

Hon. Rosanna Malouf Peterson

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15 **UNITED STATES DISTRICT COURT**
16 **EASTERN DISTRICT OF WASHINGTON**

17 PAUL GRONDAL, a Washington
18 resident and THE MILL BAY
MEMBERS ASSOCIATION, INC.,
19 a Washington Non-Profit
Corporation,

20 Plaintiffs,

21 v.

22 UNITED STATES OF AMERICA;
23 UNITED STATES DEPARTMENT
OF THE INTERIOR; THE
24 BUREAU OF INDIAN AFFAIRS,
and FRANCIS ABRAHAM,
25 CATHERINE GARRISON,
MAUREEN MARCELLAY, MIKE

CASE NO. CV-09-0018-RMP

**JOINT NOTICE OF APPEAL TO
THE NINTH CIRCUIT COURT
OF APPEALS**

1 PALMER, JAMES ABRAHAM,)
 NAOMI DICK, ANNIE WAPATO,)
 2 ENID MARCHAND, GARY)
 REYES, PAUL WAPATO, JR.,)
 LYNN BENSON, DARLENE)
 3 HYLAND, RANDY MARCELLAY,)
 FRANCIS REYES, LYDIA W.)
 4 ARMEECHER, MARY JO)
 GARRISON, MARLENE)
 5 MARCELLAY, LUCINDA)
 O'DELL, MOSE SAM, SHERMAN)
 6 T. WAPATO, SANDRA)
 COVINGTON, GABRIEL)
 7 MARCELLAY, LINDA MILLS,)
 LINDA SAINT, JEFF M. CONDON,)
 8 DENA JACKSON, MIKE)
 MARCELLAY, VIVIAN PIERRE,)
 9 SOMA VANWOERKON,)
 WAPATO HERITAGE, LLC,)
 10 LEONARD WAPATO, JR,)
 DERRICK D. ZUNIE, II,)
 11 DEBORAH L. BACKWELL, JUDY)
 ZUNIE, JAQUELINE WHITE)
 12 PLUME, DENISE N. ZUNIE and)
 CONFEDERATED TRIBES OF)
 13 THE COLVILLE RESERVATION,)
 Allottees of MA-8 (known as Moses)
 14 Allotment 8),)
 15 Defendants.)

16 Defendants Wapato Heritage, LLC, and Gary Reyes hereby seek review by the
 17 United States Court of Appeals for the Ninth Circuit, of the district court's Order
 18 Regarding Representation of Indian Allottees entered March 26, 2020 in this matter at
 19 ECF No. 411, a copy of which is attached as Exhibit A. This appeal is made pursuant
 20 to 28 U.S.C. § 1291 and *Rincon Band of Mission Indians v. Escondido Mutual Water*
 21 *Company*, 459 F.2d 1082 (9th Cir. 1972). The filing fee is paid herewith.
 22
 23

24 Pursuant to Federal Rule of Appellate Procedure 12(b) and Ninth Circuit Rule 3-
 25 2, a representation statement is attached hereto as Exhibit B.

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DATED this 22nd day of April 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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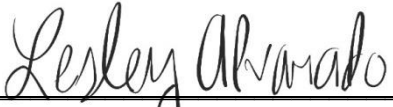
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DATED this 22nd day of April 2020.



Lesley Alvarado

EXHIBIT A

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 26, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington
resident,

Plaintiff,

v.

MILL BAY MEMBERS
ASSOCIATION, INC., a Washington
non-profit corporation; UNITED
STATES OF AMERICA; UNITED
STATES DEPARTMENT OF
INTERIOR; 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;
PAULWAPATO, JR.; LYNN
BENSON; DARLENE HYLAND;
RANDY MARCELLAY; FRANCIS
REYES; LYDIA W. ARMEECHER;
MARY JO GARRISON; MARLENE
MARCELLAY; LUCINA O'DELL;
MOSE SAM; SHERMAN T.
WAPATO; SANDRA COVINGTON;
GABRIEL MARCELLAY; LINDA

NO: 2:09-CV-18-RMP

ORDER REGARDING
REPRESENTATION OF INDIAN
ALLOTTEES

1 MILLS; LINDA SAINT; JEFF M.
2 CONDON; DENA JACKSON; MIKE
3 MARCELLAY; VIVIAN PIERRE;
4 SONIA VANWOERKON; WAPATO
5 HERITAGE, LLC; LEONARD
6 WAPATO, JR.; DERRICK D.
7 ZUNIE, II; DEBORAH L.
8 BACKWELL; JUDY ZUNIE;
9 JAQUELINE WHITE PLUME;
10 DENISE N. ZUNIE;
11 CONFEDERATED TRIBES
12 COLVILLE RESERVATION; and
13 ALLOTTEES OF MA-8, also known
14 as Moses Allotment 8,
15 Defendants.

