

1 Sally W. Harmeling, WSBA No. 49457
Robert R. Siderius, WSBA No. 15551
2 Joseph Q. Ridgeway, WSBA No. 53438
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
3 2600 Chester Kimm Road
P.O. Box 1688
4 Wenatchee, WA 98807-1688
Email: SallyH@jdsalaw.com
5 Email: BobS@jdsalaw.com
Email: JosephR@jdsalaw.com
6 (509) 662-3685 / (509) 662-2452

7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON

9 PAUL GRONDAL, et al,

10 Plaintiffs,

11 vs.

12 UNITED STATES OF AMERICA; et al,

13 Defendants.
14

NO. 09-CV-00018-RMP

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AGAINST
CERTAIN INDIVIDUAL ALLOTTEES

June 5, 2020

Without Oral Argument

1 **I. INTRODUCTION**

2 In 2012, Plaintiffs propounded Requests for Admissions (“RFAs”) on nine (9)
3 individual Allottee Defendants, who failed to respond. Those Defendants are James
4 Abraham, Lynn Benson, Darlene Hyland, Marlene Marcellay, Maureen Marcellay, Linda
5 Saint, Michael Marcellay, Randolph Marcellay, and Gary Reyes (collectively, “**Non-**
6 **Responding Allottees**”). The RFAs and Affidavit of Service appear in the court record at
7 ECF 296-1, Ex. 7-8. Nine (9) RFAs were propounded; all are dispositive on the issue
8 whether Non-Responding Allottees are estopped to deny Plaintiffs’ right to occupy and use
9 MA-8 through 2034.

10 By virtue of their failure to respond, and pursuant to Fed. R. Civ. P. 36(a)(3), Non-
11 Responding Allottees have admitted to the matters requested therein. Pursuant to Fed. R.
12 Civ. P. 56, summary judgment on Plaintiffs’ claim in the Complaint that Non-Responding
13 Allottees are equitably, collaterally, or otherwise estopped from denying the Plaintiffs their
14 right to occupy and use the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer
15 for Relief ¶2; *see also* ECF 197 at 2), should be granted in favor of Plaintiffs.

16 **II. FACTUAL BACKGROUND**

17 The complex history of this case has already been exhaustively briefed and Plaintiffs
18 will not again recite it. Instead, for the facts relevant to this Motion, Plaintiffs refer the

19 Court to Plaintiffs’ Supplemental Brief in Opposition to Federal Defendants’ Motion for
20 **PLAINTIFFS’ MOTION FOR SUMMARY**
JUDGMENT AGAINST CERTAIN INDIVIDUAL
ALLOTTEES - Page 2
48I9882

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
Attorneys at Law
(509) 662-3685 / FAX (509) 662-2452
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688

1 Summary Judgment Re Ejectment and the Amended and Restated Statement of Undisputed
2 Facts filed contemporaneously herewith by Plaintiffs and Wapato Heritage.

3 On October 1, 2012, Plaintiffs propounded RFAs on, among others, the nine (9)
4 Non-Responding Allottees, who (to date) have never responded to those RFAs. Declaration
5 of S. Harmeling in Support of Motion for Summary Judgment Against Certain Individual
6 Allottees at ¶12. Plaintiffs' RFAs read as follows:

7 REQUEST NO. 1: You are a beneficial landowner of Moses
8 Agreement Allotment No. 8 (also known as "MA-8").

9 ...
10 REQUEST NO. 2: You or your predecessor in interest to MA-8
11 allowed William Evans Jr ("Evans") to sell RV Camping Club Memberships
12 that included representations either in the membership agreements themselves
13 or in the sales literature, that stated (1) the MA-8 lease with Evans ("Master
14 Lease") had been approved by the Bureau of Indian Affairs, (2) the camping
15 club memberships were subject to Washington State Law, and (3) the Master
16 Lease expiration date extended to 2034.

17 ...
18 REQUEST NO. 3: Prior to January 1, 2008, you or your predecessor in
19 interest to MA-8 received a copy of Evans' letter dated January 30, 1985.

20 ...
REQUEST NO. 4: Prior to January 1, 008, you knew Evans or his
successor in interest to the Master Lease intended to exercise the option to
renew as provided for in the Master Lease to extend the Master Lease until
the year 2034.

