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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, et al, Plaintiffs, vs. UNITED STATES OF AMERICA, et al; Defendants.	NO. 2:09-CV-00018-RMP PLAINTIFFS' TRIAL BRIEF

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I. INTRODUCTION

The United States represented for more than 24 years that the Mill Bay Members Association, Inc., could remain through 2034 on the disputed RV Park property on the disputed Indian allotment land known as "MA-8." Last fall, 173 members were ejected after investing millions of dollars on the reasonable (but, this Court has ruled, apparently incorrect) understanding that they could remain through 2034. But for the Government this is not enough. The Government is now doubling down and seeking over $1.6 million in trespass damages, plus pre- and post-judgment interest, plus joint and several liability for the elderly retirees and families who were ejected from what they thought would be their vacation properties for another 14 years.

The evidence at trial will show minimal to no trespass damages should be awarded against Plaintiffs Paul Grondal and the Mill Bay Members Association, Inc. ("Plaintiffs" or "Mill Bay"). To the extent trespass damages are awarded, the $1.6m amount of rental value assessed by the United States' expert witness, Bruce Jolicoeur, for February 2, 2009, through September 30, 2020, is too high due to an erroneous methodology based on sale of the property to a developer for residential subdivision. Use as a residential subdivision is not appropriate for this property that previously could *not* be developed residentially and which is sacred land possessing tremendous cultural significance to the Colville Tribes and landowners. A more appropriate reasonable rental value would be for

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lease of an RV Park during the period of time in question, at the $1.4m figure determined by Plaintiffs' expert Kenneth Barnes.

In either case, however, Mill Bay is *owed* a refund on prepaid rents. Mill Bay has already paid over $1.6m to remain on the property through 2034 via membership fees, settlement payments, and annual rents, paid to the allottee landowners and Wapato Heritage, LLC ("Wapato") (which funds Mill Bay intended for Wapato to route to the landowners). Since Mill Bay was deprived of the opportunity to remain on the property through 2034, assuming $1.4m in trespass damages is awarded against Mill Bay, Mill Bay is actually owed back more than $200,000 in recoupment or offset for its prior payments. Nevertheless, Mill Bay does not ask for an affirmative recovery, but rather only that these payments be deduced from any damages the Court might otherwise award.

In any event, an award of $1.4m in trespass damages for Mill Bay's presence on the property from February 2, 2009, until September 30, 2020, is also inappropriate. Perhaps most glaringly, some of these damages are barred by the doctrines of laches and failure to mitigate damages. The United States' failure to diligently prosecute their ejectment counterclaim and decision to allow the case to sit idle for large swaths of its more than 11-year history, should limit the United States' recovery of trespass damages during that period. Instead, if the Court is inclined to award trespass damages, the amount should be limited to the amount of annual rents paid by Mill Bay to Wapato

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Heritage from 2009 to 2020, pursuant to the 2004 Settlement Agreement.

But no matter the amount of trespass damages awarded, the membership fees, settlement payments, and annual rents paid by Mill Bay to Wapato Heritage should be treated as an offset against any trespass damages awarded against Mill Bay. Specifically, the payments Mill Bay has made to Wapato Heritage during this litigation should offset from the trespass damages that Wapato Heritage's 23.8 percent life estate interest would otherwise entitle it to receive. Alternatively, the United States' refusal to accept Wapato Heritage's tender of those funds to it should constitute a waiver of the United States' right to claim further damages now.

The United States also has identified no evidence for presentation at trial to show when the Mill Bay Members (and which ones) were actually present on the property during which specific periods of time, and trespass damages are unavailable without evidence of actual presence thereon.

In sum, trespass damages are inappropriate, and the United States' request for joint and several liability is severely unjust and should be denied.

II. FACTUAL BACKGOUND

Moses Allotment # 8 ("MA-8") is fractionated Indian allotment land near the banks of Lake Chelan in Washington State. ECF No. 503 at 2. In the early 1980s, William Evans, Jr. ("Evans") and over 40 individuals (together, the "landowners" or

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"allottees") held undivided ownership interests in MA-8. ECF No. 42 at 7 ¶43. Evans sought to lease MA-8 to create a camping club resort, and he obtained the approval of the landowners and the United States Bureau of Indian Affairs ("BIA") to do so. *Id.* at 1-2 ¶2.

Evans executed a Master Lease on February 2, 1984, as "Lessee," and BIA signed as "Lessor" on behalf of the landowners. ECF No. 90-2 at Ex. 1. The Master Lease had an initial 25-year term with an option to renew for another 25-years. *Id.* at 5-6; ECF No. 90-2, Ex. 1 at ¶3. To renew, Evans had to notify in writing the "Lessor" and BIA Secretary one year before the Master Lease's expiration. ECF No. 144 at 5-6; ECF No. 90-2, Ex. 1 at ¶3.

In January 1985, Evans attempted to renew by letter to the Colville Agency. This Court found in 2010:

> There is no evidence that anyone, from the time of Evans' 1985 letter until the year 2007, questioned whether Evans had validly exercised the renewal of the Master Lease. . . . The written record reflects that during the course of over twenty years, Evans and his successors after his death, the BIA, and some of the Indian landowners proceeded, without questioning, upon an assumption that the term of the Master Lease would be and had been validly extended an additional 25 years to the year 2034.

ECF No. 144 at 7.

Upon execution of the Master Lease, Evans began selling Mill Bay RV Resort memberships. ECF No. 89 at ¶¶3-4. All memberships were for use and occupation of a

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23.52-acre RV Park, of which 10.3 acres are wetlands. *See* Plaintiffs' Trial Ex. 1 (Kenneth Barnes' initial & supplemental expert reports).

Evans initially sold "Regular" memberships to Washington State residents for a fee of $5,995 each, which memberships did not reserve a specific RV lot for purchasers but permitted purchasers to use any open lot on the "Regular" side whenever they would come to the RV Park. *See* Plaintiffs' Trial Ex. 15 (Regular Camping Membership); ECF No. 1 at ¶94; ECF No. 89 at ¶9. Evans subsequently sold "Expanded" memberships to Washington residents for a fee of $25,000 each. *See* Plaintiffs' Trial Ex. 16; ECF No. 1 at ¶94; ECF No. 89 at ¶9. All told, Evans sold 150 "Regular" memberships and 23 "Expanded" memberships to Washington residents. Plaintiffs' Trial Ex. 17 at ¶5.

In 2001, Evans informed the Mill Bay Members the RV Park would close at the end of 2001 and all memberships would be terminated. ECF No. 503 at 9.

