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HON. JUSTIN L. QUACKENBUSH  
April 30, 2012  
6:30 pm  
Without Oral Argument

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12  
13 **UNITED STATES DISTRICT COURT**  
14 **EASTERN DISTRICT OF WASHINGTON**  
15 **AT SPOKANE**

16 PAUL GRONDAL, a Washington )  
17 resident and THE MILL BAY )  
18 MEMBERS ASSOCIATION, INC., )  
19 a Washington Non-Profit )  
20 Corporation, )  
21 )  
22 Plaintiffs, )

v. )

23 UNITED STATES OF AMERICA; )  
24 UNITED STATES DEPARTMENT )  
25 OF THE INTERIOR; THE )  
BUREAU OF INDIAN AFFAIRS, )  
and FRANCIS ABRAHAM, )  
CATHERINE GARRISON, )

Case No. CV-09-0018-JLQ

**RESPONSE OF WAPATO  
HERITAGE, LLC TO, AND  
JOINDER IN:**

**1. PLAINTIFF'S FRCP 56(d)  
MOTION FOR CONTINUANCE  
TO ENABLE DEPOSITIONS  
AND DISCOVERY, and**

**2. TO MODIFY BRIEFING  
SCHEDULE**

RESPONSE OF WAPATO HERITAGE, LLC TO  
FRCP 56(d) MOTION AND FOR REVISED  
BRIEFING SCHEDULE-PAGE 1

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1 MAUREEN MARCELLAY, MIKE )  
 PALMER, JAMES ABRAHAM, )  
 2 NAOMI DICK, ANNIE WAPATO, )  
 ENID MARCHAND, GARY )  
 3 REYES, PAUL WAPATO, JR., )  
 4 LYNN BENSON, DARLENE )  
 5 HYLAND, RANDY MARCELLAY, )  
 FRANCIS REYES, LYDIA W. )  
 6 ARMEECHER, MARY JO )  
 7 GARRISON, MARLENE )  
 MARCELLAY, LUCINDA )  
 8 O'DELL, MOSE SAM, SHERMAN )  
 9 T. WAPATO, SANDRA )  
 COVINGTON, GABRIEL )  
 10 MARCELLAY, LINDA MILLS, )  
 11 LINDA SAINT, JEFF M. CONDON, )  
 DENA JACKSON, MIKE )  
 12 MARCELLAY, VIVIAN PIERRE, )  
 13 SOMA VANWOERKON, )  
 WAPATO HERITAGE, LLC, )  
 14 LEONARD WAPATO, JR, )  
 15 DERRICK D. ZUNIE, II, )  
 DEBORAH L. BACKWELL, JUDY )  
 16 ZUNIE, JAQUELINE WHITE )  
 17 PLUME, DENISE N. ZUNIE and )  
 CONFEDERATED TRIBES OF )  
 18 THE COLVILLE RESERVATION, )  
 19 Allottees of MA-8 (known as Moses )  
 Allotment 8), )  
 20 Defendants. )  
 21 )

**I. INTRODUCTION**

The United States parties have brought a fact intensive motion for summary judgment and are requesting the matter be heard before the Plaintiff or Wapato

RESPONSE OF WAPATO HERITAGE, LLC TO  
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1 Heritage, LLC, or any other party, have the opportunity for any disclosure or  
2 discovery from the moving party. This is not a case where the parties opposing the  
3 motion have had full opportunity for discovery, and just didn't pursue those  
4 opportunities; it is a case in which the opposing parties have had no opportunity for  
5 discovery, and are facing factual contentions regarding which they have had no  
6 opportunity for confrontation or cross examination of the accusing witnesses.  
7 Moreover, defenses to the summary judgment motion of the United States parties,  
8 factual in nature, have been asserted, and there has been no opportunity for discovery  
9 regarding those defenses.  
10  
11

12  
13 A reasonable opportunity for discovery is a matter of due process. As said in  
14 the reversal of one of the very few cases located where a factual decision was made  
15 without allowing any discovery:  
16

