UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington resident; MILL BAY MEMBERS ASSOCIATION, INC., a Washington non-profit corporation, Plaintiffs – Appellees, v. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Defendants – Appellees, v. WAPATO HERITAGE, LLC; and GARY REYES,	**Case No. 20-35357** **MOTION OF APPELLANTS WAPATO HERITAGE, LLC AND GARY REYES FOR A STAY PENDING INTERLOCUTORY APPEAL** **DECISION REQUESTED BY: MAY 28, 2020**

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Defendants - Appellants,

and

FRANCIS ABRAHAM; PAUL G. WAPATO, Jr.; KATHLEEN DICK; DEBORAH BACKWELL; CATHERINE GARRISON; MARY JO GARRISON; ENID T. WIPPEL, LEONARD WAPATO, ANNIE WAPATO; JUDY ZUNIE; JEFFREY M. CONDON; VIVIANNE PIERRE; SONA W. VANWOERKOM; ARTHUR DICK; HANNAH RAE DICK; FRANCIS J. REYES; LYNN K. BENSON; JAMES ABRAHAM; RANDY MARCELLAY; MAUREEN M. MARCELLAY; MIKE MARCELLAY; LINDA SAINT; STEPHEN WAPATO; MARLENE MARCELLAY; DWANE DICK; GABE MARCELLAY; TRAVIS E. DICK; HANNAH DICK; JACQUELINE L. WAPATO; DARLENE MARCELLAY-HYLAND; ENID T. MARCHAND; LYDIA A. ARNEECHER; GABRIEL MARCELLAY; MIKE PALMER; SANDRA COVINGTON,

Defendants.

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I. RELIEF REQUESTED

Appellants Wapato Heritage, LLC and Gary Reyes ask the Court to order a stay of all litigation in case number CV-09-0018-RMP, Eastern District of Washington, during the pendency of this interlocutory appeal. A stay is necessary to prevent irreparable harm from immediate decisions in a combined dispositive motion hearing set for May 29, 2020, on the parties' respective real property rights, ejectment of certain parties, and default against unrepresented allottees, while threshold matters are in dispute on appeal.

The central issue in this appeal is the obligation of the United States to provide counsel to Appellant Gary Reyes and certain other defendants below, the individual allottees of alleged Indian trust land, free from conflicts of interests. That issue is clear and separable from the merits of the underlying action, and thus, this Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine. *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082 (9th Cir. 1972). The substantive rights of those unrepresented defendants and the related rights of Appellants, should not be disposed of below while this Court determines whether Appellee Bureau of Indian Affairs ("BIA") must provide independent counsel to defend their rights.

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The district court decided not to stay this matter. Exhibit S to the Declaration of Dale M. Foreman in Support of Motion to Stay ("Dec. D.M.F"), ECF No. 453 at 3:8–11.

II. BACKGROUND

A. History of Moses Allotments

This litigation centers on the rights of various parties in and to real property known as the Moses Allotment #8 ("MA-8") on the north shore of Lake Chelan in central Washington State. The Moses Allotments were formed under a 19th-Century agreement with the Moses Band of Indians. The history of the management of these properties by Appellee the BIA is replete with bad faith. As far back as the early 1900s, the BIA, while claiming the Moses Allotments were "Indian trust" land, conspired with certain non-Indian persons (collectively the "Wapato Irrigation Company") to defraud Peter Wapato (original allottee of MA-10) and Wapato John (original allottee of MA-8) out of most of the original 640 acres that each received.[1] That egregious breach of

[1] A key pending issue in the trial court is whether MA-8 is actually still Indian Trust land. For purposes of this appeal, and without waiving their position below, Appellants assume, *arguendo*, that it is because the BIA takes

(continued...)

