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October 12, 2007

**JOSHUA JAY KANASSATEGA**  
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**VIA FACSIMILE TRANSMISSION 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 of America v. Menominee Tribal Enterprises, et al.:  
Case No. 07-cv-00316, United States District Court – Eastern  
District of Wisconsin – Green Bay Div.  
Discovery Issues (Review of BIA Documents)***

Dear Mr. Larsen:

I write in response to your letter dated October 9, 2007 regarding the United States' production of documents currently and formerly in the possession, custody or control of Bureau of Indian Affairs ("BIA") and its employees (collectively "BIA Documents"). This letter supplements Menominee Tribal Enterprises' ("Menominee") October 9, 2007 letter to the United States, and the matters discussed in Menominee's October 9, 2007 letter will not be repeated here.

This letter addresses three issues (in addition to those raised in Menominee's October 9, 2007 letter to the United States): (1) the United States' misrepresentation of the process and timeline concerning production and review of the BIA Documents; (2) the alleged

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burden imposed on BIA in connection with the production and review of the BIA Documents; and (3) the United States' demand that Menominee pay for BIA Document copies.

With respect to the *first* issue – United States' misrepresentation of the process and timeline concerning production and review of the BIA Documents – it would be useful to recount what has *in fact* happened in the course of this case, including the United States' delay tactics.

As you will recall, on May 1, 2007, the United States requested that Judge Griesbach remove the then calendared Rule 16(b) Scheduling Conference because all parties had not formally "appeared." Notwithstanding that position, your office moved forward on May 3, 2007 with the Rule 26(f) Conference. Your office then took the position that discovery could only commence after all parties had formally "appeared." On May 15, 2007 your office declined to comment on the proposed Joint Rule 26(f) Report and on May 16, 2007 it refused to timely serve the United States' Rule 26(a)(1) Disclosures. Both of those positions relied on the fact that all parties had not formally "appeared." After a two-month delay, at the Rule 16(b) Scheduling Conference on July 25, 2007, you requested Judge Griesbach to order discovery stayed pending mediation. As you will recall, Menominee opposed that request, and Judge Griesbach summarily ordered discovery to continue.

After discovery had commenced and near the expiration of the United States' time to respond to Menominee's initial round of discovery requests, the United States in a letter dated August 29, 2007 reported that the United States Attorney for the Eastern District of Wisconsin had unilaterally granted the United States a 45-day extension of time to respond to Menominee's sets of written discovery.

Because the United States' purported self-grant of a 45-day extension was completely improper, you will recall that the United States and Menominee (at Menominee's request) participated in a meet-and-confer regarding discovery issues on September 17, 2007 at approximately 11:15 a.m. You will also recall that you represented to us during the September 17, 2007 discovery meet-and-confer that all BIA records responsive to Menominee's discovery requests had been collected, including, without limitation, collected from individual BIA employees, and that approximately 15 boxes of such documents were "immediately available" for review. When we called Ms. Pfister that day to request immediate review of those documents, however, Ms. Pfister told us, contrary to your representation, that those documents were not ready for review.

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We left a message for you the afternoon of September 17, 2007, asking for further information about your prior representation to us. You responded to that voice message at approximately 4:29 p.m. on September 17 via email, in which you stated, among other things, as follows:

Dear Jay – I received your voice mail of earlier today in follow-up to our discussion, in which you requested that Kara Pfister give you access this afternoon to BIA records. Most of the records are available and can be assembled in short order for your review, but that will be dependent to some extent on the schedule of BIA employees, including Ms. Pfister, to help supervise your review. Also, as Kara pointed out, the BIA has not yet conducted privilege review of all the documents, so there may be a need to withhold certain documents at this time. As I indicated, we can make a reasonable number of copies at no charge, but we may have to assess a charge depending on the volume requested.

Suffice it to say that this September 17, 2007 4:29 p.m. email demonstrated that, contrary to your representation to us during the September 17, 2007 meet-and-confer, the BIA records were not, in fact, “immediately available” for review.