...
REQUEST NO. 5: You or your predecessor in interest to MA-8 granted
the Superintendent of the Colville Agency, either express or implied authority
to act on your behalf as your agent for all matters involving the MA-8 Master
Lease and the RV Park camping club memberships.

...

1 REQUEST NO. 6: You approved, either expressly or impliedly, of the
2 Colville Tribal Enterprise Corporation sublease with Evans (or one of his
3 companies) allowing a casino to operate on MA-8 and which contained a
4 provision affirming the validity of the January 30, 1985 renewal letter.

5 ...
6 REQUEST NO. 7: As of January 1, 2008, you knew that Wapato
7 Heritage LLC (Evans' successor in interest to the Master Lease) had
8 negotiated a settlement with the Mill Bay Members Association (formerly the
9 members of the Mill Bay RV Park) to allow the Mill Bay Members
10 Association to remain on a portion of MA-8 known as the Mill Bay Resort
11 until 2034 in exchange for increased rent and other provisions.

12 ...
13 REQUEST NO. 8: You accepted the above mentioned increased rent in
14 exchange for agreeing that the Mill Bay Members Association could remain
15 on a portion of MA-8 known as the Mill Bay Resort until 2034.

16 ...
17 REQUEST NO. 9: You approved, either expressly or impliedly the
18 above mentioned 2004 Settlement Agreement between the Mill Bay Members
19 Association and Wapato Heritage LLC, as an interested party because that
20 settlement agreement affected your interest in MA-8.

ECF No. 296-1, Ex. 7.

III. LEGAL ARGUMENT

A. Summary Judgment May Arise from Unanswered Requests for Admission.

Summary judgment is appropriate only when “there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). A party may support a motion for summary judgment by citing to “depositions, documents, electronically stored information, affidavits or declarations...admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A). “Unanswered requests for admissions may be relied on as the basis for

1 granting summary judgment.” *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007)
2 (citing *O’Campo v. Hardisty*, 262 F.2d 621, 624 (9th Cir.1958)). “[W]here a rational trier
3 of fact could not find for the non-moving party based on the record as a whole, there is no
4 ‘genuine issue for trial,’” and summary judgment is appropriate. ECF 144 at 16 (quoting
5 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d
6 538 (1986)).

7 **B. Failure to Respond to an RFA Deems it Admitted and Conclusively Established.**

8 “It is undisputed that failure to answer or object to a proper request for admission is
9 itself an admission: the Rule itself so states.” *Asea, Inc. v. Southern Pac. Transp. Co.*, 669
10 F.2d 1242, 1245 (9th Cir. 1981); *see* FRCP 36(a)(3) (“A matter is admitted unless, within
11 30 days after being served, the party whom the request is directed serves on the requesting
12 party a written answer or objection addressed to the matter and signed by the party or its
13 attorney.”). “**Once admitted, the matter ‘is conclusively established** unless the court on
14 motion permits withdrawal or amendment of the admission’ pursuant to Rule 36(b).”
15 *Conlon*, 474 F.3d at 621 (emphasis added); *see also* FRCP 36(b).

16 “The purpose of Rule 36(a) is to expedite trial by establishing certain material facts
17 as true and thus narrowing the range of issues for trial.” *Asea*, 669 F.2d at 1245 (collecting
18 cases). “[T]he rule seeks to serve two important goals: truth-seeking in litigation and

1 efficiency in dispensing justice.” *Conlon*, 474 F.3d at 621 (citing FRCP 36(b) advisory
2 committee note).

3 **C. As Non-Responding Allottees Failed to Respond to Plaintiffs’ RFAs, it is**
4 **Conclusively Established that they Knowingly Granted Plaintiffs the Right to**
5 **Remain on MA-8 Through 2034.**

6 Due to Non-Responding Allottees’ failure to respond to Plaintiffs’ RFAs, the
7 following facts are conclusively established:

- 8 • Non-Responding Allottees owned an interest in MA-8. ECF No. 296-1, Ex. 7 at
9 RFA 1.
- 10 • Non-Responding Allottees allowed Evans to sell the Camping Club Memberships
11 stating the Master Lease with Evans had been approved by the BIA, the
12 Memberships were subject to Washington State law, and the Master Lease expiration
13 date had been extended to 2034. *Id.* at RFA 2.
- 14 • Non-Responding Allottees received a copy of Evan’s letter dated January 30, 1985,
15 purporting to extend the Master Lease through 2034. *Id.* at RFA 3.
- 16 • Prior to January 1, 2008, Non-Responding Allottees knew Evans intended to
17 exercise the option to renew the Master Lease to extend its term through 2034. *Id.*
18 at RFA 4.

