IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MCI COMMUNICATIONS SERVICES, INC., et al., Plaintiffs, v. ARIZONA TELEPHONE COMPANY, et al., Defendants.	Civil Action No. 3:15-cv-00116-D (MDL No. 2587)

TRIBAL DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS

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INTRODUCTION

Each of the three moving parties here[1] is a defendant LEC which:

1. is wholly-owned and operated by a federally recognized American Indian Tribe;
2. was created by its parent Tribe under tribal (not state) law;
3. is intended to provide benefits to its parent Tribe and its members;
4. provides telecommunications services exclusively on its parent Tribe's reservation lands;
5. is regulated by its parent tribal government and not by the Arizona Corporation Commission or any other state agency, and
6. enjoys the same tribal sovereign immunity from unconsented suit as its parent Tribe.

The three moving parties are hereafter referred to as the "Tribal Defendants." Because these Tribal Defendants enjoy sovereign immunity and have not consented to this lawsuit, this Court is without subject matter jurisdiction to adjudicate the claims asserted against them. The Tribal Defendants therefore respectfully move that this cause of action be dismissed, as against them, pursuant to Fed. R. Civ. P. 12(b)(1).

[1] The movants are Hopi Telecommunications, Inc., San Carlos Apache Telecommunications Utility, Inc., and Gila River Telecommunications, Inc.

PROCEDURAL STATEMENT

I. THE ASSERTION OF TRIBAL SOVEREIGN IMMUNITY GOES TO THE SUBJECT MATTER JURISDICTION OF THE COURT.

The assertion of sovereign immunity raises a jurisdictional issue. In Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989), the Ninth Circuit carefully analyzed the doctrine and concluded that

> Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants. [Citations omitted]. Thus the issue of tribal sovereign immunity is jurisdictional in nature.

884 F.2d at 418 (emphasis added). In support of this basic principle, the court cited more than a dozen other authorities, including U.S. v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940) ("consent alone gives jurisdiction to adjudicate against a sovereign. Absent that consent, the attempted exercise of judicial power is void") and California v. Quechan Tribe of Indians, 595 F.2d 1153, 1154 (9th Cir. 1979) ("Since the Tribe's claim of sovereign immunity goes to the jurisdiction of this court to hear the case, that question must be addressed first"). More recently, the court has noted that "[s]overeign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. [Citation omitted]. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1005-16 (9th Cir. 2007).

Because tribal sovereign immunity raises a jurisdictional bar, a motion under Rule 12(b)(1) is the appropriate means to raise the issue. Miller v. Wright, 705 F.3d 919, 927 (9th Cir. 2013) (affirming a dismissal under Rule 12 (b)(1), finding that "[b]ecause [the plaintiffs] failed to successfully challenge the Tribe's sovereign immunity, we affirm the

district court's holding that it lacked subject matter jurisdiction to adjudicate the claims asserted against the Tribe"). See also, Brown v. United States, 151 F.3d 800, 804 (8th Cir. 1998) (because sovereign immunity is a jurisdictional issue, lower court erred in treating a Rule 12(b)(1) motion as a Rule 12(b)(6) motion).

Respected commentators also support this view. According to Wright & Miller, "the Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction also may be appropriate . . . when a plaintiff's claim is barred by one of the various aspects of the doctrine of sovereign immunity . . ." Wright & Miller, Federal Practice and Procedure, Civil 3d § 1350, pages 70-79 (footnote and citations omitted).

II. IN DECIDING A 12(B)(1) MOTION, THE DISTRICT COURT IS NOT BOUND BY THE FOUR CORNERS OF THE COMPLAINT AND SHOULD REVIEW AND WEIGH ADDITIONAL EVIDENCE TO DETERMINE ITS JURISDICTION.

A court's role in deciding a 12(b)(1) motion as opposed to a 12(b)(6) motion is dramatically different. It is true that under Rule 12(b)(6), the court is required to accept the allegations of the complaint as true. Not so however when the movant presents a factual attack on the court's jurisdiction under Rule 12(b)(1), as was done here. According to a leading treatise:

> When the attack is factual, however, the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56. Because a factual Rule 12(b)(1) motion involves the court's very power to hear the case, the court may weigh the evidence to confirm its jurisdiction. No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.30(4) (Matthew Bender 3d Ed. 2012) (internal quotation marks and footnotes omitted).

