

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

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UNITED STATES OF AMERICA,	:	CIVIL ACTION No. 07-C-316
	Plaintiff,:	
v.	:	
	:	MENOMINEE TRIBAL ENTERPRISES'
MENOMINEE TRIBAL ENTERPRISES,	:	MEMORANDUM OF LAW IN
the principal business arm	:	SUPPORT OF MOTION TO COMPEL
of the Menominee Indian Tribe of Wisconsin,	:	
MARSHALL PECORE, and	:	
CONRAD WANIGER,	:	
	:	
	Defendants.:	
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INTRODUCTION

On March 21, 2008, this Court issued an interim Protective Order (Docket No. 69), granting temporary relief to the United States (“Government”) pending a full hearing on April 15, 2008. The Court sustained the Government’s objection to producing David Congos’s (“Congos”) personnel file, pending the filing by Menominee Tribal Enterprises (“Menominee”)¹ of a motion relating to that subject. (Docket No. 69, at ¶ 3(D).) Menominee now moves to compel production of David Congos’s personnel file. Menominee also requests that the Court grant Menominee an additional seven hours of deposition time to complete its deposition of Congos.

There are three additional issues that Menominee requests the Court to address at the hearing on April 15. **First**, Menominee requests that the Court address production of the specific *original* invoices at issue in this case, and the specific *original* attachments thereto, if any.

¹ The Government seems to believe that confusion exists or could exist (it is not clear which) as to *Menominee* Tribal Enterprises’ characterization of itself as “*Menominee*.” See Plaintiff’s Memorandum in Support of the Menominee Indian Tribe’s Motion for Protective Order at 1, n.1. Any such confusion would be merely illusory and is not likely to have any dispositive basis in fact or law because *Menominee* Tribal Enterprises is a sovereign representative of and its assets beneficially owned by the people of the *Menominee* Indian Tribe of Wisconsin.

Those materials have to date neither been specifically produced nor specifically identified by the Government, and Menominee requests that the Court order production of either the *originals* of the specific invoices and any attachments, or, in the alternative, exact copies of the same, with an appropriate certification as to same, as well as a document management system (bates numbers) placed on each page of each document.

Second, Menominee requests that the Court address production of documents relating to the Department of the Interior (“DOI”), Bureau of Indian Affairs (“BIA”), Midwest Regional Office’s (“MRO”) policies and procedures relating to invoice review and the determination for payment, for BIA Fire Suppression and Hazardous Fuels Reduction program invoices. As discussed below, Menominee has reason to believe that BIA imposed requirements and standards on Menominee which BIA had not been promulgated and did not in practice impose on any other Tribe in the region for these programs.

Third, although the Court has already ordered the Government to produce the emails from Congos’s laptop computer which are potentially responsive to MTE’s request concerning “Congos communications,” Menominee requests that the Court address additional electronic discovery issues both in connection with Congos’s laptop computer and in connection with other electronically-stored BIA documents.

BACKGROUND

I. Background Relating to Congos’s Personnel File, Additional Deposition Time, and BIA Invoicing Policies and Procedures

The Government’s False Claims Act (“FCA”) claim with respect to alleged false invoices submitted by Menominee rises and falls on Congos’s credibility. As investigator Todd Bucci (“Bucci”) – the Government’s designated investigative agent in this matter – admits, if Congos is

wrong, then he is wrong and if he is wrong, the Government is wrong. (Declaration of Joshua Jay Kanassatega dated April 3, 2008 (“Kanassatega Dec.”), Ex. A at 224:7-20.)

A. Congos’s Expert Report

The Government has designated Congos as one of its expert witnesses. (Kanassatega Dec. Ex. B.) According to Congos’s expert report, he hopes to testify at trial as an expert witness with respect to “allegations that Menominee Tribal Enterprises, Marshall Pecore and Conrad Waniger submitted false or fraudulent invoices and documents in support of certain claims for BIA-funded road and fire work on the Menominee Indian Reservation.” (*Id.*, at 1.)

Congos’s expert report states that his “education, training and experience” which “supports [his] ability to determine whether the road and fire work in question was performed as required by the project proposals,” specifically includes his training and experience as a BIA employee from 1979 to present. (*Id.*, at 1-2.) According to Congos, the BIA training and experience that he is relying upon to support his expert opinions in this case includes his employment as a “BIA Forester” at various reservations from 1979 to 2007, and with MRO from 2007 to present. (*Id.*)

According to the Government, this BIA employment history provides Congos with numerous “Qualifications” relevant to his expert opinions in this case, including, among other things, Congos’s forestry and field experience, work at the reservation level, involvement with federal contracts, and his experience with trust protection policy and procedures. (*Id.*, at “Qualifications” page.) In addition, Congos states that he will rely on his employment and experience as a BIA firefighter in providing his expert testimony in this case. (*Id.*, at 2.) According to Congos, “[a]s a result of this firefighting work, I have extensive first-hand

experience evaluating the type of forest work necessary to create adequate fuel breaks for fire suppression purposes.” (*Id.*, at 3.)

Congos’s expert report also relies upon his interpretation of what is required under the proposals and contracts at issue in this case, as well as “field inspections” conducted by Congos “as part of [his] duties as BIA Trust Forester” (*Id.*) According to Congos:

I based my field inspections of the Hazard Fuel Reduction (HFR) and Fire Subsidiary project work allegedly performed by MTE on project proposals developed by the MTE forestry staff and agreed to by MTE and BIA officials. The approved project proposals contained detailed information describing the work MTE would perform, the amount MTE could spend for the work performed (actual costs up to the approved limit) and the reporting procedures MTE agreed to follow upon completion of the projects.

