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FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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United States of America,

CR-05-498-PCT-FJM

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Plaintiff,

OPINION

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vs.

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Juvenile Male 1

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Defendant.

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MARTONE, District Judge:

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This is a delinquency proceeding under 18 U.S.C. §§ 5031-42 in which the juvenile is charged with violating 18 U.S.C. §§ 1153 and 2241(c), aggravated sexual abuse of a minor on an Indian reservation. The issue is whether the juvenile's right "to have compulsory process for obtaining witnesses in his favor" under the Sixth Amendment to the United States Constitution extends to those witnesses who are the custodians of records maintained by school and social service agencies under the control of the Navajo Tribe of Indians. We hold that it does.

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The juvenile in this case contends that the victim is falsely accusing him and that the victim's records at the Navajo Nation Shiprock Youth Home and the Navajo Social

1 Services will contain evidence to support this contention. We granted the juvenile's
2 applications for subpoenas *duces tecum* under Rule 17(b) and (c), Fed. R. Crim. P.

3 Instead of compliance, or a motion to quash or modify under Rule 17(c)(2), Fed.
4 R. Crim. P., Kandis Martine, a lawyer employed by the Navajo Tribe, sent a letter to the
5 Office of the Federal Public Defender stating that it would not honor the subpoena issued to
6 the Navajo Social Services unless the Federal Public Defender followed what she
7 characterized as a "routine procedure for domestication of extra-territorial subpoenas through
8 the Navajo Nation courts." Motion to Compel, Exhibit A at 1 (doc. 53). The juvenile then
9 filed a motion to compel compliance with the subpoena *duces tecum* and outlined the efforts
10 that even the United States Attorney and the FBI undertook in order to get the Tribe to
11 comply with the subpoena. The Tribe was just as uncooperative with the government. The
12 juvenile argued that the Tribe was interfering with his Sixth Amendment rights in this federal
13 prosecution and that even if the Tribe had some governmental immunity to ignore federal
14 process, it surely waived it by providing documents to the government. The government did
15 not oppose the motion to compel and we promptly entered an order dated March 17, 2006
16 which, as to the objections raised in the Kandis Martine letter, stated as follows:

17 The objections raised in the letter are without merit. There are no
18 issues of 'domestication of extra-territorial subpoenas through the
19 Navajo Nation Courts.' The Navajo reservation is within the
jurisdiction of the United States and process issued by this court is
obviously independently effective.

20 Order of March 17, 2006 at 1 (doc. 55).

21 The juvenile fared no better with the subpoena served on the Shiprock Youth
22 Home. Diandra D. Benally, a lawyer employed by the Navajo Tribe, sent the Federal Public
23 Defender a letter dated March 27, 2006 stating that the subpoena would be ignored
24 "[b]ecause the Navajo Nation is a separate sovereign nation, and as a matter of public policy,
25 foreign subpoenas issued from neighboring sovereigns are not honored." Motion to Compel,
26 Exhibit A at 1 (doc. 58). Thus, the juvenile filed a second motion to compel compliance
27 with subpoena *duces tecum* contending again that his rights under the Sixth Amendment were
28 in jeopardy and, in any event, there was waiver. The juvenile again described how the Tribe

1 rejected even the overtures of the government and its FBI agent. The government, of course,
2 did not oppose the motion to compel. In granting it we said:

3 The reasons stated in Diandra Benally's letter of March 27, 2006 for
4 not complying with the subpoena are utterly without merit. The
5 reference to a federal subpoena as a 'foreign' subpoena and the
6 suggestion for 'domestication of extra-territorial' subpoenas reflect an
7 erroneous understanding of the relationship between the United
8 States and Indian tribes. While Indian tribes have been accorded a
9 certain amount of self-governmental power over their own members,
10 and while they have been insulated generally from the application of
11 state law, Congress has plenary control over Indian affairs and has
12 exercised that plenary power by the enactment of the Major Crimes
13 Act. The Navajo reservation is within the jurisdiction of the United
14 States of America and a federal subpoena is as fully and
15 independently operative within the reservation as without. Indeed, no
16 state of the union or municipality of a state would dream of thinking
17 that because a state is a sovereign, a federal subpoena must be
18 domesticated in its court. Under the Constitution of the United
19 States, the federal Constitution and laws are the supreme law of the
20 land. U.S. Const. art. VI.

21 Order of April 4, 2006 at 1-2 (doc. 59).

22 We then granted the juvenile's request for an order to show cause to the
23 custodians of records of the Shiprock Youth Home and Navajo Social Services, along with
24 Kandis Martine and Diandra Benally of the Office of the Navajo Attorney General and
25 scheduled a contempt proceeding for May 12, 2006. Order of April 5, 2006 (doc. 66).

