

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

----- X
UNITED STATES OF AMERICA, :
 :
 : Plaintiff, :
v. :
 : CIVIL ACTION No. 07-C-316
MENOMINEE TRIBAL ENTERPRISES, :
the principal business arm :
of the Menominee Indian Tribe of Wisconsin, :
MARSHALL PECORE, and :
CONRAD WANIGER, :
 :
 : Defendants. :
----- X

**DEFENDANT MENOMINEE TRIBAL ENTERPRISES’ MEMORANDUM OF LAW IN
OPPOSITION TO MENOMINEE INDIAN TRIBE OF WISCONSIN’S
MOTION FOR PROTECTIVE ORDER**

INTRODUCTION

“Every person within the jurisdiction of the United States is bound to perform when properly summoned.” United States v. Bryan, 339 U.S. 323, 331 (1950). While Courts recognize certain exemptions, “every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth.” Id. (recognizing the “fundamental maxim that the public . . . has a right to every man’s evidence.”). Any other result would be in “derogation of the search for the truth.” See United States v. Nixon, 418 U.S. 683, 710 (1974). Applying this principle, this Court should not extend tribal immunity to prevent Lisa Waukau from testifying about her voluntary statements and allegations against Menominee Tribal Enterprises (“Menominee”) provided to a federal investigator during the course of an official investigative interview, as well as about her

conversations with other federal employees and non-elected tribal and non-tribal members. Ms. Waukau's current position as a tribal official does not outweigh the public interest in the search for truth.

The facts are straight-forward. Menominee served a notice of deposition and subpoena on Lisa Waukau ("Ms. Waukau") to question her about: (1) allegations she made to a federal investigator that Menominee had mismanaged the contracts at issue in this lawsuit; (2) Ms. Waukau's conversation(s) with Douglas Cox ("Cox") regarding the culvert inspections at issue in this case; and (3) Ms. Waukau's conversations with Larry Morrin ("Morrin"), as well as her conversations and "coordination" with David Congos ("Congos") in connection with the federal investigation leading to the filing of this case. Ms. Waukau was not an elected member of the Menominee Tribal Legislature ("Legislature") at the time she sat for an interview with a federal investigator about the matters at issue in this case. Moreover, Ms. Waukau's conversations with Cox, conversations with Morrin, and conversations and "coordination" with Congos occurred at a time when the Legislature was not a party to the pertinent contracts.¹

Ignoring these important facts, the Legislature now asserts that various forms of immunity require this Court to issue a protective order quashing Menominee's deposition

¹ Menominee is not making any argument with respect to any organic document of the Menominee Indian Tribe of Wisconsin ("MITW"), including MITW's Constitution. Menominee is not making any argument with respect to any MITW intergovernmental agreements, including the Menominee Forest Management Plan. Likewise, Menominee is not attacking the validity of any tribal legislative enactment or resolution. Nor does Menominee's subpoena to Ms. Waukau require to the Court to decide whether Ms. Waukau was acting outside the scope of her authority as a legislator. Menominee is thus not making any challenge that would require the Court to interpret any MITW organic document, intergovernmental agreement, or tribal legislative enactment or resolution. The exhaustion doctrine is not implicated by Menominee's subpoena to Ms. Waukau. She is a simple fact witness.

subpoena to Ms. Waukau. In effect, the Legislature (and Ms. Waukau²) seeks an order from this Court excusing Ms. Waukau from fulfilling her obligations as an individual and United States citizen to give deposition testimony as a fact witness regarding the matters at issue in this litigation.

The Legislature's primary legal argument is based on a case that misconstrued the relationship between the immunity possessed by an Indian tribe and that possessed by the United States. Moreover, the Legislature's proposed application of immunity is overly broad, comprehends no legal or factual boundaries, and conveniently ignores the long established principle that the doctrine of sovereign immunity does not immunize "individual members of the Tribe," like Ms. Waukau, from their legal duty to give deposition testimony. Puyallup Tribe, Inc. v. Washington Dept. of Game, 433 U.S. 165, 171-172 (1977).

