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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, vs. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, et al., Defendants.	NO. CV-09-0018-JLQ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND FOR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs filed this action after an Order was issued by Judge Robert H. Whaley in the case *Wapato Heritage LLC v. United States of America, et. al*; Case No. CV-08-177-RHW ("*Wapato Heritage*") on November 21, 2008. Wapato Heritage LLC had filed suit challenging, *inter alia*, a decision by the BIA that Lease 82-21(Master Lease) between Wapato Heritage LLC and certain Indian landowners was to expire on February 2, 2009. (*See generally, Wapato Heritage*, Ct. Rec. 1). Wapato Heritage LLC asserted that its predecessor, William Evans, Jr.(Evans) had exercised an option to renew a provision in the lease and that the lease had been automatically renewed as a result. Alternatively, Wapato Heritage LLC argued that the BIA, through various actions which acknowledged the lease

extension, approved the exercise of the option and extended the term of the lease for 25 years. Lastly, Plaintiffs argued that in equity the court should determine the lease extends to 2034. (*See generally, Wapato Heritage*, Ct. Rec. 1 and Order, Ct. Rec. 30 at 9).

Both parties moved for summary judgment under the APA and the positions of the parties were extensively briefed. (*See Wapato Heritage*, Ct. Recs. 13-28). In a 14-page Order, the Court in *Wapato Heritage LLC* addressed all of the plaintiffs' evidence and arguments in support of its position. The Court found that neither the plaintiff nor its predecessor had actually or substantially complied with the option to renew provision in the Master Lease. In so doing, the Court concluded that the "BIA did not have authority to sign the lease or accept service of a notice for the other listed Indian landowners." (*Wapato Heritage*, Ct. Rec. 30 at 9). Applying a *de novo* standard of review, (*Wapato Heritage*, Ct. Rec. 30 at 8) the Court concluded that a 1985 letter written by Evans to the BIA did not act to extend the lease. (*Id*. at 9).

The Court also addressed the plaintiffs' argument that the BIA had approved the extension of the lease through its various acknowledgments and approvals of documents which indicated the Master Lease was effective through February 2, 2034. (*Wapato Heritage*, Ct. Rec. 30 at 4-6, 12-13). The Court found that the BIA's actions aside (some disputed, some not), BIA did not have the authority, either under the terms of the Master Lease or by law to "alter the notice requirements, ratify any deficiency in compliance with those requirements, or unilaterally approve any extension of the lease." (*Id*. at 12-13).

Finally, the Court ruled that the facts did not warrant a finding of special circumstances to excuse, in equity, the plaintiffs' failure to timely exercise the option to renew. The Court noted that the "Plaintiff inexplicably failed to provide

notice to the Indian landowners despite being notified of the BIA's position on lease renewal over two months before the applicable deadline." (*Wapato Heritage*, Ct. Rec. 30 at 13). The Court dismissed the plaintiffs' cause of action seeking declaratory judgment that the Master Lease did not expire until February 2, 2034. (*Wapato Heritage*, Ct. Rec. 30 at 14). On motion for reconsideration, the Court again emphasized that:

> Moreover, the law and the Master Lease itself remain clear that the Bureau of Indian Affairs is not the lessor nor even a party to leases of this kind. . . . (citation to authority omitted). Plaintiff's renewed argument that "BIA was the sole Lessor under the Master Lease" . . . is inconsistent with the unambiguous language of the lease and the law guiding the Court's interpretation of that instrument.

(Wapato Heritage, Ct. Rec. 58 at 3).

Federal Defendants in *Wapato Heritage LLC* have now moved for dismissal of the remaining claim for relief in that action. (*Wapato Heritage,* Ct. Rec. 68-70). In its response, Wapato Heritage LLC concedes that, with the Court's dismissal of its Third Cause of Action, the remaining claims relating to the Master Lease are also properly dismissed. (*Wapato Heritage,* Ct. Rec. 80).

In the present action, Plaintiffs' claims, with two possible exceptions, rest on the exact issue as that in *Wapato Heritage* - whether the term of the Master Lease was in fact extended or should in equity be considered to be extended. That issue has been decided and cannot again be re-litigated in this action. Plaintiffs have also set forth a due process claim, alleging that Federal Defendants' notice to Plaintiffs that their right to remain on MA-8 ended with the expiration of the Master Lease deprives them of due process under the Fifth Amendment. Additionally, although not a separate claim, but perhaps better labeled an anticipatory affirmative defense to Federal Defendants' counterclaim, Plaintiffs assert that the Master Lease itself provides for their continued occupancy on MA-8 even after the expiration of the Master Lease.