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trust brought MA-8 and MA-10 to their current size of less than 180 acres each. *See* Ex. N, Dec. D.M.F, ECF No. 329 at 7:14-26. After the involuntary transfer of the majority of MA-8 and MA-10 to the Wapato Irrigation Company, the BIA did nothing to administer the remainder of these valuable allotments except to keep ownership transfer records, and in six instances, issue "fee patents." Ex. C, Decl. D.M.F., ECF No. 90-16 at 8 (Ex. 103 to ECF No. 90).

The immediate dispute in this case arose from efforts by certain heirs of the original allottees to develop the property themselves. The late William Wapato Evans ("Bill Evans") was the surviving heir of Peter Wapato in his generation and an heir of Wapato John. In the 1980s, frustrated with the BIA's do-nothing approach, Bill Evans took decisive action to help the heirs. For MA-10, he obtained an act of Congress allowing a 99-year lease on the land. *See* Ex. N, Decl. D.M.F., ECF No. 329 at 15:23-16:17. He then developed MA-10 into a well-known resort community called Wapato Point. Bill Evans passed away on September 11, 2003. Wapato Point continues to generate substantial income for its allottees, the heirs of Bill Evans, who are now the sole heirs of Peter Wapato.

(...continued)
the position that it could, but will not, appoint counsel for MA-8's beneficiaries.

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Bill Evans also held a minority interest (approximately 24%) in MA-8. For himself, and for his many relatives, Wapato John's other heirs, who were also 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 term of 25 years, with a 25-year option to renew. Ex. D, Decl. D.M.F., ECF No. 91 at 3:2–8. In an arms-length transaction he then licensed use of MA-8 to the Mill Bay Members Association, Inc. ("Mill Bay") for a period of 50 years and the license was approved by the BIA.[2] Bill Evans later, again at arms-length, subleased a section of the property to a subsidiary of Appellee Confederated Tribes of the Colville Reservation ("the Tribes") to build and operate a casino. Ex. N, Decl. D.M.F., ECF No. 329 at 18:10–16.

Wapato Heritage, LLC is the vehicle through which Bill Evans held the developed MA-10 and MA-8. Ex. D, Decl. D.M.F., ECF No. 91 at 3:8. It is now owned by his sister, children, and grandchildren, one of who is an enrolled member of the Tribes and who are collectively all of the surviving heirs of Peter

[2] This Court, following argument, correctly determined that the RV Park Expanded Membership Agreements were licenses rather than subleases. Ex. G, Decl. D.M.F., ECF No. 144 at 29:8–30:16.

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Wapato.

Before Bill Evans' death in 2003, he made plans to develop MA-8 similar to MA-10. Wapato Heritage obtained the necessary Act of Congress to allow a 99-year lease of MA-8.[3] Ex. D, Decl. D.M.F., ECF No. 91 at 3:26-4:3; *see also* Ex. N, Decl. D.M.F., ECF No. 329 at 16:17-20.

Thereafter, a great amount of development work was done, a four phase development was planned and a replacement lease of 99 years was proposed to the BIA. Ex. Q, Decl. D.M.F., ECF No. 405 ¶¶ 4, 5. The BIA interposed excessive delays in considering that proposal, while working with the Tribe, which wanted to take over MA-8 and become a new Master Lessee. *Id*.; *see also* Ex. N, Decl. D.M.F., ECF No. 329 at 21:17-19, 15:24. Rather than pursue the 99-year development program, the BIA took the position that the Master Lease terminated on February 9, 2009, and immediately entered into a reduced rate lease for the casino and undertook to eject Mill Bay from MA-8. Ex. Q, Decl. D.M.F., ECF No. 405 ¶¶ 6, 7. The refusal of the BIA to meaningfully

[3] By Public Law 109–221 (HR 3351), May 12, 2006, § 202, amending 25 U.S.C. § 415(a), a 99-year lease of MA-8 was allowed.

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consider the 99-year lease proposal caused significant loss to Wapato Heritage and to the individual Indian landowners. The below-market leases to the Tribe also caused significant losses to Wapato Heritage and the individual Indian landowners. Ex. Q, Decl. D.M.F., ECF No. 405 ¶¶ 4-9.

