UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOY SPURR

Plaintiff,

v.

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

MELISSA L. POPE, et al.,

Defendants.

Plaintiff's Reply to Defendants' Joint Response

PLAINTIFF'S REPLY TO THE DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION

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A law professor teaching a course in appellate advocacy is reputed to have told his students the following: *"These are my final words on advocacy. If you have the facts on your side, hammer the facts. If you have the law on your side, hammer the law. If you have neither the facts nor the law, hammer the table."*

It is most unfortunate that the Defendants begin their brief with a "Factual Background" that has absolutely nothing to do with the issues of this case. The fundamental issue in this case is whether the NHBP Trial Court and Supreme Court had jurisdiction to issue a personal protection order against the Plaintiff, a nontribal member, nonIndian who had no ties to the Tribe that would support a claim of jurisdiction. We will show that the case law, federal statutes, legislative history, federal government web sites and treatises overwhelmingly reject the idea that the Tribal Courts had such jurisdiction. The thrust of the "Factual Background" section seems to be that the Plaintiff is a bad person, and should therefore obtain no relief regardless of the law. This "Factual Background" is almost entirely false except for the recitation of certain uncontroversial facts and dates, and is a remarkably biased and distorted rewriting of the history of the litigation in Tribal Court. Since this material is utterly irrelevant, and we do not wish to divert the Court from the applicable law, we will not now respond to these allegations, but will address them briefly in Appendix II after our discussion of the law.

1. The Defendants' Claim that this Action is Barred by Sovereign Immunity is 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. *See* ECF 13 at 2. There is no basis for this argument. 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).[1] 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 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

[1] In this area of the law, a tribe has sovereign immunity only if Congress has not decided to eliminate it.

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 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 post-*Kiowa* 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.

Defendants seem to be arguing that in some way the idea of tribal sovereign immunity prevents the Plaintiffs from obtaining a temporary injunction against them; yet there are many cases in which a challenge to the jurisdiction of a tribal court has led a federal court to issue an injunction against a tribal court. *McKesson Corporation et al. v. Todd Hembree* et al., 2018 U.S. Dist. Lexis

3700 (N.D. Okla. 2018); *Stifel, Nicholaus & Company, Inc. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F. 3d 184 (7th Cir. 2015); *Kerr-McGee Corporation et al., v. Kee Tom Farley et al*., 88 F. Supp. 2nd 1219 (D. New Mexico 2000); *Crowe & Dunlevy v. Gregory R. Stidham*, 640 F.3d 1140 (2011) at 1157; *UNC Resources, Inc., et al. v. Kee Joe Benally et al.*, 518 F. Supp. 1046 (D. Arizona 1981).

2. If a Permanent Protection Order Against "Stalking" is considered a Civil Sanction, Did the NHBP Trial Court have Jurisdiction to Issue It Against the Plaintiff?

The severe limits of civil jurisdiction of a tribal court over non-Tribal members were set forth by the United States Supreme Court in In *Montana v. United States*, 450 U.S. 544 (1981). The Court stated that in general, Indian Tribes lack civil authority over the conduct of nonmembers, subject to two exceptions, which have come to be known as the "Montana exceptions":

> (1) A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements [citing cases].
> (2). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. Fisher v. District Court, 424 U.S. 382, 386; Williams v. Lee, 358 U.S. 217, 219-220; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264, 273.
> 450 U.S. at 565-566.

Any attempt to support the claim that the NHBP Trial Court had jurisdiction to issue the personal protection order at issue here would have to be based on the second exception. With regard to this exception, the U.S. Supreme Court stated in 1997 that:

> Montana's second exception, concerning conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe" 450 U.S. at 566, is also inapplicable. The cases cited by Montana as stating this exception each raised the question whether a State's (or Territory's) exercise of authority would

> trench unduly on tribal self-government. [citing cases]. *Strate v. A-1 Contractors*, 520 U.S. 438, 441 (1997).

The scope of the second Montana exception was also addressed in *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316 (2008), in which the U.S. Supreme Court held that a Tribal Court did not have jurisdiction of a claim of discrimination brought by an Indian couple against a non-Indian bank. The Court stated that:

> Because the second Montana exception stems from the same sovereign interests giving rise to the first, it is also inapplicable here. The "conduct" covered by that exception must do more than injure a tribe; it must "imperil the subsistence" of the tribal community. *Montana*, 450 U.S., at 566. One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n 220.The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the Tribe, but cannot **fairly be called "catastrophic**" for tribal self-government. See *Strate*, 520 U.S., at 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661.

Therefore it is clear that the personal protection order at issue in this case cannot be saved by the claim that it is merely a civil sanction.

3. If a Permanent Protection Order Against "Stalking" is a Criminal Sanction, Did the NHBP Trial Court have Jurisdiction to Issue It Against the Plaintiff?

