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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 OBJECTION TO MAGISTRATE JUDGE'S RULING & ORDER AND REQUEST FOR A *DE NOVO* DETERMINATION OF THE TRIBE'S SOVEREIGN IMMUNITY CHALLENGE** Civil Case No. 2:10-cv-00217 District Judge Clark Waddoups Magistrate Judge Brooke C. Wells

Pursuant to Fed. R. Civ. P. 72 and 28 U.S.C. § 636(b)(1), the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") objects to the magistrate judge's ruling and order entered on August 11, 2011, **Doc. 56**, which denied the Tribe's motion to quash a subpoena duces tecum served on the Tribe by the plaintiffs in this case, **Docs. 33, 34, 43 and 46**. Because the Tribe's motion to quash was based in part on the jurisdictional defense of sovereign immunity, the Tribe requests that the District Court reconsider, *de novo*, the issue of tribal sovereign immunity.

STATEMENT OF THE CASE

The plaintiffs in this case served a subpoena duces tecum on the Ute Indian Tribe, seeking broad categories of internal tribal records and information. **Doc. 34-1**. The Tribe filed a motion to quash which was denied by the magistrate judge in a ruling and order entered on August 11, 2011. **Doc. 56**. The Tribe's objection is timely filed within the fourteen day time prescribed by Rule 72 and the additional three day allowed by Rule 6(d).

The plaintiffs allege in their amended complaint that plaintiff Robert C. Bonnet was hired by the Tribe's Energy and Minerals Department to work as a senior petroleum landman, and that Mr. Bonnet was subsequently terminated from employment. **Doc. 26**, ¶ ¶ 12, 53. Mr. Bonnet is seeking damages from various defendants for interference with economic relations, libel, slander, infliction of emotional distress, and civil conspiracy. Id. Before discovery requests were served on any defendant, *see* **Doc. 46**, p. 2, the plaintiffs served a subpoena duces tecum on the Tribe, seeking:

> 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.
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> 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.
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> 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.

Doc. 34-1. The Ute Tribe filed a motion to quash the subpoena on grounds, *inter alia*, of sovereign immunity. **Docs. 33, 34, 43**. A court hearing on the motion to quash was conducted before Magistrate Judge Brooke C. Wells on June 8, 2011. Following the hearing, undersigned counsel for the Ute Tribe learned in a conversation with counsel for the defendants that in the eight months since a scheduling order had been entered in the case, the only discovery undertaken by the plaintiffs was the subpoena duces tecum served on the Ute Tribe. This information suggested to the Tribe's undersigned counsel that the plaintiffs' lawsuit is, effectively, an attempt to circumvent the Ute Tribe's sovereign

immunity through the expedient of an *indirect* lawsuit against the named defendants. The additional information provided an additional ground for the Tribe's sovereign immunity defense because federal courts are clear that tribal sovereign immunity cannot be circumvented though the expedient of *indirect* lawsuits against third-parties.[1] The Tribe's counsel therefore filed a document captioned, "Notice of Additional Information Regarding Tribe's Motion to Quash Subpoena Duces Tecum and Additional Legal Authority Relevant to the Additional Information." **Doc. 46**.

In a ruling and order entered on August 11, 2011, the magistrate judge denied the Tribe's motion to quash, holding that sovereign immunity is available as a defense only if a tribe is named as party to a lawsuit; and therefore, the Ute Tribe must comply with Rule 45 of the Federal Rules of Civil Procedure. In addition, the magistrate judge granted the plaintiffs' motion to strike the Tribe's Notice of Additional Information and Additional Legal Authority, **Doc. 46**; consequently, the judge did not consider the contents of that document. Based on the arguments and authorities below, the Ute Tribe objects to the magistrate's ruling and order, and requests a *de novo* determination of the jurisdictional question of tribal sovereign immunity.

