IN THE

UNITES STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 11-1520

ALLTEL COMMUNICATIONS, LLC
Respondent/Appellee
vs.
OGLALA SIOUX TRIBE, JOSEPH RED CLOUD
AND GONZALEZ LAW FIRM
Petitioners/Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
CASE # CIV. 10-mc-00024

REPLY BRIEF OF APPELLANTS OGLALA SIOUX TRIBE AND JOSEPH RED CLOUD

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RESPONSE TO ALLTEL'S STATEMENT OF FACTS

Alltel spends nearly fourteen pages of its Brief setting forth its rendition of the "facts." However, many of those facts are simply irrelevant to the one issue before this Court – whether tribal immunity protects the Tribe from having to comply with the subpoena duces tecum – and Alltel's invocation of such facts simply confuses this issue. For example, Alltel goes to great lengths in describing the underlying relationship between Eugene DeJordy and Alltel and between DeJordy and the Tribe, and Alltel's acquisition and divestiture of certain telecommunications assets, none of which are pertinent to the issue before the Court. As such, without addressing the accuracy of such irrelevant facts, the Tribe will not respond to them.

Further, many of the "facts" alleged by Alltel are unsupported and contain no citation to any record evidence. *See* Alltel's Brief, pp. 7, 10, 12, 13. To the extent any of these alleged facts are deemed relevant, which is expressly denied, the Court should refuse to consider them, in light of Alltel's failure to provide record support for them.

The only relevant facts in Alltel's Brief are found in sections D. through F. of Alltel's Statement of Facts. There, Alltel describes its discovery efforts, including the subpoena duces tecum served on the Tribe and Red Cloud, seeking DeJordy's communications with the Tribe. Alltel Brief, p. 9. However, Alltel

claims, without citation to any record evidence, that "the relevance of such documents to the breach of contract action against DeJordy is undisputed" and that "Alltel knows that responsive documents exist." Alltel Brief, p. 10. To the Tribe's knowledge, neither the relevance nor existence of such documents is undisputed. In any event, Alltel has not established that the Tribe's immunity does not protect it from compliance with the subpoena duces tecum, or that Alltel's interest is somehow greater than the Tribe's interest in protecting its immunity.

STANDARD OF REVIEW

As stated in the Tribe's previous Brief, the District Court's application of tribal immunity is subject to de novo review. *See e.g. E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (applying *de novo* standard of review to claim of tribal immunity); *In re Mayes*, 294 B.R. 145, 147 (B.A.P. 10th Cir. 2003) ("the application of tribal sovereign immunity is a question of law subject to *de novo* review by this Court."); *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 783 (5th Cir. 2004) (applying *de novo* standard of review to issue of tribal immunity). The Tribe disagrees with Alltel's argument that an abuse of discretion standard also applies. The relevant inquiry in this case is simply whether tribal immunity applies, and the de novo standard of review, therefore, applies.

ARGUMENT

A. Tribal Immunity Protects the Tribe from Compliance with the Subpoena Duces Tecum

Alltel argues first that "sovereign immunity is implicated only 'if the judgment sought would expend itself on the public treasury or domain.'" Alltel's Brief, p. 21 (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). As previously argued in the Tribe's initial brief, **tribal sovereign immunity** ("tribal immunity") is at issue in this case not Federal or State sovereign immunity ("sovereign immunity"), and any discussion or argument regarding sovereign immunity is simply inapplicable. Thus, the authorities cited by Alltel are inapposite. *See* Tribe's Brief, pp. 18-24.

Alltel's argument is unavailing because it unduly restricts the applicability of tribal sovereign immunity and misquotes the Court's opinion in *Dugan*. The Court in *Dugan* did not consider the breadth of sovereign immunity (and did not consider tribal immunity at all), but rather, considered only whether the lawsuit brought implicated the United States. In concluding the lawsuit was against the United States, the Court held, "[t]he **general rule** is that a suit **is against the sovereign** if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration.'" *Dugan*, 372 U.S. at 620 (other citations omitted) (emphasis added). Thus, the Court's statement was not so absolute as Alltel claims it to be, and in any event, it applies in determining

whether a claim is made against the sovereign, not whether sovereign immunity applies to bar the lawsuit. Alltel's reliance on *Dugan* is, therefore, misplaced.

