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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,

Plaintiffs,

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. 2:09-CV-00018-RMP**

**WAPATO HERITAGE LLC'S  
MOTION FOR TRANSFER  
PURSUANT TO 28 USC § 1631  
OR FOR PARTIAL SUMMARY  
JUDGMENT**

**Noted for Hearing:  
December 8, 2020  
Without Oral Argument**

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

## 12 I. INTRODUCTION

13  
 14 Defendant Wapato Heritage, LLC (“Wapato Heritage”) respectfully requests  
 15 that the Court transfer the case to the Court of Claims pursuant to 28 USC § 1631. A  
 16 Statement of Undisputed Facts has been filed herewith pursuant to LCR 56(c)(1)(A).  
 17

## 18 II. ARGUMENT

19 The issue presented here is one of jurisdiction. The Federal Defendants raised  
 20 lack of jurisdiction as an affirmative defense to Wapato Heritage’s claims against  
 21 them. ECF No. 230, p. 12. The Federal Defendants are correct in their most recent  
 22 pleading that “any federal court must determine its jurisdiction to hear a case before it  
 23 advances to the merits, regardless of whether the court's jurisdiction is raised by the  
 24  
 25

1 parties. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95, (1998) (citing *Ex*  
 2 *parte McCardle*, 74 U.S. 506 (1868)).” ECF No. 570, p. 1. The Federal Defendants go  
 3 on to state “it is unclear how the Court has subject matter jurisdiction.” *Id.* p. 2. The  
 4 Federal Defendant’s hand-waving at sovereign immunity and the limited jurisdiction  
 5 of Article III courts may provide the parties to this action with some rare common  
 6 ground.  
 7

8  
 9 When the Court elected to sever the equitable claims under Fed. Civ. Pro. 54(b)  
 10 it relieved itself of jurisdiction over the remaining monetary claims by isolating them  
 11 from their equitable counterparts. “The United States Court of Federal Claims shall  
 12 have jurisdiction to render judgment upon any claim against the United States founded  
 13 ... upon any express or implied contract... or for liquidated or unliquidated damages  
 14 in cases not sounding in tort.” 28 USC § 1491 (a)(1), the *Tucker Act*.  
 15  
 16

17 Wapato Heritage respectfully requests transfer of this action to the Court of  
 18 Claims, pursuant to 28 USC § 1631, which states:  
 19

20 Whenever a civil action is filed in a court as defined in section 610 of this  
 21 title or an appeal, including a petition for review of administrative action,  
 22 is noticed for or filed with such a court and that court finds that there is a  
 23 want of jurisdiction, the court shall, if it is in the interest of justice,  
 24 transfer such action or appeal to any other such court (or, for cases within  
 25 the jurisdiction of the United States Tax Court, to that court) in which the  
 action or appeal could have been brought at the time it was filed or  
 noticed, and the action or appeal shall proceed as if it had been filed in or  
 noticed for the court to which it is transferred on the date upon which it

1 was actually filed in or noticed for the court from which it is transferred.  
2 The referenced “section 610” expressly includes District Courts and the Court of  
3 Claims, among others.  
4

5 In determining whether to grant or deny a motion to transfer an action pursuant  
6 to section 1631, the district court must consider whether the action would have been  
7 timely if it had been filed in the proper forum on the date filed, and if so, whether a  
8 transfer would be “in the interest of justice.” *Taylor v. Soc. Sec. Admin.*, 842 F.2d 232,  
9 233 (9th Cir. 1988).  
10

11 Wapato Heritage’s Claims Are Timely as Filed  
12

13 This case was initiated on January 21, 2009. ECF No. 1. That is the operative  
14 date under Section 1631 (“the action or appeal shall proceed as if it had been filed in  
15 or noticed for the court to which it is transferred on the date upon which it was  
16 actually filed in or noticed for the court from which it is transferred.”). The *Tucker Act*  
17 carries a six-year statute of limitations. 28 USC § 1501.  
18