SUMMARY OF THE ARGUMENT

The essence of the magistrate judge's 13-page ruling is the court's statement on page 10 that the "doctrine of tribal sovereign immunity was not *intended* to extend to a non-

[1] *United States v. United States Fidelity & Guaranty Co*., 309 U. S. 506, 514 (1940) (voiding a judgment against the Choctaw and Chickasaw Nations entered through the U.S. acting as the tribes' trustee); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957) (it is "impermissible" to circumvent tribal sovereign immunity "indirectly by suing the United States as trustee or guardian"); *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908) (the same).

party Tribe." (emphasis added) Not only is there no legal authority cited in support of the magistrate's conclusion, but to say that sovereign immunity was not *intended* to extend to non-parties, implies that sovereign immunity—like a piece of legislation or an administrative rule or regulation—was formulated by a governmental actor who acted with a particular "intent" in devising the substance and "extent" of the sovereign immunity defense. The magistrate's conclusion reflects a fundamental misunderstanding of sovereign immunity, whether it be an Indian tribe's sovereign immunity, or the sovereign immunity of the federal and state governments. The magistrate judge's ruling is clearly erroneous and contrary to established law in the following respects:

1) While paying lip service to the Tribe's status as a sovereign government, the magistrate failed to follow established federal law governing tribal sovereign immunity and ignored controlling Supreme Court and Tenth Circuit precedent.

2) Instead of following Supreme Court and Tenth Circuit precedent, the magistrate elected to follow an unprecedented ruling by a federal district court in South Dakota that eviscerates tribal sovereign immunity, which ruling is now on appeal to the Eighth Circuit Court of Appeals. **Doc. 56**, pp. 8-9.[2]

3) The magistrate erred in understanding—and framing the issue—as one that does not implicate "*the general principles*" of sovereign immunity. **Doc. 56**, p. 6.

4) The magistrate was mistaken in understanding the Tribe's motion to present a "*somewhat novel*" question— "whether principles of sovereign immunity apply to quash the enforcement of a non-party subpoena duces tecum." **Doc. 56**, p. 6.

[2] *Alltel Communications, LLC v. Oglala Sioux Tribe*, Case No. 11-8003, Eighth Circuit Court of Appeals.

5) Contrary to the magistrate's understanding, this question is not "novel" and long-standing Supreme Court and Tenth Circuit precedent prohibits the enforcement of subpoenas and similar process against Indian tribes unless the tribe has waived sovereign immunity. The controlling precedent was cited to the Court, but the magistrate neither distinguished nor discussed the cited precedent.

6) The magistrate erred in assuming that the Federal Rules of Civil Procedure impliedly waive sovereign immunity. The magistrate's erroneous assumption is contrary to Tenth Circuit and U.S. Supreme Court precedent which requires that the waiver of tribal sovereign immunity to be explicit and unequivocal.

7) The magistrate misunderstood two of the cases cited by the Tribe, *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182-85, 1188-99 (10th Cir. 2010), and *Cash Advance v. Colorado ex. rel. Suthers*, 242 P.3d 1099, 1106-1109 (Colo. 2010). The magistrate said these cases were "readily distinguishable" because the cases involved the issue of immunity for tribally-owned commercial entities instead of tribes in their governmental capacities. **Doc. 56**, p. 7. The court's statement reveals a fundamental misunderstanding of sovereign immunity jurisprudence because the sovereign immunity analysis remains the same whether the factual circumstances involve (*i*) tribes as governments, or (*ii*) tribal officials and employees acting in their official capacities, or (*iii*) tribal entities that function as "arms-of-the tribe."

8) The magistrate erred in applying a balancing test. **Doc. 56**, p. 10. A balancing test is antithetical to sovereignty—a sovereign government is cloaked with sovereign immunity unless it has expressly waived immunity. Sovereign immunity is a *jurisdictional* defense that immunizes governments from revenue-draining litigation and legal entanglements. Application of the doctrine is not situational, depending upon a balancing of interests, as ruled by the magistrate judge.