In 2002, the Members sued Evans and his interests in *Grondal v. Chief Evans, Inc.*, Chelan County Superior Court Cause No. 02-2-01100-9 (Bridges, J.) ("*Grondal*"). Before that litigation resolved, Evans died and Wapato Heritage, LLC, succeeded to his interests in MA-8, and the Members incorporated as the Mill Bay Members Association, Inc. ECF 503 at 9. The litigation was ultimately mediated, culminating in a September 15, 2004 settlement agreement (the "*Grondal* Agreement"). *Id.* at 9-10; ECF No. 16-5. It is undisputed that BIA-representatives were present during the mediation; however, the

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parties dispute the extent of BIA's participation therein. *E.g.,* ECF No. 503 at 10; ECF No. 144 at 10. In the *Grondal* Agreement, in exchange for the right to use the RV Park on MA-8 through 2034, Mill Bay agreed to pay $48,000 in settlement funds and escalating rents to the landowners (passed through Wapato Heritage and BIA), as assumed responsibility for the RV Park's upkeep and maintenance. ECF No. 16-5; ECF No. 89 at ¶¶ 18, 22, Ex. D at ¶ 5.7; ECF No. 359 at ¶ 5; ECF No. 144 at 10.

The escalating rents to be paid by Mill Bay in the *Grondal* Agreement were as follows:

Year	Rental Amount
2004-08	$25,000.00
2009-13	$30,000.00
2014-18	$35,000.00
2019-23	$40,000.00
2020-24	$45,000.00
2025-29	$50,000.00
2030-34	$55,000.00

ECF No. 16-5 at 7.

Wapato Heritage filed a notice of the *Grondal* Agreement and motion seeking judicial approve under TEDRA, which were served on all interested parties and required anyone with objections/comments to notify the Court by November 23, 2004. ECF 90-3, Ex. 2; ECF 90-11, Ex. 77-79. The only objection came from landowner Sandra Evans.

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ECF 90-11, Ex. 77. Judge Bridges approved the *Grondal* Agreement on November 23, 2004. *Id.*

Mill Bay's $48,000 in settlement payments were made to the landowners in 2005; the checks were cashed. Plaintiffs Trial Ex. 32 (ECF 91) at ¶¶ 10-11, Ex A; ECF 90-11, Ex. 82 & 83. Post-settlement, Mill Bay timely paid the escalating annual rents to Wapato Heritage, to be passed on to the BIA and the landowners. ECF 144 at 11; Plaintiffs Trial Ex. 32 (ECF 91) at ¶¶ 10-11; ECF 359 at ¶¶ 4-8; ECF 349 at ¶¶ 18-21.

From 2009 to 2020, Mill Bay paid a total of $402,500 in annual rents to Wapato Heritage to be passed on to the BIA and the landowners, in exchange for Mill Bay's use of the RV Park on MA-8 through 2034 (pursuant to the terms of the *Grondal* Agreement). Plaintiffs' Trial Exs. 24-30 (ECF Nos. 348, 348-1, 359, 359-1). Wapato Heritage only passed through a small percentage of these funds to the BIA and landowners, and the remainder was tendered or otherwise made available to the BIA by Wapato Heritage but then rejected by the BIA and ultimately retained by Wapato Heritage. Indeed, the BIA refused to accept payments from Wapato Heritage beginning with a March 13, 2009 letter from Colleen Kelley to Michael Arch. ECF No. 346-7. And, at oral argument on January 10, 2013, Wapato Heritage's counsel told Judge Quackenbush that Wapato Heritage was holding the rental payments made by Mill Bay, but would release them to the BIA immediately if directed by the Court following a

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decision on Wapato Heritage's overpayment claims against the allottees. ECF No. 352 at 39:9–40:8. But Federal Defendants still declined to accept payments from Wapato Heritage or accept Wapato Heritage's offer.

BIA never examined or questioned the legal efficacy of Evans' purported renewal of the Master Lease until late 2007. ECF 144 at 11 (citing ECF 90 at Ex. 75 & 81; ECF 126 at Ex. 112); *see also* ECF 503 at 11. By November 30, 2007, letter to Wapato Heritage, BIA stated Evans' 1985 letter to BIA had not effectively renewed the Master Lease. *Id.*; ECF 90 at Ex. 93. BIA did not notify Plaintiffs the Master Lease would expire in 2009 until after February 2, 2008. ECF 296, Ex. 4 at 23:23-24:19; ECF 90-15, Ex. 99.

On January 21, 2009, Paul Grondal and the Mill Bay Members Association, Inc. (collectively "Mill Bay") filed the instant lawsuit against the United States and the landowners, including Wapato Heritage. ECF No. 1.

On April 3, 2009, the United States filed a counterclaim against Mill Bay for ejectment and trespass damages. ECF No. 42. But at no time during the litigation (or any other time) did Mill Bay (a former tenant on the land) *ever* receive a Notice to Vacate MA-8.

On April 23, 2009, Mill Bay filed an Answer to the United States' Counterclaim and pled 19 affirmative defenses, including:

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> 9. The Federal Defendants' alleged damages and injury were caused by the fault of other defendants in this action.
>
> . . .
>
> 12. Federal Defendants carelessly and negligently conducted itself that it contributed directly and proximately to Federal Defendants' own alleged injuries and damages.
>
> 13. As to all causes of action, Plaintiffs allege that Federal Defendants have unreasonably delayed in bringing this action and asserting these rights, or both, to the prejudice of Plaintiffs, and therefore Federal Defendants' Counterclaim, in whole or in part, is barred by the doctrine of laches.
>
> 14. Federal Defendants' recovery in this action is barred in whole or in part by its failure to exercise reasonable diligence to protect its own interests or to mitigate any alleged damages.
>
> 15. Plaintiffs are entitled to offset against any damages awarded to Federal Defendants.

ECF No. 43 at 5-6.

On September 1, 2009, the United States filed a Motion for Summary Judgment on their ejectment counterclaim. ECF No. 70. However, at no point during the litigation did the United States seek a temporary restraining order or preliminary injunction, or pursue any other provisional remedies which would have abated Mill Bay's purported trespass.

On January 12, 2010, the Court denied the United States' Motion for Summary Judgment Re Ejectment as premature, finding:

> There is no evidence in this case that the BIA has consulted with the Indian landowners or that this trespass action is a response to their concerns. . . . If the Federal Defendants opt to renew their motion, they must supplement their motion with evidence that federal regulations

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> governing their conduct in this action have been complied with and that the action is not premature.

ECF 144 at 26-27.

On May 24, 2010, following a May 13 hearing of counsel for all represented parties, the Court granted the parties' stipulated request to stay the proceedings and stay all discovery to facilitate settlement conversations. ECF No. 197 at 3-4 (emphasis in original).

On April 1, 2011, the Court entered an Order directing the parties to file a Status Report on whether a stay was still warranted. ECF No. 205 at 1-2 (emphasis in original).

On April 19, 2011, the Court entered an Order extending the stay for an unspecified period of time, in response to the mutual request of the parties. ECF No. 207 at 1-2 (emphasis in original).

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

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

On April 17, 2012, the Court entered an Order staying all briefing deadlines on the United States' Motion for Summary Judgment Re Ejectment, pending resolution of a

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Motion for Continuance filed by the Plaintiffs for purposes of conducting discovery on their estoppel defense/claim. ECF No. 252 at 3.

