Nos. 10-2676 and 10-3599

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

Appeal of the July 14, 2010 Order
from the United States District Court
for the Eastern District of Wisconsin
Case No. 07-CV-316
Hon. William C. Griesbach

BRIEF AND SHORT APPENDIX OF DEFENDANTS-APPELLANTS MARSHALL PECORE AND CONRAD WANIGER

Dated April 1, 2011

REYNOLDS & ASSOCIATES

Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833
407 East Main Street
Madison, WI 53703
608/257-3621 (tel)
608/257-5551 (fax)
greynolds@reynlaw.net

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 07-cv-316

Short Caption: United States of America v. Marshall Pecore, et al.

1) The names of parties are Marshall Pecore and Conrad Waniger.

2) The names of the law firm appearing for the parties in the case is:

Reynolds & Associates
Glenn C. Reynolds
Wade Max Williams
Rebecca A. Paulson

3) If the party or amicus is a corporation: NIA

Identify all of its parent corporations, if any: NIA
List any publicly held company that owns 10% or more of the party's or amicus' stock: NIA

Reynolds & Associates is listed as counsel of Record for the above-named parties pursuant to Circuit Rule 3(d).

Dated April 1, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds

Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833
407 East Main Street
Madison, WI 53703
608/257-3621 (tel)
608/257-5551 (fax)
greynolds@reynlaw.net

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction as a civil action arising under the laws of the United States pursuant to 28 U.S.C. 1331. This appeal is taken from the final decision of the U.S. District Court for the Eastern District of Wisconsin entered on June 15, 2010 by the Honorable William C. Griesbach. The United States Court of Appeals has jurisdiction to decide this case pursuant to 28 U.S.C. §1295. The Notice of Appeal was filed with the District Court on July 14, 2010. Defendants are not pursuing an appeal of the October 12, 2010 order of the trial court pertaining to costs.

ISSUES FOR REVIEW

Issue 1: Does the Government have the burden of proof the show that it had substantial justification to proceed with a false claims action that it lost at a jury trial?

Standard of Review: De novo as a question of law

Issue 2: Did the trial court abuse its discretion in finding that the Government had a substantial basis to proceed with the false claims action against the Defendants when the Government failed to prove evidence of "a lie?"

Standard of Review: Abuse of Discretion

Issue 3: Did the trial court err as a matter of law in determining that the Government had a substantial legal justification to hold tribal officials, acting in their official capacities, individually liable for actions taken on behalf on an Indian tribe that was immune from suit?

Standard of Review: De novo as a question of law

Issue 4: Did the Government have a substantial basis to connect the facts it proved at trial to a "false claim"?

Standard of Review: Abuse of Discretion

Issue 5: Did the Court err as a matter of law in failing to sanction the Government for refusing to answer Requests for Admissions that Menomonee incurred reasonable expenses for fire prevention work that justified the contested invoices when the Defendants proved the truth of the Requests at trial?

Standard of Review: De novo as a question of law

I. STATEMENT OF THE CASE

On April 3, 2007, following seven years of investigation, the United States Government filed a civil False Claims Act suit against the Menominee Tribal Enterprises ("Menominee"), the principal business arm of the Menominee Indian Tribe of Wisconsin, and two of its key employees Marshall Pecore and Conrad Waniger ("Defendants"), Menominee's Forest Manager and Fire Management Officer respectively. The Government alleged that in 2000 and 2001, Menominee and the Defendants created "false records" to support "false" invoices to bill the Government under self-determination grants for fire prevention work in the Menominee forest that "was never done" or "inadequately performed." The individual Defendants filed an Answer and counterclaim alleging that substantial fire prevention work was done in the forest according to the same standards that Menominee had followed for decades.

In June 2008, Menominee and the Defendants filed motions to dismiss on the grounds, that neither the tribe nor its representatives acting in their official capacities was a "person" under the False Claims Act and were immune from suit. The district court dismissed Menominee on the grounds that a tribal entity was not a "person" within the meaning of the Act, but denied the Defendants' parallel motion on the grounds that the Government was not suing them in their "official capacities."

All parties also filed separate summary judgment motions based on the merits of the case. In spite of photographic, forensic, physical and testimonial evidence produced by the Defendants proving that extensive fire prevention work was done to justify the

invoices submitted to the Government, the district court denied all summary judgment motions and the case proceeded to trial.

At the conclusion of a nine-day trial in October 2009, the jury returned a unanimous verdict in favor of Defendants after deliberating less than three hours. The jury rejected 24 potential findings of "false records" and 24 potential findings of "false claims" for each Defendant.

As the prevailing party, Defendants moved for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). The court denied the motion on the grounds, that the Government was legitimately confused by the Menomonee billing practices and did not act in bad faith, and because it had previously denied Defendants' Motion for Summary Judgment and Motion to Dismiss at the close of the Government's case.

Defendants now appeal, contending that the district court abused its discretion in finding that the Government had a substantial basis, and that it applied the wrong legal standards in deciding this question.

II. STATEMENT OF FACTS

A. The Origins of the Menominee Tribe

Several times throughout the course of these proceedings, the district court questioned the wisdom of the Government's case:

> During the course of this case, **I have also acknowledged that the government's case against Pecore and Waniger may not be a wise use of government resources – spending nearly a decade of time and effort to attempt to prove false claims totaling only a few thousands of dollars.** Even if the government's exercise of prosecutorial discretion was

> questionable, however, that does not necessarily mean it had no reasonable basis to bring the lawsuit.

(Dkt.#369, pg.5).

The history between the Bureau of Indian Affairs ("BIA") and the Menominee Tribe begins to shed some light on the court's quandary. The Menominee Tribe have lived in Wisconsin from "time immemorial," and in 1854 obtained a 230,000 acre reservation "for a home, to be held as Indian lands are held. . . . a reservation for their way of life." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968). The Menominee land and its forests were to be "governed by them according to the customs, laws, rules, and regulations of the tribe without any outside interference by state or anyone else." *Menominee v. United States*, 388 F.2d 998, 1001 (Ct.Cl. 1967).

For the next 120 years, the Tribe struggled to maintain their sovereign rights in the face of outside political and economic forces which sought to exploit and control their forest resources. In the 1890s, the BIA advocated clear-cutting, which resulted in the destruction of the vast sections of the forest. Slash piles left after clear-cuts dried out and burned caused catastrophic fires and huge losses. *Menominee v. U.S.*, 91 F.Supp. 917, 919 (Ct.Cl. 1950).

This dark period led to the passage of the LaFollette Act of 1908, which sought to preserve the forest resources in perpetuity for the Menominee people. But two years after the Act passed, the BIA again promoted clear-cutting of the forest resources, which, between 1910 and 1922, caused massive deforestation, catastrophic fires and severe damage to the forest resources. *Menominee*, 91 F.Supp. at 921-926. The Court of Claims

ultimately awarded the Tribe an $8.5 million judgment for the Government's breach of trust responsibility and total disregard to the sustained yield concepts embodied in the LaFollette Act. Congress approved the settlement, but terminated the Menominee as a "recognized" tribe as a condition of payment. *Menominee v. U.S.*; Cong. Ref. 93-649 (1997).

The Tribe was restored to federal status in 1974 and created a business arm – Menominee Tribal Enterprises ("MTE" or "Menominee"). Unlike other Wisconsin tribes, Menominee lands had never been divided and privatized under the General Allotment Act of 1887. The profitability of the Tribe's sawmill was a big factor in this outcome.[1]

B. Federal Funding for Fire

Until 1992, fire control on the reservation had been under state jurisdiction. The BIA provided partial funding for fire prevention work as part of the Government's trust responsibility to protect the trust resources – the forest. (Trial Transcript, October 19-29, 2009, pg. 61:21-25)[2]. Federal policies of self-determination, however, gave the Tribe great latitude to decide to how to spend the money. (TT:60:10-13). The Tribe and the Government were committed to work together to preserve the forest resources for the Menominee in perpetuity.

1. Subsidiary Grants

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[1] *See* Patty Loew, INDIAN NATIONS OF WISCONSIN, 30-31(Wisconsin Historical Society Press 2001) (2001).

[2] Hereinafter the October 19-19, 2009 Trial Transcript will be cited to as TT:61:21-25.

Menominee took over fire control responsibility from the State in 1992. (TT:1938:14, 18-21). Three departments were important in carrying out the function of fire prevention and suppression: the Forestry Department headed by Marshall Pecore, the Fire Department, headed by Conrad Waniger, and the Roads Department. The Menominee, would decide on appropriate fire projects for a year, apply for grants, and implement the work through the roads crew foreman and forestry staff. (TT:1938:25-1939:1).

Two areas of the Reservation were high risk because they had residential areas located near highly flammable pine stands: the "Jackson Creek" and "the Lakes" area, which consisted of two nineteen mile stretches of dirt road. (TT:1315:2-9). In 1999, Waniger filed an application for a "subsidiary proposal" for brushing and grading of fire access roads and fuel breaks in the Jackson Creek and Lakes areas. (TT:1956:16-25). This proposal called for the Tribe to target high risk areas with the objectives of brushing and grading and disking defined miles of the existing roads for fire access and fuel breaks. (TT:1333:19-21).

The primary component of each grant application was "expense reimbursement" – to pass on to the Government the actual expenses incurred in doing the work. (TT:1953:5-9). This was not a typical government contract where the provider of services would make a profit and the Government was the "customer." (TT:248:12-21). The Tribe, not the Government was the beneficiary of the fire prevention work. At the end of the fiscal year, the grant required the Tribe to show "accomplishments," in the form of narratives and maps describing acres or miles of road "treated" under the fire

program. (TT:1953:24-1954:1). Unlike normal commercial contracts, "accomplishments" were never used as a basis for billing the Government. They were sent to the BIA to secure funding for future years by demonstrating past benefits. (TT:1953:15-17).

2. Hazardous Fuels Program

In 2000, the Federal Government announced a new program – the Hazardous Fuels Reduction Program ("HFR") – that would phase out the subsidiary program. (TT:1319:2). The HFR was funded by Congress in part to address raging western fires caused by the accumulation of dead trees in remote areas. (TT:1762:8-18). Due in large part to its unique forest management practices including the diversification of forest species, the Menominee Forest had different, more cost effective, strategies to fight fires than out west. (TT:1763:17-20).

The BIA encouraged Menominee to apply for the funds. (TT:1961:2-6). Waniger applied for and received the HFR funding using identical goals and objectives from the Subsidiary proposal the previous year. (App. p.176-190). He estimated that Menominee expenses to do the work would cost $480 per mile. Work began in December 2000 - January, 2001. Ross McNeel was Menominee's first civil engineer who was assigned to do the HFR work. (TT:1980:7-10). McNeel used a large multi-arm buzz saw with whirling blades fitted to a front end loader, known as the "Alamo." (TT:1982:1-2). The men were not used to the machine which moved quickly but imprecisely through the forest, cutting limbs and stumps in a haphazard manner, leaving a mess behind. (TT:2005:9-12). Waniger instructed John Cooper to assess the work and make

recommendations of what needed to be done to bring the work up to Menomonee standards. (TT:2005:22-2006:1). The end goal was to make access roads wide enough to bring in bulldozers; improve the road surface by putting gravel in low soft spots; placing culverts in water ways; and removing slash or cut branches either by chipping the brush or piling the brush and burning the piles during the winter. (TT:1793:3-9).

C. The Redo Phase

Waniger conferred with BIA forester David Congos about the project and committed Menominee to "redo" at its expense, all nineteen miles in the "Lakes area" of the Reservation on Invoice 200, for which the BIA had paid the Tribe the $8,707.00. (TT:2010:16-20). The Tribe, however, would charge the BIA for the outstanding invoice on the nineteen mile stretch in "Jackson Creek" on Invoice 212, which was billed for $8,550.00.

The plan was to "redo" these roads, billing by the mile of "treated road" in subsequent monthly invoices. (TT:2011:16-17). Since Congos was pushing for "new accomplishments" to assure future funding, it was agreed that "new accomplishments" would be billed as "expenses" (wages and machine hours) and "redos" would be billed at $450 per mile as partial completion. (TT:2012:8-10). The balance of the $480 per mile fixed rate would be paid when the brush piles were burned the next winter. Waniger came up with the per mile billing rate as a means to capture expenses for the work. (TT:2011:9-12).

During the redo phase of the project, Menominee realized that it could not afford to do the project at $480.00 per mile. (App. p.168). Waniger wrote a memo to Sean

Hart, the fire manager in the Minneapolis region, suggesting a number of methods for allowing Menominee to recover the cost of doing the fire access work. (App. p.196-197).

One method was to charge the Government at a fixed rate for lengths of *treated* (i.e. not necessarily completed) road. At trial, all the BIA witnesses confirmed that Menominee would be reimbursed for its actual expenses along these roads even if the same road had to be redone to meet the objectives of the grant proposal. (TT:305:2-10; 388:4-16).

D. Stumpage

At the time these projects were underway, a BIA forester and chief witness in this case, David Congas, threw himself into an internal tribal dispute on "stumpage." Due to the desire for MTE to be competitive with outside logging operations, the Tribe did not require the Mill to pay for "stumpage" - or the fair market value of the logs processed in the Mill and sold on the open market. The question of whether the Mill should pay tribal members for "stumpage" became the single most divisive political question on the reservation.

Congos believed strongly the sawmill must pay tribal members for the timber that was cut in the forest. (TT:509:1-3). If the Mill was too inefficient to carry its own weight, it should be shut down. He fought against those who were opposed – including Marshall Pecore. (TT:509:1-2). Congos apparently "didn't like" Pecore and advocated for his removal. (TT:1296:8-14).

Menominee employees were so upset with Congos' political tactics that in August 2002, the President of MTE, Larry Waukau, ordered MTE staff not to communicate with

Congos. (TT:1290:1). Waukau told Congos to drop the idea, or he would seek a new BIA representative. Congos took great offense to this "threat," which changed his entire relationship with Menominee and its staff.

In a later memo to the BIA describing his investigation which led to this lawsuit, Congos stated:

> Until late February 2001, my relationship with Menominee seemed amicable, professional and cooperative …This relationship between myself and Menominee changed dramatically on February 20, 2001 when I met with Lawrence Waukau, Menominee President and Marshall Pecore, Menominee Forest Manager. This meeting was in follow up to my letter regarding accountability for the stumpage value of timber cut by Menominee. . . .During this meeting I was threatened by Waukau and Pecore as they attempted to coerce me into dropping my concern over stumpage value accountability. . .

(Dkt.#306).

The trial evidence showed that Congos' animosity toward Marshall Pecore tainted the objectivity of his investigations as he fervently recommended removing the "thugs" from power at MTE. (Dkt.#345, 278).

E. Invoice investigations

As Congos pushed his agenda on the stumpage dispute, pro-stumpage Menominee employees relayed "rumors" that work was not up to par on the HFR Invoices. (Dkt.#379). Congos began writing memos to Pecore, asking for "accomplishment maps and reports" showing where work was done, in addition to time cards and other materials. (TT:1490:10-13). "Accomplishment maps" were hand drawn maps created by the road crew and had never been used as a basis for billing. (TT:1953:15-17). In February, 2002, after reviewing the documentation provided by Pecore and Waniger, Congos wrote

a memo to the regional office alleging that Menominee and its managers have committed fraud on the Government by billing for work that was never done. At the end of the memo, Congos wrote, "Shall we tell them?" (App. p.251).

F. Auditor Meeting

In January 2001, after receiving no payment on invoices for over one year, Larry Johnson, head of MTE Accounting , requested an auditor, Jason Hilger, to help resolve the impasse. A meeting was held with Congos, Pecore, Waniger, road crew foreman Myron Grignon, and the administrative staff who put the actual invoices together. Hilger testified that at the end of the meeting Congos agreed that the invoices would be paid on an "expense basis" as long as the Tribe would reduce its current expenses to the original estimate for the project of $65,000.00. (TT:1923:23-1924:4). Congos insisted, however, for Pecore and Waniger to sign certifications that the invoices were true and correct. (App. 198-199)(TT:1923:14-18).

Waniger included in the invoice packages detailed memos explaining the basis for the work and the rationale for the billing. (App. 170). The Defendants saw this as one more hurdle to get the invoice issues resolved and move on. They were wrong.

As soon as the ink was dry on the certifications, Congos began his second round of invoice inspections and his collection of 191 photographs, later used at trial, that he believed showed "fraud, waste and abuse." (App. p.253-254). Congos used the photos to create a series of maps for trial that showed different interpretations of the supposed fraud: from "no work done" to "work unacceptable" to " no fuel reduction work." (Dkt.#345, Trial Exhibit, 80-86). Neither MTE staff nor the auditor was informed of

these fraud theories, and had relied on Congos' commitment to recommend payment of the invoices upon signing the "certifications."

Congos' allegations of "fraud waste and abuse" caused the Government to go into "investigation mode" where it stayed for seven years. Congos vehemently advocated that the investigation be pursued vigorously through memos to the OIG investigator, the AUSA and to the BIA. (App. p. 247-261). As soon as the criminal investigation passed, Waniger went to the office of AUSA Chris Larson offering to sit down and answer any questions to resolve the investigation. He was briefly interviewed and then shown the door. (TT:2168:4-22).

III. THE CIVIL ACTION

On April 3, 2007, the United States brought a 38-page Complaint against MTE, Pecore and Waniger. (Dkt. #1). The Government alleged that Defendants knowingly presented "false or fraudulent claims" to the United States through the BIA, and used "false records" to get a false claim paid by the United States, in violation of the False Claims Act, 31 U.S.C. §§ 3729(a)(1) and (2). The Complaint alleged that Menominee sent nine invoices to the BIA for work to cut and establish "fuel breaks" and access roads and that Congos "spot-checked" several areas identified on "accomplishment maps" and concluded that "work that had not been performed," and Defendants "double or triple billed in multiple invoices" for the same work. (Dkt.#1, ¶¶119-123; 141-144) (emphasis added). The Complaint further alleged that there were false HFR invoices for prescribed burns based on fraudulent use of Menominee time cards.

The Government also alleged that Defendants "knowingly made and used or caused to be made and used false records or statements to get the false claims paid." (Dkt.#1, ¶172). Specifically, the Government alleged the use of "false records, including false invoices, accomplishment maps, and other documents described in this complaint to get false claims paid." *Id.*

Pecore and Waniger filed a counterclaim that the Government's agents knew or should have known that the fire prevention work was done and that any mistakes in preparing the invoices by Menominee staff in the Accounting Department were "unintentional." (Dkt.#37,¶4 and #38,¶4).

A. Pretrial Proceedings

1. Summary Judgment Decision

The Defendants moved to dismiss the False Claims Act on the grounds that an Indian tribe is not a "person" under the False Claims Act, and that since Pecore and Waniger were acting in the scope of their employment in certifying the fire prevention work, they too were protected by immunity. (Dkt.#180). Pecore and Waniger also moved for summary judgment on the grounds that legitimate expenses were incurred, that the Government's complaints were based on a contract dispute with Menominee, and that the Government knew the fire prevention work was done according to Menominee traditional guidelines and standards. (Dkt.#182).

The trial judge ruled that although Menominee was not a "person" under FCA, the individuals could be found liable under the FCA because they were not "sued" in their official capacities. (App. p.140). The court then either discounted or misunderstood the

extensive evidence that explained the rationale behind Menominee's billing practices, and that proved that a substantial amount of fire prevention work had been done.[3]

The court concluded that the Government's case "is a strong one," believing that the Menominee "draft[ed] invoices for phony miles" (App. pp.150, 142). The trial court also rejected the Defendants' contention that this was a dispute over standards of how the work was performed, and believed that the Government could prove "a complete lack of performance that would fail under any standard." (App. p.147).

