Indians** Lands included and boundaries; appropriation and diminishment

Indians Disestablishment and termination

In interpreting statutes that terminate or alter Indian reservations, Court of Appeals construes ambiguities in favor of Indians, and rights arising from these statutes must be interpreted liberally, in favor of Indians.

4 Cases that cite this headnote

[8] **Indians** Fishing Rights

Indian fishing rights that exist under federal law may constitute "other applicable law" for purpose of section of Magnuson Act permitting Secretary of Commerce to issue emergency regulations to achieve consistency with national standards set forth in Act and "any other applicable law." Magnuson Fishery Conservation and Management Act, §§ 303(a)(1)(C), 304(a)(1)(B), as amended, 16 U.S.C.A. §§ 1853(a)(1)(C), 1854(a)(1)(B).

9 Cases that cite this headnote

[9] **Indians** Status of Indian Nations or Tribes

When it comes to protecting tribal rights against nonfederal interests, it makes no difference whether those rights derived from treaty, statute or executive order, unless Congress has provided otherwise.

4 Cases that cite this headnote

[10] **Indians** Authority over and regulation of tribes in general

Indians Purpose and construction

Difference in form between treaties and seemingly more mundane instruments of law, such as statutes, executive orders, and federal regulations, should not substantially alter judicial methodology in federal Indian law decisions where such nontreaty enactments embody agreements with tribes that would have been handled by treaty prior to 1871, when Congress suspended process of treaty negotiations and delegated power to President to create specified numbers of Indian reservations. 25 U.S.C.A. § 71.

1 Cases that cite this headnote

[11] **Indians** Indians and tribes holding rights

As authorized by Congress, 1876 and 1891 executive orders creating and extending Hoopa Valley Reservation for "Indian purposes" along main course of Klamath River necessarily included Hoopa Valley and Yurok Tribes' traditional salmon fishing as one of those purposes.

3 Cases that cite this headnote

[12] **Indians** Hunting, Fishing, and Similar Rights

Indians Fishing Rights

In general, hunting and fishing rights arise by implication when reservation is set aside for Indian purposes.

1 Cases that cite this headnote

[13] **Indians** Abrogation, modification, or relinquishment in general

Hoopa-Yurok Settlement Act of 1988, partitioning extended Hoopa Valley Reservation into Yurok Reservation and Hoopa Valley Reservation, did not divest Hoopa Valley and Yurok Tribes of their federally reserved fishing rights, even though Act did not explicitly set aside fishing rights. Hoopa-Yurok Settlement Act, § 1, 25 U.S.C.A. § 1300i.

6 Cases that cite this headnote

[14] **Indians** Reservations or Grants to Indian Nations or Tribes

Indians Lands included and boundaries; appropriation and diminishment

Barring explicit congressional instructions to contrary, Court of Appeals must construe any ambiguities in 1876 and 1891 executive orders creating and extending Hoopa Valley Reservation and 1988 Hoopa-Yurok Settlement Act, partitioning extended reservation, in favor of Hoopa Valley and Yurok Tribes. Hoopa-Yurok Settlement Act, §§ 1–14, 25 U.S.C.A. §§ 1300i to 1300i–11.

4 Cases that cite this headnote

[15] **Indians** Trust relationship; fiduciary duty of United States

Indians Duties and liabilities

Indians Fishing Rights

Trust responsibility over Indian tribe's rights, including fishing rights, extends not just to Interior Department but attaches to federal government as a whole, and, in particular, includes trust obligation to protect Yurok and Hoopa Valley Tribes' rights to harvest Klamath chinook salmon.

