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Attorneys for the Shoshone-Bannock Tribes

UNITED STATES OF AMERICA,)	
)	Case No. CR-08-96-E-BLW
Plaintiff,)	
v.)	MEMORANDUM IN SUPPORT
)	OF MOTION TO QUASH
ALFRED WAHTOMY and)	SUBPOENAS
MARTIN AUCK,)	
)	
Defendant.)	
_____)	

INTRODUCTION

On September 30, 2008, counsel for Defendant Wahtomy caused subpoenas duces tecum to be issued to Tom Katsilometes, Shoshone-Bannock Tribal Court Administrator; Rosephine Coby, Shoshone-Bannock Tribal Court Associate Judge; Leo Ariwite, Shoshone-Bannock Tribal Court Chief Judge; and Bill Bacon, Shoshone-Bannock Tribes General Counsel. The subpoenas directed the four Tribal employees to appear and testify in this Court on October 20, 2008 at 9:00 a.m. and to bring with them the following documents:

Any and all rules of procedure regarding the hiring of tribal judges, including the required qualifications for such potential judges. Also, the actual qualifications for Judge Rosephine Coby.

Copies of the above-referenced subpoenas issued on September 30, 2008 are attached hereto as **Exhibit A**. The subpoenas issued to Tom Katsilometes, Rosephine Coby, Leo Ariwite, and Bill Bacon (all Tribal employees) should be quashed for two principal

reasons. First, the Shoshone-Bannock Tribes have not waived sovereign immunity relating to the Tribal documents demanded in the subpoenas. Second, the subpoenas command the Tribal employees and officials to violate the Shoshone-Bannock Tribes Privacy Act and records disclosure policies, subjecting them to disciplinary action and potential criminal liability in Tribal Court.

ARGUMENT

A. The Shoshone-Bannock Tribes have not waived sovereign immunity relating to the Tribal Records.

The Ninth Circuit has previously addressed whether an Indian tribe is required to produce sensitive Tribal documents pertaining to its members pursuant to subpoena from a federal district court. In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), the Ninth Circuit reviewed an Indian Defendant's claim that the federal district court erred in granting the tribe's motion to quash a subpoena of tribal documents related to the Indian victim's alleged alcohol and drug problems. *Id.* at 1319. In addressing this issue the court stated: "It is clear that Indian tribes' immunity from suit remains intact 'absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.'" *Id.* (quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992)); *see also Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002) (holding that the tribe was possessed of sovereign immunity which barred the county's execution of a warrant to search tribal employee records on the reservation).

In concluding that the Quinalt Tribe "was possessed of tribal immunity at the time the subpoena was served, unless the immunity had been waived," the court stated: "By making individual Indians subject to federal prosecution for certain crimes,

Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced.” Id.

The privacy interests of Tribal members implicated by the subpoenaed documents in this case are high. Counsel for the Defendant has subpoenaed two sitting Shoshone-Bannock Tribal Court judges (including the Tribal Court Chief Judge) to appear in Federal District Court on October 20, 2008 and to bring with them internal Tribal personnel documents for a judge who is currently in office. In addition, the subpoenas command the Tribal Court Administrator and the General Counsel for the Tribes to appear in Federal District Court and produce Tribal documents contrary to established Tribal law and policy. The subpoena commands Tribal employees to produce “*Any and all rules of procedure regarding the hiring of tribal judges, including the required qualifications for such potential judges. Also, the actual qualifications for Judge Rosephine Coby.*” The Ninth Circuit in James recognized a tribal government’s interest in protecting from disclosure tribal records based on the “increased privacy interest on the part of tribal members in documents which detail emotional, mental, or physical problems of tribal members.” Id. at 1320. The Shoshone-Bannock Tribes’ interest in protecting the privacy of its members also applies to the records subpoenaed in this case, which contain details of confidential internal Tribal personnel records for a sitting Tribal Court judge.

Because the Shoshone-Bannock Tribes have not expressly waived sovereign immunity with respect to the Tribal records that Tom Katsilometes, Rosephine Coby, Leo Ariwite, and Bill Bacon were ordered to produce, the subpoenas must be quashed.

B. The Subpoenas order Tribal employees to violate Shoshone-Bannock Tribal laws relating to the unauthorized disclosure of Tribal documents and records.