B. Procedural History

This case was filed early in 2009 by Mill Bay, the RV Park that has occupied a portion of MA-8 under a license issued by Bill Evans and approved by the BIA. While asserting a variety of claims, the main goal of Mill Bay is to protect its right to continue using its license on MA-8 until the end of the original term, which is 2034. The case was initially assigned to Judge Justin Quackenbush, who issued a number of orders over the years, some of which are submitted with this motion. *See* Ex. G, Decl. D.M.F., ECF No. 144; Ex. N, Decl. D.M.F., ECF No. 329; Ex. O, Decl. D.M.F., ECF No. 345. These orders describe in detail the factual and procedural history of this matter.

Judge Quackenbush expressed tremendous concern regarding the lack of representation for the individual Indian allottees, particularly given issues regarding trust status of the land. Ex. N, Decl. D.M.F., ECF No. 329 at 7, 26, 32 (quoted *infra*). In September 2019, the case was re-assigned to Judge Peterson,

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who has expressed great interest in quickly resolving the case. Judge Peterson ruled that the government did not have any obligation to provide independent counsel to the allottees. Ex. R, Decl. D.M.F., ECF No. 411. It is this order that is challenged on appeal. Meanwhile, Judge Peterson has pressed on with a tight schedule to decide the preeminent issues in the case and ordered that "[w]ithout action by the Ninth Circuit, the Court will not…entertain a stay." Ex. S, Decl. D.M.F., ECF No. 453 at 3:8–11. As such, pursuant to Fed.R.App.P. 8(a)(2)(A)(i) and 18(a)(2)(A)(i), moving for a stay in the district court was impracticable. The Tribe and the United States oppose a stay. Decl. D.M.F. at ¶¶ 3-4; *see also* Ex. A, Decl. D.M.F.; Ex. B, Decl. D.M.F. Mill Bay supports a stay. Decl. D.M.F. at ¶ 2.

III. ARGUMENT

The authority of this Court to issue stays stems from the All Writs Act, 28 U.S.C. § 1651. *Nken v. Holder*, 556 U.S. 418, 427 (2009). A stay is not a matter of right, *Id.* at 427, but an "exercise of judicial discretion." *Id.* "The propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry. Co.*, 272 U.S. at 672-673. The party asking for a stay has "the burden of showing that the circumstances justify an exercise of that

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discretion." *Nken*, 556 U.S. at 434.

Courts consider four factors to guide their judgment on the issuance of stays. *Id.* at 434; *see also City & Cty. S.F. v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 789 (9th Cir. 2019). The first two of the four factors are the most critical. *Id.* at 789. The final two factors are considered if the first two are satisfied. *Id.*; *Nken*, 556 U.S. at 435.

First, courts consider whether the applicant for a stay has made "a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 434. However, applicants are not required to show "it is more likely than not they will win on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). The burden is merely to show that there is a "substantial case for relief on the merits." *Id.* Second, courts look at "whether the applicant will be irreparably injured absent a stay." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006–07 (9th Cir. 2020). "The claimed irreparable injury must be *likely* to occur." *City & Cty. S.F.*, 944 F.3d at 805 (emphasis in original). Third, the Court balances the equities, considering "the hardships each party is likely to suffer if the other prevails." *Id.* at 806. Finally, the Court must determine where the public interest lies. *Nken*, 556 U.S. at 434.

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The Ninth Circuit uses a sliding scale approach to this inquiry "so that a stronger showing of one element may offset a weaker showing of another." *Al Otro Lado*, 952 F.3d at 1007.

A. Appellants Are Likely to Succeed on the Merits.

The primary issue on this appeal is whether the United States should provide un-conflicted, independent counsel to the Indian allottees. As discussed by Judge Quackenbush, Ex. N, Decl. D.M.F., ECF No. 329 at 32:8–12, such representation is critical to the proper administration of justice due to the largely unsophisticated and splintered allottees.

