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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, Plaintiffs, vs. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, AND FRANCIS ABRAHAM, CATHERINE GARRISON, MAUREEN MARCELLAY, MIKE PALMER, JAMES ABRAHAM, NAOMI DICK, ANNIE WAPATO, ENID MARCHAND, GARY REYES, PAUL WAPATO, JR., LYNN BENSON, DARLENE HYLAND, RANDY MARCELLAY, FRANCIS REYES, LYDIA W. ARMEECHER, MARY JO	NO. 09-CV-00018-JLQ PLAINTIFFS' RESPONSE TO UNITED STATES' SUPPLEMENTAL BRIEFING REGARDING REPRESENTATION

GARRISON, MARLENE MARCELLAY, LUCINDA O'DELL, MOSE SAM, SHERMAN T. WAPATO, SANDRA COVINGTON, GABRIEL MARCELLAY, LINDA MILLS, LINDA SAINT, JEFF M. CONDON, DENA JACKSON, MIKE MARCELLAY, VIVIAN PIERRE, SONIA VANWOERKOM, WAPATO HERITAGE, LLC, LEONARD WAPATO, JR, DERRICK D. ZUNIE, II, DEBORAH L. BACKWELL, JUDY ZUNIE, JACQUELINE WHITE PLUME, DENISE N. ZUNIE AND CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ALLOTTEES OF MA-8 (KNOWN AS MOSES ALLOTMENT 8)

Defendants.

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A. Introduction

The Complaint individually names as Defendants 35 beneficial owners of an undivided interest in an Indian allotment known as MA-8 ("Allottees"). ECF 1. The majority of Allottees neither appeared nor had independent legal counsel in this action. Plaintiffs obtained an order of default against 27 of them. ECF Nos. 102-104, 114-116, 135. Court mailings to them were returned undeliverable. *E.g.,* ECF 331, 332, 390, 392, 395, 397. Requests for Admissions to them went unanswered. ECF 295 at 17.

The U.S. has flip-flopped as to whether, and what extent, it represents the Allottees. First, the U.S. claimed it *did not* and *could not* represent them due to conflicts of interest. ECF 146. Then, the U.S. claimed it *did* represent them. ECF 186 at 7. Then, the U.S. said it did not represent them *personally* but did represent their *interests* as trustee. ECF 232 at 2-4. The Allottees do not see the U.S. as their counsel. *E.g.,* ECF 99; ECF 326. The confusing state of the Allottees' legal representation precludes settlement negotiations and breaches the U.S.' fiduciary duty as trustee to its beneficiaries. *E.g.,* ECF 315 at 8-10.

Meanwhile, the U.S. colluded with the Colville Tribe for the benefit of the *Tribe*, and *not* the Allottees. As one example, the U.S. aided the Tribe in quietly purchasing unrepresented Allottees' allotments, at rates below fair market value. ECF 347 at 4-6; ECF 382 at 7-9. All such purchases were approved by the Colville BIA Superintendent (*i.e.*, the U.S.), who in Jan. 2017 was elected to head the Colville Tribal Public Safety Division, which oversees tribal legal services. ECF 382 at 9; ECF 386 at 6. Further still, Wapato

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Heritage reports "the BIA has been complicit in making sweetheart deals with the Colville Confederated Tribes regarding rent, terms, etc., to the most extreme disadvantage of the [A]llottees . . . ." ECF 386 at 3. The U.S. cannot credibly claim to represent the Allottees or their interests while also representing the directly adverse interests of the Tribe.

But the U.S.' interests are also directly oppositional to the Allottees. In the event the land is no longer trust land (an issue still to be determined), then the Allottees have a significant claim against the U.S. for failure to advise them that MA-8 passed into non-trust status more than 80 years ago by Act of Congress. ECF 314 at 6-8; *see also* ECF 188 at 12-13 ("The impropriety of preventing counsel to a *cestui*, to prevent the *cestui* from exercising rights against the trustee, is, well – self-evident.").