On May 21, 2012, the Court granted Plaintiffs' Motion to Continue the United States' Motion for Summary Judgment Re Ejectment (ECF No. 246) to allow Plaintiffs to conduct discovery on their estoppel defense/claim. ECF No. 267.

On January 10, 2013, after hearing oral argument on the United States' Motion for Summary Judgment RE Ejectment, the Court entered an Order Directing Supplemental Briefing on issues relating to the pending Motion for Summary Judgment Re Ejectment. ECF No. 308 at 2; ECF No. 310.

On August 1, 2014, the Court entered a Memorandum and Order Re: Appointment of Counsel, again noting the Federal Defendants' Motion for Summary Judgment Re Ejectment was still pending but explaining: "[T]he court will not finally rule upon the pending matters without independent legal counsel for the individually named Defendant landowners." ECF No. 329 at 1-2. The Order concluded by setting a deadline on related submissions by the United States. *Id.* at 32.

On September 23, 2014, the Court granted Federal Defendants' request for a 1-month extension of time to submit the requested briefing. ECF No. 338.

The Court did not again enter an Order until February 23, 2016, when it entered an Order Re: Pending Motions and Directing Filing of Reports, in which the Court

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acknowledged the United States' Motion for Summary Judgment Re Ejectment was still pending but still declined to rule on it, explaining:

> This court, having continually expressed its concerns over the lack of independent representation of the MA-8 landowners, and the potential conflicts between the position of the United States and the Indian landowners, directed the BIA to consider the provision of independent counsel for the un-represented MA-8 landowners. As stated in this court's Memorandum and Order Re: Appointment of Counsel (ECF No. 329) dated July 31, 2014 (filed August 1, 2014) at 30, the landowner '. . . Defendants have the right to be represented by private counsel independent of any actual or potential conflict of interest.' The BIA was further ordered to 'file all BIA responses and decisions rendered in regard to requests for independent counsel made by any Defendant in the instant case.' (ECF No. 329 at 32). The BIA has not complied with that direction. . . . Due to the noncompliance, the court has no basis to evaluate whether all individual landowners who requested representation have received independent counsel. This is highly concerning to the court. In order for the views of all parties to be properly represented and presented, the parties must satisfy the court's concerns before any Order on dispositive matters can be considered or issued.

ECF No. 345 at 2.

The Court did not again enter an Order until June 27, 2018, when it issued an Order Directing Additional Filings, requesting documents and information regarding the mediation precipitating the *Grondal* Agreement. ECF No. 353.

The Court did not again enter an Order until September 16, 2019, when it issued an Order of Recusal of Judge Quackenbush. ECF No. 366.

On September 17, 2019, the case was reassigned to Judge Rosanna Malouf

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Peterson. ECF No. 367.

On November 1, 2019, the Court entered an Order Memorializing the Court's Oral Rulings and Setting Briefing Schedule on the issue whether the United States must provide representation for the individual landowner defendants, and noted "[a]fter the Court resolves the issue of legal representation of the parties, the Court will set a briefing schedule for the issue of whether the property at issue is trust land." ECF No. 389 at 3.

On March 26, 2020, the Court entered an Order Regarding Representation of Allottees, in which it recognized:

> The Court [previously] ordered the Government to take numerous steps to ensure that the individual landowners who wanted independent legal representation would receive it. *See id.* The Court refused to set a briefing schedule until these matters were addressed. *Id.* That was in February of 2016. In September of 2019, this case was transferred. . . . The Court explained that it would decide the pending motions after resolving the representation issue.

ECF No. 411 at 3-4.

The Order continued: "The Court will become an instrument of injustice if it delays a resolution of this matter any longer . . ." *Id.* at 9. The Order concluded the United States need not supply the individual landowner Defendants with representation, and: "The Court will proceed to resolve the remaining motions in this case, beginning with the fully briefed motion for summary judgment. . . . [A]ny party may, **within fourteen days** of the date of this Order, submit a supplemental brief that identifies any

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new, relevant precedent or facts that were not previously briefed." *Id.* at 10 (emphasis in original).

On July 9, 2020, the Court entered an order granting the United States' Motion for Summary Judgment Re Ejectment, and ejecting Mill Bay from MA-8. ECF No. 503.

To facilitate a reasonable transition time and in recognition of further difficulties caused by the COVID-19 pandemic, the Government and Tribe consented to Mill Bay's presence on MA-8 until September 30, 2020. ECF No. 520 at 2.

On September 30, 2020, Mill Bay vacated MA-8.

III. ARGUMENT

Under the law of the case,[1] federal common law controls the extent of trespass damages recoverable by Federal Defendants on behalf of MA-8's beneficial owners. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 (9th Cir. 1994). The Ninth Circuit has held damages for trespass on Native American land is determined via a reasonable rental value standard. *See, e.g.*, *Hammond v. County of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) (*abrogation on other grounds recognized by Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1163 (9th Cir. 2021)). This is the threshold, but

[1] Although Mill Bay disagrees that federal law applies to all issues in this case, this Court's previous rulings make clear trespass damages will be analyzed under federal common law.

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not the only, question in evaluating the amount of trespass damages to award, if any.

A. Damages for Reasonable Rental Value.

According to the February 12, 2021 supplement to the appraisal report by Federal Defendants' damages expert, Bruce Jolicoeur, Federal Defendants' claim the reasonable rental value for the relevant portion of MA-8 during the relevant period of events is $1,674,600. But the evidence at trial will show that supplemental report—although abating significant errors in Mr. Jolicoeur's original report that incorrectly inflated the original claimed damages amount by more than $900,000—is still *wrong.* The initial and supplemental appraisal reports of Mill Bay's expert, Kenneth Barnes, will show the maximum reasonable rental value for the time period in question is $1,411,702, even without consideration of Mill Bay's legal defenses.

Moreover, despite Mr. Jolicoeur's reasonable rental value based on the highest and best use of the land (as is the standard used by the experts), Mill Bay will put on evidence at trial to show there was no possibility of that highest and best use of the land—which Mr. Jolicoeur describes as sale, subdivision, and development for residential homes. Testimony at trial will show that exact use was previously explored by Wapato Heritage and the BIA and found untenable. Moreover, evidence in the record shows the RV Park on MA-8 sits on sacred grounds with deep cultural importance to the Colville Tribes that the landowners would *never* have sold to a developer for residential subdivision. ECF No.

