No. 21-

IN THE

Supreme Court of the United States

MILL BAY MEMBERS ASSOCIATION, INC., A WASHINGTON NON-PROFIT CORPORATION, PAUL GRONDAL AND WAPATO HERITAGE, LLC, A WASHINGTON LIMITED LIABILITY COMPANY,

Petitioners,

v.

UNITED STATE OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AND THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the early twentieth century, the United States allotted a parcel of land called Moses Allotment No. 8 ("MA-8") to American Indian Wapato John under the Act of Mar. 8, 1906, ch. 629, 34 Stat. 55–56. In 1914, President Wilson issued Executive Order No. 2109, Dec. 23, 1914, which invoked two statutes as authority to extend MA-8's trust period until 1926: (1) the Act of June 21, 1906, ch. 3504, 34 Stat. 326, *codified as* 25 U.S.C § 391, and (2) the Act of February 8, 1887, ch. 119, § 5, 24 Stat. L. 389, *codified as amended at* 25 U.S.C. § 348 (i.e., Section 5 of the General Allotment Act). Below, the Ninth Circuit held the government's standing to sue for trespass to MA-8 depends on whether MA-8 remains held in trust, but since 25 U.S.C § 391 authorized Executive Order No. 2109, MA-8 remains held in trust. Pet. App. 21a–24a, 30a–40a, 47a. The Ninth Circuit also held the government is categorically immune from equitable estoppel when it sues as trustee for Indian lands. Pet. App. at 57a–63a.

The questions presented are:

1. Whether equitable estoppel ever applies against the federal government, and if so, whether it applies when the government acts as trustee for Indian lands?

2. Whether 25 U.S.C § 391 authorizes the President to extend the trust period of allotments held in trust, and if not, whether Section 5 of the General Allotment Act applies to allotments patented under separate legislation?

PARTIES

Petitioners are the Mill Bay Members Association, Inc., a Washington non-profit corporation ("MBMA"), Paul Grondal, and Wapato Heritage, LLC, a Washington limited liability company ("Wapato Heritage"), and were appellants at the Ninth Circuit. In the district court, MBMA and Mr. Grondal (collectively, "Mill Bay") were plaintiffs and counter-claim defendants. Wapato Heritage was a defendant.

Respondents are the United State of America, United States Department of the Interior, and Bureau of Indian Affairs (collectively, "BIA" or the "Government"), and the Confederated Tribes of the Colville Reservation (the "Tribes"), and were appellees at the Ninth Circuit. In the district court, BIA and the Tribes were defendants, and BIA was a counter-claim plaintiff.

Other Parties. The following individuals were allotment landowners of MA-8 when the district court action was filed in 2009. Gary Reyes was a defendant in the district court and an appellant in the Ninth Circuit, but does not join in this petition. Defendants in the district court that did not participate at the Ninth Circuit are: 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; and Sandra Covington.

CORPORATE DISCLOSURE STATEMENT

MBMA and Wapato Heritage represent that neither has a parent corporation and that no publicly held corporation owns 10 percent or more of either one's stock.

LIST OF DIRECTLY RELATED PROCEEDINGS

Under S. Ct. R. 14.1(b)(iii), the following proceedings are directly related to this case:

Grondal, et al. v. United States of America, et al., No. 2:09CV00018 (E.D. Wash.) (final judgment entered June, 4, 2021).

Wapato Heritage, LLC, et al. v. United States of America, et al., No. 20-35357 (9th Cir.) (opinion and judgment issued December 30, 2021).

Grondal, et al. v. United States of America, et al., No. 20-35694 (9th Cir.) (opinion and judgment issued December 30, 2021; petition for rehearing en banc denied March 9, 2022).

Wapato Heritage, LLC, et al. v. United State of America, et al., No. 21-35417 (9th Cir.) (appeal voluntarily dismissed effective April 6, 2021).

Grondal, et al. v. United States of America, et al., No. 21-35507 (9th Cir.) (appeal currently pending).

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OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 21 F.4th 1140 and reproduced at Pet. App. 1a–63a. The opinions of the district court are reported at 471 F.Supp.3d 1095 and 682 F.Supp.2d 1203 and reproduced at Pet. App. 101a–231a.

JURISDICTION

The Ninth Circuit issued its opinion on December 30, 2021 (Pet. App. 2a), and denied a timely petition for rehearing en banc on March 9, 2022. Pet. App. 232a–233a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

The relevant federal statutes and executive orders involved are: Executive Order No. 2109, Dec. 23, 1914 (Pet. App. 264a) ("**EO 2109**"); the Act of June 21, 1906, ch. 3504, 34 Stat. 325–326, *codified as* 25 U.S.C. § 391 (Pet. App. 234a) (hereinafter, "**25 U.S.C. § 391**"); The Act of February 8, 1887, ch. 119, § 5, 24 Stat. L. 389, *codified as amended at* 25 U.S.C. § 348 (Pet. App. 239a–241a) ("**Section 5 of the General Allotment Act**" or "**GAA**"); Agreement with the Columbia and Colville, 1883 (Pet. App. 235a–237a), the Act of July 4, 1884. 23 Stat. 79 (1884) (Pet. App. 238a), the Act of Mar. 8, 1906, ch. 629, 34 Stat. 55–56 (Pet. App. 242a–243a) ("**Act of March 8, 1906**"), and Executive Order April 18, 1879 (Pet. App. 244a).

INTRODUCTION

In the summer of 2020, more than 170 Washington residents—mostly elderly individuals and families (Mill Bay)—were judicially ejected from a Recreational Vehicle ("RV") Park they had invested millions of dollars to use, occupy, and improve since 1984. Critical for these proceedings is that the RV Park sat on MA-8, a parcel of allotted land purportedly held in trust by BIA for its beneficial owners. *For more than two decades*, BIA represented to these Washington residents, their landlord, and Washington State (under oath) that Mill Bay could use and occupy the RV Park until February 2, 2034, pursuant to a BIA-approved "Master Lease." But in fall 2008, BIA reversed course, and set on a path that would ultimately, tragically, and prematurely remove Mill Bay from the premises.

But BIA does not "own" MA-8. Instead, it claims to hold the land in trust for its beneficial owners. Below, the Ninth Circuit held BIA's Article III standing depends on whether MA-8 remains held in trust, which turns on whether a complex chain of statutes and executive orders extended MA-8's period of trust from 1926 to the present. Pet. App. 18a, 21a–24a, 29a. The Ninth Circuit found each link in the chain was valid; therefore, BIA had standing and was immune from the defense of equitable estoppel. Pet. App. 47a, 57a–63a. That opinion raises two exceptionally important questions on the limits of Executive power, both of which are unresolved by this Court's precedents.

The *first* question concerns an equitable limitation on the Executive's power, and asks whether equitable

estoppel can ever apply against the Government, including when it sues as trustee for Indian land. In the Ninth Circuit, equitable estoppel is generally available against the Government, albeit under a heightened standard. *See, e.g.*, *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989). Yet, the Ninth Circuit has made equitable estoppel categorically unavailable when the Government acts in its sovereign capacity as trustee for Indian lands. Pet. App. 57a–63a. In effect, within the Ninth Circuit, so long as Indian lands are involved, the Government has carte blanche to misrepresent with impunity. This cannot be right.

This Court should grant review and answer the open question whether estoppel *ever* applies against the Government. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60–61 (1984). If this Court agrees with most circuits that estoppel *does* apply, it should then answer whether a suit brought by the Government in its capacity as trustee for Indian lands nonetheless creates a categorical exception to estoppel. Indeed, in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005), this Court held "federal equity practice" must co-exist with principles of Indian law. Building on *Sherrill*, the Second Circuit held the same equitable defenses recognized in *Sherrill* can apply against the Government when it sues as "trustee" for Indian lands. *See, e.g.*, *Oneida Indian Nation of New York v. Cty. of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010). But the Ninth Circuit has de facto (if not de jure) refused to recognize *Sherrill* or its Second Circuit progeny. *See United States v. Washington*, 864 F.3d 1017, 1031 (9th Cir. 2017) (O'Scannlain, J., respecting the denial of rehearing en banc)). And the last case to squarely present

this growing tension ended in a two sentence per curiam opinion affirming the judgment by an equally divided Court. *Washington v. United States*, 138 S. Ct. 1832, 1833 (2018). Thus, this growing split, as well as basic notions of fairness, cry out for some equitable limitation on the Government's conduct. And, as the Ninth Circuit's opinion below and previous decisions reflect, this Court's intervention is needed to provide such a limiting principle.

The *second* question concerns a statutory limitation on the Executive's authority to extend MA-8's period of trust, and asks whether MA-8 in fact fell out of trust status over 100 years ago, such that BIA had no standing to seek ejectment of Mill Bay. In 1907 and 1908, the Government issued two trust patents to American Indian Wapato John for MA-8 under the Act of March 8, 1906, which provided the Government would hold the land in trust until 10 years after the statute's enactment (i.e., until 1916). Yet, in 1914, President Woodrow Wilson issued EO 2109, purporting to extend MA-8's period of trust until 1926. EO 2109 invoked two statutes as authority to do so: 25 U.S.C. § 391 and Section 5 of the General Allotment Act. In analyzing this link in the chain, the Ninth Circuit held 25 U.S.C. § 391 was ambiguous on whether it authorized the President to extend the "trust period" or merely "restrictions on alienation;" yet, the panel nevertheless construed the statute's limited language to confer the broader power, thereby authorizing MA-8's subsequent trust extensions. Pet. App. 30a–40a.

This Court's review is necessary to provide a controlling interpretation of whether 25 U.S.C. § 391 authorized the President to: (i) extend the trust period for MA-8 and similarly situated allotments, *or* (ii) merely

extend restrictions on alienation for such allotments. While the Ninth Circuit did not reach Section 5 of the GAA, it can do so on remand. If this Court reaches Section 5 of the GAA, the plain text of that statute confirms it did not authorize EO 2109 because Section 5—as enacted in 1914—did not apply to allotments issued under separate statutes such as MA-8, which was allotted under the Act of March 8, 1906. Either way, the interpretation of these statutes is dispositive of BIA's Article III standing, and no doubt affects the status of other allotments BIA may have improperly held in trust.

STATEMENT OF THE CASE

A. MA-8's History.

MA-8 is an allotment of land on the north shore of Lake Chelan in eastern Washington (Pet. App. 9a), with a history marred by broken promises and Executive overreach. The most pertinent of that history for this petition begins in 1906, when Congress enacted the Act of March 8, 1906, authorizing the issuance of allotments under the "Moses Agreement." Pet. App. 25a.[1] There, Congress provided the trust period under these patents would expire ten years after March 8, 1906, and the allotment landowners would then be entitled to receive fee patents. Pet. App. 25a–26a. In 1907 and 1908, the Government issued two trust patents for MA-8 to Wapato John, the ancestor of the members of Wapato Heritage. Pet. App. 26a.

1. MA-8's pre-1906 history is discussed more fully in the Ninth Circuit's opinion at Pet. 24a–28a, and the district court's opinion at Pet. App. 129a–137a.

Over the following decades, the Government attempted to extend MA-8's trust period past its original ten-year term through a chain of statutes and executive orders. In 1914, President Woodrow Wilson issued EO 2109, purporting to extend MA-8's trust period for an additional 10 year period until 1926. Pet. App. 26a–27a. For statutory authority, EO 2019 relied Section 5 of the GAA and 25 U.S.C. § 391. Pet. App. 30a, 264a. On February 10, 1926, President Calvin Coolidge issued Executive Order 4832 (Feb. 10, 1926), purportedly extending the trust period another ten years through March 8, 1936, and relying on the same statutes as EO 2109. Pet. App. 27a Subsequent statutes extended all Indian-land trust periods, finally decreeing that all Indian land then in trust would remain that way forever. Pet. App. 27a–28a.

Throughout most of the twentieth century, MA-8 sat barren and unimproved. Pet. App. 10a. The land became fractionated as undivided beneficial interests in the land continued to pass to Wapato John's heirs. Pet. App. 10a, 103a–104a. Today, numerous individual descendants of Wapato John (the "allottees"), the Confederated Tribes of the Colville Reservation (the "Tribes"), and Wapato Heritage hold beneficial ownership percentages in MA-8. Pet. App. 10a.

B. MA-8 is Leased, Developed, and Marketed.

In 1979, William Wapato Evans, Jr. ("Evans")—one of Wapato John's descendants—sought to develop MA-8 and generate income for himself and his fellow allottees. Pet. App. 10a. In 1984, Evans obtained a BIA-approved "Master Lease" for the entirety of MA-8 to develop a recreational vehicle park (the "RV Park"). Pet. App. 10a.

Under the terms of the Master Lease, the allottees leased MA-8 to Evans for a 25-year term, with an option to renew for a second 25-year term. Pet. App. 11a. To exercise this option, Evans needed to provide written notice to both the "Lessor(s)" (later deemed to be the allottees) *and* BIA 12-months before the expiration of the original 25-year term. Pet. App. 11a.

In 1985, Evans sought to exercise the renewal option through a letter to BIA. Pet. App. 183a. For *more than two decades*, BIA represented that Evans *had* extended the Master Lease, through 2034. Pet. App. 183a–191a. In fact, "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." Pet. App. 106a–107a.

Meanwhile, Evans, through his companies, developed, marketed, and sold to Washington residents "regular" and "expanded memberships" to the RV Park. Pet. App. 10a–12a. As the district court found—and consistent with Evans' and BIA's understanding of the Master Lease—both memberships "were represented to be effective through 2034." Pet. App. 68a, 108a. In fact, the expanded memberships—which BIA approved before sale—expressly stated the Master Lease had been renewed. Pet. App. 185a. Between 1984 and 1994, Evans, through his companies, sold more than 170 memberships to Washington consumers. Pet. App. 185a–186a. As the Ninth Circuit explained:

> 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.

Pet. App. 13a.

C. Earlier Litigation.

Two earlier lawsuits are relevant to the current proceedings. *First*, in 2001, Evans sought to unilaterally close the RV Park, causing Mill Bay's individual members to sue in Washington state court. Pet. App. 12a. Evans died during that litigation, and much of his assets were distributed by will to Wapato Heritage, including his rights under the Master Lease. Pet. App. 12a. The personal representative for Evans' estate requested mediation of the state litigation (Pet. App. 12a), and this culminated in a settlement agreement whereby Mill Bay agreed to make escalating rental payments to Wapato Heritage, for remittance to BIA, for distribution to the allottees—all in exchange for Mill Bay's right to remain on the RV Park through February 2, 2034. Pet. App. 188a. During the proceedings, Wapato Heritage kept BIA apprised on the litigation's progress and repeatedly asked it to formally intervene and participate in the mediation. Pet. App. 188a. BIA never formally intervened, yet its agents were informed and attended hearings and the mediation. Pet. App. 188a. In 2004, however, "the BIA listed itself as the 'landlord' in a document provided to the Washington state liquor control board and also stated that the [Master Lease] expired in 2034." Pet. App. 184a.

Second, in 2007—despite more than two decades of representations to the contrary—BIA began to scrutinize the validity of Evans' attempted renewal of the Master Lease in 1985. Pet. App. 111a. The district court detailed numerous instances in which BIA was asked to address the terms of the Master Lease, but failed to do so. Pet. App. 183a–191a. Eventually, in November 2007—with approximately two months left to renew—BIA sent a letter to Wapato Heritage, stating its position that the Master Lease was never properly renewed and would expire in February 2009. Pet. App. 191a.

In 2008, Wapato Heritage sued the Government, arguing Evans' 1985 letter had actually or substantially complied with the renewal notice terms of the Master Lease, or alternatively that BIA had approved the renewal and extended the Lease's length. Pet. App. 14a. Wapato Heritage lost in the district court, and the Ninth Circuit affirmed. *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011). The Ninth Circuit held Evans had to notify all MA-8 allottees directly via certified mail to renew the Master Lease, which did not happen. *Id.* at 1040. Thus, the Ninth Circuit found the Master Lease was not renewed and expired in 2009.

BIA failed to inform Mill Bay that the Master Lease was not properly renewed and would expire on February 2, 2009, until *after* the renewal deadline had passed—too late for Mill Bay to do anything about it. Pet. App. 193a.

D. District Court Proceedings.

In January 2009, Mill Bay filed a separate lawsuit to enforce (and soon defend) its own unique rights with

respect to MA-8, naming as defendants BIA, the Tribes, Wapato Heritage, and the allottees. Pet. App. 15a. BIA counter-claimed for trespass, claiming Mill Bay had no right to occupy MA-8 after the Master Lease's February 2, 2009, expiration. Pet. App. 15a. In a 2010 order on cross-motions for summary judgment, the district court dismissed most of Mill Bay's claims and affirmative defenses (Pet. App. 15a–16a), but reserved ruling on BIA's trespass counterclaim and Mill Bay's equitable estoppel defense. Pet. App. 227a–229a. Following the 2010 order, Wapato Heritage and Mill Bay argued MA-8 lost trust status during the 20th century chain of trust period extensions, and therefore BIA lacked standing to prosecute a trespass claim as "trustee" for that land. Pet. App. 16a–17a.

In 2020, the district court granted BIA's renewed motion for summary judgment. Pet. App. 18a. The district court concluded Mill Bay was judicially estopped from challenging MA-8's trust status, but nevertheless found on the merits that MA-8 remained trust land. Pet. App. 18a. The district court also concluded that Mill Bay's estoppel defense was barred as a matter of law under *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003)—and the line of cases that proceeded it—since BIA sued "in its sovereign capacity as trustee for Indian land." Pet. App. 18, 169a. Following its 2020 order, the district court directed entry of final judgment against Mill Bay, allowing for immediate appeal under Fed. R. Civ. P. 54(b). Fed. App. 18a–19a.

Mill Bay and Wapato Heritage timely appealed the district court's judgment, seeking review on several issues from the 2020 and 2010 summary judgment orders. Pet.

App. 19a. While that Ninth Circuit appeal was pending, the district court held a bench trial on trespass damages, resulting in a $1,411,702.00 damages judgment against Mill Bay. Pet. App. 82a–83a.

E. Ninth Circuit Proceedings.

On appeal, the Ninth Circuit panel affirmed the district court's 2020 and 2010 summary judgment orders. Pet. App. 9a. But the Ninth Circuit held whether MA-8 remained in trust raised an Article III jurisdictional issue on BIA's standing to sue that could not be dodged through judicial estoppel (Pet. App. 21a–24a), and correctly rejected BIA's arguments based on "landlord-tenant" estoppel and the Quiet Title Act, 28 U.S.C. § 2409a. Pet. App. 21a–24a.

Yet, on the merits of MA-8's status, the Ninth Circuit affirmed. As to 25 U.S.C. § 391—the statute from which EO 2109 purported to derive statutory authority to extend MA-8's trust period—the Ninth Circuit found the statute ambiguous on whether it granted the President only the authority to extend "restrictions on alienation" or also the "trust period." Pet. App. 30a–40a. The Ninth Circuit then construed the statute to provide authority to extend MA-8's trust period. Pet. App. 30a–40a. The panel opinion did not, however, address whether Section 5 of the GAA separately provided authority for EO 2109. Pet. App. 30a. After determining MA-8 remained held in trust, the Ninth Circuit held BIA had standing as trustee to seek to eject Mill Bay. Pet. App. 47a.

The Ninth Circuit also affirmed on estoppel, holding under *United States v. City of Tacoma*, 332 F.3d 574 (9th

Cir. 2003) the defense is categorically unavailable when the Government sues as trustee for Indian lands. Pet. App. 57a–63a. Like the district court, the Ninth Circuit did not analyze whether the facts of the case might raise a genuine dispute of material fact on estoppel under the "heightened standard" otherwise applicable to the Government in the Ninth Circuit. Pet. App. 57a–63a, 169a–170a. Mill Bay and Wapato Heritage filed a timely petition for rehearing en banc, which the Ninth Circuit denied. Pet. App. 232a–233a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether Estoppel Applies to the Government as Trustee or Otherwise.

This case presents an ideal vehicle to answer: (1) a question unresolved by this Court's precedent: Is estoppel ever available against the Government? And (2) an issue of growing tension among the circuits: Does estoppel or other equitable defenses apply when the Government sues as trustee for Indian land?

A. This Court Should Confirm the Government Can Be Estopped.

Review of the Ninth Circuit opinion is necessary to confirm estoppel requires "some minimum standard of decency, honor, and reliability in [the citizens] dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60–61 (1984). At bottom, estoppel is an equitable doctrine precluding one from contradicting prior representations reasonably and detrimentally relied upon by another. *See id.* at 59. Under the traditional rule, estoppel could never be invoked against

the Government. *See* David K. Thompson, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 552 (1979). But most lower federal courts—including the Ninth Circuit—now recognize estoppel *can* apply to the Government in some circumstances. *See, e.g.*, *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *Hansen v. Harris*, 619 F.2d 942, 959 (2d Cir. 1980) (Newman, J., concurring) (collecting cases), *rev'd sub nom. Schweiker v. Hansen*, 450 U.S. 785 (1981).

This Court has never confirmed whether the lower court's rejection of the traditional "no estoppel rule" is correct. *E.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) ("But it remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case."); *Heckler*, 467 U.S. at 60–61 ("[W]e are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."). Now is the time to answer that question in the affirmative.

As this Court's precedents in various contexts make clear, the rationale for the traditional rule—that the "sovereign can do no wrong"—no longer justifies the exercise of government power devoid of accountability to its citizens. In the administrative law context, for example, this Court recently explained it is "arbitrary and capricious" for an agency to ignore longstanding policies that may have "'engendered serious reliance interests'" when it changes course. *Dep't of Homeland Sec. v. Regents*

of the Univ. of California, 140 S. Ct. 1891, 1913 (2020) (citation omitted). Much like estoppel, arbitrary and capricious review protects citizens' legitimate reliance interests created by longstanding government policies and positions, from summary contradiction. Such protection is even more critical where, as here, the harm flows from government power exercised by unelected, un-appointed officials, lacking the safeguards of the legislative process or even notice and comment rulemaking.

Likewise, in the context of government contracts, this Court held even Congressional changes to law, which "barred the Government from specifically honoring its agreements," could not excuse the Government from damages for breaching a contract with terms assigning the risk of regulatory changes to the Government. *United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996). As *Winstar* explained, allowing the Government to "simply shift costs of legislation onto its contractual partners" would be "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *Id.* at 883. *Winstar* affirms the Government cannot unilaterally disavow its prior promises, then force citizens who deal with it to bear the cost of their reliance. That harm is the very evil that estoppel arose to prevent.

Allowing estoppel in this case also would not undermine this Court's previous precedents on estoppel against the Government. In *Heckler*, 467 U.S. at 61, for instance, this Court explained, irrespective of whether estoppel was available against the Government, the citizen could not even demonstrate the traditional elements of estoppel. Here, by contrast, neither the district court nor

the Ninth Circuit even addressed whether the traditional elements of estoppel could apply, despite opportunity to do so. Pet. App. 57a–63a, 169a–170a. Instead, both concluded *United States v. City of Tacoma.*, 332 F.3d 574 (9th Cir. 2003), simply barred the defense.

