No. 20-35694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington resident; MILL BAY MEMBERS ASSOCIATION, INC., a Washington non-profit corporation,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellees,

v.

WAPATO HERITAGE LLC; GARY REYES, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:09-cv-00018-RMP
Hon. Rosanna Malouf Peterson

APPELLANTS PAUL GRONDAL, MILL BAY MEMBERS ASSOCIATION, INC., WAPATO HERITAGE, LLC, AND GARY REYES' JOINT OPENING BRIEF

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I. INTRODUCTION

This is the story of 183 Washington residents—*elderly individuals and families*—who were affirmatively misled by the U.S. Bureau of Indian Affairs ("BIA")[1] and its fiduciary Indian allotment owners ("landowners") ***for 24 years***, and who seek only to hold BIA and the landowners accountable. In the 1980s, BIA got itself and the landowners into the business of selling membership agreements expressly governed by Washington law, for use and occupation of an RV Park on Indian allotment land, known as Moses Allotment #8 ("MA-8"). Appellant Mill Bay Members Association, Inc. ("Plaintiffs" or "Mill Bay"), is a Washington non-profit corporation representing the collective interests of individuals who purchased the memberships ("Members"). The membership agreements were sold pursuant to a BIA-approved "Master Lease," which BIA represented would last through February 2, 2034, based on an initial 25-year term plus a renewed 25-year term.

BIA officials admitted under oath that: (i) they represented to Washington State and its residents that the memberships would last through 2034; (ii) they had authority give those assurances; (iii) they knew prospective purchasers would rely on BIA's promises; and (iv) those purchasers had the right to rely. BIA marketed the memberships for sale with the 2034 end date, approved documents containing the 2034 date, informed both Washington State in writing and the landowners of the

[1] All Federal Defendants are collectively herein referred to as "BIA."

2034 end date, and delivered Plaintiffs' rents to the landowners, pursuant to the 2034 end date. ***This went on for 24 years***.

But BIA did not act alone. The landowners knowingly profited from Plaintiffs' rents knowing Plaintiffs expected to be there through 2034. The landowners were even represented by BIA officials at a mediation of related state court litigation concerning Plaintiffs' right to use and occupy MA-8 through 2034. They then received notice of the settlement agreement, did not object, and accepted Plaintiffs' settlement funds and escalating rents—all affirming Plaintiffs' right to remain through 2034.

In reliance on BIA and landowner promises, Plaintiffs invested millions of dollars and countless volunteer hours improving and enjoying the RV Park. They created a community they believed would exist through 2034.

But these dreams and this community were shattered.

On February 2, 2008, BIA abruptly reversed course and notified Plaintiffs the Master Lease had not been properly renewed 23-years earlier and would terminate on February 2, 2009.

Plaintiffs filed this lawsuit. After 11-years of litigation, the District Court granted summary judgment for BIA and ejected Plaintiffs from MA-8. Plaintiffs now appeal on the following bases.

First, this dispute is governed by Washington State (not federal) law, under which Master Lease Paragraph 8 expressly permits Plaintiffs' sub-tenancies to survive the Master Lease's termination.

Second, Plaintiffs assert a viable equitable estoppel defense. After 24-years of leading Plaintiffs to detrimentally rely on the 2034 end date, BIA and the landowners should be estopped to prematurely eject Plaintiffs.

Third, as interested parties that received notice and failed to object to the state court settlement agreement, BIA and the landowners are precluded by res judicata from re-litigating whether Plaintiffs may remain on MA-8 through 2034.

Finally, MA-8 is no longer Indian-trust land; therefore, BIA lacks standing to eject Plaintiffs.

Appellants Mill Bay, Wapato Heritage, LLC ("Wapato"), and Gary Reyes respectfully ask this Court to reverse the decisions below.

II. JURISDICTIONAL STATEMENT

This is an appeal from an immediately-executable final injunctive order (ER 1568–1639, 1688) certified by Judge Peterson for immediate appeal. ER 1680–85. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), 28 U.S.C. § 1291, and Fed. R. Civ. P. 54(b).

III. STATUTORY AND REGULATORY AUTHORITIES

Copies of these materials appear in the Addendum filed herewith.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err in concluding:

(1) Washington State law does not govern the claims and defenses in this action?

(2) Plaintiffs were not Master Lease sub-tenants, protected by its Paragraph 8 even upon Evans' ineffective Master Lease renewal?

(3) Plaintiffs failed to state an equitable estoppel defense or claim against BIA and/or the landowners, respectively?

(4) BIA and the landowners may re-litigate in this action whether Plaintiffs may remain on MA-8 through 2034, despite receiving notice of the state court settlement agreement and failing to object?

(5) Plaintiffs are judicially estopped to argue MA-8 lost its trust status?

(6) MA-8 did not fall out of trust status years ago?

V. STATEMENT OF THE CASE[2]

A. The Master Lease.

MA-8 is fractionated Indian land near the banks of Lake Chelan in Washington State. ER 1569. For most of the 20th Century, MA-8 lay vacant and unused. William Evans, Jr. ("Evans") changed this.

[2] Facts underlying MA-8's alleged trust-stated are addressed *infra* at pp. 59-72.

In the early 1980s, Evans and over 40 individuals (together, the "landowners" or "allottees") held undivided ownership interests in MA-8. ER 376, 102 at ¶43. Evans sought to lease MA-8 to create a camping club resort, with BIA's assistance and approval. ER 392–95, 404–05, 417–18, 96–97 at ¶2. Evans felt "an R.V. Development would provide good solid monies to the landowners." ER 404. Landowners with 64% interest in MA-8 executed a July 14, 1982, Acceptance of Lessor form, then Colville Agency Superintendent George Davis (authorized by BIA Portland Area office's Acting Director) exercised statutory authority to approve the Master Lease. ER 399–400, 403, 406, 1571, 101–02 at ¶¶48, 51; *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1035 (9th Cir. 2011).

Evans executed the Master Lease on February 2, 1984, as "Lessee." ER 217–242 (**the Master Lease**); *Wapato Heritage*, 637 F.3d at 1035, 1039. BIA signed as "Lessor" on behalf of the landowners. *Wapato Heritage*, 637 F.3d at 1039. The Master Lease referenced an "Exhibit A" containing landowner names and addresses, but no such Exhibit appears in the record and it is unclear whether it ever existed. ER 830, 1572 n.2.[3] The Master Lease lasted 25-years with an option to renew for another 25-years. ER 296. To renew, Evans had to notify in writing the "Lessor" and BIA Secretary one year before the Master Lease's expiration. *Id.*; ER 1572. In

[3] Evans created Mar-Lu, Ltd., and Chief Evans, Inc., to conduct MA-8-related business; herein, their actions are considered his. ER 1572 n.3. Under the Master Lease, he subleased part of MA-8 to Mar-Lu to create the Mill Bay RV Resort. *Id.*

January 1985, Evans attempted to renew by letter to the Colville Agency, which was marked received March 18, 1985. ER 420, 1572–73.

For 24-years, BIA's official position was that the Master Lease had been extended until 2034:

> There is no evidence that anyone, from the time of Evans' 1985 letter until . . . 2007, questioned whether Evans had validly exercised the renewal of the Master Lease. . . . [D]uring the course of over twenty years, Evans and his successors . . . , the BIA, and some of the Indian landowners proceeded, without questioning, upon the assumption that the term of the Master Lease . . . had been validly extended an additional 25 years to . . . 2034.

ER 832; *see also* ER 1150–52 (Davis Dep. at 20:5–22, 25:12–26:1, 28:3–6).

B. BIA and Evans Marketed and Sold Memberships to Washington Residents Lasting Through 2034.

Upon execution of the Master Lease, Evans began selling Mill Bay RV Resort memberships. ER 137–38 at ¶3. These "Regular" Membership Agreements stated:

> 13. NATURE OF MEMBERSHIP. . . . The duration of this membership is coextensive with the twenty-five (25) year term commencing February 2, 1984 (plus the twenty-five year extension, if elected by Seller), 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 . . . .
>
> 14. CONTROLLING LAW. This contract shall be interpreted and enforced in accordance with the laws of the State of Washington.

12/16/2020 Motion to Supplement Record, Ex. A.

Evans provided potential buyers a prospectus filed under oath with Washington State, stating the Membership Agreements lasted through 2034. ER 153–63.

> In 1989, Evans sought to modify his development plan to add a golf course and to change the RV Park to introduce "expanded camping memberships" so that campers could pay for a more exclusive right to a specific RV site on MA-8. . . . [H]e sought the BIA's approval for this change in development plan. Evans provided a copy of the "Expanded Membership Sale Agreement" to the BIA, the same document provided to those individuals who wished to purchase a membership. Ct. Rec. 90, Ex. 30-32. The Expanded Membership Agreement's provision on the duration of the agreement stated: *"The duration of this membership is coextensive with the fifty (50) year term commencing February 2, 1984, of Seller's lease for the Mill Bay property."* The BIA agreed to Evans' proposed change in the development plan by letter dated July 7, 1989. . . . In its approval of the modification of the Master Lease, the BIA made no mention of and did not question the Membership Agreement's characterization of the 2034 term of the Master Lease. Ct. Rec. 90 at 231-247, Exs. 30-33.

ER 833; *see also* ER 422–31, 433, 1575 ("BIA approved the requested modification of the Master Lease, which allowed Evans to sell these expanded memberships."). BIA directed Evans on how to accomplish the modification. ER 421–432, 434–39. George Davis considered the Master Lease modified to incorporate the Expanded Membership Agreements. ER 1150–51 (Davis Dep. at 20:23–22:4). He knew Evans would sell the Expanded Memberships, and he expected buyers would rely on his approval. ER 1151–52 (Davis Dep. at 22:23–25:7).

The Expanded Membership Agreements also contained a Washington choice-of-law provision. ER 430–31. BIA approved the Expanded Membership Agreements on behalf of the landowners, adopting their provisions applying Washington State law to the Mill Bay Resort. ER 1158–59 (Nicholson Dep. at 25:20–27:12).

In 1991, Evans began selling the Expanded Memberships to Washington residents, representing they lasted through 2034. ER 833; *see also* ER 73–79, 437.

Contrary to the Court below,[4] BIA *expressly and affirmatively* represented memberships lasted through 2034: (i) BIA *marketed* the memberships to Washington residents as lasting through 2034;[5] (ii) BIA *told the landowners in writing*, "the term of this lease is to expire February 1, 2034;"[6] (iii) BIA *represented under oath to Washington State* the lease expired in 2034;[7] and (iv) BIA *knew Evans was advertising the memberships* as lasting through 2034.[8] George Davis and BIA Superintendent Gene Nicholson affirmed the 2034 expiration date and *knew buyers would rely* on BIA's representations about it. ER 1151 (Davis Dep. at 22:23–23:17, 24:12–25:7), 1156 (Nicholson Dep. at 14:16-15:10, 15:21–16:11). And they did.

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[4] ER 1573.
[5] ER 417–18 (***joint BIA/Evans press release***).
[6] ER 832 (citing ER 441–44).
[7] ER 832 (citing ER 597–98)); *see also* ER 1156 (Nicholson Dep. at 14:16–16:11.
[8] ER 1155 (Nicholson Dep. at 13:7–25).

Between 1989 and 1994, over 183 Washington residents purchased camp memberships at prices ranging from $5,995 to $25,000. ER 23 at ¶94; ER 140 at ¶9; ER 833. The Expanded Memberships were sold to buyers for $25,000 each with representations that they were BIA-approved, protected by Washington's Camping Resorts Act, and extended through 2034. ER 139–40 at ¶¶7, 9, ER 777–778.

