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

TERRYL T. MATT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-cv-00028
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO QUASH AND SUPPLEMENT TO MOTION TO COMPEL

BACKGROUND OF THE CASE

This case arises from the Fort Belknap Indian Reservation, near the mouth of Whitehorse Canyon, where the Bureau of Indian Affairs ("BIA") and Fort Belknap tribal officials built a road across the creek without proper engineering. The road obstructs a creek from traveling along the natural riparian corridor and diverts the

stream onto the Plaintiff's property where it has gouged a ravine and deposited large volumes of sediment on Plaintiff's farmland. (Ex. A). During high-water events in 2011 and 2013, flood waters made the road impassible. The Tribes declared the situations as emergencies. (Ex. B). The Tribes installed a temporary road across Plaintiff's property without permission, located west of the roadway that blocks the creek. The Tribes also sought and received Emergency Relief for Federally Owned Roads Program ("ERFO") grant money to fix the primary road and restore the creek to its natural alignment. (*See*, for example, Ex. C). The Tribes received approximately $644,000, apparently spent on road building activities, but failed to use the taxpayer money to restore the creek to its original channel alignment. Apparently, the Tribes put hundreds of thousands of dollars worth of road base material along the old road, which essentially served as a dam, preventing the creek from reaching its natural channel and exacerbating the ongoing damage to Plaintiff's farmland. Plaintiff has also received reports that the Fort Belknap Community Council used grant funds for road building projects that do not fall within ERFO terms. Because of the mixture of federal and tribal actors, Plaintiff has filed suit in this action as well as in *Matt v. King, et. al.*, CV 2012-111, in the Fort Belknap Tribal Court. The same set of facts, at times,

may lead to actions in tribal and federal court.[1]

The discovery Plaintiff seeks is directed toward collecting the grant funding, reporting, engineering, and impact studies directly related to the placement and construction of the road. Plaintiff reasonably believes that these documents will be important evidence in proving who did what in the fact pattern underlying these tort claims. Similarly, the depositions Plaintiff seeks are aimed at collecting first-hand information that may not have been memorialized in writing from the tribal officials and individuals involved in this misguided road building exercise. Most of the depositions Plaintiff has noticed are directed at names that appear on the 2011 organization assignment list. (Ex. D).

PROCEDURAL CHRONOLOGY OF THE SUBPOENAS

On July 17, 2015, Plaintiff served Mr. Sam Painter, counsel of record for certain Fort Belknap tribal representatives in *Matt v. King, et. al.*, CV-2012-111 (Tribal Court), with the *Subpoena Duces Tecum* for Mark Azure, current President for the Fort Belknap Community Council.

On July 22, 2015, Mr. Painter informed Plaintiff's counsel that he had communicated with Mr. Azure and the Community Council's General Counsel regarding the subpoena. Mr. James Vogel serves as General Counsel for the Fort

[1] Thomas W. Christie, *An Introduction to the Federal Tort Claims Act in Indian Self-Determination Contracting*, 71 Mont. L. Rev. 115, 123 (Winter 2010).

Belknap Community Council and their officials and employees ("Tribal Representatives").

On July 23, 2015, Mr. Painter informed Plaintiff's counsel that the Fort Belknap Community Council had not authorized him to accept service of the *Subpoena Duces Tecum*. He did not indicate that anyone else would represent the Council or the Tribal representatives regarding the subpoena.

On July 28, 2015, Plaintiff's counsel re-issued the *Subpoena Duces Tecum* for Mr. Azure.

On July 31, 2015, Mr. Mark Azure was personally served with the *Subpoena Duces Tecum.* The subpoena commanded that documents be produced within ten (10) days after service (August 10, 2015). Plaintiff attempted to accommodate Mr. Azure by providing two alternative locations for delivery of the documents: either at the Fort Belknap Agency Tribal Building where Mr. Azure regularly conducts business as the President of the Community Council, or at the law office of Mr. Painter in Billings, Montana.

Between July 31 and August 10, 2015, Plaintiff's counsel received no communication from Mr. Painter or Mr. Vogel leading up to or on the date for production of documents.