9) The magistrate erred in concluding that the Ute Tribe's "tribal treasury is not implicated" and that the information sought by plaintiffs "is not critical to matters of tribal self-government or self-sufficiency. **Doc. 56**, p. 10.

10) The magistrate's action in striking the Tribe's Notice of Supplemental Information and Supplemental Legal Authority, **Doc. 56**, p. 2, violates the well-settled rule that the defense of sovereign immunity may be raised at any time *throughout* the proceedings.

11) The magistrate erred in ordering the Tribe—a non-party—to produce documents that could be obtained from existing parties to the lawsuit.

12) The magistrate erred in refusing to allow attorney's fees under Rule 45(c)(1).

ARGUMENT

I. *Stare Decisis* Obligates Lower Federal Courts to Follow—not Ignore—Supreme Court and Tenth Circuit Precedents

The adherence to controlling legal authority is not *optional* to lower courts in the federal court system. The principle of *stare decisis* obligates district courts to follow Supreme Court and Tenth Circuit precedent—and not merely the "narrow holdings" of legal precedent, "*but also the reasoning underlying those holdings*, particularly when such reasoning articulates a point of law." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2003) (emphasis added) (citation omitted). As explained by the Supreme Court, "the principle of *stare decisis* obligates federal courts "to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

The doctrine of *stare decisis* serves to insure "the evenhanded, predictable, and consistent development of legal principles . . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As explained by Judge Jenkins of this court:

> *Stare decisis* . . . makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions. It is derived from considerations of stability and equal treatment . . . . As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by a superior court is theoretically absolute.
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> *Stare decisis* affects parties by binding courts before whom they appear to present their claims to follow decisions of superior courts in the judicial hierarchy; under *stare decisis*, there is a general presumption that settled issues of law will not be reexamined, and this presumption is fortified in the federal system by a three-tier court structure, in which the Supreme Court has a largely discretionary jurisdiction, with inferior courts that owe strict obedience to its decisions.

Ute Indian Tribe v. State of Utah, 935 F. Supp. 1473, 1509 (1996), *upheld and remanded*, 114 F.3d 1513 (1997), *cert. denied*, *Duchesne County v. Ute Indian Tribe*, 522 U.S. 1107 (1998).

The magistrate's ruling in this case violates *stare decisis* by eviscerating tribal sovereign immunity and by refusing to follow U.S. Supreme Court and Tenth Circuit precedent directly on point, *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165 (1977) (vacating enforcement of a state court order requiring the "non-party" Tribe to produce information); *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1190 (10th Cir. 2010) (upholding the denial of jurisdictional discovery on tribal entities); and *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (denying enforcement of a federal subpoena on grounds of tribal sovereign immunity).

II. Binding Precedent Dictates That Tribal Sovereign Immunity Prevents This Court From Enforcing the Subpoena

Tribal sovereign immunity is a mandatory doctrine that courts must honor and apply. Tribal sovereign immunity "predates the birth of the Republic. The immunity rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance." *Ninigret Development Corp. v. Naragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir. 2000). Sovereign immunity is a jurisdictional defense that, absent waiver, presents an absolute bar to suits or court process against tribes. *E.g., Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754-759 (1998) (refusing to confine tribal sovereign immunity to governmental activities and transaction on a Tribe's reservation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (Congressional abrogations of tribal sovereign immunity must be explicit); *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007) (federal question jurisdiction under 28 U.S.C. § 1331 does not abrogate tribal sovereign immunity); *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006) (tribal sovereign immunity extends to tribal officials acting in the scope of their official authority).

Because sovereign immunity is a "jurisdictional" barrier, *United States v. United States Fidelity & Guaranty Co*., 309 U. S. 506, 512-14 (1940), it is necessary to understand the sum and substance of "jurisdiction." "Jurisdiction" is the power of a court "to proscribe, prescribe, adjudicate, and enforce law." *New Jersey v. New York*, 1997 WL 291594, at *28 (Special Master's Report to U.S. Supreme Court) (citing Rebecca M.M. Wallace, *International Law* 101 (1986)). A legal process or proceeding is

one "against the sovereign" if, among other things, the process or proceeding is one that can "restrain the Government from acting, or to compel it to act.'" *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 87 (S.D.N.Y. 2002) (citing *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999), *vacated in part on other grounds*, 212 F.3d 689 (2000) (citing *Dugan v. Rank*, 372 U.S. 609, 620(1963)).