On Nov. 1, 2019, this Court directed Federal Defendants to file a supplemental brief "explaining their position on the legal representation of individual Defendants in this matter." ECF 389 at 2. Federal Defendants' brief addressed a morass of unrelated issues concerning the alleged trust status of the land, whether Defendants were bound by the 2005 mediation, and a skewed case history. Plaintiffs instead point this Court to more accurate and neutral background facts in the record. ECF 144 at 3-14; ECF 88; ECF 294; ECF 297.

To be clear, the *only* question presently before this Court is whether the Allottees must be supplied with representation before the remaining legal questions may be finally resolved. As this brief will make clear, the answer is "yes." Representation must be supplied—as Judge Quackenbush, Plaintiffs, Wapato Heritage, and the Allottees have

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acknowledged—and *adequate* representation is essential to protect the Allottees' interests.

B. Factual Background

1. Jan. 2009: The U.S. Does Not Represent the Allottees.

This lawsuit was filed on Jan. 21, 2009. ECF 1. Judge Quackenbush earlier recounted the appearances:

> The Federal Defendants are named in their alleged role as trustee over MA-8 as Indian trust land. Two of the Defendant MA-8 landowners are not individuals: the Colville Tribe has acquired an approximate 18% ownership interest in MA-8; and Wapato Heritage has a life estate ownership interest in MA-8 (approximately 23.8%), measured by the last surviving great-grandchild of Evans. Plaintiffs and Wapato Heritage contend that the Colville Tribe is pushing the Bureau of Indian Affairs to terminate the Plaintiffs' interests in their camping and other interests in order that the Tribe may become the lessee and occupier thereof in connection with its casino operations.
>
> The Federal Defendants have not entered an appearance on behalf of the individually named Defendant landowners. Eight of the 35 individual Defendants filed identical *pro se* Answers to the Complaint denying all allegations. (ECF Nos. 125, 134, 138-142). **Plaintiffs motioned the Clerk for an Order of Default which was entered against 24 individual Defendants.** (ECF No. 135).

ECF 329 at 20-21 (emphasis added).

Plaintiffs have not executed on the Order of Default, but:

> The defaulted Defendant Landowners are deemed to have admitted that Plaintiffs have a valid right to use and occupy the Mill Bay Resort until 2034. (ECF No. 294 at 23.) Likewise, the Defendant Landowners who have appeared, but failed to answer Plaintiffs' Requests for Admission within the requisite 30 days have admitted the same and also admitted that they provided the BIA with express authority to act on their behalf with regards to the entirety of the MA-8 lease and

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> contract transactions, including acceptance of the 2004 Settlement Agreement. (*Id.*)

ECF 295 at 17.[1]

On Sept. 3, 2009, Defendant Paul Wapato, Jr., wrote a letter to the Court opining that, "the BIA acted in response to . . . the Confederated Tribes . . ."; the individual Indian owners named to the suit "generally have low income and relatively low sophistication, hav[e] involvement considerably different than the Department of Interior, the Bureau of Indian Affairs, and the Confederated Tribes of the Colville Reservation"; and while "the individual Indian owners have appealed to the BIA and the Tribe to provide legal counsel in this matter, we have been flatly rejected." ECF 99; ECF 329 at 26.

On Jan. 12, 2010, in issuing an Order on several dispositive motions (ECF 144 at 3), Judge Quackenbush noted his similar concern:

> On October 29, 2009, the court heard oral argument on all motions. . . . None of the individually named Defendants who have ownership interests in the real property known as MA-8 appeared. The court notes that the United States has not entered an appearance on behalf of any of the named individual Indian landowners. The court does not know why such an appearance has not been filed since the United States actually *granted* the Master Lease (as opposed to simply

[1] While Plaintiffs reluctantly concede that equity and fairness militate against entry of Judgments against those unable to properly defend themselves, a more palatable result would be for this Court to enter the Judgments and hold the United States responsible for the damage to the Allottees arising from lack of representation.