This Court lacks jurisdiction over Plaintiffs' Complaint. Although the Complaint asserts jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), the Complaint does not raise a cognizable claim under the APA because it fails to identify any reviewable, final agency action that the BIA has taken. In any event, Plaintiffs have failed to state how they have been aggrieved by agency action withing the meaning of a relevant statute. Because the APA provides the only applicable waiver of sovereign immunity of the United States under Plaintiffs' fourth claim for relief, the defects are jurisdictional and sovereign immunity has not been waived. As to Plaintiffs' due process claim, Federal Defendants submit that Plaintiffs have an insufficient property interest which would entitle them to due process. Moreover, Federal Defendants' written notice to Plaintiffs advising them that their right to occupy MA-8 ended on February 2, 2009, with the expiration of the Master Lease does not constitute a taking. In any event, with Federal Defendants' filing of the counterclaim which seeks Plaintiffs' ejectment, this issue is moot as due process will be afforded by a hearing on this claim.

Finally, as set forth below, Federal Defendants submit that Plaintiffs' right to occupy MA-8 expired on February 2, 2009, that they are in trespass and that this Court should issue a judgment of ejectment on Federal Defendants' counterclaim.

II. FACTUAL BACKGROUND

This factual background is largely taken from pleadings in the *Wapato Heritage* case and is provided as background information only. It is not meant to set forth material facts not otherwise listed in Federal Defendants' Statement of Material Facts, filed herewith in support of their motion for ejectment.

The land at issue, known as MA-8, lies within the boundaries of the Columbia or Moses Reservation established by Executive Orders of April 19, 1879

and March 6, 1880. *Kappler*, 904 (GPO 1904). Pursuant to an agreement between the Moses Band and the Secretary of the Interior dated July 7, 1883, affirmed and ratified by Congress in the Act of July 4, 1884, 23 Stat. 79-80, allotments were issued to various members of the Moses Band that chose not to remove to the Colville Reservation. The current MA-8 is a portion of the original Moses Allotment 8 that was allotted to Nek-quel-e-kin or Wapato John in 1907. In the allotment document the United States declared that it would hold the land in trust for the benefit of Wapato John and his heirs.

In 1984, when the lease at issue was entered into, Wapato John and many of his heirs had died and the beneficial ownership had fractionated into many interests, most but not all still held in trust status.[1] One of the beneficial Indian owners, William Evans (Evans), wanted to lease the entire parcel from his co-owners for a development. The law authorizing the leasing of this individual trust land is codified at 25 U.S.C. § 415.

In 1984 the BIA approved Lease No. 82-21 (Master Lease) between Evans and his Indian co-owners. The lease authorized Evans to use MA-8 for "a recreational development and related activities." (SMF 3, Attachment A, Exhibit 1 at ¶ 6). Evans began by developing a camping resort and golf course, and in 1993 sublet a portion of MA-8 to the Colville Confederated Tribes for a gaming facility. Prior to his death in 2003, Evans established Wapato Heritage LLC, a state chartered limited liability corporation, to manage his non-trust assets. No later

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[1] When an interest in trust or restricted Indian land is inherited by a non-Indian, the interest loses its trust or restricted status. *Bailess v. Paukune*, 344 U.S. 171 (1952); 25 C.F.R. § 152.6.

than when he died, his interest as the lessee of MA-8 was acquired by Wapato Heritage LLC. Before he died, Evans and Plaintiffs had become engaged in litigation over Plaintiffs' occupancy of the land developed as the camping resort. The litigation was resolved after his death in a Settlement Agreement executed by Wapato Heritage, the members of the LLC, and Plaintiffs in 2004.

The Master Lease was granted and approved for a term of 25 years, to February 2, 2009, with an option to renew for an additional 25 years. The option needed to be exercised prior to the last year of the lease. (SMF 2, Attachment A, Exhibit 1, ¶ 3). In 1985 Evans purported to exercise the option to renew by writing a letter to the Superintendent of the BIA. In 2007, prior to the final year of the lease, the Superintendent notified Wapato Heritage LLC that BIA did not consider the 1985 letter to be an effective exercise of the option. In August 2008, BIA notified Wapato Heritage LLC that the Master Lease would expire on February 2, 2009. Wapato Heritage LLC filed suit against the BIA contesting its conclusion that the lease had not been effectively extended beyond February 2, 2009. As previously discussed in the Introduction, on November 21, 2008, Judge Whaley upheld the BIA's position that the lease had not been effectively renewed. Consequently, on December 10, 2008, BIA informed all occupants of MA-8 that Lease 82-21 would expire as of February 2, 2009, and that they should negotiate new leases with the Indian landowners if they wished to continue to occupy the property. (SMF 10). This action followed.