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520 at 2-3 ("After Mill Bay vacates MA-8, the land will be available for Colville Tribal members to access and use in order to restore the vital connection they have to this land and its cultural properties, which are at the heart of the constituent Chelan Tribe's traditional territory. Full access to MA-8 will allow Tribal elders to bring Tribal youth to the land and pass on cultural teachings to future generations."); *id.* at 9-10 ("The Colville Tribes attach extraordinary importance on the land. Declaration of Chairman Rodney Cawston ¶ 4 ('It is our identity. It is the foundation of our culture, spirituality and way of life.'). . . . At least seven cultural properties have been identified on MA-8, and the Tribal cemetery adjacent to the RV Park houses the remains of over 100 Tribal ancestors and is where the remains of Colville ancestors who burials were displaced from other locations are reinterred.").

Thus, a reasonable rental value based on development as a residential subdivision is not appropriate. Rather, as the Colville Tribes admit in the record: "[T]he most parsimonious and immediately available use of MA-8 by the allottees would be the same as its current use – an RV park – for which the existing infrastructure is suited." ECF No. 537 at 4. Thus, reasonable rental value based on use lease of the property as an RV Park is the most appropriate here, as done by Plaintiffs' expert, Mr. Barnes.

B. Mill Bay's Affirmative Defenses Should Further Reduce Any Trespass Damages Awarded.

1. Laches should reduce any damages award because Federal Defendants'

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failure to diligently prosecute their claims has prejudiced Mill Bay.

Mill Bay reserved the right to raise laches as a damages defense by pleading laches as an affirmative defense. ECF No. 43 at 5–6, ¶13. While not a defense to *liability* for trespass on Indian land in the Ninth Circuit, laches can still limit the *amount* of damages on such claims. *See, e.g.*, *Brooks v. Nez Perce Cty., Idaho*, 670 F.2d 835, 837 (9th Cir. 1982) ("State taxpayers must now bear the cost of the government's inaction. Lack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages."); *Jones v. United States*, 9 Cl. Ct. 292, 294 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986) ("The district court found that plaintiffs suffered damages of $216,000 but awarded only half that amount, stating . . . 'Certainly the [U.S.] government was most dilatory in the exercising of its role as trustee in this matter and the court cannot in good conscience assess full damages for the present value of past income on the property against the taxpayers of Nez Perce County.'"); *United States v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1068 (S.D. Cal. 1992) ("Third, there is precedent for applying equitable factors and thereby limiting relief otherwise available for Indian claims.") (citing *Brooks*, 670 F.2d at 837); *Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ.*, 258 F. Supp. 3d 1114, 1132 (E.D. Cal. 2017) ("If the elements of a laches defense are met, a court may dismiss an entire case, dismiss certain claims, or restrict the damages available to the plaintiff.") (citations omitted). This is because rewarding plaintiffs for their

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delays would unjustly enrich them for their own avoidable actions. *See Hammond v. Cty. of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) ("If we were to award plaintiffs profits the County earned up through the period of this litigation, we would effectively compensate the plaintiffs for delaying the filing of this action. Furthermore, we would encourage plaintiffs in other cases to intentionally refrain from filing suit until such time as defendants had amassed huge profits flowing from alleged misconduct. Such delay and unjust enrichment cannot be rewarded.").

"To establish laches, [Mill Bay] must establish (1) lack of diligence by the [Federal Defendants], and (2) prejudice to [Mill Bay]." *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979, 987 (9th Cir. 2004) (citing *Costello v. United States*, 365 U.S. 265, 282 (1961)). The Court record and the evidence presented at trial will establish Federal Defendants' litigation decisions and inactions satisfy both elements of laches.

a. Element one: Federal Defendants failed to diligently prosecute their trespass damages claim.

The Ninth Circuit has held plaintiffs' failure to diligently prosecute their claims can trigger laches. *E.g.*, *The Kermit Lamborn v. American Ship & Commerce Nav. Corp.*, 76 F.2d 363, 367 (9th Cir. 1935) ("And the mere institution of a suit does not relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently, the consequences are the same as though no suit had been begun.") (quotations omitted) (collecting cases); *Wells Fargo Nevada Nat. Bank of San Francisco v. Barnette*, 298 F.

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689, 691 (9th Cir. 1924), *aff'd*, 270 U.S. 438, 46 S. Ct. 326, 70 L. Ed. 669 (1926) (same). Here, Federal Defendants' litigation decisions and inactions reflect a failure to diligently prosecute their claims.

Despite repeatedly claiming Mill Bay was in unlawful possession of MA-8, Federal Defendants *never* sought injunctive relief or other provisional remedies to abate that purported trespass during the first **11 years** of this case. Unlike most landlord-tenant disputes (which are resolved through summary proceedings), Federal Defendants never tried to rush Mill Bay off MA-8 to prevent the continuous accrual of trespass damages. Federal Defendants never sought a temporary restraining order or preliminary injunction, nor pursued any other provisional remedies that would have abated Mill Bay's purported trespass. But at least one judge in this district has issued a preliminary injunction to prevent trespass during the pendency of an action, signaling these remedies were available if proper. *See Friends of Moon Creek v. Diamond Lake Imp., Ass'n, Inc.*, CV-13-0396-JLQ, 2014 WL 1285931, at *6 (E.D. Wash. Mar. 27, 2014), *judgment set aside in part sub nom. Friends of Moon Creek v. Diamond Lake Improvement, Ass'n, Inc.*, 2:13-CV-0396-JLQ, 2017 WL 6622558 (E.D. Wash. Dec. 28, 2017).

Nor did Federal Defendants seek to avail themselves of other available provisional remedies. For example, Mill Bay sought a temporary restraining order early on. ECF No. 11. Judge Quackenbush denied that motion with leave to renew, noting, "At the hearing,

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counsel for the United States represented that lease negotiations are presently ongoing and at this time they do not have the intention of taking any action that could result in injury/loss to the Plaintiffs[,]" and "Given the commitments of counsel made at the hearing of this matter, the court finds that there is no showing of immediate irreparable injury." ECF No. 22 at 2, 4. In effect, Judge Quackenbush granted Mill Bay preservation of the status quo. Nevertheless, Federal Defendants sought no injunction bond under Fed. R. Civ. P. 65(c) or any other form of security in exchange for Mill Bay's right to remain there, to set "the limit of the damages the defendant can obtain for a wrongful injunction, ... provided the plaintiff was acting in good faith." *Continuum Co., Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir.1989) (citing *Buddy Systems, Inc. v. Exer–Genie, Inc.*, 545 F.2d 1164, 1168 (9th Cir.1976), *cert. denied*, 431 U.S. 903, 97 S.Ct. 1694, 52 L.Ed.2d 387 (1977)).

Instead, Federal Defendants filed a dispositive motion on September 1, 2009 (ECF Nos. 70–71), which Judge Quackenbush denied with leave to renew as premature for failure to comply with federal regulations. ECF No. 144, at 26–27. Judge Quackenbush concluded by warning: if Federal Defendants renew their motion for summary judgment, "they must supplement their motion with evidence that federal regulations governing their conduct in this action have been complied with and that the action is not premature." *Id.* at 27.

