UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOY SPURR,
Plaintiff,

vs.

Case No. 1:17-cv-01083
Hon. Janet T. Neff

MELISSA L. POPE, et al.,

Defendants.

/

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

/ **ORAL ARGUMENT IS REQUESTED**

Date: February 12, 2018

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A. Cases Cited

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National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985)
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John Thomas Benson v. Mary Pat Foster, 2015 Mich. App. Lexis 339 (2015).

B. Constitutions and Statutes Cited

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25 U.S.C. 1302
18 U.S.C. Section 2265
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Section 7.4-52 A. of the NHBP Tribal Code.
Section 7.4-54, Chapter 7.4, NHBP Domestic Violence Code.
Sec. 7-4-75(B) of the NHBP Domestic Violence Code.
Section 7.4-76(D) of the NHBP Domestic Violence Code,
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H.R. 757 and H.R. 4154
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S. 1763
Senate Report 112-153

D. Exhibits Attached

NHBP Trial Court Order dated January 30, 2018
NHBP Trial Court Order dated February 5, 2018

III. Statement of Facts

As the wife of Stephen J. Spurr, the Plaintiff came into contact with the Grandmother,[1] the mother of his deceased wife Laura, and with Laura's sister Mary Wesley and her three children Sarah, Brad, and Robbie. The Plaintiff and her husband, who live three hours from the NHBP reservation, visited the Grandmother's household during holidays, birthdays, and tribal functions. The Plaintiff had a close relationship with all members of the household, and kept in touch with them by accepting their telephone calls numerous times a week and assisting with paperwork. The Plaintiff took the Grandmother to doctors' appointments, transcribed her life story, sent her cards and family photographs,

[1] We are respecting the Huron Potawatomi Tribal custom that the name of a deceased Tribal member is not used for one year after her death. The Grandmother passed away on February 15, 2017.

cleaned her house, and with her husband Stephen provided meals and gifts to the family at every visit. The Grandmother passed away on February 15, 2017.

IV. Statement of the Legal Issues and Legal Argument

In the Sixth Circuit, it is a well-established rule that a federal district court must consider the following four elements in deciding whether to issue a preliminary injunction: (1) whether the Plaintiff has shown a strong or substantial likelihood or probability of success on the merits; (2) she has shown irreparable injury if the injunction is denied; (3) whether the preliminary injunction would harm third parties; and (4) whether the public interest would be served by issuing the preliminary injunction. *Mason County Medical Ass'n v. Knebel*, 563 F. 2nd 256, 261 (6th Cir. 1977); *Frisch's Restaurant, Inc. v, Shoney's Inc*., 759 F. 2nd 1261, 1263 (6th Cir. 1985); *Ardister v. Taylor*, 627 F. Supp. 641 (W.D. Mich. 1986). In *Ardister v. Taylor,* the Court stated that

> The emphasis on balancing the four factors in the *Frisch* opinion could suggest that a particularly strong showing of irreparable injury would lessen the moving party's burden of showing a "substantial likelihood or probability of success on the merits."

We consider each of the four requirements below.

(1) Has Plaintiff Shown a Strong or Substantial Likelihood or Probability of Success on the Merits?

The Plaintiff believes her probability of success more than meets the standard required for a preliminary injunction. The Plaintiff notes that the Defendants, in their Joint Request for a Pre-Motion Conference, have raised several issues that must be answered to show that she has a strong or substantial probability of success on the merits. Specifically, the Defendants have argued that **(i)** all claims against the Tribe and its Supreme Court are barred by sovereign immunity; **(ii)** this Court Lacks Subject Matter Jurisdiction of the Plaintiff's Claim; **(iii)** the Plaintiff's Complaint fails to state a claim for which relief can be granted; and **(iv)** the Plaintiff has failed to exhaust her Tribal Court remedies. We answer each of these points below.

(i) and (ii). The Defendants' Claims of Sovereign Immunity, and that This Court Lacks Subject Matter Jurisdiction of the Plaintiff's Claim, are Invalid.

The Plaintiff has pointed out that this Court has subject matter jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction) and 25 U.S.C. 1302 (the Indian Civil Rights Act). The Defendants however contend that all claims against the Tribe and its Supreme Court are barred by sovereign immunity (p. 2, Defendants' Joint Request for a Pre-Motion Conference). The United States Supreme Court has stated that a federal court has federal question jurisdiction to determine whether a Tribal Court has jurisdiction; tribal sovereign immunity does not apply. In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) the petitioner, a non-Indian school district, brought an action in federal district court for injunctive relief, invoking 28 U.S.C. 1331 as a basis for federal jurisdiction. The petitioner claimed, as in this case, that the Tribal Court had no jurisdiction over a civil action against a non-Indian. The Supreme Court noted that:

> Petitioners contend that the right which they assert – a right to be protected against the unlawful exercise of Tribal Court judicial power - has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians. . . . The District Court correctly concluded that a federal court may determine under 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. 471 U.S. at 853.

This principle has been confirmed in many cases, such as *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008). The Court there stated:

> We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. See *Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9, 15 . . . *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-853, . . . If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void.