3 Cases that cite this headnote

[16] **Indians** Allocation or apportionment of fish

Secretary of Commerce did not act arbitrarily or capriciously when he reformulated fishing recommendations of Pacific Fishery Management Council by issuing emergency regulations reducing ocean harvest limits of Klamath chinook, pursuant to Magnuson Act provision for such regulations in order to conserve salmon runs and protect against violations of "other applicable law," which included federally reserved fishing rights of Hoopa Valley and Yurok Tribes under 1988 Hoopa-Yurok Settlement Act; Secretary was trustee of tribal interests as well as administrator of Magnuson Act and protection of upstream tribal fishing rights depended on coordinating regulation of ocean and river fishing. Magnuson Fishery Conservation and Management Act, §§ 2 et seq., 304, 305(b), as amended, 16 U.S.C.A. §§ 1801 et seq., 1854, 1855(b); Hoopa-Yurok Settlement Act, §§ 1–14, 25 U.S.C.A. §§ 1300i to 1300i–11.

14 Cases that cite this headnote

Attorneys and Law Firms

***541** James M. Johnson, Olympia, Washington, for plaintiffs-appellants.

Jacques B. Gelin, United States Department of Justice, Washington, DC, for defendants-appellees.

George Forman, Alexander & Karshmer, Berkeley, California, for intervenor-appellee.

Thomas F. Gede, Special Assistant Attorney General, Sacramento, California, for amicus States of California, Idaho, Nevada, North Dakota, Oklahoma, South Dakota and Vermont.

Thomas P. Schlosser, Morisset, Schlosser, Ayer & Jozwiak, Seattle, Washington, for amicus Hoopa Valley Tribe.

Appeal from the United States District Court for the Northern District of California.

Before: SKOPIL, PREGERSON, and FERNANDEZ, Circuit Judges.

Opinion

PREGERSON, Circuit Judge:

Pietro Parravano, other commercial fishermen, and commercial fishing associations (collectively "Parravano") appeal the district court's order granting partial summary judgment in favor of defendants Interior Secretary Babbitt and Commerce Secretary Brown and dismissing the remainder of Parravano's claims.

In United States District Court, Parravano alleged that Secretary Brown violated the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.*, when he issued an emergency regulation that reduced the ocean harvest rate of Klamath River chinook for the fall 1993 season. The district court determined that executive orders issued in 1876 and 1891 and the 1988 Hoopa–Yurok Settlement Act, 25 U.S.C. § 1300i *et seq.*, vested the Hoopa Valley and Yurok Tribes (the "Tribes") with federally reserved fishing rights. The district court found that these fishing rights constituted "any other applicable law," 16 U.S.C. § 1854(a)(1)(B), which the Secretary of Commerce could take into consideration when reviewing fishery management policies under the Magnuson Act. For this reason, the district court concluded that Secretary Brown did not violate the Magnuson Act when he issued emergency regulations for the fall 1993 ocean harvest.

Parravano also charged that Secretary Babbitt failed to comply with the Klamath River Basin Fishery Resources Restoration Act ("Klamath Act"), 16 U.S.C. § 460ss, and the Trinity Basin Act ("Trinity Act"), Pub.L. No. 98–541, by failing to enforce limitations on Indian fishing in the Klamath River. The district court dismissed the claims against Secretary Babbitt, concluding that there was no basis for judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and that Parravano did not have standing because there was neither an explicit nor an implicit private right of action under the Klamath and Trinity Acts. [1] Parravano now appeals.

We have jurisdiction under 28 U.S.C. § 1291. We affirm for the same reasons stated by the district court in its orders published at 837 F.Supp. 1034 (N.D.Cal.1993) ***542** and 861 F.Supp. 914 (N.D.Cal.1994). Accordingly, we adopt those portions of the district court orders relating to the issues raised by Parravano on appeal. We write only to emphasize that Indian fishing rights, whether they arise from treaty, statute, or executive order, are to be treated the same under the Magnuson Act.

BACKGROUND

We incorporate by reference the factual background to this case as set forth by the district court at 837 F.Supp. at 1038–39 and 861 F.Supp. at 917. We discuss only those facts relevant to the issues raised on appeal.

