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THE HONORABLE JUSTIN L. QUACKENBUSH

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7	PAUL GRONDAL, a Washington)	NO. 09-CV-00018-JLQ
8	resident; and THE MILL BAY)	
9	MEMBERS ASSOCIATION, INC., a)	PLAINTIFFS' STATEMENT OF FACTS
10	Washington Non-Profit Corporation,)	IN RESPONSE TO FEDERAL
11	Plaintiffs,)	DEFENDANT'S MOTION FOR
12)	SUMMARY JUDGMENT
13	vs.)	
14	UNITED STATES OF AMERICA; ET.)	
15	AL,)	
16	Defendants.)	

17 Plaintiffs Paul Grondal and Mill Bay Members Association, by and through their
18 attorneys of records, Jeffers, Danielson, Sonn, & Aylward, P.S., by James M.
19 Danielson and Kristin M. Ferrera, submit these facts in response to the Federal
20 Defendant's Motion for Summary Judgment re: Ejectment:
21

22 **FEDERAL DEFENDANTS' STATEMENT OF FACTS**

23
24 1. A parcel of land known as MA-8 is an Indian allotment granted to Wapato
25 John in 1907 and currently held by the United States in trust or restricted status for the

1 benefit of the Indian owners. **DISPUTED. Plaintiffs Responsive Fact Nos. 14 and**
2 **15.**

3 2. On February 2, 1984, William Evans, Jr. (Evans) entered into Business
4 Lease 82-21 (the "Master Lease") to lease MA-8 as "Lessee". **UNDISPUTED**

5 3. The Master Lease at paragraph 6 provided that Evans could develop the
6 property for recreational purposes. The Master Lease at paragraph 3 had a term of 25
7 years with an option to renew for an additional 25 years. **UNDISPUTED**

8 4. On June 11, 1984, Evans sublet a portion of MA-8 to MAR-LU, Ltd., a
9 company controlled by Evans. This company was to develop the property as a camping
10 resort. **UNDISPUTED**

11 5. As lessee, Evans or companies controlled by him entered into various
12 agreements with individuals who wanted to make use of MA-8 for a camping resort.
13 What was sold to the individuals was called a camping membership. **UNDISPUTED**

14 6. Individual plaintiff, Paul Grondal, purchased a type of camping
15 membership. Plaintiff Mill Bay RV Park is made up of individuals who purchased
16 some type of camping membership. **UNDISPUTED**

17 7. On August 7, 2008, the Acting Superintendent for the BIA Colville
18 Agency issued a letter to the lessee Wapato Heritage LLC setting forth the BIA's
19 position that the Master Lease had not been effectively renewed and so would expire in
20 February 2009. **UNDISPUTED**

1 8. Wapato Heritage appealed the decision and on October 31,2008, the
2 Regional Director agreed with the Superintendent's decision and made it effective
3 immediately pursuant to his authority under 5 C.F.R. Section 2.6(a). **UNDISPUTED**
4

5 9. Wapato Heritage challenged the position of the BIA as to the
6 effectiveness of the exercise of the option to renew, and the U.S. District Court for the
7 Eastern District of Washington concluded that the option had not been effectively
8 exercised. **UNDISPUTED**
9

10 10. On December 10, 2008, BIA issued a letter to Colville Tribal Enterprise
11 Corporation, Wapato Heritage, LLC, and Mill Bay Members Association, Inc.
12 referring to the District Court's decision and indicating that the Master Lease would
13 expire as of February 2, 2009. The letter stated that unless they took action to negotiate
14 a new lease with the Indian landowners, they would be treated as trespassers if they
15 occupied MA-8 after February 2, 2009. **UNDISPUTED**
16

17 11. On March 4, 2010, the Acting Superintendent for the BIA Colville
18 Agency sent a letter to Michael Arch, then counsel for Wapato Heritage LLC,
19 "reiterate[ing] BIA's position as to the status of" of a proposed lease between Wapato
20 Heritage LLC and the Indian beneficial owners of MA-8. **UNDISPUTED**
21

22 12. The March 4, 2010, letter stated that BIA had taken no final action and
23 had no current plans to take any action with respect to the proposal because
24 insufficient consent had been obtained from the Indian beneficial owners, Wapato
25

1 Heritage had neglected to address BIA's position that an EIS would need to be
2 prepared in connection with its consideration of the proposed lease, and BIA would
3 need to conduct further reviews of the lease terms and consideration offered. The letter
4 stated that "BIA was, and is, unable to complete its consideration of the Wapato
5 Heritage's lease proposal due to the issues noted in this letter, and is treating the
6 proposal as a stale matter." **UNDISPUTED**

8 13. On March 12, 2010, in response to a request from Mr. Arch, the BIA
9 Acting Real Property Officer sent Mr. Arch a list of the names and mailing addresses
10 of the MA-8 beneficial land owners. **UNDISPUTED**

12 14. Since March 12, 2010, no one representing Wapato Heritage LLC has
13 submitted any proposed new lease between Wapato Heritage LLC and the Indian
14 beneficial landowners, or provided any evidence to BIA that negotiations are occurring
15 for a new lease. **UNDISPUTED**

17 15. No representative of Wapato Heritage LLC has addressed the deficiencies
18 in the EA that were noted in the March 4, 2010, letter to Mr. Arch. **UNDISPUTED**

20 16. The Mill Bay RV Park members continue to occupy a portion of MA-8 at
21 this time and have not entered into any lease with the Indian landowners. **DISPUTED.**

22 **Plaintiffs' Responsive Fact Nos. 65 through 69 and 122 through 149.**

24 17. On July 19, 2011, the Superintendent for the BIA Colville Agency sent a
25 letter to the Indian beneficial owners of MA-8. The letter summarized the status of the

1 lawsuits affecting MA-8 and identified two options for future action by the BIA. The
2 letter requested input and responses from the beneficial owners. **DISPUTED—only**
3 **to the extent of the adequacy of the summary of the status of the lawsuits**
4 **provided to the Landowners. The document speaks for itself.**

5
6 18. Sixteen (16) beneficial owners responded. **UNDISPUTED**

7 19. Among the trust owners, 81.6% supported the option to eject the RV Park
8 from MA-8 and seek trespass damages, 2.3% supported an option to attempt to
9 negotiate a new lease with the RV Park, and 16.1% did not respond. These figures
10 include the interest held by the Confederated Tribes of the Colville Reservation subject
11 to the life estate of Wapato Heritage LLC. **DISPUTED. Defendants provide no**
12 **supporting facts as to the percentage ownership interests that responded to this**
13 **letter.**

14 **PLAINTIFFS' RESPONSE STATEMENT OF FACTS**

15 **Land History**

16
17 1. MA-8 is a parcel of land that is a portion of the original trust allotment
18 granted to Wapato John as Moses Agreement Allotment No. 8, pursuant to Act of July
19 4, 1884, 23 Stat. 79-80. (ECF No. 90-5 at Ex. 12, 13, 14; ECF No. 90-16, Ex. 103.)

20
21 2. MA-8 is located outside of the boundaries of the Colville Confederated
22 Tribes' Reservation. (ECF No. 90-15, Ex. 96.)

23
24 3. The Bureau of Indian Affairs ("BIA") and the Superintendent of the

1 BIA's Colville Agency have certain responsibilities, as set forth in federal statutes and
2 regulations, with respect to land held in trust for individual Indians and tribes.
3 (Admitted in U.S. Answer, ECF No. 42 at ¶ 1.)
4

5 4. The Wapato Family were members of the a group of Indians known as the
6 Chief Moses Band of Indians, an Indian tribe which was originally provided a
7 reservation called the Columbia Reservation. (ECF No. 90-5, Ex. 13.)
8

9 5. Upon termination of the Chief Moses Band, by agreement dated July 8,
10 1883, the United States required members of the Chief Moses Band, including Wapato
11 John and his family, to choose between accepting an allotment for each family member
12 on or near Lake Chelan on the land previously known as the Columbia Reservation or
13 "removal" to the Colville Reservation. (ECF No. 90-5, Ex. 13.)
14

15 6. Pursuant to the Act of July 4, 1884, 23 Stat. 79, Wapato John elected to
16 remain on the land previously known as the Columbia Reservation. (ECF No. 90-5,
17 Ex. 13; Admitted in US Answer, ECF No. 42 at ¶ 30.)
18

19 7. The remainder of the Columbia Reservation, other than the allotted lands,
20 was restored to the public domain. (ECF No. 161-1 at 14.)

21 8. In 1907, the United States allotted a parcel of land, a portion of which is
22 MA-8, to Wapato John declaring that it would hold such land in trust for Wapato John
23 or his heirs. (ECF No. 90-5, Ex. 13; Admitted in US Answer, ECF No. 42 at ¶ 32.)
24

25 9. The trust patent allotting MA-8 issued by the United States Department of
26

1 Interior (“DOI”) to Wapato John states that the land will be held for a “period of ten
2 years in trust for the sole use and benefit of Nek-quel-e-kin, or Wa-pa-to John or in the
3 case of his death for the sole use of his heirs, according to the laws of the State or
4 Territory where in the land is located and that the expiration of said period the United
5 States will convey the same by patent to said Indian.” (ECF No. 90-5, Ex. 12.)

7
8 10. Under the Act of March 8, 1906, patents were to be issued to the Moses
9 Agreement (or “Chief Moses Band”) allottees, including Wapato John for MA-8, in
10 which the allottees were to be provided a patent for land held in trust by the United
11 States for ten years from the date of its issuance and, after 10 years, would be free of
12 all restrictions on alienation. (ECF No. 234-3, Ex. 2 at 12.)

13
14 11. In 1914, President Woodrow Wilson specifically extended the trust period
15 on Moses Agreement allotments for ten additional years. (ECF No. 234-5, Ex. 4 at 17.)

16
17 12. On May 20, 1924, in 43 Stat., 133, Congress released the restrictions on
18 alienation for the Moses Agreement lands stating, in part:

19 **Chapter 160—An Act To authorize the sale of lands**
20 **allotted to Indians under the Moses agreement of July 7,**
21 **1883**

22 ... any allottee to whom a trust patent has heretofore been ...
23 issued by virtue of the agreement ... with Chief Moses ...
24 may sell and convey any or all the land covered by such
25 patents, or if the allottee is deceased the heirs may sell or
26 convey the land, in accordance with the provisions of the Act
of Congress of June 25, 1910...

1 (ECF No. 280-1, Attachment A.)

2 13. President Calvin Coolidge, on February 10, 1926, specifically extended
3 the Chief Moses Band allotments' trust period an additional 10 years to expire on
4 March 8, 1936. The trust status of the Moses Agreement allotments expired on that
5 date. (ECF No. 234-8, Ex. 7 at 29.)

6
7 14. When Congress enacted the Act of September 30, 1936, the Moses
8 Agreement allotments' trust status had expired. (ECF No. 234-11, Ex. 10 at 38.)

9
10 15. Upon the death of Wapato John, his ownership interest in MA-8 passed to
11 his wife, certain children and grandchildren in undivided shares. (ECF No. 90-5, Ex.
12 14; Admitted in US Answer, ECF No. 42 at ¶ 36.)

13
14 16. Undivided ownership interests in MA-8 continue to pass pursuant to
15 probate proceedings and by purchase. (ECF No. 90-5, Ex. 14; ECF No. 90-16, Ex.
16 103; Admitted in U.S. Answer, ECF No. 42 at ¶ 37.)

17
18 17. The Colville Tribes acquired an undivided interest in MA-8 by purchasing
19 the ownership interests of Wapato John's heirs. (ECF No. 90-16, Ex. 103 and 104.)

20 **Master Lease**

21 18. In the early 1980's William Evans, Jr. ("Evans"), a member of the
22 Confederated Tribes of the Colville Reservation (the "Colville Tribes") who owned an
23 interest in MA-8, sought to lease MA-8 for economic development purposes,
24
25

1 specifically to create a camping resort. (ECF No. 90-5, Ex. 15; ECF No. 90-6, Ex. 20
2 and 25; Admitted in U.S. Answer, ECF No. 42 at ¶ 2.)