2. Discovery Disputes

In the months leading up to trial, the Government tried to stop the defense from gathering videotape evidence that proved the Government's 2002 road inspections were wrong. The court sided with the Government, contending Defendants should have done the evaluations earlier. (App. p.108). Nevertheless, Defendants began filming each stretch of the road that the Government claimed was untreated and made a desperate plea for the court to admit the evidence in order to prevent a miscarriage of justice. (App. p.236). One week before trial, the court reversed his ruling and allowed the Defendants to present the exculpatory evidence. (Dkt.#339).

About three weeks prior to trial, the defense discovered employee time sheets and activity codes showing precisely where employees worked in the forest and what work they were doing for each invoice. Copies of these documents were immediately made available to the Government with a request to search its files and establish that

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[3] (*See* App. p.160-234).

Menominee had indeed incurred expenses to justify the invoices. (Dkt.#339). Defendants also requested the Government's lawyer, Chris Larsen, personally inspect the road segments before proceeding to trial because it was readily obvious as evidenced on the videos that substantial amounts of fire prevention road work was done. (App. p.236). He refused.

IV. TRIAL

A jury trial commenced on October, 19, 2009. In opening statements the Government promised that it would prove that either no work was done or was done so poorly as to not meet any standard:

> Mr. Congos will testify regarding his findings; first, that there were about 50 miles of road which Menominee claimed to have been brushed which were not, in fact, done, but were done so poorly, again, that it increased the fire risk in the forest. Two, that some segments of road were billed for brushing on two or more invoices. Three, that about a hundred miles of road were claimed to have been graded but were not, in fact, graded. And there were ten culverts -- the fourth thing is there were ten culverts included on those invoices which had not been installed.

(TT:16:6-17).

A. Government's Witnesses

At trial, the Government called thirteen witnesses. First, with respect to billing procedures, BIA employees Sean Hart and Andy Bellcourt confirmed Waniger and Pecore's contention that the federal grants called for expense billing as opposed to a per-mile charge for roads. (TT:388:12-16). They also confirmed that the BIA would reimburse MTE expenses for going over the same road different times, and that contracts were for time and materials, not fixed bid contracts for a completed road. (TT:388:4-11). Neither witness had any information about whether fraud was committed but both had

professional respect and admiration for both Marshall Pecore and Conrad Waniger. (TT:365:5-15).

With respect to time cards, several MTE employees testified that they worked in forest management but were told to bill their time for "fire," specifically, "presuppression." Waniger later explained that this was due to an internal agreement at MTE between departments. (TT:2126:16-20, 23). The Government did not understand until trial that MTE employed this accounting method in order to refund the Forestry Department for wages it had paid to its employees while they were off-reservation fighting fires for the BIA. (TT:2129:1-5). The BIA would send in replacement wages to the Menominee Fire Department months later. (2123:17-23). Rather than refund these forestry wages directly to the Forestry Department, Waniger simply requested the forestry workers bill their forestry work to "presuppression" until the balance of wages between the two departments equalized. Menominee's auditor, Wayne Link, testified that this practice was legitimate. (TT:1903:20-21).

Only one of the MTE employees, Greg Van Orsow, testified that he was informed by Waniger to bill his time not for general fire suppression, but for "prescribed burn." Van Orsow's testimony at trial, however, contradicted his earlier statements to the Federal Government in which he indicated that it was John Cooper, Waniger's assistant, who told him to bill his time to "fire," but never mentioned being told to bill his time to "prescribed fire." (App. p.342). Neither Waniger nor Pecore realized this apparent error on Van Orsow's part until the Complaint was brought and they saw the actual accounting

records. (TT:2123:6-7). Had the Government spent time discussing this issue with MTE, it would have discovered the rationale for the time card shift.

The Government's case at trial shifted from "no work done" to "not the right kind of work done" to the fuel breaks were too narrow." But the Government's witnesses did not agree on how big "fuel breaks" should be. BIA fire chief Sean Hart testified that fuel breaks should extend three to four feet off roads, and later said ten feet. (TT:51:3; 85:16-23; 87:10-15). Hart testified that the well-accepted standard "should be three times the expected *flame height*, but they also, in our guide it said *fuel height*." (TT:178:15-20; 196:2-3). He then suggested three times the flame length "is another standard that is often used." (TT:196:9-12).

Others disagreed. Congos believed the correct standard was "four times" the standard vegetation height. (TT:490:4-14). Thomas Magnuson, a 29-year BIA forester, believed that there was *no* firm standard but testified that the written standard was "1.5" times the height of the fuel. (TT:984:16-20;985:22-23). Andrew Bellcourt, 30-year BIA forester, testified that a fuel break is generally "three times" the height of vegetation. (TT:340:15, 18, 20;350:18-22). Astoundingly, Congas denied that there was any reason for anyone with fire experience to be confused over what the standards were for creating fuel breaks. (TT:502:3-6).

The witnesses revealed further confusion over the type of fire Menominee was working to prevent. Hart testified that the funding was to prevent mid-level fires. (TT:273:20-23). Lyle Carlyle, BIA forester essentially agreed, testifying that the BIA does not fund plans for the worst case scenario, but for the type of fire that creates

problems with suppression. (TT:2284:18-22). Congos, however, believed the main goal of the proposal was preventing "*catastrophic* wildfires". (TT:826:7; 19-21).

Finally, the witnesses disagreed over whether an "access road" could also serve as a "fuel break." Hart testified it could. (TT:91:13-14; 278:20). Carlyle testified it could not. (TT:2284:7-12). Yet he later said a twelve foot access road with mineral soils exposed could indeed act as a fuel break for small fires. (TT:2299:14-18). And, while having quick access and maintaining roads is a "key fire fighting strategy" according to Hart, Congos still believed that the funding was purely for creating "fuel breaks". (TT:500:1-15).

Virtually the only concept the Government's witnesses concurred on was that communication between the BIA and the Menominee fire prevention team is vital. Hart agreed that it is important to go into the field to make sure everyone is on the same page with a new program. (TT:229:5). Congos said that if there is "discommunication" it is important to sit down and have some open dialogue and discuss the issue. (TT:703:20-23). Magnuson testified that when the BIA is concerned that project standards are not being met, "We talk about it." (TT:994:4). Yet the allegation of "fraud" apparently prevented the BIA from having such a dialogue in this case.

B. Defendants' Witnesses

1. Worker testimony

Seven Menominee employees testified as to the work they did for MTE during 1999-2001.[4] They each testified that their objective was to create "fire lanes" that would accommodate emergency equipment in case of a fire, and also to create "fire breaks" to keep fires from spreading. (TT:1060:8-18;1661:1-7;1796:17-18;1800:13-15;1823:13-15;1854:4-13). Robert Delabrue, an sixteen-year MTE road grader, testified that when they began brushing the roads, "a small car could barely go through … it was like a tunnel is what it looked like." (TT:1610:21-24). When they were finished, as fifteen-year MTE dozer operator Edward Otradobec testified, semis could fit through. (TT:1647:19-11).

Machinery driver Kendall Madosh testified that the process to make a road drivable included brushing, clearing the brush, bringing in dozers to "rough it up," and then bringing in graders to do the fine work. (TT:1778:2;1793:10-14). Eugene Wescott, a fifteen-year Menominee road grader, testified that he had to go over roads with the grader two to four times before they were complete. (1799:19, 22;1812:23-25). The workers testified to putting in between 10-20 culverts over a two year period. (TT:1833:5-6;1873:23-74:1).

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[4] This evidence was also presented to the court in Defendants' summary judgment via six worker affidavits which indicated where and when they did fire prevention work, and included time cards and invoice documentation corroborating their statements. (Dkt.##217-222). Pecore also provided the locations of all the alleged non-existent culverts and additional photographs of stump sprouts taken along the roads that according to Congos had "no work done." (App. p.211-212). The evidence was further supported in both summary judgment and trial by the expert testimony of Kenneth Sloan. Sloan testified that there was ample forensic evidence in the form of thousands of stump sprouts per mile, that extensive fire prevention work had been done in 2000 and 2001. (App. p. 215).

Bernard Vandenplas, former dozer operator, recalled that between the water draining, logging, hand brushing, machine work, and dump truck work, "it takes a lot to build a good road." (TT:1829:20-24;1829:20-24). Joseph Thunder, a ten-year MTE employee, recognized during his testimony that they tried to do as much as they could, but work is never done in the forest. (TT:1641:22-1642:5). None of these witnesses had ever been interviewed by the Government until they took the stand.

2. Defendants' testimony

Defendants Pecore and Waniger also testified, confirming that throughout their Menominee employment they acted to harmonize the objectives of the Tribe with the goals of the funding. Pecore recalled the teachings of Menominee Chief Oshkosh, who was an early advocate of sustained yield forestry. (TT:1301:13-18, 16-18). Pecore said this centuries-old concept of cutting slow enough to always have timber available, and of only taking what the forest could provide, is still followed today. (TT:1302:16-18). To this end, Pecore would have never considered removing 8-10 feet of trees on the side of the road for disking purposes, as Congos claimed was necessary. (TT:1354:18-19). Not only would it have violated the sustained yield practice, but because much of the land is "ancestral land" the Tribe would not have allowed such desecration without an extensive archeological review. (TT:1357:22-1358:2). Waniger was similarly trying to effectuate "what the Menominee Tribe wanted." (TT:2031:22-23).

Pecore and Waniger harmonized this commitment to the Tribe's values with the objectives required by the federal funding. Pecore testified that when the "hazardous fuel funding" became available around 2000, he viewed this program to be essentially the

same as subsidiary funding. (TT:1957:15-20;1337:1-2). While Pecore was concerned about the program fitting into the Menominee system, Lyle Carlyle of the BIA convinced him that they could use this program to "fit the Menominee needs" despite the "western philosophies not necessarily [meeting] the philosophies of the Menominee's." (TT:1963:17-23). Whereas the new funding required fuel breaks, Pecore and Waniger recognized that the access roads already being created could double as fuel breaks as long as mineral soil was exposed. (TT:1358:20-23; 1966:20-21). This method addressed the reality that nearly all fires in Menominee are surface fires, and that Menominee's policy is to keep fire small and use forest management to manipulate fuel loads. (TT:1944:24-1945:2; 1958:22-1959:4). Moreover, the dual purpose roads enabled Menominee to avoid disking excessive surrounding land, which would have clashed with Tribal objectives. No one from the Government ever asked Pecore to explain these fire strategies until he took the stand. (TT:1325:24-1326:3).

C. Government's Closing Arguments

In closing arguments, the Government had a completely different view of the evidence than it did in opening, when it argued that no work had been done. The testimony, photographs, videos and business records had proven that substantial amounts of work were done. Now, it was not the right work:

> You know, we've seen the roads crew, I think, have made big circles in areas where they worked, and there's no question they were out there working. Again, the question is exactly what they were doing and for what purpose.
>
> … Mr. Congos' findings, which, as he explained yesterday, is really that the cutting that I saw either appeared to be for a different purpose or it was

> a subsidiary project. It's not the type of cutting that would have been consistent with the project proposal in 2001.

(TT:2425:5-9,12-17).

D. Jury Verdict

At the end of a nine-day trial, the jury returned a unanimous verdict, finding no fraud on any of the 48 counts proposed by the Government for each Defendant. In spite of the fact that the trial lasted almost two weeks, the jury was out only three hours before reaching a unanimous verdict. (Dkt.#342).

V. MOTION FOR ATTORNEYS FEES

Following the verdict and dismissal of all claims, Defendants moved the Court for an award of attorney fees under EAJA. (Dkt.#373). The Government opposed the motion. On June 15, 2010, nearly a year after trial, the Judge refused to grant the motion on the basis that it believed the Government was acting in "good faith" over dealing with "confusing billing practices" of the Tribe. (App. p.112). The Court also denied the Motion for fees reasoning that it had allowed the case to the jury thereby creating a conclusive presumption that the Government's case was "substantially justified. (App. p.114).

VI. STANDARD OF REVIEW

In *Pierce v. Underwood*, the Supreme Court ruled that an abuse of discretion standard of review is proper to review EAJA determinations. 487 U.S. 552, 571 (1988); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-61 (1986); *See also Marcus v. Shalala* , 17 F.3d 1033, 1037 (7th Cir. 1994). However, "this

deferential standard does not dilute [this Court's] meaningful examination of the district court's decision." *Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996).

The district court's interpretation of the EAJA and its applicability to the False Claims Act, however, is a legal conclusion; which is reviewed de novo. *Pierce*, 487 U.S. at 557; *Sosebee v. Astrue*, 494 F.3d 583, 586 (7th Cir. 2007). The district court's decision on summary judgment is also reviewed de novo. *Mosley v. City of Chicago*, 614 F.3d 391, 395 (7th Cir. 2010).

SUMMARY ARGUMENT

Under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), the Defendants, as the prevailing parties, are entitled to attorneys' fees unless the Government can demonstrate that it was "substantially justified" in threes respects: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

First, the district court erred as a matter of law in concluding that the Defendants had the burden to prove that the Government's false claims case was not substantially justified especially when the Government failed to prove "a lie" at trial.

Second, the district court abused its discretion in failing to require the Government to establish a substantial factual basis that the defendants "lied" in any of the invoices submitted by Menominee to the BIA or in any of the supporting maps which showed where the fire prevention work was done in the Menominee forest.

Third, the district court erred as a matter of law in concluding that the Government had a substantial basis to bring a false claims case against Menomonee forest managers, acting in their official capacities and implementing Menominee forest management policies, when the Tribe was dismissed on grounds of sovereign immunity. In addition, the Government lacked a substantial legal basis to proceed with a false claims action by failing to follow its own regulations for consultation and dispute resolution with a tribe - especially when compliance with those regulations would have resolved the Government's questions regarding Menominee forest fire prevention policies and invoicing procedures.

Fourth, the Government breached its ethical and statutory duty to seek the truth and "thoroughly investigate" the claim of fraud before filing suit against the Defendants. All the Government's "fraud" theories alleged in the Complaint collapsed at trial in the face of defense evidence which had been in the Government's hand for years, but ignored. Instead of searching for the truth, the Government attempted first to suppress the exculpatory evidence and when that failed, changed its fraud theories from "no work done" to "wrong kind of work done." The Government proved at trial that Menominee submitted invoices for "fuel breaks" that the Government contended were not wide enough to fight a catastrophic fire. This was a pure contract question, not a "lie".

Fifth, the trial court abused its discretion in failing to sanction the Government for failing to admit that Menominee incurred reasonable expenses that more than justified the unpaid invoices sent to the Government.

After a nine-day trial, the jury rejected the Government's nine-year-old case with a unanimous verdict that was reached in under three hours. Since the Defendants bore the burden of defending Menominee fire prevention policies and proved that neither the invoices nor the "accomplishment maps" were "lies," they are now entitled to attorneys' fees and costs under the Equal Access to Justice Act.

ARGUMENT

I. THE POLICY OF THE EAJA WARRANTS AN AWARD OF FEES UNDER THE CIRCUMSTANCES OF THIS CASE

The EAJA serves two important policy purposes. First, it "remove[s] the obstacle of litigation expenses, including attorney's fees, so that litigants with limited resources may challenge unreasonable governmental action and vindicate their rights in court." *Krecioch v. United States*, 316 F.3d 684, 688 (7th Cir. 2003), citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11; *see also Commissioner, I.N.S. v. Jean*, 496 U.S. 154,164-65 and n.14 (1990); *Pierce*, 487 U.S. at 575.

Second, by making the Government potentially liable for attorney fees, the EAJA encourages the Government to "investigate, prepare and pursue litigation against private parties in a professional and appropriate manner." *U.S. v. Hallmark Const. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000).

By statute and case law, the Government has the burden of proof to show that it was substantially justified in asserting the truth of the "lies" alleged in the complaint; had a reasonable legal basis to sue tribal officials when the tribe was immune from suit; and established a reasonable connection between the facts and law. *See Pierce*, 487 U.S. at

563; *Hallmark Constr. Co.*, 200 F.3d at 1079-81 (finding the district court's reasoning troubling because the district court indicated the Government was substantially justified simply because its case survived summary judgment). As a remedial statute the purpose of the EAJA must be liberally construed to ensure that those who most need the protection provided by the EAJA will not be turned away from its protection. *See Tammi v. Porsche Cars N. Am. Inc.*, 536 F.3d 702, 709-710 (7th Cir. 2008).

This long standing jurisprudence has been clouded by this Court's recent decision in *U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010), in which this Court determined there is a presumption of "substantial justification" if the district court allows a case to go to the jury. *Thouvenot* was heavily relied on by the district court as grounds to deny fees, but it conflicts with the thrust and purpose of the EAJA, which specifically places the burden on the Government. Until *Thouvenot*, no court in this circuit or elsewhere had shifted the burden to the successful defendant. *See* 28 U.S.C. § 2412(d)(1)(A); *see also Tchemkou v. Mukasey*, 517 F.3d 506 (7th Cir. 2008); *Potdar v. Holder*, 585 F.3d 317, 319 (7th Cir. 2009); *Floroiu v. Gonzales*, 498 F.3d 746, 748 (7th Cir. 2007); *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004). Merely that a "factual dispute" existed at trial is not sufficient to meet the burden of showing the Government had a substantial basis. *Hallmark Const. Co*., 200 F.3d at 1080-81; *see also Precision Pine and Timber v. U.S.,* 83 Fed. Cl. 544, 551 (2008); Kevin W. Brown, *What Constitutes Substantial Justification of Government's Position so as to Prohibit Awards of Attorneys' Fees against Government Equal Access to Justice Act*, 69 A.L.R. FED. 130 (2010).

In spite of the hurdles of *Thouvenot,* the Defendants will once again embrace the burden to prove that Menominee did not lie in either the invoices or accomplishment maps it sent to the Government. ***At best*** the Government had an arguable ***contract dispute*** over appropriate standards for fire prevention work – not a "false claim."

II. THE GOVERNMENT HAD NO SUBSTANTIAL LEGAL BASIS TO BRING A FALSE CLAIM ACTION AGAINST THE DEFENDANTS

The appellate court reviews a trial court's interpretation of law de novo because a district court's incorrect view of the law is automatically an abuse of discretion. *Sosebee v. Astrue*, 494 F.3d 583, 586 (7th Cir. 2007); *Boyd v. Ill. State Police*, 384 F.3d 888, 897 (7th Cir. 2004) (applying the wrong legal rule constitutes an abuse of discretion); *EEOC v. Liberal R-II School District*, 314 F.3d 920, 926 (8th Cir. 2002).

A. The FCA Does Not Apply to Indian Tribes or their Employees Acting in their Official Capacity

No court has ever allowed a False Claims Act to be brought against a tribe, due to sovereign immunity. The Supreme Court has said, "considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy …form an import backdrop against which" … "federal statutes must be read." *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Immunity from suit is a tribal right, which the Supreme Court has consistently championed. *See e.g. Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173 (1977). Indian tribes cannot be sued without either specific consent or "affirmative statutory authority." *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 515-16 (1940).

The trial court dismissed all claims against Menominee, stating "[b]ecause there is no affirmative evidence that Congress intended to allow Indian tribes to be sued under the FCA, I conclude tribes are not 'persons' under § 3729(a)." (App. p.136).