A subpoena duces tecum is a compulsory summons that orders the production of documents or other tangible materials, and it is an instrument of the court's process. *See In re Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1495 (11th Cir. 1986). Clearly, then, the enforcement of a subpoena requires a court to "proscribe, prescribe, adjudicate, and enforce law." And for that reason, an Indian tribe is entitled to assert its status as a sovereign against the compelled enforcement of a subpoena or equivalent court order. *E.g., Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. at 172-173 (vacating a court order directed to a "non-party" tribe which had appeared as a representative of its individual members, but not as a sovereign government); *EEOC v. Cherokee Nation*, 871 F.2d at 939 (denying enforcement of a federal subpoena to a "non-party" tribe); *Namekagon Dev. Co. v. Boise Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975) (upholding tribal immunity from levy and attachment); *Maryland Cas. Co. v. Citizens Nat'l Band of W. Hollywood*, 361 F.2d 517, 522 (5th Cir. 1966), *cert. den*. 385 U.S. 918 (upholding tribal immunity from garnishment).

The leading commentator on federal Indian law summarizes the controlling federal law on this question as follows:

> Indian tribes are immune from lawsuits *or court process* in both state and federal court unless "Congress has authorized the suit or the tribe has waived its immunity." (emphasis added)

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 7.05, p. 635 (5th Ed.). It is undisputed that neither the Ute Tribe nor the Congress has waived the Tribe's sovereign immunity from enforcement of the plaintiffs' subpoena duces tecum in this case. *See* **Doc. 43**, p. 2.

III. The Magistrate's Ruling Enforcing the Subpoena Violates Sovereign Immunity

An important aspect of tribal sovereign immunity is an Indian tribe's right of internal self-government. *United States v. Wheeler*, 435 U.S. 313, 322 (1978). "The common law sovereign immunity possessed by [tribes] is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). "Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but 'immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy.'" *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1182 (citing *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *accord* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D.L. Rev. 398, 398 (2009)).

Requiring Indian tribes to respond to civil subpoenas is a degradation of sovereign immunity and interferes with tribal sovereignty. *See New Mexico v.*

Mescalero Apache Tribe, 462 U.S. 324, 332-33 (1983) (invalidating New Mexico law on the Tribe's reservation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (validating tribal tax as an inherent attribute of tribal sovereignty that has not been divested by treaty or Act of Congress); *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1190 n. 11 (upholding denial of jurisdictional discovery on tribal entities).

As pertinent here, it is undisputed that Plaintiff Robert Bonnet was employed by a division of the Ute Tribe's government, its tribal Energy and Minerals Department. The Tribe has the inherent sovereign right to hire and terminate employees from its tribal government. Enforcement of the plaintiffs' subpoena duces tecum would necessarily force the Ute Tribe to produce internal governmental records and documents, including documents that clearly qualify for protection under one or more evidentiary privileges, forcing the Tribe to potentially litigate the applicability of such evidentiary privileges. *See* **Doc. 34**, pp. 8-9. In addition, enforcement of this initial subpoena duces tecum will establish the law of the case, allowing Mr. Bonnet to then serve subpoenas compelling the testimony of Ute tribal governmental officials in depositions and at trial. Finally, enforcement of the subpoena will establish the unprecedented precedent of allowing any third-party in any civil lawsuit to serve subpoenas on the Ute Tribe, forcing the Tribe to expend limited tribal resources in defending and/or complying with repeated intrusions upon the Tribe's sovereignty.

