

U.S. Department of Labor

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Issue Date: 09 September 2011

CASE NO.: 2006-WPC-00001

In the Matter of:

JAMAL KANJ,
Complainant,

v.

VIEJAS BAND OF KUMEYAAY INDIANS,
Respondent.

Appearances: Scott A. McMillan, Esq.
For Complainant

George S. Howard, Jr., Esq.
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION & ORDER DISMISSING COMPLAINT ON REMAND

This case arises under the employee protection provisions of § 1367 of the Federal Water Pollution Control Act and its implementing regulations, also known as the Clean Water Act ("the Act"). *See* 33 U.S.C. § 1367; *see also* 33 U.S.C. §1252 *et seq.*; 29 CFR Part 24. On August 5, 2005, Complainant Jamal Kanj ("Complainant") filed a Complaint alleging that his employer, the Viejas Band of Kumeyaay Indians ("Respondent") terminated him from his position as the Director of Public Works and Deputy Tribal Government Manager because he reported high levels of fecal coliform in Viejas Creek to the Respondent's Tribal Council. On September 28, 2005, the Secretary of Labor found that Respondent is sheltered by the doctrine of tribal sovereign immunity, and dismissed the complaint. On October 1, 2005, Complainant objected to the dismissal and requested a formal hearing on the matter.

The undersigned held a formal hearing in San Diego, California on August 18-21, 2008. The parties were afforded a full and fair opportunity to present evidence and arguments. Both Complainant and Respondent were represented by counsel. Administrative Law Judge Exhibits ("AX") 1-3, Complainant's Exhibits ("CX") 1-19, 21-106, 109-123, 125-127, 129-131, 136-138, 144-157, 158 (pages 1-3 only), 159, 161-164, 165 (page 1432 only), 166-171, 173-180, and A through I, and Respondent's Exhibits 1-35 were admitted into the record.¹ The following

¹ *See* Hearing Transcript ("TR") at 12, 83, 88, 98-99, 168, 287, 649, 687, 807, 998 and 1003.

witnesses testified at the hearing: Jamal Kanj, Edward Rose, Phillip Kaushall, Steven Jones, Don McDermott, Bobby Barrett and Wendy Roach Parnell. Additional testimony was offered by deposition of Thomas Hyde, Penelope Culbreath-Graft, Virginia Christman, Anthony Pico, and Brian Frasier. The parties were provided the opportunity to present post trial briefs. On November 18, 2008, Respondent filed a post trial brief. Complainant filed a post trial brief on November 21, 2008.

FACTUAL BACKGROUND

The Respondent is a federally-recognized Indian Tribe. RX 1. On August 21, 2000, the Respondent hired the Complainant as its Director of Public Works and Deputy Tribal Government Manager. RX 1 at 6. The Complainant's duties included supervising the Public Works Department; ensuring utility services to the Reservation; communicating with the Tribal Council; maintaining a positive working relationship with the San Diego community and outside public agencies; and serving in the absence of the Tribal Government Manager. He oversaw the development, maintenance, and repair of the natural landscape and all infrastructure including waterways, waste-water treatment systems, water quality, testing, storm drains, buildings, and roads. TR at 235-236.

In the spring of 2003, the Complainant noticed an unusually high amount of fecal coliform in Viejas Creek, which runs through the Respondent's Reservation. He obtained a lab report confirming that the level of fecal coliform in the creek was in violation of the Clean Water Act and reported the results to the Tribal Council. TR 266-268; RX 3. He believed that the contaminated water in Viejas Creek directly impacted the drinking water of communities outside the Respondent's Reservation. TR at 267-268. The Complainant identified a likely source of the contamination—the livestock owned by a Tribal Elder, Tom Hyde. TR at 269. The Complainant appParnelled Tom Hyde about fencing to keep the livestock away from the water source, but was allegedly met with insults. Thereafter, the Complainant alleges that he became the target of on-going abuse by Tom Hyde that was recognized but ignored by the Tribal Council. TR at 351-352. By letter dated June 23, 2005, Respondent notified Complainant that his employment was terminated “without cause effective thirty days from the date of this letter.” RX 22 at 64. The termination notice also requested that Complainant not be present at the Tribe's facilities unless specifically requested. Complainant acknowledged receipt of this letter at a meeting on June 23, 2005. TR at 769. By letter dated July 25, 2005, Respondent notified Complainant that his employment was terminated and forwarded Complainant funds for final pay and severance pay in accordance with his employment agreement with the Tribe. RX 23. Complainant, through his counsel, filed his Complaint on August 5, 2005.

Ms. Parnell, the Tribal Manager, testified that she decided to terminate Complainant's employment due to her belief that his performance had deteriorated particularly with respect to his handling of a construction project. She further testified that she did not have confidence in Complainant's continued “commitment” to the Tribe in view of Complainant's taking vacation at what she considered a critical time and Complainant's suggestions that he was considering termination of his employment with the Tribe. TR at 911-912. Ms. Parnell testified that on June 21, 2005 she received the Tribal Council's support for the termination decision, which she had

made, but did not seek a formal resolution of the Tribal Council as she did not consider such a resolution to be necessary. TR at 911, 913-914.

PROCEDURAL HISTORY

On November 14, 2005, Respondent filed a motion for Summary Judgment on the ground that the doctrine of tribal sovereign immunity precludes the application of the whistleblower protection provision of the Act. On December 3, 2005, the Complainant opposed the motion by arguing that the Act explicitly abrogates tribal sovereign immunity. In a decision issued on December 19, 2005, the undersigned found that the Clean Water Act expressly and unequivocally waives the Respondent's sovereign immunity because the language of the whistleblower protection provision prohibits a person from discriminating against an employee, and the term "person" is defined within the Act as an Indian Tribe. Thereafter, Respondent sought an interlocutory appeal of the denial of Summary Judgment. On March 9, 2006, the undersigned certified the sovereign immunity issue to the Administrative Review Board ("ARB") and stayed the proceeding pending decision by the ARB. The ARB subsequently affirmed the denial of Summary Judgment in a decision issued on April 27, 2007. The case was remanded to the undersigned for hearing and the hearing was scheduled for January 22, 2008, but was subsequently continued to May 27, 2008 at the request of both parties in order to conduct discovery. The hearing was again continued and rescheduled for hearing on August 18, 2008 at the request of Complainant in order to conduct further discovery.

On January 25, 2008, Respondent filed a Notice of Motion and Motion for Leave to File a First Amended Answer requesting leave to supplement its pleadings with a Tenth Affirmative Defense asserting that some of Complainant's claims are time-barred. On March 17, 2008, the undersigned granted Respondent's Motion for Leave to File a First Amended Answer finding that since discovery in the case was placed on hold for well over a year except as to the question of tribal immunity, the filing delay by Respondent did not warrant a denial of the motion based on either delay or bad faith. On the first day of the hearing, Respondent essentially argued for summary decision on the basis that Complainant's claims were time-barred but the undersigned refused to decide this issue without hearing all of the evidence in the case. TR at 75. Respondent argued in its prehearing statement and filed a brief at the start of the hearing on the issue of timeliness of the Complaint. Complainant as well as Respondent addressed the issue of timeliness in their respective post hearing briefs.

On January 29, 2009, the undersigned issued a Decision & Order Dismissing Complaint finding that Complainant had not timely filed his claim within the thirty day period set forth at 33 U.S.C. § 1367(b). On December 1, 2010, the Administrative Review Board decided that the Complaint herein was permissible because Respondent was barred from raising the time bar defense due to its binding judicial admissions during the course of the litigation conceding that Complainant had filed his Complaint timely. This matter was remanded to the undersigned for a decision on the remaining issues and the merits of the case. The undersigned accorded the parties additional time for submission of supplemental briefs regarding the remaining issues. Both parties filed such additional briefs herein.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

Findings of Fact

Claimant's Testimony

(a) Employment Background

Jamal Kanj began his career as a civil engineer in 1985 working for the City of San Diego. He started as an entry-level engineer specializing in conducting inspections and operational testing on water utilities, and then later assumed responsibility for coordinating studies on the sewage system. After some time, he was promoted to the position of lead engineer, through which he assumed more supervisory responsibilities. He eventually rose to the rank of Chief Engineer of the Waste Water Collection Division, a newly-created division responsible for analyzing sewage spills and repairs to the sewage system city-wide. TR at 220-222.

Sometime after assuming the role of Chief Engineer, Kanj testified that he was contacted by Penny Culbreth-Graft, a former public official with the San Diego city administration and then current Tribal Government Manager of the Viejas Band of Kumeyaay Indians, who wished to inform him about an upcoming job announcement for the Director of Public Works position with the Viejas Reservation. TR at 234-235; Exhibit 16. In reviewing the posting, Kanj did not form any belief that the position would require him to be a "water policeman" or to assume any responsibility for water monitoring or inspection. TR at 235. Kanj did form the belief, however, that the position, like other similar public works director positions, would entail responsibility for public works construction ("water, sewer, roads, buildings" or "construction that has anything to do with serving the public"). TR at 235-236.

During his interview for the position, Graft explained to Kanj that the tribal government expected the Public Works Director to assume responsibility for several construction projects, including "a multi-year water and waste water program," infrastructure for City Hall, and a gymnasium and recreation center. TR at 235-236. Graft did inform Kanj that the tribal government needed to build a "waste water collection system," but failed to inform him of any concerns that the tribal government might have had regarding waste water management problems. TR at 236. Moreover, Kanj believed that the water collection system he would be responsible for constructing would not be affected by the Viejas Creek because it was a U.S. waterway that merely ran through the Reservation incidentally. TR at 236-237.

At Kanj's hiring, Graft proposed and authored the employment contract. TR at 247-248; Exhibit 149. As noted in Graft's handwriting, the contract reflected an annual salary of \$73,000. TR at 249. Over the course of subsequent employment negotiations, Graft increased the salary offer to \$98,000 with an additional 20% bonus. Kanj accepted this offer. TR at 254-255. Kanj testified that he was also informed that future salary increases would be justified by the annual performance evaluations he was to receive from his supervisors. TR at 262-263.

In 2004, Kanj discussed with Bobby Barrett his interest in the Tribal Government Manager position. TR at 771. The position ultimately went to Wendy Parnell Parnell because Kanj and the Tribe were not able to reach an employment agreement: Kanj stated that he wanted a five-year contract because he felt the Tribal Government Manager position would be a “sacrificial position.” TR at 772-773. At the time, Kanj felt that his request for a five-year contract was reasonable. Penny Culbreth-Graft, the former Tribal Government Manager, had a three year contract with a one year separation, therefore, essentially a four year contract. However, five years was apparently too long a commitment for the Tribe and marked the end of Kanj and the Tribe’s discussion regarding the Tribal Government Manager position. TR at 773.

(b) Titles and Responsibilities

While hired initially to fill the position of Public Works Director, Kanj also assumed the position of Acting (or Deputy) Tribal Government Manager in 2003. TR at 348. As Director of Public Works, Kanj oversaw Donald McDermott, the Superintendent of Public Works, McDermott’s staff, and the Landscape Maintenance Department. TR at 272-273. McDermott, the Public Works Superintendent, was responsible for working solely with the sewer and water systems and road maintenance. TR at 271. However, the foreman and construction team operating on the Tribe’s public construction projects would also typically report to McDermott directly. TR at 272-273. In addition, though he might report to others in the Tribe through the course of his work, McDermott would report officially to Kanj. TR at 277-278. As Deputy Tribal Government Manager, Kanj assumed also a supervisory role over other departments. He directly oversaw a team of subordinates who would, in turn, manage the departments of recreation and maintenance on a regular basis. TR at 274. Kanj testified that Exhibit 27, a tribal council report that Kanj had submitted to the Chairman and members of the Tribal Council, was an accurate reflection of his duties as Acting (or Deputy) Tribal Government Manager. CX 27. Most of these duties, however, were also subsumed within the responsibilities of the Public Works Director. TR at 339; CX 27. However, on cross examination, Kanj admitted that, as Director of Public Works, he was responsible for the staff that ensured the water quality on the Reservation. TR at 660. If the staff did not monitor the water as required, he would have the authority to replace him or her with another employee. TR at 660.

Kanj reported to the Tribal Council, but would not always go through each and every item of his reports verbally at the Tribal Council meetings. TR at 663-664. When he applied for the job, Kanj detailed his recent work experience monitoring water quality compliance; therefore, he testified that it was apparent from the way he articulated his resume and job qualifications that he expected his water monitoring experience to be relevant to the job qualifications of the Public Works Director. TR at 666. Exhibit 16, the description of the Public Works Director position, stated that among the skills required were “familiar[ity] with water, wastewater, and other utility services.” TR at 667-668; RX 16. Exhibit 12 is an Executive Team Member Evaluation, dated August 16, 2002, listing Kanj’s job accomplishments, all of which implicated some knowledge of water quality monitoring. TR at 668-670; RX 12. If a member of McDermott’s staff were not properly monitoring water quality, then Kanj stated he had the authority to speak with McDermott about resolving the situation; however, ultimately “the final authority to make a recommendation” to hire or fire would ultimately be with McDermott. TR at 672. Kanj had the responsibility “to make sure that... somebody” monitored water quality. TR at

673. Kanj stated that water quality was related to the projects for which he was responsible. TR at 674. Kanj noted that the March 2003 report of water contamination might have been a function of his job but it was not his job in its entirety. TR at 681. Once he discovered potential water pollution violations, Kanj testified that reporting the violations became a function of his job. TR at 682. He assumed responsibility for alerting the Tribal Council of anything on the Reservation that would threaten the welfare of tribal members. TR at 683-684. Moreover, Kanj believed he had an obligation “to ensure that the Viejas Band complied with the applicable federal laws concerning water quality.” TR at 686.

(c) Tribal Government Structure

The Tribal Council embodied the leadership of the Tribe. The Tribe would regularly host two kinds of meetings: open council sessions and closed council sessions. In his capacity as Public Works Director, Kanj would receive regular invitations to present during open council sessions, along with other employees: McDermott, the Public Works Superintendent; the Director of Education; and supervisors of the recreation and housing departments. In closed council sessions, attendees were limited to include only the following roster: members of the Tribal Council, legal counsel, legal director, and employees raising specific issues. TR at 338.

(d) Viejas Creek

According to Kanj, water from the Viejas Creek flowed into Paula Ve Arde, a community lake in Alpine. This was a small lake used by a local residential community for fishing and other recreational activities, including child’s play during the summer. TR at 267. Eventually, the water would discharge from the lake into Loveland Reservoir, one of the major fresh water reservoirs that serves San Diego city residents. TR at 245.

(e) Discovery and Reporting of Contamination

The Tribe wanted to construct homes on the Reservation; therefore, Kanj and his staff contracted with URS, an engineering firm, to conduct a flood plain study to identify site locations for homes that were not vulnerable to flooding. In identifying flood plain zones, Kanj and the contractors agreed also to test the quality of the water entering and exiting the Reservation. The study revealed that Viejas Creek was contaminated, but that the contamination originated in the creek and did not result from a source outside the Reservation. This finding instigated a second, more extensive, water testing. TR at 677-679. To determine the source of the contamination, Kanj contracted with URS to test water samples collected both up- and downstream. Based on his prior experiences investigating water contamination as a city engineer, Kanj expected the contamination to be sourced upstream and, therefore, diminish downstream. However, to his surprise, the results of the study were the opposite: the water upstream was relatively clean but the water downstream was more heavily contaminated. After testing for and eliminating alternative theories of contamination (including sewage pond leakage and pollution from other crossings in the creek), Kanj concluded that farm animals were the source of the contamination. The most populous farm animal surrounding Viejas Creek was the Viejas Tribe’s free-range cattle. TR at 265-267; 267-269. Kanj testified that CX 25 is a request form Kanj submitted to add to the Tribal Council meeting agenda a ten minute allotment to discuss the

Viejas Creek water testing. TR at 332; CX 25. CX 26 is a cover letter to the tribal council to report detailing the fecal coliform contamination of Viejas Creek and his recommendation to enclose the creek with fencing. TR at 333; CX 26. Kanj submitted an activity report, upon which he would base his verbal briefing of tribal government activities to the Tribal Council. TR at 336-337. In his verbal briefing, Kanj stated he tried to educate the Tribal Council of the harmful repercussions of the contamination, particularly for children and the elderly. TR at 341.

