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HON. ROSANNA MALOUF PETERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

PAUL GRONDAL, a Washington resident and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE	**Case No. CV-09-0018-RMP** **WAPATO HERITAGE BRIEF REGARDING LEGAL REPRESENTATION OF INDIVIDUAL INDIAN LANDOWNERS**

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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 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, SOMA VANWOERKON, WAPATO HERITAGE, LLC, LEONARD WAPATO, JR, DERRICK D. ZUNIE, II, DEBORAH L. BACKWELL, JUDY ZUNIE, JAQUELINE 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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I. STATEMENT OF MATERIAL FACTS

This case involves the rights of the current heirs of Wapato John, the original allottee of Moses Allotment #8 ("MA-8"), in Chelan, Washington. One of Wapato John's heirs, his brother Peter Wapato, was also the original allottee of the adjacent Moses Allotment #10 ("MA-10"). The late William Wapato Evans ("Bill Evans") was the surviving heir of Peter Wapato in his generation. Wapato Heritage, LLC (and predecessor entities) is the vehicle in which Bill Evans held his MA-10 and MA-8 interests.[1] It is now owned by his surviving daughter, Sandra Evans (an enrolled member of CCT), his surviving grandchildren Kenneth Evans and Jamie Jones, and the Estate of his other grandchild, the late John Wayne Jones. Jamie Jones and John Wayne Jones each have children, the sole heirs of their generation of Peter Wapato.

The other heirs of Wapato John, owners of undivided interests in MA-8, are real parties in interest. As Wapato Heritage informed the Assistant U.S. Attorney in 2010, the absence of counsel for the landowners "erected formidable barriers to our ability to act in this case."[2] CCT has chosen to sit on the sidelines, shielded by sovereign immunity. It is respectfully submitted that had independent counsel been appointed, this case would likely have been resolved long ago. It cannot fairly be resolved without independent counsel for the individual landowners.

The BIA erroneously treated MA-8 and MA-10 as "Indian trust" land, but did

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[1] ECF-91 at 2:8.

[2] ECF-315 at 9.

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nothing to administer them for the benefit of the Wapatos and their heirs except to keep ownership transfer records and issue "fee patents."[3,4] Frustrated with the BIA's do-nothing approach, Bill Evans took decisive action starting in the 1980s to help himself and the other heirs. For MA-10, he obtained an act of Congress allowing him to take a 99-year lease on the land.[5] He then developed MA-10 into a resort community, Wapato Point. Bill Evans passed away on September 11, 2003. Wapato Point continues to generate substantial income for his heirs, who are now the sole heirs of Peter Wapato.

Bill Evans was equally frustrated by the BIA's do-nothing approach to MA-8. For himself, and for his many relatives, Wapato John's other heirs, who were the other individual Indian landowners of undivided interests in MA-8, he wanted progress and income. Bill Evans obtained a Master Lease on MA-8 for a renewable term of 25 years.[6] He then, in an arms-length transaction, licensed use of MA-8 to Plaintiff RV Park for a

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[3] ECF-90-16, p. 8 of 31, Exhibit 103 to ECF-90.

[4] Indeed, in the early 1900s, the BIA conspired with certain non-Indians to defraud Peter Wapato and Wapato John out of most of the property, bringing MA-8 and MA-10 down from 640 acres each to their current size of less than 180 acres each. Order, August 1, 2014, ECF-329 at 6:18 – 7:26

[5] Order of August 1, 2014, ECF-329, at 15:23 – 16:17.

[6] ECF-91 at 3:2-8.

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period of 50 years.[7] And, again at arms-length, he subleased a section of the property to a subsidiary of the Colville Confederated Tribes ("CCT") for a casino.[8]

There is no evidence that the BIA would have done anything with MA-8 had it not been for the entrepreneurial efforts of Bill Evans, which provided income to its individual Indian landowners for the first time since Wapato John's death in 1911.[9]

Before Bill Evans's death in 2003, he made plans to develop MA-8 similarly to MA-10. His financial advisor and CPA Jeffrey Webb, now the executor of his estate and manager of Wapato Heritage, LLC, helped obtain the necessary Act of Congress. By PL 109–221 § 202 (HR 3351) May 12, 2006, amending 25 U.S.C. §415(a), a 99-year lease of MA-8 was allowed.[10] That was a long and expensive process.

