Nathan J. Arnold, WSBA NO. 45356
R. Bruce Johnston, WSBA No. 4646
Emanuel F. Jacobowitz, WSBA No. 39991
Cloutier Arnold Jacobowitz, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
(206) 866-3230, Fax (206) 866-3234
nathan@CAJlawyers.com
bruce@rbrucejohnston.com
manny@CAJlawyers.com

Dale M. Foreman, WSBA No. 6507
Tyler Hotchkiss, WSBA No. 40604
Foreman, Hotchkiss, Bauscher & Zimmerman, PLLC
124 N. Wenatchee, Ave., Suite A
P. O. Box 3125
Wenatchee, WA 98807
(509) 662-9602; Fax (509) 662-9606
dale@fhbzlaw.com
tyler@fhbzlaw.com

Hon. Rosanna Malouf Peterson

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,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, and FRANCIS ABRAHAM, CATHERINE GARRISON, MAUREEN MARCELLAY, MIKE PALMER, JAMES ABRAHAM, NAOMI DICK, ANNIE WAPATO, ENID MARCHAND, GARY REYES, PAUL WAPATO, JR., LYNN BENSON, DARLENE HYLAND, RANDY MARCELLAY, FRANCIS REYES, LYDIA W.

CASE NO. CV-09-0018-RMP

SUPPLEMENTAL BRIEF OF WAPATO HERITAGE IN OPPOSITION TO USA MOTION FOR PARTIAL SUMMARY JUDGMENT AND COLVILLE MOTION TO DISMISS

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

ARMEECHER, MARY JO GARRISON, MARLENE MARCELLAY, LUCINDA O'DELL, MOSE SAM, SHERMAN T. WAPATO, SANDRA COVINGTON, GABRIEL MARCELLAY, LINDA MILLS, LINDA SAINT, JEFF M. CONDON, DENA JACKSON, MIKE MARCELLAY, VIVIAN PIERRE, SOMA VANWOERKON, WAPATO HERITAGE, LLC, LEONARD WAPATO, JR, DERRICK D. ZUNIE, II, DEBORAH L. BACKWELL, JUDY ZUNIE, JAQUELINE WHITE PLUME, DENISE N. ZUNIE and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Allottees of MA-8 (known as Moses Allotment 8),

Defendants.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

TABLE OF CONTENTS

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

I. INTRODUCTION

The Court and the parties in this action have all had some difficulty coming to grips with recondite issues of century-old Indian law. Even the Hon. Justin Quackenbush, a giant in this field, erroneously stated at first that MA-8 was allotted "under the General Allotment Act of 1877," ECF No. 144 at 4:6, a position he had to correct in his more recent survey of the property's complex history, stating that "the Moses Allotments were not granted under that [General Allotment] Act." ECF 329 at 8:11–12. The Moses Allotments did in fact proceed along their own independent statutory path, a path which led out of Indian trust property status. Because MA-8 is not trust land, the Government and the Tribe's motions must be denied.

At base, however, the issue is simple. As has so often happened, the United States withheld from Indians the rights it had promised, took their land without fair compensation, and purported to keep them in a dependent condition for more than another century. This Court should not accept this malfeasance, and should instead afford the heirs of Wapato John, and his son, Peter Wapato, their full rights and dignity as landowners, not the presumptively incompetent wards of the state that the BIA would have them be.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

II. STATEMENT OF MATERIAL FACT

A. Prior Filings and Court Orders Set Forth Material Facts, Both Undisputed and Disputed, and Legal Context.

The court has honored FRCP 1 and 56(g) by digesting the extensive and complex legal and factual environment of this case from the parties' many submissions, and focusing the parties on those legal and factual issues necessary to a decision on the trust, or non-trust, status of MA-8 and other threshold issues. The Court's Orders at ECF No. 144, ECF No. 227, and ECF No. 329, although they did not decide these issues, provided useful guidance and context for this brief. For the Court's convenience and to make a clear record, rather than referencing the many LR 56(c)(1)(A) and (B) statements previously filed and the many additional facts now submitted, Wapato Heritage and RV Park also submit an Amended and Restated Statement of Undisputed Facts.

