

No. 09-36150

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

WAPATO HERITAGE, L.L.C.,
Appellant,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF THE INTERIOR, and
UNITED STATES BUREAU OF INDIAN AFFAIRS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:08-cv-00177-RHW
The Honorable Robert H. Whaley
United States District Court Judge

**MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE**

JEFFERS, DANIELSON, SONN &
AYLWARD, P.S.
James M. Danielson, WSBA No. 1629
Kristin M. Ferrera, WSBA No. 40508
2600 Chester Kimm Road
Wenatchee, Washington 98801
(509) 662-3685
JimD@jdsalaw.com

The undersigned respectfully moves this court pursuant to Rule 29 of the Federal Rules of Appellate Procedure (FRAP 29) and Ninth Circuit Rule 29-2 requesting permission to file a brief in this case *amicus curiae* in the form attached to this motion.. Consent of the parties to file such a brief has been requested and denied by one of the parties. The grounds for this motion follow.

Paul Grondal, individually, and the Mill Bay Members Association, Inc., a Washington non-profit corporation, collectively represent 183 camping reserve memberships (“Members”) in the Mill Bay Resort. The Mill Bay Resort was created by Wapato Heritage LLC’s predecessors-in-interest, and memberships were created with the express representation that the Lease to William Evans was for a total of fifty years, extending through 2034.

The Bureau of Indian Affairs (“BIA”), on behalf of the MA-8 beneficial landowners (heirs of the original allottee, Wapato John), represented to the Members that there was a lease in place until 2034 and represented that same fact to the State of Washington in order for the State to issue an camping resort permit under Washington’s Camping Club Resort’s Act. Washington consumers relied on these express representations that the memberships were to expire in 2034 and sold under the protections of the Camping Club Resorts Act in purchasing these memberships and investing in improvements of the land. In recent years, the

purchase price for various memberships within the resort were in excess of \$100,000.

An *amicus curiae* brief would be helpful to the Court on rehearing in order to bring to the Court's attention how the panel decision conflicts with decisions of the United States Supreme Court, the Ninth Circuit, and other circuits regarding the authority of the BIA when fulfilling its obligations to its Indian wards, established law which the Members had a right to rely on in purchasing their memberships. An *amicus curiae* brief would also be helpful to the Court to understand the exceptional impact this decision has on third parties' (such as the Members) ability to invest in development on Indian allotted lands.

The three-judge panel did not address the statutory authority granted to the BIA which allowed the BIA to act as the MA-8 landowners' agent in renewing the lease and bind the MA-8 landowners in contract, nor did it discuss at all appellants' contentions as to disputed material facts on the issue of whether the BIA is an agent for the landowners and, because the landowners were not joined in the action, whether in fact they had actual notice of the lease renewal. The undersigned respectfully requests that Paul Grondal and the Mill Bay Members Association, Inc., a Washington non-profit organization, be granted leave to file an *amicus curiae* brief in order to present arguments and viewpoints on the matters involved in the case which the parties themselves may not present.

The undersigned also moves the Court to permit *amicus curiae* to supplement the Excerpts of Record on appeal because significant documents and declarations were excluded from the Excerpts of Record that would better assist the Court in its decision.

The undersigned also moves, pursuant to FRAP 29(g), that it be permitted to participate in oral argument.

Respectfully submitted this 16th day of May, 2011.

s/JAMES M. DANIELSON
WSBA No. 01629
Attorney for Amicus Curiae Mill Bay Members
Association, Inc.
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: jimd@jdsalaw.com

s/KRISTIN M. FERRERA
WSBA No. 40508
Attorney for Amicus Curiae Mill Bay Members
Association, Inc.
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road - P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: kristinf@jdsalaw.com

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 16, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Andrew Sean Biviano
USSP - OFFICE OF THE U.S. ATTORNEY
Suite 340
P.O. Box 1494
Spokane, WA 99210-1494
usawae.abivianoECF@usdoj.gov

Pamela J. DeRusha
USSP - OFFICE OF THE U.S. ATTORNEY
Suite 340
P.O. Box 1494
Spokane, WA 99210-1494
USAWAE.PDerushaECF@usdoj.gov

Robert Bruce Johnston
LAW OFFICE OF R. BRUCE JOHNSTON
Suite 300
200 Winslow Way West
Bainbridge Island, WA 98110
bruce@rbrucejohnston.com

s/JAMES M. DANIELSON
WSBA #1629
Attorney for Amicus Curiae Mill Bay Members Association
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: (509) 662-3685
Facsimile: (509) 662-2462
Email: jimd@jdsalaw.com