

1 Nathan J. Arnold, WSBA No. 45356  
2 R. Bruce Johnston, WSBA No. 4646  
3 Emanuel F. Jacobowitz, WSBA No. 39991  
4 Cloutier Arnold Jacobowitz, PLLC  
5 2701 First Avenue, Suite 200  
6 Seattle, WA 98121  
7 (206) 866-3230, Fax (206) 866-3234  
8 nathan@CAJlawyers.com  
9 bruce@CAJlawyers.com  
10 manny@CAJlawyers.com

Hon. Rosanna Malouf Peterson

6 Dale M. Foreman, WSBA No. 6507  
7 Tyler Hotchkiss, WSBA No. 40604  
8 Foreman, Hotchkiss, Bauscher &  
9 Zimmerman, PLLC  
10 124 N. Wenatchee, Ave., Suite A  
11 P. O. Box 3125  
12 Wenatchee, WA 98807  
13 (509) 662-9602; Fax (509) 662-9606  
14 dale@fhbzlaw.com  
15 tyler@fhbzlaw.com

12 **UNITED STATES DISTRICT COURT**  
13 **EASTERN DISTRICT OF WASHINGTON**

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

18 Plaintiffs,

19 v.

19 UNITED STATES OF AMERICA;  
20 UNITED STATES DEPARTMENT  
21 OF THE INTERIOR; THE  
22 BUREAU OF INDIAN AFFAIRS,  
23 and FRANCIS ABRAHAM,  
24 CATHERINE GARRISON,  
25 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**

**WAPATO HERITAGE, LLC'S  
RESPONSE TO MOTION TO  
CLARIFY (ECF No. 490) AND  
CROSS-MOTION FOR  
CONTEMPT**

WAPATO HERITAGE, LLC'S RESPONSE  
TO MOTION TO CLARIFY (ECF No. 490) AND  
MOTION FOR CONTEMPT - 1

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

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

23 **INTRODUCTION**

24 Over four years ago, Defendant United States of America (“the Government”) was  
 25 ordered to provide full records regarding purported sales of stakeholder interests in MA-  
 8. ECF No. 345 at 3. The Government, after being confronted with its failure to do so,  
 now comes to this Court admitting it did not comply, and flatly refusing to comply  
 without a further order. “The United States does not plan to clutter the record with  
 additional documents unless the Court desires otherwise or rules on the Motion for  
 Clarification.” ECF No. 493 at 1. As a red flag to its feigned compliance, the Government  
 fails to provide any declaration that it is now in compliance. This is for good reason—as  
 the Government has failed to provide all relevant documents in its possession.

1 The Government’s last-ditch attempt to avoid sanction is to assert that when the  
2 Court ordered it to produce “all” documents related to the sale of these interests, the Court  
3 meant only deeds. Respectfully, if the Court had meant only “deeds” it would have said  
4 only “deeds.” Instead, the Court ordered the Government to produce “all documents in  
5 its possession applying to any such sale.” ECF No. 345 at 3:20. And had the Government  
6 actually been in doubt as to what was required, it could and should have moved to clarify  
7 long since, at least when the issue was first raised in briefing related to other motions,  
8 rather than waiting until a motion for contempt was threatened. The Government is  
9 simply flouting ECF No. 345, this Court’s February 23, 2016 Order. Accordingly,  
10 Wapato Heritage respectfully asks the Court to hold the Government in contempt.  
11  
12

13  
14 **RELIEF REQUESTED**

- 15 1. Should the Government be found in contempt where it willfully disobeyed this  
16 Court’s Order for over four years? *Yes*.
- 17  
18 2. Should the Government’s pending requests for relief be stayed until it purges its  
19 contempt? *Yes*.
- 20  
21 3. Should the Government be estopped from arguing it is carrying out the wishes of  
22 the majority interests of allottees by seeking ejectment of Plaintiffs? *Yes*.
- 23

24 **EVIDENCE RELIED UPON**

25 This Response and Motion relies upon the Declarations of Brad Selland, George

1 Schuchart, Jeffrey Webb, and Nathan J. Arnold, and the balance of filings and pleadings  
2 in this matter.

3  
4 **HISTORY**

5 *Order to Disclose, ECF No. 345*

6 On February 23, 2016, this Court ordered, *inter alia*, that the Government make  
7 substantial and complete disclosures regarding purported transfers of landowner interests.