- 1 • Non-Responding Allottees granted the BIA authority to act on their behalf as their
2 agent for all matters involving the Master Lease and Camping Club Memberships.
3 *Id.* at RFA 5.
- 4 • Non-Responding Allottees approved of the Colville Enterprise Corporation sublease
5 with Evans allowing a casino to operate on MA-8 and which expressly affirmed the
6 validity of Evans' January 30, 1985 letter purporting to renew the Master Lease
7 through 2034. *Id.* at RFA 6.
- 8 • As of January 1, 2008, Non-Responding Allottees knew of the 2004 Settlement
9 Agreement that would allow the Mill Bay Members Association to remain on the
10 Mill Bay Resort until 2034 in exchange for increased rent paid to the Allottees. *Id.*
11 at RFA 7.
- 12 • Non-Responding Allottees accepted that rental increase in exchange for agreeing
13 that the Mill Bay Members Association could remain on the Mill Bay Resort until
14 2034. *Id.* at RFA 8.
- 15 • Non-Responding Allottees approved the 2004 Settlement Agreement as interested
16 parties, because that Settlement Agreement affected Non-Responding Allottees'
17 interest in MA-8. *Id.* at RFA 9.

1 **D. These Conclusively-Established Facts Preclude Non-Responding Allottees from**
2 **Denying Plaintiffs' Right to Occupy MA-8 through 2034.**

3 Non-Responding Allottees' admissions justify a declaratory judgment that they are
4 equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use
5 the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer for Relief ¶2; *see also*
6 ECF 197 at 2). Under Washington law:

7 [T]he elements of equitable estoppel are: (1) a party's admission, statement or
8 act inconsistent with its later claim; (2) action by another party in reliance on
9 the first party's act, statement or admission; and (3) injury that would result to
10 the relying party from allowing the first party to contradict or repudiate the
11 prior act, statement or admission.

12 *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993)
13 (citation and footnote omitted).

14 As to the first element, it is conclusively established that Non-Responding Allottees
15 took acts and/or made omissions inconsistent with the position that Plaintiffs have no right
16 to use and occupy the Mill Bay Resort through February 2, 2034. They (or their successors
17 in interest) allowed Evans to sell Camping Club Memberships for MA-8 stating the Master
18 Lease extended through 2034. ECF No. 296-1, Ex. 7. They received actual notice of
19 Evans's attempt to extend the Master Lease, and knew Evans believed the Master Lease
20 had been extended. ECF No. 296-1, Ex. 7. They also had notice of the 2004 Settlement
Agreement and accepted rents therefrom in consideration of permitting the Mill Bay

1 Members Association to remain on the property through 2034. *Id.* Again, these facts are
2 now conclusively established and indisputable. For Non-Responding Allottees to take the
3 contrary position *now* that the Master Lease expired prior to 2034 would be inconsistent
4 with the conclusively established facts in the record, and is thus impermissible. *See also*
5 *Sorenson v. Pyeatt*, 158 Wash.2d 523, 539, 146 P.3d 1172 (2006) (equitable estoppel may
6 flow from silence); *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 935, 592
7 P.2d 676 1979) (“Estoppel by operation of law arises where the acts or statements of the
8 defendant or his agent induce the plaintiff, in reasonable reliance, to act or forbear to act to
9 his prejudice.”).

