IN THE

UNITES STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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No. 11-1520 and No. 11-1947

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ALLTEL COMMUNICATIONS, LLC
Respondent/Appellee
vs.
OGLALA SIOUX TRIBE, JOSEPH RED CLOUD
AND GONZALEZ LAW FIRM
Petitioners/Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
CASE # CIV. 10-mc-00024

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# BRIEF OF APPELLANTS OGLALA SIOUX TRIBE AND JOSEPH RED CLOUD

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## SUMMARY AND REQUEST FOR ORAL ARGUMENT

Alltel Communications, LLC ("Alltel"), the Plaintiff in the underlying diversity action filed in United States District Court for the Eastern District of Arkansas, brought suit against Eugene DeJordy ("DeJordy"), alleging DeJordy breached a Separation Agreement entered into between Alltel and DeJordy. In connection with that lawsuit, Alltel served a subpoena duces tecum on the Oglala Sioux Tribe ("the Tribe") and Joseph Red Cloud ("Red Cloud")[1], and served a separate subpoena duces tecum on the Gonzalez Law Firm. The Tribe/Red Cloud and the Gonzalez Law Firm each filed a Motion to Quash the subpoenas duces tecum. By Order dated February 17, 2011, the United States District Court for the District of South Dakota, Western Division, denied the Motions to Quash. The Tribe timely filed Notice of Appeal on March 3, 2011. The Gonzalez Law Firm has also appealed the District Court's Order, and the cases have been consolidated by the Court on appeal.

The Tribe respectfully requests twenty (20) minutes for oral argument.

[1] Except where the two must be referred to separately, the Tribe and Red Cloud will be referred to collectively as the Tribe.

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## JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Arkansas, where the underlying lawsuit was filed, had subject matter over this civil matter based upon diversity jurisdiction under 28 U.S.C. § 1332. The United States District Court for the Western District of South Dakota, where the subpoena duces tecum was issued, had the power to issue the subpoena duces tecum because the Tribe's and Red Cloud's production of the documents sought was to be made in that District. The District Court entered its Order denying the Motions to Quash on February 17, 2011. This appeal is from that Order, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine, which permits appeal of questions of tribal immunity, as alleged in this case.

## STATEMENT OF THE ISSUES

**I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING TRIBAL SOVEREIGN IMMUNITY DID NOT PROTECT THE TRIBE FROM ENFORCEMENT OF THE SUBPOENA DUCES TECUM?**

i) *Cash Advance and Preferred Cash Loans v. State of Colorado*, 242 P.3d 1099 (Colo. 2010) (en banc)

ii) *United States v. James*, 980 F.2d 1314 (9th Cir. 1992)

iii) *Catskill Dev., L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002)

iv) Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV.L.REV. 1058

## STATEMENT OF THE CASE

Alltel brought this diversity action against DeJordy in the United States District Court, Eastern Division of Arkansas ("Arkansas District Court"), alleging breach of contract. (Appx. 2-12)[2] DeJordy filed a Motion to Dismiss, which the Arkansas District Court denied. (Appx. 59, 61-66) DeJordy timely filed his Answer and Counterclaims. (Appx. 67-78) Alltel moved to dismiss DeJordy's Counterclaims. (Appx. 80).

In connection with its suit against DeJordy, Alltel served subpoenas duces tecum on the Tribe, on Red Cloud and on the Gonzalez Law Firm.

[2] Citations to the record will be denoted as "Appx.," followed by the appropriate page number.

(Appx. 83-91; 92-101; 105-110) The Gonzalez Law Firm filed a Motion to Quash the subpoena duces tecum. (Appx. 102) The Tribe and Red Cloud jointly filed a Motion to Quash the subpoena duces tecum. (Appx. 113) As the basis for its Motion to Quash, the Gonzalez Law Firm asserted attorney client privilege, and the Tribe and Red Cloud asserted tribal sovereign immunity, as well as attorney client privilege as the basis for its Motion to Quash. (Appx. 132-135)

