No. 09-36150

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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. CV-08-177-RHW
The Honorable **ROBERT H. WHALEY**
United States District Court Judge

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

Appellant Wapato Heritage, LLC ("Wapato") petitions for rehearing or rehearing *en banc*. The decision of the panel at *Wapato Heritage, L.C.C. v. United States*, ---F.3d--, 2011 U.S. App. LEXIS 5724 (9th Cir. Mar. 22, 2011)(published) and at 2011 U.S. App. LEXIS 6006 (9th Cir. Mar. 22, 2011) (unpublished), conflicts with:

(A) the very precedent it relies upon, *United States v. Algoma Lumber Co*., 305 U.S. 415, 421, 59 S. Ct. 267, 83 L. Ed. 260 (1939), which holds that the BIA signs leases for Native American landowners as their agent and has the power to modify as needed to protect the property;

(B) *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) by affirming summary judgment on a materially disputed factual record;

(C) *Straub v. A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994), which held that actual notice, in the absence of prejudice, could be substantial compliance with a notice service requirement;

(D) published findings of fact in a related, ongoing action in this Circuit at *Grondal v. United States*, 682 F. Supp. 2d 1203 (E.D. Wash. 2010);[1] and

[1] *See* Appellants' Statement of Related Cases.

(E) BIA's own precedent at *Siegfried v. Area Director, Billings, et al.* 81 I.D. 718; 1974 I.D. LEXIS 135; 3 IBIA 195 (I.D. 1974).

Consideration by the full Court is needed to prevent harmful inconsistencies.

This proceeding also presents a question of exceptional importance: Can agencies, and particularly the BIA, be held to their express, unequivocal approval and decades-long ratification of contracts? If, as here, a lease may be stripped after the lessee's multimillion dollar investment, on grounds of technical notice compliance twenty-five years earlier, then potential lessees of the BIA's vast trust lands cannot rely on their contracts, substantial compliance is meaningless, and the BIA betrays its own fiduciary duty to maintain and increase the value of the entrusted lands.

PROCEDURAL AND FACTUAL SUMMARY

The late William Wapato Evans, Jr., a Native American, held an interest in "MA-8," a valuable 140-acre allotment of Native American lands held in trust by the BIA since 1883 for allottees and their descendants. CR-78 at 3.[2] In 1983, Mr. Evans sought to lease MA-8. By that date, as often happens with Native American allotment land, there were so many descendants that MA-8 interests were highly 'fractionated.' Fractionation of allotments is an ongoing problem: it is very difficult to develop such land where getting owner consensus or even notice is

[2] Appellant cites for clarity to the Clerk's Records, which under FRAP 10-2(b) are all part of the record on appeal. Most if not all of the cited records are in the Excerpts of Record or the Supplemental Excerpts of Record.

so difficult. *See Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995), *aff'd* 519 U.S. 234, 117 S.Ct. 727, 136 L. Ed.2d 696 (1997). One partial regulatory solution allows the BIA to execute on the owners' behalf when they cannot timely reach agreement. 25 C.F.R. § 162.601. That is what happened here.

The local BIA Superintendent, George Davies, was authorized to sign the lease for the BIA, for a 25 year term with an option to extend for a second term. The Secretary also gave Davies an independent grant of authority in January 1984 to "approve the lease and any assignments and modifications regarding the lease that may arise during its term." ER 111. On February 2, 1984, Davies executed the lease, signing as "Lessor." CR-56-1 at 6.

The Lease provides that Evans could renew at his exclusive option, "provided that notice of the exercise of such option shall be given by the Lessee to the Lessor and the Secretary in writing at lease [sic] twenve [sic] (12) months prior to said expiration of original term." Any notices under the lease were to be served "by certified mail….Copies of all notices and demands shall be sent to the Secretary….All notices to Lessor shall be sent to the landowers. The Secretary shall furnish Lessee with the current names and addresses of Lessor upon the request of Lessee." The lease indicates that "Lessor" was all the owners, whose names and addresses were at Exhibit A to the lease. There was no Exhibit A attached to the lease, however.