10 As to the second element, Plaintiffs have acted in reliance on Non-Responding
11 Allottees’ acts. Plaintiffs invested millions of dollars in reliance on the validity of the
12 Camping Club Memberships and the understanding that their terms lasted through 2034.
13 ECF No. 89 at pp. 3, 5, ¶¶5, 9. After executing the 2004 Settlement Agreement, Plaintiffs
14 paid escalating rents and made improvements to the park in reliance on the representations
15 that they could use and occupy the property through 2034. *Id.* at p. 12, ¶23. Some Mill Bay
16 Members even waited to purchase Camping Club Members until after the Mill Bay Resort
17 Litigation, and did so only after the 2004 Settlement Agreement was finalized. ECF No.
18 93 at pp. 2–3, ¶¶3–5; ECF No. 94. Non-Responding Allottees benefited from Evans’ sale
19 of Camping Club Memberships and the 2004 Settlement Agreement, and acquiesced to and

1 approved those Agreements’ terms—on which Plaintiffs relied by continuing to purchase
2 Camping Club Memberships and making improvements to the park.

3 As to the third element, it is undisputed that Plaintiffs will be injured if Non-
4 Responding Allottees are permitted to now deny Plaintiffs the right to occupy MA-8 until
5 2034, after years of representations, approvals, and acquiescence to the contrary. The
6 millions spent on Camping Club Memberships, park improvements, and escalating rents
7 will be lost, and Plaintiffs will be denied the benefit of the 2004 Settlement Agreement.
8 ECF Nos. 358 at 6–8; 360 at 2–3; *see also Metro. Park Dist. of Tacoma v. State, Dep’t of*
9 *Nat. Res.*, 85 Wn.2d 821, 828, 539 P.2d 854 (1975) (equitable estoppel precluded party
10 from cancelling deed where opposing party already made substantial investments in the
11 property).

12 At bottom, by way of their admitted RFAs, it is conclusively established that Non-
13 Responding Defendants have taken affirmative acts, have acquiesced, and have made
14 critical omissions that are flatly inconsistent with now denying Plaintiffs the right to occupy
15 and use MA-8 through 2034. *Conlon*, 474 F.3d at 621 (summary judgment warranted due
16 to admitted RFAs now conclusively established); *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000,
17 1003 (D. Nev. 2015) (suggesting equitable estoppel is a viable defense against Indian land
18 allottees in the context of BIA-approved leases where the allottees accepted lease payments
19 for many years; ultimately deciding the case on other grounds). As all elements are

20 PLAINTIFFS’ MOTION FOR SUMMARY
JUDGMENT AGAINST CERTAIN INDIVIDUAL
ALLOTTEES - Page 10
48I9882

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
Attorneys at Law
(509) 662-3685 / FAX (509) 662-2452
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688

1 satisfied due to the conclusively established facts arising from Non-Responding Allottees’
2 admitted RFAs, summary judgment on Plaintiffs’ remaining claim in the Complaint is
3 appropriate here.

4 **IV. CONCLUSION**

5 For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter
6 summary judgment on Plaintiffs’ claim in the Complaint that the Non-Responding
7 Allottees are equitably, collaterally, or otherwise estopped from denying the Plaintiffs their
8 right to use the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer for Relief ¶2;
9 *see also* ECF 197 at 2).

10 DATED the 17th day of April, 2020.

11 By s/SALLY W. HARMELING

12 Sally W. Harmeling, WSBA No. 49457
13 Robert R. Siderius, WSBA No. 15551
14 Joseph Q. Ridgeway, WSBA No. 53438
15 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
16 2600 Chester Kimm Road
17 P.O. Box 1688
18 Wenatchee, WA 98807-1688
19 Telephone: 509-662-3685
20 Fax: 509-662-2452
Email: SallyH@jdsalaw.com
Email: BobS@jdsalaw.com
Email: JosephR@jdsalaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

