

---

**IN THE UNITED STATES DISTRICT COURT**  
**CENTRAL DIVISION, DISTRICT OF UTAH**

---

**ROBERT C. BONNET, an individual, and :**  
**BOBBY BONNET LAND SERVICES, a**  
**sole proprietorship, :**

**Plaintiffs, :**

**vs. :**

**HARVEST (US) HOLDINGS, INC., a :**  
**Delaware corporation, BRANTA**  
**EXPLORATION & PRODUCTION, LLC, a :**  
**Delaware limited liability company, UTE**  
**ENERGY LLC, a Delaware limited**  
**liability company, CAMERON CUCH, an**  
**individual, ELTON BLACKHAIR, an**  
**individual, and JOHN DOES 1-20, :**

**Defendants. :**

**Civil No. 2:10-cv-00217**

**RULING & ORDER**

**DISTRICT COURT JUDGE CLARK**  
**WADDOUPS**

**MAGISTRATE JUDGE BROOKE C.**  
**WELLS**

---

Currently pending before this Court are: (1) non-party movant, the Ute Indian Tribe of the Uintah and Ouray Reservation's "Motion To Quash Subpoena Duces Tecum"<sup>1</sup>; and (2) Plaintiffs', Robert Bonnet and Bobby Bonnet Land Services, "Motion To Strike Non-Party Movant Ute Indian Tribe's Notice of Additional Information

---

<sup>1</sup>Document Number 33.

Regarding Its Motion To Quash Subpoena.”<sup>2</sup> Oral arguments on the motion to quash were heard on June 8, 2011, at the conclusion of which this Court took the matter under advisement.<sup>3</sup> Now, having considered the parties’ written and oral submissions, along with all relevant legal authorities, the Court rules as stated herein.

#### **I. Motion To Strike<sup>4</sup>**

On June 9, 2011, one day after the Court took oral argument on the motion to quash, the Tribe electronically filed a document entitled “Notice of Additional Information Regarding Tribe’s Motion to Quash Subpoena Duces Tecum and Additional Legal Authority Relevant to the Additional Information by Ute Indian Tribe of the Uintah and Ouray Reservation.”<sup>5</sup> Through its notice, the Tribe provides additional information and legal authorities it considers relevant to the motion. Plaintiffs responded by filing a “Motion To Strike” arguing the notice should be stricken as duplicative and legally improper.<sup>6</sup>

Upon consideration, the Court hereby grants plaintiffs’ motion to strike concluding that the Tribe’s “Notice of Additional Information Regarding Tribe’s Motion to Quash Subpoena Duces Tecum and Additional Legal Authority Relevant to the Additional Information by Ute Indian Tribe of the Uintah and Ouray Reservation” is an unnecessary supplement to issues thoroughly briefed and previously argued before this

---

<sup>2</sup>Document Number 48.

<sup>3</sup>Document Number 47.

<sup>4</sup>Document Number 48.

<sup>5</sup>Document Number 46.

<sup>6</sup>Document Number 48.

Court. Therefore, the Court will not consider the Tribe's "Notice"<sup>7</sup> in reaching its decision.

## **II. Motion To Quash<sup>8</sup>**

### **1. Argument**

On March 23, 2011, the Tribe filed its "Motion To Quash" the March 1, 2011, Subpoena Duces Tecum served by plaintiffs on the Tribe's Energy and Minerals Department.<sup>9</sup> The subpoena requests production of numerous documents and communications which plaintiffs contend are essential to their ability to proceed in the underlying lawsuit.<sup>10</sup> That lawsuit involves issues and causes of action stemming from

---

<sup>7</sup>Document Number 46.

<sup>8</sup>Document Number 33.

<sup>9</sup>Document Number 33.

