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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada limited liability company; DAVID JIN, an individual; THEODORE (TED) R. QUASULA, an individual,

Plaintiffs,

vs.

DAVID JOHN CIESLAK, an individual; NICHOLAS PETER "CHIP" SCUTARI, an individual; SCUTARI & CIESLAK PUBLIC RELATIONS. INC., an Arizona corporation,

Defendants.

DAVID JOHN CIESLAK, an individual; NICHOLAS PETER "CHIP" SCUTARI, an individual; SCUTARI & CIESLAK PUBLIC RELATIONS. INC., an Arizona corporation,

Third-Party Plaintiffs,

vs.

HUALAPAI TRIBE,

Third-Party Defendant.

Case No. 2:15-cv-01189-JAD-GWF

REPLY IN SUPPORT OF MOTION TO QUASH PLAINTIFFS' SUBPOENA TO GLEN HALLMAN

I. INTRODUCTION.

In response to the Motion to Quash Plaintiffs' Subpoena to Glen Hallman, Plaintiffs raise a number of issues, such as whether a prior ruling is law of the case or whether a subpoena is a "suit" for immunity purposes, which can be disposed of relatively quickly. The real issue is one that was previously identified by the Magistrate Judge – whether the Tribe's sovereign immunity extends to G&K and Mr. Hallman as Tribal counsel. As we will explain,

Mr. Hallman was not an "employee" or "third party service provider," but an attorney assisting the Tribe in carrying out its fundamental sovereign and legislative powers, including the exercise of eminent domain. Because this role was in the nature of an official function involving matters of internal governance, the Tribe's immunity extends to him, and this Court has no jurisdiction to compel compliance with the subpoena.[1]

Likewise, G&K and the Tribe needed help managing the public relations aspect of its eminent domain action. As Plaintiffs themselves have argued, the use of eminent domain was a controversial governmental action that triggered multiple lawsuits by Grand Canyon Skywalk Development, LLC ("GCSD") and resulted in extensive media coverage. The Tribe hired Scutari & Cieslak ("S&C") at G&K's suggestion to help both G&K and the Tribe manage the public relations side of the eminent domain litigation. Therefore, Mr. Hallman's conversations with S&C are privileged or otherwise protected from discovery.

II. LEGAL ARGUMENT

A. Law Of The Case Does Not Apply.

Plaintiffs' law of the case argument is unavailing for two reasons. First, the law of the case does not apply to a Magistrate Judge's ruling that has not been accepted by a District Court judge. *Farr v. Anderson*, 37 Fed. Appx. 330 (9th Cir. 2002) (rejecting contention that magistrate's report and recommendation was law of the case "because the district court never adopted it"), citing *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997); *Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998) ("The magistrate judge's report and recommendation does not have the force of law, it being merely a recommendation, unless and until the district court enters an order accepting or rejecting it."). Indeed, the Tribe filed a timely objection to the Magistrate's determination that is still pending, so the ruling is not final. [Dkt. 29]. Under these circumstances, there is no law of the case to apply.

Second, even if the Magistrate Judge's decision could be the law of the case, it is "clearly erroneous and works a manifest injustice." *See Arizona v. California*, 460 U.S. 605,

[1] We request the Court to take judicial notice of the file in Case No. 2:15-cv-00663-JAD-GWF, and incorporate by reference the pleadings at Docket Nos. 1, 15, and 29. For the Court's convenience, we will try to avoid duplicating the arguments in those pleadings.

618, n. 8 (1983). The grounds for this Court's decision denying the motion to quash the subpoena *duces tecum* to G&K were that the Tribe presented no proof that Mr. Hallman was a Tribal "official" or "general counsel," and that a subpoena served on a private individual does not trigger sovereign immunity. However, none of the parties made these arguments in the pleadings or at the hearing in that case. The issues were raised *sua sponte* by the Magistrate Judge, which provided no opportunity for G&K to address Mr. Hallman's and G&K's role as the Tribe's attorneys or the cases cited as support in the decision. Therefore, it is only fair that the Tribe be permitted to address the prior ruling on the merits.

B. Sovereign Immunity Deprives This Court Of Jurisdiction To Issue And Compel Compliance With A Subpoena.

1. A Subpoena On A Tribal Representative Is A "Suit" For Purposes Of Sovereign Immunity.

a) A subpoena is a suit for purpose of sovereign immunity.