3 19. Evans and over 40 other individuals held undivided ownership interests in
4 MA-8. (ECF No. 90-5, Ex. 14; Admitted in U.S. Answer, ECF No. 42 at ¶ 43.)

5 20. The owners of MA-8 were provided with an Acceptance of Lessor form
6 dated July 14, 1982. Many of the owners executed the form. (ECF No. 90-6, Ex.17;
7 Admitted in U.S. Answer, ECF No. 42 at ¶ 48.)

8 21. This consent form included a provision that the Landowner agrees that
9 “if a satisfactory lease is not agreed upon within 90 days from July 20, 1982
10 Superintendent may, if necessary, exercise his authority to lease the land pursuant to
11 the Act of July 8, 1940 (54 Stat. 745; 25 USC 380) Dept. of the Interior, Bureau of
12 Indian Affairs.” (ECF No. 90-6, Ex.17.)

13 22. As stated on the 1982 consent forms, at the time George Davis signed the
14 lease, Title 25 § 162.2 of the Code of Federal Regulations provided:

15 (a) The Secretary may grant leases on individually owned
16 land on behalf of... (4) the heirs or devisees to individually
17 owned land who have not been able to agree upon a lease
18 during the three-month period immediately following the
19 date on which a lease may be entered into; provided, that the
20 land is not in use by any of the heirs or devisees; and (5)
21 Indians who have given the Secretary written authority to
22 execute leases on their behalf.

1 (26 FR 10966, Nov. 23, 1961. Redesignated at 47 FR 13327, Mar. 30, 1982.)

2 23. In a letter dated April 29, 1983, the DOI informed the Superintendent of
3 the Colville Agency that he was authorized to act as signatory for the Secretary of the
4 Interior in this lease action. (ECF No. 90-6, Ex. 19.)

5 24. In a letter dated January 30, 1984, the Acting Area Director of the BIA
6 Portland Area Office authorized George Davis, Superintendent of the Colville Agency,
7 to approve the Mill Bay Recreational Vehicle Park lease and any “assignments, and
8 modifications regarding the lease which may arise during its term.” (ECF No. 90-6,
9 Ex. 21, US Answer, ECF No. 42 at ¶ 51.)

10 25. On February 2, 1984, Evans entered into a business lease (“Master
11 Lease”) to lease MA-8 as “Lessee.” (ECF No. 90-2, Ex. 1; Admitted in U.S. Answer,
12 ECF No. 42 at ¶ 52.)

13 26. The purpose of the Master Lease was to develop a recreational vehicle
14 (“RV”) camping resort and offer 50-year campground memberships under the
15 Washington State Campgrounds Act, Revised Code of Washington 19.105 *et seq.*
16 (ECF No. 90-2, Ex. 1, ¶ 4(b).)

17 27. The Master Lease expressly recognized its purpose was to provide
18 recreational vehicles a right to use the property. (ECF No. 90-2, Ex. 1, ¶ 4.)

19 28. The Master Lease provided lease income to the owners of MA-8. (ECF
20 No. 90-6, Ex. 18 & 20, Admitted in U.S. Answer, ECF No. 42 at ¶ 7.)

1 29. Evans developed the property in accordance with his responsibilities
2 under the lease:

3
4 Q Okay. And what I'm trying to find out is: After the
5 master lease was entered into, what did the property look like
6 then? Was there any development at all? Or was it just
7 undeveloped land?

8 A When he entered into the lease it was undeveloped. But
9 in accordance with the lease he was to develop it. And I
10 believe he started developing right away after his lease.

(Redthunder Dep. at 46:13-19 [ECF No. 296, Ex. 1].)

11 **Term of the Master Lease and the Option to Renew**

12
13 30. Under the Master Lease, Evans was to give “Lessor and the Secretary”
14 written notice of his intent to exercise this renewal option at least 12 months prior to
15 the expiration of the original term. (ECF No. 90-2, Ex. 1, ¶ 3.)

16
17 31. The Master Lease did not require approval of this renewal by either the
18 Secretary or the Landowners, rather the lease would automatically renew upon written
19 notice. (ECF No. 90-2, Ex. 1, ¶ 3.)

20 32. Past BIA Superintendent William “Gene” Nicholson acknowledged that
21 the Landowners did not need to approve the renewal:

22
23 Q I want you to assume for the sake of my question that
24 when that notice of extension was received extending the
25 lease to 2034, Mr. Davis did not at that time communicate

1 with any of the landowners of MA-8 requesting consents or
2 any other action on their part. With that assumption in mind,
3 sir, would that not be consistent with your view that the
4 Superintendent did not need the consents of the landowners
5 when he was dealing with the existing master lease for MA-
6 8?

7 A I would say that he didn't need their consent. He had the
8 master lease.

9 Q All right. And that view of the Superintendent of the
10 BIA, you would understand that people dealing with lease-
11 hold interests and so on would rely on that view; is that
12 correct?

13 A Correct.

14 Q Following up on that, did you at any time communicate to
15 Bill Evans that you did not think the lease had been extended
16 to 2034?

17 A No.

18 (9/26/12 William Nicholson Dep. at 31:15-32:8 [12/1/12 Ferrera Decl., ECF No. 296,
19 Ex. 3].)

20 33. Evans' address and the BIA Colville Agency's address were the only
21 addresses cited in the Lease and no other addresses were attached to the Lease. (ECF
22 No. 90-2, Ex. 1; US Answer, ECF No. 42 at ¶ 66.)

23 34. Federal Defendants admit that, prior to 2007, most, if not all, written
24
25

1 correspondence between Evans and the BIA or between Evans and the owners of MA-
2 8 was not made using certified mail. (Admitted in U.S. Answer, ECF No. 42 at ¶ 67.)

3
4 35. Sharon Redthunder, then the Colville Agency's Realty Officer stated that
5 most of the Colville Agency's communications with the Landowners were oral, not
6 written:

7
8 Q Okay. But you don't recall ever sending notices,
9 demands, correspondence via certified mail?

10 A No --

11

12 Q How often did you send correspondence or notices to the
13 landowners regarding this lease or the use of this property, if
14 you remember?

15 A I don't think there were a lot of notices sent. But there
16 was a -- the landowners came in quite a bit asking questions.

17 Q Okay. Would you sometimes call them instead of
18 sending a letter?

19 A It was mainly them calling in.

20 (9/6/12 Sharon Redthunder Dep. at 39:1-13 [ECF No. 296, Ex. 1].)

21 36. Sharon Redthunder stated that, if the Superintendent approved any
22 modifications, the Landowners had already consented to those modifications:

23
24 Q After this lease was executed do you remember this
25 situation ever coming up where the landowners had to

1 consent or approve anything?

2
3 A I believe they had to -- I'm trying to think. I believe they
4 had to when a portion of it was going to go into the casino.

5 Q I'm sorry. Can you repeat that.

6
7 A When -- when they were contemplating a casino, I
8 believe the landowners had to changing the use of the
9 property.

10 Q Do you remember what happened there, how you had
11 obtained consents?

12 A A meeting was called.

13 Q Do you remember about how many people showed up?

14 A Probably about 15.

15
16 Q So to get that consent, how would you go about getting
17 the consent? Would you just do that at the meeting?

18 A Could -- could have done it at the meeting or a mail out
19 to the ones that weren't at the meeting. It would be -- this --
20 that document that you showed me before is how we -- we
21 had got their con-- signature on that to agree to a -- especially
22 on that, a change in the lease.

23 Q Do you remember sending out a consent like that?

24 A I myself I don't.

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Q Okay.

A I would assume normally that it was done. But for me to personally recall, I didn't do the paperwork myself.

(Redthunder Dep. at 39:20-40:19 [ECF No. 296, Ex. 1].)

Q And if there weren't consent forms sent out, then how were the other landowners contacted; do you remember?

A Possibly some of -- they were all family. And it may have been from one family member getting another family member's -- a lot of them were -- say there could be five in one family, five brothers and sisters in one family, five or six family members in another family. They were pretty much families is what they were.

Q So would they then get verbal approval from their family members?

A We had to have a certain percentage in order to -- so it depends on how big their interests were. If you look at the title status report it'll show that they all owned different interests. And what we had to do is get the majority. ...

....
A So it just depended on who signed and how much interest they had.

....
Q So they didn't necessarily sign a consent, though? They may just verbally say they approved?

A Normally we got their signature.

1 Q Okay. If their signature isn't in the files, though, do you
2 think then -- I mean, do you remember if you got verbal
3 consents?

4 A We normally didn't go off of verbal consents.

5 (Redthunder Dep. at 40:20-41:21 [ECF No. 296, Ex. 1].)
6

7 37. In early 1985, Evans sent notice that he was exercising his option to
8 renew and that receipt of the letter by the Superintendent would be deemed acceptance
9 of this renewal. (ECF No. 90-6, Ex. 27.)

10 38. The Colville Agency marked this letter as received on March 18, 1985.
11 (ECF No. 90-6, Ex. 27.)
12

13 39. George Davis, Superintendent of the Colville Agency at that time, stated
14 that he believed Evans' letter was sufficient to renew the Master Lease:
15

16 Q Now, do you, sir, have any recollection of talking with
17 Bill Evans about needing to modify the lease on MA-8 in
18 order to exercise the option to extend?

19 A I do not recall it.

20 Q Do you recall any conversation with Bill Evans about
21 sending the notice of extension to the landowners?

22 A No, I do not.

23 Q Did you direct anyone to send this notice of extension to
24 the landowners?
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A I don't -- I don't recall that I did.

Q Did you consider the lease extended to 2034 after receiving Exhibit 18?

A Vaguely I recollect the concern I had for the length of the lease. However -- and I believe it was Jack Doty explaining to me that -- the reasons why it should. And between him and Sharon I believe I went along with it.

Q That it was extended to 2034?

A Yes.

(9/26/12 George Davis Dep. at 20:5-22 [ECF No. 296, Ex. 2].)

A I always had the concern for the lengths of the times. And -- and that's probably my biggest recollection of that whole process. I always felt that that -- the terms were too lengthy. And between Sharon and Jack Doty and a couple of other people, they convinced me that it wasn't too long.

Q Okay.

A So as the approving authority, I signed off.

(Davis Dep. at 25:12-18 [ECF No. 296, Ex. 2].)

Q....when you take an official act, people dealing with you are entitled to rely on your official acts?

A Yes.

1
2 (Davis Dep. at 25:24-26:1 [ECF No. 296, Ex. 2].)

3 Q Did you have an independent recollection of your own --
4 or not recollection -- independent view of your own that it
5 had been extended?

6 A Yes, I did. I thought it was extended.

7
8 (Davis Dep. at 28:3-6 [ECF No. 296, Ex. 2].)

9 40. Sharon Redthunder, the person who wrote a handwritten note that the
10 Master Lease needed to be modified, did not know if that note had anything to do with
11 the effectiveness of Evans' renewal:

12
13 Q ... Let's turn to Exhibit 18. ...

14 A Yes, that's --

15
16 Q -- looks familiar.

17 A -- my writing.

18

19 A "George Davis informed Bill Evans by phone that cannot
20 be done unless lease is modified. They will request
21 modification in writing."

22 (Redthunder Dep. at 47:7-48:7 [ECF No. 296, Ex. 1].)

23 Q Do you remember why you wrote that?

24 A I'm assuming the superintendent was George at the time.
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....

Q And what I'm trying to understand is what it was -- why the lease would need to be modified. If this note is talking about the option to renew, what aspect of the option to renew needed to be -- required the lease to be modified?

A It may have been that there were other plans. I don't know what was discussed between George and Bill. It may have been that they discussed -- I'm -- I'm just assuming --

Q Uh-huh.

A -- there was some reason that George said it had to be modified. Maybe he was planning something else at the time.

Q Okay. So this note may not be related to Mr. Evans' letter --

A No.

....

Q Okay. So you don't know why this letter would not be enough to renew?

A I don't know what George's feeling was.

(Redthunder Dep. at 48:23-50:12 [ECF No. 296, Ex. 1].)

41. After Evans submitted his 1985 renewal letter, the BIA approved and signed documents which included the 2034 expiration date of the Master Lease. (ECF No. 90-4, Ex. 4 & 6; ECF No. 90-5, Ex. 8; ECF No. 90-10, Ex. 69.)