On August 10, 2015, Plaintiff's counsel emailed Mr. Painter and Mr. Vogel

requesting coordination regarding the delivery of documents.

On August 11, 2015, Mr. Painter informed Plaintiff's counsel that Mr. Azure would not comply with the *Subpoena Duces Tecum.* Furthermore, Mr. Painter informed Plaintiff's counsel that no tribal deponents would attend depositions originally scheduled for August 17-20, 2015. These depositions had been scheduled pursuant to a Stipulation in the Tribal Court proceeding allowing discovery and a Tribal Court Order approving the Stipulation.

On August 21, 2015, Subpoenas for Depositions scheduled for September 1-3, 2015, at Fort Belknap, were served personally on Richard Boushie, David Crasco, Loren Stiffarm, Theodore Bell, James Bell and Mark Azure. These subpoenas also commanded the production of documents.

Also on August 21, 2015, Mr. Vogel emailed Plaintiff's counsel saying that he would be submitting a Motion to Intervene and a Motion to Quash the Subpoenas. Plaintiff's counsel responded within the hour informing Mr. Vogel that Plaintiff would oppose the motions.

On August 24, 2015, Subpoenas for Depositions scheduled for September 1-3, 2015, at Fort Belknap, were served personally on Patricia Quisno and Tracy King. These subpoenas also commanded the production of documents. Of all the deponents served, Mr. Boushie and Mr. Stiffarm cashed their checks for milage

and witness fees and were apparently willing and planning to appear for their depositions. However, it appears that Mr. Azure instructed them not to attend about twelve hours before the depositions were scheduled.

On August 24 and 27, 2015, Plaintiff's counsel sent Mr. Vogel letters requesting clarification regarding who he represents. (*See* Doc. No. 33, Fn. 2, Ex. 1). Mr. Vogel did not respond to the requests.

On August 31, 2015 (approximately 4:35 p.m.), while Plaintiff's counsel were traveling to the depositions at Fort Belknap, Mr. Vogel faxed to the office of Plaintiff's counsel his Motion to Quash and Brief in Support. Mr. Vogel had been notified since at least August 21, 2015, that depositions were scheduled and arranged for September 1-3 at the Fort Belknap Agency, which is approximately an eight (8) hour drive from Lander, Wyoming, where Plaintiff's counsel has their office.

STANDARD

The subpoenas at issue adhere to the Federal Rules of Civil Procedure, including the criteria for form and content, Rule 45(a)(1), and the Tribal representatives do not contend otherwise. The Court must quash or modify a subpoena that fails to allow for a reasonable time to comply, requires compliance beyond geographical limits, requires disclosure of privileged or protected material

if no exception or waiver applies, or subjects a person to an undue burden. Fed. R. C.P. 45(d)(3). None of these circumstances apply in the present matter.

ARGUMENTS AND AUTHORITIES

I. The Motion to Quash Should Be Denied As Untimely and the Objection Waived.

Tribal representatives filed their Motion to Quash with this Court approximately forty (40) days after they learned of Plaintiff's original subpoena issued to Mark Azure and thirty-one (31) days after the subpoena was served.

Federal Rule of Civil Procedure 45(d)(2)(B) provides that "objection[s] must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." As a threshold matter, "a nonparty's failure to timely make objections to a Rule 45 subpoena duces tecum generally requires the court to find that any objection has been waived." *Voxpath RS, LLC v. LG Electronics U.S.A., Inc*., 2013 WL 5744045, 3 (D. Ariz. Oct. 23, 2013). The Motion to Quash the *Subpoena Duces Tecum* is untimely and should be denied.

Through a series of stall tactics and non-responsiveness, counsel for Tribal representatives have also delayed and obstructed the deposition subpoenas (*see* chronology above) and their objection should be deemed waived on that basis.

II. The Motion To Quash Subpoenas On Grounds of Sovereign Immunity Lacks Merit.

Tribal Representatives assert that the *Subpoena Duces Tecum* and Subpoenas for Depositions and to Produce Documents should be quashed because they: 1) create an undue burden; and 2) seek privileged or protected information. Both of these arguments are premised on the mistaken assumption that compliance is excused under the tribal sovereign immunity doctrine.

Tribal sovereign immunity is no bar to federal subpoenas issued to Tribal representatives. In *Grand Canyon Skywalk Dev. LLC v. Cieslak*, 2015 WL 4773585, 7 (D. Nev. Aug. 13, 2015), the District Court for Nevada considered a motion to quash that involved a deposition subpoena. The subpoena was served by plaintiffs on a tribal official (attorney) who assisted a Tribe in performing fundamental sovereign and legislative powers. In examining the issue, the *Skywalk* Court held that:

> tribal sovereign immunity is even more limited than state sovereign immunity because it is a matter of federal common law and not a constitutional guarantee. Thus, it can be fairly argued that the scope of tribal sovereign immunity is more comparable to that enjoyed by the states and their respective officers and employees, than it is to the immunity enjoyed by the greater sovereign, the United States of America and its agencies and officers.

Grand Canyon Skywalk at 5 (D. Nev. Aug. 13, 2015).

After careful analysis, the *Skywalk* Court also held that "tribal sovereign

immunity does not bar enforcement of the deposition subpoena served" on tribal officers or employees. *Id.* at 7. Further, the Court held that it believes that the Ninth Circuit will adopt the view that tribal sovereign immunity does not bar enforcement of depositions subpoenas "with respect to subpoenas served on nonparty state and tribal officers and employees." *Id*.

In this connection, tribal sovereign immunity is no shield to subpoenas issued to non-party tribal officials in federal court actions. This view is further bolstered by the Court in *United States v. Juvenile Male 1,* which also concluded that "given an opportunity there is every likelihood that the United States Court of Appeals for the Ninth Circuit would revisit the issue" regarding the "extension of immunity beyond its purpose" which "was neither presented to nor considered by the court in James." *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012, 1018 (D. Ariz. 2006). In addition, the *Juvenile Male 1* Court provided that:

> immunity protects a tribe as an entity from unconsensual civil actions against it. The service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe. For example, the United States enjoys sovereign immunity from suit without its consent. And the states of the Union enjoy immunity from suit without their consent. But it can hardly be contended that federal or state sovereign immunity from suit has any application to the enforcement of a federal subpoena on the custodian of records of a state or federal agency. Federal subpoenas routinely issue to state and federal employees to produce official records or appear and testify in court and are fully enforceable despite any claim of immunity. *See, e.g., Exxon Shipping Co. v. United States Dep't of Interior,* 34 F.3d

> 774, 778 (9th Cir.1994). Even the President of the United States must comply with a federal subpoena. *United States v. Nixon,* 418 U.S. 683, 713, 94 S.Ct. 3090, 3110, 41 L.Ed.2d 1039 (1974). It would be strange indeed if a federal subpoena were operative against the greater sovereign and its officers but not the lesser. *See Cherokee Nation v. *1017 Southern Kan. Ry. Co.*, 135 U.S. 641, 656, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890).

United States v. Juvenile Male 1 at 1016-17.

A. The Cases On Which the Tribal Representatives Rely Miss the Mark.

Tribal Representatives rely heavily on two cases – *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012) and *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). However, *Grand Canyon Skywalk* carefully examined *Alltel* and *James* and ultimately found both cases inapplicable or unpersuasive.

In *Alltel,* the plaintiff in a civil action served an Indian Tribe with a federal *subpoena duces tecum*. The Eighth Circuit Court held that sovereign immunity barred a subpoena issued to the Tribe itself. In *dicta*, *Alltel* indicated that the same result might apply to tribal officials. *See Grand Canyon Skywalk at* 4. *Grand Canyon Skywalk* rejected the proposition that *Alltel* might or should extend to tribal representatives, explaining that in doing so would create an anomalous result where tribal officers would enjoy greater immunity than that enjoyed by federal or state agencies or officers. *Id.* Here, the individuals subpoenaed are Fort Belknap tribal officials and employees past and present, not the Fort Belknap Tribes. *Alltel*

is inapplicable here and the ruling in *Grand Canyon Skywalk* is directly on point.

In similar fashion, the *Grand Canyon Skywalk* Court examined and found *James* unpersuasive. Specifically, the Court distinguished *James* as a criminal prosecution rather than a civil matter. Of more significance, however, the Court noted that "*James* did not expressly address the enforceability of subpoenas served on individual tribal officers or employees in civil cases or the applicability of the *Ex Parte Young* doctrine in such instances". *Grand Canyon Skywalk* at 7. Again, *James* lacks applicability to the case at bar and the ruling in *Grand Canyon Skywalk* is directly on point.

B. The Ex Parte Young Doctrine Illustrates Why Tribal Representatives Must Comply With Federal Subpoenas.

As the *Skywalk* case indicates, tribal officials are not immune from federal subpoenas because, in part, of the principles embodied in *Ex Parte Young*. *Grand Canyon Skywalk* at 4. The *Ex Parte Young* rationale is an expression of a longstanding, legal fiction that arose at common law: officials of the sovereign are not immune where the sovereign itself may otherwise be. The most recent cases on the question whether tribal officials must comply with federal subpoenas (or participate in other federal court proceedings absent consent) reflect a growing understanding that *Ex Parte Young* principles apply with equal force to both state and tribal officials. *Id.* at 5. *See also Wadsworth v. Boysen*, 148 F. 771, 780 (8th

Cir. 1906). Furthermore, the "Non–Parties assertion that they must comply with the subpoenas in their official capacities as custodians of record is irrelevant; no judgment or other relief of any kind is sought against them in this litigation." *Grand Canyon Skywalk at 7* citing *Allen v. Woodford*, 544 F.Supp.2d at 1079.

C. Tribal Sovereign Immunity Does Not Protect Private Individuals or Those Whose Actions Are *Ultra Vires*.

The Motion to Quash ignores the principle that "individual capacity suits related to an officers official duties are generally permissible," and not barred by tribal sovereign immunity. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). With the case at bar, the evidence developed to date indicates that a combination of federal officials, tribal officials, and private individuals were involved in the road building at issue. Tribal officials may have acted in violation of federal funding agreements. To the extent that the tribal officials involved were acting in excess of their lawful authority, or *ultra vires*, sovereign immunity would not insulate their conduct from judicial scrutiny. While the tribal officials are not named defendants here, the rule should apply with equal force – where a tribal official is involved in *ultra vires* conduct beyond the scope of that official's lawful authority, sovereign immunity cannot serve as a basis to prevent discovery.

D. The Motion to Quash Ignores the Impact of Federal Contracting Terms on Sovereign Immunity.

In a federal tort claim case where an Indian Tribe is involved, additional considerations arise that effect the analysis of sovereign immunity. Where the facts at issue arise from a federal government contract, Congress has required Indian Tribes to maintain insurance and, to some extent, to indemnify the United States. *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir.1989). Where a federal tort claim implicates insurance coverage in this way, sovereign immunity will not defeat claims that trigger indemnity. *Id*. at 1346. The facts presented by the case at bar, which involve federal ERFO funds, and tribal officials that maintain insurance, are likely to fall within the rule. The discovery that Plaintiff seeks serves an important purpose in bringing the indemnity backdrop into focus. It is well-established that such insurance information is readily discoverable. Federal Rule of Civil Procedure 26(a)(1)(A)(iv); *see also Wright and Miller* §2010, Relevancy to the subject matter - Existence and Limits of Insurance, 8 Fed. Prac. & Proc. Civ. (3d. ed.).

E. The Tribal Representatives' Other Assertions Are Unpersuasive.

The Motion to Quash asserts that the subpoenas create an undue burden (Doc. #37 at p. 5) and that the information sought is privileged or protected (Doc. #37 at p. 6). Neither is persuasive.

1. The Subpoenas Do Not Create an Undue Burden.

Tribal Representatives bear the burden of proving that the subpoenas impose an undue burden. *See Wright and Miller,* §2459, Subpoena for the Production of Documents and Things - Quashing or Modifying a Subpoena, 9A Fed. Prac. & Proc. Civ. (3d ed.).

Tribal Representatives claim that responding to the subpoenas would require "days of searching" and that it would be "impossible" to conduct needed research within the ten (10) day period allotted in the subpoena (Doc. #37, pp. 3-4). These general assertions fail to meet the standard, which provides that "[a]n objecting party must state specifically how, despite the broad and liberal construction of the discovery rules, each question is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Voxpath RS* at 2.

The subpoenaed documents relate directly to the planning, engineering, and construction of the road way on Plaintiff's land and are not likely to be voluminous. In any event, "volume alone is not determinative in deciding whether a subpoena is unreasonable or oppressive" and generalized assertions of privilege are not adequate to quash the subpoena. *U.S. Department of the Treasury v. Pension Benefit Guaranty Corporation*, 301 F.R.D. 20, 21 (D.D.C. 2014) cited in

Wright and Miller, §2459, Subpoena for the Production of Documents and Things - Quashing or Modifying a Subpoena, 9A Fed. Prac. & Proc. Civ. (3d ed.).

The scope of the subpoenaed information is "precautionary rather than harassing" and stems from the Plaintiff's lack of knowledge of tribal records rather than any improper motive. *See Atlantic Coast Insulating Co. v. U.S.*, D.C.N.Y. 34 F.R.D. 450 (1964) cited in *Wright and Miller* §2459, Subpoena for the Production of Documents and Things - Quashing or Modifying a Subpoena, 9A Fed. Prac. & Proc. Civ. §2459 (3d ed.).

2. The Information Sought is Not Privileged or Protected.

The Tribal Representatives assert that the information sought is privileged or protected by sovereign immunity (Doc. #37, p. 6), an argument addressed above. As a general matter, Federal Rule of Civil Procedure 45(e)(2) provides that:

> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
> (i) expressly make the claim; and
> (ii) describe the nature of the withheld documents, communications or other tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

The Motion to Quash fails to meet the criteria provided by the rule. Broad assertions are insufficient. Tribal Representatives fail to describe the documents in a manner that allows this Court, or the parties, to assess the claim of privilege.

Furthermore, Plaintiff does not seek privileged or protected information. Rather, Plaintiff seeks information that is generally public in nature, including government funding applications and budgets, studies regarding feasibility, engineering, and environmental impacts, and related reports or audits. Furthermore, claiming privilege or protection is inconsistence with the Tribes' own laws. The Fort Belknap Corporate Charter, in its Section 9, Corporate Accounts, provides that the "officers of the Community shall maintain accurate and complete public accounts of the financial affairs of the Community. …" In addition, the books of the Secretary-Treasurer "… shall be open to inspection by members of the Community. …"

3. Mark Azure has Information that is Responsive to the Subpoena Duces Tecum.

The Tribal Representatives assert that Mark Azure has "no documents in his immediate possession" that respond to information sought (Doc. #37, p. 10). They similarly assert that the Fort Belknap Community Council's Secretary/Treasurer is "normally identified as the office responsible for Tribal records" in the Council's Constitution and By-Laws. *Id.*

However, the Fort Belknap Constitution in its Article IV, Section 4, provides that ". . . the Secretary-Treasurer shall serve at the pleasure of the President." In addition, the Fort Belknap By-Laws, in its Article 1, Section 1, provides that the

Chairman shall ". . . direct the work of [the Council's] officers" which includes the work of the Secretary/Treasurer.

In light of the above, it is disingenuous for the tribal representatives to assert that Mr. Azure is unable to comply with the Subpoena Duces Tecum because he does not have information sought in his "immediate possession." (Doc. No. 37, p. 10). More accurately, Mr. Azure, as the current Community Council President/Chairman, is empowered by the Fort Belknap Constitution and By-Laws to direct the Secretary/Treasurer to produce documents pursuant to the *Subpoena Duces Tecum* and on behalf of past and present employees of the Fort Belknap Tribes.

CONCLUSION

Tribal sovereign immunity is no bar to federal subpoenas issued to tribal officials or employees, particularly when, as here, federal contracting terms or statutes have likely waived or otherwise limited the immunity doctrine and when actions by the officials involved may be *ultra vires*.

Respectfully submitted this 14th day of September, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,669 words, excluding the caption and certificates of compliance and service.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiff's Brief In Opposition to Motion to Quash and Supplement to Motion to Compel was served upon the following by the methods indicated below on the 14th day of September, 2015:

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