UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, vs. UNITED STATES OF AMERICA; US DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, WAPATO HERITAGE, LLC, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, FRANCIS ABRAHAM, CATHERINE GARRISON, et al., allotees of Moses Allotment 8, Defendants, Cross-, Counter-claimants.	Cause No: 2:09-CV-0018-JLQ **MEMORANDUM AND ORDER RE: APPOINTMENT OF COUNSEL**

BEFORE THE COURT are the Federal Defendants' Motion for Summary Judgment re: Ejectment (ECF No. 231) and the Tribe's Motion to Dismiss (ECF No. 274) the Cross-claims of Wapato Heritage, LLC. The claims and defense in this case concern the Plaintiffs' claims to occupy a portion of land known as Moses Allotment 8 (MA-8), an off-reservation

allotment claimed by the some of the Defendants to be held in trust by the United States. Plaintiffs claim the Defendants are estopped to deny Plaintiffs' right to occupy the property. The two pending dispositive motions hinge upon the Plaintiffs' and Defendant Wapato Heritage's contentions that MA-8's trust period has expired and that the United States therefore lacks standing to seek ejectment as trustee. 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. As "those with direct interests—economic, historical, spiritual—in the outcome of a case are their own best representatives," *Arizona v. California*, 460 U.S. 605, 652 (1983)(dissent), the court will not finally rule upon the pending matters without independent legal counsel for the individually named Defendant landowners.

I. BACKGROUND: THE CREATION OF MA-8 AND THE FEDERAL GOVERNMENT'S TREATMENT OF MA-8 AS TRUST LAND

Where an allotted property is held in trust, the title to and control over the land remain in the United States in trust for the use and benefit of the allottee. The Indian Long-Term Leasing Act, 25 U.S.C. § 415, allows the lease of restricted Indian trust lands, with approval of the Secretary of the Interior or the BIA. The Code of Federal Regulations also permits the United States, as trustee and on behalf of the Indian landowners, to take action to recover possession from an individual or entity in possession of Indian trust land without a lease. 25 C.F.R. § 162.023; 25 C.F.R. § 162.471.

Plaintiffs defend against the United States' ejectment claim and Motion for Summary Judgment claiming that the United States lacks standing to sue because its trust authority and responsibilities terminated when MA-8 ceased being trust land in 1936. Wapato Heritage joins in Plaintiffs' position, and has asserted its own Cross-claim (which is not the subject of a motion presently before the court) against the individual landowners seeking a declaratory judgment that the land is not trust land. The overarching legal question of trust status would appear to require initial resolution.

The issue of whether the property in dispute is land held in trust necessitates an in-depth, complex review and analysis of the creation and historical development of the Moses Allotments, as well as the conduct of the Government in regard to these allotments. A chronological summary from the pleadings and the court's research follows; it does not constitute findings by the court. Portions of this history have been recited in this court's decision on summary judgment (ECF No. 144); in *Wapato Heritage, LLC v. U.S.*, 637 F.3d 1033 (9th Cir. 2011); in *U.S. v. La Chappelle*, 81 F. 152 (C.C. Wash. 1897); in *United States v. Moore*, 161 F. 513 (9th Cir. 1908); and in *Starr v. Long Jim*, 227 U.S. 613 (1913).

A. Tracts of Land "Reserved" from the Columbia Reservation Following The Moses Agreement and the Act of July 4, 1884

1879. On April 19, 1879, United States President R.B. Hayes signed an Executive Order establishing a reservation for Chief Moses (of the Moses Band of Indians), later named the Columbia Reservation (ECF No. 293, Ex. A) in what became the State of Washington. It included portions of the aboriginal lands of the Wenatchi, Entiat, Columbia and Chelan Indians. It was directly west of the Colville Reservation, and had a boundary along the south shore of Lake Chelan, Washington. *U.S. v. State of Or.*, 787 F.Supp. 1557 (D.Or. 1992). The Columbia Reservation was bordered on the east by the Okanogan River (the western boundary of the Colville Indian Reservation), on the south by the Columbia River, on the west by the Chelan River, Lake Chelan and the crest of the Cascade Mountains, and on the north by the international boundary with Canada. The eastern boundary of the Columbia Reservation was adjacent to the Colville Reservation. (ECF No. 316 at 2). In 1880, President Hayes signed another Executive Order increasing the size of the reservation to approximately 3 million acres. On February 23, 1883, President Chester Arthur removed 15 miles of the reservation as a result of non-Indian settlement demands, shrinking it to approximately 2,243,000 acres.

1883. On July 7, 1883, four Indian chiefs, namely Moses and Sar-sarp-kin of the Columbia Reservation, and Tonasket and Lot of the Colville Reservation, reached an agreement with the Secretary of the Interior, commonly called the Moses Agreement. The Moses Agreement provided that the head of each Indian family living on the Columbia Reservation could elect to receive tracts of land (640 acres, or one square mile) from the then Columbia Reservation, or elect to relocate to the Colville Reservation. The remainder of the Columbia Reservation would be restored to the public domain and subject to entry by non-Indians under the homestead laws. (ECF No. 175, Ex. 1).

1884. Congress ratified the Moses Agreement by the Act of July 4, 1884 (23 Stat.79, c. 180). (ECF No. 234, Ex. 2). The Act of July 4, 1884 provided:

> That Sarsopkin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: And provided further, that in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws...

The Moses Agreement provided that those Indians receiving an allotment were to surrender all rights to the rest of the Columbia Reservation. The Act of July 4, 1884, confirming the Moses Agreement, contained no express provision for the issuance of trust or fee patents for the Indian selected tracts.

On May 1, 1886, President Grover Cleveland issued an Executive Order formally dissolving and opening the Columbia Reservation to settlement and homesteading by non-Indians, subject to the terms of the Moses Agreement and 1884 Act. *See U.S. v. State of Or.*, 29 F.3d 481 (9th Cir. 1994)("They agreed to restore the reservation to the public domain and to let Moses and his people relocate to the Colville Reservation. Many of Moses' followers voluntarily relocated to Colville, although the Chelan tribe was moved

there by military force in 1890."). The 1886 Executive Order set apart a number of allotment lands "for the exclusive use and occupation of said Indians," including Allotment No. 8 in favor of Wapato John (ECF No. 293, Ex. A) and included this survey description of its location:

> From stone monument on shore of Lake Chelan, near houses of Wa-pa-to John...run north...80.00 chains...thence run west 80.00 chains, cross trail, course northwest and southeast 80.00 chains...thence run south 35.60 chains, crossed fence, course east and west, 77.00 chains...[to the] blazed cottonwood tree 12 inches in diameter ...on shore of Lake Chelan..., which contains about 640 acres.

Id. The Annual Report of the Commissioner of Indian Affairs from 1886 states: "...the surveys of the Columbia Reservation were completed...and the reserve restored to the public domain...after giving to Sar-Sarp-kin and others...thirty-seven allotments." Available at University of Wisconsin Digital Collections, http://uwdc.library.wisc.edu/collections/History/IndianTreatiesMicro.