8  
9 The Court reiterated its concern as to whether the individual allottees' interests were  
10 being fully represented, and therefore ordered an update on whether counsel had been  
11 provided, and further ordered:

12  
13 3. On or before April 1, 2016, the United States Defendants shall also  
14 file a schedule setting forth the following:

15 a. The name and address of the parties to the sale of any landowner's  
16 interest in MA-8 since the inception of this action on January 21,  
17 2009, including the name and address of each party thereto;

18  
19 b. The specifics of the sale of such property interest including whether  
20 the sale was approved by the United States or its agent;

21  
22 c. The United States shall file a copy of *all* documents in its  
23 possession applying to any such sale;

24  
25 d. Whether the seller of any interest in MA-8 requested the

1 appointment of independent counsel in connection with the sale.

2 ECF No. 345 at 2 (emphasis added).

3  
4 Given the context of the Order, the Court was concerned that in the absence of  
5 counsel representing their individual interests, landowners may not have been given full  
6 information and otherwise treated fairly, as regulations require, when the Colville Tribes,  
7 in coordination with the BIA, offered to buy their valuable real property.

8  
9 *Wapato Heritage's Attempts to Resolve the Issue without Motion*

10 The Government did not produce appraisals of the subject property. This fact was  
11 material to pending dispositive motions and was raised in other parties' briefs. ECF No.  
12 483 at 5:4-13. At oral argument on May 29, 2020, the Government asserted that there had  
13 been appraisals of the subject property. Counsel for Mr. Reyes raised this issue with the  
14 Government's counsel on June 3, 2020, asking that the appraisal(s) be filed. Declaration  
15 of Nathan J. Arnold ("Arnold Dec.") Exh. A. When the Government refused, counsel  
16 asked to meet and confer, although there is no meet-and-confer requirement for a  
17 contempt motion. The Government refused. *Id.* Despite claiming to be "unavailable," the  
18 Government's counsel was reached by the undersigned on June 4, 2020 by telephone. *Id.*  
19 The Government was given the additional time requested in that meet and confer to  
20 engage with its "stakeholders," and a second telephone call was scheduled. *Id.* Shortly  
21 before that conference was set to occur, the Government filed this motion to "clarify,"  
22  
23  
24  
25

1 and then refused to get on the call despite undersigned counsel's renewed request after  
2 the Government's filing. *Id.*

3 *Effect of the Government's Failure to Comply with the Court's Order*  
4

5 In recent dispositive-motion briefs, the Tribe asserted that its support of the  
6 Government's motion for ejectment legitimizes that motion because the Tribe has now  
7 acquired the majority interest in MA-8 (ignoring Wapato Heritage's life-interest).  
8 However, the Government's failure to comply with this Court's Order at ECF No. 345  
9 brings the validity of the Tribe's acquisitions back into question. Had the Government  
10 complied with the Court's prior Order, then dissenting allottees, such as Wapato Heritage,  
11 could have challenged the transfers. Indeed, had the Government not covertly favored the  
12 Tribe over all other allottees, Wapato Heritage and other allottees could have bid for these  
13 interests at the time. Additional marketing and an opportunity to solicit competing bids  
14 would have economically benefited all the allottees, by increasing the sellers' sale prices  
15 and the non-sellers' property value. Instead, not only was there no attempt to seek better  
16 offers from other allottees (or anyone else), it has just recently come to light that the  
17 Government went so far as to ask the allottees targeted by the Tribe to waive their rights  
18 to an appraisal. ECF No. 490-1, Exh. A.  
19  
20  
21  
22

23 The Government's now-admitted contempt brings even more sharply into focus its  
24 wrongful methods and motives in benefiting the Tribe at the expense of other allottees.  
25

1 The Government has argued that it does not need majority approval to act, but it has not  
2 articulated, even when challenged, what else motivates its apparently arbitrary conduct.  
3 Certainly not the best interests of all the allottees. The Government has still not stated,  
4 after many years of litigation, any plan to replace the income which MA-8 generates for  
5 the allottees from payments made by the RV Park. If ejecting the RV Park would help  
6 the allottees, Wapato Heritage may, hypothetically, even want to withdraw its objections  
7 to ejectment, but no reason has been suggested other than the Tribe's private grudge.<sup>1</sup>  
8  
9