Likewise, the Legislature's assertion that Ms. Waukau is cloaked with immunity because she was a tribal official prior to the date of her interview, is factually misplaced because, as a private citizen, Ms. Waukau voluntarily agreed to be interviewed by a federal investigator, and during the interview (and perhaps at other times thereafter) she made allegations against Menominee and otherwise provided the investigator with information about alleged Menominee wrongdoing. In addition, Ms. Waukau's conversations with Morrin, as well as her conversations and coordination with Congos in the investigation of Menominee occurred as part of a federal investigation under federal law, not under Menominee law. Ms. Waukau's communications with Cox about his culvert inspections are a matter of statements made by one fact witness to another fact witness. It is not relevant what the Legislature may or may not have authorized Ms. Waukau to do with respect to her firsthand knowledge of these matters.

² Lisa Waukau has not herself moved the Court for a protective order under Fed. R. Civ. P. 26(c).

Because the Legislature has failed to carry its burden of proof to provide legal and factual support for its motion, Menominee respectfully requests that this Court deny the Legislature's motion for a protective order.

BACKGROUND

A. THE COMPLAINT

On April 7, 2007, the United States ("Government") filed its Complaint in this case. The gravamen of the Complaint concern Menominee's actions under two federal contracts (a Roads Maintenance Contract ("Roads Contract") and a Forest Management Contract ("Forest Contract")). (See Complaint (hereinafter "Comp.") at ¶ 18 (Docket No. 1.)) The Government alleges that these two contracts were issued pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(f)(a)(1)(B)(Public Law 93-638) (the "ISDEA"). (*Id.*)

With respect to the Roads Contract, the Government alleges that Menominee made certain "unapproved capital expenditures." (*Id.* at ¶¶ 39 – 76.) Among the allegations is that on June 12, 1998, the Chairman of the Legislature wrote to the Bureau of Indian Affairs ("BIA") objecting to the use of Roads Contract funds for the purchase of certain capital equipment. (*Id.* at ¶¶ 43-44.) These allegations relate to the Government's breach of contract claim.

As to the Forest Contract, the Government alleges that Menominee agreed to use BIA funds for purposes set out in the "Forest Management Plan" and Forest Contract "Statement of Work" including, among other things, fire protection activities. The Government also alleges that Menominee submitted false invoices under Hazardous Fuels Reduction Proposals. (*Id.* at ¶¶ 35 -38 and ¶¶ 93 – 146.) Some of the allegations in the Complaint relate to whether culverts were installed. (*Id.* at ¶¶ 89-90.) Further, the Government alleges that Menominee improperly

transferred indirect cost funds from the Roads Contract to the Forest Contract for use as program funds. (Id. at ¶¶ 160 – 167.) In addition, the Government alleges that Menominee improperly accumulated funds in a Reserve for Asset Replacement Account (“RFAR”) (characterized by the Government as improper lease charges). (Id. ¶ 68.)

B. DISCOVERY RELATING TO LISA WAUKAU

1. LISA WAUKAU’S INTERVIEW WITH A FEDERAL INVESTIGATOR AND RELATED INVESTIGATIVE ACTIVITY REPORT

The Government produced to Menominee several *Office of Inspector General, Office of Investigations, U.S. Department of the Interior, Investigative Activity Reports* (“IAR”). These IARs constitute written records of interviews conducted by federal investigators leading up to the filing of this case. Among the IARs, Menominee discovered an IAR memorializing an interview of Lisa Waukau (“Waukau IAR”). (Declaration of Joshua Jay Kanassatega dated March 27, 2008 (“Kanassatega Dec.”), Ex. 1.)

The interview was conducted by Special Agent Joseph Schwartz (“S.A. Schwartz”) on March 12, 2003. The complete text of the Waukau IAR is as follows:

On 3/12/03 Lisa Waukau, past Chairperson for the Menominee Tribe, was interviewed. Waukau said that sometime between 1993 and 1994, the Menominee Tribe allowed Menominee Tribal Enterprises (MTE) to be the contractor for the 93-638 Road Maintenance and Forest Development contracts. Waukau said that because MTE had mismanaged the above contracts, the Menominee Tribal Legislature passed a resolution in March of 2001 to take the above contracts away from MTE.