A factual attack on jurisdiction under Rule 12(b)(1) is, by definition, based upon evidence beyond the face of the complaint. Morrison v. Amway Corp., 323 F.3d 920, 924-25 and n. 5 (11th Cir. 2003) ("Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. Id. In resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits"). As a result, when presented with a factual attack on its jurisdiction, the district court can and should accept and weigh extrinsic evidence in order to determine its own jurisdiction:

> In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegation. Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations and internal quotation marks omitted). Under Safe Air, once the moving party has submitted evidence challenging subject matter jurisdiction, the plaintiff has the affirmative burden of proving facts that establish subject matter jurisdiction. Id. This latter point is of critical importance because federal courts are presumed to lack subject matter jurisdiction, and the party asserting jurisdiction has the burden of proving its existence. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

STATEMENT OF FACTS

In support of this motion, and filed contemporaneously herewith, Tribal Defendant Hopi Telecommunications, Incorporated has filed the Declaration of Carroll Onsae (hereafter "Onsae Dec."); Tribal Defendant San Carlos Apache Telecommunications Utility, Inc. has filed the Declaration of Shirley Ortiz (hereafter "Ortiz Dec.") and Tribal Defendant Gila River Telecommunications, Inc. has filed the Declaration of Anthony Newkirk (hereafter "Newkirk Dec."). The facts set forth in these declarations plainly establish that each of the Tribal Defendants is entitled to assert, and is protected by, the sovereign immunity of its parent Tribe.

Specifically, the declarations establish that:

1) each of the Tribal Defendants is a tribal telecommunications company organized, operated, chartered and wholly owned by a federally recognized American Indian Tribe. Onsae Dec. at ¶ 4; Ortiz Dec. at ¶ 4; Newkirk Dec. at ¶ 4;

2) each of the Tribal Defendants was created under tribal law, not state law. Onsae Dec. at ¶ 4; Ortiz Dec. at ¶ 4; Newkirk Dec. at ¶ 4;

3) each of the Tribal Defendants was created to upgrade and improve telecommunications services on the reservation of its parent Tribe, for the benefit of the Tribe and its members. Onsae Dec. at ¶ 5; Ortiz Dec. at ¶ 5; Newkirk Dec. at ¶ 5;

4) each of the Tribal Defendants provides Local Exchange Carrier ("LEC") services exclusively on and within the reservation of its parent Tribe. Onsae Dec. at ¶ 6; Ortiz Dec. at ¶ 6; Newkirk Dec. at ¶ 6;

5) because they operate only on Tribal lands, each of the Tribal Defendants is regulated by its parent Tribe and not by the Arizona Corporation Commission ("ACC"); nor do they file tariffs with the ACC. Onsae Dec. at ¶ 7; Ortiz Dec. at ¶ 7; Newkirk Dec. at ¶ 7;

6) each of the Tribal Defendants is organized under a Charter of Incorporation or Articles of Incorporation and Bylaws issued by the governing body of its parent Tribe; Onsae Dec. at ¶ 8; Ortiz Dec. at ¶ 8; Newkirk Dec. at ¶ 8;

7) the organizational documents of each Tribal Defendant describes economic, social and other benefits that the Tribal Defendant is intended to provide the parent Tribe and its members; Onsae Dec. at ¶ 9; Ortiz Dec. at ¶ 9; Newkirk Dec. at ¶ 9;

8) members of the Board of Directors of each Tribal Defendant are appointed by the governing body of the parent Tribe. Onsae Dec. at ¶ 10; Ortiz Dec. at ¶ 10; Newkirk Dec. at ¶ 10;

9) revenues of each Tribal Defendant inure to its parent Tribe. Onsae Dec. at ¶ 11; Ortiz Dec. at ¶ 11; Newkirk Dec. at ¶ 11;

10) in the case of Tribal Defendant Hopi Telecommunications Incorporated, its Charter of Incorporation expressly provides that it enjoys the same sovereign immunity as its parent Tribe. Onsae Dec. ¶ 12;[2]

[2] The Charter of Incorporation of Hopi Telecommunications, Incorporated, attached as Attachment A to the Onsae Declaration, includes express language acknowledging that it enjoys the Hopi Tribe's sovereign immunity, while the organizational documents of the other two Tribal Defendants, attached as Attachments A to the Ortiz and Newkirk Declarations, do not include such language. Although this distinction may strengthen the position of Hopi Telcom, it does not diminish the right of the other two Tribal Defendants to assert tribal sovereign immunity. Sovereign immunity is not dependent on a statement in a sovereign's governing documents. Rather, it is an inherent element of the sovereign's status. "The immunity from suit enjoyed by Indian tribes, in turn, just like that of federal and state governments is "an attribute of sovereignty, a privilege that attaches to sovereign rank." State of Wisconsin v. Baker, 698 F.2d 1323, 1333 (7th Cir. 1983) (quoting Nevada v. Hall, 440 U.S. 410, 415 (1979)). Or, as the Supreme Court has also said, "[t]he common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-government." Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890 (1986). Thus, no express statement concerning sovereign immunity needs to be included in a sovereign's

11) none of the Tribal Defendants has waived its sovereign immunity or otherwise consented to this lawsuit. Onsae Dec. at ¶ 14; Ortiz Dec. at ¶ 12; Newkirk Dec. at ¶ 12.

