

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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ALLTEL COMMUNICATIONS, LLC,	)	<b>Civil No. 10-MC-24</b>
	)	
Plaintiff,	)	Civil No. 4:10-cv-00130
	)	(action pending in
vs.	)	Eastern District of Arkansas)
	)	
EUGENE DEJORDY,	)	<b>OGLALA SIOUX TRIBE’S</b>
	)	<b>OPPOSITION TO MOTION FOR</b>
Defendant.	)	<b>CONTEMPT, SANCTIONS AND FOR</b>
	)	<b>ORDER ENFORCING JUDGMENT</b>

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The Oglala Sioux Tribe (the “Tribe”), by and through its attorneys of record, respectfully submits this Opposition to Alltel Communications, LLC’s Motion for Contempt, Sanctions and for Order Enforcing Judgment.

**INTRODUCTION**

In September 2010, Alltel Communications, LLC (“Alltel”) issued a Subpoena Duces Tecum to the Tribe in the above-captioned case. The Tribe moved to quash the Subpoena on the ground that it is protected by tribal sovereign immunity and as such, is not amenable to the subpoena power of the Court. The Court denied the Tribe’s Motion to Quash by Order dated February 17, 2011.

Subsequently, the Tribe filed Notice of Appeal of the Court’s February 17 Order, maintaining the Court’s Order denying the Motion to Quash based on tribal sovereign immunity was immediately appealable. In addition, the Tribe filed a Petition for Permission to Appeal with the United States Court of Appeals for the Eighth Circuit, in

the event the Eighth Circuit concluded the matter was not immediately appealable. The Eighth Circuit has now determined the Court's February 17 Order is immediately appealable and has entered a briefing schedule for the appeal.

However, even prior to the Eighth Circuit determining whether the Order denying the Motion to Quash was immediately appealable and whether to grant the Petition for Permission to Appeal, Alltel filed a Motion for Contempt, Sanctions and for Order Enforcing Judgment, based on the Tribe's refusal to produce the documents responsive to the Subpoena Duces Tecum. Alltel contends the Tribe's "interlocutory appeal of the February 17 Order . . . does not permit the Tribe . . . to simply ignore the February 17 Order based on the doctrine of tribal sovereign immunity." Alltel's Brief, p. 1. Alltel bases this argument on 28 U.S.C. § 1292, which states that an interlocutory appeal "shall not stay proceedings in the district court unless the district court judge or the Court of Appeal or a judge thereof shall so order."

Alltel ignores, however, that while proceedings may still occur in the District Court during the pendency of the appeal, the District Court lacks jurisdiction over the matter or order that is the subject of the appeal. In this case, the matter that is the subject of the appeal is the Order denying the Motion to Quash and thereby requiring the Tribe to produce requested documentation. The District Court lacks jurisdiction over this particular matter and cannot, therefore, issue any contempt ruling based on the Tribe's refusal to comply with that Order.

## ARGUMENT AND AUTHORITIES

Alltel's Motion for Contempt, Sanctions and for Order Enforcing Judgment is based on the faulty premise that the District Court currently has jurisdiction over this matter. Quite simply, it does not. Once a notice of appeal is filed, the District Court no longer has jurisdiction over the issues on appeal.

Quoting the United States Supreme Court, the Eighth Circuit in *U.S. v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989) held:

[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and **divests the district court of its control over those aspects of the case involved in the appeal.**

*Id.* (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (emphasis added)). Similarly, in *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999), the Eighth Circuit explained:

**Once a notice of appeal is filed, the district court is divested of jurisdiction over matters on appeal. For example, while an appeal is pending, the district court may not reexamine or supplement the order being appealed.** This jurisdictional principle is not absolute. To prevent parties from using frivolous appeals to delay or interrupt proceedings in the district court, that court does not normally lose jurisdiction to proceed with the case when one party appeals a non-appealable order. However, appellate jurisdiction is primarily an issue for the appellate court. Therefore, if an appeal is taken from an interlocutory order and the issue of appealability is in doubt, the district court should stay its hand until we resolve the issue of our jurisdiction, or remand for further clarification of that issue.

*Id.* (internal citations omitted; emphasis added). The Eighth Circuit in *Johnson v. Hay*, 931 F.2d 456, 459 n.2 (8th Cir.1991) likewise noted:

We have held that “[a] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously,” and that the filing of a notice of appeal “confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Once a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand. **Jurisdiction has been vested in the court of appeals and the district court should not act further.** If the appeal is utterly lacking in merit and for the purpose of delay only, this court may take appropriate action.

*Id.* (internal citations omitted; emphasis added).

From settled Supreme Court and Eighth Circuit law, it is evident that even if the Notice of Appeal does not stay **all** proceedings in the District Court, it certainly deprives the District Court of jurisdiction over the Order being appealed, which in this case is the Order denying the Tribe’s Motion to Quash, so as to prevent it from having to produce the very documents Alltel again seeks to obtain by this Motion. As such, the Tribe need not produce documents that are the subject of the Order the Tribe has appealed, and the District Court cannot, and is without the power, to enter any order of contempt or sanctions or to enter an order enforcing judgment. Alltel’s Motion for Contempt, Sanctions and for Order Enforcing Judgment is wholly without merit and should be denied.

**CONCLUSION**

For these reasons, the Tribe respectfully requests that the Court deny Alltel's Motion for Contempt, Sanctions and for Order Enforcing Judgment in its entirety.

Dated this 12th day of April, 2011.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of April, 2011, I sent to:

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by Notice of Electronic Filing generated by the CM/ECF system, a true and correct copy of the foregoing **Oglala Sioux Tribe's Opposition To Motion For Contempt, Sanctions And For Order Enforcing Judgment** relative to the above-entitled matter.

and via e-mail to  
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/s/ Jay C. Shultz  
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