B. Dismissal of Menominee Required Dismissal of Individuals Acting in their Official Capacity

Courts have universally held that tribal sovereign immunity extends to tribal employees when conducting work in their official capacities. *Cook v. Avi Casino Enterprises*, 548 F.3d 718 (9th Cir. 2008); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004), (Plaintiff couldn't circumvent tribal immunity "by merely naming officers or employees of the Tribe when the complaint concerns actions taken in Defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority"). No reported case, except this one, has ever allowed tribal officials acting in their official capacities to be sued for the actions of the Tribe.

In *Cook,* the Ninth Circuit explained:

> [t]he principles that motivate the immunizing of tribal officials from suit – protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official – apply just as much to tribal employees when they are sued in their official capacity.

548 F.3d at 718.

Even though Defendants in this case were not named in their "official capacity," the Supreme Court has held that sovereign immunity cannot be circumvented through "a mere pleading device." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). The district court, however, adopted the Government's 'double speak' by ruling: "[t]his is not a lawsuit brought against individuals in their 'official capacities,' it is a

lawsuit brought against individuals who *happen to be Tribal employees*." (App. p.140) (emphasis added).

The Supreme Court has repeatedly cautioned that any waiver of sovereign immunity by Congress or tribes "cannot be implied but must be unequivocally expressed.'" *See e.g. United States v. Testan*, 424 U.S. 392, 399 (1976) (citation omitted). Yet here, the district court minced words to keep the tribal officials in the lawsuit while finding immunity for the Tribe.

The Government's false claims case was in essence a suit against the Tribe's forest management policies. *See United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 935 (8th Cir. 2001) (a false claims lawsuit against a state administrator is essentially a lawsuit against the state). Pecore and Waniger were following Menomonee directives in setting standards and goals for fire prevention work, supervising the work, and certifying that the invoices reflected a fair assessment of expenses incurred.

C. The Government Failed to Follow its Own Regulations Before Filing the Suit

Even if the tribal employees could be sued, the Government's failure to follow its own regulations is a clear indication that its conduct and position was not "substantially justified." *See Stewart v. Astrue*, 561 F.3d 679, 682-85 (7th Cir. 2009)(where ALJ "contravened longstanding agency regulations, as well as judicial precedent" Government's position lacked substantial justification); *see also Golembiewski*, 382 F.3d at 721 (where the Commissioner "violated clear and long judicial precedent and violated

the Commissioner's own Ruling and Regulations" in evaluating evidence, the Government's position lacked substantial justification). A number of other cases have reached the same conclusion. *See Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1331-33 (9th Cir. 1992) (EAJA attorney fees awarded where the Government did not issue regulations before harvesting timber contrary to clear statutory duty); *LaDuke v. Nelson*, 762 F.2d 1318, 1332-33 (9th Cir. 1985)(where the INS conducted warrantless searches without articulable suspicion in violation of law and its own policies, the district court did not abuse its discretion in awarding EAJA attorneys fees); *Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943, 946-47 (N.D. Cal. 1983) (where the Government's refusal to approve stream clearance contract with the tribe was "contrary to its own regulations and past practice," contrary to the spirit of the Indian Self-Determination Act, and without authority, the Government's position was without "substantial justification" within the meaning of the EAJA); *Randolph v. Sullivan*, 738 F. Supp. 305, 306 (C.D. Ill. 1990)(where the ALJ failed to perform the analysis required by applicable law and regulations, the Government's position was not substantially justified); and *Hauser v. Astrue*, Slip Copy, 2009 WL 2595608 (E.D. Wis. August 20, 2009)(the ALJ's "inadequate four-step evaluation" alone was enough to render the Government's position without substantial justification).

Had the Government opened a dialogue with Menominee as required in these regulations before suing the Tribe, Pecore or Waniger, it would have found no substantial basis to pursue its claims.

1. BIA Policy Manual

First, the 2000 Bureau of Indian Affairs ("BIA") Government-to-Government Consultation Policy establishes a duty for the BIA to consult with Indian tribes before taking "federal action." (App. p.348a-358). "Federal action" includes "actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." *Id*. The Policy arises out of the recognition that Indian tribes have a right to self-government, and that federal actions must respect the "responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." *Id*.

The Policy defines consultation as "a process of government to government dialogue between the [BIA] and the Indian tribes," and further requires "Indian tribes" to receive notification of the formulated or proposed "Federal action" and to be informed of the potential impact on Indian tribes of the formulated or proposed Federal action." *Id*. §4.

Certainly, the United States' pursuit of a False Claims Act against Menominee is a "federal action" that could have had "substantial direct effects on" the Menominee including the requested removal of Marshall Pecore as forest manager.

Had BIA policy been followed and consultation occurred, crucial misunderstandings about the size of fuel breaks and billing practices would have been resolved without litigation. The district court abused its discretion by excusing the Government of the above requirements without providing any valid justification, simply offering:

> [T]he BIA policy manuals do not have the force of law or regulation. They are useful guides, perhaps, and indeed I could conceivably consider the failure to follow internal policies as evidence of the government's potential bad faith or some sort of improper agenda. . . [T]here seems little reason to look to intergovernmental dispute resolution policies when the case (at this stage) involves only private citizens.

(App. p.104-105).

2. MRO Handbook

In addition to the BIA Policy, the Midwest Regional Office ("MRO") Handbook instructs the BIA to consult with the Tribe if its officers identify areas where the Tribe's forest management practices are insufficient to protect the forest. (*See* Dkt.#345, Trial Exhibit 253). The MRO Handbook also provides that BIA staff should engage in a dialogue with a tribe on its findings in the field. Further, if the BIA finds that a tribal program is "deficient in some facet," the BIA is to "assist the tribe in reaching that standard" through "a process of informing, notifying and assisting through a government-to-government dialogue." *Id.*, §7.0.

The BIA never made a good-faith effort to work with Menominee to rectify the problems Congos perceived. As soon as Congos decided to use the word "fraud" the OIG investigation took off. The BIA never verified the accuracy of Congos' field investigations or assisted the Tribe to understand the different goals and expectations of the Hazardous Fuels Program.

3. The Government Failed to Pursue Proper Dispute Resolution Procedures

The Government also refused to resolve this dispute through regular administrative procedure. The Indian Self-Determination Education and Assistance Act

("ISDEAA") requires that all ISDEAA contracts (Public Law 93-638 contracts, such as those at issue in this case) be subject to the Contract Disputes Act of 1978 ("CDA") (Public Law 95-563) 41 U.S.C. §601. 25 U.S.C.A § 450m-1(d). The ISDEAA and CDA set forth requirements for the Government to attempt to resolve all contract disputes by agreement rather than litigation.

In this case, the substance of the Government's dispute was whether Menominee substantially performed the work for which it billed the BIA. The majority of the BIA's contention at trial was that Menominee's fuel breaks were too small. This is a question of contract performance, not fraud. Therefore, the contracts at issue were subject to the ISDEAA, and the BIA should have attempted resolution by agreement rather than litigation.

III. THE GOVERNMENT DID NOT HAVE SUBSTANTIAL FACTUAL JUSTIFICATION WITHOUT EVIDENCE OF A LIE

At trial, the Government failed to prove that either Pecore or Waniger lied. The Government's initial assessment based on the Congos inspections that no work was done turned out to be dead wrong.[5]

In its summary judgment decision the trial court concluded that the Government had a "strong case." It had "maps" that showed Menominee submitted false invoices

[5] Thomas Magnuson also accompanied Congos on a number of occasions and contended that he saw work that was incomplete. (TT:994:13-14). This was in June, 2001, when the "Alamo," a machine that one Menominee's engineers used to cut brush, did an inadequate job. The redo work took care of these problems, as evidenced by Congos' photographs displayed at trial.

with "bogus" and "phony" miles. In the beginning of the trial just after opening statements, the trial judge confirmed that the Government had to prove a "lie:"

> I'm not sure to what extent people need context to understand the government's claim they lied. . . There is no mystery. People understand lies. That is what the allegations here are, lies.

(TT:72:15-73:24).

The Seventh Circuit has repeatedly confirmed that the Government must prove that a "false claim" is a "lie," as opposed to a contract dispute or a negligent mistake. *See Hindo v. University of Health Sciences/The Chicago Med. School*, 65 F.3d 608, 613 (7th Cir. 1995)("Innocent mistakes or negligence are not actionable under this section. In short, the claim must be a lie.").

Yet at the close of the case, the Government objected to a "lie" as a definition of a "false claim." Inexplicably and over objection from the Defendants, the trial judge took out this key defining phrase:

> Okay. I'm going to strike that last sentence. I'm satisfied that it is a bit of hyperbole on part of the Seventh Circuit…

(TT:2365:15-17).

A. The Government's Theories of Lies Collapsed at Trial

1. The Government's Changing Fraud Theories Morphed into a Contract Claim

The Government's Complaint alleged that the Defendants and MTE lied about the use of Government grant money for fire prevention:

> Menominee did not complete much of their fire work, and instead improperly used the fire funds to pay its roads crews for performing their usual road maintenance work, including clearing trails for access to timber sale harvest areas. [6]

(Dkt.#1,¶5).

These allegations were abandoned at trial and replaced with a "no work done" or "work done poorly" theory. In opening statements, the Government stated:

> The government contends that those claims were false because in some instances the work was not done and in other instances the work was done so poorly that it actually increased the fire risk on the reservation. Moreover, the government contends that the defendants knew those claims to be false and in some cases created false records to support those claims.

(TT:4:16-22).

At the end of trial, after the Government heard for the first time the testimony of the roads crew, viewed videos and photographs of brushing, grading and culverts, and heard the testimony of Ken Sloan, it changed its theory from "no work done" to "no right work done." Now, instead of contending that the Menominee sent false claims for "bogus miles," the Government claimed in closing argument that the invoices were false claims because the fire funds were not used to construct fuel breaks sufficient to defend a "catastrophic fire" – an event that happens at most every 100 years:

> Instead, the defendants sought federal funding for work to design--to afford additional protection against a catastrophic fire, but they really continued to do the same type of work that they were doing before, building and clearing roads for access as set forth in the fire subsidiary proposals in previous years.

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[6] In addition to the false claims counts, Menominee was also alleged to have breached contract claims to the Government for purchasing heavy equipment using federal grant dollars without permission from the BIA. These claims were dismissed by the Court. (Dkt.#1,¶5).

(TT:2391:23-2392:4).

The Government's key fact and expert witness, David Congos, testified that the fuel break needed to be 28 to 30 feet wide for firefighters to defend a catastrophic fire. Congos, who was the Government's sole expert witness, had never fought a forest fire within the Menominee Forest, and could not identify even one place in the Midwest where such a fuel break has been constructed.

But BIA forester Thomas Magnuson, also a Government witness, disagreed that the Hazardous Fuel funds were designed to build fuel breaks to fight a catastrophic fire, as opposed to the anticipated fire of 1-3 feet. (TT:987:16-22). Magnuson could only think of one fuel break that had been tested by a catastrophic fire - Interstate 94 which was 350 feet wide. (TT:987:1). As demonstrated by defense expert, Ken Sloan, even Interstate 94 was not sufficiently wide enough to stop a catastrophic fire. (TT:1710:8).

Ken Sloan was the undisputed fire expert at trial. Sloan had fought more than 5,000 forest fires in Wisconsin as the State Fire Marshal for the northern part of the state. (TT:1706:20-23). He had worked at Menominee as a young forester for the State Department of Natural Resources and worked with both David Congos and Marshall Pecore. (TT:1706:16; 1760:3-4). Sloan was very comfortable with the Menominee fire prevention strategy, and confirmed at trial that the access roads and fuel breaks were functioning well, nine years after the work was done. He found evidence of at least 1,000 cut stumps and tree limbs per mile that from an analysis of growth rings of stump sprouts, corresponded to when this work was done by the MTE roads crew. (TT:1695:11). Sloan did not believe it was reasonable or necessary for the Tribe to spend the funds to build 28

foot wide fuel breaks, which would only waste valuable forest resources and would not help fight a catastrophic crown-to-crown forest fire, anyway. The best fire preventive measure was to maintain access roads which could effectively act as "fuel breaks" for the anticipated fire. (TT:1678:1).

Since the average fire in the Menominee Forest is only one to three feet high, even Sean hart agreed that a fuel break could be as small as 9 feet. (TT:178:15-20).

2. The Government's "Motive for Fraud" Theory Collapsed At Trial

The Complaint alleged that Menominee was in "poor financial status" in 2001, that "MTE officials" were "concerned about MTE's ability to pay the legitimate expenses of its roads crews"… and that in order to "secure a source of money to pay Menominee's roads crews, Defendants MTE, Pecore, and Waniger billed BIA for "fire prevention work" under grants and self-determination contracts. (Dkt.#1,¶5).

Todd Kennedy, the Governments' key "motive" witness testified that the additional BIA funding requested by the MTE Roads Department in 2001 for work on BIA roads (as opposed to fire access roads) was not even used by Menominee for three years. (TT:336:1). Thus, the Government's "motive theory," just like the "timber access theory," was pure bunk. The trial court agreed with this point:

> There was never any credible evidence that either Waniger or Pecore stood to gain financially from submitting false claims, and thus the idea that they would have repeatedly tried to defraud the government was always a difficult proposition to take to a jury.

(App. p.109).

3. The Government's Fraudulent Time Card Theory was Disproven at Trial

After seven years of investigation, which included the review of over 250,000 pages of MTE records, the Government found an error in two of the invoices caused by one employee's miscoded time cards. Since these time card errors were missed by other MTE employees, the MTE accounting department mistakenly used this information when preparing the invoices. Although this invoice was never paid, the Defendants did not discover the error until after the lawsuit was brought. (App. p.14).

IV. THE GOVERNMENT BREACHED ITS DUTY TO SEEK THE TRUTH

A. Duty to Investigate

When the Government pursues an action under the False Claims Act, it has a special statutory duty to thoroughly investigate the facts underlying the claim and connect those facts to the law. Specifically, 31 U.S.C. § 3730(a) mandates:

> [T]he Attorney General diligently shall investigate a violation under section 3729.

This duty to investigate applies solely to the Government and not private litigants suing as "realtors" in qui tam or "whistle blower" cases. This is because the United States has a duty to use its resources to fully investigate the claim before bringing a false claims case against private citizens with limited resources to defend the case. *See United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 53 (8th Cir. 1943)("diligence in the enforcement of the false claim statute requires …the careful and orderly investigation and preparation of the action to be brought, in order that the government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the

public."). The courts have a duty to assure that the Government diligently investigates its case in pursuit of the truth, not just a victory. *See United States v. Gillespie*, 974 F.2d 796, 801-02 (7th Cir. 1992).

Cases brought under the False Claims Act are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b) which requires the Plaintiff "to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate," and requires the Plaintiff to allege "the who, what, where, and when of the alleged fraud." *Ackerman v. Northwestern Mut. Life Ins. Co*. 172 F.3d 467, 469 (7th Cir. 1999). In this case, however, the Government's allegations of *what* the fraud was and where it was kept changed throughout the litigation and made it difficult for Defendants to defend themselves. (App. p.347).

Given the Government's enormous financial advantage over a private citizen and its obligation to seek justice, not just a legal victory, Congress mandated that the Government thoroughly investigate its case before bringing a claim. The trial court disagreed:

> The fact that the Defendants conducted a more recent investigation does not impose some kind of duty on the government to do the same. . . .

(App. p.107).

B. The Government's Failure to Investigate Renders It Without Substantial Justification

After seven years of investigation, the Government had no handle on the facts of this case until the trial was over. Its stubborn insistence on continuing this suit despite

solid evidence of Defendants' innocence, also renders the Government's position substantially unjustified. *Hallmark Const. Co*. 200 F.3d at 1080-81; *Phil Smidt & Son, Inc. v. N.L.R.B*., 810 F.2d 638, 642-43 (7th Cir. 1987).

In *Phil Smidt & Son*, the National Labor Relations Board (NLRB) sought over $5,000 in back pay to an employee; the ALJ found the NLRB's order for back pay in the amount of $5,000 did not have a factual basis. 810 F.2d at 640-41. This court found the Government's position lacked "substantial justification" because the NLRB did not independently corroborate the facts upon which it based its calculation, and, more importantly, the NLRB ignored evidence in its possession upon which it could have concluded that its back pay calculation was incorrect and excessive. *Id*. at 642-43. In holding that the Government's position lacked substantial justification, the court found "the agency not only knew that there was conflicting evidence on this point but it failed to take adequate measures to assess that evidence." *Id*. at 643.

The Government's failure to investigate in this case – to evaluate existing evidence in its possession and fairly assess rather than attempt to exclude the evidence provided by the Defendants – severely undermines the reasonableness of the its position. *See also Precision Pine and Timber v. U.S.*, 83 Fed. Cl. 544, 551 (2008)(where the Government ignored relevant contract, which a "reasonable, intelligent person, acquainted with the contemporaneous circumstances" would have understood, and created a new method of calculating damages, the Government's position was not substantially justified under EAJA).

1. The Government Ignored Evidence of Innocence

The Government heard the road crew testimony for the first time at trial. It ignored the forensic evidence submitted by Ken Sloan and the testimony Defendants submitted one year earlier in Defendants' Motion for Summary Judgment. (App. p.160-243). It ignored the pleas of defense counsel to examine the roads before trial. (Dkt.##291, 313). The Government refused to evaluate the roads crew's time logs and activity sheets in its possession that showed proof – unchallenged at trial – that over $300,000 of expenses were incurred by Menominee to do work for which the Tribe only sought reimbursement for $65,000. (Dkt.#345, Trial Exhibit 479). This is a violation of its obligation to seek the truth. The Defendants must be made whole for the costs of proving the Government wrong.

2. The Government's Attempts to Exclude the Truth from the Trial

After receiving photographic, forensic, physical and testimonial evidence that proved the brushing and grading work was done, instead of evaluating this evidence, the Government sought its exclusion from trial on the grounds that it was not disclosed immediately when the lawsuit was filed. (Dkt.##246, 298). In contrast to the six years it took to investigate its case, the Defendants were given only six months to discover the Government's complex case, and locate and evaluate hundreds of miles of roads that Congos claimed were fraudulently billed. The trial court nearly prevented the Defendants from submitting evidence of their innocence at trial. (App. p.108).

The trial court supported the Government's opposition to the exculpatory evidence as a matter of tactical strategy:

> The government's opposition to the evidence was sound, and it was based partly on its position that it had all the evidence it needed, which had not been contested by Defendants' expert until the eve of trial.

(App. p.108).

This last observation is disheartening, since the Defendants strongly challenged the "no work done" theory from the beginning and submitted substantial evidence in the Motion for Summary Judgment showing considerable work done on roads Congos said were "never done." (App. p.160-234). This evidence was never mentioned by the trial court in its summary judgment decision. (*See* App. p.128-159).

In its opening statement, the Government contended that the Menominee roads crew left brush piles on the roads that were "fire jackpots" which raised fire risks. (TT:9:1). Yet on the stand, Congos could only point to three photos out of 191 of small brush piles to support his accusations. (App. p.263-265)(TT:888-894).

In 2002, Conrad Waniger wrote memos to Sean Hart while the work was being done and the invoices were being scrutinized, explaining that Menominee's cost saving strategy was to pile the brush with a bulldozer on the side of the road and burn them in the winter. (Dkt.#345, Trial Exhibit 473). Conrad Waniger's request to burn the brush piles was denied by the BIA because of the OIG investigation, and as a result they were used as more physical evidence to prove that substantial road work was done. (TT:2094:17-2095:18).

