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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; US DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, WAPATO HERITAGE, LLC, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, FRANCIS ABRAHAM, CATHERINE GARRISON, et al., allotees of Moses Allotment 8, Defendants, Cross-, Counter-claimants.	No. 09-CV-00018-RMP UNITED STATES' RESPONSE TO PLAINTIFFS' AND WAPATO HERITAGE LLC'S "AMENDED AND RESTATED STATEMENT OF UNDISPUTED FACTS"

Because Mill Bay's equitable estoppel claim fails as a matter of law, whether disputed or not, these facts are immaterial. Any statements of material facts that contain legal conclusions or argument, are evasive, contain hearsay or are not based on personal knowledge, are irrelevant, or are not supported by evidence in the record should not be considered by the court in ruling on a summary judgment motion. Fed. R. Civ. P. 56(c)(4).

OBJECTION TO STATEMENTS OF FACT 1-33

Statements of fact 1-33 are principally drawn from the "Background" section of Judge Quackenbush's August 1, 2014 "Memorandum and Order re: Appointment of Counsel," ECF No. 329. The "Background" section of that order is a "chronological summary" that "does not constitute findings by the court." ECF No. 329 at 3. To the extent Plaintiffs and Wapato Heritage seek to have Judge Quackenbush's chronological summary accepted as "undisputed facts" on summary judgment, the Federal Defendants object. The Federal Defendants do not object to the Court using the chronological summary to aid in its review and understanding of the documents in the record.

1. On April 19, 1879, United States President R.B. Hayes signed an Executive Order establishing a reservation for Chief Moses (of the Moses Band of Indians), later named the Columbia Reservation, in what later became the State of Washington. ECF No. 293 Ex. A; ECF No. 329 at 3:12–15.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

2. The Columbia Reservation was directly to the west of the Colville Reservation, but separate from it. *U.S. v. State of Or.*, 787 F. Supp. 1557 (D. Or. 1992); ECF No. 329 at 3:17–18.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

3. In 1880, President Hayes signed another Executive Order increasing the size of the Columbia Reservation to approximately 3 million acres. On February 23, 1883, President Chester Arthur removed 15 miles of that reservation as a result of

non-Indian settlement demands, shrinking it to approximately 2,243,000 acres. ECF No. 329, at 3:23–26.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

4. On July 7, 1883, four Indian chiefs, namely Moses and Sar-sarp-kin of the Columbia Reservation, and Tonasket and Lot of the Colville Reservation, reached an agreement with the Secretary of the Interior, commonly called the Moses Agreement. The Moses Agreement provided that the head of each Indian family living on the Columbia Reservation could elect to receive tracts of land (640 acres, or one square mile) from the then Columbia Reservation, or elect to relocate to the Colville Reservation. The remainder of the Columbia Reservation would be restored to the public domain and subject to entry by non-Indians under the homestead laws. ECF No. 175, Ex. 1; ECF No. 329 at 4:1–8.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

5. Congress ratified the Moses Agreement by the Act of July 4, 1884 (23 Stat.79, c. 180). The Act of July 4, 1884 provided:

> That Sarsopkin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: And provided further, that in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws...

ECF No. 234, Ex. 2; ECF No. 329 at 4:9–21.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

6. The Act of July 4, 1884, confirming the Moses Agreement, contained no express provision for the issuance of trust or fee patents for the Indian selected tracts. *Id.*; *and see In Re Long Jim*, 32 Pub. Lands Dec. 568, 569. (D.O.I.), 1904 WL 962.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

7. On May 1, 1886, President Grover Cleveland issued an Executive Order formally dissolving and opening the Columbia Reservation to settlement and homesteading by non-Indians, subject to the terms of the Moses Agreement and 1884 Act. *U.S. v. State of Or.*, 29 F.3d 481 (9th Cir. 1994); *Starr v. Long Jim*, 227 U.S. 613, 619 (1913); ECF No. 293, Attachment A; ECF No. 329 at 4:22–25.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

8. The 1886 Executive Order set apart a number of allotment lands "for the exclusive use and occupation of said Indians," including Allotment No. 8 in favor of Wapato John and included this survey description of its location:

> From stone monument on shore of Lake Chelan, near houses of Wa-pa- to John...run north...80.00 chains...thence run west 80.00 chains, cross trail, course northwest and southeast 80.00 chains...thence run south 35.60 chains, crossed fence, course east and west, 77.00 chains...[to the] blazed cottonwood tree 12 inches in diameter ...on shore of Lake Chelan..., which contains about 640 acres.

ECF No. 293, Att. A; ECF No. 329 at 5:1–8.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

9. The Moses Allotments, including MA-8, are located outside of the boundaries of the Colville Confederated Tribes' Reservation. (ECF No. 90, Ex. 96).

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment."

10. The Annual Report of the Commissioner of Indian Affairs from 1886 states: "the surveys of the Columbia Reservation were completed...and the reserve restored to the public domain...after giving to Sar-Sarp-kin and others...thirty-seven allotments." ECF No. 329 at 5:9–11.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

11. The Moses Allotments were not created under the auspices of the General Allotment Act, the Dawes Act, of 1887. ECF No. 329 at 8:11–12.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

12. In addition to the 37 allotments identified in the 1886 Annual Report, several additional allotments were granted under the Moses Agreement as a result of litigation, *Long Jim v. Robinson et al and Cultus Jim et al v. Chappelle et al.* 16

Pub. Lands Dec. 15 (D.O.I.), 1893 WL 467; *Starr v. Long Jim*, 227 U.S. 613, 619–20 (1913). Chief Long Jim was granted Moses Allotment 40.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

13. The first Long Jim case establishes that the Department of Interior understood the Indians living on the former Columbia Reservation to be "non-reservation Indians." *Long Jim v. Robinson*, 16 Pub. Lands Dec. 15 at 18 (D.O.I.), 1893 WL 467.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

14. Because, among other things, the Act of July 4, 1884 confirming the Moses Agreement did not provide for issuance of patents (*see* ¶ 6 above), Congress enacted legislation on March 3, 1905 (33 Stat. 1064, c. 1479) authorizing the issuance of fee patents, which would ultimately pass the full and unrestricted fee title for trust patents or allotment certificates issued to Indian allottees. ECF No. 329 at 6: 1–5.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

15. That 1905 legislation (33 Stat. 1064, c. 1479) was the immediate result of a second case in the Department of Interior involving Long Jim. *In Re Long Jim*, 32 Pub. Lands Dec. 568, 569. (D.O.I.), 1904 WL 962. That DOI case held that Long Jim was not entitled to a Patent in 1904, because the Moses Agreement and the legislation confirming it (23 Stat.79, c. 180) had no provision for the issuance of a patent. *Id., and see Starr v. Long Jim*, 227 U.S. 613, 620–21 (1913).

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

16. Following the March 3, 1905 legislation (33 Stat. 1064, c. 1479), Chief Long Jim of the Chelan Indians was issued a fee patent for his allotted land (Moses Allotment 40) pursuant to the Moses Agreement on August 2, 1905. ECF No. 329 at 6: 1–5.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

17. An Act of March 8, 1906 (34 Stat. 55, c. 629) next expressly provided for the issuance of trust patents, not fee patents, for the remaining allottees, declaring the land allotted to Indians under the Moses Agreement be held in trust:

> for the period of ten years from the date of the approval of this Act...and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsover.

ECF No. 234, Ex. 2; *and see Starr v. Long Jim*, 227 U.S. 613, 621–22 (1913); ECF No. 329 at 6:6–11.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

18. The Supreme Court characterized the Moses Allotments as allotments made in "severalty." *Starr v. Long Jim*, 227 U.S. at 616, 620 (1913).

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

19. The Act of March 8, 1906 (34 Stat. 55, c. 629) also permitted the Moses Agreement allottees to sell their allotted lands during the trust period, but with the restriction that the allottee could "sell and convey all lands covered thereby, except eighty acres." The ability to convey allotted lands during the trust period was a distinguishing feature of the Moses Agreement allotments as compared to other Indian allotments made pursuant to the General Allotment Act, which did not permit such conveyance. ECF No. 234, Ex. 2; *and see Starr v. Long Jim*, 227 U.S. at 621–22 (1913); ECF No. 329 at 6:12–17.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

20. Two trust patents were issued to Wapato John for MA-8. ECF No. 175, Ex. E at 24–28; ECF No. 234, Att B, Ex. 4 at 71–75. The first, Trust Patent No. 151-1599, handwritten, dated April 9, 1907, was for 548 acres. ECF No. 90 at 178, Ex. 12 at 175. The second, No. 151-1555, dated December 28, 1908, was for 57.85 acres. *Id.*; ECF No. 329 at 6:18 – 7:10.