16 Pursuant to this Court’s prior Order, the parties have submitted supplemental
17 briefing regarding the legal representation of the individual Indian allottees in this
18 matter. The Court requested this briefing to determine whether the Government
19 has a legal obligation to provide private attorneys to the named Indian allottee
20 Defendants and, if so, whether the Government has complied with that obligation.
21 The Court has considered the supplemental briefing, the extensive record in this
matter, the relevant case law, and is fully informed.

BACKGROUND

This case involves land known as Moses Allotment 8, or “MA-8.” When this litigation began, Plaintiffs Grondal and the Mill Bay Members Association (together “the Mill Bay Members”) did not dispute that the land, while allotted,

1 remained in trust status. *See* ECF No. 1. However, after the Government and the
2 Confederated Tribes of the Colville (“the Colville”) moved to eject Plaintiffs Mill
3 Bay Members from the land, and after the Ninth Circuit held that the Mill Bay
4 Members’ lease had expired¹, the Mill Bay Members, along with Defendant/
5 Cross-Claimant Wapato Heritage, LLC, began to argue that the land had lost its
6 trust status, and that the land is instead held in fee by the individual Indian
7 allottees. Therefore, they claim that the Government has no authority to eject the
8 Mill Bay Members, even though their lease expired. *See, e.g.*, ECF No. 295 at 1
9 (containing Plaintiffs’ argument that “[g]enuine issues of material fact exist as to
10 whether the United States has standing to eject and sue on behalf of the
11 landowners”).

12 When the dispute regarding MA-8’s trust status arose, the individual Indian
13 allottee Defendants were not represented by counsel. Because the status of the
14 allotted land would be determined through this litigation, the Court at that time
15 became concerned about the allottees’ lack of representation. ECF No. 345. The
16 Court ordered the Government to take numerous steps to ensure that the individual
17 landowners who wanted independent legal representation would receive it. *See id.*
18 The Court refused to set a briefing schedule until these matters were addressed. *Id.*
19 That was in February of 2016.

20 _____
21 ¹ *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1040 (9th Cir. 2011).

1 In September of 2019, this case was transferred. However, the Mill Bay
2 Members and Wapato Heritage argue that the pending motions still may not be
3 resolved because the Government has failed to find and provide representation to
4 each of the individual Indian allottee Defendants. To resolve the issue of
5 representation raised by the Mill Bay Members and Wapato Heritage, the Court
6 ordered the parties to submit supplemental briefing on the issue. ECF No. 389.
7 The Court explained that it would decide the pending motions after resolving the
8 representation issue. *Id.*

9 In their supplemental briefing, Plaintiffs Mill Bay Members and Defendant/
10 Cross-Claimant Wapato Heritage argue that the Government, as part of its trust
11 obligation, must provide representation to the individual allottees. The Mill Bay
12 Members and Wapato Heritage claim that the Government and the Colville have a
13 conflict of interest with the individual allottees. Thus, they contend that the
14 Government must find and provide private legal counsel for each individual Indian
15 allottee Defendant before the Court may resolve the pending motions in this
16 matter. The Mill Bay Members and Wapato Heritage essentially argue that a
17 conflict of interest exists because individual allottees may want to argue, contrary
18 to the Colville and the Government, that the land is fee land, rather than trust land.

