

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

TERRYL T. MATT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CV 15-28-GF-BMM

ORDER

I. BACKGROUND

Plaintiff Terryl Matt (Matt) filed a Motion to Compel Mark Azure, President of the Fort Belknap Tribal Community Council of the Fort Belknap Reservation, to produce subpoenaed documents pursuant to Rule 37 of the Federal Rules of Civil Procedure and to hold Azure in contempt of court pursuant to Rule 45 of the Federal Rules of Civil Procedure (Doc. 26 at 1.) Azure refused to comply with Plaintiff's Subpoena *Duces Tecum* on the grounds of "tribal sovereign immunity." *Id.* at 2.

The Subpoena requests documents regarding road construction, maintenance, and related activities on Plaintiff's land, rights-of-way or other permissions to enter onto or cross Plaintiff's land, applications for federal funding

related to projects on Plaintiff's land, and establishment and maintenance of a road designated as BIA Route 113 that may cross Plaintiff's land. *Id.* at 2. Azure, along with employees, officials, and officers of the Fort Belknap Indian Community Council (Council), filed a Motion to Squash the Subpoenas on August 31, 2015, on the grounds of tribal sovereign immunity. (Doc. 36.) Matt opposed the motion (Doc. 40.)

II. DISCUSSION

A. Tribal Sovereign Immunity

Indian tribes have been recognized as being immune from suit in both state and federal court unless "Congress has authorized suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The Ninth Circuit determined in *U.S. v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), that tribal sovereign immunity barred enforcement of a subpoena issued against a tribe. In *James*, the Director of Social Service of the Quinault Indian Nation received a subpoena and an order to produce documents. *Id.* James, the defendant who had been convicted of rape charges on an Indian Reservation, sought records related to the victim's alleged alcohol and drug use. *Id.* James argued that the tribal immunity did not protect the tribe from complying with the subpoena. *Id.* The district court disagreed and quashed the subpoena based on tribal sovereign immunity. *Id.*

The Ninth Circuit determined that tribal sovereign immunity protected the tribe. The Court noted that “the mere fact that a statute . . . grants jurisdiction to a federal court does not automatically abrogate the Indian tribe’s sovereign immunity.” *Id.* The court went on to determine, however, that the tribe partially had waived immunity when it provided the Government with other documents relevant to the case. *Id.* at 1319-1320.

District courts within the Ninth Circuit have applied *James* in a limited context. *U.S. v. Juv. Male 1*, 431 F. Supp. 2d 1012, 1013 (D. Ariz. 2006). A district court in Arizona addressed whether tribal immunity protected tribes from subpoena power in *Juvenile Male 1*. The court determined that “service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe.” *Id.* at 1016. The court distinguished the facts from *James*. The defendant in *James* had raised no constitutional challenges; the defendant in *Juvenile Male 1* had raised Sixth Amendment right challenges. *Id.* at 1017-19. The district court ultimately concluded that the Sixth Amendment rights of criminal defendants and Congress’s grant of federal jurisdiction through the Major Crimes Act outweighed the tribe’s claim of sovereign immunity. *Id.* at 1017-18.

The Eighth Circuit has taken a different approach to enforcement of subpoenas against non-party tribal custodians. *Alltel Comm., LLC v. Dejordy*, 675 F.3d 1100 (8th Cir. 2012). A party to a civil lawsuit in federal court served tribal

administrators of the Oglala Sioux Tribe with subpoenas *duces tecum*. *Id.* at 1101. The tribal administrators filed a motion to quash the subpoenas based on tribal sovereign immunity. *Id.* The Eighth Circuit agreed that a third-party subpoena in private civil litigation constitutes a “suit” for purposes of the Tribe’s common law sovereign immunity. *Id.* The Court recognized that the Eleventh Amendment provides instruction on tribal sovereign immunity. The Court concluded, however, that tribal sovereign immunity is not congruent to that of federal or state immunity. *Id.* at 1104. As a result, the Court reversed the district court’s order that had denied the tribe’s motion to quash on the basis of tribal sovereign immunity. *Id.* at 1106.

The United States Supreme Court acknowledged in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980), that it has divested tribal powers in cases “where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.” For example, courts have been reluctant to apply *James* to instances where a criminal defendant has raised constitutional issues. *Juv. Male 1*, 431 F. Supp. 2d at 1013. This overriding interest of the National Government further supports enforcement of service of a subpoena in Indian Country pursuant to Federal Rule of Civil Procedure 17(e)(1). A court faced with enforcement of a grand jury subpoena in Indian Country must balance the interests of the United States in enforcing the Major Crimes Act, coupled with a criminal defendant’s constitutional

rights of due process and a fair trial, against the tribe's interest. *U.S. v. Verlarde*, 40 F. Supp. 2d 1314, 1315 (D.N.M. 1999). The Eighth Circuit in *In re Long Visitor*, 523 F.2d 443, 446-47 (8th Cir. 1975), determined that the United States's interest in enforcement of the Major Crimes Act proved sufficient to override a tribe's claim of sovereign immunity in the face of service in Indian Country of a grand jury subpoena issued pursuant to Federal Rule of Criminal Procedure 17(e)(1).

