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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA, JUNEAU OFFICE**

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|---|---|
| LACANO INVESTMENTS, LLC, NOWELL AVENUE DEVELOPMENT, and AVA L. EADS, on behalf of themselves and the class they seek to represent,<br><br>Plaintiffs,<br><br>v.<br><br>DAN SULLIVAN, Commissioner, Alaska Department of Natural Resources, in his official capacity,<br><br>BRENT GOODRUM, Director, Division of Mining, Land & Water, Alaska Department of Natural Resources, in his official capacity,<br><br>Defendants. | No. 1:12-cv-00014-TMB<br><br>**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** |

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## INTRODUCTION

Named Plaintiffs have brought this action seeking declaratory and injunctive relief requiring Defendants to cease implementing their "Challenged Policy" (as defined herein) through which Defendants unlawfully claim ownership to Named Plaintiffs' land and the land of those similarly situated in contravention of sections 6(a) and 6(m) of the Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, July 7, 1958, and section 2(f) of the Submerged Lands Act ("SLA"), 43 U.S.C. §1301(f). Complaint ¶ 50. The class that the Named Plaintiffs seek to represent consists of those persons and entities who own, or have warranted title, to lands within the State of Alaska that:

1. formerly constituted part of the public lands of the United States;

2. were patented by the United States prior to Alaska's statehood based upon one or more public surveys; and

3. include one or more streams that were not meandered in conjunction with the public survey(s).

*Id.* ¶ 22.

## BACKGROUND

Named Plaintiffs and the class they seek to represent in this action are fee owners and warrantors, of title to lands within the State of Alaska that were surveyed by the United States General Land Office ("GLO") and granted to private parties by the United States prior to Alaska's statehood in 1959. *Id.* ¶ 30. The GLO surveyors were instructed to meander the boundaries of all navigable and tidal streams and exclude them from the grants to Named Plaintiffs' predecessors in title. Accordingly, the surveyors determined that some small streams on Named Plaintiffs' lands were not navigable or tidal and did not meander them as part of the surveys. *Id.* Thus, Named Plaintiffs' predecessors in title paid the United States for these lands

and were issued patents that included the streambeds. *Id.* Since that time, the owners of these grants have treated the streambeds as their fee simple property and developed and/or sold them accordingly. *Id.*

Defendants have issued a "State Policy on Navigability" ("written policy") for allegedly "identifying and protecting the state's title to the beds of navigable waters." ALASKA DEPARTMENT OF NATURAL RESOURCES, STATE POLICY ON NAVIGABILITY, http://dnr.alaska.gov/mlw/nav/nav_ policy.htm (last visited December 19, 2012). Compl. ¶ 18; Ex. 1 to Compl. Defendants generally implement their written policy in one of two ways. First, Defendants issue "navigability determinations" through which Defendants establish title to streambeds determined to be navigable under Defendants' own navigability criteria. Compl. ¶ 18. Defendants purportedly formulate their navigability determinations based on historical research and by floating a recreational rubber raft down the stream. Defendants also rely on air photos from about the time of Statehood in 1959. *Id.* ¶ 19. In cases where stream locations have been rerouted or channelized, Defendants have used old air photos to draw property lines based on stream locations at the time of statehood. *Id.* Defendants then claim that these lands on behalf of the State of Alaska as part of Alaska's Statehood land grant in 1959. *Id.* These newly-drawn lines can and do cut across developed property, including buildings. *Id.* Defendants do not consider whether streambeds have been granted to private parties prior to statehood. *Id.* 31.

Second, Defendants also implement their written policy in response to property owners' applications for land use permits, without issuing a navigability determination. Compl. ¶ 39; Exs. 1 and 4 to Compl. In these situations, a property owner may provide notice to the State that he is seeking a regulatory permit from the federal government, as Plaintiff Lacano Investments, LLC ("Lacano") did, only to receive Defendants' reply that the streambed is now owned by the

State of Alaska. Compl. ¶ 30; Ex. 4 to Compl. Defendants do not consider whether the streambed in question was granted to private parties prior to statehood before claiming title. Compl. ¶ 29.

Defendants' actions have placed a cloud on Named Plaintiffs' property and the property of similarly situated property owners throughout the state. Moreover, Defendants' actions have opened Named Plaintiffs and those similarly situated to untold liability in those instances where they have sold affected property and issued warranty deeds. *Id.* ¶ 20. Thus, Named Plaintiffs are challenging Defendants' written policy, and implementation and enforcement practices (hereinafter collectively "Challenged Policy"), that result in Defendants' claim to privately-owned streambeds under the guise of navigability. *Id.*

## STANDARD OF REVIEW

This Court may certify the proposed class so long as the class satisfies the prerequisites set forth in Rule 23(a) of the Federal Rules of Civil Procedure, as well as at least one of the requirements of Rule 23(b). *See Gen. Tele. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977). Specifically, the proposed class must satisfy the following criteria pursuant to Rule 23(a): (1) numerosity; (2) commonality of facts and law; (3) typicality between the class claims and those of the named parties; and (4) adequacy of the representation by the named parties and class counsel. In addition, Courts have recognized an additional implicit requirement under Rule 23(a), *i.e.*, the class must be readily identifiable. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962).

Assuming the four prerequisites of Rule 23(a) are met, Named Plaintiffs must then show that the action fits within one or more subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005

(11th Cir. 1997). In this case, Named Plaintiffs seek to certify their proposed class under Rule 23(b)(2), thus, they must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final and injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

The decision to certify a class rests squarely within this Court's discretion. *See Doninger*, 564 F.2d at 1308; *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974); *O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359 (C.D. Cal. 1997). Named Plaintiffs bear the burden of showing that the requirements for class certification have been met. *General Tel. Co. of Sw.*, 457 U.S. at 161. In considering Named Plaintiffs' Motion for Class Certification, this Court should view Named Plaintiffs' allegations in support of certification as true, and should not examine the underlying merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974).

## ARGUMENT

### I. THIS COURT SHOULD GRANT NAMED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION BECAUSE THE PROPOSED CLASS IS READILY IDENTIFIABLE.

The requirement that a class be readily identifiable serves primarily to help the trial court ensure the "orderly management of litigation," and to "advance the efficiency and economy of multi-party litigation." *See Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994). The requirement does not present a particularly high hurdle to certification, but Named Plaintiffs should be able to establish that "the general outlines of the membership of the class are determinable at the outset of the litigation." 7A Wright & Miller, *Federal Practice and Procedure* § 1760 (3d Ed. West 2012). In other words, the class must be sufficiently definite

"that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.*; *See also Pigford v. Glickman*, 182 F.R.D. 341 (D.C. Cir. 1998).

The proposed class in this case is defined with precision as those persons and entities who, or have warranted title, to lands within the State of Alaska that:

1. formerly constituted part of the public lands of the United States;

2. were patented by the United States prior to Alaska's statehood based upon one or more public surveys; and

3. include one or more streams that were not meandered in conjunction with the public survey(s).

Complaint *Id.* ¶ 24. These class criteria are objective, and easily provable, by way of federal patents and public surveys, allowing this Court to determine whether any particular individual is a member with ease.

## II. THIS COURT SHOULD GRANT NAMED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION BECAUSE THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(a).

A class may be certified pursuant to Rule 23(a) when: (1) its members are so numerous that joinder of claims is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the class claims; and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class. As demonstrated below, the proposed class easily meets the requirements of Rule 23(a).

### A. Joinder Is Impracticable.

Rule 23(a)(1) requires that a class be so numerous as to render joinder of all members impracticable. For purposes of class certification, "'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964). Moreover,

impracticability cannot be determined as purely a matter of the precise number of members in a class. *Ardrey v. Fed. Kemper Ins. Co*., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (stating that the number in the class is not, by itself, determinative). Indeed, there is no absolute numerical minimum, nor any numerical limitation by which impracticability may be defined. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 329 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations."); *see also Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980) ("We believe that the numerosity requirement must be evaluated in the context of the particular setting . . . .").

Ultimately, the facts of the case must be evaluated to determine the feasibility of joinder, considering the totality of the circumstances. *See Gen. Tel. Co. of the Nw., Inc.*, 446 U.S. 318. Beyond the "numerosity" requirement, ". . . courts consider factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought." *Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds*, 459 U.S. 810 (1982).

**1. The proposed class satisfies the numerosity requirement.**

Joinder in this case is impracticable, due to the large number of class members affected by Defendants' Challenged Policy. Compl. ¶ 25. Unmeandered streams are ubiquitous in pre-statehood Alaska land grants. Because these grants were made, at a minimum, 53 years ago, and in many cases more than a century ago, the number of property owners claiming title to the beds of these unmeandered streams has multiplied many times over as properties have been subdivided. For example, the portion of Lemon Creek in Juneau where Named Plaintiffs Lacano and Nowell Avenue Development ("Nowell") own property was originally conveyed in one homestead patent; today, 20 to 50 others now own property once included in that patent, some in

the form of condominiums. Thus, the number of pre-statehood patents conveying the land underlying unmeandered streams throughout the State of Alaska represents only a fraction of the number of property owners now affected by Defendants' Challenged Policy. Beyond the hundreds or thousands of property owners directly affected by Defendants' practices, there are many other individuals that may suffer residual injury from previous ownership and sale of property throughout the State. Such properties have been used as security on mortgages and transferred by warranty deeds. Compl. ¶ 32. The cloud placed on title by Defendants' Challenged Policy potentially affects thousands who cannot, as a practical matter, sue to remove that cloud.

**2. The proposed class is geographically dispersed.**

Members of the proposed class are scattered throughout Alaska, and in some cases may reside out of state. *Id.* ¶ 24. Although the State has only one Federal Judicial District, the geographic challenges potential plaintiffs face even within a state with a limited road system are unique and substantial. Indeed, the dispersement of potential class members throughout the counties of a state has been held to constitute "geographical dispersement" for class certification purposes. *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (citing *Novella v. Westchester County,* 443 F.Supp.2d 540, 546 (S.D.N.Y.2006)). In addition, current and previous property owners may reside out of state. Thus, the widespread dispersement of potential class members throughout Alaska and beyond the State's borders in this case supports certification.

**3. It is unlikely that potential class members could pursue individual lawsuits to protect their property.**

Certification is appropriate when individual lawsuits would be impractical if not impossible to pursue due to economic or other concerns, leaving class members without an

avenue to relief. Indeed, one purpose of Rule 23 is "to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 318 (C.D. Cal. 1998).

While the number of potential class members in this case is large, the risk associated with a potential ownership claim by Defendants varies greatly between each owner based on the property interest they own, as well as what property interests they may have owned and sold in the past. Defendants' primary implementation practice has been to wait for a property owner to seek to exercise a property right, for example by attempting to obtain a permit to mine gravel, and then make a claim of ownership. *See* Compl. ¶ 41. Needless to say, this comes as a surprise to affected property owners, but for each of the owners surprised, great numbers of others exist under the same cloud on title but never know it. It goes without saying that if a property owner is unaware of the cloud on his title and cannot be identified, he cannot be joined. *See Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1543 n. 48 ("Joinder of unknown individuals or organizations, of course, is inherently impracticable.").

Other factors weighing heavily in favor of class certification in this case are the Defendants' extensive resources and political weight. Defendants are representatives of the State and will no doubt have an arsenal of legal resources and means by which to defend against the claims of potential class members. This speaks to the inability of individual property owners to fund litigation against Defendants, but also raises the issue of fear of retribution from Defendants and, perhaps, other state officials. Potential class members' reluctance to sue due to fear of retribution has been recognized as a factor weighing toward the impracticability of joinder. *Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (citing *Rodriguez ex rel. Rodriguez v. Berrybrook Farms, Inc.*, 672 F.Supp. 1009, 1014 (W.D. Mich.1987) (reluctance of individual

members to sue for fear of jeopardizing future employment in region is an appropriate factor to be considered)); *Arkansas Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765 (8th Cir.1971) (17 members of class sufficient, where teachers remaining in school system could have a natural fear or reluctance to sue individually). In preparing for this suit, class counsel encountered expressed reluctance of some affected property owners to be named in this suit due to such fears, namely worries that the State would either treat Named Plaintiffs unfairly in the future or the more immediate fear that involvement in the lawsuit would result in the application of the Challenged Policy against them.

Ultimately, due to the surreptitious manner in which Defendants apply their Challenged Policy, many potential class members are most likely unaware of the cloud on their title. Those property owners who have triggered the Defendants' title claims or have had their property captured under Defendants' Challenged Policy may not be able to pursue this litigation due to economic or political concerns. Under these circumstances, joinder is impracticable.

**4. Named Plaintiffs seek uniform declaratory and injunctive relief for the class.**

Certification is also favored when the relief sought is declarative or injunctive in nature, and uniform throughout the class. *Jordan*, 669 F.2d at 1319. Named Plaintiffs seek only declaratory and injunctive relief, and are not pursuing any monetary damages for Defendants' illegal conduct. Compl., Prayer for Relief. The relief sought is uniform throughout the class.

As demonstrated above, the totality of the circumstances in this case indicates that joinder would be impracticable, regardless of the proposed class size. When considered in conjunction with the fact that the class is indeed quite large, it is clear that the proposed class meets the requirements of Rule 23(a)(1).

### B. There Are Questions Of Law And Fact Common To The Proposed Class.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class" sufficient to support certification. Legal and factual differences among class members do not necessarily undermine commonality as long as the resolution of the common questions pursued in the litigation affect all or a substantial number of the members. *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993). Indeed, class actions may be certified on limited common issues of fact. *Cent. Wesleyan Coll. v W.R. Grace*, 6 F.3d 177, 184 (4th Cir. 1993). Thus, "[al common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

It follows then, that an allegation that a defendant's policy or practices affect the class as a whole will suffice to prove commonality of claims, even when the factual situation of each class member differs. *Rosario*, 963 F.2d at 1017 ("The fact that there is some factual variation among class grievances will not defeat a class action.") (citing *Patterson v. Gen. Motors Corp*., 631 F.2d 476, 481 (7th Cir. 1980)). More simply, a defendant's "standardized conduct" toward class members, such as a generalized policy that affects all class members in the same way, is sufficient to satisfy commonality. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *see Gen. Tele. Co. of the Sw.*, 457 U.S. at 159 n.15.

Common questions of law bind the proposed class in this case. Section 2(f) of the SLA specifically protects the members of the class from Defendants' unlawful claims to class members' property. Indeed, the definition of the class, as set forth in the Complaint and repeated in this Memorandum, is derived from the words of section 2(f) of the SLA. Furthermore, Section 6(a) of the Alaska Statehood Act protects valid pre-statehood interests, which members of the proposed class, by definition, hold.

Moreover, Named Plaintiffs have challenged the Defendants' claim to title to streambeds in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and then conveyed to private parties. Class members are owners and warrantors of title in these lands containing these streambeds, thus the fact of their ownership or previous warranty is a common nucleus of operative fact.

These common issues of law and fact clearly satisfy the commonality requirement of Rule 23(a)(2), and support class certification.

**C. The Named Plaintiffs' Claims Are Typical Of Those Of The Class.**

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P., 23(a)(3). In other words, there must be a nexus between the class representative's claims or defenses and the common questions of fact or law that unite the class. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332. A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same events or pattern or practice and are based on the same legal theory. *Id.* at 1337.

The commonality and typicality requirements of Rule 23(a) are closely related. *Rosario*, 963 F.2d 1013. Both requirements focus on the nexus between the legal claims of the named class representatives and those of individual class members to warrant class certification. *See Washington v. Brown & Williamson Tobacco Co.*, 959 F.2d 1566, 1569 n.8 (11th Cir. 1992). These requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members

will be fairly and adequately protected in their absence." *See Gen. Tel. Co. of Sw.*, 457 U.S. at 156–57 n.13.

Courts have uniformly held that a claim is typical if it arises from the same event or course of conduct giving rise to the claims of other class members and is based on the same legal theory. *E.g., De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Typicality guarantees that the class representatives share issues common to other class members. *Harriston v Chicago Tribune Co.*, 992 F2d 697, 703 (7th Cir. 1993). If, by advancing their own interests, the named plaintiffs also advance the interests of the proposed class, then the typicality requirement will have been met. *Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir. 1968).

In other words, plaintiffs who purport to represent a class "'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 n 20 (1976) (quoting *Warth v Seldin*, 442 U.S. 490, 502 (1975)). The test for typicality, then, is whether other members have the same or similar injury, whether the action is based on conduct that is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. *Hanon v Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Here, the Named Plaintiffs are owners of streambeds that were conveyed from the public lands prior to Alaska statehood, but were not meandered. Complaint ¶¶ 32–3; 35-6. Additionally, Plaintiff Lacano sold property on an unmeandered stream bed under a warranty deed and may incur liability from a failure in title. *Id*. ¶ 34. Because the facts defining the putative class in this case are simple—the possession of a property interest in unmeandered

streambeds traceable to pre-statehood conveyances—the issue of typicality is easily met. While there are differences in the factual situation of each property, these do not relate to the common legal issues raised in this case.

### D. The Named Plaintiffs And Their Counsel Will Fairly And Adequately Protect The Interests Of The Class.

It is an essential prerequisite to the right to maintain a class action under Rule 23(a)(4) that the court be certain the class representatives will fairly and adequately protect the interests of the class. *Hill v W. Elec. Co.*, 672 F.2d 381, 388 (4th Cir. 1982). The adequacy standard is met if: (1) the named plaintiffs have interests common with, and not antagonistic to, those of absent class members; and (2) the named plaintiffs' attorney is qualified, experienced and generally able to conduct the litigation. *Sosna v Iowa*, 419 U.S. 393, 403 (1975). As demonstrated below, Named Plaintiffs and their counsel meet both requirements here.

#### 1. The Named Plaintiffs' interests are not antagonistic to those of the broader class.

The Supreme Court recently held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (internal quotations omitted). The premise of a class action is that litigation by representative parties adjudicates the rights of the class members, so due process requires that the Named plaintiffs possess undivided loyalties to absent class members. *See e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785, 796 (3d Cir. 1995) (*abrogated in part on other grounds by Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997)).

In this case, the Named Plaintiffs' interests are entirely coextensive with those of the class. For instance, Named Plaintiffs share the same claims as the class members as well as a

strong interest in securing declaratory and injunctive relief to remedy the cloud on title created by the Defendants' Challenged Policy. The relief sought by the Named Plaintiffs, if granted, will benefit all members of the class. Furthermore, there are no conflicts or antagonism, whether actual or apparent, between the Named Plaintiffs and the class, as they all share in the same interest—to remove any cloud on their respective titles.

**2. Named Plaintiffs' counsel are qualified to maintain this action.**

Named Plaintiffs' counsel are experienced in representing litigants in federal court regarding property interests under federal land grant statutes. *See, e.g.*, Doc. No. 3-1. These attorneys are provided *pro bono* by a national charitable legal foundation that has the resources to pursue a class action of this magnitude. Named Plaintiffs' attorneys are therefore well qualified to serve as class counsel and will competently and vigorously prosecute this action.

## III. THIS COURT SHOULD GRANT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION BECAUSE THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), this case must also meet the requirements of Rule 23(b)(2), which allows class certification if the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Courts have frequently recognized that Rule 23(b)(2) was designed for cases ". . . seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *Barnes v. The Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998); *see also, Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

For example, in *Greenway v. Information Dynamics, Inc.*, 399 F. Supp. 1092 (D. Ariz. 1974), *aff'd*, 524 F.2d 1145 (9th Cir. 1975), the plaintiffs claimed that the defendant's practice of

distributing to subscribers a list of persons whose checks had been returned by their banks without payment violated the Fair Credit Reporting Act. A class was certified, pursuant to Rule 23(b)(2), consisting of all persons whose names appeared on the lists collected and disseminated by the defendant. All the class members in *Greenway* were being treated in the same way by the defendant, and if the court found the defendant's practice of distributing such lists was illegal, all class members were entitled to relief. As another example of a Rule 23(b)(2) action, in a suit for injunctive and declaratory relief, a public school teacher sought to halt the deduction of union fees from wages of nonunion teachers. The class claim was based on an alleged violation of the teachers' First and Fourteenth Amendment rights. Finding a pattern of activity applicable class wide, the court granted certification. *George v Baltimore City Public Schools,* 117 F.R.D. 368, 372 (D. Md. 1987).

Furthermore, the Supreme Court has recently held that Rule 23(b)(2) certification is proper where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557. As the Court further explained, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunctive or declaratory judgment would provide relief to each member of the class." *Id.* (internal quotations and citations omitted). It follows then that, "[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Walters*, 145 F.3d at 1047.

The widespread effect of Defendants' Challenged Policy to place cloud on the title of large numbers of class members makes it ideal for resolution in a class action. Without a class action, individual class members would be forced to pursue individual actions against Defendants' Challenged Policy. This would result in a waste of resources, including judicial resources. In fact, the broad scope of Defendants' Challenged Policy invites comparisons to civil rights cases against parties charged with broad-based discrimination. Such cases are "prime examples" of class actions certified under Rule 23(b)(2). *Amchem Prods.*, 521 U.S. at 613.

This case is well-suited to proceed as a Rule 23(b)(2) action because the Defendants' Challenged Policy affects all members of the class as well as the Named Plaintiffs in precisely the same manner, by illegally claiming title to lands previously conveyed in the manner set forth in Section 2(f) of the SLA. Named Plaintiffs and class members need declaratory and injunctive relief to remediate their current injuries and to prevent future injuries from Defendants' Challenged Policy.[1] Accordingly, Named Plaintiffs' proposed class easily meets the requirements of Rule 23(b)(2).

## CONCLUSION

For the reasons stated above, Named Plaintiffs respectfully request this Court grant their Motion for Class Certification.

DATED this 21st day of December 2012

Respectfully submitted,

s/ Steven J. Lechner

Steven J. Lechner, CO Bar No. 19853
(*pro hac vice* application pending)

[1] Notably, Named Plaintiffs do not seek monetary damages. *See* Advisory Comm. Note to Fed. R. Civ. P. 23(b)(2) (noting that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.").

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of December 2012, I filed the foregoing document using the Court's CM/ECF system. I also served the foregoing document on all the parties by sending true and accurate copies via first class U.S. Mail, postage prepaid, and addressed as follows:

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