III. ARGUMENT

A. Dismissal Standard.

It is fundamental that federal courts are courts of limited jurisdiction, and that "the limits on federal jurisdiction must not be disregarded or evaded". *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1230

(E.D. Cal. 2003) (citing *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978)). The doctrine of sovereign immunity, moreover, is one of those limitations on the power of a federal court to hear a claim for relief against the United States. *See Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). The burden of asserting jurisdiction rests on the plaintiffs. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)).

B. Plaintiffs' Claims Should be Dismissed for Lack of Jurisdiction Because the United States Has Not Waived Its Sovereign Immunity.

It is well established the United States, as sovereign, "is immune from suit (unless) it consents to be sued." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The government's waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Testan*, 424 U.S. at 399 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Waivers of sovereign immunity are to be construed narrowly in favor of the government unless Congress clearly states otherwise. *Safeway Portland Employees' Fed. Credit Union v. FDIC*, 506 F.2d 1213, 1216 (9th Cir. 1974) (citations omitted).

"Any claim for which sovereign immunity has not been waived must be dismissed for lack of jurisdiction." *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004) (citing *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985), *aff'd*, 545 U.S. 596 (2005)). Thus, in determining whether Congress has waived sovereign immunity in a suit with multiple claims against the government, the courts must determine whether each claim falls within an applicable waiver. *See, e.g., Tucson Airport Auth. v. General Dynamics Corp.*, 922 F. Supp. 273, 279-87 (D. Ariz. 1996) (examining whether each of the plaintiff's eight claims for relief fell within an applicable waiver of sovereign immunity), *aff'd*, 36 F.3d 641, (9th

Cir. 1998). The plaintiff has the burden of proving sovereign immunity has been waived. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citing *Cole v. United States*, 657 F.2d 107, 109 (7th Cir.1981).

Although Plaintiffs have set forth five claims for relief, only two of them set forth ostensible causes of action - Plaintiffs' fourth claim for relief under the Administrative Procedures Act and the Fifth Amendment due process claim.[2] Plaintiffs' first three claims for Estoppel, Waiver, and Modification are not proper claims for relief and should be characterized as anticipatory affirmative defenses; they cannot form the basis of a claim against the United States.

C. Plaintiffs have failed to state a claim under the Administrative Procedures Act.

Plaintiffs assert a waiver of sovereign immunity under the APA, 5 U.S.C. § 701-706. (Ct. Rec. 1, ¶ 26). Section 702 of the APA provides in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof.

5 U.S.C. § 702. Plaintiffs generally allege that BIA action was arbitrary, capricious and not in accordance with the law, citing a test for judicial review of final agency action under the APA, 5 U.S.C. §§ 702, 706. (Ct. Rec. 1, ¶¶186-198). Plaintiffs do not clearly identify the BIA action that they challenge. In fact, Plaintiffs claim that:

> BIA's current position that it did not have authority to accept notice on behalf of the Allottees, modify the terms of the Master Lease, modify terms of any Subleases to MA-8, or otherwise burden and encumber the Allottees' rights to MA-8 constitutes arbitrary and capricious agency action, is an abuse of discretion and otherwise not in accordance with the law.

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[2] *See* paragraph 26 of the Complaint wherein Plaintiffs claim Federal Defendants have waived sovereign immunity under 5 U.S.C. § 702 and the Fifth Amendment.

(Ct. Rec. 1, ¶ 197). If a plaintiff fails to identify a final agency action challengeable under the APA, the action should be dismissed for lack of subject matter jurisdiction. *See ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1140 (9th Cir. 1998) (holding that plaintiff had no statutory standing because it failed to identify a final agency action for purposes of the APA). Here, Plaintiffs have only identified a position taken by the BIA.

