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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANTS-APPELLANTS' MARSHALL PECORE AND CONRAD WANIGER

Dated June 10, 2011.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

When the United States of America accuses private citizens of fraud, it carries a heavy weight. A case brought under the False Claims Act ("FCA") is a quasi-criminal proceeding carrying serious penalties. District judges and jurors assume the Government acts carefully and judiciously before suing private citizens for fraud. Unlimited resources and competent courtroom presentations by Government lawyers add to the burden of proving the Government wrong.

Congress enacted the Equal Access to Justice Act ("EAJA") as a counterbalance to the Government's vast resources, which "could force citizens into acquiescing to adverse Government action, rather than vindicating their rights." *Pierce v. Underwood*, 487 U.S. 552, 575 (1988) (Brennan, J. concurring) (citing S.Rep. No. 96-253, pp. 1-6 (1979)). To this end, courts have found three purposes underlying EAJA fee shifting: "(1) to encourage private litigants to pursue challenges to government actions notwithstanding the cost of attorneys' fees; (2) to compensate parties for the cost of defending against unreasonable government action; and (3) to deter the government from prosecuting or defending cases in which its position is not substantially justified." *Kholyavskiy v. Schlecht*, 479 F.Supp.2d 897, 900 (E.D.Wis. 2007) (citing *Berman v. Schweiker*, 713 F.2d 1290, 1297 (7th Cir.1983)). When the Government loses its case and cannot establish that it had a substantial basis in the truth of its factual allegations and correctness of its legal position, it must reimburse the wrongfully accused defendants. This is such a case.

I. THE GOVERNMENT'S RESPONSE BRIEF DISPLAYS ITS LACK OF COMPREHENSION OF ITS OWN CASE

The entirety of the Government's "Statement of Facts" are recited not from the trial record but almost word for word from a declaration filed by AUSA Chris Larsen in opposition to the Defendants' motion for attorneys fees. (Dkt.#380). Many of these "facts" are groundless, misleading and erroneous. Many refer to hearsay statements of disgruntled MTE employees, rumors, and other unfounded evidence that was never presented at trial. For instance, the Government points to Defendants' Exhibit 479, a memo from Congos claiming that Waniger admitted falsifying records because of the "pressure he was under." (Pl.'s Br. at 9). Although the exhibit was entered into the record, it was never part of the Government's case and testified to at trial.

The fact that the Government would now use allegations, rumors, and at times double hearsay to bolster a case which was solidly rejected by the jury is troubling. After seven years of litigating a case based on the "no work done" theory, the Government conceded that extensive amounts of work was indeed done, but the wrong kind.

The Government's baseless motive theory again reveals the weakness of its case. No witness ever connected Marshall Pecore with the alleged roads department conspiracy to use BIA fire funds to keep the roads crew working. In fact, the HFR was the ideal way to do that.

Another misstatement is that invoices submitted to the BIA were always accompanied by a map. Menominee's fire road work has historically consisted of reimbursement of expenses. All witnesses at trial explained that maps were sent in at the end of the fiscal year to show "accomplishments" to secure next year's funding from Congress. (*See e.g.* TT:1953:24-1954:1). No witnesses refuted that the maps were never

used for billing purposes to show miles accomplished. Rather, it was Congos who demanded maps with the understanding that the Tribe was billing by the mile. Then after an agreement was made in the February, 2002 meeting to pay a reduced amount of expenses, Congos demanded certifications which required maps be shown of "where the work was done." (TT:1923:14-18).

The Government also erroneously claimed that the Defendants belatedly hired Kenneth Sloan to evaluate the Government's case. (Pl.'s Br. at 14). That is false. Kenneth Sloan, like all experts in the case, was disclosed by the Scheduling Order deadline. He remained available to the Defense to evaluate the Government's allegations of "no work done." He was able to look at a portion of the Government's case through its maps in July, 2008, shortly after those maps became available. Everywhere Sloan looked, the forest showed evidence of brush having been cut, and fuel breaks and access roads (which hadn't been brushed since 2002) still open and functioning. (TT:1695:11).

In its brief, the Government also erroneously claims that the Complaint alleged that the Defendants violated the FCA by presenting "false claims for fire prevention work which MTE did not perform *or which failed to achieve any fire prevention benefit.*" (Pl.'s Br. at 6) (emphasis added). The Complaint, however, only alleged that MTE performed no work for which it billed. (Dkt.#1, ¶ 139). If true, this would be the "lie" that forms the archetypal false claims case." *See Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 613 (7th Cir. 1995). But the Government never proved a "lie."

The Government's continued allegation that the Defendants told MTE employees to "falsify" their time cards is equally baseless. (Pl.'s Br. at 15). As explained in Defendants' Brief, when MTE employees performed emergency firefighting work out west for the BIA, the BIA only paid for their time after the fire work was over. (Def.'s Br. at 15). In order to keep their paychecks coming while away from home, their time cards were coded "forestry work." Months later, when the BIA reimbursed MTE for the crews' wages, Larry Johnson, MTE's accountant, insisted that fire dollars from the BIA go to the fire department, not forestry. (TT: 2132:21-25). As explained at trial, the imbalances lead to $150,000 of funds that needed to be returned to the forestry account. (TT:2131:10). In order to correct a disparity in wages, MTE had crafted an informal way to balance out wages between forestry and fire. The department personnel directed employees to code their time cards to "fire" to balance those forestry wages that had been paid out. Thus, there was no falsification. This was an accounting correction, not fraud.

Ironically, the Government knew all along that there was a disparity of funds between fire and forestry caused by forestry employees fighting fires for the BIA. Hart conceded that MTE had a right to determine its own internal accounting mechanism to resolve this imbalance. (TT:2317:6). The MTE auditors whose job it is to detect fraud, also found nothing wrong with this accounting method used to reconcile the disparity between the forest account and the fire department account. (TT:1904:4). Thus, although the Government's "time card fraud" theory collapsed and was rejected by the jury, the Government still claims this proved "fraud."

Appellate courts expect trial judges to address whether the Government was substantially justified in pressing forward with the suit given the factual support it had for the legal elements it was required to prove. *United States v. Hallmark*, 200 F.3d 1076, 1081 (7th Cir. 2000). As will be seen below, throughout these proceedings, the trial court consistently supported the Governments theories of fraud but gave little attention to the defense on the facts, the law and the uncontested proof that this was not a false claims case.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE GOVERNMENT HAD A LEGAL BASIS TO PROCEED

In order to avoid paying fees under the EAJA, the Government has the burden of proving that it had a substantial legal basis to bring a false claim action against the Defendants. *See Pierce*, 487 U.S. at 565. Even though the trial court's EAJA decision is reviewed under an abuse of discretion standard, questions of law are reviewed de novo. *Sosebee v. Astrue*, 494 F.3d 583, 586 (7th Cir. 2007). The application of an erroneous view of the law is, by definition, abuse of discretion. *Id.*

The Supreme Court has emphasized that courts should decide EAJA fee cases by "treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner v. Jean*, 496 U.S. 154, 161-62 (1990). This requires an evaluation of the entire case from investigation to trial.

A. The Government Investigation Should Have Included Consultation With Tribal Officials

The trial court abused its discretion by discounting the Government's failure to follow its own policies before bringing this case. Defendants cited a number of internal

policies that were violated by the Government – including the failure to consult with tribal officials before bringing a lawsuit against the Menominee. (Dkt.#371, p.3). The consultation requirement arose from Executive Order 13175, issued by President Clinton in 2000. Judge Griesbach only found it to be a "useful guide[], perhaps." (App. p.104). Though it appears he never read the guide, as he deemed it "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 it the case brought against these *individual* defendants." (App. p.105) (emphasis provided). The guide defines "tribal officials" to include "elected or duly appointed officials of Indian tribal governments …" (Supp. App. p.384). Pecore and Waniger, were appointed officials and they fit within this order.

