COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
District Court, City And County Of Denver Hon. Robert S. Hyatt, 05CV1143 Colorado Court of Appeals, Hon. Steven L. Bernard, Hon. Russell E. Caparelli, and Hon. Karen S. Metzger (sitting by assignment of the Chief Justice), Case No. 07CV0582	
STATE OF COLORADO ex rel. JOHN W. SUTHERS, Attorney General, and LAURA E. UDIS, Administrator, Uniform Consumer Credit Code, Respondents/Cross-Petitioners, v. CASH ADVANCE and PREFERRED CASH LOANS, Petitioners/Cross-Respondents.	▲COURT USE ONLY▲

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RESPONSE BRIEF OF *AMICI CURIAE* THE COLORADO INDIAN BAR ASSOCIATION, THE UTE MOUNTAIN UTE TRIBE, THE AMERICAN INDIAN LAW CENTER, INC., AND THE UNIVERSITY OF COLORADO SCHOOL OF LAW AMERICAN INDIAN LAW CLINIC IN SUPPORT OF CROSS-RESPONDENTS

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The Colorado Indian Bar Association, the Ute Mountain Ute Tribe, the American Indian Law Center, Inc. and the University of Colorado School of Law American Indian Law Clinic, as *amici curiae*, respectfully submit this brief in support of the Answer/Reply Brief submitted on this date by the Petitioners/Cross-Respondents, Miami Nation Enterprises d/b/a Cash Advance ("MNE") and SFS, Inc. d/b/a Preferred Cash Loans ("SFS") (collectively "Tribal Entities"), which are entities of the federally-recognized Miami Tribe of Oklahoma and the Santee Sioux Nation respectively. Although the *amici curiae* were all either specifically identified in the Court's April 13, 2009 Order inviting amicus briefing or accepted as *amici* pursuant to the Court's July 8, 2009 Order, because this brief is the second submission by the *amici curiae*, it is conditionally filed with a motion for leave to file brief pursuant to C.A.R. 29.

INTRODUCTION

Both the State of Colorado ("Cross-Petitioner" or the "State") and the *amici curiae* states assert that judicial proceedings to enforce investigative subpoenas are somehow wholly different in kind than all other judicial proceedings such that issues of tribal sovereign immunity need not be addressed. As explained below, that contention is without merit or precedential support. Rather, in its zeal to assert its investigative authority and target the Tribal Entities, the State misapprehends

the controlling issue in this case. In doing so, the State mischaracterizes and misstates both facts and law to the Court. The *amici curiae* adopt the factual corrections set forth in the Response Brief of the Tribal Entities, but as experts in Indian Law believe it is necessary to provide the Court with their own Response Brief to correct the legal inaccuracies advanced by the State. The State and its *amici* have overlooked or misunderstood key Indian Law authorities. With this Response Brief, the *amici curiae* supporting the position of the Tribal Entities seek to clarify well-settled propositions of Indian Law.

I. ALL OF THE STATE'S ARGUMENTS AGAINST THE APPLICABILITY OF SOVEREIGN IMMUNITY IN THIS CASE RING HOLLOW.[1]

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[1] The *amici curiae* also agree with the Tribal Entities' responses regarding the tribal officer suit and arbitration agreement issues presented in the case, but also believe that those matters are sufficiently clear that additional briefing on those matters is unnecessary because the State's positions are so far afield from law. *See, e.g., Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) ("It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials; 'the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself'") (quoting additional Tenth Circuit authority); *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1902-1902 (2009) (noting that purpose of Federal Arbitration Act was to put arbitration agreements on equal footing with all other contracts and that FAA did nothing "to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)"). Accordingly, the *amici curiae* have not briefed those issues herein.

A. The Breadth of the State's Investigative Power Is Irrelevant to the Determination of the Trial Court's Adjudicative Power.

The State's argument is summarized in its brief as follows: "A court's role in investigative subpoena enforcement proceedings is limited to assuring the investigation is lawfully authorized, the information sought is relevant to the inquiry, and the subpoena is sufficiently specific." State's Br. at p. 13. This presumes, however, that the court has a role – an inaccurate presumption when the court in question lacks jurisdiction. In fact, when the trial court lacks subject matter jurisdiction, its role is very limited, even more so than the State contends.