III. MA-8 IS NOT TRUST PROPERTY

A. The Trust Period and Any Restrictions of Alienation Ended No Later Than December 28, 1918.

This Court's Order of August 1, 2014 describes, without endorsing, each link in the chain of agreements, statutes, and Executive Orders by which MA-8 was allegedly maintained in trust. ECF No. 329 at 8–14. Wapato Heritage does not agree completely with the Court's description—respectfully, the 1934 IRA should not be read to encompass allotments carved out of a reservation which no longer existed by the time that Act was passed. That issue has been fully briefed. But in at least one respect, Judge

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Quackenbush's research was more insightful than any of the parties': the Court cogently observed that no party had yet disputed the alleged effect of President Wilson's 1914 Executive Order No. 2109. *Id.* at 8:14.[1] Following Judge Quackenbush's lead, Wapato Heritage has carefully reviewed that Executive Order, and now sees that it failed to extend the alleged trust status of MA-8.

An executive order must be within the scope of the authority granted to the President by some act of Congress, and "[w]hen an executive acts ultra vires, courts are normally available to re-establish the limits on his authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *and see Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019) ("only if the statute *actually* permits the action can it even *possibly* give authority for that action.") (emphasis in original); *Levy v. Urbach*, 651 F.2d 1278, 1283 (9th Cir. 1981) ("we also cannot blind ourselves to any change which the Order might

[1] More precisely, no party disputed the effect of EO 2109 in this round of briefing. In their supplemental brief against a prior motion by the Tribes, three of the individual Indian owners, Paul Wapato Jr., Gary Reyes, and Frances Reyes, disputed that very question, in a section entitled "Executive Order 2109 was Issued without Statutory Authority." ECF 195 at 11–13. Wapato Heritage adopts the cogent, albeit incomplete, analysis therein.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
113 East Woodin Avenue, Suite 200
Chelan, WA 98816
(206) 866-3230 Fax: (206) 866-3234

work in the operation of the statute so as to deny the plaintiffs any benefit to which they might otherwise be entitled.")

EO 2109 expressly relies upon two statutes: "Section 5 of the Act of February 8, 1887 (24 Stat. L. 388) and the Act of June 21, 1906 (34 Stat. L. 325-326)" to extend "the period of trust" for the Moses Allotments for another ten years. As Judge Quackenbush noted, the first of those statutes, the General Allotment Act, authorized the President to extend the trust period only "for allotments made under the General Allotment Act" itself, so the reference to that Act in EO 2109 was mere "confusion." ECF 329 at 5:21, 8:12. That leaves the June 21, 1906 Act, which provides:

> Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent **containing restrictions upon alienation** has been or shall be issued under any law or treaty the President may, in his discretion, continue such **restrictions on alienation** for such period as he may deem best.

25 U.S.C. § 391 (emphasis added). A trust, of course, is not itself a restriction on alienation—the beneficiary of a trust never had title to begin with and has no rights of alienation to restrict. Only if an allottee also, in addition to receiving benefits under a trust, receives the power to convey title, would it make any sense to talk of restraining that power. That is exactly what happened here.

The MA-8 trust patents expressly incorporated "statutory restrictions." ECF No. 90 at 178, Ex. 12 at 175. The statute under which they were issued, the Act of March 6,

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

1906, expressly provided two different kinds of rights and protections for the allottees. First, the statute provided for the allotments to be held "for the period of ten years…in trust." ECF No. 234-3 Ex. 2. Second, even though the mere creation of a trust, by definition, does not pass title to the beneficiary or any ability to alienate, the statute also provided for the allottee, even during the so-called trust period, to have the power of sale—but only under Departmental rules and regulations, and not at all for 80 acres of the allotment. *Id.* The subsequent June 21, 1906 statute on which President Wilson erroneously relied, 25 U.S.C. § 391, authorized the President to extend the **latter** provisions, the "restrictions on alienation," incorporated by reference into the patents, but it says nothing about extending trust status.