In response to your September 17, 2007 4:29 p.m. email, we sent you a letter, also dated September 17, 2007, discussing the serious questions implicated by the inconsistencies in your September 17, 2007 representations. Your response by email on September 18, 2007, included, among other things, the following statements:

Jay – I am in receipt of your letter dated September 17, 2007. Despite your stated intent to bring a motion before the court, the government will make the following records available for your inspection in the near future, most likely by early next week. However, upon further consideration we do need a few additional days to complete our privilege review before producing these documents.

To clarify, BIA records that are available (subject to the withholding of certain documents for privilege) will consist of the following:

- 1) MRO forestry program files (approximately 22 boxes)
- 2) MRO contracting files (approximately 2 boxes)(some of the original documents are flood damaged but have been scanned and are available for review)

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3) MRO Roads program files are still being gathered and should be available at the beginning of next week (believed to be 2-3 boxes)

This comprises a substantial portion of the BIA's production, but not the entirety of that production, as we continue to track down responsive documents for production . . . . Based on employee schedules, we anticipate that this process can begin as early as 7:00 a.m. on Monday, Sept. 24. The hours for inspection will generally be Monday-Friday, 7 a.m – 4:00 p.m

On September 19, 2007, however, you backtracked from the position stated during the September 17, 2007 meet-and-confer and subsequent email communications:

Jay – I wanted to give you an update on a matter that has recently come to my attention. I may have left the impression during our telephone conference on Sept. 17 that the entirety of the BIA boxes gathered to date had been scanned in full. However, I was informed yesterday that only the internal BIA documents were scanned due to the volume involved, and that some redundant copies were weeded out during the scanning process as well. Therefore, any documents the BIA may have received from MTE during the 15 years covered by your discovery requests were not scanned. MTE, however, should already possess these records in its files. I think this was a reasonable approach given the volume of records involved, but I wanted to make sure you were aware of this as you proceed with your inspection of the original records next week.

As I indicated to you in yesterday's email, the government work with you to grant access to the complete records (containing both internal BIA documents and documents sent to BIA by MTE) as they currently exist starting next week, with the exception of any documents removed based on privilege. We anticipate completing our privilege review this week, but I will confirm the status of that review no later than Monday, September 24.

Then, despite your prior representations that the BIA records would be available for review on September 24, 2007, you wrote to us as follows (on September 24, 2007 at 12:01 p.m.):

Hi Jay – I wanted to let you know that we hope to have an Index, privilege log, and explanatory letter to you no later than COB Wednesday, Sept. 26. Assuming we meet this goal, you could begin reviewing records as early as Sept. 27, but I'll report back to you on Wednesday evening.

On Wednesday, September 26, 2007, at 4:55 p.m., you sent us a communication, stating that BIA records were finally available for review. The September 26, 2007 letter, however,

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raised serious concerns about spoliation of evidence on the "fire laptop" computers and hard-drives of central players in this litigation, including, without limitation, David Congos, Sean Hart and Tom Magnuson. In the email transmitting your September 26, 2007 letter, you stated as follows:

Please let me know if you would like to begin inspecting records tomorrow at the BIA's Midwest Regional Office. Sean Hart is available tomorrow to assist in your inspection process, but he will be out Friday.

Hence, your September 26, 2007 email provided less than 24-hours notice (at the close of business) that Menominee could make arrangements with Mr. Hart for review of BIA records on September 27, 2007. In other words, the United States attempted to place Menominee in the position of its counsel having to make arrangements directly with Mr. Hart – a BIA employee directly implicated in evidence spoliation – without adequate notice for Thursday, September 27, 2007 review, and with admitted unavailability for Friday, September 28, 2007 review.

Menominee sent an email to you the morning of Monday, October 1, 2007 at 9:50 a.m., which stated as follows:

Good morning Chris:

Menominee would like to begin its review of the BIA documents that you indicate are now available for inspection, at least according to your September 26th letter. I would like to undertake that inspection sometime this week, perhaps Tuesday through Thursday. Please make appropriate arrangements for the inspection and let me know *via* return e-mail. Also, for going forward purposes, let me know whether you want us to make future arrangements for continued document inspection indirectly through you or directly with the BIA contact person. If it is to be "direct" to the BIA contact person, please provide me with appropriate contact information for that person.

In this connection, it seems prudent to raise another issue with you that comes to light from one of the disclosures contained in your September 26th letter. That is, you have identified Sean Hart as BIA's contact person for the upcoming document inspection. In light of your disclosure involving Mr. Hart's computer and his status as a fact witness, Menominee requests that you identify another contact person -- perhaps one who is clearly not a fact witness.