Kanj proposed to the Tribal Council his plan to fence in Viejas Creek, thereby preventing farm animals from further polluting the water. He proposed this plan alongside McDermott, Public Works Superintendent and Kanj's subordinate. TR at 275. The Tribal Council was receptive to this plan and advised Kanj and McDermott to invite John Christman, Treasurer, to join them in a second presentation, this time to Tom Hyde, a tribal elder. TR at 269-270. Kanj did not report the water quality findings to any government agency. He "wanted to work with the Tribal Council as the director of public works to ensure that the water was safe on the Reservation." TR at 680. In Kanj and Hyde's discussion about the animal-fencing proposition, Hyde allegedly reacted in a very hostile manner and berated Kanj. Kanj complained during his presentation at a closed council session that the Tribal Council did not "pay [him] enough to be treated that way." TR at 333. After their initial heated confrontation in 2003, both Kanj and the Tribal Council "cool[ed] off," preventing their working relationship from deteriorating further. In July 2003, Kanj's employment contract was up for renewal. He presented his contract to the Council and Bobby Barrett, then vice-Chairman of the Tribal Council, signed it. TR at 343-345. CX 105 is an Employment Action Notice that reflects Kanj receiving a salary increase from \$4,880 biweekly to \$5,368 biweekly, effective July 15, 2003. CX 105.

In October 2004, Wendy Parnell assumed the role of Tribal Government Manager. TR at 360. As Tribal Government Manager, Parnell had to sign the "Council docket"; if she had any questions about any of the items on the docket, she would discuss it with Kanj. Because Kanj placed notice of the fecal coliform contamination in the Council docket and it was never inquired about it, he presumed that Parnell had knowledge about the contamination. TR at 362. In January 2005, a new Tribal Council was elected. TR at 367. Kanj presented to the new Tribal Council a comprehensive report about the contamination consisting of historical data chronicling the persistence of the contamination. TR at 368. CX 157 is a report produced by a member of Kanj's staff who is directly responsible for the water system. The staff contacted a laboratory that extracted and tested water samples from Viejas Creek. TR at 371. Kanj explained to the Tribal Council that the historical data showed that the Reservation "continue[d] to have the presence of fecal coliform and that [was] in violation of the [Clean Water Act] standards... It was a well-known fact, an accepted fact, that the coliform, or the presence of coliform [was]... a result of the cattle on the reservation." The newly-elected Tribal Council reacted to his presentation with "stone faces" – no demonstrable reaction. Kanj did not remember presenting to this new Tribal Council his cattle-fencing proposition. TR at 378. After January 18, 2005, he continued to receive "stone faces" or "unresponsive faces" but he could not remember any express statement of unhappiness or dissatisfaction being made regarding his recommendation to fence in Viejas Creek. TR at 778.

(f) Harassment

According to Kanj, Hyde reacted very negatively to the proposition of fencing in the cattle and berated Kanj. TR at 333. Kanj complained of Hyde's treatment before the Tribal Council, claiming that the Tribe did not "pay [him] enough to be treated that way." TR at 333. Graft advised Kanj to document this treatment in a harassment log. TR at 342. Kanj began his harassment log around January of 2002. When he started the log, Kanj was not aware of the contamination problems with Viejas Creek. TR at 776. The log is not exhaustive, however, as he continued to be harassed even after his last entry in the harassment log. TR at 777.

Kanj testified that Hyde attended virtually every single General Council meeting, during which he would harass Kanj. TR at 351. Hyde and Kanj had never had a positive working relationship, but after their heated discussion about cattle fencing, Hyde became much more hostile in his treatment of Kanj. TR at 352. According to Kanj, Hyde's influence over his career went far beyond harassment, as members of his family were also members of the Tribal Council. In 2003, three of the five Tribal Council members were related to Hyde: Anthony Pico, Chairman of the Tribal Council and raised by Hyde; John Christman, Treasurer and grandson to Hyde; and Diane Aguilar, granddaughter to Hyde. In 2005, two additional members were elected, one of whom was also Hyde's grandson. Therefore, Kanj believed that Hyde's progeny maintained a controlling vote on the Tribal Council. TR at 353.

(g) Performance Evaluations

Kanj allegedly received one performance evaluation in 2001 and two evaluations in 2002 but had not received any evaluations thereafter. Following his discovery and presentation of the Viejas Creek fecal coliform contamination to the Tribal Council in March of 2003, all of his requests for performance evaluations were allegedly denied. During this time, he expected to receive evaluations either from Steven DeSam, then Chairman of the Tribal Council, or from Bobby Barrett, then vice-Chairman and his contact person with the Tribal Council. TR at 264-265.

After he assumed the role of Deputy Tribal Government Manager in 2003, Kanj continued to report to and regularly request performance evaluations from Bobby Barrett. TR at 359. From 2003 to 2004, even as he began to take a "softer" or less confrontational approach in advising the Tribal Council of the fecal coliform contamination, he still was not receiving any evaluations of his work performance. TR at 360. Based on his experience as Deputy Tribal Government Manager, Kanj believed it was customary for all directors to receive performance evaluations, upon which their salary increases could be based. He had not received a performance evaluation since 2002. TR at 262-263. CX 102 is a proposed salary grade structure based on a "salary study" conducted by the Tribe's human resources department; the study "made certain comparisons between different Tribes and different agencies." TR at 357; CX 102.

(h) Construction Project

In 2004, the Tribe conducted tentative discussions about constructing a gymnasium and recreation center around the end of 2004. TR at 380-381. The tribal council established a bid and award committee, composed "basically [of] Tribal members and Council members to make sure

they review the contracts before they are considered for award, to make sure that it is a clean process.” TR at 657. The project was awarded in September of 2004, having undergone a bid and specification process for six to eight weeks. TR at 380-381. At the conclusion of the bid specification process, “all the studies that were required... by the architect for the project were done, completed, and the plans were ready... [the Council] went to bid the job at that time.” TR at 381.

During the bid selection process, Kanj testified that he was instructed that Bernhardt Construction should be “barred from bidding the job.” TR at 381. The reason was because the company’s last engagement with the Reservation, to construct the “Dream Catcher room” venue in the Reservation’s casino, was fraught with structural deficiencies that significantly increased the likelihood of the building’s collapse. The Tribe held Bernhardt Construction, and specifically John Stilfox, the construction manager for Bernhardt, responsible. TR at 382-383. However, Sach Christman advocated for Big D Construction to receive the construction contract. Christman was a tribal representative. His office was located on the “Enterprise side” of the casino. TR at 548. Although he had nothing to do with the gym construction project at the time, he started the bidding process together with Kanj. TR at 549. Christman requested that Kanj invite Big D Construction to bid for the job because he believed Big D was a competent contractor. TR at 549-550. At this time, Christman had influence in tribal affairs by virtue of his relationships. Christman was Hyde’s son. Moreover, Christman’s son, John Christman, and daughter were members of the Tribal Council. TR at 550-551.

When Alan Barrett awarded the construction contract to Big D Construction, and realized that Stilfox, formerly of Bernhardt Construction, would be the senior project manager for Big D on this engagement, Barrett warned Kanj to be cautious of Stilfox and “his change order business.” Barrett allegedly warned Kanj that “these guys, you know, they’ll try to rip you off, if they can, so be careful when you’re dealing with him.” TR at 384. Kanj maintained that “the Tribe was becoming sensitive to change orders, especially for the amount of change orders.” TR at 388. Kanj immediately communicated to Big D that he would be taking a defensive position on change orders. He attended the first meeting wearing a button that read change orders with a big “X” symbol over it. He meant for this button to convey the message that he would be reviewing change orders with heightened scrutiny: he would not easily grant change orders. TR at 389. Kanj recognized that change orders were part of the construction process, but that they needed to be managed. More often than not, change orders would result in an increase in the price of a contract. Kanj stated that sometimes, contractors were even known to exploit the change order process: contractors would submit a low bid, winning the construction contract, and then effectively revise their bid price upward by requesting change orders once construction got underway. TR at 390.

At some point during the change order review process, Steve Jones began to attend biweekly owner-contractor meetings to supervise. Kanj, however, did not know that Jones was supervising him. TR at 528. From Kanj’s recollection, Jones did not take a conciliatory approach in deciding the change orders also; he “came across as even more adamant against the contract... He was taking a hard line against the contractor.” TR at 529. Kanj believed that his process of deciding change orders was not halting production. He differentiated change orders according to the costs that they would impose. A cost change order may impose costs in terms of

additional work, financing, or time; however, change orders “proceed through the construction” process and, if the change orders were disputed and not immediately settled, then they could be “settled at the end of construction.” TR at 529-530.

The only contested change order of significance that Kanj could remember was the concrete slab for which Big D Construction wanted to charge more money, \$45,799, to demolish. TR at 530-531. Kanj felt that it would be “unfair to grant [Big D] the change order for an existing facility that did not change, that was there available to them before they bid the job, as it was available to all of the other contractors.” He felt that granting Big D’s change order with respect to this one item would encourage Big D to manipulate the bidding process by underbidding initially and then correcting its low bid through a change order. TR at 533-534.

In contrast to the change orders, the Requests for Information (RFIs) were not delayed and never became an issue. TR at 535. Kanj never thought of himself as being a bottleneck on responding to the RFIs. At the time, he stated he had a “professional relationship” with Ben Frasier, the contractor’s representative. Even though they had conflicting interests (as agents of the contractor and the owner), they also had coinciding interests because they both wanted to “finish the job, and... to make money”. Kanj acknowledged that “at times [they] did have conflicts, but [they were] manageable conflict[s].” TR at 536.

Kanj maintained that he had not been accused of being excessively rigid over the course of this process. The gym roof underlayment complaint that he did receive had “nothing to do with the completion of the project.” He “did not receive any letter that told [him] that such-and-such [Potential Change Order] PCO [was] causing a delay for this project.” There were delays, but never anything indicated in any letter, as being caused by a PCO. TR at 537. Kanj believed that the architect and the construction company had a difficult working relationship. He saw it as his responsibility to facilitate their relationship. TR at 538. The parties also had an “errors and omissions clause” that would enable the Tribe to “surcharge the architect out of their fees” for design errors. TR at 539.

Kanj testified that there was a delay of 23 working calendar days, but 18 of those days were “due to weather conditions because [of]... unusual heavy rain in San Diego.” TR at 539. Kanj had not been told that his actions or inactions were holding up the project. TR at 541. However, on cross-examination, Kanj admitted that there were delays but maintained, nevertheless, that none of the delays were associated with mismanagement of the construction project; they were all weather delays. TR at 695.

In response to the court’s question as to whether Steve Jones was correct in claiming “essentially that because [Kanj] hadn’t moved things up to the council... who has to approve monetary changes... they weren’t going to be able to complete... the project... by July 4th,” Kanj raised several counterarguments. TR at 706. First, Kanj alleged that the project was scheduled to be completed by October 2005, and was not driven by the July 4th deadline. TR at 712. However, Kanj later admitted that several construction projects or aspects of construction projects would have been due by that time. The structural supports for the basketball equipment had been discussed for months and still had not been resolved because of contentious working relations between the architect and the builders. TR at 707. The water reclamation project, an

ongoing project for four to five months, was tentatively scheduled to be completed in July of 2005. TR at 717. “An exterior component of [the gymnasium project] must also be completed before July 4, 2005 during the specific time [Kanj had] requested leave”. TR at 755. And there also existed problems (“a mix of personnel issues and Tribal issues”) with the Tribe’s senior landscaping program. TR at 756.

Second, Kanj challenged the allegation that he had not decided change orders in a timely fashion. At the time of his termination, forty-eight change orders were outstanding, however, as the Tribe’s agent, he had already rejected four of them, which Big D disputed. TR at 811. Kanj alleged that he did in fact respond to the open change orders. He explained that the change orders were disputed simply because he had not decided them to the contractor’s liking. TR at 814.

Respondent submitted RX 30, a list of seventeen “major current project issues for discussion” that required some form of approval on the part of Kanj so that work could continue to progress. TR at 701-702; RX 30. In RX 31, the June 6, 2005 meeting minutes, agents representing Big D Construction, the Viejas Tribe, and Wheeler, Wilmer, Blackmun & Associates discussed the progress made in deciding outstanding change orders. Personnel from Big D Construction and Ben Frasier might have stated that “the project was being delayed while they waited for Viejas’ direction” regarding the change orders; however, Kanj contested the allegation that he had told Big D Construction to prepare to litigate the disputed change orders. He alleged that what he meant to suggest was be prepared to arbitrate. TR at 762; RX 31.

i. Water Billing Formula

The Tribe utilized a formula to determine water and sewage billing for the Reservation. TR at 1015. Around June of 2004, the State of California and the Viejas Tribe signed an agreement that would allow the Tribe to operate gaming casinos with more than 2000 slot machines. Kanj testified that as a tradeoff, the State would charge additional fees including possible taxes on the profit reaped from the additional machines; therefore, Viejas billed the Casino for water and sewer usages to lower its apparent profit margins and decrease its taxes. TR at 1015-1016. According to Kanj, only three people were immediately concerned about the billing: the engineer (Kanj himself), the accountant, and the lawyer. TR at 1019. However, there was no common language of communication among the three. TR at 1019. Specifically, Kanj stated the lawyer and accountant lacked the operational expertise to understand the technicalities of the water billing formula. TR at 1020. Moreover, the lawyer and accountant’s understanding of the water billing formula would be unimportant anyway because it would not change the mechanics of the billing system. Explanation of the formula would not have any “instrumental” effect on how the billing system worked. The Tribe would not lose money whether or not the lawyer or accountant understood it. TR at 1020-1021. Kanj believed that his inability to explain adequately the water billing formula was made into an issue after he filed for litigation. TR at 1021. Prior to his termination, he testified that he had kept the Tribal Council apprised of the budget in all its biweekly meetings, and no Tribal Council member had any contention with him over the budget. TR at 1023.

(j) Vacation

CX 39 is an email that Kanj sent to Parnell expressing his desire to go on vacation. CX 39. Though not explained in the email, Kanj had not received a vacation up to that point since 2002, and wanted to take a vacation to visit his ailing parents: his mother, who was expecting to undergo surgery in mid-2005, and his father, who had recently undergone surgery in January of 2005. TR at 379-380. By that time, Kanj stated he had already accrued enough vacation days to take a thirty day vacation. TR at 380.

Kanj believed that he had a professional working relationship with Parnell, the new Tribal Government Manager. In April of 2004, Kanj explained to her the purpose of his vacation request, and she responded that she would take his request to the Tribal Council for approval. Kanj preemptively raised the issue that his employment contract had stipulated a vacation policy of at most ten consecutive vacation days. He alleged that, at the time of his hiring, he was verbally informed that the ten-day vacation policy was relaxed and enacted merely to prevent people from abusing vacation time by taking “too many... long vacations.” TR at 385; 692.

At the time when he submitted his vacation request, much of the ongoing gymnasium construction project was already on stable footing. The Tribe was “toward finalizing the shop drawings.” Moreover, the Tribe employed its own inspector and architect and additional personnel to assist in the management of the project. TR at 386. Kanj was still in the course of conducting owner-contractor meetings with Big D Construction, the prime contractor, and the architect. But if Kanj were to be unavailable, McDermott and the architect, who had attended every single meeting, would supervise. An “outside structural engineering firm... was also involved” as “part of the architect team.” TR at 388. Kanj alleged that the shop drawings, which he believed were “the most critical part of any project,” were already complete. The actual physical building itself, however, was not yet complete; construction and change orders were still pending. TR at 693-694.

