

1 Kristin M. Ferrera
2 Jeffers, Danielson, Sonn & Aylward, P.S.
3 P.O. Box 1688
4 Wenatchee, WA 98807-1688
(509) 662-3685 / (509) 662-2452 FAX

THE HONORABLE JUSTIN L. QUACKENBUSH

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 PAUL GRONDAL, a Washington)
9 resident; and THE MILL BAY) NO. 09-CV-00018-JLQ
MEMBERS ASSOCIATION, INC., a)
10 Washington Non-Profit Corporation,) PLAINTIFFS' REPLY
11 Plaintiffs,) MEMORANDUM IN SUPPORT OF
12 vs.) MOTION FOR FRCP 56(d)
13 UNITED STATES OF AMERICA; ET) CONTINUANCE
14 AL.)
15 Defendants.)

16 I. INTRODUCTION
17

18 Plaintiffs have sued the Defendants to obtain a declaratory ruling from the Court
19 that Plaintiffs have the right to use and occupy the portion of Moses Agreement
20 Allotment No. 8 ("MA-8") known as the Mill Bay Recreational Vehicle Resort ("Mill
21 Bay Resort"). Plaintiffs' Answer and Affirmative Defenses to the United States'
22 trespass and ejectment action listed several affirmative defenses, most of which align
23 with Plaintiffs' bases for seeking declaratory relief from this Court, including: failure
24 to state a claim upon which relief may be granted, accord and satisfaction, ratification,
25
26

1 novation, Settlement Agreement, license, release, res judicata, assumption of risk,
2 laches, failure to mitigate, waiver, estoppel, and privilege or consent of defendants.
3 (ECF No. 42 at 4-7.) The Court recognized that these equitable claims and defenses
4 may preclude the United States' ejectment claim. (ECF No. 144 at 37:1-38:14.)
5 Plaintiffs now seek to discover the supplemental evidence necessary to support the
6 above-described claims and defenses.
7

8
9 Plaintiffs need to take the depositions of at least the former BIA employees who
10 have knowledge about the BIA's representations to William Wapato Evans Jr.
11 ("Evans") and his successors in interest (ECF No. 241-1 at 12), and the MA-8
12 Landowners and also need to obtain answers to interrogatories and requests for
13 admission to establish facts material to Plaintiffs' estoppel claims and defenses. (*See*
14 *4/25/12 Ferrera Decl.*)
15

16 II. ARGUMENT

17 Plaintiffs dispute that the Federal Defendants possess the authority to eject
18 Plaintiffs from MA-8 because Plaintiffs obtained the Landowners' consent for their use
19 of the property:
20

21
22 ...there exists a federal common law cause of action for
23 trespass on Indian lands. ...a person is liable for trespass if he
24 intentionally causes a thing to enter land in the possession of
25 another or fails to remove from the land a thing which he is
26 under a duty to remove." ...such entry is an "intrusion" only
when "the possessor's interest in the exclusive possession of
his land has been invaded by the presence of a person or

1 thing upon it **without the possessor's consent.**" *Restatement*
2 (*Second*) of *Torts* § 158 cmt. c (1965).

3 *Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1212 (D.N.M. 2010)(emphasis
4 added)(citations omitted).

5 Plaintiffs need to conduct discovery to explore additional facts proving the
6 Landowners and the BIA consented to their occupancy of the Mill Bay Resort until
7 2034 in order to defeat the United States Motion re: Ejectment.
8

9 **A. FRCP 56(d)**

10 Plaintiffs have already set forth specific facts they seek related to Plaintiffs'
11 estoppel defenses, how they will be obtained (via depositions and interrogatories of
12 Landowners and key BIA employees), why these facts are material to Plaintiffs'
13 defense to the United States' Motion to Dismiss, and the reason that Plaintiffs had not
14 yet conducted discovery to develop this evidence (the stay in place during these
15 proceedings prevented all parties from conducting discovery). (ECF No. 247.) The
16 4/25/2012 Kristin Ferrera Declaration filed in support of this reply memorandum
17 provides additional specific facts justifying a continuance of the Motion re: Ejectment
18 in order to conduct discovery. Generally, summary judgment should not be granted
19 when the nonmoving party has had no meaningful opportunity to conduct discovery of
20 issues material to the case:
21
22
23

24 Since summary judgment is a 'drastic device,' it should not
25 be granted when there are major factual contentions in
26 dispute. This is particularly so when, as here, one party has

1 yet to exercise its opportunities for pretrial discovery.

