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HON. JUSTIN L. QUACKENBUSH

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10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF WASHINGTON**
12 **AT SPOKANE**

12 PAUL GRONDAL, a Washington
13 resident and THE MILL BAY
14 MEMBERS ASSOCIATION, INC.,
15 a Washington Non-Profit
16 Corporation,

Plaintiffs,

v.

16 UNITED STATES OF AMERICA;
17 UNITED STATES DEPARTMENT
18 OF THE INTERIOR; THE
19 BUREAU OF INDIAN AFFAIRS,
20 and FRANCIS ABRAHAM,
21 CATHERINE GARRISON,
22 MAUREEN MARCELLAY, MIKE
23 PALMER, JAMES ABRAHAM,
24 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

Case No. CV-09-0018-JLQ

**RESPONSE TO COURT'S
QUESTIONS AS PER ORDER
DATED JANUARY 10, 2013**

25 **RESPONSES OF REPRESENTED
ALLOTTEES TO COURT'S
QUESTIONS OF 1-10-13
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1 O'DELL, MOSE SAM, SHERMAN
 2 T. WAPATO, SANDRA
 3 COVINGTON, GABRIEL
 4 MARCELLAY, LINDA MILLS,
 5 LINDA SAINT, JEFF M. CONDON,
 6 DENA JACKSON, MIKE
 7 MARCELLAY, VIVIAN PIERRE,
 8 SOMA VANWOERKON,
 9 WAPATO HERITAGE, LLC,
 10 LEONARD WAPATO, JR,
 11 DERRICK D. ZUNIE, II,
 12 DEBORAH L. BACKWELL, JUDY
 13 ZUNIE, JAQUELINE WHITE
 14 PLUMÉ, DENISE N. ZUNIE and
 15 CONFEDERATED TRIBES OF
 16 THE COLVILLE RESERVATION,
 17 Allottees of MA-8 (known as Moses
 18 Allotment 8),
 19 Defendants.

INTRODUCTION

The undersigned is counsel for the individual allottee defendants, PAUL G. WAPATO, Jr., GARY REYES, and FRANCIS REYES, My clients and I were in Court at the hearing on January 10, 2013 and the following is submitted in response to the Court's issues as enumerated in the Order dated January 10, 2013.

The Court has directed that *supplemental* briefing is to be filed no later than January 22 on four separate issues: 1) whether the trust period has expired and/or whether the Act of June 15, 1935 applies to MA-8; 2) whether MA-8 remains land held in trust by the United States; 3) if the trust period has expired, whether the Court has authority to direct the issuance of fee patents; and 4) whether any of these issues

**RESPONSES OF REPRESENTED
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1 require appointment of counsel for the individually named *pro se* landowners.

2 Before attempting to respond some additional information should be placed before
3 the Court. First and totally separate and apart from any legal issues, *the Court*
4 *should understand that my three clients' distinct preference is that MA-8 continue*
5 *in trust status.* Each of them has so advised me in writing. These are pragmatic
6 preferences in addition to being quite personal. They do not see a better solution as
7 being available to the landowners now. A determination that trust status has ended
8 would require the cessation of operations at the Mill Bay Casino, which is the only
9 source of significant income to the landowners, and indeed the only significant
10 income source the land has enjoyed since the Moses Allotments were created.
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14 Second, the Court can and should take judicial notice of the settlement in the
15 case of Cobell v. Salazar, No. 11-5205 (D.C.C., 2012) . The Cobell settlement will
16 provide over Three Billion Dollars to compensate owners of fractionated interests in
17 Indian trust lands because of the failure of the United States government to fulfil its
18 responsibilities to the Indian owners of fractionated interests in trust land over many,
19 many years. Two Billion Dollars are earmarked for the purchase of fractionated
20 interests at market value. A serious question, then, is whether the owners of MA-8
21 would qualify for the Cobell Land Buy-Back program if there were to be a ruling
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1 that trust status has ended. It would be the irony of ironies and a gross miscarriage of
2 justice for the owners of MA-8 to be denied participation in Cobell after having their
3 land controlled by the federal government and treated as trust land that produced next
4 to nothing in income for over 100 years in that status.