On January 30, 1985, Evans (unrepresented by counsel) sent a letter to the BIA, his fiduciary, stating that in accordance with the renewal option provision, "you are notified by receipt of this letter," that he was exercising the renewal option, thus extending the term to February 1, 2034. For the next twenty years until his death, Evans performed under the lease, spent millions developing the land in anticipation of a long lease term, and made more than $10,000,000.00 for the Allottees. CR-16, p. 21. Meanwhile, the BIA repeatedly reaffirmed that the lease had been renewed, and acted consistently with its grant of agency authority to modify the lease. CR-16, CR-26, CR-37, CR-78

Most notably, as found in *Grondal v. United States*, 682 F. Supp. 2d 1203, 1211 (E.D. Wash. 2010), the BIA approved –without seeking the landowners' approval – a sublease with a simultaneous term extension:

> TERM-OPTION TO RENEW: The term of this sublease shall be the time remaining on the twenty-five (25) year term as established in Master Lease No. 82-21 and shall begin approval by the BIA, [underline in original]1993, ***and the additional term of twenty-five (25) years exercised by Evans in the letter to the Superintendent on January 30, 1985***. CTEC's act of entering into this sublease by subscribing its name hereto shall be deemed as the exercise of its option to extend this sublease for the additional twenty-five (25) year term. The initial approval of this sublease by the Secretary shall be deemed to be ***an acceptance by the Secretary of such extension***. (Emphasis added).

In 2003, Evans died, leaving his MA-8 interest to his grandsons' business entity, Wapato (thus avoiding further fractionation). In 2005-2006, Wapato tried to renegotiate the terms of the lease, to extend it to 99 years. Seeking landowners' support, Wapato requested their names and addresses as provided by the lease; BIA responded that it would not provide their names – but that it would pass along to the landowners any notice given to it. *Wapato Heritage*, ---F.3d. --2011 U.S. App. LEXIS 5724 *18 n.4. As directed, Wapato served its proposal on the landowners through the BIA. The proposal included a statement that the lease renewal option had been exercised and attached Evans' 1985 renewal letter. CR-26 at 3.

A majority of landowners approved the 99-year lease. CR-16 at 17. However, BIA delayed approval. Wapato learned that its sublessor, the Confederated Colville Tribes – which is not a landowner, and whose tribal lands are not near MA-8 – was seeking a lease. CR-30 at 6. At the Tribes' prompting, in November 2007, BIA for the first time informed Evans' heirs – who by then had only very incomplete, jumbled records from the original transactions – that they had no extended lease term. CR-30 at 4.

The dispute then went to the BIA, the IBIA, the District Court, and to this Court, where the panel affirmed summary judgment against Wapato in an opinion,

published in part, entered on March 22, 2011, from which this petition timely follows.

In affirming summary judgment against Wapato:

The panel held the BIA was not the Lessor or a party to the lease, but failed to address the dispositive issue of whether, having signed as agent for Lessor and modified the lease in other ways as agent for Lessor, it could have extended, and did extend, the lease period as agent for Lessor;

The panel held the lease was not ambiguous as to whether the BIA was Lessor, but failed to address the dispositive issue of whether the lease was, at the least, ambiguous so as to raise a factual question of whether notice could be given to the Lessor (i.e. the landowners) **through** the BIA;

The panel held there was no evidence that Lessee had requested the landowners' names and addresses for notice in 2007, even though the record undisputedly showed the BIA instructed Lessee in 2005 that the BIA would not give Lessee their names and addresses, but would pass notice along to them.

The result of these errors was to exalt form over substance, ignore substantial compliance, and impair the BIA's ability to administer Native American trust land leases.