Applying estoppel here also would not implicate the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, or the "public fisc"—as was the case in *Richmond*, 496 U.S. at 424, 426. Mill Bay does not seek money damages; it seeks the right to continue using MA-8 until 2034 in exchange for previously agreed-upon rent payments. These rental payments would then be distributed to the allottees under the terms of the Master Lease and the 2004 Settlement Agreement. Pet. App. 69a–70a, 187a–189a. In this sense, the Government merely administers money changing hands between private contracting parties; the Appropriations Clause and the public fisc are not implicated one way or another.

And applying estoppel here would not bar BIA from insisting upon compliance with valid regulations, as was the case in *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981). To the contrary, estoppel would simply provide Mill Bay with the right to continue using MA-8 through 2034. And that right is identical to what the BIA-approved Master Lease already allowed Mill Bay to do as a matter of contract law, consistent with applicable federal regulations.

Leases for "restricted Indian lands" are governed by 25 U.S.C. § 415 and regulations promulgated thereunder by the Secretary of the Interior. In enacting this regime, Congress delegated authority for the Interior (and BIA) to approve, regulate, and administer private contracts for

the use of Indian land. While leases granted under these laws must generally comply with applicable regulations—at least to the extent those laws are mandatory and non-discretionary—determining parties' rights and obligations under these leases requires applying common-law doctrines, such as contract law. *See, e.g.*, *Wapato Heritage*, 637 F.3d at 1039. Thus, unlike social security benefits (*e.g.*, *Schweiker*, 450 U.S. at 786), but much like government contracts (*e.g.*, *Winstar*, 518 U.S. at 843), determining a party's rights under these leases does not turn solely on applying federal regulations. In approving a system of private contracts, Congress surely knew that judicially-created, common-law principles, like contract interpretation, would play a role. Like contract interpretation, estoppel is a judicially-created, common-law doctrine that often goes hand-in-hand with contract disputes. And Mill Bay is aware of no statute (or regulation) preempting or prohibiting applying equitable principles in interpreting leases for or resolving disputes concerning restricted Indian land.

So too here. Evans originally derived the right to sub-lease a portion of MA-8 to Mill Bay through the Master Lease. No one disputes that the BIA-approved Master Lease was valid and complied with applicable federal regulations on leasing Indian land. The Master Lease authorized a 50-year term (25-years plus renewal for another 25-years), consistent with the version of 25 U.S.C. § 415(a) in effect when the Master Lease was executed. *See* Native American Technical Corrections Act of 2006, Pub. L. 109-221, 120 Stat. 340 (codified as amended at 25 U.S.C. 415(a) (2006)) (amending 25. U.S.C. 415(a) to allow leases for 99 years for MA-8). And Paragraph 8 even allowed sub-leases to survive termination of the Master Lease by "cancelation or otherwise." Pet. App. 53a.

Applying estoppel would, therefore, do only what the BIA-approved Master Lease authorized Mill Bay to do as a matter of contract law: continue using MA-8 until 2034 in exchange for rental payments. BIA already approved the scope of the Master Lease's contractual rights, in compliance with applicable leasing regulations. Thus, applying estoppel would do nothing more than what the Master Lease already allowed per the leasing regulations—that is, the judicially-created, common-law doctrine of *estoppel*, rather than the judicially-created, common-law doctrine of *contract interpretation*, would allow Mill Bay to enforce the same rights. Indeed, estoppel only became relevant due to the Ninth Circuit's contract interpretation of the Master Lease in *Wapato Heritage*, 637 F.3d at 1039. If the Ninth Circuit had not interpreted the Master Lease to require Evans to notify BIA *and* the allottees of his intent to extend, there would be no need for Mill Bay to estop BIA based on prior representations. There is no reason equitable doctrines like estoppel should not supplement contract interpretation in disputes over private contracts when contract interpretation would not separately render the requested relief illegal under the leasing regulations.

For all of these reasons, this Court should accept review and confirm estoppel can apply against the Government.

B. The Ninth Circuit's Decision Conflicts with Decisions of Second Circuit on the Availability of Equitable Defenses in Indian Land Disputes.

If the Court agrees that estoppel can apply against the Government, then the Ninth Circuit opinion necessarily

conflicts with Second Circuit decisions on equitable defenses in Indian land disputes. In *City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), a tribe purchased land within the boundaries of its historic reservation that had been held by non-Indians (and was therefore subject to state and local taxation) for decades. This Court held equitable doctrines such as laches defeated the tribe's attempt to enjoin the city from imposing property taxes on the newly-reacquired land. The Second Circuit applied *City of Sherrill* to hold laches barred all remedies for disruptive treaty-based Indian land claims brought by tribes and by the United States on their behalf. *Oneida Indian Nation of New York v. Cty. of Oneida,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 565 U.S. 970 (2011); *Cayuga Indian Nation of New York v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006); *see Stockbridge-Munsee Crnty. v. New York,* 756 F.3d 163, 165 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 1492 (2015).

The Second Circuit's holding that *City of Sherrill* allows equitable defenses when the Government brings claims as trustee for Indian lands cannot be squared with the broad, unqualified holding of *City of Tacoma*, 332 F.3d at 581 ("Here, there can be no argument that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense."). As the Ninth Circuit put it, "[a]lternatively, 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." Pet. App. 61a–62a.

While BIA's misrepresentations as to the duration of the Master Lease (50-years) could not have laid dormant as long as in *Sherrill*, the dissent from the denial of rehearing en banc in *United States v. Washington* saw no difference with a 30-year period of dormancy. *United States v. Washington*, 864 F.3d 1017, 1031 (9th Cir. 2017) (O'Scannlain, J., respecting the denial of rehearing en banc) ("Yet, the United States found no problem with the culverts until 2001. While the claims did not lie dormant for 200 years as in *Sherrill*, they were dormant for over 30 years."). Likewise, BIA did not "find problems" with the Master Lease renewal until 2007—more than two decades after Evans sought to renew, and Mill Bay had already paid a significant sum in reliance on BIA's representations.

To be sure, while (unlike here) *Sherrill* dealt with a treaty, there is no reason why *Sherrill* should be limited to disputes involving treaties. Although using estoppel to abrogate treaty rights provided by Congress based on the acts of the Executive raises legitimate separation of powers concerns, Indian land leases present no such concerns. Quite the opposite: As explained above, Congress has largely delegated authority over these leases to the Executive Branch. Estopping the Executive Branch based on its own conduct in exercising this delegated authority does not undermine any specific Congressional action, like a treaty. Indeed, the Ninth Circuit's refusal to apply estoppel removes an important check on Executive power. Without safeguards like estoppel, the unelected, un-appointed employees of the Executive in charge of these leases have little incentive to abide by a "minimum standard of decency, honor, and reliability" in their dealings with citizens. In turn, this leaves the Executive largely (if not entirely) unaccountable to its citizens, with

the flexibility to change its mind without consequence—no matter how detrimental to its citizens who relied.

II. This Court Should Provide a Controlling Interpretation of the President's Authority to Extend Trust Periods under 25 U.S.C. § 391 and Section 5 of the GAA.

The Ninth Circuit's opinion below also squarely poses an important two-fold question of statutory interpretation unresolved by this Court's precedents: (1) whether 25 U.S.C. § 391 authorized the President to extend allotments' "trust periods" or merely "restrictions on alienation;" and (2) whether Section 5 of the GAA applied to allotments formed under separate legislation, like MA-8. EO 2109 relied on 25 U.S.C. § 391 and Section 5 of the GAA as authority to extend MA-8's trust status:

> It is hereby ordered, under authority contained in section 5 of the act of February 8, 1887 (24 Stat. L., 388), and the act of June 21, 1906 (34 Stat. L.; 325-326), that the ten-year period of trust on all allotments made to members of the Chief Moses Band of Indians, in the State of Washington, under the agreement of July 7, 1883, as ratified and confirmed by the act of July 4, 1884 (23 Stat. L., 79-80), the title to which has not passed from the United States, be, and the same is hereby, extended for a further period of ten years.

Pet. App. 264a. As the Ninth Circuit's opinion recognized, MA-8's subsequent trust extensions relied on EO 2109's

validity. Pet. App. 24a–29a.[2] And, as the Ninth Circuit correctly held, whether MA-8 remains held in trust controls whether BIA had Article III standing to sue for trespass to the land. Pet. App. 18a, 21a–24a, 29a; *see also United States v. Waller*, 243 U.S. 452, 463 (1917); *U. S. ex rel. Noel v. Moore Mill & Lumber Co.*, 313 F.2d 71, 73 (9th Cir. 1963). Thus, the interpretation of these statutes is both dispositive to this case and carries significant ramifications for other allotted lands purportedly held in trust through executive orders relying on authority from these statutes.

A. This Court's Precedents Have Not Interpreted 25 U.S.C. § 391's Scope, Which Carries Important Implications for Other Allotted Lands.

As the Ninth Circuit correctly recognized, whether EO 2109 validly extended MA-8's trust period until 1926 first hinges on whether 25 U.S.C. § 391 authorized the extension. That statute provides:

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2. Otherwise, MA-8's trust period would have expired by lapse of time in 1916 under the Act of Mar. 8, 1906, 34 Stat. 55–56 (Pet. App. 242a–243a). This would mean Executive Order 4832 could not have invoked 25 U.S.C. § 391 or Section 5 of the GAA to "extend" MA-8's trust period in 1926. *See* 25 U.S.C. § 391 ("Prior to expiration…"); Section 5 of the GAA (Pet. App. 239a) ("at the expiration, of said period the United States will convey the same by patent…in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President…may… extend the period."). Instead, Congress would need to specifically authorize "re-taking" MA-8 back into trust. *See United States v. Bartlett*, 235 U.S. 72, 80 (1914).

> 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 be 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: *Provided, however*, That this shall not apply to lands in the former Indian Territory.

25 U.S.C. § 391.

In turn, the critical question is whether this language authorized the President to (1) extend the "trust period" for lands "held in trust" and "restrictions on alienation" in "other patents containing restrictions on alienation" or (2) extend "restrictions on alienation" in both "trust patents" and "other patents containing restrictions on alienation." Pet. App. 31a–32a. As the opinion below demonstrates, this Court has not yet specifically answered that question. Pet. App. 30a–40a.

The closest this Court came to the question is dictum in a footnote in *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 443, n. 29 (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, and Mar. 2, 1917, 39 Stat. 976."). But *DeCoteau* was a reservation diminishment case, and the precise scope of 25 U.S.C. § 391 was not directly at issue. Moreover, dicta in a footnote cannot provide a controlling interpretation of a statute when its interpretation was not at issue in the opinion. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1993 (2017) ("[T]his Court has long made

clear that where, as here, we have not "squarely addressed [an] issue, and have at most assumed [one side of it to be correct], we are free to address the issue on the merits.'") (Gorsuch, J., dissenting) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)). This is particularly so, given that trust relations with Indian tribes are separate from trust relations with the individual owners of trust allotments. Therefore, the scope of 25 U.S.C. § 391 lacks a controlling interpretation from this Court.

To be sure, the correct interpretation of 25 U.S.C. § 391 is important. In addition to MA-8, the status of many other allotments (whose trust period was purportedly extended under 25 U.S.C. § 391) hangs in the balance. *See generally* 25 C.F.R. Ch. I, App. (cataloging list of executive orders issued under 25 U.S.C. § 391 for patents issued for land on the public domain). Indeed, as the Ninth Circuit recognized, Congress enacted 25 U.S.C. § 391 *because* the President's extension power under Section 5 of the GAA was limited to allotments formed under the GAA. Pet. App. 38a (citing 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.")). So if 25 U.S.C. § 391 only authorized extending restrictions on alienation, then the Government improperly held numerous other allotments that were not formed under the GAA, like MA-8, in trust under this statute. The correct interpretation of 25 U.S.C. § 391 therefore has sweeping ramifications for allotted lands across the Country.

And if the Ninth Circuit misinterpreted 25 U.S.C. § 391 (and BIA lacked Article III standing), then the Ninth Circuit's opinion would allow a judgment devoid of subject matter jurisdiction to stand. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95–100 (1998). The Ninth Circuit's interpretation would also authorize BIA to prosecute claims for other allotted lands that fell out of trust without Article III standing to do so—resulting in both the Executive and lower federal courts acting outside the restraints imposed by the separation of powers. *Id.* at 101. These jurisdictional ramifications and BIA's continued control over MA-8 and similarly situated allotments warrant this Court's review.

B. The Ninth Circuit Misinterpreted 25 U.S.C. § 391, in Conflict With This Court's Precedents on Statutory Interpretation.

Despite correctly framing the issue, the Ninth Circuit's interpretation of 25 U.S.C. § 391 conflicts with this Court's precedents on statutory interpretation. In *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009), this Court made clear that settled principles of statutory interpretation apply with equal force even to statutes passed decades ago governing Indian lands. Under that analysis, courts first determine whether the statute is plain and unambiguous, and if so, apply the statute according to its terms. *Id.* That inquiry begins with the ordinary meaning of the words used in the statute as the time of its enactment. *Id.* at 388. In interpreting 25 U.S.C. § 391, the Ninth Circuit disregarded these controlling principles.

To begin with, the plain language of 25 U.S.C. § 391 shows in 1906 Congress understood the word "trust" to

have a distinct meaning from "restrictions on alienation." In the Ninth Circuit's own words:

> 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… 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.

Pet. App. 31a–32a.

Under *Carcieri*, this correct observation is both the beginning and end of the interpretation of 25 U.S.C. § 391; it is unnecessary to go beyond the statute's plain language. Because 25 U.S.C. § 391 acknowledges both

the "trust period" of "trust patents" and "other patents containing restriction on alienation," yet only authorized the President to extend "such restrictions on alienation," the statute's plain language only conferred the limited power to extend "restrictions on alienation" in both "trust patents" and "other patents." If Congress had intended to also confer the broader power to extend the entire "trust period" for allotted lands, Congress would have only needed to include the words "trust period" before or after the words "such restrictions on alienation" in defining what the President could extend. Congress did not do so. Thus, 25 U.S.C. § 391's plain language is unambiguous.

Moreover, as the Ninth Circuit recognized (Pet. App. 31a–32a), statutory context and this Court's precedents confirm (1) "restrictions on alienation" are but one of three components for land's held in "trust," which also include (2) restrictions on encumbrances and (3) restrictions state taxation. Pet App. 32a (citing *United States v. Mitchell*, 445 U.S. 535, 544 (1980)). Indeed, Section 2 of the Moses Agreement's enabling legislation specifically acknowledges allottees would receive "trust patents," but portions of these allotments could be sold and "when so approved shall convey a full title to the purchaser the same as if a final patent without restrictions upon alienation has been issued to the allotee [sic]," after which the land would be subject to state taxation. The Act of Mar. 8, 1906 (Pet. App. 243a).

Provisions from the GAA further underscore the delineation between "restrictions on alienation" from restrictions on encumbrances and state taxation—all of which comprise "trust status." *See* Act of May 8, 1906, c. 2348, 34 Stat. 182, *codified as* 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."); Section 5 of the GAA (Pet. App. 239a–241a) ("That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees…for the period of twenty-five years, in trust for the sole use and held in benefit of the Indian to whom such allotment shall have been made…and that at the expiration, of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period."). (Pet. App. 239a–241a). These provisions show that "restrictions on alienation" and "trust period" are separate concepts with separate meanings, both as used in 25 U.S.C. § 391 and in other statutes governing Indian allotments.

Dictionary definitions from before the time of enactment confirm this distinction too. *Compare* Trust, Black's Law Dictionary (1st ed. 1891) ("An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by chancery courts."), *with* Alienation, Black's Law Dictionary (1st ed. 1891) ("In real property law. The transfer of the property and possession of lands, tenements, or other things, from one person to another…It is particularly applied to absolute conveyances of real property.").

And the canon against superfluity supports this reading by giving "trust" and "trust period" a separate meaning from "restriction on alienation." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The presumption of consistent meaning likewise supports this interpretation by giving the term "restrictions on alienation" a consistent meaning, as used for both "restricted fee patents" and "trust patents" (which include, but are not limited to, a restriction on alienation). *Law v. Siegel*, 571 U.S. 415, 422 (2014).

As the provisions above demonstrate, Congress was keenly aware of the fine points of allotments of individual Indians. Notably, elsewhere in the Act of June 21, 1906, 34 Stat. 373–79, Congress made specific provision for the imposition or release of restrictions on alienation on various Indians' lands:

> [A]llottee numbered eight hundred and sixty three to whom a trust patent has been issued containing restrictions upon alienation, may sell and convey any part of her allotment, but such conveyance shall be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe, and when so approved shall convey full title purchaser the same as if a final patent without restriction had been issued to the allottee….
>
> ***
>
> [Names,] Yankton Sioux allottees to whom trust patents have been issued containing restrictions on alienation, may sell and convey

> not exceeding forty acres of their allotments; but such conveyance shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser the same as if a final patent without restriction had been issued to the allottee….

There is simply no reason to presume when Congress provided for the extension of "restrictions on alienation" in "trust or other patents," a mere three months after requiring hybrid trust patents to be issued for the Moses Allotments, Congress secretly meant, "or of the trust periods." Congress knew the GAA provided for simple trust patents that did not allow alienation at all, that Congress had separately provided certain Indians with hybrid trust patents in statutes such as the Act of March 8, 1906, and that Congress had authorized fee patents with restrictions on alienation to be issued to yet other Indians in contemporaneous statutes. *See*, *e.g.*, *Sunderland v. United States*, 266 U.S. 226, 231 (1924) (interpreting Act of May 27, 1908, § 1, c. 199, 35 Stat. 312). Congress knew how to use all of those devices.

These provisions also show Congress was still assiduously pursuing a policy of encouraging and micro-managing the sale of Indian allotments in 1906. *See Cent. Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (courts interpret Indian statutes "in light of the intent of the Congress that enacted them."). The plain meaning of the provision at issue is consistent with that policy. When the trust periods ended, the Moses Allotments and similar hybrid trust allotments would be subject to state tax and primed for sale to third parties, as Congress wanted; and allowing the Executive to extend

restrictions on alienation maintained the Department's and Congress' control over such transactions, as Congress also wanted.

To be sure, this Court already held the various components of trust status are distinct, and that one may be changed without the other. *Choate v. Trapp*, 224 U.S. 665, 671–73 (1912) ("But the exemption and nonalienability were two separate and distinct subjects…. The right to remove the restriction was in pursuance of the power under which Congress could legislate ….. But the provision that the land should be nontaxable was a property right."). Mill Bay's interpretation of 25 U.S.C. § 391 simply recognizes Congress used words that gave the President authority to extend one aspect of trust status (restrictions on alienation) without necessarily delegating the broader power to extend trust status as whole (which also includes restrictions on encumbrances and state taxation).

The Ninth Circuit's interpretation to the contrary rests on four conclusions, none of which support going beyond 25 U.S.C. § 391's text.

First, the Ninth Circuit relied on the conclusions that "a trust is itself a restriction on alienation," and trust patents "like those given to Wapato John inherently contained restrictions on how the American Indian allottee could sell their property." Pet. App. 32a. Contrary to the Ninth Circuit's decision, a trust is not the same as a restriction on alienation. Normally, a cestui que trust cannot alienate legal title, not because the trust restricts alienation, but because the cestui que never had legal title in the first place. *See N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S.

Ct. 2213, 2218 (2019) (a trust is a relationship between trustee, who holds legal title, and beneficiary, who does not). On the other hand, during the period when Congress was developing the trust-patent system, the equitable interest held by a cestui que trust was presumed to be fully alienable, unless otherwise provided by law. *Croxall v. Shererd*, 72 U.S. 268, 281 (1866). Moreover, in a "dry," or "passive" trust, title might even be deemed to vest in the cestui que contingent on the fulfillment of the trust's purposes, with the trustee holding some temporary "lesser estate" such as a life estate. *Doe ex dem. Poor v. Considine*, 73 U.S. 458, 471 (1867). Trust patents were favored by Congress because they not only prevented the Indian allottee from alienating title, they also immunized the land from state taxation by putting title in the United States. *Mitchell*, 445 U.S. at 543–44 ("he feared that States might attempt to tax allotted lands if the allottees held title to them subject to a restraint on alienation. By placing title in the United States in trust for the allottee, his amendment [to the Dawes Act] made it 'impossible to raise the question of [state] taxation.'"). And, as this Court has held, these different aspects of a trust patent are independent; Congress may remove restrictions on alienation but may not have the power to remove non-taxability. *Choate*, 224 U.S. at 671–73. When Congress referred to a "trust patent containing restrictions on alienation," Congress spoke with precision—a trust patent might freely allow alienation of legal title or of equitable rights, not allow alienation at all, or allow alienation with various restrictions, depending on the terms of the authorizing statute.

Second, the Ninth Circuit relied on the conclusion that "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." Pet. App. 34a. But 25 U.S.C. § 391's plain language demonstrates Congress had approved the creation of both trust and other patents containing restrictions on alienation. And while both types of patents are similar, this Court has said, "[i]t rests with Congress to say which of the two modes shall be followed in respect of the lands of a particular tribe" (or individual). *United States v. Bowling*, 256 U.S. 484, 487 (1921)

Third, the Ninth Circuit relied on the conclusion that although the three principal characteristics of Indian trust status—inalienability by the allottee, immunity from encumbrance, and immunity from state taxation—may seem conceptually distinct, if the first is removed, the others fail as well. Pet. App. 36a (citing *Goudy v. Meath*, 203 U.S. 146, 149 (1906)). But *Choate* teaches these three components are not inextricably bound together, and in any event 25 U.S.C. § 391 can and should be read to allow extension of the first component without extending all three.

Finally, the Ninth Circuit relied on the conclusion that BIA has always viewed the statute as allowing for extension of trust status and this view should be given deference. 39a. But deference doctrines come into play only when the statute is ambiguous. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002). The statute here is clear and unambiguous.

C. Section 5 of the General Allotment Act Does Not Apply to Allotments Granted Under Separate Legislation.

If the Court agrees that 25 U.S.C. § 391 authorized extensions on "restrictions on alienation," but not "trust periods," then the Ninth Circuit can address whether Section 5 of the GAA authorized EO 2109 on remand for "further proceedings not inconsistent with this opinion." *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 537 (2011). Alternatively, if this Court reaches the issue, a brief examination of Section 5 of the GAA reveals that it does not apply to MA-8.