Thereafter, a four-phase development was planned and begun at further great expense, and a replacement 99-year lease was proposed by Wapato Heritage.[11] The BIA interposed excessive delays in considering that proposal, while working with CCT,

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[7] This Court, following argument, correctly determined that the RV Park Expanded Membership Agreements were licenses rather than subleases. Order of January 12, 2010, ECF-144 at 29:8 – 30:16.

[8] ECF-329 at 18:10-16.

[9] Order of August 1, 2014, ECF-329 at 8:1–2.

[10] ECF-91 at 3:26 – 4:3; *and see* Order of August 1, 2014, ECF-329 at 16:17–20.

[11] Webb Declaration filed herewith, ¶¶ 4, 5.

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which wanted to take over MA-8 as Master Lessee.[12] Rather than pursue Wapato Heritage's development program, the BIA took the position that the Master Lease terminated on February 9, 2009, and immediately entered into a reduced-rate, below-market lease for the casino and undertook to eject the RV Park.[13] Replacing Bill Evans' achievements with this sweetheart deal has caused and will continue to cause significant loss to Wapato Heritage and the individual Indian landowners. [14]

II. JOINDER IN PLAINTIFF'S BRIEF

Further facts and procedural history are set forth in the Court's Order of August 1, 2014, ECF-329, which tees up the current issue before the Court: the need for independent representation of the individual landowners of MA-8. Plaintiffs RV Park and Grondal have most ably argued why independent counsel are needed, in their contemporaneously filed brief. Wapato Heritage joins in Plaintiffs' arguments, and adopts and relies upon the annotated facts in Plaintiffs' Brief.

III. U.S. PARTIES' CONFLICTS OF INTEREST

Ten years ago, Wapato Heritage confronted the US Attorney with his obvious conflicts of interest. ECF-315, p. 9. The court referred to this letter extensively in the Order of August 1, 2014, ECF-329, p. 27:20-28:5. The Court correctly noted that the

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[12] *Id.*; *and see* Order of August 1, 2014, ECF-329 at 15:24–26, 21:17-19.

[13] Webb Declaration filed herewith ¶¶ 6, 7.

[14] *Id.* ¶¶ 4 – 9.

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United States parties and the U.S. Attorney in particular suffer from both "actual" and "potential" conflicts of interest.[15] Specifically, the Court held:

> The United States has not entered an appearance on [the individual Indian owners'] behalf, because the actual or potential conflict of interest is so obvious: in the circumstances presented herein, it could not meet its obligations to represent the agency, serve in its capacity as trustee, and for example, assert that legal title vested in a Defendant pursuant to an agreement, executive order, or statute. Moreover, given the BIA's extensive involvement in the negotiation of the Master Lease and management of the property and its unique relationship with one of the landowners – the Tribe – the BIA's interests in this case are not completely identical to those of the Defendant landowners, and its positions could potentially conflict with the interests of the Defendant landowners. See e.g., *Nevada v. U.S.*, 463 U.S. 110 (1983)("If in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government).[16]

These points deserve elaboration, to show why the Court should now take the next step to protect the individual owners' interests.

A. Actual Historical Conflicts of Interest of the U.S. Parties.

1. Plaintiffs' Claims Against Individual Indian Landowners.

As this Court noted, "the landowners, the Master Lease lessors, were not even named parties to" the prior litigation before Judge Whaley.[17] In that action, it was

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[15] Order of August 1, 2014, ECF-329 at 7.

[16] *Id.* at 26:6–18

[17] Order of January 12, 2010, ECF-144 at 23:4–5.

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specifically held that "[t]he BIA is not a party to the Master Lease."[18] In substance this court has held that the individual Indian landowners are the real parties in interest:

> the court … construes Plaintiffs' Complaint and Answer to the Government's ejectment counterclaim (Ct. Rec. 43) as a claim for declaratory relief against the MA-8 landowners, on whose behalf the United States has not entered an appearance.[19]

The Court thus allowed Plaintiffs' claims for declaratory relief as being against each and every individual Indian allottee who was named in and served with (or otherwise appeared) in this case.