Joesph P. Derrig
Usawae-jderrigecf@usdoj.gov

Nathan J. Arnold
nathan@caoteam.com

Dale M. Foreman
dale@fahzlaw.com

Sally W. Harmeling
sallyh@jdsalaw.com

Dale Melvin Foreman
dale@fahzlaw.com

Robert R. Siderius
Bobs@jdsalaw.com

Franklin L Smith
Frank@Flyonsmith.com

R Bruce Johnston
bruce@rbrucejohnston.com

Brian Gruber
bgruber@ziontchestnut.com

Matthew A. Mensik
mam@witherspoonkelley.com

Brian W. Chestnut
bchestnut@ziontchestnut.com

Dana Cleveland
Dana.cleveland@colvilletribes.com

Pamela J. DeRusha

Timothy W. Woolsey

PRO SE PARTIES

Francis Abraham
11103 E. Empire Avenue
Spokane Valley, WA 99206

Annie Wapato
1800 Jones Rd
Wapato, WA 98951-9

Paul G. Wapato, Jr.
10216 N Sundance Dr.
Spokane, WA 992085

Gary and Francis Reyes
PO Box 296
Newman Lake, WA 99025

Kathleen Dick
P.O. Box 288
Nespelem, WA 99155-0288

Jeffrey M Condon
PO Box 3561
Omak, WA 9884 1-3561

Deborah A. Backwell
24375 SE Keegan RD
Eagle Creek, OR 97022

Vivian Pierre
PO Box 294
Elmer City, WA 99124-0294

Catherine Garrison
3434 S 114th St., Apt. 124
Tukwila, WA 98168-4061

Sonia W (Wapato) Vanwoerkom
810 19th St
Lewiston, Id 83501-3172

Mary Jo Garrison
PO Box 1922
Seattle, WA 98111

Arthur Dick
PO Box 288
Nespelem, WA 99155-0288

Enid T. Wippel
PO Box 101
Nespelem, WA 99155

Hannah Rae Dick
PO Box 198
Nespelem, WA 99155-0198

Leonard Wapato
P.O. Box 442
White Swan, WA 98952-0442

Francis J Reyes
PO Box 215
Elmer City, WA 99124-0215

Lynn K. Benson
PO Box 746
Omak, WA 98841-0746

Dwane Dick
PO Box 463
Nespelem, WA 99155-0463

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AGAINST CERTAIN INDIVIDUAL
ALLOTTEES - Page 13
48I9882

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
Attorneys at Law
(509) 662-3685 / FAX (509) 662-2452
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688

1 James Abraham
2727 Virginia Avenue
2 Everett, WA 98201-3743

Gabe Marcellay
PO Box 76
Wellpinit, WA 99040-0076

3 Randy Marcellay
P.O. Box 3287
4 Omak, WA 98841-3

5 Paul G Wapato Jr
Catherine L (Gufsa) Garrison
6 3434 S 144th St Apt 124
Tukwila, WA 98168 -4061

Travis E Dick and Hannah Dick
Guardian of Travis E Dick
PO Box 198
Nespelem, WA 99155

7 Maureen M. Marcellay
8 501 SE 123rd Ave., Apt U150
Vancouver, WA 9868a3-4008

Jacqueline L Wapato
PO Box 611
Lapwai, Id 83540-0611

9 Leonard M Wapato
10 PO Box 442
White Swan, WA 98952-0442

Darlene Marcellay-Hyland
16713 SE Fisher Drive
Vancouver, WA 98683

11 Mike Marcellay
PO Box 594
12 Brewster, WA 98812-0594
Marlene Marcellay
13 1300 SE 116th Ct.
14 Vancouver, WA 98683-5290

Enid T (Pierre) Marchand
PO Box 101
Nespelem, WA 99155-0101

15 Stephen Wapato
246 N. Franklin
16 Wenatchee, WA 98801

Lydia A. Arneecheer
P.O. Box 45
Wapato, WA 98951-0475
Gabriel Marcellay
P.O. Box 76
Wellpinit, WA 99040

17
18
19
20 PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AGAINST CERTAIN INDIVIDUAL
ALLOTTEES - Page 14
48I9882

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
Attorneys at Law
(509) 662-3685 / FAX (509) 662-2452
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688

1 DATED at Wenatchee, Washington this 17th day of April, 2020.

2 s/SALLY W. HARMELING
3 Sally W. Harmeling, WSBA No. 49457
4 Attorney for Plaintiffs
5 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
6 2600 Chester Kimm Road
7 P.O. Box 1688
8 Wenatchee, WA 98807-1688
9 Telephone: 509-662-3685
10 Fax: 509-662-2452
11 Email: SallyH@jdsalaw.com
12
13
14
15
16
17
18
19

20 PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AGAINST CERTAIN INDIVIDUAL
ALLOTTEES - Page 15
48I9882

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
Attorneys at Law
(509) 662-3685 / FAX (509) 662-2452
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688