No. 20-35694

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington Resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation,
Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.
Defendants-Appellees,

v.

CONFEDERATED TRIBES OF COLVILLE RESERVATION,
Defendant-Appellee,

v.

WAPATO HERITAGE, LLC; and GARY REYES
Defendants-Appellants,

Appeal from the United States District Court
For the Eastern District of Washington
No. 2:09-cv-00018-RMP

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GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
Evans	William Evans, Jr.
Interior	Department of the Interior
IRA	Indian Reorganization Act
MA-8	Moses Allotment Number 8
Mill Bay	Mill Bay Members Association
RV	recreational vehicle
QTA	Quiet Title Act
TEDRA	Trust and Estate Dispute Resolutions Act
Wapato	Wapato Heritage LLC

INTRODUCTION

This case concerns the consequences of an expired business lease (hereinafter, the "Master Lease") that was held by Wapato Heritage, LLC ("Wapato") on Indian trust land in Washington known as Moses Allotment Number 8 ("MA-8"). The United States holds MA-8 in trust for the Indian heirs of the original Indian allottee and for the Confederated Tribes of the Colville Reservation, which acquired its ownership interests from such heirs. Through similar succession and transfer, Wapato (a non-Indian corporation) holds a 23.8% interest in MA-8 in the form of a life estate.

In 1984, with approval from the Bureau of Indian Affairs ("BIA"), the beneficial owners leased MA-8 to William Evans, Jr. ("Evans"), Wapato's predecessor, for the operation of a recreational vehicle ("RV") park. Evans sold camping memberships to RV owners on a "right to use" basis. In a 2004 Settlement with park members, Wapato agreed that the memberships would endure through 2034. But as this Court has already held, Wapato failed to exercise its option to renew the Master Lease for a second 25-year term, and the lease expired on February 2, 2009. *Wapato Heritage, LLC v. U.S.*, 637 F.3d 1033 (9th Cir. 2011). The camping memberships (as licenses under the Master Lease) expired with the lease.

Nonetheless, the RV park members—now organized as the Mill Bay Members Association ("Mill Bay")—refused to relinquish the leasehold. Instead, they filed the present suit alleging their rights to remain in possession of MA-8 through 2034: (1) as third-party beneficiaries under the Master Lease; (2) as a matter of equitable estoppel due to BIA representations regarding the lease's duration; (3) because BIA is bound to a 2004 settlement agreement between Wapato and Mill Bay; and (4) because MA-8 ceased to be trust land decades ago. After more than a decade of litigation, the district court rejected all of these alleged defenses, and granted summary judgment for the United States on its counterclaim for ejectment. For reasons stated herein, that judgment should be affirmed.

JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

Plaintiff Mill Bay asserted claims for injunctive and declaratory relief against the United States, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 1361, and 1367, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. 7-ER_1827-28, 1853-63. Defendant Wapato filed cross-claims against the United States alleging that MA-8 is not Indian trust land. SER_127-135. The district court lacked subject matter jurisdiction over these claims: (1) because Mill Bay does not challenge final agency action under the APA and has not identified any other waiver of sovereign immunity, *see* 1-ER_217-24,

238; and (2) because Wapato's cross-claims are foreclosed by the Quiet Title Act, 28 U.S.C. § 2409a. *See infra*, pp. 55-60. The United States filed a counterclaim against Mill Bay for trespass, seeking damages and ejectment. 7-ER_1774. The district court had jurisdiction over the counterclaim under 28 U.S.C. § 1345.

B. Jurisdiction of the Court of Appeals

The district court issued a memorandum opinion on motions for summary judgment and an order of ejectment on July 9, 2020. *See* 1-ER_33-103. The clerk entered final judgment on July 28, 2020. 1-ER_31. On motion for clarification, the district court certified, under Fed. R. Civ. P. 54(b), that there was no just reason for delay in entering final judgment on the ejectment order. 1-ER_240-45. The clerk issued amended judgments on July 31, 2020, 1-ER_30, and August 18, 2021, 1-ER_29. This court has jurisdiction because the appeal is from a final judgment, 28 U.S.C. § 1291, and is in the nature of an injunction, 28 U.S.C. § 1292(a)(1); *Thompson v. Enomoto*, 815 F.2d 1323, 1326-27 (9th Cir. 1987).

C. Timeliness of appeal

This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(B)(i). Appellants filed a Joint Notice of Appeal on August 7, 2020, 8-ER_1885-1889, that being within 60 days of the district court's July 28, 2020 judgment, 1-ER_31, and July 31, 2020 amended judgment, 1-ER_30.

ISSUES PRESENTED

The issues are whether the district court correctly entered summary judgment on the United States' counterclaim for ejectment:

1. because (a) Mill Bay's members were not intended third-party beneficiaries under a Master Lease provision that protected "subleases" and "subtenancies" from early "termination," and (b) that provision does not apply to lease expiration;

2. because (a) Mill Bay's members cannot assert estoppel against federal officials acting in trust for Indians and (b) Mill Bay has not satisfied the standards for estopping federal officials;

3. because a 2004 state court settlement and judgment—as to which the United States was not a party—does not bind the United States; and

4. because (a) Mill Bay's members may not challenge the trust status of MA-8 as a defense to trespass, or, alternatively (b) if this Court has appellate and subject-matter jurisdiction over the title issue, because MA-8 remains Indian trust land.

STATEMENT OF THE CASE

A. Factual Background

1. Master Lease

The United States allotted MA-8 via a trust patent to Wapato John in 1907. 1-ER_35; *see also infra* pp. 60-72 (allotment history). The allotment includes approximately 175 acres of land on the shores of Lake Chelan, Washington. 1-ER_204. When Wapato John died, the beneficial ownership in MA-8 passed to his heirs and over time it became highly fractionated. 1-ER_35. In 1979, Evans, an heir of Wapato John who then held an approximately 5.4% beneficial interest in MA-8, proposed to lease the allotment from his fellow beneficial owners to enable commercial development. 1-ER_35-36.

Under federal law, the Indian owners of an allotment must obtain BIA approval to issue a lease. 25 U.S.C. § 415(a). Under BIA's leasing regulations, when the ownership of an allotment is fractionated, BIA may approve a lease if a specified majority or supermajority of the Indian owners (varying with the number of owners) consent. 25 C.F.R. § 162.012. In 1982, after garnering the support of approximately 63% of the beneficial owners, Evans sought BIA approval to lease MA-8 for use as a "Recreational Vehicle Park." 5-ER_1301-03. Evans proposed to construct campground facilities and amenities, and to sell memberships on a "Right to Use" basis. 5-ER_1302.

On February 2, 1984, BIA approved a Master Lease of MA-8 on those terms. 5-ER_1128-53. The lease authorized Evans to use MA-8 "exclusively for the purpose of a recreational development," 5-ER_1133, and recognized that portions of the leasehold would be "allocated to recreational vehicles on a 'right to use' basis." 5-ER_1131. The Master Lease had a term of 25 years beginning February 2, 1984, with an option to renew for another 25 years. 5-ER_1130.

2. Mar-Lu sublease and camping memberships

Paragraph 7 of the Master Lease authorized Evans to enter into subleases

> 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 approval will be conclusively presumed.

5 ER_1133 (emphasis added). Shortly after acquiring the Master Lease, Evans subleased most of MA-8 to Mar-Lu Limited Partnership ("Mar-Lu"), a company he controlled. 1-ER_37, 206-07, 5-ER_1206-11. The sublease stated that it would "expire on the date of the expiration of the Master Lease and exercised extension option, if any, whichever be later." 5-ER_1207. BIA approved and signed the sublease. 5-ER_1211; *see also* 5-ER_1204-05.

In August 1984, Mar-Lu commenced a campaign to sell memberships to the planned "Mill Bay Resort." 1-ER_207; 5-ER_1346. For a one-time membership fee (beginning around $5,995) and annual dues, the membership agreements provided purchasers a "contractual license to use" RV spaces and park facilities

(clubhouse, pools, tennis courts, and beaches) from "time to time." 6-ER_1482, 7-ER _1687, 1840. The stated membership term was "coextensive" with the Master Lease's "twenty-five (25) year term" "plus the twenty-five year extension, if elected by Seller." *Id.*; *see also* Ninth Cir. Dkt 27-2 (¶ 13). Evans ultimately constructed 33 RV spaces, 5-ER_1346, 1349, to be shared among members on a "first come first serve" basis. 6-ER_1485; 7-ER_1685. Evans sold approximately 160 regular memberships. 5-ER_1349.

3. Purported Master Lease extension

On January 30, 1985, Evans sent a letter to BIA purporting to exercise his option to extend the lease to February 2, 2034. 5-ER_1329. The Master Lease provided, however: (1) that notice of renewal had to be sent to the "Lessor and the Secretary," (2) that all notices "shall be served by certified mail," and (3) that BIA would "furnish" Evans with the "current names and addresses of Lessor upon . . . request." 5-ER_1130, 1151. Evans did not send notice by certified mail or any notice to the allottee owners. *See Wapato Heritage*, 637 F.3d at 1036. For these reasons, this Court eventually held that the 1985 letter was insufficient to exercise the renewal option. *Id.* at 1040.

BIA did not formally respond to the 1985 letter or offer an opinion on its sufficiency until 2007. 1-ER_38. In the interim, BIA proceeded on the mistaken

assumption (shared with Evans) that the Master Lease had been extended. 1-ER_38.

4. Expanded memberships

Evans originally planned to construct 750 RV spaces to occupy the entire leasehold. 5-ER_1346. In the late 1980s, when that plan proved economically infeasible, Evans proposed to change the development plan by selling up to 24 "expanded memberships" and by adding a 9-hole golf course. 5-ER_1346; *see also* 5-ER_1331.

Paragraph 10 of the Master Lease required Evans to submit a development plan for BIA approval prior to lease approval. *See* 5-ER_1135. The Master Lease prohibited Evans from making any "substantial change" to this plan, or any "other change which adversely affects lessor's potential income," without BIA consent. *Id.* The "conceptual change" to sell expanded memberships substantially reduced the overall number of RV spaces, 5-ER_1331, 1346, thus implicating rent owed to the lessors, which was calculated, in part, on the number of memberships. 5-ER_1331; s*ee also* 5-ER_1131. Accordingly, Evans sought BIA's approval for this modification to the development plan. 5-ER_1331, 1346-47

On July 7, 1989, BIA sent Evans a letter requesting additional information on the proposed golf course, and stating that "the modification in accordance with" the expanded membership agreements "has been reviewed and permission will be

granted to incorporate into the lease." 5-ER_1342. On July 30, 1990, BIA formally approved the modification of the "original development plan." 5-ER_1344. Evans did not apply in writing for BIA approval of the expanded membership agreements as "subleases," *see* 5-ER_1346-47 (modification requests), and BIA did not sign or approve the expanded membership agreements. *See* 5-ER_1333-1340; 6-ER_1472; 7-ER_1690-96.

In 1991, Evans began selling expanded memberships under agreements like those for the original memberships. *See* 5-ER_1333-1340, 7-ER_1837. But for a higher initial fee ($25,000), purchasers received a dedicated RV space for their "exclusive[]" use, under "posted rules" to be promulgated by the "Seller," including rules concerning the "length of season for use." 5-ER_1336-37. Evans adopted rules that: (1) limited expanded members to "83 days during each stay," (2) required those members to "vacate [their] campsite[s] for a period of 7 days before they may again occupy," and (3) specified that "no permanent occupancy shall be permitted." 1-ER_22. Like the regular memberships, the expanded memberships expressly provided "only a contractual license to use such facilities as may be provided by Seller from time to time." 5-ER_1339. The expanded memberships stated a term "coextensive with the fifty (50) year term commencing February 2, 1984, of Seller's lease for the Mill Bay property." 5-ER_1339. Evans ultimately sold 23 expanded memberships. 5-ER_1183, 1349.

5. Subleases

Evans sought two subleases in addition to the Mar-Lu sublease. In August 1993, Evans sought to sublease a five-acre portion of the leasehold to the Colville Tribal Enterprise Corporation for use as a tribal casino. *See* 5-ER_1214-1234, 1349. BIA signed and approved this sublease. 5-ER_1213, 1234. In 1996, Evans sought to sublease a small strip of land to an adjacent landowner for use as a front yard. 5-ER_1237-45. BIA also signed and approved this sublease. 5-ER_1245. In both cases, the subleases represented (mistakenly) that the Master Lease had been renewed, and that the sublease would endure through February 2, 2034. 5-ER_1215, 1238.

Paragraph 8 of the Master Lease provided certain protections for sublessees, through assignment of subleases to the Lessor in the event of lease "termination, . . . by cancellation or otherwise." 5-ER_1134. As part of this provision, the Master Lease required Evans (and subsequently Wapato) to "send to Lessor" an annual "list of sublessees together with their addresses." 5-ER_1134. There is no evidence that Evans or Wapato ever sent the allottee owners/lessors a list of all persons holding camping memberships.