Response: Undisputed.

21. Both Patents issued to Wapato John provide that at the "expiration" of the trust period: "the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charges or encumbrance whatsoever." ECF No. 175, Ex. E at 24–28; ECF No. 234, Att B, Ex. 4 at 71–75; ECF No. 90, Ex. 12 at 178; ECF No. 329 at 7:7–8.

Response: Undisputed that quoted language appears in the patents.

22. By Act of June 21, 1906, 34 Stat. 325, 25 U.S.C. § 391, the President's delegated authority to extend the period of "*restrictions on alienation*" (not of the trust status) for Indian land patents was expanded beyond General Allotment Act

patents to cover patents issued under "any law or treaty." ECF No. 329 at 7:10-14 (emphasis added).

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

23. In 1911, Wapato John was fraudulently induced by the Wapato Irrigation Company, aided and abetted by the Department of Interior to "sell" 441.45 acres of MA-8 for $50 per acre, as detailed in *Lord v. Wapato Irr.Co.*, 81 Wash. 561 (1914). ECF No. 329 at 7:14–26.

Response: Disputed as to Plaintiffs' characterization of the transaction. Also not relevant to any pending motion.

24. The fraudulent nature of the "sale" of the 441.45 acres of MA-8 to the Wapato Irrigation Company was evidenced by, among other things, its nearly immediate sale to the "Lake Chelan Land Company" for $200/acre. *Id*.

Response: Disputed as to Plaintiffs' characterization of the transaction. Also not relevant to any pending motion.

25. The fraudulent nature of the "sale" of the 441.45 acres of MA-8 to the Wapato Irrigation Company was further confirmed by the Regional Solicitor in 1967 when it was admitted that the "sale" by Wapato John was "not a voluntary relinquishment of ownership." ECF No. 90, Ex. 13 at 3.

Response: Disputed as to Plaintiffs' characterization of the transaction. Mischaracterizes the contents of the cited document. Also not relevant to any pending motion.

26. MA-8 has since that fraudulent "sale" consisted of 174.4 acres. ECF No. 329 at 7:26, Ex. 14.

Response: Disputed as to Plaintiffs' characterization of the transaction. Undisputed as to current acreage of MA-8.

27. Wapato John died in September, 1911 whereupon his ownership interest in MA-8 passed to his heirs, including Peter Wapato, one of Wapato John's two sons. ECF No. 234, Att. B. Ex. 5; ECF No. 90-5, Ex. 14; Admitted in U.S. Answer, ECF No. 42 ¶ 36.

Response: Undisputed.

28. On December 23, 1914, President Woodrow Wilson issued an Executive Order purporting to extend the 10-year period of trust on all allotments made to members of the Chief Moses Band of Indians, "the title to which had not passed from the United States," for an additional 10 years. If this Executive Order applied to MA-8, it would extend the trust period of MA-8 to March 8, 1926. ECF No. 234, Ex. 5.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

29. On February 10, 1926, President Calvin Coolidge issued Executive Order 4382, purporting to provide that the ten year period of trust on all allotments made to members of the Chief Moses Band of Indians under the Moses Agreement was "extended for a further period of ten years, from March 8, 1926, with the exception of allotment No. 5." If the trust period was still in effect as to MA-8 on February 10, 1926, this Executive Order extended the trust period to March 8, 1936. ECF No. 234, Ex. 7. No President of the United States ever issued an Executive Order pertaining to MA-8 prior to the March 8, 1936 expiration date set by Executive Order 4382 (March 8, 1936). ECF No. 307, Ex. D [25 CFR Appendix-Extension of the Trust or Restricted Status of Certain Indian Lands (1949)]; ECF No. 329 at 13:17–21.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

30. The Annual Reports of the Commissioner of Indian Affairs commencing at least in 1907 and extending through at least 1926 (after issuance of Executive Order 4382) categorized and counted the Moses Allotments as "Columbia" reservation, "allotted," "reservation lands." The Moses Allotments were distinctly listed separate from the allotted lands on the Colville Reservation and Indian land in the "public domain." ECF No. 329; ECF No. 234 Ex. 8 (ECF No. 234-9) at 7.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

31. In 1924, Congress passed an Act specific to the Moses Allotments, which permitted sale of a Moses Allotment, *in its entirety*, with Secretary approval. The Act of May 20, 1924 (43 Stat. 133) provided the following:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any allottee to whom a trust patent has heretofore been or shall hereafter be issued by virtue of the agreement concluded on July 7, 1883, with Chief Moses and other Indians of the Columbia and Colville Reservations, ratified by Congress in the Act of July 4, 1884...may sell and convey any or all the land covered by such patents, or if the allottee is deceased the heirs may sell or convey the land, in accordance with the provisions of the Act of Congress of June 25, 1910.

ECF No. 280, Ex. A; ECF No. 175, Ex. G. (emphasis added); ECF No. 329 at 10:11–20.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

32. A letter from the Secretary of Interior dated December 5, 1923 explaining the need for passage of this legislation stated: "Section 2 of the act of March 8, 1906...which authorizes the issuing of trust patents, contains a provision withholding from sale or conveyance at least 80 acres of each allotment. It is reported that most of the allottees are now deceased that their heirs are widely scattered, and legislation is desired that will authorize the sale of the whole or any portion of the allotments under the existing laws and regulations governing the sale of Indian trust lands." ECF No. 280, Ex. E; ECF No. 329 at 11:1–3.

Response: This statement is a conclusion of law or an opinion, belief or interpretation of congressional and executive action not a statement of material fact relevant to the motion for ejectment.

33. The Indian Reorganization Act was passed in 1934 and amended by an Act of June 15, 1935. ECF No. 329 at 12–13.

Response: Undisputed.

B. MA-8 Ownership.

34. Wapato Heritage was created by William Wapato Evans, who, at the time of his death on September 11, 2003, was, of his generation, the sole surviving heir of Peter Wapato. ECF No. 90-5, Ex. 14 at 54 of 59; *and see id.* at 44, 49. Wapato Heritage is owned by heirs of William Wapato Evans.

Response: Objection. Wapato Heritage, LLC is a limited liability company managed and governed by Jeffery D. Webb (ECF No. 398-2) who is not an heir of William Wapato Evans. The remainder appears to be background information to which there is no objection.

35. At the time of the commencement of this lawsuit in 2009, the undivided interests in MA-8 were held by Wapato Heritage, the Confederated Tribes of the Colville Reservation, the named defendants, and six holders of fee patents (or their heirs) who were “Canadian Nationals.” ECF No. 90, Exs. 14, 20, 103; ECF No.

144a at 4 n. 2. Copies of four (4) of the Fee Patents, issued in December 1984, and recorded in Chelan County in 1985 are at ECF No. 224, Ex. B.

Response: Undisputed.

36. At the time of commencement of this case, except for the Colville Confederated Tribes and Wapato Heritage, LLC, all entities that hold an ownership interest in MA-8 are individuals who are either descendants of Wapato John or successors in interest through probate or purchase. ECF No. 90, Exs. 14, 103; Admitted in U.S. Answer, ECF No. 42, ¶¶ 18, 35.

Response: Undisputed.

37. As of February 14, 2007, 37 members of the Colville Tribes held undivided ownership interests in MA-8. (Admitted in U.S. Answer, ECF No. 42 ¶ 39).

Response: Undisputed.

38. As of February 14, 2007, an unknown number of other individuals held undivided ownership interests in MA-8, as established by six fee patents issued to "Canadian Nationals." ECF No. 90, Exs. 14, 20, 103; ECF No. 144 at 4 n.2; ECF No. 227 n. 3; ECF No. 224, Ex. B; Admitted in US Answer, ECF No. 42 ¶ 18. Those individuals or their heirs are not parties to this litigation. No evidence has been introduced that such persons have ever received compensation for their ownership interests, or been consulted by the US parties, ever, in any respect after issuance of the fee patents. According to ECF No. 90, Ex. 103, these fee interests amount to approximately 4% of the allotment interests in MA-8.

