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 REPLY BRIEF

Respectfully submitted,
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Oral Argument is requested.

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The Non-Party Movant-Appellant, Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe"), respectfully submits its reply brief.

INTRODUCTION

Robert C. Bonnet and Bobby Bonnet Land Services ("Plaintiffs") have not responded to the Ute Tribe's argument that tribal sovereign immunity is a jurisdictional barrier to the enforcement of civil subpoenas issued under Rule 45. See Opening Brief, pp. 13-20. When tribal immunity is understood conceptually as constituting a jurisdictional "barrier," it is immaterial whether enforcement of a subpoena under Rule 45(e) is tantamount to a lawsuit or not; tribal sovereign immunity functions as a jurisdictional bar irrespective of the nature of the court proceeding. The Plaintiffs do not address subject matter jurisdiction but instead confine their argument to the contention that enforcement of a subpoena is *not* the legal equivalent of a "lawsuit." On the theory that compelling compliance with a subpoena is not tantamount to a full-fledged lawsuit, Plaintiffs assert that Indian tribes should be denied the right to assert the "jurisdictional barrier" of sovereign immunity. Plaintiffs rely almost exclusively on cases involving Eleventh Amendment immunity for their proposition. However, as explained below, tribal sovereign immunity is different from Eleventh Amendment immunity in both its

legal and its philosophical underpinnings. Moreover, the cases on which the Plaintiffs rely are easily distinguished and do not stand for the broad proposition that the Plaintiffs espouse.

ARGUMENT

I. Tribal Immunity is Not Equivalent to Eleventh Amendment Immunity

The Plaintiffs' reliance on Eleventh Amendment immunity is misplaced because tribal immunity "is not congruent" with the sovereign immunity that "the Federal Government, or the States, enjoy." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). This Court has said that "the doctrine of tribal immunity … is similar, but not identical, to the sovereign immunity of the States as preserved by the Eleventh Amendment." *In re Mayes*, 294 B.R. 145, 149 (B.A.P. 10th Cir. 2003). Tribal sovereign immunity is broader and has wholly different origins than Eleventh Amendment immunity. As explained in *Cash Advance & Preferred Cash Loans v. Colorado, 242 P.3d 1099, 1107 (Colo. 2010)*, "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." In its explanation of the "independent origin of tribal sovereignty" the court stated:

> Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them. The forms of political order included multi-tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans. For most tribes, these forms of self-government were also sacred orders, supported by creation stories and ceremonies invoking spiritual powers. . . .
>
> The history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as "distinct, independent political communities," qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. The right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to ensure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished by lawful federal authority. Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once recognized as a political body of the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty.

Id. at 1106 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* § 4.01[1][a] (2005 ed.)).

The *Cash Advance* court also explained the reasons that justify a "broad applicability" for the doctrine of tribal sovereign immunity:

> The modern realities of tribal sovereignty explain the broad applicability of the doctrine of tribal sovereign immunity. As Indian law scholar Robert A. Williams, Jr. recognized twenty-five years ago, '[t]erritorial remoteness, an inadequate public infrastructure base, capital access barriers, land ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policymakers to stifle Indian Country development and investment.' Because of these barriers and tribes' virtual lack of a tax base, tribal economic development – often in the form of tribally owned and controlled businesses – is necessary to generate revenue to support tribal government and services.

242 P.3d at 1107 (quoting Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 Harv. J. on Legis. 335, 335-36 (1985)).

The *Cash Advance* court noted that the United States Supreme Court has observed that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Id*. at 1110 n. 11 (citing *Kiowa Tribe,* 523 U.S. at 756; *and Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 782 (1991)). "Instead, the inherent nature of tribal sovereignty … requires us to distinguish tribal sovereign

immunity from state sovereign immunity." *Id*. (other citations omitted); *see also Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 959 (E.D. Cal. 2009) ("Case law setting out the bounds of the Eleventh Amendment cannot be directly applied to tribal sovereign immunity without analysis as 'Tribal sovereign immunity . . . is not precisely the same as either international law sovereign immunity or sovereign immunity among the states.'"); *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002) (distinguishing tribal immunity from Eleventh Amendment immunity and holding that suing someone in their "individual capacity" may affect Eleventh Amendment immunity, but it does not so affect tribal immunity); *In re Mayes*, 294 B.R. at 149 ("the doctrine of tribal immunity . . . is similar, but not identical, to the sovereign immunity of States as preserved by the Eleventh Amendment."); *Conservatorship of the Estate of Gonzalez*, No. A117307, 2008 WL 788606 at *4 (Cal. Ct. App. 2008) (finding analogy of "tribal sovereign immunity to that of state sovereign immunity under the Eleventh Amendment" to be "unhelpful"); *Rosenberg v. Hualapai Indian Nation*, No. 1 CA-CV 08-0135, 2009 WL 757436 (Ariz. Ct. App. 2009) (rejecting argument that Indian nations have sovereign immunity equal to, but not greater than, that possessed by other sovereign nations

that may be hailed into state courts and otherwise distinguishing tribal immunity from Eleventh Amendment immunity).

For this reason the Bonnet Plaintiffs' characterization of tribal sovereign immunity as equivalent to Eleventh Amendment immunity is simply incorrect. As explained by one author:

> Indian tribes are culturally, politically, and economically separate from the rest of society and should continue to be largely self-governing. The courts and Congress have consistently made it clear that, unlike the focus of the law concerning treatment of other minority groups, 'the focus of federal Indian law is on a political entity – the tribe – rather than on individual Indians.' Furthermore, tribes, unlike any other minority group, are included in the Constitution along with foreign nations and the states in the clause empowering Congress to regulate commerce, and the federal government has, over time, entered into treaties with tribes as political entities.

Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv.L.Rev. 1058, 1069-70 (1982) (footnotes and citations omitted). The author goes on to opine that '"[w]hile it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments."' *Id*. at 1074 (internal citations omitted). Of most importance, the author rejects the notion that tribal immunity should be treated the same as the other common law immunities:

> In deciding the fate of tribal immunity, courts must determine whether the policy reasons for the restriction of other immunities require similar curtailment of tribal immunity . . . [S]pecial federal concerns for Indian self-determination, for cultural autonomy, and for economic development *set tribal immunity apart from other immunities*. These unique concerns suggest, in turn, that tribal immunity is best seen through the lens of intergovernmental relations and the new federalism, and not simply as a normal species of common law immunity.
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> * * * *
>
> At first glance, the reasons for the decline of the common law immunities would seem to apply to tribal immunity and mandate similar limitations on it. *Yet in fact the policy concerns of tribal self-determination, economic development, and cultural autonomy are quite different from those that apply to suits against foreign nations, against the federal government, against a state in its own courts, or against charitable organizations.*

Id. at 1069, 1072 (emphasis added). Because tribal sovereign immunity is different in significant respects from Eleventh Amendment immunity, cases involving Eleventh Amendment immunity are inapposite.

II. Enforcement of a Third-Party Subpoena Against an Indian Tribe is Tantamount to a "Suit" to Which Tribal Sovereign Immunity Applies

The Tribe argued in its Opening Brief that its claim to sovereign immunity is governed by existing Supreme Court and Tenth Circuit precedent. *E.g.*, *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165 (1977) (Puyallup Tribe was

immune from compelled compliance with a court order directing the Tribe to provide information to the State of Washington); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (enforcement of legal process would invade tribal sovereignty); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (recognizing Cherokee Nation's immunity from compelled compliance with an administrative subpoena).

Parenthetically, the Tribe notes that the Tenth Circuit has defined legal precedent to include not only 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) (quoting *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)).

Nonetheless, the Bonnet Plaintiffs reject the Tribe's cited authority as not controlling because of factual or legal differences between the cited cases and this case. See Answer Brief, 6 n 1. However, the federal courts that have considered the precise issue presented here, the issue of an Indian tribe's immunity from compelled compliance with subpoenas issued under Rule 45, have *all* ruled that tribal sovereign immunity bars enforcement of civil subpoenas.

As noted in the Tribe's Opening Brief, the Eighth Circuit ruled most recently in *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1102 (2012), that tribal immunity can be invoked to preclude compelled compliance with subpoenas. In deciding the issue the Eighth Circuit addressed whether enforcement of civil subpoenas can be characterized as a "suit." The court reasoned that "[t]he 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, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.*" *Id*. (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (emphasis added).

Similarly, the Fourth Circuit in quashing third-party subpoenas issued to require federal officials to testify in a civil lawsuit reasoned that:

> Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained through his official capacity is inherently that of an action against the United States because such a proceeding "interfere[s] with the public administration" and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function.

Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989), quoting *Dugan*, 372 U.S. at 620. The Supreme Court has endorsed the principles underlying sovereign immunity accentuated in *Boron Oil*:

> [I]t is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.

Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949). Based on the foregoing, the Eighth Circuit concluded in *Alltel* that "from the plain language of the Supreme Court's definition of a 'suit' in *Dugan*, and from the Court's well-established federal policy of furthering Indian self-government . . . a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." *Alltel*, 675 F.3d at 1105; (internal quotations omitted, internal citations omitted). The *Alltel* court further explained that the Supreme Court has consistently applied the doctrine of tribal sovereign immunity even when modern economic realities "might suggest a need to abrogate tribal immunity, at least as an overarching rule," and has left that decision to Congress. *Id*. at 1106; citing *Kiowa Tribe*, 523 U.S. at 758.

Likewise in *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 81 (S.D.N.Y. 2002), the issue was whether tribal sovereign immunity can be invoked against non-party subpoenas in civil litigation. The court ruled in the affirmative. *Id*. at 87-88. In reaching its decision the court acknowledged a lack of authority on this issue, but cited to the Ninth Circuit's opinion in *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993), and the Second Circuit's opinion in *U.S. Envtl. Prot. Agency v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999), *vacated in part on other grounds*, 212 F.3d 689 (2000), while rejecting the cases cited by the plaintiffs who contended that tribal immunity did not apply. *See Catskill*, 206 F.R.D. at 88. The court also relied on *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002), *judgment vacated and remanded on other grounds*, 538 U.S. 701 (2003), which affirmed the holding of *James*. *Id*. at 86.

The court in *Catskill* likened the sovereign immunity of Indian tribes to that of the United States. *Id*. at 87-88. As stated by the court:

> While this Circuit has not addressed the issue of non-party subpoenas and sovereign immunity in the tribal context, it has held that the sovereign immunity of the United States government applied to non-party subpoenas in a civil case.

Id. at 87; citing *General Elec. Co.* 197 F.3d at 597. The court then went on to say that the same rule of law applies to the matter at issue since, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers such as the United States." *Id*. at 87-88; *Bishop Paiute Tribe*, 275 F.3d at 904 n. 3 (noting that "comparison cases denying enforcement of state court subpoenas against the United States government is … appropriate"); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"); *Sekaquaptewa v. MacDonald*, 591 F.2d 1289, 1291 (9th Cir. 1979) ("The sovereign immunity of Indian tribes is coextensive with that of the United States.").

The plaintiffs in *Catskill* relied on two grand jury subpoena cases, a district court criminal subpoena case, and four circuit court cases involving administrative law. *206 F.R.D.* at 88. The court concluded that none of the cases relied on by plaintiffs were on point. *Id*. The court distinguished both *In re Application to Quash Grand Jury Subpoenas*, Misc. No. 3774 (N.D.N.Y. 1997) and *United States v. Boggs*, 493 F. Supp. 1050 (D. Mont. 1980), because both cases involved criminal conduct in which the subpoenas were issued *by the government, and not by individuals*. *Catskill*, 206 F.R.D. at 88 (emphasis added).

The *Catskill* court also rejected the case of *United States v. Velarde*, 40 F. Supp. 2d 1314 (D.N.M. 1999), *remanded*, 214 F.3d 1204 (10th Cir. 2000), where the court used a balancing test to weigh the "Court's interests in seeing that federal law is enforced" and "the Defendant's constitutional rights" against the Tribe's sovereign immunity. *Catskill*, 206 F.R.D. at 88. The court based its rejection of *Velarde* on the fact that the federal government itself subpoenaed the tribe. *Id*. The court then noted that "[a] tribe cannot assert sovereign immunity against the United States." *Id*. (internal citations omitted).

The present case is most analogous to *Alltel* and *Catskill*. Both cases are civil suits that presented the identical issue presented here – whether Indian tribes can be compelled to comply with third-party subpoenas issued at the behest of private litigants. As explained by the Eighth Circuit in *Alltel*, "a federal court's third-party subpoena in a private civil litigation is a 'suit' that is subject to Indian tribal immunity." 675 F.3d at 1105. Absent a waiver of tribal sovereign immunity, the tribe is shielded from complying with a subpoena issued by a private litigant in a civil suit. *Id*. Likewise the court in *Catskill* ruled that Indian tribes can invoke tribal immunity against compelled compliance with civil subpoenas. *206 F.R.D.* at 87-88. The Ute Tribe urges the Tenth Circuit to reach the same result in this case.

The authorities relied upon by the Plaintiffs do not dictate a different result. *Juvenile Male 1* was a criminal case in which the United States brought charges under the Major Crimes Act against a juvenile for sexually abusing a minor on an Indian reservation. *United States v. Juvenile Male I*, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006). The defendant issued subpoenas on the Tribe and tribal agencies seeking records relating to the victim. *Id*. at 1013. The Tribe refused to comply with the subpoenas on the basis of tribal sovereign immunity. *Id*. at 1013. Responding to the sovereign immunity claim, the court ruled that "tribal immunity has no application to *claims made by the United States*." *Id*. at 1017 (emphasis added).

The matter before this court is easily distinguished from *Juvenile Male I* on a couple of fronts. First, *Juvenile Male I* was a criminal case prosecuted by a superior sovereign, the United States. In contrast, here the United States is not bringing any claims in the underlying lawsuit. Second, in *Juvenile Male I* the court disposed of the sovereign immunity argument based on the fact that it was a criminal case, stating "Congress has vested jurisdiction over major crimes committed by Indians on the reservation in the federal courts." *Id.; see also In re Long Visitor*, 523 F.2d 443, 446 (8th Cir. 1975) (noting that court order compelling grand jury testimony was based on "the extension by Congress of federal

jurisdiction to crimes committed on Indian reservations [which] inherently includes every aspect of federal criminal procedure applicable to the prosecution of such crimes.").

Further, the Bonnet Plaintiffs are simply incorrect in stating that "neither the Eleventh Amendment nor the general doctrine of sovereign immunity shields a non-party state from complying with a federal subpoena." See Answer Brief, 5. The matter is significantly more nuanced than what the Bonnet Plaintiffs portray because the precise issue has never been decided by the Supreme Court. As the Eighth Circuit explained in *Alltel*:

> [W]e are unwilling to predict how the Supreme Court would decide a case in which disruptive third-party subpoenas that would clearly be barred in a State's own courts are served on a state agency in private federal court civil litigation. Based upon the reasoning in cases such as *Boren Oil*, the Court might well conclude that the Eleventh Amendment applies, or it might apply a broader form of state sovereign immunity as a matter of comity, which would likewise apply to claims of tribal immunity.

Alltel Communications, LLC, 675 F.3d at 1104-05. What is known are the existing Supreme Court and Tenth Circuit precedents that are cited in the Tribe's Opening and Reply briefs. And under those precedents the District Court erred in denying the Tribe's motion to quash.

The Supreme Court has consistently said that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members

and territories." *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). At a minimum tribal sovereignty should encompass the sovereign right to withhold internal tribal records and documents from private, third-party examination, documents and records that are maintained inside tribal buildings located on tribal lands, which documents and records relate exclusively to internal tribal affairs.

The Plaintiffs are incorrect in asserting that the Ute Tribe is claiming a level of sovereign immunity equal to that of the United States. To the contrary, the Ute Tribe is claiming only that level of sovereign immunity that is consistent with this Nation's well-established jurisprudence.

CONCLUSION

Based on the arguments and authorities cited here and in the Tribe's Opening Brief, the Tribe respectfully requests that the Court reverse the District Court's Order denying its Motion to Quash.

Dated this 5th day of March, 2013.

Respectfully submitted,

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