C. Congos' Inspections Were Unfounded and Stale

It was unreasonable for the Government to rely on Congos' inspections as its basis for bringing this suit. First, at the time Congos carried out his inspections,

communication with Menominee staff had shut down because he advocated for policies that threatened the Mill and its dependent wage earners. Second, Congos had concluded that the Defendants were "thugs" attempting to line their own pockets, hated Pecore, and relentlessly pushed the Government to prosecute the Defendants. (Dkt.#345, Trial Exhibit 278). Third, Congos erroneously believed that the Menominee was billing on a "miles completed" rather than a "time and materials" basis. Finally, as became very clear at trial, Congos' definition of an adequate "fuel break" was inconsistent with any other used in the entire Midwest.

This is hardly the kind of evidence that would allow a reasonable federal prosecutor to pursue charges of fraud against Marshall Pecore and Conrad Waniger. *See Hallmark Const. Co.*, 200 F.3d at 1079-81; *Phil Smidt & Son, Inc.*, 810 F.2d at 642-43.

D. The MTE Maps Were Not False Records

One half of the Government's case – 24 separate fraud allegations in all – pertained to its claims that the maps attached to the certifications under the new policy were false. Yet the Government failed to call a single witness at trial to establish that the maps inaccurately showed where the work was done.

It was uncontested at trial that the MTE maps were a compilation of field maps produced by the roads crew and its foreman, Myron Grignon. None of the field drawn maps were intended to be accurate in terms of mileage. They were provided, to show where work was performed, and not to be used as a "miles-completed invoice." (TT:1953:15-17). The Government's interpretation of the maps led to wild estimates of "fraud" that sometimes exceeded the amount sought on the invoice. (App. p.347). The

Government's failure to show that the maps were false records, renders its case without substantial justification. See *Phil Smidt & Son, Inc.*, 810 F.2d at 642-43; and *Hallmark Const. Co*. 200 F.3d at 1080-81.

E. MTE Invoices were Based on Expenses Incurred and "Miles Treated," Not Miles Completed

The mainstay of the Government's fraud theory was that the maps submitted by Defendants were fraudulent because MTE was to be paid based on miles of roads completed. At trial, Bellcourt and Hart testified that the road grading and brushing at issue were to be billed based on expenses incurred in doing the work. A fixed-cost contract for mileage which caused the Menominee to actually lose money is incongruent with the Federal Government's trust responsibilities.[7] (*See* MRO Handbook, Dkt.#345, Trial Exhibit 253, § 3.0(A).)

V. THE GOVERNMENT DID NOT CONNECT ITS FACTS TO THE LAW

A district court abuses its discretion when clear judicial precedent is ignored and the district court mischaracterizes important factual evidence. *See Hallmark Constr. Co.,* 200 F.3d at 1078; *Golembiewski* , 382 F.3d 723-25; *Stewart v. Astrue*, 561 F.3d 679, 684 (7th Cir. 2009). When a district court does not provide an adequate description of the reasons why it denies attorneys' fees, it is more likely that a court has abused its discretion. *Hallmark Co.,* 200 F.3d at 1078. Additionally, the district court should make an effort to provide a logical bridge between the evidence submitted and the conclusion

[7] Much of this case was based upon a theory that the invoices were billed by the mile of completed work, even though $480.00 per mile of completed road, including gravel, culverts, and brushing, was neither realistic nor practical.

reached. *Stewart*, 561 F.3d at 684 (*citing Getch v. Astrue*, 539 F.3d 473, 481-81 (7th Cir. 2008)(asserting a reviewing court must limit its analysis to the reasons provided by the ALJ and, therefore, the ALJ has a responsibility to connect the evidence to the conclusion)). The district court is not granted the same deference as it otherwise would be if it has not properly reflected on the record a comparison of the Government's allegations with the actual evidence. *Pierce*, 487 U.S. at 569.

Critically, the district court must examine the evidence in a different way than it did at any other stage of the proceeding when making a determination under the EAJA. *Hallmark Co.,* 200 F.3d at 1078; *Cummings v. Sullivan*, 950 F.2d 492, 498 (7th Cir. 1991)(clarifying that the 'substantial justification' standard under the EAJA is not the same standard as substantial evidence for summary judgment and evidentiary purposes); *Pierce*, 487 U.S. at 568-69 (distinguishing "substantial justification" from the summary judgment standard).

The examination of the record must be thorough so that the Government has a proper incentive to conduct its investigation, preparation and litigation in a diligent manner that underscores its role as the primary administer of justice. *Hallmark Co.*, 200 F.3d at 1080. That did not happen in this case.

The False Claims Act was intended to respond to widespread fraud in the sale of supplies to the Union Government during the Civil War. H. Rep. No. 660, 99th Cong., 2d Sess. 17 (1986). In the late 1980s and early 1990s, the False Claims Act was used in simple fraud cases in which billed services were not performed at all. *See* Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm*

Under the Civil False Claims Act, 36 GA. L. REV. 121, 124-26 (2001). However, over time, the Government has expanded its use of the Act to cases in which services are performed but perhaps not in compliance with certain legal requirements. *Id.* Using novel approaches to pursuing FCA actions, the Government has a heightened responsibility to administer justice; thus, it must only pursue those cases in which it can definitively demonstrate that the Defendant has presented a false claim to the Government.

A. A Contract Dispute Is Not a False Claim

At trial, the Government failed to prove a lie or that the maps were false. At best, the Government had a contract dispute with Menominee over how wide the fuel breaks should be, whether culverts should be new or used, whether brush should be burned in the winter or chipped, and how BIA western fire wages should be reimbursed to the Forestry Department.

A contract dispute is not a false claim. *See Hindo*, 65 F.3d at 613 (holding that the claim must be a lie to be actionable under the FCA). If the Defendants believed they had substantially complied with the major provisions of the contract and that any defects were generally correctable, then there is not evidence of an actionable lie. *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999).

The trial court rejected this argument in Summary Judgment and in the attorneys fees portion of the case:

> Part of the government's argument was that some of the fire prevention work done was so shoddy (e.g., leaving cut brush on fire break roads) that the work done actually made the forest *more* susceptible to fires. Certainly

> there is a point at which the quality of one's performance under a contract is so substandard that it cannot legitimately be called performance at all, and in such cases an invoice based on substandard performance may rightly be considered "false."

(App. p.111).

The evidence of slash on the road was however pathetically weak. Congos could only provide three photographs that illustrated this point. (App. p.263-265).

In closing argument the Government conceded that at best this was a contract dispute:

> …not only did Marshall Pecore and Conrad Waniger not do fuel break work as defined in the project proposals, that they never really intended to do that work to begin with. Instead, the defendants sought federal funding for work to design--to afford additional protection against a catastrophic fire, but they really continued to do the same type of work that they were doing before, building and clearing roads for access as set forth in the fire subsidiary proposals in previous years.

(TT:2390:19-2391:4).

B. The Government Knew What Work Would Be Done

Government knowledge of the relevant facts may negate the "knowing" requirement under the FCA. *United States ex rel. Durcholz v. FKW, Inc.,* 189 F.3d at 545 ("If the government knows and approves of the particulars of a claim . . . [its] knowledge effectively negates the fraud or falsity required by the FCA."); *United States ex rel. Lamers*, 998 F. Supp. at 986-88 ("[T]he 'knowing' submission of fraudulent claims is logically impossible when responsible government officials have been fully apprised of all relevant information … [T]he presence of an open dialogue with government officials about relevant factual circumstances does mitigate a defendant's specific intent

to defraud, or the degree to which false statements and claims were 'knowingly' submitted.").

Here the BIA acting through Congos agreed to pay the invoices at a reduced rate on the conditions that certifications were signed. It was not a false claim.

VI. DEFENDANTS ARE ENTITLED TO REASONABLE ATTORNEYS FEES AND EXPENSES BECAUSE THEY PROVED FACTS DENIED UNDER RULE 36, AND NO RULE 37 EXCEPTION APPLIES

Rule 37(c)(2) expenses are triggered if (1) "a party fails to admit what is requested under Rule 36," (2) "the requesting party later proves a document to be genuine or the matter true," and (3) no exception applies. *See* Fed. R. Civ. P. 37(c)(2). In this case, Defendants requested admissions that Menominee had incurred reasonable expenses to justify payment for each invoice and that the work for each invoice was substantially performed. The Government claimed that it had insufficient knowledge to affirm or deny the expense requests, and it denied that the work reflected on each invoice was substantially performed. Yet, with pretrial documents and the nine day trial, Defendants clearly proved the truth of these matters, as demonstrated by the jury's rejection of all 48 potential findings of false claims and false records.

This Court must order reasonable expenses and attorneys fees attributable to those proofs unless one of four exceptions apply under Rule 37(c)(2):

1. the request was held objectionable under Rule 36(a);

the admission sought was of no substantial importance;

the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

there was other good reason for the failure to admit.

None of these exceptions apply because the admissions were central to the case and the Government neither had reasonable grounds to believe it would prevail on the matters nor good reason for its failure to admit.

A. The Government had No Good Reason for Failing to Admit at the Discovery Phase

This Rule 37(c)(2) motion is grounded in failures to admit under Rule 36. Rule 36 states that a party may admit, deny, or "assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." Fed. R. Civ. P. 36(a)(4). A reasonable inquiry generally requires the party to consult with "persons under its control," such as "officers, administrators, agents, employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response," although a particular inquiry may also require consultation with third parties. *Loudermilk v. Best Pallet Co*., 2009 WL 3272429, at ¶1 (N.D.Ill. 2009). Also, when appropriate, a reasonable inquiry includes "a review of relevant documents and regulations." *Tequila Centinela v. Bacardi & Co*., 242 F.R.D. 1, 15 (D.D.C. 2007).

In this case, Defendants submitted two categories of Requests for Admission to the Government. One dealt with the reasonable expenses Menominee incurred doing the work on each invoice. The other category of admissions concerned the substantial work actually performed by Menominee. For example, in Defendants' first set of Requests for

Admission dated January 1, 2008, Request 21 concerns reasonable expenses for Invoice 200:

> As of March 22, 2001, hazardous fuel expense totaling at least $8,707.50 had been incurred by Menominee for work performed pursuant to the applicable HFR proposals.

The Government, through Sean Hart and Chris Larsen, answered as follows on February 21, 2008:

> The United States denies knowledge sufficient to admit or deny this request. Based on the records provided by Menominee to the BIA, the United States cannot determine if Menominee incurred legitimate hazardous fuels expenses for work actually performed within the appropriate scope of the applicable HFR proposals.

Requests for admissions like this were submitted for each invoice, and each time the Government gave the same response.

The other category of Requests for Admissions pertained to substantial performance. For example, Request 22 dealt with Invoice 200 stated:

> The work indicated on invoice 200 (with supporting attachments) had been substantially performed by Menominee by March 14, 2002.

Equivalent requests were made for each invoice and SF 269A reports, and the Government's response was to "deny" each Request. (Dkt.##43 and 44).

In the second set of Requests for Admission, Defendants again made requests regarding reasonable expenses and substantial work. Defendants requested admissions regarding substantial performance of hazardous fuel reduction work and regarding the nature of Menominee expense billing and the significance of the mileage on the invoices and the maps. Again, the Government denied all of these Requests for Admission. *Id*.

This unreasonable series of Government denials and assertions of insufficient knowledge made it necessary for Defendants to produce lengthy proof at trial. As the evidence and jury verdict demonstrated, Defendants succeeded – Menominee records and worker testimony uniformly showed that Menominee had in fact incurred reasonable expenses and had done substantial work. This evidence convinced the jury that this was not a case of fraud.

Under Rule 37(c)(2), the Government must now pay the reasonable expenses, including attorney's fees incurred in making this proof, unless a Rule 37(c)(2) exception applies. The first two exceptions, regarding a Rule 36(a) objection and matters not of substantial importance, clearly do not apply. The remaining two exceptions should not apply either because the Government neither had "a reasonable ground to believe that it might prevail on the matter" nor other "good reason" for failing to admit. *See* Fed. R. Civ. P. Rule 37(c)(2).

The Government had in its possession all the related records and invoices showing these expenses. The records show total expenses of ***at least*** $313,000.00 incurred in brushing and grading projects for which the disputed invoices were submitted. (Dkt.#345, Trial Exhibit 453). If the Government doubted the accuracy of these records, a simple conversation with Menominee workers and a review of their time cards and activity sheets would have been warranted. Yet, the Government chose not to speak to the workers involved, look at the forest roads or examine its own subpoenaed records. Therefore, the Government could not have *reasonably* believed it might prevail on the matter of expenses because it made no effort to investigate the facts supporting these

expenses. Without contrary evidence, a belief of prevailing on this matter was not reasonable. *See, e.g., Marchand v. Mercy Medical Center*, 22 F.3d 933, 936 (9th Cir. 1994) (no reasonable basis to deny when undisputed testimony later established the facts).

In addition, Rule 36 requires a reasonable inquiry and, when appropriate, this includes a review of relevant documents and consultation with third parties. *See Tequila Centinela*, 242 F.R.D. at 15; *Loudermilk*, 2009 WL ¶1. If a "reasonable inquiry" is to have any meaning, surely it includes consulting relevant documents in the Government's possession and speaking to third parties, such as Menominee workers, Marshall Pecore, and Conrad Waniger. Since the Government did not abide by Rule 36, no other "good reason" exists for its failure to admit reasonable Menominee expenses.

Similarly, neither exception applies to the Requests for Admissions regarding substantial work done. Again, the Government had in its possession records showing Menominee's expenses for doing the claimed work. It also had access to third parties who would have confirmed that the appropriate work was substantially done. The Government could have also simply looked at the forest to see if the records in its possession were accurate, and that the work had been done. Therefore, the Government's denial of substantial work done was not based on a reasonable expectation of prevailing on the matter, since the Government made no effort to discover whether or not it would prevail on the matter. *See Marchand*, 22 F.3d at 936. The Government's lack of investigation shows that no other "good reason" for failing to properly answer existed.

Because of these failures to admit and the Defendants' lack of success at the summary judgment phase of the case, Defendants were forced to present lengthy testimony and evidence to show what the Government already did, or reasonably should have, known. The Government offered very little contrary evidence, largely consisting of a single, very biased and unqualified expert witness. If the Government had acted reasonably instead of forcing a trial on these facts, Defendants would have been saved the expense of making these proofs. Under Rule 37(c)(2), Defendants are therefore entitled to reasonable expenses and attorneys fees for the entirety of the proceedings following the Government's failure to admit. *See, e.g., Hicklin Engineering v. Bartell*, 2005 WL 3805914, ¶1 (E.D.Wis. 2005)(ordering reasonable attorneys' fees under 37(c)(2)); *Frazier v. Layne Christensen Co.*, 486 F.Supp.2d 831, 833 (W.D.Wis. 2006)(concluding that Rule 37(c)(2) fees were proper when defendants violated their discovery obligations).

B. Defendants are Entitled to Reasonable Fees under Rule 37

As set out above, this Court should award reasonable expenses, including attorneys fees, incurred in making the necessary proofs because the conditions of Rule 37(c)(2) are satisfied and no exception applies. *See, e.g., Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo,* 248 F.3d 29, 33 (1st Cir. 2001)(Rule 37(c)(2) "is a self-executing sanction for failure to make a disclosure required by Rule 26(a)."). Because the entire trial was focused on the task of refuting the Government's unreasonable failures to admit, all reasonable expenses and attorney's fees incurred after the failures to admit should be awarded under Rule 37(c)(2). *See Marchand v. Mercy Medical Center*,

22 F.3d 933 (9th Cir. 1994). In addition, it is proper to assess these fees without regard to the ceiling established by the EAJA. *See Mortenson v. United States*, 996 F.2d 1177 (Fed Cir. 1993)(stating that Congress intended "a court under the FRCP to assess fees against the United States for abuse of discovery").

CONCLUSION

The Government had no substantial justification in law or fact for bringing this action against two honest Menominee managers for doing the fire prevention work the same way that Menominee has always done it. After seven years, the Government failed to make a convincing legal case that Menominee could be liable for false claims and that its managers should be personally liable for carrying out the work requested by the Tribe.

Dated this 1st day of April, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds
Glenn C. Reynolds
State Bar No. 1017065
Attorney for Defendants
407 East Main Street
Madison, WI 53703
608/257-3621 (tel)
608/257-5551 (fax)

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) this brief contains 13,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 13-point font.

Dated this 1st day of April, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833

CERTIFICATION OF COMPLIANCE WITH RULE 30(d)

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated this 1st day of April, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833

CERTIFICATION OF COMPLIANCE WITH RULE 31(e)(1)

The undersigned hereby certifies that an electronic version of the Brief of Defendants-Appellants Marshall Pecore and Conrad Waniger has been filed on this 1st day of April, 2011, pursuant to 7th Cir. Rule 31(e); and that the disk submitted for service is virus-free.

Dated this 1st day of April, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833

PROOF OF SERVICE

I, Glenn C. Reynolds, an attorney, hereby certify that on this 1st day of April, 2011, three true and correct copies of the foregoing Brief of Defendants-Appellants Marshall Pecore and Conrad Waniger were served by U.S. Mail and upon each of the parties listed below:

AUSA Lisa Warwick
United States District Attorney's Office
517 East Wisconsin Avenue, Room 530
Milwaukee, WI 53202

Dated this 1st day of April, 2011.

REYNOLDS & ASSOCIATES

s/Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Wade Max Williams, SBN 1025502
Rebecca A. Paulson, SBN 1079833

SHORT APPENDIX OF DEFENDANTS-APPELLANTS MARSHALL PECORE AND CONRAD WANIGER

SHORT APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 07-C-316

v.

MENOMINEE TRIBAL ENTERPRISES,
MARSHALL PECORE,
and CONRAD WANIGER,

Defendants.

DECISION AND ORDER

A jury returned a verdict in favor of Defendants Pecore and Waniger in this False Claims Act action brought by the United States.[1] Defendants now move for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). For the reasons given below, I conclude that the government's case was substantially justified and that a fee award would be inappropriate.

I. EAJA Standard for Awarding Fees

For a fee award to be justified, it is not enough that the government lost its case. The EAJA provides that a court "shall award to a prevailing party other than the United States fees and other expenses . . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* Although the "substantially justified" qualifier gives up the certainty that would be afforded by a clearer rule, it allows courts to award

[1]The factual background underlying this action is set forth in numerous previous decisions.

fees in those cases where the government's case was so weak that it would be unjust to require the defendant to foot the bill for his defense. The Seventh Circuit has explained the analysis as follows:

> A position is substantially justified if it has a reasonable basis in law and fact. The government has the burden of establishing that its position was substantially justified, and to do so must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the theory propounded. EAJA fees may be awarded if the government's pre-litigation conduct . . . or its litigation position are not substantially justified, but the district court is to make only one determination for the entire civil action.

Conrad v. Barnhart, 434 F.3d 987, 990 (7th Cir. 2006).

As just noted, in determining whether fees are appropriately awarded, a court is to make "only one determination for the entire civil action." *Id.* That suggests that a court must take a broad, *gestalt* approach rather than a narrow, line-by-line analysis of the record. Even so, the court does not examine the entirety of the case. Instead, the only "relevant 'position' of the government is that which corresponds to the claim or aspect of the case on which the private party prevailed." *Jacobs v. Schiffer,* 204 F.3d 259, 264 (D.C. Cir. 2000).