To start, MA-8 was granted under the Act of March 8, 1906—legislation wholly separate from Section 5 of the GAA. The Act of March 8, 1906, authorized the issuance of 10-year trust patents with specific provisions allowing for the sale of a portion of such allotments. Pet. App. 242a–243a. By contrast, Section 5 of the GAA contained no comparable sale provisions and required patents to be issued for 25 years. Pet. App. 239a–241a. Unlike Section 5 of the GAA, Congress also did not give the President discretionary authority to extend the trust period for allotments granted under the Act of March 8, 1906—like MA-8. Thus, MA-8 is not an "allotment provided for in [the GAA]," and therefore Section 5 could not authorize the President to extend its trust period.

Further, Congress amended the GAA in 1902 to provide:

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the

> Indian Territory, shall be made in conformity to the provisions of the [General Allotment Act] and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Act of June 19, 1902, Fifty-Seventh Congress, Sess. 1 Pub. Res. No. 31, 32 Stat. 744.

But MA-8 and the other Moses allotments were "specifically provided" for by separate legislation enacted both before the GAA in 1887 and after this 1902 amendment. So, as of 1902, the President's extension authority under Section 5 of the GAA still did not apply to allotments granted under other statutes, like MA-8. Finally, if Section 5 of the GAA was generally applicable to all allotments, there would have been no need for Congress to enact 25 U.S.C. § 391 with respect to trust patents.

For these reasons, if the Court reaches Section 5 of the GAA, the Court should confirm that it does not apply to MA-8, and therefore could not authorize EO 2109.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35694

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;

Appendix A

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.

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

Argued and Submitted August 9, 2021
Seattle, Washington

Filed December 30, 2021

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

Appendix A

Opinion by Judge Bea

SUMMARY*

Bureau of Indian Affairs/Government's Tribal Trust Duty

The panel affirmed the district court's grant of the Bureau of Indian Affairs' motion for summary judgment and ejectment order in an action brought by a group of recreational vehicle owners seeking to retain their rights to remain on a lakeside RV park located on American Indian land held in trust by the Bureau.

Decades ago, a group of recreational vehicle ("RV") owners purchased fifty-year memberships to the RV park on a plot of land in Eastern Washington known as the Moses Allotment Number 8 ("MA-8"). However, the park's management had validly leased the park's land from its landowners for only twenty-five years.

In the 1900s, the United States originally issued title to the 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 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

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ten-year trust period, the land was to be managed by the Department of the Interior (now the Bureau of Indian Affairs) 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 Bureau of Indian Affairs ("BIA") continues to hold legal title to the land in trust for beneficial interests of Wapato John's heirs, referred to as the individual allottees ("IAs"), and also for the Wapato Heritage LLC ("Wapato Heritage"), and the Confederated Tribes of the Coleville Reservation. The BIA's trust status, however, is in dispute.

In 1979, William Wapato Evans, Jr.. an heir of Wapato John, obtained approval from a majority of other IAs to lease the entirety of MA-8 to develop a recreational vehicle park—the Mill Bay RV Park. Evans negotiated and signed a Master Lease in 1984, under which 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. Thereafter, Evans developed and sold regular and expanded memberships to purchasers to use and park their vehicles in the RV park. After Evans's death, his company Wapato Heritage obtained Evans's interest under the Master Lease as the lessee of the MA-8 land. The Master lease expired in 2009, leaving unexercised the option to extend. *See Wapato Heritage, L.C.C. v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011).

Plaintiffs, Mill Bay Members Association ("Mill Bay") and RV owner Paul Grondal, filed this lawsuit

seeking a declaratory judgment that would recognize their right to remain on MA-8 through 2034. 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 from the 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. 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 the panel decided by a separate memorandum disposition. In 2020, 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 and ordered Mill Bay removed from MA-8. Mill Bay appealed and defendant Wapato Heritage joined Mill Bay's appeal on the issue of the BIA's standing to bring a trespass counterclaim on behalf of the IAs.

The panel first held that 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. The panel held that of the three transactions and trust extensions in MA-8's history that appellants challenged, none were

legally deficient. The panel therefore first rejected the assertion that the MA-8 allotments vested legal title in the IAs in fee simple rather than in trust. The panel noted that the Supreme Court in *Starr v. Long Jim*, 227 U.S. 613, 621-22, 33 S. Ct. 358, 57 L. Ed. 670 (1913), held that the 1883 Moses Agreement and its implementing legislation, the Act of July 4, 1884, did not guarantee title in fee but instead permitted the United States to hold the allotments in trust. The panel next rejected appellants' assertion 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 panel held 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. Finally, the panel rejected appellants' argument that MA-8's trust period was not properly extended in 1936 after the passage of the 1934 Indian Reorganization Act ("IRA"). 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, the panel rejected the argument that the Moses Allotments were non-reservation land outside of the scope of the 1934 IRA and its 1935 Amendment. The panel therefore affirmed the district court's conclusion that the 1935 Amendment extended the Moses Allotments' trust status.

Mill Bay next asserted that the BIA should be precluded under res judicata from seeking ejectment due to the BIA's involvement in 2004 state court litigation ("*Grondal* state litigation") that resulted in a 2004

Settlement Agreement permitting Mill Bay the right to use the property through 2034, in compliance with the Master Lease. The panel noted that the BIA was not itself a party to the *Grondal* state litigation or the 2004 Settlement Agreement. Nor was the BIA in privity with Wapato Heritage, concededly one of the parties to the *Grondal* state litigation. And Wapato Heritage's interest as the lessee under the Master Lease was quite different from the BIA's interest as trustee for the lessors under the same lease. Even setting aside that different parties were involved in the *Grondal* state litigation and in this lawsuit, the two cases also involved different claims. The panel therefore rejected Mill Bay's argument that the IAs and the BIA were precluded under res judicata from ejecting Mill Bay.

The panel rejected Mill Bay's assertion that 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. The panel held that Paragraph 8 of the Master Lease did not apply at all because the Master Lease was not terminated by cancellation or otherwise. Paragraph 8 did not apply when the Lease expires by the passage of time, as happened here.

Finally, Mill Bay argued that, based on the BIA's alleged prior representations that Mill Bay would be able to remain on MA-8 through 2034, the court should apply equitable estoppel to prevent the BIA from seeking Mill Bay's ejectment. The district court concluded the equitable estoppel defense was not available under *United States*

v. City of Tacoma, 332 F.3d 574 (9th Cir. 2003), which holds that the United States is not subject to equitable estoppel when it acts in its sovereign capacity as trustee for Indian land. The panel concluded that *City of Tacoma* was not distinguishable, and that Mill Bay was barred from asserting its defense of equitable estoppel against the BIA.

OPINION

BEA, Circuit Judge:

Decades ago, a group of recreational vehicle ("RV") owners purchased fifty-year 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 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]

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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

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

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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**.

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 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

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

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 U.S. Dist. LEXIS 103667, 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 U.S. Dist. LEXIS 117185, 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, L.C.C. v. United States*, 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 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.

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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.

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

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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.

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 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]

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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 . . . .").

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

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

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 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.

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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))).

II. STANDARD OF REVIEW

"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

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 cannot prevent us from analyzing the BIA's standing.

"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.

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

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.

character to that which he acknowledged in accepting the demise." *Williams v. Morris*, 95 U.S. 444, 455, 24 L. Ed. 360 (1877).

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

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.

claim.[16] We thus proceed and examine whether the 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]

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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.

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

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.

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 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

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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:

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

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> 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 (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.

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, 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.

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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.

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

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

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."

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. 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

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:

> 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 (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 (describing how Congress sought to prevent American 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]

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

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'

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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.

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 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 ("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, 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. And that decoupling would be doubly strange given that many American Indians who owned fee-simple allotments 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 U.S. AG LEXIS 20 (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 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

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 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

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.

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]

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.

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 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.

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 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,

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

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

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

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

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.

Mill Bay believes that the settlement's guarantees—for instance, Mill Bay's "right to use the property . . . through December 31, 2034"—preclude the 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

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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.

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).

"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.

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 § 11.96A.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 § 11.96A.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 at *3 [published in full-text format at 2016 Wash. App. LEXIS 1052] (2016) (unpublished) (likening "persons holding powers over the trust assets" to the trustee); *In re Est. of Whitehead*, 139 Wash. App. 1038 at *5 & n.39 [published in full-text format at 2007 Wash. App. LEXIS 1827] (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 . . . .").

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*, 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

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 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.

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]

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

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.

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 between Wapato Heritage and the IAs. But

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.").

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

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.

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

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

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.

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 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]

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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.

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. 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." *Jicarilla*, 564 U.S. at 176. 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).

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)).

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, 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.

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.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, FILED MAY 17, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 2:09-CV-18-RMP

PAUL GRONDAL, A WASHINGTON RESIDENT; MILL BAY MEMBERS ASSOCIATION, INC., A WASHINGTON NON-PROFIT CORPORATION,

Plaintiffs,

v.

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; LUCINDA O'DELL; MOSE SAM; SHERMAN T. WAPATO; SANDRA COVINGTON; GABRIEL MARCELLAY; LINDA MILLS; LINDA SAINT; JEFF M. CONDON; DENA JACKSON; MIKE MARCELLAY; VIVIAN PIERRE;

Appendix B

SONIA VANWOERKON; 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A bench trial was held in the above-captioned case on March 30-31, 2021, via videoconferencing pursuant to the parties' stipulation and consent to the same. ECF Nos. 657, 672. Plaintiffs Paul Grondal and Mill Bay Members Association, Inc. (collectively "Mill Bay") were represented by Sally W. Harmeling and Robert R. Siderius, Jr. Assistant United States Attorneys Joseph P. Derrig and Jessica A. Pilgrim appeared on behalf of the Federal Defendants. The Court heard testimony in open court from the following witnesses: Federal Defendants' expert Bruce C. Jolicoeur; Plaintiffs' expert Ken Barnes; Jeffery Webb; and Douglas Gibbs. All of the exhibits that were admitted in evidence have been reviewed and considered by the Court.

Having heard testimony and fully reviewed all of the materials submitted by the parties and the record in this matter, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a).

Appendix B

PREVIOUS RULINGS

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1345. ECF No. 144 at 24.

On July 9, 2020, the Court granted the Federal Defendants' motion for summary judgment which sought to eject Plaintiffs Paul Grondal and Mill Bay Members Association, Inc., from property known as MA-8, and an award of damages for Plaintiffs' occupation of MA-8. *See* ECF No. 503; *see also* 25 C.F.R. § 162.023 ("If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized use is a trespass."). The Court expressly found that "Plaintiffs have had no right to occupy any portion of MA-8 after February 2, 2009." ECF No. 503 at 71; *see also* ECF No. 534 ("The parties agree that the following claims remain in this case: The United States has successfully established its counterclaim in ejectment and thus an assessment of monetary damages based on Mill Bay's trespass remains.").

All of the findings and conclusions set forth in ECF No. 503 are incorporated by this reference and are the law of this case.

FINDINGS OF FACT

This dispute concerns Moses Allotment No. 8 ("MA-8"), which is fractionated allotment land near the banks of Lake Chelan in Washington State, held in trust by the United States Government for individual Indian allottee

landowners and the Confederated Tribes of the Colville Reservation (the "Tribes"). Plaintiffs and Counterclaim Defendants in this case are Paul Grondal and Mill Bay Members Association, Inc. (collectively "Mill Bay") who are non-Indians who purchased, or represent a group of individuals who purchased, camping memberships to use 23.52 acres of MA-8 for recreational purposes. These memberships were represented to be effective through 2034.

Plaintiffs purchased these camping memberships from companies owned or controlled by William Evans Jr. ("Evans"), who was an Indian allottee landowner holding a beneficial ownership interest in MA-8. Evans had leased MA-8 from the other individual Indian allottee landowners who held a beneficial ownership interest in MA-8 in accordance with federal regulations in 1984 (the "Master Lease").

The Master Lease granted use of MA-8 to Evans for a period of twenty-five years, beginning in 1984 and ending on February 2, 2009. The Master Lease had an initial twenty five-year term with an option to renew for another twenty-five years. If renewed, the Master Lease would have extended to 2034. However, the "option to renew the Lease was not effectively exercised by Evans, or later by Wapato, and [ ] the Lease terminated upon the last day of its 25-year term." *Wapato Heritage, L.C.C. v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011). Thus, the Master Lease expired on February 2, 2009.

Between 1985 and 1994, Evans, through his company Chief Evans, Inc., sold 150 "Regular" memberships and 23

"Expanded" Mill Bay memberships to Plaintiffs or their predecessors in interest. ECF No. 503 at 8. "Regular" memberships were represented to be effective through 2034 and were sold for a fee of $5,995. "Expanded" memberships were represented to be effective through 2034 and were sold for a fee of $25,000. Plaintiffs' camping memberships gave them the right to use a RV park on 23.52 acres of MA-8 ("RV park") consistent with the Master Lease. "These camping memberships are contracts between Plaintiffs and Evans/Wapato Heritage." ECF No. 503 at 65.

Evans, through his corporate entity Chief Evans, Inc., threatened to close the RV park in or about 2001. In 2002, Paul Grondal and all similarly situated Mill Bay Resort Members sued Chief Evans, Inc., in Chelan County Superior Court, Cause No. 02-2-01100-9.

Evans also established Wapato Heritage, LLC ("Wapato Heritage"), a Washington state corporation, in July 2002. As Evans' successor in interest, Wapato Heritage presently possesses a life estate in Evans' MA-8 allotment interest (approximately 23.8 percent) with the remainder reverting to the Tribes. Mr. Jeffery Webb is the manager of Wapato Heritage.

On April 16, 2003, all Mill Bay Resort Members, then existing, formed and incorporated the Mill Bay Members Association, Inc., a Washington state non-profit corporation. The Mill Bay Members Association, Inc., is comprised of 173 members.

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In May of 2003, William Evans' Last Will and Testament was drafted with Mr. Webb as the personal representative of the (non-trust) estate of William Evans. Mr. Webb previously had been appointed as Evans' limited Guardian in 2001. Evans died in September 2003. A probate proceeding was started for Evans' nontrust assets in Chelan County Superior Court, Cause No. 03-4-00185-8 (Chelan Super. Ct., 2003).

In 2004, Grondal and all similarly situated Mill Bay Resort Members sued Jeffrey Webb in Chelan County Superior Court, Cause No. 04-2-00441-6 (Chelan Super. Ct., 2004). Paul Grondal and Mill Bay settled its lawsuits against Chief Evans, Inc., and Jeffery Webb, and the settlement agreement was entered into the court record of the Evans's state probate proceeding (the "2004 Settlement Agreement"). As part of the 2004 Settlement Agreement, the Mill Bay Members agreed to pay escalating annual rent for their continued use of the RV park through 2034. Ex. 65 at 7. The Bureau of Indian Affairs ("BIA") was not a party to the 2004 Settlement Agreement. Ex. 41.

The rents for both 2004 and 2005 were collected in December 2004. Ex. 45 at 2. Wapato Heritage collected approximately $48,000 (referred to by Plaintiffs as "upfront settlement funds"). *Id.* at 8. Fifty percent of the entire amount of rents collected in December 2004 was remitted to the BIA for distribution to the individual allottee landowners (approximately $23,478.69). *Id.* at 2, 8. Mr. Webb described "[t]his payment over and above what was required under the Master Lease . . . as an

incentive [to the individual allottees] to enter into a new master lease allowing for residential development of a portion of the MA-8 land." *Id.* at 3; *see also* Ex. 41 at 3 ("The attached check represents 50% of your 2004 & 2005 MA-8 R.V. Park Rental Income. The remaining balance will be mailed upon receipt of your vote per the proposed MA-8 development."). Some individual allottee landowners demanded and received the remaining fifty percent balance directly from Wapato Heritage. Ex. 45 at 3. Accordingly, in 2006, Wapato paid to some individual allottee landowners 7.5 percent of the rent collected from Mill Bay ($1,875) plus an added $3,351.07, reflecting the fifty percent balance of the 2004/2005 rents that some individual allottee landowners demanded. Ex. 45 at 3, 8.

On November 30, 2007, the BIA sent a letter to the Tribes and Wapato Heritage stating that, in its opinion, the option to renew the Master Lease had not been effectively exercised. As of the date of the letter, November 30, 2007, Wapato Heritage still had two months left in which to exercise its option to renew the Master Lease. It did not do so.

In June of 2008, Wapato Heritage filed suit against the United States in *Wapato Heritage, LLC v. United States*, No. 08-cv-177-RHW (E.D. Wash.) (Whaley, J.). *See Wapato Heritage, LLC v. United States*, No. CV-08-177-RHW, 2008 U.S. Dist. LEXIS 117185, 2008 WL 5046447 (E.D. Wash. Nov. 21, 2008) (holding that Evans and Wapato Heritage failed to renew the Master Lease) *aff'd*, 637 F.3d 1033, 1040 (9th Cir. 2011).

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In 2008, the United States notified Mill Bay that the Master Lease was never properly renewed, and the Master Lease would expire on February 2, 2009.

On January 21, 2009, Plaintiffs filed the instant lawsuit against the United States and the individual allottee landowners (collectively the "Federal Defendants"), as well as Wapato Heritage, seeking declaratory and injunctive relief. ECF No. 1. Plaintiff Paul Grondal took no actions separate and apart from his role as a member of the Mill Bay Members Association, Inc.

On March 16, 2009, the BIA notified Wapato Heritage that it was rejecting Wapato Heritage's proffered payments for annual "base rent" and "ground rent" made pursuant to the Master Lease since the lease had expired by its own terms on February 2, 2009. *See* Ex. 40.

From 2009-2020, Mill Bay Members continued to pay rent to Wapato Heritage pursuant to the 2004 Settlement Agreement. Exhibits 25, 27-30, 45 at 8. Mr. Webb testified that Wapato Heritage received annual rental payments from Mill Bay and cashed the checks received. *See, e.g.*, Ex. 25 at 2 ("Enclosed is the Mill Bay Members Association's 2010 RV rental park payment in the amount of $30,000.00. As per previous agreements, please remit this payment to the individual MA-8 allottees/landowners via the [BIA]."). However, according to the testimony of Mr. Webb, Wapato Heritage did not remit these payments to the individual allottee landowners based upon (1) the BIA's previous rejection of payments tendered by Wapato Heritage

per the letter received in 2009, Ex. 40; and (2) Wapato Heritage's not having access to the individual allottees' addresses.

On April 3, 2009, the United States filed a counterclaim against Mill Bay for ejectment from the RV park and for trespass damages. ECF No. 42. Mill Bay pleaded 19 affirmative defenses, including the following:

> 9. The Federal Defendants' alleged damages and injury were caused by the fault of other defendants in this action.
>
> 12. Federal Defendants carelessly and negligently conducted itself that it contributed directly and proximately to Federal Defendants' own alleged injuries and damages.
>
> 13. As to all causes of action, Plaintiffs allege that Federal Defendants have unreasonably delayed in bringing this action and asserting these rights, or both, to the prejudice of Plaintiffs, and therefore Federal Defendants' Counterclaim, in whole or in part, is barred by the doctrine of laches.
>
> 14. Federal Defendants' recovery in this action is barred in whole or in part by its failure to exercise reasonable diligence to protect its own interests or to mitigate any alleged damages.

> 15. Plaintiffs are entitled to offset against any damages awarded to Federal Defendants.

ECF No. 43 at 5-6.

On September 1, 2009, the United States filed a Motion for Summary Judgment on its ejectment counterclaim. ECF No. 70.

On January 12, 2010, the Court denied the United States' Motion for Summary Judgment Re Ejectment as premature. ECF No. 144 at 26-27.

On May 24, 2010, the Court granted the parties' stipulated request to stay the proceedings and stay all discovery to facilitate settlement conversations. ECF No. 197 at 3-4. The parties conducted two separate mediation sessions attempting to resolve the case. ECF No. 206.

On April 1, 2011, the Court entered an Order directing the parties to file a Status Report on whether a stay was still warranted. ECF No. 205 at 1-2. The parties requested the stay be continued to allow for further mediation and for a determination on whether the Ninth Circuit would hear *Wapato Heritage, LLC v. United States* en banc. ECF Nos. 206, 207; *see Wapato Heritage v. United States*, 637 F.3d 1033 (9th Cir. 2011); *see also Wapato Heritage v. United States*, 423 Fed. Appx. 709 (9th Cir. 2011).

On March 22, 2012, the United States filed a renewed Motion for Summary Judgment seeking ejectment of Plaintiffs from the RV park ("Motion for Summary Judgment Re Ejectment"). ECF No. 231.

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On March 29, 2012, the Court entered an Order lifting the stay and granting an extension on the briefing schedule for the United States' Motion for Summary Judgment Re Ejectment. ECF No. 242 at 1-2.

On April 17, 2012, the Court entered an Order staying all briefing deadlines on the United States' Motion for Summary Judgment Re Ejectment, pending resolution of a Motion for Continuance filed by the Plaintiffs. ECF No. 252 at 3.

On May 21, 2012, the Court granted Plaintiffs' Motion to Continue the United States' Motion for Summary Judgment Re Ejectment to allow Plaintiffs to conduct discovery on their estoppel defense/claim. ECF No. 267.

On January 10, 2013, after hearing oral argument on the United States' Motion for Summary Judgment Re Ejectment, the Court entered an Order Directing Supplemental Briefing on the issue concerning MA-8's trust status. ECF Nos. 308, 310.

On August 1, 2014, the Court entered a Memorandum and Order Re: Appointment of Counsel, noting that the United States' Motion for Summary Judgment Re Ejectment was still pending, but declining to rule on the motion until supplemental briefing concerning the unrepresented individual allotee landowner Defendants had been submitted by the United States. ECF No. 329.

On September 23, 2014, the Court granted the United States' request for a one-month extension of time to submit

the requested briefing. ECF No. 338. The United States timely submitted the requested supplemental briefing. ECF Nos. 339, 340.

On February 23, 2016, an Order was entered Re: Pending Motions and Directing Filing of Reports, in which the Court acknowledged that the United States' Motion for Summary Judgment Re Ejectment was still pending but declining to rule on the motion until the United States submitted further information concerning legal representation of the individual Defendants. ECF No. 345. The parties timely responded to the Court's Order. ECF Nos. 345-349.

On June 27, 2018, an Order was entered directing additional filings. ECF No. 353. The parties timely responded to the Court's Order. ECF Nos. 356-358, 360.

On September 16, 2019, an Order was entered of voluntary Recusal of Judge Quackenbush. ECF No. 366.

On September 17, 2019, the case was reassigned to Judge Rosanna Malouf Peterson, currently presiding over this matter. ECF No. 367.

On November 1, 2019, the Court entered an Order Memorializing the Court's Oral Rulings and Setting Briefing Schedule on the issue of whether the United States must provide representation for the individual allottee landowner Defendants, and noted "[a]fter the Court resolves the issue of legal representation of the parties, the Court will set a briefing schedule for the issue

of whether the property at issue is trust land." ECF No. 389 at 3.

On March 26, 2020, the Court entered an Order Regarding Representation of the Allottees finding that the United States need not supply the individual allottee landowner Defendants with representation, and setting a supplemental briefing schedule on the United States' Motion for Summary Judgment Re Ejectment. ECF No. 411.