Kanj testified that the minutes for the June 6, 2005 biweekly meeting that state “Jamal is taking a month off and is not sure if or when he will return” mischaracterizes his vacation request and his commitment to the job. The statement reflects what he said in connection with his request for leave: he had requested ten working days off from work and, because he had applied for FMLA leave, the approval of which was still pending, he “didn’t know exactly when [he] would be back.” TR at 542. He was never provided with a copy of the minutes for the June 6, 2005 meeting. TR at 543. Had he been given the chance to review those minutes, he believed he would have corrected the error: he was not unsure whether he would ever return; he was unsure as to *when* he would return because the status of his FMLA application was still pending. TR at 544. With regards to the special “afternoon meeting” held that very same day, Kanj stated he neither attended nor had any knowledge of the discussions held during that meeting. TR at 545.

CX 40 is a letter sent from the Viejas Tribal Council denying Kanj’s vacation request. TR at 552; CX 40. Kanj had submitted to the Tribal Council a letter asking for a thirty-day (or twenty-one working day) vacation. TR at 553-554. CX 42 is a time off request form. CX 42. Kanj submitted this second request for vacation, this time to Parnell. (554). He requested a ten

working-day vacation, running from June 9th through the end of June 20th. He returned to work on June 23rd. TR at 554-555. Viejas objected also to his request for additional FMLA leave. TR at 556. CX 50 is the letter of rejection directed at Kanj's FMLA request. TR at 558.

(k) Claimant's Intentions

Kanj testified that he still wanted to keep his job because "it [was] a job I like[d] doing... it [was] something I was able to contribute to the community. And that gave me some satisfaction. There is no question about it." TR at 558. He stated he never made any statement suggesting that he would not be returning to work at the conclusion of his vacation. Kanj felt that it "was understood that I would be back after ten days." TR at 559. In fact, he noted he had instructed his secretary to finish finalizing a report that he had written because he would "need to come back and present it to the Council." TR at 562. Kanj returned the night of June 22nd and left a voice message at the office. TR at 562.

Even while on vacation, Kanj stated he would tend to monitor and respond to emails and work issues. TR at 562. However, on June 13th, he learned that he could not access his email because his email account had been terminated. TR at 563; 566. CX 48 is an email that he sent from his private email account to his assistant, Catherine Norris, and to Parnell. TR at 564. Parnell responded with an email explaining that she was "unclear" whether he planned to return to work on June 23rd after his vacation. Her email also stated that Norris too was unsure. TR at 565. However, Kanj claimed that he told Norris explicitly that he would be returning. TR at 566.

On cross examination, however, Kanj revealed that he had been looking for a new job near the end of 2004, and became more aggressive in his job search at the start of 2005. TR at 779-780. Kanj began correspondence with the Bahrain Petroleum Company starting in the early part of 2005. TR at 726. In fact, he had been having discussions with Bahrain Petroleum regarding potential positions with the company since before March 29, 2005 when the company sent Kanj a draft contract. TR at 727. In his June 1st email back to Bahrain Petroleum, Kanj indicated that he could travel to interview with the company. TR at 729. Kanj's plan was to take four weeks off for vacation, return in July 2005, then take additional time off immediately to interview for his position with Bahrain Petroleum. TR at 729-730. RX 6 is an email that he sent to Derek Zumwalt of Veneer Construction, a potential employer. TR at 780. RX 7 is an email he had sent to Steven Glynn at Aerotek, a head hunter company. TR at 781.

Despite these revelations, Kanj maintained that he did not have any intention of severing his career with the Viejas Tribe. Kanj claimed that, because he uploaded his resume on Monster, a job-recruiting site, and received job contacts regularly, regardless of whether he was actively searching for jobs, his communications with prospective employers are not reflective of his intentions of staying on the job. TR at 781. Furthermore, he claimed to have deliberately used the word "splitting," not "severance," as a negotiation tactic. TR at 731. He stated he was attempting to negotiate with the Tribe. TR at 732. Kanj testified he was surprised that the Tribe delivered his severance papers so quickly in response to his threats of "splitting." TR at 734. Kanj alleged that in his discussion with Wendy, they agreed "If we can't work things out, let's just split or something like that, to that nature." TR at 740. He could not remember whether he asked the Tribe to honor his contract or to give severance pay upon his resignation. TR at 740. Kanj

alleged that before he left for vacation, he communicated to Wendy his intention of staying on the job: writing a letter saying clearly that he would “be there” when he is needed, and will be back on June 23rd. TR at 828.

(l) Credibility

The Court is skeptical of Claimant’s argument regarding his intention to continue his employment relationship with the Respondent. Regardless of who brought up the issue of severance, Claimant “knew what was going on”; therefore, it is inconsistent with Claimant’s knowledge of the ongoing negotiations that he would be surprised to receive severance papers. It is more likely that he was surprised the Tribal Council called him on his bluff. TR at 743.

(m) Termination

The morning of June 23rd, Kanj’s assistant instructed him as soon as he entered his office that he needed to speak with Parnell. When he went to Parnell’s office, he saw Parnell accompanied by a human resources employee who he had seen handing out termination notices to people. He claimed to have understood immediately what was happening: “basically got the message just like that... you don’t need to be a genius.” Parnell handed him a letter that served as his termination notice. TR at 567-568.

Kanj understood however, from his former experiences as Deputy Tribal Government Manager, that the authority of a Tribal Government Manager to make employment decisions concerning any particular employee was dependent on the status of that employee: “those who are hired by resolution of [Tribal] Council... get fired by resolution of Council.” Therefore, the Tribal Government Manager could unilaterally terminate employees who were hired without council resolution, but could not terminate employees at the director-level because they were hired with council resolution. TR at 648.

Kanj expressed to Parnell his regret that he did not learn about his termination while he was on vacation, so that he could lengthen his vacation stay. The HR person then accompanied him to his office to remove his personal belongings. TR at 567-568. He was told to remain away from the office for the remainder of the month. However, he remained on call and would be called in only if the Tribe needed him. TR at 569. CX 35 is the first termination letter that Parnell’s office had given him. CX 36 is the second termination letter, sent from Parnell’s office via mail, along with Kanj’s paychecks. TR at 569-570. CX 35, 36. On cross examination, Kanj admitted that in his June 23rd, 2005 meeting during which he received his notice of termination (see RX 22), none of the participants made any mention of Viejas Creek or Tom Hyde. TR at 726-770; RX 22.

Testimony of Steven Jones

From March 11, 1997 through March 2, 2007, a period of nearly ten years, Jones was employed with the Viejas tribe, first as an employment manager with the Tribe’s human resources department, then as a project manager “who [oversaw] construction projects and development for Viejas Enterprises.” TR at 392-394. Jones testified that “Viejas Enterprises

[was] the business entity of the organization... the Tribe [was] the governing entity of the organization.” Frank Rielo “was the CEO of Viejas Enterprises.” TR at 395.

From either late 2004 or early 2005, Jones was involved in the gymnasium construction project. TR at 395. Rielo had asked him to attend because “the Tribe had some concerns about how the project was being run and they wanted another set of eyes on the project.” His role was primarily observational. TR at 397. Various parties attended the project owner-contractor meetings: Ben Frasier, the Big D project manager; the Big D superintendent on site; a representative from the architecture firm; Kanj, as the tribe’s representative; a subordinate of Kanj; and Ben Foster, head of the Tribe’s Recreation Department. TR at 398. John Stilfox had minimal participation in the project. TR at 388-399. According to Jones, under Kanj’s leadership, the gymnasium construction project fell behind schedule: “there were multiple design issues because they were trying to build off... an incomplete and inaccurate set of [design] documents.” TR at 401. RX 30 is the PCO (potential change orders) log, prepared by Big D Construction and distributed to the members of the team during meetings. TR at 416-417; RX 30. These PCO documents were discussed regularly at the owner-contractor meetings. As reflected in the meeting minutes, “[the team] would review the PCO log to see if there were any changes” needed to be added to the log. TR at 419. During the meetings, members discussed inaccuracies and misinformation in the design documents. The meetings were held every two weeks. TR at 421. Jones would perform a site visit “about once a month because that’s what time allowed.” TR at 422. RX 31 is the minutes for a meeting dated June 6, 2005, which Jones attended. TR at 422, 424. Various other parties also attended the meeting: a representative of the architecture firm; the on-site superintendent; Frasier, Kanj, a subordinate of Kanj, and Foster. TR at 424. The discussion focused on questions and PCOs regarding the gymnasium construction project that needed to be addressed. TR at 424. At the time, Jones stated the project was already “one month behind schedule” and “RFIs (requests for information) and PCOs (potential change orders) [were] currently delaying the project.” TR at 425.

There had been significant weather delays from November 2004 through January 2005. TR at 428. Extremely high winds were reported and represented a safety concern. TR at 432. In the June 6, 2005 meeting, the contractor requested a change order for weather-delayed costs because it had fallen “behind schedule for at least six months from the weather” and “it hadn’t been made up.” TR at 428. As of June 6, 2005, the PCO regarding weather delays was still pending. TR at 429; RX 30, 31. The process required Kanj and his staff to “put together justification[s]... either in favor or against, and... they would present those to [the] Tribal Council.” TR at 433.

PCOs were not always decided at the conclusion of a project. There were occasions where they would be decided during the construction process. TR at 433-434. Big D Construction did not state expressly that it would refrain from completing the project until the PCOs were decided; but it did state that it required approval of the PCOs before it could move forward. TR at 435. Jones testified that practically-speaking, there were occasions where a PCO had to be approved, even if it were not payable yet. Examples include the contractor “procur[ing] the right material” or “procur[ing] additional material for additional scope on a project.” TR at 436. Some change orders required the Tribe’s approval for construction to continue. One example was PCO 44 (“underlayment on the roofing material for the gymnasium”). Jones

testified that the contractor sought approval of this PCO to continue construction, but Kanj was nonresponsive and construction was delayed. TR at 438. Jones stated that other PCOs that delayed the project also included PCO 50 (“skylight rolled steel channel”) and PCO 19 (“structure at switch room”). According to Jones, another PCO that potentially caused delay was PCO 43 (“structural steel basketball equipment rating direction.”). TR at 444.

As one of the Tribe’s representatives, Jones himself “butted heads with contractors over PCOs a number of times” and would “recommend to the owner that they not approve it” if he “felt it was something that was not unforeseen.” TR at 440. However, Jones testified Kanj was uncompromising, adversarial, and potentially litigious in his dealings with the Contractor over PCOs. TR at 444-445. Jones noted that Kanj said that “the Contractor would have to proceed without approval of the PCOs and that [the Contractor] should hire an attorney or other expert to pursue the cost associated with the changes as a claim.” TR at 444. Frasier, representing Big D Construction, resisted the idea of litigating the PCOs. TR at 446.

An RFI (request for information) is “generated by a subcontractor or general contractor referring it back to the owner or the architect that they’re needing additional specific information regarding a specific area or issue.” TR at 446. In almost all the owner-contractor meetings that Jones attended, Big D was “complaining about or concerned about the speed in which they were receiving information.” TR at 447.

Jones testified that the Tribe considered it very important that the construction project be completed as scheduled because the Tribe expected to hold its July 4th celebration at the gym facility that year. TR at 448. Kanj noted in the June 6, 2005 meeting minutes that he was “taking a month off and is not sure if/when he will return.” TR at 448. Kanj had alluded to his vacation earlier that day but had not mentioned it expressly to the parties at the meeting before then. Jones had no prior knowledge about his travel plans. TR at 458. Jones was concerned that there would not be a follow-up meeting scheduled. TR at 449. Parnell initiated a second meeting to be held later that afternoon “to get an update from Big D’s management.” TR at 450. RX 32 is the special meeting agenda. RX 32. Attendees included Parnell, Frasier, the President of Big D Construction, Alan Barrett, and Jones himself. TR at 451. Kanj was not present at this meeting. TR at 452. As discussed during that meeting, the architect, the contractor, and Kanj appeared to have developed a contentious working relationship. TR at 452. At the meeting, Parnell asked about “the general attitude on the project” because “she wanted to find out why... there were delays... why there was such a combative relationship between the architect, the contractor and the owner [the Tribe, which Kanj was representing]... what needed to be done to get this project completed.” TR at 453-454. Jones had “provided Wendy with the meeting minutes and PCO logs from the bi-weekly meeting” and, in subsequent discussions with her, shared her “repeated concern for the course of the project, the schedule, the budget.” TR at 455. Jones noted that “the relationship between the three entities was... like three kids fighting on the playground. Everybody was fighting but nobody was listening.” TR at 456. The parties were “at an impasse on a lot of these issues” and needed Wendy’s intervention. TR at 457. Jones had two significant concerns: (1) the “combative relationship between” the three parties, and (2) “that Mr. Kanj, being a certified engineer, was stamping engineering documents related to the project, which... could have a view of impropriety.” TR at 458. According to Jones, Kanj’s response to Jones’ concern was dismissive (“he was running the budget and... stay out of it.”). TR at 458-459.

Jones learned about Kanj's termination after the fact but never heard that "any member or Tribal Council criticize or say negative things about Mr. Kanj's reporting... pollution in Viejas Creek." TR at 459.

Jones' testimony was offered to provide an alternate explanation for the change orders. If design plans changed, then the scope of the work would presumably change, raising the number of PCOs. TR at 462. According to Jones, there were several reasons for the delay in the project construction other than weather: (1) documents were incomplete (inaccuracies stemming from the complexity of the design), and (2) delays in ordering construction steel... because of [missing] elements" from the engineering or architecture side. TR at 463. One of the plans had to be changed because of design problems (see Exhibit 47, "change order associated with the glue lam beams"). TR at 464; RX 30. Other PCOs arising from changes in the plans and the scope of the work include PCO 44 ("the roof underlayment"), PCO 46/49 ("the trellis system"), and PCO 49/46 ("the structural steel on the east wall of the building"). TR at 465-467. Jones alleged that these types of disagreements were a standard part of the process but they should not have been allowed to escalate to the point of stalling construction. TR at 468. At various points in the process, "changes to the documents in the middle of the project... [resulted] in changes to the scope of the work." TR at 469.

Credibility

Jones worked as an assistant superintendent on large-scale commercial projects, including the construction or reconstruction of grocery stores, shopping centers, country clubs, and golf courses. TR at 404. The Court recognized that Jones' testimony is not that of an expert witness. The Court accepted Jones' testimony on the basis of his twenty-year experience in construction and as a representative of the Tribe's interests and viewpoint during that time. TR at 411. Jones' role as a project manager was to track the budget and schedule. He deferred to "[his] inspectors, engineers and architects to resolve issues on the projects." TR at 414. I find his testimony very credible.

Testimony of Donald McDermott

McDermott was certified to authenticate reports to the Department of Health and Human Services in the State of California and to the federal Environmental Protection Agency. TR at 508. McDermott also appeared before the Tribal Council to report on water quality. TR at 504. McDermott was not required by federal law to report water quality; however, he did perform quality testing on the water and report findings to the Tribe for its own knowledge. TR at 505-506. At the time, Kanj was Dylan's direct supervisor; therefore, Dylan cleared all of his reports, including his reports to the Tribal Council, by Kanj. TR at 516. Before reporting on any potential contamination problems, McDermott would need to "have gone to Mr. Kanj first with that." TR at 522. On some occasions, however, McDermott would receive job requests from outside his chain of command. TR at 509.

According to McDermott, Hyde placed cultural significance on his cattle staying on the Reservation. TR at 513-514. McDermott noted that "Hyde had considerable influence on the

Tribe and its actions.” TR at 514. McDermott accompanied Kanj on his meeting with Hyde regarding “fenc[ing] in the retention basin on the reservation.” Others present at the meeting included Mr. John Christman and Ms. Leone. TR at 517. From Kanj and Hyde’s discussion, McDermott had the impression that Kanj insinuated Hyde was a liar; Hyde became upset and asked Kanj to leave but Kanj refused. TR at 518, 521. McDermott believed that “it was inappropriate for [Kanj] to not leave when he was asked the first time.” TR at 521. McDermott believed it was possible for Hyde to have heard Kanj insult him, though McDermott did not hear it. TR at 521.