Response: Undisputed that six individuals have been issued fee patents, and that the interests held by those individuals constitute approximately 4% of the allotment interests. Undisputed that those individuals or their heirs are not parties to this litigation. Disputed as to any suggestion that those individuals were required to be "compensated for their ownership interests," or that the Federal Defendants were required to "consult" with them.

39. Prior to the commencement of this case, the Colville Confederated Tribes acquired an undivided interest in MA-8 by purchasing the "ownership" interests of certain heirs of Wapato John. ECF No. 90, Exs. 103, 104.

Response: Undisputed that the Colville Tribes have acquired interest in MA-8 formerly held by certain heirs of Wapato John.

40. Since the commencement of this case, the Colville Confederated Tribes purport to have purchased the interests of some individual allottees. ECF No. 347. No evidence has been provided to establish these purchases, if they were of trust property, were not void *ab initio,* for failure to fully comply with applicable regulations. *See* ECF No. 404.

Response: Undisputed that the Colville Tribes have purchased the interests of some of the individual allottees. The remainder of this statement is legal argument to which no response is required.

41. The Confederated Colville Tribes did not hold an ownership interest in MA-8 as of 1991. ECF No. 224, Ex.1; ECF No. 223 at 3:10–20.

Response: Undisputed.

42. The Confederated Colville Tribes have attempted to purchase allotment interests in MA-8 following the commencement of this action. The validity of those purchases presents an issue of fact. *See* ECF No. 404 at 10:10 – 13:2.

Response: Undisputed that the Colville Tribes have purchased allotment interests in MA-8 after the commencement of this action. The remainder of this statement is legal argument to which no response is required.

43. The claimed Remainder Interest of the Colville Confederated Tribes in the interest of Wapato Heritage in MA-8 is in material dispute. Under the Will of William Wapato Evans, only a 1/8 residual interest was bequeathed to the Confederated Colville Tribes, not 100%. ECF No. 398-3, article 5.1.1. The

Settlement Agreement of 2005, provides in Article 11 it may be amended by agreement of all the parties. ECF No. 90-13, page 60 of 67. The Confederated Colville Tribes are not a party to that Agreement. *Id*. at 29 of 67. That Settlement Agreement relied upon by the Tribe has been amended in accordance with its terms to return generally to the dispositive scheme under the approved Will of Bill Evans, i.e. 1/8 to the Tribe.

Response: Disputed. The cites identified do not support this claim. The Last Will and Testament of William Wapato Evans, Jr., bequeaths a life estate in MA-8 to Wapato Heritage, LLC, with the residuary passing in equal shares to the Colville Tribes and others. ECF No. 398-3 at 5-6, Art. 5.1.1. Regardless, the percentage of the Colville Tribes' remainder interest in the life estate held by Wapato Heritage is not relevant to the pending motion for summary judgment re: ejectment.

C. The Master Lease.

44. Despite the strategic and desirable location of MA-8, and the development of adjoining properties (formerly part of MA-8) there is no evidence that BIA took any action whatsoever to develop or produce income from MA-8 for the allottee owners before the application of William Evans, Jr. ("Evans") for a Master Lease in 1982. *See* ECF No. 144 at 4:22.

Response: This statement is legal argument to which no response is required.

45. Prior to the signing of the Master Lease, MA-8 was primarily unoccupied. *Id.*; Admitted in U.S. Answer, ECF No. 42 ¶ 7.

Response: Undisputed.

46. In the early 1980s Evans, who owned a beneficial interest in MA-8, sought to lease MA-8 for economic development purposes, specifically a camping resort. ECF No. 90, Exs. 15, 20, 25; Admitted in U.S. Answer, ECF No. 42 ¶ 2.

Response: Background information. No objection.

47. Other individual Indians who also owned beneficial interests in MA-8 and in total constituted a majority of the ownership interests, agreed to lease their interests in MA-8 to Evans. ECF No. 90, Exs. 16, 18, 19; Admitted in U.S. Answer, ECF No. 42 ¶ 2.

Response: Undisputed.

48. In 1984, Evans possessed a 5.4% undivided ownership interest in MA-8. Admitted in U.S. Answer, ECF No. 42 ¶ 42.

Response: Undisputed.

49. In approximately 1984, Evans and over 40 other individuals held undivided ownership interests in MA-8, some in trust status and some in fee status. ECF No. 90, Ex. 14; Admitted in U.S. Answer, ECF No. 42, ¶ 43.

Response: Background information. No objection.

50. In 1981, Evans communicated with his co-owners about his interest in leasing MA-8 for a Recreational Vehicle Park. ECF No. 90, Ex. 15, 16; Admitted in U.S. Answer, ECF No. 42 ¶ 44.

Response: Background information. No objection.

51. Evans asserted that a majority of his co-owners expressed an interest in leasing out MA-8 and thereafter, Evans submitted a proposed lease for the consideration of his co-owners and the BIA. ECF No. 90, Ex. 15, 16, 19; Admitted in U.S. Answer, ECF No. 42 ¶ 45).

Response: Background information. No objection.

52. Evans sent a letter dated January 19, 1982 to the BIA's Colville Agency making a formal request to lease MA-8. ECF No. 90, Ex. 15; Admitted in U.S. Answer, ECF No. 42 ¶ 47).

Response: Background information. No objection.

53. The Indian beneficial owners of MA-8 were provided with an Acceptance of Lessor form dated July 14, 1982. Many of the beneficial owners executed the form. ECF No. 90 Ex. 17; Admitted in U.S. Answer, ECF No. 42 ¶ 48.

Response: Background information. No objection.

54. This consent form included a provision that the Landowner agrees that "if a satisfactory lease is not agreed upon within 90 days from July 20, 1982, Superintendent may, if necessary, exercise his authority to lease the land pursuant to the Act of July 8, 1940 (54 Stat. 745; 25 USC 380) Dept. of the Interior, Bureau of Indian Affairs." ECF No. 90, Ex. 17.

Response: Undisputed.

55. The regulations in effect in 1982 and 1984 authorized the Secretary in certain circumstances to grant leases of individually owned land on behalf of certain owners. 25 CFR § 162.2(a) (1982 & 1984), Admitted in U.S. Answer, ECF No. 42 ¶ 50.

Response: Background information. No objection.

56. As stated on the 1982 consent forms, at the time George Davis signed the lease, 25 CFR § 162.2(a) provided:

> 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; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf.

(26 FR 10966, Nov. 23, 1961. Redesignated at 47 FR 13327, Mar. 30, 1982.).

Response: Background information. No objection.

57. During the Master Lease negotiations, the Mill Bay Recreational Vehicle Resort was intended to provide needed income to the Landowners as well as "make

possible improvements needed to preserve" the land "including bank stabilization and surface water control." ECF No. 90, Ex. 18.

Response: Background information. No objection.

58. During the Master Lease negotiations, alternative uses of the land were considered, but none proved to be as economically feasible as the Recreational Vehicle Resort concept. ECF No. 90, Ex. 18.

Response: Background information. No objection.

59. In a letter dated April 29, 1983, the Office of the Area Director of the Department of the Interior informed the Superintendent of the Colville Agency that the allottees proposed to lease MA-8 to William W. Evans "for the purpose of development of a commercial recreational facility to be called "Mill Bay Recreational Vehicle Resort." The letter further stated that the Superintendent was authorized to act as signatory for the Secretary of the Interior on this lease. ECF No. 90, Ex. 19.

Response: Background information. No objection.

60. The BIA considered the lease proposal and projected income for the heirs based upon sales projections by a Washington State realtor and surveys of other RV parks within the State of Washington. ECF No. 90, Ex. 20.

Response: Background information. No objection.

61. In a letter dated July 6, 1983, George Davis stated that the Area Office's delegation of authority for the Master Lease made the Realty staff uncomfortable because they were no longer "third parties" to the negotiation and were now "the accountable delegation authority." ECF No. 90 Ex. 24, Page 5.

Response: Quotation from document is presented out of context. No objection to consideration of document as a whole.