By Order dated February 17, 2011, the District Court denied both Motions to Quash, concluding tribal sovereign immunity did not protect the Tribe or Red Cloud from complying with the subpoena duces tecum served by Alltel. (Appx 128-162). The District Court also required that the Tribe/Red Cloud submit documents responsive to the subpoena duces tecum to the court for in camera review and submit a privilege log if it intended on asserting the attorney-client or work product privilege.[3] (Appx. 161-162) In addition, as to the Gonzalez Law Firm's claim of attorney-client privilege, the District Court required the Gonzalez Law Firm to submit a privilege log, and submit documents responsive to the subpoena duces tecum to the court for in camera review. (Appx. 161-162)

[3] The claim of attorney-client privilege is not at issue in this appeal.

On March 3, 2011, the Tribe filed its Notice of Appeal from the District Court's Order denying its Motion to Quash and denying its claim of tribal sovereign immunity. (Appx. 163) On the same date, the Tribe also filed with this Court, a Petition for Permission to Appeal, in the event the Court determined the District Court's Order was not immediately appealable under the collateral order doctrine. *See* Petition for Permission to Appeal. The Court denied the Petition for Permission to Appeal as unnecessary, implicitly concluding the District Court's denial of the Tribe's sovereign immunity claim was immediately appealable under the collateral order doctrine. *See* Order dated April 7, 2011.[4]

## STATEMENT OF THE FACTS[5]

DeJordy was employed by Alltel and its predecessors from approximately 1995 until November 2007, when Alltel alleges it terminated DeJordy's employment and DeJordy alleges he resigned his employment. (Appx. 2, 72) In August 2000, DeJordy negotiated the Tate Woglaka Service Agreement ("TWSA") between the Oglala Sioux Tribe and Alltel's predecessor, Western Wireless. (Appx. 4) The TWSA was executed on

[4] Other proceedings not directly involving the Tribe and its claim of tribal sovereign immunity took place in the District Court after the Tribe filed its Notice of Appeal. As these proceedings do not affect the Tribe's appeal, these proceedings will not be addressed in the Tribe's briefing.

[5] Many of the facts of the underlying lawsuit are simply not relevant to the issue in this appeal. Accordingly, such facts will not be recited here.

August 21, 2000, and set forth the terms and conditions applying to telecommunications services that were to be provided by Western Wireless and/or its subsidiary to the Tribe and its members located on the Pine Ridge Indian Reservation. (Appx. 4)

Upon DeJordy's departure from Alltel, DeJordy was provided a severance payment of $2,039,983, and in exchange, DeJordy entered into a Separation and Release Agreement with Alltel. (Appx. 2) Alltel alleges that under the Separation Agreement, DeJordy agreed not to recruit Alltel employees for one year and not to support or assist legal actions against Alltel or its successors and assigns. (Appx. 2) Alltel claims DeJordy breached the Separation Agreement by recruiting one of Alltel's employees, who left Alltel and formed a new company with DeJordy. (Appx. 3) Alltel also claims DeJordy breached the Separation Agreement by supporting and assisting the Tribe in a legal action against Alltel. (Appx. 3)

Alltel brought suit against DeJordy in Arkansas District Court by Complaint filed February 23, 2010. (Appx. 2) The lawsuit was brought in Arkansas District Court pursuant to the Separation Agreement, which stated that a claim related to the Separation Agreement must be brought in state or federal court located in or having jurisdiction over matters arising in Pulaksi County, Arkansas. (Appx. 3)

In connection with the Arkansas lawsuit, Alltel issued subpoenas duces tecum to the Gonzalez Law Firm, to Joseph Red Cloud, individually and as an employee of the Oglala Sioux Tribe, and to the Oglala Sioux Tribe. (Appx. 83-91; 92-101; 105-110) The subpoenas duces tecum requested production of a number of documents from the Tribe and Red Cloud from the time period of January 1, 2007 to June 22, 2010. (Appx. 83-91; 92-101; 105-110) The requested documentation revolves around the TWSA and includes, generally: communications between the Tribe/Red Cloud and DeJordy; offers, proposals and statements of work made to the Tribe/Red Cloud by DeJordy; contracts and memoranda between the Tribe/Red Cloud and DeJordy; reports, advice or documents provided to the Tribe/Red Cloud by DeJordy; documents prepared on behalf of the Tribe/Red Cloud by DeJordy; memoranda, records and notes from meetings or telephone conversations between the Tribe/Red Cloud and DeJordy; and the Tribe's/Red Cloud's telephone records to show calls to and from DeJordy. (Appx. 83-91; 92-101; 105-110)