19 Accrual of claims is “suspended” when the Plaintiff can “show that defendant  
20 has concealed its acts with the result that plaintiff was unaware of their existence.”  
21 *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed.Cir.), *cert. denied*, 474 U.S. 826,  
22 106 S.Ct. 83, 88 L.Ed.2d 68 (1985)). Even if the Federal Defendants attempt to  
23 ameliorate their admitted concealment, discussed below, by arguing that Wapato  
24  
25

1 Heritage *should* have known that both the BIA was accepting overpayments *and* not  
2 policing CTEC's underpayments to the damage of both Wapato Heritage, LLC *and* all  
3 other allottees, Wapato Heritage's claims from January 21, 2003 on are not barred by  
4 any statute of limitations.  
5

6 In any event, the Federal Defendants, by asserting lack of jurisdiction as an  
7 affirmative defense (ECF No. 230, p. 12), concede that the statute of limitations  
8 analysis is not properly before this Court. "The proposition that the judgment of a  
9 court lacking jurisdiction is void traces back to the English Year Books." *Burnham v.*  
10 *Superior Court of California, Cty. of Marin*, 495 U.S. 604, 608, 110 S. Ct. 2105,  
11 2109, 109 L. Ed. 2d 631 (1990), *citing*, *Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f.  
12 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482). It "was made settled law by Lord Coke in  
13 Case of the Marshalsea" *Id.*, *citing*, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041  
14 (K.B. 1612).  
15  
16  
17

18 Because Wapato Heritage's claims "would have been timely if it had been filed  
19 in [the Court of Claims]" the Court should next turn to the "interest of justice" prong.  
20  
21 *Taylor, supra.*

## 22 Interest of Justice

23  
24 In the Ninth Circuit if the statute of limitations has passed then "the interests of  
25 justice require that the matter be transferred to the Federal Circuit pursuant to 28

1 U.S.C. § 1631.” *Kennecott Corp. v. U.S. Dist. Court for S. Dist. of California*, 873  
 2 F.2d 1292, 1293 (9th Cir. 1989) (emphasis added). Here, if the Court were to dismiss  
 3 Wapato Heritage’s claims against the Federal Defendants then there is a significant  
 4 risk the statute of limitations will run. On this basis alone, Wapato Heritage satisfies  
 5 the “interest of justice” prong.  
 6

7 Further, “transfer will generally be in the interest of justice, unless it is apparent  
 8 that the matter to be transferred is frivolous or was filed in bad faith. This is a low bar  
 9 and, as prior cases illustrate, it will usually involve a very limited inquiry by the  
 10 transferring court.” *Amity Rubberized Pen Co. v. Mkt. Quest Grp. Inc.*, 793 F.3d 991,  
 11 996 (9th Cir. 2015).  
 12

#### 13 Wapato Heritage’s Claims Have the Requisite Merit

14  
 15 “So long as an appellant has made a colorable claim, however, even if its  
 16 support is ‘quite spare,’ we have found it best to transfer and “leave such issues to the  
 17 court with jurisdiction over the claims.” *Amity Rubberized Pen Co.* at 996.  
 18

19 The Master MA-8 Lease was entered into on February 2, 1984 between the  
 20 Bureau of Indian Affairs, on behalf of the Allottees, and William W. Evans, Jr., as  
 21 lease administrator, along with a sublease between Mr. Evans, personally, and the  
 22 Colville Tribal Enterprise Corporation (“CTEC”). Webb Dec. Exhs. A & B. Upon  
 23 completion of CTEC’s Mill Bay Casino in 1994 lease payments escalated under the  
 24  
 25

1 Master Lease. Webb Dec. Exhs. A & C. A second sub-lease was entered into when the  
2 Casino opened. Webb Dec. Exhs. A & D. The Sells Group, P.S., of Everett,  
3 Washington was engaged by the BIA and the Colville Tribe to account for payments  
4 under the lease. Webb Dec. Exh. A and ECF No. 198, ¶ 248 & ECF No. 230, ¶ 258  
5 (“Federal Defendants admit that prior to December 29, 2005 the BIA retained the  
6 Sells Group to review records concerning payments made under the Master Lease by  
7 Evans and his successors....”).  
8  
9