Lisa Waukau said that between 1999, and 2001, tribal officials held numerous meetings regarding the taking back of the above contracts. Waukau added that MTE had a history of not cooperating with the tribe. Waukau said that at the time of the above meetings Apesanahkwat was the Chairperson for the Menominee Tribe, and that he wanted to take the contracts from MTE due to mismanagement of money and services by MTE.

(Kanassatega Dec. Ex. 1.)

2. MS. WAUKAU'S CONVERSATIONS WITH DOUGLAS COX REGARDING COX'S CULVERT INSPECTIONS

Cox testified at his deposition that he was asked by Congos to conduct an inspection relating to certain culverts at issue. (Kanassatega Dec. Ex. 2, at 128:5-145:5). Menominee asked Cox whether he told Ms. Waukau that he had inspected culverts at the request of federal investigators. Mr. Cox testified, "I believe I told Lisa Waukau that I provided information to OIG, yes." (Id. at 241:13-14.)

3. MS. WAUKAU'S CONVERSATIONS WITH MORRIN AND "COORDINATION" WITH CONGOS IN THE INVESTIGATION OF MENOMINEE

In a letter dated April 30, 2002, Ms. Waukau wrote to Morrin, then the BIA Midwest Regional Office's ("MRO") Area Director. Ms. Waukau's letter states:

Dear Mr. Morrin:

As per our conversation today, this is a formal request from the Menominee Tribe that we indeed do want a formal review of the Menominee Tribal Enterprise contract performance. Whoever on this end needs to meet with your staff to assist in the development of the Review Plan, we stand ready to comply with that request.

I will contact David Congos to begin the coordination effort.

(Kanassatega Dec. Ex. 3.) (emphasis added). Congos was carbon copied on Ms. Waukau's April 30, 2002 letter to Morrin. (Id.)

C. MENOMINEE'S REQUEST TO INTERVIEW MS. WAUKAU

On February 14, 2008, Menominee's counsel conferred with the Legislature's counsel (William F. Kussel, Jr., Esq.) to determine whether Mr. Kussel would assert, as counsel for the Legislature, that he represented Ms. Waukau and, if so, whether she would agree to participate in an interview. (Kanassatega Dec. at ¶ 2.) Mr. Kussel affirmed that he represented Ms. Waukau. (Id.) Menominee's counsel then requested an opportunity to interview Ms. Waukau and engaged

in a discussion with Mr. Kussel as to the interview topics. (Id.) Mr. Kussel took the matter under advisement and stated that he would confer with Ms. Waukau. (Id.) The next day, on February 15, 2008, Mr. Kussel wrote to Menominee's counsel notifying him that "Chairman Waukau is declining your request to meet with her at this time." (Id. at Ex. 4.) (emphasis in original).

D. THE NOTICE OF DEPOSITION AND SUBPOENA TO LISA WAUKAU

On February 19, 2008, Menominee issued a Notice of Taking Deposition and Subpoena to Lisa Waukau. (Kanassatega Dec., Exhs. 5, 6.) Ms. Waukau accepted service of the Notice of Taking Deposition and Subpoena on February 22, 2008.

E. MS. WAUKAU OBJECTS TO THE SUBPOENA

On February 28, 2008, Mr. Kussel wrote to Menominee's counsel stating that he represented Ms. Waukau "in her official capacity as Chairperson of the Menominee Tribal Legislature." (Kanassatega Dec. Ex. 7.) He also advised that "Chairperson Waukau objects to the subpoena" on the ground of "Tribal sovereign immunity" and requested that Menominee meet and confer if Menominee was unwilling to withdraw the subpoena. (Id.)

In connection with Menominee's effort to set a date for a meet and confer, on March 4, 2008, Mr. Kussel requested a copy of the Waukau IAR, which Menominee promptly provided. On March 10, 2008, counsel for Menominee, Joshua Jay Kanassatega and Bryant Tchida, and counsel for Ms. Waukau, Mr. Kussel and John Wilhelmi, held a telephonic conference in an effort to resolve Ms. Waukau's objections to the deposition subpoena. (Kanassatega Dec. at ¶ 3.) Counsel were unable to reach an agreement, as evidenced by the Legislature's filing of this motion.