6. 2004 Settlement

In 2001, citing financial losses, Evans notified the RV park members that he was considering closing the park. 1-ER-209. In November 2002, Plaintiff Paul

Grondal and other RV park members (who would later form Mill Bay) filed a class action suit against Wapato in Chelan County court, seeking injunctive relief to prevent the threatened park closure. 5-ER_1158; 6-ER_1554. In September 2003, Evans died and his business assets eventually passed to Wapato (which Evans founded). *Id.* Wapato now holds a 23.8% life estate in MA-8, measured by the life of Evans's last surviving great-grandchild, with the reversionary interest held by the Confederated Tribes. 1-ER_209, n. 3, 7-ER_1847-48 (¶ 137); SER_51-52 (Evans's Will).

After Evans's death, Mill Bay's suit proceeded against his estate and beneficiaries, and Evans's personal representative invoked mediation procedures under Washington's Trust and Estate Dispute Resolutions Act. *See* 6-ER_1555-56; *see also* Wash. Rev. Code § 11.96A.300. In September 2004, Mill Bay, the estate, and Wapato reached a mediated settlement ("2004 Settlement"). *See* 5-ER_1155-72. In the 2004 Settlement, Mill Bay agreed to pay increased "rents" (in place of annual membership fees) for "use of the Park" through 2034. 5-ER_1162-63. In exchange, Wapato agreed to allow Mill Bay "continued use" of the park through 2034, "[s]ubject to the . . . terms of their Membership agreements and the Master Lease with the BIA." 5-ER_1164.

The 2004 Settlement was filed with the county court and served on interested parties to the estate, as well as members of the plaintiff class (who held

camping memberships). 6-ER_1557, 1559. One interested party (Evans's daughter) filed an objection. 6-ER_1531-1550. In November 2004, the court approved the settlement. 6-ER_1551-61. The United States was not a party to the litigation or settlement. *See* 6-ER_1698. Although BIA officials were invited to participate and attended some mediation sessions, they did not actively participate and did not pre-approve or endorse the terms of the settlement. *See* 3-ER_699-700; 3-ER_713-14; 3-ER_727-730; 6-ER_1508; 7-ER_1712.

7. Wapato's effort to acquire a 99-year lease

Under the Master Lease, Wapato (as successor to Evans) owed annual rent to the beneficial owners comprised of an inflation-adjusted "base rent" starting at $12,000, a "ground rent" relating to the number of memberships, and a "percentage rent" based on cash receipts excluding retail sales. 5-ER_1131; *see also* SER_64, 69.[1] In February 2005, after receiving its first payments from Mill Bay under the 2004 Settlement, Wapato sent rent checks to BIA, for distribution to the allottee owners, totaling $23,478.69. *See* 5-ER_1094-1102. Wapato represented that the checks constituted 50% of the rent due in 2004 and 2005, and that the "balance" would be "mailed upon receipt" of the allottees' "vote per the proposed MA-8 development." 6-ER_1571-73, 1576.

[1] The Master Lease also guaranteed a "minimum" rent, rising to $70,000 per year in the lease's seventh year, if such amount was greater than the calculated rent. 5-ER_1131-32.

This statement referred to a new proposal by Wapato to use the unoccupied portion of MA-8 for a residential development. 6-ER_1577, 1581; *see also* 7-ER_1651. To enable this development, Wapato needed the support of the allottees and Congressional authorization for a 99-year ground lease. 6-ER_1577. At an April 2008 meeting, the allottee owners complained to BIA that their rental payments were being "held hostage" to garner the owners' support for the proposed development. 6-ER_1587. Wapato representatives responded that the balance of the rent would be released immediately. *Id.*

In 2006, Congress amended the federal leasing statute to enable 99-year leases on MA-8. Pub. L. 110-453, title II, § 202(a)(5), 120 Stat. 3339, 340 (amending 25 U.S.C. § 415(a)). But the allottee owners never accepted and BIA never approved a 99-year lease to Wapato. *See* 1-ER_211, 226-27.

8. Notification of need to renew the Master Lease.

In October 2006, one of the allottee owners of MA-8 wrote BIA asking whether the owners' consent would be obtained for renewal of the Master Lease, and whether BIA had already determined that the renewal option had been exercised. 4-ER_1031-3; *see also* 1-ER_212. Thereafter, BIA undertook an internal review of these and other questions of lease compliance. 7-ER_1608.

On November 30, 2007, BIA wrote to alert Wapato of its determination that the lease renewal option had not been exercised. *Id.* BIA explained that Evans

"purported to exercise" the option in the 1985 letter, but that BIA had no record of Evans notifying the allottee owners as required by the Master Lease. *Id.* BIA concluded:

> As a consequence, it is now our position that *Lessee's option to renew has not been exercised effectively to date*. If your records indicate otherwise please provide us with copies as soon as possible.

Id. At this time, there were two months remaining within which Wapato could have renewed the Master Lease, merely by providing written notice by certified mail to the landowners. *See* 5-ER_1130, 1151.

9. Master Lease expiration.

Instead of taking steps to exercise the renewal option, Wapato sent a letter to BIA disagreeing with BIA's lease interpretation and arguing that BIA was bound to the statement in the Confederated Tribes' sublease that the Master Lease already had been extended to 2034. 7-ER_1616-17. In August 2008, after the deadline for renewal passed, BIA reiterated its determination that the Master Lease had not been renewed and notified Wapato that the lease would now expire in February 2009. *See Wapato Heritage*, 637 F.3d at 1036. Wapato promptly filed suit in federal district court to challenge BIA's action. *Id.* The district court upheld BIA's interpretation and this Court affirmed. *Id.* at 1040.

B. Course of proceedings.

1. Complaint and counterclaim

In the meantime, in January 2009, Mill Bay filed the present action. 7-ER_1820. Mill Bay asserted its members' right to remain on the leasehold through 2034—even if Wapato had failed to renew its leasehold—based on: (1) "estoppel," (2) "waiver and laches," (3) contract "modification," (4) BIA's alleged "arbitrary and capricious" conduct, and (5) the alleged lack of an "adequate compensatory remedy" for an alleged Fifth Amendment taking that would occur if Mill Bay's possessory rights were denied. 7-ER_1853-59. Mill Bay named as defendants BIA, the Department of the Interior ("Interior"), and the United States, as well as all beneficial owners of MA-8, including Wapato, the Confederated Tribes, and individual Indian allottees.[2] 7-ER_1826-27.

The United States filed a trespass counterclaim, seeking an order of ejectment and damages for Mill Bay's refusal to relinquish possession. 7-ER_1774-75. Under BIA regulations, the United States "may take action to recover possession on behalf of the Indian landowners," unless a specified majority or supermajority of landowners (depending on the number of owners) "have notified [BIA] in writing that they are engaged in good faith negotiations with [a]

[2] Defedant/Appellant Gary Reyes owned a beneficial interest in MA-8 when Mill Bay's suit was filed. He subsequently sold his interest. 1-ER_96, n.10.

holdover lessee to obtain a new lease." 25 C.F.R. § 162.471; *see also id.* §§ 162.012, 162.023.

2. Judge Quackenbush's 2010 summary judgment ruling

In 2010, on cross motions for summary judgment, the district court (Judge Quackenbush) granted partial summary judgment for the United States and dismissed all of Mill Bay's claims. 1-ER_217-24, 238. The court held that it lacked subject matter jurisdiction over Mill Bay's affirmative claims because Mill Bay alleged no final action under the APA, 5 U.S.C. § 702, and because there was no applicable waiver of sovereign immunity. 1-ER_217-24. But the court addressed Mill Bay's first three claims as affirmative defenses to the United States' trespass counterclaim. 1-ER_227-38.

As pertinent here, the court rejected Mill Bay's defense that the camping memberships were "subleases" protected from termination under Paragraph 8 of the Master Lease. 1-ER_228-31. The court determined that the memberships were licenses, not subleases, 1-ER_228-29, and that Paragraph 8 did not apply to the lease's natural "expiration," 1-ER_229-30. The court also rejected Mill Bay's arguments that 2004 Settlement modified the Master Lease and was binding on the United States or other defendants as a matter of collateral estoppel. 1-ER_231-32, 234-35.

The district court withheld summary judgment on the United States' trespass claim and Mill Bay's equitable estoppel defense. 1-ER_236-38. While observing that estoppel will "rarely work against the government," the court determined that the "unique" circumstances of this case merited "further consideration," and that the trespass action was potentially "premature." 1-ER_225-27, 238. The court cited BIA's leasing regulations that generally require BIA to look to the Indian landowners' desires before initiating a trespass proceeding. 1-ER_225. The court found no specific evidence that BIA had consulted with the beneficial owners and observed that Wapato's proposal for a 99-year lease remained outstanding. 1-ER_226-27. The court declined to resolve the trespass claims while the desires of the beneficial owners remained unclear. 1-ER_238.

3. Wapato's cross-claims

Following Judge Quackenbush's summary judgment ruling, Defendant Wapato filed an answer and cross-complaint against the federal defendants. SER_104-145. In its cross-claims, Wapato asserted for the first time that MA-8 is not Indian trust property. SER_123-241 (¶¶ 235-36). Wapato asked the court to quiet fee title in the allottee owners and to enter an order of partition. SER_127-30, 132-33.

4. Allottee representation issues

The United States renewed its motion for summary judgment on the trespass claim in 2012. *See* 1-ER_50. In light of Wapato's belated challenge to the trust status of MA-8, and because many of the allottee defendants had failed to appear through counsel, the district court became concerned about the adequacy of the United States' representation of allottees and whether the allottees were entitled to separate representation at the United States' expense. *See generally* 1-ER_53-54. The court deferred resolving the merits of the ejectment claim pending resolution of these issues. *Id.* In 2016, allottees who sought and obtained separate representation moved to join the United States' summary judgment motion on ejectment. SER_77-79.

5. Judge Peterson's summary judgment ruling

In September 2019, the case was transferred from Judge Quackenbush to Judge Peterson. 1-ER_54. Judge Peterson revisited the issue of attorney representation and in April 2020 issued an order holding that the United States is not required to ensure independent counsel for all allottees. 1-ER_104-112. Defendant Wapato and Defendant Gary Reyes filed an interlocutory appeal from that order, which is separately pending before this Court. *See Grondal v. United States*, Ninth Cir. No. 20-35357.

On July 9, 2020, Judge Peterson issued an opinion and order granting the United States' renewed motion for summary judgment on ejectment. 1-ER_33-103. The court accepted Mill Bay's view that the trust status of MA-8 is relevant for determining the United States' "standing" to prosecute the trespass claim. 1-ER_53, 56, 82. But the court determined that Mill Bay is judicially estopped from denying MA-8's trust status, having asserted the opposite view in earlier pleadings. 1-ER_56-59. And the court held that MA-8 remains trust land in any event. 1-ER_59-82.

On the merits of the ejectment claim, the court determined that there is no genuine factual dispute: (1) that Mill Bay lacks legal authority to possess MA-8, (2) that Mill Bay and Wapato are not engaged in good faith negotiations with the allottee owners over a new lease; and (3) that the ejectment is in accordance with BIA regulations, 25 C.F.R. §§ 162.012, 162.471. 1-ER_91-98. The court then rejected Mill Bay's remaining affirmative defenses, 1-ER_98-104, holding, as pertinent here, that "equitable estoppel does not apply to the Government when it acts in its sovereign capacity as trustee for Indian land." 1-ER_98-99 (citing *United States v. City of Tacoma, Wash.*, 332 F.3d 574 (9th Cir. 2003)).

The district court entered final judgment on the ejectment claim, finding no "just reason for delay." 1-ER_29-30 (citing Fed. R. Civ. P. 54(b)). Since the filing of the present appeal, the court has dismissed or granted summary judgment on all

remaining claims (without entry of final judgment), except the United States' claim for trespass damages, which was tried on March 30-31, 2021.

SUMMARY OF ARGUMENT

1. The district court correctly held that Mill Bay's members lack contractual rights to remain on MA-8. Under Master Lease Paragraph 8, "termination" of the lease by cancellation or otherwise would not have cancelled "subleases," but instead would have assigned them to the "Lessor" (beneficial owners). But Evans sold camping memberships that were "contractual license[s] to use" park facilities, not subleases. And Evans did not seek BIA approval of the membership agreements as required for subleases under Master Lease Paragraph 7. Whether the parties to the Master Lease intended to provide enforceable third-party rights to campground members is a question of contractual intent. The parties plainly did not intend Paragraph 8 to cover agreements that the parties did not treat as subleases under Paragraph 7. As required by Paragraph 10 of the Master Lease, Evans sought and BIA approved changes to the leasehold development plan associated with the expanded memberships. But Evans did not seek approval of the expanded membership agreements per se, and BIA did not review or approve them as subleases. Similarly, BIA did not approve the 2004 Settlement as a "sublease" or in any other fashion.

Moreover, Paragraph 8 of the Master Lease only protected subleases from early termination, not from lease expiration. Paragraph 7 of the Master Lease specifically prohibited Evans and Wapato from issuing subleases "extending beyond the life of this lease." Paragraph 8 of the Master Lease cannot be construed as protecting subleases with fixed terms longer than the Master Lease (if not contingent on lease renewal) without contradicting Paragraph 7. BIA's authority to approve subleases (with the consent of the beneficial owner/lessors) did not include authority to modify the Master Lease or to nullify lease renewal requirements.