All told, Washington residents spent *millions of dollars* purchasing memberships. ER 140 at ¶9. Since memberships are transferrable at an increased price, "new members have paid up to three times that of the original price[.]" ER 1575, 23 at ¶21; *see also* ER 147–49, 764–80. (detailing Member investments). Purchasers "invested literally thousands of dollars into improving their family properties in virtually every infrastructure imaginable—water, electricity, fiber optics, and construction, as just a few examples." ER 49 at ¶5; *see also* ER 764–80 ; ER 147–49 at ¶23 (detailing investment of funds and volunteer hours). Purchasers were "predominantly elderly individuals and families," who created a "community for more than 35 years;" they built homes, memories, and family legacies in the RV Park. ER 49 at ¶¶3,5.

C. The Casino Sublease.

In 1993, Evans sub-leased part of MA-8 to the Colville Tribal Enterprise Corporation ("CTEC") for construction and operation of a casino. ER 293–325, 833.

BIA approved this sub-lease, again stating the Master Lease would last until 2034. ER 306, 1576.

D. The *Grondal* Litigation.

In 2001, Evans informed the Members the RV Park would close at the end of 2001 and all memberships would terminate. ER 140–41 at ¶10, ER 59 at ¶7. In 2002, the Members sued Evans in *Grondal, v. Chief Evans, Inc.*, Chelan County Superior Court Cause No. 02-2-01100-9 (Bridges, J.) ("*Grondal*"). ER 140–41, 564. Evans—and Wapato, who acquired Evans' interest as "Lessee" upon his death—repeatedly notified BIA of the litigation and asked BIA to intervene; BIA never did. ER 496–546, 553–563, 588–591, 599–602. On June 26, 2003, Judge Bridges found Washington State retained jurisdiction. ER 582–87. Before the litigation resolved, Evans died. ER 1576, 834.[9] The Members incorporated as the Mill Bay Members Association pursuant to Washington's Camping Resorts Act, RCW 19.105, *et seq*. ER 721, 146 at ¶22.[10]

The Personal Representative of Evans' Estate invoked the right to mediate under Washington's Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A *et seq*. ER 647, 750, 142 at ¶16. The mediation lasted two days. ER 647, 143–44 at ¶17. Representatives of BIA, the Colville Tribe, Evans' estate, Wapato,

[9] Then and now, Wapato possessed a life estate in approximately 23.8% of MA-8, with the remainder reverting to the Tribe. ER 834 n.3.

landowners, and Mill Bay attended. ER 143–44 at ¶17. "Though the BIA did not formally intervene in the case, its agents were informed, attended hearings . . . and participated in the mediation which ultimately resolved the case." ER 835. BIA representatives testified that they attended the mediation on behalf of the landowners. ER 1157–60 (Nicholson Dep. at 21:12–25:19, 36:1-22).

The mediation culminated in a September 15, 2004 settlement agreement ("*Grondal* Agreement") (ER 80–95), reviewed and approved by the mediation attendees. ER 145–46 ¶21, ER 172–187. In exchange for the right to occupy MA-8 through 2034, Mill Bay agreed to pay $48,000 in settlement funds and escalating rents to the landowners (passed through Wapato and BIA), and assumed responsibility for the RV Park's upkeep and maintenance. ER 80–95, 144–47 at ¶¶18, 22, ER 179 at ¶5.8, ER 1343–44 at ¶5. By letter to the mediation attendees, mediator Doug Lawrence summarized the mediation and his understanding that Evans' Estate would present to the Tribe and landowners regarding the settlement. ER 610–11 at Introductory Paragraph and ¶ 3.

Wapato filed a notice of the *Grondal* Agreement and motion seeking judicial approval under TEDRA, which were served on all interested parties (including BIA and the Tribe), and required anyone with objections/comments to notify the Court by November 23, 2004. ER 243–261. The only objection came from landowner Sandra

[10] In a separate action, Mill Bay filed a creditor claim against Evans' estate. ER 142

Evans. ER 649. BIA did not object. Judge Bridges approved the *Grondal* Agreement on November 23, 2004. ER 651.

That same day, BIA informed the landowners Mill Bay would pay the settlement money within 30 days. ER 659–660. Gene Nicholson later wrote to the landowners:

> Find enclosed one half of the payment you will be receiving on the RV Park settlement monies. This was the agreement Wapato Heritage, LLC and the RV Members came to on the RV Park Litigation. The RV Members will pay $48,000.00 now, and $25,000.00[11] per year through 2034. . . .

ER 667–68 (footnote added). No landowner objected to receiving the money. ER 1159–60 (Nicholson Dep. at 29:24–30:21).

Mill Bay's settlement payments were made to the landowners in two parts in 2005; the checks were cashed. ER 661–666, 750–51, 754–762 at ¶¶10–11. After the first payment, landowners *demanded* the second. ER 675. BIA acknowledged receipt of the funds and passed them onto the landowners, as it would not release their addresses to Wapato or Mill Bay. ER 1159 (Nicholson Dep. at 28:7–29:11), 1179–80 (Joseph Dep. at 81:22–83:8).

BIA representatives testified: (1) they understood the *Grondal* Agreement implicated the landowners because it extended the Master Lease through 2034 (ER 1159 (Nicholson Dep. at 27:18–24)); (2) they informed the landowners the Master

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at ¶ 15.

Lease extended to 2034 (ER 1160 (Nicholson Dep. at 32:9–33:10)); and (3) BIA determined the *Grondal* Agreement was in the landowners' best interests and affected their welfare. ER 1176 (Joseph Dep. at 52:24-53:11, 56:11–57:6). From 2003 and 2007, BIA officials attended meetings where landowners with a majority interest in MA-8 were informed the Master Lease extended through 2034. ER 326–327, 339–40, 360–61.

Post-settlement, Mill Bay paid the escalating annual rents to Wapato, to pass on to the landowners. ER 836, 751–52 at ¶¶10–11; ER 1343–45 at ¶¶4–8; ER 1248–50 at ¶¶18–21. Some Members waited on the outcome of the state court litigation to purchase memberships. ER 769, 773–74. Investments in the RV Park continued. ER 1250 at ¶ 22.

E. BIA Abruptly Reversed Course, Claiming the Master Lease Would Expire in February 2009.

Not until late 2007 did BIA ever suggest the Master Lease had not been renewed. ER 694, 98 at ¶9.

> The BIA admits it did not examine or question the legal efficacy of the purported renewal of the Master Lease until late 2007. This despite being well-informed of the RV Park Members' 2004 state court litigation, mediation and settlement, and despite repeated direct inquiries to the agency the response to which should have involved a review [of] the Master Lease.

ER 836 (citing ER 618–621; ER 1715; ER 820–25); *see also* ER 1578.

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[11] In fact, Mill Bay was to pay *escalating* rents. ER 86.

But in October 2007, in response to an inquiry from the Tribe, "BIA then examined the issue of renewal." ER 837. By November 30, 2007 letter to Wapato, BIA stated Evans' 1985 letter to BIA had not effectively renewed the Master Lease. ER 694–700, 837. BIA did not notify Plaintiffs the Master Lease would expire in 2009 until February 2, 2008—*when it was too late for Plaintiffs to do anything about it*. ER 1165 (Fry Dep. at 23:23–24:19); ER 716.

F. The *Wapato Heritage* Litigation.

In June 2008, Wapato sued BIA, challenging its determination that Evans had not effectively renewed the Master Lease. *Wapato Heritage LLC v. United States*, No. 08-cv-177-RHW (E.D. Wash.) (Whaley, J.); *see also* ER 838, 1579–80. Wapato lost in the district court, and this Court affirmed. *Wapato Heritage*, 673 F.3d at 1040. Judge Quackenbush, below, explained these decisions as follows:

> There are three narrow issues pertaining to the Master Lease which were fully litigated before Judge Whaley. . . .
>
> 1) The BIA is not a party to the Master Lease;
>
> 2) Evans and Wapato Heritage (the lessees to the Master Lease) did not actually or substantially comply with the notice requirements of the renewal provisions of the Master Lease; and
>
> 3) The BIA had no authority to unilaterally modify the terms of the Master Lease or ratify any deficiency in compliance with the terms of the lease.
>
> *See* EDWA Cause No. 08-CV-177, *Ct Rec. 30*.

> . . . The court rejects the Federal Defendants' attempt to more broadly characterize Judge Whaley's ruling as precluding Plaintiffs from making any argument regarding the term of the Master Lease in this lawsuit. . . . Judge Whaley's decision did not declare the expiration date of the Master Lease and more relevantly, did not address Plaintiffs['] rights to occupy MA-8. Notably, the landowners, the Master Lease lessors, were not even named parties to that lawsuit. Rather, upon Wapato Heritage's own submission of the issue to the court, Judge Whaley only ruled that Evans had not actually or substantially complied with the notice requirement of the renewal provision. Judge Whaley's decision forecloses re-litigation only of the three precise issues addressed by the ruling and identified above.

ER 846–848.

G. The Current Litigation.

On January 21, 2009, Plaintiffs sued BIA and the landowners on multiple claims, seeking to hold the Defendants to their prior representations about the Master Lease term. ER 1. At that time, the Tribe owned less than a majority interest in MA-8. ER 723-731 (January 2009 MA-8 landowner ownership percentages). BIA counterclaimed Plaintiffs were in trespass, and sought their ejectment from MA-8. ER 119–120. In doing so, BIA "voluntarily placed the United States' ownership interest in MA-8 directly in issue" as "[i]n an action for trespass and in ejectment, a plaintiff is required to prove ownership and right to possession." ER 944.

Judge Quackenbush presided for over 10 years. In 2010, he dismissed most of Plaintiffs' claims on summary judgment (including the claim that their sub-tenancy should survive the Master Lease's termination under its Paragraph 8), leaving: (i) a

claim "for declaratory relief against the MA-8 landowners asserting that they are 'equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034;" and (ii) an "equitable *defense* to the Government's counterclaim for trespass and/or ejectment, which also remains pending." ER 927, 933. But he *denied* summary judgment on BIA's ejectment counterclaim in part because:

> There is no evidence in this case that the BIA has consulted with the Indian landowners or that this trespass action is in response to their concerns. . . . If . . . the BIA has yet to consult with the Indian landowners in regard to the issue of Evan's failure to properly renew under the Master Lease, then the BIA's trespass action is inappropriate.

ER 850–52; *see also* ER 1226, 1584–85.

Years later, BIA finally filed its *sole* evidence of landowner consultation: a Declaration of Debra Wulff, then-Superintendent for BIA's Colville Agency, explaining she mailed to the landowners in July 2011 a (biased and incomplete) two-page summary of the litigation with a check-a-box form: "Please check which, if any, option you prefer. . . . ___ Option A: Attempt Eviction/Damages from RV park. ___ Option B: Attempt to Negotiate a lease with RV park." ER 1025–1028 at ¶5, ER 1034–1036. She did not poll Wapato, holding an almost 25% interest in MA-8's alleged trust portion. ER 1026–27 at ¶5. She claimed she received responses from 81.6% of the non-Wapato landowner interest, and concluded, "[i]f the interest held subject to Wapato Heritage, LLC's life estate is excluded, owners holding 54% of the

trust interests in MA-8 support Opinion A." ER 1027 at ¶¶6–7. The alleged completed mailers do not appear in the record. Plaintiffs challenged Ms. Wulff's assertions, below. ER 1485–87.