ARGUMENT

A. THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDE FOR BROAD DISCOVERY AND LIMITED GROUNDS TO QUASH OR MODIFY A SUBPOENA

Federal Rule of Civil Procedure 26(b)(1) provides for broad discovery and protects Menominee's right to seek discovery of any "matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b)(1). Moreover, Rule 30 provides that deposition testimony may be taken from "any person." Fed. R. Civ. P. 30(a). It is appropriate for Menominee to seek to depose Ms. Waukau because she is a person who possesses firsthand knowledge of discoverable matters.

Moreover, while this Court has authority to "limit the frequency or extent of discovery otherwise allowed by these rules or by local rule on three grounds, (see Fed. R. Civ. P. 26(b)(2)(C)(i – iii)), none of those grounds are applicable here. **First**, the Legislature has not asserted that the testimony sought from Ms. Waukau is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Nor could it do so in good faith, as Ms. Waukau is in the best position to testify about what she said and did not say to S.A. Schwartz, Morrin, Congos and Cox and what she meant by what she said or implied. **Second**, Menominee has had no opportunity to informally obtain the information from Ms. Waukau as she has declined to be informally interviewed. (Kanassatega Dec. Ex. 4.) **Third**, the facts outlined and applied in this memorandum show that the importance of this discovery outweighs any purported burden on Ms. Waukau.

Notwithstanding Menominee's broad discovery rights under Rules 26(b)(1) and 30(a), the Legislature asserts that it is entitled to a protective order to quash the deposition subpoena

issued to Ms. Waukau. However, the Legislature has failed to cite any one of the four provision(s) of Fed. R. Civ. P. 45(c)(3)(A) it relies on to move the Court to quash or modify a subpoena. In relevant part, the Legislature has not asserted that the Subpoena issued by Menominee: (i) “fails to allow a reasonable time to comply;” (ii) requires Ms. Waukau to “travel more than 100 miles” from where she resides; (iii) “requires disclosure of privileged or other protected matter, if no exception or waiver applies;” or (iv) subjects her to “undue burden.” Fed. R. Civ. P. Rule 45(c)(3)(A)(i) – (iv). Because the Legislature did not assert that it is entitled to relief under any one of the four provisions in Rule 45(c)(3)(A) within 14 days of issuance of subpoena, this Court must deny the motion outright, to the extent styled as a motion to quash. Fed. R. Civ. P. 45(c)(2)(B); Richter v. Mutual of Omaha Ins. Co., No. CV 05-498 ABC (PJWx), 2006 WL 1277906, at *3 (E.D. Wis. May 5, 2006) (objections not raised within 14 days of issuance of subpoena are waived); Angell v. Shawmut Bank Connecticut Nat’l Assoc., 153 F.R.D. 585, 590 (M.D.N.C. 1994) (holding that 1991 amendments to Rule 45 granting additional protections to subpoenaed parties “make it reasonable to construe the new time limits more strictly so that failure to timely file an objection will result in a waiver . . .”). To the extent that Court decides to consider the Legislature’s claim that it is entitled to relief on other grounds, namely a protective order based on purported tribal immunity, this Court should nevertheless deem that the Legislature has waived any argument based on any one of the four provisions in Rule 45(c)(3)(A).

B. TRIBAL IMMUNITY IS NOT APPLICABLE AS MENOMINEE HAS NOT BROUGHT SUIT AGAINST THE MENOMINEE INDIAN TRIBE OF WISCONSIN, THE MENOMINEE LEGISLATURE, OR MS. WAUKAU AS A MEMBER OF THE TRIBAL LEGISLATURE

Menominee does not dispute that, “[a]s a matter of federal law, an Indian tribe is subject to *suit* only where Congress has authorized the *suit* or the tribe has waived its immunity.” Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U. S. 751, 754 (1998) (emphasis added). However, even assuming, for the sake of argument, that tribal immunity³ applies to protect Ms. Waukau from fulfilling the testimonial obligation of every citizen of the United States, which it does not, the Legislature’s assertion is misplaced for three reasons.