(*Id.*)

Based upon Congos’s “education, training, experience and personal inspections . . . ,” he hopes to express expert opinions at trial about whether the work performed by Menominee did or did not meet the standards as determined by Congos. (*Id.* at 6.) Congos hopes to opine that because some *sections* of the fire breaks at issue were purportedly inadequate, then the *entire fire break* was deemed to be inadequate. (*Id.*) In addition, Congos hopes to opine that the *location* (hardwood as opposed to pine areas of the Menominee forest) of much of the work at issue is the reason the work was deemed by Congos to be not done or not done to standard. (*Id.*)

B. Congos’s Insistence that Menominee be Charged with Fraud

In addition to undertaking inspections purportedly “as part of [his] duties as BIA Trust Forester,” Congos is the BIA employee who first made allegations of fraud, waste and abuse against Menominee. According to Congos, “I brought my findings of possible fraud, waste and abuse to the Regional Forester and the Contracting Officer because it was my job. They

concluded with my findings and, consistent with their job responsibilities, forwarded the information to OIG.” (Kanassatega Dec. Ex. C (emphasis added).)

In early 2003, when the United States Attorney had apparently reached an initial conclusion that it would be difficult to pursue a case against Menominee, it was Congos who pressed for claims to be brought:

I spoke with Joe Schwartz, OIG investigator, on January 30 regarding the Menominee investigation. During our meeting Mr. Schwartz indicated the U.S. Attorney had expressed the view that the government ‘wins very few cases involving BIA’. This suggested to me that a prejudice already exists against the decision to investigate and prosecute (in the facts support) the alleged fraud, waste and abuse of appropriated fire funds.

* * *

I spoke with Mr. Schwartz again today and suggested a meeting be scheduled that includes the OIG, the U.S. Attorney (if possible), MRO forestry and contracting staff and yourself at Ft. Snelling for the purpose of identifying the issue(s) and reaching consensus on the preferred course of action. Mr. Schwartz agreed that this meeting could be helpful and said he would contact the U.S. Attorney regarding its feasibility, after which he would get back to me.

(*Id.*)

Two years later, in January 2005, Congos alleged continuing federal contract non-compliance, fraud, waste and abuse by Menominee that was “the same” as the alleged misconduct at issue in the OIG investigation. Congos made a recommendation to his superiors as follows:

It is my recommendation that the Regional Director consult with the OIG and the U.S. Attorney to expedite the on-going investigation to final conclusion, expose past practices of fraud, waste and abuse by MTE and subsequently enjoin the Menominee Tribal Legislature to exercise its governmental authorities, ensuring the satisfactory delivery of trust services to the tribal membership.

(Kanassatega Dec. Ex. D.)

When Congos had still not gotten his way by March 2005, he complained again:

I spoke with Joe Schwartz (OIG) and Chris Larson (U.S. Attorney) this afternoon regarding the status of the invoice fraud investigation.

Mr. Larson said he was unsure what direction they were going, but suggested that a criminal charge was unlikely. They may bring some civil action to recover some of the funds or may simply report their findings (to whom I'm not sure) and hope the guilty parties feel sufficiently chastised to mend their ways.

I was not impressed by their scenarios, and asked about the documented situations where MTE clearly billed for work they didn't do. Additionally, I pointed out that over \$250,000 of fire project funds were spent on non-fire activities and that MTE knew this was illegal before they did it. Mr. Larson agreed it was an unpleasant situation but since no one pocketed any money in the deal he didn't think his boss would support any serious actions against the individuals involved. I then said if the final outcome is nothing, we would have been better off if the investigation had never started, since the MTE people that cooperated have paid a heavy price for doing so and I too have become a target for expecting MTE to comply with the rules. Mr. Larson hoped the final outcome would be better than nothing, but couldn't make any promises.

It is my read that someone very high in the Justice Department has a severe case of political correctness and fears taking an action that might appear insensitive toward Native Americans. Do you have any suggestions on who I, you or we should contact above the Milwaukee office to provide an infusion of courage?

(Kanassatega Dec. Ex. E. (italics added).)

C. Stumpage

1. Congos's Anger with Marshall Pecore in Fall 2001 About Stumpage

Marshall Pecore ("Pecore") testified that the issue of stumpage had a direct impact on

Congos's interactions with Pecore in fall 2001, with respect to the invoices at issue in this case:

Q: Okay. Let me ask you this - - at about this time, in October 2001, how would you describe your relationship with David Congos at that time?

A: Probably not real good.

Q: Okay. What was happening? Tell me what was going on that made it not real good.

A: He was pushing a stumpage issue that Menominee Tribal Enterprise had to pay for the standing timber before it cut it, and I disagreed with that - -

with him, and I think it was me or the B.I.A.'s information to do that, and that really bothered him.

Q: Okay. And what was it that caused that disagreement to lead to a problem with you two? I mean, it's sort of one thing to disagree on an issue, but - -

A: I don't know. He took it really serious.

Q: Uh-huh. Did you take it serious?

A: You betcha I did, you know, so I had a pass from Legal that stumpage was not an issue at Menominee, as it was concerned with the Bureau. It was a divisive [issue], and I have had discussions with other tribal members, there have been other tribal members that have brought it up, and it can bring a lot of static in - - and may be a thing that tribal members talk about. But the documents and all my instructions from my supervisors wasn't - - it wasn't a Forest Manager's issue. In my understanding, it wasn't a Bureau issue, but he didn't accept that.

Q: All right. Did that - -

A: And then, at one time - -

Q: Go ahead.

A: - - at one time, because it was causing problems, and I did ask him that we forget about this, and shake hands at our staff meeting, which I invited him to every week, and he denied that.

Q: Did he tell you why he wouldn't shake your hand?

A: No, not really at that - - at a different meeting, he said he didn't trust me.

Q: Do you know why he would have said that?

A: I don't know. We were friends for 17 years. I don't know - - well, not friends, working cohorts, thereabouts, since '85.

Q: Has that stumpage issue had been something that had been going on for many years, or did it arise at about this time for some reason?

A: It came up a little bit around 2000, maybe '99. People talked about it here and there, but he brought it forward pretty heavily.