26 The court then received four separate motions to quash the order to show cause
27 filed by Dana Bobroff, a lawyer employed by the Navajo Tribe on behalf of Kandis Martine,
28 Diandra Benally, social worker Jennifer Johnson of Navajo Social Services, and the
custodian of records of the Navajo Nation Shiprock Youth Home. Among other arguments,
the Tribe contended that the subpoenas were "contrary to the Navajo Nation's sovereign
immunity" and not "from a Court of competent jurisdiction." Memorandum in Support of
Motion to Quash (re Jennifer Johnson) at 3 (doc. 76). The Tribe argued that "[t]he Navajo
Nation's status as a sovereign nation should be recognized rather than resorting to a foreign
court." *Id.* at 9-10. In addition, the Tribe raised, for the first time, the case of *United States*
v. James, 980 F.2d 1314 (9th Cir. 1992).

1 *Cayuga Indian Claims (Great Britain v. United States)*, 20 Am. J. Int'l. L. 574 (1926). An
2 Indian tribe is not a foreign state under the Constitution. *Cherokee Nation v. Georgia*, 30
3 U.S. (5 Pet.) 1, 20 (1831). And, 25 U.S.C. § 71 (originally enacted as Act of March 3, 1871,
4 ch. 120, 16 Stat. 544, 566), provides that "[n]o Indian nation or tribe within the territory of
5 the United States shall be acknowledged or recognized as an independent nation, tribe, or
6 power."

7 It was thus frivolous for the lawyers representing the Tribe to refer to a federal
8 subpoena as "extra-territorial," to describe the Tribe as a "separate sovereign nation," to refer
9 to this court's processes as "foreign subpoenas issued from neighboring sovereigns," and to
10 refer to this court as "foreign." If this rhetoric had come from non-lawyers, one could just
11 dismiss it as hyperbole. But lawyers have an obligation to refrain from making frivolous
12 contentions. *See, e.g.*, ER 3.1, Arizona Rules of Professional Conduct, which applies to
13 lawyers authorized to practice before the United States District Court for the District of
14 Arizona. LRCiv 83.2(d). This includes tribal lawyers. LRCiv 83.1(b)(2).

15 To be sure, federal law permits Indian tribes a limited power of self-government
16 over their own members. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1085-
17 86 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978). And,
18 federal law has generally insulated tribal members from the application of state law while on
19 their reservation. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S. Ct.
20 1257 (1973). But the Congress of the United States and the Supreme Court of the United
21 States have always made it quite clear that these limited doctrines under federal Indian law
22 have no application when it comes to relationships between Indian tribes and the United
23 States. Here, Congress has vested jurisdiction over major crimes committed by Indians on
24 a reservation in this court. 18 U.S.C. § 1153. In rejecting a challenge to the constitutionality
25 of the statute, the Supreme Court of the United States said:

26 Indians are within the geographical limits of the United States. The
27 soil and the people within these limits are under the political control
28 of the government of the United States, or of the states of the Union.
There exist within the broad domain of sovereignty but these two.

1 claim of immunity. *See, e.g., Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d
2 774, 778 (9th Cir. 1994). Even the President of the United States must comply with a federal
3 subpoena. *United States v. Nixon*, 418 U.S. 683, 713, 94 S. Ct. 3090, 3110 (1974). It would
4 be strange indeed if a federal subpoena were operative against the greater sovereign and its
5 officers but not the lesser. *See Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641,
6 656, 10 S. Ct. 965, 971 (1890).

7 But even if the immunity of a tribe as an entity from lawsuits has any application
8 to the enforcement of a subpoena against an employee of a tribal entity, tribal immunity has
9 no application to claims made by the United States. As the court stated in *Quileute Indian*
10 *Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994), "tribal sovereignty does not extend to
11 prevent the federal government from exercising its superior sovereign powers."

12 Moreover, Congress has vested jurisdiction over major crimes committed by
13 Indians on the reservation in the federal courts. Everything that Congress does is in turn
14 subject to the limitations imposed on it by the Constitution of the United States. The Sixth
15 Amendment to the Constitution provides in relevant part that "[i]n all criminal prosecutions,
16 the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and]
17 to have compulsory process for obtaining witnesses in his favor." (Emphasis added).¹
18 Congress could not except out from the Sixth Amendment federal prosecutions for crimes
19 on Indian reservations. Thus, it is plain that when Congress vested jurisdiction in the federal
20 courts, it expected it to be effective. The juvenile here has the right to compulsory process
21 or else this prosecution shall fail. The District of Arizona has hundreds of such cases every
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25 ¹ "The very integrity of the judicial system and public confidence in the system
26 depend on full disclosure of all the facts, within the framework of the rules of evidence. To
27 ensure that justice is done, it is imperative to the function of courts that compulsory process
28 be available for the production of evidence needed either by the prosecution or by the
defense." *Nixon*, 418 U.S. at 709, 94 S. Ct. at 3108.

