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Attorneys for the Shoshone-Bannock Tribes

UNITED STATES OF AMERICA, Plaintiff, v. ALFRED WAHTOMY and MARTIN AUCK, Defendant.	)	Case No. CR-08-96-E-BLW **SHOSHONE-BANNOCK TRIBES' REPLY TO DEFENDANT'S RESPONSE TO MOTION TO QUASH**

In accordance with the Court's direction at the October 20, 2008 hearing, the Shoshone-Bannock Tribes ("Tribes") submit this reply to the Defendant's Response to Shoshone-Bannock Tribes' Motion to Quash the subpoenas issued to Tribal Court Judges, Tribal Court Administrator, and the Tribes' General Counsel commanding them to produce confidential Tribal records contrary to Ninth Circuit precedent and Shoshone-Bannock Tribal law.

INTRODUCTION

United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992) is controlling. *James* holds that Indian tribal governments and officials possess sovereign immunity from non-party subpoenas unless there is a clear and unequivocal waiver of that immunity. In this case, the Tribes have not waived their sovereign immunity either expressly or through the actions of any of its officers. The Tribes' sovereign immunity extends to the four Tribal employees, who were subpoenaed in their official capacities.

Shoshone-Bannock Tribal law requires authorization from the Fort Hall Business Council for the release of the subpoenaed Tribal records, and the Council has not authorized their release in this case.

United States v. Snowden, *United States v. Velarde*, and *United States v. Juvenile Male 1* are cases from other jurisdictions that are distinguishable and should not affect the Court's application of *United States v. James* to this case. Any application of a "balancing test" to effect a waiver of the Tribes' sovereign immunity contradicts Ninth Circuit precedent and is contrary to the settled rule that waivers of tribal sovereign immunity cannot be implied, but must be express, clear, and unequivocal. Even if the balancing test were to apply (which it does not), the Tribal interests implicated sharply outweigh the interests of the Defendant in this case.

The subpoenas issued to the four high-level Tribal employees in this case should be quashed because tribal sovereign immunity applies to bar their enforcement under *United States v. James*, which is the law of the Ninth Circuit. In addition, the subpoenas are unreasonable and oppressive because they command Tribal employees to violate the Shoshone-Bannock Tribes Privacy Act, subjecting them to disciplinary action and potential criminal liability in Tribal Court.

ARGUMENT

A. The Shoshone-Bannock Tribes have not waived sovereign immunity from the four subpoenas issued to high-level Tribal officials and employees in this case.

As discussed in the Tribes' Memorandum in Support of Motion to Quash, the law of the Ninth Circuit on this issue is that an Indian tribe is not required to produce Tribal documents pertaining to its members pursuant to a non-party subpoena because of tribal sovereign immunity. *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)

(holding that the Quinalt Tribe "was possessed of tribal immunity at the time the subpoena was served, unless the immunity had been waived."). The Shoshone-Bannock Tribes' sovereign immunity applies in this case and has not been waived.

a. The Tribes' sovereign immunity extends to the four Tribal employees in this case.

Indian tribes have long been recognized as possessing common-law immunity from suit co-extensive with those enjoyed by other sovereign powers, including the United States, as a means of protecting tribal political autonomy and recognizing their sovereignty which substantially predates the United States Constitution. *See, e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *United States v. Wheeler,* 435 U.S. 313, 322-23 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983); *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989); *Rehner v. Rice,* 678 F.2d 1340, 1351 (9th Cir. 1982) (en banc), *rev'd on other grounds*, 463 U.S. 713 (1983); *see also* F. Cohen, *Handbook of Federal Indian Law* 324 (2d ed. 1982).

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), the Supreme Court explained that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." The Ninth Circuit has also recognized that "[i]t 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.'" *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) (quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992)).

