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; US DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, et. al.,

Defendants.

NO. CV-09-0018-JLQ

ORDER GRANTING MOTION TO CONTINUE

BEFORE THE COURT is Plaintiffs' Motion to Continue to Enable Depositions and Discovery (ECF No. 246) filed pursuant to Federal Rule of Civil Procedure 56(d) ("Rule 56(d)"), which the court has expedited. Plaintiffs ask the court to continue the Federal Defendants' Motion for Summary Judgment re: Ejectment in order to allow them to conduct discovery on their estoppel defense/claim. Defendant/Cross-claimant Wapato Heritage has joined in Plaintiffs' Motion stating it "clearly has an interest in seeing that discovery on all issues which may assist the Plaintiff is fully conducted." ECF No. 263. For the reasons set forth below, the court grants the Motion.

I. BACKGROUND

Plaintiffs filed their Complaint on January 21, 2009. Plaintiffs have acquired memberships in and are occupants of the Mill Bay Resort, a campground located on Lake Chelan in Chelan County, Washington. The Mill Bay Resort exists on real property known as Moses Allotment No. 8 ("MA-8"), which consists of approximately 174.26 acres on the shores of Lake Chelan. Plaintiffs named as Defendants the MA-8 landowners and the United States Department of Interior and Bureau of Indian Affairs. Plaintiffs assert they are entitled to occupy the Mill Bay Resort until the year 2034.

In responding to the Complaint, the Federal Defendants (Department of Interior and Bureau of Indian Affairs) asserted a counterclaim against Plaintiffs for trespass and for ejectment, asserting that the Plaintiffs' right to occupy the Mill Bay Resort expired on February 2, 2009, the date the Master Lease between the landowners and Wapato Heritage terminated. ECF No. 42. Plaintiffs have asserted estoppel as an equitable defense to the Government's counterclaims.

On June 15, 2009, the court set a deadline for the early filing of dispositive motions, but set no other pretrial deadlines or the trial of this matter.

On January 12, 2010, the court ruled upon six summary judgment motions, dismissing Plaintiffs' claims against the Federal Government for lack of subject matter jurisdiction. ECF No. 144. The court held, however, that the Government's threat of ejectment was sufficient to give Plaintiffs standing to seek declaratory relief against the MA-8 landowners (the "Lessors" of the property under the Master Lease) regarding their entitlement to occupy MA-8. ECF No. 144 at 24. Thus, the only claim remaining in the Complaint seeks declaratory judgment against the landowners asserting that they are "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034." ECF No. 1 at 43, Prayer for Relief, ¶ 2; ECF No. 197 at 2.

In the same January Order, the court also denied the Federal Defendants' Motion for Summary Judgment on its trespass and ejectment counterclaims against the Plaintiffs. The

court first noted that the trespass action was premature as there was evidence of ongoing negotiations to obtain a new 99-year lease for MA-8 and the Federal Defendants had not provided any evidence of compliance with federal regulations requiring consultation with the Indian landowners. *Id.* at 25-26.

In order to "assist the parties in clarifying and settling the relations in issue and also to afford relief from the uncertainty and controversy faced by the parties," the court proceeded to rule upon Plaintiffs' four other summary judgment motions which pertained to their defenses to the Federal Defendants' ejectment action. The court rejected all but their equitable estoppel defense. The court specifically held that neither the terms of the Master Lease nor the 2004 Settlement Agreement between them and Wapato Heritage LLC operated to give Plaintiffs the right to occupy the Mill Bay Resort until 2034. As to Plaintiffs' equitable right to occupy Mill Bay Resort the court held as follows:

> Plaintiffs' Third and Fifth motions for summary judgment assert equitable estoppel prohibits the Defendants from denying Plaintiffs the right to use the Mill Bay Resort until 2034. One would think that litigation revolving around such a straightforward issue as lease renewal would be rare. It is after all, a dispute entirely avoidable by careful drafting and lease administration. In fact, there are numerous cases involving inadequate, non-conforming, non-compliant renewal notices, which involve court's intervention in equity to avoid unconscionable hardships and fulfillment of commercial expectations. Noticeably there are a paucity of such cases in Washington. As this case demonstrates, this simple issue becomes very complex when it involves allotment property which has endured a century of fractionation in ownership, which is held in trust and controlled by the United States Bureau of Indian Affairs, and which is also prime real estate.
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> One can not consider this case without some sympathy for the predicament the Plaintiffs find themselves in. They have invested substantial sums of money relying primarily upon the word of Bill Evans and his entities, that the Master Lease option to renew would be exercised and that Evans' leasehold interest would not expire until 2034. Under the terms of the Master Lease, obtaining the renewal could not have been simpler. The consent of either the landowners or the BIA was not required. There was just one condition to be met: giving timely and proper notice of the exercise of the option. The deadline was February 1, 2008. One undisputable point in this case, evidenced by written and oral communications going back more than 20 years, is that Bill Evans' desired and intended to exercise the option, and apparently believed that the 1985 letter to the Secretary would suffice.
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> Additional facts making this case unique is that a non-party to the contract, the BIA, plays the lead role in its drafting, execution, approval, administration, and enforcement of the lease. As for the drafting of the lease, it is noted that at the time, the BIA had standard form leases it provided to potential lessees (including Evans) and terms it required in order to obtain its approval. Indeed, as 25 C.F.R Part 162 outlines, the Secretary's primary

> role in management and control is setting standard conditions for leases. In lease administration the BIA's duties are defined by statute and regulations created for trust lands which impose general fiduciary duties on the Government in its dealings with Indian allottees. In this case, upon receipt of Evans' 1985 letter explicitly purporting to exercise the option to renew, the BIA a) neglected to inform the Indian landowners, whose interests it is their duty to protect, of the letter; b) did not ensure that their tenant (Evans) had complied with the requirements of the lease until over twenty-years later, despite numerous inquiries, and then c) conducted its business without questioning and on the explicit assumption that the lease had been effectively renewed. In 2004, the BIA even made affirmative representations to the State of Washington that the lease did not expire until February 2, 2034.
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> Although estoppel will rarely work against the government, the assertion of this defense against the Defendant landowners and the BIA, acting on their behalf, in this trespass action presents a unique context which would merit further consideration by the court. However, the court does not desire to waste judicial resources prematurely deciding disputes or to unnecessarily disrupt an agency's administrative decision making process. Given the facts of record suggesting Wapato Heritage is in the process of attempting to secure a 99-year lease, the court will not decide the claims of trespass and equitable estoppel without the parties first having evaluated the fitness of these issues for decision in light of the court's rulings herein.

Id. at 36-38. The court's January 12, 2010 order denied the Federal Defendants' ejectment/trespass motion and Plaintiffs' motions relating to estoppel with leave to renew and with these instructions: "The court has granted the parties leave to renew certain motions. These motions shall only be renewed with supplemental evidence and further points and authorities demonstrating judicial action on the motion is appropriate." *Id.* at 39.

On March 22, 2010, the Ninth Circuit upheld Judge Whaley's ruling in *Wapato Heritage LLC v. United States*, that the Mater Lease's option to renew was not validly exercised because notice was provided to the BIA instead of the lessor landowners as required by the lease terms. The Ninth Circuit also declared "that the Lease terminated upon the last day of its 25-year term." *Wapato Heritage v. USA*, 637 F.3d 1033, 1040 (9th Cir. 2010).

On March 26, 2010, Defendant Wapato Heritage, filed its Answer and asserted eight Cross-claims against its Co-defendants, thereby expanding the scope of this litigation beyond just the issue of the use of the Mill Bay Resort site. ECF No. 170. Wapato Heritage seeks declaratory judgment that MA-8 is "not subject to trust status" and is not "Indian Country." Wapato Heritage's other Cross-claims assert claims for quiet title, estoppel, ejectment of the Tribe unless rent is paid, money damages against the allottees, partition, and attorneys fees

and costs. The Federal Defendants Answered the Cross-claims and asserted a Cross-claim against Wapato Heritage for rent due.

On May 24, 2010, the court suspended all discovery and further motion practice, in order to accommodate the parties settlement discussions. On April 19, 2011, despite an eleven-month stay and two failed mediation attempts, the court granted the parties' request to continue the stay so that the parties would know the results of the request for en banc review of Ninth Circuit's decision in Judge Whaley's case and have a further opportunity to "globally resolve the case." ECF No. 207.

On February 16, 2012, the court granted in part and denied in part the Tribe's Motion to Dismiss for lack of jurisdiction. ECF No. 227. The court dismissed the *in personam* claims asserted against the Tribe, which included Plaintiffs' estoppel claim and Wapato Heritage's estoppel and damages Cross-claims. The court discussed the fact that the remaining Cross-claims asserted by Wapato Heritage against the Tribe might be considered *in rem* if MA-8 were held to be land held in fee-simple, rather than land held in trust. The court decided that it would "not decide these specific matters until Wapato Heritage has filed an amended pleading complying with Fed.R.Civ.P. 8(a) and until these issues have been properly presented and fully briefed to the court." ECF No. 227 at 17. The court declared that Wapato Heritage's Cross-claims against the Tribe would be held in abeyance pending the filing of the amended pleading "and a determination of the status and ownership of MA-8."

