UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

CURTIS TEMPLE, Plaintiff, v. LAWRENCE ROBERTS, et al., Defendants.	))))))))	Case No. 5:15-cv-05062-JLV

THIRD-PARTY MOVANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO QUASH SUBPOENAS

COME NOW the Oglala Sioux Tribe ("Tribe"), Denise Mesteth, and Jolene Provost (collectively "Movants") and for their Reply to Plaintiff's Response to the Motion to Quash Subpoenas [doc. 176] state as follows:

INTRODUCTION

Plaintiff seeks to depose two current or former officers of the Tribe ("Tribal Officers") concerning actions they took, decisions they made, and information they obtained in their official capacities as officers of the Tribe. Among other things, Plaintiff intends to depose the Tribal Officers about allocation, grazing, and leasing decisions made by the Tribe prior to the decision by the United States to impound Plaintiff's cattle. *See* Movants' Mem. Law [doc. 173] 3-4; U.S. Statement [doc. 175] 4-5.

Plaintiff also seeks to compel the Tribal Officers to produce extensive volumes of documents that are in the possession, custody, and control of the Tribe and that span a period of nearly six-and-a-half years, including the following:

1. Records of the source of funding for the Land Office of the Tribe ("Tribal Land Office") from January 1, 2013, to the present;[1]

[1] The subpoenas use the term "your office," *see* Movants' Mem. Law, Exh. A (Mesteth Subpoena) [doc. 173-1] 2; Movants' Mem. Law, Exh. B (Provost Subpoena) [doc. 173-2] 2, as opposed to the Tribal Land Office, but the term "your office" appears to refer to the Tribal Land Office, since

2. All applications submitted by Plaintiff to the Tribal Land Office for a leasing or grazing permit of tribal or allotted land from January 1, 2013, to the present;

3. All records of hearings and written determinations of the Tribal Land Office on all applications submitted by Plaintiff to the Tribal Land Office for a leasing or grazing permit of tribal or allotted land from January 1, 2013, to the present;

4. All records of allocations of grazing privileges or leases to Plaintiff that were subsequently vacated for any reason by the Allocation Committee of the Tribe or the Executive Committee of the Tribe from January 1, 2013, to the present;

5. All records pertaining to any administrative appeal filed by Plaintiff in the Tribal Land Office, from January 1, 2013, to the present, concerning any decision of the Allocation Committee of the Tribe;

6. All decisions of the Executive Committee of the Tribe on any appeal filed by Plaintiff from January 1, 2013, to the present

7. All correspondence from the Tribal Land Office to the Bureau of Indian Affairs ("BIA") and from the BIA to the Tribal Land Office concerning any tribal or federal administrative appeal or lawsuit commenced by Plaintiff from January 1, 2013, to the present;

8. All correspondence from the Tribal Land Office to Plaintiff from January 1, 2013, to the present; and

9. Copies of all tribal grazing ordinances in effect from January 1, 2013, to the present.

See Movants' Mem. Law, Exh. A (Mesteth Subpoena) [doc. 173-1] 2; Movants' Mem. Law, Exh. B (Provost Subpoena) [doc. 173-2] 2. Most of these documents pertain to the pre-impoundment decisions and actions of tribal agencies and officers concerning the allocation of grazing privileges (the "Pre-Impoundment Decisions").

The Tribe and Tribal Officers have moved the Court to quash the subpoenas to protect the sovereignty, sovereign immunity, and self-government of the Tribe in accordance with the

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both deponents are current or former officers in the Tribal Land Office and since that is the tribal office that handles matters relating to the allocation of tribal and alloted land for grazing purposes.

decision of the U.S. Court of Appeals for the Eighth Circuit in *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). Plaintiff makes a number of erroneous factual and legal arguments in an effort to avoid the clear mandate of *Alltel*. Plaintiff's arguments are addressed below.

ARGUMENT

1. TRIBAL RANGE SPECIALIST PROVOST MAY NOT BE DEPOSED BECAUSE SHE IS AN OFFICER OF THE OGLALA SIOUX TRIBE, NOT A FEDERAL EMPLOYEE.