Applying a liberal interpretation to this paragraph, Federal Defendants will assume that Plaintiffs' reference to "BIA's current position" refers to the BIA's final determination that the Master Lease and Plaintiffs' right to occupy would expire as of February, 2009, due to the lessee's failure to effectively exercise the option to renew the lease. However, Section 702 of the APA does not create substantive rights and "the party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action '*within the meaning of a relevant statute*.'" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)(emphasis added). Plaintiffs' allegations under the APA do not identify a legal wrong they allegedly have suffered; they merely assert they have been injured. (Ct. Rec. 1, ¶ 198). Such conclusory allegations cannot form the basis for a claim. Presumably, then, Plaintiffs base their APA claim on an allegation that the BIA action adversely affected them within the meaning of a relevant statute. But, Plaintiffs fail to identify any injury they suffered within the meaning of a relevant statute. In their claim under the APA, Plaintiffs reference only the statutory provisions regarding BIA's relationship to the beneficial land owners that Plaintiffs allege have been violated by BIA. (*Id*. at ¶ 192, 194). BIA's duties to the Indian beneficial owners with respect to leases of their trust land are set forth in the federal statutes and regulations regarding leasing of Indian trust lands. *See United States v. Mitchell,*

463 U.S. 206, 224 (1983) (statutes and regulations define the contours of the United States' fiduciary responsibilities); *Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (25 U.S.C. § 415 and 25 C.F.R. Part 162, set forth BIA's duty with respect to commercial leasing). However, Plaintiffs lack prudential standing to set forth a claim based upon an alleged violation of those provisions. In order to establish prudential standing, a plaintiff must show that the injury complained of falls within the zone of interests sought to be protected by the statutory provision alleged to be violated. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted).

The provisions setting forth BIA's trust duties as to commercial leasing were not enacted to protect any interests of Plaintiffs. Plaintiffs are occupiers of Indian trust land, and 25 U.S.C. § 415 was enacted to protect the Indian beneficial owners - not potential users or occupiers of that land. *See Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036-37 (8th Cir. 2002); *Webster v. United States*, 823 F. Supp. 1544, 1550 (D. Mont. 1992) (holding § 415 insures Indian land transactions with third parties are advantageous), *aff'd*, 22 F.3d 221 (9th Cir. 1994); *cf. San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001) (reservation specific leasing legislation nearly identical to § 415 confers no standing to non-tribal or non-government litigants).

Thus, as mere occupiers—not owners—of Indian trust land Plaintiffs do not fall within the zone of interests sought to be protected by the statutory provisions regarding leasing of Indian trust land. It follows, therefore, that they have failed to allege how they have been aggrieved by federal action "within the meaning of a relevant statute."

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D. Plaintiffs' Claims and All Issues Relating to the Term of the Master Lease are Barred by the Doctrine of Res Judicata.

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata". *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008). Generally, claim preclusion bars subsequent litigation of the same cause of action by the same parties or their privies. *Id.*; *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008); *In re Schimmels*, 127 F.3d 875, 881(9th Cir.1997)). This includes a bar of all bases for recovery which could have been asserted. *Taylor v. Sturgell*, 128 S. Ct. at 2171; *Ross v. IBEW*, 634 F.2d 453, 457 (9th Cir. 1980). Issue preclusion prevents "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment even if the issue recurs in the context of a different claim". *Taylor v. Sturgell*, 128 S. Ct. at 2171 (internal quotations omitted); *Kendall v. Visa U.S.A. Inc*, 518 F.3d 1042, 1050 (9th Cir. 2008). Here, claim preclusion bars Plaintiffs from re-litigating their APA claim and designated claims for Estoppel, Waiver and Acquiescence, Modification and Declaratory Judgment. Issue preclusion forecloses re-litigation of the issue of whether the term of the Master Lease was or should be considered extended to February 2, 2034.

Initially, for claim preclusion to apply, the claims raised in the two actions must be the same. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). The Ninth Circuit has considered four criteria in making that determination:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982) (citing *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980)). The most important criterion is whether the action arose from the same transactional nucleus of facts. *Id*. Here, there is no doubt Plaintiffs' claims are in essence, the same causes of action raised in *Wapato Heritage*. Applying the last *Costantini* criterion first, both this action and *Wapato Heritage* clearly arise from the "same transactional nucleus of facts." Both actions were filed as a result of BIA's determination that the option to renew provision in the Master Lease was not effectively exercised and the Master Lease therefore expired on February 2, 2009. As in *Wapato Heritage*, the relief requested by Plaintiffs is a determination that the option was exercised or that BIA approved extension of the Master Lease or, in equity, the lease should be treated as having been renewed.

