UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CURTIS TEMPLE,

Plaintiff,

v.

LAWRENCE ROBERTS, et al.,

Defendants.

5:15-cv-05062-JLV

RESPONSE OF TEMPLE TO MOTION TO QUASH SUBPOENAS

The Oglala Sioux Tribe has moved to quash the depositions of Denise Mesteth and Jolene Provost. Plaintiff opposes the motion to quash on the following grounds and for the following reasons.

First, neither Mesteth nor Provost are tribal employees. Both are federal employees of the Bureau of Indian Affairs (BIA). This suit is against various federal employees. Thus, both Mesteth and Provost as federal employees are subject to being deposed in the present lawsuit.

Second, any matter that is relevant to a claim or defense of any party in the pending action is discoverable unless privileged. Gov't of Ghana, ProEnergy Servs., LLC, 677 F3d 340, 342 (8th Cir. 2012); WWP, Inc. v. Wounded Warriors Family Support, Inc., 627 F3d 1032, 1039 (8th Cir. 2011). The term "relevant" is not defined by the Rules 26 through 37 but is extremely broad. Gilmore v. Palestinian Interim Self-Gov't. Auth., 843 F3d 958, 968 (D.C. Cir. 2016). Courts have defined "relevant" to encompass "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Courts also have defined "relevant" as "germane."

West Penn Power Co v. N.L.R.B., 394 F3d 233, 241 (4th Cir. 2005). A party may discover any matter that is relevant to any claim, issue, or defense that is pleaded in the case. Amgen Inc. v. Hospira, Inc., 866 F3d 1355, 1361 (Fed. Cir. 2017). Evidence need not be admissible to be relevant and thus discoverable. Seattle Times Co. v. Rinehart, 467 U.S. 20 (1984); Colonial Funding Network, Inc. v. Genuiine Builders, Inc., ___F. Supp.____, 2018 WL 2426639 at *4 (D.S.D. 2018). Parties may conduct discovery regarding the location and existence of documents and other evidence and about the indentity and location of persons having knowledge of discoverable matters. Brooks v. Kerry, 37 F. Supp. 2d 187, 202-203 (D.D.C. 2014).

Third, Alltel Communs, LLC v. DeJordy, 675 F3d 1100 (8th Cir. 2012), has no applicability and does not bar discovery depositions from Mesteth or Provost. First, in Alltel discovery was sought from tribal employees, which is not the case here because the Mesteth and Provost are federal employees. Second, the party seeking discovery in Alltel sought discovery from the Tribe itself, which is not the case here. Third, the underlying case in Alltel for which the discovery was sought was private civil litigation seeking money damages, not the case here as far as the Tribe is concerned. In the present case, the case involves a host of federal governmental employees and defendants alleged to have undertaken action and conduct involving also tribal employees that have led to the violation of substantial rights of Curtis Temple. Fourth, the Tribe concedes in its memorandum that it is in the middle of the present action although in the Oglala Sioux Tribal Court. The Tribe is involved in the litigation and at some time will be required to have its employees deposed. Fifth, providing information will not expend itself on the Tribe's treasury, interfere with its administration, or restrain the Tribe from acting, which appeared to be the case in Alltel. Supra at 1102. Sixth, sovereign immunity

cannot be a basis to avoid discovery because in Oglala Sioux Tribe Ordinance 11-05, the Ordinance in effect in 2015, it is provided that: "(a)ll bidders of a range unit permit, by acceptance of such grazing permit consent to the jurisdiction of the Oglala Sioux Tribe, and further agree to the submission of any dispute arising herein to the Courts of the Oglala Sioux Tribe." This constitutes a waiver of sovereign immunity. Alltel noted a similar provision citing Linder v. Calero-Portocarrero, 251 F3d 178, 181 (D.C. Cir. 2001). See also C & L Enterprises, Inc. v. Citizens Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001) (agreement to arbitration waiver of sovereign immunity); Rosebud Sioux Tribe v. Val-U Construction, 50 F3d 560 (8th Cir. 1988). Moreover, the Oglala Sioux Tribe contains a Bill of Rights that was added in amendments that were enacted in 2008. These rights are found in Article XII of the Constitution which prohibits tribal government from taking action that results in a denial of due process and equal protection. The courts are given the right to declare laws of the Tribe invalid if those laws are not in agreement with the Oglala Sioux Tribe Constitution.

Plaintiff should not have to have pre-question approval of opposing counsel as to ever question that will be asked of the deponents in this case. However, if the United States will make the witnesses available, as it seems they are suggesting, the depositions could be conducted at the Federal Building in Rapid City when the Magistrate or other representative of the Court would be available to rule upon any specific objections that the Tribe might have to any questions asked of Provost or Mesteth. Both the United States and the Tribe recite in unison that pre-impoundment tribal issues cannot be raised. The impoundments in this case began on August 19, 2015. There are a plethora of facts that occurred after that time which plaintiff is entitled to discover.

Dated May 24, 2019.

/S/ Terry L. Pechota
Terry L. Pechota
Attorney for Temple
1617 Sheridan Lake Road
Rapid City, SD 57702
605-341-4400
tpechota@1868treaty.com

CERTIFICATE OF SERVICE

I certify that on the above day and month, I served a true and correct copy of the foregoing objection upon Meghan Roche and Steve Gunn by electronic transmission and by E-mail to megthan.roche@usdoj.gov and sigunn@wulaw.wustl.edu

/S/ Terry L. Pechota
Terry L. Pechota