First, MITW is not a party to this suit and it is not itself being sued. The subpoena served on Ms. Waukau is not akin to a lawsuit against her, MITW, or the Legislature. Menominee has not sought any recovery of money from the Tribe’s treasury or any property – it has not sought to compel the Tribe or its Legislature to do anything. Menominee has not sought an injunction either directing or restraining the MITW, the Legislature, or Ms. Waukau in the performance of any official duty she might possess as the current Chairperson of the Legislature. Moreover, Menominee has not sought the production of any documents in connection with the deposition subpoena issued to Ms. Waukau and neither the Tribe, nor its Legislature, makes any claim that Menominee has requested the production of Legislative records in connection with Ms. Waukau’s deposition.

³ In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., the United States Supreme Court omitted use of the word “sovereign” before the word “immunity” when it referred to the type of immunity possessed by an Indian tribe. Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U. S. 751, 754 (1998). Instead, the Court substituted the word “tribal” for the word “sovereign” and, thereafter used the words *tribal* immunity when it referred to the immunity possessed by an Indian tribe. Accordingly, Menominee will use the words *tribal immunity* throughout its Memorandum even though the Legislature uses the words *sovereign immunity* in its brief.

Second, Menominee’s research has revealed no on-point federal statute or any United States Supreme Court holding that tribal immunity is one of the exemptions that outweigh the public interest in the search for the truth (see United States v. Bryan, 339 U.S. at 331) or even applies to protect a sitting tribal official from giving deposition testimony as to allegations made by that individual at a time when he or she did not hold elective tribal office at the time the allegations were made. Perhaps the reason is that such a law or court decision falls outside the purposes for which the immunity doctrine applies, namely to protect the tribe from “trial and the attendant burdens of litigation.” Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 928 (7th Cir. 2008). This policy is not implicated by Menominee’s subpoena because neither MITW nor the Legislature are subjected to trial or its attendant burdens due to that subpoena. To hold otherwise would be not only a new exemption to providing evidence, but an overly broad application of tribal immunity to a circumstance to which it was never intended to apply.

Third, nothing on the face of Menominee’s notice of deposition or the subpoena to Ms. Waukau suggests that Menominee seeks to take this deposition in a capacity other than Ms. Waukau’s capacity as an individual fact witness. As illustrated above, the notice of deposition and subpoena were issued to her, in part, based on statements she made to a federal investigator at a time when she was *not* an elected member of the Legislature, based upon her conversations with Cox about his culvert investigation, and based upon her conversations with Morrin, along with her conversations and coordination with Congos in the federal investigation leading to the filing of this case. Presumably for strategic reasons, the Legislature’s brief is completely devoid of any reference to these relevant facts.

C. THE LEGISLATURE’S RELIANCE ON THE CATSKILL CASE IS MISPLACED

The Legislature relies heavily on Catskill Development, L.L.C. v. Park Place Entertainment Corp., 206 F.R.D. 78 (S.D.N.Y. 2002) in support of its claim that tribal immunity protects Ms. Waukau from giving deposition testimony. Catskill, however, failed to identify the correct law applicable to this issue because, among other things, it failed to analyze the issue under Bryan and Nixon. Accordingly, the result in Catskill, if applied to the Legislature’s motion, would have the effect of providing greater protection to a tribal official than would be given to a federal official in a similar circumstance. That result is untenable. Kiowa, 523 U.S. at 756 (“[t]hough the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident.”); Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng’g., 476 U.S. 877, 890 (1986) (because of the “peculiar ‘quasi-sovereign’ status of the Indian tribes, the Tribe’s immunity is not congruous with that which the Federal Government, or the States, enjoy.”); see also Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (the *tribal* immunity recognized by federal law is not coextensive with that of the States).

Catskill improperly relied on United States Environmental Protection Agency v. General Electric Co., 197 F.3d 592 (2nd Cir. 1999), which held that the enforcement of a subpoena *duces tecum* issued by General Electric to an individual in the office of the EPA Regional Counsel in New York City “would compel the EPA to act and therefore is barred by sovereign immunity” 206 F.R.D. at 87 (quoting General Electric, 197 F.3d at 597). The Catskill court’s analysis failed to account for the federal Administrative Procedure Act provision at issue in General Electric, or the limitations of tribal immunity. Indeed, to the extent that the holding in United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987) is a correct statement of the law, then an Indian tribe cannot assert tribal immunity as a

defense to federal process in the form of a deposition subpoena to an individual fact witness issued by this Court.

