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

PAUL GRONDAL, a Washington resident; and the MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, et al., Defendants.	Case No. CV-09-0018-JLQ FEDERAL DEFENDANTS' REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS RE EJECTMENT

I. INTRODUCTION

Since February 2009, Plaintiffs have occupied and recreated on the lake front portion of Indian trust land known as MA-8 without the benefit of a lease or other agreement with the Indian landowners and without their permission or consent. And since January 2009, for four years, the Indian landowners have received no compensation from or on behalf of Plaintiffs for their holdover occupation.

As set forth below, MA-8 is trust land. Plaintiffs have failed to set forth any genuinely disputed material facts to raise a triable issue on whether equitable estoppel

or other legal defenses should apply to prevent the ejectment of Plaintiffs from this trust land. As a matter of law, this Court must hold that the United States has set forth facts entitling it to a judgment for ejectment and that there are no cognizable legal or equitable defenses warranting a trial on this issue.

II. LEGAL ANALYSIS

A. MA-8 Remains Indian Trust Land

For the past 106 years, when all actions relevant to this lawsuit occurred, when this lawsuit was filed, and when this Court issued its first substantive decision, all parties understood and treated MA-8 as Indian trust land. Not until over a year into this litigation was the trust status of MA-8 challenged by any party.[1] The arguments against trust status have no merit.

There is no dispute that Congress directed the issuance of trust patents to the Moses allottees in the Act of March 8, 1906. ECF No. 293 at 4-5; ECF No. 295 at 2. Nor is there any dispute that the Department of the Interior has always treated MA-8 as trust land since the patent was issued to Wapato John. Six years ago Congress ratified this position and the trust status of MA-8. In 2006, Congress 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, 120 Stat. 340.[2]

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[1] As the United States argued in its memorandum, ECF No. 232 at 5, and which has not been addressed or refuted, judicial estoppel should prevent this issue from being considered by the Court.

[2] Tellingly, this amendment was requested by WHLLC who was interested in entering into a new 99 year lease of MA-8. ECF No. 305-2, Attachment B.

The Indian Long-Term Leasing Act authorizes the Indian owners of "restricted Indian lands" to lease their land with the approval of the Secretary. 25 U.S.C. § 415. As originally enacted, the statute limited business leases, like the Master Lease at issue here, to a term of 25 years with a single renewal for an additional 25 years. Over the years Congress amended the law many times to allow leases for up to 99 years on specified trust and restricted Indian land. The 2006 amendment followed an earlier amendment in 1980 that had granted similar authority to the owners of MA-10. *See* Act of March 27, 1980, 94 Stat. 125. Because the Long-Term Leasing Act applies only to trust and restricted Indian lands, Congress' action to extend 99 year leasing authority to MA-8 and MA-10 confirms that Congress considers these allotments in trust status.

These amendments leave no question that Congress was aware of, and approved of, the Department's consistent position that the Moses allotments were still in trust status. *See Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1171-72 (9th Cir. 2008), *cert. denied*, 557 U.S. 935 (2009) (Congress ratified executive determination as to eligibility in subsequent legislation); *Disabled American Veterans v. Secretary of Veterans Affairs*, 419 F.3d 1317, 1322-23 (2005), *cert. denied*, 547 U.S. 1162 (2006); *San Huan New Materials High Tech v. ITC*, 161 F.3d 1347, 1355 (Fed. Cir. 1998) (Congress ratifies agency practice when it legislates in that area of law covered by practice, with full awareness of agency's practice, and does not change or refer to that practice). Thus, even if the path to continued trust status contains gray areas, the Department's consistent position was ratified and affirmed by Congress. MA-8 remains in trust status.