In re Missouri Department of Natural Resources, 105 F.3d 434 (8th Cir. 1997), and the other cases addressing Federal and State sovereign immunity cited by Alltel are also inapposite, as they address only whether **the Federal or State governments** are shielded from discovery via **sovereign immunity**. *See* Alltel's Brief, pp. 21-23. As noted above, and more thoroughly addressed in the Tribe's initial Brief, Federal and State sovereign immunity is not the equivalent of tribal sovereign immunity. Tribe's Brief, pp. 18-24.

Thus, Alltel is left to rely on *United States v. Juvenile Male*, 431 F.Supp.2d 1012 (D. Ariz. 2006). As previously distinguished, *Juvenile Male* was a **criminal** case in which the juvenile defendant was charged with sexual abuse of a minor on an Indian reservation. *Id.* at 1013. The defendant sought the victim's records from tribal agencies, which refused to provide them, citing sovereign immunity. *Id.* In response to the tribe's claim of sovereign immunity, the court plainly held, "tribal immunity has no application to claims **made by the United States**." *Id.* at 1017. Further, the court in *Juvenile Male* decided the immunity question based on the fact that it was a criminal case, stating "Congress has vested jurisdiction over major crimes committed by Indians on the reservation in the federal courts.

Everything that Congress does is in turn subject to the limitations imposed on it by the Constitution of the United States." *Id.*

Alltel concludes this argument by stating, "[t]he *Juvenile Male* approach is straightforward and logical: if a State is not immune to a federal non-party subpoena, **and if tribal immunity is no greater than state sovereign immunity**, then a tribe cannot be immune to a federal non-party subpoena either." Alltel Brief, p. 24 (emphasis added). The infirmity with Alltel's conclusion is that it first must establish that tribal immunity and state sovereign immunity are equivalent. They are not, and Alltel's reasoning is, therefore, flawed.

B. Tribal Immunity and State Sovereign Immunity Are Not Equivalent

As previously argued by the Tribe, Eleventh Amendment immunity, while similar in some respects, is not completely analogous to tribal immunity. Tribe's Brief, p. 19. Alltel attacks this argument by incorrectly suggesting that the "primary authority" relied upon by the Tribe is an anonymous student note. Alltel Brief, p. 28. In fact, the Tribe cited a number of relevant authorities – seven federal and state cases – that recognize the distinctions between Eleventh Amendment and tribal immunity. Most significantly, the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998), held that "the immunity possessed by Indian tribes is not coextensive with that of the States." *See also Cash Advance and Preferred Cash Loans v.*

Colorado, 242 P.3d 1099, 1110 n.11 ("Instead, the inherent nature of tribal sovereignty, . . . requires us to distinguish tribal sovereign immunity from state sovereign immunity."); *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 959 (E.D. Cal. 2009) (other citations omitted) ("Case law setting out the bound of the Eleventh Amendment can not be directly applied to tribal sovereign immunity without analysis as 'Tribal sovereign immunity . . . is not precisely the same as either international law sovereign immunity or sovereign immunity among the states.'"); *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002) (distinguishing tribal immunity from Eleventh Amendment immunity and holding that suing someone in their "individual capacity" may affect Eleventh Amendment immunity, but it does not so affect tribal immunity); *In re Mayes*, 294 B.R. 145, 149 (B.A.P. 10th Cir. 2003) ("the doctrine of tribal immunity . . . is similar, but not identical, to the sovereign immunity of States as preserved by the Eleventh Amendment."); *Conservatorship of the Estate of Gonzalez*, No. A117307, 2008 WL 788606 at *4 (Cal. Ct. App. 2008) (finding analogy of "tribal sovereign immunity to that of state sovereign immunity under the Eleventh Amendment" to be "unhelpful."). *Cf.* *Rosenberg v. Hualapai Indian Nation*, No. 1 CA-CV 08-0135, 2009 WL 757436 (Ariz. Ct. App. 2009) (rejecting argument that Indian nations have sovereign immunity equal to, but not greater than, that possessed by other sovereign nations

that may be hailed into state courts and otherwise distinguishing tribal immunity from Eleventh Amendment immunity).

Notably, Alltel does not even mention or attempt to distinguish these cases, except for the *Cash Advance* case, which Alltel claims is inapposite because it dealt with **state** process. Alltel Brief, p. 28. This is an interesting argument for Alltel to make, particularly because Alltel itself relied on the lower appeals court's opinion in *Colorado v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 402 (Colo. Ct. App. 2008), in its Opposition to the Tribe's Motion to Quash Subpoenas filed with the District Court. *See* Alltel Appendix, p. A69.[1] In support of its position in the District Court, Alltel quotes the Colorado Court of Appeals' opinion in *Cash Advance*, which stated, "Courts have authority to compel tribes to produce documents." *See* Alltel Appendix, p. A69 (quoting *Cash Advance*, 205 P.3d at 402). Only now, after the Colorado Supreme Court in *Cash Advance* disagrees with the Colorado Court of Appeals' opinion on tribal immunity, does Alltel argue that case is inapplicable because it involved state process. Alltel cannot have it both ways.