By Motion to Quash filed October 25, 2010, the Tribe/Red Cloud moved to quash the subpoena duces tecum, asserting tribal sovereign immunity protected them from compliance with the subpoena duces tecum, and asserting the attorney-client privilege applied. (Appx. 113) DeJordy

submitted a Declaration in Support of the Motion to Quash. (Appx. 115-118)

By Order filed February 17, 2011, the District Court denied the Tribe/Red Cloud's Motion to Quash, concluding tribal sovereign immunity did not apply to protect the Tribe/Red Cloud from the subpoena duces tecum. (Appx. 128-162) In so concluding, the District Court performed a balancing test and determined that "[t]o allow the Tribe to advance its interest while denying Alltel access to information to pursue its claims against DeJordy is contrary to the goals and purposes of the Federal Rules of Civil Procedure." (Appx. 153) On March 3, 2011, the Tribe/Red Cloud filed their Notice of Appeal of the District Court's Order denying their claim of tribal sovereign immunity. (Appx. 163)

## SUMMARY OF ARGUMENT

The United States District Court for the District of South Dakota, Western Division denied the Oglala Sioux Tribe's and Joseph Red Cloud's Motion to Quash the subpoenas deces tecum issued by Alltel Communications in its underlying action filed against Eugene DeJordy in the United States District Court for the Eastern Division of Arkansas regarding a Separation Agreement.

The Court erred in denyuing the Tribe's and Joseph Red Cloud's Motions to Quash because the Tribe's sovereign immunity applies to the underlying civil lawsuit and protects the Tribe and Red Cloud from complying with the subpoenas duces tecum. The Court's reliance on Eleventh Amendment immunity is misplaced because it is not analogous to tribal immunity.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN CONCLUDING TRIBAL SOVEREIGN IMMUNITY DID NOT PROTECT THE TRIBE FROM ENFORCEMENT OF THE SUBPOENAS DUCES TECUM.

#### A. Standard of Review

This Court reviews the District Court's conclusions regarding tribal immunity *de novo*. *See e.g. E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (applying *de novo* standard of review to claim of tribal immunity); *In re Mayes*, 294 B.R. 145, 147 (B.A.P. 10th Cir.) ("the application of tribal sovereign immunity is a question of law subject to *de novo* review by this Court."); *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 783 (5th Cir. 2004) (applying *de novo* standard of review to issue of tribal immunity).

## B. The District Court Erred in Concluding Tribal Immunity Does Not Protect the Tribe from Enforcement of the Subpoena Duces Tecum

### 1. The Purpose and Significance of Tribal Immunity

This Court in *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-79 (8th Cir. 1985), aptly explained both the purpose and significance of tribal sovereign immunity:

> The principle that Indian nations possess sovereign immunity has long been part of our jurisprudence. Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. That sovereign immunity can be surrendered only by express waiver enjoys similarly ancient pedigree. We steadfastly have applied the express waiver requirement irrespective of the nature of the lawsuit.

*Id.* (internal citations omitted).

The Supreme Court has observed, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). *See also* Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV.L.REV. 1058 (recognizing that "Indian tribes are culturally, politically, and economically

separate from the rest of society and should continue to be largely self-governing.").

The doctrine of tribal sovereign immunity has long been recognized by the Supreme Court:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

*Oklahoma Tax Comm'n*, 498 U.S. at 509. *Id.* (internal citations omitted). With Indian matters, Congress usually acts "upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

This Court has declared:

> It is well settled "that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers." *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 576 (8th Cir. 1998). The Supreme Court recently reaffirmed that a tribe may waive its immunity, but "a tribe's waiver must be 'clear.' " *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of*

> *Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 1594, 149 L.Ed.2d 623 (2001) (*quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)).

*Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001).

It is against this backdrop explaining the history and significance of tribal immunity that the Court must determine whether the Tribe must sacrifice its immunity to aid a corporation in its civil lawsuit. For the reasons explained below, the Tribe's immunity applies to this civil lawsuit and protects it from complying with the subpoena duces tecum.

2. Tribal Immunity Shields the Tribe from Compliance with the Subpoena Duces Tecum Issued from Alltel

The Tribe possesses tribal immunity that protects it from suit. *See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("It is undisputed that an Indian tribe enjoys sovereign immunity.")(citing *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998). *See also Catskill Dev., LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002 ("the doctrine of tribal immunity from suit is well established"); *United States v. James*, 980 F.3d 1314 (9th Cir. 1992. Further, "[a] Tribe's sovereign immunity extends to tribal officials acting in their official capacities and within the scope of

their authority," such as Red Cloud. *See Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F.Supp. 740, 746 (D.S.D. 1995).

In addition to immunity from suit, a number of courts that have considered this issue – whether tribal immunity shields an Indian tribe from compliance with a subpoena – have concluded that tribal immunity does protect tribes from compliance with subpoenas. Most recently, in *Cash Advance and Preferred Cash Loans v. State of Colorado*, 242 P.3d 1099, 1108 (Colo. 2010) (en banc), the Colorado Supreme Court, sitting en banc, determined whether "tribal sovereign immunity applies to state law enforcement actions." The court stated, "U.S. Supreme Court precedent is clear that tribal sovereign immunity applies to state law enforcement actions." *Id.* "Although tribes are subject to non-discriminatory state laws for off-reservation conduct, . . . they are immune from state enforcement actions with respect to those laws. As the U.S. Supreme Court has explained, '[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them.'" *Id.* (internal and other citations omitted).

Therefore, the Colorado Supreme Court held "[d]espite the state's arguments to the contrary in this case, tribal sovereign immunity also applies

to judicial enforcement of state investigatory actions with respect to alleged violations of state law." *Id.* (citing *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) and *Catskill*, 206 F.R.D. at 86). The court summarized its holding that "tribal sovereign immunity applies to this state investigative subpoena enforcement action and agrees with the court of appeals that the trial court erred in denying the tribal entities' motion to dismiss on the basis that tribal sovereign immunity does not preclude enforcement of the state's investigatory powers with respect to alleged violations of state law." *Cash Advance*, 242 P.3d at 1108 (citing *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 173 (1977) (vacating state court's order directing the Puyallup Tribe to provide information regarding its member's fishing activities in connection with the state's investigation regarding alleged fishing violations). *See also James*, 980 F.2d at 1319 (tribal immunity relieved Indian tribe of the duty to comply with a subpoena duces tecum issued by individual defendant in criminal case); *United States v. Wahtomy*, No. 08-96-E-BLW, 2008 WL 4693408 (D. Idaho 2008) ("The Tribes have sovereign immunity from suit, and this extends to protect them from complying with subpoenas in criminal cases.") (citing *James*, 980 F.3d at 1319).

In *Catskill*, the only case to address the precise issue in this case – whether "tribal sovereign immunity applies to non-party subpoenas in civil litigation," – the court concluded tribal immunity applied, shielding the tribe from the civil subpoena. *Catskill*, 206 F.R.D. at 88. In so concluding, the court admitted there was a dearth of authority on this issue, but cited to the court's opinion in *James* and rejected the cases cited by plaintiffs who argued tribal immunity did not apply. *See id.*

The court in *Catskill* concluded *In re Application to Quash Grand Jury Subpoenas* and *United States v. Boggs*, were "easily distinguishable," since both cases involved criminal cases in which the subpoenas were issued **by the government, and not by individuals**. *Catskill*, 206 F.R.D. at 88. The *Catskill* court also distinguished the *Velarde* case, where the court applied a balancing test in determining whether tribal immunity applied to a subpoena. *Id.* The court in *Catskill* noted that in *Velarde*, the federal government itself subpoenaed the tribe. *See Catskill*, 206 F.R.D. at 88 (citing *United States v. Velarde*, 40 F.Supp.2d 1314, 1315 (D.N.M. 1999). As noted by the court in *Catskill*, a "tribe cannot assert sovereign immunity against the United States." *Catskill*, 206 F.R.D. at 88 (other citations omitted).