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> approving it) on behalf of at least certain landowners pursuant to its authority under 25 C.F.R. § 162.601. More importantly, 25 U.S.C. § 175 provides that "[i]n all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity," although the statute is not mandatory. *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953) (holding that 25 U.S.C.A. § 175 is not mandatory and that its purpose "is no more than to insure the Indians adequate representation in suits to which they might be parties.") Unlike this case, in *Siniscal*, the Indians named were being sued as individuals and "not with reference to any right in which the United States . . . is in the position of trustee or guardian." *Id.* At least one court has recognized where there is a possible conflict of interest between the Indians and the United States, it may be proper for the Indians to be represented by private counsel *State of New Mexico v. Aamodt*, 537 F.2d 1102, 23 Fed. R. Serv. 2d 810 (10th Cir. 1976). The United States has not provided any reason for its failure to enter an appearance on behalf of the un-represented individual Indian landowners to make certain they have adequate representation in this action.

ECF 144 at 2-3 (footnote omitted; emphasis original). Judge Quackenbush Ordered the U.S. to, "file a statement setting forth its reasons for failing to enter notices of appearance on behalf of the individually named defendant allottees pursuant to 25 U.S.C. § 175 and *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953)." *Id.* at 39.

On Jan. 20, 2010, Wapato Heritage's counsel wrote to the U.S. Attorney's Office:

> [T]he statutory requirement that the individual allottees be provided with counsel, together with the absence of such counsel, erected formidable barriers to our ability to act in this case. We have further been constrained . . . from attempting to negotiate a mutually beneficial solution to all of the issues confronting the MA-8 owners, due to the allottees' trust status (even though your government entity clients have breached that trust) and their clear need for competent, independent representation in regard to such a significant and potentially complex transaction. . . . [C]ompetent representation of all parties is the most

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> likely path to a rational, mutually beneficial settlement of disputes.
>
> . . . [A]fter reviewing *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953), we respectfully assert that the obligation to provide "adequate representation" under 25 U.S.C. § 175 *is* mandatory if the action is: "with reference to any right in which the United States or any officer thereof is in the position of a trustee or guardian" to the allottee Indian. *Siniscal* at 208 F. 2d 410. In that case, the action was brought by the U.S. Attorney and had nothing to do with the rights guarded by trust status. This case is quite different. . . .
>
> In this context, as pointed out in *Siniscal* at 208 F. 2d 410, it is "obvious" that the U.S. Attorney may not act for an individual Indian in any setting where the U.S. Attorney has a conflict of interest. To do so would involve a gross violation of RPC 1.7, and be cognizable under LR 83.3.
>
> All this is to say that we object most strenuously to the tactic . . . of leaving the individual Indian allottees in this case without adequate or independent counsel, with which they (and we) may confer. We respectfully assert that tactic is affirmative misconduct by your government entity clients, in breach of their fiduciary duties.

ECF 315 at 8-10 (emphasis original).

Shortly thereafter, responding to Judge Quackenbush's Jan. 12, 2010 Order, the U.S. defended its position that it ***did not*** represent the Allottees:

> It was apparent to the BIA and the United States Attorney's Office . . . that given the differences of opinions among the Indian landowners regarding possible settlement positions and options, that it ***could not*** represent all the Indian landowners, individually. Consequently, . . . the United States Attorney . . . chose to exercise his discretion under 25 U.S.C. § 175 and avoid the significant possibility that conflicts among the individual Indian defendants, and between some of those defendants and the Bureau of Indian Affairs would arise.

ECF 146 at 2 (emphasis added). Glossing over the lack of known contact information for

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some (possibly many) Allottees, the U.S. claimed its counsel:

> [U]rged those individual defendants who had either contacted the United States Attorney's Office or the Solicitor's Office, or who had participated in the settlement conference of April 14, 2009, to seek separate representation and took steps to facilitate representation by contacting a legal services organization and referring them to that organization for legal assistance if they qualified for legal services.

Id. The U.S. did not mention how many Allottees had contacted them, how many Allottees had participated in the 2009 settlement conference, or what efforts (if any) the U.S. had taken to obtain representation for the Allottees in default.