Catskill is called into further question because it constitutes an *expansion* of the tribal immunity doctrine, after the Supreme Court questioned the validity of that doctrine in Kiowa. While Kiowa instructs that this Court is bound to apply *existing* Supreme Court precedent regarding tribal immunity, expanding the doctrine into new territory – as requested by the Legislature here – is highly suspect, especially under the facts of this case. See Kiowa, 523 U.S. at 760 (“we decline to revisit our case law and chose to defer to Congress.”).

Finally, the fundamental premise underlying the General Electric courts’ analysis (and the court’s analysis in United States v. James, 980 F.2d 1314 (9th Cir. 1992)) is not applicable here. The subpoena at issue in this motion is not a subpoena *duces tecum* to Ms. Waukau or the Legislature. Thus, unlike in General Electric and James, where the EPA and the tribal entity would have been compelled to act, the Legislature is *not* “compelled to act” in response to Menominee’s deposition subpoena to Ms. Waukau. Catskill, 206 F.R.D. at 87. The Catskill court’s extrapolation from the reasoning in General Electric and James to its conclusion that a federal court cannot enforce a deposition subpoena issued to an individual fact witness who happens to also be a currently-sitting tribal official, is fundamentally flawed. Protecting the Legislature from compulsion to act pursuant to the tribal immunity doctrine is one thing, but preventing testimony by fact witnesses under the circumstances here is quite another. This Court should reject the Legislature’s invitation to expand the tribal immunity doctrine in such a broad and unfettered manner.

D. MS. WAUKAU IS A FACT WITNESS AND IS NOT ENTITLED TO TRIBAL IMMUNITY

The Government, by letter dated March 14, 2008, represented to this Court as follows: “. . . [t]he United States is likewise not aware of Ms. Waukau having any first-hand information relevant to the United States’ allegations in this case or the defenses raised by MTE.” (Kanassatega Dec. Ex. 8.) It is puzzling in light of the facts that the Government would take this position, particularly when its own investigator interviewed Ms. Waukau.

1. MS. WAUKAU’S INTERVIEW WITH S.A. SCHWARTZ

Ms. Waukau made allegations of Menominee mismanagement of the Roads Contract and Forest Contract to a federal investigator, S.A. Schwartz, during an official interview on March 12, 2003. (Kanassatega Dec. at Ex. 1.) At this interview, Ms. Waukau reportedly alleged to S.A. Schwartz, in part, that “. . . MTE had mismanaged the above contracts” (*Id.*) Ms. Waukau’s allegations involve the same contracts at issue in this lawsuit. (*See* Comp. at ¶ 18.) The Government’s Complaint details numerous allegations of wrongdoing by Menominee in the implementation of the Roads and Forest Management Contracts. (*Id.* at ¶¶ 35-76 and ¶¶ 93-146.)

Ms. Waukau herself states in her affidavit in support of the Legislature’s motion:

That she 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.

(Waukau Aff. at ¶ 5.) Ms. Waukau was not, therefore, a member of the Legislature on March 12, 2003, the day she sat for an interview with S.A. Schwartz (and perhaps spoke with other government agents such as Congos and Morrin, or other third persons such as Cox) regarding allegations of Menominee’s mismanagement of the contracts at issue in this case.

Furthermore, the Government has produced no document indicating that Ms. Waukau was under any federal compulsive process on March 12, 2003 when S.A. Schwartz interviewed her. To the extent Ms. Waukau voluntarily agreed to meet with S.A. Schwartz on March 12, 2003 to be interviewed and made allegations of contract mismanagement against Menominee during the Government's investigation, the Court should not allow her to use prior or subsequent events – her prior office or current election to public office – to deprive Menominee of the right to explore the basis for Ms. Waukau's statements and allegations. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (citing Puyallup Tribe, Inc., 433 U.S. at 171-172).

2. MS. WAUKAU'S CONVERSATIONS WITH COX ABOUT HIS CULVERT INSPECTIONS

Ms. Waukau's conversation(s) with Cox about his culvert inspections are also the proper subject of deposition testimony in this case. Indeed, Cox testified that he conducted this inspection at the behest of OIG. What Cox said to Ms. Waukau about those inspections could be highly relevant to these proceedings. For example, Mr. Cox testified as follows:

A: There were inspections of culverts after the permits were issued, yes.