17 With no lack of sensitivity to the burdens imposed upon judges  
18 who are attempting to expediently conduct the business of a  
19 heavily burdened district court, such procedures cannot form the  
20 basis for adjudication of the merits of the complex issues in this  
21 litigation. **A reasonable opportunity for discovery must be  
22 afforded.** In addition, minimum procedural due process requires  
23 adequate notice of a hearing at which an opportunity will be  
24 afforded the parties to present sworn testimony and to cross-  
25 examine witnesses who sponsor opposing views. [Emphasis  
Added]

*Calhoun v. Cook*, 487 F.2d 680, 683 (5th Cir. 1973). And, an FOIA is not an

1 adequate substitute for discovery, because government agencies have the ability to  
2 not fully respond to FOIA's, and the only recourse (after a very long wait) is an action  
3 in District Court. 5 U.S.C. § 552(a)(4)(B).  
4

## 5 **II. ARGUMENT**

### 6 **A. Authority Cited by United States Parties Confirms that Discovery is** 7 **Required.**

8 The United States parties' Motion for Summary Judgment cites various  
9 authorities regarding the standards for summary judgment, all of which make clear  
10 that a reasonable opportunity for discovery by the opposing party is a necessary  
11 prerequisite for consideration of a motion for summary judgment. For example, the  
12 United States parties say:  
13

14  
15 If the moving party meets this burden, the non-moving party may  
16 not rest upon its pleadings, but must come forward with specific  
17 facts **by use of affidavits, depositions, admissions, or answers**  
18 **to interrogatories** showing there is a genuine issue for trial as to  
19 the elements essential to the non-moving party's case. Fed. R. Civ.  
20 P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby,*  
21 *Inc.*, 477 U.S. 242, 256 (1986).<sup>1</sup> [Emphasis Added]

22 This court's denial of the initial motion for summary judgment by the United  
23 States parties said at ECF-144, p. 39:4-6:  
24

25 The court has granted the parties leave to renew certain motions.  
**These motions shall only be renewed with supplemental**

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<sup>1</sup> ECF-232, p. 2:9-14.

1           **evidence** and further points and authorities demonstrating judicial  
2           action on the motion is appropriate. [Emphasis Added].

3           Having found sufficient factual disputes and issues to deny the  
4           trespass/ejection motion for summary judgment by the United States parties once, it  
5           seems a virtual axiom that renewal of the motion without any opportunity by the  
6           opposing party to conduct any discovery whatever, would be inconsistent with the  
7           above ruling in ECF-144. See, also, *Calhoun v. Cook, supra*, 683 (quoted above).  
8

9           **B. Disputed Factual Issues Have Been Asserted by the United States**  
10           **Parties.**

11           The Plaintiff, and Wapato Heritage, have asserted intensely factual issues of  
12           equitable remedies, including estoppel, against the United States parties, and estoppel  
13           and waiver as against the allottees named in this action. It is to be recalled that  
14           neither the Plaintiff in this action, nor the allottees, were parties to the earlier case  
15           decided by Judge Whaley. The issue of whether the Plaintiff RV Park was a licensee  
16           or a sub-lessee is a new issue to this case, and no authority restricting a licensee-for-  
17           use to 25 years, or making the use dependent upon an underlying Master Lease, have  
18           been presented by the United States parties. Therefore, substantial factual issues  
19           which appropriately call for discovery from witnesses involved in the transactions  
20           and communications, which are generally described by the "written record," referred  
21           to by the court in ECF-144, is both appropriate and required. After all, the breath of  
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23           to  
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25

1 equitable remedies available to the court is substantial; for example, the court has the  
2 power to grant an equitable grace period to the holder of an option, “where an  
3 inequitable forfeiture would otherwise result.” *Cornish Coll. of the Arts v. 1000*  
4 *Virginia Ltd. P’ship*, 158 Wash. App. 203, 217, (2010) review denied, 171 Wash. 2d  
5 1014 (2011).  
6

