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

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

INTRODUCTION

Plaintiff United States of America (the "Government") unfairly portrays what has occurred in discovery. Menominee Tribal Enterprises ("Menominee") has conducted its discovery in good faith and has targeted materials that are relevant to the claims *and defenses* at issue. This is not a simple case involving a few invoices and equipment purchases. There is a long and complicated history between Menominee and the Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA") – a course of dealing – that bears directly on the issues before the Court. Menominee is entitled to discovery of information reasonably calculated to lead to the discovery of admissible evidence. While the Government may disagree as to the scope of discovery based upon its view of the case, Menominee has a different view of the case and, not surprisingly, one that is broader than the Government's view.

Moreover, Menominee has not conducted discovery in an abusive fashion, nor has it engaged in any pattern of discovery misconduct. In fact, as is illustrated more fully below, the Court will understand why Menominee's discovery has been surgical, strategic, specific, targeted, and guided by the documentary record. In contrast to Menominee's targeted approach,

the Government is attempting to engage in a "document dump" on Menominee, producing thousands of pages documents not requested by Menominee, and then accusing Menominee of stepping out of bounds.

The broad protective order requested by the Government should be rejected. While Menominee is not opposed to a narrowly-tailored protective order relating to Government-produced documents that *actually* contain matters protected by the Privacy Act (namely, addresses, social security numbers, medical information and the like), the vast majority of Government-produced documents are not subject to the Privacy Act. As illustrated below, the Government is attempting to produce documents *never* requested by Menominee, and which in fact Menominee has repeatedly told the Government it does not want, in an attempt to bootstrap its way into a blanket protective order.

Finally, the Court should not order Menominee to remove any discovery materials from its website. This case has generated many questions, accusations, suspicions and anger toward Menominee. The Menominee people want to know what is happening in this case, what the documentary record shows, and what the witnesses are saying. The Seventh Circuit endorses a strong presumption of public access to *all* phases of a case, including the discovery phase. The Court should not take an action that prevents the Menominee people from being full participants in this process, especially when the Government fails to offer any factually-supported basis for shutting down their access.

BACKGROUND

I. Menominee's Good Faith Discovery Conduct

A. Menominee's Rejection of the Government's Initial Document Dump

As pretext for its contention that Menominee has engaged in abusive discovery, the Government states that "on July 20, 2007, the United States supplied defendants' counsel with approximately 11,500 pages of government files, in accordance with its obligation to provide "Initial Disclosures . . .," and then complains that Menominee served document requests. (Government Brief at 6.)

What *in fact* happened is that Menominee rejected the Government's proposed document dump, and informed the Government that it would not accept and did not want the Government's 11,500 page CD. (Declaration of Joshua Jay Kanassatega ("Kanassatega Dec. ¶ 2.) Instead, Menominee informed the Government that it would serve requests for documents (which as discussed below are narrowly targeted). (*Id.*) Although Menominee did receive 2 CDs from the Government containing certain maps and photographs, the Government did not produce to Menominee, or serve upon Menominee, hard copy documents or a CD containing the 11,500 pages of initial disclosure documents. (*Id.*) Indeed, as stated in the Government's Initial Disclosures, "[a]ttached to this disclosure are the following: A. Index of approximately 11,500 pages of scanned documents used to support government claims (copy of CD available upon request)" (Kanassatega Dec. Ex. 1, at 6 (emphasis added).)

Notwithstanding Menominee's rejection of the Government's first attempted document dump, the Government made a document dump on October 11, 2007. In response to Menominee's First, Second and Third Sets of Interrogatories and Document Requests, and Fourth Set of Document Requests, the Government produced two boxes of hard copy documents

"tagged for production as responsive to one or more discovery requests." (Kanassatega Dec. Ex. 2.) Along with the two boxes of responsive documents, however, the Government enclosed a CD containing approximately 13,764 documents (the "USA Documents"), the majority of which were not responsive to Menominee's discovery requests, as evidenced by plain language of the Government's October 11, 2007 production letter. (*Id.*)

In sum, the Government has made the tactical decision to produce far more documents that Menominee actually requested. Moreover, the Government invited Menominee to review BIA Midwest Regional Office ("MRO") records available for inspection consisting of documents concerning forestry matters, roads maintenance matters, contract matters, and David Congos ("Congos") & Thomas Magnuson's ("Magnuson") Keshena files, approximately 30 boxes of documents ("MRO Documents"). (Kanassatega Dec. Ex. 3, at Response to Request Interrogatory Set 1, Interrogatory No. 1, p. 3.) The Government failed to disclose to Menominee whether any of the MRO documents were contained within the 13,764 pages of the USA Documents, which Menominee did not request and did not want. (Kanassatega Dec. ¶ 3.)

B. The Government's Discovery Games at the BIA's MRO

1. The Government's Onerous Procedure

After weeks of delay by the Government in allowing Menominee to review the MRO Documents, the Government finally allowed Menominee to commence its review on October 3, 2007. Menominee came to the MRO at Fort Snelling, Minnesota, and began to inspect approximately then 19 boxes of MRO Documents. Menominee's review continued on October 4 and October 5, 2007 until such review was suspended at approximately 10:30 a.m. because of the Government's revelation that original invoices and supporting documentation (including certain maps) at issue in this litigation were removed from Congos's files by

investigators Joe Schwartz ("Schwartz") and Todd Bucci ("Bucci"), who "reorganized" the original invoices and supporting documentation after those materials were removed from Congos's files. (Kanassatega Dec. ¶ 5 and Ex. 4.)