Judge Quackenbush was not convinced. During a Mar. 30, 2010, Telephonic Scheduling Conference, he again raised his concerns:

> . . . [W]hich brings into the forefront my ongoing questions to the Government responded to by counsel but not to my full satisfaction. Here we have a large number of fractionalized fee owners who, apparently, according to Judge Whaley's ruling, are the lessors under the Master Lease. I think they have been joined in this action . . . . I don't know what the Government's going to do about its alleged trustee role in letting . . . any alleged order of default be entered against those landowners on the claims that they're estopped to deny that the lease was extended. . . . And I want you to be prepared, [counsel for the United States], to tell me, when we next meet, as to what's going to happen if these people are defaulted out. Where does that leave us in this case? Does that say, as to those people's interests, Wapato Heritage has a lease that expires in 2034 as opposed to the current status that Judge Whaley found that there was not a proper extension of the 2034 lease? So, that's another thing for you to assist me on.

ECF 177 at 8:23-10:1. Judge Quackenbush set a hearing for May 13, 2010, and requested position statements from the parties regarding:

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> 5) **Unrepresented Individual Indian Defendants.** What is the nature and extent of the trust obligations owed by the BIA to the individual Indian owners who are named defendants, including those presently in default? Does the BIA have a duty to insure adequate legal representation for those persons in this lawsuit? Is the referral to a legal services organization sufficient to fulfill the obligation owed to those individuals? What would be the effect of a default judgment against those owners be if the court entered default judgment stating that such owners are estopped from denying the existence of the Master Lease to 2034?

ECF 178 at 2; ECF 180.

2. <u>Mar. 2010:</u> The U.S. Now Claims It <u>Does</u> Represent the Allottees.

Responding to the Court's March 30, 2010, questions, the U.S. suddenly changed its position on representation, explaining:

> Because this suit concerns Indian trust land and the beneficial interest of individual Indians, the United States is, as it must be, a party to this suit. **And, as trustee, the United States represents the interest of the Indians and their trust assets. That is, in its role as trustee in this matter it stands in the shoes of the individual Indians with respect to their beneficial interests in this trust land.**

ECF 186 at 7 (emphasis added).

Defendant Wapato Heritage noted the inconsistency:

> In their earlier response . . ., the U.S. Parties acknowledged the (obvious) conflicts of interest between the individual allottees and the Tribe which owns and operates the casino. Now they seem to say they can represent "all" of the Indian landowners. On this record that has not happened and cannot happen. . . . [T]he fiduciary duty of the BIA requires appointment of separate counsel.
>
> It is respectfully submitted that the only reason the BIA has not provided separate counsel to the individual allottees is that any

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> competent lawyer so appointed would sue the BIA for the damage done while it acted with a conflict of interest. The cases cited by the Court on March 30, 2010, and specifically addressed to the parties hold that such a suit may be maintained by the allottees in the District Court. The impropriety of preventing counsel to a *cestui*, to prevent the *cestui* from exercising rights against the trustee, is, well – self-evident.

ECF 188 at 12-13.

Individual Defendants Paul Wapato, Jr., Gary Reyes, and Francis Reyes, responding through temporary, pro bono counsel,[2] argued similarly:

> [T]he office of the United States Attorney, clearly has not been representing the interests of the Indian Allottees . . . . This lack of representation appears to be more focused than merely benign neglect.
>
> The BIA asserted earlier that it did not undertake to represent the individual Allottees due to a conflict of interest. When the Court asked for additional input on the issue of representation, the BIA has again returned to the absurd contention that the BIA represented all of those to whom the BIA owed a fiduciary duty, i.e., the Tribe and the individual Allottees. That is simply impossible – the counterpoise of the interests of the lessor and lessee under a commercial lease is a matter of axiom – it is a conflict of interest which cannot be explained away.
>
> The general subject of the payment of attorney fees under 25 U.S.C. § 175, in cases where the U.S. Attorney is unavailable due to a conflict of interest is generally discussed in: *In the matter of expenditures for legal expenses of Indian tribes*, Opinion B-114868, Comptroller General of the United States, 56 Comp. Gen. 123, 1976 U.S. Comp. Gen. LEXIS 14, December 6, 1976. . . . Thus, there is certainly no impediment to the payment of attorney fees for representation of Individual Indian Allottees in this case.
>
> The BIA argues that the representation of the Individual Indian

[2] Pro bono counsel ceased this representation as of February 2013. ECF 325.