The Tenth Circuit has been explicit that such an invasion of tribal sovereignty constitutes irreparable injury to the Tribe as a matter of law. *Wyandotte Nation v.*

Sebelius, 443 F.3d 1247, 1255 (10th Cir. 2006) (upholding injunction against the enforcement of legal process that would invade tribal sovereignty) (citing *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998), and *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989)).

IV. The Magistrate's Error Flows From the Court's Failure to Acknowledge Supreme Court and Tenth Circuit Precedent Treating Sovereign Immunity as a "Jurisdictional" Defense

As emphasized above, sovereign immunity is a *jurisdictional* defense. The Supreme Court has consistently described sovereign immunity as a *jurisdictional* barrier to a court's "exercise of judicial power." *U.S. v. United States Fidelity & Guaranty Co*., 309 U. S. at 512-14 (1940). As the Court has explained, "the principle of sovereign immunity is a *constitutional limitation* on the federal judicial power established in Art. III" of the United States Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 68. The Tenth Circuit adheres to this understanding of sovereign immunity. *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.").

Therefore, once the federal government, or a state government, or a tribal government asserts the defense of sovereign immunity, the federal district court has no Article III *jurisdiction* over the sovereign in question—whether it be the federal sovereign, or a state sovereign, or a tribal sovereign. *Id*. "[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties" against a sovereign government "without consent given . . . ." *Seminole*

Tribe of Florida v. Florida, 517 U.S. at 68 (citing *Ex parte New York*, 256 U.S. 490, 497 (1921)).

Sovereign immunity is a *jurisdictional* limitation on a federal court's power to exercise judicial power over the sovereign before the court. Yet the magistrate in this case agreed with the plaintiffs' unprincipled and unprecedented argument that a distinction can be drawn between tribes (or other sovereigns) who are before the court as parties, or potential parties, and tribes (or other sovereigns) who are before the court as non-parties.[3] The magistrate concluded that "sovereign immunity does not protect the Tribe" from forced compliance with judicial process when the "Tribe is not a party to the underlying litigation." Magistrate's Ruling and Order, **Doc. 56**, p. 5. The magistrate reasoned that:

> -- the court would follow the ruling by a federal district court in South Dakota, holding that tribal immunity does not constitute a "shield" that immunizes a "non-party Tribe" from complying with discovery, *Alltel Communications, LLC v. DeJordy*, CIV. 10-MC-00024, 2011 WL 673766, at *12 (D. South Dakota Feb. 17, 2011). Ruling & Order, **Doc. 56**, p. 8.
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> -- the court would adopt the balancing test, adopted by the *Alltel* court, "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." Ruling & Order, **Doc. 56**, p. 9.

[3] There is no principled basis for confining the magistrate judge's ruling to tribal sovereign immunity alone—under the magistrate's logic neither the state of Utah nor the federal government could assert sovereign immunity from compelled compliance with "non-party subpoenas."

-- because the subpoena "was served upon the Tribe as a non-party," the Court concluded that the "distinct circumstances of this case *do not fall within the purview of the tribal immunity doctrine*, and therefore a balancing of the relevant interests is appropriate." Ruling & Order, **Doc. 56**, p. 9.

The magistrate judge never reconciled this result with controlling Supreme Court and Tenth Circuit authority *requiring* the court to uphold the Ute Tribe's invocation of sovereign immunity. *E.g., Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. at 172-173 (vacating enforcement of a court order requiring the "non-party" Tribe to produce information); *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1189-91 (upholding the denial of jurisdictional discovery on tribal entities); *EEOC v. Cherokee Nation*, 871 F.2d at 939 (denying enforcement of a federal subpoena); *Wyandotte Nation v. Sebelius*, 443 F.3d at 1255 (denying enforcement of state search warrants and other legal process).

