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THE HONORABLE JUSTIN L. QUACKENBUSH

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-JLQ MEMORANDUM IN SUPPORT OF PLAINTIFFS' **FOURTH** MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ARBITRARY AND CAPRICIOUS AGENCY ACTION AND DUE PROCESS VIOLATION BY BIA

I. BACKGROUND FACTS

The background facts supporting this Motion by Plaintiffs' Regarding Settlement Agreement are set forth in the Memorandum in Support of Plaintiffs' First Motion for Summary Judgment.

II. ADDITIONAL FACTS REGARDING ARBITRARY AND CAPRICIOUS ACTION/DUE PROCESS VIOLATION

In November, 2007, the BIA informed Wapato Heritage LLC, the successor

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Lessee of the Master Lease, that the Master Lease had not yet been effectively renewed. (Plaintiffs' Fact #193) The BIA did not provide Wapato Heritage with any reason as to why the renewal was invalid, and did not provide Wapato Heritage with information as to how it could properly exercise the renewal option prior to the deadline of February 2, 2008. (Plaintiffs' Fact #194) Prior to the February 2, 2008 deadline, the BIA never provided Plaintiffs with notice that the Master Lease would expire in 2009. (Plaintiffs' Fact #198, 202)

The BIA issued another decision on the Master Lease renewal on August 7, 2008 which Wapato Heritage, as Lessees under the Master Lease, appealed to the BIA Northwest Regional Director in Portland, Oregon. The Northwest Regional Director affirmed the BIA's position on October 31, 2008.

The Business Council of the Colville Tribes passed a resolution supporting the BIA's 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. (Plaintiffs' Fact #199)

Upon discovering the BIA's position regarding the Master Lease renewal, Plaintiff Mill Bay Members Association sent a letter to the Superintendent of the

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Colville Agency and the Regional Solicitor's Officer for the Pacific Northwest Region of the DOI, asserting that Paragraph 8 allows the Association, as subtenants, to use and occupy the land until 2034, in accordance with the Membership Agreements and the Settlement Agreement. (Plaintiffs' Fact #203) The United States attorney at the Regional Solicitor's Portland Office and the Superintendent of the Colville Agency responded to these letters asserting that the BIA's "position" is that the Association's tenancy expires when the Master Lease allegedly expires on February 2, 2009. (Plaintiffs' Fact #204)

In doing so, the BIA failed to (1) solicit comments from *all* MA-8 landowners, (2) consider that under Paragraph 8 of the Master Lease, termination of the lease did not necessarily terminate any subleases or subtenancies but rather operated as an assignment to Lessor of such subleases or subtenancies, (3) consider its prior approval of the 50 year expanded membership agreements, (4) the legal effect of the expanded membership agreements under Washington law, (5) the millions of dollars spent by the Plaintiffs, to purchase and improve their lots, in reliance on the tenancy through 2034, (6) the 2004 Settlement Agreement of which the BIA was aware, and which was the product of litigation in which the BIA participated.

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Further, the Plaintiffs' right to use and occupy the Mill Bay Resort is a valid property right. The BIA rendered its decision, providing Plaintiffs no opportunity to be heard. Though the BIA takes the stance now that the decision to terminate the Plaintiffs' tenancy was simply its "position," thus not appealable, the BIA counter-sues the Plaintiffs for trespass.

Plaintiffs request this Court reject such action by the BIA, and enter an order granting summary judgment dismissal of the BIA's trespass claim, and declaring as valid the Plaintiffs' right to use and occupy the Mill Bay Resort through 2034.

III. ARGUMENT

A. The BIA's Arbitrary and Capricious Agency Action Must Be Overturned.

In declaring as terminated the Plaintiffs' rights to the Mill Bay Resort, the BIA did not analyze those rights as existing under the Master Lease, the RV Park expanded membership agreements, nor the 2004 Settlement Agreement. The BIA did not provide any legal analysis for terminating the Plaintiffs' rights to the Mill Bay Resort. The BIA simply stated its "position" that the Plaintiffs' rights expired along with the expiration of the Master Lease, providing no factual basis or legal standard upon which it based its position. Without any such analysis or reasoning, the BIA's actions are, as

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a matter of law, arbitrary and capricious under the Administrative Procedures Act ("APA").

> 5 U.S.C.A. § 706 of the APA provides:
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C.A. § 706.

> In reviewing the action of the agencies under § 706(2)(A), the Court must engage in a "thorough, probing, in-depth review," to determine whether the agencies have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action...." "In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, **whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors**."
>
> Conclusory statements are insufficient to meet this requirement. (emphasis added, citations omitted).

Individual Reference Services Group, Inc. v. F.T.C., 145 F.Supp.2d 6, 25 (D.D.C., 2001).