2
3 *Nat'l Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975)(internal citations
4 omitted).

5 Before summary judgment may be entered against a party,
6 that party must be afforded both notice that the motion is
7 pending and an adequate opportunity to respond. Implicit in
8 the “opportunity to respond” is the requirement that
9 sufficient time be afforded for discovery necessary to
10 develop “facts essential to justify (a party's) opposition” to
11 the motion.

12 *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th
13 Cir. 1981)(internal citations omitted).

14 *See also, Jones v. Neven*, 399 F. App'x 203, 204-05 (9th Cir. 2010) and *Program*
15 *Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980).

16 The documents utilized to this point in the litigation consist primarily of the
17 Federal Defendants’ written records produced in response to Defendant Wapato
18 Heritage’s Freedom of Information Act (“FOIA”) requests. However, Plaintiffs have
19 not had the opportunity to discovery additional documents or conduct any depositions
20 of individuals who drafted or received the documents already relied upon in order to
21 verify the veracity, accuracy, or meaning of many of the statements made in those
22 documents. The 4/25/2012 Declaration of Kristin Ferrera further demonstrates how
23 Plaintiffs require additional discovery to verify the Defendants’ knowledge of material
24
25
26

1 facts that should estop them from now denying the validity of the 2034 expiration date
2 of Plaintiffs' membership agreements and the 2004 Settlement Agreement.

3 **B. Res Judicata**

4 Federal Defendants seek to have the Court reconsider its previously
5 determination regarding res judicata and the *Wapato Heritage LLC v. U.S.* case
6 holding. Plaintiffs have already fully briefed this issue and the Court held that
7 Plaintiffs are not precluded from arguing in equity that they have a right to occupy
8 MA-8 until 2034. (ECF No. 144 at 22:24-23:9.) Plaintiffs' estoppel claims were not
9 decided nor are they precluded by the *Wapato Heritage* decision.
10
11

12 **C. Estoppel**

13 As stated above, this Court has already determined that Plaintiffs have stated
14 viable claims and defenses of estoppel, both against the government and the
15 Landowners:
16

17 ...there are numerous cases involving inadequate, non-
18 conforming, non-compliant renewal notices, which involve
19 court's intervention in equity to avoid unconscionable
20 hardships and fulfillment of commercial expectations....

21 One can not consider this case without some sympathy
22 for the predicament the Plaintiffs find themselves in. ...

23 Although estoppel will rarely work against the
24 government, the assertion of this defense against the
25 Defendant landowners and the BIA, acting on their behalf, in
26 this trespass action presents a unique context which would
merit further consideration by the court...

(ECF No. 144 at 37:1-38:14.)

1 Plaintiffs maintain that the BIA and the MA-8 landowners are estopped to deny
2 the Plaintiffs' rights to use Mill Bay Resort until 2034 and, therefore, estopped to
3 pursue their ejectment claim:
4

5 The doctrine of equitable estoppel **precludes a litigant**
6 **from asserting a claim** or defense which might
7 otherwise be available to him against another party who
8 has detrimentally altered her position in reliance on the
9 former's misrepresentation or failure to disclose some
material fact.

10 *Portman v. U.S.*, 674 F.2d 1155, 1158 (7th Cir. 1982)(emphasis added).

11 "Estoppel by operation of law arises where the acts or statements of the defendant **or**
12 **his agent** induce the plaintiff, in reasonable reliance, to act or forbear to act to his
13 prejudice." *Marsh v. General Adjustment Bureau, Inc.*, 22 Wash. App. 933, 935, 592
14 P.2d 676, 678 (1979). Estoppel against the Landowners will hinge not only on the
15 Landowners' actions, but also on the BIA's authority to act as the Landowners' agent.
16 These are facts that need to be explored in discovery.
17