Q: Okay. So he was lobbying for a particular position and did that - -

A: Uh-huh.

Q: - - with a great deal of vigor - - is that fair to say?

A: Oh, yeah.

Q: And you opposed him with a great deal of vigor - - is that - -

A: No, he could do what he wanted, but I had supervisors that said it wasn't my business and wasn't my place.

Q: Okay. Did that disagreement lead to a communication problem between you and Mr. Congos?

A: I would think so.

Q: Did that - -

A: That's why I offered my hand, and if we could forget about that and at least have a working relationship on other issues.

Q: Uh-huh, all right. So did that affect your working relationship in relation to these invoices that we're talking about, hazardous fuel and the subsidiary?

A: It could have yes.

Q: Okay.

A: I would think so.

Q: It impacted your ability to communicate and work out problems?

A: Yes.

Q: Okay. Were you not communicating directly with Mr. Congos at this time, on October - - fall of 2001? Or would you communicate as you needed to accomplish your job?

A: I forget exactly when it kind of fell apart, but it was around that time.

Q: Okay. And were you under any direction not to communicate with Mr. Congos from anyone else?

A: No.

Q: Okay.

A: On business - - on Forestry issues, we could.

Q: Okay. Were you ever directed not to communicate with him on certain types of issues?

A: Other than the stumpage issue was an issue that Forestry didn't have to bring up, or I didn't have to bring up.

Q: Was there a directive from the President at some point that you're not supposed to communicate with B.I.A. on certain topics?

A: No, just the stumpage issue - -

Q: Okay, just the stumpage issue.

A: - - was a non-issue as far as discussion or - -

(Kanassatega Dec. Ex. F, at 192:10-196:9.)

2. *Congos's Allegations of Fraud, Waste and Abuse by Menominee in Fall 2001 Included Stumpage*

When Congos and BIA approached the Office of Inspector General ("OIG") in August 2001 (sparking the investigation that culminated in this lawsuit), Congos's allegations of Menominee fraud were directly tied to Congos's view that Menominee is required to pay "stumpage," a position with which Menominee disagreed. In August 2001, Congos and his then-immediate supervisor, Jay West ("West") (then Regional Forester), first brought allegations of "fraud, waste and abuse" by Menominee to Stuart Mani ("Mani"), BIA's Awarding Contracting Officer at that time. (Kanassatega Dec. Ex. G.)

In an August 31, 2001 communication to West, Mani wrote as follows:

Mr. West-

This is a followup to our conversation last week regarding the forestry programs we have under Public Law 93-638 contracts with Menominee Tribal Enterprises. During our conversation you informed me that both you and Mr. David Congos, COR were aware of certain matters that may relate to issues of mismanagement,

waste, fraud, or abuse by the Contractor of these Trust related programs being carried out under these two major Federal contracts.

I am formally requesting that both you and Mr. Congos provide me with a written narrative disclosing all information that you may have regarding this issue, so that I can take appropriate action. Please provide requested information by September 15, 2001. Communications on this matter should be held in confidence to yourself, Mr. Congos, and the Supervisory Contract Specialist. Thank you in advance for your response to this matter.

Stuart S. Mani – Supervisory Contract Specialist

(Id.)

Fourteen minutes after Mani's August 31, 2001 email to West, Mani forwarded that communication to OIG Special Agent Neil Smith ("S.A. Smith"), along with the following additional communication:

Neil- this is a followup to our telephone conversation today 8-31-01 regarding 'additional customers'. As soon as I get the information from Jay West and David Congos, I will forward to you for your review and appropriate action

(Id.)

On September 10, 2001, West forwarded Mani's August 31, 2001 request to Congos, along with the following statement:

Dave,

Things are real hectic here and I'm trying to get out to catch a plane to Denver. Please responde [sic] to the following by the 15th. Send it directly to Stu with a cc to me.

Stu also said the MTL was looking for a statement of work for their new 638 contract with forestry. MTE is not being very cooperative. Do you have anything? Why doesn't Stu have anything. This will be a good opportunity for us to put in language that will require them to follow some standard.

Feel free to talk directly with Stu.

Jay

(Kanassatega Dec. Ex. H.)

At West's request, Congos wrote an email to West and Mani, dated September 12, 2001, at 11:28 a.m., in which he delineated his allegations about purported fraud, waste and abuse by Menominee:

Stu and Jay,

I have a few comments re: Mr. Mani's e-mail dated 9/10/01. First, I must clarify that I am not the COR [Contracting Officer Representative] on the contracts, have not received copies of contract documents for several years and am responding within the context of my position as the Trust Forester on Menominee.

(Kanassatega Dec. Ex. I.)

Congos specifically made allegations about non-payment of stumpage in connection with his allegations of Menominee fraud, waste and abuse, and he tied his allegations regarding stumpage to his demand that Menominee's performance under its federal contracts be audited:

FORESTRY CONTRACT – FOREST MANAGEMENT

There are too many problems to cover in detail, therefore I will highlight only the most serious deficiencies.

* * *

MTE is not paying fair market stumpage value for the timber they cut, saw or sell. I have questioned this practice and was threatened by the MTE President for raising the issue. This issue has been misrepresented to the MTE Board by the President and the MTE legal counsel. Therefore, no effective dialogue has occurred or, base [sic] on the actions of the President, is it likely to occur. It is impossible to fully protect the trust resources when substantial administrative and legal steps are taken by MTE to prevent the BIA from exercising its trust oversight role on the Reservation in a manner consistent with the Forest Management Plan.

It is my opinion that the MTE President, as well as the Forest Manager, are knowingly and willingly violating MTE Board policies as well as the language contained in the Forest Management Plan. It is also impossible to get an honest answer to any question related to their activities under the various contracts. Therefore, if the issues/problems identified above (plus the many more not described) are deemed to be a serious threat to the trust resources, the only way to determine the truth of the matter, and effect real protection of the trust, is to conduct an audit of these programs.

