UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Case No. 12-4068

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

Non-Party Moveant-Appellant,

v.

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

Plaintiffs – Appellees.

BRIEF OF APPELLEES ROBERT C. BONNET AND BOBBY BONNET LAND SERVICES

Appeal from the United States District Court
District of Utah, Central Division
The Honorable Clark Waddoups, District Court Judge
Case No.: 2:10-cv-00217-CW-BCW

THOMAS W. FREDERICKS
FRANCES C. BASSETT
JEREMY J. PATTERSON
THOMAS J. McREYNOLDS
FREDERICKS PEEBLES & MORGAN, LLP
1900 Plaza Drive
Louisville, Colorado 80027
Attorneys for Non-Party-Movant-Appellant

LYNN S. DAVIES [0824]
RAFAEL A. SEMINARIO [10250]
RICHARDS BRANDT MILLER NELSON
299 South Main, 15th Floor
Salt Lake City, Utah 84111
E-mail: lynn-davies@rbmn.com
rafael-seminario@rbmn.com
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Regulations:

Appellees Robert C. Bonnet and Bobby Bonnet Land Services (collectively "**Appellees**"), respectfully submit the following brief in response to the opening brief filed by the Ute Indian Tribe of the Uintah and Ouray Reservation (the "**Tribe**").

STATEMENT OF JURISDICTION

Appellees are not dissatisfied with the Statement of Jurisdiction contained in Appellant's Brief.

STATEMENT OF THE ISSUES

Did the District Court err in finding that the discovery requests served upon the non-party Tribe do not constitute a "suit" and therefore that the doctrine of tribal sovereign immunity does not apply.

STATEMENT OF THE CASE

Appellees are generally not dissatisfied with the Statement of the Case contained in Appellant's Brief, but wish do clarify a few points. The Appellees served the Tribe with a subpoena duces tecum, which requested 10 categories of documents. App. Vol. II, 255-61. The requests were tailored to minimize any burden on the Tribe.

Without repeating the procedural history, the district court concluded that the Tribe's tribal immunity did not excuse the Tribe from complying with a non-

party subpoena. App. Vol. II, 412-27. Notwithstanding its ruling, the district court also applied the Rule 45 balancing test to ensure that the specific requests did not unreasonably burden the Tribe in a way that would infringe on the Tribe's independence and autonomy. App. Vol. II, 426. To that end, the district court analyzed each specific discovery request and rejected or modified requests that the court believed were overbroad or could impinge on the Tribe's tribal authority and self-governance. App. Vol. II, 423-26.

STATEMENT OF THE FACTS

Appellees dispute Appellant's characterization that the discovery requests served on the Tribe were broad or expansive. The subject discovery requests speak for themselves. App. Vol. II, 226-30.

SUMMARY OF THE ARGUMENT

Neither party disputes that under the doctrine of tribal immunity the Tribe is immune from "suit." Rather, the parties dispute the relatively novel issue of whether a non-party subpoena to an Indian tribe constitutes a "suit" that is barred by tribal immunity.

The Tenth Circuit has previously held that tribal immunity is most closely analogous to the immunity afforded states under the Eleventh Amendment. Courts have repeatedly held that the sovereignty of a state does not protect it from non-

party discovery request. In contrast, the Tribe relies on case law analogizing tribal immunity to the immunity afforded the federal government, which is a superior power. A Tribe, which has sovereign powers no greater than that of a state, cannot claim to be immune from a non-party subpoena.

ARGUMENT

I. APPELLEES DO NOT DISPUTE THE TRIBE'S POSSESSION OF SOVEREIGN IMMUNITY.

Appellees do not dispute that Indian tribes are sovereign powers and possess immunity from suit. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1979). However, although tribal immunity remains in tact, the doctrine has received increasing scrutiny. Recent Supreme Court decisions have criticized both the doctrinal support for, and policy rationale of, tribal immunity *See, e.g.*, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998) ("There are reasons to doubt the wisdom of perpetuating this doctrine. . . . [that] tribal immunity extends beyond what is needed to safeguard tribal self-governance. . . . These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule."); *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Okla.*, 498

U.S. 505, 514 (1991) (Stevens, J., concurring) (stating that tribal immunity is founded on an anachronistic fiction and is limited in scope). The district court noted that "[g]iven the increasing hesitance of courts to apply tribal immunity, this court does not believe it wise to expand the doctrine to protect tribes not only from suit, but also from non-party discovery." App. Vol. II, 417-18.

