UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized Indian tribe, Plaintiff, v. STATE OF SOUTH DAKOTA, Defendant.	Civil No. 07-CV-04040 DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE STATE'S MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF M. MICHAEL ROUNDS GOVERNOR OF SOUTH DAKOTA

I. Introduction

The State of South Dakota hereby respectfully submits its Reply to Plaintiff's Memorandum in Opposition to the State's Motion for Protective Order Regarding the Deposition of M. Michael Rounds, Governor of South Dakota. This brief is intended to supplement the State's opening brief and not to supplant or waive any arguments previously made. The State therefore, supplements its opening brief with the following arguments and authorities.

II. Argument

a. The High-Ranking Official

The current state of the law in this jurisdiction is that high-ranking government officials should not be subject to depositions unless the proponent of the deposition can establish "exceptional circumstances." *In re United States*, 197 F.3d 310, 313-314 (8th Cir. 1999). Thus, the deposition of a high-ranking official should not be compelled unless it is established that the official possesses "relevant and necessary" information "essential" to the case which is not "obtainable from another source." *Id.* Additionally,

mere allegations that a "high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." *Id.* at 314 (citing *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995)).

As described in the State's opening brief, high-ranking government officials enjoy this privilege even once out of office. (Doc. 198). The protections of *United States v. Morgan*, 313 U.S. 409 (1941), among other things, protect the thought processes of high-ranking officials. *See United States v. Wal-Mart Stores*, 2002 WL 562301 (D.Md.). These protections extend beyond the high-ranking official's term of office. FSST cites *Sanstrom v. Rosa*, 1996 WL 469589 (S.D.N.Y) for the proposition that a former governor is no longer entitled to the *Morgan* doctrine privilege. (Doc. 200 at 4). The State argues, however, that the *Sandstrom* analysis found in *Wal-Mart Stores*, presents a more balanced approach in line with the current case law. As set out in Wal-Mart Stores:

> Accordingly, *Sandstrom*, when read closely and in conjunction with the cases cited in support thereof, points to the need for the high-ranking official, active or former, to have personal involvement in a material aspect of the claim presented before a deposition will be required. Mere knowledge or awareness of information that may be helpful if discovered is insufficient.

Wal-Mart, 2002 WL 562301 at 2, 3. In essence, *Wal-Mart* finds that when looked at critically, *Sandstrom* applies the *Morgan* doctrine to former high-ranking officials. Moreover, even when the deposition is allowed, the protections are relaxed as to factual matters but not issues involving an exercise of discretion. *Id.* at 2, 3 (Comparing *American Broadcasting Co. v. U.S. Information Agency*, 599 F.Supp. 765 (D.D.C. 1984) and drawing a distinction between "factual information" and "information regarding an exercise of discretion"). Presumably, this distinction is necessary to maintain the *Morgan*

protection of deliberative process. *Wal-Mart*, 2002 WL 562301 at 1 ("Decision-makers enjoy a mental process privilege")(citations omitted); *American Broadcasting Co. v. U.S. Information Agency*, 599 F.Supp. at 769 (noting "neither are plaintiffs interested in [the defendant's] deliberative thought process"). As a result, the deliberative process privilege also survives the governor's tenure.

In the instant case, FSST's assertion is that the State of South Dakota failed to negotiate for a new Class III gaming compact in "good faith." *See Generally* Complaint, (Doc. 1). In its argument that the Governor is a necessary deponent, FSST argues, without specifics, that "No one else can explain the Governor's motivations and positions as to the negotiations with the Tribe; no one else can identify as well as Governor Rounds the alternative proposals he considered, and no one else can better explain his reason for not approving proposals submitted by the Tribe." Plaintiff's Memorandum in Opposition at 9-10 (Doc. 200). Neither of the above clauses compels the deposition of the former Governor Rounds.