I

The Klamath River fall chinook salmon is an anadromous fish that takes its name from the Klamath River where it spawns. By their very nature, anadromous fish live transient lives. They hatch in the upper tributaries of rivers such as the Klamath and migrate down to the Pacific Ocean where they spend much of their adulthood. At the age of three or four years, they instinctively return to the tributaries of their natal river where they spawn and then die. For generations, the Hoopa Valley and Yurok Indian tribes have depended on the Klamath chinook salmon for their nourishment and economic livelihood. *See Arnett v. 5 Gill Nets*, 48 Cal.App.3d 454, 121 Cal.Rptr. 906, 907–909 (1975); *cert. denied*, 425 U.S. 907, 96 S.Ct. 1500, 47 L.Ed.2d 757 (1976); Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 8 (Oct. 4, 1993) ("Interior Solicitor's Opinion"). In the past, we have observed that the Tribes' salmon fishery was "not much less necessary to [their

existence] than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir.1981) (internal quotations omitted).

In 1876, President Grant issued an executive order formally establishing a reservation for the Tribes "to be set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by Act of Congress approved April 8, 1864." I.C. Kappler, *Indian Affairs: Laws and Treaties* 815 (1904). In the years following the 1876 executive order, non-Indians encroached upon the Indian fisheries along the Klamath River, challenging the Indians' fishing rights. Interior Solicitor's Opinion, at 6. To resolve this problem, in 1891 President Harrison issued another executive order under the authority of the 1864 Act. *See* *Donnelly v. United States*, 228 U.S. 243, 258–59, 33 S.Ct. 449, 453–54, 57 L.Ed. 820 (1913), *modified on other grounds*, 228 U.S. 708, 33 S.Ct. 1024, 57 L.Ed. 1035 (1913). The 1891 order extended the Hoopa Valley Reservation to include the old Klamath Reservation and the strip of land connecting the two reservations. *See* *Mattz v. Arnett*, 412 U.S. 481, 493–94, 93 S.Ct. 2245, 2252–53, 37 L.Ed.2d 92 & app. (1973). Together, the 1876 and 1891 executive orders created the extended Hoopa Valley Reservation, which ran along both sides of the Klamath River, from the mouth of the Trinity River down to the Pacific Ocean. *See id.*

In 1988, Congress enacted the Hoopa–Yurok Settlement Act to divide the extended Hoopa Valley Reservation into the Yurok Reservation and Hoopa Valley Reservation. 25 U.S.C. § 1300i. One of the concerns of Congress at the time of the 1988 partitioning was to protect the Tribes' fisheries. *See* Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, to Clarify the Use of Tribal Timber Proceeds, and For Other Purposes, S.Rep. No. 564, at 14–15; H.R.Rep. No. 938, Pt. 1, at 20.

II

Congress enacted the Magnuson Act, 16 U.S.C. § 1801, to conserve ocean fishing resources and to protect these resources from foreign fishing. The Magnuson Act delegated to the Secretary of Commerce the authority to set harvest levels in ocean fisheries located between three and two hundred nautical miles offshore, 16 U.S.C. § 1851. The Magnuson Act also established regional Fishery Management Councils, which are charged with recommending to the Secretary of Commerce ocean harvest limits and salmon ***543** "escapement" levels.[2] 16 U.S.C. § 1852. The Secretary of Commerce reviews the regional councils' recommendations for consistency with the national standards set forth in the Magnuson Act and "any other applicable law." 16 U.S.C. § 1854(a)(1)(B).[3] The Magnuson Act, however, does not require the Secretary to follow a regional council's recommendations; he may reject them and, when necessary, promulgate ninety-day emergency regulations in their stead. 16 U.S.C. §§ 1854, 1855(b).

The regional council charged with formulating recommendations for the Klamath River chinook harvest is the Pacific Fishery Management Council ("Pacific Council"). Through the fall of 1993, Pacific Council had consistently failed to set harvest regulations sufficient to meet conservation requirements, forcing the Interior Department to severely curtail Indian salmon harvesting in the Klamath River. According to the Interior Department, this failure was adversely affecting the Tribes' reservation fisheries. *See* Letter from Eddie F. Brown, Assistant Secretary for Indian Affairs, Department of the Interior, to Barbara Hackman Franklin, Secretary of Commerce, 1–3 (May 19, 1992) ("Brown Letter"). Seeking a more equitable distribution of the Klamath chinook resource, Secretary Babbitt met with Secretary Brown to coordinate regulation of the fall 1993 harvest. Secretary Babbitt informed Secretary Brown that the Interior Department believed that the Tribes were entitled to a fifty-percent share of the total Klamath chinook harvest and that ocean harvesting of this salmon would have to be curtailed so that a sufficient number of the fish could reach the Klamath River for tribal harvests as well as for spawning. *See* Interior Solicitor's Opinion, at 27.