Even before Congress acted to confirm the trust status, actions by the executive and Congress ensured that MA-8 remained in trust. As originally granted, the

allotments' trust period was to last 10 years. ECF No. 293 at 4-5; ECF No. 295 at 2. Executive Order 2109 and Executive Order 4382 each extended the trust period for an additional 10 years. ECF No. 293 at 5 n. 3; ECF No. 295 at 5. Plaintiffs and WHLLC assert that the President lacked authority to extend the trust period in these executive orders but neither party has refuted or even addressed the clear authority granted to the President in the Act of June 21, 1906, 34 Stat. 325, codified at 25 U.S.C. § 391. *See also United States v. Jackson*, 280 U.S. 183, 197 (1930) (Act of June 21, 1906, 34 Stat. 325, authorized President to extend trust restrictions on non-General Allotment Act allotments).

Plaintiffs and WHLLC also assert that prior to the second Executive Order the Moses allotments lost their trust status due to the enactment of the Act of May 20, 1924. As explained in our Memorandum in Support, ECF No. 232 at 8-9, and in the Tribes' Supplemental Memorandum, ECF No. 280 at 2-4, the 1924 statute merely lifted the original prohibition on the sale of the last 80 acres of the allotment. Per the language in the 1924 statute, the heirs could now sell the entire allotment "in accordance with" a 1920 Act that required Secretarial approval--like all sales of trust land do. Any doubt that this is the correct interpretation of the statute's language is overcome by contemporaneous correspondence. *See* Declaration of Colleen Kelley filed herewith, Exhibits A and B (Letter from Assistant Commissioner to Mr. Wapato, dated February 5, 1924 (H.R. 2878 (that became the 1924 statute) introduced in Congress would allow owners to sell entire allotment "with approval of the Department along the same plan followed in selling trust lands on the various Indian reservations"); Letter from Superintendent to Mr. Kingman, dated August 16, 1924 (instructing that with passage of 1924 statute all of MA-8 could be sold "of course" subject to Departmental approval)).

The two Presidential Orders extended the trust period to March 8, 1936. But before the two extensions expired, Congress, acting in accordance with the new federal policy to prevent further alienation of trust land, extended the trust status to December 31, 1936. Act of June 15, 1935, 49 Stat. 378. WHLLC asserts that this act could not apply to the Moses allotments because they were not on any reservation. ECF No. 293 at 14. But WHLLC takes inconsistent positions. It challenges the argument that the 1920 Executive Order extending for 25 years the trust period on all public domain allotments does not apply to the Moses allotments. ECF. No. 293 at 10-13. Yet if the Moses allotments are not on the public domain, they must be on a reservation and thus subject to the extension granted in the 1935 Act. It was clearly the contemporaneous view of the Department of the Interior that the Moses allotments should be considered to be subject to the 1935 Act. *See* Declaration of Colleen Kelley filed herewith, exhibits C (1936 Commissioner's Report describing the 1935 statute as "extend[ing] until December 31, 1936, the trust periods on *all Indian lands outside of Oklahoma* which would otherwise have expired" (emphasis added)) and D (1949 CFR Chart listing Moses allotments among those allotments on reservations); 25 C.F.R. Subchapter O (2012). MA-8 remains trust land.

Alternatively, Plaintiffs argue that the United States is not authorized to bring this action for ejectment on behalf of the Indian landowners because it does not represent them personally. The United States represents the BIA as trustee for the Indian landowners. It is the government trustee's duty to protect this property from trespass. It is not inconsistent for the United States to take the position that, as trustee, it has statutory duty to take action when others trespass on Indian trust land, but does not represent each individual trust landowner individually and personally.

> The contention that the United States was without authority to maintain the suit in the capacity of guardian of these Indians is without merit. In United States v. Kagama, 118 U.S. 375, 383, 384, 6 Sup. Ct. 1109, 1114, 30 L.Ed. 228, the general doctrine was laid down by this court that the Indian tribes are wards of the nation, communities dependent on the United States. 'From their very weakness and helplessness, so largely due to the course of dealings of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' This duty of protection and power extend to individual Indians, even though they may have become citizens.