Plaintiff argues that Jolene Provost may be deposed because she is a federal employee of the Bureau of Indian Affairs (BIA). *See* Pl. Resp. [doc. 176] at 1. Not so. She is an officer of the Tribe. Provost has served as the Range Specialist (formerly Range Clerk) in the Land Office of the Tribe since September 15, 1980. *See* Declaration of Michelle Poor Bear ¶¶ 5-6 (May 29, 2019) (attached hereto as **Exhibit E**).[2] She is a full-time officer and employee of the Tribe. *Id.* at ¶ 7. She is paid by the Tribe out of fees paid by permittees of Range Units and farm pasture lands on the Pine Ridge Indian Reservation. *Id.* at ¶¶ 8-9. She is not an employee of the BIA. *Id.* at ¶ 10.

Plaintiff's assertion that Provost is a BIA employee is undercut by the subpoena itself, which demands that Provost produce various documents in the possession, custody, and control of the Tribe, including "[c]orrespondence from your office to the BIA and from the BIA to your office." *See* Movants' Mem. Law, Exh. B [doc. 173-2] 2. Plaintiff's assertion is further undercut by the request of Plaintiff's counsel that the undersigned counsel for the Tribe accept and admit service of the subpoena on behalf of Provost. (Counsel for the Tribe would have no authority to accept and admit service of a subpoena for Provost if she were, in fact, a federal employee.)

[2] Movants' exhibits are numbered sequentially, beginning with Exhibits A through D, which were filed with the Court on May 13, 2019, *see* Docket Nos. 173-1 through 173-4, and continuing with Exhibits E-G filed with this Reply.

As an officer of the Tribe, Provost may not be deposed (or compelled to produce documents in the possession, custody, and control of the Tribe) for the reasons set forth in *Alltel*. The subpoena operates as a suit against Provost in her official capacity as an officer of the Tribe and, as such, it is barred by the Tribe's sovereign immunity. *See Alltel*, 675 F.3d at 1102-1105; Movants' Memo. Law [doc. 173] at 4-8.

2. FORMER TRIBAL LAND DIRECTOR MESTETH MAY NOT BE DEPOSED IN HER CAPACITY AS A FORMER OFFICER OF THE OGLALA SIOUX TRIBE.

Although Denise Mesteth is currently employed by the BIA, she was, at all (or nearly all) times relevant to this action, an officer and employee of the Tribe. Mesteth served as the Director of the Tribal Land Office from June 19, 2006, through August 31, 2018. *See* Exh. E (Poor Bear Decl.) ¶ 11. During that time period, Mesteth was a full-time officer and employee of the Oglala Sioux Tribe; she was paid by the Oglala Sioux Tribe; and she was not an employee of the Bureau of Indian Affairs. *Id.* at ¶ 12.

There is little doubt that Plaintiff seeks to depose Mesteth about actions she took, decisions she made, and information she obtained in her official capacity as an officer of the Tribe, not in her capacity as an employee of the BIA. This is so for several reasons. First, Plaintiff's counsel has indicated that he intends to depose Mesteth about the pre-impoundment allocation, grazing, and leasing decisions of the Tribe. *See* Movants' Mem. Law [doc. 173] 3-4; U.S. Statement [doc. 175] 4-5.[3] Second, the Mesteth subpoena demands that she produce pre-impoundment documents in the possession, custody, and control of the Tribe. *See* Movants' Mem. Law, Exh. A [doc. 173-1] 2. Third, Plaintiff's counsel asked the undersigned counsel for the Tribe to accept and admit

[3] To be clear, Plaintiff's counsel has also indicated that there is a "plethora of facts" that occurred after the impoundments began in August 2015 and that Plaintiff is "entitled to discover" those facts. Pl. Resp. [doc. 176] 3.

service of the subpoena on behalf of Mesteth. Such an action would make little sense if Plaintiff intended to depose Mesteth in any capacity other than as a former Tribal Officer. Finally, according to the Federal Defendants, Mesteth "generally has minimal involvement with grazing permits" in her current position as Realty Specialist in the Pine Ridge Agency of the BIA. *See* U.S. Statement [doc. 175] 4. Deposing her in that capacity would likely yield little information.

To the extent Plaintiff seeks to depose Mesteth in her capacity as a former Tribal Officer about matters she participated in or obtained knowledge of as Tribal Officer, and to the extent the subpoena demands that Mesteth produce tribal documents, the subpoena operates as a suit in U.S. District Court against a Tribal Officer and, as such, it is barred by the Tribe's sovereign immunity. *See Alltel*, 675 F.3d at 1102-1105; Movants' Memo. Law [doc. 173] at 4-8.