More to point, Pecore and Waniger held knowledge that could have resolved the entire dispute; and the Government should have known better than to violate its duty to practice extra diligence when actions implicate tribes. The trial court misread the cases cited by Defendants regarding the importance of following an agency's own regulations, finding them to be inapposite because they "rely on agency violations of laws and regulations, and such violations are absent here." (App. p.105). The cases cited by Defendants did not turn on whether a law was violated. Those cases confirmed that the Government has no substantial basis to act in one way when clear cut precedent cautions it act differently.

In *Stewart v. Astrue* for instance, the Seventh Circuit found that the ALJ's decision regarding Social Security benefits lacked substantial justification because he failed to articulate the reasons for his particular assessment as required by regulation. 561 F.3d

679, 684 (7th Cir. 2009). A line of cases had already found that missing this step is error. Therefore, this mistake, amongst others showed the decision as a whole was not substantially justified. *Id.* In this case, where a well-established policy warned the Government to consult with tribal officials, the failure to do so showed the case was handled in an overall careless manner to the point of lacking substantial justification.

B. The Government Should Never Have Pursued Two Tribal Employees Who Were Only Acting in their Official Capacity

This carelessness spilled over into other legal issues as well, including the Government's decision to bring a False Claims case against tribal employees despite the weight of authority extending tribal sovereignty 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).

Throughout this case, Pecore and Waniger strongly urged the court and the Government not to proceed against them as individuals. This issue was extensively litigated in Defendants' Motion for Judgment on the Pleadings filed July 21, 2008. (Dkt.#191). The brief in support of the Motion stated, "as agents of Menominee acting in their official capacities, Marshall and Conrad stand in the shoes of Menominee and are not to be considered "persons" capable of being sued under the FCA." (Dkt.#158 at 3-4). Judge Griesbach disagreed. [1] This legal issue was fully litigated before Judge Griesbach,

[1] Notably, following the Trial, Judge Griesbach flipped on this exact point to find that employees do often "stand in the same shoes as their employer." (App. p.110). He then used this point to explain how the Government had substantial justification to bring the case because Pecore and Waniger could have had a motive to commit fraud despite there being nothing to gain personally. Judge Griesbach surmised, "If business is good, employees benefit … the government evidently believed that the Defendants were aiding their employer in drawing down BIA funds to supplement their other operations…" *Id.* In other

leading up to his decision to deny the Motion for Judgment on the Pleadings in January 2009. (Dkt.#257).

In allowing the Government to proceed against Pecore and Waniger, the trial court embraced the Government's weak claim that since Defendants were sued as individuals, they did not fall under the umbrella of sovereign immunity. (App. p.140). Accepting this trivial distinction violated the well-established policy that any waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *See e.g. United States v. Testan*, 424 U.S.392, 399 (1976). Yet the Government forged ahead with its case against the individuals.

Now, by claiming that the argument regarding immunity was waived, the Government seeks to avoid responsibility for its misguided, poorly investigated case that caused extreme financial hardship on the individual defendants. The issue was fully litigated before the trial court in their Motion for Judgment on the Pleadings which sought a dismissal on the same grounds raised by MTE. (Dkt.#191). The Motion for EAJA Fees further elaborated on the unfairness of suing these two MTE employees who were merely carrying out the charges of their employer. (*See e.g.* Dkt.#371, p.15). Therefore the issue is ripe for this Court to consider on appeal as one of the benchmarks of assessing "substantial justification" – whether it had a legal basis to sue tribal officials for carrying out tribal policies.

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words, the Judge viewed the employees as too disconnected from MTE to fall under the tribal immunity umbrella, but attached enough to have incentive to commit fraud on their employers' behalf.

The fact that the case continued against Pecore and Waniger despite MTE's removal was inextricably linked to David Congos' personal vendetta against Pecore. The Government's entire case against Pecore was built upon Congos' allegations and subsequent investigation. Yet, as explained in Defendants' initial brief, Congos had been engaged in a very public feud between he and Pecore since early 2001 regarding the stumpage policy at MTE's sawmill. (Dkt.#306). Congos sought to force the mill to start paying stumpage fees on lumber it processed, while Pecore wanted to continue exempting the mill from fees so that it would be able to remain in operation. (TT:509:1-2). The feud became so heated, that Congos sought removal of Pecore from his position as Menominee Forest Manager. (TT:1296:8-14). Nevertheless, the Government relied exclusively on Congos' fact finding to pursue a groundless False Claims case against Pecore and Waniger.

The interests of justice are served by providing lower courts with guidance to prevent mistakes from reoccurring to the detriment of honest, law abiding private citizens who are faithfully doing their job. Even Judge Griesbach recognized that it was not fair for Pecore and Waniger to bear their own attorneys fees given that they were both exonerated. (Dkt.#384, p.16). This Court has the opportunity to right this injustice by reversing the trial court's denial of fees.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ASSESS THE FACTS PRODUCED BY THE GOVERNMENT WITHIN THE CONTEXT OF A FALSE CLAIMS CASE

A mistake in applying the law to the facts occurs when the trial court does not provide an "accurate and logical bridge" between the evidence submitted and the

conclusion reached. *Berger v. Astrue*, 516 F.3d 539, 544 (7th Cir. 2008). An inadequate description occurs when the court does not compare the Government's allegations with the actual evidence. *Pierce*, 487 U.S. 552 at 569. A judgment that involves the application of law to fact requires the reviewing court to undertake more substantive scrutiny. *United States v. Taylor*, 487 U.S. 326, 336 (1988).

A. The Court Ignored Material Evidence that Exonerated Defendants

The Court of Appeals reviews EAJA determinations using an abuse of discretion standard. *Pierce v. Underwood*, 487 U.S. 552, 571 (1988). The abuse of discretion standard does not preclude a "meaningful examination of the district court's decision." *Hallmark*, 200 F.3d 1076 at 1078. A court abuses its discretion when it commits "a serious error of judgment, such as reliance on a forbidden factor or failure to consider an essential factor." *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706 (7th Cir. 2005) (internal citations omitted). For instance, the court in *Phil Smidt* found that the Government was not substantially justified in its position because the judge did not adequately assess the evidence. *Phil Smidt & Son, Inc., v. N.L.R.B.*, 810 F.2d 638 (7th Cir. 1987).

The trial court in this case did not assess the defense evidence presented at either the summary judgment or the trial phase. In its summary judgment decision, the trial court concluded that the Government had a "strong case" because it had "maps … that it believes its evidence will show to be false." (Dkt.#257, p.23). The trial court wrongly concluded that the Government was "like any customer" and that MTE could only bill for completed miles not expenses incurred. *Id.* at 15. The trial court apparently never read

the extensive evidence in the form of affidavits of the roads crew workers and Defendants, the time cards and log activity sheets, forensic evidence of Kenneth Sloan, or photographs proving that the work being billed for had been completed. (Dkt.#257; App. p.140-151). In particular, the decision on summary judgment never mentioned the photographs that showed ten culverts that were alleged to be "never installed" and extensive brushing and grading on roads which supposedly had never been worked on.

The same omissions with respect to Defendants' evidence were found in the Order Denying EAJA Fees. At trial, defense witnesses Marshall Pecore and MTE employee Jeremy Pyatskowit identified photographs and videotapes showing extensive work on fire access roads and fuel breaks which were still in good shape after seven years. Yet, the trial court's final decision on attorneys fees failed to apply any of the facts proven at trial to the law of false claims. By definition, this, is an abuse of discretion. *Phil Smidt & Son, Inc.*, 810 F.2d at 638.