By its Answer to the Plaintiffs' Complaint, Wapato Heritage admitted the factual and legal basis for the Plaintiffs' claims against the individual Indian defendants and joined in Plaintiffs' demand for declaratory relief.[20] In addition, Wapato Heritage, joined by Plaintiffs, requested additional declaratory relief that MA-8 is not Indian Trust Property or Indian country, and that all the owners are entitled to patents in fee.[21]

Virtually all of the individual Indian landowners are in default under ECF-135, or subject to immediate default. Therefore, without independent counsel, and extraordinary relief granted to the individual Indian landowners on petition of their new independent counsel, the Plaintiffs and Wapato Heritage are entitled to an immediate

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[18] *Id*. at 21:15. *See also* ECF-144 at 37:18 (BIA is "non-party to the contract.")

[19] Order of August 1, 2014, ECF 329 at 3:1–2 (emphasis added).

[20] *Id.* at 22–23.

[21] *Id.*; Wapato Heritage Answer, ECF-170 at 24:24–27:22.

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declaratory judgment against the individual Indian landowners, and Wapato Heritage is entitled to immediate monetary judgements against them as well. The only basis for withholding entry of those default judgments would be the legal representation issues repeatedly raised by the court.

2. BIA Acted for CCT, without Consulting with Allottees.

As the Court held on January 20, 2010, applicable regulations required the BIA to act in the interests of the individual Indian landowners, and to consult with them first regarding their property rights, and the BIA failed to do so.

> 25 C.F.R. §162.623 deals specifically with holdover tenants in non-agricultural leases and is entitled "What will BIA do if a tenant holds over after the expiration or cancellation of a lease?" It provides:
>
> > If a tenant remains in possession after the expiration or cancellation of a lease, we will treat the unauthorized use as a trespass. **Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease**, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.
>
> 25 C.F.R. §162.623. The regulations also indicate that in the event a tenant does not cure a lease violation within the requisite time period, the BIA must, under 25 C.F.R. § 162.619, "consult with the Indian landowners, as appropriate," and determine what remedies should be invoked, including for example whether to provide the tenant with additional time to cure.
>
> The regulations make clear that the entire purpose of the authority and remedies provided to the BIA for lease violations is to ensure

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> that the landowners' property and financial interests are protected….
>
> **There is no evidence in this case that the BIA has consulted with the Indian landowners** or that this trespass action is a response to their concerns. In addition, the record in this and Judge Whaley's case establishes that the BIA should "have reason to believe" that **the tenant, Wapato Heritage, was and is engaged in efforts to obtain a new [99-year] lease**.
> ****
> If efforts to obtain approval on the 99 year lease are actually ongoing, or the BIA has yet to consult with the Indian landowners in regards to the issue of Evans' failure to properly renew under the Master Lease, then the BIA's trespass action is inappropriate.[22]

The Court also held that the BIA has been acting in the interests of CCT, not of the individual Indian landowners, where CCT was "seeking to be the new Master Lease holder upon expiration of the current Master Lease."[23]

Instead of consulting with the true parties in interest, the individual Indian landowners, as required, the BIA through the U.S. Attorney has ignored their rights to material information, input and ultimate decision-making regarding **their** property, and marched them into counter-productive litigation.

3. BIA Exposed Individual Indian Landowners to Liability.

In a frank attempt to impugn the performance of Wapato Heritage under the

[22] Order of January 12, 2010, ECF-144 at 25:15–26:4, 27:13–15 (emphasis added).

[23] Order of January 12, 2010, ECF-144 at 12:24-26.

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Master Lease and the associated licenses and sublease, the BIA and CCT commissioned an audit. That attempt backfired, to say the least. The "Sells Audit" issued on December 29, 2005 concluded that (a) Wapato Heritage had overpaid the MA-8 allottees under the Master Lease by $751,285, and (b) CCT's affiliate Colville Tribal Enterprises, Inc. had underpaid Wapato Heritage under the Casino sublease by $866,248.[24]