Menominee also objected to the burdensome review procedure imposed upon Menominee by the Government. (Kanassatega Dec. Ex. 5.) The Government refused Menominee's request to simply have the MRO Documents bates numbered prior to production so that Menominee could quickly designate ranges of documents for copying. (*Id.* at Ex. 5 and ¶ 4.) Instead of utilizing bates numbers, the Government required Menominee to fill out two blue sheets for each document (or group of documents) requested ("Blue Sheets"). (*Id.*) The Government then required Menominee to place one Blue Sheet in front of the first document selected, and one Blue Sheet behind the last document selected. (*Id.*) A BIA employee, whom Menominee understands to be Sean Hart ("Hart") (a fact witness in this case), would then oversee a document production process that included scanning each page of each document, placing bates numbers on the document (with a "BIAF," "BIAC," "BIAR," "BIAK" prefix designation appearing in the upper left-hand corner of the document), and then making a photocopy. (*Id.*) The Government then would provide a copy of the selected document to Menominee several days, weeks, or in some cases months later. (*Id.*)

2. <u>Menominee Continues Compliance with the Government's Procedure, and Numerous Concerns about the Integrity of the Government's Production Surface</u>

In an effort to avoid motion practice with respect to the MRO Documents, Menominee agreed in December 2007 to resume its review of the MRO Documents at the MRO, notwithstanding the removal of certain documents from those files and the procedure imposed on Menominee by the Government. (Kanassatega Dec. ¶ 5.) Menominee's review occurred over a

several-week period beginning in January 2008, but was significantly slowed by the need to take detailed notes in an effort to keep track of the documents it selected for copying, so that it could compare the copied documents to the selected documents (again, the Government refused to bates label this production set prior to Menominee's selection of a given document). (Kanassatega Dec. ¶ 6.)

Menominee's taking of detailed notes proved to be well founded. For example, there proved to be large gaps in the bates ranges of copied documents, clearly indicating that a large number of documents selected for copying had not in fact been copied. (Kanassatega Dec. Ex. 6.) Moreover, although Menominee had been numbering its Blue Sheets seriatim, several of the Blue Sheet requests were not copied. (*Id.*) In other instances, the complete group of documents requested by Menominee was not copied. (*Id.*) With respect other Blue Sheet requests the requested document was not copied, and in its place was a piece of paper that said "Lost Tabs," indicating that Hart (or whoever else was attempting to make the copy) obviously lost the Blue Sheets and did not make the requested copy. (*Id.*) In still other instances the Government failed to copy numerous post-it notes attached to the documents. (*Id.*)

Menominee's review was further complicated by the fact that the MRO Document files themselves were disorganized, and the MRO refused to identify for Menominee which files belong to whom. (*Id.*) This problem was compounded by the fact that the files did not appear to have been produced as they were kept in the ordinary course of business. (*Id.*) Instead, it appeared as though these files were pulled together from numerous sources and not arranged in an orderly fashion or in the ordinary course of business (out of chronological order) for Menominee's review. (*Id.*) Important documents appeared to have been shuffled in with non-responsive documents for no logical reason. (*Id.*) In addition, the Government continued to add

(and remove) documents from the production set as Menominee was reviewing the documents. (Kanassatega Dec. Ex. 7.)

Despite these problems and despite Menominee's efforts to comply with the Government's onerous review procedure, on February 1, 2008, after Menominee had spent many hours in conducting its review, the Government announced that it would deny Menominee further access to the MRO Documents at MRO's office after February 12, 2008. (Kanassatega Dec. ¶ 7 and Ex. 8.) Menominee objected to that position. (*Id.* ¶ 7 and Ex. 9.) In response, the Government proposed to "have the entirety of the BIAK boxes copied and produced to [Menominee] within the next few weeks." (*Id.*) Menominee objected because it had already invested substantial resources in complying with the onerous and complicated procedure imposed by the Government, and it was not about to invest additional resources to *re-review* documents that it had already reviewed and selected. (Kanassatega Dec. ¶ 7.)

3. <u>The Government Moves the MRO Documents to Milwaukee</u>

On February 12, 2008, the Government informed Menominee that it was transporting all of the MRO Documents to Milwaukee, and that Menominee could continue its review of the MRO Documents there. (Kanassatega Dec. ¶ 8.) In addition, BIA assured Menominee's counsel that the MRO Documents selected by Menominee up to that point for copying would in fact be provided to Menominee. (*Id.*)

Despite BIA's representation, on February 18, 2008, the Government wrote an email to Menominee stating "[o]ur intention would be to scan the entirety of the BIA paper records. We will provide you with a scanned set in PDF format, which will include a scan of your placeholders." (Kanassatega Dec. Ex. 10.) (The "BIA paper records" are the same documents that the Government refers to in its Memorandum at 12 and the Affidavit of Christian R. Larsen,

¶ 10 and to which Menominee refers to as the MRO Documents.) Menominee objected, "[Y]our proposed resolution amounts to a document dump on Menominee after it has in good faith spent significant time and resources complying with BIA's document review procedure. The Government will simply have to live with any consequences arising from the inadequacy of the procedure it foisted upon Menominee since October 2007." (*Id.*)

Nevertheless, Menominee dutifully complied with the Government's location change to Milwaukee and continued its review of the MRO Documents in Milwaukee from February 20, 2008 through March 7, 2008, inspecting documents on six days during that time period. (Kanassatega Dec. ¶ 9.) In addition, counsel for the parties met in another effort to break the impasse created by the Government's desire to dump what the Government estimates to be 80,000 pages of MRO documents on Menominee. (*Id.*) Notwithstanding Menominee's objections, the Government persists in its desire to dump the entire 80,000 pages of MRO Documents on Menominee instead of simply copying and providing only the documents selected by Menominee in accordance with the Government's procedure. (Kanassatega Dec. ¶ 9 and Ex. 11.) Menominee maintains its objection to this attempted document dump. (*Id.*)

C. Menominee's Document Requests

1. Stumpage

One of the primary areas of disagreement between the parties regarding the proper scope of discovery continues to be the issue of stumpage. As Menominee explained in its Memorandum of Law in Support of its Motion to Compel (Docket No. 76), however, the issue of stumpage was part of the reason the investigation leading to the filing of this lawsuit was commenced. Further, Congos's pursuit of the stumpage issue caused a rift between him, Marshall Pecore ("Pecore") and Menominee, around the same time that BIA changed its past

practices with respect to invoicing and gave Congos *carte blanche* to apply whatever standards he saw fit. Menominee has conducted discovery into this issue because it bears directly on bias, motive, and Government knowledge, all of which are at issue.