In 2012, BIA renewed its Motion for Summary Judgment ("MSJ") Re Ejectment. ER 948–49. Judge Quackenbush again declined to rule on it:

> [T]he BIA's historical conduct in its management of MA-8 and its failure to seek landowner input on its decision to seek to eject Plaintiffs until *after* this court indicated that it was required, contribute to the court's concern that the interests of the individual allottees might be given short shrift. The United States has not alleviated this concern . . . . This litigation now encompasses a claim the land is no longer held in trust and also includes the Cross-claims of Wapato Heritage, one of which seeks damages for overpayment against the Defendant landowners. Most of the individual Defendants have not appeared in the litigation and all but 3 have been without the benefit of the advice of private counsel. This has the effect of placing the landowners at the mercy of a party against whom they may potentially seek redress.

ER 1234–35.

Judge Quackenbush's concerns about the landowners' lack of independent representation went unresolved. *See* ER 827–28, 864, 919–21, 925, 1197, 1206–07, 1240 ("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. . . . The BIA has not complied with [this court's] direction. . . . This is highly concerning to the court.").

On September 16, 2019, Judge Quackenbush recused himself without explanation (ER 1351), and Judge Peterson was assigned. ER 1352–54.

On March 26, 2020, Judge Peterson found the landowners need not be represented by counsel. ER 1411–20.[12] She ordered supplemental briefing on BIA's 2012 MSJ Re Ejectment. ER 1452–56; *see also* ER 1472, 1510, 1530, 1537.

Plaintiffs filed Motions for Default and Summary Judgment against certain landowner-Defendants. ER 1457, 1495. On July 9, 2020, Judge Peterson denied Plaintiffs' motions, and granted summary judgment on BIA's ejectment counterclaim. ER 1568. Judge Peterson held: "Because Plaintiffs' right to use MA-8 flowed from Evans' lease, that right expired in 2009 along with the lease. . . . Plaintiffs may not continue to occupy Indian trust land without legal authority to do so." ER 1569; *but see* ER 850–852 (Judge Quackenbush: "Judge Whaley's decision did not declare the expiration date of the Master Lease and more relevantly, did not address Plaintiffs[']s rights to occupy MA-8. Notably, the landowners, the Master Lease lessors, were not even named parties to that lawsuit."). Judge Peterson issued a Judgment for Ejectment. ER 1639, 1680–88. Appellants timely appealed.

[12] Appellant Gary Reyes' counsel appeared April 22, 2020. ER 1560–67.

VI. SUMMARY OF ARGUMENT

First, Judge Peterson erred in finding Washington State law does not govern this dispute. In participating in the market and sale of Membership Agreements expressly governed by Washington State law, and modifying the Master Lease to incorporate them, BIA and the landowners subjected MA-8 to Washington State law.

Second, Judge Quackenbush erroneously concluded Plaintiffs were not sub-tenants under the Master Lease, whether by virtue of the Membership Agreements or *Grondal* Agreement. As such, Master Lease Paragraph 8 should authorize Plaintiffs to remain on MA-8 through 2034 despite Evans' ineffective renewal.

Third, Judge Peterson erred in rejecting Plaintiffs' equitable estoppel defense and claim against BIA and the landowners, respectively. Although claiming to act as trustee, BIA in fact acted as a sovereign and proprietor, subjecting its acts to estoppel. And vis-à-vis the landowners, estoppel is a viable claim under Washington State law, in support of which Plaintiffs presented sufficient evidence to survive a *sua sponte* motion to dismiss and create an issue of fact to survive summary judgment.

Fourth, as interested parties in *Grondal* that received notice and failed to object to its Settlement Agreement under TEDRA, BIA and the landowners are precluded by res judicata from re-litigating whether Plaintiffs may remain on MA-8 through 2034.

Finally, Judge Peterson erred in finding MA-8 remained held in trust. In fact, it does not, and BIA lacked standing to pursue its ejectment counterclaim.

The challenged decisions below (ER 826, 1568, 1411–20) should be reversed.

VII. ARGUMENT

A. Standard of Review

Questions of contract interpretation are reviewed *de novo*. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009). So, too, are district court grants of summary judgment. *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008). This Court "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law." *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009) (internal quotation marks omitted).

B. Washington State Law Governs this Action.

The Regular and Expanded Membership Agreements contain Washington State choice-of-law provisions. *See* 12/16/2020 Motion to Supplement Record, Ex. A at ¶4; ER 430 at ¶14; ER 572 (comparing Regular and Expanded Membership Agreements). In approving the Membership Agreements, BIA *modified* the Master Lease to include those Agreements' provisions. ER 833, 422, 424, 433, 1575, 1150–51 (Nicholson Dep. at 20:23–22:4). BIA and Evans also marketed and sold these

memberships to Washington State residents, who later organized pursuant to Washington's Camping Resorts Act. ER 721-722, 146 at ¶22. On these facts, *three* judges found Washington State law applies to this land and the claims in this and the related *Grondal* case. ER 1446–1451, 511–517, 858–59. There, Judge Bridges explained:

> Based on the record before the court, Evans, an allottee of MA-8 subjected the beneficial owners to the jurisdiction of the State of Washington. A decision was made by the beneficial owners and the United States that MA-8 was to be used for Recreational camping purposes and that memberships would be marketed in compliance with the Camping Resorts Act, no doubt to make the offers more attractive to the buying public.

ER 583; *see also Red Mountain Mach. Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1411 (9th Cir. 1994) (applying Arizona mechanic's lien statute where tribe's BIA-approved lease specified Arizona law).

Judge Peterson's conclusion that federal law categorically governs this dispute is erroneous. ER 1619 n.9, 1627, 1631, 1634–35.

C. Judge Quackenbush Erred by Concluding Master Lease Paragraph 8 Gives Plaintiffs No Right to Occupy MA-8 Through 2034.

The Master Lease's Paragraph 8 reads in part:

> ***Termination of [this] Lease, by cancellation or otherwise, shall not serve to cancel subleases or subtenancies***, but shall operate as an assignment to Lessor of any and all such subleases or subtenancies and shall continue to honor those obligations of Lessee under the terms of any sublease agreement that do [not] require any new or additional

> performance not already provided or previously performed by Lessee. . . .

ER 223 (emphasis added).

Plaintiffs defended against BIA's ejectment counterclaim in part by arguing they held sub-tenancies protected from interruption through 2034 by Master Lease Paragraph 8, despite Evans' ineffective renewal. ER 124–135. Judge Quackenbush rejected this defense. ER 853–56.[13] But Paragraph 8 *does* salvage Plaintiffs, because: (1) Plaintiffs were sub-tenants, *not* licensees; and (2) Paragraph 8 *was* triggered by the Master Lease's ineffective renewal. ER 853–56.

1. Plaintiffs Were Sub-tenants Under the Master Lease.

a. The Expanded Membership Agreements Created Sub-Tenancies.

Based on their choice-of-law provision, Washington State law governs the Expanded Membership Agreements (*see supra* at pp. 20-21) and dictates they create sub-tenancies, not licenses. But Judge Quackenbush did not apply Washington law, or even relevant federal common law. Instead, he compared verbiage in the Expanded Membership Agreements with other Master Lease sub-lease agreements, then cited a nonbinding secondary source and *California* law to conclude the Agreements did not create sub-tenancies. ER 854.

[13] Judge Peterson did not address this issue. *See generally* ER 1568–1638.

But under Washington law, "court[s] must look at ***the nature of the right***, rather than to the name that the parties gave it, in order to learn its true character." *Draper Mach. Works v. DNR*, 117 Wn. 2d 306, 319, 815 P.2d 770 (1991) (en banc) (emphasis added) (internal quotation marks omitted). An instrument conferring exclusive possession or control of the premises (or a portion thereof) creates a lease, not license. *McKennon v. Anderson*, 49 Wn.2d 55, 59, 298 P.2d 492 (1956). That is so even if the tenant's possession is restricted by reservations, and includes the right to designate from time to time where the tenant may occupy. *Barnett v. Lincoln*, 162 Wn. 613, 618, 620, 299 P. 392 (1931). A license, by contrast, only grants authority to do a particular act on the owner's land, and is usually revocable at will and not transferable. *Id.* at 618; 1 Tiffany Real Prop. § 79 (3d ed. 2020).

Here, ***the nature of the right*** conferred by the Expanded Membership Agreements is more akin to a sub-tenancy than a license. These Memberships provide purchasers with the right to *exclusive use* of designated lots on MA-8. ER 424–29 at ¶¶4, 7 (each member must "maintain the exclusive space in a neat and clean condition"); ER 1441, 1446 (Judge Bridges in *Grondal*: "the expanded membership entitled the purchaser to the exclusive use of a designated space, presumably on a continuous basis," and "these memberships included the right to use the Mill Bay facilities but in addition, to utilize a designated site exclusively"). Judge Quackenbush's distinction between exclusive "use" conferring only a

license, and exclusive "possession" conferring a lease, was not consistent with Washington law. *Compare* ER 854–55, *with Lamken v. Miller*, 181 Wn. 544, 549-550, 44 P.2d 190 (1935) (parties' agreement conveying "exclusive use of the premises" was a lease, not a license). Only each Expanded Membership owner had exclusive right to use, and therefore possess, the corresponding lot; so although creating a license to use common spaces, these Memberships conferred exclusive possession of individual lots.

Moreover, unlike a license, the rights the Expanded Memberships conferred were *neither terminable at will* by the Lessee, *nor limited to particular acts*; rather, they had an express duration. ER 430, ¶13 ("The duration of this membership is coextensive with the fifty (50) year term commencing February 2, 1984, of Seller's lease for the Mill Bay property . . . ."). The Expanded Memberships did not restrict Members to particular acts, like fishing. Their parked RVs on designated lots were living quarters, like a house or apartment. And these Memberships were transferable (ER 428–29, ¶6)—Members commonly sold them to new purchasers. ER 1575; ER 23. Judge Quackenbush did not address these facts. ER 854–55.

Even if federal common law applied (it does not), the Expanded Memberships still create sub-tenancies (not licenses). Federal courts look to the Restatement (Second) of Property for whether an agreement creates a landlord-tenant relationship, using as supporting factors: "(1) space having a fixed location,

(2) transfer of the right of possession, and (3) legal capacity of each party to enter into the agreement." *Washington Metro. Area Transit Auth. v. Potomac Inv. Props., Inc.*, 476 F.3d 231, 236 (4th Cir. 2007) (citing Restatement (Second) of Property §§ 1.1–1.3). As already discussed, the Expanded Memberships satisfy these elements. *See also United States v. Southern Pac. Transport. Co.*, 543 F.2d 676, 699 (9th Cir. 1976) (license to use Indian land would confer revocable entry privilege only, for limited, non-possessory purpose: "Indians may permit non-Indians to come onto their reservation for some limited purpose such as hunting, fishing or sightseeing and . . . the Indians' consent is a good defense to a later trespass action. But . . . in this case[] [n]o one argues that the parties . . . intended that the railroad receive a mere express license, revocable at the will of the Tribe."); *U.S. v. Torlaw Realty*, 348 Fed. App'x. 213, 216 (9th Cir. 2009) (citing *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168, 1189 (9th Cir. 2006)) (finding operator of waste disposal facility on allotted land "'possessed' the allotment, exercising control over the entire property by clearing and grading it, making substantial capital investments, and covering it with waste during a span of fourteen years").

b. The Regular Membership Agreements Created Sub-Tenancies.

The Regular and Expanded Membership Agreements are *identical*, except Paragraph 4 of the Regular Agreements provides only the right to use camping

sites on a temporary, first-come first-serve basis. *See* 12/18/2020 Motion to Supplement Record, Ex. A at ¶4; *see also* ER 572. Under Washington law, such an arrangement can still qualify as a lease. *See City of Tacoma v. Smith*, 50 Wn. App. 717, 722, 750 P.2d 647 (1988) ("The tenancies were for fixed periods and could not be terminated without written notice. Each boat owner was given possession of a designated slip and was responsible for maintaining it in appropriate fashion. There is nothing in any of the agreements to suggest that while an owner occupied a particular slip, his possession was not exclusive. The mere fact that possession could be changed to another berth does not appear to be enough to turn what would otherwise be a lease into a license."); *Barnett*, 162 Wn. at 620 (instrument may be a lease even though landlord reserves right to designate from time to time the place on the premises to be occupied).