Further favoring CCT, the BIA did nothing to collect the underpayment of rent of $866,248, which it could have used to remediate the overpayments to the individual Indian landowners which are now claimed in this case against those parties. Having left the individual Indian landowners with the liability of $751,285 (plus interest now exceeding principal), the BIA also has left them unrepresented and in default. It is telling that the BIA concealed the Sells Audit both from Wapato Heritage and from the individual Indian landowners, until it was finally revealed in 2007 by a FOIA request.[25]

4. BIA Favors CCT in Replacement Sub-Lease at Landowners' Expense.

The 1993 Sublease for the casino was entered into at arms-length, and provided for rent of 6% of a defined quantum of revenue, going up to 7% upon a defined expansion of the casino. *Id*. ¶¶ 6-7. When the BIA (wrongly) took the position that the Master Lease, and thus the 1993 sublease, terminated on February 9, 2009, it immediately made a sweetheart lease with the subsidiary of CCT. *Id*. That lease reduced

[24] Declaration of Webb in ECF 315 at 7:2-4 (the U.S. Parties, by letter of March 3, 2009, admitted that Wapato Heritage was due a refund on rents paid).

[25] Declaration of Webb, January 14, 2020, ¶ 15.

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the percentage from 6–7% to **4 ½%**, and further reduced the quantum of revenue to which the rate applies. This resulted in a significant reduction of revenue to the landowners. *Id.* Had the arm's-length negotiated rate been maintained, the individual landowners would have received at least 35% more in the last 11 years—especially after a casino expansion which would have triggered the 7% rate. *Id.*

Wapato Heritage has challenged these lease terms, and it is respectfully submitted that any reasonable lawyer who truly represents the individual Indian allottees would likewise challenge the sweetheart deal given by the BIA to CCT's subsidiary.

5. BIA Favors CCT in Sales to CCT, at Landowners' Expense.

In regard to any purchase of an allotment interest from an individual Indian, the BIA is required to follow certain procedures to protect the 'seller.' A sale of an interest in trust land (or land believed by purchaser and seller to be trust land) to a tribe, must be (i) approved by the Secretary, and (ii) be "for not less than the **appraised** fair market value." 25 C.F.R. § 152.25(a)(2) (emphasis added). The Secretary must have a valid appraisal of fair market value "prior to making or approving a sale, exchange, or other transfer of title of trust or restricted land." 25 C.F.R. § 152.24.

If the Court's direction to the BIA and the U.S. Attorney had been followed, and competent independent counsel appointed for the individual Indian landowners, such counsel would have known of these regulations, the BIA Appraisal Handbook, the BIA Real Estate Handbook, and their requirements for valid evaluations. In 1992, the

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Department of Interior, like the state of Washington,[26] required appraisals to meet the Uniform Standards of Professional Appraisal Practice ("USPAP").[27] Simply stated, USPAP Standard 1-4(c) cannot be met without understanding the "potential earnings capacity of the property"—which would have necessarily required interviewing Mr. Webb, and consideration of the potential non-trust status of the property.[28]

The Court was clearly concerned by the sales to the Tribe. In its Order of February 23, 2016, ECF-345, at page 3:15–23, the court directed (emphasis added):

> 3. On or before April 1, 2016, the United States Defendants shall also file a schedule setting forth the following:
>
> a. The name and address of the parties to the sale of any landowner's interest in MA-8 since the inception of this action on January 21, 2009, including the name and address of each party thereto;…
>
> c. The United States shall file a copy of **all documents in its possession applying to any such sale**;
>
> d. **Whether the seller of any interest in MA-8 requested the appointment of independent counsel** in connection with the sale.

The U.S. Parties produced a schedule under ¶ 3(a) of that Order, but it was not

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[26] WAC 308-125-200.

[27] For an in-depth discussion of the BIA's appraisal duty, see *Cobell v. Norton*, No. CIV.A.96-1285(RCL), 2003 WL 21978286, at *7–8 (D.D.C. Aug. 20, 2003).

[28] Webb Declaration, January 14, 2020, ¶¶ 8, 9, 10, 12.

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accurate as to requests for independent representation.[29] That schedule ignored at least the letter from Paul Wapato to the court of September 3, 2009, received by the court on September 8, 2009, in which Mr. Wapato states:

> Although the individual Indian owners have appealed to the BIA and the Tribe to provide legal counsel in this matter, we have been flatly rejected.