<sup>10</sup>Generally, the subpoena requests the following:

Request No. 1: Any and all documents relating to any communication between you and Robert Bonnet;

Request No. 2: Any and all documents relating to communication prepared by Robert Bonnet during his employment with you;

Request No. 3: Any and all documents relating to communication between or pertaining to Branta and Robert Bonnet;

Request No. 4: Any and all documents relating to communication between or pertaining to Harvest and Robert Bonnet;

Request No. 5: Any and all documents relating to communication between or pertaining to Bureau of Indian Affairs and Robert Bonnet;

Request No. 6: Any and all documents regarding negotiations of Oil and Gas Leases for individual Indian allottee owners;

Request No. 7: Any and all documents relating to the September 9, 2008 business meeting at Falcon's Ledge;

plaintiff Robert Bonnet's employment with the Ute Indian Tribe's Energy and Minerals Department as a consultant in the capacity of senior petroleum landman.<sup>11</sup> Plaintiffs assert numerous causes of action against the named defendants for: intentional interference with economic relations, employment contract and prospective employment, libel, slander, intentional infliction of emotional distress and civil conspiracy.<sup>12</sup> The Tribe is not a party to the lawsuit.

Through its motion, the Tribe seeks to quash plaintiffs' subpoena by asserting the protections of the sovereign immunity doctrine, a defense appropriately raised by challenging the subject matter jurisdiction of the judicial forum.<sup>13</sup> In the alternative, the Tribe argues the subpoena should be quashed pursuant to Federal Rule of Civil Procedure 45(c), because it: i) fails to allow reasonable time for compliance; ii) subjects the Tribe to an undue burden; and iii) requires the disclosure of privileged and other

---

Request No. 8: Any and all documents relating to transactions with Berry Petroleum, Ute Energy and the Ute Indian Tribe;

Request No. 9: Any and all communications received by members of the Ute Indian Tribe pertaining to Robert Bonner; and

Request No. 10: Any and all documents, minutes, recordings video or otherwise, relating to meetings conducted by the Ute Indian Tribe Business Committee pertaining to Robert Bonnet, Harvest, Branta, and/or Ute Energy.

<sup>11</sup>Document Number 1, "Complaint" pg. 3, ¶ 13. The named defendants in the underlying lawsuit are: Harvest (US) Holdings, Inc., Branta Exploration & Production LLC, Ute Energy LLC, Cameron Cuch, Elton Blackhair and John Does 1-20.

<sup>12</sup> Document Number 1, "Complaint."

<sup>13</sup>Ramey Construction Co. Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982)("The issue of sovereign immunity is jurisdictional."); Document Number 34, "Non-Party Movant Ute Indian Tribe's Memorandum In Support Of Motion To Quash Subpoena Duces Tecum" pg. 4.

protected matters.<sup>14</sup>

Plaintiffs oppose any attempt to quash the subpoena, arguing that sovereign immunity does not protect the Tribe from compliance when it is not a party to the underlying litigation.<sup>15</sup> Further, plaintiffs take issue with the Tribe's Federal Rule 45 challenges asserting the Tribe has failed to prove undue burden, confidentiality and privilege.<sup>16</sup>

## **2. Ruling**

### **A. Sovereign Immunity**

It is undisputed that the Ute Tribe of the Uintah and Ouray Reservation was established under the Indian Reorganization Act of 1934 and is therefore a federally recognized sovereign Indian Tribe.<sup>17</sup> Under long-standing law, a federally recognized Tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."<sup>18</sup> Any Congressional abrogation or waiver of immunity can only be provided through an express or unequivocal waiver; a waiver of immunity may not

---

<sup>14</sup>Document Number 34, "Non-Party Movant Ute Indian Tribe's Memorandum In Support Of Motion To Quash Subpoena Duces Tecum" pgs. 6-9.

<sup>15</sup>Document Number 39, "Memorandum In Opposition To Non-Party Movant Ute Indian Tribe's Motion To Quash Subpoena Duces Tecum" pgs. 5-7.

<sup>16</sup>Document Number 39, "Memorandum In Opposition To Non-Party Movant Ute Indian Tribe's Motion To Quash Subpoena Duces Tecum" pgs. 7-10.

<sup>17</sup>25 U.S.C. § 476.

<sup>18</sup>Kiowa Tribe of Okla v. Mfg. Techs., Inc., 523 U.S. 751, 754; 118 S. Ct. 1700, L. Ed. 2d 981 (1988).

arise by implication.<sup>19</sup>

While the general principles underlying sovereign immunity and its application to the Tribe are not at issue, the somewhat novel<sup>20</sup> question before the Court is whether principles of sovereign immunity apply to quash the enforcement of a non-party subpoena duces tecum.