What all this means is that a few isolated missteps by the government – especially in a drawn-out imbroglio like this case – would not be enough to hang a fee award on. By contrast, if the government engaged in a pattern of misconduct or based the fundamentals of its case on incorrect law or shoddy factual development, a fee award could indeed be justified. Ultimately, the factors cited by the Seventh Circuit in the "substantially justified" analysis must be viewed in light of EAJA's purpose, which is "to remove the deterrent effect of having to pay attorney's fees to defend against unreasonable government action." *SEC v. Zahareas*, 374 F.3d 624, 630 (8th Cir. 2004). "The case must have sufficient merit to negate an inference that the government was coming

down on its small opponent in a careless and oppressive fashion." *United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381-82 (7th Cir. 2010).

II. Analysis

A. The Defendants' Arguments

Defendants cite several grounds supporting their claim that the government's position was not substantially justified, and I will address each of their arguments below, keeping in mind that the burden is on the government to meet the EAJA standard.

1. Failure to Follow Official Policies

First, the Defendants argue that the government failed to follow its own regulations before filing this lawsuit. Specifically, Bureau of Indian Affairs policy manuals provide that the BIA should establish a dialogue with an Indian tribe before instituting federal action. (Reynolds Decl., Ex. M.) According to Defendants, the BIA should have notified the Tribe that it was considering bringing this lawsuit and it should have asked the Tribe for input and informed it about the implications of such a lawsuit. Had the government engaged in this less formal initial approach, the Defendants argue, some of the misunderstandings about the work they performed would have been cleared up. In addition, Defendants renew their argument that this case was primarily a matter of contract performance rather than false claims. As such, the government should have used the administrative contract procedures governed by the Indian Self-Determination Education and Assistance Act before bringing this dispute to court in a False Claims action.

This argument is weakened, however, by the fact that BIA policy manuals do not have the force of law or regulation. They are useful guides, perhaps, and indeed I could conceivably consider the failure to follow internal policies as evidence of the government's potential bad faith

or some sort of improper agenda. But the cases Defendants cite rely on agency violations of laws and regulations, and such violations are absent here. Additionally, it was not as though the government's lawsuit here was a precipitous rush to the courthouse. The violations alleged occurred long before this action was brought, and this action was itself brought *in lieu* of criminal proceedings after lengthy investigations and discussions within the government. Finally, it is unclear how an alleged failure to follow policies directing the BIA to consult with tribal officials would have much weight when what's at issue now is the case brought against these *individual* defendants. Ultimately, they are individual citizens who happened to have worked for Menominee Tribal Enterprises. Their employment gave rise to their ability to interact with the government and created the window of opportunity to submit allegedly false claims, but apart from that there seems little reason to look to intergovernmental dispute resolution policies when the case (at this stage) involves only private citizens. Accordingly, I do not place much weight on the government's alleged failure to follow its own policies in bringing this lawsuit.

2. Failure to Investigate

Defendants also argue that the government failed to adequately investigate the factual basis for this lawsuit. This argument cites numerous factors that, in the Defendants' view, should have tipped the government off that its case was groundless. First, they argue that the government's key witness, David Congos, improperly deemed various road clearing work "not done" and then proceeded to deem bills associated with those roads to be "false" because the work had not been completed to his satisfaction. The Defendants were not billing based on how many miles of road they cleared but on what their expenses were. Because they were billing on a cost basis rather than a per-mile basis, the invoices submitted by the Defendants were not "false" because they accurately

reflected their actual expenses. In addition, the government's reliance on MTE's maps was flawed because MTE never intended the maps to show where work was done on a miles-completed basis.

This line of argument is not new. Defendants have argued throughout this action that they were never claiming to have billed for work on a per-mile basis. As such, an invoice seeking payment for "5 miles" of brushing was not actually a statement that MTE employees had completely brushed 5 miles. Although the jury evidently subscribed to this theory at least in part, it does not change the fact that some of the invoices actually submitted by MTE billed on a per-mile basis. They claimed to have established a given number of miles of fuel breaks, and when Congos inspected the fuel breaks he concluded that they were not completed. Clearly, there was ample confusion about the method MTE was using for billing, and the jury could have concluded that the confusion undermined the government's argument that MTE was deliberately submitting false claims. But that dispute does not itself undermine the government's justification for pursuing the case. As I noted at the summary judgment stage, even if the Defendants' expense-based view of its billing was entirely correct, that did not entitle it to list areas of work done (by mileage) if those areas were not actually done. (Dkt. # 257 at 15.) It is obvious that the government actors were actually misled and confused about MTE's requests for payment: why else would they conduct so many meetings on the subject, engage in correspondence with tribal officials, and conduct on-site investigations of what they thought MTE was claiming? In short, even though the Defendants prevailed at trial, I am satisfied that the government's basis for bringing this lawsuit arose out of the confusing nature of MTE's billing practices rather than any untoward exercise of federal power. The fact remains that government employees used the invoices and maps the Defendants submitted and concluded that work claimed in those documents had not been done.

Much of the Defendants' objection to the government's pre-litigation approach arises out of the government's alleged failure to undertake a thorough factual investigation of the roads allegedly not brushed and graded and the culverts allegedly not installed. The Defendants' own expert inspected the roads and found thousands of stumps cut that could be dated to the time the work should have been done (nearly a decade prior to trial). Defendants provided visual evidence that all but one of the contested culverts had actually been installed, and roads that Congos deemed "not graded" were actually graded in many parts. Instead of conducting a new investigation, however, the government relied largely on Congos' own field inspections of the work site from many years earlier. The Defendants argue that a thorough pre-litigation investigation would have revealed that much of the work had actually been done and that the invoices the Defendants submitted were not actually false. Moreover, they believe the government appeared to avoid interviewing the individuals who actually did the work, and it was unmoved by the time sheets and work logs that these individuals submitted to show they had done the work in question.

Any time the government loses a case, the prevailing defendants can claim that the government failed to spend enough time and effort investigating. The argument is particularly weak in a case like this, which involves questions as to whether certain trees were cut and roads were cleared nearly a decade before the trial occurred. The government relied primarily upon Congos' inspections, which were done soon after the BIA received the invoices in question. The fact that the Defendants conducted a more recent investigation does not impose some kind of duty on the government to do the same. It could reasonably have concluded that the contemporaneous inspections were the best evidence of fraud, and it could further have concluded that the various sites could have been cleared or cut in the intervening years, which would muddle the evidence and create even more factually complex issues.

Moreover, it is noteworthy that this Court allowed the Defendants to produce its inspections-based evidence despite the fact that its expert's inspections occurred after the close of discovery. The government vehemently opposed the addition of this new evidence and characterized the Defendants' late disclosures as "flagrant violations of Fed. R. Civ. P. 26." (Dkt. # 337 at 2.) Although I allowed the Defendants' late-disclosed evidence to be admitted, this was more an act of leniency in an effort to ensure a full record and protect the Defendants themselves from the arguably deficient performance of their attorney. The government's opposition to the evidence was sound, and it was based partly on its position that it had all the evidence it needed, which had not been contested by Defendants' expert until the eve of trial. The Defendants' current objection that the *government* should have conducted a more thorough investigation thus rings distinctly hollow given their own conduct during discovery: if the Defendants themselves did not conduct an on-site investigation until so late in these proceedings, why should the government have done so when it already had Congos' field inspections from years earlier?

Additionally, the Defendants complain that the government failed to investigate its belief that they committed fraud when they had other MTE employees falsify their time cards to reflect fire-related forestry work. The jury evidently rejected the government's fraud theory at trial, and had it investigated more prior to trial (the Defendants argue) it would not have made the time card fraud the "centerpiece" of its case.

Once again, however, the government called witnesses who testified that they actually falsified their time cards. Even the Defendants admit that their explanation for the time card falsification was "potentially confusing" – and it is unclear how the government is supposed to respond differently in the face of what it viewed as doctored records. (Dkt. # 383 at 30.) The fact that the jury may have sided with the Defendants does not mean the government was off-base in

pursuing this line of argument or in failing to investigate every possible explanation for the discrepancies.

Finally, Defendants also contend that the government's theory of fraud morphed over the seven year course of these proceedings. Principally, the Defendants believe it was clear from the outset that the government actors had no idea how MTE was actually billing for its work. This led to various and divergent claims of fraud for the same invoices – sometimes the government alleged (for example) eight miles worth of fraud, and other times it was twelve miles, all based on the same documents MTE submitted. These changing theories of fraud show, the Defendants believe, that the government never really had a handle on how it was actually defrauded, which means its decision to bring this action was not substantially justified.

But that, of course, is really a microcosm of this entire case. At trial it became clear that a number of different actors were operating under a variety of different assumptions and expectations. The government may have changed its various assessments of *how much* fraud there had been, but from the very beginning it was clear that the government actors were convinced they were being billed for work that was not being done. That its view of the scope of fraud changed over time does not mean the government should not have pursued a False Claims Act action at all.

3. Motive

In my view, the Defendants' strongest argument is that the government essentially failed to show a convincing motive explaining "why two good men would risk going to jail for lying on invoices when they received no benefit." (Dkt. # 371 at 15.) There was never any credible evidence that either Waniger or Pecore stood to gain financially from submitting false claims, and thus the idea that they would have repeatedly tried to defraud the government was always a difficult proposition to take to a jury.

Even though I view this as a reasonably strong argument, however, it actually does very little to call into question the government's justification for pursuing the lawsuit. First, the government did have a motive theory. Based on the testimony of MTE employees, the government argued that the Defendants were attempting to draw down BIA funding for fire prevention and use those funds for more typical forestry operations. Even if the jury did not ultimately believe that theory, it was not as though the government's theory came out of left field.

Second, the False Claims Act does not require a motive to defraud. *United States ex rel. Durcholz v. FKW Inc.,* 189 F.3d 542, 544 (7th Cir. 1999) ("The *mens rea* element, 'knowingly,' requires that the defendant have actual knowledge of (or deliberately ignore or act in reckless disregard of) the truth or falsity of the information presented.") Although naturally it helps any case to have a concrete motive (e.g., personal financial gain), the government was merely required to prove that the Defendants had knowledge that their submissions to the government were false.

Finally, the Defendants' notion of motive is too narrow. They protest that the Defendants are good men who did not stand to gain financially from the fraud. But personal financial gain can come in many forms, and it is not limited to the case where the defendant specifically pockets the proceeds of his false government claim. Employees, to some extent, stand in the same shoes as their employer. If business is good, employees benefit; if funding dries up, they (or their subordinates) could find themselves out of work. Presumably there are countless employees in the workforce who are complicit in their employers' illicit behavior (shielding income from taxes or dodging regulations, for example) even though they do not specifically profit from that activity. It is implicitly part of the job, which might not exist but for the illegality, and that can be motive enough. Here, the government evidently believed that the Defendants were aiding their employer in drawing down BIA funds to supplement their other operations; the simple fact that the

Defendants did not pocket the fruits of the alleged fraud does not mean that they had absolutely no motive to falsify documents on behalf of their employer.

4. Contract Dispute Versus False Claim

A final objection from the Defendants is also a familiar one. Defendants have objected throughout this case that the action is more similar to a contract dispute than anything involving a false claim. They argue that much of the government's case depended on its belief that work was done inadequately or improperly rather than not done at all. As such, the government's gripe was more about contract performance than about any false claims.

It should go without saying that the fact that the case involved contract performance does not necessarily foreclose False Claims Act liability. Part of the government's argument was that some of the fire prevention work done was so shoddy (e.g., leaving cut brush on fire break roads) that the work done actually made the forest *more* susceptible to fires. Certainly there is a point at which the quality of one's performance under a contract is so substandard that it cannot legitimately be called performance at all, and in such cases an invoice based on substandard performance may rightly be considered "false."

In *United States ex rel. Davis v. Dyna Corp.,* for example, the government alleged that a contractor "knowingly furnished splints that did not comply with the contract requirements and did not conform to Dyna's own drawings, specifications, standards, and quality assurance practices." 1994 WL 48316, *1 (9th Cir. 1994). There, although the government lost its case, the district court denied attorney's fees on the ground that the government's case was substantially justified. The applicable contract provided that "Metal parts shall be free from burrs, pits, corrosion, dirt, grease, foreign matter or other imperfections. Cloth and foam components shall be free from cuts, tears,

ravels, dirt, grease, foreign material, or other defects." *Id.* The government actually had evidence that significant quantities of metal parts it received contained cracks, i.e., "other imperfections."

> The government interviewed several former Dyna employees . . . A number of these former employees stated that the powdered metal parts were subject to cracking, and that they repeatedly failed when tested. The government also conducted its own tests of the splints. An inspection of 66 unused Hare Traction Splints which Dyna had delivered under its contract revealed that 12 of the splints had cracked locking wheels. In the investigator's opinion, these cracks constituted a major defect in the splints. He concluded that 21% of the sample he examined were defective, far in excess of the "[n]ormal acceptable limits" of "1% for major and 2.5% for minor defects.

Id. at 2.

In *Dyna* the question of contract performance was whether the shipped metal parts had imperfections in them, and the answer to that question was based (as here) on the government's own inspections and assessment of quality. Such questions naturally involve judgment calls about the adequacy of the contractor's performance, but that does not remove the case entirely from the purview of the False Claims Act. Just as there were imperfections in the parts shipped in *Dyna,* here there were imperfections in the work done by MTE's employees. Although some aspects of the case did resemble an action for breach of contract, that does not foreclose liability under the False Claims Act.

In sum, there is no doubt that the government's case was a difficult one. It was attempting to show fraud based on the actions of MTE employees nearly a decade earlier against a backdrop of confusing billing practices and divergent expectations on all sides. But I am satisfied that none of the arguments now raised by the Defendants undermines the essential component of good faith that is crucial to my conclusion that the government's action was substantially justified.

C. The Government's Case Was Substantially Justified

I concluded above that the Defendants' arguments do not strongly support their position that the government's claims were not substantially justified. In addition, an independent reason supports my conclusion that the government's case was substantially justified. Specifically, "there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." *Thouvenot,* 596 F.3d at 382. Though the parties do not discuss this presumption, it was the centerpiece of a recent case the Seventh Circuit consolidated for decision to address the "substantially justified" question at issue here. *Id.* There, the government had lost its case alleging that a project engineer's design of an apartment building violated the Fair Housing Act. The Seventh Circuit noted that a trial can reveal that the government had no case at all, or that the judge had erred in his prior rulings. But otherwise the presumption stands: if the government gets to trial after defeating a summary judgment motion, it should generally be found to have been substantially justified in its position.

The *Thouvenot* court found that the district judge had placed far too much weight on the fact that the government lost at trial and it found that the judge should have considered his earlier rulings in determining whether the government's case was substantially justified:

> In deciding to award fees the district judge gave no weight to his rulings denying TWM's motions for summary judgment, for judgment as a matter of law at the close of the government's evidence, and for judgment as a matter of law at the close of all the evidence. After hearing all the evidence he had decided that the government had a substantial case and therefore the jury would be permitted to decide it, and the only thing that happened afterward was that the jury rendered a verdict for TWM. This impelled the judge to review the evidence after the defendant filed its motion for an award of attorneys' fees. But all he found in his review, judging from his cryptic discussion, was that the jury's verdict was justified by the evidence, which no one questions. He pointed to nothing that suggested that the trial had revealed profound weaknesses in the government's case that, had he known about them earlier, would have moved him to grant one of TWM's dispositive motions.

Id.

Here, I denied the Defendants' motion for summary judgment. (Dkt. # 257 at 14-21.) In that opinion I concluded, among other things, that there were serious questions about the Defendants' argument that they were entitled to be paid for actual expenses rather than miles worked. And even if that were true, I observed, that would not necessarily entitle them to submit invoices with false mileage on them. At trial, I also denied the Defendants' motion for dismissal at the close of the government's case. (Dkt. # 340 at 5.) I further declined to direct a verdict in the Defendants' favor at the close of all the evidence. (*Id.* at 8.) These latter rulings (the latter motion I took under advisement rather than denying it outright) reflected my view at the time that the government had presented enough evidence to allow a jury to rule in its favor. In short, after a nearly two-week trial, I was not prepared to take the matter out of the jury's hands, and this strongly suggests that the government had at least a reasonable basis for bringing and litigating this case to verdict. And when the jury began its deliberations, I did not have a strong opinion either way about what the result would be. In short, this case is no different than *Thouvenot*. The facts adduced at trial did not cause me to question any of my earlier rulings in favor of the government, and I repeatedly held that its case should be decided by a jury. The government had a case, and reasonable jurors could have come out the other way. Accordingly, I fail to see how I could conclude that the government's case was not substantially justified.

D. Requests to Admit

Defendants also argue that they are entitled to attorney's fees under Rule 37(c)(2), which provides that if an answering party fails to admit a fact or principle that is later proven at trial, the requesting party is entitled to the reasonable expenses and fees he incurred in proving that fact. Naturally, Rule 37 does not mandate fees merely because a party proves at trial what his opponent failed to admit; the failure to admit does not give rise to fees so long as the party has a "reasonable

ground to believe that it might prevail on the matter." Fed. R. Civ. P. 37(c)(2)(C). In arguing that the government lacked a "reasonable ground," Defendants reiterate many of the arguments they raised in arguing that the government's position was not substantially justified.

Defendants cite two categories of requests that the government should have admitted. The first category involves requests such as Request 21, which involved Invoice 200: "As of March 22, 2001, hazardous fuel expense totaling at least $8,707.50 had been incurred by MTE for work performed pursuant to the applicable HFR proposals." The government responded by denying knowledge sufficient to admit or deny the assertion, and it noted that "the United States cannot determine if MTE incurred legitimate hazardous fuels expenses for work actually performed within the appropriate scope of the applicable HFR proposals." (Dkt. # 371 at 27-28.) Defendants served several similar requests, and all received the same response from the government.

The United States was well within its rights in refusing to admit such requests. Defendants argue that the amounts billed were all based on records and invoices in the possession of the government, and the accuracy of these records was never contested. But that is not all the requests ask. The requests state that the expenses were incurred "for work performed pursuant to the applicable HFR proposals," and that is essentially this case's key dispute in a nutshell. The government's position was that any work MTE did was *not* done pursuant to the applicable proposals – it was either not done at all, it was not fire prevention work, or it was done in a substandard fashion. By couching the requests to admit in such language, the Defendants were not merely asking the government to stipulate to an undisputed fact, they were asking the government to concede the essence of its case. (Not surprisingly, the government's response questioned whether MTE had incurred "legitimate hazardous fuels expenses.")

The same holds true for the other category of requests cited by the Defendants. They asked the government to admit (for example) that "the work indicated on invoice 200 (with supporting attachments) had been substantially performed by MTE by March 14, 2002." (Dkt. # 371 at 28.) Once again, the Defendants were not asking its opponent to stipulate to noncontroversial fact or assertion, they were asking the government to concede that work had been "substantially performed," which would imply that billing for the work would not constitute fraud. The mere fact that the Defendants prevailed at trial does not mean the government should have stipulated to such assertions earlier. The "true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail." *Mutual Service Ins. Co. v. Frit Industries, Inc.,* 358 F.3d 1312, 1326 (11th Cir. 2004) (quoting Fed. R. Civ. P. 37(c) advisory committee's note to 1970 amendment.) Accordingly, I conclude that the government did not improperly fail to admit the assertions proposed by Defendants. For the same reasons, I conclude that it did not improperly fail to supplement its admissions in the face of the evidence provided by Defendants during summary judgment and in advance of trial.