That schedule further ignored the Court's express findings in ECF-329 at 2:5–8 (emphasis added):

> 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 independent counsel**.

In view of the Court's findings, the inaccuracies in the U.S. Parties' schedule, and the BIA's wholesale rejection of requests for counsel, all individual Indian defendants who are, or at any time during the pendency of this case were, owners of MA-8, should be viewed as having requested independent counsel.

The U.S. Parties produced a few documents pursuant to ¶ 3(c) of the court's Order. Notably, however, they ***did not produce any appraisals***. As discussed above, an appraisal was required for any such sale, and was therefore a "document…applying to any such sale." On this record, it must be concluded that: (a) either the required appraisals were never obtained and do not exist, or (b) they were intentionally not produced in order to conceal adverse evidence.[30] Independent counsel would have

[29] ECF-347.

[30] *Singh v. Ashcroft*, 91 F. App'x 570, 571 (9th Cir. 2004).

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prevented this unprincipled litigation tactic of the BIA and the CCT of buying up the defenseless interests at below market value in order to better control this litigation.

6. Non-Trust Status for MA-8 would Benefit the Individual Landowners.

The Court has been clear that the "preeminent" issue in this case, which goes to "the landowner Defendants' individual ownership interests and their value," is the trust status of MA-8.[31] Wapato Heritage and its manager, a certified public accountant, have determined that its approximately 24% interest in MA-8 is far more valuable with non-trust status than trust status.[32] CCT and apparently the BIA take the opposite view. The trust or non-trust status of MA-8: "necessitates an in-depth, complex review and analysis."[33] That requires competent, independent counsel not beholden to the U.S. Parties. By denying the individual allottees their constitutional right to meaningfully participate in these proceedings through counsel, CCT and the BIA have *de facto* forced the individual allottees into their camp. That in itself is a breach of the BIA's duty to the individual Indian landowners.[34]

IV. AUTHORITY AND ARGUMENT

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[31] Order of August 1, 2014, ECF-329 at 29:19–21.

[32] Webb Declaration, January 14, 2020,

[33] August 1, 2014 Order, ECF-329 at 3:1–2.

[34] *See, e.g., Poafpybitty v. Skelly Oil Co*., 390 U.S. 365, 372 (1968), and other cases cited in ECF-329 at 31:22 – 32:12.

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B. A Federal Court may Not be Used as an Instrument of Injustice.

Ubi jus, ibi remedium—Where there is a right, there is a remedy.[35] As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), it was said:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.[36]

The U.S. Attorney's reliance on 25 U.S.C. § 175 is misplaced. That statute requires the United States District Attorney to represent "allotted Indians…in all suits," but that is precisely what the U.S. Attorney has failed to do and indeed cannot do where he is hamstrung by irremediable conflicts of interest. Not only has the United States Attorney not represented the allotted Indians, it has represented an Indian Tribe, at the urging of the BIA, acting directly against the interests of the allotted Indians.

Even worse, the BIA, the *soi-disant* trustee for the allotted Indians, has failed to provide the only practical remedy for this problem, independent counsel, despite this Court's clear orders. Thus, upon the facts of this case, the BIA, commanding the actions of the US attorney, has fully subverted the legislative intent of 25 U.S.C. § 175.

The "single issue raised" is **not**, as the government contends, "is the United States required to represent individual Indian allottees under 25 U.S.C. §175." This case, as

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[35] *Black's Law Dictionary* at 1520 (Legal Maxims) (6th ed.1990).

[36] As quoted in *Roberts v. Dudley*, 140 Wash. 2d 58, 68 (2000), as amended (Feb. 22, 2000).

