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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington Resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, *Plaintiffs*, vs. THE UNITED STATES OF AMERICA, *et al*., *Defendants*.	Case No. 2:09-CV-00018-RMP CONFEDERATED TRIBES OF THE COLVILLE RESERVATION'S CONSOLIDATED RESPONSE TO PLAINTIFFS' MOTIONS FOR DEFAULT JUDGMENT (ECF NO. 433) AND SUMMARY JUDGMENT (ECF NO. 439) AGAINST CERTAIN ALLOTTEES

I. INTRODUCTION

The Court should deny Plaintiffs' motion for default judgment and Plaintiffs' motion for summary judgment. Because the motions seek judgments against a small minority of ownership interests in MA-8, they have no bearing on the outcome of this case. Moreover, the motions have no merit.

II. ARGUMENT

A. Neither the Motion for Default Judgement nor the Motion for Summary Judgement, or Their Combination, Affect the Ejectment Motion or Outcome of This Case.

Unique rules govern the United States' management of trust lands and the limited role of Indian owners-allottees. These rules are a matter of federal law, and minority ownership interests by themselves have no authority or control over the leasing or management of the land. As a result, the outcomes of Plaintiffs' motions are of no consequence to this case or the United States' ejectment motion. Below, we provide some background on the Government's role as trustee and then show that the motions do not matter because: (1) the United States' ejectment action does not hinge on allottees' consent or actions; and (2) Plaintiffs' motions target a legally insignificant percentage of minority ownership interests.

1. The United States' Fiduciary Obligations to Manage Trust Land Are Creatures of Federal Law.

The long-standing trust relationship between the United States and federally-recognized tribes and their members, and the fiduciary duties assumed by the United States, are rooted in and derived from multiple federal statutory and regulatory provisions governing the administration of tribal trust assets. The United States exercises control over and has a trust obligation to

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appropriately manage trust lands. Congress delegated to the Secretary of the Interior the authority and responsibility to oversee the use of tribal lands. *See, e.g.,* 25 U.S.C. § 162a(d)(8) (stating duty to appropriately manage all trust lands); 25 U.S.C. § 415 (governing leasing of trust lands). The Secretary of the Interior promulgated regulations that describe the Government's duties in managing tribal land, including without limitation 25 C.F.R. Part 162, which governs leasing. The statutes and regulations describing the United States' duties in managing tribal land and other assets create specific fiduciary duties toward tribes and their members. *See, e.g., United States v. Mitchell,* 463 U.S. 206, 222, 224, 226 (1983); *Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996). Consistent with these principles, Plaintiffs recognized BIA has "total managerial control and authority over MA-8." ECF No. 295 at 12.

Because the United States holds tribal land and other resources in trust, it has assumed the obligations of a trustee. *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 475 (2003); *Mitchell,* 463 U.S. at 225. As trustee, the United States has a fiduciary relationship and obligations of the highest responsibility to administer the trust with the greatest skill and care. *Cobell v. Norton,* 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942)); *see also Shoshone Indian Tribe v. United States,* 364 F.3d 1339,

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1348 (Fed. Cir. 2004). These fiduciary obligations include, among other duties, ensuring that tribal trust property is protected. For example, the Supreme Court has recognized common law causes of action to protect Indian lands from trespass. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994) (citing *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850) (action for ejectment); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-36 (1985) (action for damages); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 682-84 (9th Cir. 1976) (action for damages)), *cert. denied*, 514 U.S. 1015 (1995).

Thus, the leasing and protection of MA-8 is governed by federal law, not state law. *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011); 25 C.F.R. § 162.014(a)(1). The United States as trustee administers MA-8 on behalf of the beneficial owners, as established by Congress. In the present case, the Government is representing the interests of all allottees collectively. ECF No. 232 at 4. Indeed, the Indian owners need not be parties to this suit. *Heckman v. United States*, 224 U.S. 413, 445 (1912).