3. PLAINTIFF'S ATTEMPTS TO DISTINGUISH *ALLTEL* ARE UNAVAILING.

Plaintiff attempts to distinguish *Alltel* in four ways, none of which is availing. First, Plaintiff argues that *Alltel* "has no applicability" to this case because "Mesteth and Provost are federal employees." Pl. Resp. [doc. 176] at 2. This is not so. As shown above, Provost is employed by the Tribe, not the BIA, and Mesteth was an officer of the Tribe at all relevant times through August 31, 2018. Plaintiff intends to depose both individuals (and demands that both individuals produce tribal documents) about actions they took, decisions they made, and information they obtained in their official capacities as officers of the Tribe. This is not permitted under *Alltel*. *See* 675 F.3d at 1102-1105; Movants' Memo. Law [doc. 173] at 4-8.

Second, Plaintiff argues that *Alltel* is not applicable because the plaintiff in that case "sought discovery from the tribe itself, which is not the case here." Pl. Resp. [doc. 176] at 2. To the contrary, two third-party subpoenas were quashed in *Alltel*: one was directed to the Oglala Sioux Tribe; the other was directed to an officer of the Tribe (Joseph Red Cloud); and both sought

the production of tribal documents. 675 F.3d at 1102. Like the Red Cloud subpoena in *Alltel*, the subpoenas in this case are directed to Tribal Officers. Like the subpoenas in *Alltel*, the subpoenas in this case command the production of documents in the custody, possession, and control of the Tribe.

Third, Plaintiff argues that *Alltel* is not applicable since it involved litigation between private parties, namely a corporation and its former senior vice president, whereas Plaintiff's suit is against federal employees. Pl. Resp. [doc. 176] at 2. However, the critical point under *Alltel* is not identity of the defendants, but the fact that a third-party subpoena directed to an Indian Tribe or a tribal officer operates as a suit for purposes of the Tribe's sovereign immunity.

The *Alltel* court noted that, "'[t]he general rule is that a suit is against the sovereign if 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 Government from acting, or to compel it to act.'" 675 F.3d at 1102 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). The *Alltel* court held that third-party subpoenas directed to a Tribe and tribal officer were "suits" since, among other things, they "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming. The potential for severe interference with government functions is apparent." *Id*. at 1103. The court further noted that, "permitting broad third-party discovery in civil litigation threatens to contravene federal policies of tribal self-determination, economic development, and cultural autonomy that underlie the federal doctrine of tribal immunity." *Id*. at 1104 (internal citation omitted). These considerations apply with equal force in the present action. As in *Alltel*, the third-party subpoenas directed to the Tribal Officers are "suits" barred by the Tribe's sovereign immunity.

Fourth, Plaintiff argues that *Alltel* is inapplicable since compliance with the third-party subpoenas in this case "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." Pl. Resp. [doc. 176] at 2. Yet, there is no difference between this case and *Alltel*. If the subpoenas in this case are not quashed, they would compel the Tribal Officers to appear and testify at depositions about information obtained in their official capacities, produce an extensive volume of documents in the possession, custody, and control of the Tribe, and "obey whatever judicial discovery demands may be forthcoming." *Cf.*, *Alltel*, 675 F.3d at 1103.[4] These commands are identical to those in *Alltel*, and they would expend themselves on the Tribe's treasury and interfere with the administration of the tribal government since they would compel the tribal government "'to act in a manner different from that in which [it] would ordinarily choose to exercise its public function.'" *Id*. (quoting *Boron Oil v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989).

Further, "the Tribe's gathering and production of the extensive documents" in this case, as in *Alltel*, "would likely be followed by depositions of all tribal officials identified in those documents." *Id*. at 1104. "Information gleaned from this discovery would likely reveal deliberations establishing [tribal] policies for the Reservation …" *Id*. Here, as in *Alltel*, "[t]he potential for severe interference with government functions is apparent." 675 F.3d at 1103.

Alltel is on all-fours with the present case and is directs that the Provost and Mesteth subpoenas be quashed.