2. Other Requests

The Government objects to what it characterizes as an overly-broad and burdensome series of 166 formal discovery requests comprised of (1) twenty-seven interrogatories, (2) 134 document requests, and (3) five requests for admission. (Docket Nos. 63-5, at 6; 63-3, Ex. 1.) The Government relies on the total number of document requests to suggest to the Court that Menominee has embarked on broad and burdensome discovery approach that would, if allowed to continue, produce nothing but information that is not relevant to the Government's claims or Menominee's defenses. However, a careful examination of Menominee's discovery to the Government reveals a surgical (and reasonable) approach to written discovery based on sound strategic and tactical objectives.

The Government's complaint with respect to Menominee's discovery Interrogatory Sets 1-3 and Requests for Production Sets 1-4 is unfounded, if for no other reason that the Government saw an opportunity to dump the 11,500 pages of documents from its Initial Disclosures on Menominee, which Menominee rejected, preferring to issue document requests targeted to specific matters at issue (*e.g.*, allegations in the Complaint and defenses in the Answer). Moreover, it provided an opportunity for the Government to add an additional 2,264 pages of documents to its document dump. To the extent that the Government thought these requests were overly-broad or sought production of irrelevant information (like stumpage), it

apparently saw a tactical advantage in answering these interrogatories and producing such documents instead of simply standing on its objections.[1]

With respect to Menominee's other formal discovery requests, Menominee's Fourth Set of Interrogatories sought discovery of information regarding communications between any Menominee employee, officer or director who had communications with various Government personnel (to discover whether Menominee's attorney-client relationship had been invaded, or whether the Government was having *ex parte* communications with Menominee personnel that it would contend resulted in admissions that could be imputed to Menominee). This request was based upon information produced to Menominee on October 17, 2007 in certain Office of Inspector General ("OIG") Investigative Activity Reports. Menominee's Fifth Set of Interrogatories relate to any denials by the Government of Menominee's Requests for Admission (which concern the original invoices at issue, which have *to date* neither been specifically produced nor identified by the Government).

With respect to Menominee's Document Request Sets No. 5-15 (some 82 requests) a careful examination of these requests illustrates that these requests were narrowly tailored based upon information the Government disclosed to Menominee, or revealed during Menominee's inspection of the MRO Documents. For example, Set No. 5 (9 requests) concerned the Government's disclosure of Congos's fire laptop computer, information concerning the photographs taken by Congos, Congos's job title (which he embellished – "Forester" vs. "Menominee Trust Forester"), and possible spoliation of evidence by the Government. (Docket No. 63-3, RFP Set 5, p. 38-49.)

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[1] The Government apparently has not objected to Menominee's five Requests for Admission, even though included in the Government's 166 formal discovery request calculation.

Menominee's Set No. 6 (2 requests) concerned the Government's communications with Menominee's employees, officers and directors (and coincided with Interrogatory Set 5). (Docket No. 63-3, RFP Set 6, p. 53-55.)

Menominee' Set No. 7 (2 requests) asked for the native copy of Congos's Statement of Facts (the metadata from which the Court has since ordered produced, if available) and a missing page from a communication between Congos and Schwartz, which was discovered during Menominee's review of the hardcopy documents produced by the Government in response to Menominee's Interrogatory Sets 1-3 and Requests for Production Sets 1-4. (Docket No. 63-3, RFP Set 7, p. 56-68.)

With respect to Menominee's Set No. 8 (9 requests), 8 of the 9 requests relate to the Government's expert disclosures and reports. The other request relates to a February 28, 2005 legal opinion concerning the scope of the Government's trust responsibility to the Menominee Indian Tribe of Wisconsin (which relates directly to stumpage and other issues identified in Congos's various memoranda produced to Menominee in the MRO documents). (Docket No. 63-3, RFP Set 8, p. 69-73.)

Menominee's Set No. 9 (4 requests) involves two requests for inspection relating to the global positioning device used by Congos and Magnuson in connection with their "inspections" described in the Complaint. The other two relate to Congos's qualifications (recommendations, commendations, training of a legal nature – since Congos purports to be able to interpret and apply legal contractual terms). (Docket No. 63-3, RFP Set 9, p. 74-76.)

Menominee's Set No. 10 (4 requests) involves the original invoices at issue, in light of: (1) the *Government's own* document requests to Menominee regarding the original invoices and attachments if any (Menominee's requests are a mirror image of the Government's requests to

Menominee dated January 17, 2008 (Kanassatega Dec. Ex. 12.)); and (2) the inability of the Government or any of its witnesses (S.A. Schwartz, S.A. Bucci, and Congos) to identify the original invoices and attachments if any, as of that date. (Docket No. 63-3, RFP Set 10, p. 77-84.)