Cramer v. United States, 261 U.S. 219, 232 (1923), citing *United States v. Nice*, 241 U.S. 591, 598, 36 Sup. Ct. 696, 60 L.Ed. 1102 (1916). *See also* Memorandum Opinion, ECF No. 144 at 25 (setting forth law and regulations authorizing United States to protect trust land from trespass).

B. Plaintiffs Have Not Demonstrated that Equitable Estoppel Should Grant them the Right to Occupy MA-8.

a. BIA is not an Agent of the Indian Landowners

Plaintiffs first set forth an argument that BIA is an agent for the Indian landowners with respect to MA-8 and in this agency role, BIA's actions bind the beneficial landowners. The trust relationship between BIA and the beneficial landowners has been thoroughly briefed in both this case and *Wapato Heritage LLC v. United States* No. CV-08-177-RHW. BIA does not act as the private agent of the landowners. BIA acts as a unique governmental trustee in accordance with authorities provided in federal law and regulations. Those authorities do not give BIA the broad powers of an agent and common law agency principles are not applicable to considering the effect of BIA's actions with respect to MA-8. *Sessions, Inc. v. Morton*, 491 F.2d 854, 857 n. 5 (9th Cir. 1974) (BIA's negligence cannot be

imputed to the Indian landowners so as to estop them from exercising their rights under a contract).

As explained in detail in the United States' Response to Plaintiff's Motion for Reconsideration in *Wapato Heritage LLC v. United States*, No. CV-08-177-RHW; ECF No. 53 at 9-11, the Superintendent signed the Master Lease using two different authorities. With respect to a minority of the owners he exercised the authority granted in 25 U.S.C. § 380. With respect to a majority of the owners, however, he executed the lease based upon an explicit authorization to sign that lease granted by those landowners to the Superintendent. *See also Wapato Heritage L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011). In neither case, however, was the BIA imbued with the general powers of an agent. Plaintiffs' bald assertion that from this limited authority "[n]ecessarily, the Superintendent has authority to modify and manage the same leases he has authority to enter into on behalf of the Landowners," (ECF No. 295 at 14), has no support in law. Moreover, the Court has already ruled that Plaintiffs cannot argue that BIA has authority to unilaterally modify the terms of the lease or ratify any deficiency in compliance with its terms. ECF No. 144 at 21, citing Judge Whaley's ruling. Plaintiffs' argument that BIA acts like a private agent for the landowners is entirely inconsistent with the Court's conclusion. The common law of agency has no relevance to this matter.

b. <u>There can be no estoppel against the Indian landowners or the BIA</u>

Plaintiffs begin their equitable argument by acknowledging the heightened standard they must meet when asserting estoppel against the government. ECF No. 295 at 25. But they then attempt to avoid that test by arguing that here they are not "asserting estoppel against the United States in its general governmental capacity, but

as a trustee to private individuals." *Id.*[3] Thus, they argue the heightened standard should not apply. They are wrong on two counts. First, the United States is acting in a governmental capacity--as the unique federal trustee, and second, it is acting on behalf of the Indian beneficial owners not for "private individuals." BIA is not involved in MA-8 because of some private contractual arrangement with the owners of MA-8. Its duties all arise out of federal law in accordance with its governmental role of trustee to Indians. Plaintiffs' agree. ECF No. 294 at 5-6 ¶ 3.

The equitable doctrine of estoppel cannot be applied to the United States when it acts as a trustee for Indians. *United States v. City of Tacoma, Wash.*, 332 F.3d 574, 581 (9th Cir. 2003) (when the United States acts as trustee for an Indian tribe, it is not at all subject to the defense of equitable estoppel); *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) (noting the well-established rule that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses); *United States v. Ahtanum Irr. Dist.*, 236 F.3d 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), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Cramer v. United States*, 261 U.S. 219, 234 (1923). *See also* Federal Defendants opening Memorandum, ECF No. 232 at 14-15; Federal Defendants Response to Plaintiffs' Third Motion for Summary Judgment re Estoppel, ECF No. 120 at 2-4. With respect to the Indian landowners, equitable estoppel will not be found with respect to occupancy rights on their trust land. *See* ECF No. 232 at 15-16.