(*Id.*, 2-3.)

Mani responded to Congos's 11:28 email at 1:36 p.m. with the following statement:

THANKS DAVE – I WILL FORWARD THE INFORMATION TO THE APPROPRIATE AUTHORITIES.

STU

(Kanassatega Dec. Ex. J (Caps in original).)

Congos then sent two additional email communications to Mani, also dated September 12, 2001, at 3:35 p.m., and 3:44 p.m., respectively. The first of these additional communications, at 3:35 p.m., attached a memorandum authored by Congos on the issue of stumpage. (*Id.* Ex. K.)

Mani responded to these additional emails at 6:47 p.m. and stated:

DAVID- HAVE RECEIVED ALL (3) OF YOUR E-MAILS AND REVIEWED. ALL 3 HAVE BEEN FORWARDED TO MR. NEIL SMITH, SPECIAL AGENT, OFFICE OF THE INSPECTOR GENERAL. IF YOU WISH TO SPEAK WITH MR. SMITH YOU MAY REACH HIM AT [phone number redacted].

MR. SMITH IS THE APPROPRIATE PARTY TO NOTIFY ON A MATTER OF THIS NATURE, AND HE WILL INITIATE APPROPRIATE ACTION.

STU

(Kanassatega Dec. Ex. L (Caps in original).)

Mani met with S.A. Smith the next day, September 13, 2001. Mani reported the results of that meeting back to Congos:

Dave- I met with Neil Smith this afternoon, and I can assure you he is VERY INTERESTED in the situation you described in your e-mail communications to me. Heightening his concern is the fact that TRUST issues are present. I gave him both your work and home phone telephone numbers, and I will send him copies of MTE's forest development and forest management contracts when he arrives in DC. I informed him that I thought you were in a rather precarious position, being located right in the thick of things on the Menominee Reservation.

You can be assured that he will handle this matter with care not to endanger you or your family. If anything should come up that you want to relay to him, you can call him at [phone number redacted] and leave a message. He checks his messages often, and will return your call. You can also email him at neil.smith@oig.doi.gov.

I would suggest that you and Jay get together and gather any additional information you might have on the issues you presented so you can present it to him.

Have a good weekend.

Stu

(Kanassatega Dec. Ex. M. (Caps in original).)

Congos's allegations were followed on October 3, 2001, by an email from Mani to S.A. Smith, in which Mani wrote as follows:

Neil- here is some additional information for you on this issue. After some discussions today with Jay West, Regional Forester, the issues presented by David Congos may involve issues of waste, fraud, abuse impacting a [sic] approximately \$1 BILLION + dollars forestry trust assets.

(Kanassatega Dec. Ex. N (Caps in original).)

D. BIA Changes the Rules of Invoicing on October 1, 2001

In the midst of Mani's allegations to S.A. Smith that Menominee had committed fraud, waste and abuse to the tune of "\$1 BILLION + dollars," in the midst of Congos's allegations that Menominee had committed fraud, waste and abuse by, among other things, not paying stumpage, and in the midst of Congos's anger at Menominee's Forest Manager, Pecore over the stumpage issue, BIA changed the rules of the game with respect to Menominee invoices. The rule change came in the form of an email from then Acting Fire Management Officer Sean Hart ("Hart") (and not then Regional Director Larry Morrin):

Dave-

I got an invoice from MTE today for Fire suppression costs for May and June. I am sending them back to you for approval as per Jay. He wants everything signed off by you.

The invoices need to include letterhead and original signature (which these do) and supporting documentation. These don't have the documentation. For the personnel time and fringe, we accept a tribal spread sheet documenting the time. For suppression supplies we accept a tribal spread sheet or list of supplies.

If anything is missing and you are not willing to sign off, we can ask for more documentation. The contracting rules are such that the contractor has to follow BIA policy and procedure to get paid. Our policy is that you have to be comfortable with the charges to sign off, and that includes the documentation. I will not sign off on anything until you have signed a recommendation to me to sign.

As this is a new step in the process, please inform MTE that invoices need to come through you first. I can send a letter from the Region if you want more than this email as notification to you.

If you have questions, please contact me.

(Kanassatega Dec. Ex. O (emphasis added).)

E. The BIA Implements "Forestry Invoice review and Approval Procedures" on February 28, 2002, Retroactive to October 1, 2000

According to the Government, BIA had "[n]o formal procedures . . . prior to February 2002 beyond the requirements of federal law, regulations, and all applicable agreements and project proposals." (Kanassatega Dec. Ex. X, at Response to Request No. 8.) On February 28, 2002, then BIA Regional Director Larry Morrin ("Morrin") sent a letter to "Superintendents, Midwest Region," which purported to communicate BIA's new invoice review and approval procedure policy, retroactive to October 1, 2000:

The following procedures are to be used in the Midwest Region when reviewing and approving forestry invoices made through a means other than 638 contracts. These procedures will be incorporated into a Regional Program/Project Management Handbook at a later date. Please advise tribes under your jurisdiction as you feel appropriate. This policy is retroactive to October 1, 2000 for projects not completed and invoiced.

The purpose of this policy is to firmly establish government accountability and program integrity standards throughout the Region for the Forestry program. The bulk of the workload involving invoices is with the Wildfire Management program through agreements with tribes, tribal entities or inter-agency partners. The vast majority of invoices received for payment meet this policy and should require no additional administrative work beyond what is already done. These procedures are necessary, as we manage the Wildfire Management program through agreements with our partners, to ensure the fiduciary integrity of the program. They will further ensure that our partners are promptly reimbursed for their critical services.

Every individual with the responsibility of review and approval of invoices is charged to ensure program integrity, accountability and compliance with Congressional intent. Reimbursement invoices must contain sufficient information to demonstrate that the payment is within the scope of the designated program intent. The Contracting Officer may impose higher reporting and supporting documentation standards at any time during the life of the project to ensure that payment is an allowable cost in accordance with the Federal Acquisition Regulations.