The magistrate's conclusion that sovereign immunity does not extend to "non-party" tribes disregards the Supreme Court's repeated iteration that sovereign immunity is a "jurisdictional" barrier, *United States v. United States Fidelity & Guaranty Co*., 309 U. S. at 512-14, and that, among other interests, sovereign immunity serves to avoid "the indignity of subjecting a [sovereign] to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rio Aqueduct and Sewer Authority*, 506 U.S. 139, 146 (1993).

Because sovereign immunity is a "jurisdictional barrier" and a "constitutional limitation on the federal judicial power" under Article III, *Seminole Tribe of Florida v.*

Florida, 517 U.S. at 68, the magistrate judge necessarily determined that sovereign immunity has been waived under the Federal Rules of Civil Procedure. Stated differently, by holding that "non-party" tribes must comply with Rule 45, like any other litigant, the magistrate judge necessarily inferred that the Civil Rules preempt, and thus waive, tribal sovereign immunity. Such a result is untenable under the principle of *stare decisis*. As a matter of black letter law, waivers of sovereign immunity cannot be implied, but must be clearly and unequivocally expressed. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. Indeed, the Tenth Circuit rejected a similar result in *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d at 1010-1011, when the court was called upon to decide whether the statute authorizing federal question jurisdiction under 28 U.S.C. § 1331, abrogated tribal sovereign immunity. As stated by the Tenth Circuit in that case:

> The [plaintiffs] argue that the district court properly denied the Nation's motion to dismiss because the court had jurisdiction to decide the federal question regarding the scope of the Tribal Court's jurisdiction. . . . The Nation counters that the district court erred in equating subject-matter jurisdiction based upon a federal question under 28 U.S.C. § 1331 with subject–matter jurisdiction over the Nation.

Id. Like the magistrate judge here, the district court in *Miner* paid lip service to the jurisdictional barrier of sovereign immunity, but concluded that sovereign immunity was not implicated because 28 U.S.C. § 1331 authorized the district court to find that it had "jurisdiction over the Creek Nation, and the subject matter of this action, and the power to issue injunctive relief as requested in this proceeding. " *Id*. at 1011.

In the same vein, the magistrate judge in this case paid lip service to sovereign immunity, but concluded that service of the subpoena upon the Tribe under Rule 45 conferred jurisdiction upon the court to order the Tribe to comply with the subpoena. In *Miner* the Tenth Circuit reversed the district court's disregard for sovereign immunity, stating:

> We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit. Indeed, nothing in § 1331 unequivocally abrogates tribal sovereign immunity. . . . Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where some other statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity.

By analogous logic, if § 1331 does not ipso facto waive sovereign immunity, then neither does Rule 45. Because *stare decisis* requires this court to apply not simply the "narrow holdings" of legal precedent, "*but also the reasoning underlying those holdings*," *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d at 1279, the holdings in *Miner* and *Santa Clara Pueblo v. Martinez*, among other cases—which require explicit and unequivocal waivers of sovereign immunity—means that the Civil Rules of Procedure cannot possibly vest this court with the jurisdiction necessary to enforce the subpoena in the face of the Ute Tribe's invocation of sovereign immunity.

V. The Cases Relied Upon By the Magistrate are Inapposite or Non-Binding

The magistrate based its ruling on decisions from other federal district courts, none of which trump the binding Supreme Court and Tenth Circuit precedent cited by the Tribe.

Two of the cases relied upon by the magistrate are criminal cases, *U.S. v. Juvenile Male 1*, 431 F. Supp. 2d 1012 (D. Az. 2006), and *United States v. Verlade*, 40