Regardless of the process involved, whether it is a subpoena issued in state or federal court, the reasoning of the Colorado Supreme Court in *Cash Advance* is

[1] Although Memoranda of Law are not to be included in an Appendix, *see* FRAP 30(a)(2) ("Memoranda of law in the district court should not be included in the appendix unless they have independent relevance"), the Tribe recognizes this Court has access to and may rely on any materials filed with the District Court. *See* 8th Cir. R. 30A(b)(4).

sound, and has application beyond the state court arena. Indeed, the Colorado Supreme Court applied much federal law in determining the tribal immunity issue. *See Cash Advance*, 242 P.3d at 1107 and cases cited therein. For all these reasons, Alltel's attempts to distinguish *Cash Advance* are futile and *Cash Advance* provides valuable guidance on this novel issue.

In sum, as previously argued by the Tribe, tribal immunity is not the equivalent of Eleventh Amendment immunity, and the authorities addressing Eleventh Amendment immunity cited by Alltel and the District Court are not applicable to the tribal immunity issue in this case. In fact, the only courts to consider whether tribal immunity protects a non-party Tribe from compliance with a subpoena, have found in the tribes' favor.

C. The Cases Addressing Tribal Immunity Have Concluded It Protects the Tribe from Compliance with a Subpoena

One of the few cases to consider the issue of tribal immunity in the context of a subpoena is *United States v. James,* 980 F.2d 1314 (9th Cir. 1992), which held that tribal immunity protected the tribe from compliance with the subpoena. Alltel argues the court in *James* "based its holding on an entirely different rationale: the sensitive nature of the drug counseling documents requested." Alltel Brief, p. 30. Alltel completely misreads the *James* case, as the Ninth Circuit very plainly held the "Quinault Indian nation did not waive its sovereign immunity, and thus is protected from responding to the subpoena issued by the district court." *James*,

980 F.2d at 1316. The court did not base this decision at all on the sensitive nature of the counseling documents that were requested. Rather, this consideration was brought up by the court only in determining whether the tribe waived their tribal immunity. *See James*, 980 F.2d at 1320 (explaining the tribe did not explicitly waive its immunity to documents from different agencies when it voluntarily turned over some documents because of the different interests in the counseling reports in which the tribe had an increased privacy interest).

Alltel also claims that "most courts faced with *James* have been critical of it and have refused to follow it;" yet, Alltel cites just one case – *Juvenile Male* – that was critical of *James*. As previously argued, however, *Juvenile Male* is distinguishable, as it was a criminal case and the court based its decision on the fact that the claim made was by the United States, stating, "tribal immunity has no application to claims made by the United States." *Juvenile Male*, 431 F.Supp.2d at 1017.

Alltel then argues that "numerous courts beyond the Ninth Circuit have expressly refused to follow *James*," but cites to only two cases – *United States v. Velarde*, 40 F.Supp.2d 1314, 1315-16 (D.N.M. 1999) and *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 29-30 (1st Cir. 2006). The Tribe previously pointed out that these cases are also readily distinguishable. In *Velarde*, the federal court's jurisdiction was based upon the Indian Major Crimes Act and involved a

crime allegedly committed by an Indian on Indian land. *Id.* at 1315. The court held the subpoena power of the federal court trumps sovereign immunity in cases arising under federal law because the court's interest in enforcing federal law is greater than the assertion of sovereign immunity. *See id.* And, in *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25-26 (1st Cir. 2006), the court held a search warrant could be executed on tribal lands because tribal sovereign immunity in Rhode Island had been **abrogated**.

Alltel next attempts to distinguish *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002), claiming the court there "did not hold that a federal subpoena should be quashed based on tribal immunity" and that "the court ultimately found requested documents to be discoverable on waiver grounds." Alltel Brief, p. 32. As noted by the Tribe, the *Catskill Development* case is most akin to the present case, as it was a civil case involving tribal immunity. *Id.* at 83-84 (action for tortious interference and unfair competition). Contrary to Alltel's contentions, there is no question that the *Catskill* court concluded that tribal immunity applies to a civil subpoena. *See id.* at 87-88 (noting the enforcement of a civil subpoena is barred by sovereign immunity and the same rule applies in the context of tribal immunity). However, although the court found that tribal immunity applies to and protects a tribe from compliance with a civil subpoena, it concluded the tribe waived its immunity. *See id.* at 89-90.