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> Allottees by the U.S. Attorneys is discretionary, which in certain cases it may be. . . . However, that does not end the inquiry or analysis. . . . Because it is clear that the BIA can pay for the attorney fees of the Individual Indian Allottees, and it has a non-waivable fiduciary duty to protect the interests of the Individual Indian Allottees in this litigation, it follows that the duty is at least quasi-mandatory, and the burden should be thereby shifted to the BIA to explain why it should not provide attorney fees for independent counsel to the Individual Indian Allottees, when it is (and has been) effectively providing counsel through the U.S. Attorney's Office for the Colville Tribes.

ECF 195 at 14-15.

On May 24, 2010, Judge Quackenbush issued his written Order following the May 13 hearing, first clarifying that claims *were* pending directly against the Allottees:

> Before Wapato Heritage's appearance, this case concerned the adjudication of the Plaintiffs Mill Bay RV Park members' right to use and occupy MA-8. Those Plaintiffs have asserted a claim for declaratory relief against the MA-8 landowners asserting that they are "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034." *See* Ct. Rec. 1 [Complaint] at 43, Prayer for Relief, ¶ 2. This claim for relief is distinct from the Plaintiffs equitable *defense* to the Government's counterclaim for trespass and/or ejectment, which also remains pending. The Government errs when it asserts that there are no claims asserted by Plaintiffs against the Indian landowners or that the court has "eliminated all outstanding issues except for the BIA's ejectment action." Ct. Rec. 158 at 4; *see also* Ct. Rec. 186; Ct. Rec. 158 at 3.

ECF 197 at 2. But with information that the parties were engaging in settlement communications, Judge Quackenbush issued a stay and ordered in-person negotiations:

> In advance of this meeting, the court directs Government counsel to consult with the . . . Secretary of the Interior for Indian Affairs as to whether the agency will, without court order, make available to the

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> individual Indian Defendants sufficient funds to be utilized for representation of those Defendants by private legal counsel. The Department of Justice being faced with conflicts in cases involving Indians and Indian lands is not that uncommon. *See e.g.,* Ann C, Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GALR 1307 (2003); *See also Arizona v. California*, 460 U.S. 605 at 650-51 ("There is considerable evidence that the Indians are the losers when such situations arise.") **The court continues to have concern that left unrepresented in this litigation, the Indian trust obligations and interests likely of critical economic importance to the individual beneficial landowners will be jeopardized or compromised. Rather than relying upon conflicted or no counsel, history proves that those with direct interests in the outcome of a case should be appropriately represented.**

Id. at 3-4 (emphasis added).

On July 29, 2011, Federal Defendants informed the Court they had consulted with the Departments of Interior and Justice and "both Departments have represented that there are no regulations or other policies that allow for the use of federally appropriated funds to pay for private counsel to represent Indians." ECF 209 at 7.

3. <u>Mar. 2012:</u> The U.S. Now Claims It <u>Does Not Personally</u> Represent the Allottees, But <u>Does Represent Their Interests</u>; Attempts to Dismiss them from the Lawsuit.

Despite the government's original decision to exercise its discretion *not* to represent the Allottees due to conflicts of interest (ECF 146 at 2), and its later claim that it *did* represent the Allottees (ECF 186 at 7), in its Mar. 22, 2012 MSJ Re: Ejectment, the U.S. now purported to represent the interests of the Allottees as trustee but stated it did not represent them personally. ECF 232 at 2-4. For this reason, the U.S. argued the Allottees

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were not necessary parties to the lawsuit. *Id.*

Following the filing of the government's Motion, on May 29, 2012, Judge Quackenbush sua sponte lifted the stay. ECF 242 at 2.

In response to this Motion, Plaintiffs once again briefed the U.S.' responsibility to provide counsel to the Indian landowners individually (ECF 295 at 6-9), explaining the predicament caused by the U.S.' inconsistent positions:

> While Plaintiffs assert that MA-8 is no longer trust land, the United States asserts it is trust land. Because this case relates to property of which the United States considers itself trustee, the United States should be providing the Landowners with private counsel to defend the action. However, the United States continues to maintain two inconsistent positions. The United States' position on this matter is illustrative of the obstacles Plaintiffs have encountered from the very beginning. Throughout the years, the United States has claimed to represent the Landowners in some matters, refusing to allow Plaintiffs and Wapato Heritage to deal directly with the Landowners, while later stating that the United States could not bind the Landowners to any decisions and did not represent them during the times they claimed they did.

