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THE HONORABLE JUSTIN L. QUACKENBUSH

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 PAUL GRONDAL, a Washington)
9 resident; and THE MILL BAY)
10 MEMBERS ASSOCIATION, INC., a)
11 Washington Non-Profit Corporation,)

12 Plaintiffs,

13 vs.

) NO. 09-CV-00018-JLQ
) MEMORANDUM IN SUPPORT OF
) PLAINTIFFS' **FIFTH** MOTION FOR
) SUMMARY JUDGMENT
) RE: ACTUAL NOTICE OF OPTION TO
) RENEW

14)
15 UNITED STATES OF AMERICA;)
16 UNITED STATES DEPARTMENT OF)
17 THE INTERIOR; THE BUREAU OF)
18 INDIAN AFFAIRS, and FRANCIS)
19 ABRAHAM, CATHERINE GARRISON,)
20 MAUREEN MARCELLAY, MIKE)
21 PALMER, JAMES ABRAHAM, NAOMI)
22 DICK, ANNIE WAPATO, ENID)
23 MARCHAND, GARY REYES, PAUL)
24 WAPATO, JR., LYNN BENSON,)
25 DARLENE HYLAND, RANDY)
MARCELLAY, FRANCIS REYES,)
LYDIA W. ARMEECHER, MARY JO)
GARRISON, MARLENE MARCELLAY,)

MEMORANDUM IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT RE ACTUAL NOTICE OF OPTION
TO RENEW

1 LUCINDA O'DELL, MOSE SAM,)
2 SHERMAN T. WAPATO, SANDRA)
3 COVINGTON, GABRIEL)
4 MARCELLAY, LINDA MILLS, LINDA)
5 SAINT, JEFF M. CONDON, DENA)
6 JACKSON, MIKE MARCELLAY,)
7 VIVIAN PIERRE, SONIA)
8 VANWOERKOM, WAPATO)
9 HERITAGE, LLC, LEONARD)
10 WAPATO, JR, DERRICK D. ZUNIE, II,)
11 DEBORAH L. BACKWELL, JUDY)
12 ZUNIE, JACQUELINE WHITE PLUME,)
13 DENISE N. ZUNIE and)
14 CONFEDERATED TRIBES OF THE)
COLVILLE RESERVATION, Allottees of)
MA-8 (known as Moses Allotment 8),)
Defendants.)

I. STATEMENT OF FACTS

15
16 Plaintiffs submit that the legal grounds set forth in the Plaintiffs' Second Motion
17 for Summary Judgment Regarding the Settlement Agreement preclude Defendants
18 from now taking the "position" that the Option to Renew, made over twenty years ago,
19 is invalid. In addition to the facts and argument submitted in support of Plaintiffs'
20 Second Motion, Plaintiffs file this separate motion specific to the issue of actual
21 knowledge of the MA-8 Landowners that Mr. Evans exercised the Option to Renew
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1 the Master Lease.¹

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3 The BIA bases its action for trespass upon its “position” that Bill Evans’ 1985
4 Option to Renew was invalid. The term of the Master Lease was for 25 years,
5 beginning February 2, 1984, with an option to renew for an additional 25 years.
6 (Master Lease, ¶ 3, Danielson Declaration Exhibit 1) Under the Master Lease, Lessee
7 was to give “Lessor and the Secretary” written notice of his intent to exercise this
8 renewal option at least 12 months prior to the expiration of the original term. (Master
9 Lease, ¶ 3, Danielson Declaration Exhibit 1) The Master Lease did not require
10 approval of this renewal by either the Secretary or the MA-8 Allottee/Landowners,
11 rather the Lease would automatically renew. (Master Lease, ¶ 3, Danielson
12 Declaration Exhibit 1)
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17 Paragraph 29 of the Lease, entitled “Payments and Notices,” states:

18 All notices, payments and demands shall be sent to either party
19 at the address herein recited or to such place as the parties may
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21 ¹ Plaintiffs note for the Court that the facts raised herein were not before the court in Wapato
22 Heritage, LLC v. U.S., WL 5046447 (2008). Neither the Plaintiffs nor the MA-8 Landowners were
23 parties to that action. In his November 21, 2008 decision, Judge Whaley noted “Plaintiff [Wapato
24 Heritage] cannot locate a specific point in the record when Evans or Plaintiff achieved substantial
25 compliance, or when the Indian landowners received actual notice.” Wapato Heritage, WL 5046447
at page 6.