The State and its *amici* offer chiefly *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508 (1943), and *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946) and their progeny to support the claim that the 'nature' of administrative subpoenas necessitates broad deference from the courts. *See* State's Br. at pp. 15-23; *Amici* States' Br. at pp. 23-32. The cases cited, however, do not substantiate that claim. Instead, the cited cases simply establish the unremarkable principle that a *court* may not require an *agency* to demonstrate *its* coverage in the investigative subpoena stage; that is, courts may not frustrate agency investigations on grounds of first determining coverage.[2]

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[2] Other key distinguishing features of the cited authorities precluding their applicability here include the facts that *Endicott* and *Walling*: (1) sought

Importantly, the Tribal Entities have not challenged the scope of the State's investigative authority, nor have the trial court or the Court of Appeals required the Attorney General to prove his case as a prerequisite to subpoena enforcement. The cases cited by State about the scope of its investigative powers and the general narrow range of court enforcement proceedings are inapposite. This is because the Tribal Entities have claimed sovereign immunity, positing that Colorado courts lack jurisdiction over the dispute. In other words, Colorado state courts have no authority to enter any order vis-à-vis the Tribal Entities beyond a determination of the jurisdictional question of their immunity.[3] The State's position neglects this distinction by claiming that "it is improper to require an agency to substantiate its jurisdictional, regulatory coverage before it is allowed to investigate it." State's Br. at 17. But the issue is not the scope of the Attorney General's regulatory coverage; the issue is the trial court's lack of jurisdiction to enforce the Attorney General's regulatory efforts against the Tribal Entities.

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enforcement of subpoenas against private parties, and not as against other sovereigns; and (2) were decided based upon congressional statutory delegations to federal agencies, and not upon any state statutes.

[3] This basic distinction is commonly recognized by courts. *See, e.g., Fla. Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1130 (11th Cir. 1999) ("whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions").

The State's position fails to deal with the basic reality that subpoena enforcement proceedings are court proceedings. *See Feigin v. Colo. Nat'l Bank, N.A.*, 897 P.2d 814, 820 (Colo. 1995) (noting, *inter alia*, that "the General Assembly has determined that proceedings to enforce administrative subpoenas should be conducted by district courts"). The State claims that "[q]uestions of immunity ... are not properly answered in investigative subpoena enforcement proceedings" because "the purpose of such proceedings is to enable the State to acquire from a recalcitrant party the information it needs for its decision-making process." State's Br. at 16. This is simply incorrect. Nothing in Colo. Rev. Stat. § 5-6-106(3) absolves Colorado courts of their duty to assure themselves that they have jurisdiction over litigants who come before them. Likewise, nothing in Section 5-6-106(3) provides the State with some sort of super access to courts. Here, as is always true, the State may not use the courts to compel subpoena compliance where jurisdiction is lacking. *Stuckey v. Stuckey*, 768 P.2d 694, 695 (Colo. 1989) ("It is beyond dispute that a court must have subject matter jurisdiction before it can act").

The cases outside the lines of *Endicott* and *Walling* cited by the State likewise do nothing to support the State's extreme position that Colorado courts have the ability to enter orders without first assuring themselves of their

jurisdiction. Instead, the State's citations to cases involving court enforcement of federal subpoenas served upon tribes and other entities by federal agencies in connection with federal statutes of general applicability have no bearing on a Colorado state court's jurisdiction over litigants subpoenaed pursuant to Colorado law. In particular, the State points to *N.L.R.B. v. Chapa-De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) as significant. It is not.

In *Chapa-De*, the Ninth Circuit Court of Appeals recognized the National Labor Relations Act to be a statute of general applicability and followed U.S. Supreme Court precedent indicating that federal statutes of general applicability generally apply to Indian tribes and tribal entities in connection with enforcing National Labor Relations Board subpoenas served upon Chapa-De, an Indian Health Service outlet. The State describes *Chapa-De* to the Court as "rejecting tribal entity's claim that tribal immunity barred subpoena enforcement proceeding." State's Br. at 21. That representation is not accurate.