Menominee's Set No. 11 (1 request) requested the final version of a draft document found by Menominee in the MRO Documents (Menominee could not locate a final version in those documents). The Government's response was that it could not locate any such document either. (Kanassatega Dec. Ex. 13.) This document relates to BIA's knowledge of various issues alleged in the Complaint, including BIA's purported lack of knowledge about the equipment purchases at issue until OIG investigators discovered that those purchases had been made. (Docket No. 63-3, RFP Set 11, p. 90-98.)

Menominee's Set 12 is comprised of 10 requests. Again, these requests were based upon things that Menominee was seeing in its MRO Document review, including, but not limited to, reference to a BIA "culvert inspection handbook," documents appointing Congos to various positions, and documents identified as attachments to memoranda in the MRO Documents (which attachments were missing from those files). (Docket No. 63-3, RFP Set 12, p. 99-101.) While the Government asserts that many of the requested document exist in the MRO Documents (and identifies some by USA – not BIA – bates number), the documents requested were not found in the vicinity of the document which referenced the missing attachment. To the extent any of the requested documents were produced under a "USA" bates label or exist elsewhere in the MRO files, Menominee's request for missing attachments and other documents referenced within the MRO Documents is not improper. How is Menominee to know that the actual missing attachments have been produced elsewhere? It is reasonable for Menominee to

assume that documents purportedly produced as they were kept "in the ordinary course of business" (as the MRO Documents purportedly were), would not yield missing attachments scattered throughout those files in a disorganized fashion.

Further, the Government identifies certain requested documents by "Green Sheet" number. Menominee has requested the Government to identify the various multi-color inserts (including pink, blue and green sheets of paper) throughout the MRO Documents, and the Government has refused to identify the meaning of those multi-colored sheets.

The Government also complains that Menominee improperly requested documents authorizing Congos to use the title "Menominee Trust Forester." Menominee asked for such documents because Congos's official job description identifies him simply as a "Forester." Menominee wants to know why Congos called himself "Menominee Trust Forester." Menominee believes that Congos embellished his job title. This is relevant to Congos's qualifications, credibility, integrity, honesty, and habit of exaggeration.

Menominee's Set 13 is comprised of 15 Requests. These requests are part of Menominee's Motion to Compel and relate to the BIA's Hazardous Fuel Reduction Policies and Procedures for submission, review and approval of invoices. These requests were also generated from Menominee's review of the MRO documents. (Docket No. 63-3, RFP Set 13, p. 102-105.) As explained in Menominee's Memorandum in Support of its Motion to Compel, these materials are probative of Hart's grant of *carte blanche* authority to Congos on October 3, 2001, BIA's retroactive change in policy on February 28, 2002, and whether BIA imposed standards on Menominee which were not imposed on any other tribe in the region. (Docket No.76.)

With respect to Menominee's Set 13, the Government contends that Request No. 5 is duplicative of Menominee's Set 12, Request No. 8. It is not. Set 13, Request No. 5 seeks:

> All documents related to the BIA's Midwest Regional Office's policies and procedures for *Forestry Invoice Review and Approval* in effect between April 1, 2000 through January 31, 2002.

(Docket No. 63-3, RFP Set 13, p. 103.)

In contrast, Set 12, Request No. 8 seeks:

> All documents related to the policies and procedures used or relied upon by the BIA's Midwest Regional Office to determine whether to pay an invoice for services provided *under any Hazardous Fuels Reduction program* administered by the BIA's Midwest Regional Office for fiscal years 1999, 2000, 2001, and 2002.

(Docket No. 63-3, RFP Set 12, p. 101.)

These two Requests are relevant and neither is "cumulative of prior requests." Hazardous Fuels activity does not fall under "Forestry invoicing" under 638 contracting. Hazardous Fuels is an entirely separate program and was a "proposal," not a contract, and certainly not part of the "Forestry" or "Roads" contracts at issue in this case. Therefore, the two requests cannot possibly be duplicative – and the Government knows it.

Set No. 14 (9 requests) relates to the Government's disclosure of a new theory of the case revealed for the first time in the Government's responses to Pecore and Conrad Waniger's ("Waniger") discovery requests. (Docket No. 63-3, RFP Set 14, p. 106-109.) Knowing full well that the Hazardous Fuels Reduction Proposal is a "proposal," not a contract ("on June 20, 2000, MTE representatives Marshall Pecore and Conrad Waniger executed a Hazardous Fuels Reduction ('HFR') proposal . . ." (Complaint ¶ 35 (emphasis added)), the Government recently changed its story. In its responses to Pecore and Waniger's discovery requests the Government contended, for the first time, that the Hazardous Fuels Reduction "Proposal" is in fact part of a "contract" called the "Cooperative Agreement AGF 50990023," "covered by 31 U.S.C. § 6301, *et seq.*" The Government's suggestion that Menominee is not entitled to ask for documents

relating to this new-found theory based on the "work product doctrine" and alleged "cumulative requests" is simply astonishing. In fact, the Government fails to tell the Court that these documents were not identified in the Government's Complaint, Menominee had already reviewed all but 7 boxes of the MRO Documents by the time the Government changed its theory of the case, and Menominee had no reason to select this agreement or any documents related to it before (and indeed it would be unfair to require Menominee to go back and review the MRO Documents a second time, when it would be far easier for the Government to simply produce the requested materials).