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[3] Plaintiffs also claim that their "defense, while in response to the Federal Defendant's Motion is, actually against the Landowners." ECF No. 295 at 25.

c. There are no disputed material facts warranting a trial on the issue of ejectment and as a matter of law Federal Defendants are entitled to judgment in their favor.

Even if the Court decides to consider the facts in evaluating whether estoppel should apply, Plaintiffs have failed to provide any material disputed facts and the material undisputed facts do not constitute sufficient evidence of estoppel against either the government or the beneficial landowners. In responding to a motion for summary judgment, Plaintiffs cannot just rest upon pleadings but must come forward with specific facts showing a genuine issue for trial as to the elements essential to their case. ECF No. 232 at 2. The facts Plaintiffs point to are: BIA's assumption or belief that the lease ran to or had been extended to 2034; BIA's "knowledge" or "approval" of documents, including the camping memberships and the CTEC sublease that contained an understanding they would last until 2034; BIA's signature on a state form indicating the Master Lease ran to 2034; BIA's failure to intervene or object to the 2004 Settlement Agreement between Plaintiffs and WHLLC; the payment by WHLLC of a single check to the landowners associated with the 2004 Settlement and the 99 year lease proposal; landowners receipt of documents or statements primarily after 2004 that erroneously stated the Master Lease ran to 2034; landowners' receipt of information that the RV Park and the WHLLC had entered into the 2004 Settlement Agreement; and certain admissions by Indian landowners by virtue of their failure to answer the Complaint and their failure to respond to Requests for Admissions. ECF No. 295 at 9-10; 17-18; 22-23, 26-28.[4]

[4] Despite conducting extensive discovery, Plaintiffs point to virtually no new facts from those they relied upon in defending Federal Defendants' first motion for

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Looking closely at all the undisputed facts, this is what happened. During the initial term of the Master Lease, BIA employees were presented with various documents by Evans and/or WHLLC that indicated that Evans and/or WHLLC considered the Master Lease to have been renewed for a second 25 year period. Except possibly in 1985 when Evans purportedly exercised the option, BIA employees did not challenge that understanding. A former BIA official testified in 2012 that he recollects that based upon what another BIA employee and Evans' attorney told him in 1985 he thought the Master Lease had been extended. Two BIA employees[5] were present at a portion of mediation between WHLLC and Plaintiffs regarding litigation arising from WHLLC's attempt to cancel Plaintiffs' camper memberships, and BIA employees were aware that a settlement had been reached between WHLLC and Plaintiffs. BIA employees were informed by WHLLC that the Settlement Agreement was executed and were provided a copy. BIA facilitated a single payment by WHLLC of $25,000 to the landowners consistent with the Settlement Agreement. Most of the beneficial landowners were told about the Settlement Agreement and either WHLLC or BIA represented to them that the Agreement included a provision that the RV Park could remain on MA-8 until 2034.

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ejectment and those cited in their five summary judgment motions. *See generally* ECF Nos. 88-95. Plaintiffs have not overcome the gaps pointed out by Federal Defendants then. *See* ECF No. 120 (Federal Defendants' Response to third Motion at 4-6).

[5] Sharon Redthunder was not a BIA employee in 2004. *See* ECF No. 296-1 at pp. 9-10.

A few beneficial landowners received a copy of the 1985 Evans letter during a meeting in 2007 with WHLLC to discuss a 99 year replacement lease. In 2007, BIA conducted a lease compliance audit of the Master Lease and notified WHLLC that it could not find evidence that the option to renew had been effectively exercised. In response WHLLC provided neither proof of prior notification to the landowners nor properly exercised its option to renew. The Master Lease ended as of February 2009.