10 All parties, and the Court, should be troubled by the apparent catastrophic loss in  
11 value of MA-8 between the 2010 appraisal at \$15.9 million and the 2015 appraisal at \$4  
12 million. *Compare* ECF No. 490-1 Exh. C & I. The disparity is so great as to raise doubt  
13 as to the accuracy of either appraisal. Declaration of George Schuchart ¶ 13, filed  
14  
15

16  
17 <sup>1</sup> Wapato Heritage does not believe MA-8 is properly trust land. But if the BIA is going  
18 to act as a trustee, then it must advance the allottees' interests as a whole, and certainly  
19 not procure blanket waivers regarding appraisals when the BIA is in possession of an  
20 appraisal showing the value of MA-8 is many times more than these belatedly filed  
21 appraisals that supported the Tribe's purchases. See Exhibits A and B to Webb  
22 declaration. Likewise, if the Tribe wants the privilege of a landowner to use its land as  
23 it pleases, it should seek fee patents and partition.  
24  
25

1 herewith. Wapato Heritage should have had the opportunity to explore that question  
2 before now. And if the land actually did lose 75% of its value due to the Government and  
3 Tribe's collusion, the allottees, including Wapato Heritage, should have had the  
4 opportunity to challenge this extremely adverse effect, and to try to prevent further loss  
5 of value between 2015 and the present. If the Government had been transparent regarding  
6 the Tribe's takeover attempt in the first place, Wapato Heritage would have engaged with  
7 its business associates to find a higher and better use for the land. An experienced  
8 developer familiar with MA-8, Mr. Brad Selland, considers that even \$15.9 million—the  
9 Government's appraised value before it supported the Tribe's intermeddling—was  
10 absurdly low for this property. Declaration of Brad Selland ¶ 12, filed herewith.  
11 Anybody who sold at that price was "taken advantage of." *Id.* ¶ 13.  
12

13  
14  
15  
16 *Additional Ordered Documents Remain Outstanding*

17 The Government, in its supplemental filing, admits that it will continue to willfully  
18 disobey Judge Quackenbush's order. ECF No. 493 at 1. In addition, it is not being candid  
19 with this Court in its opening motion for clarification. There are additional documents  
20 within the ambit of the order, which the Government has refused to file. For example,  
21 there is an appraisal Wapato Heritage obtained in 2006 relevant to other allottees,  
22 provided to the Government at that time, which unquestionably falls within the ambit of  
23 the Order and which the Government has willfully refused to file. Declaration of Jeff  
24  
25



1 Webb (“Webb Dec.”) ¶¶ 5-8 and Exh. A. This raises the possibility that there are still  
2 other highly relevant documents the Government is withholding.

3  
4 **AUTHORITY**

5 “There can be no question that courts have inherent power to enforce compliance  
6 with their lawful orders through civil contempt.” *Shillitani v. United States*, 384 U.S. 364,  
7 370 (1966), *United States v. United Mine Workers*, 330 U.S. 258, 330-332, 67 S.Ct. 677,  
8 713-714, 91 L.Ed. 884 (1947) (Black and Douglas, JJ., concurring in part and dissenting  
9 in part); *United States v. Barnett*, 376 U.S. 681, 753-754, 84 S.Ct. 984, 1019-1020, 12  
10 L.Ed.2d 23 (1964) (Goldberg, J., dissenting).

11  
12  
13 “The standard for finding a party in civil contempt is well settled: The moving  
14 party has the burden of showing by clear and convincing evidence that the contemnors  
15 violated a specific and definite order of the court. The burden then shifts to the  
16 contemnors to demonstrate why they were unable to comply.” *F.T.C. v. Affordable*  
17 *Media*, 179 F.3d 1228, 1239 (9th Cir.1999).

18  
19  
20 The absence of wilfulness does not relieve from civil contempt. Civil as  
21 distinguished from criminal contempt is a sanction to enforce compliance  
22 with an order of the court or to compensate for losses or damages sustained  
23 by reason of noncompliance. Since the purpose is remedial, it matters not  
24 with what intent the defendant did the prohibited act. ... An act does not  
25 cease to be a violation of a law and of a decree merely because it may have  
been done innocently. The force and vitality of judicial decrees derive from  
more robust sanctions. And the grant or withholding of remedial relief is not  
wholly discretionary with the judge.