Turning to the other *Costantini* criteria, a comparison of the two actions demonstrate that the evidence presented will be largely the same, that the two suits involve the infringement of the same right and that a decision for Plaintiffs here would result in a conflict with the earlier decision and judgment. In both cases, the complaints state that Evans entered into a lease agreement for MA-8; that Evans validly exercised his option to renew the lease in a 1985 letter to George Davis, Superintendent of the Colville Agency, BIA, and that George Davis had the authority to accept the letter as a valid exercise of the option. (*Compare Wapato Heritage* Complaint, Ct. Rec. 1, ¶¶ 16, 19, 20, 72, *with* Plaintiffs' Complaint, Ct. Rec. 1, ¶¶ 52, 58-62, 73, 167, 174). Both complaints allege that certain actions by the BIA acknowledged that the Master Lease had been extended. *Compare Wapato Heritage* Complaint, Ct. Rec. 1, ¶¶ 27-29 (CTEC sublease approved by BIA includes statement that lease had been extended), *with* Plaintiffs' Complaint, Ct. Rec. 1, ¶¶ 102, 103 (BIA approved CTEC sublease and acknowledged the

validity of the renewal of Master Lease). (*Also compare Wapato Heritage* Complaint, Ct. Rec. 1, ¶ 37 (BIA participated in and had knowledge of settlement agreement between Wapato Heritage LLC and RV Park members and knew that the agreement granted right to use until 2034) *with* Plaintiffs' Complaint, Ct. Rec. 1, ¶¶ 121-123, 131-133 (BIA was present and participated at mediation, received notice of settlement agreement, refused to respond or object to the terms of it)). Both complaints state that BIA's conduct in determining the lease was not extended conflicts with its earlier actions and should not be condoned. (*Compare Wapato Heritage* Complaint, Ct. Rec. 1, ¶¶ 75,76 with Plaintiffs' Complaint, Ct. Rec. 1, ¶¶ 169, 171-172, 177-178). Most importantly, Plaintiffs seek an order from this Court that the Master Lease did not expire on February 2, 2009, a request clearly in conflict of the Court's ruling in *Wapato Heritage*.

Plaintiffs' APA claim, and to the extent they are cognizable claims, Plaintiffs' claims for Estoppel, Waiver and Acquiescence, Modification, and Declaratory Judgment are the same claims as those brought by Wapato Heritage LLC in *Wapato Heritage*.

A person not a party to a prior lawsuit may nevertheless be precluded from re-litigating the same claims and issues decided in that suit. *See generally*, *Taylor v. Sturgell*, 128 S. Ct. at 2172-2173 (setting forth six categories of exceptions to the rule against nonparty preclusion). Often referred to as "privity", a substantive legal relationship between the party to the previous judgment and the person to be bound can act to preclude the non-party from litigating the same claims and issues. *Id.* at 2172. "Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor". *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172 (2008) (citing 2 Restatement §§ 43-44, 52, 55). "'Privity' . . . is a legal conclusion 'designating a person so identified in

interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (*citing Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977)). *See, e.g., United States v. Stull*, 105 F. Supp. 568, 571 (D.C. Conn. 1952) ("Privity, as used in the doctrine of res judicata, means mutual or successive relationships to the same rights of property; as testator and executor, ancestor and heir, assignor and assignee, grantor and grantee, lessor and lessee." *(citing National Lead Co. v. Nulsen*, 131 F.2d 51, 56 (8th Cir. 1942) (cert. denied 318 U.S. 758)).

Plaintiffs have a "substantive legal relationship" with Wapato Heritage LLC that places them in privity with Wapato Heritage LLC relative to the issues and claims raised in this complaint. Plaintiffs entered into camping membership agreements with Evans to use a portion of MA-8 which Evans had leased from the Indian landowners. (Ct. Rec. 1, ¶¶ 6, 45, 52, 76-78, 80, 84). Plaintiffs' rights to use MA-8 derive solely from documents entered into by Evans or Wapato Heritage LLC. *See* Plaintiffs' Answer to Counterclaim Ct. Rec. 43, ¶ 2 (Plaintiffs' acquired rights to use and occupy a portion of the land known as MA-8 flows from the Master Lease . . . Settlement Agreement between Mill Bay Members Association and Wapato Heritage, LLC... and the Camping Membership Agreements)). Plaintiffs are in a contractual relationship with Wapato Heritage LLC, and Plaintiffs have rights no greater than those of Wapato Heritage LLC in relation to the Master Lease and their right to occupy MA-8. Plaintiffs are, in essence, an assignee to the rights of Wapato Heritage LLC in this regard. Plaintiffs must be considered in a qualifying relationship for purposes of claim and issue preclusion.