Following a May 13, 2010 status conference, Judge Quackenbush suspended

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discovery and stayed further motion practice "to accommodate settlement discussions and negotiations." ECF No. 197, at 3. On April 19, 2011, he continued the stay until further Court order at the parties' mutual request. ECF No. 207, at 2. The Court lifted the stay on March 29, 2012. ECF No. 242, at 2.

Federal Defendants did not renew their motion for summary judgment on their trespass counterclaim until March 22, 2012. *See* ECF No. 231. After significant briefing and supplemental briefing, Judge Quackenbush found, "the court will not finally rule upon the pending matters without independent legal counsel for the individually named Defendant landowners." ECF No. 329 at 2. Yet, Federal Defendants neither complied nor sought appellate review, leaving the ruling that ostensibly led to these delays unchallenged. Instead, Federal Defendants waited **five years** for Judge Quackenbush to recuse himself, then began prosecuting their claims anew. As a result, Federal Defendants tacitly let Mill Bay "unlawfully occupy" the property it sought to recover for **11 years**. In evaluating a laches defense, federal courts will consider the applicable statute of limitations. *Wells Fargo Nevada Nat. Bank of San Francisco v. Barnette*, 298 F. 689, 692 (9th Cir. 1924). Here, the statute of limitations on actions for trespass damages brought by the United States is **six years** from when the right of action accrues. *United States v. Rice*, 886 F.2d 334, 1989 WL 112460, at *8 (9th Cir. Sept. 15, 1989) (citing 28 U.S.C. § 2415(b)). The delay here went on far longer. Thus, Mill Bay will establish the first element of laches at trial.

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b. Element two: Federal Defendants' actions have prejudiced Mill Bay.

"Courts have recognized two chief forms of prejudice in the laches context—evidentiary and expectations-based." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001). "Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died." *Id.* (citations omitted). "A defendant may also demonstrate prejudice by showing that it took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." *Id.* (citations omitted).

Mill Bay suffered significant expectations-based prejudice as a result of Federal Defendants' failure to diligently prosecute this matter. For example, while Mill Bay remained willing to pay the rent called for by the 2004 Settlement Agreement so long as it occupied MA-8 (the amount of which from 2009 through 2020 is roughly $402,500), it now faces liability significantly exceeding those amounts. Had Federal Defendants requested a bond at or near the amount of claimed trespass damages, Mill Bay could have evaluated whether to vacate or pay it, as envisioned by Fed. R. Civ. P. 65(c). *Continuum Co., Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir.1989) (citing *Buddy Systems, Inc. v. Exer–Genie, Inc.*, 545 F.2d 1164, 1168 (9th Cir.1976), *cert. denied*, 431 U.S. 903, 97 S.Ct. 1694, 52 L.Ed.2d 387 (1977)). Had Federal Defendants diligently prosecuted their claims, Mill Bay's exposure would be reduced by several years of rental value, and had it been

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ejected from MA-8 on a preliminary injunctive order or by final judgment on liability earlier in the proceeding, it would not have continued to make yearly rental payments to Wapato Heritage (which were made to preserve its rights under the 2004 Settlement Agreement). All of this significantly inflated the damages Federal Defendants seek to recover.

c. Laches should reduce Federal Defendants' damages award, if any.

The Court has significant discretion in reducing damages based on laches. *E.g.*, *Jones v. United States*, 9 Cl. Ct. 292, 294 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986) ("The district court found that plaintiffs suffered damages of $216,000 but awarded only half that amount…"). If the Court determines laches applies some or all of the damages that accrued during this litigation, Mill Bay proposes the Court award trespass damages for that laches period using the annual rental amounts called for by the *Grondal* Agreement. This calculation comports with the equities of the case by not penalizing Mill Bay with additional damages which Federal Defendants could have avoided had they diligently prosecuted their claims. *Cf. Murphy v. Texaco, Inc.*, 567 F. Supp. 910, 913 (N.D. Ill. 1983) ("However the Lease figures are at least prima facie evidence of market rentals, particularly where as here the Leases were executed within the past few years.").

2. Federal Defendants Failed to Mitigate their Damages.

Mill Bay reserved the right to argue Federal Defendants failed to mitigate their

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damages by raising this as an affirmative defense to Federal Defendants' trespass counterclaim. *See* ECF No. 43 at 6, ¶14.

A plaintiff's delay can support the defense of failure to mitigate damages. *See Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 122–23 (N.D.N.Y. 2002) ("the defense of mitigation is relevant to issue [*sic*] of damages in this action. The defense will therefore remain for the limited purpose of determining damages."). "The doctrine of mitigation of damages prevents an injured party from recovering damages that she could have avoided if she took reasonable efforts after the wrong was committed." *Thompson v. United States Bakery, Inc.*, 2:20-CV-00102-SAB, 2020 WL 7038591, at *3 (E.D. Wash. Nov. 30, 2020) (citing *Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433 (1993)); *see also Jackson v. Shell Oil Company*, 702 F.2d 197 (9th Cir. 1983).

The Government has a duty to mitigate damages. *See, e.g.*, *Robinson v. United States*, 305 F.3d 1330, 1335 (Fed. Cir. 2002); *M.E.S., Inc. v. United States*, 104 Fed. Cl. 620, 641 (Fed. Cl. 2012) ("Plaintiff is therefore entitled to summary judgment with respect to the Government's counterclaim for excess reprocurement costs because the record on summary judgment shows as a matter of undisputed fact and law that the USPS failed to mitigate by reprocuring in a reasonable and timely manner."). This is true even when the Government purports to act as trustee for Indian land. *See Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 122–23 (N.D.N.Y. 2002) (concluding failure to

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mitigate damages can apply to calculating damages where both government and tribes brought claim for trespass on Indian land); *see also Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 341 (N.D.N.Y. 2003) (same).

a. Federal Defendants Failed to Mitigate their Damages by Failure to Diligently Prosecute their Ejectment Counterclaim.

The facts supporting laches also show Federal Defendants failed to mitigate their damages. Pursuant to the *Grondal* Agreement, Mill Bay was already obligated to pay annual rents for use of the property through 2034. Federal Defendants should not receive significant *additional* trespass damages simply due to the length of this litigation, as their failures contributed to the case's protraction. *See Hammond*, 859 F.2d at 804 (awarding plaintiffs damages for the length of the litigation where facts giving rise to claim arose in 1962 but claim was not filed until 1983 "would effectively compensate the plaintiffs for delaying the filing of this action" and "would encourage plaintiffs in other cases to intentionally refrain from filing suit until such time as defendants had amassed huge profits flowing from alleged misconduct"). "Such delay and unjust enrichment cannot be rewarded." *Id.* The Court should reduce any damages award to no more than the yearly rents called for by the *Grondal* Agreement.

b. Federal Defendants Failed to Mitigate their Damages by Refusal to Accept Mill Bay's Payments from Wapato Heritage.