1 *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (citations omitted).

2 The Government claims that it cannot be in contempt because the Court never  
3 followed up on its prior order: “Judge Quackenbush never indicated that the  
4 government’s response to paragraph 3.c was somehow deficient.” ECF No. 490 at 5. The  
5 onus has never been and should never be on a court to ensure compliance with its orders.  
6 That onus belongs to the party subject to the order.  
7

8  
9 The Government next argues that appraisals are not within the scope of the order  
10 to produce “all documents in its possession applying to any such sale.” ECF No. 345 at  
11 3. But if there truly were any confusion on this point, a motion to clarify could have been  
12 made at any time in the last four years, not *after* the issue was raised in opposition to the  
13 Government’s motion for summary judgment. But, the Court’s prior Order was clear and  
14 unequivocal. It broadly required the Government to produce “all documents in its  
15 possession applying to any such sale,” being previously defined as “the sale of any  
16 landowners interest in MA-8 since the inception of this action on January 21, 2009.” *Id.*  
17  
18

19 Compounding its willful disobedience, the Government now says it will not  
20 comply with the prior order, even though it has additional responsive documents because  
21 to produce them would “clog up the docket.” ECF No. 493 at 1. That is not a basis to  
22 willfully disobey a court order. Moreover, considering that there are already four hundred  
23 ninety-four (494) docket entries in this matter, totaling several thousand pages, the  
24  
25

1 Government’s concern rings hollow. At least the Government is being candid with the  
2 Court on this point – additional documents in their possession do exist and have not been  
3 filed. Webb Dec. ¶¶ 11-14 and Exh. B. The Government lacks any plausible excuse for  
4 its willful disobedience.  
5

6 The district courts have broad discretion to fashion a remedy for civil contempt.  
7 *United Mine Workers* at 304. It is notable that the Government has not provided any  
8 sworn certification of compliance in its motion to “clarify” – in fact, it has said just the  
9 opposite, that it will not file any documents even if they exist. This Court should order  
10 the government to provide such a certification, under oath, from a custodian with  
11 knowledge, who can certify that a thorough investigation has been conducted and all  
12 documents ordered to be filed have been, and the Court should stay the Government’s  
13 pending motions, or other requests for relief until it so purges its contempt. Further, the  
14 Government should be estopped from arguing that it is carrying out the will of the  
15 majority of allottees, even setting aside its convenient disregard of Wapato Heritage’s  
16 interest, where it has failed to follow the Court’s order directed at this important issue.<sup>2</sup>  
17  
18  
19  
20  
21

---

22 <sup>2</sup> Monetary sanctions are additionally appropriate. More urgent, however, is the  
23 Government’s compliance with this Court’s Orders and that a full record be made so  
24 that the Court can later assess the validity of the purported land interest transfers.  
25

**CONCLUSION**

The Government should not be allowed to continue its years’ long flouting of Judge Quackenbush’s order, the relief it currently seeks in this action should be stayed until it purges its contempt, and it should be estopped from making any argument that it is carrying out the will of the majority of landowners.

**DATED** this 24th day of June 2020.

**CLOUTIER ARNOLD JACOBOWITZ, PLLC**

/s/ Nathan J. Arnold  
Nathan J. Arnold, WSBA No. 45356  
Cloutier Arnold Jacobowitz, PLLC  
2701 First Avenue, Suite 200  
Seattle, WA 98121  
206-866-3230  
Fax: 206-866-3234  
Nathan@CAJlawyers.com  
*Counsel for Defendant Wapato Heritage, LLC*

**FOREMAN, HOTCHKISS, BAUSCHER & ZIMMERMAN, PLLC**

/s/ Tyler D. Hotchkiss  
Tyler D. Hotchkiss, WSBA No. 40604  
Foreman, Hotchkiss, Bauscher & Zimmerman, PLLC  
124 N. Wenatchee Ave., Suite A  
Wenatchee, WA 98801  
509-662-9602  
Fax: 509-662-9606  
tyler@fhbzlaw.com  
*Counsel for Defendant Wapato Heritage, LLC*