On April 14, 1993, Pacific Council recommended harvest levels for the fall season. Although Secretary Brown had announced his desire to issue regulations consistent with providing the Tribes with a fifty-percent allocation of the salmon, Pacific Council authorized a 22% ocean harvest rate, with a spawning escapement floor of 35,000 fish. These ocean harvest levels exceeded the levels necessary to reserve fifty percent of the harvest for the Tribes' Klamath River fisheries. Faced with the possibility that Pacific Council's recommended ocean harvest levels would either fail to meet Magnuson Act goals or would compromise the resource rights of the Tribes, Secretary Brown suspended Pacific Council's regulations. Because of the imminent commencement of the

fall 1993 season, he issued ninety-day emergency regulations that set a lower ocean harvest rate of 14.5% and a higher salmon escapement floor of 38,000 fish for the fall 1993 season.

STANDARDS OF REVIEW

[1] **[2]** **[3]** We review the district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3271 (Sept. 20, 1995). We review interpretations of statutes and regulations de novo. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir.1995) (statute); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 918 (9th Cir.1995), *cert. denied*, 516 U.S. 931, 116 S.Ct. 337, 133 L.Ed.2d 236 (1995) (regulation). With respect to an action taken by the Secretary of Commerce under the Magnuson Act, we have limited judicial review, 16 U.S.C. § 1855(b), and may only invalidate the challenged action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Pacific Coast Federation of Fishermen's Ass'ns v. Secretary of Commerce*, ***544** 494 F.Supp. 626, 627–28 (N.D.Cal.1980).

[4] As for Indian affairs, we must assume that the Department of the Interior has been given reasonable power to discharge effectively its broad responsibilities in this area. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir.1986); *Udall v. Littell*, 366 F.2d 668, 672 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1007, 87 S.Ct. 713, 17 L.Ed.2d 545 (1967) Thus, although we review questions of statutory interpretation de novo, in reviewing the Secretary's actions, we give substantial deference to his interpretation of the applicable statutes and executive actions that give rise to tribal rights. *See* *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

[5] Statutory interpretation and standing issues raised under the Klamath and Trinity Acts are reviewed de novo. *See ACF Indus., Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1289 (9th Cir.1994).

CONSTRUCTION OF STATUTES AND EXECUTIVE ORDERS ESTABLISHING, MODIFYING OR EXTINGUISHING INDIAN RESERVATIONS

[6] **[7]** The rule of construction applicable to executive orders creating Indian reservations is the same as that governing the interpretation of Indian treaties. Executive orders, no less than treaties, must be interpreted as the Indians would have understood them "and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970); *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir.1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1945, 123 L.Ed.2d 651 (1993). In interpreting statutes that terminate or alter Indian reservations, we construe ambiguities in favor of the Indians. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. v. Namen*, 665 F.2d 951, 955 (9th Cir.1982), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982). Rights arising from these statutes must be interpreted liberally, in favor of the Indians. *Pacific Coast*, 494 F.Supp. at 633 n. 6 (citing *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912)).

ANALYSIS

[8] Under the Magnuson Act, the Secretary of Commerce may issue emergency regulations to achieve consistency with the national standards set forth in the Act and "any other applicable law." 16 U.S.C. §§ 1853(a)(1)(C), 1854(a)(1)(B). Indian fishing rights that exist under federal law may constitute "any other applicable law." *Washington State Charterboat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir.1983), *cert. denied*, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed.2d 194 (1984) (Northwest Indian treaty fishing rights constitute "other applicable law" under Magnuson Act). Therefore, the question before this court is whether the Hoopa Valley and Yurok Tribes retain federally reserved fishing rights that constitute "any other applicable law" within the meaning of the Magnuson Act. They do.