Judge Quackenbush held in no uncertain terms that the United States had both "actual" and "potential" conflicts of interest. Ex. N, Decl. D.M.F., ECF No. 329 at 7. He elaborated:

> 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

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> landowners, and its positions could potentially conflict with the interests of the Defendant landowners.

Ex. N, Decl. D.M.F., ECF No. 329 at 26:6–18.

Wapato Heritage has addressed these conflicts in detail in briefing to the District Court, the high points of which are repeated here.

First, the Mill Bay Members and Wapato Heritage have asserted claims for declaratory relief against each individual Indian allottee, as the real parties in interest to MA-8. Wapato Heritage also claims damages against them and has requested additional declaratory relief (joined in by Plaintiffs) that MA-8 long ago ceased to be Indian Trust Property and that all owners thereof are entitled to patents in fee. Without counsel to protect them, nearly all the individual Indian landowners are in default or subject to immediate default at the May 29, 2020 hearing. Unless attorneys appear for these parties, they cannot plausibly avoid a final declaration of rights to their disfavor.

Second, the individual Indian landowners' property rights and the best use of those rights are at issue in many respects. The BIA is required by regulation to consult with the individual Indian landowners regarding their property rights before taking action. 25 C.F.R. §§ 162.012; 162.013; 162.022. The BIA has repeatedly failed to do so. Instead, the BIA, before and during the

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litigation, has acted in the perceived interests of the Tribe, whether or not it aligns with that of the individual Indian allottees. Ex. G, Decl. D.M.F., ECF No. 144 at 12:24-26. Judge Quackenbush stated:

> 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.

Ex. G, Decl. D.M.F., ECF No. 144 at 27:13-15.

Third, the BIA exposed the allottees to a judgment for damages. An audit commissioned by the BIA 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) the Tribe's affiliate Colville Tribal Enterprises, Inc. had underpaid Wapato Heritage under the Casino sublease by $866,248. *See* Ex. L, Decl. D.M.F., ECF No. 315 at 7:2-4. Not only has the BIA not collected the underpayment of rent, it has left the individual Indian allottees with the liability of $751,285 (plus interest now exceeding principal). These individual Indian allottees are unrepresented and in default. Ex. F, Decl. D.M.F., ECF No. 135.

Fourth, the BIA approved a new lease of MA-8 in favor of the Tribe the terms of which are substantially less favorable than the previous lease. The 1993 Sublease for the casino provided for rent of 6-7% of a defined quantum of

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revenue. Ex. L, Decl. D.M.F., ECF No. 315 at 6-7. In 2009, the BIA made a sweetheart follow-up lease with the Tribe's subsidiary. *Id*. That lease reduced the percentage from 6-7% to 4.5% and further reduced the quantum of revenue to which the percentage was applied. Any reasonable lawyer for the individual Indian allottees would challenge this sweetheart deal.

Fifth, the BIA has favored the Tribe in sales of the individual Indian allottees' interests to the Tribe. For such a sale, the BIA is required to follow procedures to make the transaction fair, including procuring an appraisal. 25 C.F.R. § 152.24. Judge Quackenbush was clearly concerned by the sales to the Tribe and directed the BIA to provide relevant information related to those sales. Ex. O, Decl. D.M.F., ECF No. 345 at 3:15-23. The government produced some information required by Judge Quackenbush but not a single appraisal. Either the required appraisals do not exist or they were intentionally withheld.[4] Independent counsel for the individual allottees would have prevented this unjust litigation tactic of the BIA and the Tribe, buying up the defenseless interests at below market value in order to both profit and better control this

[4] See *Singh v. Ashcroft*, 91 F. App'x 570, 571 (9th Cir. 2004) (unpublished) (cited under Fed.R.App.P. Circuit Rule 36-3(c)(ii)).