ARGUMENT

I. INDIAN TRIBES ENJOY SOVEREIGN IMMUNITY FROM UNCONSENTED LAWSUITS.

It is a basic principle of federal law that American Indian tribes enjoy sovereign immunity from unconsented suit. Just as the United States may not be sued without its consent, United States v. Testan, 424 U.S. 392 (1976), it is equally well-established that an Indian tribe may not be sued in either federal or state court unless Congress or the tribe consents to such suit. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").[3] In addition, tribal sovereign immunity bars lawsuits arising out of a tribe's commercial activities, as well as its governmental functions and applies equally to both a tribe's on-reservation and off-reservation activities. Kiowa Tribe, 523 U.S. at 754-55.

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organizational documents in order for that sovereign entity to be clothed in sovereign immunity.

[3] Such immunity is rooted in the unique historical relationship between Indian tribes and the United States government: tribes are immune from suit because they are sovereigns predating the Constitution and because such immunity is necessary to preserve their autonomous political existence. Three Affiliated Tribes of Ft. Berthold, 476 U.S. 877 at 890 ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

Less than a year ago, the Supreme Court strongly reaffirmed these principles in Michigan v. Bay Mills Indian Community, et al., 572 U.S. ____, 134 S. Ct. 2024 (2014). In that case, the Court rejected a direct attack on the doctrine by the State of Michigan, holding that "[a]mong the core aspects of sovereignty that tribes possess – subject again to congressional action – is the common-law immunity from suit traditionally enjoyed by sovereign powers." 134 S. Ct. at 2030 (internal quotation marks and citation omitted). It is up to Congress, and not the Judiciary, to modify or abolish the doctrine of tribal sovereign immunity, the Court reasoned. Thus, the Court was able to find that "a long line of precedents" had concluded that "the doctrine of tribal immunity – without any exceptions for commercial or off-reservation conduct – is settled law and controls this case." Id. at 2036 (internal quotation marks omitted).

As noted above, tribal sovereign immunity is not a discretionary doctrine, but is jurisdictional. Pan American Co., 884 F.2d at 418. Absent an effective waiver, a court has no choice but to dismiss an action against an immune entity, "irrespective of the merits of [the] claims." Id. (citing Puyallup Tribe v. Department of Game, 433 U.S. 165, 173 (1977) and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940)).

A tribe may intentionally waive the protection of sovereign immunity for a particular activity, but such waivers must be "expressed unequivocally" and cannot be implied. Santa Clara Pueblo, 436 U.S. at 58. None of the Tribal Defendants has consented to suit by waiver in this case.

Finally, it is true that the application of sovereign immunity – whether by the federal government, the State of Texas or an Indian tribe – can sometimes produce seemingly harsh results for a particular litigant. Nevertheless, the Supreme Court has

recognized that this is a price that must be paid in order to uphold important federal interests in protecting tribal sovereignty.

In Three Affiliated Tribes of the Fort Berthold Reservation, 476 U.S. at 892, the Court held that the overriding federal interest in protecting tribal sovereignty outweighed the competing interest that a claimant have a forum for a claim to be heard:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances. . . .

See also, United States Fidelity & Guaranty Co., 309 U.S. at 513 ("the desirability for complete settlement of all issues … must … yield to the principle of immunity"); Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990) ("sovereign immunity may leave a party with no forum for its claims . . .").

II. TRIBAL SOVEREIGN IMMUNITY ALSO APPLIES TO TRIBAL ENTERPRISES AND ENTITIES.

As noted above, sovereign immunity shields a tribe's commercial ventures as well as its governmental activities. In addition, among the principal objectives of current federal Indian policy is the "overriding goal of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (internal quotation marks omitted) (and cases cited there).

Thus, the law is equally well settled that tribal sovereign immunity also protects tribal businesses, enterprises, agencies and other sub-entities that operate for the benefit of the tribe. See, e.g., Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) ("there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit"); Hagen v. Sisseton-Wahpeton Cmty. College,

205 F.3d 1040, 1043 (8th Cir. 2000) (tribal community college was "an arm of the tribe" and entitled to tribal sovereign immunity); Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982) ("the Inn of the Mountain Gods is a sub-entity of the Tribe . . . and is thus clothed with the sovereign immunity of the Tribe'); White Mountain Apache Indian Tribe v. Shelley, 480 P.2d 654, 657 (Ariz. 1971) (tribal timber enterprise "is a part of the Tribe and as such enjoys the same immunity from suit that the Tribe enjoys . . .").