I

Parravano contends that the Tribes hold no fishing rights that constitute "other applicable law" within the meaning of the Magnuson Act because their reservations were created not by treaty but by executive orders authorized by Congress. The problem with Parravano's position is threefold. First, a treaty/executive order distinction has no historical or legal significance with respect to the Tribes involved here. Second, a treaty/executive order distinction contradicts the doctrine that the grant of hunting and fishing rights is implicit in the setting aside of a reservation "for Indian purposes." Third, a treaty/executive order distinction is inconsistent with the well-established federal trust obligation owed to the Indian tribes.

Parravano argues that affording equal dignity to tribal fishing rights emanating from executive orders unfairly grants rights to executive order reservation tribes. He asserts that such a holding would debase the ***545** rights of treaty tribes. Parravano reasons that enforcing the Tribes' fishing rights would grant promises made to Indian tribes through executive order the same solemnity as promises made to tribes by treaty. These arguments are unpersuasive and contrary to federal law and policy.

[9] We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise. *See, e.g., United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 685–86 (9th Cir.1976); *Gibson v. Anderson*, 131 F. 39, 41–42 (9th Cir.1904); *McFadden v. Mountain View Mining & Milling Co.*, 97 F. 670, 673 (9th Cir.1899), *rev'd on other grounds* 180 U.S. 533, 21 S.Ct. 488, 45 L.Ed. 656 (1901).

With respect to the Hoopa Valley and Yurok Tribes, the California courts concluded nearly two decades ago that, as against non-federal interests, tribal rights derived from executive order are treated the same as treaty rights. In *Arnett v. 5 Gill Nets,* the California Court of Appeal acknowledged that the executive orders establishing the extended Hoopa Valley Reservation created recognizable fishing rights. *See Arnett,* 121 Cal.Rptr. at 907–909. In fact, the *Arnett* court sharply rejected a treaty/executive order distinction, aptly noting that the Hoopa Valley Reservation was created by executive order authorized by federal statute. *See id.* at 460, 121 Cal.Rptr. at 909–10.

In 1976, when the State of California petitioned the United States Supreme Court for certiorari in *Arnett,* the federal government opposed the petition, arguing that the fishing rights of these Tribes were tantamount to treaty rights. As Solicitor General Robert Bork explained to the Court:

> That executive orders played a prominent role in the creation of the [Hoopa Valley] Reservation does not change this result [that the United States reserved to the Indians the right to fish on the Reservation without state interference]. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe....
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Memorandum for the United States as Amicus Curiae, at 5 (writing in opposition to California's petition for a grant of certiorari in *Arnett*).

Solicitor General Bork's conclusion was well-founded. Although the Executive Branch engaged in treaty-making with the Indian tribes before 1871, in that year Congress decided that it would no longer negotiate treaties with the tribes. Congress thus suspended the entire process of treaty negotiation with the Indian tribes and delegated power to the President to create specified numbers of Indian reservations. 25 U.S.C. § 71. "Reservations established after 1871 were accordingly created either by statute or, until Congress ended the practice in 1919, by executive order." William C. Canby, *American Indian Law* 17–18 (2d ed.1988).

[10] Because of this historical background, we emphasize that there are no broad distinctions between Indian reservations created before 1871 and those created after. Although their manner of creation is different, they are substantively the same, at least with respect to non-federal interests. We agree with the observation that:

> [M]any federal Indian law decisions, especially those dealing with developments since the mid-nineteenth century, turn not on treaty language, but on the text of

> seemingly more mundane instruments of law, such as statutes, executive orders, and federal regulations.... This difference in form should not, however, substantially alter judicial methodology. Some of these non-treaty enactments embody agreements with tribes that would have been handled by treaty in former eras.

Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 Harv.L.Rev. 381, 421 & n. 164 (1993).