ARGUMENT

A. The *Celotex* Summary Judgment Standard Was Ignored, and the Trial Court and Panel Made Improper Factual Determinations.

This matter is before the Court on appeal from summary judgment. "The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. . . . [if] there is ***any evidence in the record*** from ***any source*** from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party ***simply cannot obtain a summary judgment***." *Celotex*, 477 U.S. at 322-23 (emphasis added). This also means that all facts and inferences must be construed in favor of Wapato. *Id*. The district court did exactly the opposite: it assumed without evidence that the landowners did not have notice of the lease renewal. The panel followed this error.

The BIA, a trust fiduciary to all the landowners, had an unqualified duty to keep them fully informed of the land's status. *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997) (cited favorably in *Lawrence v. DOI*, 525 F.3d 916 (9th Cir. 2008)). On summary judgment, Wapato Heritage is entitled to the presumption that the BIA fulfilled its duty in that regard.

Wapato need not rely on a presumption, however. The panel acknowledged that in 2005, the BIA informed Wapato that it would not give Wapato the landowners' names and addresses, but would send all of the landowners notices related to the lease.[3] It is a reasonable inference (in the absence of any living participant twenty-five years later) that exactly the same thing happened in 1985,

[3] ---F.3d. --2011 U.S. App. LEXIS 5724 *18 n.4.

which is why the late Mr. Evans wrote that he was serving notice of his exercise of the option in accordance with the renewal provision, by merely sending notice to the BIA.[4] On summary judgment, that inference must be drawn.

Notice through the BIA is consistent with the lease, which does not require Lessee to serve Lessor directly; the lease provides as to notice that: "Copies of all notices…shall be sent to the [BIA]. All notices to Lessor shall be sent to the landowners." At the very least, the lease is ambiguous on which party must send the notice along, and the ambiguity requires resolution by a jury, not by the judge on summary proceedings.

Further still, it is undisputed that the BIA sent every single landowner in 2005 Wapato's proposed new lease, which expressly included the information that the renewal option had been exercised. It is also undisputed that the landowners received that information previously, [5] and they took the benefits of Evans's development of the land in reliance on the BIA's approval of renewal. [6] No landowner ever objected to the renewal.

Not only did the panel err by finding facts on a disputed record, it found them inconsistently with an ongoing case in this Circuit. Both the trial court and

[4] The loss of evidence over decades exemplifies why courts developed the equitable doctrines of estoppel, ratification and laches, all of which apply here to the BIA in its roles as agent and administrator.
[5] *See* CR-16, CR-26, CR-37, and CR-78.
[6] CR-16, p. 21.

the Panel Decision rely upon the existence of "Exhibit A" to the Master Lease. The landowners, whom the panel held should have been served notice of renewal, were supposedly set out in that "Exhibit A," which fact supposedly lends weight to the (factual) conclusion that the lease unambiguously required direct service on each of them. But the BIA never established in its moving papers, nor even attempted to establish, that Exhibit A ever existed. In the related, pending, case *Grondal v. United States*, 682 F. Supp.2d 1203, 1209 (E.D. Wash. 2010),[7] the District Court found it did not:

> There is no "Exhibit A" of record and no evidence in the record whether "Exhibit A" ever existed.

Further, the court in *Grondal*, 682 F. Supp. 2d at 1211, based on essentially the same record as in this case, correctly found:

> The written record reflects that during the course of over twenty years, Evans and his successors after his death, the BIA, and some of the Indian landowners proceeded, without questioning, upon an assumption that the term of the Master Lease would be and had been validly extended an additional 25 years to the year 2034. For example, in 1996, the BIA sent letters to certain MA-8 landowners stating "the term of this lease is to expire February 1, 2034." Ct. Rec. 90, Ex. 35. In 2004, the BIA listed itself as the "landlord" in a document provided to the Washington state liquor control board and also stated

[7] *Grondal* involves the same property and the same lease, and the same parties are involved – but, in addition, the individual landowners are also parties. Although the unpublished portion of the panel opinion holds the landowners were not necessary parties required to be joined it is respectfully asserted their interests are the primary interests in both cases.