An additional reason causes me to reject the Defendants' fee request. Fees are justified under Rule 37 only when a matter is proved "true" at trial. In its verdict, the jury concluded that the government had failed to prove the alleged violations of the False Claims Act, 31 U.S.C. § 3729(a), and Defendants assume this means they proved the assertions contained in their requests to admit. But the jury verdict in the Defendants' favor does not specifically speak to the matters set forth in Defendants' requests. The government was required to prove a number of elements to establish the violations, including *mens rea,* and the jury could easily have based its verdict on the government's failure to prove that the Defendants acted "knowingly." If so, the jury's verdict would not necessarily mean that the work was, in fact, "substantially done," it would mean simply

that the Defendants did not *knowingly* submit a false claim. In other words, the jury could have believed that the claims *were* actually false, but that the Defendants did not know they were false. Because the jury's verdict did not turn on accepting as true the matters set forth in the requests to admit, I cannot conclude that those requests were ever proved "true" under Rule 37(c)(2). Accordingly, even if the United States should have admitted the requests at issue here and supplemented its disclosures, Rule 37(c)(2) is not triggered.

III. Conclusion

Above I have concluded that the Defendants are not entitled to attorney's fees under the EAJA or Rule 37. Such a conclusion is not to say that it is fair that the Defendants are required to bear the substantial costs and attorneys fees they incurred in their defense against claims for which the jury found they were not liable. But this "unfairness" is the product of the American Rule under which each side in a legal dispute is generally required to bear its own attorneys fees even though it is exonerated, as occurred here. *E.E.O.C. v. O & G Spring & Wire Forms Speciality Co.*, 38 F.3d 872, 881 (7th Cir.1994). The EAJA and Rule 37(c) are exceptions to the American Rule, but they apply only in limited circumstances that I found lacking here. The motion for attorney's fees is therefore **DENIED**.

SO ORDERED this 15th day of June, 2010.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Jury Trial — Day 5

-vs-

Case No. 07-C-316

MARSHALL PECORE and
CONRAD WANIGER,

Defendants.

HONORABLE WILLIAM C. GRIESBACH
Federal Judge Presiding

October 23, 2009

APPEARANCES:

UNITED STATES DEPARTMENT OF JUSTICE, by **CHRISTIAN R. LARSEN** and **STACY C. GERBER-WARD**, Attorneys at Law, 517 E Wisconsin Avenue, Room 530, Milwaukee, Wisconsin 53202, appearing on behalf of the plaintiff.

REYNOLDS & ASSOCIATES, by **GLENN C. REYNOLDS** and **WADE MAX WILLIAMS**, Attorneys at Law, 407 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the defendants.

requires that we take an additional recess, ladies and gentlemen, before we put the defense on. I didn't realize this would be so soon after, but we'll try to make it quick and get you back out here. All right.

(The following takes place outside the presence of the jury:)

THE COURT: Okay, we're outside the presence of the jury. Mr. Reynolds, you've indicated you wanted to make a motion; is that right?

MR. REYNOLDS: I do, Judge. Just to move things along, if that DVD player could be made available, or is that it? Okay. Excellent.

THE COURT: We'll get it all set up, but let's hear your motion.

MR. REYNOLDS: All right. Well, the motion, Judge, is these men have been charged with various counts of fraud or false claims, and in just about-- I want to talk about the time cards separately because I think that perhaps raises some issues that are different than the others.

But basically what we have here is two men that signed a proposal for a new project that was--that was very similar to subsidiary. There was some guidelines, you know, specifically detailing a massive amount of work to rip out plantations and expand the ten-foot

fire access road to something else. Mr. Congos has agreed and testified that this is a contract dispute. And if it's a contract dispute, it is not a false claim.

I think the evidence has been very, very clear that this is a disagreement about standards of work in the forest, period. Not one witness could identify the swath of--of fire fuel break that they said that they had in mind because these individuals have in mind fighting fire the same way they always did, using federal money to do the same work of creating fuel breaks that happen to also have the dual purpose of access roads. And there are times when those access roads will be in multi--they'll be in pine, they'll be in hardwood. There's criticism that it should have been all here and not there, but the self-determination contracts allow them to decide where the work should be done.

So all of this, Judge, as I've indicated now for weeks is about standards, is about whether the work was done adequately, whether they agree that every single leaf and brush pile should be cleared from the road. It isn't about lying. It isn't about fraud. You know, if it were, why would there be such an effort to try to resolve this with showing Mr. Congos's voluminous

documents, giving him maps that don't even--generally are not used in the invoice process?

Mr. Congos wanted the maps--accomplishment maps that are generally done after billing to substantiate where the work was done so he could go inspect, which is fine, but that didn't then become kind of the contract to complete 19 miles of road at four fifty a mile to the extent that would have cost 10,000 a mile. That is absurd to think that these folks and the BIA had the same idea of what was going on here.

And there's just no reason to-- You know, I know the standard for directed verdict, but there's no reason to put these folks through another round with these invoices which will be separately listed one by one with false records attached and put us through this painful process that this is at best a contract dispute. And there's been no evidence that there's anything fraudulent about it. I mean, there's no hiding a ball.

They even--MTE brings in its auditors to basically resolve whether this is per mile billing or expense billing, another contract dispute. Everything about it with respect to standards, how it should be billed, whether it should be, you know, whether the redo work is appropriately billed or not is all typical contract

stuff. This case should have been resolved seven years ago through an administrative remedy, not through a false claims case against these two guys who didn't profit by anything, never took anything for themselves. And if there are mistakes on the invoices, and there are, these were mistakes that were made in terms of not being able to communicate with the government what they expected.

They shouldn't have to go through this, Judge, and we shouldn't have to ask the jury to go through 11 or 12 counts and records and maps which when it comes down to whether disking should have been done or--every single leaf and scrap of wood should have been cleaned up from the forest.

THE COURT: Thank you, Mr. Reynolds.

Mr. Larsen or Ms. Ward.

MR. REYNOLDS: Just a bit on the time cards. Now, the time cards, I think, is a tough sell for directed verdict because there is at least a arguable case to be made that there's a misdirecting of codes which appears to be fraudulent.

The truth is, if we get there, is that Van Orsow made a mistake on his time cards and that's it, you know. Mr. Waniger will testify, and this is in our case, that he never told these men to code time cards

outside of the sort of understanding that they had internally that fire suppression work done in western states would be reimbursed to fire even though the forestry department paid for it. So the time code adjustment was done to relocate the fire money that was now in Mr. Waniger's account back to Mr. Pecore's account. Mr. Johnson testified to that, and the government ought to know that.

And with respect to Mr. Van Orsow's stuff that went into the invoice, that was in error. That was never intended to-- I mean, Mr. Waniger, when he saw this evidence, said it's a mistake. What can I do about it? It got in there and it shouldn't be there.

THE COURT: All right.

Ms. Ward?

MS. GERBER-WARD: Sure. Thank you, your Honor.

As the court knows, I'm just going to lay out the elements of the false claims act. First, the defendant has to submit or cause a claim to be submitted, the claim needs to be false, and the defendant needs to know that the claims are false.

And I think the argument that Mr. Reynolds has made is that--on directed verdict is that this should be a breach of contract case. There is, I think, case

law that supports, you know, the difference between a breach of contract case and the claim under the false claims act is the knowledge element. There's a (Indiscernible) element that the government has to prove in order to prove its case under the false claims act.

I think there's been significant evidence of knowledge that the defendants knew that these claims were false. We have Mr. Cooper's inspections, we have Mr. Congos's October memo to both defendants, we have Mr. Congos's December memos to both defendants putting them on notice that he was concerned that the work had not been done.

And so I think under the elements we've met our initial burden of proof under the false claims act and there's no basis for a directed verdict at this time.

THE COURT: All right. Anything else?

MR. REYNOLDS: Well, the Cooper memos basically saying work not done adequately. I mean, it's down to adequate standards. Everything about this case is standards, agreement on terms, how much brush should be removed, how wide the road should be. That's not a false claim, Judge. That's a contract claim. It just-- There's nothing false about point one, one piece of this case in which there's a lie. And I'll

sit down.

I agree the time cards are a touchy issue. That's a tough one that I think Larry Johnson took care of it, but, you know, I think the government has made a case in that instance where a reasonable juror could find that that is wrong, that that is a lie. But there's nothing like that in this--in this brushing and grading case. It is clearly a case of disagreement about what's appropriate work, a contract.

THE COURT: There's conflicting testimony, and I've heard the government's evidence and Mr. Congos, who I'm not allowed to assess the credibility of his testimony. That's for the jury to decide. But if his testimony is to be believed, then he went and examined the areas that the defendants claimed in their invoices submitted to the Department of Interior work had been done.

Now, the--certainly, what the witnesses say--the workers say about whether they did the work is going to be important for the jury to here. But regardless of what they say, if Mr. Congos's testimony that there was no evidence of any work relating to this proposal done or these proposals that was done, if the jury believes that, then clearly they would believe that the information the claims submitted were false.

Now, it doesn't mean just because they were false, even if it could be a mistake, could be a misunderstanding, those are possible explanations. But the state of a person's mind is something very difficult for anyone to know. It's usually determined by circumstantial evidence.

And the government has introduced circumstantial evidence in this case that would allow a reasonable jury to conclude that the defendants knew that the claims they were submitting were false. The government's introduced evidence that they had budgetary problems. There were--the road funding was--was operating without funds. They needed to pay their employees somehow.

It is true that there's no evidence that either of these defendants personally profited from submitting false claims to the government, and I'm sure the jury will assess that in deciding whether they would have, you know, for no gain themselves submitted false claims to the government.

But those are things for the jury to decide. I can't say. And if I did, it wouldn't put an end to this case. The government would appeal. I'd be reversed because this is evidence that a jury has to assess. And instead of putting Mr. Waniger and

Mr. Pecore out of misery by being the subject of this no doubt difficult case, it would simply come back and start over.

This is their day in court, and their day is with a jury to decide this thing. I can't say from the evidence I've heard that the jury acting reasonably could not find from the evidence that's been submitted that false claims were submitted and with the proper knowledge. There's that evidence there.

You admit yourself the time cards offer a problem. But the time cards--the instructions on how to complete the time cards also fits in with the evidence of the budgetary problems, which are the motive evidence.

So under those circumstances, it would clearly be improper for me to take this case from a jury. It's going to have to go forward. I think, though, that certainly, you know, the jury's attentive, they'll certainly listen.

We'll put this--you're going to start out with a deposition, I take it? Is that correct? We'll set that up.

MR. REYNOLDS: I think so.

THE COURT: All right. So the motion is denied. Anything else to address? The motion for dismissal at the close of the government's case will be

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Case No. 07-C-316

v.

MENOMINEE TRIBAL ENTERPRISES,
MARSHALL PECORE,
and CONRAD WANIGER,

Defendants.

DECISION AND ORDER

The United States brought this action against Menominee Tribal Enterprises ("MTE") and two of its employees. The Government alleges that the Defendants submitted invoices seeking payment that contained false information, in violation of the False Claims Act, 31 U.S.C. § 3729. It further alleges that MTE breached contracts it had with the Bureau of Indian Affairs ("BIA") when it made several large purchases without receiving prior approval. All parties have moved for summary judgment, at least as to some of the claims. For the reasons given herein, I conclude that all claims should be dismissed as to Defendant MTE; False Claims Act claims brought against the individual Defendants will remain.

I. BACKGROUND

MTE is the principal business arm of the Menominee Tribe of Wisconsin. The Indian Self-Determination and Education Assistance Act ("ISDEAA") provides that tribes may enter into "self-determination contracts" with the government, whereby the tribes agree to provide services that otherwise would be provided by the federal government. 25 U.S.C. § 450b(j). For more than a

decade, MTE has contracted with the BIA to manage the Menominee Forest and its roads. Its duties under the pertinent agreements included fire prevention (clearing breaks in the forest, maintaining access roads, etc.) and road maintenance.

A number of the jobs MTE performed resulted from proposals it submitted to the BIA. Among these were hazardous fuel reduction ("HFR") and other proposals in which MTE proposed to remove brush, perform controlled burns, and clear and improve fire access roads. (The quality of the access roads is important because fire fighting trucks tend to be large and heavy.) MTE also agreed to create fuel breaks – areas cleared of flammable trees and brush that would slow or stop forest fires. The process of clearing these areas is known as "brushing," and the debris left over from cutting down the trees and brush is known as "slash."

In 2001 MTE submitted a number of invoices to the BIA seeking payment for brushing and road grading. For a number of reasons, BIA employee Dave Congos was concerned that the work described in the invoices either had not been performed or had been performed inadequately. After several attempts to provide supporting documentation, MTE indicated that the invoices would be cancelled and re-submitted. In February 2002, the BIA implemented a new policy governing invoices. Invoices would now require the signature of a responsible tribal official certifying that the invoice accurately reflected the expenditures reflected on the project. (Congos Aff., ¶ 41.) The Defendants contend that the new policy was created with MTE in mind, and in fact they assert that the responsible BIA officials already knew that several of the invoices contained false information. In fact, they note, Congos wrote a memorandum dated February 20, 2002 asking for advice about how to proceed with the "fraudulent billings" MTE had submitted (and would re-submit). (Kanassatega Decl., Ex. E.)

A meeting was held on February 26, 2002 in which eight to ten individuals involved in the billing (on both sides) discussed the BIA's problems with MTE's invoices. There is some dispute about whether agreement was reached and what the nature of any agreement was, but the result of the meeting was that several of the offending invoices were returned to MTE to comply with the new certification requirement and to allow MTE to provide more documentation. On March 25, 2002, MTE re-submitted Invoice Nos. 200, 212, 214, 217, 219 and 224, all of which had certifications signed by Defendant Marshall Pecore. These invoices included maps (which the BIA had requested) showing the work performed for each invoice. (Hart Aff., ¶ 17.) For example, Invoice 212 sought payment for brushing performed in May 2001: "19.0 miles @ $450 per mile" for a total of $8,550. (Hart Aff., Ex. A-2.) The invoice included a half-page "narrative" from Defendant Conrad Waniger explaining the work accomplished. It also included a brief description of the time expended on the job: 24 hours on May 5, 2001, and 40 hours on May 12. And as the BIA had requested, the invoice included a map highlighting where the work was performed. Handwritten on the map is the phrase "19 miles brushing."

After the invoices and other documentation were submitted, Congos conducted some fourteen field inspections. (Congos Aff., ¶ 44.) On some of these inspections he was accompanied by another BIA employee, Tom Magnuson. Congos found that some of the roads MTE claimed to have brushed were either not brushed at all or were brushed but not slashed (i.e., the brush was cut but not cleared away), and in the latter case this meant the supposed fire breaks would actually encourage fires rather than stall them (presumably the slash would dry out and become fuel for any fire). Moreover, some of the road grading work for which MTE had sought payment was not accomplished. The Government has created a chart listing the invoices, the amount of work claimed by MTE, and the deficiencies identified by the Government. (Pl. PFOF ¶ 189.) A total of

the eight allegedly false invoices and other claims for payment shows a deficiency of roughly 200 miles that were not brushed, as well as 10 culverts that were not installed. Most of the invoices were not paid by the BIA as a result of Congos' inspection. The Government claims that its damages resulting from invoices it did pay amount to $48,205.41.

In addition to the FCA claims, the Government has brought breach of contract claims against MTE. The 1995 road maintenance contract entered into between the United States and MTE contained a clause requiring pre-approval of expenditures exceeding $5,000:

> The Contracting Officer must approve in writing leases of any dollar amount, all equipment purchases estimated at $5,000.00 or over and all subcontracts estimated at $5,000.00 or over. The Contractor will submit a written request for approval giving the estimated amount and the name and address of the lessor, vendor or subcontractor proposed along with a justification of need. Failure to obtain this required approval will result in disallowance of the cost of the lease, purchase or subcontract.

(Mani Aff., Ex. A, Section H-7.)

Similarly, the 2000 road maintenance contract incorporated a provision from an OMB circular that required pre-approval of certain capital expenditures. According to the United States, MTE made a number of equipment purchases without obtaining pre-approval, even though MTE was specifically notified of that requirement. For example, in 1999 MTE spent some $218,000 on a road grading machine, $67,000 on a backhoe, and $25,000 for a Chevrolet pickup truck. In 2000 MTE bought a $77,000 snowplow truck and spent $253,000 building an equipment garage.

In addition to incurring these unapproved equipment expenses, the United States alleges MTE breached its contracts by transferring funds the BIA had provided for indirect costs to the general fund it used for direct costs. These transfers allegedly occurred in October 2000 and April 2001. Further, the Government alleges that MTE breached its contracts by charging the Government for equipment usage, when in fact MTE had actually purchased the equipment in

question with BIA funds in the first place. The governing OMB circular allows equipment use costs to be charged in some cases, but not if the equipment was already purchased with government funds. The United States alleges that some $78,554 was improperly charged for equipment use costs. Other facts are set forth below, where relevant.

II. MOTIONS FOR JUDGMENT ON THE PLEADINGS

MTE and the individual defendants have moved for judgment on the pleadings. They all argue that they were not "persons," as defined in the FCA. As such, they contend, all FCA claims must be dismissed against them. A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is similar to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). A court should grant the motion "[o]nly when it appears beyond a doubt that the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no material issues of fact to be resolved." *Moss v. Martin,* 473 F.3d 694, 698 (7th Cir. 2007).

A. The Tribe is not a "Person" under 31 U.S.C. § 3279

The False Claims Act establishes civil penalties for "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(1), (3). The Tribe's motion for judgment on the pleadings is based on its argument that it is not a "person" that may be sued under the False Claims Act.[1]

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[1]The Tribe also argues that its sovereign immunity precludes this lawsuit. Immunity is a question of subject matter jurisdiction, an issue that is typically reached before the merits of the lawsuit. In *Stevens,* however, the Supreme Court found it preferable to reach the question of statutory interpretation first. *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 780 (2000). That is the approach I follow here.

The FCA provides no definition of "person" in that context, and courts have interpreted the term based on the FCA's history and purpose. In *United States ex rel. Chandler v. Cook County, Ill.*, for example, the Supreme Court found that counties and municipalities were "persons" subject to suit under the Act. 538 U.S. 119, 132 (2003). Three years earlier, the Supreme Court found that states were *not* "persons" under § 3729. *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 780-781 (2000). Courts have never had occasion to consider whether an Indian tribe is a "person" under the FCA, and thus much of the dispute in the present case boils down to which of these two recent Supreme Court cases more accurately sets forth the proper considerations applicable to Indian tribes.

The question in *Chandler* was whether Cook County, Illinois, was a "person" within the meaning of 31 U.S.C. § 3729. The Court began its analysis with a lengthy history of how the term "person" was interpreted in 1863 when the FCA was enacted. 538 U.S. at 125. It noted that private corporations were certainly deemed "persons" at that time, as corporations were collections of individual persons. Essentially, corporations were considered "artificial persons." *Id.* at 126. The Court went on to find that municipalities were also persons: "municipal corporations and private ones were simply two species of 'body politic and corporate,' treated alike in terms of their legal status as persons capable of suing and being sued." 538 U.S. at 126. Thus, given that municipalities were always capable of being sued and were considered "persons" when the FCA was drafted, the Court found no reason to exclude Cook County from the FCA's reach.

In contrast, in *Stevens* the Court found the FCA inapplicable to states. In reaching its conclusion, the Court cited a number of factors. First, it began with the presumption that the term "person" does not include the sovereign. 529 U.S. at 780. The Court then noted that since its enactment in 1863, none of the FCA's numerous amendments had broadened the definition of

"person" beyond the original understanding. Further, in another, unrelated provision, the statute defined person to include states. The fact that such a definition was absent in § 3729 suggests Congress intended to exclude states. The Court also noted that the FCA was essentially punitive in nature, and courts should generally be reluctant to apply punitive provisions to governmental entities. *Id.* at 785. Moreover, the Program Fraud Civil Remedies Act of 1986, which embodied a "sister scheme" of the FCA, contains a definition of "person" that excludes states. It would not make sense, the court found, for Congress to exclude states in one statute while including it in another. "In sum, we believe that various features of the FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term 'person' included States for purposes of qui tam liability, indicate quite the contrary." *Id.* at 787.

