Jeffrey S. Rasmussen, *Pro Hac Vice Admission*
FREDERICKS PEEBLES & MORGAN, LLP
1900 Plaza Drive
Louisville, CO 80027
Phone: 303-673-9600
Facsimile: 303-673-955
E-Mail: jrasmussen@ndnlaw.com

J. Preston Stieff
J. PRESTON STIEFF LAW OFFICES
110 South Regent Street, Suite 200
Salt Lake City, UT 84111
Phone: 801-366-6002
E-Mail: jps@stiefflaw.com

Counsel for Plaintiff and Third-Party Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

VERONICA M. WOPSOCK, Plaintiff, v. DEREK DALTON, in his individual and official capacity; TRAVIS MITCHELL, in his individual capacity and as the Duchesne County Sheriff, and DUCHESNE COUNTY, UTAH, Defendants.	Civil No. 2:12-cv-0570-RJS Judge Robert J. Shelby Magistrate Judge Evelyn J. Furse
DEREK DALTON, Counterclaim and Third-Party Plaintiff, v. VERONICA M. WOPSOCK, Counterclaim Defendant	

PLAINTIFF AND SUBPOENAED DEPONENTS' REPLY IN SUPPORT OF MOTION TO QUASH DEPOSITION NOTICES AND SUBPOENAS

Movants' motion to quash establishes multiple independent grounds for quashing the subpoenas to the Tribe and its officers. While Defendants attempt to dispute some of those reasons, they virtually confirm Movant's arguments on some grounds and Defendants do not provide any

cogent responsive argument on other grounds. It does not matter whether there are ten reasons, five, or only one reason for preventing Defendants' continuation of their harassment of the Tribe. The motion to quash must be granted.

The overarching theme of Defendants' argument is their demeaning characterization of tribes and tribal members. As they have done since the start of this case, they make up allegations against the Tribe, which appear to be based upon pure, unadulterated bias. They claim that the Tribe, its members, and its agents' including the Tribe's governing body and its attorneys, are immoral and corrupt and therefore this Court should violate the very core principles of federal law and hold that tribes are not governments. Fortunately, Defendants' view of Indians no longer inform federal courts or Congress. Tribes are governments, tribal nations are people with fundamental rights of self-determination, and Defendants' attempt to impose their decidedly idiosyncratic view of tribes must be soundly rejected.

I. THE SUBPOENAS MUST BE QUASHED BASED UPON THE TRIBE'S SOVEREIGN IMMUNITY FROM SUIT.

A. THE 30(B)(6) DEPOSITION NOTICE MUST BE QUASHED.

In *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10th Cir. 2014), the United States Court of Appeals for the Tenth Circuit held that a subpoena to a tribe is a "suit" as that term is used in tribal sovereign immunity analysis, and that therefore the subpoena must be quashed unless either: 1) the Tribe clearly and expressly waived immunity, or 2) Congress clearly and expressly created an exception to tribal immunity. That holding plainly applies here. Defendants have provided no argument to the contrary. Their only response is a note that subpoenas and subpoenas duces tecum are different. But under the rationale in *Bonnet*, that is a distinction without a difference. Under *Bonnet*, the subpoena to the Tribe must be quashed.

B. THE SUBPOENAS TO THE TRIBE'S OFFICERS MUST BE QUASHED.

Bonnet contains unnuanced dicta, based upon a concurring opinion in a case that did not even involve tribes, that tribal officers are not, per se, protected by sovereign immunity in the same way that tribes are. But that dicta does not defeat the substantial case law discussed by Movants regarding when a "suit" against a tribal officer requires a waiver of sovereign immunity. Under those cases, either the Tribe must have clearly and expressly waived immunity, or Congress must have clearly and expressly created an exception to tribal immunity. Defendants are solely seeking information which the Tribal Officers gained in their positions as elected executive/legislative Business Committee members, Defendants cannot point to any federally-created exception, nor can they point to any tribal waiver, and the subpoenas to the Tribe's officers therefore must be quashed.