Federal Defendants' refusal to accept the payments offered by Wapato Heritage—

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which would have covered a portion of the rental damages it now claims, without comprising its underlying claims—also constitutes a failure to mitigate its damages, as well as *waiver* of the right to demand trespass damages for those years now.[2]

Courts recognize landlords may accept partial payments towards holdover rents or occupation and use payments while the issues of a tenant's right to possession is litigated. *In re Collins*, 199 B.R. 561, 565 (Bankr. W.D. Pa. 1996) ("Indeed, one can argue that the Housing Authority had a duty to accept rent on a month-to-month basis post-petition in order to (a) mitigate damages pending this Court's resolution of this matter, and (b) fulfill its fiduciary duty to taxpayers… Furthermore, [t]he decisions are many which hold that even after the lease is deemed rejected, ... [a] landlord may freely accept use and occupation payments from a holdover debtor without waiving the deemed rejection.") (internal citations and quotations omitted); *see also Hinton v. Sealander Brokerage Co.*, 917 A.2d 95, 110–11 (D.C. 2007) (explaining landlord's duty to mitigate damages by holdover tenant in trespass under state law).

Yet, the BIA refused to accept payments from Wapato Heritage beginning with a March 13, 2009 letter from Colleen Kelley to Michael Arch. ECF No. 346-7. And, at oral argument on January 10, 2013, Wapato Heritage's counsel told Judge Quackenbush that

[2] Mill Bay reserved the right to argue that it is entitled to waiver by raising it as an affirmative defense to Federal Defendants' trespass counterclaim. *See* ECF No. 43 at 6, ¶16.

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Wapato Heritage was holding the rental payments made by Mill Bay, but would release them to the BIA immediately if directed by the Court following a decision on Wapato Heritage's overpayment claims against the allottees. ECF No. 352 at 39:9–40:8. But Federal Defendants still declined to accept payments from Wapato Heritage or accept Wapato Heritage's offer. This was a commercially unreasonable decision that deprived the allottees of income during this litigation and caused Federal Defendants' claimed damages to unreasonably accumulate. The Court should reduce any trespass damages award by the amount Wapato Heritage—and by extension, Mill Bay—was ready, willing, and able to pay. It is not Mill Bay's fault Federal Defendants refused to accept money that would have covered a portion of the very damages it now seeks.

(Nevertheless, as discussed below, if the Court applies these payments as offset or recoupment directly against the 23.8 percent of trespass damages Wapato Heritage would otherwise receive, Mill Bay would agree that these amounts should not be countered against the remaining damages award based on failure to mitigate.)

3. Federal Defendants' Trespass Damages Claim Must be Reduced to Account for Recoupment/Offset for Prepaid Rents and Other Money Paid to the Alottees by Mill Bay.

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Mill Bay reserved the right to argue that it is entitled to offset/recoupment[3] by raising it as an affirmative defense to Federal Defendants' trespass counterclaim. *See* ECF No. 43 at 6, ¶15.

"[W]hen the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred." *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017) (citing *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970)). The Ninth Circuit has adopted a three-part test to determine whether a party can raise recoupment or offset as a counterclaim or defense:

> To constitute a claim in recoupment, a defendant's claim must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim.

Id. (quoting *Berrey v. Asarco Inc.*, 439 F.3d 636, 645 (10th Cir. 2006)). When the

[3] Recoupment has been treated as a subset of offset. *Estate of Branson v. C.I.R.*, 264 F.3d 904, 909 (9th Cir. 2001) ("Equitable recoupment cannot be used offensively to seek a money payment, only defensively to offset an adjudicated deficiency."); *U.S. v. Lee*, 2011 WL 1344215, at *4 (N.D. Cal. Apr. 8, 2011) (referring to the defense as "offset or recoupment" and "offset/recoupment"; "equitable recoupment allows a taxpayer to recoup the amount of time-barred tax overpayment by allowing the overpayment to be applied as an offset against a deficiency if certain requirements are met"); *In re Heffernan Memorial Hosp. Dist.*, 192 B.R. 228, 230 (S.D. Cal. 1996) ("Recoupment is a mechanism for a creditor to calculate the proper liability on the amounts owed, by allowing a creditor to offset obligations which arise from the same transaction and which are essentially a defense to the debtor's claim rather than a mutual obligation."); *Strickland v. Truckers Exp., Inc.*, 2006 WL 8067553, at *5 (D. Montana Oct. 30, 2006) (referencing "recoupment" as a mechanism "to offset the amount of a plaintiff's recovery").

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Government sues for damages as a trustee for Indian tribes or individuals, recoupment or offset is a viable defense based on money paid to or owed by those Indian beneficiaries. *E.g.*, *United States v. Timber Access Indus. Co.*, 54 F.R.D. 36, 38–39 (D. Or. 1971); *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 145 (N.D.N.Y. 2002).

Here, Mill Bay is entitled to recoupment or offset for a portion of the original payments made by purchasers and Expanded Camping Memberships ($25,000 per membership) and Regular Camping Memberships ($5,995 per membership) (collectively, Camping Memberships"). First, payments for the Camping Memberships are part of the same transaction or occurrence as Federal Defendants' claims, because the purchase of the Camping Memberships gave Mill Bay the right to occupy MA-8 in the first place; the funds from these purchases were remitted to the beneficial owners of MA-8; and Federal Defendants' trespass damages claim is based on Mill Bay's occupation of MA-8.

Second, recoupment of the Camping Membership payments is relief of the same kind and nature as Federal Defendants' trespass damages claim. Federal Defendants seek damages for the rental value of Mill Bay's occupation of MA-8 from 2009 through October 2020. Similarly, Mill Bay's members individually paid $25,000 for Expanded Camping Memberships (beginning in 1991) and $5,995 for Camping Memberships (beginning in 1984)—funds which were remitted at least in part to MA-8's beneficial owners based on the promise and representations of being able to use these memberships until 2034. Instead,

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the purchasers of Regular Camping Memberships were only able to use MA-8 for 36 years (out of the 50 they expected), while purchasers of Expanded Camping Memberships were only able to use MA-8 for 29 years (out of the 43 they expected). In essence, Mill Bay's members pre-paid rent, but did not receive the full benefit of that payment. Thus, they should be able to recoup or offset a portion of these payments against Federal Defendants' claimed trespass damages.

Third, recoupment or offset of payments for Expanded Camping Memberships and Regulard Camping Memberships will not exceed the amount of Federal Defendants' claimed trespass damages.

Mill Bays' expert Mr. Barnes attests in his Appraisal Review an offset or recoupment in the amount of $1,209,546 in prepaid rents is appropriate here. Plaintiffs' Trial Ex. 1 (Kenneth Barnes Appraisal Review).

