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Appearing Specially*

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

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

Plaintiffs,

v.

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.

**NON-PARTY MOVANT UTE INDIAN
TRIBE'S MEMORANDUM IN SUPPORT
OF MOTION TO QUASH SUBPOENA
DUCES TECUM**

Civil Case No. 2:10-cv-00217

District Judge Clark Waddoups

INTRODUCTION

The Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), which is not a party to this litigation, through counsel files this memorandum in support of its motion to quash a subpoena duces tecum that was served on the Tribe's Energy and Minerals Department on March 1, 2011. As explained herein, the Tribe moves to quash the

subpoena duces tecum for lack of subject matter jurisdiction and additional grounds under Federal Rule of Civil Procedure 45(c)(3).

STATEMENT OF FACTS

On March 1, 2011, a subpoena duces tecum was served upon Manuel Myore, the Director of the Ute Indian Tribe's Energy and Minerals Department Director, seeking the production of various categories of documents. **Exhibit A**, attached hereto. The subpoena requests that production be made to the attorney for the plaintiff Bobby Bonnet in this lawsuit against Harvest Holdings, Branta Exploration & Production LLC, Ute Energy LLC, Cameron Cuch, Elton Blackhair, and twenty (20) John Does, to which the Tribe is not a party. The subpoena broadly requests the following:

Request No. 1: Any and all documents relating to any communication between or among 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.

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 Bonnet.

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.

Exhibit A. The subpoena specified a deadline of March 23, 2011, for producing the requested documents.

ARGUMENT

The Court should quash the subpoena for lack of subject matter jurisdiction and for additional grounds under Fed. R. of Civ. P. 45(c), specifically (i) failure to allow a reasonable time for compliance, (ii) subjecting the Tribe to an undue burden, (iii) and seeking disclosure of privileged and other protected information.

I. LACK OF SUBJECT MATTER JURISDICTION

The Tribe asks the Court to take judicial notice that the Ute Tribe of the Uintah and Ouray Reservation was organized under the *Indian Reorganization Act of 1934*, as amended, 25 U.S.C. Section 476, and thus, is a federally recognized sovereign Indian tribe. See <http://www.narf.org/nill/Constitutions/uteconst/uteconst.htm>.¹

The Ute Tribe is not a party to this lawsuit. However, the Plaintiff, through this subpoena, seeks the production of proprietary, financial, and other privileged information the Tribe wishes to protect. The Tribe's consent to legal process can be provided only through an express or unequivocal waiver of the Tribe's sovereign immunity, either by Congress or through an express or unequivocal waiver through the

¹ Fed.R.Evid. 201 requires the court to take notice of facts properly subject to judicial notice. *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997).

government action of the Tribe's governing body—its Business Committee. Neither waiver has been given in this case. Accordingly, the Tribe is entitled to assert the defense of sovereign immunity and requests that the subpoena be quashed.

Where governmental bodies such as the Ute Indian Tribe are immune from suit under the doctrine of sovereign immunity, the defense is appropriately raised by challenging the subject matter jurisdiction of the judicial forum. *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) (“The issue of sovereign immunity is jurisdictional.”).

As a federally recognized sovereign Indian tribe, the Ute Indian Tribe and its subordinate governmental and tribal officials are entitled to sovereign immunity. Thus, in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), the court reiterated the sovereign immunity of Indian nations, recognizing the supremacy of decisions of the United States' Supreme Court on this point. “Because of the supremacy of Federal law, *we are bound to recognize the doctrine of tribal sovereign immunity, even if we were able to find valid public policy reasons to hold it inapplicable in this case.*” *Id.* at 163 (emphasis added).

As a result of the doctrine of sovereign immunity, a subpoena or other process, such as garnishment or attachment, cannot be effected against a tribe or its subordinate governmental units or governments and agents. See *Maryland Cas. Co. v. Citizens Nat'l Band of W. Hollywood*, 361 F.2d 517 (5th Cir. 1966), *cert. den.* 385 U.S. 918; see also *United States v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992). A subpoena is considered an instrument of the court's process. See *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488 (11th Cir. 1986).

Indian tribes have always been considered to have immunity from legal process similar to that enjoyed by the federal government. *Namekagon Dev. Co. v. Boise Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is considered co-extensive with that of the United States, a party cannot maintain a claim or otherwise bring suit against an Indian tribe or *any of its tribal officials* absent a firm showing of an effective waiver that is unequivocally expressed. A waiver of tribal immunity may *never* arise by implication. *Santa Clara v. Martinez*, 436 U.S. 49, 58-59 (1978).

Here, the subpoena duces tecum for the production of certain documents from the Tribal Energy and Minerals Department and its Director involves a private lawsuit in which the Tribe is not a party. The law is clear that the sovereign immunity enjoyed by Indian tribes extends to their officials and employees. See *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir. 1981); *State of Oklahoma ex rel. Oklahoma Tax Comm'n v. Graham*, 882 F.2d 951, 956-57 (10th Cir. 1987); *vacated on other grounds*, 484 U.S. 973; *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1987); *United Nuclear Corp. v. Clark*, 584 F.Supp. 107, 109 (D.D.C. 1984); *Bruette v. Knope*, 554 F.Supp.301 (E.D. Wisc. 1983); *White Mountain Apache Tribe v. Indust. Comm'n of Arizona*, 796 P.2d 223 (Ariz. App. 1985).