The Shoshone-Bannock Tribal Privacy Act provides that Tribal records may not be disclosed unless authorized by the Fort Hall Business Council in writing. The Act also provides:

Any person who shall knowingly and willfully disclose, alter or destroy tribal records without proper authorization in writing from the Fort Hall Business Council shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to jail for a period not to exceed six months and/or a fine not to exceed \$500.00 or both the jail sentence and fine. Each disclosure of records, alteration or destruction, shall constitute a separate offense.

Tribal Privacy Act Ordinance, attached hereto as **Exhibit B**. Accordingly, by complying with the subpoena to produce sensitive Tribal Court records regarding individuals who have not consented to their release, Tom Katsilometes, Rosephine Coby, Leo Ariwite, and Bill Bacon would subject themselves to disciplinary action and potential criminal liability in Tribal Court. Compliance with the subpoenas in this case would clearly be unreasonable and oppressive. Fed. R. Crim. P. 17(c)(2). Compliance with the subpoenas is also unreasonable because the subpoenas seek confidential and protected Tribal documents and records. Fed. R. Civ. P. 45(c)(3)(A)(iii).

CONCLUSION

For all of the above reasons, the Court should grant the motion to quash the subpoena in this case.

Respectfully submitted this 17th day of October, 2008.

/s/Paul C. EchoHawk
PAUL C. ECHOHAWK
Special Tribal Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michelle Mallard
Assistant U.S. Attorney
801 Sherman Ste. 192
Pocatello, Idaho 83201
Telephone: (208) 478-4166
Facsimile: (208) 478-4175
Email: michelle.mallard@usdoj.gov

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)
- ☒ ECF Notice

Nicolas Vieth
FEDERAL DEFENDER'S OFFICE
757 N. 7th Avenu.
Pocatello, Idaho 83201
Telephone: (208) 478-4026
Facsimile: (208) 478-6698
Email: nick_vieth@fd.org

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)
- ☒ ECF Notice

Kelly Kumm
1305 E. Center Street
Pocatello, Idaho 83201
Telephone: (208) 232-4051
Facsimile: (208) 232-2880
Email: kummlaw@msm.com

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)
- ☒ ECF Notice

/s/ Paul C. EchoHawk
for ECHOHAWK LAW OFFICES

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EXHIBIT A

United States District Court

District of Idaho

UNITED STATES OF AMERICA

v.

SUBPOENA DUCES
TECUM IN A CRIMINAL
CASE

ALFRED WAHTOMY,

CASE NO. CR-08-96-E-BLW

Defendant.

TO: Tom Katsilometes
Tribal Court Administrator
478-4065

Approved for Service
Tribal Judge *[Signature]* Date *10/14/08*
Approved: _____
Usual _____
Contact _____

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	UNITED STATES DISTRICT COURT DISTRICT OF IDAHO 801 East Sherman Pocatello, ID 83201	COURTROOM
		JUDGE B. LYNN WINMILL
		DATE AND TIME
		October 20, 2008, at 9:00 a.m. ***SEE BELOW***

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any and all rules of procedure regarding the hiring of tribal judges, including the required qualifications for such potential judges. Also, the actual qualifications for Judge Rosephine Coby.

You may send records at least two weeks prior to hearing in lieu of appearance.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
Cameron S. Burke	September 30, 2008
(BY) DEPUTY CLERK	
<i>[Signature]</i>	

ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER

Nicolas V. Vieth, Counsel for Defendant
Federal Defenders of Idaho
757 N. 7th Ave
Pocatello, Idaho 83201
Phone: (208) 478-2046 (please call collect)

United States District Court

District of Idaho

UNITED STATES OF AMERICA

v.

SUBPOENA DUCES
TECUM IN A CRIMINAL
CASE

ALFRED WAHTOMY,

CASE NO. CR-08-96-E-BLW

Defendant.

TO: Rosephine Coby
Associate Judge

Approved for Service
10/14/08
Date
Approved:
Denied
Granted

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	UNITED STATES DISTRICT COURT DISTRICT OF IDAHO 801 East Sherman Pocatello, ID 83201	COURTROOM
		JUDGE B. LYNN WINMILL
		DATE AND TIME
		October 20, 2008, at 9:00 a.m. ***SEE BELOW***

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You may send records at least two weeks prior to hearing in lieu of appearance.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
Cameron S. Burke	September 30, 2008
(BY) DEPUTY CLERK	
18/ Traci L Harbart	
ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER	

Nicolas V. Vieth, Counsel for Defendant
Federal Defenders of Idaho
757 N. 7th Ave
Pocatello, Idaho 83201
Phone: (208) 478-2046 (please call collect)

United States District Court

District of Idaho

UNITED STATES OF AMERICA

v.