2. The district court also correctly held that Mill Bay's members lack equitable rights to remain on MA-8. This Court has held that equitable estoppel does not apply to preclude the United States from correcting a mistaken legal interpretation in carrying out trust responsibilities for Indians, notwithstanding detrimental reliance by third parties. This Court has also held that equitable estoppel does not apply against the United States generally, absent evidence of "affirmative misconduct" and then only to prevent "serious injustice" and only if there would not be "undue damage" to the public interest. Under either set of precedents, Mill Bay's arguments fail.

The record demonstrates, at most, that BIA mistakenly assumed that Evans's 1985 letter was sufficient for lease renewal and that BIA initially failed to exercise

diligence in notifying Evans (and Wapato) that the letter was insufficient. It is undisputed that BIA eventually provided such notice to Wapato, in time for Wapato to exercise the renewal option in the manner prescribed by the Master Lease. Although BIA did not likewise notify Mill Bay, BIA had no contractual relationship with Mill Bay and Mill Bay did not hold the renewal option (Wapato did). BIA's trust obligation was and is to the beneficial owners.

Mill Bay's efforts to apply equitable estoppel against the beneficial owners of MA-8 also fails. Mill Bay does not contend that the United States' ejectment action is contrary to the actual wishes of MA-8's beneficial owners or to BIA regulations. Rather, Mill Bay argues that BIA must carry out its trust authorities on the understanding, allegedly compelled by estoppel, that "100 percent" of the beneficial owners consent to Mill Bay's continuing possession of the RV park. But the beneficial owners' made no representations on lease renewal and took no action that were not influenced by BIA's lease administration. For reasons stated, equitable estoppel does not preclude BIA from correcting its own prior mistaken lease interpretation.

3. The district court also correctly rejected Mill Bay's res judicata defense. Mill Bay argues that the 2004 Settlement decided the issue of lease renewal, and that res judicata or collateral estoppel bars BIA from "re-litigating" that issue. But BIA was not a party to the 2004 Settlement, and due to federal

sovereign immunity, could not be compelled to join the state-court litigation. Moreover, the terms of the 2004 settlement are perfectly consistent with the understanding that Wapato would subsequently exercise its renewal option in the manner prescribed by the Master Lease. The issue of lease renewal was not ripe for decision at the time of the 2004 Settlement and was not actually decided until this Court's decision in *Wapato Heritage*. Collateral estoppel precludes Mill Bay, as Wapato's licensee, from re-litigating that adverse decision against Wapato.

4. Finally, the district court correctly held that Mill Bay may not challenge the trust status of MA-8 as a defense to its trespass. While the court mistakenly accepted Mill Bay's premise—that MA-8's status is relevant for determining the United States' standing to eject—the court reached the correct result. Federal law gives BIA standing to initiate ejectment on behalf of allottee owners and BIA's regulatory and administrative determinations are entitled to a presumption of regularity. A holdover licensee or tenant who does not claim any possessory rights except those granted in a lease may not challenge the lessor's title in an action for ejectment. Mill Bay's standing argument is an improper collateral attack on the United States' trust title and on the beneficial owners' rights to hold the land in trust status.

Nor may Wapato—in its capacity as a partial owner—challenge the United States' trust title in MA-8. The exclusive means to quiet title in property claimed

by the United States is an action under the Quiet Title Act, 28 U.S.C. § 2409a. The QTA does not apply to "trust or restricted Indian lands" and any action under the QTA is barred unless commenced within 12 years of when the plaintiff first knew or should have known of the United States' claims. Wapato's claims are not permitted under the QTA and have long-since been time barred.

Alternatively, if the Court determines that it has jurisdiction to reach the title issue, it should affirm the district court's conclusion that MA-8 remains in trust status. The trust period on MA-8 was extended by two executive orders up to and through the 1934 enactment of the Indian Reorganization Act ("IRA"). The IRA as amended, and multiple executive orders following the IRA, extended the trust period for MA-8 up to and through the present. There is no merit to Wapato's argument that MA-8 is a "public domain" allotment and not "Indian land" for purposes of the IRA trust extensions. MA-8 was allotted from the Columbia Reservation, not the public domain. If there is any ambiguity in the statutory terms, BIA's longstanding regulatory determination (classifying MA-8 as "Indian land") is entitled to deference.

ARGUMENT

I. Mill Bay lacks any contractual right to remain on MA-8.

A. Standard of Review

This court reviews grants of summary judgment de novo, *A.G. v. Paradise Valley Unified School Dist. No. 69*, 815 F.3d 1195, 1202 (9th Cir. 2016), and reviews contract interpretation de novo, *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016).

B. The camping memberships did not outlive the Master Lease.

Paragraph 8 of the Master Lease states, in relevant part, that:

> 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.

5-ER_1134. Mill Bay argues (Brief at 22-34) that the camping memberships were "subleases" or "subtenancies" and that the Master Lease's expiration (without renewal) constituted an "termination" for purposes of Paragraph 8. On this view, Mill Bay reasons that camping memberships were not voided by the natural expiration of the Master Lease, but instead were assigned to the allottee owners and must be honored through February 2034, as though the Master Lease had been extended. The district court correctly rejected these arguments for two reasons:

(1) the camping memberships are not subleases; and (2) the Master Lease did not intend any subleases to survive lease expiration. *See* 1-ER_228-230.

1. The camping memberships are not subleases.

The Master Lease anticipated, based on Evans's development plan, that Evans would sell camping memberships on a "right to use" basis. 5-ER 1131. Consistent with this expectation, Evans drafted membership agreements that provided "only a contractual right to use" park facilities. Ninth Cir. Dkt 27-2 (¶¶ 4, 13); 5-ER_1339. The vast majority of Mill Bay members (the regular members) shared a limited number of RV spaces on a "first come first serve" basis, under rules limiting stays to 14 days at a time. 7-ER_1683, 1685.

In the proceedings below, Mill Bay never claimed that the regular memberships were subleases. 1-ER_229. For that reason alone, Mill Bay's argument concerning regular memberships (Brief at 26-27) is forfeited. *Davidson v. O'Reilly Auto Enterprises*, 968 F.3d 955, 966 (9th Cir. 2020). In any event, the regular memberships could not have outlived the Master Lease even if Paragraph 8 applied, because they were expressly limited to the Master Lease's initial 25-year term, unless the "Seller" "elected" to renew. *See* Brief at 6 (quoting Ninth Cir. Dkt 27-2 (¶ 13)). It is undisputed that Evans failed to "elect" renewal in the manner prescribed by the Master Lease. *Wapato Heritage*, 637 F.3d at 1040.

Mill Bay's argument thus hinges on the expanded memberships, which stated a term "coextensive with the fifty (50) year term" of the Master Lease, 5-ER_1339, and which provided exclusive use of an assigned space. 5-ER_1336. Mill Bay contends that Washington law governs and requires this Court to look to the "nature" of the memberships, rather than "the name that the parties gave" them. *See* Brief at 23 (citing *Draper Machine Works, Inc. v. Department of Natural Resources*, 117 Wash.2d 306, 319, 815 P.2d 770, 778 (Wash. 1991)).

As a threshold matter, however, Mill Bay errs in arguing (Brief at 20-21) that Washington law governs its contract claims. Although federal courts look to state common law when there is no conflict with federal interests, the interpretation of federal contracts is a matter of federal law. *See U.S. Postal Service v. Ester*, 836 F.3d 1189, 1195 (9th Cir. 2016); *GECMC 2005-C1 Plummer Street Office L.P. v. JPMorgan Chase Bank, NA*, 671 F.3d 1027, 1032 (9th Cir. 2012). Here, BIA officials approved the Master Lease under federal statutes and leasing regulations governing federal trust lands. *Wapato Heritage*, 637 F.3d at 1035; *see also* 5-ER_1128 (Master lease) (citing federal law). This Court has already determined that federal law controls its interpretation. *Id.* at 1039; *see also* 25 C.F.R. § 162.014(a)(3) (BIA-approved leases of Indian trust land are "not subject to State law" unless federal or tribal law expressly makes State law applicable).

More to the point, Mill Bay relies on the wrong Washington law. In *Draper Machine Works,* the Washington Supreme Court held that a purported "lease" of tidelands was valid—notwithstanding law prohibiting the leasing of tidelands—because the contract met state-law requirements for a "permit." *Id.* at 319, 815 P.2d at 777-78. The relevant issue was whether the "lease" could qualify as a "permit" under the relevant state statutes, even though the parties called it a "lease." *Id.* Similarly, in *City of Tacoma v. Smith* (cited in Mill Bay's Brief at 26), the Washington Supreme Court addressed contracts mostly denominated "leases" and "subleases," which granted exclusive use of boat slips at marinas. 50 Wash. App. 717, 772, 250 P.2d 647, 651 (1988). The Court held that they constituted leases for purposes of a City tax law, even though the agreements (unlike most leases) permitted the marina owner to change possession to another berth. *Id.*

In contrast, the issue here is not whether the membership agreements constituted "subleases" for purposes of any Washington law regulating subleases. Mill Bay identifies no Washington law that requires lessors to honor subtenant rights in the event of lease termination. Rather, Mill Bay relies solely on contractual protections allegedly provided to third parties under the Master Lease. Accordingly, the relevant Washington law—to the extent it might be borrowed as a matter of federal common law—is law governing the construction of contracts as to alleged third-party rights.

On this point, there is no material difference between federal and state law. Under federal law, a federal contract will not be construed to grant third-party rights absent a clear intent to do so. *GECCMC*, 671 F.3d at 1033. Likewise, under Washington law, it is not enough that a contract evidence an intent to benefit third parties. *Lonsdale v. Chesterfield*, 99 Wash.2d 353, 360-61, 662 P.2d 385, 389-90 (Wash. 1983). To be enforceable by third parties, the contract must demonstrate an intent to provide an enforceable obligation to them. *Id.*

Here, the Master Lease evidences no intent to honor the membership agreements upon lease termination. Under fundamental principles of contract interpretation, the Master Lease must be construed as a whole. *Shultz v. England*, 106 F.2d 764, 768 (9th Cir. 1939); *Stender v. Twin City Foods, Inc.,* 82 Wash.2d 250, 254, 510 P.2d 221, 224 (Wash. 1973). The provision of paragraph 8 that obligates the Lessor to honor "subleases" upon the "termination" of the Master Lease, 5-ER_1134, immediately follows Paragraph 7 of the Lease, which allowed Evans to issue subleases only upon "written application" and "written approval of the Secretary of the Interior or his authorized representative." 5-ER_1133. Plainly, Paragraph 8 protects only those subleases and subtenancies that BIA expressly approved in accordance with Paragraph 7. This is so because the Master Lease cannot reasonably be construed as intending to protect subleases that the Lease

does not allow. *See generally GECCMC*, 671 F.3d at 1033; *Lonsdale*, 99 Wash.2d at 360-61, 662 P.2d at 389-90.

BIA expressly approved several subleases under the Master Lease. 5-ER_1211, 1213, 1234. But Evans drafted the membership agreements to be "contractual license[s]" only, and Evans did not ask BIA to approve the terms of these agreements. *See* Ninth Cir. Dkt 27-2 (¶ 13); 5-ER_1339. Nor did Evans provide BIA with annual lists of RV park members, as Evans was required to do for sublessees. 5-ER_1134. In arguing that BIA approved the expanded membership agreements and thereby "modified" the Master Lease (Brief at 7, 21), Mill Bay confuses sublease approval, 5-ER_1133 (Master Lease ¶ 7), with Evans's obligation to obtain BIA consent to changes to the development plan. *See* 5-ER_1135-36 (Master Lease ¶ 10).

As the district court explained (1 E.R. 208), Evans needed and sought BIA's approval to modify the *development plan* in accordance with the expanded membership agreements. *See* 5-ER_1346-47. In approving such "modification," BIA did not approve the expanded membership agreements themselves, or incorporate their terms into the Master Lease. *See* 5-ER_1342; *see also* 6-ER_1435. Indeed, while the Master Lease enabled BIA to consent to changes to the development plan, 5-ER_1136 (¶ 10), and to approve subleases, *see* 5-ER_1133 (¶ 7), no provision of the Master Lease authorized BIA to modify or

amend the lease without consent of the allottee owners. *See* 5-ER_1128-53; *see also* 25 C.F.R. § 162.445.

At bottom, the parties to the Master Lease were free to determine whether to extend contractual protections to subtenants and who would qualify. *See GECCMC*, 671 F.3d at 1033; *Lonsdale*, 99 Wash.2d at 360-61, 662 P.2d at 389-90. In this context, the parties' intent to treat the membership agreements as "contractual licenses" is dispositive, even if the agreements arguably might be construed as "subleases" under some other provisions of Washington law. *Cf. City of Tacoma*, 50 Wash. App. at 772, 250 P.2d at 651.[3]

2. Paragraph 8 does not apply to lease expiration.

Paragraph 8 also does not apply to lease expiration. As the district court recognized, natural "expiration" is different in kind from "termination" due to "cancellation," default, or other similar causes. *See* 1-ER_230-31. Interpreting Paragraph 8 as applying to expiration would contradict the plain language of Paragraph 7 that "[n]o part of the premises shall be subleased for a period extending beyond the life of this Lease" and "all subleasings shall be made expressly subject to the terms of this lease." 5-ER_1133. These clauses unambiguously express the parties' intent to limit subleases to the "life of [the]

[3] Mill Bay's argument (Brief at 35, n.14) that the licenses were "irrevocable" is beside the point. Evans could not grant licenses that extended beyond the life of the Master Lease, and Mill Bay's members had no contract with MA-8's owners.

lease." *Id.* Given such intent, Paragraph 8 cannot reasonably be construed as protecting agreements that fail to meet the terms of Paragraph 7.