As noted, the present case is most akin to the *Catskill* case. That case was also a civil case, and the issue involved there is the same as the issue presented here – whether a tribe must comply with a subpoena issued by a non-governmental party. As explained by the Court in *Catskill*, tribal immunity shields a tribe from compliance with a subpoena issued by a non-governmental party in a civil action. The same conclusion applies here.

The authorities relied upon by Alltel and the District Court are equally as distinguishable. *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012 (D. Ariz. 2006), was a **criminal** case in which the juvenile defendant was charged with sexual abuse of a minor on an Indian reservation. *Id.* at 1013. The defendant sought the victim's records from tribal agencies, which refused to provide them, citing sovereign immunity. *Id.* In response to the tribe's claim of sovereign immunity, the court plainly held, "tribal immunity has no application to claims **made by the United States**." *Id.* at 1017 (emphasis added).

In contrast to the *Juvenile Male 1* case, there is no claim being made by the United States in this case, and for this reason alone, *Juvenile Male* is distinguishable. Further, the court in *Juvenile Male 1* decided the immunity question based on the fact that it was a criminal case, stating "Congress has vested jurisdiction over major crimes committed by Indians on the

reservation in the federal courts. Everything that Congress does is in turn subject to the limitations imposed on it by the Constitution of the United States." *Id.* *See also In re Long Visitor*, 523 F.2d 443, 446-47 (8th Cir. 1975) (court's decision compelling grand jury testimony was based on fact that "the extension by Congress of federal jurisdiction to **crimes** committed on Indian reservations inherently included every aspect of **federal criminal procedure** applicable to the prosecution of such crimes.") (emphasis added).

This distinction was also the basis of the Court's decision in *United States v. Velarde*, 40 F.Supp.2d 1314, 1316 (D. N.M. 1999), which Alltel and the District Court cited in support of their conclusion, and which the court in *Catskill* rejected. The federal court's jurisdiction in *Velarde* was also based upon the Indian Major Crimes Act and involved a crime allegedly committed by an Indian on Indian land. *Id.* at 1315. Both the prosecution and defense, via subpoena, sought documents and testimony of tribal officials, who moved to quash the subpoenas, citing tribal sovereign immunity. *Id.* The court held, however, "sovereign immunity does not stand as a **complete** bar to enforcement of the subpoenas." *Id.* (emphasis added). Rather, the court held "the proper procedure is to balance the sovereign interest of the United States and the Tribe," which the court noted

is often performed "where sovereign immunity is asserted in an effort to quash a subpoena." *Id.* at 1316. The court explained:

> Where a federal agency is subpoenaed by a federal court as a third party in claims **arising under federal law, the agency cannot assert sovereign immunity unless a statute or a valid regulation authorizes the agency to do so**. . . . In such a case, the court's interest in enforcing federal law outweighs the agency's assertion of sovereign immunity. . . .**[W]here the federal court has only removal jurisdiction based on an underlying state law claim, the balancing of sovereign interests shifts. In those circumstances, sovereign immunity of the United States and the Supremacy Clause together defeat the interest of the federal court in seeing that state law is enforced**.

*Id.* (internal citations omitted) (emphasis added). Thus, the court held the subpoena power of the federal court trumps sovereign immunity only in cases arising under federal law because the court's interest in enforcing federal law is greater than the assertion of sovereign immunity. *See id.*

Conversely, where as here, the District Court had diversity jurisdiction, the Tribe's sovereign immunity is paramount to the court's interest in enforcing federal laws. *See id. Cf. Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986) (tribal immunity did not extend to processes of the state court where the **tribe instituted suit**); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25-26 (1st Cir. 2006) (court held

search warrant could be executed on tribal lands, concluding tribal sovereign immunity in Rhode Island had been **abrogated**).

