

The Honorable Rosanna Malouf Peterson

UNITES STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

PAUL GRONDAL, a Washington resident,

Case No. 2:09-CV-18-RMP

Plaintiffs,

vs.

MILL BAY MEMBERS ASSOCIATION,  
INC., a Washington non-profit corporation;  
UNITED STATES OF AMERICA;  
UNITED STATES DEPARTMENT OF  
THE INTERIOR; THE BUREAU OF  
INDIAN AFFAIRS; FRANCIS  
ABRAHAM, CATHERINE GARRISON,  
MAUREEN MARCELLAY, MIKE  
PALMER, also known as Michael H.  
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

STATUS REPORT

1 CONFEDERATED TRIBES OF THE  
2 COLVILLE RESERVATION, Allotees of  
3 MA-8 (known as Moses Allotment 8,  
4 Defendants.

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4 **I. INTRODUCTION**

5 By Order of November 1, 2019, the court directed Wapato Heritage to file a Status  
6 Report by November 8, 2019: “drawing the Court’s attention to any prior filings that address  
7 the issue of the legal representation of individual Defendants in this matter.” This Status  
8 Report is filed to meet that obligation.

9 As noted below, the issue of the United States refusing to provide counsel to the  
10 individual Indian defendants was first raised by an individual Indian defendant, Paul  
11 Wapato, in a letter of September 3, 2009 (filed as ECF-99 on September 8, 2009).

12 **II. PRIOR FILINGS ESTABLISHING SERVICE ON INDIVIDUAL ALLOTTEE**  
13 **DEFENDANTS**

14 **A. ECF-54; FRCP 26 Status Report.**

15 1. **Page 1:18 – Page 4:13:** All but two (2) individual Defendants were served.

16 **B. ECF-100 and ECF-106: Proofs of Service.**

17 1. Last individual named Defendant served.

18 **C. ECF-88; Plaintiff’s Statement of Facts re: Summary Judgment Motions**  
19 **(annotated).**

20 **1. Page 5:17-22, ¶ 17:**

21 17. Except for the Colville Confederated Tribes and Wapato Heritage, LLC, all  
22 entities that hold an ownership interest in MA-8 are individuals who are either  
23 descendants of Wapato John or successors in interest through probate or purchase.  
24  
25

1 (Danielson Decl. [ECF-90], Exhibits 14 and 103 ; Admitted in U.S. Answer, [ECF-  
2 42] ¶ 35)

3 **2. Page 7:3-4, ¶ 25:**

4 As of February 14, 2007, 37 members of the Colville Tribes hold undivided  
5 ownership interests in MA-8. (Admitted in U.S. Answer, [ ECF-42] ¶ 39 [sic – it  
6 was ¶ 40])

7  
8 **III. INITIAL FILINGS RAISING NON-REPRESENTATION AND DEFAULT**  
9 **ISSUES**

10 **A. ECF-99: 9/8/2009; Letter to Court from Paul Wapato, Individual Defendant.<sup>1</sup>**

11 **1. Page 1:**

12 Attorneys for the Plaintiff notified Individual Defendant of an intent to take Defaults.

13 Mr. Wapato advises the court that the “group” of individual defendants are persons:

14 generally having low income and relatively low sophistication, having  
15 involvement considerably different than the Department of the Interior, the  
16 Bureau of Indian Affairs and the Confederated Tribes of the Colville  
17 Reservation.

18 Mr. Wapato goes on to state:

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

21 Mr. Wapato requests that Defaults not be entered.  
22  
23  
24

25 <sup>1</sup> This letter, ECF-99 is discussed in the court’s Order of August 1, 2014, at page 26:9-16.

1 **B. ECF-102 and ECF-104: Motion and Declaration for Default.**

2 1. Plaintiff Moves for Orders of Default against most individual Defendants.

3 **C. ECF-114 and ECF-116; Additional Motion and Declaration for Default.**

4 1. Plaintiff Moves for Further Orders of Default against most individual Defendants.

5 **D. ECF-135; October 2, 2009; Clerks Order of Default.**

6 1. The Clerk of Court enters a default Order against twenty-seven (27) individual Indian  
7 landowners.