The presence of this overriding interest of the National Government exception would not be available in the present case due to its civil nature. Federal courts may have discretion not to apply tribal sovereign immunity in instances where more important federal interests exist, such as the Sixth Amendment rights of criminal defendants, or enforcement of the Major Crimes Act. In civil litigation, however, where a party serves a subpoena upon a non-party, no other competing interest exists other than the general benefits of discovery. *Alltel*, 675 F.3d at 1105. Under these facts, *James* represents controlling precedent that entitles the Council to sovereign immunity.

The Court hesitates to apply this conclusion as Matt's complaint alleges, and testimony at the hearing indicates, that individual tribal officials may have at least an indirect interest in the outcome of the litigation. In fact, the testimony at the hearing revealed that the Council has sought to defeat Matt's claim against the

Council in tribal court through a belated assertion of tribal sovereign immunity regarding a stipulated agreement between the parties to engage in discovery. The Council's assertion of tribal sovereign immunity has undermined the stipulated agreement and halted discovery in tribal court in its tracks.

These machinations take place beyond the scope of the Court's authority in this case. The Court simply must decide whether the Council's assertion of tribal sovereign immunity outweighs the parties' interest in access to these documents. The absence of a substantial federal interest, as explained in *James* and *Alltell*, leads this Court to conclude that it does. The Court cautions, however, that the short-term gain won by the Council's assertion of tribal sovereign immunity may pale in comparison to the Council's long-term loss as the rule of law cannot long survive in an atmosphere where assertion of tribal sovereign immunity remains subject to political manipulation for the benefit of individual tribal leaders.

B. Tribal officials

Matt has argued that tribal sovereignty does not extend to bar enforcement of a subpoena served on *tribal officers or employees*. (Doc. 40-1 at 9.) The viability of Matt's argument turns, in large part, on two factors: (1) whether Matt has served the subpoena against Mark Azure in his official or personal capacity, and (2) whether the remedy would operate against the Tribe. *See Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013).

Much of the testimony presented at the hearing centered on the cost to the Tribe in responding to the subpoena request. Federal Rules of Civil Procedure 45(c)(1), could be employed to minimize or eliminate these costs. The rule contemplates that any unusable or unreasonable costs to the Council to comply with the subpoena may be imposed on Matt. The Court focuses instead on the protection that tribal sovereign immunity affords to a tribe and its officers acting in their official capacities.

Tribal sovereign immunity extends to tribal officials sued in their official capacity. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Tribal sovereign immunity fails to bar individual capacity suits against tribal employees when the plaintiff seeks damages from the individuals personally. *Maxwell*, 708 F.3d at 1087-90. This exception applies even if the plaintiff's claims involve actions that employees allegedly took in their official capacities within the scope of their employment. *Id.*

The analysis focuses on the remedy sought. Tribal sovereign immunity bars suits due to the fact that recovery would operate against the tribe. *Id.* at 1088. Courts should focus on the essential nature and effect of the relief sought and evaluate whether “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or compel it to act.” *Id.*

An intoxicated tribal casino employee operating a motor vehicle struck and injured the plaintiff in *Cook*. The casino employee had been served alcohol at a casino function by other casino employees. *Cook*, 548 F.3d at 721. The plaintiff sued the casino and other casino employees in their official capacity to establish vicarious liability against the tribe. *Id.* at 720. The Ninth Circuit determined that the tribe represented the “real, substantial party in interest and [was] entitled to invoke sovereign immunity.” *Id.* The Court precluded plaintiffs from “circumvent[ing] tribal immunity through a mere pleading device.” *Id.* (internal quotations omitted.)

A tribe disenrolled members after the tribe implemented amended tribal enrollment regulations in *Allen v. Smith*, 2013 WL 950735 (S.D. Cal.). The disenrolled members brought an action against individual tribal officials seeking monetary damages and declaratory and injunctive relief. *Allen*, *1. Specifically, the members sought reinstatement to the Tribe. *Id.* at *11. The court employed the remedy-focused analysis of *Maxwell* and determined that only affirmative action of the Tribe could satisfy the relief sought. *Id.* at *12. Tribal sovereign immunity applied and the case was dismissed. *Id.* at *13.

Matt directs the subpoena to Azure in his capacity as the President of the Fort Belknap Tribes, and as the custodian of the requested records (Doc. 26 at 3.) The subpoena itself provides no clarity on whether Matt served Azure in his

individual or official capacity. Matt has asserted, however, that Azure's official capacity as current Community Council President empowers him "to direct the Secretary/Treasurer to produce documents pursuant to the Subpoena *Duces Tecum*." (Doc. 40-1 at 17.) Given that assertion, it appears Matt served Azure in his official capacity as Community Council President.

Matt seeks documents in the possession of the Fort Belknap Community Council. (Doc. 26-1 at 2.) In order to satisfy Matt's request, Council would be required to take affirmative action to produce tribal documents. (Doc. 37 at 3.) If the Court granted Matt's request the judgment would "interfere with public administration" of the tribe and would "compel [the sovereign] to act." *Maxwell*, 708 F.3d at 1087-90. The recovery sought in this case would operate against the tribe. Matt should not be allowed to "circumvent tribal immunity" by addressing the Subpoena *Duces Tecum* to Mark Azure instead of to the tribe.

IT IS ORDERED that Matt's Motion to Compel (Doc. 26) is DENIED and the Council's Motion to Quash (Doc. 36) is GRANTED.

DATED this 6th day of October.



Brian Morris
United States District Court Judge