7         The Plaintiff, in its motion, has articulated many of the appropriate needs for  
8 discovery to oppose the pending summary judgment motion of the United States  
9 parties. Wapato Heritage adopts, and will not repeat, those arguments for discovery  
10 made by Plaintiff. In this connection, however, it should be observed that Wapato  
11 Heritage, in view of the specter of claims against it by the Plaintiff, clearly has an  
12 interest in seeing that discovery on all issues which may assist the Plaintiff is fully  
13 conducted. To that end, Wapato Heritage submits herewith the Declaration of R.  
14 Bruce Johnston of April 20, 2012, in further support of legitimate conduct of  
15 discovery to oppose the motion for summary judgment of the United States parties.  
16  
17  
18

19         In addition to the discovery related directly to the current motion for summary  
20 judgment, Wapato Heritage will, in any event, be conducting discovery (now that the  
21 stay is lifted) in regard to its additional claims, which the court permitted to be filed  
22 on March 5, 2012.  
23  
24

25         In that connection, the United States parties have placed squarely before the

1 court the issue of whether or not the property involved, MA-8, is, or is not, trust  
2 property -- an issue which, it is respectfully submitted, independently requires  
3 discovery from many of the same persons and entities from which discovery is  
4 requested by the Plaintiff for opposition to the pending summary judgment motion  
5 upon equitable grounds.  
6

7 **C. A Related Case.**  
8

9 Since the motion for summary judgment was filed by the United States parties,  
10 Wapato Heritage has learned that the Colville Confederated Tribes (“CCT”) has been  
11 engaged in related litigation with the United States parties, specifically, *The*  
12 *Confederated Tribes of the Colville Reservation v. Salazar*, US District Court for the  
13 District of Columbia, Cause Number 1:05-cv-02471-TFH. A copy of the Settlement  
14 Agreement in that case is Exhibit 7 to the Johnston Declaration of April 20, 2012.  
15  
16

17 In that case, CCT made claims of incompetence and misconduct by the United  
18 States parties in regard to trust property, not dissimilar from those made by Wapato  
19 Heritage in this case. And, CCT prevailed to the tune of \$193 million. Certainly,  
20 discovery is appropriate to determine if any of the issues raised or claims made in the  
21 Salazar case related to MA-8, directly, indirectly or by analogy. Indeed, the test is  
22 whether or not discovery may lead to the discovery of admissible evidence. FRCP 26.  
23  
24

25 Additionally, the settlement in the Salazar case requires the United States

1 parties, at the request of CCT, to consider "appropriate enforcement action" against  
2 parties alleged to be improperly occupying property in which CCT has an interest.  
3 Johnston Exhibit 7, at pp. 16-17. This presents a coincidence regarding which  
4 inquiry is appropriate, given that the summary judgment motion of the United States  
5 parties was renewed, without opportunity for any discovery, immediately following  
6 the announcement of the settlement in Salazar.  
7

### 8 **III. CONCLUSION**

9  
10 The summary judgment motion of the United States parties was once denied,  
11 subject only to being renewed upon "supplemental evidence." It has been renewed  
12 without any opportunity in the Plaintiff or Wapato Heritage to obtain supplemental  
13 evidence, or conduct any discovery whatsoever. As a matter of fairness, equity and  
14 due process is respectfully submitted that discovery should be opened, and a  
15 reasonable period of time for both written and deposition discovery be allowed  
16 before the renewal or consideration of any summary judgment motions.  
17  
18

19 **DATED** this 20th day of April, 2012.

20  
21 **JOHNSTON LAWYERS, P.S.**

22 /s/ R. Bruce Johnston

23 R. Bruce Johnston, WSBA # 4646

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I caused the foregoing document to be electronically filed with the Clerk of the above entitled Court using the CM/ECF system, which will send notification of such filing to all registered recipients of that system as of the date hereof.

**DATED** this 20th day of April, 2012.

          /s/ R. Bruce Johnston            
R. Bruce Johnston, WSBA #4646