8 **IV. FILINGS DISCUSSING NON-REPRESENTATION ISSUES**

9 **A. ECF-144; 1/12/2010; Memorandum Opinion and Order on Dispositive Motions.**

10 **1. Page 2:8 to Page 3:13:**

11 The court observes that no individual allottees are represented at the hearing on  
12 dispositive motions, and discusses the issue. The court concludes this portion of its  
13 observations:

14 The United States has not provided any reason for its failure to enter an  
15 appearance on behalf of the un-represented individual Indian landowners to  
16 make certain they have adequate representation in this action.

17 **2. Page 39:7-10.**

18 The court orders the United States to file a statement:

19 setting forth its reasons for failing to enter notices of appearance on behalf of  
20 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).

21 **B. Three (3) Page Letter (dated January 20, 2010) Attachment to ECF-315.**

22 This letter was sent to counsel for the United States in connection with the court's Order,  
23 ECF-144, discussed immediately above. It sets forth the position of Wapato heritage  
24 regarding the lack of representation of individual allottees.

1 **C. ECF-146; 1/22/2010; U. S. Response to Court's Order, ECF-144.**

2 The United States filed a three page Response to the court's order, ECF-144 at page  
3 39:7-10 (discussed above). It is therein admitted that a conflict of interest exists. In  
4 discussing the early phases of the controversy, the U.S. attorney states:

5 It was apparent to BIA and the United States Attorney's Office at that point,  
6 that given the differences of opinions among the Indian landowners regarding  
7 possible settlement positions and options, that it could not represent all the  
8 Indian landowners, individually.

9 U.S. attorney further states that the individual Indian landowners were advised to seek  
10 separate counsel and certain legal services organizations were contacted.

11 **D. ECF-156; 3/16/2010; Joint Status Report**

12 **1. Page 4:4-16.**

13 Plaintiff anticipates ruling on representation of individual Indian allottees.

14 **E. ECF-177; 3/30/2010; Transcript of Telephonic Hearing.**

15 **1. Page 9:1 to 10:1.**

16 The court again raises the issue of the default of individual Indian landowners, and  
17 requests further information.

18 **F. ECF-186; 4/26.2010; Federal Parties Response to 3/30/2010 Questions.**

19 **1. Page 7:1 to Page 9:20:**

20 The Federal Parties set forth their responses to the questions posed by the court at the  
21 hearing on March 30, 2010. The Federal Parties argue the individual Indian landowners are  
22 not necessary parties to the action, that default is irrelevant, and indicate no further action to  
23 provide representation for the individual Indian landowner Defendants.  
24  
25

1 **G. ECF-188; 4/26/2010; Wapato Heritage Response to 3/30/2010 Questions.**

2 **1. Page 12:15 to page 13:13.**

3 Wapato Heritage reasserts its position stated in ECF-188. Wapato Heritage argues that  
4 independent counsel could, and should, sue the BIA for its conduct in regard to MA-8, and  
5 that the conflicts of interest of the Federal Parties and their counsel are self-evident.

6 **H. ECF-197; 5/24/2010; Order on May 13, 2010 Hearing; Order Staying Case.**

7 **1. Page 4:6-19.**

8 The court reiterates its concerns over conflicts of interest and non-representation of the  
9 individual Indian landowners.

10 **I. ECF-352; January 10, 2013; Transcript of Hearing held 1/10/2013.**

11 **1. Page 14:24 to 16:1.**

12 Mr. Danielson (for Plaintiff) addresses the issue of representation of individual Indian  
13 landowners, and repartee with court.

14 **2. Page 19:3-5.**

15 Mr. Danielson again raises the issue of individual Indian landowner representation.

16 **3. Page 46:20-48:2.**

17 Court and Johnston (for Wapato Heritage) discuss issues related to individual Indian  
18 landowner representation.

19 **4. Page 54:10-57:2.**

20 Court and DeRusha (for U.S.) discuss issues related to individual Indian landowner  
21 representation.  
22

1 **J. ECF-315; 1/22/2013; Supplemental Brief of Wapato Heritage.**

2 **1. Page 7:9-15.**

3 Wapato Heritage continues to assert representation of individual Indian landowners is  
4 necessary and appropriate. See also attachment, letter of January 20, 2010.