[11] **[12]** With Congress's authorization, the 1876 and 1891 executive orders first created ***546** and then extended a reservation "for Indian purposes" along the main course of the Klamath River. *Donnelly*, 228 U.S. at 253, 33 S.Ct. at 451. We have never encountered difficulty in inferring that the Tribes' traditional salmon fishing was necessarily included as one of those "purposes." *See* *United States v. Wilson*, 611 F.Supp. 813, 817–18 (N.D.Cal.1985), *rev'd on other grounds sub. nom.*, *United States v. Eberhardt*, 789 F.2d. 1354 (9th Cir.1986). Our interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes. *See* *Menominee Tribe v. United States*, 391 U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968); *Pacific Coast*, 494 F.Supp. at 632. Thus, we reject Parravano's novel theory that ambiguity in the phrase "for Indian purposes" should be resolved against the Tribes.

[13] **[14]** In partitioning the original reservation in 1988, Congress recognized the importance of the Tribes' rights to fish along the Klamath River. Although the 1988 Hoopa–Yurok Settlement Act did not explicitly set aside fishing rights, it did make clear that the partitioning would not dispossess the Tribes of their assets. The legislative history of the 1988 Act indicates that Congress was aware that each Tribes' interests in their salmon fisheries was one of its principal assets. For example, Congress explained that:

> The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its interest in the fishery, enabling the Tribe to organize and assume governing authority in the Extension.

S.R. 564, 100th Cong., 2d Sess., 2–9 (1988); H.R. 938, Pt. 1, 100th Cong., 2d Sess., 8–15. Given this legislative history, we cannot accept Parravano's invitation to interpret the 1988 Hoopa–Yurok Settlement Act as a divestiture of the Tribes' federally reserved fishing rights. Barring explicit Congressional instructions to the contrary, we must construe any ambiguities in the executive orders and in the 1988 Hoopa–Yurok Settlement Act in the Tribes' favor. *See* *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1092; *Confederated Salish and Kootenai Tribes*, 665 F.2d at 955.

[15] We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights. *See, e.g.*, *Joint Bd. of Control v. United States*, 862 F.2d 195, 198 (9th Cir.1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole. *Eberhardt*, 789 F.2d at 1363 (Beezer, J., concurring); *see also* *Pyramid Lake Paiute Tribe v. United States Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir.1990); *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir.1990). In particular, this court and the Interior Department have recognized a trust obligation to protect the Yurok and Hoopa Valley Tribes' rights to harvest Klamath chinook. *See* *Eberhardt*, 789 F.2d at 1359–62; Interior Solicitor's Opinion, at 29.

[16] Secretary Brown fulfilled his federal trust obligations by issuing emergency regulations for the fall 1993 ocean harvest of Klamath chinook. The Secretary acted in response to ocean overharvesting of Klamath chinook which threatened the Tribes' ability to harvest their share of the salmon. *Parravano*, 861 F.Supp. at 914. Upon these facts, we agree with the district court that Secretary Brown did not act arbitrarily or capriciously when he chose to reformulate Pacific Council's fishing recommendations to guarantee that the Tribes would receive their fair share of the salmon harvest.

II

Parravano argues that even if the Tribes have fishing rights, these rights cannot extend outside of the reservation because they do not derive from a treaty. According to this reasoning, because the Tribes' fishing rights arise out of executive orders, the Secretary of Commerce cannot regulate ocean fishing in order to protect Indian salmon harvests. We rejected a similar argument in *Washington Charterboat.* There, we found that there is "nothing in the language of the Magnuson Act or in its legislative history that even remotely suggests that Congress intended to abrogate or modify" Indian treaties which included salmon fishing rights. *Washington Charterboat,* 702 F.2d at 823. ***547** Because we reject a broad treaty/executive order distinction, especially with regard to the Hoopa Valley and Yurok Tribes' fishing rights, *Washington Charterboat* applies here.

The Klamath chinook is an anadromous species. As a result, successful preservation of the Tribes' on-reservation fishing rights must include regulation of ocean fishing of the same resource. Indeed, allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights. We must conclude, as we did in *Washington Charterboat,* that the Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.

