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' REPLY BRIEF

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I. THE TRIBAL DEFENDANTS ARE ARMS OF THEIR PARENT TRIBES AND THEREFORE PROTECTED BY TRIBAL SOVEREIGN IMMUNITY

In our opening brief, and through the declarations filed concurrently therewith, we have demonstrated the close relationship between the Tribal Defendants and their parent tribes that characterizes what have come to be called "arms of the tribes," for sovereign immunity purposes. Those declarations, as summarized in the Statement of Facts, Tribal Defendants' Opening Brief (hereafter "Opening Brief") at pages 5-7, clearly showed that 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) was created under organizational documents formally approved by the governing body of its parent Tribe;

7) provides 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;

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. [1]

In the same way, and for the same reasons that modern courts have found tribal casinos, Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006); construction companies, EEOC v. Fond du Lac Heavy Equipment & Construction Co., 986 F.2d 246 (8th Cir. 1993); resorts, Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982); and insurance companies, Amerind Risk Management v Malaterre, 633 F.3d 680 (8th Cir. 2011), to be arms of their parent tribes and thus protected by tribal sovereign immunity, so too with these tribally owned and controlled telecommunications companies. Not only are they providing important benefits to their reservations and members, but the telecommunications and broadband services these companies are providing to their people are fully consistent with the federal government's longstanding Indian policy of "encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987). In this day and age, the telecommunications services that these Tribal Defendants provide, which include giving Reservation residents access to health, education and emergency services, are critically important to making these tribal communities self-sufficient and economically viable. As a result, there can be little doubt that these companies are arms of their parent tribes and thus protected by tribal sovereign immunity.

The plaintiffs offer no persuasive arguments to the contrary. Their contention that the Tribal Defendants cannot enjoy sovereign immunity because they are commercial in nature, Plaintiffs' Opposition at pages 2-6, is expressly foreclosed by the Supreme

[1] Significantly, the plaintiffs have offered no evidence to question or contest any of these facts, which the Court should now take as established.

Court's holding in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In Kiowa, the Court expressly found that tribal sovereign immunity applies to a tribe's commercial activities, as well as its more traditional governmental functions. Id. at 754-55. See also Michigan v. Bay Mills Indian Community, et al., 572 U.S. ____, 134 S. Ct. 2024, 2036 (2014) (same). Thus, even if the Tribal Defendants could be characterized as "commercial" in nature (and that is not at all clear), they would be entitled to assert tribal sovereign immunity. Plaintiffs' additional contention that a tribal activity must further tribal self-governance for tribal sovereign immunity to apply, is likewise incorrect. Plaintiffs' Opposition at pages 3-4. Tribal immunity from suit "extends beyond what is needed to safeguard tribal self-governance." Kiowa, 523 U.S. at 758.

Plaintiffs also rely heavily on Dixon v. Picopa Construction Co., 772 P.2d 1104 (AZ. 1989) for many of their arguments. Plaintiff's Opposition, at pages 3-7. But whatever persuasive authority Dixon may have offered 26 years ago (and it is of no precedential value in this Court), its value is now significantly diminished. First, Dixon long predates the U.S. Supreme Court's two most recent and authoritative tribal sovereign immunity decisions: Kiowa and Bay Mills. More importantly, Dixon's reasoning is inconsistent with Kiowa, Bay Mills and more recent federal case law.[2]

So, for example, Dixon quotes with approval the contention that "Congress did not intend all commercial activity undertaken by Indian entities be immune from suit." Id., at

[2] "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." Kiowa Tribe, 523 U.S. at 756 (citation omitted, emphasis added). In addition, Bay Mills explicitly admonished lower courts not to "carv[e] out exceptions" to sovereign immunity's broad protections. Bay Mills, 134 S. Ct. at 2031. Thus, to the extent that the Arizona Supreme Court's opinion in Dixon can be read to diminish or carve out exceptions to the current federal law with respect to tribal sovereign immunity, that opinion is irrelevant.

1112 (internal quotation marks omitted). Yet that contention is exactly what both Kiowa and Bay Mills later rejected. Dixon further held that "Picopa's status as a corporation also weighs heavily against a finding that Picopa is a subordinate economic organization". Id. at 1111. But that argument was expressly rejected by the Ninth Circuit (within which this case arose and the Tribal Defendants operate) in Cook v. Avi Casino Enterprises, 548 F.3d 718, 729, n.5 (9th Cir. 2008). In Cook, the court of appeals found an incorporated tribal enterprise to be an arm of its parent tribe, and thus clothed with immunity, for exactly the same reasons that it had earlier accorded the same status to an unincorporated tribal enterprise, noting that "we see no importance in the distinction that here ACE is a tribal corporation while the casino in [Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006)] may have been unincorporated." Id. Finally, the Dixon court was apparently operating under the assumption that tribal sovereign immunity was a discretionary doctrine that "should only apply when doing so furthers the federal policies behind the immunity doctrine." Dixon, 772 P.2d at 1111. But that is not the law. As discussed in our Opening Brief at pages 2 and 8, tribal sovereign immunity is jurisdictional in nature and as the cases cited there make plain, a properly pleaded assertion of immunity deprives a court of subject matter jurisdiction over the claims asserted against the sovereign entity, whether or not a particular court believes that the assertion of a doctrine in a particular case advances certain policy objectives and "irrespective of the merits of [the] claims." Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416,418 (9th Cir. 1989).