Menominee's Set 15 (17 requests) was not provided to the Court by the Government. But, since the Government includes these requests in its tally of the total number of Menominee's requests (Docket No. 63-3, Exhibit 1), Menominee will give background about why it made these requests. (Kanassatega Dec. Ex. 14.) These requests are all based on Menominee's review of MRO Documents in Milwaukee. These requests include, without limitation: (1) Congos's OGE Forms 450 and 450-A (the importance and relevance of these materials are delineated in Menominee's Memorandum of Law in Support of its Motion to Compel (Docket No. 76.)); (2) missing pages of facsimile transmissions; (3) other documents referenced within the MRO Documents (and specifically in Congos's files designated as "BIAK"), which Menominee could not find within Congos's BIAK files previously reviewed. With respect to Menominee's Request No. 2 for documents supporting the Government's contention that certain prescribed burns were not performed, the only responsive document in the BIAK files was a post-it note to the effect that an MTE employee made unsupported allegations that the prescribed burns were not done. Since it seemed so unlikely that the Government would

bring a False Claims Act claim based on such weak evidence, Menominee issued a request to see if any other such documents exist.

Menominee's Set 16 (4 requests) were served on March 19, 2008, so it is understandable that the Government did not include those requests with its motion. However, Menominee will justify these requests for the Court as well. (Kanassatega Dec. Ex. 15.) These requests seek information in light of rebuttal expert disclosures and reports recently served by the Government.

D. Scope of Discovery – Time Period

The Government contends that Menominee is out of bounds with respect to the documents it seeks to support its defenses. The following background will highlight why Menominee has requested *some* documents created before and after the 1999-2002 timeframe identified by the Government.

Before giving this background, however, Menominee must set the record straight as to the time period covered by its requests. The Government contends that Menominee's requests are overly-broad because they require "the production of information spanning a fifteen-year time period from 1992 to the present." (Docket No. 63-2 ¶ 5.) The Government fails to quote Menominee's actual time period, which is federal fiscal year 1992 through and including the present, "*unless otherwise specified*." (Docket No. 63-3, pp. 6, 14.) In fact, the vast majority of Menominee's discovery requests are time limited in the request itself, and to interpret all requests to relate back to 1992 would be foolish. For example, Menominee has specifically requested a number of specific attachments to specific documents, specific invoices, specific things (a camera, a GPS device), litigation hold notices, specific policies and procedures, and so on. Menominee has limited other requests by time (for example Set 6, Request Nos. 1 and 2, Set 7, Request Nos. 1 and 2, Set 8, Request No. 1, Set 10, Request Nos. 1-4, Set 11, Request No. 1,

Set 12, Request Nos. 1-5, Set 13, Requests 1-15, Set 14, Request Nos. 1-9, Set 15, Request Nos. 1-3, 5-6, 10-17, Set 16, Request Nos. 1-4).

Nevertheless, there are certainly some materials dated outside the 1999-2002 timeframe that are highly relevant. Just a few examples of the relevant documents and events outside this timeframe follow.

E. <u>Course of Dealing, Government Knowledge, and Motive</u>

Menominee has conducted discovery into the course of dealing between the parties covering a timeframe outside the narrow 1999-2002 timeframe identified by the Government, because the issues in this case cannot be properly understood without considering things that happened outside that narrow timeframe.

1. <u>Example 1 – Replacement of Equipment</u>

For example, the equipment purchase and garage construction at issue in this case (the first purchase – a road grader – complained of by the Government was made April 1, 1999) were not spur-of-the-moment decisions. The history relating to these issues goes at least back to 1996. In a letter dated September 9, 1996 from Lawrence Waukau ("Waukau"), then Menominee's President, to Larry Morrin ("Morrin"), then the BIA Midwest Regional Office ("MRO") Acting Area Director, Waukau wrote:

> Following is an outline of the main topics discussed at our July meeting, progress since our meeting and pending issue areas:
>
> Issue 3. Reaching consensus upon an equipment replacement process (*e.g.*, Road Grader and Front End Loader) to facilitate our effective performance of road maintenance responsibilities.
>
> Pending: We believe that we will have begun productive dialogue on revisiting a mechanism to have equipment replacement costs reimburse via our Roads Maintenance Contract. At this point we would appreciate additional discussion among appropriate parties to set an agreed upon procedure in motion to promptly respond to immediate road maintenance needs. Mr. Marshall Pecore

> will serve as initial point of contact for BIA MAO representatives to further this discussion.

(Kanassatega Dec. Ex. 16.)

In a letter dated May 5, 1998 from Pecore to Bernita Lonetree (then BIA MRO Contracting Officer with respect to Menominee's federal 638 contracts), Pecore wrote as follows:

> In March of this year I requested permission from Todd Kennedy to use Road Maintenance Funds to replace aging BIA road maintenance equipment, the 1982 Cat Grader and the 1984 Case Front End Loader. After checking with Tony Kirby, Todd said we could. However, I am reluctant to proceed without written authorizations.
>
> Please provide MTE written authorization to purchase this equipment with BIA Road Maintenance Funds. If MTE does not receive any communications from you by May 15, 1998, we will interpret this as tacit approval to use the funds.

(Kanassatega Dec. Ex. 17 (emphasis added).)

The equipment purchase issue culminated in a meeting on or about June 16, 1998 in Minneapolis, MN, between Morrin and Menominee personnel. Pecore testified that this meeting ended with consent for Menominee to purchase new equipment:

> Q: Yeah, do you recall getting any B.I.A. approval before you requested that this grader be purchased?
>
> A: Again, we were at Minneapolis talking to Larry Morrin, and it was the consent of that meeting that we could purchase equipment.
>
> * * *
>
> Q: Okay. But that conversation, you recall that Mr. Morrin did say it would be okay to go ahead and purchase the equipment?
>
> A: Right.

(Kanassatega Dec. Ex. 18, at 253:8-254:9.)