On March 5, 2012, Wapato Heritage filed the Amended Answer and Cross-claims as directed by the court.

On March 22, 2012, the Federal Defendants renewed their Motion for Partial Summary Judgment regarding their ejectment counterclaim. They assert their ejectment action is now "ripe" and that contrary to the latest contention of Wapato Heritage, MA-8 is trust land which entitles the Government to pursue ejectment. The Federal Defendants' Motion is set for hearing on June 8, 2012.

On March 29, 2012, the court formally lifted the nearly two-year stay.

On April 12, 2012, the Plaintiffs filed a Motion to Continue the Federal Defendants' Summary Judgment Motion Pursuant to Fed.R.Civ.P. 56(d). On April 17, 2012, the court granted Plaintiffs' request to expedite the hearing of this Motion. ECF No. 252.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(d)(2) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may ... allow time to obtain affidavits or declarations or to take discovery." In requesting a continuance pursuant to Rule 56(d), the nonmovant must make clear "what information is sought and how it would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998). "[T]he party seeking a continuance bears the burden to show what specific facts it hopes to discover that will raise an issue of material fact." *Continental Maritime v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1395 (9th Cir. 1987).

III. ANALYSIS

A. Nature of the Federal Defendants' Motion for Summary Judgment Re: Ejectment

The United States, in its role as trustee for the collective Indian landowners of MA-8, has renewed its Motion for Summary Judgment seeking an order ejecting the Plaintiffs from the Mill Bay Resort, contending the Motion is "now ripe." The Federal Defendants' Motion raises both legal and factual arguments. The Federal Defendants contend that 1) MA-8 is trust land and Plaintiffs should be estopped from arguing to the contrary; 2) the affirmative defense of estoppel cannot legally apply against the United States in its capacity as trustee; and 3) Plaintiffs' estoppel claim against the Defendant landowners would not provide a basis for "any relief" from the United States' ejectment action. Notably, the Federal Defendants not only seek a judgment in their favor on their ejectment claim, but also a dismissal of Plaintiffs' remaining claim in the Complaint, the claim for declaratory relief against the individual landowners.

In addition to these legal arguments, the Federal Defendants assert the Plaintiffs' estoppel defense against it must fail because 1) they "have failed to put forward any evidence that BIA made affirmative and deliberately misleading statements to them about the term of the Master Lease prior to or at the time they entered into the camping memberships...or thereafter at the time of the 2004 Settlement Agreement"; and 2) they have not "demonstrated how they reasonably relied upon such action to their detriment." The United States also contends Plaintiffs' claim for declaratory relief against the individual landowners must fail on the basis that Plaintiffs "have failed to put forward any evidence that the Indian landowners took action that could reasonably be found to cause Plaintiffs to believe they could continue to occupy MA-8 until 2034, notwithstanding the terms of the Master Lease."

Though the Federal Defendants argue in their Motion that estoppel cannot and *should* not work against it in this instance, there is no "flat rule that estoppel may not in any circumstances run against the Government," and the Supreme Court has specifically left this issue open. *Heckler v. Community Health Servs of Crawford Co.*, 467 U.S. 51, 60 (1984). The Ninth Circuit has held that " 'where justice and fair play require it,' estoppel will be applied against the government...." *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir.1982) (*quoting United States v. Lazy FC Ranch*, 481 F.2d 985, 988-89 (9th Cir.1973)). Plaintiffs have a heavy burden in order to prove estoppel should apply. The party trying to estop the Government must establish the traditional elements of estoppel elements, as well as two additional elements: First, "[a] party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.' " *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989)(*citing Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988)).