62. On February 2, 1984, Evans entered into Business Lease 82-21 (the "Master Lease") to lease MA-8 as "Lessee." ECF No. 90, Ex. 1; Admitted in U.S. Answer, ECF No. 42 ¶ 52.

Response: Undisputed.

63. The Master Lease was entered into "by and between the Lessors, whose names and addressees (sic), and/or guardians of the Lessors, are listed in Exhibit 'A' attached hereto and by this reference incorporated herein, hereinafter collectively referred to as 'Lessor'." ECF No. 90, Ex. 1, 1st Sentence.

Response: Quotation from document is incomplete. No objection to consideration of document as a whole.

64. Exhibit "A" was not attached to the Master Lease at the time it was signed by Evans and Davis. ECF No. 90, Ex. 1.

Response: Disputed, but not relevant to any pending motion. The Ninth Circuit addressed issues relating to "Exhibit A" to the master lease in *Wapato Heritage L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011).

65. At the time of its execution, the Master Lease provided: "It is anticipated that portions of the leased property shall be allocated to recreational vehicles on a 'right to use' basis," a basis that would require compliance with the Washington State Campgrounds Act, RCW 19.105, *et seq.* ECF No. 90, Ex. 1 ¶ 4(b).

Response: Disputed as to legal conclusion that allocation of portions of the leased property "would require compliance with the Washington State Campgrounds Act, RCW 19.105, *et seq.*" Not relevant to any pending motion in any event.

OBJECTION TO STATEMENTS OF FACT 66-125

Statements of fact 66-125 are principally drawn from documents Plaintiffs filed in September 2009 in support of their First, Second, Third, Fourth and Fifth motions for summary judgment. *E.g.*, ECF No. 89, Declaration of Paul Grondal in

Support of Plaintiffs' Motion for Summary Judgment; ECF 90, Declaration of James M. Danielson in Support of Plaintiffs' Motion for Summary Judgment.

Both this Court (Judge Quackenbush) and the Ninth Circuit made extensive substantive rulings addressed to the parties' rights under the Master Lease after these documents were filed. *See, e.g.*, ECF No. 144 at 28-36 (ruling, *inter alia*, that Paragraph 8 of the Master Lease does not give Plaintiffs the right to occupy MA-8 until 2034; that Plaintiffs were licensees of Wapato Heritage's rights under the lease rather than subtenants; that the Settlement Agreement did not modify the Master Lease; that Washington's Trust and Estate Dispute Resolution Act (TEDRA) does not bind the allottees to the Settlement Agreement; that Defendants "are not collaterally estopped from denying they are bound by the terms of the 2004 Settlement Agreement"; and that the doctrines of waiver, laches, and accord and satisfaction do not bind the allottees to the terms of the Settlement Agreement); *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011) (holding, *inter alia*, that "Wapato's option to renew the Lease was not effectively exercised by Evans, or later by Wapato, and that the Lease terminated upon the last day of its 25-year term").

In relying on documents that were filed at the outset of this case, Plaintiffs and Wapato Heritage appear to be attempting to reframe and/or re-litigate issues that have long since been decided. The Federal Defendants submit that the factual record on summary judgment is more reliably established in the following filings, which were prepared and filed in connection with the Federal Defendants' pending motion for summary judgment re: ejectment:

- **ECF No. 234** – Federal Defendants' Statement of Material Facts Re: Ejectment

- **ECF No. 294** – Plaintiffs' Statement of Facts in Response to Federal Defendants' Motion for Summary Judgment; (see also ECF No. 297 – joinder by Wapato Heritage); and

- **ECF No. 307** – Federal Defendants' Supplemental Statement of Material Facts on Trust Issue and Objections to Plaintiffs' Statement of Material Facts Re: Ejectment.

D. Mill Bay Members Association, Inc.

66. Plaintiff Mill Bay Members Association, Inc. (the "Association") is a Washington Non-Profit Corporation. ECF No. 89 ¶ 22; ECF No. 90, Ex.102.

Response: Background information. No objection.

67. Following execution of the Master Lease, Evans began, and continued, selling Mill Bay Recreational Vehicle Resort memberships. ECF No. 89 ¶ 3; Ex. 65 at 5.

Response: Background information. No objection.

68. On June 12, 1984, attorney David Rockwell forwarded registration materials and a Public Offering Statement regarding the Mill Bay Resort camping club to the Washington State Department of Licensing in compliance with the Camping Resorts Act. ECF No. 90, Ex. 65 at 6.

Response: The cited document, ECF No. 90, is a letter ruling dated June 26, 2003, issued by Judge John Bridges in the Chelan County Superior Court action captioned *Grondal, et al. v. Chief Evans, Inc., et al.*, Cause No. 02-2-01100-9. The Federal Defendants were not parties to that action, and, as such, object to the facts recited in Judge Bridges' letter ruling as being established for purposes of this litigation.

69. That Public Offering Statement references 330 membership contracts at a price of $5,995 each and 40 expanded membership contracts at a price of $25,000 each. ECF No. 90, Ex. 65 at 6.

Response: The cited document, ECF No. 90, is a letter ruling dated June 26, 2003, issued by Judge John Bridges in the Chelan County Superior Court action captioned *Grondal, et al. v. Chief Evans, Inc., et al.,* Cause No. 02-2-01100-9. The Federal Defendants were not parties to that action, and, as such, object to the facts recited in Judge Bridges' letter ruling as being established for purposes of this litigation.

70. The Public Offering Statement provided in part the following general information regarding the ownership of the land:

> Mill Bay has one site which is situated approximately one mile southeast of Manson, Washington, and abuts upon Lake Chelan with approximately 2,500 feet of waterfront available to club members. It is designed to accommodate trailers, motor homes, campers and similar recreational vehicles for period of up to fourteen consecutive days. The site is located upon Indian land controlled and supervised by the Bureau of Indian Affairs, a part of the United States Department of the Interior. It was formerly occupied by the Chelan Indians, and was part of the Columbia or Chief Moses Reservation formed in 1979 (sic) and 1880. The reservation disbanded three years later and reservation members were allowed to reserve a section of the land for their own use, and the Mill Bay area was allotted to Wapato John.

ECF No. 90, Ex. 65 at 7.

Response: The cited document, ECF No. 90, is a letter ruling dated June 26, 2003, issued by Judge John Bridges in the Chelan County Superior Court action captioned *Grondal, et al. v. Chief Evans, Inc., et al.,* Cause No. 02-2-01100-9. The Federal Defendants were not parties to that action, and, as such, object to the facts recited in Judge Bridges' letter ruling as being established for purposes of this litigation.

71. Two types of Mill Bay Resort membership sales agreements were sold to purchasers, the Membership Sale Agreement (Camp Club Membership) and the Expanded Membership Sale Agreement. ECF No. 90, Ex. 65 at 7.

Response: The cited document, ECF No. 90, is a letter ruling dated June 26, 2003, issued by Judge John Bridges in the Chelan County Superior Court action captioned *Grondal, et al. v. Chief Evans, Inc., et al.,* Cause No. 02-2-01100-9. The Federal Defendants were not parties to that action, and, as such, object to the facts recited in Judge Bridges' letter ruling as being established for purposes of this litigation.

72. In 1989, Evans sought to modify the Master Lease and RV park concept. In a letter dated April 24, 1989, George Davis informed Ricky Joseph, then employee at the Colville Agency, to prepare a letter to Evans requesting Evans submit a request to change the development for construction of the golf course as well as allowing new "permanent sites vs. the lease share." ECF No. 90, Exs. 28, 29.

Response: Background information. No objection.

73. Evans submitted these modifications, including the "Expanded Membership Agreement," for approval by the BIA. ECF No. 90, Exs. 33, 30.

Response: Background information. No objection.

74. On July 6, 1989, George Davis wrote a note to Sharon Redthunder informing her that he was approving the modification and expanded membership concept and to send a letter to Evans stating the same. ECF No. 90, Ex. 31.

Response: The cited document, ECF No. 90, Ex. 31, does not support this statement.

75. On July 7, 1989, Sharon Redthunder, then Real Property Officer at the Colville Agency, sent Evans' attorney, Jack Doty, a letter stating that the Superintendent reviewed the modification in accordance with the "Expanded

Membership Sale Agreement" and granted permission to incorporate it into the Lease. George Davis was copied on this letter. ECF No. 90, Ex. 4.

