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Hon. Rosanna Malouf Peterson

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,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, and FRANCIS ABRAHAM, CATHERINE GARRISON, MAUREEN MARCELLAY, MIKE PALMER, JAMES ABRAHAM, NAOMI DICK, ANNIE WAPATO, ENID MARCHAND, GARY REYES, PAUL WAPATO, JR., LYNN BENSON, DARLENE HYLAND, RANDY MARCELLAY, FRANCIS REYES, LYDIA W.

CASE NO. CV-09-0018-RMP

BRIEF OF WAPATO HERITAGE IN SUPPORT OF REPLY BRIEF OF PLAINTIFFS IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT (ECF NO. 433) AND MOTION FOR SUMMARY JUDGMENT AGAINST CERTAIN ALLOTTEES (ECF NO. 439)

ARMEECHER, MARY JO GARRISON, MARLENE MARCELLAY, LUCINDA O'DELL, MOSE SAM, SHERMAN T. WAPATO, SANDRA COVINGTON, GABRIEL MARCELLAY, LINDA MILLS, LINDA SAINT, JEFF M. CONDON, DENA JACKSON, MIKE MARCELLAY, VIVIAN PIERRE, SOMA VANWOERKON, WAPATO HERITAGE, LLC, LEONARD WAPATO, JR, DERRICK D. ZUNIE, II, DEBORAH L. BACKWELL, JUDY ZUNIE, JAQUELINE WHITE PLUME, DENISE N. ZUNIE and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Allottees of MA-8 (known as Moses Allotment 8),

Defendants.

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I. INTRODUCTION

As this Court previously noted (ECF 144 at 7), Wapato Heritage "could assert itself" on issues affecting the rights of allottee Defendants generally. While the pending dispositive motions are not brought against Wapato Heritage, they do raise issues of potentially broad application. Accordingly, and respectfully, Wapato Heritage files this brief to respond to certain matters raised in the response briefs which bear especially closely on Wapato Heritage's own rights as landowner and on its prior related litigation.

II. ARGUMENT

A. The Majority Interests Favor Extension of the License or are Estopped.

The BIA is trying to have it both ways in this litigation. This Court dismissed prior summary judgment motions by Plaintiffs against the BIA, based on preclusion from the related *Wapato Heritage* case (EDWA Cause No. 08-cv-177-RHW). In the *Wapato Heritage* case and in this case, the BIA argued, and the Court agreed, that the BIA was not a party to the Master Lease and had no power to ratify deficiencies in compliance with its terms. ECF 144 at 3. It was the allottees who had that power, and did not exercise it, held the Court in the *Wapato Heritage* case, not the BIA. Yet now, the BIA takes the position that estoppel against the allottees with regard to license rights granted pursuant to the sublease would be meaningless because only the BIA, not the allottees, could make decisions about those rights. ECF 466 at 11, 13–14.

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Estoppel, like ratification, is an equitable doctrine. If the licensees, and not the BIA, had the sole power to ratify changes, then the licensees, and not the BIA, must also have had the power to grant use rights under that lease. Therefore, estoppel against the allottees is far from meaningless. Rather, it is the BIA which is improperly interjecting itself into a dispute primarily between Plaintiffs and allottees, despite having disclaimed the authority to extend or withhold rights under the Master Lease.[1]

Of course, in practice, ejectment is not being pursued at the direction of the allottees. Judge Quackenbush refused to even consider the BIA's first motion for summary ejectment because it had not first consulted with the landowners, as statutorily required. ECF 144 at 26–27; ECF 329 at 21. The BIA tried to cure the defect, mid-litigation, solely via the inadmissible check-a-box mailer sent by Debra Wulff, challenged in ECF 438 at 12–13.[2] Judge Quackenbush expressed continued concern

[1] To whatever extent the BIA may be the proper decision maker, however, Wapato Heritage agrees with Plaintiffs that it is estopped.

[2] The Tribe contends the declaration is admissible as "a record of the regularly-conducted BIA activity of recording consultations with trust owners." ECF 469 at n.6. The Tribe fails to establish the necessary factors under FRE 803(6), which is the Tribe's burden under FRCP 56(c)(4). Notwithstanding the Tribe's apparent admission that an

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about the BIA's decision to seek ejectment *before* consulting with the Allottees. ECF 329 at 29 ("[T]he BIA's historical conduct in its management of MA-8 and its failure to seek landowner input on its decision to seek to eject Plaintiffs until *after* this court indicated that it was required, contribute to the court's concern that the interests of the individual allottees might be given short shrift.").

Thus, without consultation, the BIA unilaterally favored the Tribe's arbitrary bias over the actual interest of Wapato Heritage and the other allottees. The BIA and the Tribe, having prevented a developer with a good track record (Bill Evans) from proceeding with a plan to enrich the allottees, have come up with no substitute plan in the ensuing eleven years. Now, they are intent upon driving out one of the two remaining revenue sources on MA-8—still without proposing any plan to replace the revenue. This is practically the definition of arbitrary and capricious conduct.