A letter dated August 3, 1998 from Morrin to Waukau confirms that the meeting testified to by Pecore occurred, and that the parties reached an agreement about purchasing equipment:

> Dear Mr. Waukau:
>
> Thank you, Ms. Daley, Mr. Pecore and Ms. Shulstad for coming in on June 16 to discuss matters of communications between Menominee Tribal Enterprises and the Bureau of Indian Affairs. We appreciate the time and attention you have given to these matters.
>
> * * *
>
> With regard to the purchase of equipment, thank you for pointing out the potential conflict between section H-7 of the current roads maintenance contract and the language of the self-determination regulations issued in 1996. We appreciate your willingness to request purchase of equipment in writing according to section H-7 of the existing contract [***i.e.*, Pecore's May 5, 1998 letter**]. ***We also expect that Menominee Tribal Enterprises will request a deletion of that section when fiscal year 1999 funds are added to the contract or sooner***.

(Kanassatega Dec. Ex. 19 (emphasis and brackets added).) This letter is relevant to both permission and materiality (an element of the Government's breach of contract claim).

In a letter dated March 1, 1999, Michael Richter, then Menominee Assistant Forester, wrote to Todd Kennedy as follows:

> Dear Todd:
>
> Attached is the description of the road grader that MTE is purchasing.
>
> If you have any questions, please contact me.

(Kanassatega Dec. Ex. 20.) Attached to this letter is a description of a "**NEW CATERPILLAR MODEL 143H MOTOR GRADER**," with a purchase price of "$217,166.00." This is the same road grader that the Government is complaining about at Paragraphs 49-52 of its Complaint. (Docket No. 1 at ¶¶ 49-50.)

2. *Example 2 – Congos's 1994 Admission of Under Funding*

The Government characterizes one of Menominee's defenses as follows: "that (1) the government intentionally under-funded the contracts at issue, causing MTE to be unable to perform the needed work with federal funds." (Government Brief at 2 (and Affidavit of

Christian R. Larsen at ¶3).) As Menominee's Answer makes clear, however, Menominee's defense based on under-funding is a defense of *equitable offset and recoupment* to recover funds spent out of its own pocket due to the Government's intentional under-funding of the contracts at issue. (Menominee Answer, Second and Third Defenses.)

In a memorandum dated September 30, 1994 from Congos to Stuart Mani ("Mani"), Congos wrote substantially as follows:

> You may wish to remind everyone concerned that MTE has providing [sic] the forestry trust services on Menominee for over twenty years. The only deficiency I have observed, in my ten years as COR, has been the lack of federal funds to perform all the trust service functions promised to Menominee by the Secretary. The Menominee Tribe should receive, by Central Office formula, over $2,479,000 above their current level of funding.

(Kanassatega Dec. ¶ 10.)[2]

3. <u>Example 3 – Statements After 2002 About Whether this Action was Brought for an Improper Purpose</u>

As delineated in Menominee's Memorandum of Law in Support of Motion to Compel (Docket No. 76), Congos was involved in the Government's investigation of this matter well after 2002, and appears to have been instrumental in pushing for this case to be filed. (Docket No. 76, at 4-6.)

REDACTED

[2] As explained in counsel's declaration, Menominee is unable to place this document on file with the Court because the Government is withholding it pending resolution of its request that *all* government-produced documents be protected. (Kanassatega Dec. ¶ 10.)

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II. **Menominee's Website**

The Government contends that Menominee has acted improperly by making materials from this litigation available to the Menominee people on its website including, without limitation, deposition transcripts and video. The Government contends that Menominee should be forced to take down *all* materials from its website because those materials may contain information subject to the Privacy Act, or, alternatively, that certain witnesses have expressed a fear of retribution or otherwise may have been intimidated "based on counsel's experience."

With respect to the Privacy Act, in accordance with the Court's interim Protective Order, Menominee conducted a full review of its website and found no Government-produced document on the website subject to the Privacy Act. (Kanassatega Dec. ¶ 11.) Moreover, Menominee's counsel wrote to the Government's counsel asking the Government to identify any such document on Menominee's website that it believed is subject to the Privacy Act. (Kanassatega Dec. Ex. 22.) The Government identified no such documents. (*Id.*) (Furthermore, with the sole exception of Menominee's request for Congos's personnel file, Menominee is not aware of any Request for Production in which Menominee sought materials protected by the Privacy Act (and the Government has identified no such requests)). Menominee has specifically informed the Government that it does not want the full 80,000 pages of MRO Documents. Menominee only wants the subset it selected, which Menominee does not believe contains materials subject to the Privacy Act. (Kanassatega Dec. ¶ 11.)

With respect to witnesses, the Government fails to date the information upon which it relies. Moreover, the Government provides no affidavits from witnesses, and no specific information for Menominee to test. Similarly, the Government does not date the information it may have regarding retribution and fails to identify any "cooperating government witness" who

purportedly failed to testify "completely and truthfully." Nor could it because the persons who could fall within the Government's description (presumably Douglas Cox and Jacci Pubanz) were deposed, and the Government expressed no concern on the record that either of these persons was failing to testify truthfully or completely. Moreover, the Government failed to move for a protective order prior to the date of these depositions. On this record, the Government now asserts entitlement to a protective order based on unspecified concerns of counsel.[3]

ARGUMENT

I. The Court should Reject the Government's Request to Limit Menominee's Discovery Rights

As this Court is well aware, the scope of discovery is broad. *MQS Inspection, Inc. v. Bielecki*, 963 F. Supp. 771, 775 (E.D. Wis. 1995); *see also Sanyo Laser Products, Inc. v. Arista Records, Inc.*, 214 F.R.D. 496, 500 (S.D. Ind. 2003) (scope of discovery remains broad after year 2000 F.R.C.P. amendments). It seems that the Government's view of relevance is that if the information supports the Government's claims it is relevant, but if the information supports Menominee's defenses, then it is not. That is not the standard for relevance. Menominee is entitled to fully explore its defenses and develop the factual record.

