IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle, et al.,	)	
Plaintiffs,	)	No. 12-431L
v.	)	Hon. Thomas C. Wheeler
United States,	)	
Defendant.	)	
Quapaw Tribe of Oklahoma (O-Gah-Pah), a federally recognized Indian nation,	)	
Plaintiff,	)	No. 12-592L
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	
Thomas Charles Bear, et al.,	)	
Claimants,	)	No. 13-51X
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	

PLAINTIFFS/CLAIMANTS' MOTION FOR DISCOVERY RELIEF

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PLAINTIFFS/CLAIMANTS' MOTION FOR DISCOVERY RELIEF

During discovery in these three coordinated cases, the Government produced

approximately 822,473 digital documents, 614,308 of which were produced in the final six weeks of discovery. Plaintiffs/Claimants, the Quapaw Tribe of Oklahoma (the O-Gah-Pah), Grace Goodeagle, et al., and Thomas Charles Bear, et al., (collectively "the Quapaw"), have repeatedly advised the United States that its document productions were insufficient because they were not organized and labeled in any consistent or useful way, and did not correspond to any of the Quapaws' specific document requests, and came far too late in the discovery process to allow the Quapaw to perform the review necessary to fully comply with the Court's order that the Quapaw provide the Government its damages schedules on July 1, 2015. The Government's refusal to sort or label its belated and massive document productions, as required by RCFC 34, has made it exceedingly burdensome, time-consuming, and expensive for the Quapaw to access or analyze the documents in any meaningful way. The Government has also produced to the Quapaw thousands of documents related to other tribes, requiring the Quapaw to sort through them only to find they have nothing to do with this case.

Rule 34 requires the Government to organize and label documents to correspond to the requests when those documents are not kept in the ordinary course of business—which these documents are not. The Government also owes the Quapaw a fiduciary duty as trustee to produce documents from which an accounting can be determined—which is entirely independent of the duties owed under Rule 34. And the Government owed the Quapaw a duty under its contract with QIS to assist in document production for the Quapaw Analysis—which the Government failed to fully comply with.

In addition, the Government has been equally uncooperative with respect to the Quapaw's other discovery requests in this case. Having refused to provide complete or responsive answers to written discovery requests,[1] the Government also refused to designate and produce witnesses on nine of the topics on which the Quapaw noticed the Government's deposition under Rule 30(b)(6). And when the Government did produce a single witness to testify about portions of the eight remaining topics, he was entirely unprepared to provide the information requested.

Because the Government has failed at every turn to meet with discovery, fiduciary, and contractual duties owed to the Quapaw, they ask this Court to issue an order: (1) requiring the Government to organize and label the previously produced documents to correspond to the Quapaw's requests for production; and (2) barring the Government from producing any testimony on any topic for which it has refused to produce a witness to testify under Rule 30(b)(6), or beyond that of the testimony of its 30(b)(6) witnesses. The Quapaw also ask this Court under Rule 37 to order the Government to reimburse the Quapaw for the costs and fees associated with preparing this motion. Finally, the Quapaw request up to three additional months to supplement the damages calculations that the Quapaw provided to the Government on July 1, 2015. Counsel has discussed this with counsel for the United States.[2] The Quapaw also do not object to extending the

[1] *See* Pls./Claimants' Status Report at 2–8 and exhibits 1–5 (June 25, 2015) (*Goodeagle* Doc. 98, *Quapaw Tribe* Doc. 96, *Bear* Doc. 81, and attachments).
[2] *See id.* at 11–12.

Government's time to response to any supplemental damages schedules.

ARGUMENT

I. The Government should be required to organize and label the documents produced to correspond with the categories in the Quapaw's Requests for Production

At the outset of discovery in this case the Quapaw served the Government with several Requests for Production of Documents in which they identified specific topics relating to the key issues in this case.[3] But in violation of RCFC 34—and despite the Quapaw's repeated protest—the Government refused to organize its responsive documents by request topic. Worse yet, the Government procrastinated, producing 75% of its documents in the final six weeks of the extended discovery period, without any organization or labeling. As a result, the Quapaw were able to make little to no use of these documents in preparing their damages schedules for exchange on July 1, 2015. Because disorganized and unusable data dumps like this are precisely the result RCFC 34 is intended to avoid, this Court should require the Government to re-produce those documents organized and labeled to correspond to the categories of documents the Quapaw Requested.

A. RCFC 34 requires a party to produce documents organized and labeled by the category of the request

Where, as here, the documents cannot be produced as they are kept in the usual course of business, RCFC 34 requires that the producing party organize and label them to

[3] *See* Pls.'/Claimants First Set of Requests for Production (March 14, 2014) (Ex. 5); Tribe's First Set of Requests for Production (April 25, 2014) (Ex. 7).

correspond to the categories in the request for production:

> A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request[.][4]

This Court has previously determined that the Government has a RCFC 34 duty to sort the BIA records it produces from storage. Former Chief Judge Hewitt found in *Osage Tribe of Indians of Oklahoma v. United States*,[5] that Indian documents located at facilities such as the National Archives and Records Administration (NARA) and "different facilities around the country . . . are, in most cases, poorly organized."[6] In *Ak-Chin Indian Community v. United States*,[7] she closely reviewed the document-retention system at the American Indian Records Repository (AIRR)—where most of the documents produced by the Government in this case were located—and concluded that the documents stored at the AIRR "are not maintained 'in the usual course of business.'"[8] She explained:

> In preparation for their transport to the AIRR, plaintiff's documents were substantially rearranged and co-mingled with the documents of at least one other Tribe. According to the Director of the OTR, defendant's procedures for transporting files include placing the transported files chronologically by year, separating trust records from non-trust records, and arranging the files by case number or alphabetically by name. In addition, file folders are organized by record series, a designation which "organize[s] records by program and subject matter." Representatives of the OTR re-order the files in local agency offices by record series "so records within the same record series are kept together when shipped to the AIRR." The Director of OTR

[4] RCFC 34(b)(2)(E)(i).
[5] *Osage Tribe of Indians of Okla. v. United States*, 87 Fed. Cl. 338 (2009).
[6] *Osage Tribe*, 87 Fed. Cl. at 340.
[7] *Ak-Chin Indian Community v. United States*, 85 Fed. Cl. 397 (2009).
[8] *Ak-Chin*, 85 Fed. Cl. at 399.

> further explains that, "[w]hen preparing records for shipment to and storage at the AIRR, if file folders from different record series have been co[-]mingled, [OTR's contractor] will sort the file folders in accordance with the record series [established by the Indian Affairs Records Schedule (IARS)]." Therefore, "[i]n the course of this sorting process, files from differing file cabinets [at the agency office] that fell within the same record series [established by IARS] could be combined, while files falling in different record series which may have been boxed together for storage would be sorted by record series, and could end up in different boxes." As a result, "[I]t can be difficult to trace where a file folder was originally stored."
>
> Significantly, defendant's procedures for preparing documents for storage at the AIRR do not require that files from each agency office be separated and stored by Tribe. Therefore, "[plaintiff's] records maintained at the Pima Agency—along with those of the Gila River Indian Community as well—may well have ended up being shipped to [the AIRR] in the same boxes." As a result of the significant reorganization of the files undertaken in preparation for transporting the files from the agency office to the AIRR, the documents are "irrevocably shuffled around and placed in a different order than they had been kept while being actively used by agency personnel."[9]

Having been rearranged in a new organization, stored BIA documents are no longer maintained as they were at BIA offices:

> Once the documents are disassembled from their filing system at the agency office and reorganized to comport with the filing system at the AIRR, they are no longer kept "in the usual course of business," RCFC 34(b)(2)(E)(i). "[S]tored documents are not kept in the usual course of business within the meaning of [Rule 34(b)]." *In re Sulfuric Acid Antitrust Litig. (In re Sulfuric Acid)*, 231 F.R.D. 351, 363 (N.D. Ill. 2005). Documents in storage "are no longer kept in the 'usual course' of business, they are kept in the usual course of 'storage,' and the option granted by the first clause of Rule 34(b) no longer exists. That leaves the producing party with the obligation to 'organize and label' the documents to correspond to the document requests." *Id.* (citation omitted).