10 On December 29, 2005, The Sells Group issued their report to the BIA (the  
11 “Sells Group Report”). Webb Dec. Exh. A and ECF No. 198, ¶ 248 (“...Federal  
12 Defendants further admit that the Sells Group provided a written report dated  
13 December 29, 2005 to the BIA...”).  
14

15 The Sells Group concluded that between 1994 and 2005, Mr. Evans, through  
16 Wapato Heritage, LLC, had overpaid the BIA approximately \$751,285. Webb Dec.  
17 Exh. A. The accounting conducted by The Sells Group concluded that between 1994  
18 and 2005, the Colville Tribal Enterprise Corporation (“CTEC”) had underpaid Mr.  
19 Evans, through Wapato Heritage, LLC, \$866,248. *Id.*  
20  
21

22 The Estate of William Evans was open at the time of the Sells Group Report.  
23 Webb. Dec. ¶ 6. The funds owed according to the Sells Group Report were due to Mr.  
24 Evans, an enrolled member of the Colville Tribe, during his lifetime; and later, to his  
25



1 estate. Webb Dec. ¶ 7.

2 The Estate of William Evans and Wapato Heritage, LLC first received the Sells  
3 Group Report pursuant to a Freedom of Information Act request responded to on July  
4 19, 2007. Webb. Dec. ¶ 8 & Exh. E and ECF No. 198, ¶ 251 & ECF No. 230, ¶ 260.  
5 But-for the FOIA request, the Federal Defendants had not provided the Sells Group  
6 Report to Wapato Heritage. ECF No. 198, ¶ 250 & ECF No. 230, ¶ 260 (“...Federal  
7 Defendants admit that BIA did not immediately send a copy of the Report to the  
8 beneficial owners or to Wapato Heritage LLC....”).  
9

10 The BIA has taken no corrective steps despite its knowledge of the Sells Group  
11 Report. ECF No. 198, ¶ 250 & ECF No. 230, ¶ 260 (“... Federal Defendants admit  
12 that BIA has taken no steps to collect from CTEC any amount of any alleged  
13 “deficiency in the payment of rent”....”). The BIA has not remitted funds previously  
14 overpaid, as concluded by the Sells Group Report. ECH No. 198, ¶ 253 & ECF No.  
15 230, ¶ 263 (“...Federal Defendants admit that BIA has not paid any money to Wapato  
16 Heritage LLC or to any beneficial owners of MA-8 because of the contents of the  
17 Sells Report.”). And, the Federal Defendants could have taken action where CTEC  
18 explicitly waived its sovereign immunity in the lease approved of by the Federal  
19 Defendants. Webb Dec. Exh. C, p. 19, ¶ 36.1 (“CTEC, solely for the purpose of this  
20 sublease, hereby waives sovereign immunity with respect to the enforcement of all of  
21  
22  
23  
24  
25



1 the terms of the sublease by Evans and consents to the entry of a money  
2 judgment....”). Instead, despite its admitted knowledge of the Sells Group Report, the  
3 BIA filed claims seeking money damages against Wapato Heritage, LLC for  
4 underpayment under the Lease. ECF No. 198.

6 The foregoing facts, undisputed by the Federal Defendants, meet the “colorable  
7 claim” standard in the Ninth Circuit for Section 1631 transfer. Indeed, these  
8 undisputed facts meet a Rule 56 summary judgments standard as to liability.

10 *Wapato Heritage’s Claims Were Not Brought in Bad Faith*

11 28 USC § 1500 bars Wapato Heritage from filing its claims against the  
12 government independently in the Court of Claims during the pendency of this action.  
13 Two lawsuits are “for or in respect to” the same claim, precluding jurisdiction in the  
14 Court of Federal Claims, if they are based on the substantially the same operative  
15 facts, regardless of the relief sought in each suit. *United States v. Tohono O’Odham*  
16 *Nation*, 563 U.S. 307, 311-318, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011). Wapato  
17 Heritage was thus wise to file its money damages claims against the Federal  
18 Government here and preserve its rights regarding the Statute of Limitations, instead  
19 of risking a dismissal at the Court of Claims under Section 1500, leading to the  
20 potential loss of claims and/or mere re-filing here. Further, such claims splitting  
21 would not have forwarded judicial efficiency. And, the risk of an adverse result was  
22  
23  
24  
25

