CASE NO. 12-4068

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, Non-Party Movant-Appellant, v. ROBERT C. BONNET, an individual, and BOBBY BONNET LAND SERVICES, a sole proprietorship, Plaintiffs-Appellees.	)

On Appeal from the United States District Court for the District of Utah, Central Division
Dist. Ct. Case: *Robert C. Bonnet and Bobby Bonnet Land Services v. Harvest (US) Holdings, Inc., et. al*, No. 2:10-cv-00217-CW-BCW
The Honorable Judge Clark Waddoups

APPELLANT'S OPENING BRIEF

Respectfully submitted,
FREDERICKS PEEBLES & MORGAN LLP
Thomas W. Fredericks
Frances C. Bassett
Jeremy J. Patterson
Thomas J. McReynolds
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Attorneys for Non-Party Movant-Appellant

Oral Argument is requested.

SCANNED PDF ATTACHMENT IS INCLUDED

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The Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") respectfully submits its opening brief.

STATEMENT OF JURISDICTION

This appeal involves a lawsuit between private litigants brought under the diversity statute, 28 U.S.C. § 1332, in the United States District Court for the District of Utah, Central Division. The Ute Tribe is not a party to the lawsuit. Before conducting discovery on any party, the Plaintiffs served the Tribe with a subpoena duces tecum seeking the production of broad categories of internal tribal records and documents. The Tribe moved to quash the subpoena asserting tribal sovereign immunity. The district court entered its order denying the Tribe's motion to quash on March 23, 2012. This appeal is from that order. The Court has appellate jurisdiction under 28 U.S.C. § 1291 and under the collateral order doctrine which allows an immediate appeal from an order denying the assertion of tribal sovereign immunity. At the Court's request, the Ute Tribe filed a separate brief on the question of the Court's appellate jurisdiction on June 5, 2012.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in ruling that tribal sovereign immunity is not a jurisdictional bar to the enforcement of private party civil subpoenas served on Indian tribes. Alternatively, formulated more narrowly to the

specific facts of this case, whether the Ute Tribe's decision as a sovereign to enter into a contract with the Plaintiffs, and its later decision to terminate that contract, are matters uniquely within the Ute Tribe's prerogative as a sovereign, such that the Ute Tribe has immunity as a sovereign against the enforcement of any subpoenas issued by any party to the lawsuit below.

STATEMENT OF THE CASE

Robert C. Bonnet, an individual, and Bobby Bonnet Land Services, a sole proprietorship ("Plaintiffs"), filed suit against Harvest (US) Holdings, Inc., Branta Exploration & Production, LLC, Ute Energy LLC ("Defendants") and various other individuals, alleging that the Defendants tortiously interfered with the Plaintiffs' contract with the Ute Tribe, resulting in the contract's premature termination.[1] App. Vol. I, 14-37. The Plaintiffs' amended complaint alleges claims against the Defendants for intentional interference with economic relations, libel, slander, intentional infliction of emotional distress, and civil conspiracy. App. Vol. I, 123-46.

Before conducting discovery on any of the named Defendants, the Plaintiffs served the Tribe with a subpoena duces tecum seeking to have the Tribe produce

[1] Citations to the record will be denoted as "App. Vol. I or II," followed by the appropriate page numbers.

broad categories of internal tribal records and documents. App. Vol. II, 255-61. The Tribe filed a timely motion to quash the subpoena, asserting, *inter alia*, the jurisdictional bar of tribal sovereign immunity. App. Vol. II, 214-30, 242-54.

The motion to quash was denied by the magistrate judge in an order entered on August 11, 2011. App. Vol. II, 299-311. The Tribe filed a timely objection to the magistrate's ruling and requested that the district court review the matter *de novo*. App. Vol. II, 312-35. The district court conducted a *de novo* review and entered an order denying the Tribe's motion to quash on March 23, 2012. App. Vol. II, 412-27. Applying the balancing test utilized under Federal Rule 45, the district court decided only to modify the *duces tecum* request, ruling that the Tribe is not required to comply fully with the sixth *duces tecum* request, and ruling that the Tribe is not required to comply at all with the ninth and tenth requests. App. Vol. II, 422-26. Both the magistrate judge and the district court refused the Tribe's request for reimbursement of the attorney fees the Tribe would incur in responding to the subpoena. App. Vol. II, 332-33, 308-11, 426.