[9] *Ak-Chin*, 85 Fed. Cl. at 399–400.

> As discussed above, the testimony of people familiar with the organization of documents as they were originally kept and how the documents are organized in storage, demonstrates that the documents undergo significant reorganization in preparation for their storage at the AIRR.[10]

Judge Hewitt thus concluded that the filing system at the AIRR is too disorganized to facilitate meaningful review:

> [T]he filing system at the AIRR, and the tools created to search for documents stored at the AIRR, do not facilitate a meaningful review by plaintiff of the documents produced.[11]

Other courts have also held that when the producing party fails to produce documents in the usual course of business, the document production must be organized and labeled.[12] Thus, the Southern District of New York required the producing party, which failed to produce documents in the ordinary course of business, to respond to discovery requests by organizing and labeling their document production, including metadata and tagging information performed by the producing party.[13] In *Collins & Aikman Corp.*, the defendant asked the SEC to produce documents for 54 separate categories relating to the agency's investigation of the company.[14] The SEC then produced 1.7 million unorganized documents with different and inconsistent metadata.[15] The defendant argued that providing the documents without the file folders or tagged information constitutes a "document dump."[16]

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[10] *Ak-Chin*, 85 Fed. Cl. at 400.
[11] *Id.*
[12] *See Sparton Corp. v. United States*, 77 Fed. Cl. 10, 16 (2007).
[13] *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 411 (S.D.N.Y. 2009).
[14] *Id.* at 406.
[15] *Id.* at 407.
[16] *Id.* at 408.

The court first held that the production of this information would not be attorney-client privilege because the protection is a "narrow exception aimed at preventing requests with the precise goal of learning what the opposing attorney's thinking or strategy may be."[17] The Court then held that Rule 34 requires production to be "useful to the requesting party" and not "inject unnecessary time and cost into litigation."[18] Then, because the documents were maintained in disorderly databases and could not be provided in a useful manner, the Court required the SEC to organize and label the production to respond to each demand and to produce the folders arranged by the SEC to correlate with different allegations in the case.[19]

And even when voluminous documents are produced in the usual course of business under Rule 34, the documents must be accompanied by indices to guide the requesting party to the responsive documents.[20] Or if a producing party "ha[s] been 'overly generous" in identifying responsive documents so as to unduly burden Plaintiffs in their search of the documents, the Court [will] similarly require [the producing party]

[17] *Collins & Aikman Corp.*, 256 F.R.D. at 408.
[18] *Id.* at 411.
[19] *Id.* at 413.
[20] *See F.D.I.C. v. Baldini*, No. CIV.A. 1:12-7050, 2014 WL 1302479 (S.D.W. Va. Mar. 28, 2014) (holding that a Government agency did not keep previously-produced records in the ordinary course of business was required to organize and label the documents and re-produce them)); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 64 (2003) (when a large number of documents have been produced based upon the "usual course of business election" the pivotal consideration is "whether the filing system for the produced documents is so disorganized that it is unreasonable for the party to whom the documents have been produced to make its own review.").

to organize and label documents as responsive to Plaintiff's requests."[21]

In *Graske v. Auto-Owners Ins. Co.*,[22] the court held that the production of 7,000 pages organized in the ordinary course of business was not in compliance with Rule 34 because they were not accompanied by indices or other tools to guide the plaintiffs to the responsive documents.[23] Because the producing party was more familiar with the records than the requesting party and there was no sufficient guidance on how to locate responsive documents, the court ordered the producing party to serve supplemental responses with more detailed information.[24]

B. The Government has refused to organize and label the documents it produced in this litigation

Here the Government has produced documents from the AIRR and other document repositories without organizing or labeling them. The Government has made 45 separate document productions, totaling 822,473 documents,[25] without any attempt to designate which documents are responsive to which requests. And the Government's transmittal letters, which sometimes accompany the DVDs, are opaque, generally containing only a statement that the documents are responsive to a string of Quapaw document requests—without identifying which of the thousands of documents is responsive to which of the requests. For example, volume ALX-012 was produced on

[21] *Williams v. Taser Int'l, Inc.*, No. CIVA1:06-CV-0051-RWS, 2006 WL 1835437, at *7 (N.D. Ga. June 30, 2006).
[22] *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp.2d 1105 (D.Neb. 2009).
[23] *Graske*, 647 F. Supp.2d at 1108.
[24] *Id*. at 1109.
[25] Huntzinger Decl. ¶5(a).

March 30, 2015, and contains over 88,000 documents.[26] The Government states in its transmittal letter only that the documents are responsive to requests for production numbers 1–13 and 18–20 in the *Goodeagle* and *Bear* cases and 1–14 and 18–20 in the *Quapaw Tribe* matter.[27]

As the Quapaw's chief document paralegal states, neither the Government's metadata on the DVDs nor their description of the document production provides information necessary to search and categorize the documents:

> The metadata provided by the United States with documents in this case does not categorize the documents as responsive to particular requests for production. The United States' transmittal letters generally state which of several document requests are covered by the production, but do not specify which documents produced relate to which requests.
>
> The metadata provided by the government is incomplete, and is not consistent or precise, and is not a reliable basis for conducting searches of the productions/volumes.[28]
>
> For the metadata provided by the Government to be useful, we would need the Government to provide a better description of each document, including information such as the person or persons it pertains to, type of document, and the subject matter that the document relates to.[29]

From the outset of discovery in this case the Quapaw have objected and reported to this Court the Government's refusal to organize or label the documents it produces. On April 7, 2014, the Government served its first Response to the Quapaw's March 14, 2014 Document Request, producing two DVDs containing 46,693 single-page .tiff and

[26] Huntzinger Decl. ¶5(d).
[27] Ltr. from S. Terrell to N. Marzulla (April 1, 2015) (Ex. 11).
[28] Huntzinger Decl. ¶¶5(f)–(g).
[29] Huntzinger Decl. ¶7.