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litigation.

Finally, the "preeminent" issues in this case are the trust status and value of MA-8. Again, Judge Quackenbush:

> The issues in this case, including the preeminent question of trust status, concern the landowner Defendants' individual ownership interests and their value, and other concerns that are preeminently personal to their own individual livelihood and well-being.

Ex. N, Decl. D.M.F., ECF No. 329 at 29:19-21.

Wapato Heritage has determined that it's nearly 24% interest in MA-8 is far more valuable in non-trust status than in trust status. Ex. Q, Decl. D.M.F., ECF No. 405 at ¶ 13. The BIA may disagree, but by denying the individual allottees the right to counsel, it has forced the individual allottees to adopt its view. The trust status, or non-trust status, of MA-8 is complex and requires competent counsel not tainted by conflict of interest. Instead, the District Court is poised to decide the issue without input from the majority of landholding interests.

In light of these significant conflicts of interest, applicable law requires the United States to provide independent counsel to the individual Indian

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allottees, as follows.[5]

To begin, a right implies a remedy, and a key purpose of government is to provide a remedy to injuries. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This case, as Judge Quackenbush recognized, invokes the full power of a United States District Court to see that justice is done and to not participate in an injustice. It is fundamental that no one may "make the courts of the United States the instruments of injustice." *United States v. Lyon*, 26 F. Cas. 1036, 1037 (C.C.D. Mich. 1840). In 1897, the United States Supreme Court cautioned: "The court must be careful not to become an instrument of injustice." *Hovey v. Elliott*, 167 U.S. 409, 442–43 (1897).

Judge Quackenbush 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." 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***.

Ex. N, Decl. D.M.F., ECF No. 329 at 32:8–12 (emphasis added).

[5] Appellant will address these issues more fully in its appellate brief.

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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. Thereafter, on February 23, 2016, the Court bluntly found: "The BIA has not complied with that direction." Ex. O, Decl. D.M.F., ECF No. 345 at 2:18.

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 allottees, but as to the Mill Bay Members and Wapato Heritage as well.

While courts have held that the federal government's duty under 25 U.S.C. § 175 is discretionary, that discretion cannot be unfettered and is not absolute. As Judge Quackenbush acknowledged, in circumstances such as the present, the typically discretionary application of 25 U.S.C. § 175 may become mandatory. Ex. G, Decl. D.M.F., ECF No. 144 at 2–3. Not only has the federal government actively colluded with the Tribe for the benefit of the Tribe, against the allottees, Ex. P, Decl. D.M.F., ECF No. 403 at 1–2, it has also flip-flopped as to whether, and to what extent, it represents the allottees. At first, the government correctly claimed it *did not* and *could not* represent them due to

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conflicts of interest. Ex. H, Decl. D.M.F., ECF No. 146. Then, the government claimed it did represent them. Ex. I, Decl. D.M.F., ECF No. 186 at 7. Then, the government said it did not represent them *personally* but did represent their interests as trustee. Ex. J, Decl. D.M.F., ECF No. 232 at 2–4. At least some of the allottees do not see the government as their counsel. *E.g.*, Ex. E, Decl. D.M.F., ECF No. 99; Ex. M, Decl. D.M.F., ECF No. 326. The state of the government's involvement raises serious questions regarding how any individual allottee can even understand whether the government represents their interests or not.

Put another way, the federal government has abused its discretion. Indian trust land statutes were enacted to require the government to protect the interests of landowners like these allottees. In this case, the government has done and continues to do just the opposite. It has colluded and continues to collude with the Tribe to deprive individual allottees of their rights. Given its material conflicts of interest, the United States must find some other means to provide representation.