Unable to explain how their acts could serve the interests of the allottees, the BIA and Tribe then colluded to try to make the allottees appear irrelevant. *See* ECF 466 at 9 ("individual allottees are not necessary parties to an ejectment action"); ECF 469 at 4

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unreliable process is "typical" of allottee consultations, the declaration contains double hearsay, which the Tribe has failed to establish would be admissible at trial in any form. *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003).

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("the Indian owners need not be parties to this suit"). The Tribe argues that as the majority interest holder, it "has control" over ejectment under the terms of the Master Lease and relevant statutes. ECF 469 at 8:4; *id.* at 6–7 (citing ECF 90-1 ¶ 35; 25 C.F.R. § 162.012). The BIA too is content to ignore minority interests, despite the lease (from which the licenses arose) and statute. Yet the Tribe's claimed majority interest is illusory.

The Tribe owned little interest if any in MA-8 when the BIA partnered with Bill Evans to sell the campground memberships. Even by 2009, it owned only 18.17%. ECF 440-1. By 2016, however, it claims to have purchased another 13.6% interest from unrepresented allottees. ECF 347 at 4-6. On that basis, the Tribe now claims a 56% ownership interest in MA-8; ECF 441. As has been previously briefed, there are at least two problems with the 56% figure. First, at least the recent 13.6% acquisitions are void or voidable ab initio for failure to obtain appraisals of fair market value as required by 25 C.F.R. § 152.24—no such appraisals were produced when ordered by this Court at ECF No. 345 at 3:15-23, and must be assumed not to exist. *See Singh v. Ashcroft*, 91 F. App'x 570, 571 (9th Cir. 2004)((unpublished) (cited under 9th Cir. Rule 36-3(c)(ii)); *and see* ECF 405 at 6 ¶ 10 (sales were at less than half of fair market value). Second, the supposed majority figure does not take into account Wapato Heritage's almost 25% ownership interest as statutorily required. *See* 25 C.F.R. § 162.004(b); *Fredericks v.*

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BIA, 2016 WL 4153788, at *3-5, *6 n.3 (I.B.I.A. July 28, 2016) (holders of remainder interest cannot unilaterally enter into lease for present use of allotment without life tenants' consent). Contrary to the Tribe's response, 25 C.F.R. § 162.012(a) is silent on the treatment of life estates. Because the Tribe cannot bypass Wapato Heritage's 24% interest, the Tribe presently owns only 32% of MA-8 interests. See ECF 440 ¶ 4 & Exh. A. Thus, even now, between Wapato Heritage and the allottees subject to Plaintiffs' instant motions, a majority of allottees either affirmatively favor construction of the license as extending to 2034, or at least are estopped from saying otherwise.

Further, the irrevocable license granted to Plaintiffs to remain on MA-8 through 2034 is an equitable servitude that runs with the land and binds successors, particularly successors who, like the Tribe, took with full knowledge. *Lake Limerick Cntry. Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004); Restatement (3d) of Property (Servitudes) § 2.10 (2000); *and see Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 899, 337 P.3d 1076, 1081 (2014). The alleged increase in the Tribe's ownership does not matter.

Further still, although Plaintiffs have not yet asked for summary determination that the Tribe itself is estopped as to and/or ratified the license extensions, the evidence in favor of that conclusion is strong. The Tribe was undisputedly informed of the 2004 Settlement Agreement and even participated in the mediation via its real estate advisor,

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Ms. Sharon Redthunder. *See* ECF 465 ¶ 115; *and see* ECF 296-1 at 9. It was then involved in the Indian Probate of Bill Evans' will before Judge Stancampiano, which culminated in a further settlement agreement under which it now claims residual interests in MA-8—an agreement which relied on the presumption that the Master Lease and related licenses were good through 2034 under the 2004 Settlement Agreement. *See* ECF 360 at 4–9 and record citations therein. The Court's reasoning (ECF 144 at 33) that the allottees lacked proper notice of the 2004 Settlement Agreement for purposes of TEDRA, RCW 11.96A.220, does not apply to the Tribe.

B. State Law Applies to the Issues Before the Court.

The BIA and the Tribe argue that *only* federal law applies to the parties' rights. The Court has already rejected the BIA's related argument on jurisdiction: "Contrary to the Federal Defendants' contention, there is no federal or state law which would have precluded the state court from assuming jurisdiction over a contract dispute pertaining to the right to use property held in trust property under a contract." ECF 144 at 33:12–15. The Court went on to apply Washington State precedent, not federal precedent, in considering whether the allottees' acceptance of money paid under the 2004 Settlement Agreement ratified the agreement; while Wapato Heritage maintains that they did ratify on the facts here, the Court relied on the right source of law. ECF 144 at 37:9–22 (citing *Hooper v. Yakima County*, 79 Wn. App. 770, 775-76, 904 P.2d 1193 (1995)). This is

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consistent with precedent applying state law to Indian land disputes where the operative instruments authorized application of state law. *See Red Mountain Mach. Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1411 (9th Cir. 1994) (applying Arizona mechanic's lien statute where tribe's lease specified Arizona law). The original trust patent for MA-8 (assuming *arguendo* that it still applies), specified that the land was held in trust according to the laws of the State of Washington, and the camping agreements at issue choose Washington law. ECF 109 at 15–16 (citing ECF 90-5 Ex. 12); ECF 90-6 at 35, Ex. 30 ¶ 14. The BIA, in its ALJ hat, has acknowledged that state law may be at least "a convenient source of the general law of contracts." *High Desert Recreation, Inc. v. Western Regional Director, Bureau of Indian Affairs*, 57 IBIA 32, 38, 2013 WL 3088101 at *5.