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Judge Quackenbush clearly recognized in his Orders, invokes the power and duty of a United States District Court to see that justice is done, and to not participate in an injustice. No one, not even the United States Congress may "make the courts of the United States the instruments of injustice."[37] The Ninth Circuit too warned that trial courts must prevent themselves "from being turned into instruments of injustice."[38] This venerable principle carries through to modern times. In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 422 (2d Cir. 1999), for instance, the Court of Appeals favorably quoted the Connecticut Supreme Court as follows:

> In all cases, where by accident, mistake, fraud or otherwise, a party has an unfair advantage in proceeding in a court of law, ***which must necessarily make that court an instrument of injustice***, and it is, therefore, against conscience that he should use that

[37] *United States v. Lyon*, 26 F. Cas. 1036, 1037 (C.C.D. Mich. 1840) ("If it were necessary I would say that congress have not the power, by an act of legislation, to take away the exercise of that discretion by a court, which is essential to the attainment of justice. They have not power to say how a court shall decide a case, nor that they shall decide it without evidence."); *and see Hovey v. Elliott*, 167 U.S. 409, 442–43, 17 S. Ct. 841, 854, 42 L. Ed. 215 (1897) ("The court must be careful not to become an instrument of injustice");

[38] *Marks, ex parte*, 136 F. 168, 170 (9th Cir. 1905); *and see Paul H. Aschkar & Co. v. Curtis*, 327 F.2d 306, 310 n.11 (9th Cir. 1963) (a statute, improperly construed or applied, is "very liable to be abused as an instrument of injustice and oppression.")

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> advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained.
>
> *Folwell v. Howell*, 117 Conn. 565, 568–69, 169 A. 199, 200 (1933) (quoting *Tucker v. Baldwin*, 13 Conn. 136, 144 (1839) (emphasis added)).

This Court, in its Order, ECF-329, recognized that the absence of representation of the individual Indian allottees was an injustice:

> It is clear that the potential conflicts the United States faces in this case, "must not be resolved through disloyalty to the Native beneficiary." See, Coulter, Robert, Native Land Law § 4:19. Given the complexity and nature of the claims and defenses in this case, the court concludes ***it would be fundamentally unfair to allow this case to proceed without legal counsel appointed on behalf of the requesting landowners***.[39]

And following entry of that Order, the Court exercised its inherent power to control the matters before it, by refusing to proceed without legal counsel being appointed for the landowners.[40] Thereafter, on February 23, 2016, the Court bluntly found: "The BIA has not complied with that direction."[41] Consistent with ECF-329, the Court has continued to refuse to proceed without legal counsel appointed for the individual Indian landowners.

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[39] ECF-329 at 32:8–12 (emphasis added).

[40] *See Naranjo v. Thompson*, 809 F.3d 793, 802–06 (5th Cir. 2015), for a discussion of the court's inherent powers regarding appointment of counsel.

[41] ECF-345 at 2:18.

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It is respectfully submitted that if this case were to proceed without independent counsel for the landowners, the Court would become an instrument of injustice, not only as to the individual Indian landowners, but as to the Plaintiff and Wapato Heritage as well. The delay in this case has been caused solely by the BIA's refusal to provide independent counsel to the individual Indian landowners, contrary to its duties under statute, its fiduciary or quasi-fiduciary duties, the requirement that it act good faith, and its duty to acknowledge, respect and obey the Orders of the Court entered in the legitimate exercise of the Court's inherent power to control the matters before it.

C. US Attorney's Conflicts of Interest are Obvious and Material.

As discussed *supra*, the U.S. Attorney's lawyers' representation of the interests of the Tribe at the same time as representing the interests of the individual Indian landowners, would be a strictly prohibited, non-waivable, conflict of interest under RPC 1.7. Even the suggestion that they can, or do, represent the interests of the individual Indian landowners through their representation of the BIA (which has primarily pursued the interests of the Tribe) borders on a violation of RPC 1.7.[42]

Thus, the U.S. Attorney's office has wisely declined to directly represent the individual owners. But while that avoids further trouble for the U.S. Attorney, it does not solve the owners' problem: they need counsel. Why, then, has the U.S. Attorney not simply followed the Court's orders and arranged for counsel?

One of the reasons independent counsel is so necessary in this case, is that honest

[42] U.S. Attorneys are subject to state and local federal rules. 28 U.S.C. §530B.

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independent counsel would have to seriously consider advising his or her clients to sue the BIA. The authority cited above by Judge Quackenbush indicates that Indian beneficiaries of the BIA trust, when that trust is breached, have causes of action against the United States. This principle is also shown by *The Confederated Tribes of the Colville Reservation v. Salazar*, USDC DC #1:05-cv-02471-TFH. In that case, CCT brought claims of incompetence and misconduct by the U.S. Parties in regard trust property, not dissimilar from those made by Wapato Heritage. CCT prevailed in that case to the tune of $193 million. Any competent, independent, lawyer would necessarily have to investigate claims against the BIA on behalf of the individual Indian landowners. Given that conflict, the refusal of the BIA to fund beneficiaries of its trust for counsel in this case, where the court has said the conflicts of interest are "obvious," itself constitutes a serious breach of trust.