SUBPOENA DUCES
TECUM IN A CRIMINAL
CASE

ALFRED WAHTOMY,

CASE NO. CR-08-96-E-BLW

Defendant.

Approved for Service
10/14/08
Date
Approved
Denied
Granted

TO: Leo Ariwite
Chief Judge
478-4062

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	UNITED STATES DISTRICT COURT DISTRICT OF IDAHO 801 East Sherman Pocatello, ID 83201	COURTROOM
		JUDGE B. LYNN WINMILL
		DATE AND TIME
		October 20, 2008, at 9:00 a.m. ***SEE BELOW***

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

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You may send records at least two weeks prior to hearing in lieu of appearance.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
Cameron S. Burke	September 30, 2008
(BY) DEPUTY CLERK	
15/ Traci L Harbart	
ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER	

Nicolas V. Vieth, Counsel for Defendant
Federal Defenders of Idaho
757 N. 7th Ave
Pocatello, Idaho 83201
Phone: (208) 478-2046 (please call collect)

United States District Court

District of Idaho

UNITED STATES OF AMERICA

v.

SUBPOENA DUCES
TECUM IN A CRIMINAL
CASE

ALFRED WAHTOMY,

CASE NO. CR-08-96-E-BLW

Defendant.

TO: Bill Bacon
Tribal Attorney
478-3822

[Signature]
Approved for Service
10/14/08
Date
Approved: _____
Denied: _____
Created: _____

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	UNITED STATES DISTRICT COURT DISTRICT OF IDAHO 801 East Sherman Pocatello, ID 83201	COURTROOM
		JUDGE B. LYNN WINMILL
		DATE AND TIME
		October 20, 2008, at 9:00 a.m. ***SEE BELOW***

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any and all rules of procedure regarding the hiring of tribal judges, including the required qualifications for such potential judges. Also, the actual qualifications for Judge Rosephine Coby.

You may send records at least two weeks prior to hearing in lieu of appearance.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
Cameron S. Burke	September 30, 2008
(BY) DEPUTY CLERK	
<i>[Signature]</i>	
ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER	

Nicolas V. Vieth, Counsel for Defendant
Federal Defenders of Idaho
757 N. 7th Ave
Pocatello, Idaho 83201
Phone: (208) 478-2046 (please call collect)

EXHIBIT B

ORDINANCE

WHEREAS, the Shoshone-Bannock Tribes deem it in the best interests of the Shoshone-Bannock Tribes to enact a Privacy Act for the protection and preservation of tribal records, and

WHEREAS, access to the records maintained in tribal offices should be limited to persons authorized by the Fort Hall Business Council, and

WHEREAS, all employees handling tribal records should at all times protect the integrity, security and confidentiality of tribal records, and

WHEREAS, no person shall alter or destroy tribal records unless authorized to do so by the Fort Hall Business Council in writing.

WHEREAS, the Law and Order Code of the Shoshone-Bannock Tribes should be amended to include Section 75, imposing a criminal penalty for knowingly and willfully disclosing, altering or destroying tribal records without authority.

NOW, THEREFORE, BE IT ENACTED BY THE BUSINESS COUNCIL OF THE SHOSHONE-BANNOCK TRIBES, that the "Shoshone-Bannock Tribal Privacy Act" is hereby enacted and shall read as follows:

GENERAL: Access to records maintained in tribal offices is limited to authorized persons - Such authorization must be by the Fort Hall Business Council and must be in writing.

HANDLING OF RECORDS SUBJECT TO THE ACT: All employees handling tribal records will at all times protect the integrity, security, and confidentiality of these records.

DISCLOSURE OF RECORDS: Tribal records may not be disclosed unless authorized by the Fort Hall Business Council in writing.

ALTERATION OF RECORDS: No employee may alter or destroy tribal records unless authorized by the Fort Hall Business Council in writing.

Page Two--
Tribal Privacy Act Ordinance

RESPONSIBILITY: A criminal penalty will be imposed for knowingly and willfully disclosing, altering or destroying tribal records without proper authority amounting to a \$500.00 fine and/or six month jail sentence or both. Each disclosure of records, alteration or destruction, shall constitute a separate offense.