McDermott himself had also discussed with Hyde “the issue of having the cows stay out of the ponds or out of the creek” and Hyde did not react in anger. However, McDermott also believed that, even if he were not particularly upset, Hyde also never had a pleasant disposition about him. TR at 522. Hyde “had very strong feelings” about allowing the cattle to stay “in the retention ponds... That was the cattle’s drinking water.” TR at 523. One year after Kanj left the Reservation, however, Alan Barrett, a Tribal Council member, ordered to have the fencing constructed. TR at 523-524. With respect to Kanj staking out his position with respect to the cattle pollution issue, McDermott had not perceived any outward manifestations of animosity being directed at Kanj. TR at 526.

Credibility

McDermott appeared to have no stake in the outcome of the proceedings. I accordingly found his testimony very credible.

Testimony of Bobby Barrett

Bobby Barrett worked for twelve years, primarily as a casino manager, at Viejas Enterprises before he was promoted to vice-Chairman. Six years later, in January of 2008, Barrett was elected Chairman of the Viejas Tribe. TR at 579-580.

Barrett confirmed that Kanj was employed first as Director of Public Works, then as an interim Tribal Government Manager. But after Parnell assumed the Tribal Government Manager position, Kanj retained only his original director-level position for some time thereafter and was then terminated. TR at 581-582. Barrett recalled that Kanj had not appParnelled him for performance evaluations or for salary increases. TR at 591.

Barrett testified that the Tribal Council received a letter dated May 10, 2005 requesting vacation time in excess of the maximum number of consecutive vacation days as stipulated in his contract. TR at 583-584. The Tribal Council discussed and ultimately denied Kanj’s request for two reasons: (1) “it was more days than he could take consecutively”; and (2) the gym construction project “had a deadline... it was nearing completion... [but] was stalled somewhat.” TR at 584. In a second letter, dated May 16, 2005, Kanj asked that the Tribal Council reconsider. This letter pled additional information in support of his vacation request. The Council held the same. TR at 585. After the Council denied Kanj his thirty-day vacation, he took a ten-day vacation instead. During that time, “Jamal’s duties fell over to... the government manager,” Parnell. TR at 587.

Barrett alleged that “Wendy and Jamal had a subsequent conversation after [the Council’s] second denial of his time off... She brought to [the Council] the fact that Jamal [was] interested in a severance package, leaving the organization.” TR at 585. Moreover, “Jamal had actually requested that there be a severance when there would be a separation of his employment with Viejas.” TR at 590. The Council requested its attorneys “to draw up a severance package and have Wendy move forward with [the] idea” of terminating him. TR at 586. Barrett claimed that Parnell was unhappy with how Kanj had been executing his duties in relation to the design and construction of the gymnasium. While Kanj was on vacation, Parnell, as Tribal Government Manager, assumed his responsibilities and discovered many problems with his performance, for example, the way he managed the PCOs. Consequently, she wanted to terminate him. TR at 588. Allegedly, her most significant reason for wanting to terminate him was that “she was unhappy with [his] performance at the recreation center and his oversight of... that job.” TR at 590.

As Tribal Government Manager, Parnell “had the authority to handle personnel, even senior personnel [or directors]... like Kanj, including terminating, firing, demoting.” TR at 635. Therefore, Parnell had the authority to fire Kanj. TR at 590. According to Barrett, the Tribal Council “stood by her” and gave her the “authority to hire and fire without... Tribal Council meddling.” TR at 591. As a result, the Tribal Council did not pass a resolution to terminate Kanj. TR at 634. Barrett testified that during the Council’s discussion to terminate Kanj, Hyde was not present. TR at 591. In fact, “Tom Hyde would never have any kind of decision or any kind of influence in those kinds of decisions.” At the meeting to terminate Kanj, Barrett stated the Council did not have any discussion about the coliform contamination of Viejas Creek, which Kanj alleged to be the reason for his termination. TR at 591.

The Council “entrust[ed] authority in the... manager to make the day-to-day decisions regarding the operations of the tribal government.” TR at 595. However the Tribal Government also reserved some decisions to the province of the Tribal Council and would occasionally decide resolutions that the manager had implemented. TR at 595. In this case, however, Barrett testified that Parnell, as the Tribal Government Manager, had the “plenary authority to hire and fire” despite the fact that the Council may have voted on a resolution to authorize the hire. TR at 596. Parnell made the decision to terminate Kanj. The Tribal Council discussed the termination but did not hold a vote on the issue. TR at 623.

Barrett stated that Culbreth-Graft, the Tribal Government Manager when Kanj was hired, also had the plenary power to make unitary hiring and firing decisions. TR at 601. The Tribal Council resolution to hire Kanj did not state this explicitly because the Council wanted Kanj to be at ease with his employment contract. TR at 602. After Culbreth-Graft vacated the position, Kanj became the Acting Tribal Government Manager. TR at 636. However, Barrett did not have any knowledge as to whether Kanj was informed about the unilateral ability of the Tribal Government Manager to terminate personnel. TR at 637. In fact, Kanj’s termination was the first instance that Barrett knew of a director being fired without Tribal Council resolution. TR at 638. Before, only lower-level employees were fired in such a manner. That is the reason why there were no hard and fast rules governing this type of termination. TR at 639. Barrett testified that the Council could have reversed Kanj’s termination but did not because it “wouldn’t be normal for [the Council] to do that.” TR at 639.

Personally, Barrett thought Kanj to be an honest and loyal person, and a competent employee. TR at 603. He did not find Kanj's handling of the PCOs to be causing any significant cost overruns. TR at 604. But from the Council's conversations with Parnell, Barrett learned that Kanj had delayed in presenting PCOs to "the proper authorities" for approval, resulting in "cost overruns." TR at 605. Kanj later informed the Council of the existence of PCOs and the likelihood of higher costs. TR at 605. Kanj did not have the ability to approve PCOs. He had to recommend them to Council. Kanj "didn't bring those [change orders] forward for authorization in a timely manner." TR at 609. Barrett stated the original budget for the project was approximately \$8 million; the costs were about \$11 million—a cost overrun of approximately \$3 million. TR at 608. Barrett was unaware of Kanj's delays in reporting the PCOs to the Council until Parnell informed him about it. Barrett was unsure, however, whether he learned this before or after Parnell recommended termination. TR at 615. Barrett testified that the majority of the Tribal Council supported Parnell's decision to terminate Kanj. TR at 616.

With respect to the fecal coliform contamination, Barrett "took steps" to fence in Viejas Creek. TR at 617-618. He was raised in the area and had personal knowledge of people living near and playing in the river. TR at 618. The initial "steps" that Barrett took to fence in the Creek consisted of winning approval for the measure from the general membership of the Tribe. He could not recall when the vote or the subsequent construction of the fence occurred. TR at 620, 622. Barrett had not heard of "any allegations of retaliating against Jamal until after his employment with Viejas ended." TR at 629. In fact, "it wasn't until... after Jamal left Viejas that [Barrett] understood his allegations." TR at 631. Wendy used to work in the Legal Department, and Kanj had written a letter to Legal complaining of alleged retaliation. But as far as Barrett knew, the Council never discussed Kanj's claim of retaliation leading up to its decision to terminate him. TR at 642. According to Barrett, there were two issues that led the Council to approve of Parnell's decision to terminate him: (1) his allegedly poor work performance; and (2) his request for a severance package, which indicated to the Council that "he wanted to leave." TR at 642-643.

Credibility

Barrett's testimony appeared fairly consistent with all the other testimony in the case including much of Complainant's testimony. I thus find his testimony credible.

Testimony of Wendy Roach Parnell

(a) Employment Background

Wendy Roach Parnell is a descendent, active member, and citizen of the Viejas Tribe. TR at 885. In March of 2001, Parnell, as associate legal counsel for the Tribe, collaborated with Kanj on one of the Tribe's housing programs. In October of 2004, she assumed the role of Tribal Government Manager. TR at 887. As associate legal counsel for the Tribe, Parnell worked under Diane Vitols, General Counsel. In this role, she helped Vitols draft resolutions for the Tribal Government and the Tribal Council at large. TR at 953. Through her experiences as associate legal counsel, Parnell acquired knowledge of the operations of the Tribal Government and the

Tribal Council. She knew that Viejas was a “custom and tradition Tribe,” meaning the Tribe’s governance was dictated by custom, not by “organic documents” (i.e., a Constitution). TR at 954.

(b) Discovery and Reporting of Contamination

Based on her familiarity with Tribal government customs as former associate legal counsel and as Tribal Government Manager, Parnell believed that Kanj’s findings of coliform contamination would not have been something “that would have been a presentation.” It would merely be a “bi-weekly report.” According to Parnell, there would be no presentation that would accompany a report of this type unless a Tribal member requested it or a staff member felt strongly enough to highlight it within their report. TR at 956. Parnell did review Kanj’s reports regarding fecal coliform contamination; however, she could not testify to what she knew on March 1, 2005—whether she knew only of a general issue with the ponds or specifically fecal coliform contamination. TR at 941. Moreover, she could not confirm when she learned about the contamination (“when that happened, I don’t know”). TR at 943. While acknowledging the possibility of knowing about the fecal coliform contamination, Parnell maintained that Kanj’s creek fencing proposition would have only been a partial solution: the Tribe would still need to find some way to water the cattle without inter-mixing that water source with the Creek. Parnell assumed that something else was done other than just the fencing, to afford water to the cattle on the reservation. She based her presumption on the fact that Alan Barrett identified the problem to the Reservation’s Water Quality Board; therefore, an employee in the Public Works department, superintendent or lower, would likely have assumed responsibility for fencing in and watering the cattle. TR at 946. Parnell also had no recollection of advising Kanj not to attend the General Council meetings. However, she stated that Kanj typically attended the General Council meetings only for specific purposes (i.e., to give a presentation that only he had the expertise to give). TR at 919.

(c) Performance Evaluations

Parnell testified that salary reviews were reviewed on a regular basis, annually or bi-annually. TR at 917. CX 54 is the salary grade structure for the Tribe in 2004. CX 54. Parnell testified that because his salary was not at the minimum level, Kanj was not entitled to receive a pay increase; however, he would have received one eventually. TR at 918. Moreover, Parnell noted that there was a salary freeze for employees at the level that Kanj previously occupied in 2008. Individuals at the executive level did not receive bonuses for 2008. TR at 916. Parnell never wrote Kanj a performance evaluation because she felt that, given her short tenure working with him, she could not provide him a fair evaluation. TR at 918. Parnell stated that had he not been terminated, she would have given Kanj an evaluation recommending a salary increase. TR at 918.

(d) Concerns about Kanj’s Workplace Performance

In the late spring of 2005, Parnell started becoming concerned about Kanj’s work performance: she worried that he had become disengaged from his job, evidenced by his ignorance of how the water billing formula operated; the complaints from Big D Construction about Kanj being difficult to work with; and the fact that the gymnasium construction project,

one of Kanj's responsibilities, still was not completed. TR at 888-889, 891. Between February 22, 2005 and April 1, 2005, Parnell testified that she and Kanj had discussions about his workplace performance, including his inability to explain how the water billing formula worked and his failure to approve several pending change orders. TR at 957.

In late April of 2005, before she submitted Kanj's vacation request to the Tribal Council, Parnell had a discussion with Kanj about the reasons why a month-long vacation request was inappropriate: (1) "it was outside the scope of his contract with the Tribe," and (2) it was "coming at a very bad time considering that [the Tribe was still] in the middle of the gymnasium project, which [Parnell] considered to be very important. All eyes were on it... It was a project that was several years in the works before... it got going. So people were really watching him and wanting to make sure that it was successful." TR at 892-893. Moreover, Parnell stated the Tribe was also engaged in a senior landscaping program in which Kanj's participation would have been very important: "a program where [the Tribe] would have Public Works employees work with seniors to landscape the area around their homes... And it was an important program in that the... seniors and elders are very revered within Indian communities across the U.S." TR at 892.

Parnell testified that the building design for the gymnasium project was intended to be very elaborate, but after the occurrence of Hurricane Katrina, the price of steel unexpectedly increased. Therefore, the team redesigned the building to use less steel, thereby bringing the cost of the project within budget. TR at 898-899. She contacted several people—Frank Riello, Steve Jones, and Bob Scanell (a Viejas employee who is also an architect)—about how to proceed with the construction project. Following their discussions, Parnell scheduled a meeting with Big D Construction for around early to mid-May to gather information about potential disputes. She did not invite Kanj to that meeting as it was intended for information-gathering and because she did not want it to get too acrimonious. TR at 901-902.

The meeting was held on June 6, 2005. The following people attended: Frank Riello; the president of Big D; Brian Fraser, the project manager for Big D; John Stilfox; Steve Jones; and possibly Bob Scanell and one or two other Tribal members. TR at 903-904. Parnell testified that the meeting focused on understanding the contractor's frustrations in working with Kanj: "that change orders were not being considered fairly, that Jamal was difficult to work with, and that Big D was committed to the project and was... looking for a way to resolve these issues" to complete construction in a timely manner; the project was almost at a complete "standstill." TR at 904. Parnell stated she had never told Kanj that she did not want him to approve change orders. TR at 920. Parnell reassured attendees that she would go back to review the issues. Change orders were a necessary evil in construction. After the meeting, Parnell stated she took over as the Tribe's new liaison on the project. TR at 905.

Parnell went to Frank Riello, a former CEO of Viejas Enterprises, the casino operation, sometime in March of 2005 because she wanted somebody else involved in the meetings with the contractor who would have expertise in contracting. (948). Following the June 6, 2005 meeting, Parnell worked with other project supervisors to reengineer the value of the construction project. Because Parnell was a relatively new member of the Tribal government, she

stated she was offered assistance by Frank Rielo, a former CEO of Viejas Enterprises, who was experienced working with contractors. TR 948, 952.

Several days after the June 6, 2005 meeting, Kanj left for vacation. At the time, Parnell testified that there were difficulties with the senior landscaping project, particularly with Donald McDermott. Parnell testified that “there was a general distrust that Mr. McDermott had the interest of the seniors” at heart. Parnell stated that Kanj needed to have been present to ensure that the program would run smoothly. TR at 907. His presence was essential (“someone higher up was necessary to work out a solution to make that program work”). Parnell testified that she discussed these difficulties with Kanj prior to his leaving for vacation. TR at 907. After submitting his vacation request to the Council, Parnell also attended Council meetings where his vacation was discussed. She relayed the Council’s decision to Kanj. She offered him a three week vacation as a compromise solution. Kanj asked Parnell to get him three weeks or else “talk to Council about a civilized way of resolving a severance agreement in lieu of the three weeks... [to] sever the relationship of the parties.” TR at 894. Parnell testified that she “was actually surprised. [Her] reaction was that it became clear to [her] that he was not invested in working [at] Viejas anymore.” She had a “complete lack of confidence” that he was going to perform at his job. TR at 895-896.

The vacation proposal was taken to the Tribal Council on May 24, 2005. Parnell presented Kanj’s ultimatum and “the Tribal Council recommended... to offer Jamal a severance agreement terminating his contract.” She believed that a severance agreement was prepared and given to Kanj. TR at 896. RX 14 is a time-off request form that Parnell approved for a period of ten to fourteen working days. Parnell claimed to have later learned from Kanj’s email that he was also seeking family medical leave at the time. TR at 897. She had no recollection of having discussed the FMLA request with Kanj. TR at 898.

While Kanj was on vacation, Parnell stated she was also, for a period of time, unsure as to whether Kanj would return. TR at 908. Catherine, Jamal’s assistant, also told Parnell that she was unsure whether Jamal would return on June 23, 2005. TR at 910. During this time, Parnell stated she cancelled Kanj’s email access for these reasons: (1) she wanted to ensure that staff would not receive conflicting work instructions by email, given that she was overseeing the construction project while he was away; and (2) she wanted to prevent Kanj from working while he was on vacation, which she worried may be a predicate for a back wage claim. TR at 908-909.