.jpeg files, with a load file containing the start and end Bates-stamp numbers for each of the 4,434 documents, along with the document title and file title, and source (the Miami Agency). In its cover letter accompanying the two DVDs, the Government simply stated that it was producing documents as a partial response, and that some or all of the documents are a supplemental initial disclosure:

> These documents are produced in partial response to plaintiffs' first set of requests for production in *Goodeagle* and *Bear*. Furthermore, the United States may use the documents on the enclosed DVDs to support its defenses in these cases. Thus, the United States hereby supplements its amended initial disclosures by this production.[30]

In their May 28, 2014 report to this Court the Quapaw stated that this Government's first production of documents did not comply with the organization and labeling requirements of RCFC 34:

> Plaintiffs/Claimants submit that the Government's response to Plaintiffs/Claimants' First Request for Production of Documents failed to comply with Rule 34(b)(2)(E)(i), which requires a producing party to produce responsive documents either as they are kept in the ordinary course of business or organized according to the categories in the request . . . .
>
> Plaintiffs/Claimants question whether the Miami office maintains these documents as 46,693 single-page .jpeg and .tiff files—not organized as 4,434 documents and not in any folders or any grouping—which is how these documents were produced. More likely, these documents are primarily paper records, stored in file cabinets and presumably selectively scanned and produced by the Government. Nor does the Government disclose, as it must, who maintains them . . . .[31]

[30] Ltr. from S. Terrell to N. Marzulla (April 7, 2014) (Ex. 6).
[31] Jt. Status Report (May 28, 2014) (*Goodeagle* Doc. 55, *Bear* Doc. 35).

At that time the Quapaw also put the Government on notice that consequences would flow from its refusal to comply with Rule 34—particularly given the Government's multi-million-dollar contract to produce documents for discovery and for its defense in this case:

> [A]lthough the Government has entered into a $2,987,536 contract with an expert accounting firm in these cases, it has failed to complete the privilege review and to produce the documents imaged back in February 2014.[32]
>
> The Quapaw remain concerned that the Government and its litigation experts are not making their best efforts to produce the documents the Quapaw require to prove their case. Absent reasonable compliance with the Quapaw's requests for production, the Government should expect that the Quapaw will request this Court to relieve them of the burden of proving facts that require the documentary evidence that the Government controls and has failed to produce.[33]

But the Government did not alter its document production, continuing to disregard Rule 34 and producing masses of documents with no organization and no indication whether they had any relationship to the Quapaws' document requests or were relevant to the case at all:

> [O]n September 12, 2014, the Government produced almost 17,000 pages of documents from the AIRR. But the Government's description of those documents simply provides a laundry list of document types and a string cite to the Quapaw's requests for production . . . .[34]

And the Government's final enclosure letter was no more informative than its first, failing to organize or label the documents in any useful way:

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[32] Jt. Status Report (May 28, 2014) (*Goodeagle* Doc. 55, *Bear* Doc. 35).
[33] *Id.* at 5.
[34] Jt. Status Report at 4 (Oct. 16, 2014) (*Goodeagle* Doc. 70, *Quapaw Tribe* Doc. 55, *Bear* Doc. 50).

> [The first DVD] contains documents imaged at the American Indian Records Repository ("AIRR"). Those documents include Schedules of Collection; Cash Collection Files; town lot use permits; Individual Indian Money ("IIM") Case Files; and probate files. Accordingly the documents on this [DVD] are responsive to requests for production number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 in *Goodeagle* and *Bear*, requests for production numbers 1, 2, and 3 in *Quapaw Tribe*.[35]

Not only are the document productions inaccurate and inconsistent, the metadata has also been inaccurate and inconsistent, when not non-existent and unusable.[36] Metadata should enable the receiving party to have the same ability to access, search, and display the information as the producing party.[37] The descriptive metadata provided by the Government consists of fields for: (1) Startbates, (2) Endbates, (3) Document Date, (4) Folder Title, (5) Title, (6) Source, and (7) Volume.[38] However, most of these fields are left blank, or when information is included, it is most often incomprehensible.[39]

As counsel told the Court at the May 29, 2014 status conference:

> [W]e have had two substantial discussions with counsel for the Government -- what we understand the Government's position to be is this. We don't have to tell you what the documents are responsive to or really what the documents are. You can sort through them and try to figure out for yourself what they are. We don't have to -- and this is the second issue -- we don't have to tell you what we're going to produce or when we're going to produce it. You just sit around and wait for us to show up one day with a DVD, and we'll hand it to you, and we'll say, "Here's the

[35] Ltr. from S. Terrell to N. Marzulla (April 15, 2015) (Ex. 17).
[36] Huntzinger Decl. ¶5(g) and ¶¶6(a)–(e).
[37] *See* The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (Second Edition). Many courts, including the Federal Circuit, have found the Sedona Conference guidance instructive in applying discovery rules. *See CBT Flint Partners v. Return Path, Inc.*, 737 F.3d 1320 (Fed. 2013); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Fed. Cl. 2004).
[38] Huntzinger Decl. ¶3.
[39] Huntzinger Decl. ¶¶5–6.

documents."[40]

Over a year later, the Quapaw were still discussing this issue extensively in their June 25, 2015 discovery status report.[41]

Here, just as in *Collins & Aikman Corp.*, the Court should order the Government to produce documents organized and labeled to respond to each production demand. The Government's production has not been useful to the Quapaw. Therefore, the Quapaw request the court to require the Government to provide additional information allowing the Quapaw to more reasonably search and access documents, as many other courts have done under similar circumstances.[42]

As the *Ak-Chin* court stated, the Government is the only party in a position to know what documents it is producing from the AIRR:

> [D]efendant is not only more familiar with the documents that it stores at the AIRR, defendant is also much more familiar with the tools used to identify potentially responsive documents. Defendant itself created the BISS database. . . Defendant employs research staff at the AIRR who have a working knowledge of the software associated with the BISS. . . . Defendant also contracts with a public accounting firm which routinely

[40] Hearing Tr. 16:9–19 (May 29, 2015).
[41] Pls.'/Claimants' Status Report (June 25, 2015) (*Goodeagle* Doc. 98, *Quapaw Tribe* Doc. 96, *Bear* Doc. 81).
[42] *See In re Priceline.com Inc. Sec. Litig*., 233 F.R.D. 88, 91 (D. Conn. 2005) (court ordered the defendant to convert the files into PDF or TIFF format, eliminate duplicate files, and produce a table containing metadata that would allow the plaintiff to search through and organize the files); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 111 (E.D. Pa. 2010) (court ordered production of all associated metadata for previously produced discovery documents); *Eli Lilly & Co. v. Wockhardt Ltd*., No. 1:08CV1547WTLTAB, 2010 WL 2605855, at *4–5 (S.D. Ind. June 22, 2010) (missing metadata rendered production not useable so court ordered production of date, custodian and other metadata to supplement production).

performs searches for documents stored at the AIRR.[43]

C. The Government should also be required to identify and remove any non-responsive documents or documents that have no relevance to this litigation

The Government's description of the documents it produces is sometimes just wrong.[44] For example, the Government described its September 2, 2014 production to be "chat production and royalty documents, chat lease and sales documents; bills for collection; and lease files."[45] But as the Quapaw dutifully dug through these documents, they found that they were oil-and-gas-production records for other tribes (the Quapaw have no oil or gas), and not the "chat production and royalty documents, chat lease and sales documents; bills for collection; and lease files," the Government claimed them to be at all:

> [W]e found that only approximately 120 of the 7,250 documents had any apparent relevance to the plaintiffs' claims in this litigation. The remainder of the documents appear to be related to royalties paid to other Indian tribes and their members for oil and gas production, and for such production on Indian lands other than the Quapaw Reservation.[46]

The 2006 Advisory Committee notes for RCFC 34 state that organizing and categorizing the documents is intended to help a party to identify critical documents and weed out those that have nothing to do with the requests:

> Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of

[43] *Ak-Chin*, 85 Fed. Cl. at 403.
[44] Huntzinger Decl. ¶5(g) and ¶8.
[45] Ltr. from S. Terrell to N. Marzulla (Sept. 2, 2014) (Ex. 9).
[46] Huntzinger Decl. ¶5(e).

> electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party.[47]

Under RCFC 34(b)(2)(E), a party responding to a document request must either "produce documents as they are kept in the usual course of business" or "organize and label them to correspond to the categories in the request."[48] This rule "was designed to prevent the specific discovery abuse of parties deliberately mixing critical documents with others in the hope of obscuring the documents' significance."[49]

Attorneys must take some effort to review or limit its production to information potentially relevant to the case.[50] Likewise, "a producing party may not bury those relevant documents in the hope that opposing counsel will overlook the proverbial 'smoking gun' as he wades through an ocean of production."[51] As stated by one court, "[w]hen producing documents, the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents."[52] Another court put it more colorfully, stating that the producing party cannot simply hand over a large number of documents and tell the other side to "go

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[47] Fed. R. Civ. P. 34(b), Advisory Cmte. Notes to the 2006 Amendment.
[48] RCFC 34(b).
[49] *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 63 (2003) (quotations omitted).
[50] *See Reedhycalog UK, Ltd. v. United Diamond Drilling Services, Inc.*, Case 6:07-cv-00251-LED, *4 (E.D. Tex. 2008).
[51] *Id.*
[52] *Hagemeyer N. Am., Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004).

fish."[53]

When a producing party mixes responsive and non-responsive documents, whether in bad faith or not, it creates the proverbial "needle in a haystack" that discovery rules intend to prevent.[54] As this Court has held under similar facts in *Osage Tribe of Indians of Oklahoma v. United States*,[55] where the Government's poor organization of tribal documents resulted in a production of nonresponsive documents, the Government should be "required to sort through voluminous amounts of documents and produce only documents that are responsive to [the tribe's] requests."[56]

In *Montania v. Aetna Cas. & Sur. Co.*,[57] the court issued sanctions against the producing party for producing irrelevant and nonresponsive documents. The court explained that "[e]fficient conduct of discovery requires some exertion on the part of counsel to see to it that what they produce is responsive to the requests the other side has made."[58] The court further stated that the production of irrelevant documents for inspection is "properly sanctionable for any substantial waste of time caused by his

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[53] *See Residential Constructors, LLC v. ACE Prop. & Cas. Ins. Co*, 2006 WL 1582122, at *2 (D. Nev. June 5, 2006); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) (the producing party is prohibited from "simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought.").
[54] *See Ak Chin Indian Community v. United States*, 85 Fed. Cl. 397, 400 (2009).
[55] *Osage Tribe of Indians of Oklahoma v. United States*, 87 Fed. Cl. 338 (2009).
[56] *Id.* at 340 (2009). *See also Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 610-11 (D. Neb. 2001).
[57] *Montania v. Aetna Cas. & Sur. Co.*, 153 F.R.D. 620, 621 (N.D. Ill. 1994)
[58] *Id.*

negligent production of irrelevant materials."[59] As a result, the court required the plaintiff to issue a further response indicating what documents are responsive to which document request—along with payment of costs—because the defendant "should not be required to guess which documents relate to which request . . . ."[60]

The Government's actions in this case are precisely the type of discovery abuse Rule 26(g) is designed to prohibit, and the unnecessary delays and needless costs are exactly the outcomes the rules intend to prevent. The Government produced 822,473 documents in this case, and the Quapaw know that over 7,000 of those documents from one discovery production alone are completely unrelated to the Quapaw's claims or to any discovery requests made by the Quapaw. On September 2, 2014, the Government stated that it produced documents related to "chat production and royalty documents, chat lease and sales documents; bills for collection; and lease files."[61] But upon review of those documents, the Quapaw discovered that most of these documents are related to oil and gas royalty payments made to other Indian tribes and their members.[62] Fewer than 200 of the 7,250 documents were even remotely relevant to the Quapaw tribe and its claims.[63] The Quapaw spent the time and resources to review these documents because they purported to deal with mining claims, and are documents that the Government failed

[59] *Montania*, 153 F.R.D. at 621.
[60] *Id.*
[61] Ltr. from S. Terrell to N. Marzulla (Sept. 2, 2014) (Ex. 9).
[62] Huntzinger Decl. ¶5(e).
[63] Huntzinger Decl. ¶5(e).

to produce to the QIS team during preparation of the Quapaw Analysis.[64]

Since the Government has not separated the responsive from the nonresponsive documents in its production, the Quapaw should not be required to conduct the time-consuming and costly task of separating the relevant from the irrelevant documents. Since the Government's own poor organization of documents and failure to cull through the produced documents has created this problem, the Government should be required to resolve the problem by providing to the Quapaw information that will advise them what additional documents are non-responsive and irrelevant to this litigation.

D. The Government had ample time to organize and label these documents prior to producing them in the final weeks of discovery

Although this litigation has been pending since 2012, the Government waited until the final two months of discovery to produce 75% of its documents. As the discovery deadline approached, the Quapaw reported to this Court that, after a year of lassitude, the Government was planning to dump a tsunami of documents on the Quapaw just before the discovery cutoff:

> We approach the April 16, 2015, discovery deadline (originally December 19, 2014 but extended twice at the Government's request) with the Government having reviewed—but not yet produced documents from—less than 60% (1,027 out of 1,700) of the boxes it identified as early as June 2014. According to the Government's February 27, 2015 Discovery Status Report, it has so far produced a total of 431,636 images since discovery began more than a year ago, and will dump an additional 762,961 images

[64] *See* Quapaw Analysis at 3 ("[T]he Project Team requested the archeological clearances and environmental assessments from the Bureau of Indian Affairs' (herein after, the 'BIA') Eastern Oklahoma Region, TTA documents, chat leases, lease sale files and rights of way from the Miami Agency. The Project Team received no response to certain of these requests.").

> (pages) on the Quapaw in the final month of discovery. . . . The Government presumably plans to produce all of these documents—far more than it has yet produced in more than a year of discovery—before the discovery deadline of April 16, 2015.[65]

And, as it turned out, the Government produced 614,308 documents in March and April 2015—the last six weeks of discovery—which constitutes 75% of the Government's entire document production in this litigation:

Government Document Production

Month	Number of Documents
December 2013	66
January 2014	3
February 2014	4,678
March 2014	None
April 2014	4,434
May 2014	4,091
June 2014	6,098
July 2014	28,551
August 2014	25,809
September 2014	17,912
October 2014	None
November 2014	10,676
December 2014	72,234
January 2015	28,085
February 2015	5,528
March 2015	370,986
April 2015	243,322

This massive production came eleven years after the Government entered into a settlement agreement with the Quapaw Tribe in which the Government agreed to make available to the contractor all records relevant to Quapaw trust funds and assets for the

[65] Pls.' Resp. to the Gov't's February 27, 2015 Discovery Status Report 2–3 (March 19, 2015) (*Goodeagle* Doc. 84, *Quapaw Tribe* Doc. 78, *Bear* Doc. 64).

Quapaw Analysis,[66] almost five years after the Government was delivered a final copy of the Quapaw Analysis,[67] triggering the Government's obligation under their agreement to review the Analysis and enter mediation, and more than three years after the complaint in *Goodeagle* was filed on June 28, 2012.[68] But the Government did not even begin its reviewing documents at the American Indian Record Repository until May 27, 2014.[69] That the Government waited to produce 614,308 documents during March and April of 2015—at the tail of discovery—is consistent with the conclusion that the Government was engaging in a document dump to delay the case and leave the Quapaw buried as they struggle to analyze documents at the time they are supposed to be finalizing damages figures for exchange with Government.

In *Branhaven, LLC v. Beeftek, Inc.*,[70] the court issued monetary sanctions against an attorney under Rule 26(g) who delayed producing documents for five months and then did a document dump in the eleventh hour.[71] The court held this action violated the counsel's affirmative duty to assure that their client responds completely and promptly to discovery requests under Rule 26(g).[72] The court held the "record here demonstrates a casualness at best and a recklessness at worst" in the treatment of their discovery duties.[73]

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[66] *See* Settlement Agreement (Ex. 3).
[67] *See* Ltr. from M. Estes to S. Ward (Nov. 19, 2010) (Ex. 4).
[68] *Goodeagle* Complaint (*Goodeagle* Doc. 1).
[69] Def.'s Mot. to Modify Scheduling Orders, Ex. 5, Decl. of M. Evans ¶8 (*Goodeagle* Doc. 62-1, *Quapaw* Doc. 47-1, *Bear* Doc. 42-1).
[70] *Branhaven, LLC v. Beeftek, Inc.*, 288 F.R.D. 386, 390–392 (D. Md. 2013).
[71] *Id.*
[72] *Id.* at 392.
[73] *Id.*

The court also held the attorney failed to produce documents in a "reasonably useable form" because the documents were produced late in discovery without any tools for the requesting party to search through the production, such as a full production of metadata.[74]

In *Reedhycalog UK, Ltd v. United Diamond Drilling Services, Inc.*,[75] a federal district court granted a Motion to compel that prohibited a producing party from using any documents produced in an eleventh-hour document dump. The court also ordered a simplified supplemental discovery that limited the production to only relevant documents, and limited the producing party's use of documents to the secondary production.[76] The court reasoned that "a producing party may not bury those relevant documents in the hope that opposing counsel will overlook the proverbial 'smoking gun' as he wades through an ocean of production."[77]

II. The Government has also failed its duty as trustee to provide trust records to Plaintiff/Claimants

Over and above the requirements of the discovery rules, the Government, as trustee, also has a fiduciary duty to "provide information reasonably necessary to enable a beneficiary to enforce his rights under the trust or to prevent or redress a breach of trust."[78] As this Court has stated "[t]he [tribe] is entitled to 'material information needed

[74] *Id.* at 391.
[75] Case No. 6:07-cv-00-251-LED, at 5 (E.D. Tex. 2008).
[76] *Id.* at 4.
[77] *Id.*
[78] Restatement (Second) of Trusts § 173 comment c (1959).

by beneficiaries for the protection of their interests'" against the Government.[79] Further, as trustee, the Government "ha[s] a clear obligation to maintain trust records and furnish such records to beneficiaries upon request . . . ."[80] Additionally, the trustee has a duty "to keep and render clear and accurate accounts with respect to the administration of the trust."[81]

In *Osage*, this Court stressed that the Government has a fiduciary responsibility when managing trust records:

> Further, and importantly, plaintiff is a trust beneficiary of a trust as to which the United States is the trustee. *See United States v. Mason*, 412 U.S. 391, 398, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to [the Osage Nation] and that, as such, it is duty bound to exercise great care in administering its trust."); *Short v. United States*, 50 F.3d 994, 999 (Fed.Cir.1995) (noting the "high fiduciary duty" the government owes as trustee to Native American tribes). Accordingly, plaintiff is entitled to "material information needed by beneficiaries for the protection of their interests." *See Restatement (Third) of Trusts* § 82(1)(c) (2007). The court finds that the documents at issue in this case contain "material information needed by beneficiaries for the protection of their interests." *See id.* It is irrelevant that some of these documents may be public documents.
>
> As the court stated in earlier proceedings in this case:
>
> The availability of other sources of information "is irrelevant" because . . . the government [has an] obligation, as a fiduciary, to provide complete and accurate information. The Osage Nation is entitled to *all* documents related to the trust, even if similar information is contained in multiple documents. The *only* basis for the government to refuse to produce documents is if [they] fall into one of the narrow exceptions to the fiduciary exception.[82]

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[79] *Osage Tribe of Indians of Oklahoma*, 87 Fed. Cl. at 340 (quoting Restatement (Third) of Trusts § 82(1)(c) (2007)).
[80] *Cobell v. Norton*, 240 F.3d 1081, 1093 (D.C. Cir. 2001).
[81] Restatement (Second) of Trusts § 172 (1952).
[82] *Osage Tribe of Indians of Oklahoma*, 87 Fed. Cl. at 340.

That organizing Plaintiff/Claimants' trust records after retrieval from AIRR and other repositories where the Government stores them may be difficult or expensive is no excuse for Producing an unmanageable mass of unorganized documents. "The fact that the [producing party] has an unwieldy record keeping system which requires it to incur heavy expenditures of time and effort to produce requested documents is an insufficient reason to prevent disclosure of otherwise discoverable information."[83] And "the [producing party] may not excuse itself from compliance with Rule 34 by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition."[84]

Thus, the Government here has no excuse for not presenting the Quapaw the documents it has requested in a timely, organized, and useable manner. So the Government contractor—hired in February 2014—seems to have been hired chiefly to identify and retrieve potentially responsive documents for the benefit of the Government not for the Quapaw: "Based upon CLA [the firm hired by the Government]'s experience, understanding of plaintiffs' claims, and plaintiffs' discovery requests, CLA identified boxes at the AIRR that are likely to contain documents responsive to plaintiffs' discovery requests or supportive of the United States' defenses."[85] The Government has thus made

[83] *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001).
[84] *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976).
[85] Def.'s Mot. to Modify Scheduling Orders, Ex. 5, Decl. of M. Evans ¶6 (*Goodeagle* Doc. 62-1, *Quapaw* Doc. 47-1, *Bear* Doc. 42-1).

no effort to get these files in anything approaching a comprehensible order for the Quapaws' review, failing its duty as trustee.

III. The Government's failure to provide a witness to testify under RCFC 30(b)(6) bars it from presenting evidence on those 30(b)(6) topics at trial

Under RCFC 30(b)(6), the Quapaw were entitled to the collective knowledge of the Government—not the uninformed testimony of Yates. The testimony of a Rule 30(b)(6) designee represents the collective knowledge of the entity, not the specific individual deponents.[86] And a witness who is unable to give useful information is "no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."[87]

When a Rule 30(b)(6) designee lacks the ability to answer relevant questions on listed topics, the "I don't know" answer will be binding and prohibit a party from offering evidence at trial on those points.[88] As one court held, a party that fails to fulfill its obligations under Rule 30(b)(6) is bound by the consequences:

> [T]he Court does not believe it is critical to specify, on a topic-by-topic basis, which topics involve a failure to adequately prepare and which topics concern a genuine lack of knowledge (i.e., in the words of the rule, the matters were not "known or reasonably available" to QBE). Regardless of which scenario is involved, QBE will not be able to take a position at trial on those issues for which Mr. O'Brien did not provide testimony.
>
> It would be fundamentally unfair if QBE did not provide 30(b)(6) testimony on certain matters, proclaimed a lack of its own knowledge,

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[86] *See* Fed. R. Civ. Proc. 30(b)(6) Rules Committee Notes to 1970 Amendments.
[87] *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir. 2000).
[88] *See Ierardi v. Lorillard, Inc*., No. CIV. A. 90-7049, 1991 WL 66799, at *2 (E.D. Pa. Apr. 15, 1991); *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 698 (S.D. Fla. 2012).

> advocated that the association's refusal to cooperate should not impact it and then at trial take affirmative positions on these topics and seek to introduce evidence against Jorda.[89]

Here too, the Government failed to produce a knowledgeable designee and failed to educate and prepare the designee as required under RCFC 30(b)(6). Thus, the Court should bind the Government to its deposition responses claiming lack of knowledge, and bar the Government from introducing any evidence at trial on the 15 topics identified in the Quapaws' March 16, 2015 Notice for which the Government produced no knowledgeable witnesses.[90]

On March 16, 2015, the Quapaw served a notice of deposition under Rule 30(b)(6) on the Government, identifying 15 topics for examination. The Government flatly refused to produce any witness at all on six of the topics stated in the Quapaws' March 16, 2015 Notice of 30(b)(6) Deposition of the United States:

- The Government's procedures and policies for approving mining leases on Plaintiffs/Claimants' land, permitting or allowing mining on Quapaw Tribal or members' land, and all Government procedures and policies to ensure that the Plaintiffs/Claimants were paid fair royalties for all ore or minerals extracted from their lands.

- wThe Quapaw Analysis's conclusion that "[t]he Bureau of Land Management, in some instances, failed in its fiduciary duty by allowing excessive pillar removal," and all Government procedures and policies to safeguard and protect natural resources during the periods of significant mining activities on Plaintiffs/Claimants' lands.

- Lease payments owed to the Quapaw Tribe from leasing activities on the Industrial Park property, as described in the Quapaw

[89] *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 697–698 (S.D. Fla. 2012).
[90] Pls./Claimants' Notice of 30(b)(6) Deposition of the United States (Ex. 10).

Analysis.

- The Government's actions in the clean-up of environmental contamination from the Plaintiffs/Claimants' land, and the costs of that clean-up.

- The Government's failure or refusal to: permit the Quapaw Tribe to acquire title to restricted Indian lands within its Indian country jurisdiction; accept land into trust for the Tribe; or allow the Tribe to acquire fractionated interests in Indian lands. In addition, the Government's requirement that the Tribe must agree to waive certain claims as a condition to its participation in the Land Buy-Back Program for Tribal Nations.

- The Government's failure or refusal, until approximately October 2008, to permit the Quapaw Tribe to assume responsibility for tribal governmental functions and services, including responsibility for the management of Quapaw Indian chat.

The Quapaw agreed to remove Topic No. 9, covering leasing activities on the Industrial Park, from the list and to substitute an interrogatory.[91] However, because the Government failed to provide an adequate and complete response to this interrogatory, the Quapaw also objected and have advised the Government that they have reinstated Topic No. 9 as a matter for deposition: "On May 13, 2015, the Government responded with two paragraphs of information, providing only the total costs for work on the Tar Creek Superfund Operable Units 1 to 5. This response did not provide a detailed statement or detailed description about the activities as requested. . . . Therefore, I must reiterate our request for the Government to designate a witness responsive to Topic 9 of the Tribe's March 16, 2015 Notice . . . ."[92]

In addition to the four topics the Government agreed to produce a witness to

[91] *See* Ltr. from N. Marzulla to S. Terrell (April 13, 2015) (Ex. 16).
[92] Ltr. from N. Marzulla to S. Terrell (June 16, 2015) (Ex. 19).

testify, for four more topics the Government refused to designate any witness for the time period prior to 2007:

- All facts relating to the Quapaw Analysis's conclusion that Plaintiffs/Claimants who owned the "allotments that are involved in the ownership of town lots throughout the reservation were never compensated for the easements granted to form streets and alleys, sewer facilities, and electric, phone and gas lines," or the Government's disagreement, if any, to that conclusion.

- All facts relating to trespass on Plaintiffs'/Claimants' land, including trespassing related to occupation and use of land without a valid lease or easement, or occupation and use that is not compliant with the terms of the lease or easement.

- All facts relating to the Quapaw Analysis's conclusion that "damages . . . have resulted from non-use and loss of value due to lack of proper trust management and supervision of the Catholic Mission Land" and "that the royalty realized by the Catholic Church from removal of lead, zinc, and chat from 1937 to 1975 is a valid damage due and owing to the Tribe."

- Mining royalties from mining activities on the Catholic 40 property, as described in the Quapaw Analysis.[93]

And although the Government did designate a witness, Superintendent of the Miami Agency, Paul Yates, to testify on eight topics, he was unable to provide answers to questions on many of the eight topics for which he had been designated—in effect, giving the Quapaw no adequate RCFC 30(b)(6) deposition on these topics:

- The identification, location, and sale or leasing of third-party easements and rights of way (including but not limited to utilities, pipelines, roads and highways, and railroads) across Plaintiffs' or Claimants' land and the federal government's collection of payments for these easements and rights of way and deposit of these payments into tribal trust accounts or individual Indian money accounts.

[93] N. Marzulla Decl. ¶ .

- The factual bases for the Government's denial of the allegations contained in paragraph 77 of the Claimants' Complaint:

  The Government's actions and policies regarding mining, waste disposal, town construction, and rights-of-way (among others) have destroyed the Quapaws' use of their homelands for traditional activities such as agriculture, hunting and fishing—all in violation of the Government's fiduciary duty of trust to preserve and protect Quapaw trust and restricted lands under the Government's control and supervision.

- The Government's role in the sale, leasing, permitting, production, or removal of chat on Plaintiffs/Claimants' lands; and its practices and procedures for ensuring that Plaintiffs/Claimants have been paid fair market value for all sales or leases of chat.

- For periods relevant to this litigation, the Government's policies, procedures, and practice for retention, maintenance, and storage of documents and records relating to the Quapaw Tribe and its members; any destruction or loss of documents and records, such as the Bureau of Indian Affairs' destruction of environmental documents and records relating to the Tar Creek Superfund Site, as reported in an undated report of the Office of Internal Evaluation and Assessment; the reasons for any document destruction; the description of the documents destroyed; and any subsequent investigations or reports concerning any document destruction.

- Compensation owed to Plaintiffs/Claimants for easements on Plaintiffs/Claimants' allotted land, including "easements granted to form streets and alleys, sewer facilities, and electric, phone and gas lines," as discussed in the Quapaw Analysis.

- Trespasses, as discussed in the Quapaw Analysis, on Plaintiffs/Claimants' land, including trespassing related to occupation and use of land without a valid lease or easement, or occupation and use that is not compliant with the terms of the lease or easement. Specifically, the 20-year instance of trespass identified in the Quapaw Analysis "where the Tribe did not receive compensation for the pipeline that was running across its land. . . . from November of 1963 to November of 1983." In addition, the Quapaw Analysis's findings that "Inspection Reports of trespass . . . were never acted upon by the BIA," "[t]respass was rampant" on town lots, and the specific allotments studied in the Quapaw

Analysis had evidence of trespass.

- The Quapaw Analysis's conclusion that "damages . . . have resulted from non-use and loss of value due to lack of proper trust management and supervision of the Catholic Mission Land" and "that the royalty realized by the Catholic Church from removal of lead, zinc, and chat from 1937 to 1975 is a valid damage due and owing to the Tribe."

- Mining royalties from mining activities on the Catholic 40 property, as described in the Quapaw Analysis.[94]

Because the Government has steadfastly refused to provide a properly prepared deponent to testify on these topics during discovery, the Quapaw request that this Court bar the Government from introducing any evidence on these topics at trial beyond the Yates' testimony.[95]

A. The Government's choice to merely object rather than seek a protective order did not meet its RCFC 30(b)(6) obligation to provide a person to testify

Rule 30(b)(6) allows a party to designate the government agency as the deponent. The Government then has the obligation to produce a witness to testify to information known or reasonably available to the Government:

[94] N. Marzulla Decl. ¶ .

[95] The Government earlier in this litigation also produced a witness in response to a 30(b)(6) deposition notice. That witness, Greg Chavarria, also testified in his deposition that he did not have the requested information and was still looking for it: "I can say that we have identified boxes of records that may very well pertain to this. However, our search efforts haven't reached to those yet and continue." Chavarria, Dep. Tr. 178:3–6; *see also* Chavarria, Dep. Tr. 177:8–191:5 (Ex. 20). Then, in response to the Quapaw's motion for partial summary judgment, Chavarria suddenly finds the documents and the Government uses them in its defense. *See* Def.'s Br. in Opposition to Pls.' Mot. for Partial Summ. J. re- Treaty claims Ex. 2 (*Quapaw Tribe* Doc. 92-2, *Bear* Doc. 76-2). This trial-by-ambush tactic is at odds with the purpose of Rule 30(b)(6). *See* Fed. R. Civ. P. 30(b)(6) Rules Committee Notes to 1970 Amendments.

> In its notice or subpoena, a party may name as the deponent . . . a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. . . The persons designated must testify about information known or reasonably available to the organization.[96]

As this Court has held, a notice of deposition under RCFC 30(b)(6) obligates the Government to produce a knowledgeable person whose answers will bind the Government in the litigation:

> [T]he governmental or business deponent has "an affirmative duty to make available persons who will be able to 'give complete, knowledgeable and binding answers' on its behalf," *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 709, 714 (2007) (quoting *Reilly v. NatWest Mkts. Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999)). The deponent also has "an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are 'known or reasonably available' to the corporation." *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla.1995) (quoting FRCP 30(b)(6)), *aff'd*, 213 F.3d 646 (11th Cir.2000). In this regard, RCFC 30(b)(6) "sets a high burden of knowledge, but only regarding the noticed topics, no more and no less." *Payless Shoesource Worldwide, Inc. v. Target Corp.*, No. 05–4023–JAR, 2008 WL 973118, at *10 (D. Kan. Apr. 8, 2008).[97]

Nor does the plaintiff have to justify the deposition request:

> Plaintiffs do not bear the burden of justifying their deposition and discovery requests. *In re Subpoena Issued to Dennis Friedman,* 350 F.3d 65, 69 (2d Cir.2003) (citing Rule 30(a)(1) of the Federal Rules of Civil Procedure[3]). In fact, plaintiffs "may simply name the corporation, or other organization, as the deponent." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2103 (2d ed.1994); *see also Marker v. Union Fid. Life Ins. Co.,* 125 F.R.D. 121, 126 (N.D.N.C.1989) ("A party need only designate, with reasonable particularity, the topics for examination."). Once a deposition notice has been served, it becomes "the duty of the corporation to name one or more persons who consent to testify

[96] RCFC 30(b)(6).

[97] *AG-Innovations Inc. v. United States*, 82 Fed. Cl. 69, 80 (2008).

> on its behalf ... as to matters known or reasonably available to the corporation." Wright, Miller & Marcus, *supra,* at § 2103.[98]

If the Government cannot (or does not wish to) designate a deponent, it has the affirmative duty to seek a protective order:

> If "a corporation is truly unable to designate a representative under Rule 30(b)(6), it must seek a protective order." 7 James Wm. Moore, *Moore's Fed. Practice* § 30.25[3] at 30–56.4 (3d ed.2006).[99]

The Quapaw advised the Government that it could not simply object and refuse to produce a witness, but must obtain a protective order to comply with RCFC 30(b)(6):

> "[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued." *New Eng. Carpenters Health Benefit Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007). The Second Circuit, for example, affirmed a district court's decision to preclude the trial testimony of two witnesses after the defendant refused to produce the witnesses for a 30(b)(6) deposition in a timely manner. *Reilly v. Natwest Markets Grp.*, 181 F.3d 253, 268–69 (2d Cir. 1999); *see also id.* ("Having determined that NatWest violated both Rule 30(b)(6) and Judge Sprizzo's order, we have little difficulty in concluding that barring Adams and Letzler from testifying about Reilly's work was proper."); *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007) ("Ecclesiastes could have explained its purported inability to provide information responsive to the notice. Then, failing a negotiated resolution with defendants, Ecclesiastes could have sought a protective order from the district court."); *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989) (imposing Rule 37 sanctions when a successor to a corporate party refused to designate a 30(b)(6) witness because the successor "had absolutely no right . . . to refuse to designate a witness. If it had an objection to discovery, its opportunity was to request a protective order . . . ."); *see generally* 8A WRIGHT & MILLER, FED. PRACTICE & PROC. CIV. § 2103 (3d ed.) ("Defendant could not avoid the obligation to produce

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[98] *Algonquin Heights v. United States*, No. 97-582 C, 2008 WL 2019025, at *5 (Fed. Cl. Feb. 29, 2008).

[99] *Sys. Fuels, Inc. v. United States*, 73 Fed. Cl. 206, 217 (2006).

a witness by serving objections to the notice.").[100]

Yet the Government flatly refused to produce any witness on six topics, and on four others agreed to produce one witness, Paul Yates, to testify only as to his personal knowledge from 2007 to present.[101] The Quapaw gave the Government multiple opportunities to designate a deponent on the topics it objected to, and warned the Government that "we reserve the right to object to the Government's use of any testimony or witness about any of the topics for which the Government has refused to produce a witness . . . ."[102] The Government chose not to produce a witness, depriving the Quapaw of the requested information.

Wright & Miller states that barring testimony is an appropriate sanction for a party's failure to produce that testimony during the discovery process:

> A court might also sanction a party that has failed to satisfy its Rule 30(b)(6) duties by limiting the evidence it could present, either by forbidding it from calling witnesses who would offer testimony inconsistent with that given by the one it designated, or by forbidding it from presenting evidence on topics listed in the Rule 30(b)(6) notice on which it did not provide proper discovery. Such a sanction would be consistent with Rule 37(c)(1), which more generally authorizes a court to forbid a party from submitting evidence it failed to provide as required through discovery.[103]

Because the Government failed to produce a witness to testify on its behalf during discovery, this Court should not allow it to produce that testimony for the first time at trial.

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[100] Ltr. from N. Marzulla to S. Terrell (April 13, 2015) (Ex. 16).
[101] N. Marzulla Decl. ¶9.
[102] *Id.*
[103] Persons Subject to Examination—Corporations and Other Organizations, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.).