2. The United States May Proceed on Ejectment without Allottee Consent.

The Ninth Circuit held that Plaintiffs' MA-8 lease terminated for failure to exercise the option to renew the lease. *Wapato Heritage*, 637 F.3d at 1035

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(Wapato "did not effectively exercise the option to renew the Lease"); *id*. at 1040 ("we hold that Wapato's option to renew the Lease was not effectively exercised by Evans, or later by Wapato, and that the Lease terminated upon the last day of its 25-year term"). Under the applicable federal regulations, 25 C.F.R. §§ 162.023 and 162.471,[1] Plaintiffs' use of the land without a lease subjects them to ejectment.[2] As trustee, the Government may proceed with ejectment. Allottee consent is not required. Given this legal context, it makes no sense to estop the Government from proceeding with ejectment based on a few allottees' actions or

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[1] 25 C.F.R. § 162.023 states:

> If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

25 C.F.R. § 162.471 contains similar language.

[2] Similarly, the lease provided that holding over would not grant Plaintiffs any renewal, extension or other rights to the leased premises. ECF No. 90-2 at 21.

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inactions as interpreted through Plaintiffs' legal maneuvers of default judgement or requests for admission.

3. The Actions of a Minority of Allottees Are of No Import Because, Even if Allottee Consent was at Issue, a Majority of the MA-8 Ownership Supports Ejectment.

Under governing federal regulations, the allottees have a limited role with respect to the highly-fractionated MA-8 land. For example, a requisite percentage of owners must consent to any lease. Because more than 20 allottees hold interests in MA-8, a majority of the ownership interests must consent. 25 C.F.R. § 162.012(a). If consent of a majority is secured, the "lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document." 25 C.F.R. § 162.012(a)(4)(i). As a result, dissenting minority owners have no control over the leasing of highly fractionated lands such as MA-8. Under federal law, they do not have authority, by themselves, to take any action of legal consequence with the respect to the land. Notably, the expired Master Lease was consistent with federal regulations in that it required consent to be obtained from those holding a majority of ownership interests. ECF No. 90-2 at 25. The expired lease was indeed approved by a majority of the ownership interests in the 1980s. *Wapato Heritage,* 637 F.3d at 1035.

Plaintiffs claim that, by virtue of their motions for default and summary

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judgment, it should be established that certain trust land owners engaged in acts or omissions inconsistent with denying Plaintiffs the right to occupy and use MA-8 through 2034. However, taken together, the ownership percentage of the nine current owners[3] targeted by the Motion for Default Judgment constitutes only 21.3% of the MA-8 ownership. Similarly, taken together, the ownership percentage of the six current owners that are targeted by the Motion for Summary Judgment constitutes just 1.8% of the MA-8 ownership. Those percentages

[3] The ownership percentages listed in this paragraph are those of the MA-8 owners as set forth in the January 28, 2020 certified Title Status Report for MA-8 (ECF No. 441, Ex. 1). As confirmed by the Title Status Report, the following ten individuals identified in Plaintiffs' Motion for Default Judgment are no longer owners of MA-8: Francis Abraham, Lydia Armeecher, Deborah Blackwell, Naomi Dick, Dena Jackson, Linda Mills, Lucinda O'Dell, Mose Sam, Denise Zunie, and Derrick Zunie, Jr. The following three individuals identified in Plaintiffs' Motion for Summary Judgment are no longer owners of MA-8: Lynn Benson, Linda Saint, and Gary Reyes.

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together total a mere 23.1%.[4] Thus, under federal law, these minority owners – even if acting in concert – have no authority to make any commitments or bind the other owners of MA-8 or the United States. *See* 25 CFR §162.012. The majority owner of MA-8, Colville, has control and supports ejectment. ECF No. 441.[5]

[4] This percentage includes the ownership of Jeff Condon, even though he submitted a letter to the Court indicating his interest in the case. ECF No. 458-1. Under the logic of Plaintiffs' motion, default judgment should not be entered against him because he wrote to the Court. *See* ECF No. 433 at 2 (seeking default against allottees "who filed no . . . letter . . . in this action"). If Mr. Condon's ownership interest is not included, the total ownership percentage targeted in both motions is 10.1%.