Mill Bay postulates (Brief at 29-30) that "life of this lease" must mean the "full potential 50-year term" because the alternative interpretation (limiting "life of this lease" to the 25-year term if the renewal option is not exercised) would "contradict" Paragraph 8, which dictates that subleases may extend beyond "termination." But Paragraph 8 easily stands on its own as protection for subleases in the event of early "termination" for "cancellation" and other similar reasons. *See* 5-ER_1134. The supposed contradiction exists only if one assumes (incorrectly) that the purpose of Paragraph 8 was to protect sublessees from the Lessee's failure to exercise the lease renewal option.

That assumption is improper because it contradicts the basic rule that lessees cannot sublease rights that they do not hold. With BIA approval, Evans and Wapato were free to grant subleases with extended terms contingent on Master Lease renewal, and they could have assigned the renewal option to a sublessee to exercise. But they had no power to grant rights to remain on the leasehold in the event of a failure to exercise the option, because they did not possess such a right. Nor could BIA approve a sublease that provided such a right. Any such sublease would nullify the renewal requirements and thus modify the terms of the Master Lease. Neither Evans (as lessee) nor BIA (as trustee) had authority—through

subleasing or sublease approval—to *modify* the terms of the lease, including the renewal requirements.

C. The 2004 Settlement did not modify the lease.

Mill Bay's argument (Brief at 27-29) that the 2004 Settlement "modified" the Master Lease and "created sub-tenancies" fails for similar reasons. First, BIA was not a party to the 2004 Settlement. The 2004 Settlement resolved a dispute between Mill Bay's members and Wapato (as well as Evans's estate) over rights under the camping memberships. 5-ER_1158. Although BIA officials were invited to attend mediation sessions and participated to a limited degree, they did not formally review or approve the settlement. 5-ER_1171-72; 1-ER_42; 1-ER 210.

Second, BIA's lack of objection following notice of the 2004 Settlement did not make the settlement a "sublease." Mill Bay relies on the provision of Paragraph 7 stating that BIA's approval of a sublease "will be conclusively presumed" in the absence of written "approval or rejection . . . within thirty (30) days of a written application" for approval. Brief at 27-28 (quoting 5-ER_1133). Notice of a proposed settlement plainly is not a "written application" for approval of a sublease.

Third, even if the 2004 Settlement had been submitted for BIA approval as a sublease modification, BIA's inaction could not have resulted in a *modification* of the Master Lease. As just explained (*supra*), the authority to approve subleases is

not authority to amend the lease. Under the express terms of the Master Lease, Evans could not issue, nor could BIA approve, subleases for a "period extending beyond the life" of the Master Lease. *See* 5-ER_1133.

Fourth and finally, *nothing in the 2004 Settlement contradicted the Master Lease*. To be sure, in the 2004 Settlement, Wapato agreed to allow Mill Bay members to occupy the RV park through 2034. But the 2004 Settlement was reached years before the deadline for Master Lease renewal. And it was common knowledge that Wapato held an option to renew without need for further consent from BIA or the beneficial owners. 3-ER_715; *see also* 5-ER_1130 (renewal provision). In other words, BIA had no reason to object to the settlement provision allowing the RV park to remain open through 2034. This commitment was within Wapato's rights under the Master Lease. To fulfill the commitment, Wapato needed only to exercise the renewal option in the manner prescribed by the Master Lease. 5-ER-1130, 1151.

II. Mill Bay members lacked an equitable right to remain on MA-8

A. Standard of Review

The district court's rejection of Mill Bay's equitable-estoppel defense is reviewed for abuse of discretion. *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2010); *Hoefler v. Babbitt*, 139 F.3d 726, 727 (9th Cir. 1998). Whether the district court correctly determined the law of estoppel is

reviewed de novo. *Cf. Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244-45 (9th Cir. 2021).

B. The district court did not abuse its discretion in rejecting Mill Bay's equitable estoppel defense.

In *United States v. City of Tacoma*, this Court stated categorically that "when the government acts as trustee for an Indian tribe, it is not at all subject to [the] defense" of equitable estoppel. 332 F.3d 574, 581-82 (9th 2003) (citing *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956); *Cramer v. United States*, 261 U.S. 219, 234 (1923); *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995)). Invoking *City of Tacoma*, the district court summarily rejected Mill Bay's estoppel defense. 1-ER_98. Mill Bay now argues: (1) that there should not be a categorical prohibition on applying equitable estoppel in all cases where the United States acts as trustee for Indians, *see* Brief at 43-46; and (2) that the elements for applying equitable estoppel against BIA are otherwise "more than satisfied," *id.* at 37-42. Mill Bay is mistaken on both points. Even if equitable estoppel conceivably might apply against the government in a different case involving Indian trust authorities, *City of Tacoma* controls the facts of this case. And Mill Bay has not alleged evidence satisfying the heightened requirements for applying estoppel against federal officials.

1. *City of Tacoma* controls.

Like this case, *City of Tacoma* involved an action by the United States to recover title or possession of Indian allotments. 332 F.3d at 575-78. In particular, in the early 1920s, the City of Tacoma, Washington initiated state-court condemnation proceedings to acquire easements across five Indian allotments. 332 F.3d at 576. Citing 25 U.S.C. § 357, which allows Indian allotments to be condemned under state law "in the same manner" as lands held in fee, federal officials determined that the condemnations were lawful and assisted the City in obtaining possession. *City of Tacoma*, 332 F.3d at 577. The Supreme Court subsequently held that § 357 applies only to federal court proceedings where the United States is joined as a party. *Id.* at 580 (citing *Minnesota v. United States*, 305 U.S. 382, 389 (1939)). Decades later, relying on *Minnesota*, the United States sued on behalf of the allottee owners to void the state-court condemnations. *Id.* at 578. This Court held that *Minnesota* applied retroactively and that the United States could not be equitably estopped from reclaiming full title. *Id.* at 579-82.

The facts of the present case are indistinguishable from those of *City of Tacoma* for estoppel purposes. First, as in *City of Tacoma*, BIA officials here mistakenly believed and represented that possessory rights had been created on an Indian allotment via an invalid transaction (here, the flawed attempt to renew the Master lease). Second, as in *City of Tacoma*, BIA's mistaken representations are

alleged to have created reliance interests. Here, Mill Bay members allege (Brief at 2) that they paid increased fees and made improvements within the RV Park in reliance on the representations that the Master Lease expired in 2034. In *City of Tacoma*, the City paid just compensation and constructed a hydroelectric power plant on the condemned easements. 332 F.3d at 576. Third, in both cases, this Court ultimately voided the possessory interests that federal officials originally thought existed, setting the stage for the trespass actions. *See City of Takoma*, 332 F.3d at 579-82 (citing *Minnesota*, 305 U.S. at 389); *Wapato Heritage*, 637 F.3d at 1040.

The only significant difference between this case and *City of Tacoma* is BIA's *timely* notification to Wapato that the Master Lease had not been properly renewed, thereby providing it with the opportunity (which it did not take) to avoid any injury to itself and its licensees. 7-ER_1608. In *City of Tacoma*, the City had no similar opportunity. *See* 332 F.3d at 586 (Ferguson, J., dissenting) (noting that City took "every reasonable effort to comply with the law"). Yet this Court nonetheless determined that the City had no equitable estoppel defense. *Id.* at 579-82. As the district court correctly held (1-ER_98-99), because equitable estoppel did not apply in *City of Tacoma*, it cannot apply here.

2. Mill Bay has not satisfied the heightened standard for estopping the government.

In any event, Mill Bay has failed to allege or proffer facts sufficient to support equitable estoppel under this Court's general precedents concerning estopping the government. The four "traditional" elements of estoppel are: (1) the party to be estopped must "know the facts" and (2) must act in a manner that is reasonably construed as intending to induce reliance; and (3) the party asserting estoppel must be "ignorant of the true facts" and (4) must detrimentally rely on the former party's conduct. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011). A party asserting estoppel against the government must also show: (1) that federal officials "engaged in affirmative misconduct going beyond mere negligence," (2) that such misconduct "will cause a serious injustice," and (3) that applying estoppel will not cause "undue damage" to the public interest. *Id.*; *see also Watkins v. United States Army,* 875 F.2d 699, 706-08 (9th Cir.1989) (en banc); *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978). Setting aside the traditional elements, Mill Bay has not alleged or proffered facts sufficient to meet the heightened standard for estopping the government.

a. Mill Bay has not shown affirmative misconduct.

Most significantly, Mill Bay does not allege or proffer any evidence of "affirmative misconduct." Mill Bay relies on evidence: (1) that BIA knew that the expanded memberships marketed by Evans from 1989 to 1994 stated a term

through 2034, *see* Brief at 7-8; *see also* 3-ER_705-06; 5-ER_1339; and (2) that BIA participated in the mediation resulting in the 2004 Settlement, in which Wapato agreed to keep the RV park open through 2034 in exchange for increased "rents," *see* Brief at 10-13; 35-36. Mill Bay contends (Brief at 1-2) that when its members purchased extended memberships and agreed to the 2004 Settlement, they detrimentally relied on BIA's representations (or silence in the face of others' representations) that the Master Lease would not expire until 2034.

Mill Bay identifies no evidence, however, to suggest that BIA intentionally misrepresented or withheld material facts regarding lease renewal. The record shows only that BIA assumed that the Master Lease had been (or would be) validly extended. *See* 1-ER_207. Critically, all of the above conduct was years before Wapato's February 2008 deadline for renewing the Master lease. Until that date, Wapato held an option to renew the Master Lease, merely by providing timely notice to the allottee owners in the prescribed manner. 5-ER_1130, 1151; *Wapato Heritage*, 637 F.3d at 1040. BIA's actions must be viewed in this context. Whether Evans (or Wapato) exercised the renewal option *before* selling extended memberships or *before* the 2004 settlement was not critical to honoring the promise in those agreements (to keep the RV park open through 2034), because Evans (and Wapato) had years left within which to exercise their option and held a unilateral right to do so.

Moreover, while BIA did not scrutinize the lease requirements until the issue of renewal became time-sensitive, *see* 1-ER_208, 237-38, BIA identified the issue and alerted Wapato in sufficient time for Wapato to protect all rights under the Master Lease, including rights of licensees. *See* 7 E.R. 1608. It is true that BIA did not likewise notify Mill Bay's members. 3 E.R. 720. But BIA had no contractual or trust relationship with Mill Bay and Mill Bay's members did not hold the power to renew (Wapato did). Moreover, even if BIA owed a direct duty of care to Mill Bay's members, a failure to meet that duty of care would amount to negligence not affirmative misconduct. *See Baccei*, 632 F.3d at 1147.

In an apparent acknowledgment of the lack of affirmative misconduct at the time of Mill Bay's alleged detrimental reliance, Mill Bay also attempts (Brief at 38-40) to show *later* misconduct. Specifically, Mill Bay contends (Brief at 38-39) that, between 2009 and 2020, BIA "colluded" with the Confederated Tribes in their effort to acquire a majority stake in MA-8, by approving ownership transfers from allottees at below-market rates. And Mill Bay contends (Brief at 40) that BIA in 2009 approved a new lease for the Confederated Tribes' casino (upon the expiration of the Master Lease) that paid "significantly less rent" to the owners than the earlier sublease from Wapato. BIA does not accept Mill Bay's comparison of the casino leases or concede that it approved transfers at below-market rates. But it should be noted that federal law permits transfers of trust or restricted lands

from individual Indians to tribes at below-market rates. *See* 25 U.S.C. § 2216(b)(1)(A). More to the point, alleged misconduct by BIA *after* the expiration of the Master Lease has no bearing on Mill Bay's alleged detrimental reliance on BIA's earlier (mistaken) representations that the Master Lease had been renewed.

b. Mill Bay has not satisfied the other estoppel requirements.

While acknowledging (Brief at 40-41) the need to show "affirmative misconduct," Mill Bay fails to acknowledge the full legal standard for applying estoppel against the government, and, in particular, its need to show "serious injustice" and the absence of "undue damage" to the public interest. *See Baccei*, 632 F.3d at 1147. To the extent Mill Bay impliedly addresses these elements, its arguments fall short.

Mill Bay contends that its members invested time and resources in infrastructure and "created a community that they believed would exist through 2034." Brief at 2, 9, 13. But Mill Bay's members undeniably received a return on their investments through their use of park facilities through the Master Lease's expiration in February 2009, and they ultimately overstayed that date by more than a decade. To the extent Mill Bay's members made uncompensated payments or investments in infrastructure, Mill Bay's members had a cause of action for breach of contract against Wapato, and Mill Bay has asserted its losses as an offset against

trespass damages. The earlier-than-anticipated closure of the RV Park (and loss of recreational use) is a misfortune, not a "serious injustice."

