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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, et al, Plaintiffs, vs. UNITED STATES OF AMERICA; et al, Defendants.	NO. 09-CV-00018-RMP PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST CERTAIN INDIVIDUAL ALLOTTEES June 5, 2020 Without Oral Argument

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I. INTRODUCTION

In 2012, Plaintiffs propounded Requests for Admissions ("RFAs") on nine (9) individual Allottee Defendants, who failed to respond. Those Defendants are James Abraham, Lynn Benson, Darlene Hyland, Marlene Marcellay, Maureen Marcellay, Linda Saint, Michael Marcellay, Randolph Marcellay, and Gary Reyes (collectively, "**Non-Responding Allottees**"). The RFAs and Affidavit of Service appear in the court record at ECF 296-1, Ex. 7-8. Nine (9) RFAs were propounded; all are dispositive on the issue whether Non-Responding Allottees are estopped to deny Plaintiffs' right to occupy and use MA-8 through 2034.

By virtue of their failure to respond, and pursuant to Fed. R. Civ. P. 36(a)(3), Non-Responding Allottees have admitted to the matters requested therein. Pursuant to Fed. R. Civ. P. 56, summary judgment on Plaintiffs' claim in the Complaint that Non-Responding Allottees are equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to occupy and use the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer for Relief ¶2; *see also* ECF 197 at 2), should be granted in favor of Plaintiffs.

II. FACTUAL BACKGROUND

The complex history of this case has already been exhaustively briefed and Plaintiffs will not again recite it. Instead, for the facts relevant to this Motion, Plaintiffs refer the Court to Plaintiffs' Supplemental Brief in Opposition to Federal Defendants' Motion for

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Summary Judgment Re Ejectment and the Amended and Restated Statement of Undisputed Facts filed contemporaneously herewith by Plaintiffs and Wapato Heritage.

On October 1, 2012, Plaintiffs propounded RFAs on, among others, the nine (9) Non-Responding Allottees, who (to date) have never responded to those RFAs. Declaration of S. Harmeling in Support of Motion for Summary Judgment Against Certain Individual Allottees at ¶12. Plaintiffs' RFAs read as follows:

> REQUEST NO. 1: You are a beneficial landowner of Moses Agreement Allotment No. 8 (also known as "MA-8").
>
> . . .
>
> REQUEST NO. 2: You or your predecessor in interest to MA-8 allowed William Evans Jr ("Evans") to sell RV Camping Club Memberships that included representations either in the membership agreements themselves or in the sales literature, that stated (1) the MA-8 lease with Evans ("Master Lease") had been approved by the Bureau of Indian Affairs, (2) the camping club memberships were subject to Washington State Law, and (3) the Master Lease expiration date extended to 2034.
>
> . . .
>
> REQUEST NO. 3: Prior to January 1, 2008, you or your predecessor in interest to MA-8 received a copy of Evans' letter dated January 30, 1985.
>
> . . .
>
> REQUEST NO. 4: Prior to January 1, 008, you knew Evans or his successor in interest to the Master Lease intended to exercise the option to renew as provided for in the Master Lease to extend the Master Lease until the year 2034.
>
> . . .
>
> REQUEST NO. 5: You or your predecessor in interest to MA-8 granted the Superintended of the Colville Agency, either express or implied authority to act on your behalf as your agent for all matters involving the MA-8 Master Lease and the RV Park camping club memberships.
>
> . . .

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> REQUEST NO. 6: You approved, either expressly or impliedly, of the Colville Tribal Enterprise Corporation sublease with Evans (or one of his companies) allowing a casino to operate on MA-8 and which contained a provision affirming the validity of the January 30, 1985 renewal letter.
>
> . . .
>
> REQUEST NO. 7: As of January 1, 2008, you knew that Wapato Heritage LLC (Evans' successor in interest to the Master Lease) had negotiated a settlement with the Mill Bay Members Association (formerly the members of the Mill Bay RV Park) to allow the Mill Bay Members Association to remain on a portion of MA-8 known as the Mill Bay Resort until 2034 in exchange for increased rent and other provisions.
>
> . . .
>
> REQUEST NO. 8: You accepted the above mentioned increased rent in exchange for agreeing that the Mill Bay Members Association could remain on a portion of MA-8 known as the Mill Bay Resort until 2034.
>
> . . .
>
> REQUEST NO. 9: You approved, either expressly or impliedly the above mentioned 2004 Settlement Agreement between the Mill Bay Members Association and Wapato Heritage LLC, as an interested party because that settlement agreement affected your interest in MA-8.