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Alltel's attack on the Colorado Supreme Court's opinion in *Cash Advance* is equally as specious. As noted above, Alltel itself cited to and relied on the lower appeals court's opinion in *Cash Advance* and certainly never brought up the argument that the case addressed whether tribes are immune from state process, not federal process. *See* Alltel Appendix, A69. In any event, as stated, the reasoning of the Colorado Supreme Court in *Cash Advance* is sound, was based on federal law on this issue and has application beyond the state court arena.

Alltel next argues the Tribe's distinctions of the cases relied upon by Alltel are irrelevant. In fact, the courts in these cases found such facts to be significant to their holdings. As to the civil versus criminal distinction, the courts' opinions in *Juvenile Male*, 431 F.Supp.2d at 1017 and *In re Long Visitor*, 523 F.2d 443, 446-47 (8th Cir. 1975), demonstrate that this distinction is compelling, not irrelevant. *See Juvenile Male*, 431 F.Supp.2d at 1017 ("Congress has vested jurisdiction over major crimes committed by Indians on the reservation in the federal courts); *In re Long Visitor*, 523 F.2d 443, 446-47 (8th Cir. 1975) (court's decision compelling grand jury testimony was based on fact that "the extension by Congress of federal jurisdiction to **crimes** committed on Indian reservations inherently included every aspect of **federal criminal procedure** applicable to the prosecution of such crimes.") (emphasis added).

The distinction based upon the federal court's jurisdiction as an arising under or diversity case is likewise significant, not irrelevant. *See Velarde*, 40 F.Supp.2d at 1316. In that case, the court discussed the application of immunity "[w]here a federal agency is subpoenaed by a federal court as a third party in claims arising under federal law," and stated that "[i]n such a case, the court's interest in enforcing federal law outweighs the agency's assertion of sovereign immunity." *Id.* The court then discussed application of immunity "[w]here the federal court has only removal jurisdiction based on an underlying state law claim," stating, in such circumstances, "the balancing of sovereign interests shifts. In those circumstances, sovereign immunity of the United States and the Supremacy Clause together defeat the interest of the federal court in seeing that state law is enforced." *Id.*

As to the distinction based on who "issued" the subpoena, the court in *Catskill* also found this fact to be of significance, not irrelevant. *See Catskill*, 206 F.R.D. at 88. The court in *Catskill* rejected the plaintiffs' reliance on *Velarde,* stating that in *Velarde*, "an Indian tribe moved to quash subpoenas **issued by both the defendant and the federal prosecution**." *Catskill*, 206 F.R.D. at 88 (citing *Velarde*, 40 F.Supp.2d at 1317) (emphasis added). The court then plainly held, "*Velarde* is distinguishable from *James*, in that the federal government itself

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subpoenaed the tribe" and a "tribe cannot assert sovereign immunity against the United States." *Catskill*, 206 F.R.D. at 88.

The *Catskill* court's discussion of the issuance of subpoenas in the manner set forth above also demonstrates that the Tribe has no "misunderstanding of how federal non-party subpoenas work." Alltel Brief, p. 34. The Tribe's attorneys are experienced and certainly understand the way in which subpoenas are issued. This distinction and terminology used was based entirely on the *Catskill* court's description of the issuance of subpoenas.

Alltel next argues that the "Tribe treats *Juvenile Male* as if it was the United States that served the subpoena on the tribe in that case and argues that the case held that 'tribal immunity has no application to claims made by the United States.'" Alltel Brief, p. 35. However, the Tribe does not argue *Juvenile Male* is distinguishable from the present case based on who issued the subpoena, as in *Catskill*. Rather, *Juvenile Male* is distinguishable from this case because *Juvenile Male* was a criminal case and involved the United States, which the *Juvenile Male* court held were the two factors precluding tribal immunity. *See* Tribe's Brief, p. 15 (citing *Juvenile Male*, 431 F.Supp.2d at 1013, 1017).