As to the public interest, Mill Bay contends (Brief at 37-46) that BIA's actions served its "proprietary" interests only. But the use and occupancy of MA-8 is for the allottee owners to determine. *See generally* 25 C.F.R. §§ 162.021; 162.022(c). BIA has no proprietary interests in MA-8; it has only the trust responsibility to ensure that the allotment is leased consistently with the Indian owners' desires and interests. *Id.* §§ 162.021(d), 162.441(b). Mill Bay suggests (Brief at 38-40) that BIA breached its trust duties to the individual Indian owners by favoring the interests of the Confederated Tribes. But Mill Bay has no standing to assert the interests of the allottee owners, *Warth v. Seldin*. 422 U.S. 490, 499 (1975), and the contention that BIA has breached a trust duty to the allottees belies Mill Bay's argument (Brief at 37-41) that BIA's actions were not in a trust capacity.

Nor is there any merit to Mill Bay's suggestion (Brief at 38-39) that the Tribes acted improperly in seeking to enhance their ownership interest in MA-8. Federal law favors the consolidation of fractionated interests in Indian land. *See generally* 25 U.S.C. § 2216(a). Moreover, the Tribes' conduct in the present case—in pressing for strict enforcement of the lease renewal requirements—is yet another point of similarity with *City of Tacoma*. *See* 332 F.3d at 578. In that case, it was

the Skokomish Tribe that urged Interior to bring suit to recover Indian rights in allotments that federal officials had previously deemed to be condemned by the State. *Id.* This Court did not question that tribe's motives, even though it was then unknown whether the tribe had any interest in the allotments. *Id.* at 579.

3. Mill Bay cannot avoid ejectment by asserting estoppel claims against the allottee landowners.

a. Mill Bay misconstrues the issues.

The district court also correctly held that Mill Bay has no separate estoppel defense against the Indian owners of MA-8. Mill Bay's argument (Brief at 46-48) that the district court erred in "sua sponte" dismissing Mill Bay's affirmative estoppel claims is a red herring. Although the district court observed that Washington law only permits parties to assert equitable estoppel as an affirmative defense, 1-ER_85, the court did not *dismiss* Mill Bay's affirmative estoppel claims against the individual defendants on this or any other ground. Rather, the district court rejected Mill Bay's motions for default and summary judgment on its estoppel claims against certain beneficial owners who had not responded to requests for admission. 1-ER_88-93, 102.

More importantly, whether Mill Bay could sustain its affirmative claims against the beneficial owners in the absence of the United States' counterclaim is irrelevant. Although the beneficial owners did not file their own trespass counterclaim against Mill Bay, the United States' counterclaim was filed on their

behalf, *see* 25 C.F.R. § 162.471, and those who appeared through separate counsel moved to join the United States' motion for summary judgment. SER_77-79. The district court could not resolve the motion without impliedly rejecting Mill Bay's estoppel claims as asserted against the beneficial owners. The district court committed no procedural error in expressly rejecting Mill Bay's claims in this context.

b. Mill Bay's estoppel claims against individual allottees provide no affirmative defense to its trespass.

Nor did the district court commit substantive error in determining that Mill Bay could not defend against the United States' trespass claim by asserting estoppel against the individual beneficial owners. Mill Bay contends (Brief at 48-50, 52) that the beneficial owners are personally "estopped to deny" Mill Bay's right to occupy MA-8 through 2034 in light of their own acts and representations that allegedly induced detrimental reliance by Mill Bay. Mill Bay then asserts (Brief at 50-52) that such estoppel determines the "express will" of the beneficial owners for purposes of BIA's oversight of leasing. In particular, Mill Bay contends that it would be a "breach of trust" for the United States to eject Mill Bay from MA-8, because such action would be contrary to the fiction—allegedly compelled by the rule of estoppel—that "100% of its fiduciary landowners" consent to Mill Bay's continuing occupancy through 2034.

This attempted back door estoppel cannot be sustained. Mill Bay identifies no independent representation by any allottee owner on the issue of lease renewal, much less any representation that could bind all owners. Mill Bay asserts only: (1) that a "majority" of allottee owners "knew" of Evans's "attempted" lease renewal, (2) that the allottee owners "understood" that the 2004 Settlement assumed that the camping memberships would endure through 2034, and (3) that the allottee owners "accepted" and "demanded" rental payments after the 2004 Settlement was entered. Brief at 48-49. These events are unremarkable. Wapato owed rent under the Master Lease regardless. If the 2004 Settlement increased Wapato's gross receipts under the Master Lease and thus compelled higher rent payments to the beneficial owners, the owners had a preexisting contractual right to such rent.

Moreover, as already explained, the 2004 Settlement was completed years before the deadline for lease renewal. The Master Lease already expressed the beneficial owners' consent to lease renewal, subject only to Evans' exercising his option in the manner prescribed. 5-ER_1130, 1151. Mill Bay's arguments show only that the beneficial owners—*like Mill Bay's members*—assumed that Evans or Wapato had already exercised or would exercise the renewal option.

Finally, while suggesting that BIA has not faithfully represented the desires of MA-8's beneficial owners, Mill Bay does not contend and cannot show that the

United States' ejectment action is (or ever was) contrary to the wishes of a majority of beneficial owners. *See* 25 C.F.R. § 162.471 (BIA may take action to eject unless a majority of owners notify BIA of good faith efforts to negotiate new lease). Rather, Mill Bay argues that BIA would breach its trust duties to the beneficial owners if it does not bind them to BIA's own initial misunderstanding about lease renewal. *See* 1-ER_237-38. This argument is illogical and contrary to the law that BIA cannot be bound to its own prior mistakes. *See Baccei v. United States*, 632 F.3d at 1147; *City of Tacoma*, 332 F.3d at 581-82.

III. The United States' trespass claim was not precluded by res judicata.

A. Standard of Review

This Court reviews de novo whether the United States' trespass claim was barred by claim or issue preclusion. *Media Rights Technologies Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019).

B. Res judicata does not apply.

Mill Bay also argues (Brief at 56-58) that the judgment of the Chelan County court approving the 2004 Settlement (6-ER_1551-61) precludes the United States' trespass claim as a matter of res judicata. This argument fails for three separate reasons.

1. The United States was not a party to the 2004 Settlement.

First, as already explained, although BIA was asked to participate in the state-court proceedings, *see* 1-ER_210, and was served with a copy of the 2004 Settlement prior to court approval, *see* 5-ER_1199-1201, such invitation and notice did not make BIA a party. Mill Bay's reliance on Washington's Trust and Estate Dispute Resolutions Act ("TEDRA") (Brief at 12, 57-58) is misplaced.

Pursuant to TEDRA, the 2004 Settlement was made binding on all "interested parties . . . to the Estate of William Evans, Jr." *See* 6-ER_1560; *see also* Wash. Rev. Stat. §§ 11.96A.220-240. But TEDRA defines "[p]ersons interested in the estate" to mean:

> all persons beneficially interested in the estate . . . , persons holding powers over the . . . estate assets, . . . and . . . any personal representative or trustee of the estate . . .

Wash. Rev. Code § 11.96A.030(6). BIA was not a beneficiary of Evans's estate; nor did BIA "hold powers" over estate assets at issue in the state proceedings. *Id.* Under federal law, BIA had the authority to conduct probate proceedings to determine the inheritance of property held in trust for Evans, including Evans's interest in MA-8. *See* 25 U.S.C. § 373; *see also* 25 C.F.R. § 15.1 et seq. But Evans's interest under the Master Lease was not itself trust property. *See* 7-ER_1602; *see also* 25 C.F.R. § 15.10(a).

Mill Bay also mistakenly relies on a former TEDRA provision (applicable in 2004) that 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.*

Brief at 57 (quoting Wash. Rev. Stat. § 11.96A.120(4) (2001)) (emphasis added). That provision addressed when certain persons interested in an estate would be deemed to "virtually represent" others. *Id.* § 11.96A.120(2) (2001)). The current version of the statute applies to "guardians," "agents," "personal representatives," "trustees," and "parents." Wash. Rev. Stat. § 11.96A.120(4). Because Mill Bay does not contend (and cannot show) that any such person "virtually represented" BIA as to any beneficial interest in Evans's estate, § 11.96A.120 is inapposite.

Moreover, even if TEDRA somehow did require BIA to participate in the proceedings on the 2004 Settlement as a matter of Washington law, BIA had no obligation to participate, due to federal sovereign immunity. *Beeman v. Olson*, 828 F.2d 620, 621 (9th Cir. 1987); *see also Minnesota*, 305 U.S. at 386-87. Only Congress can waive the United States' sovereign immunity from involuntary joinder in federal or state court proceedings. *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 934 (9th Cir. 2009). Mill Bay cites no federal statute that gave the state court jurisdiction to compel the United States' participation in the proceedings on the 2004 Settlement.

Mill Bay's theory (Brief at 57) that the United States voluntarily joined the state-court proceedings is meritless. Mill Bay mistakenly relies (*id.*) on *Montana v. United States*. There, the Supreme Court held that collateral estoppel applies where the United States "assume[s] control" over state court litigation in which it has a "direct financial or proprietary interest," receives an adverse decision, and then seeks to re-litigate the same issue in federal court. 440 U.S. 147, 154 (1979). In *Montana*, the United States required a federal contractor to file a state-court action, reviewed and approved the complaint, paid the attorneys' fees and costs, directed all appeal proceedings, and filed its own amicus brief on appeal. *Id.* This case is nothing like *Montana*. Here, the United States had no direct "financial or proprietary interest" in Mill Bay's claim against Wapato, and did not seek to litigate any of its own claims. BIA at most monitored the litigation because of its trust interests in the land.

2. The 2004 Settlement did not decide lease renewal.

Second, Mill Bay's suit against Evans's Estate (and Wapato) did not involve—much less actually decide—any legal or factual issue relevant to the United States' present ejectment action. Claim preclusion bars new litigation on any new claim that arose between the same parties in a prior suit involving a "common nucleus of operative facts." *Lucky Brand Dungarees v. Marcel Fashion Group Inc.*, 140 S.Ct. 1589, 1594-95 (2020); *Media Rights Technologies Inc.* 922

F.3d at 1026-27 & n.10. Issue preclusion bars parties from relitigating issues actually decided between the parties in a prior case. *Lucky Brand*, 140 S.Ct. at 1594. Neither doctrine applies.

As Mill Bay acknowledges (Brief at 10-13), its members initiated the state-court litigation in 2002, after Evans threatened to shut down the RV Park for reasons unrelated to renewal of the Master Lease. *Id.* Because Wapato and Mill Bay both assumed that the Master Lease had been or would be renewed, questions regarding lease renewal were not disputed. Moreover, those issues were not ripe, as the deadline for exercising the lease renewal option had not passed. It is well established that claim preclusion does not apply to claims that accrue *after* the filing of the complaint in the prior case. *See Media Rights Technologies*, 922 F.3d at 1021 (citing *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039-40 (9th Cir. 2017)).

3. Mill Bay is bound by *Wapato Heritage*.

Third, Mill Bay's res judicata argument is itself foreclosed by collateral estoppel and this Court's decision in *Wapato Heritage*, 637 F.3d at 1037-40. That case was the first to actually consider and decide the requirements for lease renewal and whether Evans had met such requirements. *Id.* at 1037-40. Although the Mill Bay members were not parties to that federal litigation, they are in privity with Wapato, as they were licensees under the lease and shared an identical interest

in the lease extension. *See Virginia Surety Company v. Northrop Grumman Corp.*, 144 F.3d 1243, 1247 (9th Cir. 1998). Mill Bay's contention (Brief at 21, 27) that the 2004 Settlement "modified" the Master Lease and extended it through 2034 (eliminating the need for the lessee to exercise the renewal option) cannot be squared with this Court's holding that the Master Lease expired in 2009, due to Wapato's failure to exercise the option in the manner prescribed. *See Wapato Heritage*, 637 F.3d at 1040.

IV. Mill Bay cannot avoid ejectment by challenging federal title to MA-8.

A. Standard of Review

Whether Mill Bay or Wapato may challenge the United States' trust title to MA-8 in this litigation, and whether MA-8 remains in trust status under the applicable statutes and executive orders, are questions of law reviewed de novo. *See McShannock v. JP Morgan Chase Bank, NA*, 976 F.3d 881, 886 (9th Cir. 2020); *Donnelly v. United States*, 850 F.2d 1313, 1318 (9th Cir. 1988).

B. MA-8's trust status is not subject to challenge in this litigation.

Mill Bay finally contends (Brief at 3, 20, 59) that even if its members have no legal or equitable rights to remain in possession of Wapato's leasehold, the United States lacks "standing" to eject them, because the United States no longer holds trust title. Mill Bay first asserted this argument after Wapato filed cross-claims asserting that MA-8 is not Indian trust land. *See* SER_127-35 (claims 1-2,

7). In granting summary judgment on the United States' ejectment counterclaim, the district court did not specifically dispose of Wapato's cross-claims. *See* 1-ER_102-03. Rather, the district court agreed with Mill Bay that federal trust title to MA-8 was a "threshold matter" that needed to be resolved to determine the United States' "standing to eject." 1-ER_56. As explained below, the district court was mistaken on this point. In suing to eject Mill Bay's members as holdover licensees under an expired lease, the United States did not place its federal trust title at issue. And Wapato's cross-claims challenging federal trust title are foreclosed by the Quiet Title Act.