Id. at 8.

On Jan. 10, 2013, Judge Quackenbush heard argument on the U.S.' MSJ Re Ejectment (ECF 231), and the Colville Tribe's Motion to Dismiss (ECF 274), then directed:

> Both pending motions raise the following closely related, but distinct, questions regarding the portion of MA-8 at issue in this case: 1) whether the trust period has expired and/or whether the Act of June 15, 1935 applies to MA-8; 2) whether MA-8 remains land held in trust by the United States; 3) if the trust period is expired, whether this court would have authority to direct the issuance of fee patents; and 4) **whether any of these issues require and/or merit the appointment**

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> **of counsel for the individually named *pro se* and/or defaulted Defendant landowners.**

ECF 308 at 2 (emphasis added). Judge Quackenbush ordered supplemental briefing on these questions. *Id.*; ECF 310.

On Jan. 21, 2013, Plaintiffs submitted the requested supplemental briefing, and argued representation of the Indian landowners was mandatory in this instance:

> 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. 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 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.

ECF 312 at 6-7.

In response, the U.S. very briefly argued Plaintiffs "have not and cannot describe what [the conflict of interest] is" "between the Indian landowners and the United States." ECF 313 at 7. In further response still, Defendant Allottees Paul G. Wapato, Jr., Gary Reyes, and Francis Reyes, detailed the nature of the conflict:

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> The primary conflict of interest is found in the potential liability of the United States to the allottees for the loss and deprivation of trust status, if such be the case. And as an additional claim for liability and damages, the wrongful exertion of dominion and control over land that perhaps should have been released from trust status many decades ago. Who was responsible for promulgating the trail of devices that were used over time to extend the trust status of the Moses Allotments? The government. Was Executive Order 2109 issued on December 23, 1914 really not effective to extend the Moses Allotments because it placed reliance on the Act of June 21, 1906? If that is the case (as was addressed by the undersigned in a prior Memorandum to the Court), then the trust status should have ended long ago. If the failure to extend the trust status past March 8, 1936 was the cause of a possible lapse in trust status, then again it should have been over long ago. And in each case, the responsibility for the attempts to extend not being extended (if that is the conclusion) must reside with the government.
>
> ***And this is precisely why the Court must order the government to provide independent legal counsel for all allottees.*** The conflict of interest cannot be explained away or rationalized. . . . And once that is clearly in focus, it is also clear that the Court should not enter any rulings on trust status, or otherwise, until all allottees are represented by legal counsel and they have had an opportunity to confer with counsel, and, similarly, all lawyers who may be appointed to represent allottees must have the time needed to be fully abreast of all issues in the case. The presently unrepresented allottees have roughly 48% of the ownership, and with my clients' interests the individual allottees have a clear majority approaching 60%. They must be given a chance to be represented and heard in a meaningful way.

ECF 314 at 6-8 (emphasis original).

Wapato Heritage responded further with attachment of its January 20, 2010, letter to the U.S. Attorney's Office explaining the conflict and the duty of the U.S. to provide independent representation. ECF 315 at 7-10.

On Mar. 5, 2013, thirteen Allottees petitioned the Court for appointment of counsel,

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stating on each petition: "It is . . . the duty of the United States Government to provide legal counsel for all of the individual allottees, and . . . the Court should not enter any rulings on trust status, or otherwise, until all allottees are represented by legal counsel . . . ." ECF 326.

4. <u>Aug. 2014:</u> The Court Asks the U.S. to Explain Itself.