The Tribe passionately argues that both the Tenth Circuit and the Colorado Supreme Court have recently addressed this specific issue and “recognized unequivocally that Indian tribes have sovereign immunity from compelled compliance with legal process, even if, as here, the tribe is a non-party.”<sup>21</sup> In support of its claim, the Tribe specifically cites to the cases of *Breakthrough Mgt. Group, Inc. v. Chuckhansi Gold Casino and Resort*<sup>22</sup> and *Cash Advance v. Colorado*.<sup>23</sup> While *Breakthrough*

---

<sup>19</sup>Cash Advance and Preferred Cash Loans v. State of Colorado, 242 P.3d 1099, 1107 (Colo. 2010)(citing, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

<sup>20</sup>United States v. James, 980 F.2d 1314 (9th Cir. 1992)(Court did not discuss how tribal immunity from suit extended to a case in which the tribe was not a party and no suit was filed against it.); *See also*, United States of America v. Juvenile Male 1, 431 F. Supp. 2d 1012, 1018 (2006); *See also*, Catskill Dev. LLC v. Park Place Entm’t Corp., 206 F.R.D. 78, 86 (“[t]he extent to which tribal sovereign immunity applies to non-party subpoenas of individuals in civil litigation is not clearly established in this Circuit, and there is little authority anywhere on whether a Native American tribe may be compelled to testify or produce documents as non-party fact witnesses pursuant to the district courts’ subpoena power.”); *See also*, Alltel Communications v. DeJordy, 2011 U.S. Dist. LEXIS 16863.

<sup>21</sup>Document Number 43, “Non-Party Movant Ute Indian Tribe’s Reply In Support Of The Tribe’s Motion To Quash Subpoena Duces Tecum” pg. 2.

<sup>22</sup>Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010).

<sup>23</sup>Cash Advance & Preferred Cash Loans v. State of Colorado, 242 P.3d 1099 (Colo. 2010).

supports the extension of sovereign immunity to certain subdivisions of a Tribe<sup>24</sup> and *Cash Advance* maintains the application of tribal immunity to a state investigative subpoena,<sup>25</sup> the underlying issue in both cases revolves around whether a casino and a cash loan entity were operating as an “arm-of-the-Tribe” such that their activities fell under the rubric of tribal immunity. To that extent, these cases are readily distinguishable.

In further support of its position, the Tribe cites to the cases of *United States v. James*<sup>26</sup> and *Catskill Development LLC v. Park Place Entertainment*.<sup>27</sup> In *James*, a federal criminal case where a Native American defendant obtained a subpoena duces tecum seeking production of records from the alleged victim, the Court acknowledged that immunity did not necessarily extend to individual members of the Tribe.<sup>28</sup> The Court did not, however, reach the specific issue of “how tribal immunity from suit extended to a case in which the tribe was not a party and no suit was filed against it.”<sup>29</sup> While the *Catskill* Court concluded that sovereign immunity protected the Tribe from enforcement of a federal civil subpoena, it stated that “[t]he extent to which tribal

---

<sup>24</sup>Breakthrough, at 1183.

<sup>25</sup>Cash Advance, at 1108.

<sup>26</sup>United States v. James, 980 F.2d 1314 (9th Cir. 1992).

<sup>27</sup>Catskill Development LLC v. Park Place Entertainment Corp., 206 F.R.D. 78 (S.D.N.Y. 2002).

<sup>28</sup>James, at 1319 (citing, Puyallup Tribe Inc. v. Washington Game Dept., 433 U.S. 313, 328 (1978)).

<sup>29</sup>United States v. Juvenile Male 1, 431 F. Supp. 2d. 1012, 1018 (D. Ariz. 2006)(analyzing, United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992)).

sovereign immunity applies to non-party subpoenas of individuals in civil litigation is not clearly established in this Circuit, and there is little authority anywhere on whether a Native American tribe may be compelled to testify or produce documents as non-party fact witnesses pursuant to the district courts' subpoena power."<sup>30</sup> In reaching its decision, the Court compared tribal immunity with the sovereign immunity of the United States, and specifically rejected the balancing approach promoted by other Courts considering similar issues.<sup>31</sup>

In reaching a decision on the motion to quash, this Court looks to the factually similar case of *Alltel Communications*.<sup>32</sup> In *Alltel*, non-parties the Gonzalez law firm, the Oglala Sioux Tribe and Joseph Red Cloud filed motions to quash the subpoenas duces tecum served upon them by plaintiff Alltel Communications. Specifically, the Sioux Tribe, as a non-party, argued that the protections of tribal immunity applied to preclude compliance with the subpoena.<sup>33</sup> The Court, however, disagreed concluding that tribal immunity did not constitute a "shield" for the non-party Tribe that would justify non-compliance.<sup>34</sup> In support of its decision, the Court noted,

---

<sup>30</sup>Catskill at 86.