And in all other respects, the Regular Memberships are suggestive of leaseholds. Like the Expanded Memberships, these are for a fixed period, transferrable by the Member alone, and neither terminable at will nor limited to specific acts. 12/18/2020 Motion to Supplement Record, Ex. A; *see also* ER 572. Their scope of usage permitted is closer to exclusive possession of a specific part of property than a license for a limited activity, like fishing. And collectively, the Regular Memberships convey a right closer to definition of possession in *Torlaw Realty* than the license described in *Southern Pacific Transport*.

c. The *Grondal* Agreement Modified the Master Lease and Created Sub-Tenancies.

Even if neither Membership type created sub-tenancies, the *Grondal* Agreement did. Preliminarily, neither the Master Lease nor federal regulations precluded conversion of Members' purported contractual licenses to use MA-8 (if any) into sub-tenancies. Master Lease Paragraph 7 allowed "Lessee" (Evans, then Wapato) to sub-lease "upon written approval of the Secretary of the Interior or his authorized representative, which approval or rejection must be in writing within thirty (30) days of written application therefor **or approv[al] will be conclusively presumed**." ER 854 (emphasis added); ER 222 at ¶7; *see also* ER 688 (Master Lease Paragraph 7 "requires written approval by BIA of all subleases but also creates a presumption of approval if no action is taken within 30 days of a request.").

But sub-leases required only BIA (not landowner) approval. There is no record evidence that landowners consented to previous sub-leases, such as for Mar-Lu or CTEC. ER 1576, 293–325; *see also* ER 440. Nor did the then-effective federal leasing regulations require landowner consent. 25 C.F.R. § 162.12(b), *removed*, 66 FR 7068, 2084, Jan. 22, 2001 ("With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval."); *Oenga v. United States*, 83 Fed. Cl. 594, 617 n.65 (2008) ("The 1994 amendments specifically excluded facility

sharing agreements from the notice requirement for subleases, in accordance with the allowance in 25 C.F.R. § 162.610(b) for **Secretary-approved lease provisions authorizing subleases without consent**.") (emphasis added).

BIA received notice of the *Grondal* Agreement and did not object. ER 835, 858. That Agreement, therefore, satisfied the only prerequisite to create a sub-lease under the Master Lease: Secretary approval (presumed from BIA's non-response within 30-days post-notice).

That Agreement erased all doubt whether Plaintiffs were sub-tenants (verses licensees). It restructured the relationship between Plaintiffs and Wapato (by then, Master Lease prime Lessee and Sub-Lessor). It caused Plaintiffs to pay "rents" to Wapato (to pass to the landowners through BIA) rather than "dues." ER 854. It created new boundaries for the RV Park within MA-8, which generally could not be changed without Plaintiffs' consent. ER 243–263, ¶¶5.1, 5.2, 5.4, Ex. A. And it put Plaintiffs in charge of day-to-day activities, upkeep, and maintenance of the RV Park (ER 253 at ¶5.8), previously Evans' duties. ER 592–93, 603–608, 609-616.

2. As Sub-tenants, Plaintiffs Were Protected by Master Lease Paragraph 8 Following Evans' Non-Renewal.

a. Master Lease Paragraphs 7 and 8 Should be Read Consistently, with Historical Context.

This Court found the Master Lease terminated in 2009. *Wapato Heritage*, 637 F.3d at 1040. Judge Quackenbush erred in concluding Plaintiffs' sub-tenancies did not survive the termination via Paragraph 8, reasoning this would conflict with Paragraph 7 by allowing sub-leases to extend beyond the Master Lease term. ER 855–56. Paragraph 7 reads, in part: "No part of the premises shall be subleased for a period extending beyond the life of this Lease . . . ." ER 222 at ¶7. The question is whether "the life of this Lease" means the initial 25-year term, or the full potential 50-year term.

Master Lease Paragraph 3 does set an initial 25-year term, which may be renewed for "a further term of not to exceed [25] years, commencing at the expiration of the original term." Judge Quackenbush misread "the life of the Lease" to be coextensive with the *valid* lease term. This reading contradicts with Paragraph 8, which expressly allows for sub-tenancies to outlive the valid Master Lease term: "**Termination of thi[s] Lease**, by cancellation or otherwise, **shall not serve to cancel subleases or subtenancies, but shall operate as an assignment to Lessor of any and all such subleases or subtenancies and shall continue to honor those obligations of Lessee under the terms of any sublease agreement** .

. . .” *Id.* at ¶8 (emphasis added). Thus, the *only* reading of Paragraph 7 that does not contradict Paragraph 8 is as a prohibition on sub-leases purporting to extend ***past February 2, 2034***—the Master Lease’s total possible duration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (it is a “cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other”).

Of course, Plaintiffs did not draft the Master Lease. BIA (and presumably the landowners) played lead role in its drafting and provided standard form leases to potential lessees. ER 862. Plaintiffs should not bear the burden of BIA’s inartful drafting. *Mastrobuono*, 514 U.S. at 62-63 (“the common-law rule of contract interpretation [is] that a court should construe ambiguous language against the interest of the party that drafted it. . . . Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.”).

Nevertheless, Plaintiffs’ interpretation is faithful to Paragraph 8’s apparent purposes of: (i) protecting sub-tenants who contracted with an expectation about their lease term and did not anticipate premature Master Lease termination; and (ii) shielding Master Lease Lessee (Evans) from sub-tenant claims arising from early termination, intentional or otherwise.

Plaintiffs' reading also aligns with historical context. The version of 25 U.S.C. § 415(a) in effect when the Master Lease was executed prohibited leases lasting more than 50-years (25-years plus renewal for another 25-years). *See* Native American Technical Corrections Act of 2006, Pub. L. 109-221, 120 Stat. 340 (codified as amended at 25 U.S.C. 415(a) (2006)) (amending 25. U.S.C. 415(a) to allow leases for 99 years for MA-8). Any sub-lease extending beyond the total 50-year Master Lease term would have, therefore, been illegal. *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1004, 1006-07 (D. Nev. 2015). But a provision allowing sub-leases to survive the Master Lease's termination, but not extend beyond 2034, presents no such problem. *See Elte, Inc. v. S.S. Mullen, Inc.*, 469 F.2d 1127, 1131 (9th Cir. 1972) ("This court subscribes to the principle that where one interpretation makes a contract unreasonable or such that a prudent person would not normally contract under such circumstances, but another interpretation equally consistent with the language would make it reasonable, fair and just, the latter interpretation would apply.").

b. Paragraph 8 Applies to Master Lease Termination for Any Reason.

Judge Quackenbush found Paragraph 8's use of "cancellation or otherwise" (in "Termination of this lease, by cancellation or otherwise, shall not serve to cancel subleases or subtenancies . . .") was limiting language contemplating only "unexpected terminating events, . . . as opposed to terminating events such as the

normal expiration." ER 855–56. Notwithstanding that the circumstances of the Master Lease's expiration could hardly be characterized as "normal" and "expected," Judge Quackenbush's interpretation also conflicts with the ordinary meaning of these words.

"Words in a contract are interpreted in their ordinary and popular sense unless the parties use the words in a technical sense or . . . give a special meaning to them by usage. . . . In order to determine the ordinary meaning of a word used in a contract, we typically begin with dictionary definitions." *Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 442 (9th Cir. 2018), *rev'd on other grounds*, 924 F.3d 1070 (9th Cir. 2019).

Dictionary definitions show "or otherwise" is a *broadening* (rather than narrowing) term. *United States v. Wilson*, 240 F.3d 39, 52 (D.C. Cir. 2001) (Garland, J., concurring in part) ("But the use of the word 'otherwise' indicates an intention to open the second category to factors different from those considered in the first, rather than to restrict it to those that are strictly of-a-piece.") (citing Webster's Third New Int'l Dictionary 1598 (1976) (defining "otherwise" as "in a *different* way or manner")); *Silverstreak, Inc. v. Washington Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007) ("'Otherwise' is defined as 'in another way; differently; in another respect.'") (quoting Scribner–Bantom English Dictionary 641 (1977)); *Otherwise*, Black's Law Dictionary (11th ed. 2019)

(defining "otherwise" as "In a different way;" in another manner;" "By other causes or means;" "To the contrary; differently;" and noting "[t]he term otherwise tends to be quite broad in scope"); *see also Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003) (including "or otherwise" expands or broadens a term's meaning).

This broadening function is supported by Master Lease Paragraph 30, which reads in part: "The Lessee hereby agrees that at the ***termination of this Lease, by normal expiration or otherwise***, Lessee will peaceably and without legal process deliver up the possession of the premises . . . ." (Emphasis added.) This language was not intended for Lessee to only have the obligation to "peaceably and without legal process deliver up the possession of the premises" in cases of "unexpected terminating events, . . . as opposed to terminating events such as the normal expiration." ER 855–56. Judge Quackenbush's one-sentence suggestion to the contrary is not well-explained. ER 856.

Instead, "cancellation or otherwise" should be read as, "for any reason" – *i.e.*, "Termination of this lease, *for any reason*, shall not serve to cancel subleases or subtenancies . . . ." ER 223 at ¶8. Again, ambiguities should be read against the drafters (BIA and the landowners), not Evans/Wapato or Plaintiffs. *Mastrobuono*,

514 U.S. at 62; ER 862. And this reading is most faithful to Paragraph 8's apparent purposes. *See supra*, p. 30.[14]

D. Judge Peterson Erred Holding BIA Immune from Plaintiffs' Equitable Estoppel Defense.

Plaintiffs defended against BIA's counterclaim for trespass/ejectment arguing BIA was estopped to deny Plaintiffs' presence on MA-8 through 2034. ER 927. Judge Quackenbush *twice* acknowledged this case presents a "unique context which would warrant further consideration by the court" on whether estoppel applies against BIA. ER 863; *see also* ER 1226. But Judge Peterson dismissed Plaintiffs' estoppel defense in just a few sentences, finding "the defense of equitable estoppel does not apply to the Government when it acts in its sovereign capacity as trustee for Indian land." ER 1633. In so holding, she relied on *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003), *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) *cert. denied* 352 U.S. 988 (1957), and *New Mexico v. Aamodt*, 537 F.2d 1102, 1110 (10th Cir. 1976) (relying on *Ahtanum*). ER 1633. This was erroneous.

[14] Alternatively, should this Court determine Plaintiffs were licensees, their licenses were irrevocable because, acting on the faith of the license, Plaintiffs incurred expenses and made improvements. *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956); *Proctor v. Huntington*, 146 Wn. App. 836, 854 (2008); *Ormiston v. Boast*, 68 Wn.2d 548, 552, 413 P.2d 969 (1966). Judge Peterson incorrectly found Washington State law did not apply to this claim. ER 1634–35; *supra* at pp. 20-21.