> Courts are not to act simply as a rubber-stamp of an agency's decision where it is not supported by substantial, credible evidence in the record as a whole or found to be arbitrary, capricious or unreasonable.

Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J.Super. 309,

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318, 937 A.2d 318, 324 (N.J.Super.A.D.,2007).

> Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin., 342 F.3d 924, 928 (C.A.9,2003) (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

Persuasive here is the decision Woods Petroleum Corp. v. Department of Interior, 47 F.3d 1032 (1995). In Woods, plaintiff oil companies sued, challenging the Secretary of the Interior's rejection of an agreement to communize Indian and non-Indian mineral interests for oil and gas production, causing the expiration of an Indian mineral lease. The expiration of the mineral lease allowed the Indian lessors to "enter into a new, more lucrative lease" with a new lessee. Woods, 47 F.3d at 1034. In Woods, after soliciting comments from both the Indians and the oil company, the BIA Assistant Secretary concluded that "it would be in the Indians' best interest to allow the Woods Petroleum leases to expire so that the Indians could enter into new leases

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with [the new lessee], who was willing to pay the Indians a $40,000 bonus. In concluding that the BIA Secretary's decision was arbitrary and an abuse of discretion, the Woods court stated:

> [T]he Secretary and his delegates act as the Indians' fiduciary and thus must represent the Indians' best interest…Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians under [25 USC] §396d is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations.
> …
> When the Secretary first disapproved the communization agreement for the sole purpose of causing the underlying leases to terminate, and then immediately thereafter approved an identical communization agreement for the new leases, it is obvious that the Secretary was not really evaluating the communization agreement at all. **Rather, he was using his power in an arbitrary way to disapprove the communization agreement as a mere vehicle to cause the underlying leases to terminate.** (emphasis added).

Woods, 47 F.3d at 1038-1039.

Also noteworthy are the following comments by the court in Coomes v. Adkinson, 414 F. Supp. 975, 991 (1976):

> The Secretary's fiduciary duties dictate that his 'exercise of discretionary authority' is not absolute despotic power but is subject to restrictions. **The B.I.A., in administratively dealing with land transactions under 25 U.S.C. s 393, is not**

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free to take unreasoning action, without consideration and in complete disregard of the facts or circumstances of the case.

Upon further 'searching and careful inquiry into the facts,' **it further gives this Court grave concern to note that not one of the agency reviewing officers considered or even mentioned the position of the Indian land owners in this dispute.** B.I.A. officers, in their 'exercise of discretionary authority' in leasing Indian land under 25 U.S.C. s 393, do not possess sufficient power to completely disregard the interest of the Indian land owners. Under 25 U.S.C. s 393 Congress granted to the Secretary limited supervisory power over Indian lands. It has long been recognized that when the federal government enacts a statute on behalf of and for the benefit of Indian Tribes and their members, the Government commits itself to a guardian-ward relationship with that tribe and its members. It is clear that 25 U.S.C. s 393 has as its purpose the protection of lands belonging to Indian Tribes and their members and the prevention of fraud and unfairness in leasing those lands. 25 U.S.C. s 393 creates a fiduciary relationship between the Federal Government and the Indian Tribes and their members and imposes a strict and distinctive obligation of guardianship-trust upon the Secretary in his dealings with their land. In Seminole Nation v. United States, 316 U.S. 286, 296-297, 62 S.Ct. 1049, 1054-1055, 86 L.Ed. 1480, 1490-1491 (1942), the Court recognized that the United States 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.' (citations omitted).

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Here, just as in Woods and Coomes, the BIA owes a trust duty to all Allottees of MA-8. The BIA rendered its decisions about the Master Lease renewal without prior solicitation of comments from all interested parties, particularly *all* of the MA-8 landowners. The BIA's decision to attempt to invalidate the renewal of the Master Lease is based upon the input of only a few Allottees, not a majority of the Allottees; namely the Colville Tribes. (Plaintiffs' Facts #192, 199) The Colville Tribes seeks to become the lessee of a new Master Lease of the property in dispute, which includes the Plaintiffs' Mill Bay Resort. (Plaintiff Fact #199) The BIA's purpose in invalidating the Master Lease is to allow the Colville Tribes to become the lessee of the land. This will serve to allow the Colville Tribes, only one Allottee, and not the majority of the Allottees, to secure greater financial benefit from the use of the property. In declaring expired the Master Lease and the Plaintiffs' Mill Bay Resort tenancy, the BIA shirked its equal duty to the remaining MA-8 Allottees, acted arbitrarily and capriciously, and with an obvious conflict of interest. On this basis alone, the Court may conclude as a matter of law that the BIA clearly did not "analyze *all* relevant factors." *See* Woods, *supra*, 47 F.3d at 1038.

