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THE HONORABLE JUSTIN L. QUACKENBUSH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, vs. UNITED STATES OF AMERICA; ET AL Defendants.	NO. 09-CV-00018-JLQ PLAINTIFFS' MEMORANDUM IN RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Genuine issues of material fact exist as to whether the United States has standing to eject and sue on behalf of the MA-8 Landowners, whether the United States is estopped from pursuing ejectment because of its own or the Landowners' actions, whether the MA-8 Landowners consented to Plaintiffs' use of the Mill Bay Resort until 2034, and whether Plaintiffs have a valid property interest in MA-8 until 2034. Each of these issues of fact creates an independent basis for the Court to deny the

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United States' Motion for Summary Judgment re: Ejectment.

II. FACTS

The facts supporting this Response are set forth in more detail in Plaintiffs' Statement of Facts in Response to the Federal Defendants' Motion for Summary Judgment, filed with this Memorandum. Specific new facts that strongly support Plaintiffs' estoppel defenses are provided in the relevant sections below. These facts establish that genuine issues of material fact exist, precluding summary judgment in favor of the Federal Defendants.

III. LAW AND ARGUMENT

A. United States' does not possess authority to eject Plaintiffs.

1. MA-8 is no longer held in trust by the United States.

Under the Act of March 8, 1906 (ECF No. 234-3, Ex. 2 at 12), patents were to be issued to the Moses Agreement (or "Chief Moses Band") allottees, including Wapato John for MA-8, in which the allottees were to be provided a patent for land held in trust by the United States for ten years from the date of its issuance and, after 10 years, would be free of all restrictions on alienation. Instead of issuing fee patents to these allottees, the United States extended the trust period of those patents. Whether the extension was terminated or elapsed is at issue in this case. The trust status of the Moses Agreement allotments terminated in 1924 by congressional act or expired in March 8, 1936. Therefore, the United States does not have standing to sue Plaintiffs for

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trespass and ejectment on behalf of the Indian landowners ("Landowners") of Moses Agreement Allotment No. 8 ("MA-8") and the Federal Defendants' Motion for Summary Judgment should be denied.

a. The 1924 Act lifted restrictions on alienation of MA-8.

On May 20, 1924, in 43 Stat., 133 (ECF No. 280-1, Attachment A), Congress released the restrictions on alienation for the Moses Agreement lands stating, in part:

> Chapter 160—An Act To authorize the sale of lands allotted to Indians under the Moses agreement of July 7, 1883
>
> … any allottee to whom a trust patent has heretofore been … issued by virtue of the agreement … with Chief Moses … 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…

The notes in the margin of this statute describe the law as: "Allottees may dispose of patented lands." This restriction on alienation caused the Moses Agreement allotments to pass to the allottees in fee. Despite this act and the trust patents' express language, the United States has failed to provide fee patents to the allottees or their heirs.

The language of the 1924 Act is unambiguous. The Court need not look to other canons of statutory construction when the plain meaning of the Act is clear. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S. Ct. 3245, 3250 (1982). The Act lifted the restriction on alienation and passed this land into fee simple absolute, causing the United States to no longer be trustee of the land.

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b. MA-8's trust status expired in 1936, at the very latest.

Even if the Court finds that the 1924 Act did not terminate the trust status of MA-8, the trust status expired by March of 1936 under federal law. The Federal Defendants and the Colville Tribes incorrectly cite to general congressional acts and executive orders to support their contention that the trust status of MA-8 has been extended indefinitely. (ECF No. 232 at 9:7-13; ECF No. 275 at 9-11.) It is important to note that the Moses Agreement allotments are outside of the boundaries of any Indian reservation and are a part of land that is a terminated reservation which was never a part of or restored to the public domain, so many of the laws Defendants cite to do not apply for those reasons. Contrary to the United States' contention, the General Allotment Act (25 U.S.C. § 348) does not apply to MA-8. The General Allotment Act stated that patents shall under that act would be held in trust for 25 years, "Provided, that the President of the United States may in any case in his discretion extend the period." Because of this provision, the President and Congress continued to extend the trust periods of allotments created under this Act and, in 1934, passed the Indian Reorganization Act ("IRA") which extended the trust period of those lands indefinitely. 25 U.S.C. § 462. However, IRA does not apply to MA-8 because it exists outside the boundaries of any Indian reservation. 25 U.S.C. § 468.

Nothing in the Moses Agreement, subsequent acts of Congress, or the act allotting lands to the Moses allottees provided the President or Congress with authority

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to extend the trust period on those allotments. Nevertheless, in 1914, President Woodrow Wilson specifically extended the trust period on Moses allotments for an additional ten years. Regardless of whether he possessed the authority to do so, the fact that a specific order was made with reference to the Moses allotments demonstrates that the federal government knew this land operated under different laws than other land allotted under both the General Allotment Act and the Indian Homestead Act of 1884 (ch. 180, § 1, 23 Stat. 76, 96) and needed to be treated differently.