Significantly, there is no indication in the Ninth Circuit's opinion that Chapa-De ever asserted sovereign immunity from suit in the federal court enforcement action. Rather, Chapa-De challenged the jurisdiction of the National Labor Relations Board to issue the subpoenas in the first instance based on the applicability of the National Labor Relations Act. The Ninth Circuit's analysis had

nothing to do with tribal sovereign immunity. Indeed, the court expressly understood Chapa-De to be a third-party-funded, federally-contracted healthcare facility independent of tribal community to which it provided healthcare services. 316 F.3d at 1000. The court was instead focused on the potential applicability of federal common law exceptions to the general rule that federal statutes of general applicability apply to Indian tribes and tribal organizations. 316 F.3d at 998-1000. The Ninth Circuit also characterized its decision as "very limited" and "purely preliminary" when it referred the analysis of the NLRB's National Labor Relations Act jurisdiction over Chapa-De under the federal common law exceptions back to the Board for its analysis. 316 F.3d at 1002. Simply put, *Chapa-De* in no way informs the issues presented in the instant case.

1. The Indian Law Cases Cited by the State Do Not Diminish Tribal Sovereign Immunity.

The State's argument that tribal sovereign immunity does not bar investigation of a tribe's off-reservation activities is similarly obtuse. State's Br. at pp. 24-30. With that argument, the State again fails to acknowledge the difference between executive branch investigatory efforts and judicial proceedings. Additionally, the State misconstrues important Indian Law cases. Although the *amici curiae* believe that State's fundamental mistake in reasoning has been

sufficiently addressed herein, they believe that the State's extreme misuse of Indian Law cases bears mention.

First, the State cites to two cases for the proposition that Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. State's Br. at p. 25 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (requiring "clear statutory guidance" before exemption from nondiscriminatory state tax will be implied in off-reservation setting, but limiting this approach to special context in which statutory provisions of 1934 Indian Reorganization Act were "designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition'") (citation omitted)); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (upholding state court denial of tribal request to enjoin state interference with federally-permitted tribal fish traps in state waters where Court determined that no federal law vested Army Engineers or the U.S. Forest Service – the agencies that had issued fishing permits to the tribes – to grant fishing rights). That much of the State's assertion is accurate. Nondiscriminatory state laws have been held to apply to tribes outside of Indian Country unless federal law provides otherwise.

However, both *Mescalero Apache Tribe* and *Organized Village of Kake* relied in part on *Ward v. Race Horse*, 163 U.S. 504 (1896) for the proposition that state laws ordinarily apply to Indians outside the reservation context. *Mescalero Apache Tribe, 411 U.S. at 148-149; Organized Village of Kake, 369 U.S. at 75.* The U.S. Supreme Court's partial overruling of *Race Horse* in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-205 n.7 (1999) has undermined this proposition as applied to situations in which federal law confers off-reservation rights.[4] Moreover, even if the *Mille Lacs* case had not cast a shadow on the continuing viability of *Mescalero Apache Tribe* and *Organized Village of Kake*, neither case addressed judicial enforcement proceedings or sovereign immunity issues. Hence, they could be useful only in assessing the scope of the State's regulatory/investigatory power in this case – and that power in not at issue. Rather, it is the power of Colorado courts to preside over any proceedings involving the Tribal Entities that is at issue.

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[4] For example, contrary federal laws include special provisions authorizing tribal activity outside Indian country, such as treaties that secure off-reservation fishing rights and effectively preclude or restrict state regulation of Indians engaged in exercising those rights. These provisions of federal statutes and treaties ordinarily are interpreted in accordance with the Indian law canons of construction, with ambiguities resolved in favor of the existence of Indian rights and the collateral preclusion of state authority.