ECF No. 296-1, Ex. 7.

III. LEGAL ARGUMENT

A. Summary Judgment May Arise from Unanswered Requests for Admission.

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A party may support a motion for summary judgment by citing to "depositions, documents, electronically stored information, affidavits or declarations…admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Unanswered requests for admissions may be relied on as the basis for

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granting summary judgment." *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007) (citing *O'Campo v. Hardisty*, 262 F.2d 621, 624 (9th Cir.1958)). "[W]here a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no 'genuine issue for trial,'" and summary judgment is appropriate. ECF 144 at 16 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

B. Failure to Respond to an RFA Deems it Admitted and Conclusively Established.

"It is undisputed that failure to answer or object to a proper request for admission is itself an admission: the Rule itself so states." *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1981); *see* FRCP 36(a)(3) ("A matter is admitted unless, within 30 days after being served, the party whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney."). "**Once admitted, the matter 'is conclusively established** unless the court on motion permits withdrawal or amendment of the admission' pursuant to Rule 36(b)." *Conlon*, 474 F.3d at 621 (emphasis added); *see also* FRCP 36(b).

"The purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial." *Asea*, 669 F.2d at 1245 (collecting cases). "[T]he rule seeks to serve two important goals: truth-seeking in litigation and

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efficiency in dispensing justice." *Conlon*, 474 F.3d at 621 (citing FRCP 36(b) advisory committee note).

C. As Non-Responding Allottees Failed to Respond to Plaintiffs' RFAs, it is Conclusively Established that they Knowingly Granted Plaintiffs the Right to Remain on MA-8 Through 2034.

Due to Non-Responding Allottees' failure to respond to Plaintiffs' RFAs, the following facts are conclusively established:

- Non-Responding Allottees owned an interest in MA-8. ECF No. 296-1, Ex. 7 at RFA 1.
- Non-Responding Allottees allowed Evans to sell the Camping Club Memberships stating the Master Lease with Evans had been approved by the BIA, the Memberships were subject to Washington State law, and the Master Lease expiration date had been extended to 2034. *Id.* at RFA 2.
- Non-Responding Allottees received a copy of Evan's letter dated January 30, 1985, purporting to extend the Master Lease through 2034. *Id.* at RFA 3.
- Prior to January 1, 2008, Non-Responding Allottees knew Evans intended to exercise the option to renew the Master Lease to extend its term through 2034. *Id.* at RFA 4.

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- Non-Responding Allottees granted the BIA authority to act on their behalf as their agent for all matters involving the Master Lease and Camping Club Memberships. *Id.* at RFA 5.
- Non-Responding Allottees approved of the Colville Enterprise Corporation sublease with Evans allowing a casino to operate on MA-8 and which expressly affirmed the validity of Evans' January 30, 1985 letter purporting to renew the Master Lease through 2034. *Id.* at RFA 6.
- As of January 1, 2008, Non-Responding Allottees knew of the 2004 Settlement Agreement that would allow the Mill Bay Members Association to remain on the Mill Bay Resort until 2034 in exchange for increased rent paid to the Allottees. *Id.* at RFA 7.
- Non-Responding Allottees accepted that rental increase in exchange for agreeing that the Mill Bay Members Association could remain on the Mill Bay Resort until 2034. *Id.* at RFA 8.
- Non-Responding Allottees approved the 2004 Settlement Agreement as interested parties, because that Settlement Agreement affected Non-Responding Allottees' interest in MA-8. *Id.* at RFA 9.

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D. These Conclusively-Established Facts Preclude Non-Responding Allottees from Denying Plaintiffs' Right to Occupy MA-8 through 2034.