18 **1. The BIA as the Landowners' Agent.**

19
20 The BIA, although not a party to the Master Lease, while acting on behalf of the
21 Landowners as their agent, possessed authority to bind the Landowners to Plaintiffs'
22 memberships agreements and the 2004 Settlement, both calling for a 2034 expiration
23 date. The United States, through the BIA, acts as an agent and fiduciary for Indian
24 landowners and, therefore, exercises independent judgment and control in the
25 management of Indian lands. *Brown v. U.S.*, 86 F.3d 1554, 1563 (C.A.Fed.1996). *See*
26

1 also *Boesche v. Udall*, 373 U.S. 472, 476 (D.C.Col.1963); *U.S. v. Eberhardt*, 789 F.2d
2 1354 (9th Cir. 1986). Evidence in the record suggests that the Landowners also created
3 an agency relationship with the BIA, authorizing the BIA to act on their behalf in
4 matters relating to the Master Lease, Plaintiffs' membership agreements, and the 2004
5 Settlement. In fact, Evans dealt solely with the BIA's Colville Agency through the
6 years in developing the land under the Master Lease, presumably without any
7 objection from the Landowners. The Colville Agency forwarded information and
8 payments to the Landowners, rarely seeking their written consent for matters relating
9 to management of MA-8.
10
11

12 **2. Estoppel Against the Landowners**

13
14 Plaintiffs' reliance on the BIA's and Landowners' statements, actions, and
15 omissions are already established, however, Plaintiffs must engage in further discovery
16 to establish the following material facts: (1) the BIA and the Landowners acted
17 inconsistently with their current assertion that the Settlement Agreement is not valid
18 and binding as against the BIA and the Landowners (4/25/12 Ferrera Decl. at ¶ 9.g)
19 and (2) the BIA engaged in affirmative misconduct by misrepresenting that the
20 Landowners and the BIA would abide by the terms of the 2004 Settlement so long as
21 Plaintiffs paid the settlement amounts of \$25,000 per year (with increases every 5
22 years) from 2004 through 2034.
23
24

25 While the BIA's statements to Evans were enough to work estoppel against the
26 BIA and the Landowners when Evans repeated those statements to Plaintiffs

1 (Restatement (Second) of Contracts §90), Plaintiffs need to conduct discovery to
2 determine what statements the BIA made to Evans.

3
4 **3. Estoppel against the government.**

5 Contrary to the BIA's assertions, estoppel can work against the government:

6 ...Since *Georgia-Pacific* we have made it clear that estoppel
7 may be applied against the government acting in its sovereign
8 capacity.

9 ...
10 **...the public has an interest in seeing its government deal
11 carefully, honestly and fairly with its citizens.**

12 *United States v. Wharton*, 514 F.2d 406, 412-413 (9th Cir. 1975)(citations omitted).

13 In order to establish a claim for estoppel against the government, a plaintiff must prove
14 the requisite elements of traditional estoppel and an additional two elements: (1) the
15 government engaged in affirmative misconduct going beyond mere negligence, and (2)
16 government engaged in affirmative misconduct going beyond mere negligence, and (2)
17 "the government's wrongful act will cause a serious injustice, and the public's interest
18 will not suffer undue damage by imposition of the liability." *Watkins v. U.S. Army*,
19 875 F.2d 699, 707 (9th Cir. 1989)(citations and footnotes omitted). Unintentional,
20 ongoing misrepresentations or an ongoing concealment of a material fact can constitute
21 affirmative misconduct. *Id.*, at 707 -708. Plaintiffs require additional discovery as to
22 the BIA's knowledge that it was misstating material facts to Evans, Wapato Heritage,
23 and Plaintiffs. Plaintiffs also need to conduct depositions and propound interrogatories
24 on Defendants to establish that the Landowners assumed responsibility for the 2004
25
26

1 Settlement in order to demonstrate that no public injury will arise from working
2 estoppel against the government in this case.