FSST's position appears to be, in part, that simply failing to accept one of the Tribe's proposals subjects the State to a claim of failure to negotiate in "good faith" and places the Governor's subjective intent at issue. This implication fails to recognize that simply failing to arrive at a compact does not give rise to a cause of action. As seen under 25 U.S.C. § 2710 (d)(7) the cause of action stems from the failure to negotiate in good faith. Imputing lack of good faith to the inability to compact reads into IGRA presumptions that do not exist.

With regard to actual negotiations, the State is not disputing that the Governor has the ultimate authority to enter into a compact with the Tribe. The exercise of that

authority, however, is not the issue in this case. The *ultimate* and *material* issue is not whether the State and FSST agreed to enter into a compact. It is undisputed that no agreement was reached. The issue is whether the State of South Dakota *negotiated* for a compact in "good faith." As such, and in answer to FSST's concern regarding the positions taken during negotiations, the person best situated to explain the positions set forth by the State, relevant to negotiations, is the Governor's designee, Larry Eliason. In fact, the very reason Mr. Eliason was appointed as negotiator was to do exactly what FSST is seeking from the Governor; explain the positions of the State. As argued in the State's opening Memorandum, the conduct of the negotiations must be evaluated by examining the negotiations themselves. Abstract and unexpressed views, ideas or thoughts simply cannot form the basis for a determination of whether the *negotiations* were conducted in "good faith" as they were not presented during negotiations and therefore are not relevant or necessary to a determination. Moreover, the information that is essential to the claim is available from sources other than the Governor. As such, FSST fails to overcome the protections afforded to high-ranking officials.

Aside from the legal arguments, FSST is factually incorrect in some of its assertions regarding the knowledge of the Governor and intent of the State. FSST cites calendared meetings for Governor Rounds' personal involvement in negotiations. Plaintiff's Memorandum in Opposition at 8 (Doc. 200). The meetings cited by FSST, however, we not attended by the Governor. Instead, Rob Skjonsberg, the Governor's Chief of Staff and main point of contact for compact negotiations, was present and acted on his behalf. (*See* Affidavit of Tanna Zabel, Exhibit 1). Rather than an illustration of

the Governor's involvement, the calendar entries reinforce the State's assertion that any relevant and necessary information sought by FSST is available from other sources.

With regard to subjective intent, FSST likewise misconstrued the State's questioning of Mr. Allen. Plaintiff's Memorandum in Opposition at 8-9 (Doc. 200). The State's questioning was not an attempt to divine the thoughts of the Governor through Mr. Allen. Likewise the State was not asking Mr. Allen speculate on the State's intent as a subjective reflection of the State's state of mind. Instead, the purpose of the questioning was to determine whether the *Tribe* was attributing improper negotiating tactics, as forbidden by IGRA, to the positions taken by the State of South Dakota. The actual intent of the Governor's statements was not and is not the issue. The issue is whether the requests and positions taken by the State are allowed under IGRA. For its defense, it is necessary for the State to determine whether FSST is arguing the statements and positions expressed throughout the negotiations were improper under IGRA. The questions cited by FSST were intended to reveal the Tribe's views of the negotiations, not those of the Governor.

b. Intent / High-ranking Officials and Deliberative Process

FSST attempts to turn the analysis of "good faith" in negotiations into an inquiry of the subjective intent of the State. FSST argues that when the subjective intent of a party is at issue, it negates both the protections offered to high-ranking government officials and the deliberative process privilege. Accordingly, FSST argues "Under IGRA…whether the State has negotiated in good faith is a question of subjective intent." Plaintiff's Memorandum in Opposition at 11 (Doc. 2000). In support of this statement, FSST cites National Labor Relations Board cases. The problem in doing this, however,

is that "good faith" cannot be described without relation to the statutory framework in which it applies. In *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960) the Supreme Court was careful to point that good faith must be defined within the specific statutory construct. In its analysis, the Court noted "Where congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." Undoubtedly, the statutory framework implemented in National Labor Relations Board cases ask an entirely different set of questions and for different reasons than those posed by IGRA.