### 3. Tribal Immunity is Not the Equivalent of Eleventh Amendment Immunity

In concluding tribal immunity did not protect the Tribe from enforcement of the subpoena duces tecum, the District Court relied extensively on cases addressing Eleventh Amendment immunity claims. For example, the District Court cited to the Court's opinion in *In re Missouri Dep't of Natural Resources*, 105 F.3d 434 (8th Cir. 1997), in which the Court held, "[t]here is simply no authority for the position that the Eleventh Amendment shields government entities from discovery." (Appx 147-48)

The District Court also cited to the Seventh Circuit's opinion in *Barnes v. Black*, 544 F.2d 807, 812 (7th Cir. 2008), where the court held that ordering a state to produce documents was proper and did "not compromise state sovereignty to a significant degree" and therefore, did "not violate the Eleventh Amendment." (Appx 148) *See also Allen v. Woodford*, 543 F.Supp.2d 1138, 1142 (E.D. Cal. 2008) (holding Eleventh Amendment immunity did not protect non-parties from producing documents); *Wilson v. Venture Financial Group, Inc.*, No. C09-5768BHS, 2010 WL 4512803 at *1-2 (W.D. Wash. November 2, 2010) (rejecting Eleventh Amendment immunity defense to subpoena).

The District Court's reliance on cases rejecting the Eleventh Amendment Immunity as a defense to the production of documents is misplaced because Eleventh Amendment immunity, while similar in some respects, is not completely analogous to tribal immunity, which has different roots and which protects different rights. The authorities below make it clear that Eleventh Amendment immunity is not the equivalent of tribal immunity, which is broader than and has a wholly different genesis than Eleventh Amendment immunity.

Indeed, one author explains:

> In deciding the fate of tribal immunity, courts must determine whether the policy reasons for the restriction of other immunities require similar curtailment of tribal immunity. This Part contends that special federal concerns for Indian self-determination, for cultural autonomy, and for economic development **set tribal immunity apart from other immunities**. These unique concerns suggest, in turn, that tribal immunity is best seen through the lens of intergovernmental relations and the new federalism, and not simply as a normal species of common law immunity.

Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV.L.REV. 1058, 1069 (emphasis added). The author explains the unique character of Indian tribes:

> Indian tribes are culturally, politically, and economically separate from the rest of society and should continue to be largely self-governing. The courts and Congress have consistently made it clear that, unlike the focus of the law concerning

> treatment of other minority groups, "the focus of federal Indian law is on a political entity—the tribe— rather than on individual Indians." Furthermore, tribes, unlike any other minority group, are included in the Constitution along with foreign nations and the states in the clause empowering Congress to regulate commerce, and the federal government has, over time, entered into treaties with tribes as political entities.

*Id.* at 1069-70 (footnotes and citations omitted).

The author further opines, "'[w]hile it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments.'" *Id.* at 1070 (other citations omitted). Significantly, the author rejects the notion that tribal immunity be given the same treatment as other immunities:

> At first glance, the reasons for the decline of the common law immunities would seem to apply to tribal immunity and mandate similar limitations on it. **Yet in fact the policy concerns of tribal self-determination, economic development, and cultural autonomy are quite different from those that apply to suits against foreign nations, against the federal government, against a state in its own courts, or against charitable organizations**.

*Id.* 1072-73 (emphasis added). These distinctions between tribal immunity and other immunities, such as Eleventh Amendment immunity, have also been noted by a number of courts.

For example, the court in *Cash Advance*, 242 P.3d at 1107, stated, "tribal sovereignty is an inherent, retained sovereignty that pre-dates European contact, the formation of the United States, the U.S. Constitution, and individual statehood." The court in that case explained the "independent origin of tribal sovereignty":

> Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them. The forms of political order included multi-tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans. For most tribes, these forms of self-government were also sacred orders, supported by creation stories and ceremonies invoking spiritual powers . . . .
>
> The history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as "distinct, independent political communities," qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. The right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to ensure continued

> viability of Indian self-government insofar as governing powers have not been limited or extinguished by lawful federal authority. Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once recognized as a political body of the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty.