B. The Court Erroneously Ignored the Government's Changing Theories of Fraud

The fact that the Government's theory changed drastically over the course of litigation proves it had no substantial basis to proceed on its claim of fraud. *Schuenemeyer v. United States*, 776 F.2d 329, 331 (Fed. Cir. 1985). The trial court must arrive at one conclusion regarding whether the Government was substantially justified which "encompasses and accommodates" the entire action. *Hallmark*, 200 F.3d 1076 at 1081. It must examine not only whether the Government was substantially justified in its position at the beginning or end but whether it was substantially justified in continuing to

push forward at each stage. *Id.* *Hallmark* requires the trial court to address whether the Government adequately assessed the defendant's evidence as compared to its own before going to trial. *Id.* The Government's position is substantially justified only up to the point in the proceedings at which it becomes apparent that its theory was "unsupportable." *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992). That period came earl on in this case.

In its Motion for Summary Judgment, the Government had put forth a "timber access benefit" theory of fraud, contending that "MTE: … submitted false invoices to the Government for fire prevention work that was not completed or was done to benefit the revenue-generating timber operations of MTE." (Dkt.# 166, p. 2).

The Government reiterated in its reply to the Defendants' Motion for Summary Judgment:

> Despite the defendants' protestations, this case is not about subjective brushing standards. To the contrary, it is about fire-related work not being done at all – the archetypal example of a false claims case.

(Dkt.# 252, p.14). This theory of fraud had been advocated by David Congos, who accepted rumors from disgruntled MTE employees that the work was done to promote timber access, as opposed to fire prevention. (Cite memo?)

The "timber access benefit" theory was abandoned at trial when AUSA Larsen had to contend with defense evidence that MTE performed substantial amounts of brushing and grading in the forest. Indeed, MTE worker testimony showed without question that MTE's roads crew performed extensive work in the fire-prone areas using the Tribe's

decades-old standards for fire access and fuel break work. (TT:1603-1879). Congos, called Congos the stand on rebuttal, finally acknowledged that extensive brushing work had indeed been done on those roads he had previously claimed that had "no work done." The Government's archetypal fraud theory had collapsed.

Accordingly, the Government converted its decade-old theory from "no work done" to "wrong work done" – a pure contract question not a false claims case. In support of this brand new theory, Congos testified as follows:

> … I found cutting that would be consistent with subsidiary project work only, no fuel break work …
>
> The cutting I found was usually within two feet, and a lot of it within a foot of the road shoulder, so it was the type of stem that had been talked about earlier that would grow into the road surface and might hit a truck mirror. So it was everything right immediately on the road shoulder. And it was not a fuel break, it was strictly access for machinery …

(TT:2322:17-19; 2323:1-7).

On cross examination, Congos conceded that these were the same roads of which he originally claimed no brushing had been:

> Q: Mr. Congos, now, these are roads that you initially told the BIA were roads that had never been brushed right? …
>
> A: I believe this particular road segment shown in this photograph was identified as a road that had not been brushed.
>
> Q: Okay. And then subsequently you changed the definition of adequacy of work by saying roads either not brushed or roads not acceptable per Congress. That's the 2008 maps that are in evidence right?
>
> A: We did slightly redefine the road segments.

(TT:2333:13 - 2334:2).

Given these inconsistent theories, the Defendants' initial brief to the trial court on EAJA Fees outlined how the numbers changed drastically with respect to the Government's claims of how many miles and culverts Defendants fraudulently billed for. (Supp. App. pp.381, 882, 383).

Judge Griesbach dismissed the inconsistencies though suggesting they were a mere "microcosm of this entire case." (Order denying fees, p. 8). He further rationalized, "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." (App. p.109).

Judge Griesbach greatly understated the overall inconsistency that became clear upon comparing the Government's opening and closing statements. In its opening statements, the Government promised to show that "there were about 50 miles of road which Menominee claimed to have been brushed which were not, in fact, done… [and] that about a hundred miles of road were claimed to have been graded but were not, in fact graded … [and] there were ten culverts included on those invoices which had not been installed." (TT:16:6-17). In closing, the Government argued not simply different numbers, but an entirely new theory – that "there's no question they were out there working. … [but the cutting was] not the type of cutting that would have been consistent with the project proposal in 2001." (TT:2425:7, 15-17).

As Defendants have been arguing from the beginning, this case was at best a contracts claim. The Government's closing argument conceded that it did not have a substantial basis to continue with its fraud claim.

Although the trial court agreed that the case resembled a contracts case, it concluded that sometimes the performance could be so poor as to violate the False Claims Act. (App. p.111). The trial court, however, failed to indicate what Government evidence showed that the contract performance was deficient. The court concluded that MTE's road work was imperfect, but where was the "lie?"

The only qualified expert who testified on appropriate standards was Kenneth Sloan, a State of Wisconsin forester for the northern one-third of the state, who had devoted his entire professional career to fighting fire, with 5,000 fires under his belt. Sloan concluded that the Menominee fire strategy was consistent with good, sound forest firefighting principles that had a sound basis in science and fact. (TT:1669-1700).

Yet the Government and the trial court ignored and discounted Sloan's testimony in both summary judgment and at trial, and pointed to no evidence that showed Menominee's performance was so substandard as to constitute "a lie." Failure by the trial court to put the burden of proof on the Government and assess the Government's proof in light of overwhelming Defense evidence that substantial work was done was by definition an abuse of discretion.

C. The False Claims Case Cannot Be Justified Simply By Citing Confusing Billing Practices

The trial court further excused the Government's inconsistencies by finding substantial justification due to the "confusing nature of MTE's billing practices;" and because the "government actors were convinced that they were being billed for work that was not being done;" and because the Government acted in "good faith." (App. p.106-112). Aside from being irrelevant to a question of "substantial basis," these contentions, are refuted by the uncontested evidence that MTE and the BIA together created these "confusing" billing practices.

Waniger had written extensive memos to Sean Hart of the BIA detailing why MTE could not do this work for a fixed cost and what billing strategies could make this project succeed. In February 2002, after the invoices remained unpaid for over one year, Larry Johnson arranged a meeting with Congos, Sean Hart, and all MTE employees involved in invoicing. Prior to the meeting, Waniger provided the BIA with three different proposals for how this work could be billed, from fixed cost, to actual expenses, to machine hours. (App., pp.196). The meeting ended with an agreement to pay the Tribe $65,000 as expense billing for the work it accomplished. Congos' only condition was that Pecore and Waniger sign invoice certifications. Believing that the certifications were one more hoop to jump through, Waniger recommended that the certifications be signed. All the other employees agreed. Pecore signed the certifications based upon the staff's recommendation. (TT:2083-2085, App. p. 198 (Hilger letter)).

Congos then went out into the forest to photograph what he already knew: that MTE had performed the work according to its previous standards for fire access and fuel breaks which he characterized as "no work done." What is so outrageous about Congos's

stance is an email Congos wrote one year before, reflecting Marshall Pecore's desire to know what the new HFR monies could be used for, and what standards would be applied. (Supp. App. p.372; Congos Memo, January, 2001). That meeting never happened and MTE used the funds to do the same work it had always done for fire prevention. (TT:1299-1360).

Although Congos saw the evidence of extensive road work, he erroneously claimed that "no work was done." His "fraud, waste, and abuse" theory was therefore based upon his own subjective standards of a "fuel break." Although Congos had never fought a fire at Menominee and none of the other BIA fire administrators at trial agreed with his definition of a "fuel break," the Government never questioned Congos' assessments.

Congos' claim of "fraud" then launched a criminal investigation fueled by his relentless filing of memos asking that the investigation be completed, and that the responsible defendants be brought to justice. (App. p.256-260; Supp. App. p.373-380). Congos criticized AUSA Larsen's doubts that even a civil lawsuit would prevail and wrote more memos. Years later, Larsen got his marching orders. He brought his lawsuit and would not settle the case without MTE's agreement to remove Marshall Pecore as Forest Manager. (Supp. App., pp.364-371, 1377).