Non-Responding Allottees' admissions justify a declaratory judgment that they are equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer for Relief ¶2; *see also* ECF 197 at 2). Under Washington law:

> [T]he elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wash.2d 738, 743, 863 P.2d 535 (1993) (citation and footnote omitted).

As to the first element, it is conclusively established that Non-Responding Allottees took acts and/or made omissions inconsistent with the position that Plaintiffs have no right to use and occupy the Mill Bay Resort through February 2, 2034. They (or their successors in interest) allowed Evans to sell Camping Club Memberships for MA-8 stating the Master Lease extended through 2034. ECF No. 296-1, Ex. 7. They received actual notice of Evans's attempt to extend the Master Lease, and knew Evans believed the Master Lease had been extended. ECF No. 296-1, Ex. 7. They also had notice of the 2004 Settlement Agreement and accepted rents therefrom in consideration of permitting the Mill Bay

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Members Association to remain on the property through 2034. *Id.* Again, these facts are now conclusively established and indisputable. For Non-Responding Allottees to take the contrary position *now* that the Master Lease expired prior to 2034 would be inconsistent with the conclusively established facts in the record, and is thus impermissible. *See also Sorenson v. Pyeatt*, 158 Wash.2d 523, 539, 146 P.3d 1172 (2006) (equitable estoppel may flow from silence); *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 935, 592 P.2d 676 1979) ("Estoppel by operation of law arises where the acts or statements of the defendant or his agent induce the plaintiff, in reasonable reliance, to act or forbear to act to his prejudice.").

As to the second element, Plaintiffs have acted in reliance on Non-Responding Allottees' acts. Plaintiffs invested millions of dollars in reliance on the validity of the Camping Club Memberships and the understanding that their terms lasted through 2034. ECF No. 89 at pp. 3, 5, ¶¶5, 9. After executing the 2004 Settlement Agreement, Plaintiffs paid escalating rents and made improvements to the park in reliance on the representations that they could use and occupy the property through 2034. *Id.* at p. 12, ¶23. Some Mill Bay Members even waited to purchase Camping Club Members until after the Mill Bay Resort Litigation, and did so only after the 2004 Settlement Agreement was finalized. ECF No. 93 at pp. 2–3, ¶¶3–5; ECF No. 94. Non-Responding Allottees benefited from Evans' sale of Camping Club Memberships and the 2004 Settlement Agreement, and acquiesced to and

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approved those Agreements' terms—on which Plaintiffs relied by continuing to purchase Camping Club Memberships and making improvements to the park.

As to the third element, it is undisputed that Plaintiffs will be injured if Non-Responding Allottees are permitted to now deny Plaintiffs the right to occupy MA-8 until 2034, after years of representations, approvals, and acquiescence to the contrary. The millions spent on Camping Club Memberships, park improvements, and escalating rents will be lost, and Plaintiffs will be denied the benefit of the 2004 Settlement Agreement. ECF Nos. 358 at 6–8; 360 at 2–3; *see also Metro. Park Dist. of Tacoma v. State, Dep't of Nat. Res.*, 85 Wn.2d 821, 828, 539 P.2d 854 (1975) (equitable estoppel precluded party from cancelling deed where opposing party already made substantial investments in the property).

At bottom, by way of their admitted RFAs, it is conclusively established that Non-Responding Defendants have taken affirmative acts, have acquiesced, and have made critical omissions that are flatly inconsistent with now denying Plaintiffs the right to occupy and use MA-8 through 2034. *Conlon*, 474 F.3d at 621 (summary judgment warranted due to admitted RFAs now conclusively established); *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1003 (D. Nev. 2015) (suggesting equitable estoppel is a viable defense against Indian land allottees in the context of BIA-approved leases where the allottees accepted lease payments for many years; ultimately deciding the case on other grounds). As all elements are

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satisfied due to the conclusively established facts arising from Non-Responding Allottees' admitted RFAs, summary judgment on Plaintiffs' remaining claim in the Complaint is appropriate here.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment on Plaintiffs' claim in the Complaint that the Non-Responding Allottees are equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034 (ECF 1 at 43, Prayer for Relief ¶2; *see also* ECF 197 at 2).

DATED the 17th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2020, 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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DATED at Wenatchee, Washington this 17th day of April, 2020.

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