*Id.* at 1106 (quoting HANDBOOK OF FEDERAL INDIAN LAW§ 4.01[1][a] (Matthew Bender, 2005)).

The court in *Cash Advance* also explained that tribal immunity is broad:

> The modern realities of tribal sovereignty explain the broad applicability of the doctrine of tribal sovereign immunity. As Indian law scholar Robert A. Williams, Jr. recognized twenty-five years ago, "[t]erritorial remoteness, an inadequate public infrastructure base, capital access barriers, land ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policymakers to stifle Indian Country development and investment." Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 335-36 (1985). Because of these barriers and tribes' virtual lack of a tax base, tribal economic development-often in the form of tribally owned and controlled businesses-is necessary to generate revenue to support tribal government and services. *See generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D.L.REV. 759 (2004).

*Cash Advance*, 242 P.3d at 1107.

The court noted that the Supreme Court has held that "'the immunity possessed by Indian tribes is not coextensive with that of the States.'" *Id.* at 1110 n.11 (citing *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751 756 (1998)). "Instead, the inherent nature of tribal sovereignty, . . . requires us to distinguish tribal sovereign immunity from state sovereign immunity." *Cash Advance*, 242 P.3d at 1110 n.11. *See also Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 959 (E.D. Cal. 2009) (other citations omitted) ("Case law setting out the bound of the Eleventh Amendment can not be directly applied to tribal sovereign immunity without analysis as 'Tribal sovereign immunity . . . is not precisely the same as either international law sovereign immunity or sovereign immunity among the states.'"); *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002) (distinguishing tribal immunity from Eleventh Amendment immunity and holding that suing someone in their "individual capacity" may affect Eleventh Amendment immunity, but it does not so affect tribal immunity); *In re Mayes*, 294 B.R. 145, 149 (B.A.P. 10th Cir. 2003) ("the doctrine of tribal immunity . . . is similar, but not identical, to the sovereign immunity of States as preserved by the Eleventh Amendment."); *Conservatorship of the*

*Estate of Gonzalez*, No. A117307, 2008 WL 788606 at *4 (Cal. Ct. App. 2008) (finding analogy of "tribal sovereign immunity to that of state sovereign immunity under the Eleventh Amendment" to be "unhelpful."). *Cf. Rosenberg v. Hualapai Indian Nation*, No. 1 CA-CV 08-0135, 2009 WL 757436 (Ariz. Ct. App. 2009) (rejecting argument that Indian nations have sovereign immunity equal to, but not greater than, that possessed by other sovereign nations that may be hailed into state courts and otherwise distinguishing tribal immunity from Eleventh Amendment immunity).

In sum, the only court to address the precise issue presented here concluded that tribal immunity applies and an Indian tribe is shielded from enforcement of a subpoena in a civil case. In contrast, the cases relied upon by Alltel and the District Court are plainly distinguishable, as they involved criminal subpoenas and/or Eleventh Amendment immunity. As such, the Tribe respectfully requests this Court conclude the Tribe's immunity protects it from enforcement of Alltel's subpoena duces tecum.

## CONCLUSION

For all these reasons, the Tribe and Red Cloud respectfully request

that the Court reverse the District Court's Order denying their Motion to Quash.

Dated this 22nd day of June, 2011.

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

By */s/ Dana Van Beek Palmer*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), I certify that the Appellants' Brief uses a proportionately-spaced, 14-point Times New Roman typeface, and contains 4,981 words. Appellants have used Microsoft Office Word 2010 to prepare this brief.

*/s/ Dana Van Beek Palmer*

## VIRUS FREE CERTIFICATION

Pursuant to Eighth Circuit Rule 28A(d), I certify that attached for filing with this brief is a compact disc containing the full text of the Brief of Appellants Oglala Sioux Tribe and Joseph Red Cloud. I further certify that this compact disc has been scanned for viruses and is virus free.

*/s/ Dana Van Beek Palmer*

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2011, the foregoing Brief of Appellants Oglala Sioux Tribe and Joseph Red Cloud was electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants (listed below) in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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