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Recipients of Subpoenas

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

TERRYL T. MATT,)	
)	
Plaintiff,)	Civil Case No. 15-cv-00028
)	
vs.)	
)	
UNITED STATES OF AMERICA)	
)	
Defendant.)	
_____)	

**BRIEF IN SUPPORT OF
MOTION TO QUASH SUBPOENAS**

The Fort Belknap Indian Community Council (hereinafter "Council"), and their employees, officials and officers, by and through their attorney of record, specially appear, for the limited purpose of offering its Motion to Quash and Brief and respectfully submit this Brief in Support of their Motion to Quash Subpoenas.

INTRODUCTION

Plaintiff in this cause has issued a subpoena duces tecum to President Mark Azure of the Fort Belknap Indian Community Council, as well subpoenas to testify at deposition to Mark Azure, President of the Council, David Crasco, a Councilman currently serving on the Council, James Bell, project manager of the Council's Construction Company, Tracy King, President of the Council from 2009 until November, 2013, Richard Boushie, a tribal employee of the Council coordinating disaster relief efforts for the Council in 2011, Patricia Quisno, a Councilwoman presently serving on the Tribal Council, and Loren Stiffarm, an employee of the Council, who served as the Chief Administrative Officer of the Council until November, 2013. Upon information and belief, it appears that each of these individuals have knowledge about plaintiff's claims only in their official capacities for the Tribal Council, if at all, except for David Crasco, who also may have information about the BIA route on the property at issue from a time period before he was elected to the Tribal Council in November, 2013, as he was employed for the BIA Roads Department in 2011-2012. Plaintiff has also served a subpoena to testify at deposition on Ted Bell. Ted Bell has been a Tribal employee at various times, but his knowledge of plaintiff's claims appears to originate as a neighbor residing near Plaintiff's land.

The Subpoena Duces Tecum to the President of the Council, Mark Azure, demands a variety of documents identified in three (3) pages of the subpoena. See Subpoena Duces Tecum, pp. 1-3. The Subpoena Duces Tecum demanded delivery of these documents within ten (10) days of the service of the subpoena. *Id.* p. 1. The Council, its employees and officials are not parties to this suit.¹

Similarly, plaintiff has issued subpoenas to the above-listed individuals, together with a document attached entitled “Production of Documents”, which purports to command them to produce and deliver at the time of their deposition, documents in their possession just as Mark Azure was directed to produce. See subpoenas.

The subpoena duces tecum and subpoenas served are very broad in their demand of type of documents, time and detail. Only one of the four demands has any limitation on the timeframe (from January 1, 2011 to present) for which all documents are to be produced. It requires the recipient to identify all of Terry Matt’s lands on the reservations and then provide disclosures on all of these lands. The demand, if made enforceable to the Council, would require days of searching through old email accounts, files and storage boxes of program files closed out years and even decades ago, as only one time qualifier (January 1, 2011 to present)

¹ Plaintiff previously sued the Council and James Bell in this court in Case No. CV-12-22-GF, alleging a similar injury as now asserted against the United States. That cause was dismissed by this court, finding a lack of jurisdiction, on or about June 18, 2012. Plaintiff then sued the same parties in the Fort Belknap Indian Community Tribal Court on similar grounds, and that cause remains pending in that court as CV 2012-111.

is set forth. Plaintiff has offered no compensation for the research that it is demanding of President Mark Azure, these officials, these employees of the Council and the Council. Without the hiring and/or reassignment of substantial staff, it is impossible to conduct the search demanded by plaintiff within ten (10) days. Further, all of this would seem to have very little relevance in a lawsuit against the federal government for damages

The Council asserts plaintiff's subpoenas, as to its employees, officials and officers are barred by the doctrine of Tribal sovereign immunity. As plaintiff has acknowledged before this court, plaintiff is suing the Council and its employees, officials and officers in Tribal Court for very similar issues as are before this court, only in the Fort Belknap Indian Tribal Court. A Motion to Dismiss that suit is pending in that court, as well as various other Motions. The Tribal Court had stayed that proceeding earlier this summer as the parties had agreed to attempt mediation. In the subpoenas issued in this cause, Plaintiff has refused to acknowledge the status of these individuals as employees, officials and officers of the Council. Their access and testimony could very well impact the Tribal Court proceedings. The Council has the right to protect its interests and assert its status under the doctrine of sovereign immunity.