Response: The cited document, ECF No. 90, Ex. 4, does not support this statement.

76. The Expanded Membership Sale Agreement contained language similar to the regular Membership Sale Agreement except that in Paragraph 4, the privileges of membership were delineated as follows:

> In consideration for paying dues, Purchaser shall be entitled to use facilities maintained for the benefit of Mill Bay members, wheresoever located, in accordance with rules and regulations promulgated by Seller; provided that this membership is an expanded membership entitling this member to utilize space exclusively and in accordance with posted rules for expanded members. This membership does not include the right to utilize more than one space.

ECF No. No. 90, Ex. 30.

Response: Undisputed. Not relevant to any pending motion.

77. The Expanded Membership Agreement stated that the contract was to be interpreted and enforced in accordance with the law of the State of Washington. ECF No. 90, Ex. 30.

Response: Undisputed. Not relevant to any pending motion.

78. The Expanded Membership Agreement recognized it was a license and stated in ¶ 6: "Memberships may not be rented or sub-licensed." It further stated in ¶ 13: "This membership constitutes only a contractual license . . . "ECF No. 90, Ex. 30 ¶¶ 6, 13; ECF No. 90, Ex. 65 at 8; ECF No. 90-9 at 39 of 55).

Response: Undisputed. Not relevant to any pending motion.

79. The Expanded Membership Agreement also provided that its duration was

coextensive with the fifty year term commencing February 2, 1984, of Seller's lease for the Mill Bay property, which lease was entered into between the United States Department of the Interior, Bureau of Indian Affairs, and William W. Evans, Jr., on February 2, 1984, and subsequently assigned by William W. Evans, Jr., to Seller. ECF No. 90, Ex. 30.

Response: Undisputed that document purports to create a membership "coextensive with the fifty (50) year term commencing February 2, 1984, of Seller's lease for the Mill Bay property." Disputed as to any suggestion that the Master Lease was for a 50-year term, or that this document had the legal effect of extending the original 25-year term of the lease.

80. On July 30, 1990, the Master Lease was modified. The modification included an attachment entitled, Master Plan History and Modification Requests. ECF No. 90, Ex. 33.

Response: Undisputed. Not relevant to any pending motion.

81. This attachment was signed by the President of Chief Evans, Inc. and approved by the Superintendent of the Colville Agency and states in part:

> The original design for seven hundred fifty (750) R.V. sites to be constructed on the leased property designated as MA-8 at Manson, Washington, was established in 1982. Actual construction on thirty-three (33), an office building, a comfort station, gate house, boat dock and swimming pool was completed in 1984. A sales program was commenced in August 1984.

ECF No. 90, Ex. 33.

Response: Undisputed. Not relevant to any pending motion.

82. The BIA received a copy of the Expanded Membership Agreement prior to George Davis approving the Master Lease modification, which included the expanded membership concept. ECF No. 90, Exs. 30, 33.

Response: Undisputed that BIA received a copy of the proposed Expanded Membership Agreement at ECF No. 90, Ex. 30, before the Master Lease Modification at ECF No. 90, Ex. 33, was executed. Disputed as to legal conclusion that Master Lease Modification "included the expanded membership concept." Not relevant to any pending motion.

83. Evans and his sales staff advertised these camping memberships to the public providing verbal and written assurances that that the expanded membership was good for 50 years until 2034 and had been approved by the BIA. ECF No. 89 ¶ 7.

Response: The cited document, ECF No. 89 at ¶ 7, does not support this statement. To the extent this statement is supported elsewhere in the record, the fact that the camping memberships were represented by Evans as being "good for 50 years until 2034" has no bearing on the actual term of the Master Lease, which expired in 2009.

84. One such document provided to potential buyers of the camping "memberships" was a prospectus filed under oath with the State of Washington under the Washington State Campground Act. This prospectus included recitals regarding the nature of the membership and the fact that the membership agreements were coextensive with the 50-year lease term until 2034. ECF No. 89, Ex. A.

Response: The cited document, ECF No. 89, Ex. A, does not support this statement. The document does not appear to be a "prospectus," and there is no indication that it was "filed under oath with the State of Washington" or "provided to potential buyers." Statements in this document to the effect that "the membership agreements were coextensive with the 50-year lease term until 2034" have no bearing on the actual term of the Master Lease, which expired in 2009.

85. The "Expanded Memberships" were sold to many members for $25,000.00 each with the accurate representations that it had been approved by the BIA, that it was under the protection of the Washington State Campground Act and that its duration was through 2034. ECF No. 89 ¶¶ 7, 9; ECF No. 95.

Response: Disputed as to the statement and legal conclusion that the BIA "approved" the expanded memberships or the sale thereof. Disputed as to the legal conclusion that the memberships were "under the protection of the Washington State Campground Act." Disputed as to any suggestion that represented duration of memberships has any bearing on the term of the Master Lease, which expired in 2009.

86. In all, from 1984 to 1994, over 183 consumers purchased camp memberships paying anywhere between $5,995 to $25,000 for the membership alone. ECF No. 89 ¶ 9; ECF No. 95; ECF No. 93; ECF No. 92.

Response: Undisputed. Not relevant to any pending motion.

87. On resale, new members have paid up to three times that of the original price in order to purchase a camping membership valid until 2034. ECF No. 89 ¶ 9.

Response: Disputed as to legal conclusion that camping memberships are "valid until 2034." Not relevant to any pending motion.

E. BIA Communications Related to the RV Park.

88. In early 1985, Evans sent notice that he had exercised his option to renew and that receipt of the letter by the Superintendent would be deemed acceptance of this renewal. The Colville Agency marked this letter as received on March 18, 1985. ECF No. 90, Ex. 27.

Response: Disputed. As the Ninth Circuit held in *Wapato Heritage L.L.C. v. United States*, 637 F.3d 1033, 1036, 1040 (9th Cir. 2011), the cited letter did not have the effect of exercising Evans' option to renew the lease.

89. Thereafter, the BIA approved and signed documents which included the 2034 expiration date of the Master Lease. ECF No. 90, Exs. 4, 6, 8, 35, 69.

Response: ECF No. 307 at p. 18 (SMF ¶ 41). This is not a statement of a material fact relevant to the motion for ejectment. To the extent this statement suggests that the BIA agreed that the Master Lease had been extended, the statement is a mischaracterization of the evidence cited in support of that statement.

90. On July 14, 2004, Superintendent Nicholson signed a Lease Information Affidavit which was submitted to the Washington State Department of Licensing and Regulation. This affidavit stated that the MA-8 Lease expires February 2, 2034 and that the landlord for this land was the "Bureau of Indian Affairs." Superintendent Nicholson signed this affidavit as "Signature of Landlord." ECF No. 90, Ex. 69.

Response: Undisputed as to contents of Lease Information Affidavit. Disputed as to any suggestion that the BIA agreed that the Master Lease had been extended.

91. In several Landowner meetings during 2003 through 2007, the BIA was present at meetings where the Landowners were informed the Master Lease extended until the year 2034. ECF No. 90, Exs. 5, 7, 9.

Response: This is not a statement of a material fact relevant to the motion for ejectment. The documents are also hearsay, and the contents are hearsay within hearsay. Moreover, these documents are dated November 2004 and after.

92. Based upon the sign-in sheets of those meetings and the names on the letters sent with the 2034 expiration date, Landowners constituting a majority interest in MA-8 received actual notice that the Master Lease expired in 2034. ECF No. 90, Exs. 7, 9.

Response: Hearsay. Additionally, this statement is a conclusion of law or an opinion or belief, not a statement of material fact relevant to the motion for ejectment. Additionally, the exhibit cited does not support the statement. Moreover, to the extent this statement suggests that in 2007 Indian beneficial landowners constituting a majority interest in MA-8 received the 1985 Evans letter, it is disputed. "The record established only that [WHLLC] submitted a lease proposal to the BIA Colville Agency and that copies of Evans' 1985 letter were hand-delivered to the few individuals who attended the meetings held on that proposal." See Order, Wapato Heritage LLC v. U.S, et al. CV-08-177-RHW, ECF No. 30 at 11, ll. 22-28. The meeting referenced by the declarants in Wapato Heritage LLC v. U.S, is stated to have occurred in 2006. See ECF No. 16-12 at pp. 178-79; ECF No. 16-2 at pp. 26-27.