IV. THE TRIAL COURT APPLIED INCORRECT LAW AND THEREFORE ABUSED ITS DISCRETION IN DENYING RULE 37 FEES

Contrary to Plaintiff's contention, the trial court was not "well within its discretion" to deny Rule 37 fees when it based its decision on two unsubstantiated legal

theories. (Pl.'s Br. at 34). The trial court justified its denial of fees by formulating a new exception to Rule 37 and by requiring a jury verdict to prove the truth of matter. Despite the leniency given to courts under an abuse of discretion standard of review, the trial court's decision should be reversed if "it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *United States v. Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993). Because the lower court did not apply the law correctly, it's denial of Rule 37 fees should be reversed.

As explained in Defendants' initial brief, the requests at issue sought admission that reasonable expenses were incurred by Menominee and that substantial work was actually performed by Menominee. (Dkt.#374, Exhibit 11, 12). The Government refused to admit the former and denied the latter, even though it could have discovered that both were true if it had simply reviewed records and invoices in its possession and interviewed Menominee workers.

First, the Government refused to admit that Defendants incurred approximately $65,000 in expenses for work performed pursuant to the HFR proposals; yet the Government possessed work records, time cards and activity sheets to show that Defendants incurred at least $313,000 in expenses for doing this brushing and grading work. (Dkt.#345, Trial Exhibit 453; TT:2107). These records showed that MTE employees spent over 6,000 hours of work on projects that the Government claimed were never done. (TT:2107). The Government actually stated that it "cannot determine if Menominee incurred legitimate hazardous fuels expenses for work actually performed within the appropriate scope of the applicable HFR proposals." (Dkt.##43 and 44). In

claiming that it could not know whether any expenses were incurred for any work related to the HFR proposal, the Government employed the exact "evasion and word play" that Rule 37 seeks to discourage. *See Marchand v. Mercy Medical Center*, 22 F.3d 933, 936 (9th Cir. 1994) (citing The *Federal Rules, the Adversary Process, and Discovery Reform*, 50 U.PITT.L.REV. 703, 721 (1989)).

The Government' denial regarding substantial work being done was also baseless. Apparently, Plaintiff chose to believe its one biased witness, David Congos, in lieu of the work log and time sheets in its possession, and the testimony by the Menominee workers would could have been interviewed at any point during the seven year investigation. As the Ninth Circuit has cautioned, relying on the testimony of one biased expert witness cannot provide "a reasonable ground for a party to believe he would prevail it trial." *See Marchand*, 22 F.3d at 937.

A. It was an Abuse of Discretion to Create a New Exception Under Rule 37

When a party fails to admitted what is requested under Rule 36 and the requesting party later proves the matter true, Rule 37(c)(2) "mandates an award of expenses unless an exception applies." *Id.* at 936. Nevertheless, the trial court denied the Motion without regard to any of the enumerated exceptions. Instead, the trial court justified its refusal to award fees as follows:

> 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.

(App. p.115).

Rule 37 does not create an exception for admission requests that go the essence of the case. Rather it encourages such requests. The Rule actually disallows fees for admissions sought that are of "no substantial importance." Fed.R.Civ.P. 37(c)(2)(C). Given that the Federal Rules are meant "to secure the just speedy, and inexpensive determination of every action," *see* Fed.R.Civ.P. 1, Rule 37, fees should be awarded especially when the request implicates the essence of the case. This is what happened in *Marchand v. Mercy Medical Center* after a doctor who was sued for medical malpractice failed to admit that he did not comply with the applicable standard of care. While this issue certainly implicated the essence of his medical malpractice case, the trial court properly granted Rule 37(c) sanctions against the doctor after it was proven that he did not apply the proper standard of care. 22 F.3d at 937.

Rule 37 obviously seeks to force admissions to establish the truth of facts that are of substantial importance, *i.e.*, issues that go to the essence of the case. Therefore, for the trial court to deny fees on this basis was an abuse of discretion.

B. It was an Abuse of Discretion to Deny Defendants' Rule 37 Fees Simply Because the Issue was not Proved by a Jury Verdict

As an "additional reason" to reject the fee request, the trial court noted that because the jury verdict in the Defendants' favor does not specifically speak to the matters set forth in Defendants' request … the jury could easily have based is verdict on

the Government's failure to prove that the Defendants acted "knowingly. (App. p.116). In other words, the trial court did not believe that the matters of expenses incurred or substantial work done were proven "'true' at trial." *Id.*

Yet, the truth that these expenses were incurred and the work was substantially done was undeniably proven during the nine-day trial. MTE business records showing the incurred expenses were admitted into evidence. The Government did not contest their accuracy. (TT:2112:13 – 2116:4). The workers testified to the work they did, and the Government did not challenge their credibility. (*See e.g.*, TT:1647:19-11; 1799:19-22; 1812:23-25; 1833:5-6; 1873:23-74:1). Nothing in the Rule requires a jury verdict on the exact issue before fees can be awarded. The trial court abused its discretion by adding in such a requirement without any support from the law.

Moreover, in this case, the defense asked for a special verdict question that would have resolved whether the expenses were incurred and work was done, specifically: "If the Invoice ___ was not a false claim, was it a contract dispute over terms and conditions?" (Dkt.#329). A "yes" by the jury would have proven that this was not a False Claims case and that expenses were incurred for work that was done, contrary the Government's assertion that no expenses were incurred and no work was done for the HFR proposal. The trial court disallowed the special verdict. (TT:2361:4-12). To now deny Defendants fees on that basis is unfair and contrary to the intention of Rule 37. *See Roberson v. Christoferson*, D.C.N.D. 1975, 65 F.R.D. 615 (finding that discretion of trial court is limited "by the requirements of justice to the parties").

CONCLUSION

The Government had no sound legal or factual basis to accuse Marshall Pecore or Conrad Waniger of fraud. Under the policies and legal principles of the Equal Access to Justice Act, they must be made whole and the Government must be held accountable for their incurred costs to prove the Government wrong. The trial court's decision denying attorneys fees must therefore be reversed.

Dated this 10th day of June, 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 5,718 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 10th day of June, 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 10th day of June, 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 Reply Brief and Supplemental Appendix of Defendants-Appellants' Marshall Pecore and Conrad Waniger has been filed on this 10th day of June, 2011, pursuant to 7th Cir. Rule 31(e); and that the disk submitted for service is virus-free.

Dated this 10th day of June, 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 three true and correct copies of the foregoing Reply Brief and Supplemental Appendix 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 10th day of June, 2011.

REYNOLDS & ASSOCIATES

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

DEFENDANTS-APPELLANTS' SUPPLEMENTAL APPENDIX

Supplemental Appendix Table of Contents

LETTERS BETWEEN THE UNITED STATES AND MTE REGARDING THE REMOVAL OF MARSHALL PECORE

DAVID CONGOS MEMOS

DEFENSE SUMMARY CHARTS SUBMITTED TO TRIAL COURT SHOWING INCONSISTENT GOVERNMENT THEORIES OF FRAUD

EXECUTIVE ORDER

U.S. Department of Justice

United States Attorney
Eastern District of Wisconsin

517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

414/297-1700
TDD-414/297-1088

January 12, 2007

BY EMAIL
Joshua Jay Kanassatega
Leonard, Street and Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Re: **Menominee Tribal Enterprises ("MTE")**

Dear Mr. Kanassatega:

Thank you for your letter of January 11, 2007. The government appreciates the background material and thoughts included in your letter. However, as you are aware, we have spent significant time and effort constructing compliance provisions to fit the particular circumstances of MTE's business. Our proposal was submitted to and approved by several officials within the BIA and the Interior Department. Moreover, I am not persuaded that the compliance provisions proposed by the government are unworkable, and we are therefore disinclined to make substantial changes to the agreement. To the extent you would like to submit proposals to modify certain specific provisions, we would be willing to take those suggestions into consideration.