1. Mill Bay cannot deny federal trust title as an affirmative defense to ejectment.

As a general rule, in a common law suit to eject an alleged trespasser—e.g., in the case of a boundary dispute or where the defendant asserts title or a possessory right—the plaintiff must establish superior title. *See*, *e.g.*, *Von Arx v. Boone*, 193 F. 612, 614 (9th Cir. 1912); *Lundell v. Allen & Nelson Mill Co.*, 57 Wash. 150, 152-53, 106 P. 626, 627 (Wash. 1910). In addition, when the "defendant in ejectment" claims a possessory right and thus "is not a mere trespasser or interloper," the defendant "may show an outstanding and subsisting title in a stranger, to defeat the plaintiff's right of recovery." *McGuire v. Blount*, 199 U.S. 142, 144 (1905).

A different rule applies, however, when a plaintiff sues to eject a holdover tenant or licensee, whose right of possession derives solely from a lease granted by the plaintiff. *See Rector v. Gibbon*, 111 U.S. 276, 284 (1884). In such circumstances, the holdover tenant, subtenants, or licensees who knowingly entered the leasehold under authority of the lease are estopped from denying the lessor's title. *Id.*; *Good v. Gaines*, 145 U.S. 141, 152-53 (1892); *Port of Willapa Harbor v. Nelson Crab & Oyster Co.*, 15 Wash.2d 515, 516, 131 P.2d 155, 156 (Wash. 1942). This estoppel applies in any suit for ejectment, rent, or similar relief. *Rector*, 111 U.S. at 284; *Port of Willapa Harbor*, 15 Wash.2d at 516, 131 P.2d at 156 (citing Thompson on Real Property, Perm. Ed., 272 § 1739); *see also Richardson v. Van Dolah*, 429 F.2d 912, 917 (9th Cir. 1970).

In the present case, the Mill Bay members acquired possession of the RV park on MA-8 as licensees of Wapato under the Master Lease. Because the Master Lease has long since expired, *Wapato Heritage*, 637 F.3d at 1040, the Mill Bay members have no present legal or equitable right to remain in possession and are "mere trespasser[s]." *McGuire*, 199 U.S. at 144. This status would not change even if Mill Bay could show that MA-8 is not held in trust. Rather, Mill Bay members would remain in trespass regardless.[4] For this reason, Mill Bay cannot be heard to

[4] As the owner of a minority fractional interest in MA-8, Wapato alone could not consent to Mill Bay's continuing possession, even if MA-8 were held in fee.

deny federal trust title in defense of the ejectment action. *Rector*, 111 U.S. at 284; *Port of Willapa Harbor*, 15 Wash.2d at 516, 131 P.2d at 156; *see also McGuire*, 199 U.S. at 144.

To be sure, the United States was not the "lessor" of MA-8. *See Wapato Heritage*, 637 F.3d at 1037-1040. Rather, BIA approved the lease as trustee for the beneficial owners and lessors. *Id.* Nonetheless, it does not follow that the United States lacks Article III standing to prosecute an ejectment action on behalf of the beneficial owners. The United States pursued ejectment in accordance with federal regulations that govern the leasing of fractionated lands and give BIA express authority to recover possession for the allottee owners, in the event of a holdover. 25 C.F.R. §§ 162.012, 162.023, 162.471; *see also* 25 U.S.C. §§ 9, 415(a) (statutory authority). BIA's actions pursuant to federal statutes and regulations are entitled to the presumption of regularity, *Angov v. Lynch*, 788 F.3d 893, 904-05 (9th Cir. 2015), and such law provides BIA's standing to sue. *Cf. City of Takoma*, 332 F.3d at 578-79.

In short, because Mill Bay's members claim rights to possess MA-8 solely by virtue of membership agreements predicated on federal trust title, *see* 5-ER_1339, and because BIA approved the lease and undertook the present ejectment action on behalf of the lessors, the United States may assert the lessors' right to estop Mill Bay from challenging title. *Cf. French v. Starr*, 691 Fed. Appx.

885 (9th Cir. 2017) (lessee of Indian lands estopped from challenging Indian trust title in eviction action in tribal court). Mill Bay's members cannot defend against ejectment merely by raising a speculative title dispute over property in which they claim no ownership interest. *See Rector*, 111 U.S. at 284; *Port of Willapa Harbor*, 15 Wash.2d at 516, 131 P.2d at 156.

2. Wapato's cross-claims are barred by federal sovereign immunity.

Nor may Wapato challenge federal title in its capacity as *owner* of an interest in MA-8 (as opposed to its capacity as *lessee*).[5] As noted *supra*, pp. 2, 17, Wapato filed three cross-claims, variously asserting that the beneficial owners of MA-8 already hold the allotment in fee, unencumbered by any federal trust restrictions. SER 127-30, 132-35. In the decision and certified final judgment now on appeal, the district court observed that Wapato and Mill Bay were "aligned" in their arguments, 1-ER_19, and the district court expressly rejected Wapato's arguments. *See* 1-ER_56, 65, 68, 71, 75, 82. But the district court did not expressly dismiss Wapato's cross-claims.[6] *See* 1-ER_29-32; 82, 102-03. For this reason, the judgment on appeal is not final as to those claims.

[5] The United States did not file a trespass claim against Wapato. 7-ER_1774-75.

[6] The district court dismissed all of Wapato's cross-claims in a later order, which has not been entered as a final judgment. *See* Order, ECF No. 644 (Jan. 19, 2021).

In any event, this Court and the district court lack subject matter jurisdiction over the cross-claims. *See Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004) (noting Court's "independent obligation" to address subject matter jurisdiction "sua sponte"); *accord Hart v. United States*, 817 F.2d 78, 80 (9th Cir. 1987). Wapato did not plead any jurisdictional basis for its cross-claims or identify any applicable waiver of federal sovereign immunity. SER_127-30, 132-33 (¶¶ 256-270, 277-78). There is none.

The "exclusive means by which adverse claimants [may] challenge the United States' title to real property" is an action under the Quiet Title Act, 28 U.S.C. § 2409a. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 219 (2012) (quoting *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 286 (1982)). While Congress consented, via the QTA, to the United States being "named as a party defendant" in any civil action "to adjudicate a disputed title to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), Congress imposed several limitations and exceptions. As relevant here, the QTA "does not apply to trust or restricted Indian lands." *Id.* And any action under the QTA "shall be barred unless it is commenced within twelve years of the date upon which it accrued." *Id.* § 2409a(g). Wapato's cross-claims are foreclosed on both grounds.

First, Wapato plainly seeks to quiet title in "trust or restricted Indian lands." *Id.* § 2409a(a). Wapato seeks declaratory relief in the nature of quieting title (first cross-claim), SER_128-30 (¶¶ 256-65); expressly seeks to "quiet title" (second cross-claim), SER_130 (¶¶ 266-68); and seeks the further remedy of "partition" (seventh cross-claim), which depends on clear title, SER_132-33 (¶¶ 277-78). Wapato prays for a declaration that MA-8 is not (or should not be) held in trust, and that "all owners of MA-8" are entitled to "fee patents" free of any encumbrances. SER_128 (¶¶ 258-59). Through these claims, Wapato seeks to establish a fee interest in MA-8, which would deprive the United States of trust title, and would deprive the beneficial owners of the benefits associated with Indian trust land. *See generally Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645, 648-49 (9th Cir. 2002) (allotments held in trust are not subject to state taxation); 25 U.S.C. §§ 2703(4)(B), 2710(b)(1) (authorizing gaming, subject to conditions, on "Indian lands"). As the United States Supreme Court has explained, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *United States v. Mottaz*, 476 U.S. 834, 843 (1986).[7]

[7] Wapato is a non-Indian corporation with a fractional life estate in MA-8, 1-ER_209, n. 3. Accordingly, its challenge to trust title is a third-party challenge (as opposed to an Indian owners' challenge to a trust restriction). *See Mottaz*, 476

Second, even if Wapato's claims are not excluded from the scope of the QTA, they are time-barred. The twelve-year limitations period is a condition of the QTA's waiver of sovereign immunity and operates as a jurisdictional bar against untimely actions. *Block*, 461 U.S. at 292; *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1195-96 (2008); *Fidelity Exploration and Prod. Co. v. United States*, 506 F.3d 1182, 1186 (9th Cir.2007). A claim accrues under the QTA for purposes of the limitations period on "the date the plaintiff or his predecessor in interest knew or should have known of the claim against the United States." *Id.* § 2409a(g).

Wapato's cross-claims date back over a century to a 1906 statute in which Congress "authorized and directed" the Secretary of the Interior to issue fee patents to the holders of the Moses Allotments after a ten-year trust period. *See* SER_122 (¶ 232) (citing Act of Mar. 8, 1906, 34 Stat. 55). BIA did not issue a fee patent to MA-8 when the ten-year period lapsed and has never done so, because the trust was extended, ultimately indefinitely, by a series of executive orders and statutes. *See infra*, pp. 60-72. Wapato disputes the validity of the extensions and contends that trust period on MA-8 expired either in 1916 or no later than 1936. Brief at 61-71.

U.S. at 842. Appellant Gary Reyes sold his interest in MA-8, 1-ER_96, n.10, and does not join Wapato's challenge to MA-8's trust status. Opening Brief at 59, n.18.

If so, however, Wapato's cause of action likewise accrued as early as 1916 and no later than 1936. If the trust period for MA-8 expired in either of these years, Wapato's predecessors then had an "immediate right" to fee title. SER_123 (¶ 233). Moreover, the original 1907 trust patent expressly stated, as dictated by the 1906 Act, that the United States would issue a fee patent after a ten-year trust period. *Id*. (¶ 233); *see also* 5-ER_1277-1280 (patent). Wapato's predecessors were thus on inquiry notice of the United States' extension of the trust period as soon as 1916, when a fee patent was not delivered in accordance with the explicit terms of the trust patents. *See Wisconsin Valley Improvement Co. v. United States*, 569 F.3d 331, 335 (7th Cir. 2009).

Moreover, even if the failure to deliver a fee patent in conformity with the terms of the trust patents (and 1906 Act) was insufficient to put Wapato's predecessors on notice of the United States' claim, Interior provided such notice every time it took administrative action concerning MA-8, including the notification of heirs in the course of BIA-administered probate proceedings. *See* 25 C.F.R. § 15.1(a). There can be no dispute that Evans had actual knowledge of the United States' trust claim no later than 1982, when Evans sought BIA approval to lease MA-8, on the understanding the lease was held in trust. 5-ER_1301. This means that the twelve-year limitations period expired at the very latest in 1994. 28

U.S.C. § 2409a(g). Because Wapato did not file its cross-claims until 2010, those claims are manifestly too late. *Id.*

C. MA-8 remains in trust status.

If this Court nonetheless determines that it has appellate and subject-matter jurisdiction over the title dispute, this Court should affirm the district court's determination that MA-8 remains Indian trust land.

1. MA-8 was patented to Wapato John subject to a trust restriction.

In 1855, the United States entered a treaty with numerous Indian tribes of the then Washington Territory, with the objective of moving them all to the newly-established Yakima Reservation. *See United States v. Oregon*, 29 F.3d 481, 484-85 (9th Cir. 1994). But many tribes refused to relocate. *Id.* at 485. In the following decades, Chief Moses of the Columbia Indians became a spokesperson for several tribes that remained on their aboriginal lands. *Id.* In 1879, after federal officials reached an agreement with Moses, President Rutherford B. Hayes issued an executive order creating the Columbia Reservation for Moses and his followers. *Id.*; *see also Yakima Tribes v. United States*, 7 Ind. Cl. Comm. 794, 803 (1959). Some of Moses's followers relocated there, but Moses himself did not, and the parties quickly grew dissatisfied with the agreement. *See United States v. Oregon*, 787 F. Supp. 1557, 1563 (D. Or. 1992).

In 1883, Interior officials and Moses entered a second agreement, under which Moses agreed to move his followers to the nearby Colville Reservation, which was created by executive order in 1872. *Oregon*, 29 F.3d at 486; *Oregon*, 787 F. Supp. at 1564. The 1883 Agreement provided that "each head of family or male adult" who wished to remain on the Columbia Reservation "shall be entitled to 640 acres, or one square mile of land . . . in the possession and ownership of which they shall be guaranteed and protected." Agreement with the Columbia and Colville (July 7, 1883), 4-ER_988-89.

To implement this agreement, Congress in 1884 enacted legislation authorizing the selection of lands from the Columbia Reservation for the "exclusive use and occupation" of individuals who elected to remain. See Act of July 4, 1884, ch. 180, 23 Stat. 76, 79-80 (4-ER_991-93). Upon such selection, "the remainder of said reservation" was to be "restored to the public domain." *Id.* Following these directives, Interior surveyed the Columbia Reservation and created multiple allotments, including MA-8 for Wapato John. 4-ER_995-96. In 1886, President Grover Cleveland issued an executive order "set[ting] apart" the allotted lands "for the exclusive use and occupation" of "said Indians," and restoring the remainder of the Columbia Reservation to the public domain. 4-ER_994.

