Kimberly D. Washburn (Bar No. 6681)
LAW OFFICE OF KIMBERLY D. WASHBURN, P.C.
405 East 12450 South, Suite H
P.O. Box 1432
Draper, Utah 84020
Telephone: (801) 571-2533
Facsimile: (801) 571-2513
kdwashburn_esq@msn.com

Frances C. Bassett, *Pro Hac Vice Admission*
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027-2314
Telephone: 303-673-9600
Fax: 303-673-9155
Email: fbassett@ndnlaw.com

Attorneys for Non-Party Movant, Ute Indian Tribe of the Uintah and Ouray Reservation, 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 REPLY IN SUPPORT OF THE TRIBE'S MOTION TO QUASH SUBPOENA DUCES TECUM** Civil Case No. 2:10-cv-00217 District Judge Clark Waddoups

SUMMARY OF THE REPLY

The plaintiffs do not allege that enforcement of the civil subpoena in this case has been authorized by the United States Congress or by the Ute Tribe itself. Instead, plaintiffs deny that Indian tribes even possess *sovereign* immunity, positing instead that tribes are confined to an unspecified lesser sovereignty that "*is not equal to that of a sovereign government*." Doc 39, Pltf's Res., p 3 (emphasis added). Plaintiffs also assert that the legal "understanding" of tribal immunity has changed "over the past several decades," and that the Ute Tribe's memorandum fails to "reflect the changing understanding of tribal immunity." Doc 39, p. 4. In making these assertions, the plaintiffs have seriously misapprehended or misrepresented controlling federal law.

The plaintiffs further misapprehend or misrepresent applicable law by asserting, without citation to any controlling authority, that sovereign immunity only shields governmental entities from lawsuits, i.e., that sovereign immunity does not bar non-party legal process such as subpoenas when the "entity is not a party to the underlying suit." Doc. 39, pp. 5-7. Relying disingenuously on *dicta* and select excerpts from inapposite cases, the plaintiffs have ignored controlling Tenth Circuit precedent directly on point and contrary to the plaintiffs' argument.

I. TRIBAL SOVEREIGN IMMUNITY IS NOT MUTABLE AND FLUCTUATING

The Tenth Circuit and Colorado Supreme Court have recently addressed this very issue, and both courts recognized unequivocally that Indian tribes have sovereign immunity from compelled compliance with legal process, even if, as here, the tribe is a non-party. *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629

F.3d 1173, 1182-85, 1188-99 (10th Cir. 2010); *Cash Advance v. Colorado ex. rel. Suthers*, 242 P.3d 1099, 1106-1109 (Colo. 2010). So much, then, for "changed" legal "understandings." The issue in *Cash Advance* was whether the Colorado Attorney General could compel compliance with an administrative subpoena requiring tribally-owned commercial entities to appear and produce documents. In direct opposition to the tenor of the plaintiffs' assertions here, the Colorado Supreme Court explained that tribal sovereignty is neither mutable nor fluctuating:

> . . . tribal sovereignty is an inherent, retained sovereignty that pre-dates European contact, the formation of the United States, the U.S. Constitution, and individual statehood.

Id. at 1107 (citations omitted). The Colorado Supreme Court described the doctrine of tribal sovereign immunity as "long-standing," and "rooted in the inherent sovereignty of Indian tribes," emphasizing that sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* (citing *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

The Tenth Circuit used similar language in its holding in *Breakthrough Mgt.* Quoting language from an earlier case, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002), the Tenth Circuit said:

> "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." . . . *Native Am. Church of N. Am. V. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d at 1182. The arguments made by the plaintiffs in this case were derogated by the Tenth Circuit to a mere *footnote* in *Breakthrough Mgt*. *Id.* at 1183 n 7. In that footnote the Tenth Circuit explained that although the Supreme Court has "expressed reservations about the extension of tribal immunity *to economic activities*," the Supreme Court has nonetheless "deferred to Congress in this area," and the Tenth Circuit noted that "*Congress has consistently reiterated its approval of the [tribal sovereign] immunity doctrine*.'" *Id*. (emphasis added).