42. On July 14, 2004, Superintendent Nicholson signed a Lease Information

1 Affidavit which was submitted to the Washington State Department of Licensing and
2 Regulation. This affidavit stated that the Master Lease expires February 2, 2034.
3 (ECF No. 90-10, Ex. 69.) Mr. Nicholson admitted to affirming this expiration date
4 during his deposition:
5

6 Q Okay. Would you turn to Exhibit 65, please. ... Was this
7 a note that you received from Leslie Evans on or about July
8 13th, 2004?

9 A Yes.

10 Q Okay. Turn to the second page. Is that your signature on
11 the bottom of that affidavit?

12 A Yes.

13 Q And did you sign it on July 14th, 2004?

14 A Yes.

15 Q All right. Did you sign it in your official capacity as the
16 Superintendent of the Bureau of Indian Affairs?

17 A Yes.

18 Q What did you understand this affidavit to the Licensing
19 and Regulation Department in Olympia was intended to
20 accomplish?

21 A Just showed that they had the lease up through 2034.

22 (Nicholson Dep. at 14:16-15:10 [ECF No. 296, Ex. 3].)

1 43. Mr. Nicholson knew that Plaintiffs would rely on his statements that the
2 Master Lease extended until 2034:

3
4 Q ... Did you understand at the time you signed Exhibit 65
5 that the State of Washington Department of Licensing and
6 Regulation was going to rely on your sworn statement about
7 the duration of the lease?

8 A I guess I'd have to say yes.

9 Q All right. And at the time that the State of Washington
10 was going to rely on your affidavit under oath, did you
11 understand that there would be others that would be relying
12 on that information?

13 A Yes.

14 Q Who would those others be to your knowledge?

15 A Well, be the landowners, the -- the Wapato, LLC.
16 Whoever thinks they have a lease going up to 2034.

17 Q Would that include people who purchased expanded club
18 memberships in Mill Bay?

19 A If they're involved in it, yes.

20
21 (Nicholson Dep. at 15:21-16:11 [ECF No. 296, Ex. 3].)

22 44. Under the Master Lease, modifications and subleases were not valid until
23 approved by the Secretary or the Superintendent of the Colville Agency (as the
24 Secretary's agent). (ECF No. 90-2, Ex. 1 at ¶ 33.)
25

1 45. In April 1996, certain Landowners called the Colville Agency inquiring
2 about their lease payments. The Realty Specialist at the Colville Agency sent a letter
3 to these individual Landowners in response stating the term of the Master Lease is to
4 expire February 1, 2034. (ECF No. 90-7, Ex. 35.)

5
6 46. In several Landowner meetings during 2003 through 2007, the BIA was
7 present at meetings where the Landowners were informed the Master Lease extended
8 until the year 2034. (ECF No. 90-4, Ex. 5; ECF No. 90-5, Ex. 7 & 9.)

9
10 47. Past Superintendent Nicholson acknowledges that he represented to
11 Landowners and others that the Master Lease extended to 2034:

12
13 Q Did you believe during your term as Superintendent that
14 the lease had been extended to 2034?

15 A The only thing I heard about it being 2034 was from the --
16 from Michael Arch and Stacy Webb -- or Jeff Webb, I guess
17 was his name. And I never did see anything official where it
18 had been approved or actually processed for the extension.
19 They talked about they had -- they had the extension 25 and
20 25. That's about it. And I do know there was conditions that
21 had to be done to extend -- to legally extend and to exercise
22 their option. I don't know if Bill ever did that or if Wapato,
23 LLC, ever did that. I don't think it was the responsibility of
24 the RV Park to extend it.I use the word
25 "communication" purposefully to include all forms of
26 communication --

 A Okay.

1 Q -- written, verbal.

2 A In that case, yes.

3
4 (Nicholson Dep. at 32:9-33:10 [ECF No. 296, Ex. 3].)

5 48. Based upon the sign-in sheets of the Landowners' meetings and the names
6 on the letters sent with the 2034 expiration date, Landowners constituting a majority
7 interest in MA-8 received actual notice that the Master Lease expired in 2034. (ECF
8 No. 90-5, Ex. 7 & 9.)

9
10 49. 33 out of 36 Landowners admit to receiving actual notice of the Master
11 Lease renewal. This includes:

- 12
- 13 a. The 27 Defendant Landowners who are in default (ECF No. 135) and,
14 thus, admit that they received actual notice of the renewal (ECF No. 1 at
15 29, ¶ 143); and
 - 16 b. The 10 Defendant Landowners who did not respond to Plaintiffs Requests
17 for Admission within 30 days and are deemed to have admitted that,
18 "Prior to January 1, 2008, you or your predecessor in interest to MA-8
19 received a copy of Evans' letter dated January 30, 1985" and "Prior to
20 January 1, 2008, you knew Evans or his successor in interest to the Master
21 Lease intended to exercise the option to renew as provided for in the
22 Master Lease to extend the Master Lease until the year 2034." (ECF No.
23
24
25
26

1 296 at ¶ 7-12 and Ex. 7.)

2 **Mill Bay Resort**

3
4 50. Upon execution of the Master Lease, Evans or his agents began selling
5 Mill Bay Recreational Vehicle Resort memberships. (Grondal Decl. [ECF No. 89] at ¶
6 3.)

7
8 51. On June 12, 1984, attorney David Rockwell forwarded registration
9 materials and a Public Offering Statement regarding the Mill Bay Resort camping club
10 to the Washington State Department of Licensing in compliance with the Camping
11 Resorts Act. (ECF No. 90-9, Ex. 65 at 6.)

12
13 52. That Public Offering Statement references 330 membership contracts at a
14 price of \$5,995 each and 40 expanded membership contracts at a price of \$25,000
15 each. (ECF No. 90-9, Ex. 65 at 6.)

16
17 53. Two types of Mill Bay Resort membership sales agreements were sold to
18 purchasers, the Membership Sale Agreement and the Expanded Membership Sale
19 Agreement. (ECF No. 90-9, Ex. 65 at 7.)

20
21 54. The BIA knew that Evans was marketing these agreements to the public
22 as 50 year membership contracts:

23 Q Okay. Do you remember Mr. Evans representing in --
24 I'm going to say to the general public, either in news stories
25 or in some other way, that this was a 50-year lease?

1 A From looking at this, I would say yes.

2
3 (Redthunder Dep. at 44:1-4 [ECF No. 296, Ex. 1].)

4 Q Okay. Did you know that he was marketing the
5 membership agreements?

6 A I knew that he was trying to get his lots -- I don't even
7 know -- leased, I guess. I just assumed he was marketing
8 somehow.

9
10 (Redthunder Dep. at 44:20-24 [ECF No. 296, Ex. 1].)

11 **Expanded Membership Sale Agreement and Modification of Master Lease**

12 55. In 1989, Evans sought to modify the Master Lease and RV park concept.
13 (ECF No. 90-6, Ex. 29)

14 56. The BIA Colville Agency's agents have differing opinions as to whether
15 the Landowners had to consent any modifications of the Master Lease and as to
16 whether they obtained those consents:
17

18 Q In your experience, did the landowners -- were they
19 always consulted for these types of changes?

20 A I believe so.

21

22 Q But do you know -- your understanding was that it was a
23 requirement that they consent?

24 A If it will change any provisions in the lease or changed
25

1 any use.

2

3 Q Okay. So if there was a modification to this lease --

4 A Uh-huh.

5 Q -- the bureau could not just approve it?

6 A Right.

7
8 (Redthunder Dep. at 36:14-37:11 [ECF No. 296, Ex. 1].)

9
10 Q If you could turn to Exhibit 19. ... And the second
11 sentence says, "You may now approve the lease and any
12 assignments and modifications regarding the lease which
13 may arise during its term."

14 A Uh-huh.

15 Q Based on your knowledge and your experience, would
16 that mean that the superintendent could approve a
17 modification?

18 A Yes.

19 Q And would that modification require landowner
20 consents?

21 A Yes.

22 Q Would it require written consents?

23 A Yes.

1
2 (Redthunder Dep. at 51:5-25 [ECF No. 296, Ex. 1].)

3 Q ... Because we've talked about different -- there's
4 consents and you would have meetings and you'd have
5 people -- you would have the landowners come in and talk
6 about these modifications. And I'm just wondering where it
7 is in any of these documents or in the regulations that that
8 requires written consents.

9 A Yeah, it -- it's -- it's required. And we should have --
10 there should be written signed documents someplace
11 approving -- say, like when Mill Bay came into effect, I -- I
12 remember seeing that -- that we had to have the landowners'
13 consent on those modifications because we were changing
14 the use of the lease.

15 Q So would the superintendent not approve a modification
16 if there were not consents?

17 A Right.

18 (Redthunder Dep. at 52:22-53:11 [ECF No. 296, Ex. 1].)

19 A Or -- or proof that we had at least sent them documents.
20 See, because the superintendent has authority to do things per
21 the regulations, but it's only if -- if you sent out a 90-day
22 notice. And he has the right to approve if the heirs cannot
23 agree within 90 days or, like I told you before, heirs who are
24 whereabouts unknown, if it comes back that they didn't
25 receive their letter because they're not -- no longer at that
26 address.

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Q So would that approval include modifications?

A Yes.

Q The superintendent could --....-- approve modifications --
... -- on their behalf if any of those situations -- ... --
applied?

A Yes.

(Redthunder Dep. at 66:20-67:12 [ECF No. 296, Ex. 1].)

Q Directing your attention to the first page of Exhibit 26,
which has a number down on the bottom right-hand corner,
"241." Do you recognize that document?

A Uh-huh.

....

Q This purports to be a modification to a lease; is that
correct?

A Yes.

Q Let me tell you that we have taken the deposition of
Sharon Redthunder and she has testified that for the
Superintendent to sign a modification to a lease, it would
indicate to her that consent from the landowners in the
allotment had been obtained before the Superintendent would
affix his signature. Do you agree with that? Or on the
contrary, do you feel that as Superintendent, you could sign a
modification like Exhibit 26 without formal written consent
of landowners?

1 A My interpretation would be that I could sign it without
2 consent.

3 (Nicholson Dep. at 10:3-7; 10:25-11:13 [ECF No. 296, Ex. 3].)
4

5 Q All right. Let me tell you that we have obviously been
6 through a whole bunch of records, FOIA requests to the
7 Bureau of Indian Affairs, production in connection with this
8 lawsuit, and no written consents are in the record of the BIA
9 as it relates to the modification that you signed, Exhibit 26.
10 Would that be consistent with your understanding at the time
11 you signed this modification that you did not need the
12 consents?

13 A Well, the reason I would say we don't need the consents
14 on this particular lease was Mr. Evans had the master lease.
15 So as long as it was pertaining to the provision in the master
16 lease, he didn't -- wasn't required for him to get consents.
17 That's my only interpretation.

18 (Nicholson Dep. at 11:14-12:6 [ECF No. 296, Ex. 3].)
19

20 57. The BIA's recordkeeping was imperfect and some documents are missing.
21 It is possible the BIA did obtain consents to modify the Master Lease and no longer
22 have those records:
23

24 Q ... I don't know how familiar you are with the Colville
25 Agency's recordkeeping. ... Do you know whether -- did
26 you see copies of documents being kept and filed? Or were
you not involved with that?

A Normally what would happen -- documents could either

1 go direct or come through me. If they came through me, I
2 would initial it and send it on down to leasing. And they
3 were supposed to have them all in -- in good files. But at
4 times you had different workers; they were not filed
5 properly. I mean, I know there were times that I went down
6 there and -- when somebody would call about a payment and
7 I'd go down and ask and sometimes they were not in good
8 order.

9 Q Were documents missing sometimes?

10 A Could possibly be.

11 (Redthunder Dep. at 67:13-68:2 [ECF No. 296, Ex. 1].)

12 Q But sometimes documents would be missing?

13 A Well, it depends on who filed them.

14 Q Okay. All right.

15 A If they had young summer youth working there.

16 (Redthunder Dep. at 69:1-4 [ECF No. 296, Ex. 1].)