B. Discovery Requested by Plaintiffs

Though Plaintiffs possess documentary evidence obtained through a FOIA request, the Federal Defendants' ejectment motion was renewed before any formal discovery in this case. Plaintiffs request time to obtain the depositions, affidavits, depositions, admissions, or answers to interrogatories required by Rule 56 to oppose such a motion. Specifically, Plaintiffs want to 1) obtain initial disclosures from the Defendants 2) obtain answers to interrogatories and requests for production; and 3) take depositions of former BIA employees and MA-8 landowners. Plaintiffs have indicated their desire to depose the following persons (1) George Davis (former BIA Superintendent); (2) Sharon Redthunder (Former BIA employee); (3) Raymond Frye (former BIA Superintendent); (4) Harvey George, Jr. (Former BIA employee); (5) Mike Palmer (MA-8 landowner); (6) Francis Reyes (MA-8 landowner); (8) Wes Cleveland; (9) Gene Nicholson (MA-8 landowner); (10) Ricky Joseph (MA-8 landowner). Plaintiffs state additional discovery is necessary, to clarify 1) the meaning and author of certain BIA letters, handwritten notes, and other internal communications; 2) when the BIA began questioning the validity of Evans' renewal and the "BIA's knowledge it was misstating facts to Evans, Wapato Heritage and Plaintiffs"; 3) whether the BIA informed the landowners that Plaintiffs were allowed to stay on the property until 2034; 4) what the landowners understood prior to accepting the additional rent paid after the 2004 settlement; and 5) the BIA's authority to act as the landowners' agent. The Declaration of Kristin Ferrera outlines nineteen additional areas which the Plaintiffs believe merit further development in discovery. ECF No. 266 at 9 -17.

The Federal Defendants oppose Plaintiffs' Motion arguing Plaintiffs fail to specifically state the facts which are sought and fail to explain how "depositions occurring now would help them assert an argument that they reasonably relied upon such facts to their detriment in the past." ECF No. 262. They contend that what the Indian landowners understood about the 2004 settlement is irrelevant as "Plaintiffs could not have relied upon what the landowners thought unless the landowners expressed those views to Plaintiffs." Detrimental reliance is

only one of the numerous required estoppel elements. Even the Federal Defendants recognize the additional factual burden placed upon Plaintiffs to demonstrate equitable estoppel here. ECF No. 262 at 13. Plaintiffs have adequately demonstrated that discovery from the individuals involved in the complex history involved here could lead to admissible evidence pertaining to the elements of the Plaintiffs' estoppel defense/claim and the Government's ejectment claim.

The Federal Defendants also oppose any continuance of their motion on the basis that "the issues to be decided...are either legal issues for which no additional facts are needed or are issues already decided for which no additional facts are needed." However, a cursory review of the Federal Defendants' Motion reveals it is not based solely upon a legal argument. Indeed, the Government repeatedly argues that Plaintiffs lack the evidence necessary to demonstrate estoppel.

Finally, the Federal Defendants contend discovery is unnecessary because Plaintiffs' equitable estoppel defense is barred by "res judicata" because of Judge Whaley's ruling in the Wapato Heritage case, which the Ninth Circuit affirmed. The court has already rejected this contention. ECF No. 144 at 23. Neither Plaintiffs nor the landowners were parties to Judge Whaley's case. That case concerned the separate and distinct issue of whether Evans/Wapato Heritage had complied with the notice requirement of the renewal provision of the Master Lease. Judge Whaley rejected the equitable claim made by Wapato Heritage that equitable considerations ought excuse any failure to timely exercise the option to renew contained in the Master Lease. The claim rejected by Judge Whaley is *not* the equivalent of the claim of Plaintiffs herein seeking equitable relief against the consequences of the mistaken failure to properly exercise the option to renew.

IV. CONCLUSION

Rule 56(d) is “infused with a spirit of liberality.” *Reflectone, Inc. v. Farrand Optical Co.*, 862 F.2d 841, 844 (11th Cir. 1989) . Plaintiffs have had little or no opportunity to conduct discovery, and Plaintiffs have made a sufficient showing of their need for discovery before

they can address the factual issues raised in the Federal Defendants' summary judgment motion. When fact-intensive issues, such as estoppel, are involved, it is in the substantial interest of both the parties and the court to reserve judgment until presented with a full analysis of both the law and facts based upon an fair and adequate record.

Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiffs' Motion to Continue (**ECF No. 246**) is **GRANTED**.

2. By no later than **May 29, 2012**, counsel shall submit a joint proposed schedule for discovery, for the completion of briefing, and for the hearing of the Federal Defendants' Motion for Summary Judgment. The scheduled June 8, 2012 hearing is **STRICKEN** and will be **RESET** by the court after consideration of the parties' proposed schedule.

The District Court executive is directed to file this Order and provide copies to counsel and all pro se parties who have appeared in the case.

DATED this 19th day of May, 2012.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE