IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.

MENOMINEE TRIBAL ENTERPRISES
The principal business arm of
the Menominee Indian Tribe of Wisconsin,
MARSHALL PECORE, and
CONRAD WANIGER,

Defendants.

Civil Action No. 07-C-316

Honorable William C. Griesbach

MENOMINEE INDIAN TRIBE OF WISCONSIN'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER FROM DEFENDANT'S NOTICE OF TAKING DEPOSITION OF LISA WAUKAU PURSUANT TO RULE 26(c). (SPECIAL APPEARANCE)

I. INTRODUCTION

The action underlying the Notice of Deposition of Lisa Waukau and Subpoena in a Civil Case to take the deposition of Lisa Waukau (hereinafter "Subpoena") is the United States of America's complaint against Menominee Tribal Enterprises, Marshal Pecore, and Conrad Waniger (hereinafter "MTE") to recover statutory damages and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-33, and to recover statutory damages and other relief under the common law from MTE filed in this Court on April 3, 2007 (hereinafter "Complaint").

Pursuant to Rule 26 (c) of the Federal Rules of Civil Procedure, the Menominee Indian Tribe of Wisconsin seeks an order from this Court quashing MTE's Subpoena issued February 19, 2008, on the grounds that Lisa Waukau is immune from said

Subpoena pursuant to the sovereign immunity of the Menominee Indian Tribe of Wisconsin. This Brief is being filed pursuant to Rule Civil L.R. 7.1.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Menominee Indian Tribe of Wisconsin is a federally recognized Indian Tribe. *Menominee Restoration Act*, 25 U.S.C. §§ 903-903f. Lisa Waukau served on the Menominee Tribal Legislature, the executive and legislative branch of the Menominee Indian Tribe of Wisconsin from February 1995 to February 2003 and from February 2007 to present. See, Waukau Affidavit, Exhibit "A".

MTE is the principal business arm of the Menominee Indian Tribe of Wisconsin. Based on the allegations alleged in the Complaint, the actions of MTE, which are the basis for the Complaint, occurred on the Menominee Indian Reservation and involve the Menominee Indian Tribe's sawmill and forest, managed by MTE.

Neither the Menominee Indian Tribe of Wisconsin, nor Lisa Waukau is a party in the underlying Complaint. To the best of her knowledge, Lisa Waukau has had no knowledge of, and has taken no action regarding the activities described in the Complaint except in her official capacity as a member of the Menominee Tribal Legislature or as the Chairperson of the Menominee Tribal Legislature. See Waukau Affidavit, Exhibit "A".

III. ARGUMENT

A. The Menominee Indian Tribe of Wisconsin is Entitled to Sovereign Immunity.

Indian tribes have long been recognized by the courts as possessing common law immunity from suit to a similar degree enjoyed by other sovereign entities, such as the

United States, for the purpose of protecting their tribal sovereignty and political integrity which pre-dates the United States Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); *United States v. Wheeler*, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978); *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir.1983); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir.1982) (en banc), *rev'd on other grounds*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). "Indian Tribes in the United States enjoy common-law immunity from suit traditionally afforded to sovereign power," and "suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940), *Oneida Tribe of Indians of Wis v. Village of Hobart*, 500 F.Supp.2d 1143, 1145 (E.D.Wis. 2007).

The principal of tribal sovereign immunity is well established law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751,756 118 S.Ct. 1700, 1703, 140 L.Ed.2d 981 (1998). Indian Tribes are subject to suit only where Congress has authorized such suit or where the tribe has waived such immunity. *Kiowa*, 523 U.S. at 754, 118 S.Ct. at 1702. Indian tribes are immune from suit and such sovereign immunity is similar to sovereign immunity enjoyed by the United States; neither can be sued without consent of Congress, and absent congressional or tribal consent to suit, state and federal courts do not have jurisdiction over Indian tribes. *People of State of Cal. ex rel.*

California Dept. of Fish and Game v. Quechan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979). Issues regarding tribal sovereign immunity are jurisdictional in nature. *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 173, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977). Questions regarding tribal sovereign immunity are matters of subject matter jurisdiction, which may be challenged by a motion to dismiss for lack of subject matter, pursuant to the federal rules of civil procedure. *E.F.W. v. St. Stephen's Indian High School,* 264 F.3d 1297 (10th Cir. 2001).

It is undisputed that Indian tribes possess common law sovereign immunity similar to that of other sovereigns such as the United States to preserve their political integrity and tribal sovereignty. In the instant case, the Menominee Indian Tribe of Wisconsin enjoys the same sovereign immunity as other federally recognized Indian tribes located throughout the United States. Tribal sovereign immunity is a jurisdictional issue, and as such is properly raised, in the context of receipt by the Tribe of a non party subpoena, by a motion to quash pursuant to the Federal Rules of Civil Procedure.

B. The Menominee Indian Tribe of Wisconsin's Sovereign Immunity Extends to Tribal Officials Acting in their Official Capacity.

This Court has held explicitly that tribal sovereign immunity extends to tribal officials acting within the scope of their authority. *Davids v. Coyhis,* 869 F. Supp 1401, 1409 (E.D.Wis. 1994) *citing Burlington Northern R.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991), *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.,* 797 F.2d 668, 670-71 (8th Cir. 1986), *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir. 1985);*United States v. Oregon,* 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981).

Tribes, like other governments, can only act through their officials. *Willingham v. Morgan,* 395 U.S. 402, 406, 89 S.Ct. 1813, 1815-16 (1969); *Larson v. Domestic &*

Foreign Commerce Corp., 337 U.S. 682, 688, 69 S.Ct. 1457, 1460-61, 93 L.Ed. 1628 (1948). Therefore sovereign immunity would be meaningless if it could be overcome by a mere allegation that an act was done in a governmental official's individual capacity, not their official capacity. In *Bosaw v. National Treasury Employees' Union*, 887 F.Supp. 1199 (S.D. Ind. 1995) the Court analyzed the issue of a federal government official's sovereign immunity from a subpoena. It found:

> "Because the sovereign acts only through its agents, when its agent's actions are restrained or compelled, the sovereign itself may also be restrained or compelled. *Id.* One of the purposes of sovereign immunity is to protect the government from a judgment that would have the effect of restraining it from acting, or compelling it to act. The state court order compelling production of the personnel records, when the officers have refused to produce them pursuant to valid agency regulations, would seem to fall within that purpose. Consequently, this Court finds that sovereign immunity was implicated in the state court proceeding." *Bosaw*, 887 F.Supp. at 1211.

In the instant case, Lisa S. Waukau is and has been the Menominee Tribal Chairman, which is an elected position of the Menominee Indian Tribe of Wisconsin. Lisa S. Waukau has additionally held the elected office of Tribal Legislator for many years. Presumably Lisa S. Waukau has been subpoenaed to provide testimony related to the issues alleged in the Complaint. This includes information she received, possesses or is thought to possess by virtue of her official position.

The underlying Complaint involves allegations of improper activities by MTE and its officials related to its management of the Tribe's sawmill and the Tribe's forest which MTE has the duty to manage on behalf of the Tribe. It is logical, absent contrary evidence, to conclude that any knowledge Lisa Waukau possesses is as a result of her being a member of the Tribe's governing body, the Menominee Tribal Legislature. The Menominee Tribal Legislature possesses all the legislative and executive powers of the Menominee Indian Tribe of Wisconsin. *Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin*, Article III, Section 1. Enforcement of the Subpoena would, in effect, compel the Menominee Indian Tribe to act, through its agent, Lisa Waukau.

C. Exhaustion Doctrine

In determining whether or not a Tribe's sovereign immunity extends to a Tribal official, a Court must make two separate determinations: Are the alleged acts of the official within the power of the Tribe generally? Did the official act within the powers delegated to that official by the Tribe? *State of Wisconsin v. Baker*, 698 F.2d 1323, 1332 (7th Cir. 1983) *cert. den. Baker v. Wisconsin*, 463 U.S. 1207, 103 S.Ct. 3537, 77 L.Ed.2d 1388 (1983) citing *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948).

Theoretically, the information sought by the subpoena could be related to acts or statements made by Lisa Waukau that, although involving issues related to her official duties, were in fact outside her inherent or delegated powers as a Tribal official, or the general power of the Tribe. In order to make such a determination, however, a thorough review and interpretation of the powers and duties of a Menominee Tribal Legislator and the Menominee Tribal Chairperson would need to be undertaken. This would necessarily

include, at least, review and interpretation of the Menominee Indian Tribe of Wisconsin Constitution and Bylaws, all pertinent ordinances passed by the Menominee Tribal Legislature, all pertinent resolutions passed by the Menominee Tribal Legislature, all pertinent motions passed by the Menominee Tribal Legislature, the past practices of Tribal officials ratified by the Menominee Tribal Legislature, all pertinent decisions of the Menominee Tribal Court and the Menominee Tribal Supreme Court. In addition the exact relationship between the Tribe, its officials and its own business arm, MTE, in regard to the ownership and management of the Tribe's forest on the Menominee Indian Reservation would be subject to review and interpretation.

These are the type of questions that the United States Supreme Court has found are most properly answered by Tribal Courts, not federal courts, pursuant to the doctrine of Tribal Exhaustion. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). The Seventh Circuit Court of Appeals has stated that the exhaustion doctrine is meant to promote tribal self-government and self-determination. *Altheimer & Gray v. Sioux Manufacturing Corporation*, 983 F.2d 803, 815 (7th Cir. 1993), *cert. den.*, 510 U.S. 1019, 114 S.Ct. 621, 126 L.Ed.2d 585 (1993).

This Court, in applying the Tribal Exhaustion doctrine, stated in *Buchanan v. Sokoagon Chippewa Tribe,* 40 F.Supp.2d 1043(E.D.Wis. 1999) that "a court must first examine the factual circumstances of each case to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine." *Buchanan*, 40 F.Supp.2d

at 1048. In that case the Court found that a plaintiff's claim that Tribal officials were mismanaging the Tribal Housing Authority "no doubt" involved reservation matters.

Likewise in this case there is no doubt that issues of the power and duties of Menominee Tribal officials under the laws of the Menominee Tribe, and the relationship between the Menominee Tribe, and its business arm relating to the Menominee forest involve reservation matters. Therefore, if MTE asserts that Lisa Waukau was not acting within the scope of her authority, and therefore not cloaked with the sovereign immunity of the Tribe, the proper forum for obtaining such a determination is Menominee Tribal Court.

D. The Menominee Indian Tribe of Wisconsin's Sovereign Immunity Bars Issuance of a Subpoena to a Non-Party Tribal Official.

The foremost case regarding the application of principles of tribal sovereign immunity in the context of enforcement of a subpoena served on a Tribal official where the Tribe is not a party to the case is, *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. den.*, 510 U.S. 838, 114 S.Ct. 119, 126 L.Ed.2d 84 (1993). The holding in *James* was subsequently upheld in *Bishop Paiute Tribe v. County of Inyo,* 275 F.3d 893 (9th Cir. 2002) *vacated and remanded on other grounds, Inyo County v. Paiute-Shosone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003).

The *James* case involved an Indian defendant accused of rape on the Quinault Indian Reservation in Washington State. In his case before the federal district court, James issued a subpoena for documents regarding his alcohol and drug problems in the possession of the Tribe's social service department. The Tribe refused to comply with the subpoena on the basis of tribal sovereign immunity and the District Court quashed the

subpoena on that basis. On appeal, the court found that, "By making Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced." *James,* 980 F.2d at 1319. The court further stated that the tribe "was possessed of tribal immunity at the time the subpoena was served, unless immunity had been waived." *James,* 980 F.2d at 1319. The Court found no waiver and held the District Court had correctly quashed the subpoenas.

In *Inyo* the Ninth Circuit Court of Appeals reaffirmed its decision in *James.* The *Inyo* case dealt with the enforcement of a state search warrant against the Bishop Paiute Tribe. The Court found this service of process to be analogous to the service of the subpoena in *James* and concluded that enforcement of such process against a Tribe violates the "right of reservation Indians to make their own laws and be ruled by them." *Inyo*, 275 F.3d at 558, citing *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Perhaps the most detailed analysis of this issue took place in the United States District Court for the Southern District of New York, in the case of *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002). In that case the Plaintiff, a gaming development company, sued the defendant, a rival gaming development company, claiming that the defendant tortiously interfered with plaintiff's contractual agreement with the St. Regis Mohawk Tribe to develop and manage a proposed casino. The St. Regis Tribe was not a party to the case.

The plaintiffs subpoenaed two members of the Tribe, Hilda Smoke and Alma Ransom, who had signed one of the contracts at issue in the case, as well as McDonald,

the Tribe's Executive Director. The purpose of the subpoenas was to give deposition testimony. All the subpoenaed parties took the position that they were immune from the subpoena pursuant to sovereign immunity. The Plaintiff argued that the Tribe's sovereign immunity did not protect the officials from testifying as non-party fact witnesses.

The Court finding no Second Circuit case directly on point in regard to Indian Tribes looked to the effect of the federal government's sovereign immunity in similar circumstances. It cited the case of *United States Environmental Protection Agency v. General Elec. Co.,* 197 F.3d 592, 597 (2d Cir.1999), *vacated in part on other grounds,* 212 F.3d 689 (2000) where the Second Circuit Court of Appeals held that the enforcement of a subpoena *duces tecum* issued by General Electric to the EPA would compel the EPA to act and therefore is barred by sovereign immunity. The District Court found that the sovereign immunity of a Tribe was coextensive with that of the United States, and therefore, the Tribe would be also immune from enforcement of subpoena. *Catskill Development, LLC*, 206 F.R.D. at 87-88 citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *see also United States v. United States Fidelity and Guar. Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940); *Bishop Paiute Tribe,* 275 F.3d at 904, n. 3 (noting that "comparison to cases denying enforcement of state court subpoenas against the United States government is ... appropriate"); *California v. Quechan Tribe of Indians,* 595 F.2d 1153, 1155 (9th Cir.1979) (noting that the "sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"); *Sekaquaptewa v. MacDonald,* 591 F.2d 1289, 1291 (9th Cir.1979) ("The sovereign immunity of Indian tribes is coextensive with that of the United States.")

Plaintiff also raised the argument that the subpoenaed officials were not acting within the scope of their official authority, and therefore sovereign immunity was not applicable. The Court found that arguably two officials who clearly had involvement with the underlying case possibly could be subject to the subpoena in their individual capacity, and in their capacity as officials of the Gaming Authority, as the Gaming Authority had specifically waived its immunity from suit. The Court stated:

> "To the extent plaintiffs seek testimony from Ransom and Smoke about their actions as officials of the Gaming Authority, they have no ground to complain. Indeed, since Tribal members as individuals do not enjoy sovereign immunity except when they are tribal officials acting in their official capacity and within the scope of their authority, *Puyallup Tribe, Inc.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Davis v. Littell,* 398 F.2d at 84-85; *Niagara Mohawk Power Corp.*, 862 F.Supp. at 1002, plaintiffs are free to question them about both Gaming Authority matters and any other matters relevant to this action that do not involve questions of tribal governance (though I cannot imagine that there are any such matters)." *Castskill Development, LLC*, 206 F.R.D. at 90.

In regard to the subpoena of McDonald, the Tribe's executive director, the Court upheld a complete quashing of the subpoena. The Court stated:

> "I decline to set aside the order quashing the subpoena addressed to McDonald. The record is, frankly, far too sparse to allow me to do anything else. McDonald is identified only as the Executive Director of the Tribe, which I will assume (no argument to the contrary having been

made) is an official of the Tribe. He is not identified as having anything to do with the Gaming Authority. He did not sign the LPA on the Gaming Authority's behalf, as Ransom and Smoke did." *Catskill Development, LLC*, 206 F.R.D. at 90-91. *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 204 F.Supp.2d 647, 648 (S.D.N.Y. 2002).

Subsequently the Plaintiffs moved for reconsideration of the Court's order quashing the McDonald subpoena. The Plaintiff's argued that evidence had been presented that McDonald had knowledge of facts related to the underlying action. The Court in denying the Plaintiff's motion to reconsider clarified the Court's reasoning for granting the order to quash. It stated:

> I deny the motion for reconsideration. The documents and testimony submitted to me do not clarify Angus McDonald's role in the conduct of the affair of the Gaming Authority. In my February 20 opinion, I did not rule that plaintiffs had failed to show that McDonald participated in discussions; I ruled that plaintiffs had failed to show that McDonald had any connection to the Gaming Authority. The documents appended to plaintiff's motion-all of which could have been made available to the Court either in opposition to the original motion to quash or on a timely motion for reconsideration do not set forth Mr. McDonald's role in Gaming Authority, as opposed to Tribal, affairs. The deposition testimony of Chiefs Ransom and Smoke, which allegedly establishes the basis for me to reconsider my prior ruling, also does not shed any light on that discrete question. It establishes only that McDonald attended some meetings and

received some written communications with Park Place officials. *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 204 F.Supp.2d 647, 648 (S.D.N.Y. 2002).

Lisa Waukau's position in the present case is more akin to the McDonald subpoena in *Catskill Development, LLC* in that she is an official of the Tribe and has not been identified as having anything to do with the underlying action, and whose only knowledge would be related to questions of tribal governance, not subject to subpoena.

E. The Menominee Indian Tribe of Wisconsin has not Waived its Sovereign Immunity.

This Court has recognized the Supreme Court's holding in S*anta Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-1677, 56 L.Ed.2d 106 (1977), that in order to be effective, any waiver of an Indian Tribe's sovereign immunity must be unequivocally expressed. *Barker v. Menominee Nation Casino,* 897 F.Supp, 389, 394 (E.D. Wis. 1995). Effective waivers must be express and unequivocal. *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. den. Willingham v. Sac and Fox Nation*, 516 U.S. 810, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995).

In the instant case, The Menominee Indian Tribe of Wisconsin took no act which would constitute a waiver of sovereign immunity. To the contrary, the Menominee Tribal Legislature affirmatively asserted its immunity from suit from MTE when it objected to its issuance of a subpoena for documents and refused to comply with the subpoena in this case on the basis of tribal sovereign immunity See Exhibit "B". MTE did not seek an order to compel from the Court in that matter.

Tribal waivers of sovereign immunity are governed by Article XVIII of the Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, which prohibits the Tribal Legislature from waiving or limiting the right of the Menominee Indian Tribe to be immune from suit, except as stated in Section 2 of that Article, which states:

> "The Menominee Indian Tribe shall be subject to suit in Tribal Courts by persons subject to tribal jurisdiction for the purpose of enforcing rights and duties established by this Constitution and Bylaws, by the ordinances of the Tribe, and by the Indian Civil Rights Act, (25 U.S.C. s1301 and 1302). The Tribe does not, however, waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state."

It is clear that the Menominee Indian Tribe of Wisconsin did not waive their right of tribal sovereign immunity in this matter and therefore the Tribe and its officers and agents retain their right of sovereign immunity in this matter before the court.

IV. CONCLUSION

Sovereign immunity is a necessary corollary to Indian Sovereignty and self-government. *Wisconsin v. Ho Chunk Nation*, 512 F.3rd 921, 928 (7th Cir. 2008). The Tribe's ability to be immune from subpoenas of its high government officials in cases where it is not a party and where the testimony sought is related to on reservation activities protects the Tribe's sovereignty and self-government rights. Enforcement of such a subpoena in federal court, thereby subjecting Tribal officials to questioning by third parties regarding issues of Tribal governance and decision-making constitutes an

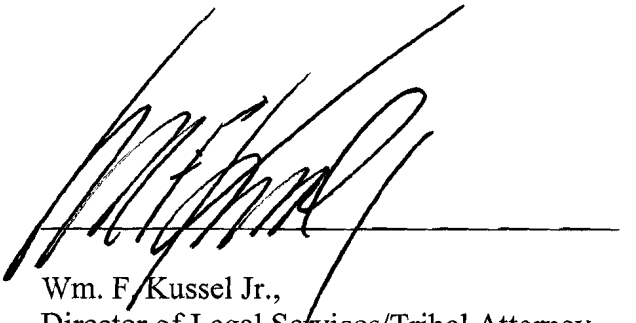
unwarranted infringement of the Tribe's sovereignty and interferes with the Tribe's right to makes its own laws and be ruled by them.

The subpoena in question should be quashed by the Court as the Menominee Indian Tribe of Wisconsin possesses tribal sovereign immunity, the Tribe did not waive its right to immunity and this immunity extends to non-party Tribal officials who have acted within the scope of their authority.

Accordingly, the Menominee Indian Tribe respectfully requests that the Court quash the subpoena in this instant case.

Respectfully Submitted,

Dated this 12 Day of March, 2008



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