Although MA-8 was created pursuant to the 1883 Moses Agreement and with the consent of the four Indian chiefs, federal policy of seeking tribal consent to allotments was abandoned shortly thereafter with the enactment of the General Allotment Act (Dawes Act) in 1887. *Cohen* at § 16.03. Allotments made under the General Allotment Act and its implementing legislation were to be held in trust for the allottees for 25 years and at the end of the trust period, the land was to be conveyed to the allottee by patent in fee, free of encumbrance and fully alienable. *Id*. The President was authorized under the General Allotment Act to extend the trust period for allotments made under the General Allotment Act.

1905. Over twenty years after the Moses Agreement and Act of July 4, 1884, Congress commenced the enactment of legislation regarding the issuance of patents for the allotted lands. *See generally*, See Felix S. Cohen, *Handbook of Federal Indian Law* § 1:04 (2012)[herein after "*Cohen*"] (describing "piecemeal process" of amending and developing the allotment program after the passage of the General Allotment Act).

Congress passed the Act of March 3, 1905 (33 Stat. 1064, c. 1479) generally authorizing the issuance of *fee* patents, which would ultimately pass the full and unrestricted fee title for the trust patent or allotment certificate issued to Indian allottees. For example, a fee patent was issued to Chief Long Jim of the Chelan Indians for his allotted land (MA-40) on August 2, 1905.

1906. The following year, the Act of March 8, 1906 (34 Stat. 55, c. 629) expressly provided for the issuance of *trust* patents, not fee patents, for the remaining allottees, declaring the land allotted to Indians under the Moses Agreement held in trust:

> for the period of ten years from the date of the approval of this Act...and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsover.

(ECF No. 234, Ex. 2). The Act of March 8, 1906 permitted the Moses Agreement allottees to sell their allotted lands during the trust period, but with the restriction that the allottee could "sell and convey all lands covered thereby, *except eighty acres*..." *Id.* (emphasis added). The ability to convey allotted lands during the trust period was a distinguishing feature of the Moses Agreement allotments as compared to other Indian allotments made pursuant to the General Allotment Act, which did not permit such conveyance.

1907-1908. The United States Department of Interior began issuing trust patents to Wapato John for MA-8 and to other allottees, who chose not to remove to the Colville Reservation and had chosen to receive allotments. Two trust patents were issued to Wapato John for MA-8. (ECF No. 175, Ex. E at 24-28);(ECF No. 234, Att B, Ex. 4 at 71-75). The first, Trust Patent No. 151-1599, handwritten and dated April 9, 1907, was for 548 acres. (ECF No. 90 at 178, Ex. 12 at 175). The second, No. 151-1555 dated December 28, 1908, issued Wapato John 57.85 acres. *Id*. Both trust patents contained virtually identical language as the language contained in the 1907 trust patent:

> Whereas, there has been deposited in the General Land Office of the United States a schedule of Allotments by the Secretary of the Interior March 20, 1907 and

> December 11, 1908, whereby it appears that Nek-quel-e-kin, or Wa-pa-to John, an Indian of the Chief Moses band has been allotted the following described land...containing five hundred and forty-eight acres.
>
> Now know Ye, That the United States of America, in consideration of the premises has allotted, and by these present does allot unto the said...Wa-pa-to John the land above described and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of ten years in trust for the sole use and benefit of...Wa-pa-to John or in case of his death for the sole use of his heirs, according to the laws of the State or Territory where in the land is located and that the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

(ECF No. 90, Ex. 12 at 178 (transcription)).

1906-1911. In 1906, Congress broadened the President's delegated authority to extend the term of trust patents. This authority then not only applied to trust patents issued under the General Allotment Act, but under "any law or treaty." Act of June 21, 1906, 34 Stat. 325, 25 U.S.C. s. 391; *Cohen* at § 16.03.

In 1906, Wapato Irrigation Company was formed by non-Indian settlers who sought to develop lands in the area of the Moses Allotments into orchards. According to *Lord v. Wapato Irr.Co.*, 81 Wash. 561 (1914), the Irrigation Company hired real estate brokers to procure consents of the Indian allottees "to sell as much of their lands as they were willing to and could lawfully alienate." 81 Wash. at 565. These brokers were to seek to purchase MA-8 for not more than "fifty dollars per acre." *Id*. at 571. Unable to obtain consent of the Wapato John family to purchase "any part of allotments 8 or 10," they thereupon "took steps to procure them through the Interior Department..." *Id*. at 573. On March 4, 1911, Congress authorized the sale of MA-8 through legislation indicating the land "may be required to advantageously and economically complete and operate its irrigation project." 36 Stat. 1358. On April 11, 1911, 441.45 acres were "sold" to Wapato Irrigation Company, who within days then conveyed all the land to the "Lake Chelan Land Company" for $200/acre, leaving the MA-8 parcel 174.4 acres which remains today.

Wapato John died several months later in September 1911 (ECF No. 234, Att B, Ex. 5), whereupon his ownership interest in MA-8 passed to his heirs. Undivided interests in MA-8 continued to pass pursuant to probate proceedings and by purchase.

1914. On December 23, 1914, President Woodrow Wilson issued Executive Order 2109 stating:

> Chief Moses Band. It is hereby ordered, under the authority contained in section 5 of the act of February 8, 1887...and the act of June 21, 1906...that the ten-year period of trust on all allotments made to members of the Chief Moses Band of Indians..under the agreement of July 7, 1883...the title of which has not passed from the United States, be, and the same is hereby extended for a further period of ten years.

(ECF No. 234, Ex. 5). This Executive Order's reference to the Act of February 8, 1887, *the General Allotment Act*, although the Moses Allotments were not granted under that Act, is just the beginning of evidence marking confusion by the Executive Branch in regard to the Moses Allotments. This Executive Order purported to extend the trust period to March 8, 1926. No party to the matters pending before this court contend this 1914 Executive Order did not apply to MA-8.

B. Pre-Indian Reorganization Act Era Policy: Interior Department Treats MA-8 as a "Reservation Allotment" and Acknowledges the Existence of the Chief Moses Band of Indians

After the establishment of the Moses Allotments, the Department of Interior continued to associate these individually held allotments with the former Columbia Reservation and the Chief Moses Band of Indians. In its attempt to manage Indian allotment lands, the Department of Interior categorized them into two categories: "reservation" allotments and "public domain" allotments. Neither category was clearly defined. However, the "public domain" category encompassed "patents issued to Indian allottees outside of reservations," allotments "made to Indians residing on the public domain," or allotments made to those Indians who did not reside on a reservation or whose tribe had no reservation. The category for "reservation" allotments listed both land

within formally designated reservations set aside on behalf of a tribe/tribes for a tribe/tribes, *as well as* parcels of land reserved (allotted) from either ceded Indian territory or former-reservation land for individuals who belonged to a tribe, band, or other Indian community.

This system of classifying allotment lands is exemplified in the 1907 Annual Report of the Commissioner of Indian Affairs containing a list of the number of patents issued, "classified by reservations." The list provides that 33 patents had been issued for "Columbia (Moses Agreement), Wash." Annual reports in subsequent years also categorize and count the Moses Allotments as "Columbia" reservation, "allotted," "reservation lands." The Moses Allotments were distinctly listed separate from the allotted lands on the Colville reservation and Indian land in the "public domain." Although the Moses Allotments, including MA-8, were made to *specific individuals* of the Chief Moses Band, in 1926, the Report of the Commissioner of Indian Affairs referenced the parcels as "allotments made to Indians within the following reservations: 'reserved lands of the Chief Moses Band.'" (ECF No. 234, Ex. 8). *Compare discussion in* William C. Canby, Jr., *American Indian Law in a Nutshell* 429 (Thomson/West, 5th ed. 2009)[hereinafter "*Canby*"]("The allotment system of landholding is in total contrast to communal ownership by the tribe."). In taking its annual census of the Indian population, the Interior Department continued to separately document a count for "Columbia (Moses-Band)" or "Chief Moses Band" Indians.