6 Finally, I acquired some information on Monday of last week detailing a
7 chronology of events that may have a significant bearing on trust status for MA-8.
8 Executive Order 4382 expressly extended Trust Status for MA-8 until March 8, 1936.
9 The legal effect of EO 4382 can be debated, but it was issued. That is a matter of fact.
10 And it happened to be the case that the trust status for the trust allotments on the
11 Colville Reservation were to expire on February 17, 1935. That also is a matter of
12 fact. The situation was complicated by the interplay of the Act of June 15, 1935 to
13 which the Court referred in the issues to be addressed. It appears that in an attempt to
14 extend the trust status on both of these groups of allotments (whether under the 1935
15 Act or by Executive Order) a mistake was made. The Colville Reservation trust
16 allotments were clearly protected and extended by the 1935 Act. But the Moses
17 Allotments were not *expressly* covered by the 1935 Act since they were not
18 physically located within the boundaries of an existing Reservation. The Moses
19 Allotments logically should have been extended by Executive Order. In fact, the
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1 reverse occurred. Executive Order 6962 was issued to extend the Colville
2 Reservation allotments, but this was not necessary due to the 1935 Act. Conversely,
3 the Moses Allotments were not expressly extended by Executive Order. Executive
4 Order 6962 is appended as Exhibit 1. And the pertinent portions of pages 1509 and
5 1510 from 22 Federal Register (1957) are appended as Exhibit 2. These pages
6 memorialize the actions taken to extend trust status on Indian allotments going back
7 to well before 1935. The provisions relating to the Moses Allotments and the Colville
8 Reservation allotments are highlighted. It seems likely that the person preparing the
9 record in 1935-36 thought they had extended the Moses Allotments (hence the
10 reference to the Moses Allotments as the first entry on page 1510, but the actual
11 Executive Order 6962 clearly pertained to the Colville Reservation Allotments and
12 not the Moses Allotments.
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17 Down through time from and after March 8, 1936, the federal government has
18 carried on business as if the trust status of the Moses Allotments was extended and
19 continued to be extended, and all landowners have acquiesced in this without
20 question until very recently. *For present purposes the sum and substance of it is*
21 *this: if the trust status of MA-8 has expired then the responsible party is the United*
22 *States government.* The universal pattern for Indian trust land over the past 100
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1 years and more was that the trust status was *always* extended. There is nothing – no
2 published positions, no news stories, no correspondence - to indicate that the federal
3 government did not intend to extend trust status on the Moses Allotments in 1936 and
4 at all times thereafter to the present.
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6 REPRESENTATION OF ALL ALLOTTEES

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8 The last issue articulated by the Court to be addressed will be taken first. In
9 addressing the question of legal representation various parties have made the point
10 that there is an inherent conflict of interest between the positions of the allottees and
11 the Tribe such that the BIA cannot represent the interests of both. *But that is not*
12 *why independent legal counsel must be provided to the allottees by the United*
13 *States government.* The primary conflict of interest is found in the potential liability
14 of the United States to the allottees for the loss and deprivation of trust status, if such
15 be the case. And as an additional claim for liability and damages, the wrongful
16 exertion of dominion and control over land that perhaps should have been released
17 from trust status many decades ago. Who was responsible for promulgating the trail
18 of devices that were used over time to extend the trust status of the Moses
19 Allotments? The government. Was Executive Order 2109 issued on December 23,
20 1914 really not effective to extend the Moses Allotments because it placed reliance
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1 on the Act of June 21, 1906? If that is the case (as was addressed by the undersigned
2 in a prior Memorandum to the Court), then the trust status should have ended long
3 ago. If the failure to extend the trust status past March 8, 1936 was the cause of a
4 possible lapse in trust status, then again it should have been over long ago. And in
5 each case, the responsibility for the attempts to extend not being effective (if that is
6 the conclusion) must reside with the government.
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9 *And this is precisely why the Court must order the government to provide*
10 *independent legal counsel for all allottees.* This conflict of interest cannot be
11 explained away or rationalized. It is the duty of the United States government to
12 provide legal counsel for all of the individual allottees. The case law leaves no room
13 for doubt. See, e.g., *Siniscal v. United States*, 208 F. 2d 406, 410 (9th Cir. 1953).
14 And once that is clearly in focus, it also clear that the Court should not enter any
15 rulings on trust status, or otherwise, until all allottees are represented by legal counsel
16 and they have had an opportunity to confer with counsel, and, similarly, all lawyers
17 who may be appointed to represent allottees must have the time needed to be fully
18 abreast of all issues in the case. The presently unrepresented allottees have roughly
19 48% of the ownership, and with my clients' interests the individual allottees have a
20 clear majority approaching 60%. They must be given a chance to be represented and
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1 heard in a meaningful way.