Perhaps more importantly, however, at this time the government does not believe further negotiations on the content of a compliance agreement will be fruitful in light of MTE's current position regarding Marshall Pecore's continued employment as Forest Manager. As stated above, the government expended significant time and effort securing approval for the overall Settlement Agreement with the assurance by MTE that the current Forest Manager, Marshall Pecore, would be removed from that position. MTE's decision to retract from that important aspect of the Agreement does not give us confidence that further extended settlement negotiations will be productive.

As you know, the government believes it can prove that as Forest Manager, Mr. Pecore signed, certified and submitted false invoices to the federal government on several occasions, and subsequently refused to cooperate with government officials when specifically advised, again on repeated occasions, that much of the work being billed under the invoices was not being performed. Under these circumstances, we do not believe that MTE can be said to be taking positive steps to correct the problems that led to this investigation, and to move forward in its relationship with the BIA in a productive manner.

EXHIBIT 3

At your request, I have discussed with my supervisor the possibility of mediation or other form of alternative dispute resolution. However, under the current circumstances, the government does not believe there is a reasonable likelihood that mediation at this time will be successful.

Sincerely,

STEVEN M. BISKUPIC
United States Attorney

By: C.R.L.
CHRISTIAN R. LARSEN
Assistant United States Attorney

CRL/jr

JAN 16 2007

LEONARD
STREET
AND
DEINARD

150 SOUTH FIFTH STREET SUITE 2300
MINNEAPOLIS, MINNESOTA 55402
612-335-1500 MAIN
612-335-1657 FAX

January 31, 2007

JOSHUA JAY KANASSATEGA
BRYANT D. TCHIDA
(612) 335-1500

RULE 408 SETTLEMENT COMMUNICATION – INADMISSIBLE

VIA FACSIMILE AND UNITED STATES MAIL

Christian R. Larsen, Esq.
Assistant United States Attorney
United States Department of Justice
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: United States Department of Interior – Office of Inspector General

Dear Mr. Larsen:

This letter is to follow up in regard to our conversation this morning about the Department of Interior ("DOI") / Office of Inspector General ("OIG") matter. Before proceeding further, we want to thank you again for your voice mail message and for getting back to Menominee Tribal Enterprises ("MTE") so quickly in response to the offer MTE made to the government during our meeting with you in Milwaukee last Friday.

As we explained this morning, however, MTE is troubled by the government's rejection of MTE's multiple offers to the government to advance settlement and to find common ground. In MTE's view, the government's responses have not been conducive to getting to "yes" and, consequently, settlement discussions could be at an impasse.

As you are aware, the parties have now been negotiating for more than nine months, beginning shortly after the government's power-point presentation on March 8, 2006 ("March 8 Presentation"). At the onset of the negotiations and in response to MTE's inquiry, the government advised that its criminal investigation was closed. As to civil and administrative

claims, MTE understood that the totality of the government's claims were those included within the March 8 Presentation. Furthermore, MTE has been clear and consistent that it needs a "global" settlement of all civil and administrative claims, meaning one in which the government would not: (1) require MTE to identify additional payback amounts; or (2) come back at a later date, making additional allegations and/or seeking additional remedies or recoveries for any claims that were or could have been investigated in connection with any grand jury subpoena *duces tecum*, DOI-OIG subpoena *duces tecum*, or the DOI-OIG audit.

MTE has negotiated with the government based on its understanding that the parties were working toward a final resolution of matters actually investigated and those that could have been investigated, and MTE informed the government of that fact.

However, the Draft Settlement Agreement proposed by the government does not provide the finality for which MTE bargained. Surprisingly, the government's proposed draft preserves certain unstated claims and eliminates certain MTE defenses. Moreover, the government's proposed draft includes and omits provisions contrary to the parties' oral negotiations, and includes provisions that were never negotiated, much less agreed upon in final.

Nevertheless, MTE attempted to get to "yes" by revising the draft agreement, and asking the government (on several occasions) to agree to alternative dispute resolution, including mediation, to resolve issues in dispute between the parties. The government rejected MTE's requests for alternative dispute resolution. The government also rejected any suggestion of a compromise that would allow Marshall Pecore ("Pecore") to continue to work in a forest-related position (or any federal payroll position, for that matter). Moreover, while the government suggested that MTE provide an overview of the problems with the proposed settlement compliance program, a suggestion with which MTE dutifully complied, the government rejected and dismissed MTE's concerns outright.

As we understand the government's current position, it is not willing to negotiate any settlement term unless and until the Pecore issue is resolved to the government's satisfaction. To avoid an impasse, MTE proposed that the government and MTE arbitrate the issue of Pecore's responsibility/liability. MTE would then use the arbitrator's decision (if Pecore is not vindicated) as the basis for its position in any subsequent MTE disciplinary proceedings brought against Pecore. As MTE explained before, its company policies and procedures dictate that Pecore be given due process. Due process does not rest on mere allegations and, accordingly, MTE reiterated its request that the government agree to arbitrate the Pecore issue while the parties continue to work on the other issues in dispute. The government, however, rejected "mediation" to resolve the Pecore issue (in your voicemail message to us on Monday of this

week). Because MTE's request was to arbitrate, not to mediate, we put the question of arbitration before you again in today's conversation. But, if the government rejects arbitration and continues to insist on resolution of the Pecore issue before addressing other settlement issues in dispute, then that position puts the parties at an impasse.

In addition, we informed you that resolution of the Pecore issue could not directly or indirectly: (1) violate the Menominee Indian Tribe of Wisconsin ("MITW") Constitution; (2) be disproportionate to the offending misconduct, if any, in which Pecore is found to have engaged; (3) modify any contract between MITW and the Bureau of Indian Affairs ("BIA"); or (4) modify the existing Management Plan. In MTE's view it would be improper for the government to utilize the Pecore issue and settlement agreement to achieve objectives which have no proportionate or logical nexus to Pecore's alleged conduct. Instead, issues involving a purported conflict of interest in connection with the Forest Manager position are more properly within the province of government-to-government political negotiations between BIA and MITW. Simply put, this is not an MTE issue.

Next, you advised us that the government expects to interview Pecore tomorrow. We inquired as to the legitimacy of continued settlement negotiations if the government is continuing its investigation, in part, by conducting additional interviews. You responded that the government would continue to investigate the matter. Of course, that is the government's prerogative. It seems, however, illogical and would serve no useful purpose for the parties to continue a settlement dialogue while the investigation remains in "active" status, which could lead to the government asserting additional claims. Thus, the better course of action might be for the government to complete its investigation before the parties resume negotiations on a global basis.

MTE would like to bring this matter to a conclusion as expeditiously as possible. To move matters forward, we explained that the next step rests with the government and identified the three possible courses of action. **First**, the government could continue to investigate to its satisfaction. **Second**, it could continue settlement discussions. **Third**, it could commence litigation.

To the extent the government decides to *investigate*, then MTE would of course cooperate with the investigation (as it has always done). If the government decides to *settle*, then the government should make a counter-offer to MTE. Of course, any settlement must be on terms that are fair, feasible and practical. If, however, the government decides that it must *commence litigation* (which MTE hopes can be avoided), then MTE is pleased to know that the government would join it in seeking to move the case forward on an expedited basis, with trial before the end of this year.

MTE looks forward to the government's response as to the manner in which it decides to proceed.