C. 1920-1934: Drastic Policy Shift Spurs Action to Halt Indian Land Loss

"By the 1920s, federal officials acknowledged that the allotment policy had not only failed to serve any beneficial purpose for Indians, but had been terribly harmful." *Cohen* at §. 16.01; *see also Canby* at 23-25. "The executive branch and Congress began extending trust periods on most allotments..." *Cohen* at §16.03. For example, in 1920, Executive Order 3365 extended the trust period for public domain allotments an additional 25 years. In 1928, "the now-famous Meriam Report documented the failure of federal

Indian policy during the Allotment period." *Canby* at 25; *see* Inst. for Gov't Research, *The Problems of Indian Administration* (1928)(Lewis Meriam, Technical Director). Between 1887 and 1934 when allotments ended, Indian land holdings were reduced from 138 million acres to 48 million. *Canby* at 23. As *Canby* explains:

> Much of the land was lost by sale as tribal surplus; the remainder passed out of the hands of allottees. Allottees who received patents after 25 years found themselves subject to state property taxation, and many forced sales resulted from non-payment. In addition, the Indians' new power to sell land provided many opportunities for non-Indians to negotiate purchase of allotted land on terms quite disadvantageous to the Indians.

Canby at 23.

1. Act of May 20, 1924

In 1924, Congress passed an Act specific to the Moses Allotments, which permitted the sale of a Moses Allotment, *in its entirety, with Secretary approval*. The Act of May 20, 1924 (43 Stat. 133) provided the following:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any allottee to whom a trust patent has heretofore been or shall hereafter be issued by virtue of the agreement concluded on July 7, 1883, with Chief Moses and other Indians of the Columbia and Colville Reservations, ratified by Congress in the Act of July 4, 1884...*may sell and convey any or all the land covered by such patents*, or if the allottee is deceased the heirs may sell or convey the land, *in accordance with the provisions of the Act of Congress of June 25, 1910*...

(ECF No. 280, Ex. A; ECF No. 175, Ex. G)(emphasis added). The purpose of the Act of May 20, 1924 is reflected both in the legislative history and contemporaneous Bureau of Indian Affairs correspondence. (ECF No. 280; ECF No. 307 [Decl of Kelley], Ex. B [2/5/1924 letter from Commissioner to Mr. Wapato], Ex. C [8/16/24 letter from Superintendent to Mr. Kingman]. In a letter from the Secretary of Interior dated December 5, 1923 explaining the need for passage of this legislation, it stated: "Section 2 of the act of March 8, 1906...which authorizes the issuing of trust patents, contains a provision withholding from sale or conveyance at least 80 acres of each allotment. It is reported that

most of the allottees are now deceased that their heirs are widely scattered, and legislation is desired that will authorize the sale of the whole or any portion of the allotments under the existing laws and regulations governing the sale of Indian trust lands." (ECF No. 280, Ex. E).

The Act of June 25, 1910, referenced in the Act of May 20, 1924, was a revision of the General Allotment Act which "sought to fill gaps and deficiencies in the administration of the estates of allottees and the management of lands retained by Indian tribes." *Cohen* at § 1.04. The 1910 Act had granted the Secretary of the Interior the authority to make rules regarding the conveyances of Indian allotment lands. For example, it set forth probate jurisdiction and rules for interests in allotted land for "any Indian who dies before the expiration of the trust period and before issuance of a fee simple patent" and allowed allotment owners to devise their interests by will, subject to the approval of the Secretary of Interior. The 1910 Act did not direct the issuance of fee patents for Moses Agreement allotment lands.

2. 1926: Executive Order 4382 Extends Trust Period to March 8, 1936

On February 10, 1926, President Calvin Coolidge issued Executive Order 4382, providing that the ten year period of trust on all allotments made to members of the Chief Moses Band of Indians under the Moses Agreement was "extended for a further period of ten years, from March 8, 1926, with the exception of allotment No. 5 (MA-5)..." (ECF No. 234, Ex. 7). This executive action extended the trust period to March 8, 1936.

Plaintiffs contend MA-8's trust period expired on March 8, 1936. The Federal Defendants and the Tribe contend that periodic congressional and executive action insured the continuation of the trust or restricted status of Indian allotments, until most recently, in 1990, when the period was continued indefinitely by act of Congress. These periodic actions are outlined below.

3. Indian Reorganization Act of 1934 and the Act of June 15, 1935

The Indian Reorganization Act of 1934 (hereinafter "IRA") reflected significant change in federal Indian policy aimed at halting further Indian land loss. Known alternatively as the "Wheeler-Howard Act" and spearheaded by reformist John Collier (who rose to the position of Commissioner of Indian Affairs in 1933), the IRA permitted tribes to organize and adopt constitutions. It prohibited further allotments of reservation lands, and it also indefinitely extended the trust period on all reservation allotments subject to the IRA. Section 2 of the IRA specifically stated: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. Specifically exempted from the Act were "Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." 25 U.S.C. § 468. Section 18 stated that "This Act shall not apply to any reservation wherein a majority of the adult Indians...shall vote against its application."

At the time the IRA was passed in 1934, there were no clear definitions of the concepts of "reservation," "Indian lands," "Indian country," or "recognized" and "unrecognized" tribes. These concepts evolved later. There was not even a comprehensive list of federally recognized tribes. After the IRA passed, Collier apparently hastily compiled a list of tribes containing numerous mistakes. *See* William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356 (1990). It was then up to the executive branch and the federal courts to determine, on an ad hoc basis, to whom these statutes should be applied.

The neighboring Colville Tribe rejected the IRA and adopt its own constitution. Though the Department of Interior characterized the Moses Allotments as allotment lands falling "within Indian reservations" (as opposed to "public domain allotments"), there is no evidence that the individual members of the Moses-Columbia band residing on the

individual Moses Allotments were formally organized members of a tribe or reservation, such that any "vote to exclude" the Moses Allotments from the IRA was or could be taken. The Moses Allotments were instead dependent upon executive or congressional action for extension of the trust period.

Concerned that the opt-out provision of § 18 if the IRA could mean the trust period extension provision would not apply to all tribes, allotments, and Indian lands, Mr. Collier quickly proposed an amendment passed by Congress on June 15, 1935. Section 3 of the Act of June 15, 1935 provided:

> SEC. 3. If the period of trust or of restriction on any Indian land, has not, before the passage of this Act, been extended to a date subsequent to December 31, 1936, ***and if the reservation containing such lands has voted or shall vote to exclude itself from the application of the [Indian Reorganization Act]***, the periods of trust or the restrictions on alienation of such lands are hereby extended to December 31, 1936.

ECF No. 234, Ex. 9 (emphasis added). In February 1935, during Congressional hearings prior to the enactment of the 1935 amendment, Collier testified before the House Committee on Indian Affairs regarding the purpose of the amendment stating that his agency did not "wish to see the trust period terminated" on "Indian lands" (ECF No. 313, Ex. B)– *a term, which at that time, was undefined*.