Despite the 1924 Act, and perhaps overlooking its existence, President Calvin Coolidge, on February 10, 1926, specifically extended the Chief Moses Band allotments' trust period an additional 10 years to expire on March 8, 1936. (ECF No. 234-8, Ex. 7.) The trust status of the Moses Agreement allotments expired on that date.

Again, the Federal Defendants and Colville Tribes ignore express federal law which explains general laws do not apply to MA-8. 25 C.F.R. Ch. 1, Appendix, details the extension of allotment trust periods and includes a section on the Moses Agreement allotments, stating:

> where the name of a reservation is not proceeded by an asterisk, such reservation is not subject to the Reorganization Act and is not subject to the benefits of such indefinite trust or restricted period extension, but such reservation is dependent upon acts of Congress or Executive orders for extension of the trust or restricted period of the land.

The Chief Moses Band allotments are listed without an asterisk, thus the general orders

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extending trust period do not apply to MA-8. The Appendix lists Executive Orders 2109 (Wilson's 1914 Order) and 4382 (Coolidge's 1926 Order) as extending the trust period of the Chief Moses Band allotments until March 8, 1936. Although the Act of September 30, 1936 (ECF No. 234-11, Ex. 10 at 38) would have provided the authority to set forth a chain of events eventually leading to indefinite extension of the Moses Agreement allotment trust period, this act came six months too late. At that time, the Moses Agreement allotments' trust status had already expired. This Court has accurately described the United States' Indian policies as, "Flying Trapeze Policies, swinging back and forth from protection to termination as the political winds directed." *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1053 (E.D. Wash. 2007). Unfortunately, in going back and forth here, the United States missed the trapeze.

2. The United States' failure to represent the Landowners in this action constitutes a waiver of its standing to eject Plaintiffs.

Although the United States purports to represent the Landowners in the ejectment action against Plaintiffs (ECF No. 232 at 2), the United States already recognized its conflict of interest representing the Landowners in this case:

> Additionally, records from the BIA's administrative files indicated that not all individual Indian defendants had taken identical positions with respect to the BIA's actions concerning the lease with Wapato Heritage, LLC nor, during settlement negotiations for a possible new lease with Mill Bay RV Park representatives, did the individual Indian defendants who attended the meeting all agree with one

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> another with respect to Mill Bay RV Park. **It was apparent to BIA and the United States Attorney's Office at that point, that given the differences of opinions among the Indian landowners regarding possible settlement positions and options, that it could not represent all the Indian landowners, individually.** Consequently, … the United States Attorney, …chose to exercise his discretion under 25 U.S.C. § 175 and avoid the **significant possibility that conflicts among the individual Indian defendants, and between some of those defendants and the Bureau of Indian Affairs** would arise. …

(ECF No. 146 at 2:3-17, emphasis added.)

The United States takes the position that it is not required to represent the Landowners against Plaintiffs' claims, despite the fact that 25 U.S.C. §175 states, "In 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." Perhaps this position is based on *Siniscal v. United States*, 208 F.2d 406, 409-410 (9th Cir. 1953). The Ninth Circuit indicated that such an interpretation of *Siniscal* is incorrect:

> We have held that the statute (section 175) is not mandatory. Siniscal v. United States, 9 Cir., 1953, 208 F.2d 406. See also Lyngstad v. Roy, N.D., 1961, 111 N.W.2d 699. There is some legislative history indicating that the statute was meant to apply only to disputes relating to public lands. As to this question, see 'Federal Indian Law,' p. 304, Dept. of Interior (1966); 25 Decisions of Department of Interior 426, 428 (1897). We need not so decide, however. It is clear that the United States Attorney could not properly represent both sides in these cases. The Congress seems to have been aware

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> of the possibility of conflict of interest. See Cong.Rec., 52d Cong. 2d Sess., Feb. 24, 1893, p. 2132. And Congress has made express provision for the retainer of private counsel, with the approval of the Secretary of the Interior, on claims against the United States. 25 U.S.C. 81, 81a, 81b. …

U.S. v. Gila River Pima-Maricopa Indian Cmty., 391 F.2d 53, 56-57 (9th Cir. 1968).

While Plaintiffs assert that MA-8 is no longer trust land, the United States asserts it is trust land. Because this case relates to property of which the United States considers itself trustee, the United States should be providing the Landowners with private counsel to defend the action. However, the United States continues to maintain two inconsistent positions. The United States' position on this matter is illustrative of the obstacles Plaintiffs have encountered from the very beginning. Throughout the years, the United States has claimed to represent the Landowners in some matters, refusing to allow Plaintiffs and Wapato Heritage to deal directly with the Landowners, while later stating that the United States could not bind the Landowners to any decisions and did not represent them during the times they claimed they did.