None of these facts exhibit the type of affirmative misconduct that justifies applying estoppel to either the Federal Government or the Indian landowners.

d. BIA's actions were not affirmative misconduct directed toward Plaintiffs.

It is undisputed that until 2007 BIA never explicitly addressed the issue of the option to renew or the length of the Master Lease. Rather, the facts suggest that BIA officials generally ignored the issue and did not object to or question Evans' and/or WHLLC's assertions as to the length of the Master Lease. This failure to object is not affirmative misconduct. *United States v. Nez Perce County*, 553 F. Supp. 187, 192-193 (D. Idaho 1982) citing *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977) (agency actions that can be characterized as ambivalent and implications drawn from silences and failures to respond do not constitute affirmative misconduct).

In fact, BIA did not necessarily need to address the issue during this time. For example, although the 2004 Settlement Agreement contained provisions that dealt with years to 2034, it also contained an express provision that the Agreement was subject to the terms of the Master Lease. In 2004, when the option period had not expired and the Master Lease could still have been lawfully renewed to 2034, a

failure to object to references to 2034 is not an affirmative statement that the option had been lawfully renewed. It was not BIA duty's to referee the dispute between WHLLC and Plaintiffs. ECF No. 144 at 33-4 (BIA had no authority to settle controversy between WHLLC and Plaintiffs). So long as the interests BIA was charged with protecting were not adversely affected it did not need to get involved. Since the Settlement Agreement expressly provided that all terms "inconsistent" with the Master Lease shall be deemed revoked, by its terms the Settlement Agreement was not inconsistent with the Master Lease and BIA would have had no reason to object.

Moreover, as the United States has set forth previously, ECF No. 120 at 4-7, there is no evidence that any statement or representation was made by BIA directly to Plaintiffs, and there is a dearth of evidence related to reliance. Rather, the only evidence is that Plaintiffs relied on representations by Evans or WHLLC in support of their belief that Master Lease had been extended to 2034. Most importantly, Plaintiffs fail to mention the only affirmative action BIA did take regarding the renewal option in the Master Lease. BIA notified WHLLC that it could not find evidence that the Master Lease had been validly renewed, and, it was this notification and WHLLC's failure to properly exercise its option thereafter that defeated WHLLC's equitable argument. *WHLLC v. U.S.*, No. CV-08-177-RHW ECF No. 30 at 13. If these facts do not establish estoppel as against the lessee, how could they establish estoppel against a third party – Plaintiffs – whose only rights on the property arise from its relationship with the lessee.

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e. Indian landowners' passive receipt of information from BIA and WHLLC cannot operate to estop them from contesting Plaintiffs' claim to a right to occupy their trust land.

Plaintiffs also argue that the Indian landowners' actual or imputed knowledge or understanding that Plaintiffs would occupy MA-8 until 2034 constitutes facts that in equity establishes Plaintiffs' right to remain on MA-8. This argument has no merit for a number of reasons.

Initially, Plaintiffs misstate the extent or the nature of what the Indian landowners knew relative to the Master Lease or the 2004 Settlement Agreement and thereafter jump to unsupported conclusions and arguments. The facts only reveal that after the 2004 Settlement Agreement was executed and during the time that WHLLC was attempting to secure a 99 year replacement lease, landowners either received correspondence from BIA or heard statements that asserted Plaintiffs could remain on MA-8 until 2034. These statements were always made in the context of seeking the landowners' consent to a new 99 year lease of MA-8. For example, Jeffery Webb testified that at a meeting he attended in 2006 to discuss the idea of a 99 year replacement lease for MA-8, the 1985 Evans letter was handed out to "at least 8" beneficial landowners who attended that meeting.[6] Such facts do not form a basis for

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[6] Plaintiffs' Statement of Material Fact states that landowners constituting a majority interest in MA-8 received this letter at that meeting. (ECF No. 294 at 23, no. 48). The exhibits cited do not support this statement. Webb's declaration stating that this 1985 letter was handed out to beneficial landowners who attended this meeting in 2006 also shows that the beneficial owners' share of interest in MA-8 does not constitute a majority interest of the beneficial landowners but that Plaintiffs include