[5] Colville submitted the MA-8 Title Status Report showing its majority ownership (ECF No. 441 at 12) in compliance with the Court's March 26, 2020 Order, which stated, "any party may . . . submit a supplemental brief that identifies any new, relevant precedent or facts that were not previously briefed . . . [which] shall not exceed fifteen pages." ECF No. 411. Plaintiffs and Wapato Heritage violated this Order when they submitted filings recounting facts already provided to the Court

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Furthermore, as of 2012, a strong majority of ownership also favored ejectment. ECF No. 234-21 at 3-4.[6] Under these circumstances, the alleged actions or

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and substantially in excess of the fifteen-page limit. *See* ECF Nos. 438, 440 at 2-6, 443, 444, and 445.

[6] Plaintiffs challenge the value of the Declaration of Debra Wulff, BIA's then-Superintendent for the Colville Agency (ECF No. 234-21), on two grounds. First, they argue she miscalculated. However, Ms. Wulff properly excluded the fee and life estate ownership stakes of Wapato Heritage and Canadian interests when determining the trust land owners' preference for ejectment, which is consistent with BIA regulations that do not include consideration of fee and life estate ownership interests. *See, e.g.,* 25 C.F.R. § 162.012(a). Second, to the extent the Declaration contains hearsay, it is admissible as a record of the regularly-conducted BIA activity of recording consultations with trust property owners. Fed. R. Evid. 803(6). Moreover, well-settled Ninth Circuit precedent specifically deals with evidentiary objections at the summary judgment stage. In general, at the summary judgment stage, courts do not focus on the admissibility of the evidence's form, but on the admissibility of its contents. *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir.

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inactions of the minority ownership interests have no legal consequence.

B. Plaintiffs' Motion for Default Judgment Should Be Denied Because the Equitable Estoppel Claim Against the Allottees Has No Merit and To Allow for a Consistent Outcome on the Merits of the Case.

A "district court's decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). "Because the Court has discretion, a party making a request may not be entitled to default judgment as a matter of right even when the defendant is technically in default and that fact has been noticed under Rule 55(a)." *Rashidi v. Albright*, 818 F. Supp. 1354, 1356 (D. Nev. 1993); *see also* ECF No. 436 at 2. The "starting point is the general rule that default judgments are ordinarily disfavored. Cases should be decided on their merits whenever reasonably possible." *Eitel v. McCool*, 782 F.2d, 1470, 1472 (9th Cir. 1986).

Plaintiffs wholly neglected to address in their motion the seven *Eitel* factors[7] considered by courts in the Ninth Circuit when exercising discretion as to default

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2003). Finally, Plaintiffs have not presented evidence contradicting the Wulff Declaration.

[7] The *Eitel* factors are: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of

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judgments. *See* ECF No. 433; *see also* ECF No. 436 at 2-3. As explained below, when those factors are considered along with other principles of applicable law, it is clear that Plaintiffs' motion fails.

First, Plaintiffs' complaint is insufficient. Plaintiffs did not plead their estoppel claim against the individual allottee-owners, but against the Bureau of Indian Affairs only. *See* ECF No. 1 at 34-35 (¶¶ 164-72). This point is cogently made in the Government's consolidated response brief. ECF No. 466 at 2-6. Under Federal Rule of Civil Procedure 54(c), a default judgment can only be entered on claims that appear on the face of the complaint. Yet Plaintiffs' claim for relief as to estoppel is aimed solely at the BIA and does not once reference individual allottee-owners as intended targets of that claim. *See* ECF No. 1 at 34-35 (¶¶ 164-72). Given Plaintiffs' drafting of their complaint, the individual allottee-owners did not have notice or reason to believe that they were objects of

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money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the "strong policy . . . favoring decisions on the merits." *Id*. at 1471-72.

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Plaintiffs' estoppel claim. Accordingly, entry of default judgment against the individual allottee-owners on Plaintiffs' estoppel claim would be contrary to law.

Second, even if Plaintiffs' estoppel claim had been adequately pled against the individual allottee-owners, it fails on the merits. It is rooted in state law, and therefore does not apply to this case.[8] Additionally, it is not an affirmative cause of action under Washington law. ECF No. 436 at 3.