This footnote in *Breakthrough Mgt*.—emphasizing the Supreme Court's deference to Congress—is critical to this court's proper understanding of the issue. Simply put, it "is not the role of the federal courts to abrogate tribal sovereignty." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp.2d 1131, 1137 (N.D. Okla. 2001) (citing *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Despite the plaintiffs' assertions here, and imprecise language found in some judicial decisions, tribal sovereignty is not subject to a general "*plenary federal control*." Doc. 39, p 3. Neither the federal executive branch nor the federal judiciary has constitutional authority to diminish or otherwise affect tribal sovereignty. Rather, tribal sovereignty is subject to only *one source* of plenary federal control and that is the control of the U.S. Congress. Congress' plenary power over Indian affairs is derived from its delegated powers under the U.S. Constitution, including, *inter alia*, the Indian Commerce Clause and the Treaty Clause. U.S. Const., Art. I, § 8, cl. 3, and Art. II, § 2, cl. 2. *See, e.g., Morton v. Mancari*,

417 U.S. 535, 552 (1974); *United States v. Lara*, 541 U.S. 193, 200 (2004), *see generally Cohen's Handbook of Federal Indian Law*, § 5.01 (2005 ed.).

For this reason the Supreme Court has refused to abolish tribal sovereign immunity even when the Court was presented with a direct opportunity to do so in *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 710-711 (2003). That case involved a state search warrant executed on the tribal offices of the Bishop Paiute Tribe. The Ninth Circuit ruled that the Tribe's sovereign immunity prevented the State of California from enforcing a state search warrant and it held that the Tribe could sue for redress under 42 U.S.C. § 1983. *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 902-03, 910-12 (9th Cir. 2002). Although the Supreme Court accepted certiorari in *Bishop Paiute*, the Court confined its review to the question whether Indian tribes are "persons" entitled to sue for civil rights violations under 42 U.S.C. § 1983. On this basis the Supreme Court vacated the Ninth Circuit's holding in *Bishop Paiute*, holding that tribes are not "persons" under § 1983. *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. at 710-711. *The Court declined to address the Tribe's immunity from legal process*. The Court's restraint was fully in keeping with the Court's earlier observation that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

The principles of tribal sovereign immunity are well settled. *United States v. Kagama*, 118 U.S. 375, 382 (1886); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998). Congress has the power

to abrogate such immunity, but may only do so expressly and with clear and unequivocal language; any ambiguity as to Congress' intent must be resolved in favor of the tribe. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264-69 (10th Cir. 1998) (reversing district court's refusal to dismiss on the ground of sovereign immunity).

A tribe itself may waive sovereign immunity, *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. at 754 (citing *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. at 890); however, a tribe's waiver of immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (citation omitted); *Nanomantube v. The Kickapoo Tribe in Kansas*, 631 F.3d 1150 (10th Cir. 2011). Sovereign immunity exists in all instances except those instances in which Congress or an Indian tribe itself has waived immunity. *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007); *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006).

II. SOVEREIGN IMMUNITY IS NOT CONFINED TO IMMUNITY FROM LAWSUITS

Plaintiffs are incorrect in asserting that sovereign immunity applies only when a tribe is sued. Contrary to this argument, the Tenth Circuit has upheld an Indian tribe's immunity from federal administrative subpoenas, *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989), and federal court-issued subpoenas, *Breakthrough Mgt. Group, Inc.*, 629 F.3d. at 1182-85, 1188-91. Tribal sovereign immunity also applies to state law enforcement subpoenas. *Cash Advance v. Colorado*, 242 P.3d at 1108 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991)).

A subpoena duces tecum is a compulsory summons that orders the production of documents or other tangible evidence. 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)).

Clearly, a non-party subpoena is a process that would "compel" Indian tribes to act under threat of the court's contempt sanctions. If the Ute Tribe were to ignore the subpoena served upon it, the Tribe and its tribal officers would subject themselves to contempt sanctions including monetary fines and possible incarceration. Conversely, if the Tribe were to submit to the subpoena, the Tribe would necessarily subject itself to the court's power to compel production of tribal records and documents, including documents the Tribe considers privileged and proprietary. For these reasons, courts have held that Indian tribes have sovereign immunity from the enforcement of non-party subpoenas. *EEOC v. Cherokee Nation*, 871 F.2d at 939; *Quair v. Bega*, 388 F. Supp.2d 1145, 1147-48 (E.D. Cal. 2005); *Cash Advance v. Colorado*, 242 P.3d at 1106-1109. Allowing Indian tribes to assert sovereign immunity against non-party subpoenas serves to conserve the limited resources of tribal governments and to minimize a tribal government's entanglement in controversies unrelated to official business. *See, e.g., Boron Oil Co. v. Downie*, 873 F.2d 67, 68-71 (4th Cir. 1989) (noting these policy rationales support the prohibitions on the testimony of federal employees).