In support of their contention the defendants have cited *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* (1998), *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* (2009), and *Michigan v. Bay Mills Indian Cmty.* (2014).[2] None of these cases involved the question whether a federal court had federal question jurisdiction of the issue whether a tribal court had jurisdiction over nontribal members who were

[2] In this area of the law, a tribe has sovereign immunity only if Congress has not decided to eliminate it. *Michigan v. Bay Mills Indian Cmty*. (2014)

defendants or respondents, in either civil or criminal cases. All of these cases involved lawsuits brought *against* Indian tribes based on commercial relationships and activities: *Kiowa* involved a purchase of an aviation business by a tribal entity, *Memphis Biofuels* a tribal corporation contracting to deliver diesel fuel and soybean oil to another business, and *Bay Mills* the operation of a tribal casino, in which the State of Michigan sought jurisdiction under the Indian Gaming Regulatory Act. The statement in *Kiowa* that "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" (523 U.S. 754) applies when there is a lawsuit against a tribe based on tribal activities of a commercial nature. In *Bay Mills* the U.S. Supreme Court made it clear that the doctrine of tribal immunity comes into play only when the tribe is sued:

> Among 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 . . . Thus, we have time and again treated the doctrine of tribal immunity [as] settled law" and dismissed *any suit against a tribe* absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. v. Manufacturing technologies, Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1988). [emphasis supplied].

Our case, on the other hand, does not involve a lawsuit brought against the Nottawaseppi Huron Band of Pottawatomi; instead it involves a lawsuit brought by a tribal member under NHBP law against the Plaintiff, a non-tribal member, and the question whether the Tribal Court had subject matter jurisdiction of that action. The limited scope of sovereign immunity in the context of our case was made clear in a Supreme Court case, *Brendale v. Confederated Tribes and Bands of the Yakima Indian nation et al*., 492 U.S. 408 (1989). The Court there stated that

> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." *Wheeler*, 435 U.S. at 326. Those cases in which the Court has found a tribe's sovereignty divested generally are those involving the relations between an Indian tribe and nonmembers of the Tribe." *Ibid.* 492 U.S. at 406.

The U.S. Supreme Court has explained that the reason why Indian tribes do not have criminal jurisdiction over non-Indians without the permission of Congress is that non-tribal members are

excluded from participation in tribal government. The fundamental principle is that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979). "Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited." *Merrion v. Jicarilla Apache Tribe*, 455 US 130, 173 (1982).

(iii). The Defendants' Claim that the Complaint Fails to State a Claim for which Relief can be Granted is Invalid.

Defendants also contend (p. 4) that the Complaint fails to state a claim for which relief can be granted. The Plaintiff has pointed out that the NHBP Trial Court lacked jurisdiction because she is a non-Indian with insufficient tribal connections. The Defendants, however, argue that a federal statute, 18 U.S.C. Section 2265(e), provides that the Tribal Court does have jurisdiction under these circumstances. But this argument is wrong – dead wrong. To see why, we must review the overall scheme of the statutes closely.

18 U.S.C. Section 2265(e) is part of section 2265, which is entitled "Full faith and credit given to protection orders." This section is listed under Part I. Crimes, and Chapter 110A. Domestic Violence and Stalking. Section 2265 reads as follows:

> (a) Full faith and credit. *Any protection order issued that is consistent with subsection (b) of this section* by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) *shall be accorded full faith and credit* by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [territory] as if it were the order of the enforcing State, Indian tribe, or territory.
>
> (b) Protection order. *A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--*
> *(1) such court has jurisdiction over the parties and matter* under the law of such State, Indian tribe, or territory; and
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. . . . [emphasis added]
>
> (e) Tribal Court jurisdiction. For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the

> authority to enforce any orders . . . . in matters arising anywhere in the Indian country of the Indian tribe . . . or otherwise *within the authority* of the Indian tribe.

In other words, this section states that a protection order shall not be given full faith and credit *unless* the court has jurisdiction over the parties and subject matter, as required under section (b)(1).

Since Section 2265 is in the chapter on domestic violence and stalking, to find out whether a tribal court has jurisdiction, one must refer to Section 1304 on "Tribal Jurisdiction over crimes of domestic violence." Section 1304 and Section 2265 were originally part of a single bill, H.R. 4154 and S. 1763, the Stand Against Violence and Empower Native Women Act. The bill was motivated by the fact that over 50 percent of Native American women were married to non-Indian men, and many others were in intimate relationships with non-Indians. There was a concern that there was inadequate law enforcement against crimes of domestic violence committed by nonIndian men against native women.[3] Section 1304(a) provides definitions, and 1304(a)(5) defines "Protection Order." Section 1304(a)(6) defines "Special domestic violence criminal jurisdiction" as follows:

The term "'Special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise." That raises the question: what criminal jurisdiction could not otherwise be exercised by the Tribe? The answer to that is provided by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which the U.S. Supreme Court held that the "history of Indian treaties. . . is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."' 437 U.S. 197 at n.8. Section 1304(b) is entitled "Nature of the criminal jurisdiction." Section 1304(b)(1) states

> Notwithstanding any other provision of law . . . the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise *special domestic violence criminal jurisdiction* over all persons.

As to what new criminal jurisdiction is made available to tribes under Section 1304, Section 1304(c) describes certain types of criminal conduct, including "Violations of protection orders."