As explained above, Menominee has conducted surgical discovery in good faith. Menominee has rejected the Government's repeated attempts to engage in a document dump. Yet, the Government relies now upon the shear volume of materials that it wants to dump on Menominee as foundation for its allegation that Menominee has engaged in a pattern of abusive

[3] With respect to the Government's concern about the deposition of Douglas Cox, relevant background is delineated in Menominee's opposition to the Government's Motion to Seal. (Docket Nos. 66, 67, 68.) With respect to background relating to Menominee's proposed deposition of Lisa Waukau, background relating to that issue is delineated in Menominee's opposition to that motion for a protective order. (Docket Nos. 71, 72.)

discovery. The Government brought a $1,400,000 claim against Menominee, after conducting a five-year investigation. Menominee is entitled to defend itself.

Indeed, **[REDATED]** delineated above, it seems that the Government has ulterior motives in pursuing its claims in this case.

[REDATED]

and this case are not founded in fact, but rather, are the result of a rewrite of history, standards that were changed after the fact (including, but not limited to an ad-hoc change in BIA's policy with respect to invoicing procedures), a setup, and ultimately a political tool to take the management of the Menominee forest out of Menominee's control and vest it with the Menominee Tribal Legislature ("Legislature"). Menominee is fighting for its reputation, and its life. This is not a little case about some little invoices and some equipment.[4]

Moreover, as illustrated above, there is a long history and course of dealing between these parties. To deprive Menominee of discovery relating to this history and course of dealing – and how it changed in the midst of Congos's anger at Pecore and Menominee over Menominee's refusal to pay stumpage – would be a terrible miscarriage of justice. What the Government knew, when it knew it, and how it changed the rules of the game *after all the work reflected in all the invoices had been completed*, could not be more relevant to Menominee's False Claims Act defenses. *U.S. ex rel Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999); *accord*

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[4] Menominee is also evaluating whether to seek leave of Court to amend its pleading to assert counterclaims for abuse of process and breach of fiduciary duty in light of documents discovered during the MRO Document review.

U.S. ex rel Lammers v. City of Green Bay, 998 F. Supp. 971, 998 (E.D. Wis. 1998); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (citations omitted).

For example, the fact that BIA never required maps to support Menominee invoices before Congos decided that maps were necessary (in late 2001 after the work was done), is highly probative because it illustrates Menominee's good faith in acting in accordance with the parties' then course of dealing, as opposed to the different standards imposed by Congos on Menominee after the fact. Moreover, a major issue at trial will be the nature of the Hazardous Fuel Reduction proposals at issue, *i.e.*, whether these "proposals" were intended to be contracts with iron-clad terms, or, alternatively, rough guideposts relating to the work that might ultimately be done, and the method by which Menominee might ultimately be paid. Another major issue will be whether payment pursuant to these "proposals" was to be based on mileage, costs, or some combination of mileage and costs. These issues are all relevant, and Menominee is entitled to explore them.

II. The Court should Reject the Government's Requested Protective Order

A. Presumption of Public Access to Discovery

Absent a protective order, parties to a lawsuit may disseminate materials obtained during discovery as they see fit. *Jepson, Inc. v. Makita Elec. Works,* 30 F.3d 854, 858 (7th Cir. 1994). Courts within the Seventh Circuit embrace a presumption of public access to discovery. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.,* 178 F.3d 943, 944 (7th Cir. 1999) ("[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding. . .the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding."); *Gross v. PPG Industries, Inc.*, No. 07-CV-982, 2008 WL 515002, at * 1 (E.D. Wis. Feb. 25, 2008) ("[a]s a general proposition, pretrial

discovery must take place in the public eye unless compelling reasons exist for denying the public access."); *Forst v. Smithkline Beecham Corp.,* No. 07 CV-612, 2008 WL 473856, at *1 (E.D. Wis. Feb. 20, 2008) (same).

B. Good Cause Standard for Issuance of Protective Orders

The Court may issue a protective order for "good cause." To establish good cause, a moving party must show that disclosure of the information for which protection is sought "will result in a clearly defined and very serious injury." *Hollinger Int'l Inc. v. Hollinger Inc.,* Case No. 04 C 698, 2005 U.S. Dist. LEXIS 30420, at *7 (N.D. Ill. Jan. 19, 2005) (quoting *Andrew Corp. v. Rossi,* 180 F.R.D. 338, 340 (N.D. Ill. 1998)). "In deciding whether good cause exists, the court must balance the interests involved; the harm to the party seeking the protective order and the importance of disclosure to the public." *Wiggins v. Burge,* 173 F.R.D. 226, 229 (N.D. Ill. 1997) (citations omitted). Factors a court may consider in making the good cause determination include "privacy interests, whether the information is important to public health and safety, and whether the party benefiting form the confidentiality of the protective order is a public official." *Id.* Importantly, "if good cause is not shown for maintaining a protective order, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection." *Doe v. Marsalis,* 202 F.R.D. 233, 237 (N.D. Ill. 2001) (internal quotations and citations omitted).