(Kanassatega Dec. Ex. P.)

Attached to this cover letter are “Invoice Administrative Requirements.” Among the new invoice requirements is a requirement that the invoice be certified as follows:

The invoice itself will contain the statement:

‘I certify that this invoice and supporting data are accurate and complete to the best of my knowledge and belief; that the amount of this invoice accurately represents the expenditures on the project(s) identified in this invoice; and that I am duly authorized to make the above certification on behalf of (name of organization) ’

(*Id.* ¶ C.) The new procedures also required that, at a minimum, the invoice would need to be supported by documentation, including, among other things, “[a] map of where the work was done.” (*Id.* ¶ C(1)(b) (emphasis in original).)

II. Background Relating to the Invoices (and Attachments, if any) at Issue

The invoices at issue in this case are not what they seem or what the Government purports them to be. With the exception of *one invoice*, the invoices were all provided to BIA, or

to David Congos, before March and April 2002. The original invoice dates are as follows: (1) Invoice 200, originally dated March 22, 2001; (2) Invoice 202, originally dated March 22, 2001; (3) Invoice 212, originally dated June 28, 2001; (4) Invoice 214, originally dated October 17, 2001; (5) Invoice 217, originally dated October 23, 2001; (6) Invoice 219, originally dated October 23, 2001; (7) Invoice 220, originally dated November 1, 2001; (8) Invoice 222, originally dated November 1, 2001; (9) Invoice 224, originally dated November 9, 2001; and (10) Invoice 248, originally dated March 27, 2002. (Docket No. 1 (Complaint), 32-33.)²

Per Hart's October 1, 2001 email to Congos, Congos held these invoices on his desk, while he demanded that Menominee correct work he deemed to be inadequate, and while he demanded that Menominee provide supporting document, after supporting document, after supporting document that he deemed necessary to support the invoices. (Kanassataga Aff. Ex. F, 269-81.) *After* BIA enacted its retroactive policy on February 28, 2002, BIA and Congos *then* had Pecore and Conrad Waniger ("Waniger") sign a "certification" for each invoice, and to submit the invoice for payment. (*Id.*, 281:8-17 ("I thought it was just one more hoop we had to get through as all these standards and stuff were changing with the Bureau and the fire - - especially in fire.")) Thus, the Government contends that many of the invoices at issue were "presented" for payment in March and April 2002, as follows: (1) Invoice 212 on March 14, 2002; (2) Invoice 214 on March 14, 2002; (3) Invoice 217 on March 14, 2002; (4) Invoice 219 on March 14, 2002; (5) Invoice 220 on April 12, 2002; (6) Invoice 222 on April 12, 2002; (7) Invoice 224 on March 14, 2002; and (8) Invoice 248 on March 14, 2002. (Complaint, 32-33.)

² The Government also contends that two SF 269A reports served as "invoices" for payment. As Jacci Pubanz testified, however, these forms are not invoices and were never intended to be used to get payment. (Kanassataga Aff. Ex. Q, 117:13-119:1.) Menominee will be moving for summary judgment to the extent the Government's False Claims Act claims are premised on SF 269A reports.

The specific original invoices as they existed when originally dated, and the specific original invoices as they existed after Congos's demands for backup, have not been specifically identified in this case, and there is a serious question as to whether the originals have been lost or altered. Gwen Awonhopay (Waukau) ("Awonhopay"), a Menominee employee who, along with Jacci Pubanz ("Pubanz"), was involved with the preparation of one or more of the invoices at issue, testified as follows:

A: And I think at that time, there was like five or more invoices that were lost, misplaced.

Q: When you say lost or misplaced, what do you mean by that? Who lost them?

A: Jacci blamed Dave, and Dave said he gave them back to Jacci. In that, somewhere, someone had misplaced them.

(Kanassatega Dec. Ex. R, at 72:18-23.)

AUSA Larsen also informed Menominee's counsel that the "invoices" and any supporting documentation as it existed in David Congos's files, has since been removed and "reorganized" by OIG investigators.³ Congos confirmed that this has happened:

Q: Have you seen that red expandable folder before today, Mr. Congos?

A: Yes, sir.

Q: When did you see that folder? When did you first see it?

A: I'm thinking it was maybe two years ago. One or two years ago.

Q: Okay. And what was the context in which you saw that red expandable folder?

³ Menominee suspended its review of BIA documents on October 5, 2007 when AUSA Larsen disclosed that the invoices and supporting materials had been removed from Congos's files and rearranged, pending conferences with the Government to attempt to figure out what happened and what other files in the BIA records may have been altered.

A: The material was being organized by OIG investigators at the U.S. Attorneys Office in Milwaukee.

Q: Identify all person present during the organization of the materials.

A: Joe Schwartz was there, Emma Canada, myself, and I don't recall if Mr. Bucci was there or not. Mr. Larsen, Chuck Westphal. Chuck Westphal works for the U.S. Attorneys Office. I don't recall if there was anyone else there.

Q: Okay, Exhibit 26 contains a number of pieces of paper, correct?

A: That is correct.

Q: How were the documents selected that found their way into the red expandable folder that's been marked Exhibit 26? Who selected the paper?

A: A system was developed between the people working there, and I'm thinking primarily Joe Schwartz, Emma Canada, and I'm sure with input from others, and documents pertaining to this invoice were tabbed and put in sequential order, and every invoice in which there was a question was organized in the same manner.

Q: Who did all that?

A: The staff working there.

Q: And who were those people?

A: The people that I already identified.

Q: What was your role in identifying the doc - - Well, first of all, to the best of your knowledge were the documents related to invoice 212 pulled together before that meeting, or did you have to select those documents from some other source and pull them together in one red expandable folder?

A: My recollection is that the documents were at the U.S. Attorneys Office.

Q: Okay.

A: And that the people that held the documents were extracting them and organizing them by individual files.

Q: Okay. And what was your role in selecting and organizing the documents?