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equitable estoppel. It would have made little sense for the landowners to recognize such statements as bearing on the option to renew to 2034 when the major topic was a new lease granting occupancy rights into the next century. Nor is passive receipt of such secondary information equivalent to notice by the lessee to exercise his option to renew. Indeed, Judge Whaley found that WHLLC did not intend to exercise the option when it forwarded copies of the Evans' 1985 letter to the landowners in 2006. *WHLLC v. U.S.*, ECF No. 30 at 12.

Plaintiffs' assertion that at least a majority of the beneficial landowners believed and accepted or affirmed that the Master Lease was renewed to 2034 or that Plaintiffs could remain on their land to 2034 is simply not supportable by the facts. ECF. No. 295 at 22, 27-28. The fact that the Indian landowners were told things about their property does not constitute any affirmative conduct and certainly cannot, in equity, be held against the Indians even if estoppel principles could apply to them.[7]

f. Indian Landowners' defaults are of no legal significance.

Plaintiffs also charge that the admissions implied by the defaults of the Indian landowners constitute undisputed facts that entitle Plaintiffs to remain on the land to 2034, or constitute disputed material facts sufficient to defeat this motion. ECF No.

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the 23.8% life estate interest of WHLLC in arriving at its conclusion "majority interest" conclusion. *See also* Judge Whaley's Order, ECF No. 30 at 5-6.

[7] It should also be noted that at least one Indian landowner, Marlene Marcellay, questioned the issue of the extension in correspondence to BIA in 2006. See ECF No. 144 at 12.

295 at 27-28. These implied admissions by default are of no legal significance to any legal or equitable argument by Plaintiffs.

As to the effect of the imputed admissions by default of allegations in Plaintiffs' Complaint, a complaint cannot be considered as evidence at the summary judgment stage if it is unverified. *Moran v. Selig*, 447 F.3d 748, 759 (9th Cir. 2006); cf., *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) ("A plaintiff's verified complaint may be considered as an affidavit in opposition to summary judgment *if* it is based on personal knowledge *and* sets forth specific facts admissible in evidence."(*emphasis added*). Here, the Complaint is not verified and is inadmissible as evidence at summary judgment. Plaintiffs' claims that the Indian landowners have admitted by default that they received actual notice of Evans option to renew and also knew that the Master Lease had been renewed fail on this basis alone. Moreover, a default admits only the well-pleaded factual allegations in a complaint. *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007) (court takes the well-pleaded factual allegation in a complaint as true, but a defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law). The complaint alleges only "Upon information and belief, Evans also gave notice of this renewal to fellow allottees", (*Compl*., ECF No. 1 at 4, ¶ 4) and that "Upon information and belief, . . . Allottees. . . at all times knew that Evans had exercised his option to renew"(*Id* at 28, ¶ 135). ECF No. 295 at 27-28. The broad, imprecise, and unsubstantiated allegation made "upon information and belief" in the Complaint has no effect in terms of proving that Evans gave the proper notice as required under the Master Lease. *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) (statements made on information or belief cannot raise a genuine issue of fact, citing Rule 56(e)).

For the reasons discussed in section (e) above, the deemed admissions made in the Requests for Admissions cited by Plaintiffs do not constitute facts of any materiality to an equitable argument here, even admissions based on a failure to respond to RFAs could be considered a factual basis for a judgment in equity.