[3] Senate Report 112-153 on the Violence against Women Reauthorization Act of 2011, March 12, 2012, at 9.

Finally Section 1304(b)(4) indicates that there are "Exceptions" (A) and (B) to the additional new domestic violence criminal jurisdiction. These exceptions are as follows:

> (A) Victim and defendant are both non-Indians. . . .
>
> (B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant
>
> (i) resides in the Indian Country of the participating tribe;
> (ii) is employed in the Indian Country of the participating tribe; or
> (iii) is a spouse, intimate partner, or dating partner of
> (I) a member of the participating tribe; or
> (II) an Indian who resides in the Indian country of the participating tribe.

The Plaintiff does not fit within any of the designated categories (i) through (iii), so she "lacks ties to the Indian tribe," and falls within exception (B). Thus the NHBP Trial Court has no jurisdiction to issue a personal protection order against her.

The legislative history of the statute makes it very clear that this grant of additional criminal jurisdiction is strictly limited in its scope:

> *That provision provides tribes special domestic-violence criminal jurisdiction to hold non-Indian offenders accountable in very limited circumstances.* First, it extends only to the crimes of domestic violence, dating violence, and violations of protection orders that are committed in Indian country. *Second, it covers only those non-Indians with significant ties to the prosecuting tribe: those who reside in the Indian country of the prosecuting tribe, or are either the spouse or intimate partner of a member of the prosecuting tribe.* The jurisdiction does not cover non-Indians who commit any offense other than domestic violence, dating violence, or violation of a protection order, and it only covers those offenses when they occur in Indian country and the defendant has a significant connection to the tribe. . . Although an important change from the current limit on tribal authority, *this jurisdictional expansion is narrowly crafted* and satisfies a clearly identified need. . . . *Extending that jurisdiction in a very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe is consistent with that approach* . . . . Senate Report 112-153 on the Violence against Women Reauthorization Act of 2011, March 12, 2012, pp. 9-10. [emphasis supplied]

Now let us consider the argument being made by the Defendants. They contend that all one needs to do to decide whether the tribal court has jurisdiction is to look at Section 2265(e). That subsection provides

> "For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any

> orders . . . . in matters arising anywhere in the Indian country of the Indian tribe . . . or otherwise *within the authority* of the Indian tribe."

Defendants argue as follows: "Look, this says the tribal court has civil jurisdiction over any person! That includes everyone, whether or not they have any ties to the tribe! Therefore the tribal court has jurisdiction!"

What's wrong with that analysis? What's wrong is that 2265 is about "full faith and credit given to protection orders," not jurisdiction. This section was motivated by a concern that a valid personal protection order issued by a Tribal Court under the new statute might not be taken seriously by other jurisdictions and non-Tribal courts. The legislative history notes that

> Section 905 of the legislation [the predecessor of Section 2265] is a *narrow technical fix to clarify* Congress's intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian. At least one Federal district court has misinterpreted 18 U.S.C. 2265(e) and held that tribes lack civil jurisdiction to issue and enforce protection orders against certain nonIndians who reside within the reservation . . . Section 905 corrects this error. *It does not in any way alter, diminish or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land.* Senate Report 112-153 on the Violence against Women Reauthorization Act of 2011, March 12, 2012, p. 11. [emphasis supplied]

In other words, 2265 is not a statute that *grants* jurisdiction; the section that grants (or in this case, fails to grant) jurisdiction is Section 1304, which is entitled "Tribal Jurisdiction over crimes of domestic violence." And that statute clearly states that a Tribal Court does not have jurisdiction to issue a personal protection order if the Plaintiff falls within one of the designated exceptions,[4] which she does, because she lacks the required ties to the Indian tribe. The Defendants would argue that Section 2265 is not only a full faith and credit statute; it is also a jurisdiction-granting statute, even though the word "jurisdiction" does not appear in its title, and the legislative history clearly states that it does not "alter" or "expand" tribal criminal jurisdiction. Moreover if we accept the Defendants' argument, then sec. 1304(b)(4) of the "Tribal Jurisdiction" statute that provides "exceptions" to tribal special criminal

[4] 25 USC 1304. Exceptions.

jurisdiction of protection orders means absolutely nothing. What exceptions? According to the Defendants, there are none. This is a tortured and manifestly unconvincing interpretation of the statute.

Section 2265 was enacted at exactly the same time as Section 1304, on March 7, 2013.[5] It was enacted because of a concern that valid personal protection orders issued by a tribal court would not be honored by outside jurisdictions. The purpose of section 2265(e) is to explain that if an order is "otherwise within the authority of the Indian tribe" then the tribal court can use the customary judicial mechanisms to enforce an otherwise valid protection order, such as civil contempt proceedings, excluding violators from Indian land, and the like, and that courts from other jurisdictions should give full faith and credit to all such methods of enforcement. But a personal protection order against a person who is excluded from the tribal court's jurisdiction by section 1304 is certainly not "within the authority" of the Indian Tribe. If we accept the Defendants' argument, Section 2265(e) by itself gives a tribal court jurisdiction to issue a protection order against any person for any reason; the protection order would not even be limited to "special domestic violence criminal jurisdiction." But this would have been a huge departure from the settled federal common law of *Oliphant v. Suquamish Indian Tribe* (if we view the personal protection order as a criminal sanction) or *Montana v. United States*, 450 U.S. 544 (1981) (if we view the personal protection order as a civil sanction). There is no indication whatsoever in the legislative history that a seismic change of this magnitude was intended by Congress; on the contrary, the legislative history says that the section 2265(e) was "a narrow technical fix" intended to "clarify" tribal civil jurisdiction rather than to "expand" or redefine it. [6] And again, if the Defendants' argument is correct, why did Section 1304, regarding "Tribal Jurisdiction over crimes of domestic violence," go to such great length to spell out the circumstances under which personal protection orders