The federal government recognizes Indian tribes as "domestic dependent nations" that although sovereign, are also "under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). A tribe's immunity, therefore, is not equal to that of a sovereign government, but is subject to the control of the federal government. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994) ("Thus, tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers."); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987) (citing *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965)) (recognizing the United States exercises "superior power" over states and tribes).

Through more limited, tribal immunity is more closely analogous to the immunity afforded to states.

> Tribal immunity is similar, although not identical, to immunity afforded to states under the Eleventh Amendment…. Tribes and states both enjoy immunity from

> suit by virtue of their status as pre-Constitutional sovereigns.… **The scope of tribal immunity, however, is more limited**. *See Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008) (noting that the "sovereignty the Indian tribes retain is of a unique and limited character" (internal quotation marks omitted)); *Montana v. United States*, 450 U.S. 544, 563 (1981) (observing that with their incorporation into the United States, "Indian tribes have lost many of the attributes of sovereignty.").

Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1154 (10th Cir. 2011) (emphasis added).

> Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition.

Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, 476 U.S. 877, 890-91 (1986) (emphasis added).

The Eleventh Amendment protects State sovereignty. However, neither the Eleventh Amendment nor the general doctrine of sovereign immunity shields a non-party state from complying with a federal subpoena. *See In re Missouri Department of National Resources*, 105 F.3d 434, 436 (8th Cir. 1997) (discussing discovery requested by a non-party state agency and holding that "[g]overnmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. There is simply no authority for the position that

the Eleventh Amendment shields government entities from discovery in federal court.") (citing *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958)); *University of Texas at Austin v. Vratil*, 96 F.3d 1337, 1340 (10th Cir. 1996) (indicating Eleventh Amendment immunity protects a state from discovery when it is a party, but does not protect it from non-party discovery under Rule 45).

For these reasons, a tribe cannot claim the level of sovereignty possessed by the federal government, nor can it claim to have greater protections than is afforded to states under the Eleventh Amendment.

II. SOVEREIGN IMMUNITY DOES NOT PROTECT A TRIBE FROM A NON-PARTY SUBPOENA.

A subpoena to a non-party tribes is not a "suit" that would trigger tribal sovereign immunity. A tribe's immunity is intended to protect its "economic development, self-sufficiency, and self-governance." *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1180 (10th Cir. 2010). Non-party subpoenas requested by Appellees do not impinge on the Appellants sovereignty and do not constitute a "suit."[1]

[1] As noted by the district court, the Tribe cites to numerous cases that deal with actual suits against the tribe or against an arm of the tribe, such as *Breakthrough Management Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), *Equal Opportunity Commission v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989), and *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006). App. Vol. II, 418. This case does not involve an actual suit against a tribe

"The 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 v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731 (1947)). In *State of Missouri v. Fiske*, 290 U.S. 18, 26-27 (1933), the Supreme Court quoted Chief Justice Marshall:

> What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand or request. In law language, it is the prosecution of some demand in a Court of justice.
> …
> To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand.

Id. (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821). The service of a federal subpoena on a tribe does not constitute a suit.

> [Tribal] immunity protects a tribe as an entity from unconsensual civil actions against it. **The service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe.**

---

or its arm. The Tribe also cites to *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165 (1977). In *Puyallup Tribe*, the state court entered an order directed at the Tribe, which placed a limit on the number of fish that members of the tribe could catch and allowed the state to police the fishing activities of individual tribe members. The decision rested on the government's ability to impose ongoing reporting obligations upon an Indian reservation. The Tribe has apparently dropped its reliance on *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), a uniformly-criticized case that the Tribe heavily relied on in prior briefs to the district court and at the June 8, 2011 hearing.

U.S. v. Juvenile Male 1, 431 F.Supp.2d 1012, 1016 (D. Ariz. 2006) (internal citations omitted) (emphasis added).[2]

This Court has previously held that "the case law defining and interpreting 'suit' as contained in the Eleventh Amendment is **instructive and persuasive** in the context of matters against Indian tribes." *In re Mayes*, 294 B.R. 145, 150 (B.A.P. 10th Cir. 2003) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996)) (emphasis added). The immunity afforded states does not apply when the state is

[2] Only a few cases have addressed whether a non-party subpoena in a civil action constitutes a "suit." *See Catskill Development, LLC v. Park Place Entertainment Corp*., 206 F.R.D. 78, 86 (S.D.N.Y 2002) ("The extent to which tribal sovereign immunity applies to non-party subpoenas of individuals in civil litigation is not clearly established in this Circuit, and there is little authority anywhere on whether a Native American tribe may be compelled to testify or produce documents as non-party fact witnesses pursuant to the district court's subpoena power."). The *Catskill* court bases its decision on an inapt analogy to subpoenas served on the federal government, which enjoys more expansive sovereign powers than a tribe.

The Tribe also emphasizes the reversal of the case of *Alltel Communications, LLC v. DeJordy*, No. CIV. 10-MC-00024, 2011 WL 673766 (D. S.D. Feb. 17, 2011) for support of its contention that non-party tribes are not subject to federal subpoenas. In addition to its lack of binding precedent on this Court, the *Alltel* decision equates a tribe's sovereign immunity to that of the Federal Government, directly contradicting the Tenth Circuit's line of cases analogizing a tribes' immunity to that of the States under the Eleventh Amendment. *See Crowe & Dunlevy*, 640 F.3d at 1140; *see also World Engineering*, 476 U.S. at 890-91. The Eighth Circuit acknowledged that its decision "confer[ed] greater immunity than that enjoyed by federal officers and agencies, or by the States." *Id.* (noting that the tribe's claim for immunity from third-party judicial process is "unsettling").

not a party to the suit. *Juvenile Male I*, 431 F. Supp. 2d at 1016 ("The Tribe does not advance any compelling arguments as to why quasi-sovereign tribes should be protected from discovery in circumstances when states, which are fully protected by the Eleventh Amendment, are not."); *Laxalt v. McClatchy*, 109 F.R.D. 632, 634 (D. Nev. 1986) (noting that Eleventh Amendment Immunity does not prevent service of a discovery subpoena.); *Allen v. Woodford*, 544 F.Supp.2d 1074, 1078 (E.D.Cal.2008) (holding that the Eleventh Amendment did not shield non-party state agencies from discovery because "the immunity of a state arises only when the state government ... is sued.") In *Allen*, the court further held subpoena was not a "suit" because no judgment would be issued against and the state's treasury would not be affected. *Id*. at 1079.

In *In re Missouri Department of National Resources*, 105 F.3d 434 (8th Cir. 1997), a state agency tried to resist a non-party subpoena on the basis of Eleventh Amendment immunity. However, the state failed to show

> how production of these documents infringes on the State of Missouri's autonomy or threatens its treasury. Governmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. There is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court.

Id. at 436. Accordingly, the state's sovereign immunity did not protect it from responding to the non-party subpoenas.

The immunity possessed by the Tribe is no greater than the immunity afforded states under the Eleventh Amendment. Consequently, the Tribe cannot expect immunity from non-party discovery requests when sovereign states do not. Ultimately, a non-party discovery request does not constitutes a suit and is not barred by a tribe's sovereign immunity.

III. THE DISTRICT COURT APPROPRIATELY CONSIDERED THE BALANCING TEST UNDER RULE 45.

The Tribe also asserts that by applying a balancing test under Rule 45, the District Court inappropriately inferred a waiver of tribal sovereign immunity. The Tribe misconstrues the district court's decision. The district court did not hold that the Federal Rules of Civil Procedure negates or preempts the Tribes' immunity from suit. Rather, after holding that tribal immunity did not apply, the court then applied a Rule 45 balancing test.[3] After determining the non-party discovery request was not a "suit" and was not barred by tribal sovereign immunity, the court

[3] The Tribe erroneously relies on *Gonzalez v. Hickman*, 466 F. Supp. 2d 1226 (E.D. Cal. 2006) because of its failure to distinguish between a non-party subpoena and a "suit" against the state. In fact, this decision has been criticized in the very district in which it was decided. *See Allen v. Woodford*, 544 F.Supp.2d at 1079 (holding that to apply *Gonzalez* would mean a plaintiff who sues a state official in his official capacity could never receive the required proof that is in the hands of the state and that "[s]uch a result is ludicrous.").

applied the balancing test to ensure that the specific requests did not invade the Tribe's sovereignty.

> In applying this test to discovery requested of a non-party Indian tribe, the court recognizes that tribes, as quasi-sovereign nations, have a substantial interest in maintaining autonomy. Therefore, non-party discovery that would significantly impact the tribal treasury, require the production of private documents related to tribal governance, or interfere with the administration of tribal services may, in those circumstances, not be permissible.

App. Vol. II, 422.

In *United States v. Bryan*, the Supreme Court held that "the great power of testimonial compulsion [is] necessary to the effective functioning of courts" and that "the public … has a right to every man's evidence." 339 U.S. 323, 330 (1950). This balancing of interests has been long been used in the context of obtaining information from a sovereign entity—such as a federal agency. *Id*. at 332 (noting that a determination of whether the "substantial individual interest" of the person refusing to respond to subpoena "outweigh[s] the public interest in the search for truth."). The *Bryan* test has been incorporated into Rule 45 of the Federal Rules of Civil Procedure, which provides that a court "must quash or modify a subpoena that" is unreasonable. Fed. R. Civ. P. 45(c)(3)(A)(iv).

The district court analyzed each discovery request to determine whether any request would require the production of documents that would "significantly impact the tribal treasury, require the production of private documents related to tribal governance, or interfere with the administration of tribal services." App. Vol. II, 423. Under this framework, the district court determined that the ninth and tenth discovery requests could impinge on the Tribe's autonomy and self-governance and quashed the requests. For similar reasons, the court appropriately modified the sixth request. However, the district court appropriately held that the remaining discovery requests did not run afoul of the Bryan test. This Court should therefore upheld the district court's decision properly recognizing the limits of the Tribe's sovereign immunity.

CONCLUSION

Based on the foregoing facts and authorities, Appellees respectfully request that this Court affirm the district court's ruling and hold that the Tribe's tribal immunity does not apply to the non-party discovery requests served in the present case. Appellees also request that this Court affirm the district court's ruling that

the discovery requests, as modified by the district court, do not impinge on the Tribe's immunity under the Rule 45 balancing test.

ORAL ARGUMENT STATEMENT

Oral argument is not necessary in this case. This appeal is based, almost exclusively, on a few narrow legal issues, which have been fully briefed.

DATED this 1st day of February, 2013.

RICHARDS BRANDT MILLER NELSON

/s/ Rafael A. Seminario
LYNN S. DAVIES
RAFAEL A. SEMINARIO
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionately spaced and contains 2,872 words. I relied on my word processor, Microsoft Word 2007, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ Rafael A. Seminario
Lynn S. Davies
Rafael A. Seminario
Attorneys for Appellees

By: /s/ Rafael A. Seminario
Lynn S. Davies
Rafael A. Seminario
Attorneys for Appellees (digital)

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing **BRIEF OF APPELLEES**, as submitted in digital form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the **McAfee 801i**, and, according to the program, is free of viruses.

By: /s/ Angalee Trujillo

By: /s/ Angalee Trujillo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Frances C. Bassett
Thomas W. Fredericks
Jeremy P. Patterson
Thomas J. McReynolds
FREDERICKS PEEBLES & MORGAN, LLP
1900 Plaza Drive
Louisville, Colorado 80027-2314

H. Douglas Owens
HOLLAND & HART
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101

Catherine L. Brabson
Paul T. Moxley
PARSONS KINGHORN HARRIS
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111

Thomas R. Karrenberg
Richard A. Kaplan
ANDERSON & KARRENBERG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

/s/ Rafael S. Seminario

G:\EDSI\DOCS\99000\0023\WM2860.DOC