II. DEFENDANTS DID NOT LAWFULLY SERVE THE TRIBE.

A. DEFENDANTS DID NOT SERVE THE TRIBE IN THE MANNER REQUIRED BY LAW.

In its brief in support of its motion to dismiss, Movants showed that if Federal Rule of Civil Procedure (FRCP) 4 does not provide the method for serving an Indian Tribe, then service must be by the only law which does provide a method—the Tribe's own laws. Defendants wisely chose not to dispute that premise to Movants' argument. Defendants also do not dispute that the Tribe has previously informed Defendants of the tribal law regarding service on the Tribe, and do not dispute that they failed to serve in the manner required by that applicable tribal law. This Court therefore can limit its consideration to that specific factual context.

Defendants' sole response is a vague, offensive assertion that tribes come within the scope of FRCP 4(h). Defendants are simply wrong. FRCP 4(h) lists several well-known types of organizations. Tribes plainly, simply, do not fit within any of those categories.

The existing hole in FRCP 4 should be fixed, but until/unless it is, the only law defining how to serve the Ute Tribe is the Tribe's own law. Under that law, the Tribe requires service on two Business Committee members from each of the Tribe's three separate bands. Defendants, having been made aware of that law, chose not to serve consistent with it, and their attempt to impose their own demeaning view of tribes on the federal courts must be rejected.

B. THIS COURT SHOULD NOT PERMIT ITS PROCESS TO BE SERVED DURING KNOWING AND INTENTIONAL TRESPASS.

In its opening brief, Movants discussed why this Court should not allow its process to be validly served during intentional trespasses.

Defendants did not contest that argument, and therefore this Court should quash the subpoenas on this uncontested basis.

III. THE DEPOSITION SUBPOENAS MUST BE QUASHED BECAUSE DEFENDANTS ARE SOLELY SEEKING PRIVILEGED COMMUNICATIONS.

Defendants are seeking to depose the Ute Tribe's Legislative/Executive officers regarding their communications in their official capacity. Even if sovereign immunity did not apply to those communications, all of those communications are privileged.

Ms. Wopsock has more thoroughly briefed this issue in her long-pending, still undecided, motion to dismiss Dalton's unsupported claims of defamation and intentional infliction of emotional distress. As discussed in that briefing, and as summarized below: 1) the Tribe's laws define the privilege; 2) like other jurisdictions, the Tribe provides a privilege for the communication. *E.g.*, Dkt. 40 (filed January 9, 2013).

A. THE TRIBE'S LAWS DEFINE THE SCOPE OF THE LEGISLATIVE AND EXECUTIVE PRIVILEGES HELD BY TRIBAL BUSINESS COMMITTEE MEMBERS AND THEIR CONSTITUENTS.

Defendants claim, contrary to the core principles of federal Indian law, and without citing any case or providing any legal analysis, that the privilege applicable between a tribal legislator

and a constituent are controlled by substantive federal law or by Utah law. While the communications here at issue would be privileged whether under state, federal or tribal law, Movants note that the privilege is controlled by Ute law. As with many of their other arguments, Defendants' argument appears to be premised upon their demeaning view of Indians and tribes, and their relentless refusal to accept that tribes are governments with the right to make their own laws applicable to tribal lands. *E.g.*, *Ute Indian Tribe v. State of Utah*, 790 F.3d, 1000 (10th Cir. 2015) (Judge Gorsuch, writing for a unanimous court, soundly criticized the State of Utah, Duchesne, Wasatch, and Uintah counties, and their attorneys (which includes Duchesne County's attorney in this matter), for refusing to accept and abide by federal court decisions recognizing the Tribe's sovereign authority within the Tribe's own lands).