Absent an affirmative textual waiver in the terms of a contractual agreement or tribal constitution, federal courts have consistently declined to find tribal consent to federal jurisdiction. *See Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (tribal bingo agreement expressly "waive[d] sovereign immunity" for actions brought to enforce or interpret contract); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (tribal council passed formal resolution expressly waiving sovereign immunity); *American Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1380 (8th Cir. 1985) (promissory note reserving "rights and remedies provided by law" in favor of lender, providing for attorney fees in the event of a collection action, and containing a conflict of laws provision did not constitute express waiver of tribe's sovereign immunity); *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) (tribal defendants did not expressly waive sovereign immunity of tribal authorities by agreeing to attorney fee clause in construction contract, consenting to partial summary judgment with respect to certain disputed sums owed under the contract, or including "sue or be sued" clause in tribal corporate charter).

Although Indian tribal members may not personally assert tribal sovereign immunity, individual tribal officials may assert tribal sovereign immunity when they are acting in their official capacity and within the scope of their authority. *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969); *United States v. Oregon*,

657 F.2d 1009, 1013 n. 8 (9th Cir.1981) ("[Tribal] immunity extends to tribal officials when acting in their official capacity and within the scope of their authority.").

The Shoshone-Bannock Tribes' sovereign immunity from the subpoenas at issue applies to the four Tribal employees subpoenaed in this case because they are all Tribal officials subpoenaed in their official capacities regarding matters within the scope of their employment. The subpoenas seek production of Tribal documents confidential personnel information for a sitting Tribal Court judge. The records and information requested by the subpoenas are only available to the individuals through their official capacities. As such, the subpoena to the four Tribal officials must be quashed based on the Tribes' sovereign immunity. *Id.*; *cf. Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 90 (S.D.N.Y. 2002).

b. The Tribes have not waived sovereign immunity in this matter.

It is undisputed that the Fort Hall Business Council has not authorized the release of the subpoenaed documents as required by the Tribal Privacy Act. It is also clear that the Fort Hall Business Council has not authorized the individuals subpoenaed to discuss or disclose the Tribal personnel matters addressed in the subpoenas. The sovereign immunity of the Shoshone-Bannock Tribes can only be expressly waived by Congress or action of the Fort Hall Business Council, the governing body of the Shoshone-Bannock Tribes. Individual tribal officers and employees, including Tribal police officers, are not authorized to waive the Tribes' sovereign immunity. *Cf. Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001). In *Sanderlin*, the Eleventh Circuit stated: "Extending authority to waive sovereign immunity to a single individual, at least in this context, would be directly contrary to the Supreme Court's clear statement that 'a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 58 (1978)); *see also United States v. Testan,* 424 U.S. 392, 399 (1976).

There is no individual Tribal officer or employee in this case who has been delegated authority from the Fort Hall Business Council to waive the sovereign immunity of the Shoshone-Bannock Tribes. A finding that a Tribal police officer or other Tribal employee involved in this case somehow had authority to waive the sovereign immunity of the Shoshone-Bannock Tribes would be directly contrary to Tribal law and custom, which provides that only the Fort Hall Business Council has authority to waive the Tribes' sovereign immunity. *Cf. World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F.Supp.2d 271, 275 (N.D.N.Y. 2000) (holding that a tribal officer's actions within the scope of his authority is not equivalent to authority to waive the Tribe's sovereign immunity).

Because the Shoshone-Bannock Tribes has not expressly waived sovereign immunity with respect to the Tribal documents and matters addressed in the subpoenas, the subpoenas must be quashed.

c. *United States v. Snowden* and *United States v. Velarde* are cases from other jurisdictions that are contrary to Ninth Circuit precedent, ignore settled principles of tribal sovereign immunity, and are distinguishable from this case.

Both *Snowden* and *Velarde* are contrary to the controlling Ninth Circuit case of *United States v. James*, established principles of tribal sovereign immunity, and are distinguishable in many respects from the instant case.