Likewise, under the 2004 Settlement Agreement, Mill Bay paid Wapato Heritage a $48,000 lump sum payment, the entirety of which was remitted directly to the allottees by Wapato Heritage. For the same reasons above, a portion of this payment should be recouped against Federal Defendants' trespass damages claim because this payment was made as part of a settlement to ensure that Mill Bay could use MA-8 until 2034, yet they only occupied MA-8 through 2020. Thus, Mill Bay only received two-thirds of the bargain from this payment, meaning one-third of the $48,000 payment ($16,000)—plus applicable

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interest value on that amount—should be recouped or offset from Federal Defendants' trespass damages claim. Jeffrey Webb's testimony and Mill Bay's trial testimony will establish the amount of recoupment/offset for this payment that should be deducted.

C. Wapato Heritage's 23.8% Life Estate Interest Should Be Discounted Pro-Rata from Any Final Trespass Damages Award.

Federal Defendants' damages claims in this action are brought in a representational capacity on behalf of MA-8's landowners. 25 C.F.R. § 162.023 ("If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law."). Past rental payments made under the Master Lease have always been distributed to the allottee landowners, pro-rata, based on their respective beneficial ownership percentage in MA-8. Thus, whatever trespass damages Federal Defendants recover (equivalent to reasonable rents for the time period of trespass) will ostensibly be remitted to the landowners, pro-rata, based on their respective beneficial ownership percentages of MA-8—just like rentals payments.

This distribution includes to *Wapato Heritage*.

As owner of a 23.8% life estate interest in MA-8, Wapato Heritage is entitled to revenue produced from that interest during the period of the life estate under 25 U.S.C. §

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2205(c)(2)(B). ECF No. 652 at 9. Although the Colville Tribes own the remainder interest in Wapato Heritage's 23.8% beneficial interest of MA-8, they are not entitled to the 23.8% pro rata share of trespass damages because these damages occurred during the period of Wapato Heritage's life estate. *See* ECF No. 644 at 38 (under "25 C.F.R. § 179.101(b)(1), the Secretary must distribute all rents and profits, as income, to the life tenant[, Wapato Heritage]"); *see also Fredericks v. Great Plains Regional Director, BIA*, 63 IBIA 274, 277, 2016 WL 4153788, at *3 (July 28, 2016) ("Because the statutes and regulations governing agricultural leasing do not address the consent requirements for a holder of a life estate or remainder interest in leasing trust property for agricultural use, we apply general principles of property law concerning the corresponding rights and authority of the life tenant and holders of a remainder interest. *See Adakai v. Acting Navajo Regional Director*, 56 IBIA 104, 108 (2013) (stating that because the regulations do not address the effect of consent by the holder of a life estate, we apply the general principles of property law). It is well established that the holder of a full life estate, and not the holders of remainder interests, has the authority to use and benefit from the life estate during the life estate holder's lifetime.").

But Wapato Heritage should not be permitted to recover trespass damages despite acquiescing and profiting from Mill Bay's occupancy in contravention of this Court's judicial estoppel findings. This would reward Wapato Heritage with what amounts to

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double recovery, despite acquiescing and profiting from Mill Bay's occupancy. *Greenlake Condo. Ass'n v. Allstate Ins. Co.*, C14-1860 BJR, 2016 WL 4499330, at *5 (W.D. Wash. Feb. 3, 2016) ("It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.") (applying Washington law) (citations and internal quotations omitted).

To be sure, this Court already dismissed Wapato Heritage from this litigation and noted that Wapato Heritage had acquiesced and already profited from Mill Bay's occupation of MA-8, thereby essentially determining Wapato Heritage has waived any claims against Mill Bay it might have otherwise had. ECF No. 652 at 11. Additionally, per that Order, Wapato Heritage is judicially estopped from seeking to claim a portion of any trespass damages recovered by Federal Defendants.

Yet, Federal Defendants' trespass damages calculation is based on the entire purported reasonable rental value of the portion of MA-8 occupied by Mill Bay; there is no discount for the 23.8 percent beneficial interest Wapato Heritage holds in the property. Thus, Federal Defendants seek a windfall for the allottees, and to unjustly enrich them beyond the actual damages suffered. *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755, 761 (9th Cir. 2015) ("Moreover, the animating purpose of the one satisfaction rule is to prevent double recovery and unjust enrichment… 'The foremost of these policy goals is assuring the tort victim one complete satisfaction of its claim, neither more nor less.'") (citing

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Seymour v. Summa Vista Cinema, Inc., 809 F.2d 1385, 1389 (9th Cir. 1987), *amended*, 817 F.2d 609 (9th Cir. 1987)).

Therefore, the Court should discount any trespass damages awarded to the Federal Defendants by Wapato Heritage's 23.8%. *See James Boire v. Acting Northwest Regional Director*, Bureau Of Indian Affairs, 65 IBIA 34, 47, 2017 WL 6402340, at *10 (Nov. 30, 2017) (reversing and remanding decision by BIA regional director where Superintendent originally discounted trespass damages award against owner of fee interest in allotment by 1/6th, which represented the trespassing fee owners' percentage of ownership in allotment, but BIA regional director's decision failed to apply this discount).

D. Joint and Several Liability is Unwarranted in this Case.

Regardless of the amount of damages, the Court should not hold Plaintiff Paul Grondal jointly and severally liable with the Mill Bay Members Association. Importantly, Paul Grondal was named as a nominal Plaintiff only, and was never intended to be anything other than a representative Plaintiff for the Mill Bay Members Association. For that reason alone, joint and several liability would be manifestly unjust and wholly inappropriate here.

Moreover, although federal case law on the topic is sparse, the few courts to address the issue have refused to hold multiple alleged trespassers on Indian land jointly and

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severally liable for trespass damages.[4] In *United States v. Imperial Irrigation District*, 799 F. Supp. 1052, 1069–70 (S.D. Cal. 1992), a federal district court concluded the multiple defendants in that case were only severally—and not joint and severally—liable for trespassing on Indian land. After concluding that the proper measure of damages for trespass was the fair rental value of the property (assuming the property is being put to its highest and best use), the district court reasoned the defendant irrigation districts should only be "severally" liable because there was no "indivisible injury" and the damages were capable of apportionment. *Id.* at 1069–70. The evidence at trial showed that Imperial Irrigation was responsible for approximately 71.5% of the flood water, while Coachella Irrigation was responsible for approximately 5.5% of the flood water. *Id.* at 1070. Thus, the district court ordered Imperial Irrigation to pay 71.5% of the damages award and

[4] In *United States v. Torlaw Realty, Inc.*, 483 F. Supp. 2d 967, 975 (C.D. Cal. 2007), *aff'd*, 348 Fed. Appx. 213 (9th Cir. 2009), the district court did impose joint and several liability on multiple tortfeasors, but that case is distinguishable because the Government brought both trespass and Resource Conservation and Recovery Act (RCRA) claims. RCRA expressly authorizes joint and several liability. *See, e.g.*, *Newark Grp., Inc. v. Dopaco, Inc.*, 2011 WL 4501034, at *6 (E.D. Cal. Sept. 27, 2011). *Torlaw* therefore has no application on the question of joint and several liability for trespass damages.