Third, Supreme Court and Ninth Circuit caselaw strongly discourage entry of default judgment as to a subset of defendants where such default judgment may be inconsistent with a final judgment on the merits as to other similarly-situated defendants. ECF No. 436 at 1-2; *see also* ECF No. 466 at 10-11. Here, the individuals targeted by Plaintiffs' motion for default judgment are similarly situated to the other allottee-owners of MA-8, including Colville, and the case is on the brink of a ruling on the Government's ejectment motion. Granting Plaintiffs' motion for default judgment now as to the targeted subset of individuals would likely to lead to divergent outcomes.

[8] The Master Lease, from which Plaintiffs formerly derived their right to use MA-8, is governed by federal law. *See* Section I.A.1, above.

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Fourth, it is excusable for the allottees to not appear in this case because their interests are wholly aligned with the Government's and their fellow allottees, who have appeared in the case and advocated for ejectment and protection of their interests. Their non-participation is especially understandable and therefore excusable given that their individual ownership interests range from miniscule to small.

Fifth and finally, the order of default on which Plaintiffs base their motion for default judgment is stale. The order of default was entered more than ten years ago, on October 2, 2009. ECF No. 135. Since that time, more than half of the individuals presently targeted in Plaintiffs' motion have passed away or sold their interests in MA-8. *See* ECF No. 441, Ex. 1. While no rule or caselaw expressly governs the timeframe within which a plaintiff must move for default judgment after entry of an order of default or forfeit the right to do so, it is notable that a motion to set aside an order of default or vacate a default judgment under Rule 55(c) "must be made within a reasonable time." Fed. R. Civ. Proc. 60(c)(1); *Stuski v. United States Lines Co.*, 31 F.R.D. 188, 191 (E.D. Pa. 1962). Motions to set aside defaults have been denied as untimely where they were not made until three years, seven months, and even just four months after movants received notification of default. *United States v. Martin*, 395 F. Supp. 954 (S.D.N.Y 1975); *Dow*

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Chemical Pacific, Ltd. v. Rascator Maritime S.A., 782 F.2d 329 (2d Cir. 1986); *Jack Gray Transport, Inc. v. Shaw*, 105 F.R.D. 485, 489 (N.D. Ill. 1984). Here, Plaintiffs waited considerably longer. Even if no rule strictly prohibits them from so moving now, the attenuated timeline and outdated nature of the order of default weigh against granting Plaintiffs' motion.

In sum, the equities tip strongly toward denial of Plaintiffs' motion for default judgment. It is far more than "reasonably possible" for this case to be decided on its merits; thus, "the starting point . . . that default judgments are ordinarily disfavored" should be the Court's conclusion as well. *Eitel*, 782 F.2d at 1472.

C. Plaintiffs' Motion for Summary Judgment Should Be Denied Because the Claim of Equitable Estoppel Does Not Apply and the Requests for Admission Were Untimely.

Plaintiffs' motion for summary judgment should be denied for many of the same reasons as their motion for default judgment, which again are ably articulated by the Government in its consolidated response. ECF No. 466. First, even if the state-law principle of equitable estoppel applied to this case and was properly pled against the allottees, it operates as a defense only under inapplicable Washington law and cannot be wielded, as Plaintiffs purport to do, as a sword. *Id*. at 6. Second, because MA-8 is held in trust and administered by the federal government, which is immune from equitable estoppel defenses when it acts in its trust capacity

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on behalf of Indians, a 'claim' of estoppel cannot be brought against individual allottee-owners in the government's stead. *Id*. at 7-8, 13. Third, the facts and statements that Plaintiffs deem admitted as to the individuals targeted in the motion are not binding on the other allottee-owners or the Government. *Id*. at 14. Fourth, the requests for admission that Plaintiffs served in October 2012 and on which they now base their motion for summary judgment were untimely and therefore provide an inadequate basis for granting such a motion. *Id*. at 12-13.

III. CONCLUSION

For the foregoing reasons, the Court should deny both the Plaintiffs' motion for default judgment and motion for summary judgment.

Dated this 8th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which caused the following CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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Dated this 8th day of May, 2020

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