Although these courts described the tribal enterprises in different ways – as "an arm of the tribe," a "sub-entity of the Tribe," or simply "part of the Tribe" – the unifying factor in each case was that the tribal enterprise was created by the tribe, owned and operated by the tribe, and intended to benefit the tribe and its members. So, for example, in Gold Country Casino, 464 F.3d at 1047, the court reasoned:

> "[w]ith the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe.
>
> * * *
>
> In light of the purposes for which the Tribe founded the Casino, and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit."

Similarly, in Amerind Risk Management v Malaterre, 633 F.3d 680, 685 (8th Cir. 2011), after noting that Amerind had been incorporated by three Indian tribes, the court found that:

> Amerind is not an ordinary insurance company. Indeed, Amerind's purpose is to administer a self-insurance risk pool for Indian Housing Authorities and Indian tribes.
>
> * * *
>
> Because Amerind is a § 477 corporation that administers a tribal self-insurance risk pool, we hold that Amerind serves as an

> arm of the [Charter Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity.

(Internal quotation marks and citation omitted). See also, Inyo County v. Paiute Shoshone Indians, 538 U.S. 701, 704 n. 1 (2003) (with respect to a Gaming Corporation chartered and wholly-owned by the Tribe, "[t]he United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes"). As these cases clearly demonstrate, tribal entities that are created, owned and controlled by, and are intended to provide benefits to their parent Tribes, including the three Tribal Defendants in this case (as discussed below), enjoy the same sovereign immunity as their parent Tribes.

III. THE THREE TRIBAL DEFENDANTS HERE ARE PROTECTED BY SOVEREIGN IMMUNITY.

The declarations filed on behalf of the Tribal Defendants make clear that each of them shares in the sovereign immunity from suit enjoyed by its parent Tribe. Just as the Hopi Tribe, the San Carlos Apache Indian Tribe or the Gila River Indian Community cannot be sued without its consent, the same doctrine bars unconsented suits against the tribal telecommunications companies established by those Tribes.

As discussed above, a broad range of tribal entities and enterprises – including casinos, educational facilities, resorts, and tribal timber companies – have been held to share their parent Tribes' sovereign immunity.[4] In addition, the terminology that various courts have used in reaching this conclusion has varied significantly: these enterprises

[4] In fact, the list is much longer. For example, tribal construction companies, EEOC v. Fond du Lac Heavy Equipment & Construction Co., 986 F.2d 246 (8th Cir. 1993), tribal housing authorities, Duke v. Absentee Shawnee Tribe Housing Authority, 199 F.3d 1123 (10th Cir. 1999), and tribal health clinics, Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998), have also been found to enjoy the same sovereign status as the Tribes that created them.

have been referred to as "arms of the Tribe," "a sub-entity of the Tribe" or simply "part of the Tribe."[5] Regardless of the terminology used, however, the Tribal Defendants' declarations plainly establish the type of close relationship between each of the Tribal Defendants and its parent Tribe necessary to find that the tribal enterprise shares in the Tribe's sovereign immunity. As set forth in more detail in the Statement of Facts, above, each of the Tribal Defendants:

1) is a tribal telecommunications company organized, chartered, operated and wholly owned by a federally recognized American Indian Tribe;

2) was created under tribal law;

3) was formed to upgrade and improve telecommunications services for the Tribe and its members;

4) provides Local Exchange Carrier services exclusively on and within the Tribe's reservation lands;

5) is regulated by the Tribe and not by the Arizona Corporation Commission, the state regulatory agency;

6) is organized under organizational documents formally approved by the governing body of its parent Tribe;

7) is intended to provide economic, social and other benefits to the Tribe and its members;

8) has a Board of Directors the members of whom are appointed by the governing body of its parent Tribe;

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[5] Nor does it matter whether the tribal enterprise is created in a corporate or non-corporate form for sovereign immunity purposes. Cook v. Avi Casino Enterprises, 548 F.3d 718, 729, n. 5 (9th Cir. 2008) ("We see no importance in the distinction that here ACE is a tribal corporation while the casino in Allen may have been unincorporated").

9) has its parent Tribe as its sole shareholder, to which the company's profits inure; and

10) has not waived its sovereign immunity with respect to, or otherwise consented to this lawsuit.

Given these facts, it is clear that the Tribal Defendants must be found to share in the sovereign immunity of their parent Tribes. Because they have not waived that immunity, this Court is therefore ithout subject matter jurisdiction to adjudicate the claims asserted against them.

CONCLUSION

For all of these reasons, the Court should grant the Tribal Defendants' motion to dismiss.

Dated: May 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I electronically filed the attached **Tribal Defendants' Rule 12(b)(1) Motion to Dismiss** with the Court using the CM/ECF system, and which will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

By: *s/* Glenn M. Feldman

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