17 Q Okay. Now, in regard to any modification of the original
18 1984 lease, am I correct that, at least if it was material, that
19 you would send out a consent form to each of the allottees or
20 provide it otherwise to them in some manner?
21

22 A If it was going to modify the lease, we would -- and
23 change the use, we would send out consents -- ... -- to the
24 modification.
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....

Q ... For example, there was a significant modification in 1993, wasn't there, where the casino was initially conceived and the sublease prepared?

A Yes.

Q And you don't have any doubt that consents were sent out to the members --

A Right.

Q -- on that, do you?

A No, I don't have any doubt.

Q And if for some reason when consents were provided to us in regard to the FOIA, if those weren't included that was a mistake, because they exist somewhere; isn't that right?

A They should exist. I -- they should exist someplace. I can't swear that they do.

(Redthunder Dep. at 100:9-101:12 [ECF No. 296, Ex. 1].)

58. Evans submitted modifications to the Master Lease, including the "Expanded Membership Agreement," for approval by the BIA. (ECF No. 90-6, Ex. 30 & 33.)

59. On July 6, 1989, George Davis wrote a note that he was approving the modification and expanded membership concept, asking Sharon Redthunder to send a

1 letter to Evans stating the same. (ECF No. 90-6, Ex. 31.)

2 60. On July 7, 1989, Sharon Redthunder, then Real Property Officer at the
3 Colville Agency, sent Evans' attorney a letter stating that the Superintendent reviewed
4 the modification in accordance with the "Expanded Membership Sale Agreement" and
5 incorporated it into the Master Lease. George Davis was copied on this letter. (ECF
6 No. 90-4, Ex. 4.)
7

8 61. On July 17, 1989, George Davis, Superintendent of the Colville Agency
9 wrote a letter to Evans approving the Expanded Membership Agreement stating:
10

11 This letter is in reference to...the approval of the "Expanded
12 Membership Sale Agreement". I have reviewed the
13 Agreement and approval is granted to incorporate into the
14 lease. These sales may begin immediately.

15 (12/1/12 Ferrera Decl., Ex. 6.)

16 This letter is missing from the BIA's files. (Ferrera Decl. at ¶ 8.)

17 62. The Expanded Membership Sale Agreement contained language similar to
18 the regular Membership Sale Agreement except in Paragraph 4, the privileges of
19 membership were delineated as, "entitling this member to utilize space exclusively..."
20

21 (ECF No. 90-6, Ex. 30.)
22

23 63. The Expanded Membership Agreement stated that the contract was to be
24 interpreted and enforced in accordance with the law of the State of Washington. (ECF
25

1 No. 90-6, Ex. 30.)

2 64. The Expanded Membership Agreement also provided that its duration was
3 for fifty years from February 2, 1984. (ECF No. 90-6, Ex. 30.)
4

5 65. George Davis, then Superintendent of the Colville Agency considered the
6 Master Lease modified and the Expanded Membership Agreement incorporated into
7 the Master Lease:
8

9 Q Would you turn to Exhibit 25. ...Did you receive a copy
10 of Ms. Redthunder's letter to Jack Doty at or about the time it
11 was sent on July 7th, 1989?

12 A I'm sure I did.

13 Q And is it a fair statement that this was a notice to Mr.
14 Doty, attorney for Mr. Evans, that the modification to the
15 Master Lease of MA-8, No. 82-21, was modified in
16 accordance with the Expanded Membership Sale Agreement?

17 A Well, I believe was.

18 (Davis Dep. at 20:23-21:7 [ECF No. 296, Ex. 2].)
19

20 Q Okay. Would you turn to Exhibit 23, please. Let me
21 represent to you that this is a copy of the Expanded
22 Membership Sale Agreement that was being referred to in
23 the last exhibit, and the "received" stamp indicates that it was
24 received at the Colville Indian Agency on June 26th, 1989.
25 Do you agree with that characterization of the exhibit?

26 A Yes.

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Q If you'd turn your attention to page 7 ...Paragraph 13, a sentence that I'm going to read to you next to last. Or I guess it's the last. (As read): "The duration of this membership is coextensive with the 50 year term commencing February 2nd, '84, of Seller's lease for the Mill Bay property, which lease was entered into between the United States Department of the Interior..." and still quoting to the end of that sentence. Do you see that paragraph?

A Yes.

Q Were you aware that when you approved this document as a modification to the Master Lease, that that language was there?

A Yes.

(Davis Dep. at 21:8-22:4 [ECF No. 296, Ex. 2].)

66. The Superintendent of the Colville Agency knew that Bill Evans and his agents were going to sell the Expanded Membership Agreements and expected that the buyers of those memberships would rely on his approval of those agreements:

Q (By Mr. Danielson) Handing you what's been marked as Exhibit 118 to your deposition, would you take a moment and read it.

....
Q Is that your signature?

A Yes.

1 Q And in the first paragraph it says it's -- (as read):
2 "Concerning the approval of the Expanded Membership Sale
3 Agreement, I have reviewed the Agreement and approval is
4 granted to incorporate it into the lease. These sales may
5 begin immediately." Is that the prose that you used?

6 A Yes.

7 Q Okay. So you understood at the time you approved the
8 Expanded Membership Sales Agreement, that it was going to
9 be marketed as a sales effort with the general public to buy
10 RV sites?

11 A No, I'm not sure that I was aware of it.

12 Q What sales were you talking about?

13 A This is for the membership -- the people that are buying
14 their --

15
16 (Davis Dep. at 22:23-23:17 [ECF No. 296, Ex. 2].)

17 Q All right. And you knew in performing your duties as the
18 Superintendent of the Bureau of Indian Affairs for the
19 Colville Agency that members of the public dealing with real
20 estate would rely on your official acts?

21 A Yes.

22 Q Okay. And they'd be entitled to rely on your official acts?

23 A Yes.
24
25
26

1 Q Okay. And so if someone invested significant funds
2 based on the representation from your official act that this
3 lease extended through 2034, they would be entitled to
4 reasonably rely on that?

5 A Yes.

6 (Davis Dep. at 24:12-25:7 [ECF No. 296, Ex. 2].)

7 67. On July 30, 1990, the Master Lease Superintendent Nicholson officially
8 approved the modification filed with the BIA's records. The modification included an
9 attachment. (ECF No. 90-6, Ex. 33.)
10

11 68. The attachment to the above described modification states, in part:

12 Expanded Camp Club Memberships. Twenty four (24) sites
13 were added in the spring of 1989 to be marketed as
14 "Expanded Memberships". The delay of materials to
15 complete the sites has postponed interest and sales until
16 spring 1990 at which time hookups and landscaping will be
17 completed....

18 (ECF No. 90-6, Ex. 33.)

19 69. The BIA approved these membership agreements on behalf of the
20 Landonwners:

21 Q Did you not have a requirement that we discussed earlier
22 to approve the modification of the master lease to allow for
23 the expanded memberships? ... You did have to approve
24 that modification?

1 A I signed that one.

2
3 Q All right. So at least as of that date, you understood that
4 the BIA had an obligation to approve that modification to
5 add the expanded club memberships to the lease?

6 A That's what we did.

7 Q Okay. And did you understand that you had an obligation
8 to do that on behalf of the allottees?

9 A Right.

10
11 (Nicholson Dep. at 25:20-27:12 [ECF No. 296, Ex. 3].)

12 70. Around 1991, Evans began selling “expanded memberships” to Mill Bay
13 Members and new buyers. (ECF No. 89 at ¶ 7.)

14
15 71. The BIA knew that Evans was selling these memberships and advertising
16 that they continued until 2034:

17
18 Q And directing your attention to the middle paragraph,
19 does it not indicate that part of that modification is
20 implementing the expanded camp club memberships?

21 A That's my interpretation.

22 Q Okay. And at the time you signed that, you had approved
23 the Expanded Camp Club Membership Agreements, had you
24 not?

25 A I can't recall.

1
2 Q All right. You were aware that the membership
3 agreements that Mr. Evans was selling provided that the
4 lease extend -- for MA-8 extended through 2034, were you
5 not?

6 A Yes. Correct.

7 (Nicholson Dep. at 13:7-25 [ECF No. 296, Ex. 3].)

8 72. Based upon the BIA's approval, Evans and his sales staff advertised these
9 camping memberships to the public providing verbal and written assurances that that
10 the expanded membership was good for 50 years until 2034 and had been approved by
11 the BIA. (ECF No. 89 at ¶ 7.)

12
13 73. One such document provided to potential buyers of the camping
14 "memberships" was a prospectus filed under oath with the State of Washington under
15 the Washington State Campground Act. This prospectus included recitals regarding
16 the nature of the membership and the fact that the membership agreements were co-
17 extensive with the 50 year lease term until 2034. (ECF No. 89, Ex. A.)

18
19 74. After 1990, many members purchased an "expanded membership" to Mill
20 Bay RV Park for \$25,000 which entitled the member to a specific piece of property for
21 the promised duration of the Master Lease of 2034. (ECF No. 89 at ¶ 7 & 9; Vertrees
22 Decl., ECF No. 95.)

23
24 75. The "Expanded Membership" was sold with the representation that it had
25

1 been approved by the BIA and under the protection of the Washington State
2 Campground Act. (ECF No. 89 at ¶ 7.)

3
4 76. Both the original Membership Sale Agreement and Expanded
5 Membership Sale Agreement include a provision stating: “This contract shall be
6 interpreted and enforced in accordance with the laws of the State of Washington.”
7 (ECF No. 90-6, Ex. 30; ECF No. 90-9, Ex. 65.)

8
9 77. By approving the membership contracts and incorporating them into the
10 Master Lease as a modification, the BIA adopted the provisions of the agreements
11 allowing state law to apply to the Mill Bay Resort and extending the members’ rights.
12 (ECF No. 90-4, Ex. 4; ECF No. 90-6, Ex. 28-31 & 33.)

13
14 78. In all, from 1984 to 1994, over 183 consumers purchased camp
15 memberships paying anywhere between \$5,995 to \$25,000 for the membership alone.
16 (ECF No. 89 at ¶ 9; Vertrees Decl., ECF No. 95; Johnson Decl., ECF No. 93; Chantry
17 Decl., ECF No. 92.)

18
19 79. Consumers paid millions of dollars in reliance on the validity of these
20 memberships and the 2034 expiration date that was approved by the BIA. (ECF No.
21 89 at ¶ 9; Vertrees Decl., ECF No. 95; Majack Decl., ECF No. 94; Johnson Decl., ECF
22 No. 93.)

23
24 80. Members continue to pay for improvements, including quarterly dues for
25

1 operating costs pursuant to their original sales agreements. (ECF No. 89 at ¶ 23;
2 Vertrees Decl., ECF No. 95; Majack Decl., ECF No. 94; Johnson Decl., ECF No. 93.)

3
4 **CTEC Sublease**

5 81. Upon selling the majority of the memberships, Evans wanted to modify
6 his original campground concept even further by subleasing a portion of MA-8 for
7 construction and operation of a casino. (ECF No. 90-6, Ex. 34.)

8 82. On August 6, 1993, Evans (on behalf of Chief Evans, Inc., successor in
9 interest to Mar-Lu) entered into another sublease (the “CTEC Sublease”) with Colville
10 Tribal Enterprise Corporation (“CTEC”) to use a portion of MA-8 as a gaming facility.
11 (ECF No. 90-4, Ex. 4.)

12 83. Part 1 of the CTEC Sublease provided:

13
14 The term of this sublease shall be the time remaining on the
15 twenty-five (25) year term as established in Master Lease
16 No. 82-21 and shall begin on _____, 1993, and the
17 additional term of twenty-five (25) years exercised by Evans
18 in the letter to the Superintendent on January 30, 1985.
19 CTEC’s act of entering into this sublease by subscribing its
20 name hereto shall be deemed as the exercise of its option to
21 extend this sublease for the additional twenty-five (25) year
22 term. The initial approval of this sublease by the Secretary
23 ***shall be deemed to be an acceptance by the Secretary of
such extension. [Emphasis added]***

24 (ECF No. 90-4, Ex. 4.)