F. Supp. 2d 1314, 1316 (D.N.M. 1999). **Doc. 56**, pp. 7-8, 10. Criminal cases are obviously inapposite, first and foremost because Indian tribes, like states, cannot assert sovereign immunity in actions brought by a superior sovereign—the federal government. *E.g., Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154 (1980). *Juvenile Male* and *Verlade* were both criminal prosecutions under federal law in which tribal sovereign immunity could not be asserted. Moreover, criminal defendants have a constitutional right under the Sixth Amendment to the issuance of compulsory process, an interest that may outweigh sovereign immunity. *See United States v. Burr*, 25 F. Cas. 30 (1807) (allowing issuance of subpoena, Chief Justice John Marshall sitting on the circuit court). However, in civil cases such as the case *sub judice*, the Sixth Amendment is not a countervailing weight. Nonetheless some court decisions—including *Juvenile Male* and *Verlade*—fail to distinguish between civil and criminal subpoenas. In *U.S. v. Juvenile Male*, the court ordered the Navajo Tribe to produce records sought by a criminal defendant. The court based its holding on the Sixth Amendment and the superior sovereignty of the federal government. However, instead of resting its ruling on these grounds, the *Juvenile Male* court emphasized in *dicta* that "[e]ven the President of the United States must comply with a federal subpoena," citing *United States v. Nixon*, 418 U.S. 683, 713 (1974). *U.S. v. Juvenile Male 1*, 431 F. Supp. 2d at 1016. The court also remarked that "it can hardly be contended that federal or state sovereign immunity from suit has any application to the enforcement of a federal subpoena on the custodian of records of a state or federal agency." *Id*. As to the court's former assertion, that even U.S. Presidents must comply with subpoenas, it

was *executive privilege*—not sovereign immunity—that Richard Nixon asserted unsuccessfully in *United States v. Nixon*. For this reason, *Nixon* is inapposite to any discussion of sovereign immunity. And as to the *Juvenile Male* court's latter assertion – that even state and federal agencies must comply with federal subpoenas — the court was either misinformed or disingenuous in suggesting that governmental entities are precluded from invoking sovereign immunity to bar the enforcement of federal subpoenas.

When state, federal or Indian tribal entities comply–or are compelled to comply—with federal subpoenas, it is because either (*i*) there is an applicable statute waiving sovereign immunity, or (*ii*) the state, federal or Indian tribal entity has otherwise waived sovereign immunity, i.e., contractually or by voluntarily producing documents. *E.g., NGV Gaming, Ltd. V. Upstream Point Molate, LLC*, Nos. C-04-3955 & C-0501605, 2009 WL 4258550, at ** 5-6 (N.D. Ca. 2009) (the Tribe waived immunity by voluntarily producing a document); *see also Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25-26 (1st Cir. 2006) (tribal sovereign immunity was both waived by the Tribe and abrogated by Congress under the Rhode Island Indian Claims Settlement Act).

Most federal courts recognize a waiver of the federal government's sovereign immunity under the Administrative Procedure Act, specifically, 5 U.S.C. § 702, which authorizes judicial review of "agency action." Thus, when an executive branch agency refuses to comply with a subpoena, the refusal is an "agency action" subject to judicial review. *EPA v. Gen. Elec. Co.*, 197 F.3d at 599. However, a majority of federal circuits defer to the federal agencies and refuse to require compliance with subpoenas unless

the agency's refusal has been arbitrary, capricious or an abuse of discretion. *Id.* at 598-99; *Comsat Corp. v. Nat'l Science Found.*, 190 F.3d 269-277-78 (4th Cir. 1999); *Moore v. Armour Pharm. Co.*, 927 F.2d 1194 (11th Cir. 1991); *Davis Enterprises v. U.S. EPA*, 877 F.2d 1181 (3rd Cir. 1989).

Conversely, non-party subpoenas generally are *not* enforceable against state, federal or Indian tribal entities when there is neither (*i*) a statutory or contractual waiver of immunity, or (*ii*) conduct unequivocally waiving sovereign immunity. Thus, a federal district court in California reversed a magistrate judge's order compelling the State of California to produce documents in response to a federal subpoena because the California statute in question did not unequivocally waive the State's sovereign immunity. *Gonzalez v. Hickman*, 466 F. Supp.2d 1226 (E.D. Cal. 2006). Likewise, where Indian tribes have not waived sovereign immunity, courts recognize that tribes can invoke sovereign immunity against compelled compliance with subpoenas. *Breakthrough Mgt. Group, Inc.*, 629 F.3d. at 1188-91; *EEOC v. Cherokee Nation*, 871 F.2d at 939; *Quair v. Bega*, 388 F. Supp.2d at 1147-48; *Cash Advance v. Colorado*, 242 P.3d at 1106-1109.