Alltel argues that the final case it relies on – *United States v. Velarde*, 40 F.Supp.2d 1314 (D.N.M. 1999) – is not distinguishable based on the federal court's underlying jurisdiction, and that the court's distinction between arising under and

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diversity jurisdiction was dicta. Alltel Brief, p. 37. The *Velarde* court's holding is clear and it centered on the basis for the court's jurisdiction:

> I find that the proper procedure is to balance the sovereign interests of the United States and the Tribe. . . . I note that courts often perform this type of balancing where sovereign immunity is asserted in an effort to quash a subpoena. Where a federal agency is subpoenaed by a federal court as a third party in claims arising under federal law, the agency cannot assert sovereign immunity unless a statute or valid regulation authorizes the agency to do so. In such a case, the court's interest in enforcing federal law outweighs the agency's assertion of sovereign immunity. . . . **[W]here the federal court has only removal jurisdiction based on an underlying state law claim, the balancing of sovereign interests shifts. In those circumstances, sovereign immunity of the United States and the Supremacy Clause together defeat the interest of the federal court in seeing that state law is enforced**.

Velarde, 40 F.Supp.2d at 1316 (internal citations omitted). The *Velarde* court's reasoning is not dicta.

D. The Court Should Not Perform a Balancing Test Between the Tribe's and Alltel's Interests

Alltel argues that even if tribal immunity applies, the district court correctly applied a balancing test to determine whether tribal immunity protects the Tribe from compliance with the subpoena duces tecum. The flaw in Alltel's reasoning is that when tribal immunity is implicated, as it is here, the Tribe's immunity is absolute (except for waiver), and no balancing test should be performed. *See American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux*

Tribe, 780 F.2d 1374, 1377-79 (8th Cir. 1985) ("tribal sovereign immunity can be surrendered only by express waiver.").

In support of this argument, Alltel relies on cases involving evidentiary privileges. Clearly, such evidentiary privileges such as executive privilege and peer review privilege are far different and less expansive than tribal immunity. *See Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, ___ F.Supp.2d ___, No.C10–05696, 2011 WL 1753479 at *4 (N.D.Cal. 2011) (explaining differences between evidentiary privileges and immunity).

Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 779-80 (9th Cir. 1994), lends no support to Alltel's balancing argument because it involved the government's assertion that federal law authorizes agency heads to prohibit their employees from testifying in litigation in which the United States is not a party. *See id.* at 776. This proposition has no application to the issue before this Court. In *United States v. Snowden*, 879 F.Supp. 1054, 1056-57 (D. Ore. 1995), the court determined the tribe had waived its claim of immunity. The *Velarde* court, as described above, performed a balancing of interests based on the court's underlying jurisdiction. *See Velarde*, 40 F.Supp.2d at 1316. In sum, tribal immunity is not subject to a balancing test, but is absolute, unless waived by the Tribe.

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Even if the Court were to apply a balancing test, the Tribe's interests in maintaining its immunity outweigh Alltel's interests in obtaining evidence from a non-party in this civil lawsuit. As more thoroughly explained in the Tribe's original brief, tribal immunity is a significant, long-standing part of United States jurisprudence. *See American Indian Agricultural Credit Consortium, Inc.*, 780 F.2d at 1377-79. "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. That sovereign immunity can be surrendered only by express waiver." *Id.*

Against the Tribe's significant interests in maintaining tribal immunity, Alltel can show only that its own interest is to obtain information concerning claimed communications between DeJordy and the Tribe. Alltel has not demonstrated that it cannot obtain this information from other sources. Further, the only interest Alltel itself has is purely financial. The Tribe should not be forced to surrender its immunity to support Alltel's efforts in its civil lawsuit against DeJordy. The Rules of Civil Procedure are not tantamount to the Tribe's immunity interests. Accordingly, even if a balancing test were applicable, which is expressly denied, the Tribe's immunity interests outweigh Alltel's financial interests.

CONCLUSION

For all these reasons, as well as those set forth in the Tribe's initial Brief, the Tribe respectfully requests that the Court conclude that tribal immunity applies and quash the subpoena duces tecum served upon the Tribe by Alltel.

Dated this 12th day of August, 2011.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), I certify that the Appellants' Brief uses a proportionately-spaced, 14-point Times New Roman typeface, and contains 3,861 words. Appellants have used Microsoft Office Word 2010 to prepare this brief.

/s/ Dana Van Beek Palmer

VIRUS FREE CERTIFICATION

Pursuant to Eighth Circuit Rule 28A(d), I certify that attached for filing with this brief is a compact disc containing the full text of the Reply Brief of Appellants Oglala Sioux Tribe and Joseph Red Cloud. I further certify that this compact disc has been scanned for viruses and is virus free.

/s/ Dana Van Beek Palmer

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2011, the foregoing Reply Brief of Appellants Oglala Sioux Tribe and Joseph Red Cloud was electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants (listed below) in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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