**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.

Franklin L. Smith Frank@Flyonsmith.com	Joseph Q. Ridgeway josephr@jdsalaw.com
Robert R. Siderius Bobs@jdsalaw.com	Sally W. Harmeling sallyh@jdsalaw.com
Timothy W. Woolsey	Pamela J. DeRusha
Nathan J. Arnold nathan@cajlawyers.com	Tyler Hotchkiss tyler@fhbzlaw.com
R Bruce Johnston bruce@rbrucejohnston.com	Dale M. Foreman dale@fhbzlaw.com
Emanuel Jacobowitz manny@cajlawyers.com	Brian Gruber bgruber@ziontchestnut.com
Brian W. Chestnut bchestnut@ziontchestnut.com	Dana Cleveland Dana.cleveland@colvilletribes.com
Joseph P. Derrig Joseph.Derrig@usdoj.gov	Manish Borde mborde@bordelaw.com

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.

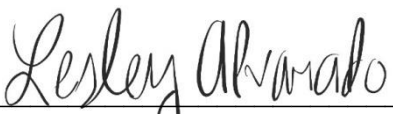
WAPATO HERITAGE, LLC'S RESPONSE  
TO MOTION TO CLARIFY (ECF No. 490) AND  
MOTION FOR CONTEMPT - 13

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

1	Francis Abraham 11103 E. Empire Avenue Spokane Valley, WA 99206	Catherine Garrison 3434 S 144th St Apt 124 Tukwila, WA 98168-4061
2		
3	Maureen M. Marcellay 7910 NE 61st Cir Vancouver, WA 98662	Mike Palmer P.O. Box 466 Nespelem, WA 99155
4		
5	James Abraham 2727 Virginia Avenue Everett, WA 98201	Annie Wapato 1800 Jones Rd Wapato, WA 98951
6		
7	Enid T (Pierre) Marchand P.O. Box 101 Nespelem, WA 99155-0101	Francis Reyes P.O. Box 215 Elmer City, WA 99124-0215
8		
9	Lydia A. Armeecher P.O. Box 45 Wapato, WA 98951-0475	Paul G. Wapato, Jr. 2312 Forest Estates Drive Spokane, WA 99223
10		
11	Darlene Marcellay-Hyland 16713 SE Fisher Drive Vancouver, WA 98683	Randy Marcellay P.O. Box 3287 Omak, WA 98841
12		
13	Mary Jo Garrison P.O. Box 1922 Seattle, WA 98111	Lynn K. Benson P.O. Box 746 Omak, WA 98841
14		
15	Marlene Marcellay 1300 SE 116th Ct. Vancouver, WA 98683-5290	Sandra Covington P.O. Box 1152 Omak, WA 98841
16		
17	Gabriel Marcellay P.O. Box 76 Wellpinit, WA 99040	Linda Saint P.O. Box 3614 Omak, WA 98841-3614
18		
19		
20		
21		
22		
23		
24		
25		

1	Jeffrey M. Condon P.O. Box 3561 Omak, WA 98841	Mike Marcellay P.O. Box 594 Brewster, WA 98812
2		
3	Vivian Pierre PO Box 294 Elmer City, WA 99124-0294	Sonia Vanwoerkom 810 19th St Lewiston, ID 83501-3172
4		
5	Leonard Wapato P.O. Box 442 White Swan, WA 98952-0442	Deborah A. Backwell 24375 SE Keegan Rd Eagle Creek, OR 97022
6		
7	Judy Zunie P.O. Box 3341 Omak, WA 98841-3341	Kathleen & Arthur Dick P.O. Box 288 Nespelem, WA 99155-0288
8		
9	Pamela Jean DeRusha US Attorney's Office - SPO P.O. Box 1494 Spokane, WA 99210-1494	Travis E Dick and Hannah Dick Guardian of Travis E Dick PO Box 198 Nespelem, WA 99155
10		
11	Jacqueline L Wapato PO Box 611 Lapwai, ID 83540-0611	Stephen Wapato 246 N. Franklin Wenatchee, WA 98801
12		
13	Dwane Dick PO Box 463 Nespelem, WA 99155-0463	Timothy Ward Woolsey Colville Tribes Office of Reservation Attorney PO Box 150 Nespelem, WA 99155
14		
15		
16		
17		
18		
19		
20		

21  
22 **DATED** this 24th day of June 2020.

23  
24   
25 Lesley Alvarado

WAPATO HERITAGE, LLC'S RESPONSE  
TO MOTION TO CLARIFY (ECF No. 490) AND  
MOTION FOR CONTEMPT - 15

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