In its order of July 21, 2017 *See* ECF 22 at 5 the NHBP Trial Court stated that its order against the Appellant is a "Permanent Harassment Protection Order." Harassment Protection Orders are authorized in Sections 7.4-71 through 7.4-76 of NHBP Chapter 7.4 on Domestic Violence under the heading: Article XII: *Criminal Protection Orders*.[2] The criminal jurisdiction of Tribal Courts over non-Tribal members who are not American Indians is very different from their jurisdiction over Tribal members, especially when it comes to acts committed outside Indian lands. See Matthew Fletcher, *Federal Indian Law*, 343-364 (West Academic Publishing,

[2] Article XII is attached as Exhibit 7 to this Reply and made a part hereof.

2016). " . . . tribal authority to prosecute non-Indians is sharply restricted." Another well-known treatise states that

> Tribes lack most criminal jurisdiction over non-Indian defendants as a result of the Supreme Court's 1978 decision in Oliphant v. Suquamish Indian Tribe. *Cohen's Handbook of Federal Indian Law*, Section 9.04 at 765 (2012), citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

In the *Oliphant* case 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. This reasoning behind this principle was explained by the U.S. Supreme Court in *Duro v. Reina*, 495 U.S. 676 (1990):

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes . . . . We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. . . . A tribe's additional authority comes from the consent of its members, and so, in the criminal sphere, membership marks the bounds of tribal authority. 495 U.S. at 693.

This point was stressed by the Supreme Court in 2008:

> Because the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action. *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316 (2008).

See also Duane Champagne, "Non-Indians and Tribal Criminal Jurisdiction", posted on Indian Country Media Network on December 23, 2012:

> According to current U.S. legal interpretations, non-Indian U.S. citizens are not subject to tribal criminal jurisdiction. A critical well-known case is where the U.S. Supreme Court ruled that the non-Indian defendant Mark Oliphant could not be prosecuted under tribal court jurisdiction.

The remaining question is whether the issuance of a personal protection order by the NHBP trial court against the plaintiff has "the permission of Congress." The Defendants claim that it

does, because of a federal statute, The Violence Against Women Reauthorization Act, 25 U.S.C. Sec. 1304 (2013). We evaluate this claim in the next section.

4. The Defendants' Claim that the Tribal Court Had Jurisdiction under 18 U.S.C. 2265(e) is Invalid.

Defendants also contend *See* ECF 13 at 4 that the Complaint fails to state a claim for which relief can be granted. Specifically, the Defendants argue that the Plaintiff's claim that the Tribal Court lacked jurisdiction because she is a non-Indian with insufficient tribal connections is mistaken, because (so goes the argument) 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. 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.

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

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." 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 Tribal 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: "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

[4] 25 USC 1304. Exceptions.

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. However if we accept this argument, then sec. 1304(b)(4) of the "Tribal Jurisdiction" statute that provides "exceptions" to tribal special criminal 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.[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

[5] Both sections, with virtually identical wording (see Appendix) 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.

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 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.

This is recognized by the U.S. Department of Justice. It has a web site on The Violence Against Women Reauthorization Act. It has a subheading for "Tribal Jurisdiction Over Crimes of Domestic Violence." Under this subheading it poses a question: "What crimes will not be covered?" It states: "The following crimes will generally not be covered:

- Crimes committed outside of Indian Country and
- Crimes committed by a person who lacks sufficient ties to the tribe, such as working or living on its reservation.

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

Finally, Defendant contends *See* ECF 13 at 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

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

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. 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 of $518.95 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.

6. Should this Court grant the Plaintiff a Preliminary Injunction?

A. 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 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 (1) all claims against the Tribe and its Supreme Court are barred by sovereign immunity; (2) this Court Lacks Subject Matter Jurisdiction of the Plaintiff's Claim; (3) the Tribal Court Had Jurisdiction under 18 U.S.C. 2265(e); and (4) the Plaintiff has failed to exhaust her Tribal Court remedies. These questions have been answered in the discussion above.

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

See ECF No. 22 at 17-18, the Defendants noted that the Plaintiff asserted *See* ECF 21 at 15, that

> 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.

The Defendants stated that "This argument is pure unsubstantiated speculation." Well it was not, but if it was, it has been substantiated. On February 13, 2018, after a hearing the NHBP Trial Court issued a new personal protection order against the Plaintiff for a year, the maximum period allowed under the NHBP statute (see Exhibit 1, attached to this brief and made a part hereof).

The irreparable harm already imposed on the Plaintiff is a clear indication of the continuing and future harm to be inflicted upon her by the personal protection orders issued by the NHBP Trial Court, acting without jurisdiction to do so.

(1). 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 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 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." *See* ECF 22-1 on 30-31

[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 Ex. 8, February 5, 2018 Ex. 9, and February 13, 2018 Ex. 10, attached to this Brief and made a part hereof.

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.

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. On February 13, 2018, after a hearing the NHBP Trial Court issued a new personal protection order against the Plaintiff for a year, the maximum period allowed under the NHBP

statute (see Exhibit 1, attached to this brief and made a part hereof). There is a high probability that the personal protection order will be renewed by the NHBP Trail Court 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.