Thus, as a matter of law, the Tribe and Manuel Myore are not required to comply with the federal subpoena duces tecum, and the federal court lacks subject matter jurisdiction to enforce it. Producing these documents would waive the Tribe's sovereign immunity, either in part or in its entirety. *United States v. James*, 980 F.2d 1314, 1320

(9th Cir. 1992). See *also*, Fed. R. Civ. P. 45(c)(3). On the converse, where a tribe has not waived its sovereign immunity and has been served a subpoena, the appropriate remedy is for the court to quash the subpoena. *Id.*

II. GROUNDS UNDER FEDERAL RULE OF CIVIL PROCEDURE 45

A. Plaintiff's Subpoena Fails to Allow a Reasonable Time for Compliance.

The Court should also quash the subpoena because it fails to allow a reasonable time for compliance. Fed. R. Civ. P. 45(c)(3)(A)(i). Should the Court enforce Plaintiff's subpoena, a vast number of documents will have to be produced. The subpoena is extremely broad, seeking the production of all documents regarding negotiations of oil and gas leases for individual Indian allottee owners and all documents relating to transactions between three energy companies that explore and develop oil and gas on the Reservation—a Reservation that has countless existing and future potential oil and gas negotiations and transactions. To identify, copy, and provide this vast amount of documents, from a non-party Indian tribe with limited resources, within less than a month, is a grossly insufficient amount of time for the Tribe to respond.

B. Plaintiff's Subpoena Subjects the Tribe to an Undue Burden.

The Court should also quash Plaintiff's subpoena because it subjects the Tribe to an undue burden. Fed. R. Civ. P. 45(c)(3)(A)(iv). Under subsection (c)(1) of Rule 45, not only must the issuing court enforce a litigant's duty to avoid undue burden or expense in discovery, but the court must also "impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply" with the proscription against undue burden and expense under Rule 45.

Again, 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.

Furthermore, the subpoena seeks to require the Tribe to produce documents that would not even be within the Tribe's possession. For instance, Request 5 seeks production of documents relating to communications between the Bureau of Indian Affairs ("the BIA") and Plaintiff Bonnet. The Tribe does not have possession, custody, or control of BIA records, as the BIA is a federal agency, a distinct and entirely separate entity from the Tribe itself.

The same is true for Requests 3, 4, and 6. Per Request 3, Plaintiff seeks to require the Tribe to produce documents pertaining to oil and gas negotiations for individual Indian allottee owners, thereby requesting the Tribe to produce documents that are not within its possession, custody, or control—in fact, documents that belong to *individual* Tribal members. Per Requests 4 and 5, Plaintiff seeks from the Tribe documents relating to communications between the Plaintiff and oil and gas companies, which also constitute information over which the Tribe lacks possession, custody, or control.

"Courts are required to balance the needs for discovery against the burdens imposed when parties are ordered to produce information or materials, *and the status of a person or entity as a non-party is a factor which weighs against disclosure.*" *Echostar Commc'n Corp. v. New Corp. Ltd.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (emphasis added) (citing *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed.Cir.

1987). Here, the Tribe is not aware of what efforts, if any, the Plaintiff here has made to first obtain the requested discovery from the Defendants who would be more likely to have possession, custody, or control of much of the requested documentation.

C. Plaintiff's Subpoena Requires Disclosure of Privileged and Other Protected Matter

The Court should also quash Plaintiff's subpoena because it seeks wholesale disclosure of privileged and other protected documents. A court is required to quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii). In order to protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires "disclosing a trade secret or other confidential research, development, or commercial information." *Id.* at (B)(i).

Here, the subpoena seeks disclosure of privileged and confidential information. For instance, Request 6 seeks to require the Tribe to produce documents regarding oil and gas lease negotiations for individual Indian allottee owners. Plaintiff, thus, is seeking confidential financial and proprietary information of *individual* Tribal Members. Further, Request 8 seeks wholesale disclosure of confidential information regarding transactions with Berry Petroleum, Ute Energy, and the Ute Indian Tribe, also clearly qualifying as confidential commercial information.

Request 10 seeks disclosure of privileged matters, for which no exception or waiver applies. The Tribe does not waive its sovereign immunity in respect to this litigation. As the executive organ and governing body of the Tribe, the deliberations and work of the Tribal Business Committee are subject to executive privilege, governmental

privilege and/or deliberative process and mental impression privileges. The U.S. Supreme Court has held that, in the context of a subpoena issued to the Executive Branch, in particular a broadly drawn subpoena in a civil case such as that here, the Executive Branch need not invoke executive privilege “with sufficient specificity [or by] making particular objections.” *Cheney v. U.S. D. Ct. for the Dt.of Columbia*, 542 U.S. 367, 388 (2004).

The Tribe objects to the subpoena to the extent it seeks any confidential, privileged, and/or proprietary information. The Tribe also objects to the production of any Tribal Business Committee meeting minutes and other materials based upon executive privilege, governmental privilege, and the deliberative process and mental impression privileges.

CONCLUSION

The Ute Tribe has not and will not waive its sovereign immunity, and because sovereign immunity is jurisdictional, the Court should quash the subpoena served on the Tribe’s Energy and Minerals Department for lack of subject matter jurisdiction. Alternatively, or in addition, the Court should quash the subpoena under Federal Rule 45(c), for the reasons set forth herein.

Respectfully submitted this 23rd day of March, 2011.

/s/ Kimberly D. Washburn

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CERTIFICATE OF SERVICE

On the 23rd day of March, 2011, I electronically filed the foregoing **NON-PARTY MOVANT UTE INDIAN TRIBE'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record as follows:

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