[4] Counsel for the Tribe also would be compelled, for all intents and purposes, to defend the depositions of the Tribal Officers, further taxing the tribal government.

4. THE PROVOST AND MESTETH SUBPOENAS SHOULD BE QUASHED BECAUSE THE TRIBE HAS NOT WAIVED ITS SOVEREIGN IMMUNITY OR THE IMMUNITY OF ITS OFFICERS.

Plaintiff argues that the Tribe and the Tribal Officers may not assert tribal sovereign immunity in this Court because the Tribal Grazing Code contains a waiver of that immunity. This is simply not the case. As shown below, there is no express, clear, or unequivocal waiver in the Tribal Grazing Code of the Tribe's sovereign immunity from suit in Tribal Court or Federal Court.

The Supreme Court has held that, a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal citation omitted), and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (internal citation omitted). Further, as a matter of statutory construction, waivers of sovereign immunity are not to be liberally construed, but "must be construed strictly in favor of the sovereign." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33–34 (1992) (internal citations omitted). *Accord, Miller v. Alamo*, 992 F.2d 766, 767 (8th Cir. 1993) ("[a] purported waiver [of sovereign immunity] is to be strictly construed against waiver of the immunity"); *Campbell v. United States*, 835 F.2d 193, 195 (9th Cir. 1987) ("[w]aivers of sovereign immunity are strictly construed in favor of the government, and courts should not enlarge such waivers beyond what a fair reading of the statute requires").

The laws of the Tribe provide that any waiver of tribal sovereign immunity must be "unequivocally expressed" and accompanied by a "consent to suit," O.S.T. Ord. No. 01-22 at 1, 2 (Movants' Mem. Law, Exh. C [doc. 173-3] at 1, 2), and "it must make specific reference to a waiver of tribal sovereign immunity," O.S.T. Ord. No. 15-16, § 1(b) (Movant's Mem. Law, Exh. D [doc. 173-4] at § 1(b)).

The provision of the Tribal Grazing Code cited by Plaintiff relates to jurisdiction of the Tribe and its courts. It is not a waiver of tribal sovereign immunity or a consent to suit. It states:

> Jurisdiction: All bidders of a range unit grazing 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.

O.S.T. Ord. No. 11-05, § 18 (Mar. 31, 2011).

The central purpose of this provision is to subject grazing permit holders to the jurisdiction of the Tribe and the Tribal Courts. Another purpose is to require permittees to bring actions against other permittees in Tribal Court. Such disputes may concern fencing, trespass, and other subjects.

The jurisdictional provision in the Tribal Grazing Code (§ 18), by its express terms, applies to successful "bidders" for range unit grazing permits. The Tribe and its agencies and officers are not bidders for such permits. There is no reference to the Tribe, its agencies, or officers in this provision, let alone an unequivocally expressed waiver of sovereign immunity, a specific reference to a waiver of tribal sovereign immunity, or a specific consent to suit by the Tribe, its agencies, or officers.

This provision affirms the jurisdiction of the Tribe and it courts, but it does not waive the sovereign immunity of the Tribe. In *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), the first Supreme Court case to address sovereign immunity, the Court made clear that a statute that confers jurisdiction upon a court does not, in itself, authorize suits against the sovereign in that court. An express waiver of sovereign immunity is required: "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id*. at 411-12. *Accord*, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (federal statute granting civil jurisdiction to State courts over Indian country causes of action only extended

to suits between private litigants and did not authorize state regulation of tribal government functions).[5]

The Oglala Sioux Tribal Court has held that the Tribal Grazing Code does not contain a waiver of tribal sovereign immunity. In *Nelson v. Oglala Sioux Tribe Allocation Committee Members*, Case No. CIV-15-0037 (May 6, 2015) (attached hereto as **Exhibit F**), the Tribal Court noted that plaintiff could not identify "any express legislative waiver of sovereign immunity" in the Tribal Grazing Code and, therefore, dismissed plaintiff's suit based on the doctrine of tribal sovereign immunity. *Id.* at 2-3.

Further, in *Nelson*, the Tribal Court noted that the allocation of grazing permits "touches on Indian trust land with title in the United States." *Id.* Since the United States formally approves and issues grazing permits, the Tribal Court noted that it is the "wrong forum" to complain about matters concerning grazing permits issued by the United States. *Id.* at 3. The Tribal Court stated: "Rather, as directed by the BIA, plaintiff must address her concerns to the BIA through its administrative process." *Id*.