No President of the United States ever issued an Executive Order pertaining to MA-8 *prior to* the March 8, 1936 expiration date set by Executive Order 4382 (March 8, 1936). (ECF No. 307, Ex. D [25 CFR Appendix-Extension of the Trust or Restricted Status of Certain Indian Lands (1949)]). Based thereon, Plaintiffs contend MA-8's trust status lapsed on March 8, 1936 and MA-8 should have been patented in fee thereafter.

4. *Subsequent trust period extensions to an indefinite trust period*

On September 30, 1936, President Franklin D. Roosevelt issued Executive Order No. 7464 extending periods of trust "applying to any Indian lands, whether of a tribal or individual status" and unless extended, expiring December 31, 1936 or in the year 1937, for a further period of 25 years from the date the trust would otherwise expire. (ECF No.

234, Ex. 10). Subsequent extensions of the trust period were made pursuant to orders of the Secretary of the Interior issued in five year intervals. (ECF No. 234, Ex. 12-18[25 Fed. Reg. 13688-89 (extending trust period to 1966); 28 Fed.reg. 11630-31 (extending period to January 1, 1969); 33 Fed.Reg. 15067 (extending period to January 1, 1974) ; 38 Fed.Reg. 33463-64 (extending period to January 1, 1979); 43 Fed.Reg. 58368-69 (extending trust period until January 1, 1984); 48 Fed.Reg. 34026 (extending period to January 1, 1989); 53 Fed.Reg. 30673-74 ((extending period to January 1, 1994)).

Finally, in 1990, Congress enacted 25 U.S.C. § 478-1 extending the indefinite trust period created by the Indian Reorganization Act of 1934 to ***"all lands held in trust by the United States for Indians***." 25 U.S.C. §§ 478-1; *See also,* Mark D. Poindexter, Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment, 14 B.C. THIRD WORLD L.J. 53, 77 (1994).

D. Post-IRA Confusion

The plain language of the Act of June 15, 1935 applies to reservation allotments such as those on the opted-out Colville Reservation. However, the Interior Department interpreted the 1935 Amendment to the IRA broadly – as insuring the continuation of the trust status for *all* "reservation" allotments, which were then designated by the Office of Indian Affairs. The 1936 Annual Report of the Commissioner of the Office of Indian Affairs evidences this broad interpretation as it states that the Act of June 15, 1935 "extended the trust periods on all Indian lands outside of Oklahoma which would otherwise have expired." (ECF No. 307, Ex. C [1936 Annual Report of Comm'r Off. Indian Affairs]). *See also,* ECF No. 307, Ex. D [25 C.F.R. ch. I App.])(the Act of June 15, 1935 served the purpose of "insuring the continuation of the trust or restricted status of Indian allotments within Indian reservations not subject to the Reorganization Act").

The Office of Indian Affairs characterized the Moses Allotments as "reservation" allotments and considered them trust land whose trust period had been extended by the Act of June 16, 1935. In 1949, the Department of Interior published a chart attached as an

Appendix to the Code of Federal Regulations listing all the acts of Congress or Executive Orders "continuing the trust or restricted period on Indian land, which would have expired otherwise, within the several Indian reservations in the states named." (ECF No. 307, Ex. D [25 C.F.R. ch. I App.]). Under the heading "Reservations," the appendix chart lists the Moses Allotments under "Chief Moses Band," separate from the listing for "Colville" and others. *Id.* The appendix designates the Moses Allotments as a "reservation" "not subject to the [IRA]" and "dependent on acts of Congress or Executive orders for extension of the trust or restricted period of the land." *Id.* Then it explains the Act of June 15, 1935 served the purpose of "insuring the continuation of the trust or restricted status of Indian allotments within Indian reservations not subject to the Reorganization Act." *Id.*

Other Department of Interior conduct evidences there was some confusion as to the status– even geographic – of the Moses Allotments. For example, in 1938, in matters related to a right of way application by the State of Washington affecting MA-8, MA-9, and MA-17, the Department of Interior's Assistant to the Commissioner of Indian Affairs described these Moses Allotments as "three restricted Indian allotments on the Colville Reservation." (ECF No. 313, Ex. A at 9). The attached right of way grant described the three allotment lands as "allotted Indian lands, Colville Indian Reservation, Washington." *Id.* In addition, the chart appended to the federal register in 1957 contains what appears to be at best, a typo, citing Executive Order 6962 as applying to the "Chief Moses Band" when Executive Order 6962 clearly only pertained to "allotments made to Indians of the Colville Reservation." (ECF No. 314, Ex. 2).

E. Recent Government Action Concerning the Moses Allotments

The Department of Interior's treatment of the Moses Allotments as Indian trust land did not change over time. In 1980 and 2006, Congress passed legislation in regards to MA-8 and MA-10, amending the maximum allowable lease term applicable to trust land, from 25 to 99 years. *See* 1980, Act of March 27, 1980, 94 Stat. 125; 2006, Act of May 12, 2006, 120 Stat. 340. This legislation reveals that as the concepts such as "reservation" and

Indian country became more defined, the Department of Interior characterized the Moses Allotments as off-reservation allotments. The legislative history of the Act of March 27, 1980 is informative, even though it referenced only MA-10 (located just one mile west of MA-8). Senate Report 96-395 of the Indian Affairs Committee set forth the background and need for the legislation:

> The Moses Allotment No. 10, also referred to as Wapato Point comprises 116.1 acres located near Manson, Wash., Chelan County, on Lake Chelan. The property lies west of the Colville Indian Reservation and east of the Okahagan (sic) National Forest. **The property was established from public land as an off-reservation allotment** for Peter Wapato **by a presidential executive order on May 1, 1886, and is not an Indian reservation.** The allotment is now devised to the following four direct descendants of Peter Wapato:..."

S. REP. 96-395, S. Rep. No. 395, 96TH Cong., 1ST Sess. 1979, 1980 U.S.C.C.A.N. 205, 1979 WL 10377 (Leg.Hist.)(emphasis added). In communicating his agency's support of the bill, the Assistant Secretary of the U.S. Department of Interior stated:

> The limited term of this lease has caused problems for the developer in obtaining long term financing. The owners are seeking this legislation to alleviate that problem. The income to the families seeking this legislation will be greatly increased and will benefit their succeeding generations for years to come, if it is enacted. The owners are all direct descendants of the original allottee, Peter Wapato, and are members of the Colville Tribe.

Id.

In 2006, Congress granted MA-8 the same extended lease option, including the amendment in the Native American Technical Corrections Act of 2005. The bill came at the request of Wapato Heritage (due to efforts to develop a gated community on the land) and added MA-8 to the list of restricted lands where long term leases would be allowable.

On May 24, 1990, Congress amended the Indian Reorganization Act again applying its indefinite trust period provision to:

> (1) all Indian tribes;
> (2) all lands held in trust by the United States for Indians; and
> (3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

Pub.L. 101-31, § 3(a), 104 Stat. 207 (1990), codified at 25 U.S.C. § 478-1 (1990 Supp.). This so-called "miscellaneous amendment" was not intended as a landmark change in the law. The legislative history for 25 U.S.C. § 478-1 in 1990 points to the government's need for administrative efficiency in dealing with American Indian lands:

> [25 U.S.C. § 478-1] provides that trust and restricted Indian lands which have not been subject to the Indian Reorganization Act of 1934 ... shall be subject to the same indefinite extension of the trust or restriction period for Indian lands provided in [25 U.S.C. § 462].... Currently the trust and excepted provisions affected by the amendment are extended by order of the Secretary of the Interior every five years as a ministerial function.... Such separate treatment is not appropriate and is administratively burdensome.