Next, the State misstates the holding of *Nevada v. Hicks*, 533 U.S. 353 (2001), describing the U.S. Supreme Court as rejecting "a tribe member's challenge to a state's authority, to execute, on tribal land, a search warrant to investigate whether the tribe member unlawfully poached protected game off-reservation (sic)." State's Br. at p. 25. Mr. Hicks never challenged the ability of Nevada game wardens to execute state warrants on his tribal trust property on the Fallon Paiute-Shoshone Reservation in Nevada. Instead, the *Hicks* case involved a challenge brought by the State of Nevada objecting to tribal court tort claims that had been brought by Mr. Hicks against Nevada state game wardens in their individual capacities following their execution of state warrants that had been endorsed by the Fallon Paiute-Shoshone Tribal Court. *See* 533 U.S. 353, 356-358. Mr. Hicks alleged that the officers exceeded the scope of the state-issued, tribally-authorized warrants (which had been limited to vehicles and the exterior premises of Mr. Hicks's residence) and violated his rights by damaging his property and by engaging in a physical altercation with his son and in unauthorized access of his home. *Id.* (citing record materials). Mr. Hicks brought various tort claims against the officers in tribal court. The State of Nevada challenged the tribal court's jurisdiction to hear claims against the state officers. When the matter reached the U.S. Supreme Court, the Court found that the tribal court's adjudicative power was

no broader than the tribe's legislative power and that none of the federal common law factors triggering tribal regulatory and adjudicatory power were implicated by Nevada's execution of investigative warrants with respect to an individual tribal member. *Id.* at 357-364.

The State suggests that the language of the *Hicks* majority opinion about the state interest in investigating potential off-reservation crimes of individual tribal members is somehow in like kind to what the U.S. Supreme Court's analysis would be with respect to state efforts to investigate tribes and tribal entities. The *amici curiae* respectfully submit that there is a big difference between investigation of individuals and investigation of sovereigns and that *Hicks* in no way informs the issues in this case. Moreover, the *Hicks* Court itself took great care to emphasize the extraordinarily limited and narrow nature of its holding. 533 U.S. at 358 n.2 (Scalia, J. for the majority); at 376 (Souter, J. concurring); at 386 (Ginsburg, J. concurring) (the "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law"). Clearly, the Court's intention in stating the limited nature of its holding in three separate opinions was to curtail efforts, such as the State's, to interpret the *Hicks* case as more than what it is, a very narrow holding about tribal court jurisdiction.

In its creative reading of U.S. Supreme Court Indian Law cases, the State next cites to *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) and represents that the U.S. Supreme Court affirmed dismissal of a tribal suit brought against the county pursuant to 42 U.S.C. § 1983. State's Br. at p. 26. In fact, the Court did not "affirm the suit's dismissal" as the State writes, but rather remanded the case to determine basis of federal court jurisdiction over the claim by the Indian tribe that state officials unlawfully entered and searched tribal property. In *Inyo County*, the Court held that Indian tribes are not "persons" who can bring civil rights claims under 42 U.S.C. § 1983. But, at the same time, the *Inyo County* ruling did preclude federal jurisdiction over a tribal civil rights claim predicated on another source of law (such as 28 U.S.C. § 1343). The Court specifically left open for the district court the threshold question of whether the tribe could base its claim on other sources of law, such as federal common law. 538 U.S. at 704. As with the other cases cited by the State, *Inyo County* is inapposite to the issues presented in the instant case.

The State asserts that "*Hicks* and *Inyo County* make plain, because this matter involves an *off*-reservation investigation into *off*-reservation illegal conduct, requiring petitioners to answer the State's subpoenas nowise impairs any self-

government rights or implicates any 'sovereign status' concerns."[5] State's Br. at 28 (emphasis in original). The State then bootstraps its read of *Hicks* and *Inyo County* to submit that "Accordingly, [the Tribal Entities] are not immune from the State's investigation, nor from judicial enforcement proceedings (including contempt) arising therefrom." *Id.* Those statements are baseless. Neither *Hicks* nor *Inyo County* provide any support for the State's sweeping declarations. As discussed above, those cases involved tort claims by an individual plaintiff in tribal court and tort claims brought by an Indian tribe and the U.S. Supreme Court's analysis of the availability of those claims based on federal common law and a federal statute. Neither case involved judicial enforcement proceedings or tribal invocations of sovereign immunity from suit. Likewise, neither case even remotely suggests that a sovereign tribal government would not have a sovereignty interest in protecting its books and records from a raid by another sovereign. Those cases simply do not stand for the propositions for which the State cites them.