<sup>31</sup>See, United States v. Verlade, 40 F. Supp. 2d. 1314, 1316 (D.N.M. 1999) (the proper procedure to apply when sovereign immunity is asserted in an effort to quash a subpoena is to balance the sovereign interests of the United States and the Tribe)).

<sup>32</sup>Alltel Communications v. DeJordy, 2011 U.S. Dist LEXIS 43583.

<sup>33</sup>Alltel at \*7.

<sup>34</sup>Id. at \*31.



[a]pplication of the discovery immunity exception not only prevents a party from access to [relevant] information, but creates a huge hole in *FRCP 26(b)(1)* as it carves out an immunity based exception that applies only when that information is sought from a non-party who is either an Indian tribe, tribal agency, tribal official or employee<sup>35</sup>

Ultimately, the *Alltel* Court employed a balancing test, weighing the Tribe's interest as a non-party, with the interests of the individual litigant in obtaining non-privileged information relevant to its claim or defense.<sup>36</sup> In doing so, the Court concluded that allowing the Tribe "to advance its interests while denying Alltel [plaintiff] access to information" would be contrary to the goals and purposes of the Federal Rules of Civil Procedure.<sup>37</sup>

It is, in part, based upon such reasoning that the Court now issues its ruling denying the Tribe's motion to quash based upon the doctrine of tribal sovereign immunity. In doing so, the Court does not seek to abrogate the well-established doctrine of tribal sovereignty.<sup>38</sup> This Court fully recognizes the viability of the doctrine which, absent a waiver of immunity, indisputably applies to protect Indian Tribes from suit. Here, however, because the subpoena was served upon the Tribe as a non-party, the Court concludes that the distinct circumstances of this case do not fall within the

---

<sup>35</sup> *Alltel*, at \*30, citing Joshua Jay Kanassattega, "The Discovery Immunity Exception in Indian Country—Promoting American Indian Sovereignty By Fostering the Rule of Law." 31 *Whittier L. Rev.* 199 (2009).

<sup>36</sup> *Alltel* at \*32-33 (citing, 31 *Whittier L. Rev.* 199 (2009)).

<sup>37</sup> *Alltel* at \*33.

<sup>38</sup> *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp.2d 1131, 1137 (N.D. Okla. 2001)(citing, *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (it "is not the role of the federal courts to abrogate tribal sovereignty.")).

purview of the tribal immunity doctrine, and therefore a balancing of the relevant interests is appropriate.<sup>39</sup>

Balancing the interests at issue, the Court considers the Tribe's "claim of immunity against the search for truth as contemplated by the Federal Rules of Civil Procedure."<sup>40</sup> Here, the Tribe is not a party to the underlying lawsuit; no claims have been brought against the Tribe. Further, the tribal treasury is not implicated and the information sought by plaintiffs is not critical to matters of tribal self-government or self-sufficiency.<sup>41</sup> Consequently, this Court concludes that as a non-party, the Tribe's interests, if any, are significantly outweighed by concerns that quashing the subpoena could deprive the plaintiffs of access to relevant, non-privileged information thereby detrimentally affecting the outcome of their case.<sup>42</sup> Based upon this balance of interests and the Tribe's status as a non-party, the Court denies the motion to quash concluding that under such circumstances the doctrine of tribal sovereign immunity was not intended to extend to a non-party Tribe.

## **B. Federal Rule of Civil Procedure 45**

In addition to sovereign immunity, as addressed below, the Tribe mounts several

---

<sup>39</sup>Alltel v. DeJordy, 2011 U.S. Dist. LEXIS 16863 \*32-33 ("The balancing test should consider the interests of a claim of immunity against the search for truth contemplated by the Federal Rules of Civil Procedure."). United States v. Velarde, 40 F. Supp.2d 1314, 1316 (D.N.M. 1999).