On July 9, 2020, the Court entered an Order Granting the United States' Motion for Summary Judgment Re Ejectment finding that MA-8 is trust land, and ordering the ejectment of Mill Bay from the RV Park on MA-8. ECF No. 503. The Court held that, "[i]t is undisputed that Plaintiffs are presently in possession of a portion of MA-8" and "[i]t is undisputed that Plaintiffs have no lease or express easement authorizing their use of MA-8." *Id.* at 65.

On July 28, 2020, the Government requested that Mill Bay remove its personal property and recreational vehicles from MA-8 by September 30, 2020. On August 31, 2020, Mill Bay requested that it be allowed to formally close the park by September 30, 2020. The Government and the landowners holding a majority percentage interest in the land agreed. On September 30, 2020, Mill Bay vacated MA-8.

At trial, the Court heard competing expert testimony on damages, quantified as the reasonable rental value of the 23.52 acres of MA-8 during the period of Mill Bay's occupancy.

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The Federal Defendants' expert witness, Bruce C. Jolicoeur, initially concluded that the reasonable rental value of the subject property from February 1, 2009, to October 31, 2020, was $2,549,199. Ex. 20. He further concluded that the subject property's highest and best during the period of trespass was residential development, notwithstanding the fact that MA-8 was determined to be trust land and the fact that during the 2008-09 recession "sales activity slowed, and . . . sales of new homes all but stopped." *Id.* at 29.

Mr. Jolicoeur first developed an opinion of the fair market value of the property as of 2020, and then completed a "retrospective analysis" dating back from 2020 to 2009. *Id.* at 3. The appraisal was based on the "extraordinary assumption that characteristics of the land have not changed between February 2009 and the current date." *Id.*

Mr. Jolicoeur also appraised the property under the following hypothetical conditions: (1) the property could be sold openly under conditions similar to typical sales of property in private ownership; (2) the property rights transferred in a hypothetical sale of the subject property are similar to the fee simple interests typical in sales of privately owned land; and (3) the property is unimproved/vacant, "even though it is currently improved with an operating RV park." *Id.* at 3-4. He then opined a yield rate of 7 percent and applied this rate to the market value of the property to develop the total amount of rent due as compensation for trespass. *Id.* at 51.

With respect to residential development, Mr. Jolicoeur opined that if the land was held in private ownership, the likely zoning of the property was UR1. *Id.* at 25-26. Mr. Jolicoeur concluded that at four lots per acre, as allowed in the UR1 zone, the property could accommodate 94 lots. *Id.*

Mr. Jolicoeur's supplemental report, dated February 12, 2021, and produced after Plaintiffs' expert's report was disclosed, recalculated the rental value to be $1,674,600 for the period of trespass from February 2, 2009, to September 30, 2020. Ex. 268. The supplement was subject to the additional extraordinary assumption that wetlands exist on the subject property. *Id.* at 2.

Mr. Jolicoeur estimated that the trespassed portion of MA-8 included 10.124 acres of wetlands. *Id.* at 6. In addition to the wetlands, a buffer of 50' to 200' is required depending on the category of the wetlands. *Id.* Mr. Jolicoeur revised his opinion that the property could accommodate 94 lots to 58 lots, contending that some lots could incorporate a portion of the wetlands and set back area for recreational purposes. *Id.* at 10. Mr. Jolicoeur concluded that the market value of each lot was $43,000, and the fair market value of the property was $2,490,000. *Id.* at 19. He then completed a "retrospective analysis" for market value dating back from 2020 to 2009. *Id.* at 23. He once again applied a yield rate of 7 percent to develop the rent due for trespass. *Id.* Mr. Jolicoeur concluded that $1,674,600 is the total amount of rent due as compensation for trespass. *Id.* at 2.

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Plaintiffs' expert, Ken Barnes, testified that the reasonable amount of rental value for the duration of trespass is $1,411,702. Exhibits 1 at 10, 67 at 8. Mr. Barnes disagreed that the single highest and best use for the entire duration of trespass would be residential development, because such development is "speculative." Ex. 67 at 3. Mr. Barnes testified that the subject property's highest and best use is its current use as a RV park. *Id.* at 4, 8. However, if developed as residential property after the market had recovered from the recession, Mr. Barnes opined that the property could accommodate only 53 lots given the presence of 10.124 acres of wetlands. *Id.* at 3.

For comparative purposes, Mr. Barnes estimated market rent for a 53-lot development starting in year 5 (2013), after the recession and the market's recovery, using the same methodology as the Appraisal completed by Mr. Jolicoeur: market value times a rate of return. *Id.* at 4, 7-8. However, Mr. Barnes opined and applied a rate of return of 6 percent rather than the 7 percent yield rate used by Mr. Jolicoeur. Ex. 67 at 6-7. Using the same market value of $43,000 per lot that Mr. Jolicoeur had used, Mr. Barnes concluded that the fair market value of the property was $2,279,000. *Id.* at 8. Using the 6 percent rate of return, Mr. Barnes concluded that if the property was developed into a 53-lot development in 2013, the total amount of rent due as compensation for trespass would be $1,287,578. *Id.* at 7-8 ("Note that the Annual Rent for the 53-lot development never exceeds the Market Rent for an RV park.").

To estimate the market rent as a RV park from 2009 through 2012, Mr. Barns analyzed leases of RV parks

around Central Washington, including comparisons in Crescent Bar. *Id.* at 6. Based on these comparisons, Mr. Barnes concluded that the market rent for the subject 65 RV pads would be $1,700 per pad, or $110,500 per year, escalated by 4 percent beginning in 2013. *Id.* Based on the determination that the property's highest and best use is as a RV park, Mr. Barnes concluded that the total amount of rent due as compensation for trespass is $1,411,702. Ex. 67 at 8.

At the conclusion of the Defendants' case in chief, Plaintiffs moved for a directed verdict on the Federal Defendants' claim for trespass damages with respect to (1) the Mill Bay Members Association, Inc., and (2) Plaintiff Paul Grondal individually. Plaintiffs argued that the Federal Defendants had failed to present evidence as to the duration and location of the trespass. Plaintiffs renewed its motion for a directed verdict at the close of all the evidence, and the Court reserved ruling on the motion.

CONCLUSIONS OF LAW

Duration of Trespass

Federal law controls actions for trespass on Indian land. *See Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-36, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985). Federal common law allows the Government to bring a trespass claim, acting in its sovereign capacity as trustee, to remove trespassers from Indian land. ECF No. 503 at 61 (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994));

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?").

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. 25 C.F.R. § 162.023. Trespass means any unauthorized occupancy, use of, or action on any Indian land or Government land. 25 C.F.R. § 162.003.

Mill Bay's right to use MA-8 flowed from the Master Lease, which expired by its own terms on February 2, 2009. Thus, Mill Bay's right to use any portion of MA-8 expired on February 2, 2009. *See* Ex. 200 (outlining RV park's location on MA-8).

Aside from the Mill Bay members' physical use of the property, Mill Bay continuously occupied MA-8 by virtue of its personal property which included approximately 90 RVs, docks, a tractor, multiple sheds, numerous mowers, miscellaneous tools, a pump, network equipment, picnic tables, decks, gazebos, buoys, pool table, ping pong table, miracle rake, pole saw sheds, kayaks, and file cabinets. ECF No. 563. Many Mill Bay members left their RVs on MA-8 and further had "no ability to move their RVs" because some RVs were "located behind heavy concrete blocks walls that [would] require either an excavator or a team of people to dig out." Exhibits 255, 258 at 2-3; *see also see also* Exhibits 259-267 (aerial view of RV-park captured in 2009, 2011, 2013-2015, and 2017).

Accordingly, the Court finds that Mill Bay used and occupied the subject portion of MA-8 from February 2, 2009, to September 30, 2020, which constitutes the period of trespass.

Trespass Damages

Remedies for trespass on Indian land under federal common law include ejectment and damages. *United States v. Torlaw Realty, Inc.*, 483 F. Supp. 2d 967, 973 (C.D. Cal. 2007), *aff'd*, 348 F. App'x 213 (9th Cir. 2009).

The proper measure of damages for trespass is the fair rental value of the property, assuming that the property is being put to its highest and best use. *United States v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1066 (S.D. Cal. 1992). The highest and best use of a property is the use that is legally permissible, physically possible, and financially feasible which results in the highest value. Ex. 268 at 14.

Based on a careful review of the expert witnesses' testimony, the Court concludes that the highest and best use of the property is its present use as a RV park. The Court finds that the property was unlikely to be used as a residential subdivision during the time period in question given the recession occurring concurrently, the land's cultural significance, and the nature of any subsequent residential ownership being encumbered by the land's trust status rather than being held in fee simple.

The Court concludes that the reasonable rental value of the portion of MA-8 if used as its highest and best use

as a RV Park for the time period of February 2, 2009, through September 30, 2020, is **$1,411,702.00**.

Prejudgment Interest

An award of prejudgment interest under federal law is left to the discretion of the court. *Home Sav. Bank by Resolution Tr. Corp. v. Gillam*, 952 F.2d 1152, 1161 (9th Cir. 1991). Prejudgment interest has become a familiar remedy widely recognized by federal courts as a means to make a plaintiff whole against a dilatory defendant. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995). "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Board of County Commissioners v. United States*, 308 U.S. 343, 352, 60 S. Ct. 285, 84 L. Ed. 313 (1939).

The Court concludes that an award of prejudgment interest in this case would be inappropriate and inequitable and therefore exercises its discretion to deny prejudgment interest on that basis. The Court recognizes that there have been several significant delays involved in this case. However, the Court does not attribute these delays to either party. For example, the Court's previous Orders delayed resolution on liability in order to first determine whether MA-8 remained held in trust by the United States, ECF No. 308, as well as address concerns related to representation for the individual allottees, ECF Nos. 329, 411. Other delays were a product of the parties' joint requests or in response to the pendency of an appeal

before the Ninth Circuit in related matters. *See, e.g.*, ECF No. 150, 206.

Moreover, the circumstances giving rise to the occupancy constituting trespass do not support an award of prejudgment interest against Mill Bay, a non-profit corporation. As member Mr. Douglas Gibbs testified, memberships entitling members to use the RV park were represented to be effective through 2034. Although these representations proved to be false, Mill Bay's trespass was a direct result of the misrepresentations and flowed from the failure to renew the Master Lease by Evans and later by Wapato Heritage.

Therefore, in response to considerations of fairness, the Court declines to award prejudgment interest.

Post-judgment Interest

Under 28 U.S.C. § 1961, post-judgment interest on any money judgment is mandatory. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1994). The purpose of awarding post-judgment interest is to compensate the wronged party for the deprivation of the monetary value of its loss until the payment of the judgment by the defendant. *United States v. Bell*, 602 F.3d 1074, 1083 (9th Cir. 2010).

Thus, post-judgment shall be awarded on the amount of trespass damages totaling **$1,411,702.00**, running from the date of the entry of judgment until paid. Post-judgment interest shall be calculated at the statutory rate: a rate

equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. 28 U.S.C. § 1961(a).

Joint and Several Liability

The Federal Defendants seek to hold Paul Grondal and Mill Bay jointly and severally liable for trespass damages. ECF No. 676 at 3 (citing *Lovejoy v. Murray*, 70 U.S. 1, 10-11, 18 L. Ed. 129 (1865)) ("[P]ersons engaged in committing the same trespass are joint and several trespassers."). The rationale for joint and several liability is that "concerted wrongdoers are considered 'joint tort-feasors' and in legal contemplation, there is a joint enterprise and a mutual agency, such that the act of one is the act of all and liability for all that is done is visited upon each[.]" *Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 66, 73 (N.D.N.Y. 1999) (citations omitted)).

The Court finds that it would be inequitable to hold Mr. Grondal jointly and severally liable for the amount of trespass damages as he is one of many individuals who used MA-8 during the period of trespass. *See id.* at 72 (declining to find approximately 7,000 individual landowners jointly and severally liable "given the relative equities and because it would be fundamentally unfair.").

The act of Mill Bay occupying MA-8 after the Master Lease expired was the act of the Association comprised of 173 members, including Mr. Grondal. *See id.* at 73 ("[T]he act of one is the act of all and liability for all that is done

is visited upon each"). However, there is no evidence that Mr. Grondal's individual actions undertaken in relation to his membership to use MA-8 were different from the actions of the Association and its other 172 members or that he alone exacerbated the damages caused by Mill Bay's trespass so as to justify holding Mr. Grondal jointly and severally liable. The Court concludes that Mr. Grondal was a named member, but that he did not act differently from any other member of Mill Bay with respect to the act of trespassing on MA-8.

Accordingly, the Court declines to hold Plaintiff Paul Grondal jointly and severally liable for trespass damages. As one of 173 members, the Court will only hold Mr. Grondal severally liable for 1/173 of the trespass damages awarded to the Federal Defendants.

Mill Bay's Affirmative Defenses

Fault of a Non-Party

Mill Bay asserted the following defense to the Federal Defendants' counterclaim for trespass: "The Federal Defendants' alleged damages and injury were caused by the fault of other defendants in this action." ECF No. 43 at 5; *see also* ECF No. 668 at 7 (Mill Bay's stating exhibit at issue was relevant to "fault of a non-party" defense).

Although the camping memberships purchased by Mill Bay members or their predecessors in interest were represented to be effective through 2034, knowledge of one's status as a trespasser is not necessary to be in

trespass. *Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. 632, 646, 135 S. Ct. 1920, 191 L. Ed. 2d 883 (2015) ("Trespass can be committed despite the actor's mistaken belief that she has a legal right to enter the property.") (citations omitted). Furthermore, "comparative fault is inapplicable in the context of an intentional tort." *Est. of Moreno by & through Moreno v. Corr. Healthcare Companies, Inc.*, No. 4:18-CV-5171-RMP, 2019 U.S. Dist. LEXIS 228648, 2019 WL 10733237, at *3 (E.D. Wash. Aug. 5, 2019) (citing *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619, 623 (1999)).

Therefore, the Court finds that Mill Bay's fault of non-party defense is not applicable here.

Laches

Mill Bay seeks to limit the amount of damages based on the affirmative defense of laches. ECF No. 43 at 5-6.

To establish laches, a party must establish (1) lack of diligence by the opposing party, and (2) prejudice to the party asserting the equitable defense. *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961). "Laches is an equitable time limitation on a party's right to bring suit." *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979). "It protects against difficulties caused by the unreasonable delay in bringing an action, not against problems created by the pendency of a lawsuit after it is filed." *Id.* (citations omitted).

The Supreme Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring

within a federally prescribed limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680, 134 S. Ct. 1962, 188 L. Ed. 2d 979 (2014); *see* 28 U.S. C. § 2415(b); "[S]tate-law defenses to possessory claims, such as estoppel and laches, are [ ] preempted." *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, § 15.08[4] (citing *County of Oneida*, 470 U.S. at 241); *see also United States v. Ahtanum Irr. 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.").

Although laches cannot bar the government's claim for damages, a "lack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages." *Brooks v. Nez Perce County*, 670 F.2d 835, 837 (9th Cir. 1982) (fifty-four-year delay between government joining the action as party-plaintiff and wrongful taxation of Indian land by county); *Jones v. United States*, 9 Cl. Ct. 292, 294 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986) (affirming district court's award of damages which was reduced by fifty percent due to government's fifty-four-year delay in the exercising of its role as trustee).

The Court finds that the circumstances of the case do not warrant application of the equitable remedy of laches to reduce the award of damages here. Mill Bay instituted the instant case on January 21, 2009, prior to the trespass. ECF No. 1. The Federal Defendants asserted the counterclaim of trespass on April 3, 2009, within two months of the start of the trespass. ECF No.

42. On September 9, 2009, the Federal Defendants moved for summary judgment on their counterclaim for trespass seeking ejectment of Mill Bay. ECF No. 70. After the motion for summary judgment was denied with leave to renew, ECF No. 144, the Federal Defendants renewed their motion for summary judgment seeking an order ejecting Plaintiffs from MA-8 on March 22, 2021. ECF No. 231. Thus, there was no unreasonable delay in bringing the counterclaim, let alone any delay analogous to the half century delay in *Brooks*, so as to justify a reduction to the award of damages.

Plaintiffs argue that the Federal Defendants' non-attempt to reobtain possession during the pendency of this lawsuit via a temporary restraining order, preliminary injunction, or other provisional relief prejudiced Mill Bay due to the accrual of damages. However, Plaintiffs also specifically sought an order at the outset of litigation enjoining the Federal Defendants from closing or ejecting Mill Bay from the RV park pending a hearing and determination of Plaintiffs' request for injunctive relief. ECF Nos. 1 at 44, 8. Plaintiffs' request was denied with leave to renew. However, if Plaintiffs' motion had been granted, the result would have been a stay of the status quo.

Mill Bay now claims that the Federal Defendants' inaction[s] and the continuation of the status quo have prejudiced Mill Bay, but the fact that Mill Bay initially sought to ensure the Federal Defendants' inaction at the outset of this litigation cuts against the prejudice, if any, suffered by Mill Bay. *See also Weyerhaeuser Co. v.*

Brantley, 510 F.3d 1256, 1268 (10th Cir. 2007) (rejecting defendant's argument that plaintiff "should have mitigated damages by removing him from the land sooner" which the Court found "was an odd position given that [defendant] also claim[ed] a possessory right to the land and that he had no obligation to leave."); *see also* Ex. 243 (Mill Bay member Frank Smith providing a "Legal Report" at a Mill Bay Board Meeting on May 27, 2017, and stating that "[w]e are at a standstill—which is good for us.").

Accordingly, the Court does not find that the doctrine of laches is applicable to reduce the award of damages here.

Failure to Mitigate Damages

Mill Bay argues that the Federal Defendants' recovery in this action is barred in whole or in part by its alleged failure to mitigate damages. Mill Bay contends that the Federal Defendants failed to mitigate damages by (1) failing to diligently prosecute their ejectment counterclaim; and by (2) rejecting payments from Wapato Heritage.

"The doctrine of mitigation of damages prevents an injured party from recovering damages that she could have avoided if she took reasonable efforts after the wrong was committed." *Thompson v. United States Bakery, Inc.*, No. 2:20-CV-00102-SAB, 2020 U.S. Dist. LEXIS 223389, 2020 WL 7038591, at *3 (E.D. Wash. Nov. 30, 2020) (citation omitted); *see Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 122 (N.D.N.Y. 2002)

(finding that "Defendant cannot rely on Plaintiffs' delay in bringing suit to escape liability" but that "the defense of mitigation is relevant to [the] issue of damages").

For the same reasons that the Court rejected Plaintiffs' laches defense, discussed *supra*, the Court does not find that the Federal Defendants failed to mitigate their damages by failing to diligently prosecute their ejectment counterclaim. The facts show that there was no unjust delay by the Federal Defendants in filing the counterclaim for trespass. The Court does not assign more or less fault to one party over the other as to the length of this litigation.

With respect to the proffered payments by Wapato Heritage, the Court also does not find that the Federal Defendants failed to mitigate damages for Mill Bay's trespass by declining to accept payments from Wapato Heritage as there was no longer a valid lease or any other agreement with Mill Bay to which the Federal Defendants were a party.

Mill Bay's obligation to pay rent was owed to Wapato Heritage, which owed separate duties as Lessee under the Master Lease. Under the Master Lease, Wapato Heritage was obligated to pay to the individual allottee landowners 7.5 percent of rents collected from Mill Bay. *See* Ex. 45 at 3, 8 (Column C). Once the Master Lease expired in 2009, Wapato Heritage was no longer obligated to pay base or annual ground rent to the BIA since Wapato Heritage no longer leased MA-8. Before and after the Master Lease's expiration, there were no mutual obligations between the

Federal Defendants and Mill Bay; any obligations flowed through Wapato Heritage.

Furthermore, to the extent Plaintiffs rely on Landlord/Tenant principles to support their position that the BIA should have accepted payments toward holdover rent, ECF No. 674 at 27 (citing *In re Collins*, 199 B.R. 561, 565 (Bankr. W.D. Pa. 1996)), this Court previously held that "Plaintiffs were mere licensees, not tenants, as their right was to use the premises . . . Neither the Expanded Membership Agreements nor the 2004 Settlement Agreement have specific indicia of leases." ECF No. 144 at 29.

Therefore, the Court does not find that the Federal Defendants failed to mitigate their damages.

Offset/Recoupment

Mill Bay argues that any award of damages for trespass must be reduced by offset (also called setoff) or recoupment to account for Mill Bay's "prepaid rents" which include the "Expanded" camping memberships ($25,000 per membership), "Regular" camping memberships ($5,995 per membership), and additional monies tendered under the 2004 Settlement Agreement ($48,000). ECF No. 674 at 28.

Offset

"Setoff allows adjustments of mutual debts arising out of separate transactions between the parties." *In re*

Harmon, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995). "The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1996) (quoting *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995)). "Off-sets, which are often applied in the bankruptcy context, require mutuality: debts in the same right and between the same parties, standing in the same capacity." *Crowley Marine Servs., Inc. v. Vigor Marine LLC*, 17 F. Supp. 3d 1091, 1098 (W.D. Wash. 2014) (citing *Newbery Corp.*, 95 F.3d at 1398). "The right of off-set is permissive and rests in the discretion of the court, applying general principles of equity." *Crowley Marine Servs., Inc.*, 17 F. Supp. 3d at 1098.

The Court finds that offset is not applicable here where there are no mutual debts between the Federal Defendants and Mill Bay, the only remaining parties in the action before the Court. Whereas Mill Bay is liable to the Federal Defendants for trespass damages, there has been no showing that the Federal Defendants owe Mill Bay any monetary damages. Furthermore, the Court finds that application of an equitable doctrine, such as offset, is not appropriate here where recovery, if any, of Mill Bay's "prepaid rents" sound in contract, arising under agreement[s] between Mill Bay and Wapato Heritage, separate from the action of ejectment and trespass currently before this Court.

Appendix B

Recoupment

The parties disagree as to whether Mill Bay timely asserted recoupment as an affirmative defense. *See also* ECF No. 676 at 14; ECF No. 674 at 29 n. 3 (Plaintiffs stating that "[r]ecoupment has been treated as a subset of offset.").

"When the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred." *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970). Notwithstanding the United States' inferred consent to competing claims, an affirmative defense such as offset or recoupment must be pled. *See In re Tews*, 502 B.R. 566, 569, 570 n 5 (2013) (citing Fed. R. Civ. P. 8(c)); *see also Newbery Corp.*, 95 F.3d at 1399 (stating "recoupment has been analogized to both compulsory counterclaims and affirmative defenses."). Plaintiffs' Answer to the Federal Defendants' counterclaim is silent with respect to recoupment. ECF No. 43 at 6 ("Plaintiffs are entitled to offset against any damages awarded to Federal Defendants."). In the bankruptcy context, for example, whereas "[r]ecoupment and setoff have much in common, [ ] they have differences with important consequences." *In re TLC Hosps., Inc. v. United States Dep't of Health and Human Servs.*, 224 F.3d 1008, 1011 (9th Cir. 2000). Nonetheless, the Court exercises its discretion to consider recoupment in resolving the issue of trespass damages.