1. The Facts Do Not Support Shielding BIA from Estoppel.

The egregious facts of this case may be ***unparalleled***. BIA, acting in a *commercial*, *non-governmental* capacity, got itself and its fiduciary landowners into the business of marketing and selling camping memberships. ***For 24-years, BIA represented the Master Lease and Membership Agreements extended through 2034.*** BIA received notice and did not dispute the Master Lease renewal through 2034 (ER 420, 1572–73, 832); BIA approved the Master Lease modification, affirming extension through 2034 (ER 304–25, 328–36, 344–52, 420, 424–31, 432, 434–39, 597–98); BIA authorized sale and advertisement of Memberships lasting through 2034 (ER 424–31, 434–439, 153–163, 763–66, 767–71, 776–80, 139–140 at ¶¶ 7, 9); BIA notified Washington State in writing the Master Lease extended through 2034 (ER 597–98); BIA notified landowners owning an MA-8 majority interest of the 2034 expiration date (ER 326–27, 337–43, 353–61); and BIA attended the *Grondal* mediation on the landowners' behalf (ER 647; ER 143–44 at ¶17), then received notice and did not object to the *Grondal* Agreement providing Plaintiffs would pay landowners escalating rents to remain on MA-8 through 2034. ER 609–16 at Introductory Paragraph and ¶3; ER 217–242, 642–58, 145–46 at ¶21. BIA had apparent, if not actual, authority to act on the landowners' behalf and, in doing so, bound them. ER 1750–56, 1768–69. BIA is not above the law; it can—*and must*—be held accountable.

Judge Quackenbush explained:

> One cannot consider this case without some sympathy for the predicament the Plaintiffs find themselves in. They have invested substantial sums of money relying primarily on the word of Bill Evans and his entities, that the Master Lease option to renew would be exercised and that Evans' leasehold interest would not expire until 2034. . . . One undisputed point in this case, evidenced by written and oral communications going back more than 20 years, is that Bill Evans' desired and intended to exercise the option, and apparently believed that the 1985 letter to the Secretary would suffice.
>
> Additional facts making this case unique is that a non-party to the contract, the BIA, plays the lead role in its drafting, execution, approval, administration, and enforcement of the lease. . . . In this case, upon receipt of Evans' 1985 letter explicitly purporting to exercise the option to renew, the BIA a) neglected to inform the Indian landowners, whose interests it is their duty to protect, of the letter; b) did not ensure that their tenant (Evans) had complied with the requirements of the lease until over twenty-years later, despite numerous inquiries, and then c) conducted its business without questioning and on the explicit assumption that the lease had been effectively renewed. In 2004, the BIA even made affirmative representations to the State of Washington that the lease did not expire until February 2, 2034.
>
> Although estoppel will rarely work against the government, the assertion of this defense against the Defendant landowners and the BIA, acting on their behalf, in this trespass action presents a unique context which would merit further consideration by the court.

ER 862–63.

2. Even if MA-8 Remains Held in Trust, BIA Did Not Act in a Trustee Capacity.

a. BIA Acted Only to Further its Own Sovereign Interests.

BIA is not shielded from estoppel when it acts in its sovereign capacity and with affirmative misconduct. *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989); *United States v. Wharton*, 514 F.2d 406, 409-413 (9th Cir. 1975). BIA's deep conflicts of interest in this case support this exception. When BIA purports to act as a trustee on behalf of Indians, but contrary to those Indians' interests, it is furthering its own sovereign interests:

> In *Heckman* [*v. United States*, 224 U.S. 413, 445–46 (1912)], the Government brought suit to cancel certain conveyances of allotted lands by members of an Indian tribe because the conveyances violated restrictions on alienation imposed by Congress. This Court explained that the Government brought suit as the representative of the very Indian grantors whose conveyances it sought to cancel, and those Indians were thereby bound by the judgment . . . **But while it was formally acting as a trustee, the Government was in fact asserting its own sovereign interest in the disposition of Indian lands, and the Indians were precluded from intervening in the litigation to advance a position contrary to that of the Government** . . . Such a result was possible because the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law.

United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) (emphasis added) (internal citations omitted). Moreover, BIA "'does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to *all* Indian tribes.'" *Lincoln v. Vigil,* 508 U.S. 182, 195 (1993) (quoting *Hoopa Valley Tribe v.*

Christie, 812 F.2d 1097, 1102 (9th Cir. 1986)). "No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians." *Hoopa Valley Tribe*, 812 F.2d at 1102.

Here, BIA consistently favored the Tribe to the detriment of other landowners. Judge Quackenbush refused to consider BIA's first MSJ because it had not first consulted with the landowners, as statutorily required. ER 851–52, 1226. BIA then tried to cure the defect, mid-litigation, solely via the deficient check-a-box mailer sent by Debra Wulff. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980) (hearsay evidence not considered on summary judgment); *supra*, at pp. 16-17. Judge Quackenbush expressed concern about BIA's efforts to eject *before* consulting with the landowners. ER 1234.

BIA and the Tribe also colluded to make the landowners irrelevant. *See* ER 1815 ("individual allottees are not necessary parties to an ejectment action"); ER 1828 ("the Indian owners need not be parties to this suit"). BIA aided the Tribe in quietly purchasing unrepresented landowners' allotments at rates below market value. ER 1773–75, 1850–53, 1845–46 at ¶¶11-13. In 2009, the Tribe owned only 18.17% of MA-8. ER 723–31, 1784–88, 1795–97. By 2016, it claimed to have purchased another 13.6% interest from unrepresented landowners. ER 1773–75. And by 2020 the Tribe claimed a 56% ownership interest in MA-8. ER 1510–20. These purchases were approved by the Colville BIA Superintendent, who in

January 2017 was elected to head the Colville Tribal Public Safety Division, which oversees tribal legal services. *See* Tribal Tribune, "Tribe Finalizes Hiring of New Public Safety Director," Jan. 6, 2017, *available at* http://www.tribaltribune.com/news/article_1e237c3a-d428-11e6-939f-67a6a16a2aab.html (accessed Dec. 15, 2020). Thus, the same BIA official purporting to neutrally approve tribal purchases of MA-8 interests from unrepresented landowners later benefitted from them. *See also* ER 1832 (Tribe arguing in 2020 it owns a majority interest in MA-8 and MA-8's minority interest holders are irrelevant); ER 1815 (BIA downplaying Wapato's 24.8% life estate interest in MA-8);[15] ER 1631 n.10 (Judge Peterson erroneously stating Gary Reyes' claim that BIA improperly approved sale of his interest in MA-8 to the Tribe "is not related to the claims of this case").

BIA approved a new sub-lease for the Tribe's casino that paid significantly less rent to the individual allottees. ER 1392 ¶6. One landowner wrote to Judge Quackenbush: "BIA acted in response to . . . the Confederated Tribes;" the landowners "generally have low income and relatively low sophistication, hav[e] involvement considerably different than the Department of Interior, the [BIA], and the [Tribe];" and "the individual Indian owners have appealed to the BIA and the

[15] *But see* 25 C.F.R. § 162.004(b); *Fredericks v. BIA*, No. IBIA 15-074, 2016 WL 4153788, at *3-5, *6 n.3 (I.B.I.A. July 28, 2016) (holders of remainder interest cannot enter into lease for present use of allotment without life tenants' consent).

Tribe to provide legal counsel in this matter, we have been flatly rejected." ER 781. BIA also aggressively opposed efforts to supply the landowners with independent counsel (*e.g.*, ER 1369–1410), which opposition Judge Peterson affirmed (ER 1411–20) and is presently on appeal to this Court. *Wapato Heritage, LLC, et al.*, *v. United States, et al.*, Ninth Cir. No. 20-35357.

There is no question BIA's conflicts of interest prevented it from discharging its trustee duty to all landowners. "When there is a conflict between the interest of the United States and the interest of Indians, representation of the Indians by the United States is not adequate." *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) (citing *Aamodt*, 537 F.2d at 1106). BIA's conflicts should disqualify it from claiming it acted as trustee, as "[n]o trust relation exists which can be discharged to the plaintiff here at the expense of other Indians." *Hoopa Valley Tribe*, 812 F.2d at 1102; *cf. Torlaw Realty*, 348 Fed. App'x. at 219 (expressing concern over Government's dual advocacy role for both EPA and BIA since Government's litigation appeared to eschew its duty to allottee landowners).

Estoppel may apply against BIA when acting in its sovereign capacity if it acted with affirmative misconduct. *Wharton*, 514 F.2d at 409–13 ("the public has an interest in seeing its government deal carefully, honestly, and fairly with its citizens"). Affirmative misconduct may be found if the Government gave "erroneous advice" and "made misrepresentations" but "knew or should have

known" of the truth. *Id.* at 412-13. That standard is more than satisfied here. Estoppel should apply.[16]

b. BIA Acted in a Proprietary Capacity.

BIA is not immune from estoppel when acting in its proprietary capacity. *E.g.*, *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 101 (9th Cir. 1970); *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973); *Wharton*, 514 F.2d at 410. "In its proprietary role, the Government is acting as a private concern would." *Georgia-Pac. Co.*, 421 F.2d at 101 (Government acted as a private concern in suing to enforce a contract between it and a third party); *see also id.* (quoting *United States v. A. Bentley & Sons Co.*, 293 F. 229, 235 (S.D. Ohio 1923)) ("'When the government enters into a contract with an individual or corporation, it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances.'"); *id.* at 235 n.19 (quoting *McQuagge v. United States*, 197 F. Supp. 460, 469 (W.D. La. 1961)) ("'When the government enters the market place, however, and puts itself in the position of one of its citizens seeking to enforce a contractual right . . . it submits to the same rules which govern legal relations among its subjects.'").

[16] For these same reasons, Appellants also seek reversal of ER 1411–20.

Here, BIA acted as a proprietor by: (i) leading the Master Lease's drafting, execution, approval, administration, and enforcement (ER 862); (ii) marketing memberships to residents (ER 417–18); and (iii) representing memberships lasted through 2034 (ER 597–98; ER1156 (Nicholson Dep. at 15:8–16:11)). BIA officials expected buyers to rely on their representations. ER 1151 (Davis Dep. at 23:1–25:7). Questions of fact exist whether individual BIA officials (who historically have overlapping roles at BIA and the Tribe, *see supra* at pp. 38-39; ER 1136 (Redthunder Dep. at 10:4–5) ultimately profited from the sales. BIA should not be permitted to renege on its promises regarding the 2034 end date. At the very least, issues of fact exist on Plaintiffs estoppel defense against BIA.

3. This Court Should Re-Examine the Scope of *City of Tacoma* and Apply Estoppel to BIA Here, Even if it Was Acting as a True Trustee.

For *decades*, this Court has held, under the right facts, the Government may be estopped. *E.g.*, *Watkins*, 875 F.2d at 706–07, 711 (estoppel applied after years of Government's affirmative misrepresentations); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982) ("no fewer than eight circuits . . . have stated that there are some circumstances in which the Government will be estopped"); *Georgia-Pac. Co.*, 421 F.2d at 103 ("the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case"); *Wharton*, 514 F.2d at 409-413 (estoppel applied to Government's dealings with

private citizens concerning public lands: "the public has an interest in seeing its government deal carefully, honestly, and fairly with its citizens").

It is difficult to imagine facts more appropriate for estoppel than this case. Judge Peterson's conclusion otherwise was unnecessary and troublesome. Her ruling precludes lessees and sub-lessees of Indian land from using equitable defenses in lease disputes when the Government (purportedly) seeks to vindicate third-party rights. And it goes further than necessary to achieve the policy goals that support immunizing the Government from equitable defenses.

Review of the case law distills only three clear justifications for the trustee immunity doctrine, none of which are served by application here.

First, courts apply trustee immunity to allow the Government to enforce federal restraints on alienation of Indian land. In *City of Tacoma*, 332 F.3d 574, the Government sued to invalidate condemnation proceedings for Indian allotments, which condemnations would have illegally alienated Indian lands by awarding the City portions some allotments and perpetual easements across others. *Id.* at 576. This Court held, notwithstanding governmental agents' prior representations that the condemnations were valid, estoppel did not bar the Government's later invalidation action because it was acting as trustee for an Indian tribe. *Id.* at 581–82. The rationale for this rule was earlier explained:

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests

> by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This . . . arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

Ahtanum Irr. Dist., 236 F.2d at 334 (internal quotations and citation omitted).