Q: And is that the follow-up inspection?

A: No. There was a request for an inspection of culverts that was made.

Q: Who made that request?

A: The Office of Inspector General.

Q: Office of – United States Department of Interior?

A: Yes.

Q: And how did that request come to you?

A: That request came to me through Mr. Congos.

(Kanassatega Dec. Ex. 2, at 128:5-16.) (Emphasis added).

In contrast to Cox's testimony, Congos testified as follows:

A: I don't recall if I asked Mr. Cox to conduct culvert inspections. I was aware that Mr. Schwartz wanted him to, and either he asked him -- I believe -- and my belief is he did, and after he asked Mr. Cox to perform that, I did give him some information about culvert locations. But I did not personally ask him to go and do that work.

(Kanassatega Dec. Ex. 9, at 139:25-140:7.) (Emphasis added).

S.A. Schwartz could not recall whether he asked Cox to conduct these inspections.

Q: Did you ask Cox to do anything specifically?

A: I don't know if I asked Cox or Dave Congos. I'm not sure which one. I don't know.

(Kanassatega Dec. Ex. 10, at 175:2-4.)

At a minimum, Ms. Waukau's recollection of her conversation(s) with Cox about these culvert inspections may lend support to either Cox's or Congos's version of the story, to the extent that Cox told her who asked him to conduct the culvert inspection at issue. Menominee is entitled to explore these issues in discovery. Furthermore, the jury is entitled to hear that testimony, as both Cox and Congos's credibility will be a central issue at trial.

3. MS. WAUKAU'S CONVERSATIONS WITH MORRIN AND "COORDINATION" WITH CONGOS TO INVESTIGATE MENOMINEE

Ms. Waukau's April 30, 2002 letter to Morrin and conversations with him illustrate that her involvement with Congos's and BIA's investigation of Menominee is not limited to actions she took as a tribal legislator. Menominee is not seeking to depose Ms. Waukau about why she voted a certain way, or as to any legislative deliberations or resolutions about whether Menominee should be investigated. Menominee is, however, entitled to ask Ms. Waukau about her conversations with Morrin and her conversations and "coordination effort" with Congos to

investigate Menominee's performance under its federal contracts. The Legislature was not a party to these contracts. Any investigation of Menominee with respect to these contracts under 18 U.S.C. § 1001 or the federal False Claims Act was solely the province of the Federal Government and does not implicate Menominee law or tribal governance in any respect. (Kanassatega Dec. Ex. 11.)

What Ms. Waukau told Morrin and Congos is relevant to, among other things, the equipment purchases, garage construction, indirect to direct cost transfer, and RFAR, at issue. Congos's and the BIA's knowledge, including what they knew and when they knew it, are important to the issue of whether the Government's claims regarding these matters are barred by the ISDEA.

Pursuant to the ISDEA:

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to October 19, 1984, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 450m-1 of this title. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of Title 31, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 476 of this title.

25 U.S.C.A. § 450j-1(f) (emphasis added).

The facts in this case will show that the Secretary failed to give notice to Menominee of any disallowed costs within 365 days of the annual single audit reports for the contracts at issue. The evidence will also show that the pertinent contracts were closed out after these annual single

audits, without complaint about Menominee's capital expenditures, transfer of indirect cost funds to direct costs, or accumulation of the RFAR account.

The Government's claims relating to Menominee's Federal 93-638 contracts (*i.e.*, ISDEA contracts) premised on alleged improper cost expenditures (*i.e.*, relating to purported disallowed costs), are thus presumptively barred by ISDEA Section 450j-1(f). 25 U.S.C. § 450j-1(f); accord Appeal of Papago Tribe of Arizona, IBCA No. 1962, 1990 WL 169271, at 2 (I.B.C.A. May 29, 1990); Appeals of Cheyenne-Arapaho Tribes of Oklahoma, et al., IBCA No. 3995, 2002 WL 31055507, at 12-13 (I.B.C.A. July 15, 2002).