The doctrine of recoupment is equitable in nature and "involves a netting out of debt arising from a single transaction." *In re Harmon*, 188 B.R. at 425. "A claim

for recoupment, if successful, can reduce or eliminate the amount of money that would otherwise be awarded to the plaintiff." *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017).

To constitute a claim in recoupment, a defendant's claim must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim. *Id.* (citing *Berrey v. Asarco Inc.*, 439 F.3d 636, 645 (10th Cir. 2006)). To determine whether a recoupment claim arises out of the same transaction or occurrence, courts in the Ninth Circuit apply the "logical relationship test." *In re Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 975 F.3d 926, 934 (9th Cir. 2020). "[T]he 'logical relationship' concept is not to be applied so loosely that multiple occurrences in any continuous commercial relationship would constitute one transaction." *In re TLC Hosps., Inc.*, 224 F.3d at 1012.

With respect to the "Expanded" and "Regular" camping memberships purchased by Mill Bay, and other monies paid pursuant to the 2004 Settlement Agreement, the Court finds that these payments are not part of the same transaction or occurrence as the Federal Defendants' counterclaim for trespass, but rather, are more appropriately characterized as "multiple occurrences in [a] continuous commercial [contractual] relationship" between Mill Bay and Wapato Heritage. *See* ECF No. 503 at 65 ("These camping memberships are contracts between Plaintiffs and Evans/Wapato Heritage."); *see also* Ex. 41 ("The [BIA] was not a party

to the Agreement with the RV members"). Although Mill Bay may be able to recover a portion of these payments from Wapato Heritage to the extent they did not receive the full benefit of the bargain, that bargain was between Mill Bay and Wapato Heritage and predated the period of trespass.

Accordingly, the Court does not find that the award of trespass damages should be reduced under the doctrines of offset or recoupment based on payments made to Wapato Heritage.

Wapato Heritage's 23.8% Interest

Mill Bay contends that the Court should reduce damages by the amount paid by Mill Bay to Wapato Heritage in annual rents, or reduce the total award by 23.8 percent, representing Wapato Heritage's 23.8 percent life estate interest in the trespassed property, in recognition of Mill Bay's offset/recoupment defense. ECF No. 675 at 33.

Mill Bay's argument is premised on two underlying contentions: (1) Any trespass damages awarded will "ostensibly be remitted to the landowners, pro-rata, based on their respective beneficial ownership percentages of MA-8 . . . [t]his distribution includes to Wapato Heritage," and (2) "Wapato Heritage should not be permitted to recover trespass damages despite acquiescing and profiting from Mill Bay's occupancy." ECF No. 674 at 32-34.

"A non-Indian devisee . . . may retain a life estate in the interest involved, including a life estate to the revenue produced from the interest." 25 U.S.C. § 2205(c)(2)(B). "Where the vested holders of remainder interests and the life tenant have not entered into a written agreement approved by the Secretary providing for the distribution of proceeds . . . the Secretary must distribute all rents and profits, as income, to the life tenant." 25 C.F.R. § 179.101(a)(2), (b)(1). "Rent and profits means the income or profit arising from the ownership or possession of the property." 25 C.F.R. § 179.2.

To the extent Mill Bay seeks to reduce the amount of damages by the amount of annual rental payments made to Mill Bay from 2009-2020, totaling approximately $402,500, it is undisputed that these funds were not remitted to the BIA for distribution to the individual allottee landowners, but appear to have been retained by Wapato Heritage. Exhibits 25, 27-30, 45 at 8. The Court finds, as noted *supra*, that the 2004 Settlement Agreement and the transactions between Mill Bay and Wapato Heritage occurring thereunder are "multiple occurrences in [a] continuous commercial [contractual] relationship." *In re TLC Hosps., Inc.*, 224 F.3d at 1012. The Court finds it inappropriate to apply an equitable doctrine, such as offset or recoupment, to reduce trespass damages where the monies at issue were tendered under a separate contractual relationship and the payments or a percentage portion of those payments were not paid to the individual allottee landowners. However, nothing in this Order shall prohibit Mill Bay from seeking recourse from Wapato Heritage in a separate action.

The Court also concludes that the damages awarded to the Federal Defendants should not be offset by 23.8 percent representing Wapato Heritage's life estate interest. "Setoff allows adjustments of mutual debts arising out of separate transactions between the parties." *In re Harmon*, 188 B.R. at 425.

In asserting its claims and defending against the Federal Defendants' counterclaim for trespass, Mill Bay did not assert any claim[s] against Wapato Heritage individually. Upon dismissal of Wapato Heritage's remaining crossclaims, ECF No. 644, and the Federal Defendants' voluntary dismissal of their sole crossclaim against Wapato Heritage, ECF No. 652, the Court dismissed Wapato Heritage from this action absent a showing that it had suffered an injury-in-fact by Mill Bay's trespass. Thus, Wapato Heritage is a non-party at this juncture, and the Court finds no cognizable basis to reduce the award of damages by 23.8 percent.

CONCLUSIONS

1. The reasonable rental value of the portion of MA-8 for the period of trespass is **$1,411,702.00**.

2. Mill Bay occupied the RV park on MA-8 since February 2, 2009, until it vacated MA-8 on September 30, 2020. Thus, Mill Bay trespassed on MA-8 for 11 years, 7 months, and 29 days (or 4,259 days in total).

3. The Federal Defendants did not fail to diligently prosecute its ejectment/trespass damages claim.

4. Having found that the Federal Defendants did not fail to diligently prosecute its ejectment/trespass damages claim, the Federal Defendants' actions or inactions did not prejudice Mill Bay.

5. Mill Bay's membership fees, settlement payments, and annual payments by Mill Bay to Wapato Heritage, which were never remitted to the individual allottee landowners, shall not be treated as "prepaid rents" for the right to use and occupy MA-8 through 2034.

6. Trespass damages that accrued during this litigation shall not be reduced based on laches.

7. Trespass damages that accrued during this litigation shall not be reduced based on failure to mitigate damages by the Federal Defendants.

8. Even if Mill Bay had pleaded recoupment as an affirmative defense, trespass damages that accrued during this litigation shall not be reduced based on recoupment.

9. Trespass damages that accrued during this litigation shall not be reduced by Wapato Heritage's 23.8 percent beneficial interest in recognition of Mill Bay's offset defense.

10. Prejudgment interest shall not be awarded.

11. Post-judgment interest shall be calculated at the statutory rate. 28 U.S.C. § 1961(a).

12. Joint and several liability against Plaintiffs Paul Grondal and Mill Bay Members Association, Inc., shall not be entered. The Court will only hold Mr. Grondal severally liable for 1/173 of the trespass damages awarded to the Federal Defendants.

13. Plaintiffs' Motion for Directed Verdict with respect to the Federal Defendants' claim for trespass damages against (1) the Mill Bay Members Association, Inc., and (2) Paul Grondal is **DENIED**.

Accordingly, **IT IS HEREBY ORDERED**: Judgment shall be entered in favor of the United States and against Plaintiffs Paul Grondal and Mill Bay Members Association, Inc., severally liable, in the amount of **$1,411,702.00** with post-judgment interest running from the date of the entry of judgment until paid, and set at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment pursuant to 28 U.S.C. § 1961(a).

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, provide copies to counsel, prepare Judgment in accordance with this Order, and **close this case**.

DATED May 17, 2021.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, FILED JULY 9, 2020

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF 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.

Appendix C

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

ORDER DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT, DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT RE EJECTMENT

July 9, 2020, Decided;
July 9, 2020, Filed

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 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

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.

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 needed to give notice of renewal to the Lessor by 2008.

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2. According to Judge Whaley in the related case, *Wapato Heritage, L.L.C. v. United States*, 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.

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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 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.

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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 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

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

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.

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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.

Appendix C

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.

Appendix C

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, 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 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.

Appendix C

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]

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.

5. In 2012, certain individual allottees filed a motion to join the Government's renewed Motion for Summary Judgment re Ejectment. ECF No. 344.

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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 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 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

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.").

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*, 667 F.2d at 1166). 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. 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).

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.

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.

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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.

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. *United States v. Oregon*, 787 F. Supp.

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).

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 Yakima 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 Yakima 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 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 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][e], 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 Nespelim, 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.

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*

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> *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).

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).

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 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.

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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 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.

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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. United States Dist. Court*, 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." *Pac. Coast Fed'n of Fishermen's Ass'ns 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)).

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)).

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

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.

broad statutory 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.

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. 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, 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)).

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.

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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.*

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 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 (9th 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

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

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 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)).

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.

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 Wn.2d 874, 691 P.2d 524, 541 (Wash.

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.

1984); *see also DigiDeal Corp. v. Kuhn*, No. 2:14-CV-227-JLQ, 2015 U.S. Dist. LEXIS 124629, 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." *Sloma v. Wash. State Dep't. of Retirement Systems*, 12 Wn. App. 2d 602, 459 P.3d 396, 406 (Wash. Ct. App. 2020) ("More importantly, equitable estoppel is not available for use as a "sword," or cause of action."); *Byrd v. Pierce Cty.*, 5 Wn. App. 2d 249, 425 P.3d 948, 952-55 (Wash. Ct. App. 2018) (discussing cases and explaining that equitable estoppel is a defense, not a separate action in equity) (citing *Motley-Motley, Inc. v. PCHB*, 127 Wn. App. 62, 110 P.3d 812, 818 (Wash. Ct. App. 2005)).

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

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 [] 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.

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 322).

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.

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 U.S. Dist. LEXIS 60573, 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 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.

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.

Kramarevicky v. Dep't of Soc. & Health Servs., 122 Wn.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 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

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 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.

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.

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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.

56(a); *see also Celotex Corp.*, 477 U.S. at 322-23. Because the Government would have the burden of proof at trial on its trespass counterclaim, in order to succeed on summary 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 322).

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

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 Irrigation 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 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.

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 U.S. Dist. LEXIS 17170, 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.

"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 U.S. Dist. LEXIS 17104, 2018 WL 660634, at *2 (E.D. Wash. Feb. 1, 2018) (quoting *Egbert v. Way*, 15 Wn. App. 76, 546 P.2d 1246, 1248 (Wash. Ct. App. 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 Wn. App. 825, 572 P.2d 742 (Wash. Ct. App. 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 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.

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. The District Court Clerk is directed to enter this Order and provide copies to counsel and pro se Defendants.

DATED July 9, 2020.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER ON DISPOSITIVE MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, FILED JANUARY 12, 2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CV-09-0018-JLQ

PAUL GRONDAL, A WASHINGTON RESIDENT; AND THE MILL BAY MEMBERS ASSOCIATION, INC., A WASHINGTON NON-PROFIT CORPORATION,

Plaintiffs,

vs.

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

Defendants.

MEMORANDUM OPINION AND ORDER ON DISPOSITIVE MOTIONS

I. INTRODUCTION

Pending before the court are six motions: Federal Defendants' Motion to Dismiss and Motion for Summary Judgment (Ct. Rec. 70); Plaintiffs' First Motion for Summary Judgment re: Contract Terms (Ct. Rec. 77); Plaintiffs' Second Motion for Summary Judgment re: Settlement Agreement (Ct Rec. 79); Plaintiffs' Third Motion for Summary Judgment re: Estoppel (Ct. Rec.

81); Plaintiffs' Fourth Motion for Summary Judgment re: Arbitrary and Capricious Action and Due Process Violation by BIA (Ct. Rec. 83); Plaintiffs' Fifth Motion for Summary Judgment re: Actual Notice of Option to Renew (Ct. Rec. 85).

On October 29, 2009 the court heard oral argument on all motions. Appearing on behalf of Plaintiffs were James Danielson and Kristin Ferrera. Appearing on behalf of Defendants the United States of America, the United States Department of Interior, and the Bureau of Indian Affairs ("the Federal Defendants") was Pamela DeRusha. Appearing on behalf of the Confederated Tribes of the Colville Reservation was Timothy Woolsey.

None of the individually named Defendants who have ownership interests in the real property known as MA-8 appeared. The court notes that the United States has not entered an appearance on behalf of any of the named individual Indian landowners. The court does not know why such an appearance has not been filed since the United States actually *granted* the Master Lease (as opposed to simply approving it) on behalf of at least certain landowners pursuant to its authority under 25 C.F.R. § 162.601.[1] More importantly, 25 U.S.C. § 175

1. 25 C.F.R. § 162.601 provides in relevant part:

(a) The Secretary may grant leases on individually owned land on behalf of:

(1) Persons who are non compos mentis;

(2) Orphaned minors;

provides that "[i]n all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity," although the statute is not mandatory. *Siniscal v. United States,* 208 F.2d 406, 410 (9th Cir.1953) (holding that 25 U.S.C.A. § 175 is not mandatory and that its purpose "is no more than to *insure the Indians adequate representation in suits to which they might be parties.*") Unlike this case, in *Siniscal,* the Indians named were being sued as individuals and "not with reference to any right in which the United States…is in the position of trustee or guardian." *Id.* At least one court has recognized where there is a possible conflict of interest between the Indians and the United States, it may be proper for the Indians to be represented by private counsel. *State of New Mexico v. Aamodt,* 537 F.2d 1102, 23 Fed. R. Serv. 2d 810 (10th Cir. 1976). The United States has not provided any

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(3) The undetermined heirs of a decedent's estate;

(4) The heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and

(5) Indians who have given the Secretary written authority to execute leases on their behalf.

(b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve such property.

…

reason for its failure to enter an appearance on behalf of the un-represented individual Indian landowners to make certain they have adequate representation in this action.

The six motions before the court are in essence cross-motions for summary judgment. The Federal Defendants' motion seeks summary judgment on their counterclaim for ejectment of the Plaintiffs' from their occupancy of the real property known as MA-8. Plaintiffs' motions seek dismissal of the Federal Defendants' counterclaim. Plaintiffs' motions also seek summary judgment on their five causes of action, all seeking declaratory judgment that the Plaintiffs have the legal right to use and occupy the Mill Bay Resort (located on MA-8) through the year 2034. Federal Defendants' seek dismissal of Plaintiffs' five causes of action seeking declaratory judgment based upon a lack of jurisdiction and for failure to state a claim. The Federal Defendants take the position that the Plaintiffs' right to occupy the Mill Bay Resort expired on February 2, 2009 pursuant to the terms of the MA-8 Master Lease.

II. STATEMENT OF FACTS

Plaintiffs are occupants of the Mill Bay Resort which exists on real property known as Moses Allotment No. 8, also known as Indian Allotment 151-MA-8 ("MA-8"). MA-8 consists of approximately 174.26 acres on the shores of Lake Chelan in Chelan County, Washington. While the record does not contain a chronology of the conveyance history of the property, evidence in the record reflects that the property was originally designated as part of the Columbia (or Moses) Reservation created by Executive

Order in 1879, but then subsequently the reservation passed out of existence and the property was allotted under the General Allotment Act of 1877. Ct. Rec. 90, Ex. 13. The MA-8 property was allotted to Wapato John in 1907 pursuant to an agreement between the Moses Band of Indians and the Secretary of the Interior. The trust patent issued by the United States for the MA-8 property provided that it was to be held in trust for Wapato John or his heirs for ten years, and then to be conveyed in fee "free of all charge or incumbrances." Ct. Rec. 90 at 178.

Upon the death of Wapato John, his interest in MA-8 passed in undivided interests to his heirs. Thereafter, interests in MA-8 continued to pass pursuant to inheritance, probate proceedings and by purchase. By the 1980s, the beneficial ownership interest of Wapato John's heirs had fractioned into many interests. Most (but not all) were still held in trust status (e.g. had Indian landowners). A small percentage of MA-8 is non-Indian land owned in fee.[2] Ct. Rec. 90, Ex. 103. It is undisputed that the portion of MA-8 at issue is trust property, held in trust by the United States and administered by the U.S. Department of Interior, Bureau of Indian Affairs ("BIA"). The local department of the BIA is known as the Colville Agency.

a. *The Master Lease.* In 1979, an Indian landowner named William Wapato Evans, Jr., ("Evans") held an approximate 5.4% beneficial ownership interest in MA-8. Evans desired to lease the entire parcel (which was

2. A 1984 BIA memorandum states the allotment at that time consisted of 97% trust interest. Ct. Rec. 90, Ex. 20 at 211-212.

largely undeveloped at that time) from his co-owners for a development.

In 1982, Evans began negotiating a 25-year lease of MA-8 from the then existing individual landowners, and eventually obtained approval for his proposed lease from additional individual heirs of MA-8 representing a total of approximately 64% of the ownership interests. Ct. Rec. 90, Ex. 15. It is undisputed the BIA had "guardianship signatory authority" for the remaining minority number of allottees pursuant to 25 C.F.R. § 162.601. The BIA consented to the lease on behalf of the rest of the trust interests pursuant to this regulatory authority. On February 2, 1984, the BIA approved Lease No. 82-21 (the "Master Lease") between Evans and his Indian co-owners.

b. *Parties to the Master Lease.* The master lease defines the "Lessee" as Evans, and the "Lessor" as individuals whose names and addresses were to be listed in an attached "Exhibit A." 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. No landowner signed the lease.

The Master Lease provided income in the form of rent to the beneficial owners of MA-8.

c. *Stated Purpose.* The Master Lease provides for the use of the property for the "purpose of a recreational

development and related activities." Ct. Rec. 90at 31 [Ex. 1 at ¶ 6]. At the time the Master Lease was signed it was contemplated that portions of the leased property would be "allocated to recreational vehicles on a 'right to use' basis." *Id.* at 29 [Ex. 1, ¶ 4(b)].

d. *Renewal.* The Master Lease contains the following provisions regarding renewal:

> 3. *TERM-OPTION TO RENEW*
>
> The term of this lease shall be twenty-five (25) years, beginning on the date that the lease is approved by the Secretary.
>
> This lease may be renewed at the option of the Lessee for a further term of not to exceed twenty=five [sic] (25) years, commencing at the expiration of the original term, upon the same conditions and terms as are in effect at the expiration of the original term, provided that notice of the exercise of such option shall be given by the Lessee to the Lessor and the Secretary in writing at lease [sic] twenve [sic] (12) months prior to said expiration of original term.

Ct. Rec. 90, Ex. 1, ¶ 3. The notice provision of the Master Lease provided that all "notices, payments, and demands shall be sent to either party at the address herein recited or to such place as the parties may hereafter designate in writing. Notices and demands shall be served be [sic]

certified mail, return receipt requested…Copies of all notices and demands shall be sent to the Secretary in care of the office of the [BIA]…All notices to Lessor shall be sent to the landowners. The Secretary shall furnish Lessee with the current names and addresses of Lessor upon the request of Lessee." Ct. Rec. 90 at 49. According to this provision, the deadline for exercising the option to renew was February 1, 2008.

e. *Changes in the Development Plan.* The Master Lease included a provision requiring the Lessor to submit for approval to the BIA the plans and specifications, and any substantial changes in the plans or specifications, for the development of the property. Ct. Rec. 90 at 34. It did not require BIA approval of documents to develop relationships with tenants of the RV park.

f. *Subleases.* Paragraph 8 of the Master Lease states:

> 8. *STATUS OF SUBLEASES ON CONCLUSION OF LEASE*
>
> Termination of thie [sic] 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 no [sic] require any new or additional performance not already provided or previously performed by Lessee. Beginning on January 15, 1984, and

> annually thereafter on each following January 15, Lessee shall send to Lessor a list of all sublessees together with their addresses.

Ct. Rec. 90 at 32.

A sublease through which the Mill Bay camping resort was created was entered into on June 11, 1984, between Evans and his company Mar-Lu, Ltd. Ct. Rec. 73 [Defs' SOF] at 33 [Ex. 2], *also* Ct. Rec. 90, Ex. 3. The term of the sublease states it "shall expire on the date of the expiration of the Master Lease and exercised extension option, if any, whichever be the later." *Id.* at 34. Evans then began selling memberships through Mar-Lu Ltd. Evans later dissolved Mar-Lu and continued selling memberships through Chief Evans, Inc.

g. *Purported Renewal.* In 1985, Evans purported to exercise the option to renew the Master Lease by a letter dated January 30, 1985, which Evans sent to the Colville Agency signed by Evans as "General Partner, Mar-Lu, Ltd." The letter referenced the Master Lease and 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 hereby exercises its option to renew the subject lease for 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 of subject lease to February 1, 2034.

Ct. Rec. 90, Ex. 27 at 227. The renewal clause, however, required that notice be given to the "Lessor and the Secretary." The renewal clause did not require the Lessor or BIA to confirm receipt of the renewal notice. There is no evidence in the record of any written response by the Colville Agency to Evans' renewal letter. There is also no evidence in the record that the Colville Agency, in its role as fiduciary, forwarded any notice of the BIA's receipt of Evans' letter to the landowners. It can not be determined from the record when, if ever, the MA-8 landowners became aware of Evans' purported renewal of the master lease. There is no evidence that anyone, from the time of Evans' 1985 letter until the year 2007, questioned whether Evans had validly exercised the renewal of the Master Lease.

The written record reflects that during the course of over twenty years, Evans and his successors after his death, the BIA, and some of the Indian landowners proceeded, without questioning, upon an assumption that the term of the Master Lease would be and had been validly extended an additional 25 years to the year 2034. For example, in 1996, the BIA sent letters to certain MA-8 landowners stating "the term of this lease is to expire February 1, 2034." Ct. Rec. 90, Ex. 35. In 2004, the BIA listed itself as the "landlord" in a document provided to the Washington state liquor control board and also stated that the lease expired in 2034. Ct. Rec. 90, Ex. 69 at 403. As further described herein, business transactions and the development of MA-8 proceeded based upon these assumptions.

h. *Modification of the Development Plan - RV Park Expanded Memberships.* In 1989, Evans sought to modify his development plan to add a golf course and to change the RV Park to introduce "expanded camping memberships" so that campers could pay for a more exclusive right to a specific RV site on MA-8. As required by the terms of the Master Lease, he sought the BIA's approval for this change in development plan. Evans provided a copy of the "Expanded Membership Sale Agreement" to the BIA, the same document provided to those individuals who wished to purchase a membership. Ct. Rec. 90, Ex. 30-32. The Expanded Membership Agreement's provision on the duration of the agreement stated: "'*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.*" The BIA agreed to Evans' proposed change in the development plan by letter dated July 7, 1989. Its approval letter stated, "The modification in accordance with 'Expanded Membership Sale Agreement' has been reviewed by the Superintendent, and permission will be granted to incorporate into the lease." In its approval of the modification of the Master Lease, the BIA made no mention of and did not question the Membership Agreement's characterization of the 2034 term of the Master Lease. Ct. Rec. 90 at 231-247, Exs. 30-33.