1 year.² We could not process all of these cases if a tribe's immunity from civil actions
2 interfered with the defendant's right to compulsory process. The Congress did not address
3 this question because it would not have occurred to anyone that a tribe's immunity from civil
4 actions had anything at all to do with the obligation of a witness to produce documents and
5 to testify. So, for example, in *In re Long Visitor*, 523 F.2d 443 (8th Cir. 1975), members
6 of a tribe refused to give testimony before a grand jury pursuant to grand jury subpoenas.
7 The tribal members tried to rely upon the tribe's sovereign immunity as a defense to the
8 enforcement of the subpoenas. The court rejected this and stated that "the extension by
9 Congress of federal jurisdiction to crimes committed on Indian reservations inherently
10 includes every aspect of federal criminal procedure applicable to the prosecution of such
11 crimes." *Id.* at 446. The court went on to hold that "[a]n Indian reservation provides no
12 sanctuary from the reach of a federal subpoena to compel testimony before a grand jury on
13 matters within the jurisdiction of the District Court." *Id.* at 447.

14 The Tribe does not address any of this but merely rests its case on *United States*
15 *v. James*, 980 F.2d 1314 (9th Cir. 1992). James, convicted of rape, contended that the district
16 court had erred in quashing a subpoena to the director of social services of the Quinault Tribe
17 based on tribal immunity. The court rejected his argument and stated that "[b]y making
18 individual Indians subject to federal prosecution for certain crimes, Congress did not address
19 implicitly, much less explicitly, the amenability of the tribes to the processes of the court in
20 which the prosecution is commenced." *James*, 980 F.2d at 1319. At one point the court
21 characterized the subpoena as "to the Quinault Indian Nation" but in the next sentence stated
22 that the subpoena was "directed toward Richard Marinez, Director of Social Services of the
23 Quinault Indian Nation." *Id.* It is thus not clear whether the subpoena was directed to the
24 tribe as an entity or to an individual witness. Although the court acknowledged that tribal
25 immunity does not extend to individual members, *id.*, it did not discuss how tribal immunity

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27 ² In 2004, there were 253 criminal case referrals from the Navajo reservation alone
28 to the United States Attorney for the District of Arizona, including 31 homicides. Office of
the United States Attorney, *2004 Indian Country Report* at 66 (2004).

1 from suit extended to a case in which the tribe was not a party and no suit was filed against
2 it. In contrast to the case before us, no constitutional issues were raised. There is thus no
3 discussion of how the defendant's constitutional right to compulsory process could be
4 reconciled with the unenforceability of a federal subpoena against a witness.

5 The limited nature of the *James* discussion was noted in *United States v.*
6 *Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995). There, the court denied a tribe's motion
7 to quash a subpoena for a victim's counseling records because the defendant's "constitutional
8 rights of due process, fair trial, confrontation, and compulsory process outweigh the [tribe's]
9 claim of immunity." *Id.* The court stated that "*James* does not control because the defendant
10 did not raise constitutional challenges to the claim of immunity." *Id.*

11 Nor did *James* acknowledge or address the extensive treatment of this issue in *In*
12 *re Long Visitor*, 523 F.2d 443 (8th Cir. 1975). This was noted in *United States v. Velarde*,
13 40 F. Supp. 2d 1314, 1315-16 (D.N.M. 1999). There, the Jicarilla Apache Tribe relied
14 heavily on *James* to resist subpoenas issued in a federal prosecution under the Major Crimes
15 Act. The court disagreed with *James* because it did not take into account the constitutional
16 issues at stake. *Velarde*, 40 F. Supp. 2d at 1317. The court followed the rule of *In re Long*
17 *Visitor* that the extension of federal jurisdiction included every aspect of criminal procedure
18 applicable to the prosecution of crimes. *Id.* at 1316.

19 To be sure, the District of New Mexico is in the Tenth Circuit and, unlike this
20 court, is free to explicitly disagree with *James*. But the Navajo reservation lies in Arizona,
21 Utah, and New Mexico. Only that portion of it in Arizona lies within the Ninth Circuit. If
22 *James* is as broad a rule as advanced by the Tribe here, we would have the anomalous
23 situation in which federal criminal prosecutions on the Navajo reservation would be
24 profoundly different depending upon whether the offense occurred within the District of New
25 Mexico, the District of Utah or the District of Arizona. If this direct conflict were allowed
26 to exist, "important federal interests in the prosecution of major offenses on Indian
27 reservations would be frustrated." *United States v. Wheeler*, 435 U.S. 313, 331, 98 S. Ct.
28 1079, 1090 (1978).