ARGUMENT AND AUTHORITIES

A. Standard for Quashing a Subpoena.

The Council, on behalf of its employees and officials, hereby requests this court, under Federal Rule of Civil Procedure 45(c) or other applicable federal law, including the established doctrine of Sovereign immunity, to quash the subpoenas of the above-listed employees and officials of the Council. This provision reads as follows:

Rule 45 (d) (3) Quashing or Modifying a Subpoena

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

The subpoenas issued by plaintiffs create an *undue burden* (pt. (iv)) on the respective witnesses identified. Each are employees/officials of the Council, yet the Council has not waived its sovereign immunity or authorized these employees to testify or to deliver information in the manner being sought by plaintiff.

Plaintiff seeks to invoke the authority of this court to mandate compliance, yet ignores the authority of the sovereignty of the Council in pursuing this process.²

² Plaintiff is well aware of the Council's position on sovereign immunity, as it has been the subject of discussion before the Tribal Court, and has not been waived.

This places these “witnesses” in an untenable position between the authority of two sovereigns, one of which they either serve as officials or for whom they are employed.

Further, the information being sought is *privileged or protected* (pt. iii) as being in the possession of a sovereign, whether physically or otherwise in its employees. That sovereign is not just another party or individual. (see below arguments) While the Council is seeking to resolve the claims of the plaintiff through mediation in the Tribal Court, plaintiff seeks in these proceedings to compel disclosures that directly impact that Tribal Court process.

Under the doctrine of sovereign immunity, established in the federal courts, (see below discussion) this court does not have the authority to compel non-party employees/officials of the Council to testify or produce records. This court should grant relief to these employees/officials from the subpoenas of the plaintiff, and require a waiver of sovereign immunity, consistent with law.

B. The Council and its Employees/Officials are protected by Tribal sovereign Immunity which bars the subpoenas offered by plaintiff.

Under the doctrine of tribal sovereign immunity, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510-11 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,

59 (1978). "[T]ribal immunity is a matter of federal law." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Tribal immunity does extend to tribal officials when acting in their official capacity and within their scope of authority. *Davis v. Littell*, 98 F.2d 83, 84-85 (9th Cir. 1968).

A suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, 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. *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963).

As to whether this doctrine applies to non-party subpoenas seeking to compel employees/officials of Tribes, the case law is clear that it does. The Eighth Circuit, in *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012) overturned a district court decision and held 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,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), that a federal court's third-party subpoena in private civil litigation is a "suit" that is subject to tribal sovereign immunity. *Id.* The court reviewed federal and state immunities, and while finding Eleventh Amendment cases instructive, concluded

that “.....tribal immunity ‘is not congruent with that which the Federal government or states enjoy’” Id. at 1102 (citations omitted)

In *Alltel*, the court determined that the compelled disclosure was the functional equivalent of a “suit” and, as such, tribal sovereign immunity applied to quash a third-party subpoena deuces tecum served on the Olgala Sioux Tribe and a tribal administrator. Id. at 1104-1105. In making this ruling, the court opined: “The point is not whether such compelled disclosure is good or bad; it is whether the end result is the functional equivalent of a “suit” against a tribal government within the meaning of its common law sovereign immunity” Id. See also, *Catskill Dev., LLC vs. Park Place Entm’t Corp.*, 206 F.R.D. 78, 86-88 (S.D.N.Y. 2002) (A party’s third party subpoena was barred by Tribal sovereign immunity)

Likewise, the Ninth Circuit, in a criminal case, *United States v. James*, 980 F.2d 1314, 1319 (1992), has held that tribal sovereign immunity bars a criminal defendant's trial subpoena "unless the immunity had been waived." In *James*, the Ninth Circuit held that the Quinalt Nation’s sovereign immunity, which had not been abrogated or waived, barred the defendant's subpoena deuces tecum served on the Director of the Nation’s Social Services Department. Id.

Plaintiff has done nothing to distinguish these precedents from the present circumstances. Plaintiff did nothing to establish the authority of this court to issue

these subpoenas to a non-party sovereign or its employees/officials, prior to issuing and serving the subpoena.

There is no suggestion in the subpoena duces tecum or subpoenas that each of the tribal employee/official witnesses have been given that they are being subpoenaed in anything but their official capacity as employees/officials of the Council. Except as noted above, they have no information to offer in this case except in their official capacities with the Council.

The Gros Ventre and Assiniboine Tribes of Fort Belknap make up the Fort Belknap Indian Community and its governing body, the Fort Belknap Indian Community Council. See *Boe vs. Fort Belknap Indian Community*, 642 F.2d 276-278 (9th Cir., 1981) As the governing body of federally-recognized Indian tribes, the Fort Belknap Indian Community Council exercises tribal sovereign immunity on behalf of those tribes. See *Colliflower vs. Fort Belknap Community Council*, 192 Mont. 450-453, 628 P.2d 1091-1092 (1981) This immunity extends to the employees and officials identified above who are the subject of plaintiff's subpoenas.

Just as in *Alltell* and *James*, plaintiff here is barred from issuing subpoenas to the Council's employees/officers, absent a waiver or abrogation of the Tribe's sovereign immunity. As for abrogation or waiver, Congress has not authorized suit

against the Tribe, and neither has the Tribe waived its sovereign immunity. Absent a waiver, this court should quash the subpoena issued to the individuals listed.

B. Mark Azure has no information in his “possession” that is responsive to the plaintiff’s subpoena duces tecum.

Plaintiff seeks to have Mark Azure turn over documents in his possession that are responsive to the listing set forth in their subpoena duces tecum. (Plaintiff has subsequently sought to hold him in contempt for failure to comply.) However, he has no documents in his immediate possession that comply with what plaintiff wants. (Plaintiff has not identified him as the keeper of the records of the Council, which is likely a correct assumption, as the Council’s Secretary/Treasurer is normally identified as the office responsible for Tribal Records. See Council’s Constitution and By-laws)

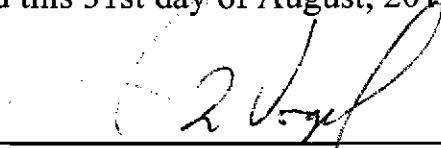
He came into office in November, 2013. While he is the President of the Council, he has no authority to waive the sovereign immunity of the Council and locate documents and turn them over to the plaintiff. It is possible that some documents could exist in the files of the Council that are responsive to plaintiff’s demands. However, to locate documents means expending Tribal resources (likely a significant amount of tribal resources to research the open-ended demands). The Council asserted sovereign immunity in this instance, and in the plaintiff’s Tribal

Court proceeding.³ Absent a specific waiver, he has no authority to countermand Council action and locate documents and deliver them to the plaintiff.

CONCLUSION

For the reasons stated herein, this court should quash the subpoenas issued by plaintiff seeking to compel testimony and disclosure of information from the Fort Belknap Indian Community and its employees/officers/officials, named above.

Respectfully submitted this 31st day of August, 2015.

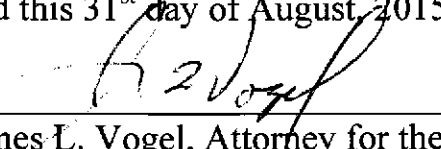


James L. Vogel, Attorney for the Fort Belknap Indian
Community Council and its Employees/Officers/Officials

CERTIFICATION OF COMPLIANCE

This is to certify that this Brief was prepared and submitted in compliance with Local Rule 7.1(d)(2), in that it was prepared in 14 point font, and contains a word count of 2488, a count below the maximum set forth in the Rule for briefs.

Respectfully submitted this 31st day of August, 2015.



James L. Vogel, Attorney for the Fort Belknap Indian
Community Council and its Employees/Officers/Officials

³ And, as noted above, this federal court, on June 18, 2012, concluded it did not have jurisdiction over the subject matter of very similar litigation against the Council and its employees.

Certificate of Service

This is to certify that the foregoing was duly served upon the following
Counsel for parties of record at their addresses of record by facsimile transmission
and U.S. mail, postage prepaid, this 31st day of August, 2015.

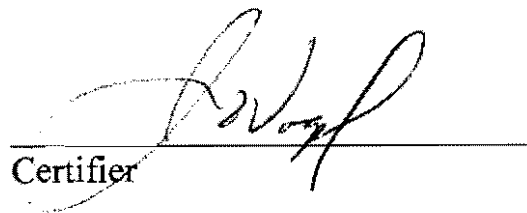
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A handwritten signature in black ink, appearing to be "R. Vogt", is written over a horizontal line that serves as a signature line.