Thank you.

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Thus, Menominee raised the issue of the propriety of designating Mr. Hart as the contact for the review of BIA records. Menominee also sent a letter to you dated October 1, 2007, addressing in further depth the document destruction and evidence spoliation issues implicated by your September 26, 2007 letter.

You did not respond to Menominee's October 1, 2007 9:50 a.m. email until 3:44 p.m. that afternoon. You stated in that response as follows:

Hi Jay – Tuesday through Thursday will work fine for the BIA. Please ask for Kara Pfister at the Office of the Field Solicitor, 1 Federal Drive, St Paul, Room 686. You may arrive anytime after 9:00 a.m. tomorrow, and I will be available for a conference call at that time if necessary.

Kara Pfister will supervise the inspection, but all substantive questions should be directed to me. I plan to be in the office during normal working hours the entire week.

Menominee replied to your October 1, 2007 3:44 p.m. email the same day at 3:54 p.m., and stated "Thank you, Chris."

On October 2, 2007 at 2:09 p.m., you wrote an email to Menominee, stating as follows:

Good afternoon Jay – as you aware, a substantial volume of BIA records have been gathered and have been awaiting your inspection since September 27, 2007.

Due to the volume of records involved and the need to reserve conference room space, we can still accommodate you this week Wednesday and Thursday (October 3 and 4) from 8:00 a.m. to 3:00 p.m. Due to employee schedules, it will be necessary to conclude inspections by 3:00 p.m. each day.

Please advise me if you would like to schedule an appointment for either or both of those days.

We will try to accommodate you next week, but it will be necessary for me to arrange employee schedules and reserve a conference room, so I would appreciate it if you would schedule an appointment with me in advance so that appropriate arrangements can be made to permit access to these records.

Thank you for your cooperation.

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As with your letter dated October 9, 2007, your October 2, 2007 2:09 p.m. email distorted the record. Menominee accordingly responded as follows:

Your e-mail of September 26, 2007 at 4:55 p.m. was the Government's first notice that some documents were available for inspection the next day. That e-mail further advised that Mr. Hart was not available on Friday, September 28, 2007.

Yesterday, I emailed you concerning logistics and raised the issue of whether it was proper for Mr. Hart to be the contact person in light of the serious matters disclosed in your September 26th letter. I was out of the office this morning and not available to respond to the voicemail message you left this morning. However, yesterday's e-mail advised you that our availability would be "perhaps Tuesday through Thursday" and you responded, "Tuesday through Thursday will work fine for BIA."

Now it appears from your e-mail that it could be a burden for BIA to provide the space necessary for inspection and that BIA personnel might not be as available as you lead us to believe. Nevertheless, I would appreciate it if you would make arrangements for inspection tomorrow and Thursday morning.

Menominee's counsel thereafter on Wednesday, October 3, 2007 came to BIA's Midwest Regional Office ("MRO") and inspected the BIA Documents from approximately 9:20 a.m. to 11:35 a.m. (Menominee's counsel had other obligations that afternoon, and accordingly had to leave at 11:35 a.m.). On Thursday, October 4, 2007, Menominee's counsel inspected the BIA Documents from approximately 9:10 a.m. to 3:15 p.m. Your October 9, 2007 letter omits the fact that Menominee's counsel agreed to take a lunch break – at the request of Ms. Pfister – during the October 4, 2007 review and inspection. Menominee's counsel inspected the BIA Documents on October 5, 2007 from 9:20 a.m. until such review was suspended at approximately 10:30 a.m. (further discussed in Menominee's October 9, 2007 letter).

The timeline delineated in your October 9, 2007 letter is, at best, misleading and/or inaccurate in light of the complete written record as recounted above.