In *United States v. Snowden*, 879 F.Supp. 1054 (D. Or. 1995), the district court for the District of Oregon denied the Confederated Tribes of the Warm Springs Reservation's motion to quash a criminal defendant's (Snowden's) subpoena for counseling records in the Tribe's control pertaining to the complainant's treatment for

alcoholism and mental capacity. The court in *Snowden* denied the motion for two reasons. First, the Tribe in that case voluntarily appeared in court and argued a motion to quash that did not raise sovereign immunity "*until after it complied with the court's Order and provided the documents to the court.*" *Id.* at 1056 (emphasis added). This distinguishes *Snowden* from the case at hand because the Shoshone-Bannock Tribes have raised sovereign immunity in its motion to quash.

The *Snowden* court also declined to follow *United States v. James* "because the defendant [in *James*] did not raise constitutional challenges to the claim of immunity." In determining whether to quash the subpoena, the court in *Snowden* applied a balancing of the defendant's constitutional rights and the Tribe's interest in preventing disclosure of the subpoenaed records. The court concluded that the defendant's constitutional rights "would be infringed if the subpoena were quashed and that the Tribes' interest in preventing disclosure is not as substantial." *Id.* at 1057-58.

The district court for the District of New Mexico in *United States v. Velarde*, 40 F.Supp.2d 1314 (D. N.M. 1999) also declined to follow *James* and instead cited *Snowden* and applied a balancing of "the sovereign interests of the United States and the Tribe." *Id.* at 1315-16. *Velarde* is a 1999 district court case from New Mexico, which is in the 10th Circuit. Similarly, the district court in *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012 (D. Ariz.) declined to follow *James* because the court there found it distinguishable that individual constitutional rights of the criminal defendant were implicated. Notwithstanding, the district court in *Juvenile Male I* acknowledged that *James* was controlling and binding precedent.

The "balancing of interests" approach applied by the courts in *Snowden* and *Velarde* (aside from contradicting controlling Ninth Circuit precedent) ignores the well-

established rule that a waiver of tribal sovereign immunity cannot be implied, but must be express, unequivocal, and come from either Congress or the tribe itself. *See, e.g.*, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The balancing approach amounts to a judicial waiver of tribal sovereign immunity without the required congressional or tribal consent. The courts in *Snowden*, *Velarde*, and *Juvenile Male 1* fail to provide a satisfactory explanation of how Congress or the tribes expressly waived immunity in those cases.

The district court in *Velarde* found that the Major Crimes Act's grant of federal court jurisdiction for Reservation crimes permitted the court to imply a waiver of the tribe's immunity through "balancing" interests. In justifying this novel approach, the court relied on *In re Long Visitor*, 523 F.2d 443 (8th Cir. 1975), a case involving a subpoena for an individual to testify before a federal grand jury. As discussed above, tribal sovereign immunity does not extend to individuals, and grand jury subpoenas to individuals are much different from a defendant's subpoena of a tribal official to produce sensitive Tribal records or testify regarding confidential personnel matters. *In re Long Visitor* simply did not address tribal sovereign immunity from non-party subpoenas of tribal records. More importantly, the *Velarde* court's finding that a grant of criminal jurisdiction over Reservation crimes amounts to a waiver of tribal immunity runs directly contrary to the Ninth Circuit's statement in *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992):

> 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 Ninth Circuit in *United States. v. James* pointed out that the Supreme Court has rejected the notion that a grant of jurisdiction to district courts over certain actions

brought by an Indian tribe abrogates states' sovereign immunity. *Id.* (citing *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992) ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct."). The court in *James* has concluded that "the mere fact that a statute, 18 U.S.C. § 1153(a), grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity." *Id.*

In *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002), the United District Court for the Southern District of New York followed *James*, and rejected *Velarde's* balancing approach. The court in *Catskill* reasoned that since enforcement of a subpoena would compel the sovereign to act, such enforcement is barred by sovereign immunity absent an express waiver. *Id.* at 87 (citing *United States Environmental Protection Agency v. General Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999), *vacated in part on other grounds*, 212 F.3d 689 (2000); *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989). The court distinguished *Velarde* on the ground that the subpoena in that case was issued by the United States itself, and declined to adopt the balancing approach based on the absence of any express waiver of tribal sovereign immunity by the tribe or Congress.