The State's citation of additional Indian Law authorities is similarly misleading. First, the State cites *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) as "upholding agencies' rights to inspect tribes' books and records." State's Br. at

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[5] The *amici curiae* disagree with the State's characterization of its efforts as an "off-reservation" investigation where the books and records the State seeks are obviously located on the tribes' respective reservations.

p. 28. In fact, the *Matheson* case did not involve an Indian tribe or a tribal business as a litigant at all. Rather, the case dealt with the applicability of the Fair Labor Standards Act to a private business owned and operated by individual tribal members on the Puyallup Indian Reservation and the coordinate ability of the United States Secretary of Labor to examine the books and records of that private business pursuant to federal law. 563 F.3d at 428-429. The case mentioned nothing about the ability of any government officer with respect to a tribe's books and records. Of course, because no tribe was involved in the case, the *Matheson* opinion did not address tribal sovereign immunity or judicial enforcement proceedings.

The State also mischaracterizes the *Chapa-De* case a second time, describing it as "enforcing subpoena against tribal entity." State's Br. at p. 28. As noted above, the Ninth Circuit's analysis in *Chapa-De* did not address tribal sovereign immunity and a tribal entity was not involved (Chapa-De was described by the court as a third-party-funded, federally-contracted healthcare facility independent of tribal community to which it provided healthcare services). 316 F.3d at 1000.

Lastly, the State cites *U.S. v. Santee Sioux Tribe*, 254 F.3d 728 (8th Cir. 2001) as holding the "tribe subject to court's contempt powers." State's Br. at p. 28. Again, the State's representation is incorrect. As the Eighth Circuit has itself

described *Santee Sioux Tribe*, the court held only that "an injunction ordering the Tribe to close a tribal casino that was unlawfully operating 'Class III' gaming devices was 'not complex' for purposes of applying [the U.S. Supreme Court's decision in *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994)]. However, no specific contempt remedy was at issue in that case." *Jake's, Ltd., Inc. v. City of Coates*, 356 F.3d 896, 902 n.4 (8th Cir. 2004). In *Santee Sioux Tribe*, the federal government had sought, unsuccessfully, contempt citations against individual members of the tribal council with respect to violations of federal gaming laws. 254 F.3d at 732. The federal government appealed on that issue. The individual tribal council members contended that the contempt citations the federal government sought were punitive/criminal in nature under *Bagwell* and had been acquitted by the district court. *Id.* at 735-736. The Eighth circuit disagreed and remanded the case to the district court for further proceedings regarding the propriety of possible contempt citations against individual tribal officers for ongoing violations of federal gaming laws. *Id.* at 737-738. As the Eighth Circuit indicated in *Jake's Ltd.*, Santee Sioux Tribe did not address any specific contempt remedy. The case did not involve any contempt issues with respect to the tribe, nor did it address judicial enforcement proceedings or implicate tribal sovereign immunity issues. Again, the case is irrelevant to the issues presented herein.

B. Tribal Sovereign Immunity Is a Matter of Subject Matter Jurisdiction Necessarily Addressed in Any Judicial Proceedings, Including Subpoena Enforcement Proceedings.

Multiple courts, including the Tenth Circuit court of Appeals, have expressly held that "[t]he defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable." *Normandy Apartments Ltd. v. U.S. Dep't of Hous. and Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009). *See also Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *Hagen v. Sisseton-Wahpeton Comm. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("[I]n this circuit, '[s]overeign immunity is a jurisdictional question'"); *California v. The Quechan Tribe of Indians*, 595 F.2d 1153, 1154-1155 (9th Cir. 1979) ("Since the Tribe's claim of immunity goes to the jurisdiction of this court to hear the case, that question must be addressed first;" "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize") (emphasis supplied); *U.S. v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992) ("We hold . . . that the Quinault Indian Nation did not waive its sovereign immunity, and thus is protected from responding to the subpoena issued by the district court"); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1301 (D. N.M. 2009) ("Tribal sovereign

immunity is a matter of subject matter jurisdiction which can be challenged in a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction"); *Gristede's Foods, Inc. v. Unkechauge Nation*, 2009 U.S. Dist. LEXIS 94402 (E.D. N.Y., Oct. 9, 2009) ("Issues of sovereign immunity are properly addressed in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction"). The *Quechan Tribe* case is particularly instructive. There, the Ninth Circuit heard an appeal from the district court's rejection of a declaratory judgment action brought by the state of California seeking to clarify the state's ability to, among other things, send its fish and game wardens on to the tribe's reservation to enforce state laws. 595 F.2d at 1154. The court aptly perceived the heart of the issue, "Although we may sympathize with California's need to resolve the extent of its regulatory power, the 'desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity.'" *Id.* at 1155 (quoting *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). The same holds true in this case, the State's desire to define and manifest its investigatory powers cannot overcome tribal sovereign immunity, which simply precludes judicial enforcement proceedings.