Wapato now argues (Brief at 62-63) that the United States should have issued fee patents to Wapato John and the other Columbia Reservation allottees "then and there," i.e., upon the original survey and selection of the so-called Moses Allotments. But nothing in the 1883 Agreement, the 1884 Act, or the 1886 executive order authorized Interior to issue fee patents. *See* 4-ER_988-89 (1883 Agreement); 23 Stat. 79-80 (1884 Act); 4-ER_994-96 (1886 order). The 1883 Agreement stated that the allottees would be "guaranteed" in their "possession and ownership," but did not specify the form of ownership. 4-ER_989. The 1884 Act and 1886 Executive Order provided that the United States would hold the lands for the "exclusive use and occupation" of the designated allottees. 4-ER_992, 994. Over a century ago, the Supreme Court held that these documents did *not* authorize the conveyance of fee title. *Starr v. Long Jim*, 227 U.S. 613, 622-25 (1913).

Congress first authorized patents for the Moses Allotments in the Act of March 8, 1906. This Act directed the Secretary of the Interior to issue patents with the following terms: (1) "the United States does and will hold the [allotted] lands . . . for the period of ten years from the date of the approval of this Act in trust for the sole use and benefit" of the designated allottee or his heirs; and (2) "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." Act of Mar. 8, 1906, ch. 629, 34 Stat. 55. The

Act also provided that any allottee "may sell and convey" lands "covered" by a trust patent, but only "under rules and regulations prescribed by the Secretary of the Interior," and excluding 80 acres from each allotment, which must be held for the entire trust period. *Id.*, 34 Stat. 55-56.

In 1907 and 1908, the United States issued trust patents to Wapato John for MA-8. *See* 4-ER_1001-1005, 5-ER_1277-80. As required by the March 1906 Act, those patents provided that MA-8 would be held "in trust" for a ten-year period and that the United States would issue a fee patent upon the expiration of the trust period. *See* 4-ER_1002; 5-ER_1280. Wapato John died in 1911, before the expiration of the trust period. 4-ER_942. Following a probate hearing in 1912, Interior determined that his real property—including MA-8—passed to his wife, four children, and three grandchildren. 4-ER_944-46. The probate order noted that the real property remained in trust. 4-ER_946.

2. Presidents Wilson and Coolidge lawfully extended the trust period on MA-8 through executive orders in 1914 and 1926.

In 1914, President Woodrow Wilson issued an executive order extending the trust period for MA-8 and all other Moses Allotments (which otherwise would have expired on March 8, 1916). 4-ER_882-83, 1007. The order stated that the "ten-year period of trust on all allotments made to members of the Chief Moses Band, . . . the title to which has not passed from the United States . . . is hereby . . . extended for a further period of ten years." *Id.* In 1926, President Calvin Coolidge

issued a nearly identical executive order, extending the trust period for another ten years, or until March 8, 1936. 4-ER_895. Both orders referenced, for authority, the "act of June 21, 1906 (34 Stat. 325-326)." 4-ER_895, 1007. That act provided, in relevant part, that

> 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 restriction on alienation for such period as he may deem best.

Act of June 21, 1906, ch. 3504, 34 Stat. 326 (emphasis added).

Wapato argues (Brief at 65-67) that the 1914 and 1926 Executive Orders were "ultra vires" and ineffective for purposes of extending the trust period for MA-8 because: (1) the June 1906 Act allegedly authorized the President to extend "restrictions on alienation" but not extensions of "trust status," (2) the trust patents (per the March 1906 Act) allegedly restricted alienation only as to 80 acres of each Moses Allotment; and (3) Congress allegedly "removed the last 80-acres restriction on alienation" in 1924. These arguments are readily dismissed.

First, there is no authority for strictly distinguishing "restraints on alienation" from "trust status." *See City of Takoma*, 332 F.3d at 580. Congress restricted alienation of allotments to protect Indian allottees from unwise or fraudulent conveyances and to preserve the opportunity for allottees to practice farming. *Yakima County v. Confederated Tribes and Bands of the Yakima Indian*

Nation, 502 U.S. 251, 254 (1992). The restriction on alienation is an essential element of the United States' trust title. *See United States v. Mitchell,* 445 U.S. 535, 541-44 (1980).

Second, while the March 1906 Act authorized Wapato John to sell all but 80 acres of MA-8 within the original 10-year trust period, such sale could occur only "under rules and regulations prescribed by the Secretary of the Interior." Act of Mar. 8, 1906, ch. 629, § 2, 34 Stat. 55. Thus, the entire allotment remained subject to restrictions on alienation and Interior's trust authority. *Id.* And, in any event, because no sale occurred, there can be no dispute that the entire allotment remained in trust status at the time of the 1914 Executive Order.

Finally, the 1924 Act is irrelevant. That act authorized any holder of a "trust patent" under the 1883 Agreement and 1884 Act or "the heirs" of such person to "sell and convey any or all the land covered by such patent[] . . . in accordance with the provisions of the Act of Congress of June 25, 1910 [36 Stat. 855]." *See* Act of May 20, 1924, ch. 160, 43 Stat. 133; 4-ER_1009. The 1910 statute, in turn, authorized Interior to issue fee patents to an allottee's heirs, to partition an allotment for the heirs, and/or to lift restrictions on alienation—all upon an application by the heirs and a determination of competency. *See* Act of June 25, 1910, ch. 431, 36 Stat. 855-56 (codified as amended at 25 U.S.C. § 372). Since the 1924 Act, no heirs of Wapato John—who died in 1911, 4-ER_942—have applied

to Interior for fee patents or partition. Wapato does not now contend (as it argued below) that the 1924 Act by itself terminated the trust status of MA-8. *See* 1-ER_68-69 (rejecting argument). The authority provided to Interior in the 1924 Act (to issue fee patents upon application) plainly did not alter Interior's preexisting authority, under the June 1906 Act, to extend the trust period for the Moses Allotments. *See* 43 Stat. 133; 4-ER_1009.

For these reasons, the district court correctly held that the 1914 and 1926 Executive orders extended the trust period for MA-8 through March 8, 1936. *See* 1-ER_67-68.

3. The Indian Reorganization Act and subsequent executive orders extended the trust periods and restrictions on alienation for all Indian lands.

Congress pursued an allotment policy from the late 1800s through the early 1900s. *Yakima*, 502 U.S. at 253-54. By allotting reservations to individual Indians, Congress hoped to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254. Congress abruptly changed course in 1934 with the enactment of the Indian Reorganization Act ("IRA"). *Id.* The IRA halted new allotments on the "land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise," 25 U.S.C. § 5101, and "extended and continued until otherwise directed by Congress" the "existing

periods of trust placed upon any Indian lands and any restriction on alienation thereof," *id.* § 5102.

This trust extension, however, was potentially undermined by IRA § 18. *See* Act of June 18, 1934, ch. 576, § 18, 48 Stat. 988 (now codified at 25 U.S.C. § 5125). Section 18 directed Interior to call special elections, within one year of the IRA's enactment, to enable reservations to opt out of the IRA. *Id.* Section 18 specified that "[t]his Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application." *Id.* This Court has since determined that Congress intended § 18 votes to apply to those sections of the IRA that address tribal organization, and not to the IRA in its entirety. *United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980) (citing 25 U.S.C. §§ 476 & 477, now codified at 25 U.S.C. §§ 5123 & 5124). But § 18 left open the possibility that the IRA's trust extension would not apply to reservations that voted against the application of the IRA in § 18 elections. The Indians of the Colville Agency—established on the Colville Reservation where Chief Moses relocated—were among those who voted to opt out of the IRA. *See* Theodore H. Haas, *Ten Years of Tribal Government under I.R.A.*, at 19 (1947).[8]

[8] Available at https://www.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/Haas-TenYears.pdf

As a stopgap measure to protect such tribes and their allottees, Congress enacted a statute on June 15, 1935, which provided in relevant part:

> 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.

Act of June 15, 1935, ch. 260, § 3, 49 Stat. 378; 4-ER_903.[9] In September 1936, within the period of this statutory extension, President Franklin D. Roosevelt issued an executive order extending for 25 years the "periods of trust applying to any Indian lands." 4-ER_904. Thereafter, various Secretaries of the Interior, on delegated authority, issued similar orders, which extended the periods of trust on Indian lands through 1994. *See* 25 Fed. Reg. 13688-89 (Dec. 24, 1960); 28 Fed. Reg. 11630-31 (Oct. 31, 1963); 33 Fed. Reg. 15067 (Oct. 9, 1968); 38 Fed. Reg. 33463-64 (Dec. 14, 1973); 43 Fed. Reg. 58368-69 (Dec. 14, 1978); 48 Fed. Reg. 34026 (July 27, 1983); 53 Fed. Reg. 30,673-74 (Aug. 15, 1988); 4-ER_904-918.

In May 1990, Congress amended the IRA to provide that, "[n]otwithstanding" IRA § 5125 (regarding opt-out elections), § 5102 "shall apply" to "all Indian tribes," "all lands held in trust by the United States for Indians," and

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[9] The act also extended the deadline for Section 18 elections to June 18, 1936, *id.* § 2, 49 Stat. 378, and clarified that the IRA was not to be construed as abrogating the rights of tribes that opt out of the IRA, *id.* § 4.

"all lands owned by Indians that are subject to a restriction . . . on alienation," Pub. L. 101-301, § 3(a), 104 Stat. 207 (1990) (codified at 25 U.S.C. § 5126). Accordingly, the IRA's trust extension now applies to all Indian lands, without regard to tribal opt-out votes. 25 U.S.C. §§ 5102, 5126.

Moreover, as already noted, Congress has more recently specifically recognized that MA-8 remains in trust. In 2006, Congress amended the statute governing the leasing of restricted Indian lands to allow 99-year leases on specified Indian lands, including "Moses Allotment numbered 8." Pub. L. 110-453, title II, § 202(a)(5), 120 Stat. 339, 340; *see also* 25 U.S.C. § 415(a).

4. The IRA trust extension applied to MA-8.

Wapato argues (Brief at 67-72) that the trust period for MA-8 and the other Moses Allotments was not extended by the IRA, the 1935 amendment, or any of the above executive orders, in light of IRA § 8, which provides that:

> Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Act of June 18, 1934, ch. 576, § 8, 48 Stat. 986 (codified at 25 U.S.C. § 5111). The Moses Allotments are outside the boundaries of the Colville Reservation and (according to Wapato) not themselves a reservation. For these reasons, Wapato contends that the IRA and 1935 amendment cannot be "construed to relate" to the

Moses Allotments, *see* 25 U.S.C. § 5111, and therefore that the trust period on those allotments expired in March 1936.

But this argument misconstrues the scope of the exclusion. In 1884, Congress authorized Indians to avail themselves of federal homestead laws. *See United States v. Jackson*, 280 U.S. 183, 189 (1930) (citing Act of July 4, 1884, ch. 180, 23 Stat 96). Shortly thereafter, when Congress authorized the allotment of reservations under the 1887 General Allotment Act, Congress authorized Interior to allot lands from the public domain to individual Indians "not residing on a reservation" or "for whose tribe no reservation has been provided." Act of Feb. 7, 1887, ch. 119, § 4, 24 Stat. 389. Section 8 of the IRA plainly refers to such Indian "allotments or homesteads upon the public domain." *See* 25 U.S.C. § 5111.

As already explained, the Moses Allotments were not created from the public domain; they were selected from within the Columbia Reservation. *See* Act of July 4, 1884, ch. 180, 23 Stat. 79-80. The IRA's restrictions on allotments apply to "*any Indian reservation* created or set apart by treaty or agreement with the Indians." 25 U.S.C. § 5101. The Columbia Reservation plainly was such a reservation. *Id.* In authorizing the original Moses Allotments, Congress specified that Indians electing to "remain on [the] Columbia reservation" would be allowed to select lands to be "held" for their continued "exclusive use and occupation," and that the "*remainder* of said reservation"—i.e., the portion not selected for

allotment to Indians—would be "thereupon restored to the public domain." Act of July 4, 1884, ch. 180, 23 Stat. 80 (emphasis added). When Congress authorizes the allotment of a reservation and then restores the *unallotted* lands to the public domain, such act might "diminish" the reservation, but it does not terminate it. *See Hagen v. Utah*, 510 U.S. 399, 410-22 (1994); *United States v. Pelican*, 232 U.S. 442, 445-49 (1914); *see also McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462-63 (2020) (intent to abolish reservation will not be found absent explicit language to that effect).