(e) Termination

While Kanj was away on vacation, Parnell reviewed the merits of the contractor’s claims. TR at 910. She decided to inform the Tribal Council that she wanted to terminate his contract, effective sometime during the weekend of June 18, 2005. On June 21, 2005, she recommended termination to the Tribal Council. TR at 911. Parnell stated numerous reasons for recommending Kanj’s termination: (1) he was creating a reputation within the community that the Viejas Tribe was difficult to work with; (2) they “were having a hard time getting people to bid [for] jobs because... the Tribe [appeared] inflexible when it came to change orders”; (3) she found problems with the budget as compared with the “capital budget” for the project, as presented initially to the community; (4) he had asked to sever the relationship; (5) she detected a lack of

dedication, as evidenced by his leaving in the middle of the gymnasium project and near the close of the water reclamation retrofit; (6) she lost confidence that he was still committed to the job; and (7) she saw a deterioration in his work product. TR at 911-912.

Though she had the unitary authority to terminate Kanj, Parnell still told the Council her intentions because she knew that he was a high-level employee and did not want to risk having the Council learn about his termination indirectly from another tribal constituent. TR at 913. She told the Council the following: (1) there were problems with change orders; (2) the contractor was ready to walk off the job as a result; (3) there were problems in the senior program; (4) the budget was not consistent with the budget as presented to the general membership; (5) Kanj's inability to comprehend or explain the multipliers for the water and sewer; and (6) miscellaneous reasons—"little things" that came "out of the woodwork that were red flags." TR at 913.

According to Parnell, Kanj's reporting of the water pollution problems was not a factor in her decision to terminate him. TR at 915. She testified Tom Hyde was not involved in the Council's termination discussions and the issue of the coliform contamination was never raised. Furthermore, she stated Hyde had no influence over the Tribal Council's deliberations because there were several other people serving on the Council during that time who were not his family members. TR at 919. Parnell testified Sach Christman did not influence Parnell's decisions to terminate Kanj. TR at 921. Moreover, Parnell stated she personally was not opposed to Kanj's idea of fencing in the creek. TR at 915-916. In fact, the issue of creek fencing was "not even on [her] radar screen". TR at 920. Parnell testified the Tribal Council was supportive of her decision to terminate him. TR at 914. Council members present included the following: Vice-Chairman Bobby Barrett; Secretary Diane Aguilar; Chairman John Christman; and Council persons Keith Grohalva, Tim Bactad, and Alan Barrett. TR at 914. RX 22 is the termination notice that Parnell handed Kanj on his return. TR at 914; RX 22. There was no Tribal Council resolution to terminate Kanj's contract and, in Parnell's estimation, none was required. TR at 914.

Parnell did not inform Kanj that he had been terminated, while he was on vacation, for several reasons: (1) the decision to terminate him was made on June 21, 2005; (2) by the time the decision was made, Kanj was scheduled to be returning from his vacation within a couple of days; (3) Parnell found it rude to conduct terminations impersonally (i.e., by phone, letter, or email); and (4) she did not know the nature of Kanj's vacation—she knew he was visiting his parents, but did not know that his parents were recovering from surgery at the time. TR at 960-961. Upon Kanj's return, Parnell notified Kanj of his termination. Afterward, the office of Diane Vitols, General Counsel, sent multiple severance proposals to Kanj. RX 15 is a cover letter sent by Vitols, dated May 26, 2005, stipulating a post-severance agreement releasing claims. TR at 934-935; RX 15. The letter stated that the severance agreement had been revised to include the addition of COBRA benefits; this indicated that Vitols' office had released a prior severance agreement. TR at 936. However, Parnell could not remember whether she ever received a copy of that agreement. TR at 936. Moreover, during June of 2005, Parnell did not have any knowledge of or come across any document stating that Kanj had invoked whistleblower protection under the Federal Water Pollution Control Act. She could not remember any document provided by Vitols' office in reference to the Act. TR at 964.

(f) Credibility

The Court was shocked that Parnell would know nothing about the existence of CX 41, a letter from Kanj dated a mere two weeks earlier, before Parnell allegedly reported to the Tribal Council, alleging retaliation against him for engaging in activity protected by the Federal Water Pollution Control Act or Clean Water Act (CWA). CX 41. The Court also questioned the efficacy of the Tribe's legal counsel if the Tribe's lawyer failed to report all drafts of the severance agreement and the termination letters to the Tribal Government Manager who had requested the termination. TR at 966. The Court also found it incredulous that "this letter was sent to [Viejas] Legal Counsel who [Parnell] used to work for daily for... three years, and who was [present] at the meeting... and nobody ever showed [her] this letter or mentioned it." TR at 966-967. However, overall I found the testimony of Parnell regarding the reasons for her decision to terminate Kanj's employment to be very credible including her testimony that the issue of fecal coliform contamination was in no way related to the termination decision.

Testimony of Thomas Hyde

In 1949, Thomas Hyde served as a Tribal Council member for one year. Between 1954 and 1971 or 1972, he served as Tribal Council Chairman for approximately eighteen years. EX A at 28-29. In 1972 or 1973, he was succeeded by his brother Joe Muller. In 1976, Muller was in turn succeeded by Carmen Daisy Welch, Hyde's step-daughter. Eventually, Welch herself was succeeded by Steven Tesam who was succeeded by Anthony Pico. EX A at 29-30. Hyde is the father of Raymond Hyde, the current Tribal Council vice-Chairman. EX A at 31. He is also the grandfather of John Christman, the Treasurer, and Diana Aguilar, the Secretary, both of whom are also Tribal Council members. EX A at 30. Moreover, he is the grandfather of Keith Grijalva, a member of the Tribal Council at some points over the past ten years. EX A at 32-33. Hyde had never discussed tribal government issues with any of his relations. EX A at 35. Hyde was also uncle to Anthony Pico and had raised him since he was fourteen until he was drafted into the U.S. Army. EX A at 17. He and Pico had a close familial relationship even after Pico returned from the draft. Pico continued to turn to Hyde for advice although he also never asked Hyde for his input regarding tribal government affairs. EX A at 18-19. Hyde had never seen Pico threaten to attack Kanj or anybody else. He found Pico to be generally a "peaceable person." EX A at 84.

Hyde testified that he did not dislike Kanj and believed he behaved civilly toward him. EX A at 39. He did ask Kanj to leave his house on one occasion, however, because he felt Kanj had made it a habit of saying disrespectful things to him, especially on that occasion. EX A at 39-40. He invited Kanj and other guests to his house on that occasion to discuss construction issues. The reason, as Hyde recalled, was because "the contractors were not being paid or were being... not treated properly." EX A at 63. Hyde never made the statement that Kanj was being compensated too well and was "not worth shit." EX A at 67. He also never instructed Kanj not to attend meetings that he was planning to attend. EX A at 69. He could not recall whether the issue of fecal coliform contamination of the Creek was raised during that meeting. EX A at 63. Hyde believed that Kanj, as Public Works Director, was inattentive to the projects he was working on, largely because Hyde found that Kanj had very seldom made any site visits to the construction projects he was overseeing. EX A at 41. He believed that Kanj, like other employees, were

taking advantage of the Tribe by not performing the duties that were assigned to them: they were taking “too many coffee breaks, too many vacations.” EX A at 42.

At the time of his deposition, Hyde owned six head of cattle. But between 2000 and 2005, he owned about twelve to thirteen head of cattle at the most. He grazed his cattle at the pasture at the Viejas Reservation. EX A at 21. That pasture is now fenced but it had not always been the case. He believed the fencing was constructed more than two years prior. EX A at 22. The pasture on the Reservation was watered by the Viejas Creek and from three mountain tributaries. EX A at 23. His cattle did not drink from the ponds that were created by the dam’s spillways. The cattle had access to the riverbed even before the Viejas Band settled on the land. EX A at 27. According to Hyde, Viejas was a “ranching operation even before it became a reservation.” EX A at 47. Initially, the Tribe sectioned off the settlement to 100 acre lots “through the ‘40s, up into the late ‘50s.” However, because of flooding damage to the fences, the Tribe eventually maintained the area as an open range or common pasture. EX A at 48.

Hyde testified that the fencing did not appear to be keeping the livestock out of Viejas Creek. Moreover, he stated he was not asked directly to keep his cattle or any cattle out of the Creek. He did hear informally that the fences were constructed to keep the livestock out of the Creek; however, the Tribe failed to find alternative water sources for the cattle, which would be a necessity if the cattle were to stay away from the Creek. EX A at 49. Hyde recalled that the Tribal Council might have discussed fencing of the Creek in one or two meetings. Hyde stated Kanj might have been working for the Tribe when the first meeting took place where the topic of fencing was raised. Hyde stated that it could have been the case also that by the time when the second meeting occurred, Kanj had already been terminated. EX A at 51. Hyde regarded the alleged cattle pollution as insignificant because he had “lived in pollution all [his] life” and that there were “other animals besides the livestock that pollute[d] the water.” EX A at 52. According to Hyde, other sources of water pollution included the following: seabirds sitting in the creek; deer, raccoons, coyotes, and mountain lions using the water; and humans driving their motorcycles across the shallow ends of the Creek. EX A at 52-53. At the time of his deposition, Hyde watered his cattle downstream in the various artificial water reservoirs. EX A at 77-78. The reservoirs were “rock and cement” structures that would be artificially filled from “water trucks” instead of the natural runoff from the Creek or other tributaries. EX A at 77-79.

Credibility

I found Hyde's testimony somewhat self-serving with respect to his relationship with Kanj and the cattle water pollution issue. However, I found overall that despite his familial relationships with various tribal leaders, his testimony that he played no role in Complainant's termination to be consistent with the testimony of the other witnesses and thus credible.

Testimony of Penelope Culbreth-Graft

From March 2000 through March 2003, Graft was employed with the Viejas Tribe as the Tribal Government Manager. Prior to working at Viejas Tribe, between 1996 and 2000, Graft was the assistant city manager and acting city manager for the City of San Diego. EX C at 8. After she left the Tribe, between March 2003 through May 2004, Graft was the city manager for

the city of Riverside, California. From June of 2004 through January of 2008, Graft served as the city administrator/city manager for Huntington Beach, California. EX C at 6. Graft knew Kanj from working with him in the administrations of the City of San Diego and the Viejas Tribe. EX C at 8. Graft was the person who made the decision to hire Kanj as the Public Works Director at Viejas, a newly-created position that was filled first by Kanj. EX C at 10, 12. Graft could not recall whether Kanj was hired by Tribal Council resolution; however, “if there [were] a resolution or formal requirement, [Graft] would have recommended an employment agreement, which the tribe [attorneys] would have prepared.” EX C at 27.

Graft could not recall whether she ever had a Deputy Tribal Government Manager. EX C at 11. However, Kanj could have filled in for her as Acting Tribal Government Manager while she was on vacation. She left for surgery for 1-2 weeks, during which Kanj was likely the Acting Tribal Government Manager. EX C at 11. Graft identified Exhibit K as the “Viejas Tribal Government Management Performance Appraisal for Jamal Kanj.” EX C at 30. She could not remember the exact explanations for the performance ratings she had given Kanj; however, as she explained in the comments, she made “numerous comments throughout about slow turnaround and communication issues.” EX C at 32. She would document whenever she had “issues or shortfalls [with Kanj] in terms of performance.” She suggested in his performance evaluation that Kanj needed “to keep focused” on updating the Tribal Council of his progress on projects and to “find ways to communicate.” Specifically, she noted that he suffered from “slow time frames and communication problems.” EX C at 32.

Graft did not find that most of the communications had to take place orally or that Tribal Council members were disinclined from reading reports. Rather, she stated some members would not thoroughly review the written materials because they were provided “a tremendous amount of public and written materials.” Regardless of whether Tribal Council members would read the materials, her staff still had “an obligation to convey the information” orally to Tribal Council members. EX C at 33. Staff members made presentations because “it is typical public policy... that [Tribal Council members] have multimedia in order to receive the information, because councils [consist of] disparate individuals with different backgrounds.” This is also typical of public processes. EX C at 34-35.

Graft still gave Kanj high marks (“outstanding or fully competent”) in the category of job knowledge. EX C at 35. However, Graft recommended that Kanj present information in “bite-size pieces” to aide Tribal Council members in understanding policy concepts. EX C at 37. The Tribal Council had expressed “concern about the speed of completion and lack of feedback” regarding Kanj’s construction projects. EX C at 38. Graft noted Kanj needed to be cognizant of his obligation to update the Tribal Council on his progress and to find ways of communicating effectively to the Council. EX C at 38.

Graft was unsure whether she would have the plenary authority to terminate Kanj from the Public Works Director position. EX C at 52. With respect to reassigning an employee to another position, Graft believed that she would still inform Tribal Council members of what she planned to do with top-level personnel, whether or not it was required. EX C at 54. However, she acknowledged that if she were “required to do a resolution to hire an employee, typically [she] would be required to do a resolution... to terminate that employee.” EX C at 55. Tribal

Government personnel would report to her, she would report to the Tribal Council, and the Council would be held accountable to their political constituents. EX C at 55. Hyde did not have a role in Tribal Government. EX C at 55. Moreover, Graft could not recall Hyde or Barrett expressing any hostility directed at Kanj. EX C at 59. After September 11, 2001, however, there was one instance when Graft heard Barrett say during a meeting that the Tribe “should take [Kanj] out and lynch him.” EX C at 59. She stopped the meeting at that point. EX C at 60. Graft found the Viejas Tribal Council to be a tolerant group “sometimes” or “most of the time.” EX C at 62.

Graft testified that Exhibit N items number 1-6 could be interpreted as Kanj’s contract goals: to complete the multi-year sewer and water infrastructure plan; to complete infrastructure strategic plan; to create and implement plan for billing of sewer service; to propose measures for an assured, redundant water supply; to evaluate energy needs and propose energy projects; and to formalize a job order system to tract labor functions of public works contracts. EX C at 64; EX C to EX N. If she, as Tribal Government Manager, were to consider termination of an employee, she stated she would terminate him for reasons consistent with his violation of his contract terms. EX C at 65.

Credibility

Graft's testimony was primarily background information. I find her testimony to be credible. Although she testified that she thought a termination such as Complainant's would require a Tribal Council resolution, I do not find this of significant value herein as the termination of Complainant was clearly discussed at and accepted by the Tribal Council.

Testimony of Virginia Christman

At the time of her deposition, Christman was one of seven Tribal Council members. EX D at 6. The Viejas Band is one of twelve bands of the Kumeyaay Indians. EX D at 7. The Band elects the Tribal Government for itself. EX D at 7. In the early 1980s, Christman was vice-, Chairman for the Tribe. EX D at 14. At the time of the deposition, Christman had been a Tribal Council member for twelve years. EX D at 18. She first met Kanj in the early 2000s when he was hired as the Public Works Director. EX D at 21. She testified that she worked with Kanj and some other Tribal Council members on a water and waste water collection system project that was designed to upgrade the Reservation’s pipes. EX D at 43-44.

The Tribal Council met once a week. EX D at 29. The Tribal Council expected department managers to report to the Tribal Council so that they could have an understanding of what was transpiring. EX D at 31. Tribal meetings were generally held at the Tribal hall but the meeting venues were subject to change. EX D at 31. Christman’s impression of Kanj was that he was “nice,” “sincere,” and “respectful” of and “responsive” to Tribal inquiries. EX D at 40.

Christman testified that the cattle have had a long presence on the Reservation. EX D at 38. In fact, the presence of cattle on the land predated the Tribe’s settlement on the land that would eventually be its reservation. EX D at 43. She could not recall Kanj’s presentation regarding the fecal coliform contamination. EX D at 38.

Christman stated the gymnasium project happened as a result of her vision for the Reservation's facilities. EX D at 45. Christman, other Tribal Council members, and Kanj "took [the gymnasium] from a dream to a reality." EX D at 45. She envisioned the gymnasium but Kanj and Culbreth-Graft got it started. EX D at 46. She attributed the construction of the gymnasium, which was of significant benefit to the Viejas community, to Kanj's efforts. EX D at 48. She recognized that Kanj had a sense of caring or personal investment in the successful completion of the gymnasium project. EX D at 52. She believed that Kanj assumed Culbreth-Graft's duties after she vacated the Tribal Government Manager position. EX D at 53. When Kanj was terminated, he notified Christman personally by phone that he was no longer employed by Viejas. EX D at 54. She was surprised to learn that he was terminated. EX D at 54. Christman never saw any Tribal member express any animosity toward Kanj. EX D at 74.