The United States either represents the Landowners in this action or it does not. Plaintiffs' claims and defenses in this action arise from the same set of facts and Plaintiffs request the same relief from the Court in both their prosecution and defense. The United States cannot claim to represent the Landowners as to the ejectment claim and refuse to represent the Landowners against Plaintiffs' other claims. The United States' refusal to represent the Landowners in this action limits its standing to sue

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Plaintiffs for trespass and ejectment.

B. Genuine issues of material fact regarding Plaintiffs' estoppel defense preclude the United States' ejectment action.

1. Facts Relevant to Estoppel Arguments

George Davis, the Colville Agency's Superintendent at key times relevant to this case admitted that he approved incorporating Plaintiffs' 50 year camping memberships into the Master Lease and Plaintiffs were justified in reasonably relying on his official actions in purchasing their memberships, as the following key facts illustrate:

Fact No. 1—Mr. Davis, Superintendent in 1985, stated that he believed Evans' 1985 letter was sufficient to renew the Master Lease:

> Q Did you have an independent recollection of your own -- or not recollection -- independent view of your own that it had been extended?
>
> A Yes, I did. I thought it was extended.

(Davis Dep. at 28:3-6, ECF No. 296, Ex. 2.)

Fact No. 2—Mr. Davis admits to approving the Expanded Membership Agreements and incorporating their fifty year term into the Master Lease, as well as knowing that Evans was selling these 50 year memberships to the public:

> Q … "The duration of this membership is coextensive with the 50 year term commencing February 2nd, '84, of Seller's lease for the Mill Bay property, which lease was entered into between the United States Department of the Interior..." ...

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> Do you see that paragraph?
>
> A Yes.
>
> Q Were you aware that when you approved this document as a modification to the Master Lease, that that language was there?
>
> A Yes.

(Davis Dep. at 21:8-22:4, ECF No. 296, Ex. 2.)

> Q And in the first paragraph it says it's -- (as read): "Concerning the approval of the Expanded Membership Sale Agreement, I have reviewed the Agreement and approval is granted to incorporate it into the lease. These sales may begin immediately." Is that the prose that you used?
>
> A Yes.
>
> ….
>
> Q What sales were you talking about?
>
> A This is for the membership -- the people that are buying their –

(Davis Dep. at 22:23-23:17, ECF No. 296, Ex. 2.)

Fact No. 3—Mr. Davis expected third parties, such as Plaintiffs, would rely on his official acts, such as accepting renewal of the Master Lease and approving Plaintiffs' membership agreements and such reliance was reasonable:

> Q All right. And you knew in performing your duties as the Superintendent of the Bureau of Indian Affairs for the Colville Agency that members of the public dealing with real estate would rely on your official acts?

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> A Yes.
>
> Q Okay. And they'd be entitled to rely on your official acts?
>
> A Yes.
>
> Q Okay. And so if someone invested significant funds based on the representation from your official act that this lease extended through 2034, they would be entitled to reasonably rely on that?
>
> A Yes.

(Davis Dep. at 24:12-25:7, ECF No. 296, Ex. 2.)

2. The BIA's agency authority bound the Landowners to its actions.

The Landowners are bound by the governments' actions made on the Landowners' behalf. As such, the BIA is estopped from ejecting Plaintiffs because the Landowners are estopped. The Court has made clear that it will not disturb the holding in *Wapato Heritage, LLC v. United States*, CV -08-177-RHW, 2008 WL 5046447 (E.D. Wash. Nov. 21, 2008) *aff'd sub nom. Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011)("*WHLLC v. U.S.*"); however, the court in that case focused on the BIA's authority to bind the *government* in contract rather than the BIA's authority to bind the *Landowners* in contract as their agent.

a. The BIA has actual authority to bind the Landowners.

The BIA has express statutory authority to sign and manage leases of restricted allotments of deceased Indians, such as MA-8. Pursuant to this authority, the Superintendent of the BIA's Colville Agency ("Superintendent") signed and executed

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the Master Lease on behalf of the Landowners and exercised total managerial control and authority over MA-8. Mill Bay relied on the BIA's authority to bind the Landowners in contract, including the 2034 expiration date of the Master Lease and membership agreements. The BIA should be estopped from arguing it lacked such authority when it properly construed its statutory authority to bind the Landowners for over 22 years.

Unlike the *WHLLC v. U.S.* case, the issue here is whether the BIA, acting on behalf of the Landowners as *their* agent, possessed authority to modify or waive the terms of the Lease. Pursuant to direct delegation from the DOI, 25 C.F.R. §162.2, and express authority from Congress (25 U.S.C. § 380), an issue of material fact exists as to whether the Superintendent had actual authority to approve any modifications to the Lease. (ECF No. 294 at 25, ¶ 56.)