> that the lease expired in 2034. Ct. Rec. 90, Ex. 69 at 403. As further described herein, business transactions and the development of MA-8 proceeded based upon these assumptions.

and:

> On August 6, 1993, Evans negotiated a sublease of MA-8 to the Colville Tribal Enterprises Corporation ("CTEC") for purpose of construction and operation of a casino on a portion of MA-8. Ct. Rec. 90, Ex. 4. The sublease references Evans' January 30, 1985 letter and states that the option to renew the Master Lease had been exercised by that letter. Although the BIA would fourteen years later take the position that the option to renew the lease had not been properly exercised, the BIA approved the CTEC sublease on November 10, 1993 apparently without questioning the term of the Master Lease.[8]

While the court in *Grondal* gives full and proper weight and respect to the District Court decision in this case,[9] its decision illustrates why summary judgment in this case was premature and harmful:

> The court rejects the Federal Defendants' attempt to more broadly characterize Judge Whaley's ruling as precluding Plaintiffs from making any argument regarding the term of the Master Lease in this lawsuit. The Federal Defendants assert that any argument as to whether the Master Lease was or should be extended to

[8] See the detailed annotated "Statement of Facts" and the more than 40 exhibits therewith, filed pursuant to the District Court's Local Rule 56.1, at CR-16, and the additional "Statement of Facts" filed with the Motion for Reconsideration, at CR-37.

[9] *Grondal*, 682 F. Supp. 2d at 1219-1220 ("Though Plaintiffs were not a party to Judge Whaley's case, they are bound by Judge Whaley's narrow ruling because as to the issues decided, Plaintiffs' interests are aligned entirely with Wapato Heritage.")

> 2034 should be dismissed on the grounds of issue and claim preclusion because of Judge Whaley's decision in the Wapato Heritage case. However, estoppel applies only to preclude relitigation of issues actually decided in the proceeding. Judge Whaley's decision did not declare the expiration date of the Master Lease and more relevantly, did not address Plaintiffs rights to occupy MA-8. Notably, the landowners, the Master Lease lessors, were not even named parties to that lawsuit. Rather, upon Wapato Heritage's own submission of the issue to the court, Judge Whaley only ruled that Evans had not actually or substantially complied with the notice requirement of the renewal provision. Judge Whaley's decision forecloses re-litigation only of the three precise issues addressed by the ruling and identified above.

The impairment of proceedings in *Grondal* shows clearly why the courts should ***consistently*** apply the rule that the moving party "***simply cannot obtain a summary judgment***" if there is "***any evidence in the record*** from ***any source*** from which a reasonable inference in the [nonmoving party's] favor may be drawn." *Celotex*, 477 U.S. at 322-32 (emphasis added).

B. The Panel Ignored Actual Notice To The Landowers, Exalting Form Over Substance To An Inequitable Degree.

On summary judgment the landowners must be deemed to have received actual notice. Thus, the BIA, and the panel, invalidated the lease renewal solely on the trivial ground that the notice was not sent by ***certified*** mail. Yet the purpose of a certified mail requirement is to protect the sender – Evans – not the recipient.

Evans hurt only himself by relying on BIA to build a proper record of service, no conceivable harm was done to the landowners.[10]

In holding that the Master Lease was not properly extended, more than fifteen (15) years after the BIA acknowledged it ***had*** been extended, merely because of the non-prejudicial absence of certified mail, the panel elevated form over substance, and in doing so worked a harsh and unjust forfeiture upon Wapato – in clear violation of its fiduciary duty to the tribal member Mr. Evans, whom the BIA misled into believing he had successfully renewed the lease as a legacy for his grandchildren. *See Youpee*, 67 F.3d at 200 (Native Americans' right to devise BIA land trust interests is a valuable property right protected by the Fifth Amendment).[11]