[5] Both sections, with virtually identical wording (see Appendix I) appear in H.R. 4154, introduced on March 7, 2012, and H.R. 757, introduced on February 15, 2013, and both were enacted on March 7, 2013 as part of P.L. 113-4, Title IX.

[6] H.R. REP. NO. 106-939, at 104 (2001).

may and may not be issued? The fact that the Defendants' interpretation of the statutes would make Section 1304 completely impotent shows that it is absolutely wrong.

(iv). The Defendant's Claim that the Plaintiff has Failed to Exhaust Her Tribal Court Remedies is Invalid.

Finally, Defendant contends (p. 4) that the Plaintiff has failed to exhaust her Tribal Court remedies. However in *Nevada v. Hicks*, the U.S. Supreme Court outlined four exceptions to the exhaustion of remedies rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). In any case there is no need for the Plaintiff to invoke an exception to the exhaustion of remedies rule, since the Plaintiff has in fact exhausted her remedies.

The Plaintiff in this Court has filed multiple briefs challenging jurisdiction in both the NHBP Trial Court and the NHBP Supreme Court. The Plaintiff also presented her case in an oral argument before the NHBP Supreme Court on January 15, 2018. An unusual feature of this litigation is that the NHBP Trial Court has made clear, and carried out, its plan to pursue the personal protection order litigation despite the fact that the case had been appealed to the NHBP Supreme Court. The Plaintiff appealed the Trial Court's decision to allow the Petitioner to continue litigation to the NHBP Supreme Court, which denied the Plaintiff's request for a stay. The NHBP Trial Court has summarily rejected all the Plaintiff's objections based on lack of jurisdiction.

The NHBP Supreme Court specifically rejected two motions by the Plaintiff to stay the proceedings of the NHBP Trial Court pending appeal, and upheld the position of the Trial Court that it could proceed with a hearing to determine whether the Plaintiff was guilty of contempt, and then impose whatever penalties, including possible incarceration for 90 days and a fine of $1000, that the Trial Court

considered appropriate. Finally, on January 25, 2018 the NHBP Supreme Court filed its opinion, denying the Plaintiff-Respondent's Appeal in every respect. The NHBP Trial Judge found that the Plaintiff had violated her personal protection order, and after a hearing on January 31, 2018, ordered sanctions imposed on the Plaintiff for her alleged violation of the personal protection order, namely a fine (the amount is not yet determined) to be paid to the Petitioner's lawyer, and community service at the Capuchin Soup Kitchen. On January 31, 2018 the NHBP Trial Judge also found the Plaintiff to be in civil contempt, and imposed a fine of $200 to cover court costs.

Under these circumstances, the Plaintiff has clearly exhausted her remedies. If there were any doubt that she had done so, which there should not be, exceptions (2), (3) and (4) - especially (4) - of *Nevada v. Hicks* would apply, if not (1) as well.

(2). Has the Plaintiff Shown that She would Suffer a Continuing, Irreparable Harm in the Absence of a Preliminary Injunction?

A. The Economic Loss from the Financial and Emotional Costs of Litigation

First, there is a very substantial economic loss which other federal courts have found to be an element of irreparable harm. Plaintiff and her attorney have had to devote hundreds of hours of time and thousands of dollars (not counting the value of her attorney's time) defending the case against her brought by the NHBP Trial Court Petitioner Nathaniel Spurr. The litigation involved a great deal of stress, inconvenience and disruption of the lives of the Plaintiff and her husband.[7] On two occasions the NHBP Trial Court has ordered both the Plaintiff and her attorney to appear in court on dates set by the Trial Court without input from them, stating that a failure to appear by either of them "may result in a bench warrant being issued for [their] arrest."[8] Furthermore, there is no end in sight for this litigation

[7] The NHBP Trial Court Judge ordered the Respondent to appear for numerous hearings without consideration of what dates were convenient for the Respondent or her attorney; when the Respondent informed the NHBP Court administrator informally of her preferences for hearing dates, the Trial Court informed her that any request for an alternative date would have to be in the form of a motion. When the Respondent submitted a motion, it was denied by the Trial Court.