Undersigned counsel is aware of only one federal court decision enforcing a civil subpoena against an Indian tribe in the absence of either a Congressional abrogation or tribal waiver of immunity. That case was decided in February by a district court in South Dakota, *Alltel Communications, LLC v. DeJordy*, CIV. 10-MC-00024, 2011 WL 673766, at *12 (D. South Dakota Feb. 17, 2011). Like the decision in *U.S. v. Juvenile Male –on* which *Alltel* relies heavily –the *Alltel* decision is poorly reasoned and hinges entirely on

cases involving subpoenas in criminal cases and *dicta* from inapposite cases. The *Alltel* court was apparently oblivious to the Supreme Court's caution in *Santa Clara Pueblo v. Martinez* that federal courts must "tread lightly" on questions of tribal sovereign immunity absent "clear indications of [Congressional] intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60. As noted *infra*, on page 8 n. 2, the *Alltel* decision in on appeal to the Eighth Circuit Court of Appeals.

The magistrate judge rested its ruling in this case on the *Alltel* decision. In doing so, the magistrate impermissibly disregarded controlling Tenth Circuit and Supreme Court precedent, which is untenable under the principle of *stare decisis.* The District Court should rectify this error.

Finally, the magistrate erred in striking the Tribe's Notice of Additional Information and Additional Legal Authority, **Doc. 46**, and in disregarding the contents of the Notice. This ruling violates the well-settled rule that the defense of sovereign immunity may be raised at any time *throughout* the proceedings. *See Lombardo v. Pa. Dep't of Public Welfare*, 540 F.3d 190, 198 n. 7 (3rd Cir. 2008); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995); *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982); *Armstrong v. Goldblatt Tool Co.*, 609 F. Supp. 736, 738 (D. Kansas 1985). *See* **Doc. 51**, Tribe's Objection to Motion to Strike.

VI. Objections to the Magistrate's Ruling Under Rule 45

At the court hearing before the magistrate, undersigned counsel for the Tribe requested that the Tribe be compensated for attorneys' fees that would be incurred for

the Tribe's attorneys to review documents and produce a privilege log. The magistrate's ruling and order allows for the recovery of costs and expenses, but not attorneys' fees. **Doc. 56**, p. 11. However, Rule 45(c) requires that the Tribe be allowed to recoup its attorney fees:

> **Avoiding Undue Burden or Expense: Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court **must** enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply. (emphasis added)

In this case the plaintiffs failed to take "reasonable steps to avoid imposing undue burden" on the Ute Tribe. The subpoena request is so broadly worded that the Tribe's attorneys must necessarily spend significant time reviewing documents to produce a privilege log as ordered by the magistrate. **Doc. 56**, pp. 11-12. For this reason, the magistrate's ruling is erroneous and contrary to law.

CONCLUSION

The Ute Indian Tribe respectfully requests that the District Court review *de novo* the Tribe's invocation of sovereign immunity and quash the subpoena duces tecum in adherence to the legal holding and rationales set forth in the Supreme Court and Tenth Circuit precedent cited herein. Alternatively, the Tribe requests that the Court find the magistrate's ruling denial of attorney's fees under Rule 45 to be erroneous as a matter of law.

Respectfully submitted this 29th day of August, 2011.

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CERTIFICATE OF SERVICE

On the 29th day of August, 2011, I electronically filed the foregoing **NON-PARTY MOVANT UTE INDIAN TRIBE'S OBJECTION TO THE MAGISTRATE JUDGE'S RULING & ORDER AND REQUEST FOR A *DE NOVO* DETERMINATION OF THE TRIBE'S SOVEREIGN IMMUNITY CHALLENGE** 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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