But this case is distinguishable. Notwithstanding that BIA agents representing the Master Lease's 2034 end date *did* have authority to bind BIA, applying equitable estoppel here would not dispossess BIA or Indians of property. Plaintiffs do not seek to alienate MA-8 from its owners, just to extend their sub-tenancies through 2034.

Second, courts refuse to apply estoppel when doing so would ratify an illegal contract. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83–84 (1982). This comports with the restraint on alienation justification because alienating Indian land without statutory compliance violates federal law, as in *City of Tacoma*, 332 F.3d at 581. But here, no one claims Plaintiffs' presence through 2034 would be illegal. Initially, BIA *approved* the Master Lease and Memberships through 2034. The Master Lease expired due to ineffective renewal, not illegality, and Paragraph

8 expressly contemplates sub-leases may survive Master Lease termination. The illegality justification does not apply.

Finally, estoppel is unavailable when used to defeat or preclude enforcement of Indian treaty rights. *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998); *see United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017). Again, that is not what Plaintiffs seek here.

Thus, there is no discernable purpose to apply *City of Tacoma* and its related cases here to bar estoppel against BIA, other than to remove equitable defenses from lease disputes for Indian land; and doing so also creates a troubling outcome when combined with a prohibition on asserting the landowners are also estopped. *See infra* at pp. 52-55. It also conflicts with U.S. Supreme Court and federal sister-circuit authority finding equitable defenses *are* permissible in Indian land disputes. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 (2005) ("We . . . hold that 'standards of federal Indian law and *federal equity practice*' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.") (emphasis added); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005) (equitable doctrine of laches can apply to Government when seeking to vindicate long-dormant third party rights against state and local municipalities, due to those claims' disruptive effect); *see also Stockbridge-*

Munsee Cmty. v. New York, 756 F.3d 163, 166 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492 (2015).

E. Judge Peterson Erred in Holding Equitable Estoppel Is Not a Viable Claim Against the Landowners.

In her Ejectment Order, Judge Peterson dismissed Plaintiffs' Motions for Default and Summary Judgment Against Certain Allottees. ER 1617–28. However, this should not have precluded Plaintiffs' claim for estoppel against the landowners from proceeding to trial. But Judge Peterson did so after concluding: (1) equitable estoppel is not a viable affirmative claim under Washington State law (which she assumed, but did not decide, applied) (ER 1619–21); and (2) no record evidence supports the third estoppel element that Plaintiffs will be injured if the landowners can "'contradict or repudiate the prior act, statement, or omission.'" ER 1627–28. Both conclusions were erroneous.

1. Estoppel Is a Viable Claim Against the Landowners.

Federal courts must apply Washington State law as the Washington Supreme Court would. *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). Only "where there is no convincing evidence that the state supreme court would decide differently" must a federal court "follow the decisions of the state's intermediate appellate court." *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001).

In concluding equitable estoppel is not an affirmative claim under Washington State law, Judge Peterson relied on intermediate appellate court decisions that relied on *pre-2013* intermediate appellate decisions, despite contrary *post-2013* Washington Supreme Court jurisprudence. *Compare* ER 1620 (citing *Sloma v. Washington Dep't of Ret. Sys.*, 12 Wn. App. 2d 602, 621, 459 P.3d 396 (2020); *Byrd v. Pierce Cty.*, 5 Wn. App. 249, 256, 425 P.3d 948 (2018)), *with Washington Educ. Ass'n v. Washington Dep't of Ret. Sys.*, 181 Wn.2d 212, 224–225, 332 P.3d 428 (2014). The State Supreme Court also left open this possibility in *Chemical Bank v. Washington Public Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Likewise, Judge Quackenbush earlier concluded Plaintiffs *had* properly asserted an estoppel claim against the landowners. ER 927; *see also DigiDeal Corp. v. Kuhn*, No. 2:14-CV-277-JLQ, 2015 WL 5477819, at *3 (E.D. Wash. Sept. 16, 2015) (refusing to find equitable estoppel claim fails "[g]iven the Washington Supreme Court's apparent recognition of equitable estoppel as a cause of action"); *Kizer*, 129 F. Supp. 3d at 1006 (suggesting estoppel may be asserted against Indian allotment landowners). Thus, Judge Peterson's conclusion that an affirmative estoppel claim is not viable under Washington law was incorrect.

2. It Was Error for Judge Peterson to Dismiss Plaintiffs' Estoppel Claim Against the Landowners.

No party moved for summary judgment on Plaintiffs' estoppel claim. Nevertheless, Judge Peterson concluded "no evidence in the record supports the

third element of equitable estoppel," effectively dismissing the claim. ER 1627–28, 1639. This was a *sua sponte* Fed. R. Civ. P. 12(b)(6) dismissal, of which Judge Peterson was required to notify Plaintiffs and provide an opportunity to respond, unless they could not possibly prevail on the claim. *Reed v. Lieurance*, 863 F.3d 1196, 1207-08 (9th Cir. 2017). Judge Peterson did not do so. To the extent she concluded Plaintiffs could not possibly prevail on the claim, she was wrong.

Under Washington law:

> The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (citation and footnote omitted). Equitable estoppel may flow from silence. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 539, 146 P.3d 1172 (2006) (en banc).

Plaintiffs presented evidence sufficient to raise a genuine dispute of fact on each element.

Element One: Inconsistent Act or Omission. A majority of landowners knew of Evans' attempted renewal before 2008. ER 337–43, 353–61. BIA representatives testified: (i) they attended the *Grondal* mediation on the landowners' behalf (ER 1157–60 (Nicholson Dep. at 21:12–25:19, 36:1-22)); (ii) they understood the *Grondal* Agreement extended Plaintiffs' presence through 2034 (ER 1159

(Nicholson Dep. at 27:18–24)); (iii) they determined the *Grondal* Agreement was in the landowners' best interests and affected their welfare (ER 1176 (Joseph Dep. at 52:24-53:11, 56:11–57:6)); and (iv) they informed the landowners the Master Lease extended to 2034 (ER 1160 (Nicholson Dep. at 32:9–33:10), 326–327, 339–40, 360–61). No landowner objected to receiving the *Grondal* settlement funds. ER 1159–60 (Nicholson Dep. at 29:24–30:21). In fact, after the first payment, they *demanded* the second. ER 675. There is a genuine issue of fact on whether these acts are inconsistent with landowner denial of Plaintiffs' presence through 2034.

Element Two: Reliance. In reliance on the landowners' promises that the Memberships lasted through 2034, Plaintiffs invested funds, paid escalating rents and made Park improvements. ER 138–149 at ¶¶5, 9, 23. Some Members waited to purchase Memberships until the *Grondal* Agreement was final. ER 773–74 at ¶¶3–5; ER 777–78 at ¶¶3–5. Only one landowner questioned the Master Lease's renewal, which correspondence BIA ignored. ER 873. There is a genuine issue of fact vis-à-vis Plaintiffs' reliance.

Element Three: Injury. Allowing the landowners to deny Plaintiffs' right to remain on MA-8 until 2034 will injure Plaintiffs. *Metro. Park Dist. of Tacoma v. State, Dep't of Nat. Res.*, 85 Wn.2d 821, 828, 539 P.2d 854 (1975) (en banc) (equitable estoppel precluded party from cancelling deed where opposing party already made substantial investments in the property).

Judge Peterson found, per federal regulations governing Indian trust land, "the Government generally may remove trespassers from fractionated allotments without first obtaining majority consent from the allottees." ER 1627. But BIA can hardly act on behalf of its fiduciary landowners while acting in a manner ***directly contrary*** to the express will of them ***all***. Indeed, "BIA has no independent *contractual* right to enforce the terms of the Master Lease. The authority of the BIA in regards to the Master Lease stems entirely from federal regulatory law" (ER 850), which provides BIA may only "take action to recover possession, including eviction, *on behalf of the Indian landowners* . . . ." 25 C.F.R. § 162.023 (emphasis added).

Judge Peterson's reading conflicts with BIA's fiduciary duties to the landowners:

> The BIA is entrusted with managing and protecting Native American interests. *See, e.g.,* 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior . . . have the management of all Indian affairs and of all matters arising out of Indian relations."); *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002) ("It is well established that the BIA holds a fiduciary relationship to Indian tribes, and its management of tribal [interests] is subject to the same fiduciary duties." (citing *United States v. Mitchell*, 463 U.S. 206 . . . (1983))).

Wapato Heritage, 637 F.3d at 1037.

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or

> properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980).

And the U.S. Supreme Court has emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); *see also Mitchell*, 463 U.S. at 225-226 (collecting cases regarding same).

These regulations, fiduciary duties, and line of cases suggest BIA has no authority to act contrary to the will of 100% of its fiduciary landowners on whose behalf it acts as trustee; otherwise, BIA would be liable for breach of trust. *E.g.*, *id.* at 206 ("[T]he statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources . . . . Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breach of trust.").

That is the point of Plaintiffs' estoppel claim against the landowners. Based on the landowners' prior acts and representations, and Plaintiffs' detrimental reliance thereon, the landowners are estopped to deny Plaintiffs' presence on MA-8 through 2034. That claim is made against *all* landowners—including the Tribe.

BIA cannot eject Plaintiffs without acting directly contrary to those interests, which are legally precluded from being in favor of ejecting Plaintiffs. Thus, Plaintiffs will be injured if the landowners are not estopped.[17]

F. Judge Peterson's Estoppel Rulings Gut All BIA and Landowner Accountability to Tenants on Indian Land.

"Equitable estoppel is an age-old principle of equity." *First Nat'l Bank of Portland v. Dudley,* 231 F.2d 396, 400 (9th Cir. 1956). It stands for "the basic precepts of common honesty, ordinary fairness, and good conscience in dealing with the rights of those whose conduct has been prompted by reasonable good-faith reliance upon the knowing acts or omissions of another." *Id.* (internal citation omitted).

As a corollary to estoppel in the contract context, arbitrary and capricious review protects reliance interests in the administrative law context. An agency's failure to consider individuals' legitimate reliance on its stated policies can render the agency decision arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of*

[17] Even assuming federal law applies, the outcome would be the same. Under federal common law, a party seeking to invoke the doctrine of estoppel must establish: (1) the party to be estopped knows the facts; (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended; (3) the party invoking estoppel must be ignorant of the true facts; and (4) he or she must detrimentally rely on the former's conduct. *Lehman v. United States*, 154 F.3d 1010, 1016–17 (9th Cir. 1998). At least one court found a party's intent to not perform under a contract can satisfy the first element. *Tehama-Colusa Canal Auth. v. U.S. Dep't of Interior*, 819 F. Supp. 2d 956, 1000 (E.D. Cal. 2011), *aff'd sub nom.* 721 F.3d 1086 (9th Cir. 2013).

the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (internal citations and quotations omitted) ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters. Yet that is what the Duke Memorandum did.") (internal citations and quotation marks omitted).

But the two summary judgment rulings below together *exempt* Indian land lease disputes from accountability for others' detrimental reliance.

Judge Quackenbush first dismissed Plaintiffs' Administrative Procedures Act ("APA") claim, finding BIA's position on the Master Lease's ineffective renewal not final agency action permitting judicial review. ER 844. He thereby removed the first important check on BIA: arbitrary and capricious review of its stated positions concerning the leases it often unilaterally manages. *Cf. Moody v. United States*, 135 Fed. Cl. 39, 47 (2017), *aff'd*, 931 F.3d 1136 (Fed. Cir. 2019) ("All of the actions pertaining to the lease, once executed, were performed by the BIA. The Oglala Sioux Tribe seems to have done nothing but appear in and sign the leases."); *see also Ewiiaapaayp Band of Kumeyaay Indians v. Acting Pac. Regional Director, BIA*, No. IBIA 11-062, 2013 WL 3088071, at *4 (Feb. 6, 2013) (relying on ER 826–64 in holding BIA lacks power to approve or deny the exercise of a renewal option, which is instead determined by contract law).