Of note is that the undisputed material facts also demonstrate that the statements to the landowners about how long Plaintiffs would remain on MA-8 were made long after Plaintiffs had taken actions based upon Evans/WHLLC representations they could stay until 2034. *See* Federal Defendants' Response to Plaintiffs' Third Motion for Summary Judgment re Estoppel, ECF No. 120 at 6. How Plaintiffs could have relied upon the landowners hearing these statements after the fact is unclear. Plaintiffs have failed to establish facts to support an equitable estoppel claim against the Indian landowners.

g. Equity lies with the Federal Defendants and the Landowners

The undisputed facts demonstrate that, prior to when the option period expired, BIA explicitly notified the only entity that could exercise the option, WHLLC, and pointed out BIA had questions about whether the option had been renewed. That action—which put WHLLC on notice that it may not have a Master Lease through 2034—granted WHLLC an opportunity to effectively exercise the option. To quote the Ninth Circuit, "As of November 30, 2007, Wapato still had two months left in which to exercise its option to renew the Lease. Whatever the deficiencies of Evan's previous efforts, Wapato could have obviated the issues before us had it taken the steps necessary to do so." *Wapato Heritage L.L.C. v. United States*, 637 F.3d at 1036. Such facts do not support the defense of equitable estoppel by a third party who ultimately was affected not by BIA's silence, but by the failure of WHLLC to act.

C. Plaintiffs Have No Property Interest in MA-8.

Plaintiffs also argue that they have a property interest in MA-8 under three theories. But none of the theories apply to property interests in Indian trust land and, even if they did, Plaintiffs identify no evidence to support these theories.

Questions regarding rights to use Indians' trust land are governed by federal laws and regulations—not state law. Federal law provides that any conveyance of an interest in MA-8 requires BIA approval. *See* 25 C.F.R. §§ 152.22 (any interest in trust land "may not be conveyed without the approval of the Secretary"); 162.104(d) (any non-owner must obtain a lease consistent with the regulations before taking possession of Indian trust land). Plaintiffs have failed to establish how common law implied rights overcome these explicit federal requirements to establish an occupancy right in Indian trust land like MA-8.

First, Plaintiffs assert that they should be granted specific performance of the 2004 Settlement Agreement based upon their partial performance. They suggest that "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." ECF No. 295 at 19.[8] But they have offered absolutely no evidence to

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[8] Legal deficiencies aside, Plaintiffs' partial performance claim is particularly unwarranted given that Plaintiffs have enjoyed recreating on the Indian defendants' land without any compensation to them for their occupation since the beginning of 2009. ECF No. 234-21 at 60 (Wulff Declaration). This fact also raises the question of whether the doctrine of unclean hands should apply here. This doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to

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demonstrate an "oral contract" between themselves and the Indian landowners. The facts they recite, ECF No. 295 at 19, lines 10-13, go only to their written agreements with Evans and WHLLC. *See also* ECF No. 144 at 32 (landowners' acceptance of money from WHLLC could not operate to unwittingly bind the owners to an agreement executed between WHLLC and Plaintiffs; no evidence that landowners intended to change term of Master Lease and allow Plaintiffs to occupy MA-8 until 2034).

Plaintiffs next suggest that they have a right to stay on the property until 2034 because they have a license, citing to ECF No. 144 at 29. But the Court's description was about Plaintiffs' relation to Evans/WHLLC—not the Indian landowners. All the cases cited by Plaintiffs relate to agreements between owners of land and parties claiming an interest in the land. Here, the actions taken by Plaintiffs that created the alleged license were actions taken with Evans and WHLLC. Under those circumstances the greatest interest Plaintiffs could acquire in MA-8 was a right to use MA-8 while Evans and WHLLC held the leasehold interest. When that leasehold interest expired as of February 8, 2009, any license Plaintiffs may have had expired also. *See* ECF No. 144 at 29-30.

Finally, Plaintiffs' argument that their alleged interest in MA-8 is more accurately described as an easement fails. Easements in Indian trust land require a written document, *see* 25 C.F.R. Part 169, and Washington State law on easements by estoppel is not relevant to MA-8.

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the matter in which he seeks relief." *Precision Instr. Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 US. 806, 814 (1945).

III. CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request the Court grant summary judgment in their favor on their counterclaim for ejectment against Plaintiffs.

RESPECTFULLY SUBMITTED this 19th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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