With respect to the *second* issue – the alleged burden imposed on BIA in connection with the production and review of the BIA Documents – Menominee is at a loss as to how the United States can reasonably take the position that Menominee is not entitled to a full and complete review of these files (after the issues raised in Menominee's October 9, 2007 letter are adequately addressed by the United States). This is particularly so in light of the United States' nearly six-year investigation, during which Menominee personnel expended hundreds of hours and significant resources in producing hundreds of thousands of pages of documents in response to the Grand Jury Subpoena *Duces Tecum* to Menominee dated December 3, 2002, along with the Department of Interior ("DOI") Office of Inspection General ("OIG") Subpoenas *Duces*

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*Tecum* to Menominee dated January 27, 2003, March 6, 2003, May 8, 2003 and November 22, 2005, as well as the OIG's 2005-2006 audit of Menominee's administration of the self-determination contracts (collectively "Investigation").

The United States' position that Menominee must complete its review and inspection of the 19 disorganized boxes of BIA Documents within "three additional business days," with access restricted to the hours of 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 3:00 p.m. is offensive and unreasonable. Indeed, it appears that many of the BIA Documents are non-responsive to Menominee's discovery requests and otherwise lack inclusion of materials that are responsive. Thus, your reliance on the sheer volume of BIA documents produced in an apparent attempt to imply good-faith is misplaced.

In addition, while you complain about the amount of time required by Menominee to complete its review and inspection of the BIA Documents, please note the burdensome and time consuming procedure employed by BIA in connection with designating materials for copying. As you will recall, the United States refused Menominee's request to have the BIA Documents bates numbered prior to production so that Menominee could quickly designate ranges of documents for copying. Because of your decision to refuse to bates label the BIA Documents, BIA has forced Menominee to insert a series of blue sheets (a tedious and confusing procedure, at best) to designate particular documents for copying. Then, once the blue sheets are recorded, a BIA employee first needs to be located (assuming such employees are not at lunch or on vacation) to come pick up the requested document. Then, once a BIA employee is finally located to make a copy, the BIA employee is to take each designated document, separately scan it, and then bates label the document. I note that on at least two instances during our October 3, 2007, October 4, 2007 and October 5, 2007 review that the BIA employee failed to make an accurate copy and/or failed to affix the correct bates numbers. Those documents accordingly had to be recopied. Subsequent copies also had to be individually reviewed for accuracy, once the BIA's ability to make accurate copies was called into question. I also note that it took several hours to have even a few pages of documents copied pursuant to this unnecessarily tedious, complicated, and time consuming procedure. This procedure also conveniently allows you insight in to our work product.

Nevertheless, if BIA would prefer to make a hardcopy of the entire production and transmit it to Menominee's counsel, Menominee would be amenable to that solution, to the extent Menominee's counsel's presence at BIA's MRO is deemed by your and BIA's offices to be too burdensome and intrusive.

Finally, with respect to copying costs, Menominee will not pay "one dime" of those costs because the United States failed to pay Menominee for so much as a scrap of the hundreds of thousands of pages of hardcopy documents produced in the course of the Investigation. If, however, the United States is willing to agree that "what is sauce for the goose is sauce for the gander," then Menominee kindly awaits receipt of the United States' check in the amount of

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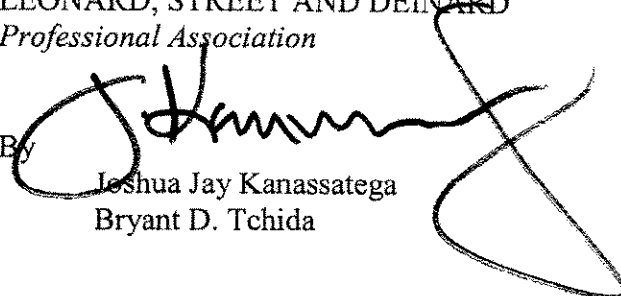
\$21,699.47 (166,919 hardcopy pages at \$.13 per page) to pay the copying costs of Menominee's production in connection with the Investigation. Menominee would then be willing, in turn, to reciprocate and pay copying costs to the United States.

I look forward to our meeting in Minneapolis (hopefully as early as next week) at which time you will be in a position to provide Menominee with a complete explanation concerning the multiple outstanding discovery issues. In the interim, Bryant and I are available to have further discussions with you in advance of that meeting. Please let us know your availability as soon as possible.

Very truly yours,

LEONARD, STREET AND DEINARD  
*Professional Association*

By

  
Joshua Jay Kanassatega  
Bryant D. Tchida

JJK/BDT/js

cc: Glenn Reynolds, Esq. (via Facsimile Transmission and United States Mail)