Christman testified hiring was done primarily through the Tribe's human resources department. She noted that it was not always the case that the Tribal Council would vote up or down on an employee's termination. EX D at 68. The Tribal Council members, including Christman, signed Kanj's hiring paperwork but she could not recall the discussions surrounding his hiring. EX D at 70. Human resources participated in the hiring process but she could not confirm whether the HR department made the decision to hire him. EX D at 70. After Culbreth-Graft vacated the Tribal Government Manager position, she recalled discussions between the Tribal Council and Kanj about Kanj filling the position on an interim basis and he accepted. EX D at 72.

She believed that Hyde was not an influential member of the Viejas community. She acknowledged that he might have been an elder, but, in her opinion, elder status was more reflective of age than of his political influence over the Tribe as conferred by his seniority. EX D at 76.

Credibility

I find Christman's testimony credible particularly with regard to Hyde's lack of influence upon Tribal political matters.

Testimony of Anthony Pico

(a) Employment Background

Anthony Pico served as Chairman of the Viejas Tribe between December 1995 and December 2007. Bobby Barrett took the office in 2007. EX F at 7. Pico became involved in Tribal Government in 1978. He was first elected as Secretary of the Tribe and held that office for two years. EX F at 10. In 1983, he was elected to the office of Chairman. EX F at 11. Pico missed several Tribal Council meetings in 2006 because of back surgery. EX 21. He stated he missed meetings for 18 months, including the entirety of year 2006. EX F at 22. Pico served as Chairman from 1984 until 2002. He took two years off and was reelected in the year of 2004 and served until 2006. EX F.

(b) Relationship with Hyde

Tom Hyde is Pico's uncle through marriage. Between 1960 and 1966, starting at the age of 14 until he turned 20, Pico was living with Hyde. EX F at 8. As a result, he had a close relationship with Hyde. EX F at 9. Pico testified that he would discuss tribal business with Hyde very frequently—about once a month—at the start of his career, but did so much less frequently over the course of his leadership as he developed “intuity.” EX F at 11.

(c) Tribal Government

The Tribal Council is responsible for policy-making, not daily operations including the termination of managerial personnel. EX F at 36. The General Council would elect the Tribal Council, which in turn appointed managers to oversee the operation of the tribal enterprises. The managers would run the enterprises. Pico testified that they did not “serve at the pleasure of the Tribal Council.” EX F at 37. All use of tribal lands must be voted on by the General Council. EX F at 40. Pico testified that the General Council took an “utmost” position with regards to maintaining “the highest environmental standards”; therefore, the General Council would have wanted to fence in the Creek. EX F at 18. Pico attended most of the General Council meetings, as did Tom Hyde. EX F at 41. Pico did recall that the Creek fencing was discussed at one of the General Council meetings but he couldn't recall the exact one. EX F at 41.

Pico testified that the General Council allowed cattle owners to use communal property for cattle-raising activity. He stated that the individual owners of private property bore the responsibility of fencing in their own property. EX F at 42. Pico noted that the issue was that people's personal property was being damaged by the cattle. EX F at 42. Pico knew that Hyde had cattle on the Reservation. EX F at 12. The cattle, until recently, were not fenced in. Pico stated that there was a perimeter fence but the cattle frequently broke out of that containment. EX F at 13. Moreover, Pico noted the perimeter fence primarily surrounded the Reservation itself, not just the Viejas Creek. EX F at 14.

(d) Reporting of Contamination

Pico testified that he reviewed the water lab reports. The reports were routine and would come in monthly. However, he could not remember seeing any indication from the reports of fecal coliform contamination. He also stated he never saw any reports on the surface water. EX F at 43. Pico recalled that Kanj reported the fecal coliform contamination findings to the Tribal Council. EX F at 91. Pico's immediate reaction upon learning of the contamination was that it was a very serious issue and needed to be “taken care” of. Pico stated he indicated to other Tribal Council members how he was feeling. EX at 92. Pico believed that the Tribal Council was not angry with Kanj. Pico did not know anyone who was angry with Kanj or had ridiculed him because of his reporting of the elevated levels of fecal coliform. EX F at 27, 93. Pico believed that the issue was “mitigated” or addressed at some point during his tenure as Chairman. EX F at 92.

(e) Source of the Contamination

Pico believed that the contamination occurred in one of the “three springs that surface [in] the middle of the Viejas Indian Reservation.” EX F at 93. Viejas Creek originated at the Reservation, connected together by three tributaries that ran through the west side of the Reservation. Pico stated the cattle were allowed to venture into the Creek and the retention ponds following their creation in 2000. EX F at 14.

(f) Vacation Request and Work Performance

Pico testified the Viejas Tribe was at a critical juncture in several projects in the month of June 2005. Pico attended the Tribal Council meetings in the month of June 2005 but could not recall the exact nature of the discussions. EX F at 79. Exhibit 144 is in reference to the Tribe’s denial of Kanj’s request for vacation leave. The basis for the denial was that there were several ongoing projects at the time. EX F at 86; EX F to EX 144. Pico could not recall the specifics of the projects but believed that Parnell, the Tribal Government Manager at the time, would have knowledge of the projects. He remembered hearing Parnell indicate that she was unhappy with Kanj’s performance: Kanj was not monitoring projects that needed to be completed. EX F at 86-87.

Pico knew that Hyde and Kanj did not get along very well but did not know the extent of it. EX F at 12. In 2003, there was a meeting attended by John Christman, Tom Hyde, Larrilyn Leone, Donald McDermott, and Jamal Kanj, which Pico later learned was a negative or non-productive meeting. EX F at 47. Kanj had asked Pico to speak with Hyde on his behalf to clarify the miscommunications between them. EX F at 51. Specifically, Pico remembered that Kanj asked him to speak with Hyde on his behalf to stop Hyde from harassing him. Pico did speak to Hyde about this issue but could not recall Hyde’s reaction during the conversation. EX F at 95. Kanj was asked to avoid attending those meetings where Hyde was expected to be present. Pico testified the leadership feared that those meetings would not be productive if both parties would be in attendance because there was no professional “business demeanor between them.” However, as far as Pico could see, both of them appeared to be mutually respectful of one another. EX F at 100. Pico could recall only one instance where Kanj was asked not to attend a General Council meeting: “Kanj was to give a report on his overall duties in progress of the projects that were going on, and... the tribal council, through discussion and caucus... [decided] that, well, maybe Mr. Kanj shouldn’t be here at that general meeting.” EX F at 102-103.

(g) Role of Diane Vitols

Pico stated that Diane Vitols provided legal services to the tribe. She did not participate in the leadership of the Tribe and was not a part of the Tribe’s decision-making process. EX F at 16. Diane Vitols, the General Counsel, and the Tribal Government Manager could act autonomously with respect to personnel decisions. Moreover, according to Pico, the Tribal Government Manager would not require Tribal Council approval before commencing with an employee’s termination. EX F at 59.

At some point, Diane Vitols departed from Viejas as well but it was “on good terms.” EX F at 98-99. As General Counsel, Pico stated Vitols had no influence over the Tribe’s personnel matters. EX F at 99. Pico also testified Vitols had no influence over the operation of the tribal government. EX F at 100.

(h) Credibility

I find Pico's testimony generally credible particularly with respect to the conflict between Complainant and Hyde. However, I also credit Pico's testimony that Parnell expressed misgivings relating to Kanj's handling of the construction projects and his request to take an extended vacation.

Testimony of Brian Frasier

(a) Employment Background

Brian Frasier was, at the time of his deposition, a project manager for Big D Construction. He had worked for Big D Construction since 2004. EX G at 12. Prior to being employed at Big D, Frasier was a project manager at HHI Construction where he was responsible for a number of tasks: writing subcontracts and RFIs, managing the bid submissions process, attending owner’s meetings, generating payment requests, and documenting construction progress. EX G at 16.

(b) Conflict over RFIs

An RFI (request for information) is a means of documenting questions and answers regarding the construction process. EX G at 17. According to Frasier, over the course of the construction, questions would arise that Viejas would fail to answer: “these [unanswered] questions resulted in costs” and delays. EX G at 29. Frasier testified that time extensions were not granted and sometimes, not even responded to. EX G at 38. As a result, Frasier stated there was a point in the construction when “more than 100 RFIs” addressing design flaws and incorrectly-specified materials were outstanding. EX G at 39. RFIs regarding project design, however, were typically fielded by architects. Frasier would send the RFIs to the architect and copied Kanj on the emails. EX G at 93.

(c) Conflict over PCOs

Frasier testified that a change order is a “change to the contract documents that may or may not impact time or money.” EX G at 19. Generally, the contractor generates the change order. The parties contracted to the construction project are usually involved in discussing and negotiating the change order. Once the parties agree to the change order, it moves from being a PCO (proposed change order) to being an approved change order. EX G at 20.

Frasier was the author of the PCOs that Big D Construction had submitted to Viejas. EX G at 97. However, Kanj flatly rejected or failed to approve promptly many of the PCOs. Frasier noted a representative sample of PCOs that Kanj had rejected:

- (1) Big D's subcontractor wanted to charge more money to remove the basketball court and the trellis structure because they did not anticipate the dimensions of an attached concrete slab. EX G at 101. It was possible for Big D to assess the dimensions of the concrete slab by using x-ray technologies or by conducting "design discovery work": manually digging around the concrete slab and taking physical measurements. However, manual "design discovery work" would have been uncommon at the bidding stage. EX G at 103-104. Big D submitted a PCO for an additional \$30,000 for removal of the concrete slab. EX G at 105. Frasier stated Kanj rejected the PCO. Big D likely responded by requesting to split the cost with Viejas and by requesting the subcontractor to be more economical in its estimates of the project. EX G at 107.
- (2) Exhibit 6 states that "the HVAC system and intake louvers located in the men's room will not fit below on the roof structure in the ceiling." EX G at 129; EX G to EX 6. Allegedly, a design error prevented the mechanical contractor from completing his work. Frasier submitted a PCO to Viejas and the architect. Frasier noted that Kanj shifted the burden of paying for the design error onto the architect, who flatly refused to pay. Big D outlined in its proposal the change in the scope of work, and the additional costs and expenses incurred beyond that reflected in the initial bid. EX G at 130-131.
- (3) A discrepancy in the drawings that Viejas has asked contractors to bid on had led Big D to propose using felt material in its roof underlayment for the gymnasium facility. But, as the roofing manufacturer later identified, felt would not be as resistant to water leakage as other watertight material like bithutane; therefore, the manufacturer would not be able to warranty the roof being leak proof. Frasier stated that Big D submitted a PCO to remedy this change in material but Kanj rejected it. EX G at 139-142. The PCO for the roof underlayment asked for an additional \$5,828, which Frasier believed was a marginal revision considering the expected price and intended use and duration of the facility: he thought "it was ridiculous that we were arguing about... an upgrade that benefited the owner and added value to the project." EX G at 144-145.

Frasier testified the following PCOs in Exhibit 3 were ultimately approved: PCO 30 was approved for \$4,107; PCO 19 for \$2,491; PCO 46 for \$1,931; PCO 49 for \$2,878; PCO 43 for \$27,796; PCO 47 for \$21,721; PCO 44, the gym roof underlayment, for \$5,828; PCO 3 for \$45,799; and PCO 17 for \$4,148. However, he stated these approvals might not accurately reflect the amounts that Viejas had actually paid Big D. Also, Frasier noted not all the PCOs were approved simply because Kanj was no longer part of the project. EX G at 219-222; EX G to EX 3.

(d) Special Meeting on June 6, 2005

Exhibit 4 is meeting minutes that identified unresolved issues, RFIs, and PCOs as of June 6, 2005. EX G at 49; EX G to EX 4. According to the minutes, Kanj rejected some outstanding

PCOs and warned Frasier to “hire an attorney or other expert to pursue the... claim.” EX G at 50. Frasier testified that the discussion became emotional when Kanj suggested that Big D should consult with a lawyer. EX G at 51. Frasier stated he reached out to Parnell to resolve the problem instead of hiring an attorney. EX G at 58. Frasier met with Parnell and other representatives of Viejas in the special afternoon meeting, also on June 6, 2005. EX G at 59. Frasier testified that he wanted to clarify to the Tribe that Big D Construction was not running a “change order” racket. EX G at 60. Frasier believed that Kanj was “causing the problem here by not responding to us and not giving us direction and not participating as a team player.” EX G at 61. After the special meeting on June 6, 2005, Parnell informed Kanj to copy her on all the work documentation because Kanj would not be returning to work. EX G at 72. In all their interactions, Frasier stated he had never heard Kanj complain about cattle pollution in Viejas Creek. EX G at 73.

According to Exhibit 3, item 16 read that “plan conflicts or issues are being found on an on-going basis.” EX G at 126; EX G to EX 6. Frasier explained that each issue individually might not warrant the special meeting with Parnell but the cumulative effect of all the issues would. EX G at 126. Frasier testified that the most significant reason prompting the special June 6 meeting was the roof underlayment issue. EX G at 201. During the course of the special meeting on June 6, 2005, Frasier led the discussion regarding items with which Big D wanted Viejas’ input. Frasier did not criticize Kanj specifically. They discussed only a few items as representations of the types of problems that Big D was having with Viejas. EX G at 159. Frasier considered the following to be a rough order, from most to least severe, of his concerns that prompted the special June 6 meeting: the roof underlayment and the roof overhang metal deck edge support; the HVAC system and the basketball standard; the sunshade design; the south trellis, the storm drain, the electrical outlets for treadmills, and compatibility with ADT; and the specifications indicating overhead coiling doors, and the CCTV and audio systems. EX G at 203.

(e) Assessment of Kanj’s Work Performance

Representing Big D Construction on the Viejas gymnasium construction project, Frasier would meet regularly with Kanj every other Monday and would communicate regularly through phone or email. EX G at 24. Frasier believed that there were a number of problems with respect to the project—especially pertaining to “design and constructability of the facility.” EX G at 27. The expected completion date of the project was October of 2005. The actual date of completion was December of 2005. By May of 2005, however, Frasier stated it was already apparent that the project was behind schedule. EX G at 28.

Frasier and Kanj had a civil relationship; however, it was also quite argumentative, especially with respect to the issue of money. EX G at 31. Exhibit 2 is an executive summary report that Frasier prepared by referring to the RFI and PCO logs. EX G at 31, 40. At the time when he wrote it, Frasier intended it to be accurate and truthful. EX G at 31; EX G to EX2. Exhibit 2 detailed that the project had undergone multiple design revisions due to budget constraints. EX G at 32. The project had been value engineered in which parts of the building had been “deleted from the scope of work” to control construction costs. EX G at 35. According to Frasier, “on many occasions justified changes have been straight out denied and contractor suggested value added changes... have also been generally denied.” EX G at 36.

Frasier's impression of Kanj was that he did not know what he was doing most of the time, like he was not interested to learn the details of the project. Frasier stated Kanj appeared to be frustrated by the details of the project. EX G at 37. Frasier had to explain basic items to Kanj multiple times before he appeared to understand. EX G at 164. Kanj's attitude regarding PCOs were "just no, no, no"—he would not offer any justification for rejecting PCOs. EX G at 165. Frasier testified that owners might not be contractually required to provide justifications but it is customary to do so. EX G at 167. Frasier felt like they "were at a stopping point with a lot of issues"; he felt "frustrated, and... didn't sleep for months... it was stressful." However, he did not ask Parnell to remove Kanj from the project. EX G at 240-241.

Frasier was stressed about Kanj's taking an obstinate position against granting PCOs, and his litigious response, to "go get your attorney and file a claim." EX G at 241. Frasier stated he had conflicting obligations to secure payment for Big D's subcontractors "who had real claims... real proposals, real costs, and deserved to get paid for changes that... were honest and real and reasonable to the best of my knowledge." EX G at 242. Frasier believed that "the project team [had] competing interests that [were] not allowing for rational decision making and synergy between the owner, architect, and contractor." EX G at 37. Frasier understood that Kanj might have been skeptical of Big D's use of PCOs based on the reputation of John Stilfox. From his interactions with John Stilfox, Frasier also formed the opinion that John was not "always ethical and honest in his dealings." EX G at 115. However, John "was not involved in the day-to-day dealings of the project." EX G at 116.

(f) Final Cost Estimation of the Project

Frasier believed that the entire construction project cost around \$8 million and the change orders amounted to about \$200,000. EX G at 109. However, on cross-examination, Frasier admitted that it might also have been plausible that the initial project award was \$7,568,486, the cost reduction was \$141,024, and the completed project was slightly above \$8 million, with some part of the difference being attributed to Big D's PCO requests. EX G at 242-243.

(g) Credibility

I find Frasier's testimony very credible. Although Frasier was on opposite sides of the construction issues from Complainant, his testimony confirms the concern that Parnell had with Kanj over the construction issues and the temporal relationship between Parnell having the meeting over the construction issues and the decision to terminate Kanj's employment shortly thereafter.

Conclusions of Law

Section 507(a) of the Clean Water Act ("CWA"), 33 U.S.C. 1367(a), provides:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee . . . by reason of the fact that such employee . . . has filed, instituted, or

caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. 1367(a).

The analysis in resolving whistleblower protection cases follows the “burden-shifting” approach that was established in *McDonnell Douglas v. Green*, 411 U.S. 492 (1973). *Passaic Valley Sewerage Comm’r v. Dep’t of Labor*, 992 F.2d 474 (3rd Cir. 1993); see also *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). The court may find that a violation has occurred only if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse employment action. Therefore, to succeed at this step of the litigation, the complainant must establish the following elements of his prima facie case by a preponderance of the evidence standard:

- (1) the complainant *engaged in protected activity*, as defined by relevant statute and regulations;
- (2) the respondent had *knowledge* of the complainant engaging in the protected activity;
- (3) the respondent subjected the complainant to an *adverse employment action*; and
- (4) the complainant’s engagement in the protected activity “was a *contributing factor* in the unfavorable personnel action.”

See *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 8. (ARB Sept. 24, 2009); *Vinnett v. Mitsubishi Power Systems*, ARB No. 08-104, ALJ 2006-ERA-029 (ARC Jul. 27, 2010); see also *Clarke v. Navajo Express, Inc.*, ARB Case No. 09-114, ALJ Case No. 2009-STA-018 (quoting *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052) (emphasis added).

A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Speegle*, ARB No 06-041, slip op. at 9. Complainant can prove this element by offering either direct or indirect proof of contribution. *Id.* Direct evidence is evidence that acts as a “smoking gun” – “evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.” *Id.* (quoting *Williams*, ARB 09-092, slip op. at 5); *Id.* If direct evidence is unavailable, complainant may proceed by indirect evidence that demonstrates by a preponderance of the evidence that the respondents’ proffered reasons are merely pretext for retaliation. *Id.* (quoting *Jenkins v. U.S. E.P.A.*, ARB No 98-149, ALJ no. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003). However, if the complainant proceeds by offering indirect evidence to prove pretext, the court may infer that the protected activity contributed to the termination, but would not be compelled to do so. *Id.*

The complainant may still be defeated at the second stage of the litigation, however, if respondent can demonstrate by clear and convincing evidence that it would have taken the same adverse action, even in the absence of any protected activity or retaliatory motive. *Id.* Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Id.* (quoting *Williams*, ARB 09-092, slip op. at 5); *Speegle*, ARB No 06-041, slip op. at 16.

After examining the evidence as a whole, the undersigned concludes that Claimant has failed to demonstrate by a preponderance of the evidence that Respondent terminated him because of his protected activity.

(1) Kanj’s Prima Facie Case

(A) Protected Activity

(a) Kanj reported the contamination

Intra-corporate complaints and disclosures relating to safety and quality constitute protected activity under the environmental protection statutes, including the CWA. *See Passaic Valley Sewerage Comm’r v. Dep’t of Labor*, 992 F.2d 474, 478-80 (3rd Cir. 1993); *Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); and *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). Kanj contends that he engaged in a series of protected activity by reporting the issue of fecal coliform contamination of Viejas Creek to the Tribal Council, including the Tribal Government Manager, over the course of at least two years.

In March 2003, Kanj submitted to the Tribal Council a written request for permission to make a ten-minute presentation about the fecal coliform contamination of Viejas Creek as a result of cattle-watering activities, and to propose an enclosure around the Creek as a solution to potentially worsening contamination. TR at 332; CX 25. He also submitted a cover letter and an activity report to accompany his verbal briefing on the issue. TR at 332-333; CX 25, 26. Kanj allegedly continued to raise this issue with members of the Tribal Council repeatedly over the course of the next two years, until the new Tribal Council was elected in January 2005. After the election, Kanj claimed to have presented the issue of fecal coliform contamination to the new Tribal Council as well. TR 362-368.

In October 2004, Parnell assumed the role of Tribal Government Manager. TR at 887. In this role, Parnell would have been present at the Tribal Council meetings where Kanj continued to report on the contamination of Viejas Creek. Parnell disputed Kanj’s claim, arguing that reports about fecal coliform contamination would not have been consistent with the types of reports that would typically be presented verbally to the Tribal Council. TR at 956. And according to Graft, a prior Tribal Government Manager, Tribal Council members likely would not be able to digest information from reports alone, unless they were accompanied by a verbal or multimedia presentation, because of the sheer number of reports that Tribal Council members were charged with reading. Virginia Christman, a Tribal Council member, separately corroborated this account in her deposition testimony by confirming that she indeed could not recall Kanj’s presentation on the fecal coliform contamination. EX D at 38.

However, McDermott, Kanj's subordinate and fellow presenter, confirmed that he was with Kanj at the time when he made his presentation to the Tribal Council. TR at 504. Pico, the Chairman of the Tribal Council, also confirmed in his deposition testimony that Kanj reported the fecal coliform contamination findings to the Tribal Council. EX F at 91. Given the uncertainty among Tribal Council members regarding how and when they learned about the fecal coliform contamination, the Court credits Kanj's testimony that he did indeed make verbal presentations about the contamination issue. The Court arrives at this determination based on the consistency between Kanj's and McDermott's testimonies, Pico's corroboration, and trial exhibits (the Request for Agenda item and the Tribal Council Report cover sheet) evidencing Kanj's attempt to present the issue at the Tribal Council meeting.

(b) Kanj's activities may have fallen within his job duties

In *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, the court held that employees alleging that performance of their normal job responsibilities constitutes protected activity must overcome the presumption that they are merely acting in accordance with their employment obligations to put their employers on notice. *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1260-61. Without evidence that an employee expressed any concerns to his supervisors other than those typically raised as part of the employee's job, the court cannot find an employer to have been placed on notice. *Id.* The court decided *Martin-Baker* strictly within the purview of the False Claims Act, which imposes liability on those alleging fraudulent monetary claims against the U.S. government. *Id.* The undersigned finds no precedent applying this holding to the interpretation of environmental protection statutes and as invoked against a non-federal government employer.

If the undersigned were to apply the *Martin-Baker* ruling here, the Court could find that Kanj's reporting activities fell within the Tribal Council's and Kanj's reasonable expectations of his job duties. As the Director of Public Works, Kanj was responsible for supervising the construction of public works projects, including "water, sewer, roads, building" and all other "construction that has anything to do with serving the public." TR at 235-36. The job description for the Public Works Director position listed "familiar[ity] with water, wastewater, and other utility services" as a job requirement. TR at 667-68; CX 16. When Kanj applied for the job, he tailored his resume to draw emphasis to his water monitoring experience, evincing some awareness that the job would require some degree of water monitoring activity. TR at 666. In fact, as part of his job responsibilities, he did oversee staff tasked with the responsibility of monitoring water quality on the Reservation. TR at 660. If his staff failed to monitor water quality, he would have the authority to replace him or her with another employee. TR at 660. These facts suggest to the Court that Kanj had direct supervision over the water monitoring process. That the contaminated lakes in question did not exist at the time of his hiring would not be determinative for the Tribal Council could have reasonably expected Kanj to have assumed the responsibility for monitoring that body of water, as he would all the other bodies of water on the Reservation.

Kanj explained that McDermott, the Public Works Superintendent and Kanj's supervisee, was the only employee certified to authenticate water reports before the California Department of Health and Human Services and the federal Environmental Protection Agency. See Complainant's Post-Trial Brief at 5-7. However, the Court finds no evidence that certification was required to report on water quality before the Tribal Council. See TR at 508. And while McDermott was responsible for performing water quality testing and would present his findings to the Tribal Council, the evidentiary record is also silent on the issue of whether Kanj presenting that same information before the Tribal Council would have been seen as a significant departure from his typical job responsibilities. See TR at 505-06. As implied from Graft's deposition testimony, Kanj regularly made presentations before the Tribal Council regarding his progress on projects. EX C at 32-35. Water monitoring might not have been one of Kanj's construction projects, but it appeared to have been an established part of his job responsibilities, as understood by all parties. Therefore, the Court believes that the Tribal Council could have reasonably expected Kanj to present his findings on contamination of Viejas Creek.

However, the scope of Kanj's job duties is ultimately not a determinative issue with respect to the Court's analysis of this claim, and accordingly, I decline to restrict whistleblower protection to individuals such as Kanj on the basis that he was only doing his job. Thus, I find that Complainant did engage in protected activity within the meaning of the Act.

(B) Knowledge

For the knowledge element to be satisfied, someone in a position to affect the complainant's employment must have known of the protected activity before the adverse action was taken. *Shirani v. Comed/Exelon Corp.*, ARB No. 03-100, ALJ No. 2002-ERA-28 slip op. at 9-10 (ARB Sept. 30, 2005). Reasonable notice given is sufficient to satisfy this knowledge requirement. See *id.* As explained above, Kanj presented this information repeatedly throughout the course of two years both in written findings and in verbal presentations. Thus, I find that the members of the Tribal Council as well as Parnell did have knowledge of the issue.

(C) Adverse Employment Action

The parties do not dispute that Kanj's employment with the Tribal Government was terminated effective June 23, 2005, which undoubtedly qualifies as an adverse employment action under the CWA. Kanj further alleged that he was denied performance evaluations and salary increases, which were tied to the results of his performance evaluations. TR at 262-65, 360. The respondent acknowledged that Kanj did not receive any performance evaluations or salary increases following his last salary increase on July 15, 2003. TR at 343-45; CX 105.

(a) Kanj has failed to prove hostile work environment

In *Burlington Industries v. Ellerth*, the Court held that an "employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate

or successively higher authority over employee.” *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). Hostile work environment differs from a discrete adverse employment action in that the former “affects the employee’s psyche first, and his and his earning power or prospects only secondarily.” *Sasse v. Office of the U.S. Attorney*, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004). “To prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive.” *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). The harassment complained of must have been serious enough to have “detrimentally affected a reasonable person and did detrimentally affect the complainant.” *Id.*

Here, it seems unlikely that the harassment Kanj claimed he suffered would qualify as creating a hostile work environment: Hyde was not employed by the Tribal government and, in his personal interactions with Kanj, was not acting in any official capacity. *See* EX A 28-30. Moreover, Hyde’s harassment appeared to have been limited to yelling, berating, and compelling Kanj not to appear at the General Council meetings because he wanted to attend. TR at 351-52. Kanj claimed that Hyde’s influence over his career was extensive, given that several members of the Tribal Council were related to Hyde and, as a coalition, could maintain a controlling voting bloc on all the activities of the Tribal Council, including presumably disciplinary and termination actions against him. TR at 353. However, Kanj failed to identify in his testimony specific facts that would give rise to an inference of Hyde’s extensive influence beyond mere speculation. Therefore, the Court believes that Hyde’s harassment of Kanj does not constitute adverse employment action. However, even if it were to constitute adverse action, it would not be determinative of this case.

(D) Contributing Factor

(a) Retaliatory Motive

A complainant may prove that the respondent’s true reasons for imposing an adverse employment action are retaliation by either direct or circumstantial evidence. *Clarke*, ARB No. 09-114, ALJ No. 2009-STA-018. Circumstantial factors that the court considers in finding contribution includes temporal proximity or “closeness in time” between the employer forming his retaliatory motive and the employer imposing the adverse action, and additional proof when needed to establish the existence of employer’s retaliatory motive. *Id.*

Here, the undersigned finds Kanj has failed to establish his whistle-blowing activities as a contributing factor to the adverse employment action that he suffered. Kanj presented his discovery of the fecal coliform contamination to the Tribal Council at their meeting scheduled for March 11, 2003, as evidenced by Exhibit 25, a form requesting an additional ten-minute allotment to discuss “the staff samp[ling] the storm water in the dam structures.” TR at 332; CX 25. According to Kanj’s testimony, the Tribal Council was receptive to his solution of fencing in

the Creek but directed him to make a second presentation, this time for Hyde, a Tribal elder. TR at 269-70, 353.

After giving this second presentation at Hyde's home, Kanj alleged that Hyde reacted very negatively, berating him and telling him to leave his house. TR at 333. According to McDermott, "Hyde had considerable influence on the Tribe and its actions." TR at 541. Presumably, Kanj believed the same and thought that Hyde's treatment of him precipitated the adverse employment action. Hyde admitted to asking Kanj to leave his house on that particular occasion, but only because he believed Kanj was saying disrespectful things toward him. EX A at 39-40. Moreover, Hyde acknowledged his familial relations with some Tribal Council members but disputed that his familial relations gave him special influence over tribal affairs. EX A at 35. McDermott, who also attended this second presentation, said he had the impression that Hyde got upset at Kanj's insinuation of Hyde being a liar. TR at 518-21. McDermott added that he thought "it was inappropriate for [Kanj] to not leave when he was asked the first time." Based on these testimonies, the Court finds that Hyde's dislike for Kanj was likely the result of personality conflicts that became apparent during, but were not the result of, Kanj's presentation of the fecal coliform contamination.

(b) Denial of Performance Evaluations

Moreover, even if the Court were to find that Hyde both developed retaliatory animus against Kanj on the basis of his whistle-blowing activities and leveraged his relationships with Tribal Council members to impose adverse action on Kanj, the lack of temporal proximity between the formation of the retaliatory animus and the imposition of the adverse action would cut against a finding that the contribution element has been satisfied.

Kanj allegedly complained about the fecal coliform contamination over the course of two years, starting from his March 11, 2003 presentation before the Tribal Council through the day of his termination on June 23, 2005. *See* TR at 332, 567-68; CX 25. During this time, however, Kanj still received salary increases, as evidenced by Exhibit 105, an Employment Action Notice that reflected Kanj's salary increase from \$4,880 biweekly to \$5,368 biweekly, effective July 15, 2003, approximately four months after he began his whistle-blowing activities. TR at 343-45; CX 105. In addition, Barrett, then vice-Chairman of the Tribal Council, also renewed Kanj's employment contract in July of 2003, instead of allowing it to expire. TR at 343-45. The Court finds that Kanj's receiving a salary increase immediately after he started his whistle-blowing activities to be inconsistent with the actions of an employer motivated by retaliatory animus.

Kanj argued that, following his reporting of the fecal coliform contamination in March of 2003, he had not received any performance evaluations, which are delivered to employees annually or semiannually and serve as the basis for subsequent salary increases and promotions. TR at 262-63. He argued that he submitted performance evaluations to the Tribal Government Managers during this time, but they were denied. TR at 264-65. From his experience as an

Acting Tribal Government Manager, Kanj believed it was customary for all directors to receive performance evaluations. TR at 262-63. However, Parnell, the Tribal Government Manager starting in October of 2004, testified that she did not provide Kanj a performance evaluation because she felt that, given the short amount of time she had to work with him, she felt she could not provide a very well-informed evaluation. TR at 918. Moreover, Kanj was not entitled to receive another salary increase because his salary, as measured against Exhibit 54, the salary grade structure for the Tribe in 2004, was not yet at the minimum level to warrant an increase. TR at 918; CX at 54. Furthermore, had Kanj not been terminated, Parnell would have provided him a performance evaluation recommending a salary increase. TR at 918. The Court finds Parnell's excuse for failing to provide Kanj with a performance evaluation to be a credible one.