19 The Colville and the Government claim that there is no legal or factual basis
20 supporting the Mill Bay Members' and Wapato Heritage's argument. They assert
21 that the Government is fulfilling its trust responsibility by seeking the ejectment of

1 trespassers on Indian trust land, and, to the extent that the individual Indian
2 allottees want to argue that the land has fallen out of trust status, the Government
3 has no trust obligation to represent them individually. The Government and the
4 Colville also argue that, factually, there is no conflict of interest, asserting, “The
5 United States has continually protected the trust status of MA-8, consistent with its
6 duty and the position of every individual *Indian* allottee that has stated a position
7 in this case.” ECF No. 398 at 2 (emphasis in original) (citing ECF Nos. 311, 314,
8 318, 320, 322, 323, 324, and 131 at 6–7). Additionally, in a footnote, the
9 Government asserts that the Mill Bay Members and Wapato Heritage do not have
10 standing to raise this representation issue on behalf of the Indian allottees, some of
11 whom have appeared in this case. *Id.* at 2 n.1.

12 DISCUSSION

13 *Representation of Individual Allottees under 25 U.S.C. § 175*

14 The Mill Bay Members and Wapato Heritage argue that the Government has
15 a duty to provide independent counsel to each of the individual Indian allottees
16 pursuant to 25 U.S.C. § 175. That statute provides, “In all States or Territories
17 where there are reservations or allotted Indians the United States attorney shall
18 represent them in all suits at law and in equity.” 25 U.S.C. § 175. Although the
19 statute uses mandatory language, a long line of precedent explains that the statute
20 is discretionary. *See Sinsical v. United States*, 208 F.2d 406, 409–410 (9th Cir.
21

1 1953); *United States v. Gila River Pima-Maricopa Indian Cmty.*, 391 F.3d 53, 56
2 (9th Cir. 1968).

3 The Ninth Circuit recently has reiterated that 25 U.S.C. § 175 is not
4 mandatory, and that the statute does not require the Government to provide private
5 counsel to individual Indian allottees. *Crow Allottees Ass’n v. BIA*, 705 Fed.
6 Appx. 489, 492 (9th Cir. 2017). In *Crow Allottees Association v. BIA*, individual
7 Indian allottees challenged a water compact entered into by the Crow Tribe, the
8 State of Montana, and the United States. *Crow Allottees Ass’n v. BIA*, No. CV 14–
9 62–BLG–SPW, 2015 WL 4041303, at *1 (D. Mont. June 30, 2015). The allottees
10 argued that the Government failed to negotiate the water compact in their best
11 interests. See *Crow Allottees Ass’n*, 705 Fed. Appx. at 492. On appeal, they
12 claimed that, pursuant to 25 U.S.C. § 175, the Government was required to provide
13 them with independent legal counsel to represent their individual interests and
14 rights. *Id.* The Ninth Circuit expressly rejected that argument, stating: “Section
15 175 provides no basis for Plaintiffs’ argument that they are entitled to private legal
16 counsel at the Government’s expense.” *Id.* Moreover, the Ninth Circuit explained,
17 “to the extent that Plaintiffs might seek representation by the United States
18 Attorney (which they do not claim to do), ‘we have held that the statute (section
19 175) is not mandatory.’” *Id.* (citing *Gila River Pima-Maricopa Indian Cmty.*, 391
20 F.3d at 56).

1 Neither the Mill Bay Members nor Wapato Heritage have cited binding
2 precedent requiring the Government to represent individual allottees, or to provide
3 private counsel to represent individual allottees. Ninth Circuit precedent is clear
4 that 25 U.S.C. § 175 does not provide a legal basis for the Mill Bay Members' and
5 Wapato Heritage's argument that the Government must furnish private attorneys
6 for the allottees. *See id.* Accordingly, the Court rejects that argument.

7 ***Inherent Power***

8 Defendant/ Cross-Claimant Wapato Heritage also argues that the Court has
9 inherent power to require the Government to provide private counsel to the
10 allottees in this matter and to ensure that counsel is available to represent the
11 allottees. ECF No. 404 at 21. However, the cases that Wapato Heritage cites for
12 this proposition are inapposite, as they interpret 28 U.S.C. § 1915. Under Section
13 1915, the Court has discretion to appoint counsel to a party who has been granted
14 leave to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915(a)(1). No applications
15 to proceed *in forma pauperis* have been filed in this matter. Section 1915 does not
16 require this Court, or the Government as a function of its historic trust relationship
17 with Indian tribes, to provide private legal counsel to the individual Indian allottees
18 under these facts. Therefore, Wapato Heritage's argument is rejected.