The Supreme Court notes that in addition to the privity or substantive legal relationship category of exceptions to the general rule against nonparty preclusion,

"when a nonparty . . . brings suit as an agent for a party who is bound by a judgment" preclusion is likely appropriate. *Taylor v. Sturgell*, 128 S. Ct. at 2173. Here, the relief requested by Plaintiffs is that the lease agreement between Wapato Heritage LLC and the Indian landowners be determined to have been extended to the year 2034. Plaintiffs are asking this Court to decide a legal matter involving a lease to which it is not a party. They are, in fact, stepping into the shoes of Wapato Heritage LLC and seek from this Court what Wapato Heritage LLC did not succeed in obtaining in its action against the same Federal Defendants. They are, in essence, acting as agents for Wapato Heritage LLC.

For largely the same reasons, Plaintiffs are precluded from re-litigating the overriding issue in this case—whether the term of the Master Lease was or should be considered extended to 2034. For issue preclusion to apply, there must have been a "full and fair opportunity to litigate" the issue in the previous action, the issue had to have been actually litigated and a final judgment rendered, and the party against whom preclusion is asserted was in privity with the party in the previous action. *Kendall v. Visa U.S.A. Inc*, 518 F. 3d at 1050. Here, each of these elements are met. The pleadings in *Wapato Heritage* on this issue are extensive. Both parties moved for summary judgment and both had opportunities to and did respond and reply to the briefing. (*Wapato Heritage,* Ct. Recs. 13-22, 25-28). Oral argument was heard and a decision rendered. (*Wapato Heritage*, Ct. Recs. 29, 30). Moreover, Wapato Heritage LLC sought reconsideration on the basis of newly discovered evidence and this was fully briefed. (*Wapato Heritage*, Ct. Recs. 34-38, 53, 56). A ruling was issued on that motion. (*Wapato Heritage,* Ct. Rec. 58). There is no argument that can be made that this issue wasn't thoroughly briefed and argued. As for the privity element on issue preclusion, the same standard applies as for claim preclusion.

The doctrine of res judicata protects against "the expense and vexation attending multiple lawsuits, conserve[s] judicial resources and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor*, 128 S. Ct. at 2171 (citations omitted). Plaintiffs' complaint fits squarely into the purpose behind the doctrine of res judicata. Plaintiffs' claims under the APA and for Estoppel, Waiver and Acquiescence, Modification and Declaratory Judgment, must be dismissed on the basis of res judicata. Moreover, rehearing the issue of whether the lease expired on February 2, 2009 is foreclosed under issue preclusion.

E. Due Process Claim.

In their Fifth Amendment claim, Plaintiffs allege that they have a property right in MA-8 and that BIA's "determination" has violated their due process rights. Federal Defendants disagree that Plaintiffs have Fifth Amendment rights relative to their occupancy of MA-8. Plaintiffs merely have contracts with Wapato Heritage LLC to use MA-8. However, without waiving any rights to defend against this claim, Federal Defendants submit that because they have filed a counterclaim seeking a court order of ejectment of Plaintiffs, the hearing on this counterclaim will provide Plaintiffs with adequate due process and this claim is moot.

F. Federal Defendants Counterclaim for Ejectment.

1. Summary Judgment Standard.

Summary judgment is appropriate when “there is no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). If the moving party meets this burden, the non-moving party may not rest upon its pleadings, but must come forward with specific facts by use of affidavits, depositions, admissions, or

answers to interrogatories showing there is a genuine issue for trial as to the elements essential to the non-moving party's case. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The non-movant cannot avoid summary judgment by resting on bare assertions, general denials, conclusive allegations or mere suspicion. *See*, Fed. R. Civ. P. 56(e); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990) (non-moving party must offer specific facts contradicting the acts averred by the movant that indicate that there is a genuine issue for trial).

2. The Undisputed Facts Demonstrate That Plaintiffs Have No Right to Occupy MA-8 and Are Trespassing Upon the Indian Trust Land.

In their answer to Plaintiffs' Complaint, Federal Defendants filed a counterclaim seeking an order for Plaintiffs' ejectment from MA-8. Federal Defendants submit that there are no disputed material facts which raise a genuine issue as to Federal Defendants right to judgment on its counterclaim.