For all these reasons, then, the Court should find that the Tribal Defendants are protected by their parent tribes' sovereign immunity and that Dixon v. Picopa, and the plaintiffs' arguments based on that case, do not alter that conclusion.

II. THE TWO FIFTH CIRCUIT CASES RELIED UPON BY THE PLAINTIFFS OFFER THEM NO RELIEF

In the alternative, the plaintiffs argue that under Fifth Circuit precedent, even if they cannot sue for money damages, they have the right to sue the Tribal Defendants for declaratory relief or, at a minimum, to amend their complaint in this Court to seek declaratory relief against individual officers of the tribal entities. Plaintiffs' Opposition, at pages 8-10. Plaintiffs rely upon TTEA v Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999) and Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribe of Texas, 261 F.3d 567 (5th Cir. 2001) for these contentions. In fact, however, neither argument withstands scrutiny.

A. THE SUPREME COURT HAS EXPRESSLY BARRED DECLARATORY JUDGMENT ACTIONS AGAINST TRIBES

In both TTEA and Comstock Oil, the court of appeals concluded that tribal sovereign immunity barred only claims for money damages against the tribes and that "tribal immunity did not support [the district court's] order dismissing the actions seeking declaratory and injunctive relief." TTEA, 181 F.3d at 681; Comstock Oil, 261 F.3d at 572. Thus, the rule announced by the Fifth Circuit in these cases would allow suits for declaratory or injunctive relief to be pursued directly against the tribes themselves. Interestingly, the two Supreme Court cases primarily relied upon by the court of appeals – Ex Parte Young, 209 U.S. 123 (1908) and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) – both provided (or at least suggested) that despite sovereign immunity, actions seeking prospective equitable relief might lie against individual officers or officials of the sovereign entities, but not against the sovereign entity itself; a distinction apparently overlooked by the Fifth Circuit in the TTEA and Comstock Oil cases.

But that distinction is at the heart of the Supreme Court's jurisprudence in this area. In its Bay Mills decision last year, and citing the same two cases – Ex Parte Young

and Santa Clara Pueblo – the Supreme Court expressly barred suits seeking even equitable relief against Indian tribes:

> And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license.
>
> * * *
>
> As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct. See *Santa Clara Pueblo,* 436 U.S., at 59.

Bay Mills, 134 S.Ct. at 2035 (emphasis in original). Thus, in its most recent pronouncement on the subject, the Supreme Court has expressly prohibited the type of suit against tribes for equitable relief seemingly authorized by the Fifth Circuit in TTEA and Comstock Oil. And the Ninth Circuit has expressly prohibited such suits for decades. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) ("sovereign immunity for Indian tribes extends to both declaratory and injunctive claims").

The Fifth Circuit (like every Circuit Court of Appeals) recognizes that its decisions can be implicitly overruled by subsequent Supreme Court authority. U.S. v. Vargas-Ocampo, 747 F.3d 299, 300 n.1 (5th Cir. 2014) (a panel may overturn existing authority if "the panel determines that prior Fifth Circuit precedent is no longer binding because of inconsistency with Supreme Court decisions"); United States v. Short, 181 F.3d 620, 624 (5th Cir. 1999) (prior decision should apply unless "an intervening Supreme Court case explicitly or implicitly overrul[es] that prior precedent").

That is precisely what has happened here. To the extent that TTEA and Comstock Oil could be read to allow equitable relief claims to be pursued directly against these

Tribal Defendants, Bay Mills has expressly foreclosed that option and these claims, like the claims for money damages, are therefore barred by tribal sovereign immunity and must be dismissed.

B. TO THE EXTENT PLAINTIFFS SEEK TO AMEND THEIR COMPLAINT TO SEEK PROSPECTIVE EQUITABLE RELIEF AGAINST INDIVIDUAL OFFICERS OF THE TRIBAL DEFENDANTS, THEY MUST DO THAT, AND EXHAUST THEIR REMEDIES, IN TRIBAL COURT.

As discussed above, the Fifth Circuit's holding that equitable claims can be pursued directly against tribes or tribal entities has been expressly rejected by the Supreme Court. Yet, other elements of the TTEA and Comstock Oil decisions remain valid and should inform this Court's analysis of the Plaintiffs' request for leave to amend their complaint to name individual officers of the Tribal Defendants. Plaintiffs' Opposition, at pages 8-10. Specifically, under those Fifth Circuit authorities, this Court should require the plaintiffs to file that amended complaint in the appropriate tribal court, and to exhaust their remedies in those tribal courts, before seeking relief in this federal court.