Very truly yours,

LEONARD, STREET AND DEINARD
Professional Association

By
Joshua Jay Kanassatega
Bryant D. Tchida

JJK/BDT/js

U.S. Department of Justice

United States Attorney
Eastern District of Wisconsin

517 East Wisconsin Avenue
Milwaukee, WI 53202

414 / 297-1700

August 1, 2007

Via U.S. mail and email

Joshua Jay Kanassatega
Leonard, Street and Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Re: **USA V. Menominee Tribal Enterprises, et al.**
Case No. 07-C-316

Dear Mr. Kanassatega:

This settlement demand is submitted to defendant Menominee Tribal Enterprises ("MTE") in accordance with the Court's Order Re: Mediation/Settlement Conference issued by United States Magistrate Judge James R. Sickel on July 27, 2007. The critical components of the government's demand are as follows:

1. In exchange for the corporate integrity and compliance measure outlined in paragraphs two and three of this letter, the United States will reduce its total monetary claim from $1.4 million by 50 percent, to $700,000 (the basis for the government's monetary claim is set forth in the attached summary, which is also included as an attachment to the government's Rule 26 Disclosures).

2. As part of a settlement, MTE must agree to remove Marshall Pecore from his current position as Forest Manager, a position of trust which exercises critical oversight over the expenditure of federal funds for forest management purposes. MTE will further agree not to place Mr. Pecore in any position in which he will have control or authority over any work associated with federal government contracts or programs, or the funding for these contracts or programs. This aspect of the government's demand is important to ensure that one of the principal MTE wrongdoers is not in a position to supervise or approve the expenditure of government monies.

3. MTE will agree to implement certain corporate integrity and compliance measures designed to ensure the proper completion of, and billing for, federally-funded work performed by MTE.

This settlement demand is largely consistent with the terms of MTE's prior verbal agreement to settle this matter, reached approximately one year ago. MTE subsequently withdrew from a key component of our prior verbal agreement (in particular, the agreement set forth in paragraph two above) following changes in the composition of the MTE Board of Directors in the fall of 2006.

Thank you for your consideration of this settlement demand.

Sincerely,

STEVEN M. BISKUPIC
United States Attorney

By: 
CHRISTIAN R. LARSEN
Assistant United States Attorney

CRL:rlf
Enclosure

cc: Glenn Reynolds

David Congos
01/02/2001 12:33 PM

To: Jay West/MINNEAPOLIS/BIA/DOI@BIA, Andrew Bellcourt/MINNEAPOLIS/BIA/DOI@BIA
cc:
Subject: Menominee Fire Meeting Agenda

☐ Return receipt

Andy/Jay,

Here are the agenda items proposed by MTE:

Jacci Pubanz - 1) fire billings for suppression and hazard fuel reduction, 2) billing time lines, information needed (type and amount)

Marshall Pecore - 1) Fire reports (clarify those required by statute/regulation vs. those that are optional), 2) New fire program money (urban interface and hazard fuels), 3) Need to understand what can or cannot be done with these new monies (standards), 4) Staffing implications of current and anticipated fire funding

Give me a call if you have questions.

Dave

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Joe Schwartz
FROM: David Congos DFC
DATE: October 31, 2002
RE: Obstruction/Retribution by MTE

Attached is my memo to the file and supporting documentation regarding recent MTE actions to restrict information/communications between MTE and BIA and retaliation against MTE employees Jacci Pubanz, Administrative Assistant and Larry Johnson, Accounting Manager.

It is my view that Dan Leonard and Marshall Pecore conspired with other individuals, including at least one MTE Board member, to restrict my access to documents or activities associated with MTE fire invoices. Further, these individuals attempted to prevent the Administrative Assistant from performing her job duties and responsibilities with regard to these invoices as well as remove the Accounting Manager from the invoice process. Part of the actions against Ms. Pubanz was to begin building a case of insubordination against her, most likely in the attempt to formally remove her from the Administrative Assistant position. To achieve this objective, it appears her supervisor, Marshall Pecore and the Personnel Manager, Dan Leonard, initiated tactics to coerce her from doing her job that included arbitrarily removing some of her established job elements, smearing her work performance to other MTE managers in her absence and humiliating her in front of her coworkers.

I believe that this is directly related to the ongoing OIG investigation and is intended to "silence" people who would assist me in determining the accuracy of the invoice billings or otherwise voluntarily answer questions on the alleged fraud, waste and abuse associated with fire invoices. If this investigation is to be conducted in a fair and timely manner, I strongly recommend that you investigate this incident and determine what MTE managers (and elected officials?) were involved and why.

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Regional Director
THROUGH: Regional Forester
FROM: Menominee Trust Forester
DATE: February 3, 2003
RE: Menominee OIG Investigation

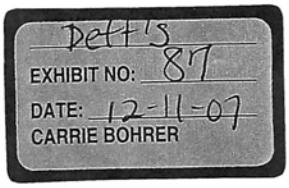
I spoke with Joe Schwartz, OIG investigator, on January 30 regarding the Menominee investigation. During our meeting Mr. Schwartz indicated the U.S. Attorney had expressed the view that the government "wins very few cases involving BIA". This suggested to me that a prejudice already exists against the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

I brought my findings of possible fraud, waste and abuse to the Regional Forester and the Contracting Officer because it was my job. They concurred with my findings and, consistent with their job responsibilities, forwarded the information to OIG. A number of MTE forestry staff likewise cooperated with the initial OIG investigation because they felt a moral obligation to do the right thing. None of us realized that the misappropriation of federal funds would be treated differently by the Justice Department just because it occurred under the BIA's watch.

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

Assuming a meeting can be scheduled, it is my opinion that your expressed support for legal action against MTE or its staff for past or current fraudulent invoicing and/or reprogramming of fire funds to non-fire uses will help remove the U.S. Attorney's political vacillation in this matter. Please let me know, through Mr. West, if you are agreeable to doing this.

CC:
Contracting Officer



MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Jay West
FROM: David Congos
DATE: August 19, 2004
RE: Conflicts of Interest

I believe that a serious organizational conflict of interest exists concerning those entities controlling and directing the financial interests of the beneficial owners of the Menominee forest resources. Primarily, Memoninee Tribal Enterprises (MTE) insists that it does not have to pay the tribal beneficiaries fair market stumpage value for the timber harvested. This determination comes directly from the MTE Board of Directors and the recommendations of the previous two presidents, the MTE attorney and the Forest Manager.

MTE, by tribal constitution, is delegated sole responsibility for effecting forest management practices on trust land. This responsibility has been interpreted by MTE to include the sale of the trust assets for MTE's exclusive use to (by order of priority): 1) create jobs and 2) make a profit. While the tribal enterprise annually cuts approximately $5 million of standing timber, less than $.20 of each stumpage dollar is paid to the beneficial owners. The remainder is placed in the general fund of the sawmill to subsidize milling operations, despite 60% of the annual cut volume is sold in round wood form to off-reservation mills for processing.

The MTL enacted a stumpage ordinance in July, 2002 after determining that MTE's "...use of the tribal forest land has gone on since 1975 with little or no payment to tribal members for such use and this continued practice must be brought to an end. This tribal ordinance for stumpage payment to tribal members is intended for such purposes." In February, 2003, following tribal elections, new Legislators were seated and, subsequently, the practice of using trust assets to subsidize the sawmill operation returned as an MTL priority. However, the tribal constitution and the management plan for the sawmill enterprise both mandate that tribal land and timber thereon shall not be an asset of MTE for any purpose, clearly placing responsibility and accountability for the timber assets with the MTL.

The MTL and MTE Board of Directors created the Joint Task Force as a mechanism for both bodies to meet and discuss important forest management issues and policies, such as stumpage. Members from each body are appointed to sit on the Joint Task Force and,

following agenda item business, report forestry findings and recommendations to the full Legislature or Board for formal action. MTL Joint Task Force members include two Legislators that are immediate family members to sitting MTE Board members. Community members charged that this was a conflict of interest between MTL and MTE, prompting a legal opinion from the Tribal Attorney recommending that the involved Legislators (Gary Besaw and Tony Waupochick Sr.) resign their positions on the MTL/MTE Task Force and be replaced by "non-controversial" members.