Over the past century, the ownership of MA-8 has become fractionated, with approximately 40 Landowners owning an undivided interest in MA-8 today, a common problem with allotted lands. The fractionization of allotted Indian lands has had devastating impacts on the landowners. As the United States Supreme Court recognized in *Hodel v. Irving*, 481 U.S. 704 (1987):

> …The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. …parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners…

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> …Good, potentially productive, land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner…

Id. at 707-709 (citations omitted).

Congress addressed the problem of leasing fractionated allotments by enacting 25 U.S.C. § 380 which states, in relevant part:

> The Secretary may grant leases on individually owned land on behalf of…(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…

The Senate report in favor of enacting 25 U.S.C. § 380 further explained:

> The only method in many cases of deriving some benefit from the land is through a lease. Frequently a difference of opinion exists among the heirs…concerning to whom the land should be leased and the price to be paid… Such an impasse between [owners] proves detrimental to all of them in that no lease is executed, the land lies idle, and no benefit is derived therefrom…It is believed that the leasing of restricted allotments of deceased Indians by the superintendent …will result in protecting the land and its value, insure an income to the interested Indians and reduce the cost to the Government in administering such lands.

S. Rep. No. 76-1570, at 2 (1940). Subsequently, the Secretary issued regulations for superintendents to carry out this Act. The *McNabb v. U.S.*, 54 Fed.Cl. 759 (Fed.Cl. 2002) court describes this authority:

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> FN3. In addition to approving leases, the Secretary may "grant" leases "on individually owned land on behalf of" Native Americans...**The BIA in circumstances pursuant to 25 C.F.R. § 162.2 would be acting on behalf of the allottee, who would be the lessor.**

Id., at 771 (emphasis added). Necessarily, the Superintendent has authority to modify and manage the same leases he has authority to enter into on behalf of the Landowners.

The United States Supreme Court, in *United States v. Mitchell*, 463 U.S. 206 (1983)("*Mitchell II*") recognizes that the BIA does have the authority to manage the leases of allotted lands and, if managed improperly, then the landowners' redress is to sue the United States for mismanagement:

> To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical locations of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.

Id., at 227.

After *Mitchell II*, the courts continued to recognize the BIA's broad authority to supervise and manage leases on Indian lands as a fiduciary of Indian landowners:

> This protection of another's financial interests by the exercise

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> of independent judgment and control is, of course, the essence of a fiduciary's duty to the beneficial owner of a trust corpus…section 415(a) and the implementing regulations of part 162 impose upon the government a fiduciary duty in the commercial leasing context.

Brown v. U.S., 86 F.3d 1554, 1563 (C.A.Fed.1996). *See also Boesche v. Udall*, 373 U.S. 472, 476 (D.C.Col.1963); *U.S. v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986).

Consistent with the above holdings, the courts have always assumed the BIA ***does*** have authority to execute contracts binding Indian landowners without their express approval under the applicable regulatory and statutory schemes. *See U.S. v. Algoma Lumber Co.*, 305 U.S. 415, 423 (1939); *U.S. v. Allbaugh*, 83 F.Supp. 109, 116 -117 (D.C.Neb. 1949). The Supreme Court recognized in *Heckman v. U.S.*, 224 U.S. 413, 444-445 (1912), that when a statute grants the government authority to bind Indian landowners (such as in litigation and settlement), their consent is unnecessary.

Unlike this case, at issue in *McNabb* was privity of contract between the government and the lessee of Indian lands. However, the Court recognized the BIA's managerial authority:

> As to the BIA's role of manager and protector of Native American interests, plaintiffs argue that "BIA representatives assumed almost total managerial control over the allotted lands on the Fort Hall Indian Reservation," and that "**most, if not all, Indian land owners had no input in the management or care of the allotted lands and relied almost exclusively upon the BIA to lease and manage [the**

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> **Tribal lands]**." **This description of the BIA's role**, to the extent that it is consistent with the statutory command for the BIA to "have the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, however, **is distinguishable from the BIA as the party which entered into a contract with the plaintiffs**.

McNabb, 54 Fed.Cl. at 768 -769 (emphasis added).

Unlike the plaintiffs in *McNabb*, Plaintiffs here allege no breach of contract claim against the United States. The *McNabb* plaintiffs' fatal flaw was that they did not make the same agency argument that Plaintiffs make here:

> Perhaps recognizing the **fundamental defect** in both contract and taking theories of recovery, **plaintiffs** merely renew their **contention**, addressed and dismissed earlier, that "[c]ontract law compels the conclusion **that the BIA entered into the leases as a principal, and not simply an agent for the Indian allottees**."…

McNabb, 54 Fed.Cl. at 779 (emphasis added).