Accordingly, in the years since the IRA's enactment, Interior has consistently treated the Moses Allotments as "reservation" allotments, and not as public domain allotments under IRA Section 8 (25 U.S.C. § 5111).[10] Interior has long maintained, as part of the Code of Federal Regulations, an appendix listing reservation allotments, along with the statutes and executive orders that have extended the associated periods of trust. *See* 25 C.F.R. Appendix I; *see also* SER_94-99. The appendix includes allotments within the "Chief Moses Band"

[10] Wapato Heritage cites a 2009 Title Status Report—which refers to MA-8 as "Colville Public Domain"—for the proposition that "BIA has not consistently referred to MA-8 as reservation land." Brief at 70 (citing 7-ER_1638). But this notation does not reflect a view that the Moses Allotments are on "public domain" lands of the United States. 7-ER_1638. Rather, Interior treats the allotments to be part of the "Colville Tribes' Public Domain." *See* 7-ER_1622.

reservation. 25 C.F.R. Appendix I. Contrary to Wapato's arguments (Brief at 68-71), this determination is consistent with the text and purpose of the IRA.

To be sure, as Wapato observes (Brief at 68), Interior did not call a § 18 election for the Moses Allotments (or the Columbia Reservation) standing alone. Rather, Interior called a single election for the Colville Agency. *See* Haas, *Ten Years of Tribal Government*, at 19. Interior evidently associated the Moses Allotments with the Colville Reservation, in light of the shared history of the Columbia and Colville Reservations as reserved lands for the "Chief Moses Band," and the band's ultimate decision to relocate (for the most part) to the Colville Reservation. *See supra* pp. 60-61; *see also Anderson*, 625 F.2d at 916 (noting that § 18 votes principally concern tribal organization). In any event, Interior's decision not to call a § 18 election for the Indians of the Moses Allotments (as a separate and independent tribe) does not alter the history of the allotments or their status as reservation allotments.

Wapato argues (Brief at 70-71) that the absence of an election for the Moses Allotments matters because the vote by Colville Agency Indians to opt out of the IRA (if limited to the Colville Reservation) cannot be applied to the Moses Allotments for purposes of the 1935 Act. But this proves too much. The 1935 Act was a stopgap for Indian lands that lost (or might lose) the protection of the IRA's indefinite trust extension (25 U.S.C. § 5102) as a result of an opt-out vote. *See* Act

of June 15, 1935, ch. 260, § 3, 49 Stat. 378 (1935); 4-ER_903. If the Colville Indians' opt-out vote did not apply to the Moses Allotments, those allotments remained subject to the IRA's indefinite trust extension, 25 U.S.C. § 5102, and the 1935 Act was unnecessary (as to them).

Wapato also argues (Brief at 68-69) that the Moses Allotments cannot be construed to be reservation allotments because they were held in trust for individual Indians (not a tribe) and because the Columbia Reservation "was not a tribal homeland, but merely a placeholder" for the Moses Band before it moved to the Colville Reservation. But the Columbia Reservation was not intended to be a waystation from the outset. *See Oregon*, 29 F.3d at 485. And Wapato's arguments again prove too much. Prior to the IRA, Congress pursued an allotment policy for *all* reservations, with the goal of erasing reservation boundaries and extinguishing tribal sovereignty as to *all* Indians. *Yakima*, 502 U.S. at 254. The allotment of the Columbia Reservation—to provide lands for individual Indians and not a tribe—is not different in this regard from any other pre-IRA allotment of reservation land.

5. If there is any statutory ambiguity, BIA's interpretation of the IRA is entitled to deference.

Finally, Wapato argues (Brief at 70) that BIA's treatment of the Moses Allotments as reservation allotments is not entitled to *Skidmore* deference. But where the terms of a statute are unambiguous, the plain text controls without need to invoke deference principles. *See Larson v. Saul*, 967 F.3d 914, 922 (9th

Cir. 2020). As already explained, the IRA's trust extension applied from the outset to "existing periods of trust placed on *any* Indian lands," 25 U.S.C. § 5102, excluding only "Indian holdings of allotments or homesteads upon the public domain." *Id.* § 5111. The Moses Allotments were allotted reservation lands. Under the plain terms of the IRA, the "public domain" exclusion did not apply.

But if deference principles do come into play, the appropriate rule is *Chevron* not *Skidmore* deference. *Chevron* deference is due where Congress has given an agency regulatory authority to interpret a statute with the "force of law." *Larson*, 967 F.3d at 924 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, Congress gave Interior broad authority to manage Indian affairs and to issue regulations for such purpose, 25 U.S.C. §§ 2, 9; as well as specific responsibilities for managing restricted lands in ways that carry the force of law, *see* 25 U.S.C. §§ 393, 415 (leasing of restricted lands); *id.* §§ 2206, 2216 (inheritance or restricted lands); *id.* § 5107 (transfer and exchange of restricted lands). Interior identified the Moses Allotments as restricted lands as part of its regulations, *see* 25 C.F.R. Appendix I; and Interior has made decisions for these lands (by way of Indian probate and leasing) that carry the force of law. *Cf. County of Amador v. U.S. Department of the Interior*, 872 F.3d 1012, 1021-22 (9th

Cir. 2017) (noting that courts have deferred under *Chevron* to Interior's application of the IRA on land-status issues).

In any event, even if *Chevron* deference does not apply, *Skidmore* deference is appropriate. The questions of Indian land tenure can be complex, Interior has longstanding expertise in this area, and Interior's determination that MA-8 is a reservation allotment (and therefore "Indian land" for purposes of the IRA's trust extension) is reasonable. This Court has made it clear that *Skidmore* deference is appropriate in such circumstances, even if a statute reasonably might be read differently, and even when the agency did not provide (in relevant administrative proceedings) an extensive explanation for its interpretation. *See Larson*, 967 F.3d at 925-26 (applying *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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March 31, 2021
DJ No: 90-6-6-16151

STATEMENT OF RELATED CASES

The following are related cases under Circuit Rule 28 2.6 because they arise from the same district court proceeding (E.D.Wash. No. 2:09-cv-00018-RMP):

- *Grondal v. United States*, 9th Cir. No. 20 35357 (docketed Apr. 28, 2020). Plaintiff/Appellant Mill Bay, and Defendants/Appellants Wapato and Reyes appealed an order holding that the United States is not required to provide, at government expense, independent counsel to defendant allottee landowners. The appeal has been briefed, but not yet scheduled for argument.\
- *Grondal v. United States*, 9th Cir. No. 21-35147 (docketed Feb. 24, 2021). Appellant Wapato appealed from an interlocutory judgment dismissing the United States' cross-claims against Wapato and denying Wapato the right to participate in the trial of the United States' claim against Mill Bay for trespass damages. On March 12, 2021, this Court directed Appellant to show cause why the appeal should not be dismissed for absence of appellate jurisdiction.

/s/ John L. Smeltzer
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U.S. Department of Justice

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number U.S.C.A. No. 20-35694 U.S.D.C. No. 2:09-CR-00018-RMP

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/s/ *John L. Smeltzer*

Date March 31, 2021

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

ADDENDUM

25 U.S.C. § 372 – Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under the Indian Land Consolidation Act or a tribal probate code approved under such Act and pursuant to such rules as he may prescribe, shall ascertain the legal heirs of such decedent . . . All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe . . .

25 U.S.C. § 373 – Disposal by will of allotments held under trust

Any persons of the age of eighteen years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with the Indian Land Consolidation Act or a tribal probate code approved under such Act and regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior . . . Provided further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period . . .

25 U.S.C. § 415 – Leases of restricted lands

(a) Authorized purposes; term; approval by Secretary

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except . . .

leases of the land comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington . . . which may be for a term of not to exceed ninety-nine years, . . . Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior . . .

25 U.S.C. § 2216 – Trust and restricted land transactions

(a) Policy

It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions--

(1) involving individual Indians;

(2) between Indians and the tribal government that exercises jurisdiction over the land; or

(3) between individuals who own an interest in trust and restricted land who wish to convey that interest to an Indian or the tribal government that exercises jurisdiction over the parcel of land involved;

in a manner consistent with the policy of maintaining the trust status of allotted lands. Nothing in this section shall be construed to apply to or to authorize the sale of trust or restricted lands to a person who is not an Indian.

(b) Sales, exchanges and gift deeds between Indians and between Indians and Indian tribes

(1) In general

(A) Estimate of value

Notwithstanding any other provision of law and only after the Indian selling, exchanging, or conveying by gift deed for no or nominal consideration an interest in land, has been provided with an estimate of the value of the interest of the Indian pursuant to this section—

(i) the sale or exchange or conveyance of an interest in trust or restricted land may be made for an amount that is less than the fair market value of that interest; and

(ii) the approval of a transaction that is in compliance with this section shall not constitute a breach of trust by the Secretary.

(B) Waiver of requirement

The requirement for an estimate of value under subparagraph (A) may be waived in writing by an owner of a trust or restricted interest in land either selling, exchanging, or conveying by gift deed for no or nominal consideration such interest--

(i) to an Indian person who is the owner's spouse, brother, sister, lineal ancestor, lineal descendant, or collateral heir; or

(ii) to an Indian co-owner or to the tribe with jurisdiction over the subject parcel of land, where the grantor owns a fractional interest that represents 5 percent or less of the parcel.

. . .

25 U.S.C. § 5102 – Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 5111 – Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to 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. § 5125 – Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior,

within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 5126 – Mandatory application of sections 5102 and 5124

Notwithstanding section 5125 of this title, sections 5102 and 5124 of this title shall apply to--

(1) all Indian tribes,

(2) all lands held in trust by the United States for Indians, and

(3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

28 U.S.C. § 2409a – Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

. . .

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Act of Mar. 8, 1906, ch. 629, 34 Stat. 55 – An act providing for the issuance of patents for lands allotted to Indians under the Moses agreement of July seventh, eighteen hundred and eighty-three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to issue patents to such Indians as have been allotted land under and by virtue of the agreement concluded July seventh, eighteen hundred and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the Moses agreement, accepted, ratified, and confirmed by the act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), which patents shall be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of ten years from the date of the approval of this act in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his decease, either prior or subsequent to the issuance of such patent, of his heirs, according to the laws of the State of Washington, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands so held in trust by any allottee or his heirs, or any contract made touching the same, except as hereinafter provided, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

Sec. 2. That any allottee to whom any trust patent shall be issued nder the provisions of the foregoing section may sell and convey all the lands covered thereby, except eighty acres, under rules and regulations prescribed by the Secretary of the Interior. And the heirs of any deceased Indian to whom a patent shall be issued under said section may in like manner sell and convey all of such inherited allotment except eighty acres, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser the same as if a final patent without restrictions upon alienation had been issued to the allottee. All allotted land alienated under the provisions of this act shall thereupon be subject to taxation under the laws of the State of Washington.

Act of June 21, 1906, ch. 3504, 34 Stat. 326

Be it enacted by the Senate and House of Representatives of the United States of Ameica in Congress assembled, . . .

That prior to file expiration of tile trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall lie 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 . . .

Act of June 15, 1935, ch. 260, 49 Stat. 378 – To define the election procedure under the Act of June 18, 1984 and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: *Provided*, *however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote.

Sec. 2. The time for holding elections on the question of excluding a reservation from the application of said Act of June 18, 1934, is hereby extended to June 18, 1936.

Sec. 3. 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 Act of Juno 18, 1934, the periods of trust or the restrictions on alienation of such lands are hereby extended to December 31, 1936.

Sec. 4. All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 stat. 984), shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.

25 C.F.R. § 162.012 – What are the consent requirements for a lease?

(a) For fractionated tracts:

(1) Except in Alaska, the owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract:

If the number of owners of the undivided trust or restricted interest in the tract is . . .	Then the required percentage of the undivided trust or restricted interest is . . .
(i) One to five,	90 percent;
(ii) Six to 10,	80 percent;
(iii) 11 to 19,	60 percent;
(iv) 20 or more,	Over 50 percent.

(2) Leases in Alaska require consent of all of the Indian landowners in the tract.

(3) If the prospective lessee is also an Indian landowner, his or her consent will be included in the percentages in paragraphs (a)(1) and (2) of this section.

(4) Where owners of the applicable percentages in paragraph (a)(1) of this section consent to a lease document:

(i) That lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document; and

(ii) That lease document will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the lease. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe.

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages in paragraph (a)(1) of this section based on our records on the date on which the lease is submitted to us for approval.

25 C.F.R. § 162.021 – What are BIA's responsibilities in approving leases?

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self–Determination and Education Assistance Act, as amended, 25 U.S.C. 450f et. seq.

(c) We will promptly respond to requests for BIA approval of leases, as specified in §§ 162.340, 162.440, 162.530, and 162.565.

(d) We will work to ensure that the use of the land is consistent with the Indian landowners' wishes and applicable tribal law.

25 C.F.R. § 162.022 What are BIA's responsibilities in administering and enforcing leases?

(a) Upon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take appropriate action, as specified in §§ 162.364, 162.464, and 162.589. Nothing in this part prevents an Indian landowner from exercising remedies available to the Indian landowners under the lease or applicable law.

(b) We will promptly respond to requests for BIA approval of amendments, assignments, leasehold mortgages, and subleases, as specified in subparts C, D, and E.

(c) We will respond to Indian landowners' concerns regarding the management of their land.

(d) We will take emergency action as needed to preserve the value of the land under § 162.024.

25 C.F.R. § 162.023 – What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

25 C.F.R. § 162.441 – How will BIA decide whether to approve a business lease?

(a) We will approve a business lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

§ 162.471 What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.