Menominee understands the Government's contention to be that these claims are not barred because it had no knowledge of the purported improper costs until OIG discovered the issue after the contracts had been closed. Although Menominee disagrees those facts would, if true, save the Government's fatally-defective claims, Menominee believes that the communications between Congos and Ms. Waukau will reveal that Congos, and by extension BIA, had knowledge of the equipment purchases, garage construction, indirect cost to direct cost transfer, and RFAR long before OIG purportedly discovered the issue.

Ms. Waukau's communications with Congos and Morrin are relevant for a separate reason. "The government's prior knowledge of an allegedly false claim can vitiate a FCA action." U.S. ex rel Durcholz v. FKW Inc., 189 F.3d 542, 544-45 (7th Cir. 1999) (citation omitted). "If the government knows and approves of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA." Id. at 545. In other words, "[s]ince the crux of an FCA violation is intentionally deceiving the government, no violation exists where the government has not been deceived."

U.S. ex rel Lammers v. City of Green Bay, 998 F. Supp. 971, 998 (E.D. Wis. 1998). Thus, “[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.” 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)).

Menominee believes that discovery will reveal sufficient facts to support the application of this doctrine. There is a long history between Menominee, Congos and BIA with respect to the invoices at issue, including attempts to reach a common solution to perceived problems. This history spans the course of years, and culminated in BIA directing Menominee to *re-submit* the invoices at issue in March and April 2002, long after Menominee had originally first submitted the invoices, and after the BIA implemented a new invoicing “policy” in February 2002. (Complaint ¶ 38.)

According to Ms. Waukau’s letter to Morrin, she began coordinating with Congos in April 2002, some two months before OIG prepared its case initiation report. (Kanassatega Dec. Ex. 11.) The communications she had with Congos before, during, and after April 2002 about alleged Menominee misconduct are probative to the issues of what Congos knew, when he knew it, and the perceived “benefits”⁴ that the investigation of Menominee would bring (motive). Any admissions Congos may have made to Ms. Waukau in the course of their joint effort are also relevant. Moreover, upon information and belief, Ms. Waukau also had communications with Congos about alleged Menominee misconduct prior to April 2002. Those communications are relevant. Again, what did Congos know, when did he know it, and what were his motives.

⁴ See Docket No. 46, Exhs. 21 and 23 for examples of the “benefits” Congos expected to be realized by the investigation leading to this lawsuit.

The Government itself relies upon a communication written by a former Chairperson of the Legislature in its Complaint. (Complaint at ¶¶ 43-44.) Ms. Waukau, like her predecessor in office, is a fact witness with respect to matters at issue in this case. Simply put, she was a willing participant in a federal investigation, by conducted by federal authorities, under color of federal law. Irrespective of whether the Legislature did or did not authorize Ms. Waukau to “coordinate” with Congos, her actions have made her a fact witness to Congos’s knowledge and the investigation upon which the Government’s claims in this case rest. No one is in a better position to testify about Ms. Waukau’s communications with Congos and others than Ms. Waukau herself.

Menominee, this Court and the jury are entitled to the truth about what has happened here. Ms. Waukau is a piece of that puzzle. The Court should not endorse a course of action that prevents the truth from coming to light.

CONCLUSION

Tribal immunity was never intended to shield individual tribal members from giving fact testimony in connection with a federal judicial proceeding or to make an exemption from an individual’s right to “every man’s evidence.” Nor was it intended to shield a sitting tribal official from giving deposition testimony about conduct in which he or she voluntarily engaged that gives rise to firsthand knowledge of facts relevant to a case. While tribal immunity may protect an Indian tribe from suit in the courts of another sovereign when such a suit is not authorized by Congress or waived by the Indian tribe, that is not the factual posture of the issue before this Court. Moreover, none of policies and interests underlying tribal Immunity are

served by the result pressed by the Legislature here. Accordingly, Menominee respectfully requests that the Legislature's motion be denied.

DATED: MARCH 27, 2008

/s/ Joshua Jay Kanassatega
Joshua Jay Kanassatega (MN #211254)
Bryant D. Tchida (MN #314298)

LEONARD, STREET AND DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

**ATTORNEYS FOR DEFENDANT
MENOMINEE TRIBAL ENTERPRISES**