[8] See Plaintiff's Exhibits for NHBP Trial Court's orders dated January 30, 2018 and February 5, 2018, attached to this Brief and made a part hereof.

unless this Court suspends it with a preliminary injunction. In its opinion of July 21, 2017, the NHBP Trial Court made the extraordinary suggestion that if the Petitioner wished to renew the Personal Protection Order pursuant to Section 7.4-76(D) of the NHBP Domestic Violence Code,

> "the Court [upon a hearing] shall grant the motion for renewal unless the respondent proves by preponderance of evidence that he [sic] will not resume harassment of the petitioner when the order expires. The Court may renew the harassment protection order for another fixed period or may enter a permanent order." (pp. 30-31)

This amounted to an invitation to the Petitioner that he may renew his Personal Protection Order. This raises serious questions whether these provisions violate the Indian Civil Rights Act and the United States Constitution. In addition,

NHBP Section 7.4-76, Chapter 7.4, Domestic Violence Code provides that:

> B. An order issued under this article shall be effective for not more than one (1) year unless the Court finds that any future contact with the petitioner would result in the harm from which the petitioner originally sought protection. If the Court so finds, the Court may enter an order to a fixed time exceeding one (1) year.
>
> D. At any time within three (3) months prior to the expiration of the order, the petitioner may apply for a renewal of the order by filing a motion for renewal with the Court. The motion for renewal shall state the reasons why he or she seeks to renew the order. Upon receipt of the motion for renewal, the Court shall order a hearing which shall be held within fourteen (14) days from the date of motion. *The Court shall grant the motion for renewal unless the respondent proves by preponderance of evidence that he will not resume harassment of the petitioner when the order expires.* The Court may renew the harassment protection order for another fixed period or may enter a permanent order. [emphasis supplied]

Section D raises serious constitutional issues under the Indian Civil Rights Act and U.S. Constitutions. This provision puts the burden of proof on the Plaintiff to show that she has *not* been harassing the Petitioner; if the Plaintiff cannot prove that she has not been harassing the petitioner, she is deemed guilty of harassment. In other words, the Plaintiff is guilty until proven innocent. This is a clear violation of due process of law, which is guaranteed by the Indian Civil Rights Act and by Amendments V and XIV of the United States Constitution. Due process is also required by 18 USC 2265(b)(2) as a

requirement for a personal protection order issued under the Violence Against Women Reauthorization Act. Appendix II provides details on Tribal Court procedures that the Plaintiff believes were clear violations of her right to due process.

On January 31, 2018, the Petitioner responded to the NHBP Trial Court's invitation, filing a notice to the Trial Court that he was requesting renewal of the personal protection order for another year. There is a high probability that the personal protection order will be renewed again and again, on into the indefinite future unless and until this Court addresses the fact that the NHBP Trial Court lacks jurisdiction.

In *McKesson Corporation et al. v. Todd Hembree* et al., 2018 U.S. Dist. Lexis 3700 (N.D. Okla. 2018), plaintiffs brought an action for a preliminary injunction against tribal court officials of the Cherokee Nation, seeking a preliminary injunction enjoining the defendants from taking an action in Tribal Court and a declaratory judgment that the defendants lacked jurisdiction to prosecute and hear the Tribal Court action. Plaintiffs contended that they would suffer irreparable injury absent an injunction. The federal district court stated as follows:

> Plaintiffs also argue that without an injunction, they would be forced to expend time and money litigating before a tribal court that lacks jurisdiction. Under the CAJA, Plaintiffs would be required to proceed through the tribal court appellate system before they could challenge any adverse jurisdictional ruling in federal court. See CAJA Sec. 3-19 ("The District Court shall not certify jurisdictional rulings for interlocutory appeal."). While "economic loss is usually insufficient to constitute irreparable harm, " [*35] *Crowe & Dunlevy*, 640 F.3d at 1157, in cases where a tribal court clearly lacks jurisdiction, courts have found a litigant's time and expense to defend itself may constitute irreparable harm. *See id.; see also Kerr-McGee Corp. v. Farley*, 88F. Supp. 2d 1219, 1233 (D.N.M. 2000) (finding plaintiff will suffer irreparable damage "as demonstrated by the expense and time involved in litigating this case in tribal court: that lacked jurisdiction); *UNC Res. V. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz.1981) (finding plaintiff "would be faced with the possibility of irreparable injury if it were forced to appear and defend in Tribal Court" that "very probabl[y]" lacked jurisdiction). The burden and cost of litigation is a significant consideration here, where the Court has found that the trial court clearly lacks jurisdiction.

The federal district court granted the Plaintiffs' motion for a preliminary injunction. Of course, in *McKesson Corporation the* injunction was granted before the Plaintiffs were forced to litigate in the

tribal court action, while in our case the Plaintiff has fully exhausted its remedies in the NHBP Court system, by litigating to verdict in the Trial Court, and to a final decision in the NHBP Supreme Court. The irreparable harm resulting from this never-ending litigation is a major component of irreparable harm.

B. Irreparable Emotional and Psychological Harm to the Plaintiff

The Plaintiff has already suffered substantial emotional harm from the PPO entered by the NHBP Trial Court, which had no jurisdiction to do so. The Trial Court immediately registered the PPO with the Michigan Law Enforcement Information Network. Here are some examples of the consequences of the Trial Court's actions:

(a). Disruption of an Important Family Reunion

The Plaintiff along with her husband Stephen J. Spurr were organizers of a family reunion which was held in Dover, New Hampshire from July 28 to July 30, 2017. This is an event held every four or five years, and is attended by relatives of Stephen J. Spurr coming from all parts of the country. The Plaintiff informed the NHBP Trial Court of these plans in the hearing of April 19, 2017. On March 6, 2017 she requested a stay of the Personal Protection Order from the Trial Court, which was denied on July 21, 2017, and on July 22, 2017 she appealed this denial to the NHBP Supreme Court so that she could meet relatives and friends at this reunion. On July 28, 2017 (the first day of the reunion), the Supreme Court denied the request, stating that

> Missing a family reunion which is not one's own blood family is not such a grave or extenuating circumstance that Appellant should be allowed to bypass or circumvent the traditional appellate review process.

