UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

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

MEMORANDUM OF LAW IN SUPPORT OF THIRD-PARTY MOTION TO QUASH SUBPOENAS

COME NOW the Oglala Sioux Tribe ("Tribe"), Denise Mesteth, and Jolene Provost (collectively "Movants") and for their Memorandum of Law in Support of Third-Party Motion to Quash state as follows:

BACKGROUND

A. The Federal Court Action.

Plaintiff Curtis Temple is suing four (4) federal government officials ("Federal Defendants") for declaratory, injunctive, and monetary relief in twelve (12) claims arising out of the impoundment of Plaintiff's livestock from Range Units on the Pine Ridge Indian Reservation. *See* Pl. 2nd Amend. Compl. [doc. 152] at 1 (¶ 1). *See also id.* at 5 (¶ 18) and 7 (¶27).

The Court has ruled that it has subject matter jurisdiction over Plaintiff's claims directly "stemming from the impoundment of his cattle." Order of Feb. 19, 2016 [doc. 55] ("February 2016 Order") at 26. *See also id.* at 27 and 45. However, the Court has twice ruled that it "does not have jurisdiction to adjudicate" other claims raised by Plaintiff, including claims "stemming from the alleged pre-impoundment conduct … relating to the allocation of tribal grazing permits." *Id*. at 14; *see also id.* at 14-15, 45; Order of Aug. 29, 2018 [doc. 147] ("August 2018 Order") at 2, 8, 11.

In its February 2016 Order, the Court ruled that, "the doctrine of tribal exhaustion applies in this case," and bars litigation in this Court of Plaintiff's pre-impoundment claims, because "the resolution of Mr. Temple's pre-impoundment allegations hinge on issues of tribal law and governance and because Mr. Temple's claims are pending in Tribal Court." February 2016 Order at 15. In its August 2018 Order, this Court confirmed that Plaintiff's pre-impoundment claims "are barred by the February 2016 order," and Plaintiff is prohibited from pursuing those claims in this case. August 2018 Order at 8.

Plaintiff's second amended complaint – filed *after* this Court's February 2016 and August 2018 Orders – still contains allegations concerning pre-impoundment conduct by the Tribe and the federal government relating to the allocation of grazing permits for Range Units on the Reservation. Pl. 2d Amend. Compl. at 3-5 (¶¶ 11-17), 5 (¶ 16), and 12 (¶ 47).

The Federal Defendants have moved the Court to dismiss or strike Plaintiff's pre-impoundment claims (and other claims). *See* Defts. Partial Mot. Dismiss Pl. 2nd Amend. Compl. [doc. 153]. *See also* Defts. Mem. Law [doc. 154] at 1, 17-19; Defts. Reply. Br. [doc. 168] at 2-3, 13-16. The motion to dismiss has been fully briefed and is pending before the Court.

B. The Tribal Court Actions.

Plaintiff's pre-impoundment claims are the subject of three civil actions now pending in the Oglala Sioux Tribal Court: *Temple v. OST Allocation Committee*, No. CIV-13-0533, *Temple v. BIA Superintendent, et al.*, No. CIV-15-0333, and *Temple v. OST Land Committee Members, et al.*, No. CIV-18-0038. These actions, referred to collectively as the "Tribal Court Actions," have been consolidated and a motion to dismiss has been filed by the tribal defendants. The motion to dismiss has been briefed, argued, and taken under advisement by the Chief Judge of the Tribal

Court. The motion seeks dismissal for lack of subject matter jurisdiction based on the doctrine of tribal sovereign immunity, among other things.

No discovery has taken place in the Tribal Court Actions because the Tribal Court has not issued a written decision on the threshold issue of sovereign immunity. To permit discovery at this stage would undermine the Tribe's immunity. It is well settled that sovereign immunity protects government agencies and officials not just from liability, but from "the burdens of litigation." *Fant v. City of Ferguson, Missouri*, 913 F.3d 757, 759 (8th Cir. 2019) (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143–44, 146 (1993)). Those burdens include "the costs and general consequences of subjecting public officials to the risks of discovery and trial." *Puerto Rico Aqueduct*, 506 U.S. at 143–44. *Accord*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability….") (emphasis in original).