D. The Court has Inherent Power to Make Sure Necessary Counsel is Available Under the Unusual Circumstances of this Case.

For an in-depth discussion of a District Court's inherent powers to control the matters before it, as they relate to appointment of counsel, see *Naranjo v. Thompson*, 809 F.3d 793, 802–06 (5th Cir. 2015). The court even has the power to require members of its bar to represent parties *pro bono*, in unusual circumstances—which could well include this case. The Supreme Court has held that a District Court has the inherent power to appoint private counsel, to the exclusion of the U.S. Attorney, to pursue contempt proceedings. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793, (1987). The Ninth Circuit has recognized that counsel may be appointed in civil cases.

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United States v. McQuade, 579 F.2d 1180, 1181 (9th Cir. 1978) (reversing because trial court assumed it had no power to appoint counsel). *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103–04 (9th Cir. 2004) (reversing because of denial of counsel in complex case). The inherent power of the court allows it to appoint counsel to prevent injustice. Where the BIA, a self-proclaimed trustee—and potential defendant—of the individual Indian landowners has left them without counsel in respect of the alleged trust *res*, despite their requests, that breach of trust invokes the inherent power of the court to impose terms upon the pursuits of the U.S. Parties' case and order the BIA to provide independent counsel as a condition of proceeding.

V. PROPOSAL FOR RESOLVING REPRESENTATION ISSUES

One would have expected the alleged fiduciary, BIA, to propose an appropriate procedure to cure the representation problem. The U.S. Parties have not done so, for 10 years. Wapato Heritage therefore respectfully proposes the following course, with all deference to the Court's sole and sound discretion to manage the case.

1. Require the Department of the Interior/BIA to establish a fund of reasonable amount in the registry of the court for payment of counsel.
2. Establish a reasonable rate and appropriate terms for retention of lawyers for the individual Indian landowners.
3. Appoint a Special Master (or Magistrate) to supervise the lawyer retention process and make recommendations to the Court, to be paid, as necessary, from the established fund.
4. Issue an order directed to the 35 individual Indian allottee defendants, advising them that a process is underway to determine if, and upon what terms, counsel may be appointed for them, and commanding them:

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a. That their deposition shall be taken regarding the case, their knowledge of it, and matters related to actual or potential representation by counsel.

b. That each deposition shall not exceed four (4) hours and shall be scheduled at a time reasonably convenient to them, and held at the Jeffers Danielson offices in Wenatchee, or such other place as may be agreed among the witness and counsel for the Plaintiff's, the US parties, and the RV Park parties.

c. That the initial testimony shall be taken by counsel for the RV Park parties or Wapato Heritage, not to exceed 1 ½ hours, testimony may then be elicited by the U.S. Parties for a time equal to, but no greater than the actual initial testimony, and last, testimony may be elicited by the other of RV Park or Wapato Heritage counsel not to exceed ½ the time of the initial testimony.

d. The testimony given for purposes related to representation may not be used for any other purpose without the represented consent of the deponent, or order of court.

e. That if they fail to participate in this process, an order of default will be entered against them.

f. The aggregated testimony shall be supplied to the Special Master/Magistrate with further suggestions by the represented parties as may be appropriate.

5. Direct the Special Master/Magistrate to establish and/or recommend and conduct procedures, including interviews, to confirm that any appointed counsel accepts the terms of employment and is independent of influence from, or conflicts with, any of the other parties. Such procedures to include preference, where appropriate, for any choice of counsel expressed by an individual defendant, and may include appointment of common counsel for some or all individual defendants.

6. Such other terms as the court deems appropriate.

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RESPECTFULLY SUBMITTED this 14th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused the foregoing document to be electronically filed with the Clerk of the above entitled Court using the CM/ECF system, which will send notification of such filing to all registered recipients of that system as of the date hereof.

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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