S.Rep. No. 226, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 196, 198.

II. BACKGROUND AND PROCEDURAL HISTORY OF THIS CASE

The following summary of history of this case is also derived from the pleadings herein and does not constitute Findings of Fact by the court.

A. Master Lease Dispute

Upon the death of Wapato John in 1911, his interest in MA-8 passed in undivided interests to his heirs, and thereafter continued to pass pursuant to inheritance, probate proceedings, and by purchase. In 1984, William ("Bill") Evans, , an heir of Wapato John, held an approximate 5.4% beneficial ownership interest in the property. Evans, as Lessee, entered into a business lease (Lease No. 82-21) with the other beneficial landowners as Lessors. The lease, referred to as "the Master Lease," allowed Evans to develop the property for recreational purposes. The lease had a 25-year term, expiring February 2, 2009, with an option to automatically renew for an additional 25 years until 2034. The lease states the property was held in trust by the United States, and as such, administered by the Bureau of Indian Affairs, Department of the Interior. (ECF No. 90, at 47). To renew the lease, Evans was required to give timely and proper notice to the Lessors, the MA-8 landowners. *See Wapato Heritage LLC v. USA*, 647 F.3d 1033, 1040(9th Cir. 2011)("the BIA was not the Lessor"). In 1985, Evans sent a letter to the BIA purporting to exercise the option to renew. *Id*. Based upon the assumption

the lease had been renewed to 2034 and with knowledge of the BIA, Evans, his entities and successors developed MA-8 and sold more than 180 individual recreational vehicle campground memberships in the Mill Bay Resort campground to Plaintiffs and others who claim their purchases were based upon representations that the ground lease ran to 2034. The "membership agreements," entered into by Plaintiff Paul Grondal and others, were for a term consistent with the Master Lease, believed to be 2034. *Id.* Evans had established Wapato Heritage, LLC to manage some of his assets and upon Evans' death in 2003, Wapato Heritage acquired Evans' leasehold interest as the Lessee of the Master Lease and his interests in the camping membership agreements with the Mill Bay Resort members.

In 1993, the BIA approved Evans' sublease of a portion of MA-8 to the Colville Tribal Enterprises Corporation ("CTEC") for the purpose of construction and operation of a casino by the Tribe on a portion of MA-8. (ECF No. 90, Ex. 4)("The Northerly 400 feet of the Easterly 500 feet" of the 174.26 acre MA-8). The Term Provision of the CTEC sublease provided its term was the remaining 25-year term as established in the Master Lease "and the additional term of twenty-five years exercised by Evans in the letter of the Superintendent on January 30, 1984."

In 2001, a dispute arose when Evans informed the Mill Bay members that he was considering closing the RV park at the end of the 2001 season due to financial losses. The Mill Bay Resort members believed they had purchased the right to occupy the resort until the year 2034. The Mill Bay Resort Members sought out the BIA's position regarding the threatened action by Evans. The BIA refused to offer an official position. (ECF No. 90, Ex. 85)(letter dated June 5, 2002). Litigation ensued. A lawsuit was filed in Colville Tribal court seeking to close the RV park, but it was dismissed for lack of jurisdiction. (ECF No. 90 at 254; ECF No. 91 at 4). In November 2002, the approximately 180 RV Park Members, filed suit in Chelan County Superior Court seeking damages against Evans' corporation managing the contracts with the RV park. (ECF 90 at 318, Ex. 51 (Grondal, et al., v. Chief Evans, Inc., et al., EDWA Cause No. 03-CS-92-WFN (April 18, 2003 Order remanding case)). During the proceedings

Plaintiff Paul Grondal and the RV Park Members formed and incorporated the Plaintiff "Mill Bay Members Association."

The Chelan County state court litigation with all the RV Park Members was resolved through mediation and a settlement agreement was approved by the state court in November 2004. (ECF No. 90, Ex. 2). A key issue involved in the mediation was the RV Park Members' desire to remain on MA-8 through 2034. The settlement proposals and the final agreement between all the RV Park Members, the Estate of Evans, and Wapato Heritage, explicitly recognized the RV Park Members "right to continued use of the Park until December 31, 2034," though it also recognized that this right was subject to the terms of "the Master Lease with the BIA." (ECF No. 90, Ex. 2 at 62). The BIA received notice of the agreement, was informed throughout the litigation of its progress, was provided litigation pleadings for review, and was repeatedly asked by counsel to formally intervene in the case and participate in the mediation, recognizing that the issues the parties were attempting to resolve involved trust property and implicated rights provided for in the Master Lease. (ECF No. 90 at 458-61, Ex. 78). Though the BIA did not formally intervene in the case, its agents were informed of its progress, attended hearings (ECF No. 126 at 59 [Ex. 114]), attended the mediation in Seattle, and had contact with the mediator who ultimately resolved the case. (ECF No. 89 at 8-9). The BIA and the Tribe were served notice of the state court's approval of the settlement. The BIA remained involved in effectuating the settlement including disbursing settlement monies provided to it for disbursement to the MA-8 landowners.

The BIA admits it did not examine or question the legal efficacy of the purported 1985 renewal of the Master Lease by Evans until late 2007, though the record suggests the issue had been raised beforehand by the Colville Tribe. In January 2005, the Colville Tribe's attorney sent a letter to the BIA requesting a meeting to discuss "options of cancelling the Master Lease and the option of taking over the management of MA-8 during the Interim Order." (ECF No. 90, Ex. 81). In October 2007, after the Colville Tribe sent another letter to the BIA requesting a meeting to discuss the status of the renewal of the Master Lease, the BIA began examining

the issue of renewal. On November 30, 2007, sent a letter to Wapato Heritage stating its position that the option to renew had not been effectively exercised by Evans' 1985 letter to the BIA because there was no evidence Evans had provided notice of his exercise of the option to renew to the landowners as required by the terms of the Master Lease. (ECF No. 90, Ex. 93). Neither Wapato Heritage or its attorney forwarded a further notice of renewal to the individual landowners even though ample time to do so existed prior to the cut off date of February 1, 2008.

In 2008, Wapato Heritage, as the Master Lease lessee, filed a lawsuit against the United States challenging the BIA's determination that the Master Lease had not been properly renewed. In 2011, the Ninth Circuit affirmed Judge Robert H. Whaley's decision and held the option to renew the Master Lease was not effectively exercised by Evans, or later by Wapato Heritage. The Plaintiffs were not parties to that litigation.

B. Plaintiffs Commence Litigation in Federal Court

On January 21, 2009, Plaintiffs Paul Grondal and the Mill Bay Members Association, initiated this litigation against the Federal Government and the 37 MA-8 landowners asserting that: 1) a valid contract gives them the exclusive right to occupy and use the Mill Bay Resort campground; 2) they have the right to occupy the campground until the year 2034; and 3) the Defendants should be estopped from denying them their camping membership rights until 2034.