C. The Subpoenas of Tribal Government Officers.

On May 9, 2019, Plaintiff Curtis Temple caused third-party subpoenas to be served on Denise Mesteth and Jolene Provost to command them to appear and testify at depositions on May 20, 2019. The subpoenas are attached hereto as **Exhibits A and B**. Denise Mesteth is the former Director of the Land Office of the Tribe. She is a named defendant in one of the Tribal Court Actions: *Temple v. BIA Superintendent, et al.*, No. CIV-15-0333. *See* Pl. Compl., Ex. A [doc. 1-1]. Jolene Provost is the current Range Specialist in the Land Office of the Tribe. She and Ms. Mesteth are referred to collectively hereafter as the "Tribal Officers."

On May 3, 2019, the undersigned counsel for the Tribe and Tribal Officers had a telephone conference with Terry L. Pechota, counsel for Plaintiff, and Assistant U.S. Attorney Meghan

Roche, counsel for the Federal Defendants. The purpose of the conference was to ascertain the nature and scope of Plaintiff's intended depositions of the Tribal Officers.

Based on the May 3 conference, and on information and belief, the Tribe and Tribal Officers aver that the nature and scope of the intended depositions is, in whole or in part, to depose the Tribal Officers:

- In their official capacities as (present or former) officers and representatives of the Tribe; and
- About actions taken, decisions made, or information obtained in their official capacities; and
- About the pre-impoundment decisions and actions of tribal agencies and officials concerning the inclusion of Plaintiff's land in the Tribal Range Management Program and the allocation of grazing privileges to, and leasing of, Range Units on the Pine Ridge Indian Reservation (the "Pre-Impoundment Decisions"); and
- About the deliberations, deliberative process, discussions, and reasons for the Pre-impoundment Decisions; and
- About other matters that are the subject of the Tribal Court Actions.

The Tribe and Tribal Officers move to quash the subpoenas for the reasons set forth below.

ARGUMENT

THE SUBPOENAS SHOULD BE QUASHED TO PROTECT THE SOVEREIGNTY, SOVEREIGN IMMUNITY, AND RIGHT TO SELF-GOVERNMENT OF THE TRIBE.

A. Tribal Sovereign Immunity Bars Suits Against the Tribe and Tribal Officers.

The Oglala Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Indian tribes are "domestic dependent nations," with inherent sovereign authority over their members and their territory, and in *Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), the Supreme Court held that suits against Indian tribes are barred by tribal sovereign immunity.

The Supreme Court has "time and again treated the 'doctrine of tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-2031 (2014) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998)).

Tribal sovereign immunity extends to tribal officers acting in their official capacities. "A suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent." *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (cleaned up). "There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Lewis v. Clarke*, 137 S.Ct. 1285, 1292 (2017).

B. The Tribe Has Not Waived Its Immunity.

The Tribe has preserved its sovereign immunity, including the immunity of its officers from suit in any civil action arising from the performance of their official duties. Oglala Sioux Tribal Ordinance No. 01-22 provides that:

> [T]he Oglala Sioux Tribal Council, acting in the exercise of their Constitutional and Reserved Powers does hereby declare the Oglala Sioux Tribe, Oglala Sioux Tribal Officials, and Oglala Sioux Tribal Employees, acting in their official capacity, immune from suit, based on the Doctrine of Sovereign Immunity ….

O.S.T. Ord. No. 01-22 (Jul. 30, 2001) (attached hereto as **Exhibit C**). Similarly, Oglala Sioux Tribal Ordinance No. 15-16 provides that:

> The Oglala Sioux Tribe and its governing body, the Oglala Sioux Tribal Council, and its departments, programs, and agencies shall be immune from suit in any civil action and its officers, employees, and agents shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

O.S.T. Ord. No. 15-16, § 1(a) (Sept. 28, 2015) (attached hereto as **Exhibit D**).

