Grondal v. Mill Bay Members Ass'n, 471 F. Supp. 3d 1095 (2020) & ___ F. Supp. 3d ___, 2021 WL 1962563 (E.D. Wash. May 17, 2021)

- **Holdings:** United States holds Moses Allotment No. 8 in trust and was entitled to summary judgment as to ejectment and trespass counterclaims against Plaintiffs with camping memberships on MA-8 lands subject to an expired lease. Following trial, $1,411,702 in trespass damages were awarded.
- **Summary:** This long-lived suit began in 2009 and was largely controlled by the validity of a lease on the Lake Chelan shoreline in Washington State for Moses No. 8 allotment lands (MA-8). Plaintiffs rented camping memberships from the lessee (Wapato Heritage, L.L.C.) on the assurance that the lease would continue until 2034. However, by virtue of the lessee's failure to extend the lease as required by its 1984 terms, it expired in 2009. *See Wapato Heritage L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011). As the district court summarized the major issues, "Plaintiffs advance various arguments as to why they are entitled to occupy MA-8 until 2034, even though the Master Lease was not renewed. In its Answer to the Complaint, the Government asserts a counterclaim of trespass, requesting ejectment of Plaintiffs from MA-8." In a lengthy opinion, the court held, inter alia, that Plaintiffs were judicially estopped to the extent that they now argued that MA-8 was not held in trust by the United States and, alternatively, that the government did hold them in trust. It further granted summary judgment to the United States on its trespass and ejectment counterclaims.

  The judicial estoppel "doctrine prevents a party who takes one position from later assuming a second, contradictory position on the same issue, either in the same litigation or in subsequent litigation." Here, "[w]hile Plaintiffs once asserted that MA-8 was trust land and used the land's trust status as a basis to assert its claims against the BIA, Plaintiffs now maintain that MA-8 is not trust land." Their change of position occurred "approximately two years after filing their Complaint, and only after their own claims against the BIA had failed. The Court finds that by changing position on such a fundamental issue so late in the litigation, and only after their own claims against the United States had been resolved, Plaintiffs attempt to gain an unfair advantage and have played 'fast and loose' with this Court." It therefore declined to allow such change "[t]o protect the integrity of the judicial process." In a belt-and-suspenders approach, however, the court held alternatively that MA-8 is trust land. Its analysis on that point was lengthy and confined to statutes directly affecting MA-8 and its relationship to the Colville Indian Reservation.

  As to the ejectment counterclaim, the court held that the United States did not need the MA-8 allottees' consent to seek such relief. After quoting 25 C.F.R. § 162.123, which provides in part that the Bureau of Indian Affairs "may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law[,]" it held that "Plaintiffs have cited no law, and the Court has found none, that requires the Government to obtain consent from a majority of the allottees before removing trespassers from a highly fractionated allotment." As to the trespass counterclaim, "Plaintiffs' camping memberships gave them the right to use MA-8 consistent with the Master Lease. The Ninth Circuit has held [in *Wapato Heritage*] that the Master Lease expired as of February 2, 2009."

The court also addressed other substantive and procedural issues—e.g., denial of Plaintiffs' motion for default judgment against non-responding individual allottees; the absence of equitable estoppel under Washington State law as an independent cause of action that could be brought by Plaintiffs; denial of Plaintiffs' motion for summary judgment against individual allottees who failed to respond to requests for admission; and unavailability of equitable estoppel as an affirmative defense against the United States.

- **Relevant (2020) Deskbook Section:** 3:12 n.2
- **Comment:** Following trial, the district court issued findings of fact and conclusions of law awarding the United States trespass damages for the period between February 1, 2009 to October 31, 2020 in the amount of $1,411,702 plus post-judgment interest. *Grondal v. United States*, ___ F. Supp. 3d ___, 2021 WL 1962563 (E.D. Wash. May 17, 2021). The duration of the trespass period and the measure of damages were determined with reference to federal common law. The court also rejected various affirmative defenses to all or a portion of the damages award. In that regard, it declined reductions based on payments made to Wapato Heritage, LLC--which was no longer a party in the litigation--but added that "nothing in this Order shall prohibit Mill Bay [Members Association, Inc.] from seeking recourse from Wapato Heritage in a separate action."