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Additionally, there is no evidence the BIA considered other relevant factors, particularly the following (1) that under Paragraph 8 of the Master Lease, termination of the lease did not necessarily terminate any subleases or subtenancies but rather operated as an assignment to Lessor of such subleases or subtenancies, (2) that the expanded membership agreements approved by the BIA extended the lease term through 2034, (3) that the Plaintiffs expended millions of dollars to purchase the right to use and occupy the Mill Bay Resort in reliance on the that term, (4) the legal effect of the expanded membership agreements under Washington law, and (5) the existence of the 2004 Settlement Agreement in which the BIA participated.

B. Violation of the Plaintiffs' Procedural Due Process Rights.

Here, the BIA denies that the Plaintiffs' lease of the Mill Bay Resort, which entitles Plaintiffs to use and occupy the land, is a valid property right. The Supreme Court's decision in Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct.2701, 33 L.Ed.2d 548 (1972) holds otherwise:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of

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> entitlement to those benefits.
> …
> [C]ertain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Further, "[a]n interest in real property is defined not only by the metes and bounds that describe the geographic dimensions of the property **but also by the term of years** that describes the temporal aspect of the Owner's interest." Chancellor Manor v. U.S., 331 F.3d 891, 902 (C.A.Fed., 2003) (emphasis added); *see also* Restatement of Property §§ 7-9 (1936).

Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing." Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113. "While '(m)any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . ., it must afford 'notice and opportunity for hearing appropriate to the nature

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of the case' before the termination becomes effective." Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90.

In Coomes, *supra*, the court held that the BIA's grant of holdover status to the plaintiffs after their lease of Indian grazing land expired constituted a valid property interest. Coomes, 414 F. Supp. at 994. The Coomes court held that the termination of the plaintiffs' lease "without a due process hearing" violated plaintiffs' due process rights:

> In the absence of specific rules and regulations by the Secretary, this Court deems an informal procedure which meets the minimal requirements of fair play and provides reasonable opportunity to be heard, complies which due process. The Eighth Circuit Court of Appeals in Brouillette v. Board of Directors, 519 F.2d 126, 128 (8th Cir. 1975) has determined general minimal requirements of due process, and as applied appropriately to this situation, Bell v. Burson, 402 U.S. 535, 541-542, 91 S.Ct. 1586, 1590-1591, 29 L.Ed.2d 90, 95-96 (1971), are: **(1) clear and actual notice of the reasons for termination in sufficient detail to prepare and present evidence relating to them, (2) notice of the names of persons who have knowledge of facts adverse and relied upon for termination and the opportunity to examine each of them as to knowledge and credibility, (3) a reasonable time and opportunity to present testimony in defense; and (4) a hearing on record before an impartial board or tribunal.**

Coomes, 414 F. Supp. at 995.

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Further, the court in Sessions Inc. v. Morton, 348 F. Supp. 694 (1972) recognized due process rights would be implicated if the court accepted the argument of the Secretary of Interior, which took the same position as the BIA takes here:

> To hold, as defendants urge, that the Secretary's decision is a binding termination of the lease if supported by substantial evidence in the administrative record, **would make one of the interested parties to the lease the final arbiter of the respective rights and obligations of the parties to the lease contract. Such a ruling would be anathema to the concept of due process**, equally applicable to administrative proceedings as it is to the judicial actions of our court system.
>
> FN6. The position of the Secretary through the Bureau of Indian Affairs as representing the United States as Trustee for Indian lands; **in negotiating the terms and approving the lease; in continuing as the approving authority for plans and improvements makes him an "interested party." The Indian lessors in this respect cannot be separated from the functions of the Bureau of Indian Affairs.**
>
> **…**
>
> The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it-if not express-at least an implied requirement of diligence. The tripartite nature of Indian affairs-at least in the context of this case-points up the wisdom of review of these activities to assure that the exercise of these responsibilities remains sensitive to the desires-and more importantly to the needs of those our laws have been enacted to protect.

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Sessions, Inc., 348 F. Supp. at 699.

In the instant case, Plaintiffs have a valid property interest; the right to use and occupy the Mill Bay Resort until 2034. The BIA declared those rights terminated along with the expiration of the Master Lease. There can be no dispute that in doing so, the BIA did not afford Plaintiffs even minimal due process.

Under the terms of the Master Lease and 2004 Settlement Agreement, Plaintiffs request an award of their attorney's fees and costs. *See* Section C of Plaintiffs' Memorandum in Support of First Motion for Summary Judgment Re Contract Terms.

IV. CONCLUSION

Based upon the foregoing, the BIA's trespass must be dismissed as a matter of law. Entry of an order granting Plaintiffs' summary judgment, declaring as valid the Plaintiffs' right to use and occupy the Mill Bay Resort through 2034, is proper.

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DATED this 1st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and via U.S. Mail. Parties may access this filing through the Court's system.

DATED at Wenatchee, Washington this 1st day of September, 2009.

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