2 **The Act of June 15, 1935**

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4 _ The express language of the statute does not cover the Moses Allotments. But
5 what latitude does the Court have in fashioning a remedy that could cure (or repair) a
6 technical lapse of trust status due to a simple human error? Or can it be cured by
7 legislation? Or is there something in the legislative history that saves trust status? In
8 any event these are questions that should be deferred until all allottees have legal
9 counsel.
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12 **Does MA-8 Remain in Trust, and What About Issuance of Fee Patents?**

13 The Court should make no ruling at this time other than the appointment of legal
14 counsel at the expense of the United States government and they have become
15 assimilated into the case.
16

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18 **DATED** this 22nd day of January, 2013

19
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**Executive Order 6962 - Extension of Trust Periods on Allotments
Made to Indians of the Colville Reservation**

February 4, 1935

**FEDERAL
REGISTER**



By virtue of and pursuant to the authority vested in me by section 5 of the act of February 8, 1887 (ch. 119, 24 Stat. 388, 389), and the act of June 21, 1906 (ch. 3504, 34 Stat. 325, 326), it is ordered that the periods of trust on allotments made to Indians of the Colville Reservation, Washington, which, unless extended, would expire during the calendar year 1935, be, and they are hereby, extended for a further period of 10 years from the date on which any such trust would otherwise expire; Provided, however, That extensions of the trust periods herein provided for are made subject to the provisions of the act of June 18, 1934 (ch. 576, 48 Stat. 984), and if a majority of the adult Indians of said reservation voting at the election to be held under section 18 of said act shall vote in favor of the application of the provisions of the act to the reservation, then this order shall thereafter cease to be of force and effect.

FRANKLIN D. ROOSEVELT

22 FEDERAL REGISTER (1957)

1509

State	Reservation	E. O. No.	Date	Period of extension
Nebraska (Cont.)	*Santee (Cont.)	5768	Dec. 30, 1931	10 years.
Do	do	5957	Nov. 23, 1932	Do.
Do	Winnebago	2985	Sept. 28, 1918	Do.
Do	do	4518	Dec. 4, 1925	Do.
Do	do	4979	Oct. 16, 1928	Do.
Do	do	4994	Nov. 14, 1928	Do.
Do	*Sac and Fox, William Banks allotment	3878	July 27, 1923	1 year.
Do	do	5802	Mar. 12, 1930	Do.
Do	do	5768	Dec. 30, 1931	Do.
Do	Sisseton and Wahpeton	1916	Apr. 16, 1914	Do.
Do	do	3994	Apr. 19, 1924	13 years.
Do	*Yankton Sioux	2363	Apr. 29, 1916	10 years.
Do	do	4406	Mar. 30, 1926	Do.
Do	do	5173	Aug. 9, 1929	Do.
Do	*Lower Brule	4981	Oct. 20, 1928	Do.
Do	*Pine Ridge	3557	Feb. 13, 1931	Do.
Do	do	5768	Dec. 30, 1931	Do.
Do	do	5953	Nov. 23, 1932	Do.
Do	*Cheyenne River	3546	Jan. 31, 1931	Do.
Do	do	5768	Dec. 30, 1931	Do.
Do	do	5257	May 29, 1930	Do.
Utah	*Uncompahgre, Uintah and White River Bands of Utes, Chief Moses Band	2109	Dec. 28, 1914	Do.
Washington	do	4382	Feb. 10, 1926	10 years from Mar. 8, 1926.
Do	Colville	4167	Feb. 17, 1925	10 years.

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PART IV—EXECUTIVE AND DEPARTMENTAL ORDERS

State	Reservation	E.O. No.	Date	Period of extension
Washington (Cont.)	Chief Moses Band (Cont.)	6982	Feb. 4, 1935	10 years.
Do	*Quinalt	5768	Dec. 30, 1931	Do.
Do	Spokane	6939	Jan. 7, 1935	Do.
Do	Yakima	3639	Feb. 3, 1922	Do.
Do	do	4168	Mar. 11, 1925	Do.
Do	do	5746	Nov. 10, 1931	Do.
Do	do	7036	May 8, 1935	Do.
Wisconsin	*Oriskany	Art of May 27, 1937 (50 Stat. 2161)		To July 9, 1942.
Do	do	2623	May 19, 1917	1 year.
Do	do	2856	May 4, 1918	9 years.
Wyoming	Wind River	4600	Mar. 1, 1927	10 years.
Do	do	5768	Dec. 30, 1931	Do.
Do	do	5953	Nov. 23, 1932	Do.