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THE HONORABLE JUSTIN L. QUACKENBUSH

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,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, et al.,<br><br>Defendants. | NO. 09-CV-00018-JLQ<br><br>SUPPLEMENTAL MEMORANDUM RE: MA-8 TRUST STATUS |

Plaintiffs respectfully submit this memorandum in response to the Court's questions dated January 10, 2013. (ECF No. 308.)

1. **The Act of June 15, 1935 does not apply to MA-8 and the trust period on MA-8 has expired.**

The Court is already well aware of the language in the Act of June 15, 1935 that



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states that the trust period of any Indian land was extended to December 31, 1936 "if the reservation containing such lands has voted or shall vote to exclude itself from the application of the Act of June 18, 1934…" (ECF No. 234-10, Ex. 9 at 37.) The Moses Allotments, including MA-8, were not located on any reservation at that time. The Moses Allotments were allotted from land that used to be the Columbia Reservation but that reservation was terminated in 1886. (ECF No. 161-1 at 16.) There was no tribal entity located on the Moses Allotments and thus no members of a tribe that could vote.

In its Reply, the Colville Tribes asserted that the Columbia Reservation was never dissolved, citing the various agreements and an Indian Claims Commission case and stating that only Congress can "dissolve" an Indian reservation. (ECF No. 304 at 7-9.) Congress did dissolve the Columbia Reservation as early as the July 4, 1884 Act. (ECF No. 161-1 at 13.) If the reservation had not been dissolved, it would be a reservation without a tribe, which cannot exist. Although it claims the Moses Allotments are still a part of the active Columbia Reservation, during oral argument, the Colville Tribes asserted that Moses Allotments are a part of the Colville Reservation. In *United States v. State of Or.*, 787 F. Supp. 1557, 1579 (D. Or. 1992)



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*aff'd*, 29 F.3d 481 (9th Cir. 1994) *amended*, 43 F.3d 1284 (9th Cir. 1994), the court held that the Colville Tribes is not "the successor Indian government and the present day holder of treaty rights reserved to the Wenatchi, Entiat, Chelan, Columbia, Palus, or Chief Joseph Band of Nez Perce...." *Id.*, at 1572. Because it is not the successor Indian government for the Columbia band of Indians, it cannot be the governing entity of the allotments which derived from the Columbia Reservation. There is no basis upon which the Act of June 15, 1935 could apply to the Moses Allotments. Thus, that Act did not extend the trust status of MA-8 and MA-8's trust status expired in March of 1936.

**2. This Court does have authority to declare MA-8 is land held in fee.**

The Court has posed the question as to whether the Court has authority to direct the issuance of fee patents. For the purposes of Plaintiffs' claims and defenses, such a determination is unnecessary. This case is not a mandamus action. In order to reach the issues raised in Plaintiffs' claims and defenses, the Court need only determine whether MA-8 is land held in trust by the United States for the benefit of the Defendant Landowners or held in fee by those landowners. If MA-8 is fee land, then the United States lacks standing to sue Plaintiffs for ejectment and trespass and



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Plaintiffs may pursue claims against the individual Defendant Landowners pursuant to state remedies without consideration of federal law relating to Indian lands.

Even if the Court determines this land is held in trust by the United States, Plaintiffs reiterate their previous arguments that this does not preclude their estoppel defense. It is true that estoppel cannot work against the government when it is acting as trustee for Indian landowners to affirm *unauthorized* acts. *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir. 1956); *United States v. State of Wash.*, 233 F.2d 811, 817 (9th Cir. 1956). However, estoppel can work against the government in this situation to affirm actions which it was authorized to make. *See United States v. Certain Parcels of Land*, 131 F. Supp. 65, 73-74 (S.D. Cal. 1955). *See also U. S. v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975)("…estoppel can apply against the government even in disputes over public land…"). This is especially true if estoppel is claimed and can work against the individual Indian landowners for their own actions and acquiescence in the government's actions. This Court already correctly ruled that estoppel may appropriately be applied against the government and the Defendant Landowners in this case, even before the trust status of land was at issue:

> Although estoppel will rarely work against the government, the assertion of this defense against the Defendant



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> landowners and the BIA, acting on their behalf, in this trespass action presents a unique context which would merit further consideration by the court.

(ECF No. 144 at 38:6-8.)