Parties must have a method ensuring that the contracts they enter into bind the landowners and landowners must be able to rely on the BIA's proper managerial control of fractionated land. Without such protections, investors are discouraged from doing business on allotted lands, jeopardizing economic development that could benefit the landowners. It is imperative that the Court bind the BIA decisions made on behalf of and ratified by the Landowners to approve the 2034 expiration of the Mill Bay memberships (via membership agreements and/or the 2004 Settlement

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Agreement), which the BIA affirmed as valid to Bill Evans, his successors in interest, Plaintiffs, the Landowners, and numerous other third parties for over 22 years. (ECF No. 294 at 16-20.)

The defaulted Defendant Landowners are deemed to have admitted that Plaintiffs have a valid right to use and occupy the Mill Bay Resort until 2034. (ECF No. 294 at 23.) Likewise, the Defendant Landowners who have appeared, but failed to answer Plaintiffs' Requests for Admission within the requisite 30 days have admitted the same and also admitted that they provided the BIA with express authority to act on their behalf with regards to the entirety of the MA-8 lease and contract transactions, including acceptance of the 2004 Settlement Agreement. (*Id*.) At the very least, an issue of fact exists as to what express authority the Landowners provided the BIA in representing them as to the transactions with Plaintiffs, thus, precluding summary judgment in favor of the Federal Defendants.

3. Plaintiffs have a property interest in MA-8.

The determination of the type of interest Plaintiffs have in MA-8 depends on a resolution of disputed material facts. Thus, the Federal Defendants' Motion for Summary Judgment should be denied. "The property interest created by an instrument poses a mixed question of law and fact…The parties' intent is a question of fact and the legal effect of their intent is a question of law." *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wash.2d 442, 459 at FN7, 243 P.3d 521 (2010). In

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Affiliated FM Ins., the court found that it was unnecessary to label the plaintiff's property interest as a lease, a license, a profit, or an easement, but nonetheless recognized Plaintiffs did have a property interest. *Id.*, at 458. Likewise, it is unnecessary for the Court to determine exactly which type of property interest Plaintiffs have in MA-8 because this is an issue of fact not ripe for summary judgment. At this point in the proceedings, the majority of Defendant Landowners are deemed to have admitted that they agreed to allow Plaintiffs to use and occupy the Mill Bay Resort until 2034. (ECF No. 294 at 23.) The Federal Defendants' contention that the Landowners *now* want to eject Plaintiffs has no effect on whether the Landowners agreed to allow Plaintiffs this right in the first place. A question of fact exists as to what the Landowners' intent was when they accepted rent from Evans and his entities based upon membership sales and when they accepted the 2004 Settlement Agreement money. (*Id*. at 68-69.)

a. Partial Performance

A genuine issue of material fact exists as to whether Plaintiffs are entitled to specific performance allowing them to use the Mill Bay Resort in accordance with their membership agreements or the 2004 Settlement Agreement because of partial performance. The doctrine of partial performance allows validation of an agreement granting an estate in real property that does not satisfy the specific requirements of the statute of frauds if there is part performance of that agreement. *Berg v. Ting*, 125

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Wash. 2d 544, 556, 886 P.2d 564, 571 (1995). "[A] court of equity will specifically enforce a parol contract for the conveyance of an interest in real property where there has been part performance by one of the parties if 'the contract (can) be established to the satisfaction of the court by clear and unequivocal proof, leaving no doubt as to the character, terms, and existence of the contract.'" *Canterbury Shores Assoc. v. Lakeshore Prop., Inc.*, 18 Wash.App. 825, 829, 572 P.2d 742 (1977); *see also Proctor v. Huntington*, 146 Wash.App. 836, 853 at FN8, 192 P.3d 958 (2008).

Plaintiffs took possession of the Mill Bay Resort, paid for membership contracts and annual dues that went, in part, to the Landowners and, in 2004, started paying additional rent of $25,000 per year to the Landowners for use of the Mill Bay Resort. (ECF No. 294 at 10, 68-69.) While no one disputes that Plaintiffs have a valid written contract with Wapato Heritage, Federal Defendants argue that Plaintiffs have no written contract with Defendant Landowners. At the very least, there is an issue of fact as to whether Plaintiffs have an enforceable oral contract with Defendant Landowners that is enforceable through the doctrine of partial performance.

b. License

The Court indicated that Plaintiffs may have a license to use the Mill Bay Resort. To the extent this license is deemed set for a specific term and not revocable at will, Plaintiffs agree to this characterization. A license is "a privilege to use property." *Affiliated FM Ins.*, 170 Wash.2d at 458. A license is not an interest in land; rather, a

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license is permission to do some act or series of acts on another's land that would otherwise be a trespass. *Conaway v. Time Oil Co.*, 34 Wash.2d 884, 893, 210 P.2d 1012, 1017 (1949). An implied or express license is ordinarily revocable at will. *Reed Logging Co. v. Marenakos*, 31 Wash.2d 321, 326, 196 P.2d 737 (1948). However, the Washington Supreme Court has expressly recognized that certain licenses may not be terminable at will: "The law protects a wide range of property interests from harm. A license, a privilege to use property, is entitled to legal protection against interference by a third person **if the license is not terminable at will** or grants possession to the exclusion of the third person." *Affiliated FM Ins. Co.*, 170 Wash.2d at 458 (emphasis added); *see also, Moe v. Cagle*, 62 Wash.2d 935, 936, 385 P.2d 56 (1963) (the court recognizes possible permissive uses in that case as "a revocable or irrevocable license, or an easement").