Both of the named Legislators attended meetings held by MTE to discuss forestry and trust issues including allowable expenditures of the Forest Management Conract, stumpage payments/accountability, summer harvest of white pine logs and regeneration of white pine shelterwoods. During these meetings I advocated for certain contractual and trust protection principles that weren't shared by either MTE or Legislators Besaw and Waupochick.

The MTE Board of Directors, many of its employees and some MTL Legislators oppose any attempt to fully account for Menominee trust assets (stumpage), instead favoring the use of these funds to subsidize the sawmill. The decision to deny the Menominee beneficiaries their equitable share of the tribal assets is controlled by self-serving interests that have the power or authority to distribute or direct these assets. The collaborative effort between the self-serving elite has corrupted the protective measures contained in the tribal constitution and the Trust and Management Agreement flowing from the Restoration Act.

The Forest Management Contract contains language and provisions to properly perform the trust services and preserve the federal protection promised to the Menominee Tribe, but not if the organizational conflicts of interest are allowed to operate unimpeded. I recommend that these organizational failures be formally corrected and replaced with a structure that fully meets the federal fiduciary trust standard.

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Joe Schwartz
FROM: David Congos DC
DATE: December 2, 2004
RE: Menominee

Attached are parts of a letter from George Howlett to the Regional Director reiterating charges that I am involved in a conspiracy with Doug Cox to shut down the MTE sawmill. It additionally alleges professional misconduct on my part and suggests my motives are to ultimately harm the Menominee Tribe.

The letters from Howlett and the recent tribal resolution requesting the Regional Director to reassign me are linked. MTE Board members, MTL legislators and MTE managers have participated in this effort to destroy my credibility and prevent me from performing my trust oversight duties. The reason, of course, is to protect the status quo at MTE and avoid being held accountable for the waste of trust assets or federal contract dollars.

I am considering pursuing legal action against Mr. Howlett, as it appears the BIA doesn't have a problem with tribes using character assassination as a means to skim money. If I do go to court, I will try to show the personal attacks against me stem back to the start of your investigation for invoice fraud by MTE. Will testimony regarding the invoice fraud and misappropriation of fire dollars by Marshall Pecore and his staff be a problem with the U.S. Attorney's Office?

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Jay West
Stu Mani
FROM: David Congos
DATE: March 17, 2005
RE: OIG Invoice Fraud Investigation

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

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

I was not impressed by their scenarios, and asked about the documented situations where MTE clearly billed for work they didn't do. Additionally, I pointed out that over $250,000 of fire project funds were spent on non-fire activities and that MTE knew this was illegal before they did it. Mr. Larson agreed it was an unpleasant situation but since no one pocketed any money in the deal he didn't think his boss would support any serious actions against the individuals involved.

I then said if the final outcome is nothing, we would have been better off if the investigation had never started, since the MTE people that cooperated have paid a heavy price for doing so and I too have become a target for expecting MTE to comply with the rules. Mr. Larson hoped the final outcome would be better than nothing, but couldn't make any promises.

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

EXHIBIT E

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Jay West
FROM: David Congos
DATE: January 31, 2005
RE: Contract Non-Compliance and the OIG Investigation

The BIA provided evidence of fraud, waste and abuse (FWA) within the Forest Management Contract by Menominee Tribal Enterprises (MTE) to the OIG for investigation. This investigation has been on-going for almost three years, is still active and remains unresolved.

Recently, the Midwest Regional Director notified the Menominee Indian Tribe of Wisconsin (MITW) that they were non-compliant with the Forest Management Contract, placing trust assets at risk as well as endangering the contract itself. A meeting between the Regional Director and the MITW to identify the reasons for non-compliance was inconclusive pending an explanation for the failure by MTE (the sub-contractor) to the MITW (the primary contractor). Essentially, the MITW had no idea why MTE failed to perform the Forest Management Contract work satisfactorily.

It is my conclusion that the underlying causes leading to the OIG investigation and the recent contract non-compliance findings are the same. In both cases MTE disregarded the contract statement of work and instead chose to use contract funds primarily for the purpose of supporting MTE sawmill operations, not providing services to the beneficial owners. I believe that if the OIG investigation had been completed and their findings reported to the MITW, the MITW would have exercised immediate control over MTE's subcontracting performance. Consequently, non-compliance within the Forest Management Contract statement of work would never have occurred. Unfortunately, the pattern of contractual FWA by MTE continues unabated and potential federal liability grows.

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

MEMORANDUM

Menominee Tribal Enterprises Forestry Center
Bureau of Indian Affairs
P.O. Box 670
Keshena, Wi. 54135

TO: Jay West
FROM: David Congos
DATE: September 16, 2004
RE: MTE Defamation

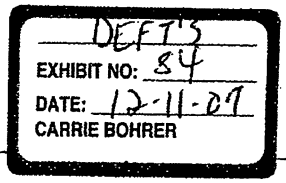
In a letter to the tribal newspaper, the MTE Chairman of the Board has accused me of attempting to hurt MTE's sawmill and forestry operations, resulting in layoffs of mill workers and lost company profits. This was supposedly done for some political purpose and will, according to the Board Chairman, harm the Menominee people and their economic future.

This is very strong language designed to distract other elected tribal officials from the real issues, such as the tribal conflict of interest that controls the harvest, sale and distribution of the trust assets for the benefit of MTE without regard for the beneficial owners. Additionally, MTE's forest management practices resulting in noncompliance with the Forest Management Contract and failure to follow the Forest Management Plan has created a forestry program that does not practice sustained yield forestry.

Further, MTE's corporate interest in collecting and keeping the stumpage revenue that properly belongs to the beneficial owners is supported by some members of the Menominee Tribal Legislature, including the MTL Chairperson. The MTL has a duty, under the Menominee Constitution, to ensure that the tribal assets are not used by MTE as a company asset. Allowing MTE to retain these tribal assets represents a failure by MTL to exercise its authority over the tribal enterprise under the controlling documents. As a result, MTE now charges that the Secretary of the Interior is directly responsible for the loss, waste or diminishment of the trust assets that they manage and control.

Many tribal members recognize that this is, in fact, the case and are attempting to properly correct the situation by seeking election to the MTE Board of Directors (the platform of six candidates published in the Menominee Nation News, 9/13/04, attached). These individuals are the ones identified in MTE Chairman Besaw's letter as using "misleading tactics" against MTE and whom he is actively working against.

MTE also supports (directly or indirectly) attempts to smear these tribal members by posting, on the bulletin board beside the front door of the main office, a hate letter directed against



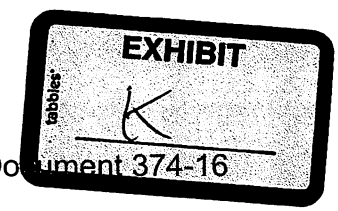
these candidates (attached). Again, my name is also used in this hate letter and tied to the Menominee electoral process.

I can only summarize this chain of events as a continuing pattern of fraud, waste and abuse by MTE that began with the stumpage payment question and expanded into invoice fraud, misappropriation of contract funds and a departure from sustained yield forest management practices. Until someone with authority within the DOI confronts MTE and forces them to manage the trust assets for the benefit of all tribal members, and do so within the boundaries of conventional decency, it is unlikely that Menominee self-governance will fully succeed.