In 1991, Evans began selling the "expanded memberships" to Mill Bay Members and new buyers. Evans and his staff made recitals in writing and verbally, that the membership agreements were coextensive with what was believed to be the 50-year term of the master lease. Between 1984 and 1994, approximately

183 consumers purchased camp memberships paying anywhere from $ 5995 to $ 25,000 for the membership. Ct. Rec. 1 at 94.

i. *1993 CTEC Sublease for the Casino.* On August 6, 1993, Evans negotiated a sublease of MA-8 to the Colville Tribal Enterprises Corporation ("CTEC") for purpose of construction and operation of a casino on a portion of MA-8. Ct. Rec. 90, Ex. 4. The sublease references Evans' January 30, 1985 letter and states that the option to renew the Master Lease had been exercised by that letter. Although the BIA would fourteen years later take the position that the option to renew the lease *had not* been properly exercised, the BIA approved the CTEC sublease on November 10, 1993 apparently without questioning the term of the Master Lease.

j. *RV Park Members Litigate with Wapato Heritage.* A dispute over Mill Bay members' right to occupy MA-8 began in 2001 when Evans informed the Mill Bay members that he was considering closing the RV park at the end of the 2001 season due to financial losses. The Mill Bay Resort members believed they had purchased the right to occupy the resort until the year 2034. The Mill Bay Resort Members began pursuing information from the BIA regarding Evan's threatened action. They filed Freedom of Information Act requests from the BIA for information pertaining to MA-8's Master Lease. They also contacted the BIA by letter dated May 8, 2002 because it was their belief the BIA had approved the plans for the expanded membership agreements, which included terms lasting to 2034. The letter requested the BIA to provide

them an "official position" regarding the threatened action by Evans. Ct. Rec. 89 at 53-54. The BIA did not take a position because it took the narrow view that the major dispute was over the contractual rights obtained by the resort members in their membership agreements with Evans. The inquiry apparently did not cause the BIA to review or question the purported renewal of the Master Lease. Ct. Rec. 90 at 475-76 (Ex. 85).

Litigation eventually ensued. A lawsuit was filed in Colville Tribal court seeking to close the RV park. Ct. Rec. 90 at 254; Ct. Rec. 91 at 4. Evans died on September 11, 2003. Prior to his death, Evans established "Wapato Heritage LLC" to manage his non-trust assets. When he died his leasehold interest as the *lessee* of MA-8 was acquired by Wapato Heritage LLC.[3] In 2004, Plaintiffs herein, Paul Grondal and the Mill Bay Resort Members, filed suit in Chelan County court seeking damages against Wapato Heritage LLC. During the proceedings the approximately 180 Mill Bay Resort contract holders formed and incorporated the "Mill Bay Members Association."

The litigation between Wapato Heritage LLC and Mill Bay Members was ultimately resolved through mediation and a settlement agreement. Ct. Rec. 90, Ex. 2. The settlement agreement between Wapato Heritage LLC and the RV Park Members modified the camping membership agreements. The RV Park Members agreed

3. Wapato Heritage LLC possesses a life estate in Evans' MA-8 allotment interest (approximately 23.8% of MA-8) with the remainder reverting to the Colville Confederated Tribes.

to reduce the space of the RV Park and increase the rent (retroactive to January 1, 2004) paid to Wapato Heritage LLC to $ 25,000 a year, incrementally increasing in years thereafter up to $ 55,000 a year. Ct. Rec. 90, Ex. 2. A key issue involved in the mediation was the RV Park Members desire to remain on MA-8 through 2034. The settlement proposals and the final 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." Ct. Rec. 90, Ex. 2 at 62. The settlement agreement provided that "…the 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." Ct. Rec. 90, Ex. 2 at 63. The Master Lease is listed as one of the "Prior Documents." The agreement was approved by the state court on November 23, 2004. The BIA, Colville Tribes, and the CTEC received notice of the agreement. Ct. Rec. 90 at 458-61 [Ex. 78].

The BIA was informed throughout the litigation of its progress and repeatedly asked by counsel for Wapato Heritage LLC to formally intervene and to participate in the mediation, recognizing that the issues the parties were attempting to resolve involved trust property and implicated rights provided for in the Master Lease. Though the BIA did not formally intervene in the case, its agents were informed, attended hearings (Ct. Rec. 126 at 59 [Ex. 114]), and participated in the mediation which ultimately resolved the case. Ct. Rec. 89 at 8-9.

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It is uncontested that over the course of the years, representations had been made to some landowners on various occasions and at meetings that the Master Lease did not expire until 2034. The individual MA-8 landowners were not in attendance at the mediation and were not parties to the 2004 settlement agreement. At the time of the settlement, Wapato Heritage LLC began negotiations to obtain consent of the landowners and authorization to obtain a "Replacement Lease" for MA-8 which would carry a 99-year term and allow the development of a 75 lot residential subdivision. After the settlement, the RV Park Members paid the rent to Wapato Heritage and in February and April, 2007, Wapato Heritage wrote checks dividing the rent payable to each individual landowner. Ct. Rec. 91. The BIA distributed the checks. A note authored by Wapato Heritage LLC was sent with the first round of checks to each landowner informed each landowner that the remaining half of their rent check would be mailed upon receipt of their vote upon the proposed 99 year lease/ development of MA-8. *Id.* at 10; Ct. Rec. 90, Ex. 82-84. The BIA distributed the checks along with Wapato Heritage's note to the landowners. The effort to obtain a 99-year lease was still ongoing when litigation was commenced in this district in June 2008.

k. *BIA's Review of the Status of the Renewal of the Master Lease*

The BIA admits it did not examine or question the legal efficacy of the purported renewal of the Master Lease until late 2007. This despite being well-informed of the RV Park Members' 2004 state court litigation,

mediation and settlement, and despite repeated direct inquiries to the agency the response to which should have involved a review the Master Lease and the renewal:

• In August 2004, the BIA was asked in a letter from Evans' daughter, Sandra Evans, whether "her father's extension of the master lease in 1987 has any effect on the renewal of the RV Park sublease." Ct. Rec. 90 at 423 [Ex. 75].

• At some point after the Master Lease was entered into, the Colville Confederated Tribes ["CCT"] acquired an ownership interest(s) in MA-8 (approximately 18% in October 2007). On January 21, 2005, reservation attorney, Rit Bellis, sent a letter to the BIA requesting a meeting to discuss "options of cancelling the Master Lease and the option of taking over the management of MA-8 during the Interim Order." Ct. Rec. 90, Ex. 81.

• In October 2006, MA-8 landowner Marlene Marcellay specifically asked the BIA to answer the question: "When did the BIA approve the option to extend? Was the option to extend the lease until the year 2034 actually presented to and approved by 51% of the landholders?" Ct. Rec. 126 at 47 [Ex. 112]. According to her follow up letters to the BIA, by March 28, 2007, the BIA had failed to respond to her inquiry. Ct. Rec. 126 at 51 [Ex. 112].

One year after Marcellay's inquiry, in October 2007, allegedly after the Tribe sent a letter to the BIA requesting a meeting to discuss the status of the renewal of the Master Lease, the BIA then examined the issue

of renewal. In a letter to Wapato Heritage LLC dated November 30, 2007, the BIA stated its position that the option to renew had not been effectively exercised by Evans' 1985 letter to the BIA because there was no evidence Evans had provided notice of his exercise of the option to renew to the landowners as required by the terms of the Master Lease. Ct. Rec. 90 ex. 93. In order to complete its review of the issue, the letter requested Wapato Heritage provide documentation if its records indicated otherwise. *Id.*

Although there was still two months left to effectuate a renewal under the terms of the Master Lease, Wapato Heritage's counsel, Michael Arch, responded to the BIA with a letter dated December 18, 2007, expressing disagreement with the position taken by the BIA, calling it "erroneous and frivolous,"and threatening litigation. Ct. Rec. 90 at 654-55 [Ex. 94]. Arch's response did not mention that in December 2006, he had apparently copied "the Allottees" on a letter to the BIA with Bill Evans' 1985 renewal letter attached. Ct. Rec. 9.

On April 3, 2008 the Colville Confederated Tribe's Tribal Business Council passed a resolution expressly indicating its support of the BIA's position concerning the expiration of the Master Lease and expressing its interest in "seeking to be the new Master Lease holder upon expiration of the current Master Lease." Ct. Rec. 90, Ex. 93 at 648.

On June 9, 2008, Wapato Heritage filed its action in the U.S. District Court against the United States challenging the decision made by the BIA that the Master Lease

was to expire on February 2, 2009. *Wapato Heritage LLC v. United States,* EDWA Cause No. 08-CV-177-RHW ("*Wapato Heritage* case"). Wapato Heritage LLC asserted three arguments: 1) that Evans had actually or substantially complied with the renewal notice terms of the Master Lease; 2) alternatively, regardless of Evans' actions, the BIA through its own actions had approved and extended the term of the lease; and 3) that equity favored a determination that the lease renewal was validly exercised. Both parties moved for summary judgment under the Administrative Procedures Act. On August 7, 2008, Acting BIA Superintendent informed Wapato Heritage that it believed the Master Lease would expire as of February 2, 2009. The agency's decision was administratively appealed and upheld in October, 2008.

On November 21, 2008, Judge Whaley issued a decision in the *Wapato Heritage* case rejecting all three of Wapato Heritage LLC's contentions and dismissing the claim for declaratory judgment that the option to renew was validly exercised. In denying the motion for reconsideration, Judge Whaley held:

> Moreover, the law and the Master Lease itself remain clear that the Bureau of Indian Affairs is not the lessor nor even a party to leases of this kind….Plaintiff's renewed argument that 'BIA was the sole Lessor under the Master Lease'…is inconsistent with the unambiguous language of the lease and the law guiding the Court's interpretation of that instrument.

Cause No. 08-CV-177-RHW, Ct. Rec. 58 at 3.

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After Judge Whaley's ruling, on December 10, 2008, the BIA informed the occupants of MA-8 that the Master Lease would expire as of February 2, 2009 and that their right to use and occupy the resort property would also expire at that time, unless further action was taken. The BIA informed them they should negotiate new leases with the Indian landowners if they wished to continue to occupy the property. Ct. Rec. 90, Ex. 101. On January 21, 2009, the action before this court was filed by the RV Park Member's Association and its individual member Paul Grondal. The "Claims for Relief" asserted by Plaintiffs in the Complaint are as follows:

Claim No. 1: "Estoppel." This claim generally alleges the BIA was authorized to bind the allottees to the Master Lease and any modifications and BIA should be prohibited from repudiating 20 years of statements and actions signifying the term of the lease extended until 2034.

Claim No. 2. "Waiver and Acquiescence." This claim generally alleges the BIA has waived any objections to the validity of the notice to exercise the option to renew the Master Lease by its conduct approving and failing to object to the Extended Membership Agreements and the Settlement Agreement, and by accepting increased rent payments as scheduled under the Settlement Agreement.

Claim No. 3: "Modification." This claim generally alleges the BIA had the authority to and did approve the Membership Agreements which extended the term of the Association's tenancy to 2034.

Claim No. 4: "Agency Action was Arbitrary, Capricious, an Abuse of Discretion, and Not In Accordance with Law." This claim generally alleges the "BIA's position" that it did not have authority to accept notice on behalf of MA-8 allottees, to modify the terms of the master lease or its subleases, is an abuse of discretion, which has caused injury to Plaintiffs.

Claim No. 5: "Violation of the Fifth Amendment to the Constitution of the United States." This claim generally alleges the BIA's determination that the tenancy of MA-8 expired on February 2, 2009 deprived Plaintiffs of their property rights without due process of law.

Finally, Plaintiffs' sixth claim asserts a claim for declaratory judgment.

III. STANDARD OF REVIEW

The United States has moved to dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Rule 12(b)(1) authorizes a court to dismiss claims over which it lacks proper subject matter jurisdiction. The court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) so long as "the jurisdictional issue is [not] inextricable from the merits of a case." *Kingman Reef Atoll Invs., L.L.C. v. United States,* 541 F.3d 1189, 1195 (9th Cir. 2008).

Rule 12(b)(6) permits a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]" A Rule 12(b)(6) motion will be denied unless it

is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Falkowski v. Imation Corp.,* 309 F.3d 1123, 1132 (9th Cir. 2002) (citing *Swierkiewicz v.. Sorema N.A.,* 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)). The court takes all material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

Rule 12(b)(6) does not allow a court to reach "matters outside the pleading" without following the summary judgment procedures of Rule 56. Fed.R.Civ.P. 12(b); *San Pedro Hotel Co., Inc. v. City of Los Angeles,* 159 F.3d 470, 477 (9th Cir. 1998) ("If matters outside the pleadings are considered, the motion to dismiss is to be treated as one for summary judgment."). Here, the parties have filed declarations and exhibits in support of their briefs. Both parties have had an opportunity to present all material made pertinent to this motion. See Fed.R.Civ.P. 12(b). The court will therefore treat this matter as a motion for summary judgment and apply the general standard of review for summary judgment. *See San Pedro Hotel,* 159 F.3d at 477.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett,* 477 U.S. 317, 323-24, 106

S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion…." *Id.* at 323. The non-moving party "may not reply merely on allegations or denials in its own pleading; rather, its response must-by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e).

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court draws all reasonable inferences in favor of the nonmoving party, including questions of credibility and of the weight that particular evidence is accorded. *See, e.g., Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1992). The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. *T.W. Elec. Serv. v. Pac. Elec. Contractors,* 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is inappropriate. *Anderson,* 477 U.S. at 248. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Summary judgment is not warranted if a material issue of fact exists for trial. *Warren v. City of Carlsbad,*

58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "Summary judgment will not lie if … the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U. S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. *Id.* at 324.

IV. DISCUSSION

A. Jurisdiction over Plaintiffs' Complaint

The Federal Defendants move to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), or alternatively Rule 12(b)(6). Because the jurisdiction of federal courts is limited the party invoking federal jurisdiction bears the burden of proof.

Appendix D

1. Plaintiffs' Claims 4 and 5; Court Lacks Jurisdiction under the APA

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell,* 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). Such consent may not be implied, but must be "unequivocally expressed." *United States v. Nordic Village, Inc.,* 503 U.S. 30, 33-34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Absent a waiver of sovereign immunity, the court lacks subject matter jurisdiction. Plaintiffs' Complaint asserts that the United States has waived sovereign immunity pursuant to the Administrative Procedure Act and the Fifth Amendment. Ct. Rec. 1 at ¶ 26. The APA contains an explicit waiver of the sovereign immunity of the United States to be sued. 5 U.S.C. § 702 (2006). However, this waiver permits suit by parties "suffering legal wrong because of agency action," *id.,* which is elsewhere limited by Congress to mean only "final agency action." *Id.* § 704 (emphasis added).

Plaintiffs Fourth and Fifth claims for relief, as well as their Fourth motion for summary judgment claim that under the Administrative Procedures Act BIA action was arbitrary, capricious and not in accordance with the law. Though it is not clear from the Complaint what agency action the Plaintiff seeks review of,[4] Plaintiffs'

4. The agency action referred to in the Complaint was described as the BIA's "most recent decisions" and its "current position that it did not have authority to accept notice on behalf of the Allottees, modify the terms of the Master Lease, modify terms of any Subleases

motion refers to the BIA's December 2008 letters from the Regional Solicitor's Portland Office and the Superintendent of the Colville Agency which set forth the BIA's position that the Plaintiffs' tenancy expired when the Master Lease expired, on February 2, 2009. Plaintiffs' Fifth Claim for relief asserts the BIA's failure to provide Plaintiffs opportunity to be heard before rendering the 2008 decision violated their procedural due process rights. The Federal Defendants argue that its December 2008 was not "final agency action" and was "no more than a courtesy gesture" responding to the Plaintiffs' inquiry following the decision in the *Wapato Heritage* case. Ct. Rec. 121 at 3.

Agency action is considered "final" when: (1) the action marks "the 'consummation' of the agency's decisionmaking process;" and (2) the action is one by which " 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997) (citations omitted). Helpful in understanding the second *Bennett* prong is the Ninth Circuit's decision in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers,* 543 F.3d 586 (9th Cir. 2008). In that case, the Army Corps had issued a jurisdictional determination finding that the Plaintiffs' property contained wetlands subject to Clean Water Act regulatory provisions forbidding any discharge of dredged or fill materials without securing a permit. The court reasoned that this action was not a final

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to MA-8, or otherwise burden and encumber the allottees' rights to MA-8." Ct. Rec. 1 at § 197.

agency action under the APA under the second prong of *Bennett* because as the Plaintiffs' "rights and obligations remain unchanged" by the determination and the decision did not "itself command [Plaintiff] to do or forbear from anything…" *Id.* at 594.

> [A]s a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance. Up to the present, the Corps has 'expresse[d] its view of what the law requires' of Fairbanks without altering or otherwise fixing its legal relationship. This expression of views lacks the 'status of law or comparable legal force.' In any later enforcement action, Fairbanks would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination.

Id. (citations omitted).

Nowhere in the statutory scheme of the leasing of Indian lands is there granted to the Secretary the discretion to declare an approved lease expired and thereby declare a contract extinguished. Such a function is judicial in scope and is not entrusted to the Secretary, but rather reserved for court action, either seeking declaratory relief to determine the respective rights and obligations of the parties to the lease, or a suit by the lessor (or the United States on their behalf) to recover possession of the leased premises. The 2008 letters of the BIA did

not "impose an obligation, deny a right, or fix some legal relationship" -- they were *not* binding determinations. If they were, it would make the BIA, who is obligated to act on behalf of just the lessors, the final arbiter of the respective rights and obligations of the parties to the lease contract. Such governmental authority would be an anathema to the basic notion of due process. Moreover, the statute states "preliminary, procedural, or intermediate agency action," as distinguished from final agency action, is "not directly reviewable" under the APA, although it "is subject to review on the review of the final agency action." 5 U.S.C. 704.

There is nothing for the court to review under the Administrative Procedures Act as there has been no final agency action, and therefore there are no facts which will support judicial review of Plaintiffs' Fourth Claim for Relief under the APA. Likewise, the lack of final agency action leaves no basis for reviewing Plaintiffs' due process claim asserted in their Fifth Claim for Relief because neither the federal question statute, the Declaratory Judgment Act, or the Constitution contain waivers of sovereign immunity. Accordingly, Plaintiffs' Fourth and Fifth Claims for Relief asserted in the Complaint are dismissed for lack of subject matter jurisdiction and the court also dismisses the request for declaratory judgment "holding unlawful and setting aside the Defendants' determinations that the Master Lease was not properly renewed…" Ct. Rec. 1 at 44, ¶ 6.

Appendix D

2. Plaintiffs' Claims 1-3 and 6

Plaintiffs' first three causes of action (in conjunction with its Sixth cause of action) seek declaratory relief based upon the equitable defenses estoppel, waiver, acquiescence and modification. They are each directed at the BIA. Plaintiffs' first three claims for relief are subject to dismissal for a variety of reasons. The United States has moved to dismiss these causes of action on the grounds that they fail to state a claim, but it nonetheless recognizes that they raise equitable/anticipatory affirmative defenses to its ejectment action. Plaintiffs' First claim seeks to estop the BIA from repudiating it actions and statements of the last 20 years that the Master Lease had been renewed and expired in 2034. The Second claim contends BIA conduct waived objection to the renewal of the Master Lease. The Third claim alleges BIA conduct modified the term of Master Lease by granting approval of the Membership Agreement.

First, while it is well settled that 28 U.S.C. § 1331 is a jurisdictional statute, it is not a waiver of the United States' sovereign immunity. *Army and Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 102 S.Ct. 2118, 72 L. Ed. 2d 520 (1982). A waiver of sovereign immunity must come from the statute giving rise to the cause of action. The Declaratory Judgment Act, 28 U.S.C. § 2201, does not constitute a waiver of sovereign immunity. *Schilling v. Rogers,* 363 U.S. 666, 677, 80 S.Ct. 1288, 1296, 4 L. Ed. 2d 1478 (1960). There being no cognizable claim asserted under the Administrative Procedure Act, the court does not have subject matter jurisdiction over any such claim

asserted against the BIA. The court does, however, have jurisdiction over the United States' trespass action brought on behalf of the Indian allottees. However, the court's adverse ruling on Plaintiffs' cause of action for declaratory relief against the BIA, does not restrict or limit the defenses the Plaintiffs can assert to the trespass claim brought by the United States.

Second, a private party can hardly estop the Government from taking a certain position on an issue. Moreover, it would be unnecessary to estop the Government from taking a position because the Government is not the lessor, not a party to the Master Lease, and does not possess the authority to decide contract disputes. The BIA's own view of whether the Master Lease had expired is meaningless to the actual judicial determination of whether this is in fact the case. The BIA's position on the renewal served only to provide notice to the lessee that an issue existed and also of the potential for an enforcement action by the United States on behalf of the Indian landowners.

Thirdly, even if subject matter jurisdiction existed, dismissal of Plaintiffs' first three causes of action and claim for declaratory relief against the BIA would be appropriate, as they raise the identical claims made and issues raised by Wapato Heritage against the BIA, and rejected in the case before Judge Whaley. There are three narrow issues pertaining to the Master Lease which were fully litigated before Judge Whaley. Issue preclusion bars relitigation of these findings here:

1) The BIA is not a party to the Master Lease;

2) Evans and Wapato Heritage (the lessees to the Master Lease) did not actually or substantially comply with the notice requirements of the renewal provisions of the Master Lease; and

3) The BIA had no authority to unilaterally modify the terms of the Master Lease or ratify any deficiency in compliance with the terms of the lease.

See EDWA Cause No. 08-CV-177, *Ct. Rec. 30.* These findings are on issues identical to Plaintiffs' assertions in the Complaint herein that "the option to renew the Master Lease has been validly exercised" (Ct. Rec. 1, ¶ 212) and "the BIA had actual authority to sign on behalf of the Allottees and subsequently modify the terms of the lease" (Ct. Rec. 1, ¶ 213).