Our conclusion is not a new one. Nearly a decade has elapsed since Judge Beezer of this court first observed uncoordinated regulation of Pacific Ocean fishing and the Tribe's fisheries. *See United States v. Eberhardt,* 789 F.2d 1354, 1363 (9th Cir.1986) (Beezer, Circuit Judge, concurring). He noted then, as we note now, that overharvesting of the Klamath chinook in the Pacific Ocean results in dwindling numbers of salmon able to survive for spawning. *Id.;* Brown Letter at 1–3. Low spawning levels, in turn, reduce further the number of Klamath chinook available for future harvests, thus creating long-term conservation concerns. *See Eberhardt,* 789 F.2d at 1363 (Beezer, Circuit Judge, concurring).

Specific harm to the Indians' fisheries is clear. The low numbers of salmon escaping Pacific trolling has forced the Department of the Interior to preserve a sufficient number of salmon for spawning by dramatically reducing the number of salmon that the Tribes are allowed to harvest. The government has continued to allow ocean fishermen to overharvest the Klamath chinook. This ocean overharvesting has reduced the number of salmon remaining for upstream reproduction and, as a result, has only increased the conservation burden placed on the Tribes. *Id.; see also* Brown Letter, at 1–3.

Given Pacific Council's past reluctance to set ocean harvest levels that would guarantee adequate upstream spawning for conservation of the Klamath chinook, as well as the imminent harm that would befall the Tribes if ocean overharvesting were allowed to continue, Secretary Brown had ample justification for an emergency departure from Pacific Council's recommendations. Indeed, the Magnuson Act requires the Secretary to scrutinize carefully the suggested harvest levels promulgated by the regional councils. When the councils' recommendations threaten conservation goals or undermine other federal laws and obligations, the Secretary must reject them. If the councils refuse to comply with national standards or "any other applicable law," the Secretary may need to issue emergency regulations. Here, Secretary Brown issued emergency regulations to conserve salmon runs and to ensure consistency with "any other applicable law," which includes the Tribes' federally reserved fishing rights. *Parravano,* 837 F.Supp. at 1042–44; 861 F.Supp. at 914. The district court therefore correctly held that Secretary Brown's actions were not arbitrary, capricious, or an abuse of discretion.

CONCLUSION

We affirm the district court's orders. In so doing, we emphasize that Indian rights arising from executive orders are entitled to the same protection against non-federal interests as Indian rights arising from treaties. *See Southern Pac. Transp. Co.,* 543 F.2d at 685–86.

Under the Magnuson Act, the Secretary of Commerce may issue regulations affecting coastal fishing to protect against violations of "other applicable law." The 1876 and 1891 executive orders that created the extended Hoopa Valley Reservation and the 1988 Hoopa–Yurok Settlement Act vested the Tribes with federally reserved fishing rights that constitute "other applicable law" within the meaning of the Magnuson Act.

Secretary Brown is a trustee of tribal interests as well as the administrator of the Magnuson Act; he properly considered the Tribes' federally reserved fishing rights in

issuing emergency regulations reducing ocean harvest limits of the Klamath chinook.

***548** Finally, because of the migratory nature of the Klamath chinook, the protection of upstream tribal fishing rights depends on coordinating regulation of ocean and river fishing.

AFFIRMED.

All Citations

70 F.3d 539, 26 Envtl. L. Rep. 20,232, 95 Cal. Daily Op. Serv. 8761, 95 Daily Journal D.A.R. 15,182

Footnotes

1 In district court, Parravano also charged that the actions of Secretaries Brown and Babbitt violated the Civil Rights Act, 42 U.S.C. § 1981, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552b, and the United States Constitution. The district court held that this action did not present any due process or equal protection violations. *See* *Parravano v. Babbitt,* 861 F.Supp. 914, 926–931 (N.D.Cal.1994). Parravano does not appeal these holdings.

2 "Escapement" literally refers to the number of salmon that are allowed to "escape" harvest and to spawn.

3 16 U.S.C. § 1854(a)(1)(B) provides:

> (1) After the Secretary receives a fishery management plan, ... which was prepared by a Council, the Secretary shall—
>
> . . . . .
>
> (B) Immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and *any other applicable law.*

(Emphasis added).