(b). Prohibiting the Plaintiff from Attending the Memorial Service of a Close Friend

The Grandmother passed away on February 15, 2017, and one week later, a memorial service for the Grandmother was held on the Tribe's reservation. Although the NHBP Trial Court's Permanent Protection Order was issued on February 17, 2017, it was not served on the Plaintiff, nor did the Plaintiff

have actual notice of it, until February 22, 2017, when the Plaintiff arrived together with her husband Stephen J. Spurr and her husband's son Josiah H. Spurr, to attend the memorial service of the Grandmother. When the Plaintiff arrived at the service, she was surrounded by five Tribal police officers and four police vehicles, who served the Plaintiff with the Court Order of February 17, 2017, and informed her that she could not attend the memorial service of the Grandmother, whom she knew well, and with whom she had a close friendship. The Tribal Police, acting on information on the NHBP Trial Court's order obtained from the Petitioner's attorney, further informed Plaintiff's attorney that she would have to leave the reservation immediately, and also would not be allowed to attend the burial ceremony in Burr Oak Cemetery in Athens, well outside the reservation. The Plaintiff, her husband and his son Josiah then departed together as a family. In other words, the NHBP Trial Court did not notify the Plaintiff that she was subject to a permanent protection order signed six days earlier and prohibited from attending the memorial service until after the Plaintiff had made a three hour drive to arrive at the service.

(c). Being Listed in the Michigan Law Enforcement Information Network, and Repeated Interrogation by U.S. Customs Officials

Because the NHBP Trial Court entered the Personal Protection Order into the Michigan Law Enforcement Information Network, the Plaintiff and her husband have been detained at Detroit's Metro Airport by Customs officials for approximately two hours on three separate occasions when they returned to Detroit by air travel. The consequences of being listed in the Michigan Law Enforcement Information Network are described in Appendix III.

(d). A Tribal Court's Finding of a Criminal Violation, and Imposition of Fines and Community Service.

The NHBP Supreme Court specifically rejected two motions by the Plaintiff to stay the proceedings of the Trial Court pending appeal, and upheld the position of the Trial Court that it could proceed with a hearing to determine whether the Plaintiff was guilty of contempt, and then impose whatever penalties,

including possible incarceration for 90 days and a fine of $1000, that the Trial Court considered appropriate. Finally, on January 25, 2018 the NHBP Supreme Court filed its opinion, denying the Plaintiff-Respondent's Appeal in every respect. The NHBP Trial Judge found that the Plaintiff had violated her personal protection order by submitting a letter to the NHBP Trial Court in another case (a finding with which we vehemently disagree) and after a hearing on January 31, 2018, ordered sanctions imposed on the Plaintiff for her alleged violation of the personal protection order, namely a fine (the amount is not yet determined) to be paid to the Petitioner's lawyer, and community service at the Capuchin Soup Kitchen. On January 31, 2018 the NHBP Trial Judge also found the Plaintiff to be in civil contempt, and imposed a fine of $200 to cover court costs. The Plaintiff, who has had a successful career as a professional engineer, has no criminal record and has never been in jail. She has experienced great anxiety over the possibility of being incarcerated by the Trial Judge, a sanction which was strongly advocated by the Petitioner.

(3). Whether the Preliminary Injunction Would Harm Third Parties.

Since the NHBP Trial Court lacked jurisdiction to issue the personal protection order against the Plaintiff, it is extremely unlikely that the preliminary injunction requested here could somehow harm third parties. *McKesson Corporation et al. v. Todd Hembree et al*, 2018 U.S. Dist. LEXIS 3700 at 37.

(4). Whether the Public Interest Would be Served by Issuing the Preliminary Injunction.

A statement in *McKesson Corporation et al. v. Todd Hembree et al.* is directly applicable to the facts of this case:

> Hembree contends an injunction would contravene the congressional policy of supporting tribal self-government and would deprive the federal courts of the benefits of tribal expertise. However, as explained *supra* Part IV, the conduct alleged in the Tribal Court Action does not concern tribal self-government or directly affect tribal sovereignty. The lack of tribal court jurisdiction over this matter is clear, and it would not serve the public interest to require Plaintiffs to litigate through the tribal court system before challenging jurisdiction in this Court. Accordingly, the Court finds that the public interest favors an injunction.

One important difference between *McKesson Corporation* and this case is that here, the Plaintiff has exhausted all her remedies through litigation in the NHBP Court system. Thus this Court is not "deprived . . . of the benefits of tribal expertise" that may be obtained through litigation in Tribal Court. Another crucial difference between *McKesson Corporation* and this case is that in *McKesson* the irreparable harm was entirely economic: a waste of time and money involving litigation, when the tribal court had no jurisdiction in the first place. In this case the irreparable harm involves not only a waste of time and money, but also a very real potential loss of personal liberty, in a situation where the tribal courts have no jurisdiction and may be immune from damages. A preliminary injunction would serve the public interest, by signaling to the Tribal Courts that they must take into account the limits on their jurisdiction imposed by federal law and improving the quality of decisions in the Tribal Courts. This would avoid needless expense to litigants and the Tribal Nations themselves.