The Supreme Court has held that, "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) (quoting *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). The laws of the Tribe provide that any waiver of sovereign immunity must be "unequivocally expressed," O.S.T. Ord. No. 01-22 at 1, and "it must make specific reference to a waiver of tribal sovereign immunity," O.S.T. Ord. No. 15-16, § 1(b). There is no waiver of sovereign immunity in this case.

C. Plaintiff's Third-Party Subpoenas Are "Suits" That Are Barred by Tribal Sovereign Immunity.

In *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012), the U.S. Court of Appeals for the Eighth Circuit held that tribal sovereign immunity bars enforcement of third-party subpoenas against an Indian tribe and its officers. The court's decision in *Alltel* is controlling, and it requires that the subpoenas in this case be quashed.

The *Alltel* court held that, "a third-party subpoena in private civil litigation is a 'suit' for purposes of the Tribe's common law sovereign immunity," and unless "that immunity has … been waived or abrogated," the subpoena may not be enforced. *Id*. at 1102. The 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.'" *Id.* (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). Applying this standard, the court held that third-party subpoenas directed to the Oglala Sioux Tribe and an officer of the Tribe were "suits" since 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.[1]

The *Alltel* court 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 (quoting *Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir.1985). The court "conclude[d] from the plain language of the Supreme Court's definition of a 'suit' in *Dugan,* and from the Court's 'well-established federal policy of furthering Indian self-government,' that a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." 675 F.3d at 1105 (quoting *Santa Clara Pueblo*, 436 U.S. at 62).

In the case at bar, Plaintiff has issued third-subpoenas to compel two officers of the Oglala Sioux Tribe to appear at depositions and testify about information obtained in their official capacity, including information that "would likely reveal deliberations" about tribal policies and decisions. *Cf., Alltel*, 675 F.3d at 1104. The subpoenas interfere with the public administration and self-government of the Tribe. Under *Alltel*, the subpoenas are "suits" and, as such, they are subject to the Tribe's sovereign immunity. There being no waiver of the Tribe's immunity, the subpoenas should be quashed.[2]

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[1] *Accord*, *Boron Oil v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) (holding that, "the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding interferes with the public administration and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function") (cleaned up; internal citations omitted).

[2] *Accord, United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992) (tribal sovereign immunity prohibits enforcement of third-party subpoena *duces tecum* directed to tribal official).

Movants note that, apart from sovereign immunity, there are other grounds on which the subpoenas may be quashed. First, the subpoenas appear to seek information about pre-impoundment matters that have been dismissed from this case and over which the Court has ruled it has no jurisdiction. *See* February 2016 Order at 14-15, 45; August 2018 Order at 2, 8, 11. Second, the subpoenas appear to seek information about matters that are the subject of the Tribal Court Actions, and this Court has said that exhaustion of tribal remedies is "mandatory" as to those matters. February 2016 Order at 14-15. Third, the subpoenas appear to seek information protected by the "deliberative process" privilege, including information about the opinions, discussions, recommendations, deliberations, and reasons of tribal officials concerning the Pre-impoundment Decisions. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). The courts have held that examination of certain government officials concerning the reasons for administrative decisions is not permitted, since it would undermine the integrity of the administrative process. *See In re U.S.*, 197 F.3d 310, 313 (8th Cir. 1999); *United States v. Morgan*, 313 U.S. 409, 422-423 (1941). Notwithstanding these important points, Movants reiterate that the Eighth Circuit's decision in *Alltel* is controlling, and it requires that the subpoenas be quashed.

CONCLUSION

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

Dated: May 13, 2019

/s/ Steven J. Gunn
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CERTIFICATE OF SERVICE

The undersigned certifies that, on May 13, 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
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