In this case, there has been no waiver of the Shoshone-Bannock Tribes' sovereign immunity by Congress or the Fort Hall Business Council. This Court should follow the controlling Ninth Circuit precedent on this issue, and reject the balancing approach adopted by the courts in *Snowden* and *Velarde*. Such an approach ignores the requirement of a clear and unequivocal waiver of tribal immunity by Congress or the tribe and amounts to a judicial finding of an implied waiver.

d. Even if it were applicable, the balancing test weighs in favor of granting the Tribes' Motion to Quash.

The Defendant asks that the Court utilize a balancing test to decide whether the Tribes must comply with the subpoena, and frames the issue in terms of the total loss of the Defendant's constitutional rights. Surely, without the information sought by the subpoena, the Defendant would still have the right to confront witnesses, have a fair trial, and due process. The Defendant has failed to provide a clear explanation for what facts he seeks to establish through the subpoenas of Tribal employees. Further, the vague reference to 4th, 5th, and 6th amendment issues is not tied to any clear legal authority or legal theory justifying the need for subpoenas of high level Tribal officials in this case. Counsel for the Tribes' has attempted in vain to identify what facts defense counsel is attempting to establish. *See Letter from Paul EchoHawk to Nick Vieth dated October 17, 2008* attached hereto as **Exhibit C**. It appears that defense counsel does not know what facts he is seeking to establish through the subpoenas, or how those facts would apply to any legal remedy for the Defendant. Under these circumstances, the Defendant should not permitted to subpoena these high-level Tribal officials for what is essentially a fishing expedition.

On the other hand, the Tribal interests implicated in opposing these subpoenas are substantial. These interests include the right to protect Tribal Court Judges from cross-examination scrutiny of decisions and the associated infringement on the integrity of the Shoshone-Bannock Tribal Court. The Tribes also have an interest in maintaining adherence to its Privacy Act and records management policies. The Tribes also have a high interest in protecting is General Counsel from having to respond to a subpoena in a case where there is questionable purpose and relevance to any non-privileged information he might be able to provide. The Tribes also have an interest in avoiding a

situation where every criminal defendant with subpoena resources can require any Tribal official (including Tribal Court judges, legal counsel, or council members) to testify in their official capacities regarding confidential and/or internal Tribal matters.

Also, contrary to the circumstances in the *Snowden* case, there is no suggestion that anyone has made inconsistent statements like the witness in *Snowden*, which heighten a defendant's need to challenge the credibility of the witness. *See Snowden*, 879 F. Supp. 1054, 1058. Also, the district court in *Snowden* did not find any assertion of significant Tribal interests in applying the balancing test. See 879 F.Supp. at 1057-58 ("The [Tribe] has not argued what, if any, interest the Tribes have in preventing disclosure of the records apart from the complainant's personal privacy."). This Defendant simply has not shown that he has the same risk to his constitutional rights as the defendant in *Snowden*. Thus, even if the balancing test in *Snowden* applied (which it does not), the balance tips sharply in favor of the Tribes' interest in maintaining their sovereign immunity. Because the substantial interests of the Tribes outweigh any relevant utility of the subpoenaed Tribal employees to the Defendant, the Tribes' motion to quash should be granted.