Congress knew how to authorize extensions of trust periods, as it had in the General Allotment Act of 1887, 25 U.S.C. § 348. In the Indian Reorganization Act of 1934, erroneously relied upon by the Government, Congress chose to extend both, and it did so in plain, express language: "[t]he existing **periods of trust** placed upon any Indian lands **and any restriction on alienation** thereof are extended and continued." 25 U.S.C.A. § 5102 (emphasis added). That phrasing recognizes that trusts and restrictions on alienation of land are two different things and that to retain both as to a subject property, Congress had to extend both. In the June 21, 1906 Act, however, Congress chose to do otherwise.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Congress's eagerness, only five years later, in 1911, to facilitate the Department's shameful disregard for its fiduciary duties, by helping land speculators defraud the allottees of most of the allotment land for a quarter of its fair market value, *see* ECF No. 329 at 7, shows clearly why Congress wanted to enable the Department to stay in control of land sales without fiduciary obligations. As that private act shows, the relevant statutes simply do not, as the Government now argues, show a consistent, unified intent to protect (and infantilize) Indians; they embody a compromise between that impulse, and the desire to enable exploitation. In the 1930s, as public attitudes towards Indians softened, Congress began a series of extensions of trust periods. ECF No. 329 at 12. But when the Executive tried to anticipate that sea change decades earlier, in 1914, Executive Order 2109 was *ultra vires*. It either had no effect, or at most, extended the statutory restriction on alienation for ten years.

Congress seems to have believed that EO 2109 extended the restriction on alienation, which is why Congress later expressly eliminated those restrictions specifically as to the Moses Allotments, allowing conveyances under the lighter and only procedural restrictions of the Act of June 25, 1910. 26 Stat. 855 (ECF No. 234-7). Act of May 20, 1924, 43 Stat. 133 (ECF No. 280 Ex. A). EO 2109 could not, and did not, however, extend the trust period—neither the General Allotment Act nor the June 21, 1906 statute gave the President that authority.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

The trust period therefore ended on March 8, 1916 (ten years after the Act of March 8, 1906 (34 Stat. 55, c. 629) went into effect) and certainly no later than December 28, 1918 (ten years after the issuance of the later trust patent, ECF No. 90 at 178, Ex. 12 at 175). The Department's obligation, under the organic statute of March 8, 1906, was then triggered "at the expiration of said period…to convey the [land] by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of any charge or encumbrance whatsoever." ECF No. 234 Ex. 2. In fact, that is precisely what BIA did for other MA-8 interests on which a trust patent had been issued, issuing fee patents as a matter of course. ECF No. 224 Ex. B.[2]

Once the trust period had ended, the later statutes or orders extending then-existing trust periods, which are relied upon by the Tribe and the Government, *see* ECF 275 at 9–11, including EO 4382, 25 U.S.C. § 5102, and so forth, could not and did not apply. BIA's attempt to apply them after the fact was nothing more or less than an unconstitutional taking of the Allottees' vested real property rights.

B. Fee Patents on Moses Allotments Were Issued When Requested.

[2] That these fee patents were issued under a regulatory carve-out for Canadian owners is irrelevant: there is no reason to favor Canadian owners over American owners, by regulation or otherwise.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

The Fee Patents issued to Canadian allottees discussed above, were issued long after the right to fee patents was determined. ECF No. 90 Ex. 14 (ECF No. 90-5 at 43) establishes that by 1960, the BIA had somehow decided that a number of Wapato John's heirs were "not such a person entitled to trust privileges." However, there fee patents were not issued until 1984 or 1985. ECF No. 224, Ex. B.

As important, an initial Trust Patent issued under the 1906 Act to one "Ko-mo-dal-kish, an Indian of the Chief Moses tribe or band" was issued on March 16, 1917, in precisely the same form as the Patents issued to Wapato John. Yet, contrary to the BIA's or the Tribe's current position that the Moses Allotments are ineluctably Indian Trust land, a fee patent was issued as recently as 1960. ECF No. 224 Ex. C.

The Tribe has argued that the Court should defer to what it views as an administrative determination by the BIA that MA-8 is trust land. ECF No. 305-1 at 12.[3] No deference is due where the statute is unambiguous. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630, 200 L. Ed. 2d 889 (2018). In any event, the ICC decision on which the Tribe relies merely held that the Moses Allotments were carved out of the Columbia

[3] The Tribe also suggests that there is some kind of general principle of always favoring tribes. No authority it cites stands for that proposition, and certainly not for the proposition that a tribe has more rights than an individual Indian of another tribe.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Reservation before it was dissolved. ECF No. 305-2 at 45. What the Tribe, and the BIA, are actually asking the Court to defer to, is an unexamined assumption underlying wrongful agency action, not an agency interpretation. *Chevron* deference requires a formal, considered agency decision; even *Skidmore* deference requires at least a clear, specific interpretation of a statute. *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, 1218–19 (9th Cir. 2018). As the Supreme Court recently reaffirmed, a mere litigation position adopted *post hoc* to justify past agency action taken in the absence of any interpretation at all, deserves no deference whatsoever. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417, 204 L. Ed. 2d 841 (2019).

