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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TAWNYA BEARCOMESOUT, Defendant.	**Case No. CR-16-13-BLG-SPW** **DEFENDANT'S REPLY TO GOVERNMENT RESPONSE TO MOTION TO DISMISS THE INDICTMENT: DOUBLE JEOPARDY**

Tawnya Bearcomesout, pursuant to Local Rule CR 47.2(a), submits this Reply to the Government's opposition to her Motion to Dismiss the Indictment on Double Jeopardy grounds. (Doc. 30, hereafter, "Response"). For reasons stated previously (Doc. 25, 26) and expanded on below, this successive prosecution is unconstitutional.

The Government cites broad principles and general precedent, but it fails to recognize:

> Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures.

See *United States v. Bryant*, 579 U.S. ___, 2016 WL 3221519, at *14 (June 13, 2016) (Thomas, J., concurring). As alluded to less than a month ago by Justice Thomas in *Bryant*, Indian tribes cannot be treated as an undifferentiated mass. Congressional grants of power to Indian Tribes differ significantly. *Id.* at *15.

The Government argues (Response, pp. 3–5) that when an Indian tribe exercises inherent power, the dual sovereignty exception to double jeopardy permits federal and tribal prosecutions for the same crime. See e.g. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*). Examining that concept, the *Enas* Court said:

> the question before us here is whether the White Mountain Apache Tribe prosecuted Michael Enas pursuant to its inherent sovereign power, or instead pursuant to power delegated to it by Congress. If it exercised inherent power, the federal prosecution can go forward; if it employed delegated power, the federal prosecution is barred.

Enas, 255 F.3d at 667-668. Similarly, the question here is whether the Northern Cheyenne Tribe prosecuted Tawnya Bearcomesout pursuant to inherent sovereign power, or instead pursuant to power devolved from the federal government.

How other tribes may structure their relationship with the United States is irrelevant. Blanket, nonspecific arguments raised in the Response miss the mark. It is the Northern Cheyenne Tribe's variant of its interaction with the federal government which must be examined. The analysis here turns on whether the Northern Cheyenne retained sovereign authority or intentionally divested control to the United States. If the two entities derive their prosecutorial power from the same ultimate source, they are not separate sovereigns. *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

The Response (Doc. 30) never addresses Exhibit 502 – the Tribe's formation document which renounces any semblance of sovereignty. While some tribes may retain the inherent power to prosecute, that is not the case with the Northern Cheyenne. Of their own volition, governance for the Northern Cheyenne people is subject to the Secretary of the Interior. What's more: the Tribe receives federally sanctioned funding; all costs are borne by the United States; the Northern Cheyenne's authority in criminal cases is dictated by federal law. See e.g., 25 U.S.C. §§ 1301, 1302; 18 U.S.C. § 1153. The Tribe is a *de facto* arm of the federal government. See *Wheeler*, 435 U.S. at 320. Since the Tribe's ability to govern emanates from a superior sovereign it is a subject political entity. Therefore, for the purpose of Double Jeopardy analysis, these are not separate sovereigns.

When the provisions of the Northern Cheyenne Constitution are scrutinized, it is clear the Tribe gives away any sovereignty it may have inherently possessed. The Preamble sets forth the identity of the framers of the Constitution and Bylaws: the people of the Northern Cheyenne. It also outlines fundamental goals. See Exhibit 502, p. 1. The Tribe established an elected Council as the governing body of the Northern Cheyenne. Under the 1996 amendments, the Tribal government has three branches. See Exhibit 502, p. 12, Art XI. While the Tribal Council defines core purposes of police powers, court jurisdiction, and who is subject to tribal jurisdiction, the overarching power explicitly lies with the Secretary of the Interior. The Secretary has been given final review authority. See Exhibit 502, p. 4, Art. IV, § 1(i). In fact, the constitution cannot be amended without input from and approval by the Interior Secretary. Exhibit 502, p. 11-12, Art. X. The federal government, through its review and approval power, dictates the management of all Tribal functions and exercises sway over all three branches of government.

As Exhibit 502 shows, contrary to contentions in the Response (see Doc. 30, pp. 6–8), ultimate decision-making is in the hands of the Secretary of the Interior. This fact is critical to resolution of Ms. Bearcomesout's double jeopardy claim. The Northern Cheyenne Executive Branch's prerogative to prosecute the Tribe's members is not free of the United States' dominance.

Whether two entities are separate sovereigns turns on a simple question: does the prosecuting power of each flow from an independent source? Because the Tribe divested self-governing authority in unqualified deference to review and approval by the federal government, the Tribe by its own choice is not sovereign. The dual sovereignty doctrine cannot apply. Cf. *Wheeler*, 435 U.S. at 322-323.

Alternatively, because the United States has been granted supremacy by the Northern Cheyenne over executive actions, Ms. Bearcomesout's tribal prosecution was a tool of the federal government. The financial dependence and political domination of the United States over Northern Cheyenne mandated by the tribal constitution represents the epitome of one government being the tool of the other. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991). Cf. *Bartkus*, 359 U.S. at 123-124.

Perhaps it is time to eschew the 'separate sovereign' concept altogether. "The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. Current separate sovereigns doctrine hardly serves that objective." See *Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 2016 WL 3189527 (June 9, 2016) (Ginsberg, J., concurring) (internal citations, brackets and quotations omitted). The double jeopardy bar was always historically understood to *encompass, not exempt*, prosecutions by separate sovereigns. Two prosecutions

for the same crime, even if by different sovereigns, is contrary to centuries of jurisprudence. "Even in the Dark Ages, when so many other principles were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers." *Bartkus v. People of State of Illinois*, 359 U.S. 121, 151-52, 79 S.Ct. 676 (1959) (Black, J., dissenting).

The frequency of litigation over identical and successive prosecutions says something about the inherent unfairness and counter intuitive legal analysis imposed on what seems to be a simple constitutional provision. It may be true that the separate sovereign doctrine in Double Jeopardy jurisprudence has a long history, but it is also true that there is a rising chorus questioning its continued viability and structural equity.

On any or all of these grounds, Ms. Bearcomesout's prior conviction in Tribal Court bars subsequent federal prosecution in this Court.

RESPECTFULLY SUBMITTED this 9th day of July, 2016.

/s/ Anthony R. Gallagher

CERTIFICATE OF COMPLIANCE – L.R. CR 47.2(a), (c)

Anthony R. Gallagher of the Federal Defenders of Montana hereby certifies that this Reply Brief is in compliance with Local Rule CR 47.2. The Reply's line spacing is double spaced (except quotations), and is proportionately spaced, with a 14-point font size and contains less than 3,250 words. (Total number of words: 1159, excluding captions and certificates).

RESPECTFULLY SUBMITTED this 9th day of July, 2016.

/s/ Anthony R. Gallagher

CERTIFICATE OF SERVICE - L.R. 5.2(b)

I hereby certify that on July 9, 2016, a copy of the foregoing document was served on the following persons by the following means:

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