25 84. This sublease, signed as approved by the BIA for the Secretary, further

1 modified the Master Lease and acknowledged the validity of the renewal. (ECF 90-2
2 Ex. 1; ECF 90-4, Ex. 4 & 6.)

3
4 85. Past BIA officials disagree as to whether the BIA obtained Landowner
5 approval for the CTEC sublease:

6 Q When you approved the sublease of MA-8 to Mar-Lu on
7 Exhibit 20, did you obtain consent of the landowners to that
8 sublease?

9

10 A The Bureau of Indian Affairs did I'm sure.

11 Q Did you think it was necessary to have consents to
12 approve the sublease of MA-8?

13 A Yes, I -- yes, I did.

14 (Davis Dep. at 15:16-24 [ECF No. 296, Ex. 2].)

15
16 Q Let me tell you that we get documents produced by the
17 Bureau of Indian Affairs, from Portland, Nespelem, and
18 elsewhere. And in all of those document productions we
19 have not found any written consents to the sublease of MA-8.
20 Would that suggest to you that there were consents and were
21 lost, or that the view that consents were not needed
22 prevailed?

23 A I have to -- I can't answer that yes or no. Getting consents
24 from the -- from a fractionated piece of land like that is
25 sometimes very complicated, and sometimes it's only
26 percentages. So I believe we did and I think we -- I feel we
did, and I think we had the majority, but I'm -- I don't

1 recollect it.

2
3 (Davis Dep. at 16:7-20 [ECF No. 296, Ex. 2].)

4 Q ... If you could turn to Document 28Do you
5 know if you sent a copy of this sublease to the landowners?

6 A We may have because we had meetings on it. I don't
7 know if we had a copy of the sublease to them, but we had
8 meetings with them to discuss it.

9 Q Okay. Would you normally have given them a copy of a
10 sublease to look at?

11 A Only if they requested it. We would discuss the -- the
12 sublease and the provisions. But if they requested a copy, we
13 would give it to them.

14 Q So you would explain each of the provisions to them?

15 A Yes. That was in order for them to agree to a sublease.

16 Q Would this be in meetings then that you would explain --

17 A Uh-huh.

18 Q -- the provisions?

19 A Uh-huh.

20 Q What about landowners that did not attend the meetings,
21 how did you explain it to them?
22

1 A Normally a consent to lease would go out.

2 Q Okay. Would that include a copy of the proposed lease?

3 A No.

4 Q Okay. It would just explain the provisions in the lease?

5 A Yeah. It would be a consent like the -- the consent that's
6 in here.

7 (Redthunder Dep. at 65:5-66:12 [ECF No. 296, Ex. 1].)

8
9
10 **The Mill Bay Resort Litigation and 2004 Settlement**

11 86. In 2001, Mill Bay Members received a letter from Chief Evans, Inc.
12 stating the park was closing at the end of 2001 and all membership contracts would be
13 cancelled at that time. (ECF No. 89 at ¶ 10.)

14 87. The Members sent a letter to Superintendent Nicholson expressing their
15 concern regarding the actions of Chief Evans, Inc. and the Members' belief that the
16 BIA "specifically approved all plans for the resort development and its subsequent
17 ownership and operation under the laws of the State of Washington" as well as the
18 assertion that the BIA approved the plans that called for membership contracts to last
19 50 years. This letter attached for the BIA's reference a number of newspaper articles
20 regarding the BIA's involvement in the Mill Bay development and approval of the 50
21 year contracts. (ECF No. 90-7, Ex. 39.)
22
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1 88. On May 16, 2002, Mr. Nicholson sent a letter to Paul Grondal stating that
2 he had received the letter and would forward to the Office of the Solicitor for their
3 review. (ECF No. 90-7, Ex. 40.)
4

5 89. On May 16, 2002, Mr. Nicholson forwarded the Members' letter to
6 Colleen Kelley, United States Department of the Interior, Office of the Solicitor,
7 Pacific Northwest Regional Office. Mr. Nicholson forwarded the relevant contracts
8 and leases regarding the issue and specifically requested Ms. Kelley advise on the
9 matter. (ECF No. 90-7, Ex. 40.)
10

11 90. The BIA never provided a meaningful written response to the May 8,
12 2002 letter. (ECF No. 90-7, Ex. 40; ECF No. 89 at ¶ 25.)
13

14 91. In order to better understand their rights under the various agreements
15 with Evans and the Master Lease, Mill Bay Resort Members submitted several
16 Freedom of Information Act ("FOIA") requests for documents in the Mill Bay/Evans
17 Lease file at the Colville Agency to which the BIA failed to timely respond. (ECF No.
18 89 at ¶ 26; ECF No. 90-7, Ex. 36.)
19

20 92. When the BIA finally provided documents regarding the Mill Bay Resort
21 and Master Lease, it excluded much of the documentation for various reasons. (ECF
22 No. 89 at ¶ 26.)
23

24 93. In June 2002, the Office of the Regional Solicitor informed the BIA
25

1 Colville Agency that:

2 the BIA owes no duty to the Resort members, or to Mr.
3 Evans in his position as a lessee under the lease of Allotment
4 MA-8. Thus, it would be inappropriate, at this time, for the
5 BIA to form or offer an “official position” as to the merits of
any dispute between the Resort members and Evans.

6 (ECF No. 90-11, Ex. 85.)

7
8 94. In response to Chief Evans, Inc.’s letter stating the decision to close the
9 park, Mill Bay Members Association (the “Association”) petitioned the Washington
10 State Attorney General, beginning an investigation into the assets and affairs of the
11 Mill Bay Resort and Chief Evans, Inc. (ECF No. 89 at ¶ 11.)

12
13 95. The Washington State Department of Licensing provided the BIA with
14 copies of the Members’ complaints to the State. (ECF No. 90-7, Ex. 37 & 38.)

15
16 96. On October 21, 2002, the Realty Officer at the Colville Agency forwarded
17 a congressional inquiry from Senator Maria Cantwell to the Realty Officer at the
18 Northwest Regional Office which requested information regarding the situation
19 affecting one of her constituents, Ms. LaVonne Johnson, a Mill Bay Resort member.

20 (ECF No. 90-7, Ex. 41.)

21
22 97. Deputy Commissioner of Indian Affairs responded to Senator Cantwell’s
23 letter by informing her that the Regional Director, Northwest Region, BIA would
24 respond directly to Ms. Johnson’s concerns. (ECF No. 90-7, Ex. 41.)

1 98. Chief Evans, Inc. commenced a lawsuit against both the Mill Bay
2 Members and the Washington State Attorney General in Colville Tribal Court seeking
3 court approval to close the park. (ECF No. 89 at ¶ 12.)
4

5 99. The Colville Tribal Court dismissed the suit for lack of jurisdiction. (ECF
6 No. 89 at ¶ 13.)
7

8 100. On November 21, 2002 the Mill Bay Resort Members filed a lawsuit in
9 Chelan County Superior Court against Chief Evans, Inc., William Evans, Jamie Jones,
10 Kenneth and Leslie Evans, and John Jones (the “Chief Evans Defendants”) seeking to
11 enjoin them from cancelling the memberships and closing the park. (ECF No. 90-9,
12 Ex. 65.)
13

14 101. On March 17, 2003, Superintendent Nicholson informed Michael Arch,
15 attorney for the Chief Evans Defendants, that Ms. Kelley, “suggested that this was not
16 an issue the Bureau of Indian Affairs could resolve” and “[a] court of competent
17 jurisdiction should be fully capable of resolving the issue.” (ECF No. 90-8, Ex. 42 at
18 2-3; ECF No. 90-11, Ex. 85.)
19

20 102. On March 18, 2003, Mr. Arch informed Colleen Kelly that he was going
21 to remove the action to the Federal Court in Spokane. He also formally requested the
22 BIA to intervene in the Federal action “as removed based upon the clear vested interest
23 the BIA has in maintaining exclusive control over the MA-8 property.” (ECF No. 90-
24
25

1 8, Ex. 43.)

2 103. On March 21, 2003, Mr. Arch forwarded copies of the pleadings filed in
3 the RV Park lawsuit for the BIA's review. (ECF No. 90-8, Ex. 45.)
4

5 104. On April 3, 2003, Mr. Arch again requested the BIA to formally intervene
6 in the action given his position that "it is clear that the Members are asking the Federal
7 Court for relief which is anathema to the BIA's regulatory supervision and control of
8 subject MA-8 property." (ECF No. 90-8, Ex. 46.)
9

10 105. Mr. Arch continued to forward the pleadings from that case to the BIA for
11 review. (ECF No. 90-8, Ex. 47, 48, 49, 50, & 51.)
12

13 106. In March 2003, Defendants in that action sought removal to the Eastern
14 District of Washington but the Court ruled it lacked subject matter jurisdiction over the
15 claims. (ECF No. 90-8, Ex. 51.)
16

17 107. On April 22, 2003, co-counsel for the Chief Evans Defendants, sent a
18 letter to Mr. Nicholson and Ms. Kelly informing them of a June 4, 2003 hearing in
19 Chelan County Superior Court so that the Department of Justice ("DOJ") could timely
20 submit a brief to the court to discuss Public Law 280 and the application of
21 Washington State law to the dispute. (ECF No. 90-8, Ex. 52.)
22

23 108. On April 22, 2003, Mr. Arch sent another letter to Ms. Kelley and Mr.
24 Nicholson stating "We remain hopeful based on our teleconferences with you last
25

1 week that the BIA will formally intervene in the State Court action through the DOJ
2 for the limited purpose of seeking a determination that the Camping Resorts Act is not
3 applicable to the allotment land in question.” (ECF No. 90-8, Ex. 53.)
4

5 109. Mr. Arch continued to send numerous letters to the BIA requesting the
6 BIA to intervene and keeping the BIA apprised of the developments in the RV Park
7 litigation. (ECF No. 90-8, Ex. 54-55; ECF No. 90-9, Ex. 56-59; ECF No. 90-10, Ex.
8 66 at 1-4, 67, 68.)
9

10 110. On May 27, 2003, Mr. Arch sent another letter to Mr. Nicholson and Ms.
11 Kelley listing important arguments in the Members’ briefing. Gene Nicholson asked
12 Ricky Joseph, BIA Realty Officer, to assist Ms. Kelly in answering two specific issues
13 raised in this letter. The issues which Ms. Kelly wanted addressed were:
14

15 The Secretary of the Interior was aware of the particular use
16 of this land and anticipated membership agreements to be
17 sold. In ratifying the master lease and the sublease, the
18 Secretary gave approval to said agreements.

19 In the case at bar, the Secretary approved the “modification”
20 for expanded Camp Club Memberships in July of 1990...The
21 expanded membership agreements (as well as the regular
22 agreements) state: ‘This contract shall be interpreted and
23 enforced in accordance with the laws of the State of
24 Washington.’...By approving the modification, the Secretary
25 adopted the provisions of the expanded membership
26 agreement allowing state law to apply. Thus, the Secretary
has exercised the authority granted in 25 C.F.R. § 1.4(b).

1 (ECF No. 90-9, Ex. 59.)

2 111. Ricky Joseph, the person responsible for providing this information to the
3 BIA's attorney had not paid attention to the membership agreements:
4

5 Q. ... The second page, have you seen this -- a document like
6 this before?

7 A. I believe so. It was between Bill and the RV people.
8

9 Q. Okay. When did you first see it?

10 A. Oh, I don't know. Just through the years.
11

12 Q. Do you think maybe you saw it in the 1980's at some
13 point?

14 A. I don't know. I probably wasn't paying attention to it.
15

16 (9/27/12 Ricky Joseph Dep. at 15:16-24 [ECF No. 296, Ex. 5].)

17 Q. Do you remember, at the time, any discussion about Mr.
18 Evans selling these expanded membership agreements?

19 A. No.

20 Q. Did you know, during this time, that he was selling
21 membership agreements?

22 A. I don't know why, but I was -- I think I was focused on the
23 golf course.

24 Q. Okay. So you were more concerned with the golf course
25

1 rather than the expanded membership agreement?

2
3 A. Yeah.

4

5 Q. So if I understand your testimony, you don't remember
6 this part of the modification, the expanded camp club
7 memberships being part of the modification?