There is no dispute between the parties that MA-8 constitutes Indian land. While Plaintiffs and Federal Defendants may differ on the statutory basis for the creation of MA-8, both parties agree that the land is held by the United States for the benefit of the Indian owners. *(Compare* Ct. Rec. 1, ¶ 33 ("The United States holds title to MA-8 for the use and benefit of individual Indian allottees") *with* Federal Defendants' Answer, Ct. Rec. 42 ¶ 33) ("Federal Defendants admit that the United States holds MA-8 in trust for the Tribe and certain individual Indians")). As such, MA-8 meets the definition of "Indian land" in 25 C.F.R. § 162.101 ("Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status").

Plaintiffs are an individual and a Washington State non-profit corporation. (Ct. Rec. 1, ¶¶ 10-11). Neither Plaintiffs have claimed any ownership interest in

MA-8. Title 25 C.F.R. § 162.104(d) provides "any [nonowner] person or legal entity, including an independent legal entity owned and operated by a tribe, must obtain a lease under these regulations before taking possession". Consequently, in order for Plaintiffs to lawfully occupy or possess Indian land they must obtain a lease under 25 C.F.R. Part 162, the regulations governing the leasing of Indian land. It is conceded that at one time, the Master Lease (Lease No. 82-21) was the lawful source of Plaintiffs' occupancy. However, the Master Lease has expired, and any rights Plaintiffs may have had to occupy MA-8 expired at the same time.

Plaintiffs appear to acknowledge that their rights are derivative of the rights of Wapato Heritage LLC, for they have raised the same arguments for extension of the term of the Master Lease made by the plaintiffs in *Wapato Heritage.* These arguments and allegations were addressed by Judge Whaley in his decisions. For example, in their estoppel claim/affirmative defense, Plaintiffs allege BIA was "authorized to bind the Allottees to the Master Lease and any modification or plans related to that lease" and that by its acknowledgment that the tenancy of the Master Lease had been extended until 2034, the BIA is estopped from issuing a determination that the lease option to renew was not effectively exercised and the tenancy expires on February 2, 2009. (Ct. Rec. 1 ¶¶ 165, 169, 171, and ¶ 2 of the Prayer for Relief). In its Waiver and Acquiescence claim, Plaintiffs again charge that BIA executed the Master Lease as the Lessor and claim that BIA's actions in signing and approving certain documents, including the Extended Membership Agreement, and its failure to object to a settlement agreement between Wapato Heritage LLC and Plaintiffs, constitute a waiver of its authority to determine that Plaintiffs have no rights to remain on MA-8 after February 2, 2009. (Ct. Rec. 1, ¶¶ 174, 176, 177, 178). Plaintiffs' Modification claim repeats Wapato Heritage LLC's arguments that BIA had the "authority to bind the allottees in the Master Lease and

enter into any subsequent modification of the Master Lease" and had the authority to accept Evan's exercise of the option to renew regardless of Evan's compliance with the terms of the Master Lease in that regard. (Ct. Rec. 1, ¶¶ 182, 183).

These arguments were considered and resolved in *Wapato Heritage*. Judge Whaley found that BIA did not have authority to modify the lease by approving a term extension or to waive compliance with the lease provisions.

> The BIA did not have authority to sign the lease or accept service of a notice for the other listed Indian landowners. The Superintendent of the Colville Agency is merely one listed party, who has regulatory authority to sign the Master Lease as a guardian of the individual landowners. Moreover, federal law is clear that the BIA is not a party to leases of this kind. *McNabb v. United States*, 54 Fed. Cl. 759, 769 (Fed. Cl. 2002) (holding that the BIA's managerial control over allotted lands does not convert the BIA into a party to contracts involving those lands).
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> . . .
>
> The BIA is a party to the contract only insofar as it has guardianship signatory authority for a minority of allottees. *Neither the lease nor the law grant the BIA the authority to alter the notice requirements, ratify any deficiency in compliance with those requirements, or unilaterally approve any extension of the lease*.

(*Wapato Heritage*, Ct. Rec. 30 at 9 and 13) (emphasis added).

Those findings and conclusions of law preclude Plaintiffs from raising those same arguments now and re-litigating these issues. Federal Defendants do not have the legal authority to approve Plaintiffs' occupancy beyond the term of the Master Lease. Plaintiffs are in trespass and an ejectment order should issue.