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Coachella Irrigation to pay 5.5% of the damages award. *Id.*

In *Cayuga Indian Nation of N.Y. v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) ("*Cayuga*"), a district court also rejected the Government's request to hold multiple tortfeasors jointly and severally liable for trespass on Indian land. There, the district court cited three reasons for rejecting joint and several liability: "(1) such a finding would be manifestly inequitable; (2) the injury here is divisible; and (3) the non-State defendants are, at most, independent, successive tortfeasors." *Id.* at 70. For the first reason, the district court explained, "any one of the approximately 7,000 individual landowners could be held liable for the entire amount of damages sustained by the Cayugas for the past 200 years or so." *Id.* at 71–72. As a result, the district court refused to impose joint and several liability on equitable grounds. On the second reason, the court explained the Cayugas suffered a "divisible" injury—not a "single, indivisible injury' since these to some extent, capable of reasonable or practical division or allocation." *Id.* (citing *United States v. Imperial Irrigation District*, 799 F. Supp. 1052, 1069–70 (S.D. Cal. 1992)). The damages were conveniently severable because they could be "apportioned to various time periods and are discrete harms based upon who possessed the land at the time." *Id.* (internal citations and quotation marks omitted).[5]

[5] The district court's third rationale, however, rested largely on discussions of New York

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Here, both *Imperial Irrigation District* and *Cayuga* support, *at most*, holding Plaintiff Paul Grondal severally liable for trespass damages. First, Mr. Grondal did not possess the entire disputed portion of MA-8. Mr. Grondal owned one of the 173 Camping Memberships sold by Evans (150 "Regular" memberships and 23 "Expanded" membership). *See generally* ECF No. 144 at 8. Thus, at most, Mr. Grondal can only be held severally liable for 1/173 of the amount of any trespass damages awarded. The other 172/173 in damages should be apportioned to the Mill Bay Members Association entity.

Second, much like in *Cayuga*, it would be manifestly inequitable to hold Mr. Grondal jointly and severally liable for the entire amount of trespass damages—which could, but should not, be a very large sum—when he was but one of many individuals who used and enjoyed MA-8 during this litigation. Mr. Grondal should not be saddled with a potentially astronomical damages award simply because he chose to serve as a named Plaintiff along with the Association.

Finally, there is at least one procedural reason to deny joint and several liability: Federal Defendants have failed to plead a request for joint and several liability. *See* ECF No. 42 at 24–25. Although courts have sometimes allowed parties to later seek relief not specifically requested in the pleadings, the Ninth Circuit has held that "if the failure to ask

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tort law, making it inapplicable here.

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for particular relief substantially prejudiced the opposing party, Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings." *Rental Dev. Corp. of Am. v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962). Here, the Federal Defendants failure to plead joint and several liability denied Mr. Grondal notice that they might seek to hold liable for the entirety of any trespass judgment, thereby substantially prejudicing him. If the Federal Defendants had provided such notice, Mr. Grondal could have decided whether to remain a named Plaintiff or pay his several share and extricate himself from the litigation. By denying Mr. Grondal this notice, the Federal Defendants have substantially prejudiced Mr. Grondal and now seek to hold a single individual who was simply using the Expanded membership during the summer months while this lawsuit was pending with a potentially multi-million dollar judgment. The Court should not endorse such a manifestly inequitable result.

E. The Court Should Not Award Prejudgment Interest.

Because the United States' claims arise under federal law, federal pre-judgment interest principles apply. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1553 (9th Cir. 1994). Under federal law, this Court has discretion to determine whether prejudgment interest is appropriate and in what amounts, if any. *Id.* "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would

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be inequitable." *Id.* (quoting *Board of County Commissioners v. United States*, 308 U.S. 343, 352 (1939)). One reason for denying prejudgment interest arises when the plaintiff is responsible for "undue delay in prosecuting a lawsuit." *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 196 (1995) (quoting *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 657 (1983)). At least one district court in the Ninth Circuit has denied prejudgment interest in an Indian land dispute. *United States v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1070 (S.D. Cal. 1992).

Here, the Court should deny prejudgment interest for at least two reasons.

First, the same facts that support reducing any final damages awarded based on laches, apply with equal, if not greater, force to barring an award of prejudgment interest. The United States' undue delay in prosecuting the abatement of Mill Bay's purported trespass should not result a punitive prejudgment interest award. *Cf. United States v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1070 (S.D. Cal. 1992) ("Moreover, in this case, awarding prejudgment interest seems inequitable since it would in effect reward the plaintiffs for not being vigilant about bringing this lawsuit much earlier than they did.").

Second, the exaction of prejudgment interest would also be manifestly inequitable. An award of prejudgment interest on top of trespass damages would be financially catastrophic for the Mill Bay Members Association, Inc., a non-profit organization, and Paul Grondal, an individual. Unlike cases where prejudgment interest has been awarded

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against entities like the Pend Oreille County PUD or State of New York,[6] neither Mill Bay nor its individual members are deep-pocketed entities who have financially profited from their use of MA-8. And prejudgment interest would also result in a windfall to allottees who have already financially profited from Mill Bay's presence, despite Mill Bay being denied the full benefit of its bargain. *See Bd. of Comm'rs of Jackson Cty. v. United States*, 308 U.S. 343, 353 (1939) ("If thereby Indians are out of pocket, they should not be made whole by putting Jackson County unfairly out of pocket."). Especially since Mill Bay stood ready and willing to uphold its financial obligations under the *Grondal* Agreement, yet the United States refused to accept these payments from Wapato Heritage and remit them to the allottees—thereby allowing the potential for even greater accrual of prejudgment interest. And given the disparity between the Federal Defendants' claimed reasonable rental value of MA-8 and the contractual amounts the allottees actually received from under the Master Lease and *Gronal* Agreement, a prejudgment interest award would go far beyond mere compensation if the Court awards damages at or around the amount sought

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[6] *United States v. Pend Oreille Cty. Pub. Util. Dist. No. 1*, 135 F.3d 602, 613 (9th Cir. 1998); *Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001), *rev'd sub nom. Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

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by the Federal Defendants.

In any event, if the Court is inclined to award prejudgment interest, it should not make any determination on the amount on the current record. The Federal Defendants have not even indicated the amount of prejudgment interest they might seek, let alone disclose expert testimony or provide evidence in support of that amount. After all, the Federal Defendants bear the burden of establishing the propriety of the amount of prejudgment interest sought. *Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 298 (N.D.N.Y. 2001), *rev'd sub nom. Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

IV. CONCLUSION

For all of the foregoing reasons, the evidence at trial will show minimal to no trespass damages should be awarded against Plaintiffs**.**

DATED this 5th day of March, 2021.

By s/SALLY W. HARMELING

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on March 5th, 2021 the foregoing was delivered to the following persons by depositing the foregoing into the (1) U.S. Mail, postage prepaid and (2) was sent via email, as indicated below:

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