As we already have explained in the prior case, a subpoena is a "suit" for purposes of sovereign immunity. The Ninth Circuit in *United States v. James*, 980 F.2d. 1314 (9th Cir. 1992), applied the doctrine of tribal sovereign immunity to a federal subpoena to a non-party tribal employee. *James* held that sovereign immunity protects a tribe from enforcement of a third-party-records subpoena in a federal lawsuit, impliedly rejecting the notion that sovereign immunity only applies to lawsuits in which a sovereign entity is subject to liability. *Id.* at 1319. That decision is binding on this Court and also is good law. We agree with Plaintiffs that a "suit" is more than just a legal action for monetary compensation:

> The general rule is that a suit is against the sovereign if the judgment sought would interfere with the public administration, or if the effect of the judgment would be "to restrain the Government from acting, to *compel the government to act*."

Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted, emphasis added), quoted at Response at 9.

A subpoena compels action, which brings it within the ambit of *Dugan*. The Fourth Circuit cited the above language in *Dugan* in denying a motion to compel a federal official to testify. *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) ("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 in his official capacity is inherently that of an action against the United States . . ."); *see also Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288, 290-91 (D. Mass. 1982) (federal official's refusal to testify in response to state court subpoena protected by privilege of sovereign immunity); *United States v. McLeod*, 385 F.2d 734, 752 (5th Cir. 1967) (federal officers could not be subpoenaed to testify before a state grand jury).

The Tenth Circuit summarized the logical conclusion of these cases nicely in terms of how immunity from suit applies to subpoenas:

> According to binding precedent then: tribes are immune from "suit" under *Kiowa*, "suit" includes "judicial process" under *Murdock*, and a subpoena *duces tecum* is a form of judicial process under *Becker*. The logical conclusion, therefore, is that a subpoena *duces tecum* served directly on the Tribe, regardless of whether it is a party to the underlying legal action, is a "suit" against the Tribe, triggering tribal sovereign immunity.

Bonnet v. Harvest (U.S.) Holdings, Inc., 741 F.3d 1155, 1160 (10th Cir. 2014).

b) Sovereign immunity extends to service of a subpoena on a tribal official.

While Plaintiffs focus on language in *Bonnet* that the subpoena be "served directly on the Tribe" to trigger immunity, it is immaterial that the subpoena was served on Mr. Hallman as former Tribal counsel rather than on the Tribal entity. Indeed, the subpoena quashed by the Ninth Circuit in *James* was served on a tribal officer rather than the tribe itself. *James*, 980 F.2d at 1319 (noting subpoena *duces tecum* was directed to Richard Marinez, Director of Social Services of the Quinault Indian Nation). In *Davis*, the Ninth Circuit found a tribal attorney to have immunity when the suit was filed against him directly, rather than against the Tribe derivatively based on his tortious conduct. And the court in *Stock West Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991), held that tribal immunity "extends to individual tribal officials acting in their representative capacity and within the scope of their authority."

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Therefore, whatever the law may be elsewhere, in the Ninth Circuit tribal sovereign immunity is not limited to subpoenas or actions directly against a tribe.[2] Moreover, in analogous cases in other jurisdictions, it has been held that a state subpoena served on a federal official is a suit against the government precluded by sovereign immunity. *See e.g. Boron Oil Co.*, 873 F.2d at 69 (a subpoena to a federal official, acting within the scope of his authority, is "an action against the United States," subject to governmental immunity).[3]

To suggest that sovereign immunity does not extend to the subpoena served on Mr. Hallman as Tribal counsel is to ignore binding Ninth Circuit precedent and federal law recognizing sovereign immunity as protection from subpoenas directed against government officials. *See also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit"); *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) ("Generally, discovery "can be particularly disruptive of effective government").

The critical question, which we turn to now, is whether Mr. Hallman and G&K had a sufficient connection with the Tribe to fall within its sovereign immunity.