Colorado has also recognized this basic principle: "Tribal sovereign immunity is not merely a defense to liability; rather, it provides immunity from

suit." *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 405 (Colo. App. 2004) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) and finding express waiver of sovereign immunity made where tribal CFO signed contract containing clear waiver provision). *See also Adams County Dep't of Soc. Serv. v. Huynh*, 883 P.2d 573 ("Subject matter jurisdiction concerns the court's authority to deal with a particular case").

The State and the *amici* states are at pains to paint sovereign immunity into some category loosely described as 'jurisdictional other,' but not a matter of subject matter jurisdiction. State's Br. at pp. 23-30;[6] *Amici* States' Br. at pp. 9-14. The *amici* states recognize that some of the authorities they cite in support of their

[6] The State also asserts that "to inject [analysis of the applicability of sovereign immunity] in these proceedings would upset the proper separation between judicial and executive functions." State's Br. at p. 23. That is a red herring. The State's position is contrary to law. "[A] challenge to a court's subject matter jurisdiction is not waivable, and may be raised for the first time on appeal." *Herr v. People*, 198 P.3d 108, 111 (Colo. 2008) (emphasis added). Moreover, "a judgment rendered without subject matter jurisdiction is void." *Huynh*, 883 P.2d at 574. The fundamental legal principle of courts assuring themselves of jurisdiction before acting, at any time in litigation, is equally applicable with respect to determining issues of tribal sovereign immunity. *See Hagen*, 205 F.3d at 1044 ("because sovereign immunity ... is a jurisdictional prerequisite which may be asserted at any stage of the proceedings, ... [a] Court simply cannot ignore arguments, however belated, that call into doubt the Court's authority to exercise jurisdiction over [a] matter") (internal citations and quotation marks omitted). Here, the fact of the tribes' timing in asserting the sovereign immunity defense is absolutely immaterial; it may be asserted *at any time* and the courts must address it when raised.

argument are caught up with conflicting authorities about the nature of state sovereign immunity under the Eleventh Amendment as either a constraint on Article III subject matter jurisdiction or some other sort of jurisdictional issue. *Amici* States Br. at pp. 11-14.[7] The better-reasoned authorities, including the Tenth Circuit's 2009 *Normandy Apartments Ltd.* decision, avoid the semantic gymnastics advanced by the *amici* states and recognize that sovereign immunity should be addressed immediately upon claim of a litigant. Moreover, none of the cases cited by the State or the *amici* states indicate that a court need not assure itself of its jurisdictional authority before acting in litigation.

Because tribal sovereign immunity is a constraint on the court's subject matter jurisdiction, it should have been considered by the district court, and is properly addressed by Colorado appellate courts at any juncture.

C. No Judicial Remedy Is Available to the State. U.S. Supreme Court Authority Recognizes Such a Circumstance as a Logical and Acceptable Result of the Application of the Doctrine of Tribal Sovereign Immunity.

It is correct that, under Colorado's Consumer Credit Code, the State is granted broad discretion in issuing subpoenas as part of its investigative function.

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[7] A thorough discussion of the competing theories of the Eleventh Amendment may be found at Erwin Chemerinsky, Federal Jurisdiction § 7.3 (5th Ed. 2007) (noting that, with the U.S. Supreme Court's present composition, "it is widely expected . . . to continue the five-to-four majorities in favor of sovereign immunity as a jurisdictional limit").