5 **V. COURT HOLDS UNEQUIVOCALLY IT WILL NOT RULE ON ISSUES**  
6 **BEFORE IT WITHOUT INDEPENDENT LEGAL COUNSEL FOR THE**  
7 **INDIVIDUAL ALLOTTEES**

8 **A. ECF-329; 08/01/2014; Memorandum and Order Re: Appointment of Counsel.**

9 **1. Page 2:5-11.**

10 The court notes the continued absence of counsel for the individual allottees, and states:

11 As “those with direct interests—economic, historical, spiritual—in the outcome  
12 of a case are their own best representatives,” *Arizona v. California*, 460 U.S. 605,  
13 652 (1983)(dissent), the court will not finally rule upon the pending matters  
without independent legal counsel for the individually named Defendant  
landowners.

14 **2. Page 20:24-21:8.**

15 Further discussion of the representation issued by the court.

16 **3. Page 24:20 to page 32-12.**

17 Here, the court spends eight pages discussing this issue in detail, including statutes and  
18 regulations related to it, and case law. The court sets forth the positions of all of the parties at  
19 that time, and provides an analysis. The court concluded:

20 Given the complexity and nature of the claims and defenses in this case, the court  
21 concludes it would be fundamentally unfair to allow this case to proceed without  
22 legal counsel appointed on behalf of the requesting landowners.

23 **4. Page 32:15 to page 33:2.**

24 Here, the court orders action by the Federal Parties, and concludes:  
25

1 The court desires to give all of the individual landowner Defendants the  
2 opportunity to inform the court of their positions in this case after consultation  
with legal counsel.

3 **B. ECF-333; 8/29/2014; Federal Parties Response to ECF-329.**

4 The Federal Parties respond to ECF-329 and set forth in attempts to find volunteer  
5 representation for individual Indian landowners. *See* Declarations ECF-333-1 and ECF-333-  
6 2 (explanatory declarations).

7 **C. ECF-335; 9/19/2014; declaration of Michael S. Black.**

8 Declaration indicating that there are no funds allocated or available for independent  
9 counsel for individual Indian landowners.

10 **D. ECF-339; 9/19/2014; BIA Counsel Declaration.**

11 Declaration regarding conversations with possible pro bono lawyers for individual  
12 Indian landowners.

13 **E. ECF-340; 10/24/2014; BIA Director Second Declaration of Mr. Black.**

14 Declaration indicating Mr. Black was advised of success getting lawyers for individual  
15 Indian landowners, and he ceased activity in that regard.

16 **F. ECF-341 and ECF-342; 1/28/2015; Notices of Appearance for “Marcellay  
17 Defendants.”**

18 Mr. Lawler and Mr. Mensik file Notices of Appearance.<sup>2</sup>

19 **G. ECF-345; 02/23/2016; Order Re: Pending Motions and Directing Filing of Reports.**

20 **1. Page 2:7 to Page 3:1.**

21 The court discusses its prior order (ECF-329) and states:

22 The BIA has not complied with that direction.  
23

24  
25 <sup>2</sup> Mr. Lawler was granted leave to withdraw on November 1, 2019



1 The court then recites its receipt of ECF-339 through ECF 342, noting that no other  
2 attorney appearances were entered. The court concludes:

3 Due to the noncompliance, the court has no basis to evaluate whether all  
4 individual landowners who requested representation have received independent  
5 counsel. This is highly concerning to the court. In order for the views of all  
6 parties to be properly represented and presented, the parties must satisfy the  
7 court's concerns.

8 **2. Page 3:4-14.**

9 The court orders the BIA to file further information regarding individual landowner  
10 defendants.

11 **H. ECF-347; 4/1/2016; Federal Defendants Response to ECF-345.**

12 The Federal Defendants supply information requested by the court in ECF-345,  
13 including purchases by the Tribe of MA-8 ownership interests from the unrepresented  
14 individual allottees. ECF-347-1, ECF-347-2, and ECF-347-3 are exhibits related to the  
15 statements made in ECF-345.

16 DATED this 8<sup>th</sup> day of November 2019.

17 CLOUTIER ARNOLD JACOBOWITZ, PLLC

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