Judge Peterson then put the nail in the coffin by broadly interpreting *City of Tacoma* to preclude equitable estoppel vis-à-vis BIA whenever it purports to act in its trustee capacity.

This leaves remedies against the landowners as the *one* protector of Indian-land-tenants' reliance interests. Indeed, the landowners, not BIA, are the Master Lease Lessors; BIA could not unilaterally modify the Master Lease on their behalf. *Wapato Heritage*, 637 F.3d at 1037, 1040 n.4. Thus, only the landowner-Lessors' acts and omissions can create an enforceable reliance interest. Except Judge Peterson has taken estoppel against the landowners off the table, concluding their acts and omissions cannot support an estoppel defense as a matter of law because BIA purported to act as trustee on their behalf.

Absent availment of arbitrary and capricious review or equitable estoppel, Indian land tenants lack all recourse if BIA or Indian landowners change position on contract interpretation, and BIA and beneficial owners have no incentive to adhere to commercial standards of fair dealing.

This outcome is inconsistent with recent decisions. *See City of Sherrill*, 544 U.S. at 198, 214, 221 (protecting New York's reliance interests by holding equitable defenses (such a laches, acquiescence, and impossibility) can be used to defeat an Indian's claim to Indian lands, even where the underlying land transaction contravened federal law designed to protect Indians); *Cayuga Indian*

Nation, 413 F. 3d at 274 (relying on *Sherrill* to hold laches barred a possessory land claim despite alleged violations of the Nonintercourse Act, and finding *Sherrill* is not limited to claims attempting to revive sovereignty, "but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally."); *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 617 F.3d 114, 140 (2d Cir. 2010) (holding defense in *Sherrill* and *Cayuga* could also apply to damages claims); *Stockbridge-Munsee Cmty.*, 756 F.3d at 165 ("In the wake of this trilogy—Sherrill, Cayuga, and Oneida—it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the *settled expectations of current landowners*, and are subject to dismissal on the basis of laches, acquiescence, and impossibility.") (emphasis added).

The decisions below put Indian land tenants in a vulnerable position that is both undesirable and untenable. It should be reversed.

G. Judge Quackenbush Erred by Finding Res Judicata Did Not Bar Re-Litigation of Plaintiffs' Right to Remain on MA-8 Through 2034.

Just as BIA claims to represent the landowners' interests in this action (despite its conflicts of interest), by participating in the *Grondal* litigation BIA had authority to bind itself and the landowners under TEDRA. Judge Quackenbush rejected this defense, reasoning BIA had no independent authority to modify or

alter the Master Lease terms. ER 858–59. While perhaps correct as a matter of contract law, that conclusion was erroroneous pursuant to preclusion law.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, "Congress has specifically required all federal courts to give preclusive effect to state–court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). "Indian land claims are not entitled to a special exemption from res judicata principles . . . ." *Bear v. United States*, 810 F. 2d 153, 157 (8th Cir. 1987). Nor is the United States categorically exempt from preclusion principles when it voluntarily submitted to a determination in state court proceedings. *Montana v. United States*, 440 U.S. 147, 163 (1979).

The Supreme Court has held, when the Government represents owners of restricted Indian lands in litigation, that litigation binds the Government *and* the landowners, who are not necessary parties to such litigation. *Heckman*, 224 U.S. at 445–46. Similarly, when a state government sues on behalf of its citizens, any judgment in that litigation is binding on both the state and its citizens. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

Thus, the crucial question is whether the *Grondal* litigation that culminated in the *Grondal* Agreement gave rise to a judgment enforceable against BIA under Washington State law. If so, then that judgment also binds the landowners because

BIA attended the mediation—and involved itself in the state court litigation—on behalf of the landowners. ER 1157–60 (Nicholson Dep. at 21:12–25:19, 36:1-22).

Under Washington law, BIA need not have been a formal party to *Grondal* for the *Grondal* Agreement to have preclusive effect. The version of RCW 11.96A.120(4) in effect in 2004 provided: "An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented." ER 1727. Likewise, RCW 11.96A.220 made settlement agreements entered under TEDRA "binding and conclusive on all persons interested in the estate or trust." ER 858. And under RCW 11.96A.230(2), once an agreement is entered by a court, it is deemed approved by the court and is "equivalent to a final court order binding on all persons interested in the estate or trust." ER 1727.

Here, there is no dispute that Judge Bridges approved the *Grondal* Agreement and BIA received notice of this approval. ER 858. By its terms, Judge Bridge's Order approving the *Grondal* Agreement stated it would have "*res judicata*" effect and was binding on all interested parties under RCW 11.96A230–40. ER 651. Thus, notice of Judge Bridge's approval of the *Grondal* Agreement made it res judicata on BIA, who bound the landowners to that de-facto judgment via its representation on their behalf, as in *Heckman*. BIA's claimed representation of the landowners' interests in litigation, therefore, cuts both ways.

If BIA and the landowners dislike the *Grondal* Agreement, their remedy is not to simply re-litigate it in federal court. Rather, BIA should have intervened in *Grondal* (as Evans and Wapato Heritage implored it to do) and/or objected to Judge Bridges upon receipt of notice of the *Grondal* Agreement. Meanwhile, the landowner's remedy is to sue BIA for breach of fiduciary duties under the Tucker Act, 28 U.S.C. § 1491. *Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996).

H. Judge Peterson Erred by Holding MA-8 Is Trust Land.[18]

BIA's authority to act on behalf of the landowners to evict Plaintiffs from MA-8 stems from its presumed role as their statutory trustee. But close scrutiny of century-old statutes and executive orders reveals MA-8 is not Indian-trust land; therefore, BIA had no authority to evict Plaintiffs. *U.S. ex rel. Noel v. Moore Mill & Lumber Co.*, 313 F.2d 71, 73 (9th Cir. 1963). History reveals the U.S., as it so often did, promised rights to Indians, withheld the rights, changed the deal, took their land without fair compensation, and kept them in a dependent condition for more than a century. This Court should afford the heirs of the original Indian landowner their full rights and dignity as landowners, not the presumptively-incompetent wards of the state that BIA would have them be.

[18] Appellant Gary Reyes, although joining the appeal, does not join the argument that MA-8 lost trust status.

1. Neither Plaintiffs Nor Wapato are Estopped from Challenging MA-8's Purported Trust Status.

BIA posits Plaintiffs are judicially-estopped to challenge the trust status of MA-8. *E.g.*, ER 953. Judge Quackenbush rejected this argument both before[19] and after[20] BIA's motion, and even BIA once conceded Plaintiffs should not be precluded from challenging MA-8's trust status. ER 1203 ("although the United States concedes that Plaintiffs may challenge the property's trust status as a defense to the United States' motion, the United States has not waived any of its defenses . . . to any cross-claim asserted by WHLLC"). Nevertheless, Judge Peterson resurrected this theory (ER 1591), even while spending the bulk of her ejectment order analyzing MA-8's purported trust status on the merits. ER 1594–1617. In doing so, she erred.

First, since MA-8's status is a jurisdictional question, judicial estoppel cannot apply. BIA's Article III standing to assert its trespass counterclaim first requires finding MA-8 is trust land (or, at the very least, restricted fee land subject to Congressional and regulatory control over leasing). *City of Tacoma*, 332 F.3d at 578. BIA lacks standing if MA-8 lost trust status. *U.S. ex rel. Noel*, 313 F.2d at

[19] ER 994 (BIA voluntarily put MA-8's status into controversy).
[20] *Compare* ER 1197 *with* ER 1304–06 (January 1, 2013 Order directing additional briefing on MA-8's trust status same day on oral argument considering arguments on judicial estoppel); *see also* ER 1306 ("this case is going to turn on whether or not the 1935 extension applied to MA-8").

73. Judicial estoppel is no substitute for subject matter jurisdiction. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012) (citing *Gray v. City of Valley Park*, 567 F.3d 976, 980-82 (8th Cir. 2009)). And Article III standing is a jurisdictional question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95–100 (1998). Thus, judicial estoppel *does not*, and *cannot*, preclude consideration of MA-8's status and its jurisdictional consequences.

Second, the judicial estoppel "factors" are not satisfied vis-à-vis Plaintiffs' challenge to MA-8's trust status. To find a party judicially-estopped, courts consider: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)). But "[i]f incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply." *Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998). The second two factors are absent because nearly all of Plaintiffs' claims against BIA were dismissed on jurisdictional grounds early on. ER 842–49. The District Court would have dismissed them even had Plaintiffs alleged MA-8 was held in

trust in its complaint or pleaded in the alternative that it was fee land.[21] Plaintiffs therefore did not "successfully persuade" the District Court on an earlier position, and certainly did not derive an unfair advantage through any mispleading in the complaint. Much like BIA's 20 years of affirming the Master Lease lasted through 2034, Plaintiffs asserted claims based on the "unexamined" (but mistaken) presumption that MA-8 was trust land.

Third, even if *Plaintiffs* were judicially estopped, Appellant Wapato was not. *See generally* ER 1568–1638 (never suggesting Wapato was judicially estopped). Thus, judicial estoppel cannot prevent a merit's analysis of MA-8's status.

2. The U.S. Promised Land, Then Withheld Fee Patents.

In 1879, Chief Moses, a leader and spokesperson for the Moses Band (a group of several hundred Wenatchi, Entiat, Columbia, and Chelan Indians), negotiated with the U.S. to establish a new reservation for his followers. ER 1595–96; 7 Ind. Cl. Comm. at 802 (1959). This resulted the same year in President Hayes signing an executive order reserving land south of Lake Chelan in the Washington Territory for the Moses Band. *United States v. Oregon*, 787 F. Supp. 1557, 1561 (D. Or. 1992), *aff'd,* 29 F.3d 481 (9th Cir. 1994), *amd*, 43 F.3d 1284 (9th Cir. 1994); ER 1114–21. But Congress never ratified the preliminary agreement with the Moses Band, and the Moses Band did not accept the "Columbia Reservation"

[21] Fed. R. Civ. P. 8(d)(2), (3) allows pleading alternative and inconsistent claims

as their tribal home, so the parties returned to negotiations. *United States v. Oregon*, 787 F. Supp. at 1563; ER 1597.

In 1883, the finalized "Moses Agreement" was ratified by Act of July 4, 1884 (23 Stat.79, c. 180), under which the head of each Indian family living on the Columbia Reservation could elect to either: (i) receive individual allotments of 640 acres from the then-Columbia Reservation (upon such election, becoming the "Moses Allottees"); or (ii) relocate to the Colville Reservation; and the remainder of the Columbia Reservation would be restored to the public domain. ER 874–76, 976–77, 1597–98. An 1886 Executive Order carried out the Moses Agreement and expressly provided all Columbia Reservation land not already restored to the public domain was "restored to the public domain, subject to the limitations on disposition" created by the Act of July 4, 1884—meaning portions of this newly-restored land were allotted to the Moses Allottees "for the exclusive use and occupation of said Indians." ER 1114–21, 1598. The Executive Order identified the allotments by metes-and-bounds legal descriptions, including MA-8 for Wapato John. ER 1114–21. In other words, the whole reservation was removed from reservation status and divided up among individual Indians.