<sup>40</sup>Alltel at \*32.

<sup>41</sup>United States v. Velarde, 40 F. Supp. 2d 1314, 1317 (1999)(examining the sovereign interests of the Tribe in resisting a subpoena); Alltel Communications v. DeJordy, 2011 U.S. Dist. LEXIS 16863 \*31 ("Tribal sovereignty and immunity from suit are important elements in the Tribe's self-governance and self preservation.").

<sup>42</sup>Alltel at \*33.

Rule 45 challenges to plaintiffs' subpoena duces tecum.

### **1. Failure To Allow Reasonable Time**

The Tribe asserts that plaintiffs' subpoena should be quashed because it fails to allow a reasonable time for compliance.<sup>43</sup> However, at oral argument, plaintiffs' counsel indicated their willingness to provide additional time, as necessary, for the Tribe to gather the relevant documents. Given plaintiffs' cooperation, the Tribe's motion to quash is denied for failure to allow reasonable time for compliance.

### **2. Undue Burden**

Next, the Tribe argues that plaintiffs' subpoena should be quashed because it subjects the Tribe to an undue burden.<sup>44</sup> The Tribe contends that "locating and producing a vast number of documents will consume much time, expense and other valuable Tribal resources—a severe, undue burden for a non-party to incur."<sup>45</sup>

Tempering the Tribe's claim of undue burden, plaintiffs indicate they are willing to pay for appropriate costs, including compensation for the time and efforts necessary to compile the requested records and documents. As a result, the Court does not find the burden undue. Furthermore, as with all discovery, the Tribe is not required to produce documents not within its possession.

---

<sup>43</sup>Fed R. Civ. P. 45 (c)(3)(A)(i) states "[o]n timely motion, the issuing court must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply."

<sup>44</sup>Fed. R. Civ. P. 45 (c)(3)(A)(iv) states "[o]n timely motion, the issuing court must quash or modify a subpoena that (iv) subjects a person to undue burden."

<sup>45</sup>Document 34, Tribe's "Memorandum In Support Of Motion To Quash Subpoena Duces Tecum" pg. 7.

### 3. Privilege

Finally, the Tribe argues that the subpoena should be quashed because it improperly requires disclosure of privileged and protected matters.<sup>46</sup> The Tribe's motion generally refers to "disclosure of privileged matters for which no exception or waiver applies" but does not reference any specific privileges or protected matters.<sup>47</sup> When further questioned, the Tribe generally referenced an "executive and/or general process privilege" but was unable to indicate exactly how and to which of plaintiffs' subpoena requests the privileges applied. Accordingly, the Tribe's motion to quash on these grounds is denied.

As to the issue of confidentiality, plaintiffs indicate their willingness to address any of the Tribe's confidentiality issues through the entry of a protective order. The Court finds this to be an appropriate avenue to address such concerns, and encourages the parties to proceed as necessary.

Based upon the above, the Court does not find any of the Tribe's Rule 45 challenges to be persuasive. The Tribe's motion to quash is denied on these grounds.

---

<sup>46</sup>Fed. R. Civ. P. 45 (c)(3)(A)(iii) states "[o]n timely motion, the issuing court must quash or modify a subpoena that: (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies."

<sup>47</sup>Document 34, "Memorandum In Support Of Motion To Quash Subpoena Duces Tecum" pg. 8.

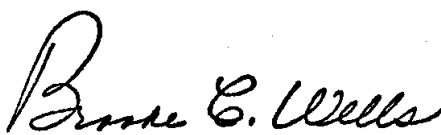
### III. Conclusion

For the reasons set forth herein, the Court rules as follows and:

1. Grants Plaintiffs' Motion To Strike; and
2. Denies the Tribe's Motion To Quash Subpoena Duces Tecum.

DATED this 11th day of August, 2011.

BY THE COURT:

A handwritten signature in black ink, reading "Brooke C. Wells". The signature is written in a cursive style with a large initial 'B' and 'W'. Below the signature is a horizontal line.

Brooke C. Wells  
United States Magistrate Judge