On Aug. 1, 2014, the Court issued a 33-page Memorandum and Order RE: Appointment of Counsel, expressing concern regarding the unrepresented nature of the individually-named Defendant landowners. ECF 329. Judge Quackenbush stated in part:

> The claims and defense in this case concern the Plaintiffs' claims to occupy a portion of land known as Moses Allotment 8 (MA-8), an off-reservation allotment claimed by . . . some of the Defendants to be held in trust by the United States. Plaintiffs claim the Defendants are estopped to deny Plaintiffs' right to occupy the property. The two pending dispositive motions hinge upon the Plaintiffs' and Defendant Wapato Heritage's contentions that MA-8's trust period has expired and that the United States therefore lacks standing to seek ejectment as trustee. Of the 35 *individually* named Defendant landowners, just 3 have appeared with legal counsel; 9 have filed *pro se* Answers; 5 have filed *pro se* Declarations; 2 have written letters to the court; and 16 have expressed the desire for individual counsel. As "those with direct interest—economic, historical, spiritual—in the outcome of a case are their own best representatives," *Arizona v. California*, 460 U.S. 605, 652 (1983) (dissent), **the court will not finally rule upon the pending matters without independent legal counsel for the individually named Defendant landowners.**

Id. at 1-2 (italics original; bold emphasis added).

The Court once again ordered briefing from Federal Defendants designed to offer assurance that the Allottees' interests were protected. *See generally, id.* But Federal

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Defendants did not comply. On Feb. 23, 2016, Judge Quackenbush reiterated:

> **This court, having continually expressed its concerns over the lack of independent representation of the MA-8 landowners, and the potential conflicts between the position of the United States and the Indian landowners, directed the BIA to consider the provision of independent counsel for the un-represented MA-8 landowners.** As stated in this court's Memorandum and Order Re: Appointment of Counsel (ECF No. 329) dated July 31, 2014 (filed August 1, 2014) at 30, the landowner ". . . Defendants have the right to be represented by private counsel independent of any actual or potential conflict of interest." The BIA was further ordered to "file all BIA responses and decisions rendered in regard to requests for independent counsel made by any Defendant in the instant case." (ECF No. 329 at 32).
>
> **The BIA has not complied with that direction.** The BIA filed declarations from counsel (ECF No. 339) and the BIA Director (ECF No. 340), but never filed any agency responses and decisions concerning requests for independent counsel as specified in that Order. Two attorneys have now appeared on behalf of the "Marcellay Defendants," (ECF No. 341 and ECF No. 342), but no other attorney appearances have been entered on behalf of the many remaining landowners who are still unrepresented. Due to the noncompliance, the court has no basis to evaluate whether all individual landowners who requested representation have received independent counsel. **This is highly concerning to the court.**

ECF 345 at 2 (emphasis added). The Court entered *another* Order that, by no later than Apr. 1, 2016, Federal Defendants must identify all landowners of MA-8 and provide information regarding "the parties to the sale of any landowner's interest in MA-8 since the inception of this action on January 21, 2009," specifics of the sale of all such property, documents underlying such property sales, and whether each individual landowner requested appointment of independent counsel in connection with the sale. *Id.* at 3.

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On Apr. 1, 2016, multiple parties, including Plaintiffs and Federal Defendants, submitted documents and information to the Court concerning, *inter alia*, the requested interactions with the unrepresented Allottees. ECF 346-349. Federal Defendants for the first time itemized the number of allotment shares purchased from individual allottees. ECF 347. **This filing disclosed that, between 2013 and Apr. 2016, the Colville Tribe purchased allotments from Allottees (many unrepresented) to the tune of $2,162,694.43 for 88,140 shares representing 13.6% of the total allotment shares.** *Id.* at 4-6. Federal Defendants made no further filings reflecting similar information from Apr. 2016 to present, although Plaintiffs anticipate such would reflect more unrepresented Allottee shares purchased by the Colville Tribe.

The parties heard nothing further from the Court until its June 27, 2018, Order Directing Additional Filings, in which the Court noted some materials submitted Apr. 1, 2016, raised questions concerning, *inter alia*, "the amount of rent money paid by the Mill Bay Members pursuant to the 2004 Settlement Agreement that was passed on to the individual landowners, if any[.]" ECF 353 at 3. The Court directed additional filings on this and other questions. *Id.* In this Order, the Court did not address further its concerns regarding the unrepresented nature of the Allottees. On Sept. 16, 2019, Judge Quackenbush recused himself (ECF 366), and Judge Peterson was appointed. ECF 367.

On Nov. 1, 2019, Judge Peterson directed the filing of additional briefing regarding the issue of the Allottees' legal representation. ECF 389.