Given these divergent precedents, the ultimate question is whether Indian tribes have more in common with states or with municipalities. I first note that many of the concerns set forth in *Stevens* are inapposite here. For example, the Court turned to other parts of the statute and another statute altogether to infer that states were excluded from § 3729. Those inferences were based on those provisions' clear applicability (and inapplicability) to states in particular. Yet the applicability of those provisions is not at all clear where tribes are concerned, and so it is impossible to draw any meaningful inferences by looking outside of § 3729 itself.

The *Stevens* court also noted that the FCA's remedial scheme was essentially punitive, and it relied partly on a presumption that states should not be subject to punitive measures absent clear Congressional intent to the contrary. One might think that a similar presumption against applying a punitive statute to the Tribe would hold, but the Court in *Chandler* found that local governments were amenable to suit under the FCA. The concern against sticking taxpayers with quasi-punitive damages was of "limited vigor" because local taxpayers may be indirect beneficiaries of the fraud

and the federal government would be entitled to recoup its losses on behalf of all U.S. taxpayers. *Cook County, Ill. v. U.S. ex rel. Chandler,* 538 U.S. 119, 132 (2003). The same, presumably, may be said with respect to Indian tribes.

But although these concerns do not apply to the present case, I am satisfied that the reasoning of *Stevens* applies with equal force to Indian tribes and that *Chandler* did not overrule any aspect of *Stevens*' holding. As the Tribe notes, *Chandler's* unanimous holding was based on a thorough analysis of the meaning of "person" as it was understood in 1863, when the FCA was enacted. The Court concluded that at that time "municipal corporations and private ones were simply two species of 'body politic and corporate,' treated alike in terms of their legal status as persons capable of suing and being sued." 538 U.S. at 126. There is no such common understanding in this case – Indian tribes, with sovereign immunity, certainly cannot be sued in the same fashion as counties or cities. Thus, *Chandler* does not alter the landscape; it merely recognized that counties have always been subject to suit, and as such there is no reason to exclude them from the definition of "persons" under the FCA.

Although a number of factors were at play in *Stevens* and *Chandler,* there is no question that the difference in outcomes was motivated chiefly by the fact that states enjoy sovereign immunity while municipalities do not. Although the immunity question does not conclusively answer the question of what the statute means (i.e., whether a tribe is a "person" under 31 U.S.C. § 3729(a)), the existence of immunity is what drives a key statutory interpretation *presumption*. The holding of the *Stevens* court reiterated the presumption that the term "person" does not include the sovereign, the upshot of which is that before a sovereign can be sued there must be some "affirmative indications" of Congress' intent to abrogate immunity. "In sum, we believe that various features of the FCA, both as originally enacted and as amended, far from providing the

requisite affirmative indications that the term "person" included States for purposes of qui tam liability, indicate quite the contrary." *Id.* at 787.

In explaining the holding in its *Chandler* opinion, the Seventh Circuit recognized the same principle:

> Given the sovereign status of states, Congress must do something more to bring states within the coverage of a federal law than enact a law aimed at "persons," even if that term is used in its broadest sense. The same is not true of municipal corporations and other governmental bodies within state boundaries.

United States ex rel. Chandler v. Cook County, Ill., 277 F.3d 969, 975 (7th Cir. 2002), aff'd 538 U.S. 119. And just as Congress "must do something more" to indicate that a sovereign state may be sued, it must do so if it intends a sovereign tribe to be sued. Because *Stevens* turned largely on the statutory presumption afforded sovereign entities, and because there is no affirmative evidence that Congress intended to allow Indian tribes to be sued under the FCA, I conclude tribes are not "persons" under § 3729(a).[2]

Nor am I persuaded by the Government's argument that the outcome should be different here in light of the fact that the United States, rather than a private party, is the plaintiff. The United States suggests that while *Stevens* applies when private individuals sue states (or tribes), the presumptions used by the majority are inapplicable when the government itself is the plaintiff. It is true that the protections of sovereign immunity do not generally apply when the United States

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[2]I further note that tribes are even deemed part of the United States for purposes of the Federal Tort Claims Act. *Hinsley v. Standing Rock Child Protective Services,* 516 F.3d 668, 672 (8th Cir. 2008) ("Tort claims against tribes, tribal organizations, or their employees, that arise out of the tribe or tribal organization carrying out a self-determination contract, are considered claims against the United States and are covered to the full extent of the FTCA.")

is suing another sovereign, but in the FCA context a private *qui tam* party is actually suing on behalf of the United States. The FCA allows private parties to sue, but they are standing in the shoes of the government and acting as private attorneys general. "The United States remains the real party in interest in a qui tam suit brought under the FCA, while the 'private attorneys general,' or 'relators,' benefit from the action by sharing with the government in the monetary recovery of the lawsuit." *Stalley v. Methodist Healthcare,* 517 F.3d 911, 917 (6th Cir. 2008); *United States ex rel. Walker v. R&F Properties of Lack County, Inc.,* 433 F.3d 1349, 1359 (11th Cir. 2005) ("The United States is the real party in interest in a qui tam action under the False Claims Act even if it is not controlling the litigation.") A private FCA action must be brought in the name of the United States, 31 U.S.C. § 3730(b)(1), and even when the Government does not intervene the case cannot be dismissed without its consent.

The point is that private litigants in FCA lawsuits are actually acting on behalf of the United States, and the United States is represented whether it is the originator of the lawsuit or just a bystander. As such, the considerations of sovereign immunity expressed in *Stevens* would apply with almost equal force regardless of whether the United States is the *named* plaintiff (represented by the attorney general) or whether it is represented by a *qui tam* relator (a "private" attorney general). Thus, there is little reason to limit *Stevens* to lawsuits in which a private citizen is the plaintiff: either way, the United States the real party in interest.

In addition, the Court in *Stevens* was construing the statutory term "person" as it is used in the FCA. The meaning of a specific term in a statute does not change depending on who the plaintiff is. Although a concurrence in *Stevens* suggested the question was left open by the majority's opinion, that sentiment was not echoed by five members of the majority. 529 U.S. at 789. And although at least a few unpublished district court opinions would seem to allow an FCA

lawsuit by the United States against a state entity, neither of these cases – nor the United States – has explained how the definition of a specific word in a statute could change based upon who is on the left side of the "v" in the caption.[3] In other words, *Stevens* construed the term "person," and in doing so it did not limit its analysis to the sovereign immunity issue, nor did it intend that the definition could change based on the identity of the plaintiff. Although the dissent and concurrences would disagree with the majority or at least keep the question open, I do not read the majority opinion as narrowly as the United States does.

B. Defendants Pecore and Waniger are "Persons" under § 3729(a)

Defendants Pecore and Waniger have filed their own motion for judgment on the pleadings. They assert that if the Tribe is not a "person," then they cannot be "persons" either because they were acting in their official capacity and in the scope of their employment.

The Ninth Circuit has recently held that "state officials, sued for damages in their individual capacities, are 'persons' within the meaning of 31 U.S.C. § 3729." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1125 (9th Cir. 2007). The considerations of sovereignty that apply in the consideration of whether a state is a "person" do not apply merely because the individuals sued are state employees:

> The individual defendants challenge this straightforward conclusion by contending that it permits an end-run around *Stevens* and the Eleventh Amendment. They argue that a relator precluded from asserting a qui tam action against a state agency could bring the same action against individual state employees in their personal capacity. We find this argument unpersuasive. An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the

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[3] *United States ex rel. Chittister v. Department of Cmty. and Econ. Dev.*, No. 1:CV-99-2057 (M.D. Pa., Sept. 23, 2002) (Dkt. # 208); *United States v. University Hosp. at Stony Brook*, 2001 WL 1548797 (E.D.N.Y. 2001).

> individual defendants rather than the state treasury. Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. As the Supreme Court explained, "the distinction between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.'" Where a plaintiff seeks to hold individual employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government, the state is not the real party in interest, and the Eleventh Amendment poses no barrier to such a suit.

Id. (citations omitted).

Defendants Pecore and Waniger suggest that they were acting in their "official capacity" when they undertook the actions cited in the complaint, and such a suit against them is really a suit against the Tribe. There is some support for their argument. In *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa,* 269 F.3d 932, 935 (8th Cir. 2001), the Eighth Circuit concluded that a lawsuit against a state administrator was essentially a lawsuit against the state. The complaint alleged that the individual defendant had administered a state program in a fashion that defrauded the federal government, and the court concluded that the lawsuit was brought against the defendant in his official capacity, i.e., a suit against the state itself. As such, it was barred by *Stevens*.

The *Gaudineer* case was subject to a dissent, and its approach was rejected by the Ninth Circuit in *Stoner*. (The *Stoner* petition for certiorari was denied by the Supreme Court on October 6, 2008.) For the reasons suggested by the Ninth Circuit, I conclude that the considerations set forth in *Stevens* and other cases do not extend to the individual employees of states and other sovereign entities unless those employees are actually sued in their official capacities.

Importantly, it is not up to the defendants to decide how the claims should be styled. Instead, the course of proceedings (e.g., the nature of the recovery sought) is what determines whether the lawsuit is brought against defendants in their individual or official capacity. *Brandon v. Holt,* 469 U.S. 464, 469 (1985). When the United States names in its complaint *both* individual

defendants and the Tribe itself, and when it insists in its briefs that it seeks relief against the individuals *as* individuals, it should be clear enough that it is not suing the individuals merely as stand-ins for the Tribe itself. *United States ex rel. Adrian v. Regents of University of California,* 363 F.3d 398, 403 (5th Cir. 2004).

In sum, this is not a lawsuit brought against individuals in their "official capacities," it is a lawsuit brought against individuals who happen to be Tribal employees. It is no different than the legions of § 1983 claims that are brought against state officials in their individual capacities, the vast majority of which involve state employees (prison guards, police officers, zoning administrators, et al.) acting within the scope of their employment. Recovery against these Defendants is not tantamount to recovery against the Tribe, and a judgment against these individuals would not in any way impact the sovereignty of the Tribe itself. It is clear that the individual defendants are "persons" within the meaning of § 3729, and the United States has not sued these defendants in their official capacity. Accordingly, the FCA claims against the individual defendants will not be dismissed.

III. MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The United States, MTE, and the individual defendants have all filed motions for partial summary judgment. Summary judgment is proper only when the materials before the court demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When the parties have filed cross-motions for summary judgment, "we construe the evidence and all reasonable inferences in favor of the party against whom the motion under consideration is made." *Samuelson v. LaPorte, Cmty. Sch. Corp.*, 526 F.3d 1046, 1051 (7th Cir. 2008).

A. Pecore's and Waniger's Motion for Summary Judgment on FCA Claims

I have concluded that MTE itself is not a "person" under the FCA, which renders its motion for summary judgment on the FCA claims moot. I have concluded, however, that individual Defendants Pecore and Waniger are "persons" under the statute. They present several arguments seeking dismissal of the FCA claims.

An FCA claim requires proof of three elements: (1) presentment to a government officer or employee; (2) a false claim; and (3) knowledge of its falsity. 31 U.S.C. § 3729(a)(1). *United States ex rel. Fowler v. Caremark RX, L.L.C.,* 496 F.3d 730, 740 (7th Cir. 2007).

1. That "Actual Expenses" Were Owed does not Insulate Defendants from Liability

One of the principal themes of the defense is that the relevant agreements stipulated that MTE would be reimbursed for its actual expenses. MTE, the Defendants argue, actually *did* incur the expenses for which it billed. For example, even if a given invoice listed 19 miles of brushing work when only 15 miles was performed, MTE's actual expenses were exactly what was invoiced. Even though the number of *miles* billed was wrong, the bottom line was correct. Because MTE was entitled to be paid its actual expenses (i.e., it could recover its bottom line), it follows that the actual miles claimed on the invoices were immaterial to the government's decision to pay.

But MTE's interpretation of the agreements is not supported by the record. Most obviously, it was clear that the Government was always interested in the number of miles that were cleared rather than simply the number of hours worked or expenses incurred. Why would the BIA request maps of completed work (and why would MTE provide them) if that information was "immaterial"? And why would Congos go on multiple inspections of the work sites if all the Government cared about were MTE's hours worked or "actual" expenses? In fact, the entire relationship of the parties makes no sense if the only thing that mattered was MTE's actual

expenses. Obviously, the Government (like any customer) was concerned with *how much work* MTE was doing. The contracts were not a blank check under which MTE could bill for anything it wanted. It actually had to do work, and MTE knew that.

Moreover, the premise underlying the Defendants' argument is something of a red herring. The Defendants' overarching theory is that (a) MTE's employees actually worked the number of hours they claimed and incurred the actual expenses MTE claimed and (b) the Government owed actual expenses anyway, so the actual number of miles listed on the invoices was immaterial. But even if the agreements may have been based on actual expenses (regardless of work done), and even if MTE actually incurred the bottom line expenses for which it sought reimbursement, that does not mean MTE had a blank check to draft invoices for phoney miles. Suppose (to take an extreme example) MTE actually incurred $1 million in expenses to clear 100 feet of brush. In doing so, it paid its employees at a rate of $10,000 per hour. Yet, recognizing that it has spent an exorbitant amount of money to do very little brushing work, MTE decides to invoice the Government for 1,000 miles of brushing instead of the mere 100 feet its employees actually cleared. That way, the false invoice disguises *how* the money was spent, even though the money *was* actually spent (albeit frivolously) on road clearing. Would MTE be justified in this approach? Of course not. The fact that they believed their actual expenses were to be reimbursed does not entitle MTE employees or anyone else to submit claims for payment that deliberately mislead the Government as to *how* those expenses were incurred.

Similarly, the fact that the invoices may have disclosed the correct number of hours worked does not mean the invoices were not false. The direct effect of overstating the number of miles cut was an increase in the apparent efficiency of the project. Just as a contractor might want to mask the rates it paid its employees for labor, it might also want to give the impression that it did more

work than it actually did. Remarkably, the Defendants chide the Government for its "stubborn insistence on inspecting whether certain roads were completely brushed" because that information is "immaterial to whether the invoices were false." (Dkt. # 214 at 12.) Of course this is a preposterous objection. The logical extension of the Defendants' argument is that they would have been within their rights to submit invoices for thousands of miles of bogus work, so long as the bottom line they sought reflected actually incurred expenses. MTE did not have a blank check to make up information about the amount of work it did just because it was otherwise entitled to be paid for its expenses.[4]

But of course much of this is beside the point. Regardless of whether the governing contracts provided actual expenses, the FCA does not view false claims in the narrow fashion the Defendants suggest. That is, the statute is not concerned with the particular details of what a given contract may have provided, it is concerned with preventing a party from submitting a false claim, which is "*any* request or demand, *whether under contract or otherwise*, for money . . ." 31 U.S.C. § 3729(c). Even if MTE were truly entitled to be compensated for its "actual expenses" under the governing agreements, it is the specific invoices here – the requests for payment – that count as false claims. The key question is whether the false information was material to the Government's decision to pay those claims. *United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428, 443 (6th Cir. 2005). Although the governing contracts could play a role in the materiality analysis, it is clear that there is substantial evidence that the amount of miles

[4]Of course it should be obvious that MTE was not entitled to be paid for whatever expenses it incurred *just because* it incurred them. Its employees knew the BIA was concerned the whole time with how much work was actually being accomplished. Why else would Congos have performed so many inspections? MTE has not identified any other similar contract where the billing party was entitled to be paid from the Government for any expense it incurred, regardless of how it performed the work in question.

brushed or graded was a key consideration (i.e., material) in the Government's decision to pay or not pay the claims, and this factor was not necessarily linked to any specific contractual provisions.

Ultimately, regardless of what the Defendants may have believed about their obligations under the relevant contracts, for FCA purposes the question is whether they submitted a claim for payment that contained false information material to the Government's decision to pay. Their supposed entitlement to "actual expenses" does not mean their allegedly false submissions were not false claims.

2. The Government's "Knowledge" of Falsity is not a Defense

The Defendants argue that the Government knew certain of the invoices were "false" before they were even presented. In particular, they assert that as of February 2002, David Congos knew MTE's invoices 212, 214, 217, 219 and 224 contained false information. These invoices were returned to MTE. On February 28, the BIA adopted a new policy requiring submissions to certify that the invoice and supporting data were "accurate and complete." This policy was adopted with MTE's invoices in mind. Congos and others hoped the new certification policy would cause MTE to either correct its submissions or to not file them at all. That did not materialize, however. When MTE did re-submit the offending invoices, which contained the same false information, MTE argues the BIA was already on notice that they were false. In fact, MTE argues that in a February 26 meeting Congos led MTE to believe that the invoice issues were "resolved" and the invoices would be paid if they were resubmitted.

MTE relies on *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542 (7th Cir. 1999). But that case does not hold that advance Government knowledge of falsity somehow renders that invoice true or insulates the defendant from liability. In *Durcholz* , a government agency needed a contract performed quickly. In order to fast-track the process, Government officials instructed

bidders to bid using excavation line-items in their bids when in fact everyone knew the project was expected to be a dredging project. An invoice was submitted by the winning bidder using the excavation line-items, even though excavation was not done. When a government accountant later flagged the problem, the contractor resubmitted the invoice by eliminating the offending line-items. After the bidder was paid, one of the losing bidders brought an FCA action alleging the proposals and invoices were false claims because they used excavation line-items when in fact the project was a dredging project.

In affirming the district court, the Seventh Circuit noted that "[i]f the Government knows and approves of the particulars 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. But this statement of the law is not as broad as MTE suggests. It is not merely government *knowledge* of falsity that precludes an FCA claim, but government *encouragement* and *involvement* in the submission of those claims. As the Seventh Circuit observed:

> From the start,[government] officials were more interested in speed than cost and made their decisions in accordance with these priorities. They classified the project as a performance specification in order to expedite the bidding, knowing that the UPB did not contain dredging line-items. They later directed FKW to modify its proposal to match the Midwest bid and told FKW to resubmit its invoices without the excavation line-items. Thus, the government not only knew that FKW's proposal and invoices contained excavation line-items, it directed FKW to use those pricing numbers. *In essence, then, Durcholz is alleging that the government was defrauded by the very activities that its agents ordered.*

Id.

Under such unique circumstances, it would be impossible to claim the Government was defrauded by the very actions it orchestrated. This narrow exception is not applicable here. Even

if Congos and other BIA officials suspected certain of MTE's invoices were false, they did not encourage or order the BIA officials to resubmit the invoices with that false data. It was not their idea to submit invoices with false amounts of work performed. In fact, according to MTE itself, the new certification rule was implemented specifically with a view towards *discouraging* MTE from submitting the invoices with the false data. (MTE PFOF ¶ 23.) In short, even if the BIA officials suspected or knew certain information was false, that does not preclude applicability of the FCA.

3. "Falsity" of the Claims Based on "Performance" Issues or Contract Disputes

Defendants argue that many of the Government's falsity contentions are based on the quality of MTE's work in performing the contract. The HFR proposals, they note, did not contain any concrete standards for performing the work. And throughout the contracting process the Defendants allege they were confused as to what the Government's invoicing expectations were. Thus, this case is only about (they allege) disputes about contracts and their performance rather than any issues involving "false" claims.