A: From time to time they would ask me a question regarding a particular document, whatever the question might be, and that would - - that would have been my involvement.

Q: Okay. Do you believe you were an active or passive participant in the process that was going on that day?

A: Sometimes passive, other times active, particularly active when a question was asked about a particular document.

Q: Okay. So you weren't - - If I understand your testimony, correct me if I'm wrong, you weren't the one that was rummaging through the boxes of documents, selecting the documents, saying, Ah, this one here goes into Invoice 212. Do I - - Is that correct or not?

A: That is correct.

Q: Okay. So somebody was bringing you documents only if they had a question that they had with respect to the document, correct?

A: It - - Well, they weren't bringing me documents.

Q: Okay.

A: The documents were already there, and they were organizing them.

Q: All right. So you took no part in the organization of the documents; your role was simply to answer a question if it was asked?

A: I was there when the document was compiled, so - -

Q: Okay.

A: But I was not physically the one creating the file.

Q: Okay. Who was the person who physically created the file?

A: My recollection, it was Joe Schwartz and Emma Canada primarily involved with creating the file organization.

(Kanassatega Dec. Ex. S, 99:11-102:23.)

III. Background Relating to Electronic Discovery Issues

A. Congos's Laptop

Menominee requested to have its own vendor provide a forensic analysis of Congos's laptop, and the Government opposed that request. The Court gave the Government the benefit of the doubt, and ruled that OIG's forensic lab could perform the initial analysis. Although the Court has ordered the Government to produce Congos's email communications from his laptop, there are additional issues that require the Court's attention.

First, Menominee has requested that the OIG lab provide a report about its search of the Congos laptop. Menominee has requested that this report include, at a minimum, the following information: (1) the date range for data stored on Congos' fire laptop computer by file type; (2) identification of all causes attributable to Hart's/Congos' inability to access data on the laptop in July 2007 (including whether the laptop shows any evidence of tampering or deletion of files); (3) a complete description of the protocol used by the OIG lab to access the data on Congos' laptop (including, without limitation, the chain of custody for this laptop); and (4) a directory identifying all documents (including, without limitation, e-mail [and attachments], Word, PDF, Excel, and PowerPoint etc.) on the hard drive, including the document's file name and file extension, the date and time each file was created, last accessed, last altered, the size of the file, the location on the hard drive, including for all active, irretrievable, inaccessible, or deleted data. (Kanassatega Dec. Ex. T.) Although the Government agreed to produce a report from the OIG lab, the Government did not agree to include the information requested by Menominee. (*Id.*)

Second, although the Court has ordered the Government to produce Congos's email communications, there are other issues associated with production of those emails and production of *other* potentially-responsive documents located on the Congos laptop. **First**, the

Government seeks to limit on the number of terms to be electronically searched by the OIG forensic lab. (*Id.* at 3-7.) Menominee rejected the Government's argument that running Menominee's search terms is not feasible or would cause unnecessary delay in production (approximately one month later, the Government still has produced no Congos email communications or other documents from that computer, although it has indicated that it hopes to produce Congos's email communications before April 14, 2008.) Moreover, Menominee reasonably rejected the Government's claim that the search proposed by Menominee would result in duplicative production. (*Id.* at 5.) As Menominee pointed out, multiple search term "hits" on any one document still only produces one document. The terms utilized by the OIG lab are not comprehensive enough to come close to capturing all relevant documents. (*Id.* at 4.) To move the issue forward, Menominee suggested to move the discussion from generalities to specifics, but to no avail. (*Id.*)

Second, Menominee and the Government disagree as to the format that the Congos emails and other documents will be produced. (*Id.* at 3 - 4.) The Government proposed to produce responsive documents on a "disk" (*id.* at 4), but that response did not provide Menominee with enough information to agree or disagree, so it inquired as to what format the documents would be produced on a disk, *i.e.*, native files in searchable format, rather than an unsearchable PDF production. Menominee requested a copy of the actual native files, or a TIFF with metadata production. (*Id.* at 14.) The Government opposes that request.

Third, the Government refuses to disclose "clearly and unequivocally" whether the OIG forensic lab was able to access data stored on Congos' fire laptop computer. (*Id.* at 15.) Thus, Menominee does not know, but needs to know for purposes of discovering information relevant

to its spoliation claim, whether the Government has information or reason to believe that DOI-OIG did not provide Congos' fire laptop computer to the OIG lab for analysis. (*Id.*)

Further, the Government has refused to provide Menominee with the chain of custody record for the Congos fire laptop computer, as well as the mirror image of the drive for that computer. (*Id.*) The integrity of this data has also been called in to further question by the Government's refusal to answer basic questions about whether files have been altered, and what steps the OIG lab took to prevent corruption of the data. (*Id.* at 13-15.)

Fourth, the Government has given Menominee no assurance that it will run the Menominee-suggested search terms "on every document on the laptop, except for dedicated system files." (*Id.* at 14.) This is necessary to ensure that the OIG lab runs a complete search for documents on the laptop. The parties were in disagreement before as to the search terms necessary to capture all emails and other documents potentially responsive to Menominee's requests. (*Id.*) They remain in disagreement to date.

B. Other Electronic BIA Records

There are also open issues with regard to other BIA electronic records. **First**, although the Government has produced some emails from the BIA's "Zantaz" system, these emails have been produced in a fashion such that the name "Chuck Westphal" (Mr. Larsen's paralegal) appears at the top of every email, rather than the individual from whose electronic files was produced. (*See, e.g.*, Kanassataga Dec. Exhs. H, I, J, K, L, M.)

Second, Hart purports to have collected a host of BIA electronic records and transferred them to a hard drive, which the Government would make available to Menominee. Menominee does not, however, believe that the protocol employed by Hart is appropriate or captured all reasonably available information. Menominee has repeatedly requested that the Government

participate in a conference with Menominee's counsel and its IT personnel to address this issue, but the Government has, to date, avoided participating in such a conference. Instead, the Government has identified potential sources of electronic information and announced that it does not "intend to conduct further searches of this material at this time." (Kanassatega Dec. Ex. U.)