The guidelines of this case are controlled by IGRA, 25 U.S.C. § 2701 *et seq*. It would appear that the only case to directly address the objective / subjective analysis of "good faith" is *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger* (*Rincon*). *Rincon*, 602 F.3d 1019 (9th Cir. 2010). In performing its analysis of good faith, the *Rincon* Court evaluated the statutory framework of IGRA and found:

> IGRA does not provide express guidance about whether good faith is to be evaluated objectively or subjectively. However, we are influence by the factors outlined in § 2710(d)(7)(B)(iii), which lend themselves to objective analysis and make no mention of unreasonable beliefs. Further, the structure and content of § 2710(d) make clear that the function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited bases, not to embroil the parties in litigation over subjective motivations. We therefore hold that good faith should be evaluated objectively based on the record of negotiations, and that a state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands.

Rincon, 602 F.3d at 1041. The Court further cited *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1033 (2nd Cir. 1990) for the proposition that "The statutory

terms are clear, and provide no exception for sincere be erroneous legal analysis." *Rincon* is clear in holding that good faith is based upon an objective analysis of the parties conduct within the guidelines provided by Congress. Good faith, then, is determined by the offers and positions actually taken in negotiations. The intent behind offers made during negotiations as well as the deliberative processes leading up to the decision to make or reject an offer is irrelevant to a determination of good faith.

Even if subjective intent were to be considered relevant, it does automatically result in a waiver of the *Morgan* doctrine or the deliberative process privilege. Citing *In re Subpoena Duces Tecum Served on the Office of Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), FSST suggests that when intent is at issue, there is an automatic waiver of the deliberative process privilege. In cases where the government's intent is potentially relevant, the wholesale approach of deliberative process waiver as seen in *In Re Subpoena Duces Tecum* has been dismissed in favor of a balancing test weighing the evidentiary need against the harm of disclosure. *See Heights Bank, FSB. v. United States*, 46 Fed.Cl. 312, 321-22 (Fed. Cl. 2000)(citing, among others, *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985). A "strong showing" of evidentiary need must be weighed against the harm of disclosure. *Id.* In discussing the attorney-client privilege, automatic waiver when intent is alleged was also dismissed in *Greater Newburyport Clamshell Alliance, v. Public Service Company of New Hampshire*, 838 F.2d 13, 19 (1st Cir. 1988)(citing *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982)(rejecting complete waiver). It would appear that a case by case analysis is favored when waiver of a privilege is sought. Such an analysis should not be disregarded in favor of automatic waiver. Instead, the application of asserted

privileges should be completed within the legal and factual framework set out above, and in the State's opening brief (Doc. 198) analyzing the applicability of the deliberative process privilege and the *Morgan* doctrine.

Presently, FSST has made only a sweeping argument that the facts and law of this case require the waiver of the *Morgan* doctrine. FSST has not specifically pointed to any relevant, necessary and essential information possessed by the Governor that is not obtainable from another source. Likewise, FSST cites to no specific acts of misconduct on the part of the Governor. Accordingly, the protections offered by *Morgan* should be extended to former Governor Rounds. Furthermore, FSST is requesting information protected by not only by *Morgan*, but also the deliberative process privilege. FSST's broad-sweeping approach again fails to cite specific reasons to support waiver of the privilege.

III. Conclusion

Based upon the above arguments and authorities as well as the State's initial Memorandum in Support of the State's Motion for Protective order Regarding the Deposition of M. Michael Rounds, (Doc. 198), the State, therefore, respectfully requests the following:

1. The Court issue a Protective Order quashing the subpoena for the deposition of Governor M. Michael Rounds.
2. In the event a Protective Order is not issued, a reasonable time to coordinate the deposition of former M. Michael Rounds.

Dated this 18th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Defendant's Reply to Plaintiff's Memorandum in Opposition to the State's Motion for Protective Order Regarding the Deposition of M. Michael Rounds Governor of South Dakota in the matter of *Flandreau Santee Sioux Tribe v. State of South Dakota* were filed by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(D) (and the Court's Electronic Filing Standing Order) on this 18th day of January, 2011:

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