For their incorrect and counterintuitive assertion that the law of the jurisdiction which is perpetually trying to harm the Ute Indian Tribe gets to determine whether communications between the Tribe's governing body and its members are privileged, Defendants make a bare citation to Federal Rule of Evidence 501, without any explanation whatsoever. And for good reason. ER 501 actually states that privilege is governed by the United States Constitution, federal statutes and then federal common law or the law of the state when the state law supplies the rule of decision for a claim or defense.

Under every single one of these possible sources of law, the Tribe's law of privilege is binding on this Court. As movants have discussed throughout this case, federal law[1] directs that the Tribe's laws apply to these on-Reservation issues. As the United States Supreme Court has

1 Reasonable attorneys might be able to debate whether the applicable federal case law stems from the United States constitution, Art. I, §8, cl. 3, federal common law, or other sources of law binding on the federal courts. We need not have that debate here, because regardless of the source, the law protecting the tribal privilege is shown by federal case law.

repeatedly held, tribes retain the sovereign right to make their own laws applicable to their own reservations. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976).

There is perhaps nothing nearer the core of that right than the authority of the Tribe to define the relationship between its governing body and their constituents and the inner workings of its government.

Additionally, independently, and redundantly, Tribal privilege would apply because the substantive law defining whether a tribal member committed a tort on the Tribe's Reservation is the Tribe's own laws. This issue has been fully briefed to this Court in the long-pending motion to dismiss. State substantive law does not apply, *e.g.*, Utah Enabling Act of 1894 (28 Stats. 107), and therefore even if the Constitution, federal statutes or federal common law did not recognize tribal authority to define the privilege between its legislative/executive officers and constituents, tribal law of privilege would apply.

B. THE TRIBE'S BUSINESS COMMITTEE MEMBERS HAVE AN ABSOLUTE PRIVILEGE NOT TO TESTIFY REGARDING GOVERNMENTAL COMMUNICATIONS WITH THEIR CONSTITUENTS.

As with other governments, the Ute Tribe provides a privilege for communications between a constituent and a legislator. Federal common law provides a similar privilege to all legislators. *E.g. Florida v. United States*, 886 F. Supp. 2d 1301 (N.D. Fla 2012) (denying motion to compel deposition of Florida state legislators, stating that the depositions were relevant to the voting rights issues in the case, but holding that the legislators and their staff members had a privilege not to testify regarding their legislative functions); *Restatement (Second) of Torts*, §§590, 590A. Coincidentally, one of the most detailed discussions of the rule comes from a recent Utah Supreme Court case, *Riddle v. Perry*, 40 P.3d 1128 (Utah 2002). *Riddle* stemmed from a statement made to a Utah legislative committee. Neither Riddle nor Perry were legislators, but both were attorneys with professional interest in a debt collection bill. When the floor was opened to public comment

on the bill, Perry "made a statement to the committee that implied that Mr. Riddle had bribed the legislator who sponsored the bill." *Id.* at 1131. The Utah Supreme Court held that Riddle's statement was absolutely privileged. In dismissing Riddle's claims, the Utah Supreme Court provides one of the better discussions of the policy underlying the absolute privilege for legislative proceedings:

> Citizen participation in legislative proceedings is absolutely vital to ensure a fully-informed and representative legislature. When acting in the narrow role of being a participant in a legislative committee hearing, a citizen should be able to freely address the committee. We endorse the rationale that in order for a democratic government to govern democratically, it is necessary that an atmosphere be created whereby facts may be freely presented to the governing legislative body. Without such a free-speaking environment, individuals might be discouraged from addressing their government. An individual must feel unrestrained by potential defamation liability when addressing the legislature. Only then can the lawmaking process be fully informed and operate with maximum effectiveness.

Id. at 1132.

Defendants' argument says more about their anti-Indian bias than about any other subject, and shows the continuing truth of the United States Supreme Court's statement that Indian tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Ute law controls. Under that law, the communications are privileged.