ARGUMENT

I. Congos's Personnel File Must be Produced

The Government objects to production of Congos's personnel file on grounds of relevance and privacy, but those objections should be rejected.

This personnel file likely contains all sorts of relevant information: potential admissions, comments in performance reviews about Congos's interactions with Menominee personnel, comments concerning Congos's adherence to BIA policy in his job duties, comments in performance reviews that bear on Congos's purported experience giving him the ability to express expert opinions in this case, compensation or promotion incentives relating to his work at Menominee (which goes to bias), the scope of Congos's job duties, Congos's actual job titles (which he embellished), matters relating to Congos's investigation of Menominee, Congos's involvement in the BIA's change in invoicing procedures for Menominee, Congos's exercise of the unfettered discretion given to him by Hart on October 1, 2001, violations by Congos of ISDEA (and the regulations relating thereto), Congos's obsession with stumpage (which goes to motive and bias), Congos's falling out with Pecore, and so on.

Moreover, the materials in Congos's file may contain information to support Menominee's defense that Congos, with the aid of others and in violation of BIA's policies of non-interference, and with full knowledge of Pecore and Waniger's good-faith efforts, sought to contrive a case of fraud against Pecore and Menominee. Those materials may also contain

information about Congos's intent to sever Menominee's prime mature contractor status with BIA, or circumvent (or modify) Menominee's management of the Menominee Forest lands under the Menominee Forest Management Plan, remove Pecore as Forest Manager, and otherwise advance these interests at Menominee expense (*i.e.*, this was a setup).

Congos's knowledge and motivation are at the very heart of this case. *U.S. ex rel Durchholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999) (“[t]he government’s prior knowledge of an allegedly false claim can vitiate a FCA action.”); *accord U.S. ex rel Lammers v. City of Green Bay*, 998 F. Supp. 971, 998 (E.D. Wis. 1998); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (citing *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 288-89 (4th Cir. 2002) and *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326-27 (9th Cir. 1995)) (“[w]here the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.”).

The Government's Privacy Act objection is misplaced. As the Government itself acknowledges, the Privacy Act does not shield materials from production in the face of a court order. 5 U.S.C. § 522a(b)(11). Nevertheless, Menominee is not interested in seeing Congos's social security number, medical information, phone number or address. Any such information could easily be redacted. Menominee is, however, entitled to documents relating to Congos's job performance and duties that directly bear on his role in the investigation leading to the filing of this lawsuit, as well as the expert opinions he hopes to offer at trial. *United States v. Luwisch*, No. Civ. A. 97-3695, 1998 WL 720657, at *2 (E.D. La. Oct. 8, 1998) (compelling production of personnel file by United States even though file subject to the Privacy Act); *Gary v. United States*, No. 3-97-CV-658, 1998 WL 834853, at *3 (E.D. Tenn. Sept. 4, 1998) (ordering

production of government employee personnel file, including performance reviews, complaints and evaluations, even though subject to the Privacy Act).

Menominee would, of course, agree to production of these materials pursuant to a properly-tailored protective order. The Government's representation to this Court that Menominee has refused to agree to *any* protective order is misleading and just plain wrong. What Menominee has objected to is the Government's demand for a protective order applicable to *every Government-produced document*, simply because *a few Government-produced documents* may be subject to the Privacy Act. Menominee is not opposed to a protective order applicable to materials that are actually subject to the Privacy Act, but Menominee does object to the Government's overly-broad demand that *everything* be protected.

Related discovery items, which may or may not be part of Congos's personnel file, include Congos's OGE Form 450 Confidential Financial Disclosure Report and OGE Form 450-A Confidential certificates of No New Interests (Executive Branch) (Request Nos. 7 and 8 to Menominee's Fifteenth Set of Requests for Production). (Kanassatega Dec. Ex. V.) Although the Government's response to these requests was not due as of the time this brief was filed, the Government states in its protective order motion that it will object to production of certain of Congos's "financial information" requested by Menominee. Form 450 and 450-A are presumably the "financial information" referred to by the Government in its protective order motion.

Congos's Form 450 and 450-A certificates should also be ordered to be produced, be they part of Congos's personnel file or not. These forms are filled out by Government personnel to disclose any financial conflicts of interest that may arise in the performance of their job duties. It would be highly relevant if, for example, Congos has any financial interest in any logging or

forestry management businesses. That information might explain Congos's motivation for attempting to discredit Menominee's performance under its federal contracts. It would be problematic if Menominee's responsibility for the management of the Menominee forest were eliminated and facts subsequently revealed that Congos possessed a direct or indirect ownership or other financial interest in any land, logging, sawmill, consulting, or other forest industry related company hired to fill that gap. Congos's potential personal gain would be implicated and would provide another motive that Menominee is entitled to explore. Menominee agrees that these materials should also be produced pursuant to a properly-tailored protective order.

II. Additional Congos Deposition Time

Pursuant to Fed. R. Civ. P. 30, "[t]he court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination."

Menominee has deposed Congos for seven hours, but that time was grossly inadequate to complete a full and fair examination. Congos's "Statement of Facts" alone has literally hundreds of pages of maps and photographs attached to it, upon which the Government's claims in this case rely. Congos has also authored numerous relevant memos, conducted numerous inspections upon which the Government relies, had numerous relevant interactions with Menominee personnel, made notations on dozens of maps at issue, and is the BIA representative that reviewed all of the invoices and supporting materials at issue.

Moreover, since the time Menominee first deposed Congos, numerous new documents have been produced (which Menominee had no opportunity to ask Congos about before), Congos has been designated as an expert witness and authored an expert report (which Menominee had no opportunity to ask Congos about before), and Congos's laptop emails have *yet* to be

produced, nearly five months *after* the Court agreed to allow the OIG forensic lab to conduct its analysis of Congos's laptop. Menominee requests that the Court grant it leave for an additional seven hours of deposition time with Congos to allow for a full and fair examination.