The 2004 Settlement Agreement was a modification of the Master Lease and the BIA went to the Landowners twice to inform them about the terms of the settlement. The Landowners, in turn, accepted settlement money and increased rent from Plaintiffs, amounts in addition to that which was called for in the Master Lease. This acceptance ratified the 2004 Settlement Agreement. Plaintiffs' membership agreements and the 2004 Settlement Agreement were properly approved by the government and the Defendant Landowners. Such approval is statutorily authorized. *See* 25 U.S.C. § 85 and 25 C.F.R. § 84.004 and, thus, equitable estoppel can prohibit the Defendants in this case from ejecting Plaintiffs from the Mill Bay Resort.

**3. These issues do merit appointment of counsel for the individually named Defendant landowners.**

The United States has chosen to bring its ejectment and trespass action in this Court on behalf of the Defendant Landowners. Since bringing these claims, it has become clear that a conflict of interest prevents the United States from properly representing the Defendant Landowners' individual interests. Because the government has already



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exercised its discretion and decided to represent the Defendant Landowners, it should be required to follow through with complete and adequate representation of their interests by appointing independent counsel for the Landowners. Plaintiffs have already expressed their position that 25 U.S.C. §175 is mandatory in cases involving public lands. (ECF No. 295 at 7.)

Even if the Court finds this statute is not mandatory in such a case, at the very least, because the United States has already initiated representation of the Landowners in this action, it should be mandatory for the United States to provide independent counsel now that a clear conflict of interest between the United States and the Landowners has arisen. In *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426-27 (1991), the Court of Claims refused to dismiss a breach of fiduciary duty claim against the United States for a similar set of facts, indicating that the United States does have a duty to appoint independent counsel when it chooses to represent Indian landowners and a conflict of interest arises that impacts its representation of those landowners. There, the court held that the United States' decision to undertake representation of a tribe regarding adjudication of water rights and subsequent refusal to appoint independent counsel when a conflict of interest arose between the United



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States and the tribe's interests exposed the United States to a breach of fiduciary duty for inadequately representing the tribe's interests in that litigation:

> …while it is true that the government ordinarily has broad discretion as to when to institute an action on behalf of Indians, *see, e.g., Creek Nation v. United States*, 318 U.S. 629, 639, 63 S.Ct. 784, 789, 87 L.Ed. 1046 (1943), it does not follow that the government is free from accountability for its actions herein.
>
> First, as noted above, where a trust exists with respect to a defined res, the trustee is charged with taking appropriate steps to preserve that res. Therefore, the United States was required under the trust arrangement to defend plaintiffs' water rights in *Arizona I.* Second, plaintiffs do not fault defendant for refusing to represent plaintiffs' interests in *Arizona I* but rather for choosing to represent their interests and then doing so inadequately. Plaintiff Colorado River Indian Tribe …had argued during the initial hearings …that because of the United States' alleged conflict of interest, the special master should appoint separate counsel to represent the tribes. The United States, …opposed this motion, *inter alia,* on the ground that the United States had "full and exclusive authority to control the presentation of the Indian's interests in the instant case." Therefore, the United States not only made the decision to represent plaintiffs' interests in *Arizona I* but also chose to exercise control over plaintiffs' defense of their water rights. As the Court concluded in *Mitchell II,* "[a] fiduciary relationship necessarily arises when the Government assumes such elaborate control over ... property belonging to Indians." *Mitchell II,* 463 U.S. at 225, 103 S.Ct. at 2972.



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*Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426-27 (1991).

This case demonstrates that once the United States undertakes the representation of Indian landowners in a case involving trust property, it is required to provide independent counsel to those landowners if a conflict of interest between the landowners and United States arises. Here, such a conflict exists and the United States should be required to provide independent counsel to the Defendant Landowners.

## CONCLUSION

MA-8's trust status expired in 1936. The Act of June 15, 1935 did not apply to this land and, therefore, could not extend the trust period for MA-8. Although this Court does have authority to declare MA-8 is land held in fee by the Defendant Landowners, the Court need not direct fee patents to be issued to the Defendants in order to resolve the issues Plaintiffs raise in this case. Finally, the United States should be required to appoint independent counsel for the Defendant Landowners for the reasons stated above and in Plaintiffs' previous briefing. Plaintiffs respectfully request the Court deny the Federal Defendants' Motion for Summary Judgment re: Ejectment and direct the United States to provide independent legal representation to the unrepresented Defendant Landowners.



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DATED this 21st day of January, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2013, 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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Notice of this filing is being sent this date via United States Postal Service First Class Mail to the parties below at the addresses indicated below.

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DATED at Wenatchee, Washington this 21st day of January, 2013.

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