BE IT FURTHER ENACTED BY THE BUSINESS COUNCIL OF THE SHOSHONE-BANNOCK TRIBES, that Chapter V, "Code of Offenses", Law and Order Code of the Shoshone-Bannock Tribe of Indians be and the same is hereby amended to include Section 75 to read as follows:

Any person who shall knowingly and willfully disclose, alter or destroy tribal records without proper authorization in writing from the Fort Hall Business Council shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to jail for a period not to exceed six months and/or a fine not to exceed \$500.00 or both the jail sentence and the fine. Each disclosure of records, alteration or destruction, shall constitute a separate offense.

BE IT FURTHER ENACTED BY THE BUSINESS COUNCIL OF THE SHOSHONE-BANNOCK TRIBES, that the Tribal Secretary is hereby directed to post on main entry doors into tribal offices, a Privacy Act Warning, a copy of which is attached to this Ordinance and made a part hereof.

BE IT FURTHER ENACTED BY THE BUSINESS COUNCIL OF THE SHOSHONE-BANNOCK TRIBES, that the Business Council shall compose a list of authorized persons who shall have access to records maintained in tribal offices.

Authority for the foregoing Ordinance is found in the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended and under Article VI, Section 1 (i) (k) (l) of the Constitution and Bylaws of the Shoshone-Bannock Tribes of the Fort Hall Reservation, Fort Hall, Idaho.

Dated this 9th day of August, 1976.

SEAL


Lionel Boyer, Chairman
Fort Hall Business Council

CERTIFICATION

I HEREBY CERTIFY, that the foregoing Ordinance was passed while a quorum of the Business Council was present by a vote of six in favor and one ont voting on the date this bears.

Betty Taylor
Betty Taylor, Tribal Secretary
Fort Hall Business Council



SHOSHONE-BANNOCK TRIBES

PRIVACY ACT - WARNING

GENERAL:

Access to records maintained in this office is limited to authorized persons - Such authorization must be by the Fort Hall Business Council and must be in writing.

HANDLING OF RECORDS SUBJECT TO THE ACT:

All employees handling these records will at all times protect the integrity, security, and confidentiality of these records.

DISCLOSURE OF RECORDS:

These records may not be disclosed unless authorized by the Fort Hall Business Council in writing.

ALTERATION OF RECORDS:

No employee may alter or destroy these records unless authorized by the Fort Hall Business Council in writing.

RESPONSIBILITY:

A criminal penalty may be imposed for knowingly and willfully disclosing, altering or destroying these records without proper authority amounting to a \$500.00 fine and/or six month jail sentence or both. Each disclosure of records, alteration or destruction, shall constitute a separate offense.

CHAPTER V. - CODE OF OFFENSES, LAW AND ORDER CODE OF
THE SHOSHONE-BANNOCK TRIBE OF INDIANS, SEC. 75.

SHOSHONE - BANNOCK TRIBES

PRIVACY ACT - WARNING

GENERAL:

ACCESS TO RECORDS MAINTAINED IN THIS OFFICE IS LIMITED TO AUTHORIZED PERSONS - SUCH AUTHORIZATION MUST BE BY THE FORT HALL BUSINESS COUNCIL AND MUST BE IN WRITING.

HANDLING OF RECORDS SUBJECT TO THE ACT:

ALL EMPLOYEES HANDLING THESE RECORDS WILL AT ALL TIMES PROTECT THE INTEGRITY, SECURITY, AND CONFIDENTIALITY OF THESE RECORDS.

DISCLOSURE OF RECORDS:

THESE RECORDS MAY NOT BE DISCLOSED UNLESS AUTHORIZED BY THE FORT HALL BUSINESS COUNCIL IN WRITING.

ALTERATION OF RECORDS:

NO EMPLOYEE MAY ALTER OR DESTROY THESE RECORDS UNLESS AUTHORIZED BY THE FORT HALL BUSINESS COUNCIL IN WRITING.

RESPONSIBILITY:

A CRIMINAL PENALTY MAY BE IMPOSED FOR KNOWINGLY AND WILLFULLY DISCLOSING, ALTERING OR DESTROYING THESE RECORDS WITHOUT PROPER AUTHORITY AMOUNTING TO A \$500.00 FINE AND/OR SIX MONTH JAIL SENTENCE OR BOTH. EACH DISCLOSURE OF RECORDS, ALTERATION OR DESTRUCTION, SHALL CONSTITUTE A SEPARATE OFFENSE.