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C. Argument

Plaintiffs stand by the concerns raised repeatedly by themselves, by Wapato Heritage, and by the Allottees over the past 10 years, that: (1) under the facts and circumstances of this case, the U.S. has a *duty* to provide representation to the Allottees; (2) however, the U.S. has a non-waivable conflict of interest in attempting to do so via the U.S. Attorney's Office; and (3) therefore, the U.S. has a fiduciary duty as trustee to provide *independent* counsel to the Allottees in this action.

It bears additional emphasis that 25 U.S.C. § 175 has mandatory application under the facts and circumstances of this case. Notwithstanding that the case involves public lands (ECF 295 at 7; ECF 312 at 6-7), the U.S.' flip-flopping on this issue—first purporting not to represent the Allottees due to the inherent conflicts of interest, then claiming to represent them all, then claiming not to represent them personally but to represent their interests as trustee—should now *mandate* that it provide the Allottees independent counsel. Indeed, the U.S. earlier undertook the representation, and subsequently a clear conflict of interest between it and the Allottees arose. In such case, the U.S. *must* supply replacement counsel. *See* ECF 312 at 6-7. Even Judge Quackenbush acknowledged, in circumstances such as the present, the typically discretionary application of 25 U.S.C. § 175 may become mandatory. ECF 144 at 2-3.

These legal principles become even more basic where, as here, the U.S. has acted to manipulate and undermine the interests of the Allottees, aiding the Colville Tribe in

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purchasing up unrepresented Allottees allotments without notice of the lawsuit or fair market value pricing, and all the while selectively purporting to represent the Allottees' interests only when doing so benefits its own interests, denying such representation when no longer convenient. *E.g.,* ECF 295 at 8-9; ECF 347 at 4-6; ECF 382 at 7-9. It is simply not enough that the U.S. referred to a legal services organization those unrepresented Allottees who actually requested the provision of counsel. ECF 146 at 2. *Twenty-seven* Allottees have made no appearance in this action, and contact information for many of them is unknown. It is clear the U.S. has never even notified them of this action, let alone its potential implications to their interests.

What has the U.S. done to locate the missing Allottees and provide notice of the pendency of this action, the outcome of which will affect their legal rights? What has the U.S. done to find these individuals and inquire as to whether they want counsel in connection with the lawsuit? In connection with the sale of their allotments to the Colville Tribe? What did the U.S. do to notify them of the existence and implications of this action upon approving the Colville Tribe's purchase of their Allotments? The answer to each question is clearly, "Nothing." *See also* ECF 188 at 12-13 ("[T]he only reason the BIA has not provided separate counsel to the individual allottees is that any competent lawyer so appointed would sue the BIA for the damage done while it acted with a conflict of interest.").

The central fact remains that the U.S. has *abandoned* this class of individuals—*its*

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trust beneficiaries—who "generally have low income and relatively low sophistication, hav[e] involvement considerably different than the Department of Interior, the Bureau of Indian Affairs, and the Confederated Tribes of the Colville Reservation." ECF 99; *see also* ECF 329 at 26.

In such case, how will this Court view Plaintiffs' inevitable efforts to execute on the Order of Default as to the Allottees? How will the Court treat Plaintiffs' use of the unanswered (and, therefore, admitted) Requests for Admission served on members of this group? *See also* ECF 295 at 17. As Judge Quackenbush recognized:

> [L]eft unrepresented in this litigation, the Indian trust obligations and interests likely of critical economic importance to the individual beneficial landowners will be jeopardized or compromised. Rather than relying upon conflicted or no counsel, history proves that those with direct interests in the outcome of a case should be appropriately represented.

ECF 197 at 3-4.

D. Conclusion

For the foregoing reasons, this Court should conclude as did Judge Quackenbush: "As "those with direct interest—economic, historical, spiritual—in the outcome of a case are their own best representatives," *Arizona v. California*, 460 U.S. 605, 652 (1983) (dissent), the court will not finally rule upon the pending matters without independent legal counsel for the individually named Defendant landowners." ECF 329 at 1-2.

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DATED the 14th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2020, 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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