3 4 **4. Estoppel by Ratification**

5 Plaintiffs have already fully briefed the issue regarding the Landowners'
6 ratification of the Settlement Agreement. (ECF No. 80 at 4-7.) Plaintiffs could not
7 allege undisputed facts sufficient to demonstrate that the Landowners ratified
8 Plaintiffs' membership agreements or the 2004 Settlement Agreement, because they
9 had not conducted discovery as to the extent of the Landowners' knowledge prior to
10 accepting the benefits of these agreements. The extent of the Landowners' knowledge
11 is a material fact without which the Court held it could not determine that the
12 Landowners ratified these agreements. *Whitcomb v. Sager*, 82 Wash. 572, 579, 144 P.
13 922, 925 (1914). Further, Plaintiffs need discovery to determine whether the
14 Landowners were put on inquiry to investigate prior to accepting the settlement
15 money, which would further evidence estoppel by ratification. *Bielicki v. Terminix*
16 *Intern. Co., L.P.*, 225 F.3d 1159 (10th Cir. 2000).

17 18 19 20 **III. CONCLUSION**

21 The United States seeks to eject Plaintiffs from the property which they were
22 promised they could use and enjoy for another 22 years. Plaintiffs have had no
23 opportunity to conduct discovery in this case, yet their defenses to ejection are purely
24 equitable in nature and, therefore, extremely fact-specific. Because it is rare for
25 estoppel to work against the government and this case is also unique in that it involves
26

1 the use and occupancy of Indian land, Plaintiffs need the opportunity to conduct
2 discovery to sufficiently defend against the United States Motion for Summary
3 Judgment re: Ejectment. For the reasons stated above and in the Declarations of
4 Kristin Ferrera in Support of Plaintiffs' Motion to Continue, Plaintiffs respectfully
5 request the Court grant Plaintiffs' FRCP 56(d) Motion to Continue.
6

7
8 DATED this 25th day of April, 2012.

9
10 s/KRISTIN M. FERRERA
11 WSBA No. 40508
12 Attorney for Plaintiffs
13 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
14 2600 Chester Kimm Road
15 P.O. Box 1688
16 Wenatchee, WA 98807-1688
17 Telephone: 509-662-3685
18 Fax: 509-662-2452
19 Email: kristinf@jdsalaw.com
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

- **Dana Cleveland**
dana.cleveland@colvilletribes.com,bonnie.timentwa@colvilletribes.com
- **James M Danielson**
jimd@jdsalaw.com,jod@jdsalaw.com
- **Pamela Jean DeRusha**
USAWAE.PDeRushaECF@usdoj.gov,colleen.Kelley@sol.doi.gov,mary.f.buhl@usdoj.gov
- **Kristin Marie Ferrera**
kristinf@jdsalaw.com,cheryla@jdsalaw.com,leiannet@jdsalaw.com
- **Joseph Cox Finley**
jos.finley@yahoo.com
- **Dale Melvin Foreman**
dale@daleforeman.com,nancy@daleforeman.com
- **R Bruce Johnston**
bruce@rbrucejohnston.com
- **Franklin L Smith**
Frank@Flyonsmith.com
- **Rudolf J Verschoor**
usawae.rverschoorecf@usdoj.gov,david.negri@usdoj.gov,mary.f.buhl@usdoj.gov
- **Timothy Ward Woolsey**
timothy.woolsey@colvilletribes.com,bonnie.timentwa@colvilletribes.com

Notice of this filing is being sent this date via United States Postal Service First Class Mail to the parties below at the addresses indicated below.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PRO SE PARTIES

Mr. James Abraham 2727 Virginia Avenue Everett, WA 98201	Ms. Lynn Benson P.O. Box 746 Omak, WA 98841
Ms. Sandra Covington P.O. Box 1152 Omak, WA 98841	Ms. Darlene Hyland 16713 SE Fisher Drive Vancouver, WA 98683
Ms. Marlene Marcellay 1300 SE 116th Court Vancouver, WA 98683	Ms. Maureen Marcellay 12108 B SE Seventh Street Vancouver, WA 98683
Mr. Michael Marcellay P.O. Box 594 Brewster, WA 98812-0594	Mr. Randolph Marcellay P.O. Box 3287 Omak, WA 98841
Ms. Linda Saint P.O. Box 1403 Libby, MT 59923-1403	

DATED at Wenatchee, Washington this 25th day of April, 2012.

s/KRISTIN M. FERRERA
 WSBA No. 40508
 Attorney for Plaintiffs
 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
 2600 Chester Kimm Road
 P.O. Box 1688
 Wenatchee, WA 98807-1688
 Telephone: 509-662-3685
 Fax: 509-662-2452
 Email: kristinf@jdsalaw.com