IV. THE DEPOSITIONS ARE UNDULY BURDENSOME.

Defendants claim to be seeking two pieces of information in their ongoing harassment of the Tribe and its officers. First they claim they should be able to discover whether the Tribe is providing any funding for Ms. Wopsock's lawsuit; and second they assert that communications between Ms. Wopsock and tribal legislators would be defamation. Their silly argument for setting

four depositions for these two immaterial or privileged issues actually illustrates why their subpoenas should be quashed as unduly burdensome

A. WHETHER THE TRIBE IS PROVIDING FUNDING IS IMMATERIAL AND PRIVILEGED.

As Movants discussed in their opening brief, facts regarding whether the Tribe is providing any funding regarding the current lawsuit is immaterial and privileged. Incredibly, Defendants' only response is to assert that the information is relevant because: "it would be evidence that Ronald Wopsock, Irene Cuch, and Stewart Pike are behind this lawsuit because of their having been sued by Dalton." Resp. at 13.

That sole claim of relevance is frivolous, and this Court should, again, remind Defendants to stay within the bounds of non-frivolous arguments. First, Defendants' sole claimed basis of relevance illustrates that Defendants are not seeking the discovery related to this case, but related to their dismissed third party claims. Defendants' despicable, fabricated conjecture regarding the motivation of tribal elected officers is simply immaterial to this suit. Ronald Wopsock, Irene Cuch, and Stewart Pike are NOT parties to this suit. Second, as this Court has previously noted, even if the Tribe were providing some funding (which is neither admitted nor denied) there is simply nothing wrong with that. The Tribe would be well within its authority to decide to expend tribal funds to hold Dalton and/or the County accountable for Dalton's actions.[2] Third, any information regarding the Tribe's decision-making is within the core of attorney client privilege or work product, and is protected by legislative privilege and sovereign immunity. Defendants' claim that those privileges only apply to "tangible objects," Resp. at 14, is frivolous. Fourth, Defendants

2 While Dalton's attorney repeatedly claims that there was no sexual assault, Ms. Wopsock vigorously disagrees. The videotape shows the sexual assault. It shows Dalton touching Ms. Wopsock's buttocks, without consent. It shows him then reaching around to her front side and touching her again.

themselves know that their prior fabricated conjecture is false, i.e. by now their claim is not merely conjecture but the perpetration of a falsity on this Court.

B. ANY COMMUNICATION BETWEEN MS. WOPSOCK AND UTE OFFICERS REGARDING THIS LAWSUIT IS IMMATERIAL AND PRIVILEGED.

Defendants makes the conclusory assertion that if Ms. Wopsock discussed Dalton's actions with Business Committee members at the Tribe's government center, that would be defamation against Dalton. There are numerous flaws with Defendant's conclusory assertion. First, it is directly contrary to Dalton's prior assertion that his defamation claim is based upon "overt acts" off the Reservation and his assertion, in his own recent deposition,[3] that his claim of defamation is based upon media reports regarding this lawsuit. As one would expect given that the media knows not to commit libel, every single statement cited by Dalton was prefaced with "the complaint alleges" or a similar qualifier. Dalton was adamant that these reports of the allegations in the complaint were defamatory, though of course he is wrong. Pleadings and reports based upon allegations in pleadings are absolutely privileged. This issue is fully briefed in the pending motion to dismiss. Second, Dalton has not stated a lawful claim for defamation or intentional infliction of emotional distress, as discussed in Ms. Wopsock's fully briefed motion to dismiss. Dalton needed to bring any claim for on-Reservation defamation under the Tribe's laws, but he openly refused to do so, instead choosing to make his claims a test case for his attempt to overturn core principles of federal Indian law. Third, the absolute privilege for legal proceedings applies to any pre-filing discussions between Ms. Wopsock and the Tribe's governing body. This issue is also fully briefed in the long-pending motion to dismiss. Fourth, as discussed above, the communications between a tribal legislator and a tribal member are absolutely privileged.

3 Movants do not yet have a final transcript of that deposition, but likely will be able to provide it prior to any argument on the current motion.