The Federal Defendants are named in their alleged role as trustee over MA-8 as Indian trust land. Two of the Defendant MA-8 landowners are not individuals: the Colville Tribe has acquired an approximate 18% ownership interest in MA-8; and Wapato Heritage has a life estate ownership interest in MA-8 (approximately 23.8%), measured by the last surviving great-grandchild of Evans. Plaintiffs and Wapato Heritage contend that the Colville Tribe is pushing the Bureau of Indian Affairs to terminate the Plaintiffs' interests in their camping and other interests in order that the Tribe may become the lessee and occupier thereof in connection with its casino operations.

The Federal Defendants have not entered an appearance on behalf of the individually named Defendant landowners. Eight of the 35 individual Defendants filed identical *pro se* Answers to the Complaint denying all allegations. (ECF Nos. 125, 134, 138-142). Plaintiffs motioned the Clerk for an Order of Default which was entered against 24 individual Defendants. (ECF No. 135). On April 3, 2009, the Federal Defendants counterclaimed against the Plaintiffs asserting claims for trespass and ejectment. The Federal Defendants claim Plaintiffs' right to occupy the Mill Bay Resort ceased on February 2, 2009, when the initial 1984 Master Lease expired.

C. Initial Dispositive Motions

On June 12, 2009 the court set a September 1, 2009 deadline for dispositive motions. The Federal Defendants moved to dismiss Plaintiffs' claims for lack of jurisdiction and also sought summary judgment on their claims for trespass and ejectment against the Plaintiffs. Plaintiffs filed multiple cross-motions for summary judgment. On January 12, 2010, the court filed its written ruling on these motions. The court dismissed all of Plaintiffs' claims against the Federal Defendants for lack of subject matter jurisdiction. (ECF No. 144). The court also ruled that the Federal Defendants' trespass and ejectment counterclaims against the RV Park Plaintiffs appeared premature because 1) there was evidence of ongoing efforts by Wapato Heritage, the lessee of the Mill Bay RV Park, to obtain a new 99-year lease from the MA-8 landowners; and 2) there was no evidence that the BIA had consulted with the Indian landowners or that the ejectment action was "needed to protect the interests of the Indian landowners and response to concerns expressed by them." (ECF No. 144 at 24-26). The court left open the Plaintiffs' contentions that the Defendants should be equitably estopped from denying Plaintiffs the right to use the Mill Bay Resort until 2034. *Id*. at 38 (holding "[a]lthough estoppel will rarely work against the government, assertion of this defense against the Defendant landowners and the BIA, acting on their behalf, in this trespass action presents a unique context which would merit further consideration by the court.").

D. Stay from May 24, 2010 until March 29, 2012

On March 26, 2010, Defendant Wapato Heritage filed 8 Cross-claims against the other Defendants (the Tribe, the Federal Defendants, and individual MA-8 landowners), expanding the scope of the litigation by challenging the trust status of MA-8 and asking the court to order the United States to issue fee patents and partition the property amongst the landowners. On May 24, 2010, the court suspended all discovery and stayed motion practice pursuant to the parties' desire to engage in settlement discussions and to globally resolve the case. (ECF No. 197).

After two separate failed mediation attempts, in April 2011 the court granted the parties' request to continue the stay pending a mediation in June and an awaited decision from the Ninth Circuit on the request for en banc review of the decision in *Wapato Heritage, LLC v. United States*. (ECF No. 207).

On July 29, 2011, the parties filed a Status Report informing the court that their mediation was unsuccessful, that the Ninth Circuit had voted to deny the petition for rehearing en banc, and that the parties anticipated filing a number of motions the parties desired resolved prior to the re-commencement of discovery. (ECF No. 209).

On February 16, 2012, the court dismissed Plaintiffs' claim against the Tribe for lack of jurisdiction and also ruled it lacked jurisdiction over certain "in-person" Cross-claims of Wapato Heritage asserted against the Colville Tribe. (ECF No. 227).

The court formally lifted the nearly 22- month stay on March 29, 2012. (ECF No. 242)

E. Claims Remaining

The claims remaining to be adjudicated in this case are as follows:

1. Plaintiffs' (the Mill Bay Members Association and Paul Grondal) claim against the MA-8 landowner Defendants, other than the Tribe, to declare them "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034." (ECF No. 1 at 43, Prayer for Relief, ¶ 2; ECF No. 197 at 2);

2.The Federal Defendants' counterclaims against Plaintiffs for Ejectment and Trespass (ECF No. 42);

3. The Federal Defendants' Cross-claim against Wapato Heritage for rent owed under the Master Lease (ECF No. 230); and

4. Wapato Heritage, LLC's 8 Cross-claims (ECF No. No. 228) for:

a) declaratory relief (against all Defendants);
b) "quiet title" (by declaring that fee patents issue to owners of MA-8;
c) estoppel (against Federal Defendants and allottees);
d) ejectment of the Tribe from MA-8 (against the Tribe);
e) damages for overpayment (against the allottees);
f) damages for underpayment and failure to collect amount due under Master Lease (against the Federal Defendants);
g) partition of MA-8 amongst various owners (against the Tribe); and
h) attorney fees and costs (against all Defendants).

F. Pending Matters

On March 22, 2012, the Federal Defendants filed a renewed (partial) Motion for Summary Judgment (ECF No. 231) regarding their common law ejectment claim. The Federal Defendants seek a judgment of ejectment of Plaintiffs to recover possession of MA-8. The Federal Defendants' separate claim for trespass/damages is not pursued in that Summary Judgment Motion. The United States brings this ejectment claim in its alleged role as trustee over MA-8, which role is challenged by Plaintiffs and Wapato Heritage.

The court continued the hearing on the Federal Defendants' ejectment motion to January 2013 to allow the Mill Bay Plaintiffs time to conduct discovery on their equitable estoppel defense. (ECF No. 272).

On October 11, 2012, the Tribe filed a Motion to Dismiss the Cross-claims of Wapato Heritage. Both the Federal Defendants' ejectment motion and the Tribe's Motion to Dismiss were fully briefed. (Response briefing at ECF No. 293-297, 304, 306). Plaintiffs defend against the United States' ejectment claim and Motion for Summary Judgment claiming that the United States lacks standing to sue because its trust authority and responsibilities terminated when MA-8 ceased being trust land in 1936. Wapato Heritage joins in Plaintiffs' position, and has asserted its own Cross-claim (which is not the subject of a motion presently before the court)

against the individual landowners seeking a declaratory judgment that the land is not trust land.

On January 10, 2013, the court heard oral argument on both the United States' Motion for Summary Judgment Re: Ejectment and the Tribe's Motion to Dismiss. The court requested supplemental briefing stating in its Order:

> Both pending motions raise the following closely related, but distinct, questions regarding the portion of MA-8 at issue in this case: 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 is expired, whether this court would have authority to direct the issuance of fee patents; and 4) whether any of these issues require and/or merit the appointment of counsel for the individually named pro se and/or defaulted Defendant landowners.

(ECF No. 308 at 2).

Supplemental briefs were filed by Plaintiffs, Wapato Heritage, the Tribe, the United States, and attorney Joseph Finley on behalf of three individually named landowners. In addition, seven form Declarations were filed *pro se* by individual landowner Defendants stating: "I believe it is in my best interest that MA-8 be in trust status." (ECF No. 311)(Judy Zunie); (ECF No. 318)(Sandra Covington); (ECF No. 319)(Michael Palmer); (ECF No. 320)Darlene (Marcellay-Hyland); (ECF No. 322)(Enid Wippel); (ECF No. 323)(Michael Marcellay); and (ECF No. 324)(Linda Saint).

III. DISCUSSION

A. Court's Prior Orders Re: Representation of Individually Named Defendants

Throughout the pendency of this case, the court has expressed concern that the Government has not appeared or appointed counsel to represent the individually named landowners.

The court's ***January 12, 2010*** Order held:

> None of the individually named Defendants who have ownership interests in the real property known as MA-8 appeared. The court notes that the United States has not entered an appearance on behalf of any of the named individual Indian landowners. The court does not know why such an appearance has not been filed since the United States actually granted the Master Lease (as opposed to simply approving it) on behalf of at

> least certain landowners pursuant to its authority under 25 C.F.R. § 162.601. More importantly, 25 U.S.C. § 175 provides that "[i]n all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity," although the statute is not mandatory. *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir.1953)(holding that 25 U.S.C.A. § 175 is not mandatory and that its purpose "is no more than to insure the Indians adequate representation in suits to which they might be parties.") Unlike this case, in *Siniscal*, the Indians named were being sued as individuals and "not with reference to any right in which the United States...is in the position of trustee or guardian." *Id*. At least one court has recognized where there is a possible conflict of interest between the Indians and the United States, it may be proper for the Indians to be represented by private counsel. *State of New Mexico v. Aamodt*, 537 F.2d 1102, 23 Fed. R. Serv. 2d 810(10th Cir. 1976). The United States has not provided any reason for its failure to enter an appearance on behalf of the un-represented individual Indian landowners to make certain they have adequate representation in this action.

(ECF No. 144 at 2-3)(footnote omitted). The court then ordered the United States to "file a statement setting forth its reasons for failing to enter notices of appearance on behalf of 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)." *Id*. at 39.

In ***April 2010***, the court set a hearing for May 13, 2010 and requested position statements from the parties on a number of issues in the case including:

> 5) Unrepresented Individual Indian Defendants. What is the nature and extent of the trust obligation owed by the BIA to the individual Indian owners who are named defendants, including those presently in default? Does the BIA have a duty to insure adequate legal representation for those persons in this lawsuit? Is the referral to a legal services organization sufficient to fulfill the obligation owed to these individuals? What would be the effect of a default judgment against those owners be if the court entered default judgment stating that such owners are estopped from denying the existence of the Master Lease to 2034?

(ECF No. 178 at 2)(ECF No. 180). After the ***May 13, 2010*** hearing, the court suspended discovery and motion practice and directed the parties and counsel to meet, but also ordered:

> In advance of this meeting, the court directs Government counsel to consult with the appropriate officer or office of the Secretary of the Interior for Indian Affairs as to whether the agency will, without court order, make available to the individual Indian Defendants sufficient funds to be utilized for representation of those Defendants by private legal counsel. The Department of Justice being faced with conflicts in cases involving Indians and Indian lands is not that uncommon. See e.g., Ann C, Juliano,

> Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes, 37 GALR 1307(2003); *See also Arizona v. California*, 460 U.S. 605 at 650-651 ("There is considerable evidence that the Indians are the losers when such situations arise.") The 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. Rather than relying upon conflicted or no counsel, history proves that those with direct interests in the outcome of a case should be appropriately represented.

(ECF No. 197 at 4).

B. Positions of the Parties Re: Representation of Individually Named Defendants

1. The Individual Landowners

Prior to any of this court's orders on this subject, Defendant Paul Wapato, Jr. wrote a letter to the court (ECF No. 99) stating his opinion that "the BIA acted in response to...the Confederated Tribes..."; that the individual Indian owners named to the suit "generally have low income and relatively low sophistication, hav[e] involvement considerably different than the Department of Interior, the Bureau of Indian Affairs, and the Confederated Tribes of the Colville Reservation"; and that "the individual Indian owners have appealed to the BIA and the Tribe to provide legal counsel in this matter, we have been flatly rejected." (ECF No. 99).

The Supplemental Brief of counsel representing Defendants Francis Reyes, Gary Reyes, and Paul Wapato, Jr. also takes the position that the court should not enter any ruling on trust status until all of the allottees are represented by legal counsel. They believe a conflict of interest is "found in the potential liability of the United States to the allottees for the loss and deprivation of trust status, if such be the case." (ECF No. 314 at 6). Notably, these Defendants have informed the court they are no longer represented by attorney Joseph Finley and have motioned the court to permit Mr. Finley to withdraw and for leave to proceed pro se. (ECF No. 327).

On March 1, 2013, after the court's January 2013 hearing on the pending Motions, the court received a letter from Defendant Marcellay-Hyland stating she had taken the initiative to start a petition "to request the Bureau of Indian Affairs to fund and provide independent and impartial legal representation to the MA-8 landowners so that our voice is heard in the legal

proceedings involving the MA-8 Allotment." (ECF No. 326). The letter enclosed copies of signed petitions of 13 individual Defendants which state:

> In the current court case....the question of legal representation for MA-8 landowners/allottees has been articulated by the court in that there is an inherent conflict of interest between the positions of the allottees (MA-8 individual landowners and the Colville Tribe) such that the BIA cannot represent the interest of both parties in ongoing litigation regarding the trust status of MA-8. The primary conflict of interest is found in the potential liability of the United States...to the allottees for the loss and deprivation of trust status, should that be the decision of the court. It is also the duty of the United States Government to provide legal counsel for all of the individual allottees, and that the Court should not enter any rulings on trust status, or otherwise, until all allottees are represented by legal counsel and said counsel has had the opportunity to confer with other lawyers representing other parties in this case and given ample time to fully ascertain all issues in this case. It is time for the individual landowners to have their own voice in the legal proceedings regarding MA-8.

(ECF No. 326). The Petitions request "that the Northwest Bureau of Indian Affairs solicit, provide and fund legal representation for the individual landowners of MA-8 John Wapato Trust Allotment." *Id.* at 2-14.

2. Plaintiffs and Wapato Heritage

Like the Defendant landowners, both Plaintiffs and Wapato Heritage maintain that the court should not decide issue of whether MA-8 is trust property because the majority of individual landowners are unrepresented and a conflict of interest exists between the landowners and the United States. They believe the court should order the United States to appoint independent counsel.

Defendant/ Cross-claimant Wapato Heritage asserts a conflict of interest exists because the BIA "has acted consistent with the interests of the CCT [Colville Confederated Tribes] and contrary to the interests of the individual allottees." (ECF No. 315 at 9)(1/20/2010 Letter from Bruce Johnston to Pamela De Rusha). The basis for this claim is that the Colville Tribe owns and operates a gaming casino on MA-8 and has a significant ownership interest in MA-8. In January 2010, counsel for Wapato Heritage wrote a letter to counsel for the United States expressing concern that the absence of counsel for the landowners "erected formidable barriers to our ability to act in this case." *Id*. The letter describes an "impasse created by the allottees'

lack of representation," and opines that "competent representation of all parties is the most likely path to a rational, mutually beneficial settlement of disputes." *Id*. Finally, counsel stated that "we object most strenuously to the tactic...of leaving the individual Indian allottees in this case without adequate or independent counsel..." and urges counsel to "solve this representation problem, rather than further debate it." *Id*.