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[2] *Miccosukee Tribe of Indians of Florida v. U.S.*, 698 F.3d 1326 (11th Cir. 2012), does not help Plaintiffs. In that case, the court declined to quash a subpoena from the IRS to a tribe's bank on sovereign immunity grounds, finding that the subpoena was not a "suit" against the tribe, and sovereign immunity could not trump an IRS subpoena. A subpoena on a tribal attorney acting in his official capacity involving tribal matters is a suit against the Tribe, and this case is not an action by the federal government.

[3] The Ninth Circuit distinguished *Boron Oil* in *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994), on the grounds that immunity from a *state* court subpoena on a federal official, addressed in *Boron Oil*, do not apply when a *federal* court exercises its subpoena power against federal officials, which was the case in *Exxon*. However, we are not dealing with a federal court subpoena being served on a federal official, but on a representative of a different sovereign – the Tribe. Therefore, this case is more akin to *Boron Oil* than *Exxon*. *See In re Elko Cnty. Grand Jury*, 109 F.3d 554, 556 (9th Cir. 1997) (citing *Boron Oil*, Forest Service had immunity from state subpoena to employee).

2. Mr. Hallman Has Sovereign Immunity Because He Was Acting Within The Scope Of Representation As Tribal Counsel In Communicating With S&C.

Relying chiefly on *Stock West* and *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), the Magistrate Judge ruled in the prior case that sovereign immunity does not apply because G&K did not represent that it was the Tribe's "general counsel" or that it held an "official" position with the Tribe. The Tribe respectfully submits that such a representation was not warranted by case law.

In *Stock West*, a lawyer representing a tribal corporation in a sawmill venture prepared an opinion letter for a lender, which concluded that the venture did not need BIA to approve an agreement. When that conclusion proved to be incorrect, the other party to the venture sued the lawyer, who sought dismissal on grounds of sovereign immunity. The Ninth Circuit's analysis of the immunity issue turned not on whether the lawyer was "general counsel" (although the Court noted that he was), but rather on whether the lawyer's actions were within his representative capacity and the scope of his authority. 942 F.2d at 664. Accordingly, the court determined that tribal officials are "amenable to suit if the subject of the suit is not related to the official's performance of official duties." *Id.* at 665. Because there were factual questions as to whether preparing the opinion letter was within the lawyer's official role for the tribe, the court held that discovery was needed before summary judgment on the issue of immunity was appropriate. *Id.*

Here, the parties have never contested that G&K was acting in its official capacity as counsel for the Tribe in communicating with S&C; to the contrary, S&C alleges (albeit incorrectly) that "All statements made by Defendants were authorized and/or approved by members of HUALAPAI Tribe and/or HUALAPAI Tribe's counsel." Third-Party Complaint ¶ 17. S&C also claims that G&K had to "vet" S&C on behalf of the Tribe and that G&K was the "gatekeeper" to the Tribal Council. G&K appeared in multiple lawsuits and jurisdictions as counsel for the Tribe in matters involving GCSD, including the eminent domain action in Tribal Court. Even Plaintiffs admit that Mr. Hallman "was active in the original dispute over

the Skywalk, which is the subject of the instant motion." Response at 4, ll. 15-16. Thus, there is no dispute that G&K was acting within the scope of its role as Tribal counsel.

Further, Mr. Hallman did not just issue a single legal opinion letter for a tribal corporation in its venture with a non-tribal member, as in *Stock West*. Instead, as in *Davis*, Mr. Hallman was involved in advising the Tribal Council with respect to Tribal matters, including the formulation and exercise of eminent domain and the related retention of a consultant such as S&C to provide advice about media relations and to coordinate communications with the media about the disputes with GCSD. *See generally* Exhibit B to S&C's Opposition to Motion to Quash Defendants/Third-Party Plaintiffs' Subpoena to Produce Documents, Information, or Objects [Filed Under Seal], Case No. 2:15-cv-00663-JAD-GWF ("Exhibit B"). G&K's and Mr. Hallman's communications with S&C were subsumed within its advice to the Tribal Council regarding the disputes with GCSD and the Tribe's exercise of its governmental powers.

There also is no question that G&K's communications with S&C, about which Plaintiffs seek to question Mr. Hallman, involved Tribal affairs. S&C's retention by the Tribe was intertwined with the overall dispute with GCSD over management of the Skywalk and the Tribal Council's legislative decision to pursue eminent domain, a fundamental constitutional power and an essential attribute of the Tribe's sovereignty. *See* Hualapai Constitution, Art. IX(c); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977) ("[T]he police power and the power of eminent domain were among those [essential attributes of sovereignty] that could not be 'contracted away.'"). These matters, which were at the heart of S&C's retention and communications with G&K, involved the Tribe's public affairs and G&K's role in the Tribe's governance.

The rationale for extending sovereign immunity to tribal counsel is that a lawyer advising the Tribe would be hindered in performing his or her functions for the tribal government without immunity. *Stock West*, 942 F.2d at 664. As the Eighth Circuit explained in a case involving alleged improprieties by retained counsel in a gaming licensing process:

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> Tribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised.

Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 550 (8th Cir. 1996).

Filarsky v. Delia, 132 S. Ct. 1657 (2012) is instructive on this point. In *Filarsky*, the city hired a private attorney to interview a firefighter named Delia, who was suspected of improperly taking sick time to work on his home. The city's suspicion was based, in part, on surveillance of Delia purchasing several rolls of fiberglass insulation. After the attorney and other fire department officials entered Delia's home to search for the insulation, Delia sued the city, the fire department, the private attorney, and others under 42 U.S.C. § 1983. All defendants except the attorney were dismissed on qualified immunity grounds except the attorney, whom the Ninth Circuit found was not a city employee entitled to assert an immunity defense. *Id.* at 1661.

After an extensive discussion about how part-time and private individuals working for governmental entities historically had been granted immunity under common law, the Supreme Court unanimously held that qualified immunity for purposes of § 1983 "should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 1665. The Court reasoned:

> As we have explained, such immunity "protect[s] government's ability to perform its traditional functions." It does so by helping to avoid "unwarranted timidity" in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits.
>
> We have called the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business "the most important special government immunity-producing concern." Ensuring that those who serve the government do so "with the decisiveness and the judgment required by the public good," is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.

> Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to "'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.'" The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals.

Id., 132 S. Ct. at 1665-66 (citations omitted).

Based on this analysis, the Court concluded, "Allowing suit under § 1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place." *Id.*, 132 S. Ct. at 1666.

The same reasoning applies to any other immunity. Indeed, the Ninth Circuit in *Davis* employed similar language in allowing a private attorney to assert executive immunity:

> . . . the rule of privilege is not founded on the need of the individual officer, but on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired.
>
> That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it.

Davis, 398 F.2d at 85.

Mr. Hallman is in no different position. Moreover, to compel Mr. Hallman to disclose his communications with S&C under threat of subpoena would chill Tribal counsel's ability to obtain information, to communicate with a Tribal consultant, and to provide reasoned advice to its Tribal client about governmental issues. And as the Court recognized in *Filarsky*, the threat of being drawn into litigation, whether as a litigant or witness, would deter attorneys from providing public services, particularly to clients such as the Tribe that do not have a legal department. The Supreme Court's concern in *Filarsky* is particularly applicable here, in light of the federal policy to encourage tribal self-determination and self-governance. *See Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("our cases have often recognized that Congress is committed to a policy of supporting tribal

self-government and self-determination"). Subjecting private attorneys to federal court jurisdiction for actions taken in their capacity as tribal counsel would impair attainment of that Congressional goal.

Whether "general counsel" or not, sovereign immunity extends to attorneys acting within the scope of their official duties to a tribal government, as G&K and Mr. Hallman indisputably were doing. *Catskill Dev., LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 92 (S.D.N.Y. 2002) (attorney "acting as a representative of the tribe and within the scope of his authority" is cloaked with sovereign immunity).

3. Mr. Hallman Was Acting In An Official Capacity In Advising The Tribe On Eminent Domain And Prosecuting The Eminent Domain Action.

At minimum, cases such as *Stock West* and *Davis* extend sovereign immunity to attorneys serving as adjuncts to governments in government-centric activities. Under *Davis*, immunity at least applies to any official whose tenure (no matter the duration) "encompasses public duties, official in character" and which "include advice with respect to the administration of public affairs to the Tribe." 398 F.2d at 85. The question is not whether the private attorney is a tribal "official," but whether the duties being performed are governmental and/or public in nature. That test is met here.

Plaintiffs' core theory in the underlying case is that defamatory statements were made as part of an illicit scheme to justify the Tribe's use of eminent domain to "seize" the Skywalk from GCSD. GCSD seeks to question Mr. Hallman about his and G&K's supposed involvement in this scheme. While this theory is rubbish, the undisputed facts demonstrate that Mr. Hallman's role as the Tribe's attorney was part and parcel of the Tribe's governmental decision to use eminent domain.

In 2003, GCSD and a wholly-owned corporation of the Tribe entered into an agreement for GCSD to manage the Grand Canyon Skywalk. By 2009 or 2010, however, the relationship between GCSD and David Jin, on one side, and the Tribe, on the other, had frayed. G&K, as counsel for the Tribe, attempted to negotiate a resolution of the disputes with GCSD. Glen Hallman was one of the Tribe's attorneys in these negotiations. The

negotiations were not successful, so G&K and Mr. Hallman began advising the Tribe about other possible options, including exercising its sovereign power of eminent domain to condemn GCSD's contract interest in the 2003 management agreement. In 2011, the Hualapai Tribal Council adopted legislation outlining a process for condemning private property and, in 2012, passed a resolution authorizing the use of eminent domain against GCSD. G&K and Mr. Hallman advised the Tribe regarding its sovereign right of eminent domain and the legislation the Tribe ultimately adopted to implement that right. Exhibit B.

Between 2011 and 2013, GCSD brought several lawsuits in Arizona District Court to try to enjoin the Tribe from exercising its power of eminent domain. Mr. Hallman represented the Tribe in each of these cases and, as Tribal counsel, prosecuted the eminent domain action the Tribe filed in Hualapai Tribal Court to condemn GCSD's interest. There is no dispute that G&K and Mr. Hallman were advising the Tribal Council on governmental matters, including the exercise of eminent domain, or that G&K was the only law firm dealing with GCSD on the Tribe's behalf arising out of the then-ongoing disputes.[4]

Nothing could be more fundamentally official government work than advising government officials on legislation and the exercise of sovereign powers, as well as prosecuting an eminent domain action – a core governmental function. "[T]he power of eminent domain is essential to a sovereign government." *U.S. v. Carmack*, 329 U.S. 230, 236 (1946). Eminent domain is "inherently governmental in character." *Contributors to Pennsylvania Hosp. v. City of Philadelphia*, 245 U.S. 20, 22, (1917). Unsurprisingly, the power of eminent domain is a "necessary and inherent function of government" and a "core governmental power." *Porter v. City of Charleston*, 65 F. Supp. 224, 226 (S.D.W. Va.) *aff'd sub nom, Porter v. City of Charleston, W. Va.*, 155 F.2d 209 (4th Cir. 1946); *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 742 (Colo. 2007). It follows, therefore, that an attorney advising a tribe about eminent domain and prosecuting an

[4] Plaintiffs have not contested any of the facts set out in the Motion to Quash, which therefore should be accepted as true.

eminent domain action is exercising an official governmental function for the public benefit, and not, as Plaintiffs contend, a mere third-party service provider.

In negotiating with GCSD to resolve the Skywalk management dispute, advising the Tribe about the exercise of eminent domain, and representing the Tribe in multiple actions against GCSD about the use of eminent domain, including the condemnation action filed in Hualapai Tribal Court, Mr. Hallman and G&K were acting in an official capacity. Mr. Hallman's involvement in the Tribe's exercise of eminent domain, a central feature of this defamation action and the driving force behind the retention of S&C, is dispositive in favor of extending immunity under *Stock West* and *Davis*.

4. *Ex Parte Young* Is Inapplicable Because Plaintiffs Do Not Seek Prospective Relief To Enjoin An Ongoing Violation Of Federal Law.

Plaintiffs misapply *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* "doctrine *only* permits actions for *prospective* non-monetary relief against state or tribal officials in their official capacity to *enjoin them from violating federal law*, without the presence of the immune State or tribe." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (emphasis added). The underlying defamation suit is not seeking prospective relief, as it seeks monetary redress for alleged past defamation. Moreover, there is no claim of any sort, either in the underlying lawsuit or in connection with the subpoena to Mr. Hallman, of ongoing violations of federal law. Finally, to the extent federal common law may be used to support the application of *Ex Parte Young*, there is no federal common law claim in this case, as defamation is a state law claim.[5]

In *Estate of Gonzalez v. Hickman*, 466 F. Supp. 2d 1226, 1229 (E.D. Cal. 2006), the District Court rejected a Magistrate Judge's reasoning that *Ex Parte Young* was applicable to a motion to compel production of documents by a non-party government official that was otherwise immune. The Court noted that the relief sought in the case, "production of

[5] Plaintiffs also offer no evidence that Mr. Hallman acted outside his authority. Plaintiffs cannot invoke *Ex Parte Young* based solely on the hypothetical claim that "Mr. Hallman *would have* acted outside his authority *if* he reviewed and approved allegedly unlawful statements," which is what their argument really boils down to. Response at 12, ll. 17-19 (emphasis added).

documents that could lead to admissible evidence in a suit seeking relief for a past wrong, *is clearly retrospective*." *Id.* (emphasis added). Because there was no "ongoing violation that could support a finding that the present issue falls within the *Ex Parte Young* exception," the Court denied the motion to compel production against the government official. *Id.* This case is no different – *Ex Parte Young* is not applicable under these circumstances.

5. The Court Lacks Jurisdiction To Compel Compliance With The Subpoena.

Mr. Hallman advised the Tribe with respect the eminent domain legislation that started this dispute, defended the legislation in federal court against GCSD's challenges, advised the Tribe on matters of public use and just compensation (both critical public affairs), and prosecuted the Tribe's eminent domain action in Tribal Court. Because eminent domain is a core sovereign function touching on the public affairs of the Tribe, involving the expenditure of public money to condemn private assets for public use, the tenure of Mr. Hallman as Tribal attorney was within the scope of his representation of the Tribe and was official in character. Accordingly, Mr. Hallman has sovereign immunity. The subpoena should therefore be quashed, since "[s]overeign immunity is jurisdictional in nature" (*FDIC v. Meyer*, 510 U.S. 471, 475 (1994)) and "the subpoena power of a court cannot be more extensive than its jurisdiction." *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988).

C. The Subpoena Should Be Quashed Because G&K's Communications With S&C Are Privileged Or Work Product.

Plaintiffs assert that Nevada privilege law should apply. For the purposes of this motion, we will accept that Nevada law applies, but the basic elements of the attorney-client privilege are the same under Arizona and Nevada law. Both Arizona and Nevada protect not only communications between a client and his or her attorney, but also communications between a lawyer and a third party engaged to assist the attorney in the provision of legal services. *See* Nev. Rev. Stat. § 49.095; *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 192, 777 P.2d 686, 690 (1989) (attorney-client privilege applies "not only to attorneys but to their

agents as well"). "[T]he day is past when a lawyer has the time and knowledge to prepare every case he accepts without consulting others." *Id.*

The recognition that a public relations firm can provide services necessary for an attorney to provide full legal assistance is the driving force behind the decision in *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). Starting from the "common ground that the privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law," the court in *Grand Jury* noted that in some circumstances, the public forum, and thus an expert in public relations, will be important to the litigation. *Id.* at 326. Accordingly, the public relations firm was integral to some of the lawyer's "most fundamental client functions," including advising the client of the legal risks of public statement, seeking to avoid charges brought against the client, and zealously advocating the client's interest. *Id.* at 330. The reason for this is that "there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions." *Id.* at 330-331.

Grand Jury is not the only case to recognize the need to retain experts in areas which a lawyer may not have suitable experience. *See F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002) (communications shared with public relations and government affairs consultants were privileged because the consultants possessed the information needed by the attorneys in rendering legal advice); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 220-221 (S.D.N.Y. 2001) (work product doctrine protected material exchanged between attorney and crisis management public relations firm); *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (communications with a psychiatric expert were necessary to prepare an insanity defense and were privileged). The cases cited by Plaintiffs do not disagree with this basic principle. *See Fine v. ESPN, Inc.*, 2015 WL 3447690, at *11 (N.D.N.Y. May 28, 2015) (discussing agency exception to attorney-client privilege). Rather, the courts in those cases found that the efforts of the public relations firm were not sufficiently related to the litigation

strategy. *See, e.g., Scott v. Chipotle Mexican Grill, Inc.*, 2015 WL 1424009, at *5 (S.D.N.Y. Mar. 27, 2015) (no privilege when third party provided factual research to make a business decision); *Ravenell v. Avis Budget Grp., Inc.*, 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) (firm sent out questionnaires and organized responses); *see also Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 432 (S.D.N.Y. 2013) (distinguishing *Grand Jury* because of a requirement under New York law that the third party "be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications"). *Grand Jury* is simply an extension of the *Kovel* doctrine, which provides that when an outside expert is engaged to aid the attorney in rendering legal services, communications with that expert fall within the privilege. *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

S&C was hired to provide expert analysis to aid G&K's legal representation of the Tribe in the prior litigation with GCSD in responding to heightened media inquiry regarding the Skywalk dispute. Indeed, as anticipated, newspaper articles began appearing as early as April 2011. *See Las Vegas Developer of Grand Canyon Skywalk Sues Tribal Council*, Las Vegas Sun, Apr. 1, 2011. GCSD later engaged in a political and public relations campaign against the Tribe by hiring its own media consultant, circulating letters to tribal members, creating a Twitter profile, and launching a blog to publicize the dispute. Media interest in the dispute between GCSD and the Tribe was intense enough that the dispute was featured on the front page of the Wall Street Journal, as well many other national and local media forums. *See A Canyon Separates Foes in Grand Battle*, Wall St. J., Mar. 22, 2012.

As the *Grand Jury* and other courts understood, there is more to providing legal services than filing pleadings, taking depositions and propounding discovery. To respond to media inquiries while avoiding an adverse impact on the pending litigation, the Tribe and G&K needed a consultant, and S&C was selected. S&C was hired to assist G&K in such risk-mitigation tasks as preparing Tribal members for interviews about the dispute, drafting press releases and acting as a conduit for media outlets. Because the case was so high profile and the use of eminent domain was highly controversial, S&C's expertise in public relations was essential. For S&C to do its job, it was necessary for G&K to inform them of some facts,

as well as certain litigation strategies, "free of the fear that the consultants could be forced to disclose those discussions." *Grand Jury*, 265 F. Supp. 2d at 330-331. Therefore, the privilege applies.[6]

D. Non-Testifying Consultant Communications Are Protected.

Contrary to Plaintiffs' arguments, the Tribe has never argued that Mr. Hallman was a non-testifying consultant. Nor is the Tribe asserting that S&C is a non-testifying consultant in the *current* defamation action. By virtue of its role, described above, S&C was a non-testifying expert whose communications with G&K or Mr. Hallman are discoverable only after a showing of "exceptional circumstances." *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982). This standard has not been met here. Plaintiffs have other avenues available to discern the extent of S&C's relationship with G&K. S&C has already released its email communications with G&K, albeit without the Tribe's consent. Plaintiffs have also taken the depositions of Mr. Scutari and Mr. Cieslak, the latter of which has not been completed.

Because the entire purpose of the deposition is to delve into privileged information concerning Mr. Hallman's communications with S&C, the subpoena should be quashed. However, if the Court orders the deposition to proceed with objections to specific questions, as Plaintiffs suggest, the Tribe reserves its privilege, work-product, and other objections.

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[6] Plaintiffs' waiver argument has no bearing because S&C was not a client of G&K and has never seriously claimed to have been one. Implied waiver arises when the holder of the privilege affirmatively inserts privileged issue into the litigation. *Wardleigh v. Second Judicial Dist. Court In & For Cnty. of Washoe*, 891 P.2d 1180, 1186 (Nev. 1995); *Ulibarri v. Superior Court in & for Cnty. of Coconino*, 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995). S&C does not hold the privilege between G&K and the Tribe – the privilege belongs to the Tribe, and S&C cannot waive it. *See State v. Sucharew*, 205 Ariz. 16, 21 ¶ 10, 66 P.3d 59, 64 (App. 2003).

III. CONCLUSION.

This Court should quash the subpoena on immunity grounds. However, if the Court does not conclude that immunity attaches to Mr. Hallman, the Court should quash the subpoena on grounds of privilege.

RESPECTFULLY submitted this 17th day of July, 2015.

GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2015, I electronically transmitted the foregoing to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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