III. PLAINTIFFS' CITED CASES CITED ARE INAPPOSITE AND POORLY REASONED

The plaintiffs cite three cases for the proposition that Indian tribes are prevented from invoking sovereign immunity against non-party subpoenas. However, two of these cases are criminal cases; two of the cases are marked by profoundly flawed legal analyses; and all three cases are factually and legally distinguishable.

Criminal cases are obviously inapposite. In criminal cases the right to subpoena government records flows from the Sixth Amendment right "to have compulsory process" issued for the production of potentially exculpatory evidence—an interest that outweighs 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 two of the decisions relied upon by the plaintiffs—fail to distinguish between civil and criminal subpoenas. In *U.S. v. Juvenile Male 1*, 431 F. Supp.2d 1012 (D. Az. 2006), 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 (which had criminal jurisdiction over the defendant under the Major Crimes Act, 18 U.S.C. § 1153). 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). *Id.* 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 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* 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. Indeed, the *Alltel* court arguably violated constitutional separation of powers by impermissibly encroaching on the Congress' exclusive and plenary authority to determine the extent of tribal sovereign immunity. *Id.* At a minimum, federal courts cannot judicially abrogate tribal sovereign immunity to civil subpoenas by relying *exclusively* on cases involving subpoenas issued in criminal cases and investigations.

CONCLUSION

It is axiomatic that district courts are bound by Supreme Court and Tenth Circuit precedent, and not just the "narrow holdings" of prior cases, "*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). In deciding the Ute Tribe's motion to quash, this court is bound by Tenth Circuit precedent holding that tribal sovereignty is preserved and protected by allowing tribes to assert sovereign immunity against the enforcement of federal subpoenas. *EEOC v. Cherokee Nation*, 871 F.2d at 939; *see also Breakthrough Mgt. Group, Inc.*, 629 F.3d. at 1182-85, 1188-91. Because the sovereign immunity of the Ute Tribe has neither been abrogated by the U. S. Congress or waived by the Tribe in this instance, the plaintiffs' subpoena must be quashed.

Respectfully submitted this 9th day of May, 2011.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Frances C. Bassett

Frances C. Bassett
1900 Plaza Drive
Louisville, CO 80027-2314
Telephone: 303-673-9600
Fax: 303-673-9155
Email: fbassett@ndnlaw.com

Kimberly D. Washburn (Bar No. 6681)
LAW OFFICE OF KIMBERLY D. WASHBURN, P.C.
405 East 12450 South, Suite H
P.O. Box 1432
Draper, Utah 84020
Telephone: (801) 571-2533
Facsimile: (801) 571-2513
kdwashburn_esq@msn.com

Attorneys for Non-Party Movant, Ute Indian Tribe of the Uintah and Ouray Reservation, Appearing Specially

CERTIFICATE OF SERVICE

On the 9th day of May, 2011, I electronically filed the foregoing **NON-PARTY MOVANT UTE INDIAN TRIBE'S REPLY IN SUPPORT OF THE TRIBE'S 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:

Attorneys for Plaintiffs/Counter Defendants

Lynn S. Davies
Rafael A. Seminario
RICHARDS BRANDT MILLER NELSON
P.O. Box 2465
299 S. Main St., 15th Floor
Salt Lake City, UT 84110-2465
lynn-davies@rbmn.com
Rafael-seminario@rbmn.com
Attorneys for Plaintiffs/Counter Defendants
Robert C. Bonnet & Bobby Bonnet Land Services

Attorneys for Defendants/Counter Claimants

H. Douglas Owens
HOLLAND & HART (UT)
222 S. Main Street, Ste. 2200
Salt Lake City, UT 84101
dowens@hollandhard.com
Attorneys for Defendants/Counter Claimants
Harvest (US) Holdings and Elton Blackhair

Catherine L. Brabson
Paul T. Moxley
PARSONS KINGHORN HARRIS
111 E. Broadway, 11th Floor
Salt Lake City, UT 84111
clb@pkhlawyers.com
ptm@pkhlawyers.com
Attorneys for Defendants Ute Energy and Cameron Cuch

Thomas R. Karrenberg
ANDERSON & KARRENBERG
50 W. Broadway, Ste. 700
Salt Lake City, UT 84101
tkarrenberg@aklawfirm.com
Attorneys for Defendant/Counter Claimant
Branta Exploration & Production

/s/ Tia Gerung
Assistant to Frances C. Bassett