Other jurisdictions have held that, where the licensee, acting on the faith of the license, has incurred expenses and made improvements, the license is considered in the nature of an easement and cannot be revoked:

> the right of revocation of the license is subject to the qualification that where the licensee has exercised the privilege given him and erected improvements or made substantial expenditures on the faith or strength of the license, **it becomes irrevocable and continues for so long a time as the nature of the license calls for. In effect, under this condition the license becomes in reality a grant through estoppel**."

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Holbrook v. Taylor, 532 S.W.2d 763, 765 (Ken. Sup. Ct. 1976) (emphasis added, internal quotations and citations omitted); *see also Indus. Disposal Corp. of America v. City of East Chicago*, 407 N.E.2d 1203, 1205 (Ind. Ct. of App., 3rd Dist. 1980); *Dance v. Tatum*, 629 So.2d 127, 128-29 (Fl. Sup. Ct. 1993); *Mund v. English*, 69 Or.App. 289, 292, 684 P.2d 1248 (Or. Ct. of App. 1984)("[W]hen a licensee makes valuable improvements on the basis of a promise, the licensor will not be permitted to assert that the license could be revoked. **An irrevocable license does not depend on proof of the agreement of the parties but arises by operation of law to prevent an injustice**." (emphasis added).); *Paul v. Blakely*, 243 Iowa 355, 359-60, 51 N.W.2d 405 (Iowa Sup. Ct. 1952); *Coumas v. Transcontinental Garage, Inc.*, 68 Wyo. 99, 127, 230 P.2d 748 (Wyo. Sup. Ct. 1951)("[A] privilege to do certain acts of a temporary character on the land of another is and always remains a mere license which is revocable at the will of a licensor **unless a definite time has been specified,** or unless it is coupled with an interest." (emphasis added).).

In *Grigoleit, Inc. v. Bd. of Trustees, Sanitary Dist. of Decataur*, 233 Ill.App.3d 606, 614, 599 N.E.2d 51 (Ill. App. Ct. 1992), the court provided a test as to when a license becomes irrevocable: "The requirement of the fraud exception to the revocability of licenses are (1) the licensee has spent substantial sums of money which were induced by the affirmative efforts of the licensor, (2) improvements which the licensee made were at least partly for the benefit of the licensor; and (3) revocation

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would result in an injury which would amount to great wrong and oppression." *Id*.

Washington case law on the subject is not nearly as comprehensive, but does not preclude (and actually supports) application of the above principles of law. Plaintiffs have expended substantial sums of money over the course of the last 28 years. (ECF No. 89 at 12-13; ECF No. 294 at 39.) The Landowners expressly agreed to a lease knowing that the Master Lease was intended to create the Mill Bay Resort as the sole source of income from MA-8 for the Landowners. (ECF No. 294 at 10.) The Landowners have benefited from this money. (*Id*.) Plaintiffs (or Evans on their behalf) have made improvements upon this land for the benefit of the Landowners in the form of landscaping and structures that will remain on the property after Plaintiffs leave. (ECF No. 89 at 12-13.) These memberships were marketed as 50 years, without exception. (ECF No. 294 at 24.) Plaintiffs would not have entered into these membership agreements if they were not purchasing them for the full 50 year term. Both Defendant Landowners and their trustee, the United States, knew that these memberships were being marketed for 50 years. (ECF No. 294 at 24, 34-35.) In 2004, the Plaintiffs expended more money and entered into a settlement agreement which the Landowners knew affirmed Plaintiffs' right to use and occupy the Mill Bay Resort until 2034. (*Id*. at 65.) With that knowledge, the Landowners and their trustee accepted the settlement money without objection. (*Id*. at 68.) Plaintiffs gave up other investment opportunities by purchasing these memberships in reliance of the promises made to

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them which were based upon promises the Landowners and the BIA made to Evans and his agents.