III. The Invoices

It is simply astounding that the Government has to date failed to produce or identify the original invoices at issue and original supporting documentation, if any, as such documents were *originally submitted* in 2001, and as they were *resubmitted* in March and April of 2002. What the Government has instead done is produced and made available for inspection and use at depositions a number of loose documents, some clipped together, many others not, contained in red rope folders. As Congos testified, however, the documents within these red rope folders constitute documents that were rearranged and assembled into folders by Schwartz, Canada, and Westphal at the United States Attorneys Office in Milwaukee in late 2005. (Kanassatega Dec. Ex. S, 99:11-102:23.) In other words, the documents in those red rope folders *may or may not* have been part of the invoices (and attachments, if any) at issue, *as originally submitted* in 2001, or *as resubmitted* in March and April 2002.

If the Government cannot identify the invoices and any attachments specifically as they were *originally* submitted as they were *resubmitted*, then fine. That simply presents a summary judgment issue on the Government's inability to show what document(s) were presented within the meaning of this term in the FCA. But, simply dumping, as the Government has done, a bunch of files containing loose documents apparently selected by Schwartz, Canada and Westphal on Menominee and stating that it believed the original invoices and attachments would be in those files is not sufficient. This is particularly so in light of Awonhopay's testimony that

Congos and Pubanz argued over who had possession of the original invoices (and attachments, if any) and, in light of their respective denials, the current location of those documents, if not lost.

As a material element of the Government's FCA claim, the Government has the burden to produce and identify the original invoices (and attachments, if any), and if it cannot do so, then the parties can address the legal effect of that circumstance in dispositive motion practice.

IV. BIA Invoicing Policies, Procedures and Application Thereof

Menominee's Thirteenth Requests for Production of Documents Nos. 1-15 request documents relating to BIA's invoicing policies and procedures, as well as documents relating to how BIA implemented and applied (or did not apply) those policies and procedures. (Kanassatega Dec. Ex. W.) Menominee believes that Morrin's February 28, 2002 letter, announcing a retroactive change, was mere pretext for changing the rules of the game as to Menominee, after the fact. Hart's October 1, 2001 email to Congos illustrates that BIA "policy" was to give Congos *carte blanche* to arbitrarily apply his own standards as to what was and was not acceptable work, and to require whatever documentation Congos deemed necessary to support Menominee's invoices, all at a time when Congos was angry with Menominee and Pecore about the issue of stumpage. This is particularly relevant in light of the Government's admission that there were "[n]o formal procedures . . . prior to February 2002 beyond the requirements of federal law, regulations, and all applicable agreements and project proposals." (Kanassatega Dec. Ex. X, at Response to Request No. 8.)

Simply put, in the absence of "formal" BIA procedures to determine whether to pay an invoice, Menominee believes that discovery will show that no other Tribe in the region was forced to comply with the retroactive standards and arbitrary and capricious whim of a BIA employee to which Menominee was held. In other words, Menominee was simply subject to

Congos's whim, without the benefit of Menominee being advised of the standard to which Congos would review the invoices and Menominee's work.⁴ These materials are relevant, and the Court should thus compel the Government to produce all documents responsive to Request Nos. 1-15 of Menominee's Thirteenth Requests for Production of Documents.

V. Electronic Discovery

As discussed above, Menominee has requested that the OIG forensics lab provide a report about its search of the Congos laptop which includes information critical to Menominee's assessment of whether relevant materials in addition to the emails the Court has ordered produced exist on that computer. Menominee also needs this information to assess whether data, including emails, has been deleted from that laptop. This is a single computer, and it should be a routine matter to provide the information requested by Menominee.

In addition, the Government has refused to agree to Menominee's search terms, search protocol, method of production, and steps to insure the integrity of this data. As this is a single computer, Menominee requests that the Court order the Government to produce a mirror image of the Congos hard drive, to produce all responsive documents on the Congos laptop, and to do so under the terms requested by Menominee.

As discussed above, Menominee objects to the Government's production of email communications from various BIA employees without identifying the name of the BIA employee from whose computer the email is stored. One problem is that Menominee must ask each BIA employee it intends to depose whether a specific email is a document he or she can authenticate. This process could have been avoided if the Government had made a proper production in which the name of the BIA employee from whose system the email was printed were displayed.

⁴ Of course, because all of the invoices except 248 had already been submitted by February 28, 2002, Menominee was whipsawed by the retroactive adoption of the Congos review standards.

Menominee requests that the Court order production of these emails in a form in which the person from whose files the email was produced is displayed instead of Westphal.

The Government has identified a number of sources of potentially relevant BIA electronic data. Menominee has repeatedly requested that the Government meet and confer with Menominee's counsel and its IT personnel about electronic discovery issues, but to date the Government, for one reason or another, has not participated in such a conference. In the Rule 26(f) report filed with the Court at the outset of this case, Menominee stated that it would be seeking production of electronically-stored exculpatory and other relevant documents. (Docket No. 26, at 11.) Menominee further stated that it "will request production of such documents in hardcopy." (*Id.*) Here the parties sit on the eve of the close of discovery with no resolution. Open issues include the form of production, how these records will be searched, and what will be produced.⁵ Menominee asks that the Court give the parties guidance on this issue at the April 15 hearing so that discovery can be completed in an orderly fashion.

DATED: APRIL 3, 2008

/s/ Joshua Jay Kanassataga
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⁵ While BIA employee Hart has supposedly conducted a search of electronic records and offered to produce these records on a hard drive apparently compiled by him, Menominee objected to that procedure. Menominee first objected to a fact witness with an interest in the outcome of this case conducting the search. Moreover, Menominee does not believe the protocol employed by Hart fulfills the Government's discovery obligations.