93. The BIA's records include a document index titled: "The Estate of William Wapato Evans: Paul Grondal, et al. v. Jeffrey Webb, Personal Representative of the Estate of William Wapato Evans," which includes a listing of six public offering statements for the Mill Bay Resort, the Expanded Membership Agreements and other Mill Bay Resort sales literature. ECF No. 90, Ex. 60.

Response: The characterization of the cited document, ECF No. 90, Ex. 60, as part of "BIA's records" is not supported by the document.

94. Prior to February 2, 2008, the BIA never provided Plaintiffs with notice that the Master Lease would expire in 2009. ECF No. 90, Ex. 99.

Response: Disputed as to any suggestion that BIA was required to provide such "notice." By its terms, the Master Lease expired in 2009 unless an option to renew had been properly exercised. Additionally, the cited document, ECF No. 90, Ex. 99, does not support this statement. Moreover, BIA advised Wapato Heritage of its view that the option to renew had not

been properly exercised on November 30, 2007, at which time Wapato Heritage still had two months left to properly exercise the option:

> **In 2007, after Wapato began efforts to develop a major residential development on MA–8, the Colville Confederated Tribe (Tribe) questioned whether Evans had effectively exercised his option to renew the Lease. The Tribe sent a letter to the BIA requesting a meeting to "discuss the current legal status of the 25–year extension." In response, the BIA reviewed the Lease terms and relevant correspondence. The BIA then sent a letter to the Tribe and Wapato on November 30, 2007, stating that, in its opinion, the option to renew had not been exercised effectively by Evans's 1985 letter. The BIA's opinion rested, in part, on Evans's failure to send notice to the individual Landowners.**
>
> **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 Evans'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 1033, 1036 (9th Cir. 2011) (emphasis added).**

Additionally, Wapato Heritage, LLC's 2004 settlement agreement with Mill Bay specifically required Wapato Heritage, LLC to "give the Mill Bay Members immediate notice of any notice of default it receives or becomes aware of with respect to the Master Lease." ECF No. 346-1 at p. 22.

95. On April 7, 2008, Ricky Joseph, BIA Real Property Officer, sent a memo to Becky Rey, T & M Realty Specialist regarding an MA-8 Landowners meeting. In that, he stated:

> The only questioned [sic] posed that I end [sic] up answering was from Paul Wapato who said when is the Bureau going to notify the RV people their lease is going to end. I explained it is subject to the Master Lease even though the agreements they made was between them and Mar Lu (Wapato

Heritage LLC) The bureau wouldn't notifying [sic] them, it would be up to LLC.

ECF No. 90, Ex. 99.

Response: Undisputed as to contents of document. Not relevant to any pending motion.

96. Upon discovering the BIA's position regarding the Master Lease renewal, the Association sent a letter to the Superintendent of the Colville Agency and the Regional Solicitor's Officer for the Pacific Northwest Region of the DOI asserting that Paragraph 8 allows the Association, as subtenants, to use and occupy the land until 2034, in accordance with the Membership Agreements and the Settlement Agreement. ECF No. 90, Ex. 108.

Response: Undisputed that this letter was sent. Disputed as to any suggestion that Paragraph 8 of the Master Lease allows Plaintiffs to use and occupy MA-8 through 2034. The Court (Judge Quackenbush) has previously ruled that Paragraph 8 does *not* give Plaintiffs the right to occupy MA-8 through 2034. ECF No. 144 at 30-31.

97. The United States attorney at the Regional Solicitor's Portland Office and the Superintendent of the Colville Agency responded to these letters asserting that the BIA's position is that the Association's tenancy expires when the Master Lease allegedly expired on February 2, 2009. ECF No. 90, Ex. 100.

Response: Disputed as to the characterization of BIA's position being that Plaintiffs' *tenancy* expired when the Master Lease expired, which is not supported by the document. Undisputed that this letter was sent.

F. The State Court RV Park Litigation.

98. In 2001, Mill Bay Members received a letter from Chief Evans, Inc. stating the park was closing at the end of 2001 and all membership contracts would be cancelled at that time. ECF No. 89 ¶ 10.

Response: Paul Grondal offered declaration testimony to this effect, ECF No. 89 ¶ 10. The letter referenced does not appear to be in the record.

99. The Members sent a letter to William ("Gene") Nicholson, then Superintendent of the BIA Colville Agency, expressing their concern regarding the actions of Chief Evans, Inc. and the Members' belief that the BIA "specifically approved all plans for the resort development and its subsequent ownership and operation under the laws of the State of Washington" as well as the assertion that the BIA approved the plans that called for membership contracts to last 50 years. This letter attached for the BIA's reference a number of newspaper articles regarding the BIA's involvement in the Mill Bay development and approval of the 50-year contracts. ECF No. 90, Ex. 39.

Response: Undisputed that letter was sent. Disputed as to the suggestions that BIA "approved" the operation of the resort development (under Washington law or otherwise), or the contracts between Plaintiffs and Wapato Heritage.

100. On May 16, 2002, Mr. Nicholson sent a letter to Paul Grondal stating that he had received the letter and would forward it to the Office of the Solicitor for review. ECF No. 90, Ex. 40.

Response: Undisputed that letter was sent.

101. On May 16, 2002, Mr. Nicholson forwarded the Members' letter to Colleen Kelley, United States Department of the Interior, Office of the Solicitor, Pacific Northwest Regional Office. Mr. Nicholson forwarded the relevant contracts and leases regarding the issue and specifically requested Ms. Kelley "Please advise me if the Membership Agreement does allow Mr. Evans to move the RV Park and does the Washington State law (Washington State Camping Resort Regulations Act, R.C.W. 19.105) apply to the Business Lease." ECF No. 90, Ex. 40.

Response: Undisputed that letter was sent.

102. The BIA never provided a meaningful written response to the May 8, 2002 letter. ECF No. 90, Ex. 40; ECF No. 89 ¶ 25.

Response: Disputed as to the purported absence of a "meaningful" response as the subjective and argumentative opinion of Paul Grondal, ECF No. 89 at ¶ 25. Further disputed as to any suggestion that BIA was required to respond to the letter.

103. The Washington State Department of Licensing provided the BIA with copies of the Members complaints to the state. ECF No. 90, Exs. 37 & 38.

Response: Undisputed. Not relevant to any pending motion.

104. On October 21, 2002, the Realty Officer at the Colville Agency forwarded a congressional inquiry from Senator Maria Cantwell to the Realty Officer at the Northwest Regional Office which requested information regarding the situation affecting one of her constituents, Ms. LaVonne Johnson, a Mill Bay Resort member. ECF No. 90, Ex. 41.

Response: Undisputed. Not relevant to any pending motion.

105. On November 21, 2002 a lawsuit was filed in Chelan County Superior Court naming Paul Grondal the plaintiff representing all Mill Bay Resort Members similarly situated, against Chief Evans, Inc. William Evans, Jamie Jones, Kenneth and Leslie Evans, and John Jones (the "Chief Evans Defendants") seeking to enjoin them from cancelling the memberships and closing the park. ECF No. 90, Ex. 65.

Response: Undisputed.

106. In a letter dated March 17, 2003, Mr. Nicholson informed Michael Arch, attorney for the Chief Evans Defendants, that Ms. Kelley's June 5, 2002 letter urges the BIA to offer an official position as to the merits of a dispute between the Members and Evans. The letter further states that "she suggested that this was not an issue the Bureau of Indian Affairs could resolve" and "[a] court of competent

jurisdiction should be fully capable of resolving the issue." ECF No. 90, Ex. 42 at 2–3 & Ex. 85.