19 ***Instrument of Injustice***

20 Wapato Heritage claims that "if this case were to proceed without
21 independent counsel for the landowners, the Court would become an instrument of

1 injustice, not only as to the individual Indian landowners, but as to Plaintiff and
2 Wapato Heritage as well.” ECF No. 404 at 19. Wapato Heritage asserts that the
3 Government has acted in bad faith and contrary to its trust obligations. *Id.* It
4 argues that the Court must require the Government to provide counsel to each
5 Defendant, or else become an agent of injustice. *Id.*

6 The Court is not persuaded. The Government has taken steps to notify the
7 individual Indian allottees of this litigation and to find counsel for individuals who
8 responded and requested private representation. *See* ECF Nos. 333 and 347. Due
9 to the Government’s actions, two *pro bono* attorneys appeared on behalf of the
10 allottees who requested private counsel.² Additionally, the individual allottees
11 who have appeared in this action have sided with the Government and the Colville,
12 undercutting Wapato Heritage’s argument that the Government’s and the Colville’s
13 position conflicts with the allottees’ interests. *See* ECF No. 344 (individual
14 allottees’ motion to join Federal Defendants’ motion for summary judgment re
15 ejection).

16 Moreover, as the Colville explain, there are many reasons that the non-
17 appearing allottees may have decided not to litigate this case, which involves a
18 highly fractionated allotment. As the Colville assert:

19
20 ² The Court acknowledges that these attorneys have since withdrawn, and the
21 parties that they represented are now proceeding *pro se*.

1 It is not surprising the allottees have forgone private attorney
2 representation in this case. First, they have small (in most cases tiny)
3 interests in MA-8. ECF No. 347 at 2–4. Second, they have no control
4 over the property. Third, their minority interests have been and
5 continue to be represented by the United States. Fourth, . . . the
6 allottees have no legal right to federally-furnished private attorneys.

6 ECF No. 399 at 6–7.

7 Furthermore, the argument that the Government is acting contrary to its trust
8 responsibilities in this matter is strained. The Government and the Colville have
9 filed a motion for summary judgment requesting the ejection of the Mill Bay
10 Members from MA-8. When ejecting trespassers from Indian trust land, the
11 Government is fulfilling an essential trust obligation. “The protection of Indian
12 land against trespass was one of the first responsibilities assumed by the Federal
13 Government. The promise of such protection for lands retained by the Indian
14 tribes was an important *quid pro quo* in the process of treaty-making by which the
15 United States acquired a vast domain.” Matthew L.M. Fletcher, *Federal Indian*
16 *Law* 175 (2016) (quoting Flexi S. Cohen, *Handbook of Federal Indian Law* xii
17 (1941 ed.)). Plaintiffs have occupied MA-8 with an expired lease for over ten
18 years while this litigation has been pending. The Court will become an instrument
19 of injustice if it delays a resolution of this matter any longer, without legal
20 authority requiring it to do so. As the preceding paragraphs explain, no legal
21

1 authority requires the Government to provide independent counsel to individual
2 allottees in this matter.

3 Accordingly, **IT IS HEREBY ORDERED** that the Government is not
4 required to take further action to provide independent counsel to individual allottee
5 Defendants. The Court will proceed to resolve the remaining motions in this case,
6 beginning with the fully briefed motion for summary judgment. The pending
7 motion for summary judgment was briefed in 2012. Thus, any party may, **within**
8 **fourteen days** of the date of this Order, submit a supplemental brief that identifies
9 any new, relevant precedent or facts that were not previously briefed. Any
10 supplemental brief submitted shall not exceed fifteen pages, shall draw the Court's
11 attention to cases that have been decided since the motion for summary judgment
12 in this matter was filed, and shall briefly explain the relevance of those recent
13 cases.

14 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
15 Order and provide copies to counsel and to the *pro se* Defendants, and set a fourteen
16 day case management deadline.

17 **DATED** March 26, 2020.

18
19 s/ Rosanna Malouf Peterson
20 ROSANNA MALOUF PETERSON
21 United States District Judge

EXHIBIT B

Exhibit B

**Representation Statement
FRAP 12(b) & Ninth Circuit Rule 3-2**

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Appellees

**United States of America
United States Department of the Interior**

Bureau of Indian Affairs

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