8 A. No, I just didn't pay attention that much.

9 (Joseph Dep. at 19:15-20:20 [ECF No. 296, Ex. 5].)

10 Q. Now, this Exhibit 53 is, again, I'll tell you, before that
11 hearing by about seven days. It's dated May 27th. And it
12 says, (as read:) "Ricky, Colleen K needs 5 and 6 answered."
13 Can you read the rest of that? ...

14 A. (As read:) "As well as that previous list of questions I
15 sent down a week ago -- a week or so ago. She needs the
16 above info ASAP."

17 Q. Do you recall getting that direction from Mr. Nicholson?

18 A. No, I don't. I just --

19

20 Q. Now, there it says, under Number 6, as a quote, (as read:)
21 "In the case at bar, the Secretary approved the 'modification'
22 for expanded Camp Club Memberships in July of 1990."
23 Did you do any investigation of that subject, that you recall?

24 A. I don't recall it. Probably did, but I don't recall it.

25 (Joseph Dep. at 59:4-61:12 [ECF No. 296, Ex. 5].)

1 112. Notes on Ms. Kelly's May 28, 2002 letter include handwritten notes
2 answering: "Did BIA review, approve, or express any opinion about any form of the
3 membership contracts between Evans, his companies, and the camping resort
4 members?" with "No" and no other explanation, failing to reference the 1989
5 modifications and approvals. (ECF No. 90-9, Ex. 61.)
6

7 113. On June 5, 2003, Mr. Arch again wrote to Mr. Nicholson and Ms. Kelly
8 informing them of the result of a hearing in Chelan County Superior Court. (ECF No.
9 90-9, Ex. 62.)
10

11 114. On June 11, 2003, Mr. Arch again sent a letter to the BIA regarding the
12 BIA's possible intervention. (ECF No. 90-9, Ex. 63.)
13

14 115. On June 17, 2003, Ms. Kelly sent a letter to Mr. Arch regarding the BIA's
15 position on the RV Park litigation. Ms. Kelly authorized Mr. Dodge to include her
16 letter in a declaration to be submitted to the Chelan County Superior Court in order to
17 support the Chief Evans Defendants' position and to request that the court consider
18 federal law in that dispute. (ECF No. 90-9, Ex. 64.)
19

20 116. On June 26, 2003, the Chelan County Superior Court issued an order
21 finding that the State of Washington retained jurisdiction over the dispute of the
22 parties. (ECF No. 90-9, Ex. 65.)
23

24 117. Evans died on September 11, 2003. (ECF No. 90-9, Ex. 65; ECF No. 90-
25

1 11, Ex. 77; ECF No. 90-13, Ex. 88.)

2 118. Upon the death of Bill Evans, Jr. the Members filed a contingent
3 creditor's claim against Evans' estate in the amount of \$2.7 million. (ECF No. 89 at ¶
4 15.)
5

6 119. During these proceedings, the Mill Bay Resort Members formed and
7 incorporated the Mill Bay Members Association, a Washington non-profit corporation.
8 (ECF No. 90-16, Ex. 102; ECF No. 89 at ¶ 22.)
9

10 120. At the same time the Mill Bay Resort pursued their claims against Evans
11 and his estate, the BIA was holding meetings informing the Landowners about the RV
12 Park lawsuit:
13

14 Q. ...Did you ever send letters to the landowners?

15 A. The realty section for the superintendent sent letters to the
16 landowners when all the court, court stuff started to happen,
17 you know. Cause we met with landowners in Yakima,
18 Spokane.

19 Q. When you say "the court stuff started to happen," do you
20 mean when the RV park sued Mr. Evans, or his estate?

21 A. Well, I think that it might have been when Arch was
22 proposing, you know, the -- you know, the condominiums,
23 the water parks and those type of things. They were just
24 trying to get an extension on their lease.
25

1 (Joseph Dep. at 26:24-27:18 [ECF No. 296, Ex. 5].)

2 121. Subsequently, the Personal Representative of Evans' Estate invoked the
3 right to mediation of the dispute under Washington's Trust and Estate Dispute
4 Resolution Act, RCW 11.96A *et seq.* (ECF No. 90-11, Ex. 77, Page 6; ECF No. 89 at
5 ¶ 16; Webb Decl., ECF No. 91.)

7 122. Mr. Arch sent two letters to Mr. Nicholson informing him of the
8 mediation, requesting that Mr. Nicholson directly participate in the mediation, and
9 stating specifically: "As we have discussed, the resolution of the members' claims to
10 the Park will undoubtedly call for changes in the MA-8 lease which will be ultimately
11 profitable for the allottees." (ECF No. 90-10, Ex. 70 & 71.)

13 123. A two-day mediation occurred in Seattle on August 8, 2004 and
14 September 9, 2004. (ECF No. 90-11, Ex. 77 at 6; ECF No. 89 at ¶ 17.)

16 124. BIA officials were present at that mediation, including Sharon
17 Redthunder, Ricky Joseph, and Superintendent Nicholson. (ECF No. 89 at ¶ 17; ECF
18 No. 90-10, Ex. 71 at 3.)

20 Q Okay. When you attended the mediation do you
21 remember speaking with the mediator at all?

22 A I don't remember speaking with the mediator. I'm trying
23 to remember. I know there was Gene Nicholson, Ricky
24 Joseph, myself were in one room. And then the RVers were
25 in another room. And I remember the mediator going back

1 and forth. And I don't remember if I specifically was asked
2 questions.

3 Q Okay.

4
5 A But I -- I think I was there mainly to support Gene
6 because he wasn't -- he wanted me to recall things.

7 Q What types of things do you remember he wanted you to
8 recall?

9 A About the lease. And he's kind of -- you know, the
10 superintendent -- when George was there, George Davis as
11 the superintendent was deeply involved. He was always
12 checking the lease. Gene, when he was superintendent he
13 just was similar to the realty officer, was overall, but he
14 wasn't deeply involved in the -- in -- in the lease.

15 (Redthunder Dep. at 72:10-73:3 [ECF No. 296, Ex. 1].)

16 125. Superintendent Nicholson acknowledges he attended the mediation as the
17 Landowners' representative:

18
19 Q ... Would you turn back to Exhibit 68. ...Did you
20 receive the letter dated August 12th, 2004, in your official
21 capacity as Superintendent of the BIA for the Colville Indian
Agency?

22 A Yes.

23
24 Q And is it a fair statement that this is a summary of the
25 mediations that were taking place to settle the dispute related

1 to MA-8 and the Mill Bay RV owners?

2
3 A Yes.

4 Q Would you turn your attention to the second page that's
5 marked 410. ... On the first paragraph it reflects that at the
6 mediation in Doug Lawrence's office there was an exchange
7 of – a paragraph about settlement, copies of which are in the
8 possession of Gene Nicholson and Selland. Does that refresh
9 your memory as to whether or not you were present at the
10 mediation at Doug Lawrence's office in Seattle?

11 A I was present at the meeting in Seattle.

12
13 Q Why were you there?

14 A Because of the heirs. Some of the heirs asked me to go
15 and Michael Arch asked me to go. I said "Why do I even
16 want to go? I'm not even a part of this." And I talked to our
17 solicitor about it and she said "Well, since some of the heirs
18 want you to go, you should go," but not to say anything. And
19 so we went over there, along with the -- there was another
20 fellow there, the attorney for Enterprise Corporation, but we
21 never were in the meeting.

22 (Nicholson Dep. at 21:12-23:6 [ECF No. 296, Ex. 3].)

23 Q All right. Would you turn to Exhibit 69. Did you receive
24 the letter dated August 13th, 2004, pursuant to the fax
25 transmission from Stokes Lawrence's offices?

26 A I don't remember. ...-- but I see Sharon signed for it, so
I'm assuming we got it.

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....

A We got it.

Q -- the Bureau of Indian Affairs Agency got it? Would you turn then to the text of the letter that was transmitted, page 416 at the bottom, and draw your attention to Paragraph 3. Would you just take a moment and read it to yourself. Were you aware at the mediation that the discussion was a settlement that would confirm the right of the Mill Bay RV to stay on the premises until 2034, and in part of that the consideration was an increase in the rent \$25,000 per year commencing January 1st, 2004?

A No.

Q Were you aware of that when you received the letter?

A Yeah, after I received the letter, I think I saw that.

....

Q Well, if you look at Paragraph 3 -- let me pull your attention to it again. The Association will pay directly to the allottees \$19,000 in satisfaction of its augmented rent responsibilities, recognizing that approximately 6,000 has already been paid and that the \$25,000 increased rent was to go to the allottees. Was that not something that was of concern to you?

A It was a concern of the BIA. This was paid, but it wasn't paid by the BIA. This payment never came to the BIA. It was handled by -- by Wapato, LLC. They paid it direct. We never collected it. We were told not to collect it.

Q Were you aware, sir, that the increased rent was paid to

1 the BIA and distributed to allottees?

2
3 A If they did, it wasn't supposed to happen. May have
4 happened the second year or after I left, but not -- not while I
5 was there. This is my understanding. I know we -- I
6 remember one -- one thing that the -- the -- the RV group
7 paid half of the payment, and then they said they weren't
8 going to pay the other half until they consented to it. And
9 once they signed, then they got the other half. But that was
10 all handled between them and the -- the individuals. And I
11 think we actually held the checks and give the people the
12 checks after they signed it because they didn't have the
13 addresses. That's -- that's what I remember.

14 (Nicholson Dep. at 23:7-25:19 [ECF No. 296, Ex. 3].)

15 126. Ricky Joseph believed he attended the mediation to represent the
16 Landowners:

17 Q. Do you remember a discussion about the Member
18 Association paying to the BIA, for distribution to the
19 landowners, additional rent?

20 A. No.

21 Q. Do you not remember that being discussed either during
22 or after the mediation?

23 A. It could have been, I just don't remember.

24 Q. Okay.

1 A. We would have had to have been involved in some, but I
2 don't remember.

3 Q. You would have had to have been involved in that
4 decision?

5 A. Discussion.

6 Q. Discussion.

7 A. Yeah, we didn't decide.

8 Q. Why would you have to be involved in that discussion?

9 A. To have input if there's something we see that may not be,
10 you know -- questioned if it was in the best interest of the
11 landowners.

12 Q. Is that because something like this would impact the
13 landowners?

14 A. Could.

15 (Joseph Dep. at 36:1-22 [ECF No. 296, Ex. 5].)

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20 127. Although they gave the impression that they were participating in the
21 mediation and knew that others saw them there as representatives of the Landowners,
22 Superintendent Nicholson advised the BIA agents at the mediation not to say anything
23 during the mediation. This instruction was never shared with Plaintiffs or Wapato
24 Heritage:

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Q. At the time [of the mediation], did you know that there were representatives of the RV park there?

A. Yeah, they were, I don't know, I guess in another room, like we were. I didn't see them.

Q. Right. But even though you didn't see them, you knew they were there?

A. Yeah.

Q. Okay. And you and Mr. Nicholson were there as representatives of the landowners, correct?

A. Yes.

Q. Okay. And you testified earlier that Mr. Nicholson asked you to go to the mediation, but instructed you not to participate in the mediation; is that right?

A. He said we wouldn't be saying anything or discussing anything.

(Joseph Dep. at 75:14-76:6 [ECF No. 296, Ex. 5].)

Q. Let me rephrase the question so we get it clear, because I want an answer to the real question, not kind of the details. Mr. Nicholson directed you to attend the mediation; isn't that correct?

A. Yes.

Q. Okay. And you did so as official business of the BIA, at

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his direction, correct?

A. Yes.

Q. Now, what precisely did Mr. Nicholson tell you when he said, "Go to the mediation"?

A. He said we're just going to attend a meeting, we wouldn't be discussing anything.

Q. He ordered you not to discuss anything at that meeting?

...

A. I don't know if it was an order, he just said we wouldn't be discussing anything.

Q. Did you take that as an official direction of Mr. Nicholson?

A. Yeah.

Q. And did you or Mr. Nicholson, or anyone else at the mediation, ever tell anybody else that you'd been instructed not to participate in the mediation?

A. No.

(Joseph Dep. at 48:15-49:16 [ECF No. 296, Ex. 5].)