Far from having ever reached an administrative interpretation that these lands are required to be held in trust pending an Act of Congress, it would appear that at some point before 1960, the BIA made exactly the opposite determination—that issuance of fee patents in respect of Moses Allotments was appropriate. Such a determination would necessarily rest upon the trust period having expired in regard to the Moses Allotments no later than March 8, 1936. No explanation for this inconsistent treatment, this lack of equal protection, has been offered by the US parties, and leaves the court with an open question of fact at the very least. In all events, the issuance of such fee patents in regard to other Moses Allotments supports the position taken by Wapato Heritage.

IV. INCORPORATION OF PRIOR BRIEFING

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Independent of the arguments above, Wapato Heritage relies upon and incorporates its prior briefing that the trust period, and any restrictions on alienation, as to the Moses Allotments in general, and MA-eight in particular, expired long ago and that Wapato Heritage and all other allottees are entitled, upon request, to the issuance of fee patents. These include:

1. **ECF No. 315.** Neither the IRA of June 18, 1934 nor the Act of June 15, 1935, extended any trust restriction of restriction on alienation as to MA-8. MA-8 is not a part of the Colville Reservation. Wapato Heritage also joined in the Plaintiff's Supplemental Memorandum Re: MA-8 Trust Status, ECF No. 312.
2. **ECF No. 297.** Wapato Heritage joined in the legal positions and authority set out by Plaintiff in ECF No. 295.
3. **ECF No. 293.** Wapato Heritage discussion of Act of 1924, other reasons for non-trust status and in opposition to the Motion to Dismiss of the Colville Confederated Tribes.
4. **ECF No. 228.** The Amended Answer, Counter Claims and Cross Claims of Wapato heritage, to the extent admitted by the USA parties and/or the Colville Confederated Tribes.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

V. PLAINTIFF'S BRIEF ADOPTED

The pending dispositive motions should also be denied for the following reasons discussed in Plaintiffs' briefs, including their concurrently-filed supplemental brief, which is adopted by Wapato Heritage:

1. While it has been held in prior litigation that the Master Lease entered into between the allottees landowners and Wapato Heritage had not been properly renewed, it has not been held that the Master Lease was ever terminated by the lessor allottees, and it was not.
2. Plaintiff RV Park, as this court has held, occupies part of MA-8 pursuant to a license, which has not expired, is not limited to any duration by a statutory provision or regulation, and is not a sub-lease.
3. The allottee owners, or at least a majority of them, are estopped from asserting that the RV Park has lost the right to occupy MA-8 until 2034.
4. BIA's alleged "consultation" with the allottee owners was invalidated by the blatant conflict of interest and bias of its "survey."

That last point deserves further elaboration. As this Court held, assuming *arguendo* that the BIA is the trustee over MA-8 for the allottees' benefit, BIA had no right or power to declare the Master Lease terminated and eject Wapato Heritage or Plaintiffs from MA-8, without **first** meaningfully consulting with the allottees. ECF No.

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

144 at 25. Set aside, for the moment, the conflict inherent in a consultation by the Superintendent of the Colville Agency, who also just happens to be a prominent member of the Tribe which is the competing lessee applicant. The ethical violation in the BIA's meeting and subsequent letter to the unrepresented Allottees, which were obviously prepared with the help of its legal team is also problematic.[4] That the letter fails to make clear that Wapato Heritage had a plan to develop MA-8, with potential multi-million dollar benefits to the Allottees,[5] and that the BIA stonewalled approval without any alternative plan,[6] at the Tribes' behest and against its fiduciary duties to the allottees, raises at least a material issue of fact as to whether the BIA honestly and fairly consulted with them and prioritized their interests. But most of all, the BIA failed to consult **before** purporting to terminate the Master Lease and seeking to evict the RV Park licenses, and there was no way for the BIA to cure that defect after the fact.