3. The United States

The United States' response to the court's Order to consult with the Interior Department on this issue is set forth in the parties Joint Status Report filed July 29, 2011:

> The Federal Defendants represent that they have consulted with the appropriate officer of the Department of Interior as well as the Department of Justice on the Court's question as to whether federal funds can and will be used for representation of the individual Indian Defendants in this case. The Federal Defendants advise the Court that both Departments have represented that ***there are no regulations or other policies that allow for the use of federally appropriated funds to pay for private counsel to represent Indians***.

(ECF No. 209 at 7)(emphasis added). The United States takes the position that it represents the BIA as trustee for the Indian landowners and does not represent the individual interests of the landowners personally. (ECF No. 186). It states that independent counsel is unnecessary because "there is no allegation or any facts to support a claim that the United States is representing any interests other than those of the beneficial landowners when it takes action to eject Plaintiff trespassers. Its only goal is to protect the assets it holds in trust for the Indian landowners." (ECF No. 313 at 7).

4. The Tribe

The Colville Tribe states only that there is no issue before the court "regarding the other Indian landowners." (ECF No. 316 at 4).

C. Analysis

25 U.S.C. § 175 provides that the United States Attorney "shall represent [reservations or allotted Indians] in all suits at law or in equity," although this statute is not mandatory. *Siniscal v. U.S.*, 208 F.2d 406 (9th Cir. 1953). In litigating this case, the United States has

asserted dual advocacy roles. It represents the Bureau of Indian Affairs as an agency Defendant, and it has asserted counterclaims against the Plaintiffs in its role as a trustee for the Indian landowners. Although the Indian landowners are also named Defendants, the United States has not formally entered an appearance on their behalf – yet an agent of the BIA Colville Agency executed the Waiver of Service on behalf of the estate of named Defendant, Sherman Wapato. (ECF No. 100). The United States has not entered an appearance on their 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); *Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413 (Fed.Cir. 1997)(Indian tribes' action seeking damages for Government's alleged misappropriation and mismanagement of tribal lands).

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. Moreover, the BIA's historical conduct in its management of MA-8 and its failure to seek landowner input on its decision to seek to eject Plaintiffs until *after* this court indicated that it was required, contribute to the court's concern that the interests of the individual allottees might be given short shrift. The United States has not alleviated this concern in its Supplemental Brief having offered only conclusory statements concerning the individual owner's interests in this action, stating "there is no allegation here or any facts to support a claim" that the United States is not

representing the interests of the beneficial landowners *when it takes action to eject Plaintiffs*. (ECF No. 313 at 7). Though this may be true, it misrepresents the situation. This litigation now encompasses a claim the land is no longer held in trust and also includes the Cross-claims of Wapato Heritage, one of which seeks damages for overpayment against the Defendant landowners. Most of the individual Defendants have not appeared in the litigation and all but 3 have been without the benefit of the advice of private counsel. This has the effect of placing the landowners at the mercy of a party against whom they may potentially seek redress. *See Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413, 1418 (Fed.Cir. 1997)(As litigation adversaries go, the United States may be a relatively trustworthy sentry, but this court is confident the Tribes would prefer to have a neutral party guard the 'hen house.'"). The Government's interest in protecting itself from liability is not trivial.

> [T]he Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property.'

Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 374 (1968) (quoting H.R.Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952)). Accordingly, it is appropriate for the court to be concerned with the adequacy of the Government's representation of the interests of the individual Indian landowners.

The Defendants have the right to be represented by private counsel independent of any actual or potential conflict of interest. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254–1255 (9th Cir.1983). Certainly the Defendants have the right to retain private counsel, as three of them have. However, in some instances such representation can be at the Government's expense. *See, e.g., State of New Mexico v. Aamodt*, 537 F.2d 1102, 1108 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *see also* 25 C.F.R. 89.41; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968)(BIA Area Director approved contract between individual

Comanche Indians and retained counsel to pursue damages action); *Drummond v. U.S.*, 324 U.S. 316 (1945)(Secretary of the Interior authorized and approved the fee of private counsel for individual allottee). It is unsatisfactory to the court that the United States has apparently denied a request to fund private counsel in this case because "there are no regulations or other policies that allow for the use of federally appropriated funds to pay for private counsel to represent Indians." For guidance, the BIA could certainly analogize the Defendants' requests to requests by tribes for funding private legal representation. *See* 25 C.F.R. § 89.41; *see e.g., Hopi Tribe v. U.S.* 55 Fed.Cl. 81 (Fed.Cl. 2002)("The Director *analogized* plaintiff's claims under the Settlement Act to requests from other tribes for attorneys' fees and stated that all requests should be treated equally."). The regulations provide that a tribe may request the BIA to fund private counsel when:

> (b) When a tribe determines it necessary to bring a court action or to defend itself to protect its trust resources, rights claimed under a treaty, agreement, executive order, or statute, or its governmental powers and the Attorney General refuses assistance or advises that assistance is not otherwise available...
> ....
> (d) When a tribe determines it critical, and the Assistant Secretary--Indian Affairs finds the concerns of the tribe to have merit after consultation with and the advice of the Solicitor, to intervene, in a lawsuit being handled by the Justice Department...because the responsible Government Attorney refuses either to exclude or to include some facet of the suit or proceedings which the tribe claims renders such legal representation completely inadequate to protect or in contravention of the rights and interests of the tribe.
> (e) When a tribe determines, and the Assistant Secretary--Indian Affairs, after consultation with the Solicitor concurs, that a substantial possibility of a negotiated settlement or agreement exists.

25 C.F.R. § 89.41. All three of the above listed justifications for the BIA to fund private counsel apply here.

Additionally, the Secretary of the Interior has approved private counsel in the past, for example in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968)(BIA Area Director approved contract between individual Comanche Indians and retained counsel to pursue damages action), in *Drummond v. U.S.*, 324 U.S. 316 (1945)(Secretary of the Interior authorized and approved the fee of private counsel for individual allottee), and in *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1108 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

In *Aamodt*, the United States had intervened both in its proprietary capacity and in its fiduciary capacity as trustee for the Pueblos. A contract for private legal counsel was approved by the Secretary of the Interior and funded by the BIA after "the Commissioner of Indian Affairs determined that provision of private counsel for the Pueblos was the only practical means of protecting fully the rights of the Pueblos in the face of significant conflicts of interest between the Pueblos and the United States, the far-reaching importance of the suit, and the urgency of the situation." *Aamodt*, 537 F.2d at 1105.

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.

IV. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED**:

1. By **August 29, 2014**, the United States Attorney shall a) file all BIA responses or decisions rendered in regards to requests for independent counsel made by any Defendant in the instant case; and b) contact the named individual Defendant landowners and obtain a current financial statement from any party desiring to request representation by a private attorney.

2. The United States Attorney shall submit all financial statements received and a formal written request on behalf of the requesting Defendant landowners to the BIA Agency Superintendent and the Area Director, pursuant to 25 C.F.R. § 89.43.

3. The BIA shall notify this court and the individual Defendant landowners of its decision by not later than **September 22, 2014**.

4. The parties should not construe this Order as any suggestion as to how it intends to rule on the issues, including that of the trust or fee status of MA-8. The court desires to give

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

Dated July 31st, 2014.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE