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Community Council/Mark Azure, President
& non-party Recipients of Subpoenas

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

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

REPLY BRIEF IN SUPPORT OF FORT BELKNAP INDIAN COMMUNITY COUNCIL'S AND THEIR OFFICIALS' AND EMPLOYEES' MOTION TO QUASH SUPBOENAS

The Fort Belknap Community Indian 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 Brief in Support of their Motion to Quash and respectfully submit this Reply Brief in Support of their Motion to Quash Subpoenas.

ARGUMENT AND AUTHORITIES

I. The Motion to Quash was timely and meritorious.

Plaintiff argues that the Council's objection to all contested subpoenas should be waived because counsel has delayed and obstructed the deposition subpoenas. Yet, Federal Rule of Civil Procedure 45(d)(3)(B) provides that an objection to produce documents or tangible things "must be served before the earlier of the time specified for compliance or the 14 days after the subpoena is served." As acknowledged by Plaintiff, the deposition subpoenas, which also commanded the production of documents, were served on August 21, 2015 and August 24, 2015. Plaintiff's counsel was notified immediately, on August 21, 2015 that a Motion to Quash would be filed on behalf of those subpoenaed. The Council then filed the Motion, with supporting arguments within 10 days of the August 21 subpoenas, within 7 days of the August 24 subpoenas, and before September 1-3, 2015, the time specified for compliance. Thus, Plaintiff's argument that the Council's timely objection should be waived is not persuasive. Plaintiff chose to give very short notice of the depositions, in spite of knowing that they would be contested. A lengthier lead time would have allowed the substantial issues present to be addressed before travel or related issues arose.

As to the subpoena duces tecum directed towards Mark Azure, President of the Council, he had no documentation as requested, within his personal possession. Mr. Azure is not the record-keeper for the Council. The Secretary-Treasurer of the Council is responsible for that role, as is defined in the Constitution and By-laws of the Council, documents which have been approved in their language and adoption by the United States.[1]

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[1] In the Tribal Council's Constitutional By-laws, Article I, SECTION 3, it is provided: SECRETARY-TREASURER: The Secretary-Treasurer shall conduct the correspondence of the Community Council, ***shall keep all records***, minutes of

When Mark Azure was sworn in as the President of the Council in November, 2013, he swore an oath to uphold the laws of the Fort Belknap Indian Community. The Council has not waived its sovereign immunity in this instance to release documentation from its files and archives. It has not authorized the President or anyone to respond to a subpoena which would involve searching Council offices and/or files to produce documentation demanded by the plaintiff in this instance. To ignore the Council's sovereign immunity and search through records stored in Tribal offices, producing those records to others, would violate the Council's assertion of its sovereign immunity and place Mark Azure in jeopardy of impeachment.

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meetings, roster of members, records as to expenditures and allotments of tribal, gratuitous, or other funds over which the council has sole charge. He shall keep an accurate record of all members of the Community, prepare necessary resolutions for appropriate action by the council; he shall prepare or cause to be prepared by such assistants as are assigned to him by the Chairman, such reports or registers as the Chairman or council may direct. He shall be required to give bond acceptable to the Community and the Commissioner of Indian Affairs. (Emphasis added)

And See: ARTICLE VI - ADOPTION
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This constitution and bylaws, when ratified by a majority vote of the qualified voters of the Fort Belknap Indian Community voting at a special election called for the purpose by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote in such election, shall be submitted to the Secretary of the Interior, and, if approved, shall be effective from the date of approval.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS, FIELD SERVICE
FT. BELKNAP INDIAN AGENCY
HARLEM, MONT. OCT. 21, 1935

CERTIFICATE OF ADOPTION
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Pursuant to an order, approved September 25, 1935, by the Secretary of the Interior, the attached constitution and bylaws were submitted for ratification to the members of the Fort Belknap Indian Community of the Fort Belknap Indian Agency, Harlem, Montana, and were on October 19, 1935, duly adopted by a majority vote of the members of said voting in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (Pub. No. 147, 74th Cong.)

Plaintiff is simply mistaken if she believes that Mark Azure has failed to produce documentation in his personal possession responsive to her subpoena duces tecum. He came into office after plaintiff's alleged claims arose. As an official of the Council, he did not have the authority to expend Tribal resources to effect a search into Tribal offices contrary to the established position of the Tribal Council.

Sovereign immunity goes to the jurisdiction of the court to hear a case. *California ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 (9th Cir. 1979). Because sovereign immunity is a jurisdictional bar absent a waiver, a claim of sovereign immunity is basically a claim for lack of subject matter jurisdiction. *McCarthy v. United States*, 850 F. 2d 558, 560 (9th Cir. 1988). As a matter of black letter law, subject matter jurisdiction can be raised at any time.

This court should deny plaintiff's request for contempt and/or sanctions in any manner against Mark Azure or any of the deponents, and quash the subpoenas for the reasons stated.

II. Tribal sovereign immunity bars the third-party subpoenas issued in this case.

A. Application of the tribal sovereign immunity doctrine to tribal officials remains the precedent in the Ninth Circuit.

The Ninth Circuit, when faced with the question of whether Tribal sovereign immunity barred a federal subpoena to compel Tribal officials and delivery of Tribal documentation in a federal proceeding, answered clearly that such a subpoena was barred. *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) Though the District Court for Nevada in *Grand Canyon Skywalk Dev. LLC v. Cieslak*, 2015 WL 4773585 (D. Nev. Aug. 13, 2015) and the District Court for Arizona in *United States v. Juvenile Male I*, 431 F. Supp. 1012, 1018 (D. Ariz. 2006) speculate

that the Ninth Circuit may change its current stance on the issue of tribal immunity and its application to nonparty tribal officials, as of the filing of this Brief, it has not done so.

Plaintiff contends that the tribal immunity argument lacks merit, but the holding in *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) remains controlling precedent on tribal immunity in the Ninth Circuit. The Eighth Circuit has also more recently affirmed the doctrine of tribal sovereign immunity. *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). The Tenth Circuit has also recently affirmed the doctrine of tribal sovereign immunity when it reversed a district court's denial of a Tribe's Motion to Quash subpoenas. *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1162 (2014) (Although, the 10th Circuit, observed that it did not reach the issue of whether that immunity extended to Tribal officials)

In *James*, the defendant served the *subpoena duces tecum* on the Director of the Nation's Social Services Department. *James*, *supra*, at 1319. The Court found that the Nation had not waived its sovereign immunity as to its Social and Health Services documents, and thus, tribal immunity barred the disclosure of the documents. *Id.* at 1320.

In ignoring *James,* this is exactly what plaintiff seeks to do in this instance. Plaintiff seeks to compel Tribal employees to appear and testify about functions within their capacities as Tribal employees. Documentation sought comes from Tribal records, not personal records.

Similarly, the Eighth Circuit in *Alltel* reversed the district court's denial of a motion to quash subpoenas served on the Tribe and a tribal administrator. *Alltel*, 675 F.3d at 1106. While *James* is criticized by other courts for not considering the Sixth Amendment rights of the defendant, as the district court did in *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012 (D. Ariz. 2006), plaintiff suggests no constitutional rights are implicated to weigh against tribal sovereign immunity in the present civil matter. *Alltell* reviewed all of the various arguments

offered by the various arguments offered by plaintiff in this case, and still overturned the district court in sustaining tribal sovereign immunity as a bar to federal subpoenas.

B. The subpoenas served on tribal officials and tribal employees constitute a suit against the Tribes and, as such, are barred by tribal immunity.

Although not congruent to that of states and the federal government, "tribes have long been recognized as possessing the same common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L. Ed. 2d 106 (1978). (The courts have noted that Tribal sovereign immunity is subject to modification or waiver by Congress)

As to federal employees, case law is contrary to that suggested by plaintiff. The nature of a "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 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).

Similarly, tribal immunity extends to tribal officials and tribal employees acting in their official capacity and within the scope of their authority. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Compelling tribal officials and tribal employees to search for relevant records, provide those records to Plaintiff, then testify as to those records is essentially "interfer[ence] with the public administration" of the Tribes' and compel[ling] the [tribal government] to act." *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). The principles motivating immunizing tribal officials and tribal employees from suit are the

protection of an Indian Tribe's treasury and preventing a plaintiff from bypassing tribal immunity by naming a tribal official or employee. *Cook, supra* at 727.

Ex Parte Young principles, as offered by plaintiff applies to prospective relief, seeking an conduct in the future. It is inapplicable in this instance, as the subpoenas of the plaintiff seek action now, including the expenditure of significant tribal resources. The subpoenas of plaintiff impact the Tribal treasury now, and therefore should be covered by sovereign immunity.

Plaintiff has cited no basis for the speculation that tribal officials may have acted *ultra vires.* This unsupported claim is insufficient to overcome the tribal officials' and employees' sovereign immunity. They have no privity of contract to assert a claim on how contracted tribal funds were expended.

Plaintiff seeks to extrapolate the terms of certain contracts entered into under the Indian Self-Determination and Education Assistance Act (ISDEAA) which may require a waiver or abrogation of tribal sovereign immunity. *Evans v. McKay*, 869 F. 2d 1341, 1345 (9th Cir. 1989); 25 U.S.C. § 450f(c). However, that provision of law offers no assistance in this instance, as plaintiff is not privy to any contract or waiver with the Council, and the funding identified by plaintiff here is not under the ISDEAA, but rather a grant of ERFO funding from the Federal Highway Administration. The argument that sovereign immunity is impacted by federal contracting terms is unsupported and unpersuasive.

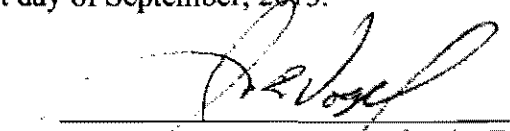
As discussed in support of the original Motion to Quash, because of the broad nature of each of the subpoenas served, the records to be explored and researched are many and the time and cost involved is substantial. It is was anticipated that it would take more than ten days to research tribal records. That is the specifics of the subpoena served.

Plaintiff is skeptical about this assertion. However, what plaintiff describes as her goal in their briefing is different than the broad nature of their subpoena. With changes in Tribal administration and staff over the course of the decades (no time frame is defined in portions of the subpoena) a large effort would have to be undertaken to comply with the subpoenas served. Multiple tribal departments and offices are involved. Record keeping is not always the best for outdated files. It is anticipated that more than 50,000 emails would have to be searched, if they could be accessed. While not all would pertain to this proceeding, if any, to comply, searches would have to be made to demonstrate compliance. These expenses and the impact on the Tribal treasury are why sovereign immunity should apply in instances like this.

CONCLUSION

For the reasons stated herein, this court should rely on established precedent in this and neighboring Circuits, and quash the subpoenas at issue in this cause, as barred by the doctrine of Tribal Sovereign Immunity. Further, this court should deny the action requested by plaintiff to compel Tribal employees to respond to subpoenas disclosing Tribal records and information and/or to impose sanctions against Tribal officials or employees in this cause.

Respectfully submitted this 21st day of September, 2015.



James L. Vogel, Attorney for the Fort Belknap Indian Community Council & the named deponents, officials and employees of the Council

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 21st day of September 2015.

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