C. The Government Fails to Show Good Cause

The burden to show good cause is on the party seeking the order. *Jepson,* 30 F.3d at 858. To establish good cause the party moving for a protective order must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 102 n.16 (1981); *In re Terra Intern., Inc.,* 134 F.3d 302,

306 (5th Cir. 1998) (court may not grant protective order in the absence of affidavits or other evidence that might provide support for party's conclusory assertion); *Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 484 (3rd Cir. 1995); *Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc.,* No. 02 C 7228, 2003 WL 21800424, *1 (N. D. Ill. July 30, 2003). Importantly, under the leading Seventh Circuit decision, a protective order must only extend to "properly demarcated categor[ies] of legitimately confidential information." *Cincinnati Insurance,* 178 F.3d at 946; *see also MRS Invs. v. Meridian Sports, Inc.,* No. IP 99-1954-C-F/M, 2002 WL 193140, at *1 (S.D. Ind. Feb. 6, 2002); *Cook Inc. v. Boston Scientific Corp.,* 206 F.R.D. 244, 248-49 (S.D. Ind. 2001); *Andrew Corp. v. Rossi,* 180 F.R.D. 338, 342 (N.D. Ill. 1998). As such, the deponent/author must proffer a specific factual justification for prohibiting dissemination of the relevant deposition or other discovery materials.

Here, the Government has not come close to meeting its burden of articulating a factual basis for a protective order. The Government has utterly failed to provide any evidence of sound basis or legitimate need for Menominee to be gagged from disclosing information that is produced during the course of discovery in this case, other than the naked *ipse dixit* of counsel. If there is truly a threat of harm to any witness in this case, that is a serious issue that the Court should consider and about which Menominee would be deeply concerned. But, the Government has made no such showing, and neither the court nor Menominee has been given no opportunity to test the merits of the Government's veiled allegations.

Moreover, to the extent the Government relies on the Privacy Act, Menominee is not opposed to a narrowly-tailored protective order to protect materials legitimately protected by that Act. But, the vast majority of the documents requested by, and selected by Menominee for production are not subject to this Act. This is illustrated starkly by the fact that the Government

has raised a "privacy interests" objection to only *one* of Menominee's discovery requests. (Kanassatega Dec. Ex. 23., Response to RFP No. 3.) The Privacy Act appears to be nothing more than a ruse to get a protective order to which the Government is not entitled.

D. The Menominee People Have a Right to Know

As stated above, there is a strong presumption of public access to discovery information, and absent a protective order, parties to a lawsuit may disseminate materials obtained during discovery as they see fit. *Jepson*, 30 F.3d at 858. The Government's contention that a protective order should be issued in this case because discovery materials are "secret" is just plain wrong. *Gross,* 2008 WL 515002 at * 1; *Forst,* 2008 WL 473856, at *1. The Government relies heavily on the case of *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984) to suggest otherwise, but its reliance is completely misplaced. *Seattle Times* stands for the narrow proposition that parties in a civil lawsuit do not have an unrestrained First Amendment right to disseminate information received through the pretrial discovery process in the face of a court-issued protective order. In fact, numerous courts in the Seventh Circuit have cited *Seattle Times* in their decisions affirming the presumption of public access to discovery materials. *See, e.g., Cincinnati Insurance,* 178 F.3d at 944-46; *Gross,* 2008 WL 515002 at * 1; *Forst,* 2008 WL 473856, at *1.

The materials on Menominee's website have given the Menominee people access to a judicial proceeding to which they might not otherwise have practical access. The pleadings, motions and orders that are on Menominee's website are no different than the pleadings, motions and order on the Court's PACER website, but Menominee's site affords the beneficiaries and owners of Menominee's trust assets a free and easy opportunity for access. Although the deposition transcripts, expert reports, and certain key documents not filed with a motion are not available on this Court's PACER website, under Seventh Circuit law those materials are no more

shielded from public view than any other pretrial materials. Shutting down Menominee's website would be a travesty of justice and would cause the Menominee people to lose faith in the integrity of the judicial process. Indeed, the Government has brought forth no evidence of any harm caused by Menominee's website since the portal was opened to public view.

The Menominee people also have a right to know about, among other things, Congos's communications in connection with the investigation leading to this lawsuit, his allegations against Menominee of fraud, waste and abuse, and his role in the BIA's retroactive change in invoice procedures. (Docket No. 76.) This is a man who held himself out to be the protector of the Menominee and was anything but. It is little wonder that the Menominee people want to know what Congos's role in all of this was.

In fact, it is no surprise to the Government that this case has generated a great deal of questions, accusations, suspicions and anger toward Menominee. Much of this is directly attributable the Government's politically-motivated interactions with the Legislature during the investigation, during settlement negotiations before this case was filed, and after this case was filed. The Government had these politically-motivated interactions notwithstanding the fact that the Legislature was neither a subject nor a target of the investigation, had no authority to settle this case, and was not a party to this lawsuit. Moreover, the Government knew or should have known that such politically-motivated communications would result in politicizing the investigation and the lawsuit within the Menominee Reservation. In light of the Government's conduct, its current effort to shut down Menominee's website is at best hypocritical. The real motivation for the Government's request for a protective order is that Menominee's website has helped to educate the Menominee people about the facts of this case and these facts have resulted in the Government losing political traction.

Finally, the Government's contention that the jury pool might by tainted by Menominee's website is without merit. It is doubtful that any Menominees would be sitting on the jury in this case anyway, and the Government makes no showing that masses of non-Menominee residents are paying any attention to Menominee's website (nor could it). Nevertheless, Menominee is confident that the Court's *voir dire* will be adequate to empanel an acceptable jury.

CONCLUSION

While Menominee is not opposed to a narrowly tailored protective order to protect truly private information, the Government's request that all discovery materials be subject to a protective order must be rejected. The discovery restrictions with which the Government asks this Court to yoke Menominee should also be rejected. Menominee has conducted its discovery in good faith. Finally, the Government's request to restrict the Menominee people's access to discovery materials in this case must be rejected. That request is contrary to the law in the Seventh Circuit. It is peculiar to say the least that the Government, which would be expected to want transparency, wants the discovery record sealed. Why?

RESPECTFULLY SUBMITTED,

DATED: APRIL 8, 2008

/s/ Joshua J. Kanassatega

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