See Colo. Rev. Stat. § 5-6-106(1). However, the State's only recourse to compel enforcement of its subpoenas is application to a district court for an order compelling compliance. *Id.* § 5-6-106(3) (emphasis added). As demonstrated above, that recourse is made unavailable by the doctrine of tribal sovereign immunity. And, as demonstrated in the opening briefs of the Tribal Entities and the *amici curiae*, tribal sovereign immunity is a clear and longstanding federal doctrine. Contrary to the litany of established precedent on the issue, the State invites the Court to cast aside tribal sovereign immunity "as extending such immunity judicially pre-empts (sic) state law and is 'anomalous' and 'unjust.'" State's Br. at p. 41. The Court should reject the State's improper invitation.

Instead, the Court should simply follow the U.S. Supreme Court's clear lead in upholding tribal sovereign immunity, leaving any diminishment in its application to the proper provinces of Congress and the tribes themselves. "[I]n the absence of federal authorization, tribal immunity, *like all aspects of tribal sovereignty*, is privileged from diminution by the States." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (emphasis supplied). "[S]ince it emanates from federal law, tribal immunity 'is not subject to diminution by the States.'" *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App.4th 632, 636 (Cal. Ct. App. 1999) (quoting *Kiowa Tribe*).

This Court need not rework the ground thoroughly ploughed by the U.S. Supreme Court. In *Kiowa*, the U.S. Supreme Court expressly declined to restrict tribal sovereign immunity with respect to commercial and off-reservation activities. 523 U.S. at 760. Instead, in *Kiowa Tribe* and other cases, the Court has consistently affirmed tribal immunity, deciding that Congress is the appropriate body to determine whether to abrogate it, because Congress is in a better position "to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, 523 U.S. at 759.

Indeed, in *Kiowa Tribe*, the Court made clear it understood the breadth of its ruling declining to bound tribal sovereign immunity:

> The doctrine of tribal immunity came under attack a few years ago in [*Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991)]. The petitioner there asked us to abandon or at least narrow the doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. . . . The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. . . .
>
> In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance . . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity,

> or who have no choice in the matter, as in the case of tort victims.
>
> . . . We decline to [place limitations on tribal sovereign immunity], as **we defer to the role Congress may wish to exercise in this important judgment.**
>
> Congress has acted against the background of our decisions. . . .
>
> Like foreign sovereign immunity, tribal immunity is a matter of federal law. *Verlinden, supra, at 486.* Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. See, *e.g., Santa Clara Pueblo* [*v. Martinez,* 436 U.S. 49, 58 (1978)].
>
> In both fields, **Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests.** . . . Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi, supra, at 510.* It has not yet done so.
>
> In light of these concerns, **we decline to revisit our case law and choose to defer to Congress.**

523 U.S. at 987-988 (emphasis supplied). *See also Native Am. Distrib.*, 546 F.3d at 1293 ("While the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context, the court has also held that the doctrine 'is settled law' and that it is not the judiciary's place to restrict its application").

The U.S. Supreme Court has also recognized that tribal sovereign immunity may well preclude state law enforcement powers. *Okla. Tax Comm'n*, 498 U.S. 505. In that case, the petitioner, the Oklahoma Tax Commission had served the Citizen Potawatomi Tribe with an assessment letter, demanding that the tribe pay $ 2.7 million for state taxes on cigarette sales. *Id.* at 507. The tribe filed suit in federal district to enjoin the assessment and Oklahoma counterclaimed, asking the District Court to enforce its $2.7 million claim against the tribe and to enjoin the tribe from selling cigarettes in the future without collecting and remitting state taxes on those sales. *Id.* at 507-508. The tribe moved to dismiss the counterclaim on the ground that the tribe had not waived its sovereign immunity and therefore could not be sued in an enforcement action by the state. *Id.*

Oklahoma presented arguments to Court identical to those advanced by the State and its *amici* in this case:

> Oklahoma offers an alternative, and more far-reaching, basis for reversing the Court of Appeals' dismissal of its counterclaims. It urges this Court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity. Oklahoma contends that the tribal sovereign immunity doctrine impermissibly burdens the administration of state tax laws. At the very least, Oklahoma proposes that the Court modify [U.S. Supreme Court precedent on tribal sovereign immunity], because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in this

> context. The sovereignty doctrine, it maintains, should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws.