If Plaintiffs were to be ejected from this property prior to the 2034 expiration date, a great injustice would result. The Mill Bay Resort is unique land. Undeveloped land such as this is virtually impossible to find in the present day. At this point, money will not restore Plaintiffs to the position they would have been in if they had not entered into the membership contracts. The BIA and Landowners are not asking for possession of the land. The Landowners, at most, have indicated they want higher returns on the property. If the Mill Bay Resort was a poor business decision, then either the Landowners or their trustee, the BIA, are to blame. The Landowners can seek damages against the BIA for mismanagement to receive the compensation they desire. Money damages will not appropriately compensate Plaintiffs.

c. Easement

Arguably, if Plaintiffs have an irrevocable license, it may more accurately be described as an easement: "… if a license is intended to be irrevocable, it is intended as an easement, as it gives an interest of a permanent or quasi permanent nature." *Bakke v. Columbia Valley Lumber Co.*, 49 Wash.2d 165, 170, 298 P.2d 849 (1956). "An easement is a right to enter and use property for some specified purpose." *Affiliated FM Ins.*, 170 Wash.2d at 458. Easements can arise by estoppel under Washington law. *Proctor*, 146 Wash.App. at 854. Federal law, including regulations related to Indian

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allotments does not preclude such an easement. In *Ormiston v. Boast*, 68 Wash.2d 548, 552, 413 P.2d 969 (1966), the Washington Supreme Court laid out several bases by which an easement by estoppel could be found: "the intentional relinquishing of any right by the defendants, or the inducing of any act by the plaintiff that constituted a change of position, or that was prejudicial to him…." *Id.*, at 552 (emphasis added). As stated above, Plaintiffs have demonstrated that at least a genuine issue of material fact exists as to whether these elements exist in this case.

C. Equitable Estoppel

As stated above, various equitable defenses apply to this action. In *Canterbury Shores*, 18 Wash.App. at 827, the Washington State Court of Appeals echoed what justice requires in this case if the Court finds no license, lease, or easement exists to protect Plaintiffs from ejectment:

> …'The facts of this case cry out for some form of relief. And the law, in developing theories, or to take care of situations, I think has developed an easement by estoppel.' We agree …**if no legal theory would support the [plaintiff's] claim, equity should intervene**…

Plaintiffs assert that the Defendants are estopped to deny the Plaintiffs' rights to use Mill Bay Resort until February 2, 2034 and, thus, estopped from ejecting them from the property. "The doctrine of equitable estoppel precludes a party from asserting a claim or position based on equitable principles." *Kinnebrew v. CM Trucking & Const., Inc.*, 102 Wash.App. 226, 235, 6 P.3d 1235, 1239 (2000). *See also Portman v.*

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United States, 674 F2d 1155, 1158 (7th Cir. 1982). "The doctrine of equitable estoppel rests on the principle that a person "shall not be permitted to deny what he has once solemnly acknowledged." *Nickell v. Southview Homeowners Ass'n*, 167 Wash.App. 42, 53, 271 P.3d 973, 980, *review denied*, 174 Wash.2d 1018, 282 P.3d 96 (2012)(quoting *Arnold v. Melani*, 75 Wash.2d 143, 147, 449 P.2d 800 (1968).). Whether the circumstances in a given case merit imposition of the doctrine of equitable estoppel to preclude a party from asserting a claim or position, necessarily involves issues of fact for the fact finder. *Shows v. Pemberton*, 73 Wash.App. 107, 111, 868 P.2d 164, 166 (1994).

Plaintiffs acknowledge that estoppel against the government is analyzed at a heightened standard. However, Plaintiffs' defense here, while in response to the Federal Defendants' Motion, is actually against the Landowners. The Federal Defendants are representing the Landowners in this ejectment action as their trustee. Plaintiffs, therefore, are not asserting estoppel against the United States in its general governmental capacity, but as a trustee to private individuals. It is not necessary to apply the governmental standard because the policy underlying that standard is to protect public funds and governmental functions, not private individuals. Thus, the same estoppel standard that would apply to the Landowners as individuals should apply to the United States while it is representing them as their trustee.

Even if the Court applies the heightened standard, the facts support estoppel

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against the United States. While estoppel principles may apply to public as well as private parties, courts generally disfavor the application of the doctrine of estoppel against public entities. *Kramarevcky v. Dept. of Social and Health Services*, 122 Wash.2d 738, 744, 863 P.2d 535 (1993) (court must be most reluctant to find government equitably estopped when public revenues are involved). Estoppel against the federal government requires a showing that the government (1) engaged in affirmative misconduct, (2) the government's wrongful actions will cause a serious injustice, and (3) government liability will not cause the public's interest to suffer undue damage. *Watkins v. U.S. Army*, 875 F.2d 699, 706 -707 (9th Cir.1989). Affirmative misconduct requires an affirmative misrepresentation or concealment of a material fact but need not be intentional. *Id*. Equitable estoppel estops the government from taking a position against a party which the government caused:

> Under equitable estoppel, the Government is estopped from raising a statute of limitations defense when the plaintiff's untimeliness is due to his justified reliance on the Government's false or misleading statements or conduct.

Muniz-Rivera v. U.S., 204 F.Supp.2d 305, 317 (D.Puerto Rico 2002).