The BIA relies on *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) for the proposition that "this matter is governed by federal law." ECF 466 at 9–10. This is an overstatement. There, the Court of Appeals applied federal law because no party had argued otherwise, and because "the BIA's role and obligations under the contract" were implicated by the question of whether a renewal notice sent to the BIA as lessor was effective. 637 F.3d at 1039. The Court of Appeals noted that there were "limited circumstances in which state law may apply to the interpretation of a federal contract, such as when the United States is not a party, or when the direct interests and obligations of the government are not in question." *Id.* (citing *Smith v. Cent. Ariz.*

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Water Conservation Dist., 418 F.3d 1028, 1034 (9th Cir.2005)). That is the case here, where the claims are purely against the allottees and the BIA insists that the allottees were not estopped by the BIA's knowledge, acts, and representations. The BIA cannot be heard to say, at the same time, (i) that it did not act for the allottees, and (ii) that state law cannot apply to claims against the allottees because the BIA is a federal agency.

Further, where the Chelan County Superior Court held that Evans, as an allottee of MA-8, "subjected the beneficial owners" to the jurisdiction of Washington courts and to the application of Washington law by entering agreements approved by the BIA on behalf of the beneficial owners which chose Washington law, that decision should be given full faith and credit by this Court. ECF 90-9 at 52–52, Ex. 65 at 20–21.

Federal law may, as the BIA contends, provide a role for the BIA in ejecting a trespasser on (alleged) Indian trust land. The statutes on which the BIA relies do not support its view, however—25 C.F.R. § 161.471 does not apply, where the Court has already held that the Plaintiffs' rights are in the nature of a license, not a lease, nor does 25 C.F.R. § 162.023, which on its face applies only where "a lease is required." Simply put, where the parties authorized to allow use of the land—the allottees, under BIA's own theory—have allowed some person's use or are estopped from saying otherwise, then that person is not a trespasser, and the BIA's role is not triggered.

C. The Court should Revisit whether TEDRA Bound other Defendants.

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Early in this case, the Court held, based on the facts then before it, that notice to the BIA in 2004 of the Settlement Agreement in Chelan County Superior Court, was not notice to the individual landowner defendants, for purposes of the Washington Trusts and Estates Dispute Resolution Act, RCW 11.96A.220 ("TEDRA").[3] ECF 144 at 33–34. The Court reasoned that the BIA had only administrative authority over leasehold interests on trust property, not "independent authority to modify or alter the terms of the Master Lease or to approve the Park Members' right to use the MA-8 property beyond the terms of the Master Lease." *Id.* at 33:23–26. Now, though, the BIA states that in this litigation, under statute, it "has represented the individual Indian allottees' collective trust interests." ECF 466 at 2:5; *and see, e.g.*, ECF 398 at 16:20–22 (denying need for independent counsel because "the United States, in its capacity as trustee, vindicates trust land rights…for the benefit of all Indian allottees.") If the "collective interests" of individual Indian allottees in trust property are routinely

[3] The BIA did not merely have notice, it participated in the case by having a letter stating its position filed. The BIA's "dispute" to that fact ignores the presenting declaration. *Compare* ECF 465 ¶ 109 *with* ECF 90-9 at 27 ¶ 2. Most of the BIA's "disputes" of material fact are similar quibbles, or mere argument, or lack citation to evidence.

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represented by the BIA for purposes of litigation, it is difficult to understand why the "collective interests" in MA-8 did not receive notice in the person of the BIA, in 2004, of the pendency of an action which determined rights in that property. To be clear, the Chelan County Superior Court did not have to be asked to specifically determine the rights of Plaintiffs as against any or all of the allottees—the purpose of the TEDRA Agreement process is to finally resolve all rights in (*arguendo*) trust property, even as against interested parties not joined to the action, so long as they have had fair notice and the opportunity to join to protect their interests. RCW 11.96A.220. According to the BIA, if the allottees have an interest that needs protecting in litigation, they can simply let the BIA handle it for them, without ever even having to know about it. By that logic, the 2004 TEDRA Agreement must have bound the individual allottees when the BIA, with full notice, encouraged the settlement.

III. CONCLUSION

For the reasons stated above and in prior briefing, the Court should deny the pending partial dispositive motions.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

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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.

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 this 22nd day of May, 2020.

Lesley Alvarado

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