B. The Government should not be allowed to introduce testimony that its RCFC 30(b)(6) deponent failed to give at deposition

While the Government did designate Superintendent of the Miami Agency Paul Yates to testify on eight topics (four of them limited to his personal knowledge since he took over the office in 2007), Yates appeared completely unprepared and unknowledgeable at his deposition. For example, the Government designated Yates to testify on topic 2, Compensation owed to Plaintiffs/Claimants for easements on Plaintiffs/Claimants' allotted land, including "easements granted to form streets and alleys, sewer facilities, and electric, phone and gas lines," as discussed in the Quapaw Analysis. But Yates could provide almost no information on this topic:

> Q: As we sit here today, do you have any information at all on topic two? That is, the question of whether any compensation was paid to the tribe or any of the members of the Quapaw Tribe for any easement or right-of-way in connection with any of the towns that were constructed on the Quapaw Reservation?
> A: No.[104]

He was not familiar with the rights-of-way crossing Quapaw lands:

> Q: Are you familiar with the rights-of-way on which the county roads were constructed?
> A: No.
> Q: Are you familiar with the rights-of-way on which the state highways were constructed?
> A: No.
> Q: Are you familiar with the right-of-way on which the federal highway, the Will Rogers Turnpike was constructed across the Quapaw Reservation?
> A: No.[105]

[104] Yates Dep. 56:1–56:8 (Ex. 21).

Nor did Yates do any preparation so he could testify as to the BIA's collective information on this topic, as RCFC 30(b)(6) requires:

> Q: In preparing for this deposition, did you determine whether there are, whether there are records in the TAAMS system of the rights-of-way—let's start with—go back through what we discussed before, first of all, with respect to railroads on the Quapaw Reservation?
> A: No, I did not do an inventory of the rights-of-way or easements on the Quapaw jurisdiction.
> Q: Did you look to see or review to determine whether there are within the BIA records of the rights-of-way for the railroads that cross the Quapaw Reservation?
> A: No.
> Q: Same question with respect to utility lines that cross the reservation. Did you look those up?
> A: No.
> Q: Did you ascertain whether the BIA has records of rights-of-way for pipelines that cross the Quapaw Reservation?
> A: No.[106]

On topic 3, Government action taken to remove trespassers from Quapaw lands, Yates was similarly unknowledgeable:

> Q: Would you turn to pages 53 and 54 of the Quapaw Analysis, and there's a reference to Richard Barrett who appears to have trespassed on the Anna Beaver allotment and also on the Slim Jim and Sin Tah Hah Hah Track. Do you know whether any damages were ever collected for that trespass?
> A: I do not know.
> Q: Okay. On page 95 of the Quapaw Analysis, the Quapaw Analysis says that with respect to Picher that trespass was rampant and the agency never established a workable method of controlling the rent—the collection of rental for the trust owners. Is that statement correct?
> MR. TERRELL: Objection. Outside the scope of the designation.
> A: I do not know.[107]

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[105] Yates Dep. 13:6–10 (Ex. 21).
[106] Yates Dep. 15:3–25 (Ex. 21).

The same was true as to topic 6:

> Q: I'm going to move on now to topic six, the so-called Catholic 40 lands. The Quapaw Analysis estimates mining royalties that would have gone to the tribe had title to that land not been deeded to the Catholic Church to between $269,961 to—somewhere between that and $711,564. Do you agree that that is the amount of mining royalties that the tribe would have received had the land not been transferred to the Catholic Church?
> MR. TERRELL: Objection. Outside the scope of the designation.
> A: I don't know.[108]

On topic 7, Yates similarly had no knowledge:

> Q: [T]he Quapaw Analysis states that today hunting and fishing are suppressed as a result of the contamination of the Quapaw Analysis Reservation. Is that statement true?
> A: I don't know.[109]

Even Yates admitted that he was not the most knowledgeable about theft of chat from Quapaw lands, and yet the Government failed to designate the person Yates named as more knowledgeable:

> Q: Have you reviewed any part of the Quapaw Analysis relating to the theft or underpayment of royalties due on chat?
> A: No.[110]
>
> ***
>
> Q: Who would be the person most knowledgeable about the determination of fractional interests in chat piles?
> A: Currently on staff or—
> Q: Yes.
> A: I would say Sam Beets.[111]

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[107] Yates Dep. 64:7–22 (Ex. 21).
[108] Yates Dep. 68:13–25 (Ex. 21).
[109] Yates Dep. 77:18–23 (Ex. 21).
[110] Yates Dep. 103:4–14 (Ex. 21).
[111] Yates Dep. 93:19–94:11 (Ex. 21).

The Government refused to provide another deponent, despite the Quapaw's demand:

> Obviously, the Government did not adequately prepare Yates for his 30(b)(6) deposition, and we do not consider the Government to have met its obligation under RCFC 30(b)(6) with regard to topics 1, 2, 3, 6, 7, 8, 10, and 13. Therefore, the Tribe reiterates its request for one or more designated 30(b)(6) deponents responsive to the Tribe's March 16, 2015 Notice, noting that Yates himself identified several individuals who likely have information known or reasonably available that Yates does not possess.[112]

Yates' deposition testimony falls far short of the Government's "affirmative duty to make available persons who will be able to give complete, knowledgeable and binding answers on its behalf."[113] The entity has a duty to make a good faith, conscientious effort to prepare deponents to testify fully and non-evasively about the subjects, including having deponents "review prior fact witness deposition testimony as well as documents and deposition exhibits."[114] The duty of preparing a witness goes beyond matters known to the designee or to matters in which the designee was personally involved; it includes all matters reasonably available to the responding party.[115] Failing to have an employee with a knowledge of earlier events "[does not relieve a party] from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from

[112] Ltr. from N. Marzulla to S. Terrell (June 16, 2015) (Ex. 14).
[113] *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 709, 714 (2007) (quotations omitted).
[114] *Id* at 539-40; *see also Wilson v. Lakner*, 228 F.R.D. 524, 528-29 (D.Md. 2005).
[115] *Id.* at 528.

documents, past employees, or other sources."[116]

Conclusion

For all these reasons, the Quapaw ask the Court to issue an order (1) requiring the Government to organize and label the previously produced documents to correspond to the Quapaw's requests for production; and (2) barring the Government from producing any testimony on any topic for which it has refused to produce a witness to testify under Rule 30(b)(6), or beyond that of the testimony of its 30(b)(6) witnesses. Finally, the Quapaw ask this Court under Rule 37 to order the Government to reimburse the Quapaw for the costs and fees associated with preparing this motion.

Respectfully submitted,

s/ Nancie G. Marzulla
Nancie G. Marzulla
Roger J. Marzulla
MARZULLA LAW LLC
1150 Connecticut Avenue, N.W.
Suite 1050
Washington, D.C. 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com
Counsel for Claimants

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Of Counsel:

Stephen R. Ward, Esq.
John L. Williams, Esq.

[116] *See Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D. Nev. 2008).

Daniel E. Gomez, Esq.
R. Daniel Carter, Esq.
Conner & Winters, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
(918) 586-8978 (telephone)
(918) 586-8698 (facsimile)
sward@cwlaw.com
jwilliams@cwlaw.com
dgomez@cwlaw.com
dcarter@cwlaw.com