Indeed, honest independent counsel would have to seriously consider advising his or her clients to sue the BIA. The Indian beneficiaries of the BIA

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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, the Tribe brought claims against the federal government in regard trust property and prevailed, securing an award of $193 million. Any independent lawyer would have to at least investigate claims against the BIA on behalf of the allottees. Given that conflict, the refusal of the BIA to fund beneficiaries of its trust or counsel in this case constitutes a serious breach of trust.

Further, the court has the inherent power to order the United States to provide counsel. *Naranjo v. Thompson*, 809 F.3d 793, 802–06 (5th Cir. 2015). It can require members of its bar to represent parties, pro bono in most unusual circumstances – such as this case.[6] Where the BIA, a trustee -- and potential defendant of the individual Indian allottees -- has left them without counsel is a unique circumstance involving breach of trust where the inherent power of the court to impose terms upon the continuation of the case require the

[6] *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987); *United States v. McQuade*, 579 F.2d 1180, 1181 (9th Cir. 1978); *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103–04 (9th Cir. 2004).

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extraordinary measure of ordering the BIA to provide independent counsel as a condition of proceeding.

Despite this authority, Judge Peterson brushed aside any concerns regarding the BIA's conflicts and is forging ahead to decide substantial legal rights of the individual Indian allottees without first ensuring proper representation. This Court should reverse on the merits, and, most relevant here, stay further proceedings below until it has considered the representation issue. Appellants have demonstrated a likelihood of success on the merits.

B. Appellants and Allottees would be Irreparably Harmed Without a Stay.

Under the second *Nken* factor, an applicant must show a probability of irreparable injury if the stay is not granted. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012). This burden is higher than under the first factor, but "a strong showing of one element may offset a weaker showing of another." *Al Otro Lado*, 952 F.3d at 1007, 1010.

Irreparable harm is "harm for which there is no adequate legal remedy." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). "Intangible injuries may… qualify as irreparable harm." *East Bay Sanctuary*

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Covenant v. Trump, 950 F.3d 1242, 1280 (9th Cir. 2020). The focus is on the "individualized nature of irreparable harm." *Leiva-Perez*, 640 F.3d at 968.

Absent a stay, on May 29, 2020, the District Court will hear oral argument and decide pending motions to resolve the preeminent issues in the case. No matter what the outcome, all unrepresented allottees will lose substantial and impactful rights. If this Court does not intervene and stay the matter pending appeal, allottees will lose those rights without a proper opportunity to determine which outcome would be in their best interest and to try to advance those interests. As the District Court marches toward final judgment, each step in the process will be more prejudicial. This prejudice is real and endures even if this case is remanded and counsel is appointed. *See Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1311-1312 (9th Cir. 1981) (holding that appellant is harmed by proceedings without counsel even if counsel is appointed after remand). Appellant Gary Reyes has already endured such prejudice.[7] *See*, *e.g.*, Ex. T, Decl. D.M.F., ECF No. 347 at 5; Ex. Q, Decl.

[7] Prior to recently obtaining counsel for this appeal, Gary Reyes and twelve other allottees at that time unsuccessfully petitioned the District Court to have counsel appointed. Ex. M, Decl. D.M.F., ECF No. 326.

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D.M.F., ECF 405 at 5–6 (BIA approved sale of Reyes' beneficial interest in the property to co-beneficiary Tribe without requisite disclosures/appraisal). He needs informed, independent, professional guidance on his best interests and how to protect them in this complex case, before it is too late.

Wapato Heritage too will be irreparably harmed by inability to meaningfully engage with the real parties in interest. The Tribe and the federal government benefit by keeping the allottees in the dark and conspiring to lessen the number of allottees by ramming through sales of their interests to the Tribe at dubious prices. Without independent counsel to advise the allottees of their rights and interests, Wapato Heritage can only engage with the BIA and the Tribe, who have taken an obdurate position that does not serve any of the other parties. Once the pending motions are decided—no matter how decided—this intransigence will only harden. The allottees are subject to whatever the government and Tribe decide, even if contrary to their interests. That harms the allottees, *see Bradshaw*, 662 F.2d 1301 (9th Cir. 1981); *Hogan v. Robinson*, 2007 WL 1614242 (E.D. Cal. 2007) (unpublished), and for practical purposes, it prevents Wapato Heritage from making common cause with them.