Plaintiffs also claim that regardless of the expiration date of the Master Lease, Paragraph 8 of the Master Lease provides for the continuation of subtenancies. (Ct. Rec. 1, ¶¶ 162, 163, 216). This paragraph provides:

> Termination of thie (sic) 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 no (sic) require any new or

> additional performance not already provided or previously performed by Lessee.
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> . . .
>
> In any event, Lessor shall not be required to honor or perform any obligation that has not been previously approved by Lessor and the Secretary.

(SMF 2).

Plaintiffs have argued that this provision should be interpreted to mean that the natural expiration of the lease is a "termination" under this paragraph and thus they must be allowed to remain upon the property after the natural expiration of the Master Lease. Such an interpretation is inconsistent both with the terms of Paragraph 8 and with other provisions within the Master Lease.

First, it is not clear what document Plaintiffs rely upon to be the "sublease" which they allege Paragraph 8 provides has not been cancelled and should be honored by the Indian landowners. The sublease through which the camping resort was created was entered into on June 11, 1984, between lessee Evans and MAR-LU, LTD., a company controlled by Evans. (SMF 4). According to Section 2 of that sublease, it "shall expire on the date of the expiration of the Master Lease and exercised extension option, if any, whichever be the later." (*Id.*). Because the District Court has held that the extension option was never validly exercised, this sublease by its own terms expired at the same time as the Master Lease. Thus, this sublease cannot authorize the continued occupancy of MA-8 by Plaintiffs.

Second, even if Plaintiffs could identify the "sublease" through which they have a right to remain upon the land, the language of Paragraph 8 does not support their position. Paragraph 8 speaks in terms of a "termination" of the Lease, and cites a possible example of a termination as "by cancellation." Cancellation of a lease of Indian trust land occurs when the lessee breaches the terms of the lease.

25 C.F.R. § 162.619 (2009); *see also* 25 C.F.R. § 162.14 (1984) (cancellation remedy described in regulations in effect when lease began). A cancellation will always occur prior to the natural expiration of the lease at the end of its term and "termination" in Paragraph 8 should be similarly interpreted. This understanding of a distinction between a natural end to a lease and a premature end is also found in Washington State common law. "There is a well defined difference in law between 'cancellation' and 'expiration.'" *Preugschat v. Hedges*, 41 Wash.2d 660, 665, 251 P.2d 166, 169 (Wash. 1952) (lessee not owed benefit accruing from cancellation of lease because lease expired by its own terms). Interpreting "termination" to include only those actions that result in a premature end to the lease also makes sense. Such an interpretation would benefit the landowners who did not anticipate an early end to the lease and might desire the continuation of the current occupation of the land. In contrast, owner/lessors would not anticipate nor necessarily benefit from the continuation of subleases at the natural end or expiration of the lease. Thus, the reasonable reading of "termination" in Paragraph 8 would not include the situation at issue here. The Master Lease was not cancelled, but expired at the end of the initial term of the lease. Plaintiffs cannot remain on MA-8 by relying upon the language in Paragraph 8.

That Paragraph 8 cannot reasonably be interpreted to allow subleases to continue after the natural expiration of the lease is also consistent with other language in Paragraph 8. The paragraph provides that if the lease is terminated and the subleases continue, the Lessor will honor the obligations in the sublease but only to a limited extent. The next to the last sentence states that with respect to such obligations in the subleases, "Lessor shall not be required to honor or perform any obligation that has not been previously approved by the Lessor and the Secretary." An obligation to lease the land for longer than the term set forth in the

Master Lease is clearly an obligation not previously approved by the Lessor or the Secretary. Thus, to the extent Plaintiffs assert that Paragraph 8 allows them to hold over beyond the stated term of the Master Lease, their position imposes an obligation upon the Indian landowners that they had not previously approved, and such an interpretation is not supported by the language in Paragraph 8.

Finally, Plaintiffs' interpretation would also result in inconsistencies with other provisions of the Master Lease. Paragraph 7, concerning subleasing, states that "No part of the premises shall be subleased for a period extending beyond the life of this Lease." Construing the natural expiration of the Master Lease to be a "termination" under Paragraph 8 would result in the subleases extending beyond the life of the lease, a clear conflict with Paragraph 7.

Plaintiffs' right to occupy MA-8 expired on February 2, 2009. There are no disputed facts which are material to Federal Defendants' counterclaim for ejectment and as a matter of law, Federal Defendants are entitled to judgment on this claim.

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IV. CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request the Court grant their motion to dismiss Plaintiffs' Complaint and grant summary judgment in favor of Federal Defendants on their counterclaim.

DATED this 1st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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