128. BIA officials attending the mediation disagree about what was said at the mediation:

A What I remember about the mediation is everyone was in separate rooms and the mediator went from room to room but

1 never ever brought anybody together, never ever said what
2 the solution was. That's what I -- I remember. So I -- that's
3 why I'm saying I don't have a lot of -- no details, no -- and I -
4 - I just couldn't figure out what -- what went on and why we -
5 - why everybody wasn't called to -- I guess it was a lot
6 different than I figured a mediation would happen, so...

7 Q But the mediator did come in and speak with the people
8 in your room?

9 A I believe so.

10 Q Okay.

11 A But I don't remember what was said.

12 (Redthunder Dep. at 75:21-76:8 [ECF No. 296, Ex. 1].)

13
14 129. In a letter dated August 12, 2004, Mr. Arch provided Mr. Nicholson and
15 others with a summary of the August 10, 2004 mediation. Specifically, Mr. Arch
16 stated:

17 2. In exchange for Evans' agreement to leave the Park
18 property "AS IS" until expiration of the memberships in
19 2034...the Member Association will pay to the BIA (for
20 distribution to the allottee owners) the sum of \$25,000
21 per year starting retroactive to January 1, 2004.."

22 (ECF No. 90-10, Ex. 72 at 3.)

23 130. The mediator sent a letter to Mr. Nicholson and the other mediation
24 attendees summarizing the August 10, 2004 mediation and stating that the Association
25

1 was agreeing to pay additional rent to the BIA and that it was the mediator's
2 understanding that the Estate would be making a presentation to the Tribal Council and
3 Allottees regarding this settlement. (ECF No. 90-10, Ex. 73, Introductory Paragraph
4 and ¶ 3.)
5

6 131. Superintendent Nicholson understood the implications the Settlement
7 Agreement had on the Landowners' rights:
8

9 Q You did understand that at the mediation a settlement was
10 reached that confirmed the lease term to 2034 and modified
11 the boundaries of the RV park and provided for increased
12 rent –

13 A That's what it says.

14 Q -- to go to the allottees?

15 A That's what it says in the letter.

16 (Nicholson Dep. at 27:18-24 [ECF No. 296, Ex. 3].)
17

18 132. Ms. Mary Pearson, attorney for Bill Evans' daughter Sandra Evans, sent a
19 letter to Mr. Nicholson in August of 2004 raising the issue of the RV Park settlement
20 and the impact this may have to the Allottees as well as questioning the validity of the
21 Master Lease renewal and any impact the settlement might have on a lease that was
22 soon to expire. (ECF No. 90-10, Ex. 75.)
23

24 133. The parties entered into a Settlement Agreement on September 15, 2004
25

1 pursuant to the mediation. (ECF No. 89 at ¶ 21; ECF No. 90-3, Ex. 2.)

2 134. BIA agent Ricky Joseph, who attended the mediation, stated that he
3 believed payment of the settlement money did affect the Landowners:
4

5 Q. Okay. And likewise, did you read this document, dated
6 August 12th, the day before Exhibit 69?

7 A. I most likely read it, but I don't recall.
8

9 Q. Would you look at the second paragraph on page 3, the
10 one that begins, "2. In exchange for Evans's agreement,"
11 etcetera, and then it talks about payment of \$25,000. Do you
12 see that?

13 A. Yes.

14 Q. Okay. Now, the payment of monies to the Allottees in
15 respect to the property, that would affect the welfare of the
16 Allottees, wouldn't it?

17 A. Yeah.

18 (Joseph Dep. at 52:24-53:11 [ECF No. 296, Ex. 5].)

19
20 Q. Did the BIA, in connection with this mediation and your
21 attendance there, make any analysis of the suggested
22 settlement as being in or not in the interests of the Allottees?

23 A. We could have. I just don't recall it.

24 Q. Would it have been a legitimate and proper concern of the
25 BIA?

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A. Yes.

Q. Okay. And would it have been the normal process of the BIA --

A. Yes.

Q. -- to have made such an analysis, given the potential interest of the Allottees?

A. Yes.

Q. And whenever there was a financial aspect affecting a lease, that was within your area of responsibility to consider the welfare of the Allottees, right?

A. One of my sections, yes.

(Joseph Dep. at 56:11-57:6 [ECF No. 296, Ex. 5].)

135. Notice of the Settlement Agreement and motion seeking judicial approval was served on all interested parties to the pending litigation and all beneficiaries of Evans' estate, including the BIA. (ECF No. 90-3, Ex. 2; ECF No. 90-11, Ex. 77-79.)

136. Notice of the Order required anyone with objections or comments to the Settlement Agreement to notify the Court and provide their contact information with a written statement of their desire to appear at the Settlement Approval Hearing scheduled on November 23, 2004. (ECF No. 90-11, Ex. 79.)

137. The BIA did not respond or object to the Settlement Agreement. (ECF

1 No. 90-11, Ex. 77.)

2 138. Judge Bridges approved the Settlement Agreement on November 23, 2004
3 after considering objections and comments by only Sandra Evans. (ECF No. 90-11,
4 Ex. 77.)

5
6 139. On November 24, 2004 all interested parties were served with notice of
7 Judge Bridges approval of the Settlement Agreement, including the BIA, Colville
8 Tribes, and CTEC. (ECF No. 90-11, Ex. 78.)

9
10 140. The Settlement Agreement sent to the BIA stated:

11 All parties acknowledge that the Mill Bay Members have a
12 right to use the property commonly known as the Park
13 pursuant to the Prior Documents and this Agreement through
14 December 31, 2034...

15 (ECF No. 90-11, Ex. 79 at 9, ¶ 5.14.)

16 141. The BIA was at all times apprised of the litigation and provided with
17 notice of the pending actions of the parties. (ECF No. 90-3, Ex. 2; ECF Nos. 90-7
18 through 90-11.)

19
20 142. On October 28, 2004, the BIA sent a letter to the Landowners informing
21 them of the RV Park court proceedings and the fact that the court ruled the Members
22 could stay until 2034 and the Association would pay \$25,000 annual rent with an
23 increase every 5th year. (ECF No. 90-11, Ex. 79.)

24
25 143. BIA officials acknowledge receipt of the settlement money and that they

1 passed this money on to the Landowners because Wapato Heritage and Plaintiffs did
2 not have the Landowners' addresses:

3
4 Q Just to clarify, [Exhibit 81] it's a letter dated February
5 15th, 2005, to the landowners of MA-8. It purports to have
6 been signed by you. Did you sign that letter?

7 A I can't remember, but I'm guessing I did. I'm saying yes.

8 Q All right. In the first paragraph it indicates that you on
9 behalf of the BIA are sending the landowners of MA-8 one-
10 half of the payment of the RV park settlement monies. Is
11 that the settlement that we were just talking about?

12 A Yes.

13 Q So the monies did come to the BIA and get dispersed --...
14 -- to landowners?

15 A There's a difference. What they did here, if I recall, we
16 didn't actually collect the money and put it into what we call
17 an Indian -- or Individual Indian Money Accounts and pay it
18 back out. They sent us the money in the form of two checks.
19 One we sent out for them because they didn't have the
20 addresses, and the other was when they come in -- or they
21 sent the consent forms back and they signed it. Then they
22 got the other check.

23 (Nicholson Dep. at 28:7-29:11 [ECF No. 296, Ex. 3].)

24 Q. Okay. Turn to Exhibit 84, second page, at the bottom.
25 Says, "The half of the RV settlement should be resolved.
26 You should all have received the second part of this

1 payment. If you have not, contact the leasing office." So the
2 leasing office was involved to some degree in those
3 payments; is that correct?

4 A. They'd have to distribute it.

5 Q. Okay. Why would they have to distribute it?
6

7 A. That's their job.

8 Q. As a duty to the landowners?
9

10 A. Uh-huh.

11
12 Q. Okay. And just to clarify, because I think I didn't get a
13 "yes" or a "no," I think you said "uh-huh." But you said the
14 leasing office would have to pass this on to the landowners
15 because it was their duty to the landowners to pass these
16 payments on; is that correct?

17 A. Yep.

18
19 Q. Thank you. So nobody at the Colville Agency ever
20 rejected the settlement payments to the landowners?

21 A. I don't know that.

(Joseph Dep. at 81:22-83:8 [ECF No. 296, Ex. 5].)

22 144. Notes from a November 23, 2004 Landowners meeting indicate that the
23 Landowners were informed the Association would pay the settlement money within
24 thirty days of the date of the meeting. (ECF No. 90-11, Ex. 80.)
25

1 145. None of the Landowners objected to receiving the settlement money:

2
3 Q Well, I think it will matter. In the -- in the last sentence of
4 the first paragraph you say the RV members will pay 48,000
5 now and \$25,000 per year through 2034. Do you see that
6 sentence?

7 A Uh-huh.

8 Q Did any of the landowners of MA-8 after they received
9 that letter complain to you about the statement that they were
10 going to get \$25,000 per year through 2034?

11 A No.

12 Q Okay. At the time you wrote the letter, that's what you
13 understood was the deal, that the lease would go through
14 2034 with the increased 25,000 in rent?

15 A It was my understanding it was going to be extended to
16 2034.

17 (Nicholson Dep. at 29:24-30:21 [ECF No. 296, Ex. 3].)

18 146. On January 21, 2005, prior to the Landowners receiving the second half of
19 the RV Park settlement monies, Mr. Nicholson sent a letter to Rit Bellis, of the
20 Colville Tribes Office of the Reservation Attorney, requesting a meeting “to discuss
21 the option of taking over the management of MA-8 during the Interim Order.” (ECF
22 No. 90-11, Ex. 81.)
23

24 147. On February 10, 2005 and April 27, 2005, Wapato Heritage, LLC, sent
25

1 letters attaching checks which was the RV Park settlement money to the BIA for
2 disbursal to the Landowners. The BIA Colville Agency also received a check for the
3 RV Park increased rent, pursuant to the Settlement Agreement, which the BIA Colville
4 Agency's Acting Superintendent endorsed for deposit into a BIA account. (Webb
5 Decl., ECF No. 91, Ex. A; ECF No. 90-11, Ex. 82 & 83.)
6

7 148. In a letter dated February 15, 2005 to the Landowners of MA-8, Mr.
8 Nicholson stated:
9

10 Find enclosed one half of the payment [the landowners] will
11 be receiving on the RV Park settlement monies. This was the
12 agreement Wapato Heritage LLC, and the RV Members
13 came to on the RV Park Litigation. The RV Members will
14 pay \$48,000.00 now, and \$25,000.000 per year through
2034.

15 (ECF No. 90-11, Ex. 84.)

16 149. In a letter dated July 14, 2005, Superintendent Nicholson forwarded to the
17 Landowners minutes from an April 18, 2005 Landowners meeting. The meeting
18 minutes stated the Landowners who attended that meeting demanded the other half of
19 their payment of the RV Park settlement money. (ECF No. 90-11, Ex. 86 at 7.)
20

21 150. In the same letter dated July 14, 2005, the Superintendent told the
22 Landowners: "The half payment of the RV settlement should be resolved. You should
23 all have received the second part of this payment. If you have not contact the Leasing
24
25

1 Office.” (ECF No. 90-11, Ex. 86 at 2.)

2 151. On October 3, 2005, the Indian Probate Judge of Evans’ probate issued a
3 summary of a conference call with the parties to Evans’ federal probate. The
4 procedural history of the RV Park litigation was discussed as it related to the federal
5 probate and reaching a “clean” settlement even though the BIA refused to move on
6 anything in order to settle the estate. (ECF No. 90-13, Ex. 88 at 8 of “Summary of
7 Conference Call”.)
8

9
10 152. On January 10, 2006, the Indian Probate Judge issued his Order
11 Approving Settlement Agreement which settled Evans’ Estate. This settlement granted
12 the Colville Tribes all of Evans’ trust interest in MA-8 subject to a life estate belonging
13 to Wapato Heritage, LLC (“Wapato Heritage”). The life estate is measured by the last
14 surviving great-grandchild of Evans. (ECF No. 90-13, Ex. 88.)
15

16 153. Wapato Heritage possesses a life estate in Evans’ MA-8 allotment
17 interest, which currently consists of an approximately twenty three percent undivided
18 interest in MA-8. (ECF No. 90-5, Ex. 14; ECF No. 90-16, Ex. 103.)
19

20 **Replacement Master Lease Negotiations**

21 154. In 2006, Wapato Heritage submitted a MA-8 99 year Replacement Lease
22 to the BIA Colville Agency. (ECF No. 90-16, Ex. 105.)
23

24 155. In a letter dated December 7, 2006, Mr. Arch copied the “Allottees” on a
25

1 letter with Bill Evans' renewal option letter from 1985. (ECF No. 90-5, Ex. 9 at 164-
2 167.)