Response: The letter dated March 17, 2003, at ECF No. 90, Ex. 42, is not signed and is not drafted on BIA letterhead. The Federal Defendants object to the admissibility of this letter for lack of foundation. Additionally, the letter dated June 5, 2002, at ECF No. 90, Ex. 85, is quoted out of context. The relevant portion of the letter reads:

> **It appears to us that a major issue in this matter is the scope of the contractual rights obtained by the Resort members in their Membership Agreements. However, the Bureau of Indian Affairs is not the appropriate forum for the resolution of that issue. Furthermore, the BIA owes no duty to the Resort members, or to Mr. Evans in his position as a lessee under the lease of Allotment MA-8. Thus, it would be inappropriate, at this time, for the BIA to form or offer an "official position" as to the merits of any dispute between the Resort members and Evans.**

107. On May 27, 2003, Mr. Arch sent another letter to Mr. Nicholson and Ms. Kelley listing important contentions in the Members' briefing. A handwritten note of that date, with the initials GN asked Ricky Joseph, BIA Realty Officer, to assist Ms. Kelly in answering two specific issues raised in this letter. The issues which Ms. Kelly specifically wanted addressed were:

> The Secretary of the Interior was aware of the particular use of this land and anticipated membership agreements to be sold. In ratifying the master lease and the sublease, the Secretary gave approval to said agreements.
>
> ***
>
> In the case at bar, the Secretary approved the "modification" for

> expanded Camp Club Memberships in July of 1990…The expanded membership agreements (as well as the regular agreements) state: 'This contract shall be interpreted and enforced in accordance with the laws of the State of Washington.'…By approving the modification, the Secretary adopted the provisions of the expanded membership agreement allowing state law to apply. Thus, the Secretary has exercised the authority granted in 25 C.F.R. § 1.4(b).

ECF No. 90, Ex. 59.

Response: Undisputed that this letter was sent. Not relevant to any pending motion.

108. On May 28, 2002, Ms. Kelly sent a letter to Betty Parisien at the Colville Agency providing her with questions to answer the above issues. This letter includes handwritten notes answering those questions, but it is unclear who authored those notes. In this letter, Ms. Kelly asked: "Did BIA review, approve, or express any opinion about any form of the membership contracts between Evans, his companies, and the camping resort members?" to which the response is simply "No" without any explanation as to why and failing to reference the 1989 modifications and approvals. ECF No. 90, Ex. 61.

Response: The Federal Defendants object to the admissibility of this document for lack of proper foundation as to the handwritten answers to the questions posed. Not relevant to any pending motion.

109. On June 17, 2003, Ms. Kelly sent a letter to Mr. Arch regarding the BIA's position on the RV Park litigation and legal arguments made therein. Ms. Kelly authorized Mr. Dodge to include this letter in a declaration to be submitted to Judge John Bridges in Chelan County Superior Court in order to support the Chief

Evans Defendants legal position and to request that the court consider federal law in that dispute. ECF No. 90, Ex. 64.

Response: Undisputed that this letter was sent. Disputed as to the statement that the author "authorized Mr. Dodge to include this letter in a declaration to be submitted to Judge John Bridges in Chelan County Superior Court in order to support the Chief Evans Defendants legal position and to request that the court consider federal law in that dispute," which is not supported by the document. Not relevant to any pending motion.

110. State court jurisdiction over the Mill Bay litigation was challenged. ECF No. 90, Ex 43.

Response: The cited document, ECF No. 90, Ex. 43, does not support this statement. Not relevant to any pending motion.

111. On June 26, 2003, Judge John Bridges in Chelan County Superior Court issued an order finding that the State of Washington retained jurisdiction over the dispute of the parties. ECF No. 90, Ex. 65.

Response: Undisputed that such an order was issued. Disputed as to any suggestion that the order has any bearing on the issues being litigated in these proceedings.

112. During these proceedings, the Mill Bay Resort Members formed and incorporated the Mill Bay Members Association, a Washington non-profit corporation. ECF No. 90, Ex. 102; ECF No. 89 ¶ 22.

Response: Background information. No objection.

113. The Mill Bay Members Association has all rights granted by the Washington Camping Resort Act, RCW ch.19.105.

Response: This statement is a legal conclusion to which no response is required.

114. A two-day mediation occurred in Seattle on August 8, 2004 and September 9, 2004. ECF No. 90, Ex.77 at 6; ECF No. 89 ¶ 17.

Response: Undisputed.

115. BIA officials were present at that mediation, including Sharon Redthunder and Superintendent Nicholson. ECF No. 89, ¶ 17.

Response: This is not a statement of a material fact relevant to the motion for ejectment. Contrary to this statement, Ms. Redthunder was not a BIA official at the time of the mediation. ECF No. 296-1 at 9-10. In addition, the BIA was not a party to the litigation that resulted in the 2004 settlement.

116. In a letter dated August 12, 2004, Mr. Arch provided Mr. Nicholson and others with a summary of the August 10, 2004 mediation. Specifically, Mr. Arch stated:

> 2. In exchange for Evans' agreement to leave the Park property "AS IS" until expiration of the memberships in 2034…the Member Association will pay to the BIA (for distribution to the allottee owners) the sum of $25,000 per year starting retroactive to January 1, 2004.."

ECF No. 90, Ex. 72 at 3.

Response: The Federal Defendants object to the admissibility of this document as hearsay. Additionally, the excepted portion of the document is incomplete and presented out of context. Additionally, this alleged fact requires clarification as previously clarified at ECF No. 119 at p. 11:

> **Nor is there any reason to construe the receipt of money from their lessee as evidence that the Indian landowners agreed to allow the RV Park members to possess their trust land after the Master Lease expired. First, the Settlement Agreement does not indicate that rent due thereafter is to be paid to the Indian landowners. Rather, Section 5.7 provides that the rent will be paid by the RV Park to Wapato Heritage LLC. Exh. 2 (Ct. Rec. 90-3 at 60-61). Thus, this provision is a modification of rental provisions**

provided in the camping membership contracts—not the Master Lease. There is no indication that the rental provisions of the Master Lease were adjusted in any way as a result of the Settlement Agreement.

Second, while Federal Defendants do not deny that Wapato Heritage LLC paid the Indian landowners money in 2005 after it entered into the Settlement Agreement, it is important to understand the context when reviewing the facts related to these payments. When Wapato Heritage LLC and the RV Park were negotiating the Agreement to settle the disputes between them, Wapato Heritage LLC also was trying to renegotiate the terms of the Master Lease and/or enter into a new lease of MA-8. Wapato Heritage LLC wanted to acquire a longer lease so that it could build and operate a large development on the entire property. (See Sections 5.1 and 5.2 of the Agreement wherein the RV Park agrees to a change in the park's boundaries when the new lease with the Indian landowners was adopted (Ct. Rec. 90-3 at 57-8)). So in order to accomplish its business goals, Wapato Heritage LLC sought both an amendment to federal law to allow a 99 year lease of MA-8, and to gain the consent of the Indian landowners to either a modification to the Master Lease or an entirely new lease for a 99 year term.

Based upon the transmittal notes that accompanied the checks provided by Wapato Heritage LLC to the Indian landowners, the decision to pay them was based on the money's persuasive power. The checks were made payable to the individual Indian and drawn upon a Wapato Heritage LLC bank account. Each included a note that read: "The attached check represents 50% of your 2004 & 2005 MA-8 R.V. Park Rental Income. The remaining balance will be mailed upon receipt of your vote per the proposed MA-8 development. Warmest personal regards, Wapato Heritage LLC.". Exh. 82 (Ct. Rec. 90-11 at 469, 472). This demonstrates that the payment was made by Wapato Heritage LLC—not the RV Park—and was intended to persuade the Indian landowners to support its development plans. That it was not an amendment to the annual rental provisions of the Master Lease is clear. For the remaining years of the Master Lease, Wapato Heritage LLC continued to make payments to the BIA on behalf of the Indian landowners pursuant to the original

> **rental terms of the Master Lease—not the terms of the Settlement Agreement—and the Plaintiffs have not demonstrated otherwise.**

See also **ECF No. 353 at pp. 2-3, and ECF No. 347 at p. 9.**

The Court has also decided Mill Bay's prior motion on this issue:

> **Moreover, the court rejects the argument that the Defendant landowners somehow ratified the 2004 Settlement Agreement by accepting the lump sum payment of money for the agreed additional rent to be paid by the RV members following the settlement. The landowners were told that the money was from the settlement. A party not bound by a contract may ratify a contract and then become bound by its terms, by affirming the contract by their words or deeds. One may be deemed to ratify a contract if, after discovery of facts that would warrant rescission, that party remains silent or continues to accept benefits under the contract. Hooper v. Yakima County, 79 Wn.App. 770, 775-76, 904 P.2d 1193 (1995), overruled on other grounds by Del Rosario v. Del Rosario, 152 Wn.2d 375, 97 P.3d 11 (2004). Because the landowners were not party to the Settlement Agreement, the element which is missing here is any evidence of full knowledge of all the material facts. A mere indirect or incidental benefit to a third person attributable to the fulfillment of a contract, to which he is not a party and has not knowingly accepted or ratified, is insufficient to render him legally responsible for it or bound by it.**

ECF No. 144 at p. 36.