V. THE DEPOSITION SUBPOENAS MUST BE QUASHED BECAUSE DEFENDANTS DID NOT COMPLY WITH MANDATORY NOTICE REQUIREMENTS AND DO NOT CONTEND THAT THEIR FAILURE WAS CAUSED BY EXCUSABLE NEGLECT.

In their brief in support of their motion to quash, Movants showed that Defendants did not meet the mandatory deposition notice and subpoenas requirements of the federal rules of civil procedure and local rules. As they must, Defendants admit the facts which show those violations.

Courts can likely excuse non-compliance if the deposition proponent alleges and proves excusable neglect. But notably, Defendants have chosen not to take that path. They do not claim their failure was inadvertent or caused by clerical error, and do not even suggest any other excusable neglect. Instead, they dig in—claiming they do not need to follow the mandatory requirements of the federal rules or local rules. Contrary to the clearly stated mandatory requirement of FRCP 30 and relevant case law, Defendants assert that the rule does not require them to state the method they will be using to record the deposition—that instead it is sufficient if they say they list a few methods that they might decide to use. They are wrong. FRCP 30(b(3); *Posr v. Roadarmel*, 466 F. Supp. 2d 527, 531 (S.D.N.Y. 2006) (notice of method of recording under rule 30 is mandatory); *Garcia v. Mako Surgical Corp.*, No. 13-CV-61361-CIV, 2014 WL 4206681, at *2-3 (S.D. Fla. Aug. 25, 2014) (same; barring videotaping of deposition because notice did not state that deposition would be videotaped).

The facts similarly demonstrate that Defendants failed to comply with this Court's mandatory requirement that Defendants provide third-party deponents with a copy of local rule 37. Defendants admit they failed to comply with the mandatory rule, offer no excuse and no facts supporting an excuse, and chose not to correct their error. *Cf. Williams v. Sampson*, 2017 WL 133052 (W.D. Wash) (after failing to provide copy of FRCP 45(d) and (e), plaintiff corrected that oversight). Instead they assert that Local Rule 37 is not that important and so they do not have to show that their failure to provide the required notice is excusable. But it is not Defendants' opinion

which matters. It is for this Court, not attorneys, to decide what content must be provided with a subpoena. This Court has made that choice and Defendants then needed to comply with this Court's directive. The rule is mandatory, and federal courts hold that subpoenas which fail to include the content required by court rule are insufficient and must be quashed. *In re Vanbrocklin*, 2017 WL 988812 (N.D. Ga. Bkrtcy.) (quashing subpoenas because the plaintiff did not include with the subpoena a copy of FRCP 45(d) and (e), as required by FRCP45(a)(1)(A)(iv)); *Selee Corp. v. McDanel Advanced Ceramic Techs., LLC*, 2016 WL 4546446, at *4 (W.D. N.C.) (subpoena issued without copy of text of FRCP 45(d) and (e) is invalid).

Had Defendants claimed inadvertent error or other excuse and sought to correct the error when they had the chance, this Court would have a more difficult case (but one for which the subpoenas, issued by an experienced local attorney, should still be quashed). But as it is, where Defendants sole argument is that they do not need to comply, this Court has no choice but to quash the invalid subpoenas.

CONCLUSION

For all of the reasons discussed in Movants motion and this reply this Court must quash the subpoenas to the Tribe and its Officers.

Respectfully submitted May 12, 2017.

FREDERICKS PEEBLES & MORGAN LLP
/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen, *Pro Hac Vice*
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff
J. Preston Stieff
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@stiefflaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12th of May, 2017, I filed the foregoing **PLAINTIFF AND SUBPOENAED DEPONENTS' REPLY IN SUPPORT OF MOTION TO QUASH DEPOSITION NOTICES AND SUBPOENAS** and served it on all parties of record via the Court's ECF system:

/s/ Ashley Klinglesmith
Ashley Klinglesmith
Legal Secretary/Paralegal