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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

TERRYL T. MATT,)
)
Plaintiff,)
)
v.) Civil Action No. 15-cv-00028
)
UNITED STATES OF AMERICA,)
)
Defendant.)

**PLAINTIFF’S UNOPPOSED MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND
HOLD NON-PARTY WITNESS IN CONTEMPT**

I. Introduction

Plaintiff Terryl T. Matt, through undersigned counsel, respectfully brings this Motion to Compel Mr. Mark Azure to produce subpoenaed documents pursuant to Rule 37 of the Federal Rules of Civil Procedure. Plaintiff similarly brings this Motion to hold Mr. Mark Azure, non-party witness, in contempt of court pursuant to Rule 45 of the Federal Rules of Civil Procedure.

Mr. Azure is the President of the Fort Belknap Tribal Community Council of the Fort Belknap Reservation in Blaine County, Montana. Mr. Azure, and others, are represented by Mr. Sam Painter in a directly related matter pending in the Fort Belknap Tribal Court. On information and belief, Mr. James Vogel, General Counsel for the Fort Belknap Tribes, and Mr. Painter represent Mr. Azure in this matter.

Mr. Azure has affirmatively refused to comply with Plaintiff's *Subpoena Duces Tecum* on the stated grounds of "tribal sovereign immunity." By this Motion, Plaintiff seeks an order to compel Mr. Azure to produce the documents, to adjudge Mr. Azure to be in contempt of this Court for failing to produce the documents, and to pay related costs incurred and attorney's fees.

II. Issuance and Service of the *Subpoena Duces Tecum*

On July 17, 2015, attorney for the Plaintiff, Mandi A. Vuinovich, issued a *Subpoena Duces Tecum* directed to Mr. Azure through his counsel, Mr. Painter (**Exhibit A**). Prior to issuing the subpoena, on July 17, 2015, Plaintiff's counsel notified Mr. Mark Smith, Assistant U.S. Attorney and counsel for the named Defendant, that a *Subpoena Duces Tecum* directed to Mr. Azure would be issued.

The Subpoena requests documents that contain information that is relevant, necessary and narrowly tailored. Specifically, the Subpoena requests documents regarding: road construction, maintenance, and related activities on Plaintiff's land; rights-of-way or other permissions to enter onto or cross Plaintiff's land; applications for federal funding related to projects on Plaintiff's land; and establishment and maintenance of a road designated as BIA Route 113 that may cross Plaintiff's land. On July 23, 2015, Plaintiff's counsel was informed by Mr. Painter that he was not authorized to accept service for Mr. Azure and to proceed with personal service (**Exhibit B**).

On July 28, 2015, attorney for the Plaintiff reissued the *Subpoena Duces Tecum* directed to Mr. Azure (**Exhibit C**). Prior to serving the subpoena, on July 28, 2015, Plaintiff's counsel notified Mr. Smith of the Subpoena. The Subpoena was served on Mr. Azure on July 31, 2015 (**Exhibit D**). The requested date for the production of these documents was August 10, 2015. Between the dates of July 31, 2015, and August 10, 2015, Plaintiff's counsel did not receive any

communication from Mr. Azure or his counsel regarding the production of documents. On August 10, 2015, Plaintiff's counsel sent a letter via email, fax and U.S. mail to counsel for Mr. Azure, Mr. Painter and Mr. Vogel, requesting cooperation regarding the delivery of these documents (**Exhibit E**).

On August 11, 2015, at the direction of Plaintiff's counsel, a courier traveled to the Fort Belknap Tribal Headquarters at the Fort Belknap Agency in search of information regarding the documents at issue. While at Tribal Headquarters, the courier spoke with Mr. Azure directly and was informed that no documents would be produced on the basis of "sovereign immunity." Subsequently, on August 11, 2015, Mr. Painter contacted Plaintiff's counsel via email to schedule a call to discuss matters. Plaintiff's counsel promptly contacted Mr. Painter on August 11, 2015, by phone. During that call, Mr. Painter informed counsel for the Plaintiff that he had not been provided with any of the requested documents and that, despite his efforts, Mr. Azure did not intend to provide the subpoenaed documents. Upon knowledge and belief, no written objection has been made regarding the subpoena.

III. The Court Should Grant this Motion

Mr. Azure is President of the Fort Belknap Tribes and custodian of the records requested. Tribal sovereign immunity is no shield to subpoenas issued in federal court actions. Tribal sovereign immunity may protect a Tribe from civil actions against it unless the Tribe has consented. However, "service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe." *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012, 1016-17 (D. Ariz. 2006). Furthermore, "federal subpoenas routinely issue to state and federal employees to produce official records or appear and testify in court and are fully enforceable despite any claim of immunity It would be strange indeed if a federal subpoena were operative against the greater sovereign and its officers but not the lesser" *Id.* (internal citations omitted).

Under Rule 37(a) of the Federal Rules of Civil Procedure, it is appropriate for this Court to order Mr. Azure to produce subpoenaed documents. Federal Rule of Civil Procedure 34 governs requests for production and Rule 37(a) "permits a party to move for a court order compelling discovery taken under Rule 34 when a non-party fails to comply with such discovery." *VFS Fin., Inc. v. Specialty Fin.*

Corp., 2013 WL 1413024, at 1 (D. Nev. Apr. 4, 2013).

Under Rule 45(g), it is appropriate for this Court to adjudge Mr. Azure in contempt of court for his failure and refusal to respond to the subpoena or produce the subpoenaed documents. Mr. Azure has failed to produce the subpoenaed documents without adequate excuse, without moving to modify or quash the subpoena under Rule 45(d) of the Federal Rules of Civil Procedure, and despite the efforts on behalf of the Plaintiff, through her counsel, to resolve the dispute amicably. *See Marti v. Baires*, 2014 WL 1747018, 1 (E.D. Cal. May 1, 2014).

By reason of Mr. Azure's failure and continuing refusal to comply with the Subpoena, the Plaintiff's preparation to prove allegations in her Complaint in the present action is substantially hindered. Plaintiff has incurred expenses and attorney's fees, both in preparation and service of the Subpoena and preparation of this Motion and proposed Order. In view of Mr. Azure's continuing interest in the outcome of this action, his failure and continuing refusal to produce the subpoenaed documents, and despite the efforts of the Plaintiff to resolve the dispute amicably, it is appropriate for this Court to order Mr. Azure to produce the subpoenaed documents and to adjudge him in contempt of court.

For the reasons stated above, Plaintiff, Terryl T. Matt, asks the Court to grant its motion.

Motion Unopposed

Before filing this Motion, Plaintiff's counsel conferred with Mr. Mark Smith, Assistant U.S. Attorney and counsel for the Defendant. Mr. Smith stated that with the caveat that the United States does not represent the person that is subject to this Motion, and does not know whether they have arguments to make under Fed. R. Civ. P. Rules 37(a)(2) or 45(e)(2)(A), the United States does not oppose the Motion.

Certification

Pursuant to Fed. R. Civ. P. 37(a)(1), on August 11, 2015, counsel for Plaintiff conferred over-the-phone with Mr. Sam Painter, counsel for Mr. Azure, in a good-faith effort to resolve the discovery matters that are subject to this Motion.