Regardless of whether it was intentional, the BIA engaged in affirmative misconduct with regards to Plaintiffs' right to use MA-8. The BIA knew Plaintiffs purchased their camping memberships in reliance that they were to last for 50 years and even approved those memberships (ECF No. 294 at 34-35), but now denies having

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any involvement in that process. The BIA allowed Plaintiffs to settle their claims against Wapato Heritage in 2004 while sitting silently, providing the appearance of agreement with that settlement and passing on the settlement money to the Landowners and later disavowed any participation in it. (*Id*. at 53-68.)

a. The Indian Landowners had actual notice of the renewal.

The Landowners, thus the BIA, should be estopped from claiming Plaintiffs' memberships expire prior to 2034. A fiduciary is an agent and must abide by the principles of agency law. As the Landowners' agent, the BIA was bound to provide material facts regarding management of the property and Lease to the Landowners, including notice of Evans' renewal letter. REST 3d AGEN § 8.11. Acknowledging this duty, the BIA frequently forwarded important information regarding the Lease to the Landowners, including repeated assertions that the Lease expired in 2034. (ECF No. 294 at 19-23.) Once third parties, such as Evans, provided information to the BIA, that information was imputed to the Landowners. REST 3d AGEN § 5.03. Additionally, there is at least a genuine issue of material fact as to whether the Landowners received actual notice that Evans had exercised the option to renew. (ECF No. 294 at 23.)

BIA records, including letters to the Landowners and Landowner meeting minutes, establish that a majority of the Landowners were informed of the renewal prior to 2008. (ECF No. 294 at 19-23, 69.) 27 of the Landowners are in default. (ECF

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No. 135.) Those Defendant Landowners thereby admit the allegations in Plaintiffs' Complaint that "the BIA and Allottees…at all times knew that Evans had exercised his option to renew" (ECF No. 1 at ¶135) and that, as a result of negotiation of the Replacement Lease "and other previous documentation provided to the Allottees, all of the Allottees received actual notice that the Master Lease had been renewed…..". (*Id*. at ¶143.)

Here the equities weigh in favor of the Plaintiffs. A majority of the MA-8 Landowners had actual knowledge of the renewal. They reconfirmed this knowledge by (1) making no objection to the 2034 term within the 2004 Settlement Agreement, (2) accepting the benefits of the 2004 Settlement Agreement, and (3) not appearing in this action to deny the Plaintiffs' allegations regarding their actual knowledge of the extension of the Master Lease through February 1, 2034.

b. The BIA is estopped from reversing its previous decisions.

For 22 years, the BIA affirmed the validity of the 2034 expiration date. CTEC relied on the renewal in its sublease to construct and operate a casino, which provided significant financial return to the Landowners. (ECF No. 294 at 40.) After Evans died and presumably many records were gone, the BIA issued a letter to Wapato Heritage that the renewal was invalid. (*Id*. at 71.) The BIA lacked authority to reconsider and reverse its earlier determinations. Plaintiffs are asking the Court to estop the BIA from taking a contrary position as opposed to asking the Court to determine whether the

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renewal option was validly exercised.

An agency may only reconsider a previous decision if it does so within a reasonable time after the first decision. *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993). An agency cannot, "based only on policy reasons, [decide] to adopt one legally supportable position rather than another." *Belville*, 999 F.2d at 999. Affirming the above rule, the Eighth Circuit, in *Coteau Properties v. Dept. of Interior*, 53 F.3d 1466, 1479 (8th Cir. 1995), refused to allow the DOI to reverse a prior decision because it, "Indeed decided that the withdrawn decision was doubtful in the light of changing policies."

The Superintendent had actual authority to bind the Landowners when he signed the Master Lease on their behalf. He also had actual authority to modify the Lease and properly construed this authority to permit him to act on the Landowners' behalf in *all* matters regarding management of MA-8. Indeed, Evans dealt solely with the Colville Agency through the years in developing the land under the Lease. The BIA cannot now change course after properly construing its authority for two decades:

> The Secretary construed the act to confer this authority, and such construction is reasonable and plausible from the language of the act. Courts have uniformly held that, when the executive department of the government is charged with the execution of a statute, places a reasonable construction upon the statute, and acts upon that construction for a number of years, changes in the construction of the statute are looked upon with disfavor, when parties who have

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> contracted with the government on the faith of the old construction may be injured thereby.

Whitebird v. Eagle-Picher Lead Co., 28 F.2d 200, 204 -205 (D.C.Okl. 1928)(citations omitted).

Public policy also prohibits the BIA from reversing course after hundreds of people entered into contracts relying on the BIA's proper interpretation of its authority to affirm the 2034 expiration date:

> In determining whether agency reconsideration is proper in a given case, "two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *Civil Aeronautics Bd., v. Delta Air Lines, Inc.*, 367 U.S. 316, 321…(1961)…

Belville, 999 F.2d at 997 (citations omitted). The right and just result here is to allow Plaintiffs to use the Mill Bay Resort until 2034.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court deny the Federal Defendants' Motion for Summary Judgment re: Ejectment.

DATED this 1st day of December, 2012.

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