False Records

MTE Invoice Number	Actual MTE invoice contents	*Bucci's Findings* Bucci creates digitization of MTE Accomplishment Maps & disregards wage claims. Bucci states MTE accomplishment maps make no sense for redo invoices	*Government's Complaint* Assumes that Accomplishment Maps represent mileage billed:	*Government's Summary Judgment Motion* Again using Accomplishment Map data, with variations from complaint:	*Trial Allegations* Again using Accomplishment Map data, with additional variations:
200	**19.4** miles $8,707.50	**19.4** miles billed	**14.16** miles billed-partial **9.54** miles billed-full	**22.6** miles billed	**22.4** miles billed
202	Hazard Fuel Reduction $59,840	**293** miles billed	**434** miles billed-grading	**293** miles billed	**294** miles billed
212	**19.0** miles $8,550.00	**32.03** miles billed	**19.78** miles billed-partial **12.26** miles billed-full	**27.5** miles billed	**28.6** miles billed
214 redo	**6.7** miles & wages $11,292.16	**37** miles billed	**2.43** miles billed-partial **37.2** miles billed-full	**19** miles billed	**38.9** miles billed
217 redo	**2.25** miles & wages $12,653.08	**19.1** miles billed	**19.1** miles billed	**18.2** miles billed	**18.2** miles billed
219 redo	**9.75** miles & wages $9,453.82	**9.75** miles billed	**9.75** miles billed	**14.3** miles billed	**14.3** miles billed
224 redo	**0.9** miles & wages $4,415.77	**10.24** miles billed	**10.24** miles billed	**9.2** miles billed	**8.7** miles billed
248 redo	**6** miles & wages $6,606.30	**10.75** miles billed	**11.7** miles billed	**13.1** miles billed	**12.7** miles billed
08/24/01 **11/21/01** Subsidiary Work	Invoices for individual workers' hours, making no mileage claims.	**278** miles billed[1]		**140.1** miles billed	**125.2** miles billed

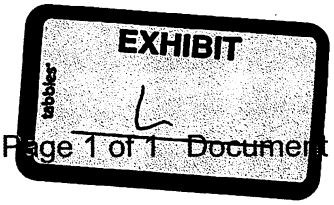
[1] Bucci attempted to calculate fraud amounts in subsidiary invoices that broke down individual workers' hours. He invented a formula and applied it to his digitization of hand drawn MTE Accomplishment Maps. *See* Exhibit 415.
May 2001: $28,434.80/55 miles on hand drawn maps
June 2001: $29,704.16/56 miles on hand drawn maps
July 2001: $22,031.27/72 miles on hand drawn maps
August 2001: $37,468.45/50 miles on hand drawn maps
September 2001: $32,229.90/45 miles on hand drawn maps



False Invoices

MTE Invoice Number	MTE invoice contents	*Bucci's Findings* Assumes miles billed based on Bucci's digitization of MTE Accomplishment Maps Bucci finding wages "Not Authorized"	*Complaint Allegations*: "Not Accomplished" "Not Performed"	*Summary Judgment Allegations*: "Work Not Accomplished / Not Acceptable"	*Trial Allegations*: "No Fire Work Done" (FW) "No Fuel Reduction" (FR)
200	$8,707.50 for 19.4 miles	**9.6** miles fraud	**9.6** miles fraud 2.2 miles duplicated billing	**15** miles fraud	**11.1** miles FW; **5.3** miles FR
202	$59,840 for Haz. Fuel Reduct.	**66** miles fraud	**66** miles fraud	**98** miles fraud	**97** miles grading not done
212	$8,550.00 for 19.0 miles	**9.7** miles fraud	**9.7** miles fraud 9.2 miles duplicated billing	**16.4** miles fraud	**10.5** miles FW; **10** miles FR
214 redo	$11,292.16 for 6.7 miles & wages	**18** miles fraud	**18** miles fraud 15.34 duplicated billing	**10.5** miles fraud	**22.5** miles FW; **12** miles FR
217 redo	$12,653.08 for 2.25 miles & wages	**10.9** miles fraud	**10.9** miles fraud 8.74 duplicated billing	**14.3** miles fraud	**7.7** miles FW; **5.9** miles FR
219 redo	$9,453.82 for 9.75 miles & wages	**8.5** miles fraud	**8.5** miles fraud 8.5 miles duplicated billing	**10.8** miles fraud	**9.6** miles FW; **2.3** miles FR
224 redo	$4,415.77 for 0.9 miles & wages	**1.6** miles fraud	**1.6** miles fraud 1.6 miles duplicated billing	**6.1** miles fraud	**3.5** miles FW; **2.9** miles FR
248 redo	$6,606.30 for 6 miles & wages	**11.7** miles fraud	**11.7** miles fraud 9.22 duplicated billing	**10.9** miles fraud	**10.9** miles FW
08/24/01 **11/21/01** Subsidiary Work	Invoices break down individual workers' hours	Bucci used a formula and his digitized maps to estimate fraud of **78** miles[1]	**21.24** never performed 78 miles duplicated billing	**24.4** fraud	**16** miles grading not done

[1] Bucci attempted to calculate fraud amounts in subsidiary invoices that broke down individual workers' hours. He invented a formula and applied it to his digitization of hand drawn MTE Accomplishment Maps. *See* Exhibit 415.
May 2001: 10 miles double billed or fraud
June 2001: 0 miles double billed or fraud
July 2001: 42 double billed or fraud
August 2001: 0 miles double billed or fraud
September 2001: 26 miles double billed or fraud



David Congos, without consulting with anyone at MTE with respect to the criteria for installing culverts, concluded that all culverts had to be new to be reimbursable by the BIA. Below is chart showing Congos' 2003 findings with respect to culverts:

Culverts

Invoice #202 (2001)	*Congos inspects 17 culverts based on field map locations* (2003) He only counts "new" culverts at Map locations and disregards culverts he deems too old or too new, finding 11 culverts "Not Accomplished" Observation (by culvert #):	Finding:	*Government Allegations:* (2008) Based on incorrect assumption that culverts must be new and at exact Accomplishment Map locations	*Pecore's Inspection*
16 culverts with siltation protection and backhoe.	1. Not found at location on map. Two old culverts nearby.	1. Not Accomplished	*Complaint allegation*: No new culverts at 11 of 17 locations on Maps. *Summary Judgment allegation*: Did not install 10 of 17 culverts.	Marshall Pecore locates all but 1 culvert
	2. Old culvert located	2. Not Accomplished		
	3. New culvert	3. Acceptable		
	4. New culvert	4. Acceptable		
	5. None located	5. Not Accomplished		
	6. New culvert, but assumed to be related to subdivision drainage	6. Not Accomplished		
	7. Two old culverts	7. Not Accomplished		
	8. None located	8. Not Accomplished		
	9. None located	9. Not Accomplished		
	10. Old culvert	10. Not Accomplished		
	11. None located	11. Not Accomplished		
	12. Culvert too new	12. Not Accomplished		
	13. Culvert too new	13. Not Accomplished		
	14. Could not find new culvert, but Cox notes indicate one exists	14. Accomplished		
	15. Could not find culvert, defers to Cox findings	15. Accomplished		
	16. New culvert	16. Accomplished		
	17. New culvert	17. Accomplished		

Executive Order 13175--Consultation and Coordination With Indian Tribal Governments

November 6, 2000

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

a. "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or 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.
b. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
c. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
d. "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles.

In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

c. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria.

In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

a. Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

b. With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

c. When undertaking to formulate and implement policies that have tribal implications, agencies shall:

    1. encourage Indian tribes to develop their own policies to achieve program objectives;

    2. where possible, defer to Indian tribes to establish standards; and

    3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals.

Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation.

a. Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

b. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

    1. funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

    2. the agency, prior to the formal promulgation of the regulation,

c. consulted with tribal officials early in the process of developing the proposed regulation;

d. in a separately identified portion of the preamble to the regulation as it

is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

e. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

f. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

1. consulted with tribal officials early in the process of developing the proposed regulation;

2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

3. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

g. On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

a. Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

b. Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

c. Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

d. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

a. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

b. In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

c. Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies.

Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

a. This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

b. This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

c. Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

d. This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review.

This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

The White House,
November 6, 2000.