In its Opening Brief to the Panel, Appellant argued:

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[10] Indeed, BIA failed to show or even hint how any lack of notice, even actual notice, could possibly have mattered. Federal contract law provides that the exercise of an option does not require any additional consent by the offerror. *Hi-Shear Tech. Corp. v. U.S.*, 53 Fed.Cl. 420, 435-36 (2002) ("The option giver, on the other hand, has the correlative liability to become bound to execute that exchange, and at the same time a disability to avoid it.") (citing IA Corbin, Contracts § 259 at 464 (1963 ed.)); *and see In re Robert L. Helms Constr. & Dev. Co., Inc.*, 139 F.3d 702,705 n. 9 (9th Cir. 1998).

[11] The BIA argued, and the panel suggests, that the BIA's fiduciary duty to the Colville Tribes requires it to act harshly towards the Evans grandchildren, who are not technically Native Americans. The BIA cannot, however, evade its duty to protect the rights of tribal members such as Mr. Evans to effectively, reliably devise their property. *Id.* (statute invalid because it impaired Native Americans' freedom to bequeath to family members).

> In this case, the only thing that is important is: Did the [BIA], through Mr. Davies (or otherwise) have the authority to accept the notice of extension as given, and the logical answer is yes – he had the authority to do everything else with the property, by delegation and regulation.

The Panel Decision addressed whether the BIA was the Lessor under the Master Lease, determined it was not, and further determined that ended the necessary inquiry. It did not address, however, the dispositive issue raised by Wapato, of whether, irrespective of the BIA being deemed the Lessor, the BIA had authority to "accept the notice of extension as given." That issue required the determination of facts, and mixed questions of fact and law. The Panel Decision determined the form of extending the lease term was incorrect and stopped there, elevating form over substance, and foreclosing development and jury consideration of facts pertinent to (1) whether actual notice was received by all landowners, (2) whether the BIA as agent for the landowners adequately received actual notice, or (3) whether the BIA had specific authority to grant the extension without the formality of the specific notice arguably required by the language of one portion of the Master Lease.

In doing so, the Panel Decision simply ignored the well-established federal common law doctrine of substantial compliance, and particularly that, generally, a person with actual notice cannot complain that some different form of notice was not given – a doctrine this Court has applied even to certain sorts of service of

process. *Straub v. A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994) ("When applying the substantial compliance test, the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance with the [Foreign Sovereign Immunities Act].") The issue of substantial compliance is a mixed question of law and fact. *Louisiana-Pacific Corp. v. ASARCO Inc*., 24 F.3d 1565, 1576 (9th Cir. 1994). On summary judgment, an issue of substantial compliance is not ripe for determination.

C. The Panel Decision Flouts The Supreme Court's Holding And BIA's Own Practice That BIA Acts As Agent In Modifying Lease Terms.

This Court's panel, in relying upon *United States v. Algoma Lumber Co*., 305 U.S. 415, 421 (U.S. 1939) to show BIA was not itself a party to the lease and not literally the "Lessor," missed the point of *Algoma Lumber*, that BIA is, however, the lessor's agent:

> It is thus on its face the contract of the Klamath Indians executed by the Superintendent, acting ***as their agent***. The form of the contract and the procedure prescribed for its execution and approval conform to the long-established relationship between the government and the Indians, under which ***the government has plenary power to take appropriate measures to safeguard the disposal of property*** of which the Indians are the substantial owners.

As trustee, the BIA gave its Colville Agency branch the express authority to act as agent:

> You may now approve the lease and any assignments and modifications regarding the lease which may arise during its term. CR-35-3.