Further, without a stay now, litigation is likely to cost more and take

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longer. The issues addressed in the pending motions are significant—particularly the status of the land as trust or fee—and no matter what the decision, further appeal is likely. Millions of dollars in value are on the line. A decision that the land is fee would effectively terminate current tribal uses of the land, such as the casino. A decision the other way would effectively terminate the plaintiffs and other parties' uses. Appeal and remand would add more expense, consume more judicial resources, and leave property rights uncertain for an extended period. Informed participation by the stakeholders could well lead to settlement instead.

Finally, injustice anywhere is injustice everywhere. The BIA and the Tribe have conspired to the detriment of individual Indian allottees. This injustice is all the more harmful because the government, the party charged with protecting the allottees, is the offending party. On this record, Appellants have shown a probability of irreparable harm absent a stay.

C. The Appellees will Not be Substantially Harmed by a Stay and the Public Interest Favors a Stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the

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public interest." *Nken*, 556 U.S. at 435 (2009). When the government is a party these two factors are considered together. *City & Cty. of S.F.*, 944 F.3d at 806. "To balance the equities, we consider the hardships each party is likely to suffer if the other prevails." *Id.*

The primary "harm" resulting from the issuance of a stay is delay in resolving the remaining issues of the case, which has been pending for over ten years. This delay, however, is the result of the federal government's intransigence and refusal to follow Judge Quackenbush's orders. The District Court initially and correctly refused to rule on the motions now scheduled for hearing on May 29 "without independent legal counsel for the individually named Defendant landowners." Ex. N, Decl. D.M.F., ECF No. 329 at 2:10-11. The motions could have and should have been heard years ago and any further delay until the BIA carries out its plain duty to provide counsel is more of the same self-inflicted wound.

The public has an interest in the integrity of the judicial system. In *Bradshaw*, this Court was concerned "with the effect on the administration of justice, the orderly processing of litigation generally, and the impact on all those who use our courts." 662 F.2d at 1316. Similar concerns are at stake

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here: the government acting as trustee with a clear conflict of interest, many unrepresented individuals who are the beneficiary of that trust relationship, and significant and weighty issues involving integrity of the judicial system. As Judge Quackenbush noted, "[t]he 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." Ex. N, Decl. D.M.F., ECF No. 329 at 26:3-4. Issuing a stay until this Court has ruled on the provision of counsel protects unrepresented allottees from further injury.

The public has an interest in avoiding the waste of judicial resources. Given that motions pending below may have to be reheard if the Court finds that allottees should have been afforded counsel, and in view of the greater likelihood of non-judicial resolution if the stakeholders can fully participate, the issuance of a stay here may result in this litigation being "disposed of more efficiently, economically, quickly, and fairly." *Bradshaw*, 662 F.2d at 1316.

Lastly, the public has an interest in the just treatment of Native Americans under treaties, agreements, and regulations imposed on them in less enlightened times. To decide these issues without the individual landowners'

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informed participation would perpetuate injustice.

IV. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to stay further proceedings in the district court pending resolution of this appeal.

RESPECTFULLY SUBMITTED this 6th day of May, 2020.

Corporate Disclosure: Appellant Wapato Heritage, LLC states that pursuant to Fed. R. App. P. 26.1it has no parent corporation or publicly held corporation that owns more than 10% of its ownership interest.

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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 the following:

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LOCAL RULES CERTIFICATE

This Motion complies with Fed. R. App. P. 27 and does not exceed 5,200 words exclusive of the table of contents, if any; signatures; certificates of service; copies of decisions; accompanying affidavits; and exhibits. The total amount of applicable words is 5,198.

DATED this 6th day of May, 2020.

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