As both TTEA and Comstock Oil make clear, the Supreme Court has long required that parties with claims against tribes, or arising on the reservation, must bring those claims first in tribal court, if there is a tribal court with jurisdiction to hear those claims. This rule requiring "exhaustion of tribal court remedies" derives from the Supreme Court's decisions in National Farmers Union Insurance Co., v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). In those cases, the Court held that when a federal court and a tribal court had apparent concurrent jurisdiction over claims involving tribes or arising on the reservation, the federal court should generally abstain from adjudicating the claims in order to give the

tribal court the first opportunity to determine its jurisdiction and resolve the dispute. Such deference, the Court held, was consistent with the federal government's objectives of "supporting tribal self-government and self-determination." National Farmers Union, 471 U.S. at 856. To do otherwise would "impair the authority of tribal courts over reservation affairs." Iowa Mutual, 480 U.S. at 16.

Recognizing the importance of this rule, the Fifth Circuit in TTEA stated:

> Before we can reach this jurisdictional issue, however, we must consider whether the district court should have abstained from evaluating the tribal court's jurisdiction, because TTEA has not yet exhausted tribal remedies. The Supreme Court has found that a federal court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." Id. at 857 (footnotes omitted); see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) (noting that the tribal appellate courts should initially be permitted to review the tribal trial court's rulings).

181 F.3d at 683.

Because this exhaustion rule is "prudential rather than jurisdictional," Id., there are limits to its applicability. Several of those limits were discussed in TTEA and Comstock Oil, but none bars the application of the doctrine in the present case.

First, since its decisions in National Farmers Union and Iowa Mutual, the Supreme Court has announced rules and exceptions to those rules giving guidance as to the scope of tribal court jurisdiction over non–Indian parties. TTEA, for example, involved a contractual dispute involving a tribe and a non-Indian vendor. In that case, the court held that the dispute fell within the jurisdiction of the tribal court. As the Fifth Circuit found:

> A tribal court generally does not have jurisdiction over non-Indian defendants. *See Montana v. United States*, 450 U.S. 544, 565 (1981). There is, however, an important exception. A tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.

> *See id*. at 656-66; *see also Strate*, 117 S. Ct. at 1415. The cases that the Supreme Court has cited as illustrating this exception do not include any contractual arrangements between the tribe and a nontribal party, such as the one here. Nonetheless, this case fits so squarely within the Supreme Court delineation of the exception, which is phrased to cover "consensual relationships with the tribe or its members," *id.* (emphasis added), that it must be applicable here.

TTEA, 181 F.3d at 684.

So, too, here. The present case involves alleged consensual commercial dealings between the plaintiffs and the Tribal Defendants that fall squarely within the Supreme Court's "consensual relationship" doctrine. As a result, the tribal courts would have jurisdiction over those claims.

The second possible limit on the tribal court exhaustion rule was discussed in Comstock Oil. In that case, the court found that exhaustion should not be required because "no tribal court properly existed" and "if no tribal court exists, exhaustion of remedies is inapplicable." 261 F.3d at 572.

While this rule makes perfect sense, it is inapplicable here. All three of the parent tribes of these Tribal Defendants have well-established, fully functioning tribal trial and appellate courts. Filed concurrently herewith are the declarations of the Chief Justices of the Hopi Tribal Court, the San Carlos Apache Tribal Court and the Gila River Indian Community Court. Each declaration attests to the fact that each tribe has a longstanding operational tribal judiciary, with written tribal codes, rules of civil procedure and courts and judges fully capable of adjudicating plaintiffs' claims.

Finally, the fact that there is no pending tribal court action in this matter does not obviate the need for exhaustion of tribal court remedies. Marceau v. Blackfeet Housing Authority, 540 F.3d 916, 921 (9th Cir. 2008) ("Although Plaintiffs' contract claim has not yet been brought in tribal court, the absence of any ongoing litigation over the same

matter in tribal court does not defeat the tribal exhaustion requirement") (internal quotation marks omitted); United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996) ("Moreover, the exhaustion rule does not require an action to be pending in tribal court").

Under these circumstances, then, the Court should deny the plaintiffs' request for leave to amend their complaint in this Court and direct them to exhaust their remedies in the appropriate tribal court, as required under National Farmers Union, Iowa Mutual and their progeny.

CONCLUSION

For all of these reasons, the Court should grant the Tribal Defendants' motion to dismiss for lack of subject matter jurisdiction. In the alternative, and to the extent that the Court finds that any of the plaintiffs' claims or potential claims survive this motion, the Court should abstain from hearing those claims and direct the plaintiffs to exhaust their remedies, if any, in the appropriate tribal court.

Dated: July 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2015, I electronically filed the attached **Tribal Defendants' Reply Brief** 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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