(c) Termination

On June 23, 2005, upon his return from vacation, Kanj was terminated immediately and without prior notice. TR at 567-68. Kanj asserted that the Tribal Council's retaliatory motive toward him contributed to his termination on the basis of several factual inconsistencies. First, it was customary practice in the Tribe for director-level employees like Kanj, who were hired by Tribal Council resolution, to be properly terminated also by Tribal Council resolution, which Parnell was not able to provide. TR at 648. Graft, a former Tribal Government Manager, said that if the Manager were "required to do a resolution to hire an employee, typically [she] would be required to do a resolution . . . to terminate that employee." EX C at 55. Second, Kanj asserted that Parnell and the rest of the Tribal Council had knowledge of him being on vacation for two weeks to visit his ailing parents only after his request for a four-week vacation had been denied. See TR at 379-80, 385, 554. Kanj appeared to imply that, if not for its retaliatory motive, the Tribal Council would have terminated him with advance notice so that he could have continued to stay on vacation instead of cutting his vacation short. Third, Kanj's access to his work email account was terminated while he was on vacation, which had never happened before. TR at 563-66. And fourth, Parnell claimed not to have known whether he would return at the end of his vacation, despite the letter he had sent her which clearly stated that he would "be there" when needed, and would return to the office by June 23, 2005. TR at 828.

However, as Parnell explained in her testimony, she arrived at her decision to terminate Kanj upon discovering problems with Kanj's work performance while Kanj was away on vacation (to be explained in the following section). TR at 888-91. According to Barrett, Chairman of the Tribal Council, the Tribal Government Manager had the "plenary authority" to make hiring or firing decisions, even though the termination of a director-level employee without Tribal Council resolution would be unusual. TR at 596. However, there were no hard and fast rules governing this type of termination. TR at 639. Moreover, Parnell nevertheless consulted with the Tribal Council for its input regarding his termination because she did not want to risk the appearance of impropriety. TR at 913. According to Barrett, the majority of the Tribal Council supported Parnell's decision to terminate Kanj. TR at 616.

Parnell claimed to have terminated Kanj because of a sum total of various reasons—among them, problems with his processing of change orders; his damaging the Tribe’s relationship with the contractor; problems with his management of the senior program; that his projects were over-budget; his inability to comprehend or explain the water billing multiplier formula; and other miscellaneous reasons. TR at 913. She alleged that Kanj’s reporting of the water pollution and Hyde’s alleged dislike for him were not factors at all her in decision to terminate him. TR at 915, 919. Parnell claimed that, for a period of time, she was unsure whether Kanj had any plans to return from his vacation. TR at 908. Catherine, Jamal’s assistant, allegedly also told Parnell that she was unsure whether Kanj would return. TR at 910. Parnell terminated Kanj’s email access while he was away because she wanted to ensure the staff did not receive conflicting work instructions by email, and because she worried that Kanj might work while on vacation, which could prompt a future wage claim against the Tribal government. TR at 908-09.

Parnell chose not to inform Kanj that he had been terminated while he was on vacation for several reasons: the decision to terminate him was made on June 21, 2005, which was only a few days before Kanj was scheduled to return; Parnell found it rude to conduct terminations impersonally (i.e. by phone, letter, or email); and Parnell might have known at some point that the purpose of Kanj’s vacation was to visit his parents, but she did not know that Kanj’s parents were recuperating from surgery. TR at 960-61.

In weighing Kanj’s and Parnell’s conflicting testimonies, and considering the fact that Kanj’s termination happened more than two years after he started complaining about the fecal coliform contamination, the Court concludes that Kanj’s termination likely was not the result of any retaliatory motive on the part of his employers.

(2) Claimant has Failed to Prove By A Preponderance of the Evidence that Respondent’s Reasons for Terminating His Employment Were Pretextual.

The Viejas tribal government based its termination of Kanj on two reasons: one, Kanj’s allegedly poor work performance, particularly in reference to his supervision of the gymnasium construction project; and two, Kanj’s conflict with the Tribal Council over vacation. TR at 584, 642-43. The Court finds the reasons Viejas cited for Kanj’s termination to be adequate. The Court believes that, while either of these reasons might not have been determinative, the sum total of these reasons provides adequate grounds for Kanj’s termination.

(a) Kanj Performed Poorly At Work

In 2004, the Tribe started to discuss the construction of a gymnasium recreation center, expected to commence by the end of the year. In September of 2004, the Tribe awarded the project. TR 380-81. During the bid selection process, Kanj claimed to have been warned about Bernhardt Construction after its last construction project with the Viejas Tribe—the “Dream Catcher Room” venue in the Reservation’s casino—became fraught with structural deficiencies. TR at 382-83.

During the bid selection process, Sach Christman, Hyde's son and father of Tribal councilman John Christman, advocated for Big D Construction to receive the construction contract. TR at 548-51. When the Tribe was in the process of awarding the construction contract to Big D Construction, Tribal member Alan Barrett learned that John Stilfox, a former manager of Bernhardt Construction, would serve as the current senior project manager for Big D Construction on its engagement with the Tribe. TR at 384. Barrett warned Kanj to be cautious of Stilfox and "his change order business." TR at 384. Frasier confirmed that his impression of Stilfox was that he appeared to be a person of questionable ethics; however, Stilfox "was not involved in the day-to-day dealings of the project." EX G at 116.

Kanj recognized that change orders were a necessary part of the construction process, as new conditions or time and cost estimations may arise that warrant the initial contract awarded to be revised. TR at 390. However, Kanj also believed that change orders presented opportunities for contractors to renege on the initial terms of their agreement to extract higher payments. TR at 390. Kanj assumed a defensive position regarding change orders, expecting to review change orders with heightened scrutiny so that they would not be easily granted. TR at 389. Kanj believed that his method of reviewing change orders was not halting construction. TR at 529-30. He believed that he disputed only those change orders that would impose costs. Moreover, if the change orders were disputed and could not be settled immediately, then they could be "settled at the end of construction." TR at 529-30. In his testimony, Jones disagreed, noting that there were occasions where Proposed Change Orders (PCOs) had to be decided during the construction process, Big D had stated expressly that it required approval of certain PCOs before it could move forward, and Kanj could have approved some of those PCOs first, even if they were not yet payable at the time of approval. TR at 433-36.

In his deposition testimony, Frasier, as Big D Construction's project manager on this engagement, noted that Kanj flatly rejected or failed to approve many of the PCOs. EX G at 97. Some important PCOs that Kanj rejected included Big D's request for an additional \$30,000 to conduct "design discovery work" (to measure the dimensions of a concrete slab, which presumably was hidden underground, before demolishing it); for additional funds to correct a design error that prevented the mechanical subcontractor from completing his work on the HVAC system and the intake louvers located in the men's room; and for an additional \$5,828 to use bithutane instead of felt in the roof underlayment of the gymnasium facility. EX G at 103-05, 129-31, 139-45. Jones testified to the same effect, noting that "there were multiple design issues because they were trying to build off... an incomplete and inaccurate set of [design] documents." TR at 401.

The only change order of significance that Kanj remembered challenging was the additional expenses that Big D Construction charged the Tribe for demolition of the aforementioned concrete slab. TR at 533-34. Kanj believed that the change order respecting the gymnasium roof underlayment had "nothing to do with the completion of the project." TR at

533-34. Moreover, he never received any formal write-up identifying potential change orders as the cause for these delays. TR at 537.

With respect to the Requests for Information, Kanj believed that his responses to them were not delayed and never became an issue. TR at 535. However, Frasier found that Kanj's inability or unwillingness to respond to construction and design questions "resulted in costs" and delays. EX G at 29. In fact, there was a point in the construction process when, according to Frasier, "more than 100 RFIs" addressing design flaws and incorrectly-specified materials were outstanding. EX G at 39. Moreover, time extensions were not granted and sometimes, not even responded to. EX G at 38.

Kanj believed that he and Benjamin Frasier, Big D Construction's representative on the project, shared a "professional relationship." TR at 536. Kanj acknowledged that "at times [they] did have conflicts, but [they were] manageable conflict[s]." TR at 536. Kanj maintained that he had not been accused of being excessively rigid over the course of this process. TR at 537. Kanj believed that only the architect and the construction company had a difficult working relationship. TR at 538. Jones disagreed, noting that there existed a "combative relationship" between all three parties. TR at 458. He found "the relationship between the three entities [to be]... like three kids fighting on the playground. Everybody was fighting but nobody was listening." TR at 456.

Frasier also noted many problems underlying his working relationship with Kanj. Frasier had the impression that Kanj was either ignorant of or disinterested in learning about the details of the project. EX G at 37. Frasier had to explain basic items to Kanj multiple times before he would appear to understand. EX G at 164. Kanj's attitude regarding PCOs were "just no, no, no" – unlike other owner representatives who would customarily provide justifications for rejecting PCOs, Kanj would not offer any. EX G at 165-67. Frasier also noted that they "were at a stopping point with a lot of issues." EX G at 240-41. By May of 2005, it was already apparent to Frasier that the project would not be able to meet its expected completion date of October 2005 and, in fact, its actual completion date was delayed to December 2005. EX G at 28. Kanj admitted that eventually there was a twenty-three day delay, but eighteen of those days were "due to weather conditions because [of] . . . unusual heavy rain in San Diego." TR at 539. Jones testified that, as of June 6, 2005, the project was already "one month behind schedule" and his delay in granting the RFIs and PCOs were delaying the project further. TR at 425. Jones noted that these disagreements were a standard part of the process, but that Kanj should not have allowed them to escalate to the point of stalling construction. TR at 468.

During this time, Kanj allegedly advised Frasier to "go get your attorney and file a claim" if he disagreed with his handling of the proposed change orders. EX G at 241. Frasier believed that Kanj's obstinate position and litigious response to change orders were exacerbating the relationship between the owner, the architect, and the contractor and subcontractors. EX G at 37. To resolve their issues, Frasier reached out to Parnell instead of hiring an attorney. EX G at 58.

Frasier, Parnell, and other representatives of Viejas held a special afternoon meeting on June 6, 2005 to discuss these concerns. EX G at 59.

Parnell confirmed discussing with the contractor about this contentious working relationship: that “change orders were not being considered fairly” and that Kanj “was difficult to work with.” TR at 904. While Kanj was away on vacation, Parnell investigated the merits of the contractor’s claims and discovered several reasons that could serve as the basis for Kanj’s termination: (1) he was creating a reputation that Viejas Tribe was difficult to work with; (2) the Tribal government was having a difficult time attracting contractors for other projects because of Kanj’s notorious inflexibility; (3) the construction project had gone over-budget; and (4) she saw a deterioration in his work product. TR at 911-912. After the special meeting, Parnell had to liaise between the Tribe and the contractor on the project and had to reengineer its value. TR at 905, 948-52.

In addition, Parnell noted that the Tribe was also engaged in a senior landscaping program (“a program where [the Tribe] would have Public Works employees work with seniors to landscape the area around their homes) in which Kanj’s participation was very important (“It was an important program in that the... seniors and elders are very revered within Indian communities across the U.S.”). TR at 892. Parnell claimed that the senior landscaping program also had problems under Kanj’s leadership, particularly the perceived lack of commitment on the part of Donald McDermott, the Public Works Superintendent and Kanj’s supervisee. TR at 907.

Furthermore, Parnell was concerned that Kanj was becoming disengaged from his job, evidenced also by his apparent ignorance of how the water billing formula operated—a water and sewage billing formula used to calculate profit margins and tax expenses. TR at 888-89, 1015-16. Between February 22, 2005 and April 1, 2005, Parnell and Kanj had several discussions about his work performance, including his inability to explain the water the billing formula as well as his failure to approve several pending change orders. TR at 957. Kanj believed that the water billing formula was made into an issue only after he filed his claim against the Tribe. TR at 1021. According to Kanj, the water billing formula would affect only the engineer (Kanj himself), the accountant, and the lawyer. TR at 1019. The accountant and the lawyer had no operational expertise to understand the technicalities of the water billing formula; furthermore, their failure to comprehend the water billing formula would not affect the actual operations of the billing system. TR at 1020-1021.

(b) Kanj Indicated a Lack of Commitment in His Request for Vacation Leave

In April of 2005, Kanj submitted to Parnell his vacation request for a thirty-day leave, the purpose of which was to visit his mother, who was expecting to undergo surgery in mid-2005, and his father, who himself had undergone surgery in January of 2005. TR at 379-80. By that time, Kanj had already accrued enough vacation days to take a thirty-day vacation. TR at 380. He was informed at the time of his hiring that Viejas’ vacation policy of at most ten consecutive

vacation days was relaxed and enacted merely to prevent people from abusing vacation time. TR at 385, 692.

In late April of 2005, before she submitted Kanj's vacation request to the Tribal Council for approval, Parnell had a discussion with Kanj about the reasons why she thought a month-long vacation request was inappropriate: (1) it circumvented the terms of his employment; and (2) the timing was inopportune because Kanj was representing the Tribe in supervising the construction of the gymnasium project, which was a high priority for the Tribe. TR at 892-93. Moreover, the Tribe was also engaged in a senior landscaping project in which Kanj's supervision was also very important. TR at 892.

Kanj believed that his vacation request was still valid because he believed the areas of the gymnasium construction project where his involvement would have been critical was already near completion. TR at 386. Moreover, the Tribe already had several personnel in its employment to assist in the management of the project: an inspector and an architect, and Donald McDermott to run the owner-contractor meetings with Big D Construction in the event of his absence. TR at 386-88.

The Tribal Council rejected Kanj's vacation request. TR at 894. Parnell offered Kanj a three week vacation as a compromise solution. TR at 894. Kanj allegedly responded by offering Parnell an ultimatum: to get him three weeks or else "talk to Council about... a severance agreement in lieu of the three weeks." TR at 894. Parnell was surprised that he would react by threatening severance; she had a "complete lack of confidence" that he was committed to performing at his job. TR at 895-96. Kanj claimed that he did not have any intention of leaving the Tribal government and had used the word "splitting" rather than "severance" in his discussions with Parnell; he intended that statement to be a negotiation tactic, not as a request to sever his ties with the Tribe. TR at 734.

During this time, Kanj had also submitted a separate request for vacation under the Family and Medical Leave Act. TR at 542. The Tribe subsequently rejected his FMLA leave request; however, there was a period of time while he was awaiting approval when he "didn't know exactly when [he] would be back." TR at 556-58, 542. Parnell explained that while Kanj was on vacation, there was a period of time in which Parnell was unsure whether Kanj would return. TR at 908. Catherine, Kanj's assistant, also told Parnell that she was unsure whether Kanj would return by June 23, 2005. TR at 910. However, Kanj believed that the confusion resulted from statements he made while he was waiting for approval of his FMLA leave request, when he indicated that he was unsure "when" he would return and not "if" he would ever return. TR at 910, 542.

Following her special afternoon June 6, 2005 meeting with the contractor, Parnell arrived at several reasons for Kanj's termination: (1) he proposed severance; (2) she detected a lack of dedication on his part, as evidenced by his leaving in the middle of the gymnasium project and

near the close of the water reclamation retrofit project, both of which were under his leadership; and (3) she lost confidence that he was still committed to the job. TR at 911-12.

The undersigned finds that Viejas' two overarching reasons for terminating Kanj—Kanj's allegedly poor work performance, specifically in relation to his supervision of the gymnasium construction project, and Kanj's apparent lack of commitment, as evidenced in the manner and timing in which he requested his vacation leave—are sufficiently grounded in the evidence and adequate bases for Kanj's termination. The Court believes that, while Hyde might have felt strongly about allowing the cattle to continue accessing the Creek in spite of the fecal coliform contamination, the Tribal Council simply did not see the resolution of this issue as being a high priority. The Court finds that, even if Kanj had not participated in the whistle-blowing activities, the Tribal Council would still have reason to terminate him and would have done so.

ORDER

Having found that Respondent did not violate the employee protection provision of the Clean Water Act, Complainant's complaint against Respondent is hereby **DISMISSED** with prejudice.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.