"The general principle … is that a right, question or fact distinctly put in issue and directly determined … cannot be disputed in a subsequent suit …." *Southern Pac. R. R. v. U.S.,* 168 U.S. 1 (1897), 18 S. Ct. 18, 42 L. Ed. 355. Issue preclusion bars re-litigation of issues adjudicated and essential to the final judgment of earlier litigation between the parties. *Dodd v. Hood River County,* 136 F.3d 1219, 1224-1225 (9th Cir. 1999); *Garrett v. City and County of San Francisco,* 818 F.2d 1515, 1520 (9th Cir. 1987). The purpose behind both issue preclusion and claim preclusion is to prevent multiple lawsuits and to enable parties to rely

on the finality of adjudications. *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

Under Ninth Circuit law, an adjudication in a prior action serves as a bar to litigation of a claim if the prior adjudication (1) involved the same claim/issue as the later suit; (2) reached a final judgment on the merits, and (3) involved the same parties or their privies. *Id.; see also Blonder-Tongue Lab. v. University of Ill. Found.,* 402 U.S. 313, 323-24, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). The court finds that as to the three limited issues identified above, all three elements are met. Though Plaintiffs were not a party to Judge Whaley's case, they are bound by Judge Whaley's narrow ruling because as to the issues decided, Plaintiffs interests are aligned entirely with Wapato Heritage by virtue of their relationship via the membership agreements. *See Taylor v. Sturgell,* 553 U.S. 880, 128 S.Ct. 2161, 2173, 171 L. Ed. 2d 155 (2008) (permitting non-party preclusion based on based on pre-existing substantive legal relationships and also when the non-party was adequately represented by someone with the same interests who was a party in the prior lawsuit). Plaintiffs do not claim they have been granted any right to exercise the option to renew in the master lease. In fact, in this case there is no, nor has there been, any contention of a contractual tie or privity of contract between the Plaintiffs and the original lessor, the MA-8 allottees. Plaintiffs admit their Membership Agreements give them rights only from Wapato Heritage, whose rights, in turn, flow from the Master Lease. Thus, *as to the Master Lease itself,* Plaintiffs would have no greater rights or interests, than Wapato Heritage. Accordingly,

as to questions regarding the terms and interpretation of the Master Lease, Plaintiffs and Wapato Heritage have mutual interests, thus fairly affording application of preclusion as to the limited issues Judge Whaley ruled upon.

The court rejects the Federal Defendants' attempt to more broadly characterize Judge Whaley's ruling as precluding Plaintiffs from making *any* argument regarding the term of the Master Lease in this lawsuit. The Federal Defendants assert that any argument as to whether the Master Lease was or should be extended to 2034 should be dismissed on the grounds of issue and claim preclusion because of Judge Whaley's decision in the *Wapato Heritage* case. However, estoppel applies only to preclude relitigation of issues actually decided in the proceeding. Judge Whaley's decision did not declare the expiration date of the Master Lease and more relevantly, did not address Plaintiffs rights to occupy MA-8. Notably, the landowners, the Master Lease lessors, were not even named parties to that lawsuit. Rather, upon Wapato Heritage's own submission of the issue to the court, Judge Whaley only ruled that Evans had not actually or substantially complied with the notice requirement of the renewal provision. Judge Whaley's decision forecloses relitigation only of the three precise issues addressed by the ruling and identified above.

Though the court recognizes that grounds for appeal of Judge Whaley's decision may exist, the established rule in federal courts is that a final judgment retains all of its res judicata consequences pending decision of any appeal.

Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988). "[The] doctrine of res judicata is not a mere matter of practice or procedure …. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts …." *Hart Steel Co. v. Railroad Supply* Co., 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148, 1917 Dec. Comm'r Pat. 417. Pp. 2427-2430.

The foregoing discussion requires the court to consider the related question of whether Plaintiffs have standing to seek declaratory relief against the MA-8 landowners as to the expiration of the Master Lease. The court has considered the general rule that a party does not possess standing to bring a declaratory judgment claim regarding rights and obligations under a contract to which it is neither a party nor a third-party beneficiary. *See Mardian Equip. Co. v. St. Paul Fire & Marine Ins. Co.,* 2006 U.S. Dist. LEXIS 60213, 2006 WL 2456214, at *5-6 (D.Ariz. 2006)(not reported)(plaintiff lacked standing to bring declaratory judgment claim against insurer concerning the meaning of a policy to which it was not a party or third party beneficiary); *cf. Newcal Indus., Inc. v. IKON Office Solution,* 513 F.3d 1038, 1055 (9th Cir. 2008) cert. denied U.S., 129 S.Ct. 2788, 174 L.Ed.2d 290 (2009) (privity of contract was not necessary because the threat of suit was enough to create standing since a threatened party may seek a declaration that the threatening party's putative rights are invalid). However, under *Newcal,* the court finds that the Government's threat of ejectment is sufficient to confer standing on Plaintiffs to seek declaratory relief against the MA-8 landowners regarding

Plaintiffs' entitlement to occupy MA-8. Importantly, since Wapato Heritage is a named Defendant, to the extent the declaratory relief sought would purport to bind Wapato Heritage, certainly Wapato Heritage could assert itself on the issues raised. Finally, declaratory relief in this circumstance could "serve a useful purpose in clarifying and settling the legal relations in issue" and could "terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985).

3. Conclusion

The court lacks subject matter jurisdiction over Plaintiffs' five claims and requests for declaratory relief against the United States Bureau of Indian Affairs. As explained below, the court does possess subject matter jurisdiction over the United States' trespass action and construes Plaintiffs' Complaint and Answer to the Government's ejectment counterclaim (Ct. Rec. 43) as a claim for declaratory relief against the MA-8 landowners, on whose behalf the United States has not entered an appearance.

B. United States' Trespass Claim

This court has jurisdiction over the United States' counterclaim for trespass and ejectment under 28 U.S.C. § 1345 which provides, "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or

officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345.

The Federal Defendants' Motion for Summary Judgment seeks the court's decision on its counterclaim for trespass and request for an ejectment order against the Plaintiffs.

1. Trespass Action May be Premature

Judge Whaley has determined that the BIA was not a party to the Master Lease. Accordingly, the BIA has no independent *contractual* right to enforce the terms of the Master Lease. The authority of the BIA in regards to the Master Lease stems entirely from federal regulatory law. Government agencies are required to scrupulously abide by their own regulations and existing statutes.

The Government holds the allotment in trust for allottees and has the power to control occupancy on the property and to protect it from trespass. *See United States v. West,* 232 F.2d 694, 698 (9th Cir .1956); see also 25 C.F.R. § 162.106(a); 73B C.J.S. Public Lands § 5. 25 C.F.R. § 162.108 is entitled "What are BIA's responsibilities in administering and enforcing leases?" It states in relevant part:

> (b) We will ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions *as needed to protect the interests of the Indian landowners and respond to concerns*

> *expressed by them.* We will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.

25 C.F.R. 162.108 (emphasis added). 25 C.F.R. § 162.623 deals specifically with holdover tenants in non-agricultural leases and is entitled "What will BIA do if a tenant holds over after the expiration or cancellation of a lease?" It provides:

> 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. The regulations also indicate that in the event a tenant does not cure a lease violation within the requisite time period, the BIA must, under 25 C.F.R. § 162.619, "consult with the Indian landowners, as appropriate," and determine what remedies should be invoked, including for example whether to provide the tenant with additional time to cure. The regulations make clear that the entire purpose of the authority and remedies provided to the BIA for lease violations is to ensure that the landowners' property and financial interests are protected.

There is no evidence in this case that the BIA has consulted with the Indian landowners or that this trespass action is a response to their concerns. In addition, the record in this and Judge Whaley's case establishes that the BIA should "have reason to believe" that the tenant, Wapato Heritage, was and is engaged in efforts to obtain a new lease. The record herein evidences that Wapato Heritage has been attempting to negotiate a 99-year lease with the Indian landowners since at least 2004 and that a proposed lease has been before the BIA since 2006. Major issues concerning majority landowner consent and compliance with NEPA delayed Wapato Heritage's efforts to secure the lease and to obtain BIA approval. In December 2007, the BIA made two decisions which raised additional issues for Wapato Heritage. First, it determined that a full environmental impact statement would be required for its approval of the 99-year lease proposal, a decision contrary to the conclusion reached by the contractor hired by Wapato Heritage that the project would have no significant impact. Second, it decided that it did not believe the Master Lease had been renewed and that it would expire in 2009. These issues remaining unresolved, Wapato Heritage then filed its action against the BIA asserting a claim that the BIA had refused to timely consider the 99-year lease proposal. On November 6, 2009, Judge Whaley ruled that claim was subject to dismissal for failure to exhaust administrative remedies and alternatively, because there was "no unreasonable delay in the BIA's two year review of the lease that would bind the beneficial owners of MA-8 for a period of 99 years." Ct. Rec. 82.

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As recently as August 6, 2009, in the BIA's reply brief filed in the *Wapato Heritage* case, the BIA admits there exists a "99 year commercial lease proposal," and that there has been "no final agency action on the proposed lease…" Ct. Rec. 81 at 3. The BIA took the position therein that the BIA had "timely began its review of the proposed [99 year] lease" also that "the proposed lease would have replaced the former lease." *Id.* at 5. The BIA also asserted in a footnote, its opinion that Wapato Heritage had chosen to "abandon its efforts for BIA approval of the lease" and instead decided to pursue legal action.

Wapato Heritage's decision to file suit in an attempt to avoid further delay in the lease review process is not evidence that it has "abandoned" its efforts to obtain a 99 year lease. Indeed, in the courts' view, the lawsuit suggests just the opposite --that Wapato Heritage strongly desires the approval of its proposed lease and reasonably, desires the process for approval to be conducted without delays. Despite this fact and the BIA's recognition that it has issued no final decision on the 99 year lease proposal, the BIA proceeded to file its trespass counterclaim. This action suggests to the court that the BIA is in fact rejecting or will refuse to further entertain the 99 year lease proposal. If the fact were otherwise, it would not have so hastily elected to pursue the most drastic remedy available of seeking to displace people from their current occupancy of the property. If this is the BIA's position, then Wapato Heritage is entitled to have the BIA render a final decision so that it may pursue any administrative or legal remedies available to it in regards to the 99-year lease.

If efforts to obtain approval on the 99 year 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 be all be for nothing, *if* the 99 year lease proposal is granted or if appellate review should result in a different outcome in Judge Whaley's case.

Accordingly, at this time, the Federal Defendants' Motion for Summary Judgment is **DENIED,** with leave to renew. If the Federal Defendants' opt to renew their motion, they must supplement their motion with evidence that federal regulations governing their conduct in this action have been complied with and that the action is not premature.

C. Plaintiffs' Summary Judgment Motions and Defenses to the Trespass Action

Though it appears as though the United States' trespass action may be premature, in order to assist the parties in clarifying and settling the relations in issue and also to "afford relief from the uncertainty and controversy faced by the parties," the court proceeds herein to address some of the arguments raised in Plaintiffs' four summary judgment motions. These motions raise defenses against the claim they are trespassers. In order to succeed on

its trespass action, the United States would have to demonstrate the Plaintiffs were unlawfully withholding possession of the property. The United States' position is that Plaintiffs' right to occupy MA-8 ceased when the Master Lease expired, which it asserts was February 2, 2009. Plaintiffs dispute these positions and have filed four summary judgment motions seeking declaratory relief to the contrary. Plaintiffs' first summary judgment motion argues the terms of the Master Lease, the Expanded Membership Agreement, and the 2004 Settlement Agreement entitle them to remain on the trust property through February 2034. Plaintiffs' second motion specifically seeks an order declaring that the Settlement Agreement entitles them to such occupancy. Plaintiffs' third and fifth motions for summary judgment seek equitable rulings that the Defendants are estopped from denying the Plaintiffs' rights to occupancy until 2034.

1. Paragraph 8 of the Master Lease Does Not Provide Legal Right for Plaintiffs to Occupy Mill Bay Resort until 2034

Plaintiffs' argue that the Federal Defendants' position that Plaintiffs' tenancy expired with the expiration of the Master Lease is not supported by the terms of the Master Lease itself. Paragraph 8 of the Master Lease provides:

> 8. *STATUS OF SUBLEASES ON CONCLUSION OF LEASE*
>
> Termination of thie [sic] 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 no [sic] require any new or additional performance not already provided or previously performed by Lessee. Beginning on January 15, 1984, and annually thereafter on each following January 15, Lessee shall send to Lessor a list of all sublessees together with their addresses.

Ct. Rec. 90 at 32.

The Master Lease also allowed the Lessee to sublease "all, part or portions of the lease premises for lawful purposes upon written approval of the Secretary of the Interior or his authorized representative, which approval or rejection must be in writing within thirty (30) days of written application therefore or approve will be conclusively presumed." Ct. Rec. 90, Ex. 1 at ¶ . Plaintiffs argue that their occupancy of MA-8 falls into Paragraph 8 of the Master Lease. Plaintiffs identify the alleged "sublease" as their Expanded Membership Agreement and the 2004 Settlement Agreement. Moreover, Plaintiffs contend Paragraph 8 applies both in the instance when the Master Lease terminates or naturally expires on its own terms.

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a. Plaintiffs' Occupancy is not a Subtenancy

Paragraph 8 does not apply to Plaintiffs because neither their Membership Agreements or the Settlement Agreement created a subtenancy. Plaintiffs were mere licensees, not tenants, as their right was to use the premises, not a right to possession. Neither the Expanded Membership Agreements nor the 2004 Settlement Agreement have specific indicia of leases. Whether an instrument is a lease (or a license) depends on the intention of the parties. First, neither agreement is denominated as a lease or generally follow the form of a lease. This is contrary to the terms of the Mar-LU and CTEC agreements which were identified as subleases. Ct. Rec. 90 at 104-110, 112-132 [Ex. 3 and 6]. Neither agreement refers to Plaintiffs as "tenants" or of Wapato Heritage LLC as "landlord." The Expanded Membership Agreement refers to "Seller" and "Purchaser." The payment for the rights was originally in the form of "dues" rather than rent. However, the court does recognize that the Settlement Agreement did provide for increased "rent" for the Members' "continued *use* of the Park." Ct. Rec. 90 at 60-61.

Second, a key characteristic that typically distinguishes between a tenancy from a mere license is the right to exclusive possession or a right to an interest in land. AMJUR LANDLORD § 20; *Spinks v. Equity Residential Briarwood Apartments,* 171 Cal.App.4th 1004, 90 Cal. Rptr.3d 453 (Cal.App. 6 Dist. 2009)(applying California law). Here, the Plaintiffs' right was only to *use* the premises, which is typical of a license, not a lease. The Expanded Membership Agreement states:

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> "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 or facilities…The duration of this membership is coextensive with the fifty (50) year term…of Seller's lease for the Mill Bay property…"

Ct. Rec. 90 at 237. The Settlement Agreement states:

> 5.14 Nature of Interest
>
> All parties acknowledge that the Mill Bay Members have a right to use the property commonly known as the Park pursuant to the Prior Documents and this agreement, through December 31, 2034, subject to the terms of this agreement and the Prior Documents. The Mill Bay Members agree and acknowledge they do not have the right to sell or encumber the underlying fee interest in the Park."

Ct. Rec. 90 at 634. Even the Operator's Public Offering Statement for Registration of Camp Resort Contracts states in part that, "Each purchaser's membership agreement affords a license *to use* all camping club property and facilities….No title to or leasehold interest in the project's property is conveyed to club members." Ct. Rec. 85 at 85 [Grondal Decl.](emphasis added).

Neither the Expanded Membership Agreement nor the Settlement Agreement have characteristics of a contract creating a tenancy. There is no evidence in the record suggesting Paragraph 8 of the Master Lease was intended to apply to mere licensees.

b. Paragraph 8 Does Not Apply to the Natural Expiration of the Lease

In addition, assuming for purposes of analysis that a subtenancy was created or Paragraph 8 was intended to apply to license agreements, Paragraph 8 of the Master Lease applies only to unexpected terminating events such as cancellation, as opposed to terminating events such as the normal expiration. Paragraph 8 states that termination of the lease by "by cancellation or otherwise" will not serve to end subtenancies. Plaintiffs contend Paragraph 8's phrase "termination, by cancellation or otherwise" should be interpreted identically to the language at ¶ 30 on the delivery of possession of the premises upon "termination of this lease, by normal expiration or otherwise." However, as the Federal Defendants argue, interpreting the contract to permit the continuation of subleases beyond the natural expiration of the lease would conflict with the terms of ¶ 7 entitled "Subleasing" which states "No part of the premises shall be subleased for a period extending beyond the life of this Lease and that all subleasings shall be made expressly subject to the terms of this Lease…" It is logical that in the event the lease would terminate unexpectedly, Paragraph 8 would protect those subtenants who had contracted based upon the normal expiration of the lease. Because the Master

Lease precludes subletting for a term beyond that of the natural expiration of the lease, it does not make sense to interpret Paragraph 8 to permit that to occur. Moreover, the language of ¶ 30 cited by Plaintiffs, supports the Federal Defendants' view that the drafters of the lease intended ¶ 8 to refer to unexpected terminating events such as cancellation, as opposed to terminating events such as the normal expiration.

2. 2004 Settlement Agreement

a. Settlement Agreement Did not Modify the Master Lease

Plaintiffs contend in their First and Second motions for Summary Judgment that the 2004 Settlement Agreement between Wapato Heritage LLC and Plaintiffs operated to "modify" the Master Lease because the settlement reduced the space of the RV Park, increased the rent, and "reaffirmed" the expiration date of the Master Lease of February 1, 2034. Plaintiffs make the argument that the Settlement Agreement is substituted in the place of the inconsistent terms of the Master Lease, and it is binding upon the "Allottees" because the Indian landowners "ratified it" by their acceptance of the benefits of the Settlement Agreement e.g., the "settlement money" (in the form of the increased rent paid by the Members) and "other benefits of the settlement." Plaintiffs contend in their Reply memorandum that though the landowners may not have had full knowledge of all the material facts, their ignorance was due to their own failure to investigate and they therefore should be estopped from denying ratification.

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The 2004 Settlement Agreement actually has a provision stating:

> 5.22 *Revocation of Inconsistent Provision:* To the extent this Agreement is inconsistent with the provisions of any of the Prior Documents listed above, the terms of this Agreement shall be deemed to revoke such prior provisions to the extent of the inconsistency.

Ct. Rec. 90 at 66. The "Prior Documents" referred to included the Master Lease. *Id.* at 55.

The 2004 Settlement Agreement was not a "modification" and § 5.22 could not effectively operate to modify the Master Lease because 1) it was not an agreement between the same parties as the Master Lease; 2) there is no indication that Wapato Heritage was acting on behalf of the landowners; 3) the mere recital of a prior agreement or contract in a later one does not extinguish the earlier agreement; and 4) there is no evidence of the supposed alteration was mutual - there was no "meeting of the minds" between the parties to the Master Lease that the 2004 Settlement Agreement was intended to supplant, rescind or alter any terms of the Master Lease. *See Dragt v. Dragt/DeTray, LLC,* 139 Wash.App. 560, 571, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042, 187 P.3d 269 (2008)(Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds and separate consideration); *Wagner v. Wagner,* 95 Wash.2d 94, 103, 621 P.2d 1279 (1980); *Hanson v. Puget Sound Navigation Co.,*

52 Wash.2d 124, 127, 323 P.2d 655 (1958). Mutual assent is required and one party may not unilaterally modify a contract. *In re Relationship of Eggers,* 30 Wash.App. 867, 638 P.2d 1267 (1982).

Moreover, it is conceded that the Master Lease could be modified only with the consent of the Indian landowners. The landowners' acceptance of money from Wapato Heritage could not operate to unwittingly bind the owners to an agreement executed by Wapato Heritage LLC and the Park Members. There is no evidence in the record that by acceptance of the money, the Indian landowners intended to alter the terms of the Master Lease to include a provision permitting the RV Park Members to occupy MA-8 until 2034. There is also no evidence that the Settlement Agreement modified the annual rental terms owed by Wapato Heritage under the Master Lease. Indeed, the Federal Defendants contend after making the increased payments to the Indian landowners, for the remaining years it paid them pursuant to the original rental terms of the Master Lease.

b. TEDRA does not bind the Defendant Landowners to the 2004 Settlement

Plaintiffs alternatively assert that because the 2004 Settlement Agreement was entered into pursuant to Washington's Trust Estate Dispute Resolution Act, RCW 11.96A, it is therefore binding on the Indian landowners of MA-8 and the Settlement Agreement forecloses the United States' attempt to preclude the Plaintiffs' right to use and occupy the Mill Bay Resort through 2034.

Plaintiffs' contend the Settlement Agreement "settled the controversy regarding the Members' rights to use and occupy the Mill Bay Resort until 2034." According to Plaintiffs, the Settlement Agreement should be binding upon the landowners because the BIA was provided actual notice of the proceeding which led to the 2004 settlement of its claims against Evans, as well as the Settlement Agreement itself.

The court rejects the United States' initial counter argument that the state court lacked jurisdiction over anything to do with MA-8. Contrary to the Federal Defendants' contention, there is no federal or state law which would have precluded the state court from assuming jurisdiction over a contract dispute pertaining to the right to *use* property held in trust property under a contract. Defendant's blanket assertion that "federal law…applies to MA-8" is an incorrect overstatement.

Settlement agreements entered under TEDRA, RCW 11.96A.220, are "binding and conclusive on all persons interested in the estate or trust." RCW 11.96A.220. TEDRA requires notice of settlement agreements made under the statute be provided to all persons interested in the estate. Plaintiffs' admit that the MA-8 landowners qualified as "interested parties" to the Evans' estate - yet they did not receive notice. The BIA, but not the MA-8 landowners, received notice of the 2004 Settlement Agreement and had the opportunity to object to it. While the BIA has administrative authority to approve and manage leasehold interests on trust property, the BIA had no independent authority to modify or alter the terms

of the Master Lease or to approve the Park Members' right to use the MA-8 property beyond the terms of the Master Lease. Thus, contrary to Plaintiffs' contention, the BIA "as an agent of the MA-8 landowners" could not settle the controversy regarding the Members' right to use and occupy the Mill Bay Resort under the terms of the Master Lease. That issue was not before the Chelan County court. While the Chelan County state court could resolve the contractual issues between Evans and the Park Members pertaining to their agreement under the camping memberships, it did not have before it the question of whether the camping membership agreement (or their settlement agreement) complied with the terms of the Master Lease. The Federal Defendants correctly state that determining the right to use MA-8 beyond what the Master Lease would permit would constitute an encumbrance on the leasehold interests of the lessors of the Master Lease. TEDRA does not provide an independent legal basis to bind the Defendant landowners to the terms of the 2004 Settlement Agreement.

c. Defendants are not Collaterally Estopped from Denying they are bound by the Terms of the 2004 Settlement Agreement

Plaintiffs also argue that collateral estoppel and res judicata operate to bar the Defendants from denying they are bound by the terms of the 2004 Settlement Agreement and preclude the United States from pursuing this trespass action. To determine whether a nonparty "assumed control over" a previous action so as to be

bound by its judgment, a court must evaluate whether the "relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 4451, p. 373 (2d ed. 2002).

Plaintiffs contend the BIA was a "laboring oar" with regard to the 2004 settlement. It was informed of the litigation, it participated in the two days of mediation, it received notice of the settlement, and submitted a letter to the state court for consideration regarding its position. Plaintiffs also point out that the BIA was asked to intervene in the case because of the implications "on the encumbrance of trust land," but it did not. Plaintiffs argue the BIA was clearly not an outsider to the litigation and knew that it would affect their interests - but chose to stand on the sidelines.