APPENDIX I: Comparison of 25 U.S.C. 1304(b)(4)(B) and 18 U.S.C. 2265(e) with Original Bills Introduced in Congress

H.R. 4154, in Section 204. Tribal Jurisdiction over Crimes of Domestic Violence, provides in Section (d) Dismissal of Certain Cases, the following in subsection (3) Ties to Indian Tribe, the following at p. 13:

> (3) TIES TO INDIAN TRIBE. In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the case shall be dismissed if-
> (B) the prosecuting tribe fails to prove that the defendant or the alleged victim-
>
> (i) resides in the Indian Country of the participating tribe;
> (ii) is employed in the Indian Country of the participating tribe; or
> (iii) is a spouse or intimate partner of a member of the participating tribe.

This language is essentially identical to that of 25 U.S.C. 1304(b)(4)(B):

> (B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant
>
> (i) resides in the Indian Country of the participating tribe;
> (ii) is employed in the Indian Country of the participating tribe; or
> (iii) is a spouse, intimate partner, or dating partner of
> (I) a member of the participating tribe; or
> (II) an Indian who resides in the Indian country of the participating tribe.

In section 6. Tribal Protection Orders, subsection (e) on Tribal Court Jurisdiction, provides in paragraph (1) the following at p. 17:

> Except as provided in paragraph (2), for purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

Paragraph (2), on pp. 17-18, states that paragraph (1) shall not apply to certain specified Indian Tribes in Alaska.

This language is essentially identical to that of 18 U.S.C. 2265(e):

> For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

H.R. 757 has exactly the same language as H.R. 4154, with the same titles of sections, subsections and paragraphs, on p. 13 and p. 17 respectively.

APPENDIX II: Procedural Issues Showing a Lack of Due Process

1. Was it Consistent with Due Process for the Trial Court to Suggest to the Petitioner that his Personal Protection Order could be renewed annually, unless the Plaintiff could prove she had not harassed him?

A. In its opinion of July 21, 2017, The NHBP Trial Court made the extraordinary suggestion that if the Plaintiff wishes to renew the Personal Protection Order pursuant to Section 7.4-76(D) of the NHBP Domestic Violence Code,

> "the Court [upon a hearing] shall grant the motion for renewal unless the respondent proves by preponderance of evidence that he [sic] will not resume harassment of the petitioner when the order expires. The Court may renew the harassment protection order for another fixed period or may enter a permanent order." (pp. 30-31)

B. There are several problems with this statement, which amounts to an invitation to the Plaintiff that he may renew his Personal Protection Order indefinitely. First, it conflicts with the NHBP statute providing that one year is the maximum period of time allowed for such a court order under the NHBP

Domestic Violence Code. Section 7.4-54, Chapter 7.4, Domestic Violence Code. Second, these provisions violate 25 U.S.C. 1304 and the United States Constitution. In addition, NHBP Section 7.4-76, Chapter 7.4, Domestic Violence Code provides that:

> B. An order issued under this article shall be effective for not more than one (1) year unless the Court finds that any future contact with the petitioner would result in the harm from which the petitioner originally sought protection. If the Court so finds, the Court may enter an order to a fixed time exceeding one (1) year.
>
> D. At any time within three (3) months prior to the expiration of the order, the petitioner may apply for a renewal of the order by filing a motion for renewal with the Court. The motion for renewal shall state the reasons why he or she seeks to renew the order. Upon receipt of the motion for renewal, the Court shall order a hearing which shall be held within fourteen (14) days from the date of motion. The Court shall grant the motion for renewal unless the respondent proves by preponderance of evidence that he will not resume harassment of the petitioner when the order expires. The Court may renew the harassment protection order for another fixed period or may enter a permanent order.

C. Section D raises serious constitutional issues under 25 U.S.C. 1304 and the U.S. Constitution. This provision puts the burden of proof on the respondent to show that she has *not* been harassing the petitioner; if the respondent cannot prove that she has not been harassing the petitioner, the Plaintiff is deemed guilty of harassment. In other words, the Plaintiff is guilty until proven innocent. This is a clear violation of due process of law, which is guaranteed by Article VII, Section 1(a)(8) of the Tribal Constitution and by Amendments V and XIV of the United States Constitution.

2. Should the Trial Court Have Granted the Plaintiff's Request to Postpone the Hearing on a Permanent Personal Protection order to a Date Later than February 16, 2017? Was the Trial Court's Refusal to Postpone the Hearing Consistent with Due Process?