3
4 156. On August 10, 2007, Landowner Paul Wapato, Jr. expressed concern that
5 the development of MA-8 was being impacted by tribal politics stating:

6 [T]here is an appearance that Tribal politics are intruding on
7 the trust responsibility of the BIA. There appears to be a
8 reluctance regarding placing formal consent papers before
9 the owners, perhaps because the Tribe's secretive
10 negotiations. It appears that individual owners and the
11 present lessee are being kept at arm's length; this brings the
12 protection of the individual owner's interests into question.
13 Although the Tribe is also an owner, it should not receive
14 more consideration than any other minority owner.

15 (ECF No. 90-15, Ex. 92.)

16 Current Dispute

17 157. In a letter dated November 30, 2007, the BIA informed Wapato Heritage
18 LLC, the successor Lessee of the Master Lease, that based upon its records the lease
19 had not yet been effectively renewed because the lessee had never provided written
20 notice to the Lessors, and sought information or records from the successor lessee that
21 would show an effective exercise. (ECF No. 90-15, Ex. 93; Admitted in U.S. Answer,
22 ECF No. 42 at ¶ 9.)

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24 158. To come to this decision, the BIA Superintendent did not thoroughly
25 investigate the matter:

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Q. ...The next document is Exhibit 91. ...Do you remember writing this letter?

A. Vaguely, yes.

Q. Okay. What led you to write this letter? ...

A. I believe when I reviewed -- I remember I reviewed the master lease. And the language in there, there was some concern about the lessor renewing -- or, exercising the renewal properly. In other words, exercising his option to renew properly; that was the question. And looking at the lease, it doesn't look like that has been done.

Q. What records did you review to make that determination?

A. The master lease.

....

Q. Did you review the Colville Agency's other records pertaining to this property?

A. No. No, I did not.

Q. So when you said, (as read:) "Nothing in our files indicates that Mr. Evans ever provided notice of his alleged exercise of the option to lessors," what provided the background for that statement?

A. Well, in talking with my realty staff, they were the ones that had worked on this for years, and they were very familiar with the file and what it had -- what had transpired before I got there. So, basically they gave me an overview of

1 what they thought the situation was. And so after reviewing
2 the master lease, you know, I kind of concurred with what
3 the thought was.

4 Q. Okay.

5 A. That it was -- that it was not a proper exercise of the
6 option to renew.

7
8 (9/27/12 Raymond Fry Dep. at 18:8-20:4 [ECF No. 296, Ex. 4].)

9 Q. Did you ever see a letter that was dated 1985 requesting a
10 renewal?

11 A. Boy, not that I recall.

12
13 (Fry Dep. at 13:23-25 [ECF No. 296, Ex. 4].)

14 Q. And this is on Exhibit 92. ... The last paragraph of that
15 second page that starts with, "More important."

16

17 Q. Did you, or anybody at the Colville Agency, look into this
18 issue as to whether -- as to the impact of this 2034 date in the
19 CTEC sublease and how that might impact your decision --

20 A. No.

21 Q. -- on the renewal?

22 A. No, never did.

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24 Q. You never looked into that --
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A. That part of it, no.

Q. -- that part of it? Okay. Did you consider that part of the argument, at all?

A. No.

Q. Okay.

A. No, I didn't.

Q. Okay. Did you review the CTEC sublease, at all?

A. No, I did not. I didn't look at their sublease, no.

Q. Okay.

A. I just looked at the master, is all.

(Fry Dep. at 41:14-42:16 [ECF No. 296, Ex. 4].)

159. The BIA failed to provide Wapato Heritage with any reason as to why this renewal was invalid and failed to provide Wapato Heritage with information as to how it could properly exercise the renewal option prior to the deadline of February 2, 2008.

(ECF No. 90-15, Ex. 93.)

160. On December 18, 2007, Wapato Heritage responded to the letter stating that the option to renew had been exercised and the BIA had repeatedly and consistently acknowledged the renewal as valid. (ECF No. 90-15, Ex. 94.)

161. The BIA Superintendent at the time did not even research Wapato

1 Heritage's letter explaining why Wapato Heritage thought the renewal was effective:

2 Q. If you could turn to Exhibit 92. ...

3

4 Q. Do you remember receiving this letter from Mr. Arch?

5 A. No, not really. I mean, it's addressed to me, but I don't
6 recall.

7 Q. Do you recall ever responding to this letter?

8
9 A. No, not offhand, huh-uh. And a lot of times what I would
10 do -- and this is part of what a superintendent does -- is we
11 rely heavily on our branch chiefs and branches to provide
12 information to myself. I have a general knowledge, pretty
13 good knowledge of different things, but I'm certainly no
14 expert in realty or leasing law, but I do depend on them to
15 provide me regulations and so forth. And they will draft the
16 letters, normally, that I would send out. I would review
17 them, of course, and make sure I'm comfortable with how it's
18 presented or how it's written, but normally I would depend
19 on them for a lot of the verbiage --

18 Q. Okay.

19 A. -- that's contained, so.

20
21 Q. Did you ever send a letter to the RV park or the Mill Bay
22 Members Association explaining the BIA's position on the
23 renewal?

24 A. No, not that I recall. I wouldn't -- I normally don't -- I
25 would be talking to Mr. Arch, their legal counsel, primarily.

1
2 (Fry Dep. at 22:16-23:20 [ECF No. 296, Ex. 4].)

3 162. Prior to February 2, 2008, the BIA never provided Plaintiffs with notice
4 that the Master Lease would expire in 2009:
5

6 Q. Did you know at that time that the Mill Bay members, the
7 RV park, believed that they had memberships – they had a
8 right to stay on that property until 2034?

9 A. I'd understood that, yes. That was what I'd been told,
10 yeah, informed of that. They had thought that they had
11 signed in good faith, you know, the right documents in order
12 to have interest in the lands that they were -- had their RVs
13 on. That was my take on that.

14 Q. ... While you were at the Colville Agency ...did you
15 have any understanding that anybody was communicating
16 this, this problem with the renewal to the RV park?

17 A. No. No, I wasn't aware of that, no.

18 Q. So as far as you knew, nobody was informing the RV park
19 that there was a problem with the renewal?

20 A. As far as I know, no.

21 Q. Were there any discussions regarding what would happen
22 to the RV park if the renewal was not effective?

23 A. No, I don't recall that, no.
24
25
26

1 (Fry Dep. at 23:23-24:19 [ECF No. 296, Ex. 4].) (*See also* ECF No. 90-15, Ex. 99.)

2 163. On January 7, 2008, less than one month prior to the expiration of the
3 renewal option, the BIA still had not provided Wapato Heritage with an answer to its
4 inquiry regarding the reasons for finding the renewal was not validly exercised. (ECF
5 No. 90-15, Ex. 95.)

6
7 164. Superintendent Fry further admitted that during the crucial and limited
8 period of time that Wapato Heritage had to correct any problems with the renewal of
9 the Master Lease, Wapato Heritage's letters went unread and unanswered:
10

11 Q. If you could turn to Exhibit 93.

12

13 Q. And this is a transmittal dated January 7, 2008. Do you
14 remember the date that you left the Colville Agency?

15 A. It was January of '08.

16 Q. Do you remember receiving --

17
18 A. So I don't -- it may have been. I don't recall. It was a
19 little hectic at that time.

20 Q. Okay.

21 A. I don't -- I don't recall seeing it.

22

23 Q. Did you respond to this letter of January 7, 2008?

24 A. I don't recall that I did, huh-uh.
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Q. And do you --

A. I don't believe I did. I may not have been there, so.

(Fry Dep. at 24:25-25:20 [ECF No. 296, Ex. 4].)

165. The BIA takes the position that the Master Lease expired by its own terms as of February 2, 2009, and that Plaintiffs' rights to occupy MA-8 expired at the same time. (ECF No. 90-16, Ex. 100; Admitted in U.S. Answer, ECF No. 42 at ¶ 9.)

166. The Business Council of the Colville Tribes passed a resolution supporting the United States position that the Master Lease had not been effectively renewed and that the Colville Tribes was seeking to be the new Master Lease holder upon expiration of the current lease. (ECF No. 90-15, Ex. 93.)

167. In a letter dated February 28, 2008, Mr. Arch objected to the BIA's suggestion that the Business Council of the Colville Tribes be responsible for organizing the next landowners' meeting regarding the Replacement Lease proposal.

Mr. Arch stated:

The Agency's course of action is part of a disturbing pattern whereby the interests of the [Tribe] are being preferred by the Agency over a clear majority of the landowners as it relates to this proposal.

(ECF No. 90-15, Ex. 97.)

168. The Colville Tribes requested a "government-to-government" meeting

1 with the BIA regarding the expiration of the Master Lease and the Tribes desire to
2 become the new master lease holder. This meeting was granted for these purposes on
3 March 13, 2008. (ECF No. 90-15, Ex. 98.) This was not the first time the Tribes were
4 provided the opportunity to speak with the BIA regarding MA-8 without the other
5 Landowners present. (ECF No. 90-15, Ex. 90.)

7 169. The BIA and CTEC and Colville tribal representatives met in Portland
8 and kept the contents of that meeting secret from the Landowners and Plaintiffs. (ECF
9 No. 296, Ex. 9.)

11 170. On April 7, 2008, Ricky Joseph, BIA Real Property Officer, sent a memo
12 to Becky Rey, T & M Realty Specialist regarding an MA-8 Landowners meeting. In
13 that, he stated:

15 The only questioned [sic] posed that I end [sic] up answering
16 was from Paul Wapato who said when is the Bureau going to
17 notify the RV people their lease is going to end. I explained
18 it is subject to the Master Lease even though the agreements
19 they made was between them and Mar Lu (Wapato Heritage
20 LLC) The bureau wouldn't notifying [sic] them, it would be
21 up to LLC.

22 (ECF No. 90-15, Ex. 99.)

23 171. Upon discovering the BIA's position regarding the Master Lease renewal,
24 the Association sent a letter to the Superintendent of the Colville Agency and the
25 Regional Solicitor's Officer for the Pacific Northwest Region of the DOI asserting that

1 Paragraph 8 allows the Association, as subtenants, to use and occupy the land until
2 2034, in accordance with the Membership Agreements and the Settlement Agreement.
3 (ECF No. 90-16, Ex. 108.)
4

5 172. The Regional Solicitor's Portland Office and the Superintendent of the
6 Colville Agency responded to these letters asserting that the BIA's position is that the
7 Association's tenancy expires when the Master Lease allegedly expires on February 2,
8 2009. (ECF No. 90-16, Ex. 100.)
9

10 173. Plaintiffs were not parties to, and did not participate in the *Wapato*
11 *Heritage LLC v. v. United States of America, et al.* action ("*Wapato Heritage*")
12 pending in this court, Cause No. CV-08-177-RHW. Ct. Rec. 1 in Cause No. CV-08-
13 177-RHW.
14

15 174. The MA-8 Landowner defendants in this action were not parties to, and
16 did not participate in *Wapato Heritage*. Ct. Rec. 1 in Cause No. CV-08-177-RHW.
17

18 175. Defendant United States, BIA did not assert a counterclaim in *Wapato*
19 *Heritage*. Ct. Rec. 1 in Cause No. CV-08-177-RHW.
20

21 DATED this 1st day of December, 2012.

22 s/KRISTIN M. FERRERA
23 WSBA No. 40508
24 JAMES M. DANIELSON
25 WSBA No. 01629
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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 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.

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Notice of this filing is being sent this date via United States Postal Service First Class

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