The Tribe filed a timely notice of appeal on April 23, 2012. App. Vol. II, 428-30. By an order dated May 9, 2012, this Court requested briefing on the question of the Court's appellate jurisdiction. The Tribe submitted its jurisdictional brief on June 5, 2012. On June 6, 2012, this Court entered an order

referring the matter to the panel of judges that will decide the appeal on its merits. On June 26, 2012, the Bonnet Plaintiffs responded to the Tribe's jurisdictional memorandum of 6/5/2012. By an order entered on June 27, 2012, the Court referred the Plaintiffs' response to the panel of judges that will decide the appeal, implying, inferentially, that the District Court's denial of the Tribe's sovereign immunity claim was immediately appealable under the collateral order doctrine. *See* Order dated June 27, 2012.

STATEMENT OF THE FACTS[2]

Mr. Bonnet is a petroleum landman who conducts business through his sole proprietorship, Bobby Bonnet Land Services ("Plaintiffs"). Mr. Bonnet entered into a written contract with the Ute Tribe's Energy & Minerals Department to serve as an independent contractor and consultant. App. Vol. I, 125-26, ¶¶ 11-13. There is no waiver of the Tribe's sovereign immunity in the written contract.

According to Plaintiffs' amended complaint, the Defendants tendered various business proposals to the Tribe, and Mr. Bonnet rejected those proposals because he felt the proposals were not in the Tribe's best interest. App. Vol. I, 128, ¶ 25. Bonnet alleges that because of his opposition to the Defendants'

[2] Many of the facts of the underlying lawsuit are not relevant to the issue on appeal. Accordingly, such facts will not be recited here.

business proposals, the Defendants caused Plaintiffs' contract with the Ute Tribe to be terminated prematurely. App. Vol. I, 128-29, ¶ 28. Plaintiffs thereupon filed the underlying lawsuit.

Before conducting discovery on any of the Defendants, the Plaintiffs served the Tribe with a subpoena duces tecum seeking the production of broad categories of internal tribal records and documents. App. Vol. II, 226-30. The subpoena is directed to the Ute Tribe and the Tribe's Energy and Minerals Department, and the subpoena broadly requests an expansive range of materials and documents:

> Request No. 1: Any and all documents relating to any communications between or among you and Robert Bonnet.
>
> Request No. 2: Any and all documents relating to communications prepared by Robert Bonnet during his employment with you.
>
> Request No. 3: Any and all documents relating to communications between or pertaining to Branta and Robert Bonnet.
>
> Request No. 4: Any and all documents relating to communications between or pertaining to Harvest and Robert Bonnet.
>
> Request No. 5: Any and all documents relating to communications between or pertaining to the 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.

The subpoena was served on March 1, 2011, and it specified a deadline of March 23, 2011, for compliance. App. Vol. II, 226.

The Tribe objected to the subpoena and moved to quash for lack of jurisdiction based on the Tribe's sovereign immunity, as well as other grounds under Rule 45. App. Vol. II, 214-30. The Plaintiffs filed an objection to the Tribe's motion to quash, and the Tribe filed a reply. App. Vol. II, 231-41, 242-52.

On August 11, 2011, the magistrate judge denied the motion to quash. The magistrate ruled that the Tribe's Rule 45 challenges were not persuasive and that the Tribe's interests as a sovereign were "significantly outweighed" by the Plaintiffs' need to access information for the lawsuit. The magistrate reasoned that "under such circumstances the doctrine of tribal sovereign immunity was not intended to extend to a non-party Tribe." App. Vol. II, 308. The magistrate did not address the fact that the Plaintiffs had not, to that date, undertaken *any* discovery on any of the named Defendants, making it impossible to determine at

that time the Plaintiffs' actual needs, if any, for documents and information from the Ute Tribe.

In rejecting the Tribe's assertion of sovereign immunity, the magistrate relied heavily on the decision of a federal district court in South Dakota in a factually analogous case, *Alltel Comm., LLC v. DeJordy*, No. Civ. 10-MC-00024, 2011 WL 673766 (D.S.D. Feb. 17, 2011). The issue in *Alltel*, like the issue here, was whether the Oglala Sioux Tribe could assert tribal sovereign immunity against enforcement of a civil subpoena served on the Tribe by private litigants. The federal district court in *Alltel* rejected the Oglala Sioux Tribe's assertion of immunity, and the magistrate, relying on the *Alltel* ruling, similarly denied the Ute Tribe's assertion of tribal sovereign immunity in this case.

In turn, the district court also rejected the Ute Tribe's assertion of tribal sovereign immunity, and like the magistrate, the district court relied heavily on the ruling and rationale of the district court in *Alltel*. App. Vol. II, 421.

Significantly, however, during the pendency of the Ute Tribe's motion to quash in the district court below, the Oglala Sioux Tribe pursued an appeal of the district court's ruling in *Alltel*. And after the district court's ruling in this case, the Eighth Circuit issued an opinion overturning the lower court's ruling in *Alltel*. *Alltel Comm., LLC v. DeJordy*, 675 F.3d 1100, 1105-06 (8th Cir. 2012).

Consequently, the district court ruling in *Alltel*–on which the magistrate and the district court both relied—has been stripped of any precedential value or persuasive weight.

STANDARD OF REVIEW

On appeal this Court conducts a *de novo* review of a district court's rejection of the tribal sovereign immunity defense. *Breakthrough Mgmt Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010); *see also Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998) (applying *de novo* standard of review to legal question of whether a party may assert immunity); *In re Mayes*, 294 B.R. 145, 147 (B.A.P 10th Cir.) ("the application of tribal sovereign immunity is a question of law subject to *de novo* review by this Court.").

SUMMARY OF THE ARGUMENT

In long established precedents the Supreme Court and the Tenth Circuit have both made clear that tribal sovereign immunity is a jurisdictional bar to compelled compliance with subpoenas and other judicial process. Instead of applying those precedents, the district court below adopted the holding of a sister district court, which holding was later reversed by the Eighth Circuit. The Tenth Circuit should

reaffirm the long standing principles of tribal sovereign immunity and should hold that the Ute Tribe's assertion of sovereign immunity is a jurisdictional barrier to compelled compliance with the subpoena.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT TRIBAL SOVEREIGN IMMUNITY DOES NOT PROTECT THE TRIBE FROM ENFORCEMENT OF THE SUBPOENA DUCES TECUM.

A. This Court Should Reaffirm the Long Established Principles of Sovereign Immunity

This Nation's jurisprudence has long recognized that Indian nations and tribes possess sovereign immunity. *United States v. Kagama*, 118 U.S. 375, 382 (1886); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832). 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). The purpose and significance of tribal sovereign immunity was eloquently summarized by the Eighth Circuit Court of Appeals:

> The principle that Indian nations possess sovereign immunity has long been part of our jurisprudence. Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity

> is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. That sovereign immunity can be surrendered only by express waiver enjoys similarly ancient pedigree. We steadfastly have applied the express waiver requirement irrespective of the nature of the lawsuit.

American Indian Ag. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1377-79 (8th Cir. 1985). Similar language is found in the Tenth Circuit's recent decision in *Breakthrough Mgmt*, 629 F.3d at 1183 (quoting *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510, 511*; Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 824 n. 9 (10th Cir. 2007)).

The Supreme Court has described tribal immunity as a jurisdictional barrier to a court's "exercise of judicial power." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940). And the Tenth Circuit adheres to this understanding of tribal immunity. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982).

Congress has plenary authority to limit, modify, or eliminate the attributes of Indian tribal sovereignty, including the attribute of sovereign immunity. As explained by the Supreme Court:

> A doctrine of tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated

> its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). *See also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1069-70 (1982) (recognizing that "Indian tribes are culturally, politically, and economically separate from the rest of society and should continue to be largely self-governing."); *see generally*, Felix S. Cohen, Cohen's Handbook of Federal Indian Law, §4.01[1], pp. 204 – 211 (Matthew Bender, 2005).

The Supreme Court has ruled that, unlike other immunities, a waiver of tribal immunity cannot be implied, but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). The predicate requirement of an explicit waiver is deeply rooted in our jurisprudence. *E.g., U. S. v. United States Fidelity & Guarantee*, 309 U.S. at 512-513 (1940); *Price v. United States and Osage Indians*, 174 U.S. 373, 375-76 (1899).

The Tenth Circuit rigorously applies the explicit waiver predicate irrespective of the nature of the lawsuit. *See, e.g., Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989) (suit asserting claims under the First, Fifth, Ninth, Thirteenth, and Fifteenth Amendments to the United States

Constitution; the Indian Civil Rights Act; the Treaty of July 19, 1866; 42 U.S.C. §§ 1981, 1985(3), 1986, and 200d; and the *Bivens* doctrine); *Ute Distribution*, 149 F.3d 1260 (10th Cir. 1998) (suit seeking declaratory relief concerning water rights).

Furthermore, as stated by this Court, "Constitutional provisions that limit federal or state authority do not apply to Indian tribes because the tribes retain powers of self-government that predate the Constitution." *Valenzuela v. Silversmith*, __ F.3d __, 2012 WL 5507249 (10th Cir. 2012) (internal citations omitted); *see also* Handbook of Federal Indian Law § 4.01 (Supp. 2009) ("Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority.").

A Tribe's right of internal self-government is integral to the doctrine of tribal sovereign immunity. *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*, 436 U.S. at 60). This Court has stated explicitly that 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)).

Against the backdrop of these important policy considerations, the Court must determine whether tribal immunity can, or should, be abrogated for the purpose of assisting private litigants in civil lawsuits. A ruling to this effect would obviously make all Indian tribes within the Tenth Circuit subject to judicial process for the enforcement of civil subpoenas issued at the behest of private litigants. The ruling would necessarily impose substantial new burdens on limited tribal coffers, directly undermining the paramount federal policy of protecting tribal property and promoting Indian self-government and self-sufficiency. For these reasons the Court should reverse the District Court's ruling.

B. The Court Should Not Recognize An Exception to Tribal Sovereign Immunity For the Enforcement of Civil Subpoenas Issued At the Behest of Private Litigants

Under existing Supreme Court precedent the doctrine of tribal sovereign immunity prevents a court from compelling an Indian tribe to produce information for investigations conducted by state governments. *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165 (1977) (absent waiver or consent, the Puyallup Tribe

had immunity from compelled compliance with a court order directing the Tribe to provide information to the State of Washington regarding its tribal members' fishing activities).

Similarly, the Colorado Supreme Court has ruled that tribal sovereign immunity is a barrier to the enforcement of state investigatory subpoenas. *Cash Advance and Preferred Cash Loans v. State of Colorado*, 242 P.3d 1099, 1108 (Colo. 2010).

In the Tenth Circuit tribal sovereign immunity bars the enforcement of federal administrative subpoenas. *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989). Tribal immunity also bars enforcement of search warrants and other legal process issued on behalf of state governmental agencies. *Wyandotte Nation v. Sebelius*, 443 F.3d at 1255.

Therefore, insofar as tribal immunity bars enforcement of civil and administrative subpoenas issued by federal and state governmental agencies, there is no principled reason for holding that tribal sovereign immunity does not also bar enforcement of civil subpoenas issued by private litigants. Indeed, it would be strangely anomalous to hold that (*i*) Indian tribes have sovereign immunity against subpoenas issued by state and federal governmental agencies, (*ii*) but tribes have no immunity against subpoenas issued by private parties. There is no principled

reason for drawing such a distinction. Nor is there any principled reason for abrogating tribal sovereign immunity for the purpose of enforcing private party subpoenas. As stated by the Fifth Circuit, "to construe the [tribal] immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of tribes * * *." *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966).

In fact the Supreme Court has acknowledged that one of the interests served by sovereign immunity is the interest of avoiding "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 v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (emphasis added).

A litigant in federal court can have civil subpoenas issued for service upon any non-party. Fed.R.Civ.P. 45. However, before a district court can compel compliance with a subpoena, the court must address the threshold question of the court's jurisdiction to act. As an example, if the Bonnet Plantiffs in this case had served a subpoena on a non-party in Vermont, the Utah district court would have no jurisdiction to order compliance with the subpoena because the jurisdictional

authority of the Utah court does not extend to persons residing in the State of Vermont. *See* Fed.R.Civ.P. 45(b)(2)(B); *McKenna v. CDC Software, Inc.*, 2008 WL 4097464 (D. Colo.) (subpoena issued by Colorado court was quashed because it sought to compel a deposition in Texas); *Spratt v. Leinster*, 2007 WL 1834035 (D. Colo.) (subpoena issued by Colorado court was quashed because it sought production of documents in Vancouver, British Columbia).

In like manner, when, as here, an Indian tribe is served with a subpoena and the Tribe asserts sovereign immunity against enforcement of the subpoena, the Tribe's assertion of immunity presents a threshold question of jurisdictional authority to compel compliance. This is because tribal sovereign immunity is a jurisdictional barrier. *U.S. v. United States Fidelity & Guaranty Co*., 309 U. S. at 512-14. And because tribal immunity can only be abrogated by Congress or waived by tribes, the Court's threshold jurisdictional inquiry must address these two questions:

1. Has Congress abrogated tribal sovereign immunity under Federal Rule 45?
2. If Congress has not abrogated tribal immunity under Rule 45, has the Indian tribe itself unequivocally waived immunity?

The answer to both threshold questions in this case is "No." Congress has not abrogated tribal immunity under Rule 45 of the Federal Rules of Civil Procedure.

And the Ute Tribe did not waive sovereign immunity against enforcement of the Plaintiffs' subpoena.

C. Congress and Tribes Alone Have The Power To Abrogate Or WaiveTribal Immunity And Here There Has Been No Abrogation or Waiver

A waiver of tribal immunity must be expressed unequivocally and cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58.

1. Congress Has Not Abrogated Tribal Sovereign Immunity Under Rule 45

In finding a waiver of tribal sovereign immunity under Rule 45, the district court did so by *implication*. The court remarked that "There is no indication that Congress intended to *exempt* quasi-sovereigns, such as the Ute Tribe, from application of Rule 45." (emphasis added) App. Vol. II, 426. Thus the district court *inferred* from the absence of an express *exemption* for Indian tribes that tribes are necessarily subject to a court's compulsory power under Rule 45. But the court's analysis was exactly the opposite of what federal law requires. It is not incumbent upon Congress to *exempt* Indian tribes from operation of Rule 45. To the contrary. Tribal sovereign immunity exists as a jurisdictional barrier to proceedings against Indian tribes in any state, federal, or arbitral tribunal. *C & L Enter., Inc. v. Citizen Bank of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In order for Congress to have abrogated tribal immunity as a defense

under Rule 45, Congress must have enacted a law stating, expressly and unequivocally, that "the sovereign immunity of Indian tribes is waived under Rule 45 of the Federal Rules of Civil Procedure." There is no such Congressional act.

The necessity for an explicit Congressional waiver was recognized by this Court in *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The plaintiff in *Miner* argued that the federal question statute, 28 U.S.C. §1331, impliedly waives tribal immunity in order for federal courts to determine the proper scope of a tribal court's jurisdiction. This Court, however, rejected the plaintiff's "waiver-by-implication" argument, noting that §1331 does not "independently waive" the federal government's sovereign immunity, and neither does § 1331 independently waive an Indian tribe's immunity:

> [I]n an action against an Indian tribe, we conclude that §1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity.

Id. at 1011. By the same logic, Federal Rule 45 does not "independently waive" tribal sovereign immunity, and the district court erred in ruling that it does.

It should be noted that the same standard applies in determining the extent to which any sovereign has waived immunity. As an example, in *Gonzalez v. Hickman*, 466 F. Supp.2d 1226 (E.D. Cal. 2006), the court reversed a magistrate judge's order compelling the State of California to produce documents in response

to a private party's civil subpoena. The *Gonzalez* court reversed on the ground that no California statute unequivocally waives the State's sovereign immunity under the Eleventh Amendment. The same is true here. No act of Congress abrogates a tribe's sovereign immunity against enforcement of private party subpoenas under Rule 45.

2. Nor Has The Ute Tribe Waived Immunity

When Indian tribes enter into contracts with private parties, the written contracts can, and often do, contain express waivers of tribal sovereign immunity. The extent to which a tribe contractually waives immunity is a matter negotiated between the parties. (Parenthetically, the same is true of contracts that are negotiated between private parties and state and federal governmental entities.)

The written contract between the Ute Tribe and Mr. Bonnet contains no waiver of the Tribe's sovereign immunity. This means that the Ute Tribe and Mr. Bonnet never contemplated, never negotiated, and never agreed to a waiver of the Ute Tribe's sovereign immunity for any purpose. The absence of an express waiver in the parties' contract should be the beginning point, and the end point, of this Court's sovereign immunity analysis. As this Court remarked in *Miner*, "Tribes and persons dealing with them long have known how to waive sovereign immunity when they wish to do so." *Id.* at 1378 (citing *e.g. Merrion v. Jicarilla*

Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982) (tribal council tax ordinance expressly provides that tribe consents to suit in tribal or federal court)).

The Ute Tribe never waived sovereign immunity in its contract with Mr. Bonnet because the Tribe never wished to do so. And because there is no Congressional act that otherwise abrogates the Tribe's immunity for purposes of subpoena enforcement under Rule 45, the Plaintiff's subpoena must be quashed.

D. Subpoena Enforcement Is a "Suit" For Purposes of Immunity Analysis

In denying the Ute Tribe's motion to quash, the district court ruled that an Indian tribe's sovereign immunity from "suit" does not extend to proceedings under Rule 45 for the enforcement of "non-party" subpoenas. App. Vol. II, 415-16.

Under Section C(1) of this brief, the Tribe argued that unless Congress enacts a law stating, expressly and unequivocally, that "the sovereign immunity of Indian tribes is waived under Rule 45 of the Federal Rules of Civil Procedure," tribes are necessarily cloaked with sovereign immunity in proceedings under Rule 45 because tribal immunity functions as a "jurisdictional barrier" to proceedings against tribes in any state, federal, or arbitral tribunal. This specific argument was not advanced, nor apparently considered by the Eighth Circuit in *Alltel*. Yet the

Eighth Circuit's ruling in *Alltel* provides an alternative ground on which this Court can reverse the district court's ruling, specifically the district court's determination that enforcement proceedings under Rule 45 are not "suits" for purposes of tribal sovereign immunity.

In *Alltel* the Eighth Circuit ruled that "a third-party subpoena in private civil litigation is a 'suit' for purposes of the Tribe's common law sovereign immunity." *Alltel*, 675 F.3d at 1102. The Court observed that civil subpoenas "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming. The potential for severe interference with government functions is apparent." *Id.* at 1103. The Court further found that permitting "broad third-party discovery in civil litigation" could "contravene 'federal policies of tribal self determination, economic development, and cultural autonomy' that underlie the federal doctrine of tribal immunity." *Id*. at 1104 (internal citation omitted). The Court went on to say:

> Here, for example, the Tribe's gathering and production of the extensive documents Alltel requests would likely be followed by depositions of all tribal officials identified in those documents. Information gleaned from this discovery would likely reveal deliberations establishing telecommunications policies for the Reservation, information Alltel could then use, not only in its Arkansas lawsuit against tribal ally DeJordy, but also to persuade federal regulators not to favor the Tribe's efforts to obtain the telecommunications assets Alltel wishes to sell elsewhere. The point is not whether such compelled disclosure is good or bad; it is whether

> the end result in the functional equivalent of a "suit" against a tribal government within the meaning of its common law sovereign immunity.

Id. The Ute Tribe agrees with the Eighth Circuit. Because sovereign immunity is a jurisdictional barrier, *U. S. v. U. S. Fidelity & Guaranty Co*., 309 U. S. at 512-14, it is necessary to characterize 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 the process or proceeding is one that can "restrain the Government from acting, or . . . 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).

In this case the Ute Tribe carefully considered the possibility of attempting to satisfy the Plaintiffs' discovery requests without resorting to a motion to quash. However, the Plaintiffs' amended complaint alleges claims against five (5) named Defendants and twenty (20) "John Doe" defendants. App. Vol. I, 123. The Tribe soon learned that in addition to the discovery sought by the Plaintiffs, the five named Defendants would also seek discovery from the Tribe. Moreover, it became clear that document production would be followed by deposition and trial subpoenas for tribal officials including the Tribe's six-member governing body. The Tribe attempted to convey to the district court the quandary the Tribe faced as a result of the subpoena. In its written objection to the magistrate's ruling, the Tribe stated:

> [I]t 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. [record cite omitted]. 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.

App. Vol. II, 323.

The Tribe was also disturbed to learn that the Plaintiffs' subpoena was the first discovery that any of the six named parties to the lawsuit had undertaken apart from the exchange of initial disclosures under Rule 26. The Tribe sought to bring these facts to the attention of the magistrate through the filing of a "Notice of Additional Information." App. Vol. II, 255-61. The Tribe's Notice of Additional Information stated in pertinent part:

> Under the court's existing Scheduling Order, Doc. 23, the cutoff date for fact discovery in this case is little more than a month away, on July 29, 2011. The Scheduling Order was entered nearly eight (8) months ago on October 18, 2010. Since then, none of the existing *six parties* to this action -- neither the Plaintiffs/Counter-defendants, nor the Defendants/Counter-Plaintiffs, nor Defendants Ute Energy , LLC and Cameron Cuch—none of these parties to this lawsuit have:
>
> --served any interrogatories on any of the other parties;
>
> --served any requests for production on any of the other parties;
>
> --served any requests for admissions on any of the other parties; or
>
> --conducted any depositions of any individuals.
>
> Stated differently, in the eight months that Plaintiffs have had to conduct discovery in this case, the only discovery Plaintiffs have undertake has been the service of an exceedingly broad subpoena duces tecum on a non-party—the Ute Indian Tribe.

App. Vol. II, 256. Relying on *Echostar Communications Corp. v. The News Corp. Ltd.*, 180 F.R.D. 391 (D. Colo. 1998), the Tribe argued that until such time as the Plaintiffs had undertaken meaningful discovery on the five Defendants, the Plaintiffs could not "even begin to argue" that Plaintiffs had a "substantial need" to obtain records and internal tribal records from the Ute Tribe. *Id*. at 395.

Much like the district court in *Echostar*, who suspected the *Echostar* plaintiffs of misusing the discovery process for ulterior motives, the Ute Tribe argued to the district court that the Tribe suspected the Bonnet Plaintiffs of conducting abusive discovery:

> The subpoena served on the Tribe is apparently intended to achieve *indirectly* what the Plaintiffs cannot obtain *directly*—that is, because the Plaintiffs are barred by sovereign immunity from suing the Ute Tribe directly, the Plaintiffs appear to be prosecuting a lawsuit "by proxy" against the named defendants, and seeking access to information and documents belonging to the Tribe which the Plaintiffs could not otherwise obtain.

App. Vol. II, 258-59.

The Bonnet Plaintiffs filed a motion to strike the Tribe's Notice of Additional Facts, App. Vol. II, 266-73, and the magistrate judge, over the Tribe's objection, granted the motion to strike and ordered the Tribe to comply with the subpoena. App. Vol. II, 280, 300-301, 311.

The Tribe's legal argument began above with an eloquent quote from the Eighth Circuit in *Standing Rock Sioux Tribe*, 780 F.2d at 1377-79. The Tribe will conclude its argument with another insightful quote from the Eighth Circuit in the *Alltel* case:

> It may be that federal courts applying normal discovery principles could adequately protect Indian tribes from abusive third-party discovery without invoking tribal immunity. But the Supreme Court has consistently applied the common law doctrine even when modern economic realities "might suggest a need to abrogate tribal immunity, at least as an overarching rule," concluding that it would leave that decision to Congress. *Kiowa Tribe*, 523 U.S. at 758, 118 S.Ct. 1700. Thus even if denying Alltel the discovery it seeks in this case works some inconvenience, or even injustice, "it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well established." *Standing Rock Sioux Tribe*, 780 F.2d at 1379.

Alltel, 675 F.3d at 1105-062 (internal citations omitted). Based on the proceedings below, the Ute Tribe has little confidence in the ability of "federal courts applying normal discovery principles" to "adequately" and predictably "protect Indian tribes from abusive third-party discovery."

CONCLUSION

Tribal sovereign immunity is a jurisdictional barrier. It ceases to function as a jurisdictional barrier only if Congress has abrogated the immunity, or if an Indian Tribe unequivocally waives immunity. Congress has not abrogated tribal sovereign immunity under Rule 45 of the Civil Rules of Procedure. And the Ute

Tribe did not waive immunity for enforcement of the Plaintiffs' subpoena duces tecum. Accordingly, this Court should reverse the District Court's order denying the Tribe's motion to quash.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the significance of tribal sovereign immunity to the appellant Ute Indian Tribe and all Indian tribes. The district court held that Indian tribes may not assert sovereign immunity as a defense against subpoenas issued by private litigants. In so ruling, the district court ignored long-standing Supreme Court and Tenth Circuit precedent holding that Indian tribes do have sovereign immunity against compelled compliance with subpoenas. The district court also ignored the Supreme Court's caution in *Santa Clara Pueblo v. Martinez* that the federal judiciary is not the branch of government that is empowered with authority to alter or restrict tribal sovereign immunity. In *Santa Clara Pueblo* the Supreme Court emphasized 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." 436 U.S. 49, 60.

STATEMENT OF RELATED CASES

There are no prior or related cases.

Dated this 30th day of November, 2012.

Respectfully submitted,

FREDERICKS PEEBLES & MORGAN LLP

By: _____
Frances C. Bassett

By: /s/ *Frances C. Bassett* (Digital)

Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Thomas J. McReynolds
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Email Addresses:
fbassett@ndnlaw.com
tfredericks@ndnlaw.com
jpatterson@ndnlaw.com
tjmcreynolds@ndnlaw.com
Attorneys for Non-Party Movant-Appellant

Certificate of Compliance

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As required by Fed. R. J.A. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 6,155 words.

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By: _____
Frances C. Bassett
Attorney for Non-Party Movant-Appellant

By: /s/ *Frances C. Bassett* (Digital)
Attorney for Non-Party Movant-Appellant

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I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sunbelt Vipre Enterprise version 4.0.3907, Definition Version 8650 dated 3/9/2011, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: _____
Debra A. Foulk

By: /s/ *Debra A. Foulk* (Digital)
Assistant to Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2012, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

Lynn S. Davies
Rafael A. Seminario
RICHARDS BRANDT MILLER NELSON
P.O. Box 2465
299 S. Main St., 15th Floor
Salt Lake City, Utah 84110-2465
Attorneys for Plaintiffs-Counter Defendants-Appellees

Debra A. Foulk

/s/ *Debra A. Foulk* (Digital)
Assistant to Frances C. Bassett