1 solidified when the Federal Defendants elected to bring a money claim against  
2 Wapato Heritage under the Master Lease in this case, instead of merely moving to  
3 dismiss for the subject matter defect they raise in their most recent motion.  
4

5 Now, as the Court recently pointed out in its Trial Scheduling Order, this case is  
6 about money claims by and against the Government. ECF No. 567, p. 2. Any question  
7 of what predominates as between law and equity is therefore resolved, the Federal  
8 Defendants have obtained the equitable relief sought,<sup>1</sup> and the remainder of the case  
9 should be transferred to the Court of Claims which holds full and exclusive  
10 jurisdiction over the remaining claims.  
11

12  
13 Wapato Heritage's Claims Should be Transferred or Sound in Recoupment

14 As the Federal Defendants point out, this Court lacks jurisdiction to hear, in  
15 full, the monetary dispute between the parties. The action should be transferred to the  
16 Court of Claims. If the Court disagrees with both Wapato Heritage and the Federal  
17

18  
19 <sup>1</sup> The Court should note that Wapato Heritage LLC did not make this motion prior to  
20 the Court's ruling on the Federal Defendants' equitable claims which would have  
21 resulted in the sort of significant delay that Court has clearly been dissatisfied with.  
22 Delay would have occurred even if the motion were denied given the accompanying  
23 stay.  
24  
25

1 Defendants, then this Court should entertain Wapato Heritage's claims for  
2 overpayment and underpayment as a setoff or recoupment to the claims brought by the  
3 Federal Defendants. *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 511, 60 S.  
4 Ct. 653, 656, 84 L. Ed. 894 (1940), citing, *Bull v. United States*, 295 U.S. 247, 261, 55  
5 S. Ct. 695, 700, 79 L. Ed. 1421 (1935) ("recovery of money so held may not only be  
6 the subject of a suit in the Court of Claims ... but may be used by way of recoupment  
7 and credit in an action by the United States arising out of the same transaction").  
8 Therefore, if the Court disagrees with transfer, it should enter an order of liability,  
9 based upon Wapato Heritage's Statement of Undisputed Fact, that the Federal  
10 Defendants are liable to Wapato Heritage in an amount to be proven at trial.

11 The moving party is entitled to judgment as a matter of law when the  
12 nonmoving party fails to make a sufficient showing on an essential element of a claim  
13 in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v.*  
14 *Catrett*, 477 U.S. 317, 323 (1986). The following facts are undisputed. The Federal  
15 Defendants' own agent, the Sells Group, determined that the BIA has taken significant  
16 overpayments to William Evans, and later his estate and Wapato Heritage, LLC.  
17 Statement of Undisputed Facts ¶ 1-7. It is further undisputed that Mr. Evans was an  
18 enrolled member of the Colville Tribe at the time of his overpayment and the  
19 underpayment to him. *Id.* 9. It is also undisputed that the BIA concealed the Sell's

1 Group Report from Mr. Evans' estate and Wapato Heritage, along with their co-  
 2 allottees. *Id.* ¶ 8 & 11-13. If this Court has jurisdiction to hear the claims against the  
 3 government, then the Federal Defendants should be found liable for their election to  
 4 pick and choose which fiduciary duties to enforce, by allowing, and then concealing,  
 5 underpayments, along with accepting, and also concealing overpayments.  
 6

### 7 **III. CONCLUSION**

8  
 9 Now that the equitable claims have been resolved and are on appeal, because  
 10 the Court lacks jurisdiction to adjudicate the parties' claims in full, and Wapato  
 11 Heritage's claims against the Federal Defendants risk being barred by the statute of  
 12 limitations if dismissed, the action should be transferred pursuant to 28 USC § 1631  
 13 and the interpreting caselaw.  
 14

15 **DATED** this 19th day of October 2020.

16 **CLOUTIER ARNOLD JACOBOWITZ PLLC**

17  
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## 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.

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I certify that I served the foregoing document on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants.

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**DATED** this 19th day of October 2020.

  
\_\_\_\_\_  
Lesley Alvarado