(2). 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 February 23, 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 Irene Wesley, the mother of Stephen J. Spurr's former wife Laura, passed away on February 15, 2017, and one week later, a memorial service for Mrs. Wesley 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 Mrs. Wesley's memorial service. When the Plaintiff arrived at the service, she was surrounded by five Tribal police officers and four police vehicles, who served her with the Court Order of February 17, 2017, and informed her that she could not attend the memorial service of Mrs. Wesley, 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 the Plaintiff 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 Stephen 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). 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 of $518.95 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.

C. 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.

D. 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.

IV. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that the Court:

1. Issue a preliminary injunction and after a hearing a permanent 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 Trial Court and any other proceedings involving a personal protection order.

2. Award the Plaintiff damages against the Defendants herein, jointly and severally, in whatever amount the Plaintiff is found to be entitled to, together with costs, interest and attorney fees, as well as all other damages allowed under Michigan or federal law.

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

Dated: March 5, 2018

Respectfully submitted,

/s/ Stephen J. Spurr

Stephen J. Spurr, Attorney for Plaintiff Joy Spurr

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: Plaintiff's Response to the Allegations in the Defendants' "Factual Background"

In this appendix the Plaintiff responds briefly to the allegations in the Defendants' "Factual Background" *See* ECF 22 at 1-6, even though they are not relevant to the issues in this case. *See* ECF 22 at 1-2 of this section are very artfully worded: the Defendants there report that the Petitioner Nathaniel Spurr, in his petition filed in NHBP Tribal Court on February 2, 2017, "*alleged* that Plaintiff had been engaged in a campaign of harassment against him, with several hundreds of letters, emails, phone calls, and voicemails, . . . etc. [emphasis supplied] They, however, do not report that the Petitioner was able to produce only one letter from the Plaintiff, and not a single email, nor evidence of any voicemails or phone calls. They also do not report that the Plaintiff testified in Tribal Court that she sent no more than three letters to the Petitioner in the last three years, made no more than 4 calls to him in 3 years and sent no more than 4 emails in 2 years.[9]

In the same paragraph the Defendants state that the Petitioner alleged in the same petition that the Plaintiff carried out the following activities: "intervening in his personal relationships;

[9] Most of this communication involved plans for family vacations, when relations between the Petitioner and Plaintiff were better.

and representing herself as him (online and via U.S. mail) to insurance, financial and government entities and making false statements to some of those entities in order to obtain his confidential information and to impair his standing with those entities." The only evidence offered by the Petitioner in Tribal Court to substantiate these charges was his testimony, which was strongly refuted by testimony of the Plaintiff; the Petitioner offered no documentary or other tangible evidence of these alleged actions of the Plaintiff.

Another propagandistic attack is made by the Defendants on *See* ECF 22 at 2-3, where they speak of an alleged "relentless submission of documents," which "completely disregarded the Tribal Court's filing and service requirements" "avalanche of misfiled documents" and "incredible morass of paper." The Defendants also note that "The Tribal Court found that Plaintiff's document submissions constituted further evidence of her harassment of the Petitioner." In this last statement the Defendants are correct; both the NHBP Trial Court and Supreme Court adopted the novel theory that the Plaintiff, by defending herself, was thereby guilty of harassment of the Petitioner. The Plaintiff and her attorney sought at all times to comply with all the rules of the NHBP Courts, in both form and substance.

Moreover it is utterly untrue that the Plaintiff attacked the integrity of the NHBP Trial Court. To the contrary, the Plaintiff and her attorney were at all times extremely respectful of, and deferential to, the NHBP Trial and Supreme Courts. There was disagreement, definitely, but not disrespect.

In ECF 22, at p.3, the Defendants stated that "They [the Plaintiff's submissions to the NHBP Tribal Court] also included documents containing Nathaniel Spurr's private financial information, which Plaintiff was unable to credibly explain how she had obtained." This is false. The Plaintiff did explain to the Tribal Court how she obtained these documents. The Plaintiff

testified that the financial information of Nathaniel Spurr came to her attention when she was helping Irene Wesley investigate why many of Mrs. Wesley's checks had bounced. (Nathaniel Spurr was then living in the home of Mrs. Wesley and acting as her guardian, pursuant to his appointment as guardian by the NHBP Tribal Court.) There is a continuing ongoing investigation of Mrs. Wesley's financial matters.

See ECF 22, at p.4, the Defendants stated that

> Plaintiff filed suit in this Court on December 11, 2017. . . The next day, she expressly informed the Tribal Court that she refused to appear at the December 13, 2017 show cause hearing. The Tribal Court held the scheduled hearing, and Plaintiff did not appear.

The Defendants failed to note that the Plaintiff was represented by her counsel at the December 13, 2017 show cause hearing, and that the Plaintiff appeared before the NHBP Trial Court together with her counsel at two subsequent hearings.