B. Requiring compliance with the subpoena would be unreasonable and oppressive.

Rule 17 of the Federal Rules of Criminal Procedure provides that the Court may quash a subpoena if compliance would be unreasonable or oppressive. Fed.R.Crim.P. 17. The subject subpoena is unreasonable and oppressive because compliance requires Tribal judges, the Tribal Court Administrator, and the Tribes' General Counsel to violate Tribal law. Other cases have held that subpoenas requiring an individual to violate a regulation should not be enforced. *See e.g., Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998) (citing *Ex Parte Sackett*, 74 F.2d 922, 923 (9th Cir.1935) (Appellees

may not be forced to comply with the subpoenas if a valid regulation required them not to comply)); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir.1997) (state court lacked jurisdiction to compel a forest service employee to appear and testify before grand jury in contravention of USDA regulations); *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208 (D.C.Cir.1996) (state court, and federal court on removal, lacked jurisdiction to compel production of records from comptroller general when production was in violation of agency regulations)). The four Tribal employees should not be required to suffer the criminal sanctions and personnel actions that will follow forced compliance with the subpoenas in this case. Therefore, the motion to quash should be granted because compliance with the subpoenas would be unreasonable and oppressive in this case.

The Defendant has not provided any explanation for what facts he seeks to establish through the subpoenas of Tribal employees. Further, the Defendant has not provided any legal authority or legal theory to support a need to subpoena high level Tribal officials in this case. The subpoenas issued to the four Tribal employees in this case are unreasonable and oppressive in the complete absence of any showing of why the Tribal officials are needed, what specific facts the Defendant seeks to establish, or what legal argument applies to the information sought by issuance of the subpoenas. The Defendant's response to the Motion to Quash offers no specifics why the subpoenas are needed other than vague references to the 4th, 5th, and 6th amendments. The Defendant's response asserts that the subpoenas were issued "[i]n an attempt to ferret out whether a 4th amendment issue exists . . . ." This vague and unsupported purpose does not justify subpoenas of Tribal Judges, the Tribal Court Administrator, and the Tribal General Counsel.

CONCLUSION

For all of the above reasons the Court should grant the Tribes' Motion to Quash the subpoenas in this case.

Respectfully submitted this 21st day of October, 2008.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 21st 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

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October 17, 2008

Nicolas V. Vieth
FEDERAL DEFENDERS SERVICES OF IDAHO
757 N. 7th Ave.
Pocatello, Idaho 83201

VIA U.S. MAIL & FACSIMILE: (208) 478-6698 10/17/08

Re: United States v. Alfred Wahtomy, Case No. CR-08-96-E-BLW

Dear Mr. Vieth:

I serve as special counsel to the Shoshone-Bannock Tribes and represent the Tribes and Tribal employees named in the subpoenas you caused to be issued on September 30, 2008 in the above-entitled case.

This letter confirms our telephone conversations this week in which I expressed our objection to the subpoenas on the grounds of tribal sovereign immunity and because the subpoenas ask Tribal employees (particularly sitting Tribal Court judges) to produce confidential and protected Tribal documents and records in violation of Tribal law and policy related to the unauthorized release of Tribal records.

I suggested that you provide a description of the facts you are seeking to establish and offered to assist in confirming the facts and obtaining the government's stipulation to those facts. The government's attorney expressed a willingness to stipulate to certain facts while reserving her right to argue their relevance and admissibility. You did not provide a description of facts you were seeking to establish.

As I indicated in our telephone conversation, I am preparing a motion to quash the subpoenas issued to Tribal employees on September 30, 2008. I understand that neither you nor the AUSA handling this case have an objection to continuing Monday's hearing to allow the Court time to consider briefing and argument on the Motion to Quash. I plan to attend the hearing on Monday to ask the court for a continuance in order to assert the Tribes' immunity from the subpoenas issued to Tribal employees in this case.

Sincerely,

Paul C. EchoHawk

PCE:pe
cc: Fort Hall Business Council
Shoshone-Bannock Law & Order Commission
Chief Judge Leo Ariwite
Hon. Rosephine Coby
Bill Bacon
Tom Katsilometes
U.S. Attorney's Office
File

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October 17, 2008

Nicolas V. Vieth
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