Plaintiff's pre-impoundment claims, like the claims in *Nelson*, are properly addressed to the BIA through the federal administrative process. The United States holds title to range unit lands in trust for the benefit of the Tribe and individual Indians. The United States is responsible for issuing grazing permits and approving leases for these units, based on the recommendations of the

[5] Contrary to Plaintiff's assertion, the jurisdictional provision in the Tribal Grazing Code is not "similar" to the unequivocally expressed waiver of federal sovereign immunity referred to in *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), for actions "seeking relief other than money damages" under the Administrative Procedures Act. Id. at 181 (citing 5 U.S.C. § 702). Nor is the Tribal Grazing Code provision similar to the "clear" waivers of sovereign immunity in the binding arbitration provisions in *C & L Enterprises*, *supra*, and *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560 (8th Cir. 1995). It is a provision conferring jurisdictional on the Tribe and the Tribal Courts over grazing permittees. It does not waive immunity or subject the Tribe, its agencies, or officers to suit in Tribal Court or any other forum.

Tribal Allocation Committee. The Tribal Grazing Code governs the manner in which the Tribal Allocation Committee makes those recommendations. The Tribal Grazing Code contains an administrative remedy for individuals aggrieved by decisions of the Allocation Committee. Plaintiff exercised his tribal administrative remedies under the Tribal Grazing Code. His appeals were heard and decided, and the administrative decisions are final.

Plaintiff also exercised his federal administrative remedies. In April 2013, Plaintiff filed an administrative appeal to challenge the decision of the Agency Superintendent to issue grazing permits to another tribal member. In August 2013, the Great Plains Regional Director affirmed the decision of the Superintendent, concluding that the Superintendent acted properly in issuing the grazing permits. *See* Great Plains Regional Director Decision (Aug. 16, 2013) (attached hereto as **Exhibit G**). Plaintiff filed an appeal with the Interior Board of Indian Appeals ("IBIA"). However, Plaintiff later voluntarily withdrew his appeal. The IBIA entered an order dismissing the appeal in May 2015. *See Temple v. Great Plains Regional Director, BIA*, 60 IBIA 296, 2015 WL 2432185 (May 11, 2015). Thus, the decision of the Great Plains Regional Director is final and binding.

Plaintiff's grievances have been heard and decided in the available administrative forums. Plaintiff waived his right to federal judicial review of the BIA's final approval and issuance of the grazing permits when he withdrew his IBIA appeal. Having failed to exhaust his administrative remedies and having failed to preserve the matter in the federal administrative process, Plaintiff should not be permitted to litigate it in this action. (The Federal Defendants have made these arguments repeatedly in this case. *See*, *e.g.*, Deft. Resp. to Pl. Mot. Prelim. Inj. [doc. 13] 5; Deft. Post-Hrg. Br. [doc. 21] 11-12; Deft. Br. on Mot. Dismiss [doc. 33] 11.)

More importantly, for present purposes, Plaintiff should not be permitted to subpoena and depose Tribal Officers in this action when the Tribe has not waived its sovereign immunity or the immunity of its agencies or officers in Tribal Court, let alone in U.S. District Court.[6]

CONCLUSION

For the foregoing reasons, Movants respectfully move the Court to quash the subpoenas.

Dated: May 31, 2019

/s/ Steven J. Gunn
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[6] Plaintiff suggests that this Court should permit the depositions of the Tribal Officers to proceed because the Tribe "is in the middle of the present action in the Oglala Sioux Tribal Court," and "at some time will be required to have its employees deposed." Pl. Resp. [doc. 176] 2. This ignores the fact that no depositions will take place in the Tribal Court if, as *Nelson* dictates, the Tribal Court dismisses the Tribal Court Actions based on the doctrine of tribal sovereign immunity. *See* Movants Mem. Law [doc. 173] 3.

CERTIFICATE OF SERVICE

The undersigned certifies that, on May 31, 2019, a true and accurate copy of the foregoing was served on all parties and counsel of record by operation of the Court's Case Management/Electronic Case Files system.

/s/ Steven J. Gunn
Steven J. Gunn