The BIA recognized it could modify the lease by approving a sub-lease extending out to 25 years past the original lease term. This shows the scope of the BIA's management authority. It also constituted an express reaffirmation and ratification of the lease extension, and even an acceptance if BIA had not accepted the extension previously. The BIA's own adjudicatory ruling at *Siegfried v. Area Director, Billings, et al.* 81 I.D. 718; 1974 I.D. LEXIS 135; 3 IBIA 195 (I.D. 1974) establishes it may approve and accept a lease renewal, even where the renewal notice was not addressed to the Area Director as the lease specified. That holding as to the breadth of the BIA's management power under 25 U.S.C. § 380 – unlike the agency's short-sighted, contrary, strategic litigation position here – is entitled to *Chevron* deference. *Williams v. Babbitt*, 115 F.3d 657, 660 n.4 (9th Cir. 1997) (IBIA rulings within BIA's scope are entitled to Chevron deference).

When an agent with plenary power to "safeguard the disposal of [trust] property" receives notice of a lease extension, accepts it, repeatedly acknowledges its existence and effect in writing, uses it for the benefit of the landowners by making a further contract (the casino sub-lease the sublease) for the principal the

terms of which depend upon the lease extension having been valid, is it not clear as a matter of law that notice to the agent was notice to the principal? It is, after all, a "well established rule that notice to an agent constitutes notice to the principal." *Kern Oil & Refining Co. v. Tenneco Oil Co*., 792 F.2d 1380, 1387 (9th Cir. 1986).

On summary judgment, is there not at least a factual question as to whether notice to the agent was a substantially compliant notice to the principal?

If the form of the notice in this case is to be so exalted over more than twenty (20) years of substance, it would violate the venerable principles outlined by Justice Cardozo in *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242-244 (N.Y. 1921):

> [T]he significance of the default is ***grievously out of proportion to the oppression of the forfeiture***.

What the government is asking for in this case is nothing less than forfeiture of a 25-year tenancy right on extremely valuable property. Equity and the law both abhor a forfeiture. *Harlan v. McGraw*, 107 Wash. 286, 292-293 (1919). "Equity has ever been jealous of the right of forfeiture, and has never enforced it unless the right thereto has been so clear and insistent as to permit of no denial." *Id.* That factual issue should go to a jury.

CONCLUSION

For the reasons and upon the authorities above set forth, a Panel Rehearing, or Rehearing En Banc, is respectfully requested.

RESPECTFULLY SUBMITTED this 6th day of May, 2011.

JOHNSTON LAWYERS, PS

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-36150

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Petition of Appellants is proportionately spaced, has a typeface of 14 points or more and contains no more than 4080 words (petitions for rehearing must not exceed 4200 words).

Dated: May 6, 2011

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Attorney for Appellants

Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer (signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

_X___ Proportionately spaced, has a typeface of 14 points or more and contains _4080_____ words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: May 6, 2011

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Attorney for Appellants

STATEMENT OF RELATED CASES

I certify that pursuant to Fed. R. App. P. 28-2.6, I know of no related cases pending in this court.

There is a related case pending in the United States District Court for the Eastern District of Washington, *Grondal, et al v. United States of America, et al,* Cause No. CV-09-0018-JLQ.

Dated: May 6, 2011.

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Attorney for Appellants

CERTIFICATE OF SERVICE

Ninth Circuit Cause Number 09-36150

District Cause Number CV-08-177-RHW

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.

R. Bruce Johnston, being over the age of 18 and not a party to this action, certifies under penalty of perjury that on May 6, 2011, he caused to be filed and sent electronically via the Ninth Circuit ECF System, a true and correct copy of the **PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***, to which this certificate of Service is appended, and said document was also sent via e-mail attachment and U. S. Mail, to the following persons and parties: James A. McDevitt, United States Attorney, by Andrew S. Biviano, Assistant United States Attorney, 300 United States Courthouse, Post Office Box 1494, Spokane, WA 99210, Telephone: (509) 353-2767, Attorney for Defendants the United States of America, United States Department of the Interior, and the United States Bureau of Indian Affairs.

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