Even if true, these circumstances do not demonstrate that the Defendant landowners or "the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)(finding privity between the government and the civil contractor plaintiff in a prior action barred the government's subsequent suit where the government had required the contractor's lawsuit to be filed; reviewed and approved its complaint; paid its attorneys' fees and costs; directed the appeal from the state trial court to the Supreme Court; appeared before and submitted an amicus brief in the Montana

Supreme Court; directed the filing of a notice of appeal to the Supreme Court; and "effectuated" the company's abandonment of that appeal). Although the BIA had an interest in the litigation, *cooperation* and discussions between individuals/entities, is not the same as control of a suit. This court cannot conclude on these facts that the BIA's involvement constituted a "full and fair" opportunity to litigate the issue of whether the Park Members had the right to remain on MA-8 until 2034. Collateral estoppel is intended to prevent injustice, primarily in procedural unfairness, where a party already had a chance to have a full and fair opportunity to hear an issue. On the facts here, there could be no conclusion reached that the BIA *and* the landowners were in privity with Wapato Heritage in the underlying state court litigation.

Collateral estoppel does not apply to preclude the Defendants from arguing the Plaintiffs do not have the right to occupy MA-8 until 2034.

d. Waiver, Laches, Accord and Satisfaction Do Not Bind the Landowners

Plaintiffs also argue that the doctrines of waiver, laches, estoppel and accord and satisfaction operate to bind the Defendants to the terms of the 2004 Settlement Agreement. Each of these arguments rest upon the assumption that the state court litigation raised the issue which is raised here -- but it did not. As the Lessee under the Master Lease, Evans/Wapato Heritage could not grant rights to Plaintiffs in the state court greater

than what Evans had received under the Master Lease. Thus, the Settlement Agreement could only resolve the disputes between the RV Park Members entitlement to the leasehold interest in MA-8 that Evans held. That litigation could not attempt to resolve the issue of the extent of Evans' leasehold interest in MA-8, e.g. whether the Master Lease had been effectively renewed, or whether the RV Park Members' had the right to occupy MA-8 until 2034 pursuant to Evans' interests under the terms of the Master Lease.

The undisputed facts do not support Plaintiffs' assertion that Wapato Heritage "as a co-tenant" of MA-8 represented the interests of *all* the landowners in the 2004 settlement. All the facts indicate that Wapato Heritage was acting as the *lessee* who was resolving a dispute over the contracts with its licensees.

Moreover, the court rejects the argument that the Defendant landowners somehow ratified the 2004 Settlement Agreement by accepting the lump sum payment of money for the agreed additional rent to be paid by the RV members following the settlement. The landowners were told that the money was from the settlement. A party not bound by a contract may ratify a contract and then become bound by its terms, by affirming the contract by their words or deeds. One may be deemed to ratify a contract if, after discovery of facts that would warrant rescission, that party remains silent or continues to accept benefits under the contract. *Hooper v. Yakima County,* 79 Wn.App. 770, 775-76, 904 P.2d 1193 (1995), overruled on other grounds by *Del Rosario v. Del Rosario,* 152 Wn.2d

375, 97 P.3d 11 (2004). Because the landowners were not party to the Settlement Agreement, the element which is missing here is any evidence of full knowledge of all the material facts. A mere indirect or incidental benefit to a third person attributable to the fulfillment of a contract, to which he is not a party and has not knowingly accepted or ratified, is insufficient to render him legally responsible for it or bound by it.

3. Plaintiffs' Equitable Right to Occupy Mill Bay Resort until 2034

Plaintiffs' Third and Fifth motions for summary judgment assert equitable estoppel prohibits the Defendants from denying Plaintiffs the right to use the Mill Bay Resort until 2034. One would think that litigation revolving around such a straightforward issue as lease renewal would be rare. It is after all, a dispute entirely avoidable by careful drafting and lease administration. In fact, there are numerous cases involving inadequate, non-conforming, non-compliant renewal notices, which involve court's intervention in equity to avoid unconscionable hardships and fulfillment of commercial expectations. Noticeably there are a paucity of such cases in Washington. As this case demonstrates, this simple issue becomes very complex when it involves allotment property which has endured a century of fractionation in ownership, which is held in trust and controlled by the United States Bureau of Indian Affairs, and which is also prime real estate.

One can not consider this case without some sympathy for the predicament the Plaintiffs find themselves in.

They have invested substantial sums of money relying primarily upon the word of Bill Evans and his entities, that the Master Lease option to renew would be exercised and that Evans' leasehold interest would not expire until 2034. Under the terms of the Master Lease, obtaining the renewal could not have been simpler. The consent of either the landowners or the BIA was not required. There was just one condition to be met: giving timely and proper notice of the exercise of the option. The deadline was February 1, 2008. One undisputable point in this case, evidenced by written and oral communications going back more than 20 years, is that Bill Evans' desired and intended to exercise the option, and apparently believed that the 1985 letter to the Secretary would suffice.

Additional facts making this case unique is that a non-party to the contract, the BIA, plays the lead role in its drafting, execution, approval, administration, and enforcement of the lease. As for the drafting of the lease, it is noted that at the time, the BIA had standard form leases it provided to potential lessees (including Evans) and terms it required in order to obtain its approval. Indeed, as 25 C.F.R Part 162 outlines, the Secretary's primary role in management and control is setting standard conditions for leases. In lease administration the BIA's duties are defined by statute and regulations created for trust lands which impose general fiduciary duties on the Government in its dealings with Indian allottees. In this case, upon receipt of Evans' 1985 letter explicitly purporting to exercise the option to renew, the BIA a) neglected to inform the Indian landowners, whose interests it is their duty to protect, of the letter; b) did not ensure that their

tenant (Evans) had complied with the requirements of the lease until over twenty-years later, despite numerous inquiries, and then c) conducted its business without questioning and on the explicit assumption that the lease had been effectively renewed. In 2004, the BIA even made affirmative representations to the State of Washington that the lease did not expire until February 2, 2034.

Although estoppel will rarely work against the government, the assertion of this defense against the Defendant landowners and the BIA, acting on their behalf, in this trespass action presents a unique context which would merit further consideration by the court. However, the court does not desire to waste judicial resources prematurely deciding disputes or to unnecessarily disrupt an agency's administrative decision making process. Given the facts of record suggesting Wapato Heritage is in the process of attempting to secure a 99-year lease, the court will not decide the claims of trespass and equitable estoppel without the parties first having evaluated the fitness of these issues for decision in light of the court's rulings herein.

V. CONCLUSION

For the reasons set forth herein, **IT IS HEREBY ORDERED:**

1. The Federal Defendants' Motion to Dismiss and for Summary Judgment **(Ct. Rec. 70)** is **GRANTED in PART** and **DENIED in PART.** Plaintiffs' Complaint against the United States Defendants shall be dismissed for lack of

subject matter jurisdiction and alternatively, for failure to state a claim upon which relief can be granted. The Federal Defendants' motion for summary judgment on its trespass counterclaim is denied with leave to renew.

2. Plaintiffs' First Motion for Summary Judgment Re: Contract Terms **(Ct. Rec. 77)** is **DENIED.**

3. Plaintiffs' Second Motion for Summary Judgment Re: Settlement Agreement **(Ct. Rec. 79)** is **DENIED.**

4. Plaintiffs' Fourth Motion for Partial Summary Judgment Re: Arbitrary and Capricious Agency Action and Due Process Violation by BIA **(Ct. Rec. 83)** is **DENIED.**

5. Plaintiffs' Third Motion for Partial Summary Judgment Re: Estoppel **(Ct. Rec. 81)** and Fifth Motion for Summary Judgment Re: Actual Notice of Option to Renew **(Ct. Rec. 85)** are **DENIED** with leave to renew.

6. The court has granted the parties leave to renew certain motions. These motions shall only be renewed with supplemental evidence and further points and authorities demonstrating judicial action on the motion is appropriate.

7. The United States shall within ten (10) days of this order file a statement setting forth its reasons for failing to enter notices of appearance on behalf of the individually named defendant allottees pursuant to 25 U.S.C. § 175 and *Siniscal v. United States,* 208 F.2d 406, 410 (9th Cir. 1953).

Appendix D

The Clerk of this court shall enter this Memorandum Opinion and forward copies to counsel.

Dated this 12th day of January, 2010.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35694

D.C. No. 2:09-cv-00018-RMP
Eastern District of Washington, Spokane

PAUL GRONDAL, A WASHINGTON RESIDENT; MILL BAY MEMBERS ASSOCIATION, INC., A WASHINGTON NON-PROFIT CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; *et al.*,

Defendants-Appellees,

v.

WAPATO HERITAGE LLC; GARY REYES,

Defendants-Appellants,

and

Appendix E

FRANCIS ABRAHAM; *et al.*,

Defendants.

ORDER

Before: BEA, BRESS, and VANDYKE, Circuit Judges.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Judge Bea recommends denying the petition for rehearing en banc. Judge Bress and Judge VanDyke vote to deny the petition for rehearing en banc.

The petition for rehearing en banc filed on February 14, 2022 [Dkt. No. 83] is **DENIED**.

APPENDIX F — STATUTORY PROVISIONS

25 U.S.C.A. § 391

§ 391. Continuance of restrictions on alienation in patent

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 be 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: *Provided, however*, That this shall not apply to lands in the former Indian Territory.

Appendix F

AGREEMENT WITH THE COLUMBIA AND COLVILLE, 1883

In the conference with chief Moses and Sar-sarp-kin, of the Columbia reservation, and Tonaskat and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte Creek to accommodate one hundred pupils (100), and a physician to res ide with them, and $100. (one hundred) to himself each year.

Sar-sarp-kin asked to be allowed to remain on the Colombia reservation with his people; where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen mile strip cut off from the northern portion of the Columbia Reservation, to be allowed to select enough more unoccupied land in Severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile; or to move on to the Colville Reservation, if they so desire, and in case they so remove, and relinquish all their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

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The secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling-house for himself; also to construct a saw mill and grist-mill as soon as the same shall be required for use; also that each bead of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claim upon the Government for any land situate elsewhere.

Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, equal rights and protection alike with all other Indians now on the Colville Reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people. That until he and his people are located permanently on the Colville Reservation, his status shall remain as now and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent

to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall 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. Or should they move on to the Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

All of the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement; and also, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville Reservation until Congress does make such appropriation, etc.

H. M. Teller,
Secretary of Interior.
H. Price,
Commissioner of Indian Affairs.
Moses (his x mark),
Tonasket (his X mark),
Sar-sarp-kin (his X mark).

Appendix F

COLUMBIA AND COLVILLES.

For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, 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, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, That Sarsopkin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: *And provided further*, That in case said Indians so elect to remain on said Columbia reservation the secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected to be as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be there upon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands.

Appendix F

1887 FEBRUARY 8 - 24 STAT. 388, ACT FOR ALLOTMENT OF LANDS TO INDIANS

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue there-for in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration, of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever : *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void : *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act : *And provided further*, That at any time after lands have been allotted to all

the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress : *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education : *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead or his heirs, and after the expiration of five years occupancy, thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom

such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational. work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Appendix F

CHAP. 629. An Act Providing for the issuance of patents for lands allotted to Indians under the Moses agreement of July seventh, eighteen hundred and eighty-three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to issue patents to such Indians as have been allotted land under and by virtue of the agreement concluded July seventh, eighteen hundred and eighty-three, by and between the Secretary of the Interior and the Commissioner and Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the Moses agreement, accepted, ratified, and confirmed by the Act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), which patents shall be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of ten years from the date of the approval of this Act in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his decease, either prior or subsequent to the issuance of such patent, of his heirs, according to the law of the State of Washington, and that at the expiration of said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free and all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands so held in trust by any allottee or his heirs, or any contract made touching the same, except as hereinafter provided, before the expiration of the time

above mentioned, such conveyance or contract shall be absolutely null and void.

SEC. 2. That any allottee to whom any trust patent shall be issued under the provisions of the foregoing section may sell and convey all the lands covered thereby, except eighty acres, under rules and regulations prescribed by the Secretary of the Interior. And the heirs of any decreased Indian to whom a patent shall be issued under said section may in like manner sell and convey all of such inherited allotment except eighty acres, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser the same as if a final patent without restrictions upon alienation has been issued to the allotee. All allotted land alienated under the provisions of the Act shall thereupon be subject to taxation under the laws of the State of Washington.

Approved, March 8, 1906.

Appendix F

COLUMBIA OR MOSES RESERVE

[In Colville Agency: occupied by Chief Moses and his people, area, 38 square miles; act of July 4, 1884 (23 Stat., 79)]

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 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 and may elect to settle thereon with his consent and that of the Secretary of the Interior.

R. B HAYES.

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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, re-spectively.]

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Set stone on north bank of Sar-sarp-kin Lake for center of south line of claim No. 1. Run line North 78 degrees west and south 78 degrees east and blazed trees to show course of south line of claim. Then run north 12 degrees east (var. 22 degrees east) in center of claim. At 80 chains set temporary stake and continued course. At 20 chains came to brush on right bank of "waving 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. Thence run south 78 degrees east 8.23 chains and set stone 10 by 10 by 24 inches for northeast corner of claim. Then retraced line north 78 degrees west 12 chains and set stone 6 by 6 by 18 inches to course of north of claim No. 1, and South line of claim No. 2, and for center point in South line of claim No. 2 (claim No. 1, Sar-sarp-kin's, contains 2,180.8 acres). Thence run north 12 degrees east 80 chains. Blazed pine 20 inches diameter on 3 sides on right bank of Waring Creek for center of north line of claim No. 2, and center of south line of claim No. 3. Set small stones north 78 degrees west and south 78 degrees east to show course of said line. Thence run north 12 degrees east 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 north line of claim No. 3, and center of south line of claim No. 4. Run north 78 degrees west and south 78 degrees east and set stake to show course of said line. Then from center stone offset to left 1.23 chains and run thence north 12 degrees east. 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 north line of claim, and set stones north 78 degrees west and south 78 degrees east 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 north line of claim near left bank of Waring Creek, about 1 ¾ miles down stream from claim No. 4, and about 1 mile up stream from Mr. Waring's house, run line north 80½ degrees west and south 80 ½ degrees east, and set small stones to show course of north line of claim. Then run south 9 ½ degrees west (var. 22 degrees east); 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 south line of claim. Thence run north 80½ degrees west and south 80½ degrees east, and blazed trees to show course of south line of claim.

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

From stone on ridge between Toad Coulee and Waring creeks run north 88 degrees east (var. 22 degrees east). 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 north 88 degrees east 300 links distant. Thence north 4 degrees west 10.50 chains set stone to corner 8 by 8 by 18 inches. Thence north 16 degrees west. At 29.20 chains pine tree 30 inches diameter in line. At 55 chains set stone for corner. Thence south 66½ degrees west 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 south 38 degrees east. 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 Canon—dry at this point—125 feet deep, about 1 chain from the west end of cannon, from which a fir 10 inches diameter bears north 25 degrees west 75 links distant, run south 55 degrees west (var. 22 degrees east). At 80 chains made stone mound for corner, from which a large limestone rock 10 by 10 by 10 bears on same course south 55 degrees west 8.80 chains distant. From monument run north 35 degrees west. At 72.50 chains crossed Johnson brook 4 links wide, and continued course east 80 chains. Made mound of stone, and run thence north 55 degrees east 80 chains. Made stone monument, and run thence south 35 degrees east 80 chains to beginning.

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[Allotment Ko. 8, in favor of Nek-qnel-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 degrees east).

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 east and west.

80.00 chains, set stake 4 inches square, 4 feet long in stone mound for northeast corner of claim. Thence run west

30.00 chains, cross trail, course northwest and southeast.

80.00 chains, made stone monument for northwest corner of claim. Thence run south

35.60 chains, crossed fence, course east and west,

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.

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[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 northeast corner, which is a stake in stone mound, run south 64½ east (var. 22 degrees east).

88.56 chains, set stake in stone mound for corner of claim. Thence run south

55.50 chains, trail, course northwest and southeast,

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 east by Wa-pa-to John's claim, and on the south and west by Lake Chelan. The field-notes of north boundary are as follows: From northwest corner of Wa-pa-to John's claim, which is a stone monument, run west (var. 22 degrees east).

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

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

From Wa-pa-to John's Northeast corner, which is a stake in stone mound, run west (var. 22 degrees east) with Wa-pa-to John's north 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 north line.

33.00 chains made stone monument in said line for southwest corner of claim, and run thence north (var. 22½ degree east).

80.00 chains, made stone monument on west side of shallow lake of about 40 acres, and continued course to

113.35 chains, made stone monument for north corner of claim, and run thence south 45 degrees east

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 east by Johnny's claim. From Peter's northwest corner, which is a pine, 20 inches diameter, blazed on four sides on shore of Lake Chelan, run east with Peter's north line,

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

80.00 claims, stone monument, previously established on west shore of shallow lake. Thence run west (var 22¼ degrees east)

80.00 chains. Set stake in stone mound for northwest corner of claim, from which a blazed pine 24 inches in diameter bears south 50 degrees west 98 links distant. A blazed pine 20 inches diameter bears north 45 degrees east 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 northwest corner, which is a stone monument, run south with Johnny's line.

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

80.00 chains, stone monument previously established, the same being the northwest corner of Celesta's claim. Thence north (var. 22 degrees east)

85.50 chains, small creek 4 links wide, course east and west,

126.70 chains, made stone monument for northwest corner of claim, from which a blazed pine 12 inches in diameter bears south 10 degrees west 59 links distant.

Thence run south 40½ degrees east

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

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

From northwest corner of Ameno's claim, which is a stone monument, from which a blazed pine 12 inches in diameter bears south 10 degrees west 59 links distant, run north 75 degrees west.

43.50 chains, shore of Lake Chelan, blazed pine tree 6 inches in diameter on 4 sides for northwest corner of claim, from which a blazed pine 14 inches in diameter bears north 45 degrees east 13 links distant. Thence returned to point of beginning and run south 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 north 40 degrees west 95 links distant, a blazed pine

30 inches in diameter bears 40 degrees west 72 links distant. Thence run west

62.00 chains, shore of Lake Chelan. Made stone monument for southwest corner of claim, from which a blazed pine 10 inches in diameter bears north 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 southwest corner of Pedoi's claim, which is a stone monument, from which a blazed pine 10 inches diameter bears north 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 north 40 degrees west 95 links distant. A blazed pine 30 inches diameter bears south 40 degrees west 72 links distant, the same being Pedoi's southeast corner. Thence run south with Ameno's west line.

25.50 chains, stake in stone mound, previously established for corner to Ameno's and Celesta's claim. Thence continued course south with Celtesta's west 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 Wa-pa-to John's house, run north 61½ degrees east (var. 22 degrees east)

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 south 28½ degrees east

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 south 61½ degrees west.

56.00 chains, made stone monument for corner of claim and run thence north 28½ degrees west.

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 northeast corner, which is a stake in stone mound, run south 64½ degreeseast (var. 22 degrees)

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

80.00 chains, to the bank of Lake Chelan, built monument of stone; thence north 64½ degrees west along Lake Chelan.

80.00 chains, to the southeast corner 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 south 80 degrees west 60 links distant, run south 35½ east (var. 22 degrees east)

30.00 chains, summit of mountain spur, about 50 feet high. Antwine's house north 35 degrees east about 20 chains distant.

80.00 chains, made stone monument for corner, from which a blazed pine 8 inches in diameter bears south 45 degrees west 32 links distant. Thence run north 55½ degrees east (var. 22 degrees).

58.00 chains, bottom of dry cañon 100 feet deep, course northwest and southeast

80.00 chains, made stone monument for corner about one-quarter mile from Columbia River, and run thence north 34½ degrees west.

80.00 chains, made stone monument for corner, and run thence south 55½ degrees west.

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 southeast, from which a blazed pine 8 inches diameter bears south 600 east 56 links distant, from which a blazed pine 8 inches diameter bears west 76 links distant. Run south 23¼ degrees to east (var. 22 degrees east)

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 north 85 degrees east 20 links distant. A blazed pine 20 inches diameter bears north 15 degrees east 27 links distant. Thence run north 66¾ degrees east.

80.00 chains, made stone monument on steep little hillside for corner. Thence run north 23¾ degrees west.

80.00 chains, made stone monument on mountain side for corner, from which a blazed pine 18 inches diameter bears north 40 degrees east 105 links distant. From which a blazed pine 20 inches diameter bears south 10 degrees east 127 links distant. Thence run south 66¾ degrees west 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 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 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-Per-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 south 40 degrees east 46 links distant, run north 69¼ degrees west (var. 22 degrees east).

3.50 chains, enter corner of small field.

7.50 chains, leave field.

8 chains, cross trail.

80 chains, made stone monument for corner on mountain side about 500 feet above river. Thence run north 20¾ degrees east.

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 south 69½ degrees east.

80.00 chains, erected stone monument for corner about 15 chains from river bank. Thence south 20¾ degrees west.

80.00 chains, point of beginning.

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

From northwest corner of Peter's claim, which is a stone monument on summit of small hill, run north 20¾ degrees east (var. 22½ degrees east).

80.00 chains, made stone monument for corner, and run thence north 69¼ degrees west (var. 23 degrees east).

80.00 chains, made stone monument for corner, and run thence south 20¾ degrees west (var. 22½ degrees east).

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 south 69¼ degrees east (var. 23½ degrees east).

80.00 chains, point of beginning.

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

From northwest corner of Peter's claim, the same being the southeast corner of Aeneas' claim, which is a stone monument on top of small hill, run north 69¼ degrees west with Aeneas' south line (var. 22½ degrees east).

80.00 chains, stone monument, previously established for southwest corner of Aeneas' claim. Thence north 20¾ degrees west (var. 23½ degrees east).

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 south 20 degrees west 84 links distant. Thence south 69¼ degrees east.

80.00 chains, monument previously established for southwest corner of Peter's claim. Thence south 20¾ degrees east with Peter's west line.

80.00 chains, point of beginning.

Appendix F

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-fourth mile from its mouth, from which a pine 24 inches in diameter bears north 37 degrees west 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 south 37 degrees west (var. 22 degrees east) (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 north 53 degrees west

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 south 37 degrees west. (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 south 37 degrees west 160 chains; thence north 52 degrees 39 minutes west 40.20 chains; thence north 37 degrees east 160 chains to point previously described in middle of Methow; thence with middle of Methow River to point of beginning. Claim contains 640 acres.

Appendix F

CHIEF MOSES BAND.

It is hereby ordered, under authority contained in section 5 of the act of February 8, 1887 (24 Stat. L., 388), and the act of June 21, 1906 (34 Stat. L.; 325-326), that the ten-year period of trust on all allotments made to members of the Chief Moses Band of Indians, in the State of Washington, under the agreement of July 7, 1883, as ratified and confirmed by the act of July 4, 1884 (23 Stat. L., 79-80), the title to which has not passed from the United States, be, and the same is hereby, extended for a further period of ten years.

WOODROW WILSON.

THE WHITE HOUSE, *23 December, 1914*