Nothing in the Moses Agreement, the Act of 1884, or the 1886 Executive Orders restoring the Columbia Reservation to the public domain and assigning

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and defenses, notwithstanding judicial estoppel.

allotments suggests Wapato John or other allottees were to receive anything less than what they bargained for: ***land in fee for settlement***. The U.S. should have simply issued fee patents then and there, using the metes-and-bounds descriptions established by the Executive Order. But soon after that Order, the U.S. began a policy of issuing so-called "trust patents" when allotting land to Indians, supposedly as an interim measure to ease Indians' transition from wards of the state to independent citizens. *See* Felix S. Cohen, *Handbook of Federal Indian Law* §§ 1:04, 16:03 (2012). These trust patents gave Indians only a beneficial interest in the land, with a right to eventually receive fee patents when the trust period ran. *Id.* Even though the Moses Allottees, unlike most of those Indians, had already been assigned their allotments, by Act of March 8, 1906 (34 Stat. 55, c. 629), Congress **unilaterally and retroactively** changed the Moses Agreement, expressly providing for the issuance of trust (not fee) patents for the Moses Allottees (except those who had already been issued fee patents). ER 978–79.

Under the Act of March 8, 1906, the trust period was to run for ten years after the 1906 Act, and "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 whatsoever." ER 978–79; *see also* ER 1602. The Act of March 8, 1906 also allowed the allottees to sell their allotted lands during the trust period, with two restrictions: (i) an allottee

could not sell the last 80 acres of his/her allotment; and (ii) any sale would be "under rules and regulations prescribed by the Secretary of the Interior." ER 978–79; *see also* ER 1602.

Accordingly, Wapato John was issued *trust* (not fee) patents for MA-8: Trust Patent No. 151-1599, handwritten and dated April 9, 1907, for 548 acres, and Trust Patent No. 151-1555 dated December 28, 1908, for 57.85 acres. ER 368–71, 888–92, 1037–41, 1602. Both trust patents expressly state the U.S. would hold these allotments in trust for 10 years "subject to all statutory provisions and restrictions," and upon "the expiration of said 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 charge or incumbrance whatsoever**." ER 371 (transcription; emphasis added).

In 1914, however, the U.S. changed the deal *again*. President Wilson issued a new Executive Order, No. 2109 ("E.O. 2109") purporting to extend the trust status of the Moses Allotments by another ten years, to 1926. ER 982–83, 1602.

3. E.O. 2109 was *Ultra Vires*.

In concluding MA-8 retained its trust status, Judge Peterson assumed (without explanation) E.O. 2109 was valid. *See* ER 1602 (acknowledging E.O. 2109 in one sentence, then not further addressing it). It was not.

Because an executive order must be within the scope of authority granted by an act of Congress, "[w]hen an executive acts *ultra vires*, courts are normally available to re-establish the limits on his [or her] authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see also Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019) ("*ultra vires*" means "without authority;" "only if the statute *actually* permits the action can it even *possibly* give authority for that action.").

E.O. 2109 claims its authority originates from "Section 5 of the Act of February 8, 1887 (24 Stat. L. 388) and the Act of June 21, 1906 (34 Stat. L. 325-326)."[22] ER 982–83. But the Moses Allotments were beyond the scope of the Dawes Act. ER 1213. The Dawes Act authorized the President to break Indian reservations into allotments and to issue—for the allotments authorized "in this Act"—25-year trust patents, a period extendable at the President's discretion. 25 U.S.C. § 348. The Dawes Act does not give the President power to extend trust periods for allotments created under *other* statutes. Congress did later pass such a statute, now at 25 U.S.C. § 335, but not until 1923. The Dawes Act did not authorize E.O. 2109 in 1914.

Nor did the Act of June 21, 1906 (codified at 25 U.S.C. § 391), which merely provides: "Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent **containing restrictions upon alienation** has been

or shall be issued under any law or treaty the President may, in his discretion, continue such **restrictions on alienation** for such period as he may deem best." (Emphasis added). The statute authorizes extending restrictions on alienation, but not *trust status*. A trust instrument may or may not restrict the trustee from alienating title to the entrusted land.[23] The MA-8 trust patents create a trust and **also** allow alienation upon request by the cestui que trust, expressly subject to statutory restrictions on alienation (*i.e.*, the restrictions in the Act of March 8, 1906). ER 371. And the Government commonly issued fee patents to Indians with express restrictions on alienation. *E.g.*, Act of January 18, 1881, 21 Stat. 317 c.23. Thus, when issuing fee patents for MA-8 in 1916 pursuant to the Act of March 8, 1906, BIA could only have been required by E.O. 2109 to include language based on that Act to the effect that, for another eight years, the last 80 acres could not be sold and sales would be subject to BIA regulations. By Act of May 20, 1924 (ER 1068), Congress removed the last-80-acres restriction on alienation, and had the fee patents been issued in 1916 as required by the Act of March 8, 1906, Wapato John's descendants should have owned title free and clear.

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[22] The Act of February 8, 1887, is commonly known as "the Dawes" or "General Allotment Act."

[23] The cestui que trust, by definition, has no title to alienate, only a right to receive benefits from the property to which the trustee holds title.

But BIA (and Judge Peterson) incorrectly treated E.O. 2109 as extending the trust period to 1924 (ER 1602), so BIA did not issue fee patents to MA-u in 1916 as required by the Act of March 8, 1906.

On February 10, 1926, President Calvin Coolidge issued Executive Order 4382, purportedly extending the trust period another ten years, to 1936, under the same inadequate statutory authorization as in E.O. 2109, equally ineffectively. ER 995; *see also* ER 1602–03 (Judge Peterson incorrectly concluding the trust status was extended).

4. Judge Peterson Improperly Classified MA-8 as Indian Reservation Land, and Improperly Applied the Indian Reorganization Act and Its 1935 Amendment.

Judge Peterson compounded her error by classifying the Moses Allotments as Indian "reservation" land (ER 1599–1601), and by applying the trust-period extension in the Indian Reorganization Act of 1934 ("IRA") as amended. ER 1605. The IRA put tribal reservations more firmly under control of organized Indian governments by, among other things, allowing tribes and bands to adopt constitutions, prohibiting further allotment of reservation lands, and indefinitely extending all "existing periods of trust placed upon any Indian lands and any restriction on alienation thereof," except for "Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." 25 U.S.C. §§ 5102, 5111.

"Indian" meant any member of any recognized tribe, and also their descendants then residing "within the present boundaries of any reservation," and "tribe" meant any "tribe, organized band, pueblo, or the Indians residing on one reservation." Act of June 18, 1934, c. 576, § 19, 48 Stat. 988.

Section 18 of the IRA provided: "This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application," and required the Secretary to call elections for such vote on all reservations within a year. 25 U.S.C. § 5125.

Had the Moses Allotments been a "reservation," Section 18 would have required the Secretary to call a vote of their residents. The Secretary did not. That is also consistent with BIA's current definition of reservation: "A federal Indian reservation is an area of land **reserved for a tribe or tribes** under treaty or other agreement with the United States, executive order, or federal statute or administrative action **as permanent tribal homelands**, and where the federal government holds title to the land in trust **on behalf of the tribe**." U.S. Dep't of Interior, Indian Affairs, *FAQs* (last visited Dec. 13, 2020), http://www.bia.gov/FAQs/index.htm (emphasis added); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998) (during the time period when the Moses Agreement was made, "tribal ownership was a critical component of reservation status"). The Moses Allotments were not held in trust on behalf of a

tribe; they were held by or on behalf of individual Indians whose ancestors did not want to be confined to dependency on the Colville Reservation. Even the Columbia Reservation, for the few years it existed, was not a tribal homeland, but merely a placeholder while the Moses Band and U.S. negotiated a final deal. Thus, the Executive Order of May 1, 1886, did not maintain a reservation of land for a tribe; it restored all land to the public domain subject only to the restrictions of the Moses Agreement, providing for individual ownership, not a tribal homeland.

MA-8 was an "allotment . . . outside the geographical boundaries of any Indian reservation." 25 U.S.C. § 2511. As such, it was exempted from the extension of trust status under the IRA. *Id.*

Judge Peterson's reliance (ER 1599) on passing references in BIA documents to MA-8 as reservation land is misplaced. Informal agency interpretations earn *Skidmore* deference only to the extent that they are persuasive, and interpretations which lack any reasoning are not persuasive. *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1211 (9th Cir. 2013), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 782 n.2 (9th Cir. 2014) (BIA ALJ's decision that applied state law without analysis not entitled to *Skidmore* deference). BIA's documents do not analyze whether MA-8 is reservation land; they merely assume it. As such, they cannot guide a court. Moreover, an agency interpretation which conflicts with the same agency's interpretation at a different time is "entitled to

considerably less deference" than a consistently held agency view. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Despite Judge Peterson's description, BIA has not consistently referred to MA-8 as reservation land—in a Title Status Report dated January 1, 2009, just before this lawsuit began, BIA listed MA-8 as "Colville Public Domain." ER 724. BIA's inconsistent, casual references cannot guide this Court.

In 1935, Congress amended the IRA to again remove power from the Indians:

> If the period of trust or of restriction on any Indian land, has not, before the passage of this Act, been extended to a date subsequent to December 31, 1936, ***and if the reservation containing such lands*** has voted or shall vote to exclude itself from the application of the [IRA], the periods of trust or the restrictions on alienation of such lands are hereby extended to December 31, 1936.

49 Stat. 378 § 3 (ER 1003) (emphasis added). This Amendment did not affect the Moses Allotments either, because, as discussed above, they were not on a reservation on which the Secretary called a vote, and were not within a reservation anymore at all.

Judge Peterson, nevertheless, found the 1935 extension (and subsequent general extensions which eventually extended all trust periods indefinitely) applied to MA-8. ER 1616. She reasoned that the Secretary had called a vote on the

Colville Reservation, to which many members of the Moses Band had elected to remove in the late 1880s rather than take allotments from the Columbia Reservation. *Id.* Although the Moses Band as such did not vote, and how its members voted is not recorded,[24] the Colville Reservation Indians as a whole voted against applying the IRA to the Colville Reservation. ER 1616. The District Court considered that vote to apply to MA-8. *Id.*

In other words, the District Court held the Colville Reservation encompassed MA-8 for purposes of the 1935 amendment to the IRA, even though the Colville Reservation was created before and independently of Columbia Reservation, the Moses Allotments are not within the borders of the Colville Reservation, and the purpose of creating the Moses Allotments was to let Indians such as Wapato John choose an alternative to reservation life. This, too, was error. Members of the Moses Band on the Colville Reservation lacked any beneficial or legal interest in Moses Allotment land, by choice. The Colville Reservation does not "contain" the Moses Allotments.

Thus, the trust period on MA-8 was not legitimately extended past 1916, and fee patents should have been issued 100 years ago. They should be issued now.

[24] *See* Theodor Haas, *Ten Years of Tribal Government Under I.R.A.*, Table A at 19 (1947).

VIII. CONCLUSION

For the foregoing reasons, Judge Peterson's ejectment Order and Judge Quackenbush's 2010 Order should be reversed. Plaintiffs should be permitted to remain on MA-8 through 2034 pursuant to Paragraph 8 of the Master Lease, because of the *Grondal* Agreement's preclusive effect, or because MA-8 is no longer held in trust. However, should this Court find those arguments without merit, then the case should be remanded for a trial on the merits of Plaintiffs' estoppel claim against the landowners and defense against BIA's claim for trespass/ejectment.

Respectfully submitted this 16th day of December, 2020.

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STATEMENT OF RELATED CASES

Grondal v. United States of America, Appellate No. 20-25247, later appeal from same case.

Wapato Heritage, LLC v. United States, 637 F.3d 1033 (9th Cir. 2011), prior appeal from related case between some of the same parties.

Date: December 16, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that I, counsel for Appellants Paul Grondal and Mill Bay Members Association, Inc., electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 16, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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