1 hereafter designate in writing. Notices and demands shall be
2 served be [sic] certified mail, return receipt requested. The
3 service of any such notice shall be deemed complete within ten
4 (10) days after mailing in any post office within the United
5 States. Copies of all notices and demands shall be sent to the
6 Secretary in care of the office of the Bureau of Indian Affairs,
7 P.O. Box 111, Nespelam, Washington 99155. All notices to
8 Lessor shall be sent to the landowners. The Secretary shall
furnish Lessee with the current names and addresses of the
Lessor upon the request of Lessee. (emphasis added)

9 (Master Lease, ¶ 29)

10 Evans's address and the BIA Colville Agency's address were the only addresses cited
11 in the Lease and no other addresses were attached to the Lease. (Plaintiffs' Fact #67)

12 In early 1985, Evans sent notice that he exercised the Option to Renew, and that
13 receipt of the letter by the Superintendent would be deemed acceptance of this
14 renewal. The Colville Agency marked this letter as received on March 18, 1985.
15 Evans also sent this letter to other Landowners in January 1985. Thereafter, the BIA
16 approved and signed documents which included 2034 as the expiration date of the
17 Master Lease. (Plaintiffs' Fact #71)

18 In April 1996, certain MA-8 Landowners called the Colville Agency inquiring
19 about their lease payments. In response, Harvey George, Jr., Realty Specialist at the
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1 Colville Agency, sent a June 4, 1996 letter to these MA-8 Landowners, explaining the
2 Lease payment schedule, and stating that the Lease was to expire February 1, 2034.
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4 (Plaintiffs' Fact #74)

5 At several meetings with MA-8 Landowners during 2003 through 2007, the BIA
6 informed the Landowners that the Master Lease extended until the year 2034.
7
8 (Plaintiffs' Facts #75, 76) Based upon the sign-in sheets of those meetings and the
9 names on the letters sent with the 2034 expiration date, Landowners constituting a
10 majority interest in MA-8 received actual notice that the Master Lease expired in 2034.
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12 (Plaintiffs' Facts #75, 76)

14 II. ARGUMENT

16 A. All Defendants had Actual Notice that the Option to Renew the Master 17 Lease was Exercised Prior to February 1, 2008.

18 Here, it is undisputed that the Landowners received actual notice that Evans'
19 exercised his option to renew the Master Lease. BIA records, including letters to the
20 landowners and landowner meeting minutes, establish that a majority of the
21 landowners were informed of the renewal prior to 2008. Plaintiffs also expect that by
22 the time this Court considers the Plaintiffs' five Motions for Summary Judgment, a
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1 majority of the Defendant MA-8 Landowners will be in default. The MA-8
2 Landowners thereby do not deny the allegations in Plaintiffs' Complaint that "the BIA
3 and Allottees...at all times knew that Evans had exercised his option to renew"
4 (Complaint, ¶135) and that as a result of negotiation of the Replacement Lease "and
5 other previous documentation provided to the Allottees, all of the Allottees received
6 actual notice that the Master Lease had been renewed.....". (Complaint, ¶143)
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10 [F]orfeitures are not favored in law and are never enforced in
11 equity unless the right thereto is so clear as to permit no denial.'
12 " *Hyrkas v. Knight*, 64 Wash.2d 733, 734, 393 P.2d 943 (1964)
13 (quoting *State ex rel. Foley v. Superior Court*, 57 Wash.2d 571,
14 574, 358 P.2d 550 (1961)). "In order to avoid the harshness of
15 forfeitures and the hardship that often results from strict
16 enforcement thereof, the courts have frequently granted a
17 'period of grace' to a purchaser before a forfeiture will be
18 decreed." *Moeller v. Good Hope Farms, Inc.*, 35 Wash.2d 777,
19 783, 215 P.2d 425 (1950); *see also Dill v. Zielke*, 26 Wash.2d
20 246, 252-53, 173 P.2d 977 (1946). Whether a grace period is
21 warranted depends on the equities in each particular case.
22 *Moeller*, 35 Wash.2d at 783, 215 P.2d 425.

23 *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008).

24 In determining whether equitable relief is appropriate, the court considers the
25 following factors: "(1) whether the lessee's failure to give timely notice was
inadvertent rather than intentional, culpable, or grossly negligent; (2) whether the

1 lessee made valuable permanent improvements; (3) whether the lessor was prejudiced
2 by the untimely notice; (4) the length of the lease; and (5) whether the lessor
3 contributed to the delay.” Pardee, 163 Wn.2d at 575 (citing Wharf Restaurant Inc. v.
4 Port of Seattle, 24 Wn. App 601, 612-13 (1979).
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7 Here the equities weigh in favor of the Plaintiffs. Over a majority of the MA-8
8 Landowners had actual knowledge of the renewal. They reconfirmed this knowledge
9 by (1) making no objection to the 2034 term within the 2004 Settlement Agreement,
10 (2) accepting the benefits of the 2004 Settlement Agreement, and (3) not appearing in
11 this action to deny the Plaintiffs’ allegations regarding their actual knowledge of the
12 extension of the Master Lease through February 1, 2034.
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16 B. Plaintiffs Are Entitled to An Award of their Attorney’s Fees and Costs.

17 Upon a ruling in Plaintiffs’ favor, the terms of the Master Lease and Settlement
18 agreement entitle Plaintiffs to an award of their attorney’s fees and costs. *See* Section
19 C of Plaintiffs’ Memorandum in Support of First Motion for Summary Judgment Re
20 Contract Terms.
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23 **III. CONCLUSION**

24 Based upon the foregoing, an order on summary judgment should be entered,
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1 declaring the Plaintiffs' legal right to use and occupy the Mill Bay Resort through
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3 February 1, 2034, and dismissing the trespass action asserted by the BIA.

4 DATED this 1st day of September, 2009.

5
6 s/JAMES M. DANIELSON

7 WSBA No. 01629

8 Attorney for Plaintiffs

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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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