498 U.S. at 510.

The Court wholly rejected Oklahoma's invitation to reverse course in its tribal sovereign immunity jurisprudence and held that Oklahoma could not bring an enforcement action against the tribe. *Id.* Oklahoma argued that the Court's decision neutered its ability to enforce its laws and the Court again rejected the state's contention:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, [U.S. Supreme Court decisions affirming state regulatory power in Indian Country] give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.

498 U.S. at 514 (going on to suggest that the state negotiate a tax agreement with the tribe or seek assistance from Congress). *See also Native Am. Distrib.*, 546 F.3d at 1295 ("The Supreme Court has acknowledged that tribes could use their immunity as a sword rather than a shield . . . [but ruled that] such concerns are not the province of the courts, but of Congress or the tribe itself").

Here, the State is in an identical position to Oklahoma. It may have lawful regulatory powers to pursue in Indian Country pursuant to state law. But the enforcement mechanism in most desires, judicial proceedings, is unavailable to it as a result of prevailing federal law.

Other federal courts have also accepted the conclusion that unavailability of remedies to some litigants is a sometimes a practical consequence of tribal sovereign immunity. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1266 n.8 (10th Cir. 1998) ("The proposition that tribal sovereign immunity is waived if a party is otherwise left without a judicial remedy is inconsistent with the reasoning of *Santa Clara Pueblo*"); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) (rejecting contention that tribal sovereign immunity should give way to federal jurisdiction when no other forum was available for resolution of claims); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("Sovereign immunity may leave a party with no forum for its claims"). The *amici curiae* posit that the State should follow the advice of such authorities and pursue alternative remedies, such as negotiations with the involved tribes.

CONCLUSION

The State's arguments ignore the fundamental reality that subpoena enforcement proceedings are judicial proceedings to which entities that enjoy tribal

sovereign immunity may not be subjected. The State's characterization of key Indian Law cases is inaccurate and should not inform this Court's analysis of the issues upon which the Court granted certiorari.

Rather, as the *amici curiae* indicated in their initial brief in support of the Tribal Entities' arguments on appeal, the eleven-part tribal sovereign immunity test assembled by the Court of Appeals with parts from all the wrong suppliers is contrary to both U.S. Supreme Court precedent and fundamental constitutional principles. Moreover, whether an entity is a tribal entity entitled to claim sovereign immunity is an issue of fact. *Native Am. Distrib.*, 546 F.3d at 1293. As the Tribal Entities explain in Section II.A of their Answer/Reply Brief, most courts are readily able to determine such fact issues without engaging in any multifactor test. They simply evaluate the evidence before them. *See, e.g., Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1283 (W.D. Okla. 2009) (dismissing case against tribal business entity where "plaintiffs have not produced any evidence . . . that the [tribal business enterprise] is not an arm or subdivision of the Tribe").

The *amici curiae* respectfully submit that the Court of Appeals' eleven-part test invites folly because it welds a machine of confusing and duplicative pieces without reference to the weight to be given to each and without regard to the test's clear contraction with federal precedent and with whatever tests might be

fashioned by other state jurisdictions. The *amici curiae* observe that avoiding that sort of jurisdictional entanglement is precisely why the U.S. Supreme Court has spoken so clearly about the absolute nature of tribal sovereign immunity in the federal context and why the Court has also so consistently referred policy judgments about any boundaries to tribal sovereign immunity to that only entity that may properly entertain them – Congress.

Accordingly, this Court should decline to adopt the eleven-part test and should decline to affirm the Court of Appeal's order crafting the test and refusing to afford the proper deference to the Tribal Entities' entitlement to assert tribal immunity from suit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

Choose one:

[X] It contains 5681 words.

[ ] It does not exceed 30 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2009, a true and complete copy of the foregoing document was served upon all parties via placing the same in the United States mail, with first class postage, addressed as follows:

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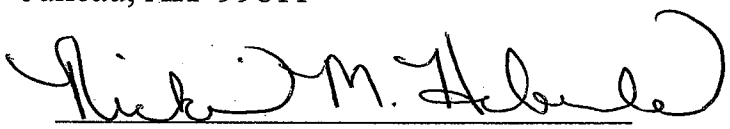

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