117. Mr. Doug Lawrence sent a letter to Mr. Nicholson and the other mediation attendees summarizing the August 10, 2004 mediation and stating that the Association was agreeing to pay additional rent to the BIA and that it was the mediator's understanding that the Estate would be making a presentation to the Tribal Council and Allottees regarding this settlement. ECF No. 90, Ex. 73, Introductory Paragraph and Numbered Paragraph 3.

Response: This statement misconstrues the summary provided by the mediator at ECF No. 90, Ex, 37. With regard to the payment of additional rent, the summary reads:

> **In consideration of the Association's agreeing to pay increased rent to the BIA, and subject to the changes noted above, the RV park will remain in its current condition (e.g. with the new boundaries, green spaces, lot locations, etc.). Subject to their compliance with applicable rules, regulations, and the terms of their Membership agreements and the Head Lease, the Association and its Members will have the right to continued use of the RV park until 2034. The increased rent to be paid is as follows: $25,000 per year commencing 1/1/2004, with increases of $5,000 per year every five year [sic]. For 2004, the Association will pay directly to the Allottees the sum of $19,000 in satisfaction of its augmented rent responsibilities (recognizing that approximately $6,000 has already been paid.**

118. The parties entered into a Settlement Agreement on September 15, 2004 pursuant to the mediation to settle the creditor's claims and lawsuits filed by Paul Grondal and Mill Bay Members. ECF No. 89, ¶ 21; ECF No. 90 Ex. 2.

Response: Undisputed that the parties to the Chelan County case, which did not include the BIA or the individual allottees, entered into a settlement agreement.

119. The BIA did not respond or object to the Settlement Agreement. ECF No. 90, Ex. 77.

Response: This statement is not supported by the cited document, ECF No. 90, Ex. 77. To the extent the statement is supported elsewhere in the record, the Federal Defendants dispute any suggestion that the BIA was required or entitled to "respond or object" to the settlement agreement as a non-party to the case.

120. Notice of the Settlement Agreement and motion seeking judicial approval was served on all interested parties to the pending litigation and all beneficiaries of Evans' estate, including the BIA. ECF No. 90, Exs. 2; 78, 79, 77.

Response: Disputed as to the description of the BIA as an "interested party to the pending litigation." The BIA was not a party to the litigation. Further disputed as to any suggestion that the BIA was a "beneficiary of Evans' estate." The BIA is not a beneficiary of Evans' estate.

121. Judge Bridges approved the Settlement Agreement on November 23, 2004. ECF No. 90, Ex. 77.

Response: Undisputed. Not relevant to any pending motion.

122. The Settlement Agreement sent to the BIA stated:

> All parties acknowledge that the Mill Bay Members have a right to use the property commonly known as the Park pursuant to the Prior Documents and this Agreement through December 31, 2034…

ECF No. 90, Ex. 79 at 9 ¶ 5.14.

Response: This statement is not supported by the cited document, ECF No. 90, Ex. 79. To the extent the citation should have been to the settlement agreement at ECF No. 90, Ex. 2, the quotation above is incomplete and presented out of context. The quoted sentence from Paragraph 5.14 of the Settlement Agreement reads (emphasis added):

> **All parties acknowledge that the Mill Bay Members have a right to use the property commonly known as the Park pursuant to the Prior Documents and this agreement through December 31, 2034, <u>subject to</u> the terms of this Agreement and <u>the Prior Documents.</u>**

The "Prior Documents" to which the Mill Bay Members' rights are subject includes the Master Lease. ECF No. 90, Ex. 2 (¶ 2.1). Thus, Plaintiffs' rights under the Settlement Agreement, including the purported right to use

MA-8 through 2034, are subject to the terms of the Master Lease—including the natural termination of the original 25-year term absent a valid exercise of the option to renew by the lessee.

123. The BIA was at all times apprised of the litigation and provided with notice of the pending actions of the parties. ECF No. 90, Exs. 2 & 37–79.

Response: The BIA was generally aware of the Chelan County litigation (which did not include BIA or the allottees). Not relevant to any pending motion and this issue has already been addressed by the Court at ECF No. 144 at pp. 34-35.

124. On October 28, 2004, the BIA sent a letter to the Landowners informing them of the RV Park court proceedings and the fact that the court ruled the Members could stay until 2034 and the Association would pay $25,000 annual rent with an increase every 5th year. ECF No. 90, Ex. 79.

Response: This statement is not supported by the cited document, ECF No. 90, Ex. 79. The letter in question, dated October 29, 2004, actually states: "Apparently, the District Court has ruled the RV people can stay at the present RV site until the expiration of their contract, which will be 2034. The RV Association has offered to pay their current dues, and $25,000.00 annually, with a $5,000.00 increase every 5th year thereafter."

The letter also states: (1) "The Leases [sic] was approved February 2nd, 1984, for a term of 25 years with an option to renew for an additional 25 years."; and (2) "The first 25 year term will expire February 4, 2009."

125. All payments made by the Mill Bay Members Association from and after the completion of the 2004 Settlement Agreement, have been made pursuant to that Settlement Agreement. ECF No. 362 and Exhibit thereto.

Response: Disputed, see ECF No. 357 and documents cited therein. While the $23,478.69 appears to be close to 50% of the rents due under the

Settlement Agreement for the years 2004 and 2005, "there was no agreement between or among any of the parties that … rent would be paid in whole or in part to the Lessors, other than what the Master Lease provided." ECF No. 347 at p. 9. Furthermore, the United States has not found any provision in the settlement related to this $48,000. ECF No. 347 at p. 9, n. 1. In context, the payment was an enticement to the beneficial landowners to sign a 99-year lease with WHLLC rather than pursuant to the settlement agreement. ECF No. 347 at p. 9.

Any money paid by Mill Bay *pursuant to* the 2004 Settlement agreement between it and WHLLC appears to remain in an account held by WHLLC. ECF No. 346-5 at p. 1 (Ex. 1C).

G. Fee Patents Issued for Other Moses Allotments.

126. A Moses Allotment Patent was issued on March 16, 1917, over the signature of President Woodrow Wilson to one "Ko-mo-dal-kish, and Indian of the Chief Moses tribe or band." The Patent was for five-hundred fifty-one and ninety-five-hundredths acres. The Patent to Ko-mo-dal-kish is Ex. C to ECF No. 224, and is in nearly precisely the same form as the Patents issued to Wapato John. *See* ECF No. 175-1, Ex. E. On November 16, 1960 and December 20, 1960, Fee Patents were issued to the then holders of the allotment interests in the Ko-mo-dal-kish Patent. ECF No. 224, Ex. C.

Response: The patent referenced is not for MA-8, and is thus not relevant to the pending motion for summary judgment re: ejectment.

127. Other MA-8 fee patents have been issued to then-holders of MA-8 trust patents. ECF No. 224, Exs. A, B.

Response: Disputed. The fee patents at ECF No. 224, Ex. B, recite that they were issued pursuant to 25 C.F.R. § 152.6. That regulation allows fee patents to be issued to *non-Indians* and *Indians with whom a special trust*

relationship does not exist. ***See*** **25 C.F.R. § 152.6 ("Whenever the Secretary determines that trust land, or any interest therein, has been acquired through inheritance or devise by a non-Indian, or by a person of Indian descent to whom the United States owes no trust responsibility, the Secretary may issue a patent in fee for the land or interest therein to such person without application."). The statement that the fee patents in question were issued to "then-holders of MA-8 trust patents" is misleading and unsupported.**

DATED this 8th day of May, 2020.

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CERTIFICATE OF SERVICE

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