A. On February 3, 2017 the NHBP Trial Court issued an ex parte temporary Personal Protection Order against the Plaintiff Joy Spurr, prohibiting her from "Stalking" the Petitioner Nathaniel W. Spurr. The Trial Court stated that it issued the ex parte order without hearing any testimony. The Order of February 3 stated that a hearing on a permanent Personal Protection Order would be held on February 16, 2017. The Order of February 3 was issued by the NHBP Trial Court without prior notice of any kind to the Plaintiff, nor did she learn of the ex parte temporary protection order until February 8, 2017. Since

the hearing on a permanent order was scheduled one week after the Plaintiff learned about it, she wrote and faxed to the Trial Court on February 12, 2017 a request that the hearing be postponed so that she would have adequate time to prepare a defense. On February 14, 2017, the Trial Court stated that it could not adjourn the hearing on a permanent personal protection order against the Plaintiff beyond February 16, 2017 because that would be prohibited by Sec. 7-4-75(B) of the NHBP Domestic Violence Code. This section states that

> A full hearing, as provided by this article, shall be set for not later than fourteen days from the issuance of the temporary order.

B. However we submit that the NHBP Trial Court's interpretation of this statute is not correct, and was severely prejudicial to the Plaintiff. The hearing must be set within 14 days, but that does not mean it cannot be postponed if the Plaintiff requests a postponement. The fourteen-day limit is clearly provided for the benefit of the Plaintiff, and should therefore subject to waiver by the Plaintiff if she believes it is in her interest to do so. 18 U.S.C. 2265(b)(2) of the Violence Against Women Reorganization Act provides that "reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. . ." In this case it was in the interest of the Plaintiff, who is not a lawyer and has a busy schedule, to postpone the hearing so that she could prepare for it more effectively. The Plaintiff was put at a serious disadvantage by the time constraint, when she learned at 5:30 P.M. on February 15, 2017 that the NHBP Trial Court would not reschedule the hearing scheduled for February 16th, 2017 at 10:00 A.M. The Trial Court's refusal to allow the Plaintiff sufficient time to prepare her case violated 18 U.S.C. 2265(b)(2) and her right to due process under the Indian Civil Rights Act.

APPENDIX III: Consequences of Entering a Permanent Protection Order into the Michigan Law Enforcement Information Network

A. Paragraph 12 of the NHBP Trial Court Order of February 17 noted that the Trial Court would enter the Order into the Michigan Law Enforcement Information Network.

B. The consequences of being listed on the Michigan Law Enforcement Information Network (LEIN) are extremely serious. Job applicants are frequently asked if they have been listed on this network; if the answer is yes, they are often eliminated from consideration. Information on the LEIN is provided to other criminal justice agencies within and without Michigan. Being listed on the LEIN could prevent a person from obtaining a security clearance. If a person who is listed on the LEIN in Michigan is pulled over for a routine traffic violation, the investigating officer will learn immediately from his computer that the person is listed on the LEIN. Plaintiff is in a volunteer teaching program for the Detroit Public Schools and successfully passed a federal, comprehensive background check enabling her to teach children. The LEIN prohibitS the Plaintiff from teaching math to underprivileged school children.

C. Other serious consequences of being listed on the LEIN are set forth in Paragraphs 7 and 8 of the NHBP Trial Court Order. Paragraph 8 of the Order of February 17 states that "This order is enforceable anywhere in this State. . . . " and that "If the Plaintiff violates this order in any other jurisdiction, the Plaintiff is subject to enforcement and penalties of the state, Indian Tribe, or United States territory under whose jurisdiction the violation occurred."

D. Paragraph 7 of the NHBP Trial Court Order of February 17 states that "Violation of this order subjects the Plaintiff to immediate arrest and to the civil and criminal contempt powers of the Court. If found guilty, the Plaintiff shall be imprisoned for not more than 90 days . . ."

……

VI Prayer for Relief

WHEREFORE, the Plaintiff respectfully requests that the Court:

1. Issue a preliminary injunction, ordering the Defendants Judge Pope and the Supreme Court of the Nottawaseppi Huron Band of Potawatomi to dismiss with prejudice, for lack of personal and subject matter jurisdiction, all proceedings against the Plaintiff based on the permanent Personal Protection

order issued by the NHBP Trial Court and any other proceedings involving a personal protection order against the Plaintiff.

2. Grant any further relief as the Court may deem appropriate under the circumstances.

PROPOSED ORDER

After duly considering the matter, the Court **HEREBY FINDS** as follows:

1. On the facts of this case, the Plaintiff is likely to succeed on the merits of her claim that the Tribal Courts of the Nottawaseppi Huron Band of Potawatomi lack personal and subject matter jurisdiction to issue a permanent Personal Protection Order against her.

2. The Plaintiff will suffer irreparable harm in the absence of the preliminary injunctive relief she requests.

3. There will be no substantial harm to others from granting the preliminary injunction.

4. Granting preliminary relief is in the public interest.

Further, the Court **HEREBY ORDERS** that Defendants are **ENJOINED FROM** continuing any proceedings against the Plaintiff based on the permanent Personal Protection order issued against her by the Trial Court of the Nottawaseppi Huron Band of Potawatomi, and are hereby ordered to withdraw the Personal Protection order from the Michigan Law Enforcement Information Network.

The Court **FURTHER ORDERS** as follows:

1. The Plaintiff shall not be required to post bond.

DONE this_____day of_____, 2018.

BY THE COURT

_____

United States District Judge

Dated: February 12, 2018

Respectfully submitted,

/s/Stephen J. Spurr

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