The Government protests that its claims relate to work either not done at all or for work that was woefully incomplete because slash was not removed. In other words, it is not quibbling about performance or seeking to enforce some idiosyncratic interpretation of the contracts; it is alleging the work in question was either not done at all or done in a fashion that no one could plausibly claim the work was satisfactory.

I conclude that the Government's FCA claims are not simply contract disputes about performance or interpretation. As to the work not done at all, there is no dispute that failure to do work claimed would be a false claim. And as to the Government's claims based on areas that were cut but not slashed, the Defendants have not even suggested that such work would constitute

adequate brushing under any performance standard. In other words, there was no reasonable "interpretation" of the contracts that would have allowed the Defendants to leave slashed brush on the ground and then bill the Government for that work as though it were completed. The Government is not suing the Defendants for failure to live up to a given standard or for failure to perform adequately. Its claims are based on a complete lack of performance that would fail under any standard. It is apparent that the United States believes there were countless discrepancies in MTE's work, but for pragmatic reasons it has focused its effort to show false claims only on the most glaring omissions in MTE's invoices. Accordingly, none of the Government's claims turns on any interpretation of the contract requirements or any issues of adequate performance.

4. Laches

Finally, the Defendants argue that the doctrine of laches precludes the Government from pursuing this case. The invoice submissions occurred five or six years before this case was brought, and Pecore and Waniger argue that it is difficult to find necessary evidence to defend against the Government's accusations (despite their own recent production of large amounts of new evidence). In particular, if the Court rejects their principal contention (discussed above) that the amount of work done was immaterial, then the number of miles worked is a key issue in the case. By the time the Government filed suit in April 2007, it was impossible to reconstruct the evidence necessary to show how much work they actually did.

The laches defense "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Pruitt v. City of Chicago, Illinois,* 472 F.3d 925, 927 (7th Cir. 2006) (citations omitted). The United States notes at the outset that application of the doctrine of laches is highly controversial when the United States itself is the plaintiff. One idea is that when the government is acting on behalf of its citizens (here, to recover

allegedly fraudulently paid funds and return them to the taxpayer), laches (an equitable doctrine) has little applicability. Another suggestion is that "only the most egregious instances of laches can be used to abate a government suit." *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670, 673 (7th Cir. 1995). Laches might come into play, for example, if a defendant's due process would be violated by prosecution of a stale civil lawsuit.

But regardless of whether laches may *ever* be a defense against the Government, it is clear that it would only be applied in an unusual case. This is not such a case. The FCA contains a six-year statute of limitations, 31 U.S.C. § 3731(b), and the Defendants concede that the Government filed suit within that time period. At the outset, therefore, it is difficult to conclude that there was an "unreasonable" delay when the Government brought suit within the statutorily allotted time period. Moreover, the lawsuit was the result of a lengthy federal investigation. The Government did not sit on its hands for five years and then dig a dusty file out of a cabinet. There was, in short, no unreasonable delay in bringing suit.

In addition, I note that much of the key evidence involves work that was documented at the time of the invoice submissions. BIA officials toured the areas extensively and concluded the work had not been done. Pictures were taken. Although some of the evidence is no doubt lost (the Defendants cite the death of an important witness), there are always going to be evidentiary problems arising from a five-year delay. That is accounted for by the statute of limitations itself, and this is not the sort of case that cries out to have the equitable defense of laches trump the Congressionally provided limitations period.[5]

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[5]Pecore and Waniger also move for summary judgment on the question of whether they were acting within the scope of their employment. This argument is largely a rehash of the arguments they raised in their motion for judgment on the pleadings. There is nothing within the FCA that insulates individuals from liability merely because they were acting within the scope of

B. The United States' Motion for Summary Judgment on the FCA Claims against Pecore and Waniger

The United States has also moved for summary judgment on the FCA claims. To reiterate, an FCA claim requires proof of three elements: (1) presentment to a government officer or employee; (2) a false claim; and (3) knowledge of its falsity. 31 U.S.C. § 3729(a)(1). *United States ex rel. Fowler v. Caremark RX, L.L.C.,* 496 F.3d 730, 740 (7th Cir. 2007). The first two elements were discussed at length above. In short, the Government believes the evidence shows that MTE's employees submitted invoices that contained false information about the amount of work done. Further, the Government argues that MTE's employees created and used false records and falsely certified every quarter that its funds were being used for the purposes for which they were intended. It has chiefly relied on eight invoices that overstated the amount of brushing and grading work MTE accomplished.

The falsity of these claims is a highly fact-intensive analysis, but even assuming the evidence is as conclusive as the Government believes, it is clear that knowledge of the falsity is where the Government's motion must fail. Under the FCA, A person acts "knowingly" if he:

> (1) has actual knowledge of the information;
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
> (3) acts in reckless disregard of the truth or falsity of the information,

31 U.S.C. § 3729(b). The statute also provides that "no proof of specific intent to defraud is required." *Id.*

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their employment – presumably *most* FCA defendants are. They also suggest the issue has resonance with respect to their cross-claims against MTE, but they have not moved for summary judgment on their cross-claims and MTE has not responded. Accordingly, the issue is not an appropriate one for summary judgment.

The Government argues that Pecore and Waniger acted in reckless disregard of the truth or falsity of the information because they submitted invoices without taking any reasonable steps to verify the information contained therein. Waniger was MTE's fire management officer, and Pecore was the forest manager. Surely it was within their ability to easily verify that the invoices were accurate.

The Government relies on two cases for the general proposition that one cannot bury his head in the sand and then claim he did not know the submissions were false. In *United States v. Krizek,* for example, a psychiatrist and his wife billed Medicare for bogus claims. 111 F.3d 934, 936 (D.C. 1997). The wife, who was in charge of billing, never made any effort to verify the amount of time her husband spent with his patients. On some days, she submitted bills totaling almost twenty-four hours, a fact which should have jumped out at any careful biller. And in *United States v. Mackby*, a physical therapy clinic billed the government using the PIN of a physician who was the father of the clinic's owner. 261 F.3d 821 (9th Cir. 2001). The defendant argued that he was not personally responsible for the fraud, but the court rejected that approach on the theory that any reasonable person in his shoes would have known what was going on. These cases demonstrate the principle (reflected in the statute itself) that a specific *mens rea* for fraud is not required. Instead, it is enough that bills are submitted with reckless disregard for their truth. Importantly, however, in both of these cases judgment was entered only after a bench trial. The cases do not stand for the proposition that a court could find the requisite level of knowledge at the summary judgment stage.

My review of the record suggests that the Government's case is a strong one. It has maps and other submissions that it believes its evidence will show to be false. The individuals responsible for submitting the invoices were in an excellent position to either know they were false

or to be reckless in not verifying their accuracy. On the other hand, there was clearly some significant give and take regarding the invoices at issue here. The Defendants would argue that they believed they were complying with what the BIA wanted. Moreover, it was obvious by the time the invoices were re-submitted that the BIA had significant veracity issues. To re-submit the invoices with false information after knowing the BIA was concerned about their truth could have been either brazen or wholly innocent, and that is a determination that cannot be made on summary judgment. In addition, there is no allegation that either of the Defendants personally profited from the fraud (unlike *Krizek* or *Mackby*). Although personal profit is not an element of an FCA case, it could at least suggest the mistake was an innocent one rather than one made with reckless disregard for the truth. These latter points may be undercut by the fact that the FCA does not require a specific intent to defraud, but they at least call into question the reckless disregard issue. The point is that I cannot conclude on summary judgment that the facts mandate judgment in the Government's favor. Accordingly, its motion will be denied.

C. Motions for Summary Judgment on the Contract Claims

MTE has also moved for summary judgment on the common law claims the Government has brought against it; for its part, the Government has moved for summary judgment on its contract claim but not its other common law claims. MTE argues that the Contract Disputes Act precludes jurisdiction over all of these claims. It also raises other arguments – some in support of its own motion and others in opposition to the Government's. In particular, it argues that the statute of limitations provided in the Indian Self-Determination and Education Assistance Act is only one year, which means the current contract claims are time-barred.

1. The Contracts Disputes Act does not Divest the Court of Jurisdiction

Federal district courts generally have jurisdiction over cases whenever the United States is the plaintiff. 28 U.S.C. § 1345. MTE argues, however, that this court lacks jurisdiction over the contract claims because the Contract Disputes Act ("CDA") applies to the contracts at issue. Under 41 U.S.C. § 605(a), "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." That means, MTE argues, that a federal district court is not the proper venue for this "claim by the government against a contractor." *Id.* *See McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 370 (Fed. Cir.1985) ("the evident purpose of Congress when it enacted the [CDA] ... [was] to centralize the adjudication of government contract disputes" in the contracting officer, the board and the Claims Court").

The Government concedes that the CDA applies to the contracts at issue, and it further concedes that courts have interpreted the CDA to generally preclude the Government from filing contract claims in federal district court. Most of the dispute on this issue involves what both sides agree is an exception to the general rule. The last sentence of § 605(a) provides that "[t]his section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." As the Government notes, courts interpreting this exception have generally done so broadly, principally because the statute itself refers to claims "involving" fraud, which suggests the exception is meant to allow the Government to sue in district court whenever fraud is at issue, even if the claim itself is not "for" fraud. *United States v. Unified Industries,* 929 F. Supp. 947, 950-51 (E. D. Va. 1996). Thus, in *Unified Industries,* the court found that breach of contract and unjust enrichment claims constitute claims "involving fraud" because "the same set of operative facts alleged here gives rise to the contract and unjust enrichment claims, as well as to the FCA claims." *Id.* at 951. Similarly, in *United States v. Rockwell Int'l Corp.,* the Government brought

both FCA claims and common law claims against a defendant. 795 F. Supp. 1131 (N.D. Ga. 1992). The defendant moved to dismiss the government's common law claims on the basis that those claims did not require proof of the elements of fraud, but the court rejected that argument on the grounds that the "involving fraud" exception was quite broad. "[N]umerous district courts have confirmed that common law claims, such as those asserted in the instant case, which arise from fact situations also involving the FCA, are 'claims involving fraud' and jurisdiction of the district court is not barred by the CDA." *Id.* at 1135 (reviewing cases).

Here, the FCA claims clearly "involve" fraud. The FCA claims assert that the Defendants knowingly submitted invoices for work that was not performed and used false records to do so. The Government further alleges that MTE misused funds advanced by the BIA by not seeking the approval that MTE knew was required. The common law claims allege not merely run-of-the-mill contract performance issues but issues of knowing receipt, misuse and misappropriation of government funds. The motivation behind some of these acts, the Government alleges, was the fact that MTE had used up substantial contract resources on its unauthorized purchases, which resulted in MTE's need to submit false billings to the Government. It is clear enough that the common law claims do not allege fraud, per se, but they certainly "involve" the Government's allegation that MTE defrauded the Government by submitting false billings and using false records.

The fact that the FCA claims are being dismissed against MTE because MTE is not a "person" under the FCA does not detract from the nature of the actions the United States has alleged.[6] And of course the FCA claims remain against the individual Defendants. Accordingly,

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[6]MTE suggests that the Government's pleadings are some sort of effort to elude the CDA's jurisdictional bar, but it offers no reason why the Government would be harmed in any way by having a contracting officer hear the dispute rather than a district court. *Unified Industries,* 928 F. Supp. at 961 ("No significant risk exists that the Government, as part of a plan to maintain a breach

because the contract claims "involve" fraud, I find that the CDA does not bar this court from considering counts III, IV, and V.

2. Breach of Contract Claim: Statute of Limitations

MTE argues that a one-year statute of limitations applies to the Government's contract claims. Because the alleged breaches of contract occurred in 1999, 2000 and 2001, MTE argues the contract claims are time-barred.

The source of MTE's argument is the ISDEAA, 25 U.S.C. § 450j-1(f). That provision states:

> (f) Limitation on remedies relating to cost disallowances
>
> 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 . . . . 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.

25 U.S.C. § 450j-1(f).

I begin by noting that this provision has apparently never been interpreted or applied by a court, at least in a published opinion. MTE argues that this provision applies because the Government's breach of contract action is "any right of action . . . relating to any disallowance of costs." It notes that the clause is clearly drafted in broad terms ("any action . . . relating to"), and the Government's common law claims, at their essence, are based on the disallowance of certain

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of government contract claim in federal district court, would attempt to avoid the exclusivity provision of the CDA by alleging fraudulent activity in relation to the contract dispute.")

costs, i.e., those purchases for which MTE did not gain preapproval and those funds which it allegedly misused.

The Government argues that "disallowance of costs" in the § 450j context is "a specific phrase" synonymous with an administrative determination by the Secretary "to reject the single-agency report as insufficient due to noncompliance with chapter 75 of Title 31 [the Single Audit Act], or noncompliance with any other applicable law." (United States Consol. Reply Br. at 19.) The United States' argument is difficult to follow. The Government apparently equates the "notice of any such disallowance" the statute requires with the Secretary's "notice of a determination . . . to reject the single audit report as insufficient due to noncompliance with [the Single Audit Act]."

The principal problem with this approach is that a cost disallowance and a rejection of an annual audit report for noncompliance with the Single Audit Act are two different things. The Single Audit Act governs the filing of annual audit reports from federal grant and contract recipients. For example, the statute requires:

> Each single audit conducted pursuant to subsection (a) for any fiscal year shall--
> (1) cover the operations of the entire non-Federal entity; or
> (2) at the option of such non-Federal entity such audit shall include a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered Federal awards during such fiscal year provided that each such audit shall encompass the financial statements and schedule of expenditures of Federal awards for each such department, agency, and organizational unit, which shall be considered to be a non-Federal entity.
> (e) The auditor shall--
> (1) determine whether the financial statements are presented fairly in all material respects in conformity with generally accepted accounting principles;
> (2) determine whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole;
> (3) with respect to internal controls pertaining to the compliance requirements for each major program--
> (A) obtain an understanding of such internal controls;
> (B) assess control risk; and

> (C) perform tests of controls unless the controls are deemed to be ineffective; and (4) determine whether the non-Federal entity has complied with the provisions of laws, regulations, and contracts or grants pertaining to Federal awards that have a direct and material effect on each major program.

31 U.S.C. § 7502.

MTE submitted the required annual audit reports in 1999, 2000, 2001 and 2002. (Tchida Decl., Exs. G-J.) These are three-page computerized documents filled out by an independent auditor. Each report breaks down the amounts MTE expended by program. For example, the 1999 report indicates expenditures totaling some $2.36 million: $454,386 for road maintenance; $1,578,366 for forest and fire management; and $327,539 for forest development. (*Id.*, Ex. G.) None of these reports were rejected as being in noncompliance with the Single Audit Act, 31 U.S.C. § 7501, *et seq.* All of United States' breach of contract damages stem from the expenses set forth in these audit reports.

The provisions of the Single Audit Act have nothing to do with cost disallowances, however. A cost disallowance could result from, for example, an unauthorized expense that required pre-approval (as here). In fact, that is what the 1995 Roads Contract actually says: "failure to obtain this required approval will result in disallowance of the cost of the lease, purchase or subcontract." (Cook Decl., Ex. A at H-7.) It is clear that the bulk of the Government's common law claims are in essence an action to enforce a disallowance. It should also be clear that a rejection of an annual audit report for noncompliance with the provisions of the Single Audit Act is a rejection of an *audit report* – it is not a *disallowance* of any costs. Because cost disallowances are different from rejections of audit reports, it seems clear that the ISDEAA's statute of limitations is not limited, as the Government argues, only to instances where the Government rejects an audit report.

Instead, the statute's terms are reasonably straightforward. The Government has one year to give notice of a cost disallowance or else "any right of action or other remedy . . . relating to any disallowance of costs shall be barred." 25 U.S.C. § 450j-1(f). The issue of the audit reports only arises in calculating *when* that year begins running: a disallowance is 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." This is sensible enough: the Secretary has a year from receiving the annual audit report to give notice of disallowance of any costs.

Moreover, the issue of the Secretary rejecting an audit report only relates to when the Secretary is deemed to have "received" the audit report: "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" the Single Audit Act, 31 U.S.C. § 7501 *et seq*. This simply means that if the Secretary does not reject the annual audit report within 60 days, the date of his actual receipt will be the date that triggers the 365-day limitations period. Thus, the rejection of an audit report only comes into play in calculating when the statute of limitations period begins ("[f]or the purpose of determining the 365-day period specified in this paragraph . . . ") – it does not somehow limit the *substantive* scope of the limitations provision. That limitation provision is undeniably broad, as it contains not one but two expansive qualifiers ("relating to" and "any"). It applies to bar "[*a*]*ny* right of action or other remedy. . . *relating* to *any* disallowance of costs." When the Government's case is based on recovering costs it believes should have been disallowed, it is clearly an action "relating to any disallowance of costs."

The Government also seeks to limit the scope of the statute of limitations by noting that the specific expenditures it complains of (e.g., the road grader MTE purchased in 1999) were not set forth by line item in the annual audit reports. (Response to MTE's Supp. PFOF, ¶ 7.) The Government further notes that § 7503 of the Single Audit Act provides that "[t]he provisions of this chapter do not limit the authority of Federal agencies to conduct, or arrange for the conduct of, audits and evaluations of Federal awards, nor limit the authority of any Federal agency Inspector General or other Federal official." Here, the inspector general conducted an audit, as allowed by § 7503. This case arises not out of any of the specific information contained in the annual audit reports but the subsequent audit the BIA conducted.

Yet the United States has not identified any requirement that specific expenses should be itemized in an annual audit report. The report forms themselves do not provide for this, and nothing in the statute suggests that such detail is required. More importantly, there is nothing in 25 U.S.C. § 450j-1(f) that limits the one-year limitations period only to claims for disallowances of expenses that are *itemized* in an annual audit report. Instead, as noted, the statute broadly applies to actions "relating to any disallowance of costs." Had Congress wanted to narrowly limit the statute of limitations in the fashion the Government suggests, it could have written the statute to apply to "any disallowance of costs arising out of expenses itemized in an annual audit report." Instead, it wrote the statute extremely broadly. The only reasonable reading of the entire provision is that any claims relating to disallowances of costs must be filed within a year after the Government receives the annual audit report governing that reporting period. Because the United States never filed any notices of disallowance relating to the claims at issue here, its common law claims are time barred.

IV. OTHER MOTIONS

In addition to the motions for judgment on the pleadings and for summary judgment, the parties have filed a number of other motions. The United States has filed a motion to exclude certain witnesses and their affidavits, on the grounds that these individuals were not disclosed until after the discovery deadline. Earlier, the Government filed a motion to strike the Defendants' amended Rule 26 disclosures. This latter motion was addressed in a July 9 hearing. In both motions the United States alleges that the Defendants have offered significant amounts of evidence at a very late stage in these proceedings.

I note that in ruling on the dispositive motions addressed above, I did not rely on any of the disputed evidence. Counsel will appear for a status conference to discuss the future scheduling of this case and a trial, if necessary. At that time the Government may renew its request for any relief that may be appropriate, including additional discovery. For now, however, the motions are denied without prejudice.

V. CONCLUSION

For the reasons given above, MTE's motion for judgment on the pleadings is GRANTED, and the other Defendants' motion for judgment on the pleadings is DENIED. The United States' motion for summary judgment is DENIED. MTE's motion for summary judgment is GRANTED in part, and all claims against Defendant MTE are DISMISSED. The other Defendants' motions for summary judgment are DENIED. FCA claims against the individual Defendants remain.

SO ORDERED this 15th day of January, 2009.

s/ William C. Griesbach
Honorable William C. Griesbach
United States District Judge