By the time the BIA got around to "consulting," Plaintiffs had already been pushed

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[4] *See* WA RPC 4.3. This rule necessarily applies to indirect communications through a client or client representative, and also applies to a person performing the function of an attorney in giving advice. *Johns v. Allstate Ins. Co.*, 146 Wn. 2d 291 (Wash. 2002).

[5] *See* ECF No. 405.

[6] *Id.*

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

into a corner where they had to sue both BIA and the individual Allottees. That fact alone irremediably tainted the process. Put simply, the BIA cannot incite an unnecessary lawsuit against the Allottees, and then go to them and say, in effect, "hey, do you mind if we keep fighting the guys who are suing you?". Of course many Allottees will want the BIA to fight back, if they perceive themselves as having been attacked in court! This sort of problem is why the BIA must consult in advance, not after battle lines have already been drawn.

VI. RESPONSE TO COLVILLE SUPPLEMENTAL MEMO, ECF NO. 316.

Lastly, the Court should not be guided by the Tribe's positions in ECF No. 316. The Court has already observed that the Moses Allotments were not, contrary to the Tribe's arguments, consistently treated as part of the Colville Reservation. ECF No. 329 at 15. Indeed, that is why, as the Court also observed, the Department of the Interior correctly considered the Moses Allotments beyond the scope of the Indian Reorganization Act. *Id.* at 15:6–7. And the argument that if MA-8 were not trust land federal subject matter jurisdiction would have been lacking in prior litigation between Wapato Heritage and the BIA, proves only that nobody questioned jurisdiction at the time. Anyway, the Tribe is confusing the BIA's powers with the Court's: a federal question was presented based on the BIA's assertion of trustee status and its acceptance of notice on behalf of the Allottees, whether it was acting within the scope of the

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

applicable statutes or not.

What the Tribe's supplemental memorandum does accomplish, is to turn the Tribe's motion to dismiss into a motion for summary judgment, in that it relies heavily on external facts, however irrelevant they are. *See* ECF No. 316 at 2 n.2, 3 n.5 (making the irrelevant point that certain members of the Chief Moses Band enrolled in the Colville Tribe, which has no bearing on the allottees' decisions not to move to the Colville Reservation but instead to accept independent allotments from the former Columbia Reservation). The Tribe has failed to file Statement of Undisputed Facts pursuant to LR 56(c)(1)(A), which should be done, and Plaintiffs and Wapato Heritage given an opportunity to refute any material facts in dispute.

VII. CONCLUSION

For the reasons stated, adopted, and incorporated above, the Court should deny the pending partial dispositive motions.

RESPECTFULLY SUBMITTED this 17th day of April 2020.

CLOUTIER ARNOLD JACOBOWITZ, PLLC

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA No. 4646
Nathan J. Arnold WSBA No. 45356
Emanuel Jacobowitz, WSBA No. 39991
Cloutier Arnold Jacobowitz, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
(206) 866-3230; Fax (206) 866-3234
Bruce@RBruceJohnston.com
Attorneys for Wapato Heritage, LLC

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 First Avenue, Suite 200
Seattle, WA 98121
113 East Woodin Avenue, Suite 200
Chelan, WA 98816
(206) 866-3230 Fax: (206) 866-3234

FOREMAN, HOTCHKISS, BAUSCHER & ZIMMERMAN, PLLC

/s/ Dale M. Foreman
Dale M. Foreman, WSBA No. 6507
Tyler Hotchkiss, WSBA No. 40604
Foreman, Hotchkiss, Bauscher, & Zimmerman, PLLC
124 N. Wenatchee, Ave., Suite A
P. O. Box 3125
Wenatchee, WA 98807
(509) 662-9602; Fax (509) 662-9606
dale@fhbzlaw.com
tyler@fhbzlaw.com
Attorneys for Wapato Heritage, LLC

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused the foregoing document to be electronically filed with the Clerk of the above entitled Court using the CM/ECF system, which will send notification of such filing to all registered recipients of that system as of the date hereof.

Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Joseph P. Derrig
Usawae-jderrigecf@usdoj.gov

Tyler Hotchkiss
tyler@fhbzlaw.com

Nathan J. Arnold
nathan@cajlawyers.com

Franklin L Smith
Frank@Flyonsmith.com

Sally W. Harmeling
sallyh@jdsalaw.com

Brian Gruber
bgruber@ziontzchestnut.com

Robert R. Siderius
Bobs@jdsalaw.com

Brian W. Chestnut
bchestnut@ziontzchestnut.com

R Bruce Johnston
bruce@rbrucejohnston.com

Pamela J. DeRusha

Matthew A. Mensik
mam@witherspoonkelley.com

Timothy W. Woolsey

Dana Cleveland
Dana.cleveland@colvilletribes.com

Dale M. Foreman
dale@fhbzlaw.com

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Notice of this filing is being sent this date via United States Postal Service First Class Mail to the parties below at the addresses indicated below.

PRO SE PARTIES

Francis Abraham
11103 E. Empire Avenue
Spokane Valley, WA 99206

Annie Wapato
1800 Jones Rd
Wapato, WA 98951-9

Paul G. Wapato, Jr.
10216 N Sundance Dr.
Spokane, WA 992085

Gary and Francis Reyes
PO Box 296
Newman Lake, WA 99025

Kathleen Dick
P.O. Box 288
Nespelem, WA 99155-0288

Jeffrey M Condon
PO Box 3561
Omak, WA 9884 1-3561

Deborah A. Backwell
24375 SE Keegan RD
Eagle Creek, OR 97022

Vivian Pierre
PO Box 294
Elmer City, WA 99124-0294

Catherine Garrison
3434 S 114th St., Apt. 124
Tukwila, WA 98168-4061

Sonia W (Wapato) Vanwoerkom
810 19th St
Lewiston, Id 83501-3172

Mary Jo Garrison
PO Box 1922
Seattle, WA 98111

Arthur Dick
PO Box 288
Nespelem, WA 99155-0288

Enid T. Wippel
PO Box 101
Nespelem, WA 99155

Hannah Rae Dick
PO Box 198
Nespelem, WA 99155-0198

Leonard Wapato
P.O. Box 442
White Swan, WA 98952-0442

Francis J Reyes
PO Box 215
Elmer City, WA 99124-0215

Lynn K. Benson
PO Box 746

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

Omak, WA 98841-0746

Dwane Dick
PO Box 463
Nespelem, WA 99155-0463

James Abraham
2727 Virginia Avenue
Everett, WA 98201-3743

Randy Marcellay
P.O. Box 3287
Omak, WA 98841-3

Gabe Marcellay
PO Box 76
Wellpinit, WA 99040-0076

Paul G Wapato Jr
Catherine L (Gufsa) Garrison
3434 S 144th St Apt 124
Tukwila, WA 98168 -4061

Travis E Dick and Hannah Dick
Guardian of Travis E Dick
PO Box 198
Nespelem, WA 99155

Maureen M. Marcellay
501 SE 123rd Ave., Apt U150
Vancouver, WA 98683-4008

Jacqueline L Wapato
PO Box 611
Lapwai, Id 83540-0611
Leonard M Wapato
PO Box 442
White Swan, WA 98952-0442

Darlene Marcellay-Hyland
16713 SE Fisher Drive
Vancouver, WA 98683

Mike Marcellay
PO Box 594
Brewster, WA 98812-0594

Enid T (Pierre) Marchand
PO Box 101
Nespelem, WA 99155-0101

Pamela Jean DeRusha
US Attorney's Office – SPO
920 W. Riverside, Suite 300
PO Box 1494
Spokane, WA 99210 - 1494

Lydia A. Arneecher
P.O. Box 45
Wapato, WA 98951-0475

Stephen Wapato
246 N. Franklin
Wenatchee, WA 98801

Gabriel Marcellay
P.O. Box 76
Wellpinit, WA 99040

Marlene Marcellay
1300 SE 116th Ct.
Vancouver, WA 98683-5290

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

DATED this 17th day of April 2020.

Lesley Alvarado

Lesley Alvarado

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234

LOCAL RULES CERTIFICATE

This Brief complies with LCivR 10(d) and does not exceed 20 pages exclusive of the table of contents, if any; signatures; certificates of service; copies of decisions required by LCivR 7(g); LCivR 56(c) Statements of Material Fact; and exhibits.

DATED this 17th day of April 2020.

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA No. 4646

CLOUTIER ARNOLD JACOBOWITZ, PLLC
2701 FIRST AVENUE, SUITE 200
SEATTLE, WA 98121
113 EAST WOODIN AVENUE, SUITE 200
CHELAN, WA 98816
(206) 866-3230 FAX: (206) 866-3234