UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOY SPURR

Plaintiff,

v.

MELISSA L. POPE, *et al*.,

Defendants.

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

Memorandum of Law in Support of Joint Motion to Dismiss

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

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I. INTRODUCTION

Defendant Nottawaseppi Huron Band of the Potawatomi ("NHBP") is a federally-recognized sovereign Indian tribe with a government-to-government relationship with the United States. *See* 81 Fed. Reg. 5019, 5022 (Jan. 29, 2016). Defendant the Honorable Melissa L. Pope is the Chief Judge of the trial court level ("Tribal Court") of the NHBP judicial system. Defendant NHBP Supreme Court is the highest court in the NHBP judicial system.

Plaintiff has brought claims against these Defendants under both tribal and federal law. As demonstrated below, all of Plaintiff's claims against NHBP and the NHBP Supreme Court are barred by sovereign immunity, thus depriving this Court of subject matter jurisdiction over those claims. This Court likewise lacks subject matter jurisdiction over all of Plaintiff's claims arising under tribal law. Defendants jointly and respectfully request that the Court dismiss these claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[1]

II. FACTUAL BACKGROUND

On February 2, 2017, Nathaniel Spurr sought from the NHBP Tribal Court an ex parte civil personal protection order against Plaintiff. He alleged that Plaintiff had been engaged in a campaign of harassment against him. *See* ECF No. 22-3.

On February 3, 2017, the Tribal Court, acting pursuant to NHBP statutory law, issued an ex parte temporary (14-day) harassment protection order against Plaintiff in favor of Nathaniel Spurr. *See* ECF No. 22-2 at PageID.240.

[1] Pursuant to this Court's directive, this motion is limited to these two bases for dismissal. However, as noted briefly in Section III(C), dismissal of Plaintiff's entire Complaint is appropriate based on the Parties' briefing to date.

On February 17, 2017, the Tribal Court, having found after an evidentiary hearing sufficient evidence that Plaintiff's conduct constituted harassment under tribal law, issued a permanent (one-year) PPO against Plaintiff. *See* ECF No. 1-3.

Plaintiff filed suit in this Court on December 11, 2017. *See* ECF No. 1-1.

III. ARGUMENT

A. All of Plaintiff's Claims Against NHBP and the NHBP Supreme Court Are Barred by Sovereign Immunity

NHBP is a sovereign Indian tribal government acknowledged by federal law "to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States[.]" 81 Fed. Reg. 5019, 5020. "Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2027 (2014) (quotation marks omitted). A tribe's sovereign immunity extends to all of its "governmental" activities. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). This naturally includes tribal courts. *See, e.g., Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (tribal sovereign immunity extends to "arms of the tribe"); *Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 670-71 (8th Cir. 2015) ("A tribe's sovereign immunity . . . extend[s] to tribal agencies, including the Tribal Court" (quotation marks and alteration omitted)).

Where tribal sovereign immunity adheres, it deprives a federal district court of subject matter jurisdiction over claims against a tribe and/or tribal entities and subjects a suit against such entities to dismissal under Federal Rule of Civil Procedure 12(b)(1). *See Kiowa Tribe*, 523 U.S. at 754. Tribal sovereign immunity is subject to only two exceptions. "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." *Id*. *See also Memphis Biofuels*, 585 F.3d at 921 (absent congressional abrogation or tribal waiver, "the tribe's immunity remains intact").

The burden for establishing congressional abrogation of tribal immunity lies with the party asserting it, and the burden is onerous. "[T]o abrogate such immunity, Congress must unequivocally express that purpose." *Bay Mills*, 134 S. Ct. at 2031 (quotation marks and alterations omitted). *See also Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1078 (6th Cir. 2013) ("Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear" (quotation marks omitted)).

The burden for establishing a tribal waiver of sovereign immunity also lies with "the part[y] asserting claims against the Tribe[.]" *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton*, 2010 U.S. Dist. LEXIS 3992, at *5 (W.D. Mich. Jan. 20, 2010). And that burden is likewise onerous. *See C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) ("[T]o relinquish its immunity, a tribe's waiver must be clear." (quotation marks omitted)).

Plaintiff's Complaint alleges neither that Congress has unequivocally abrogated the sovereign immunity of NHBP and its Supreme Court, nor that NHBP has waived that immunity. Nor would Plaintiff be able to support any such allegation, as no such abrogation or waiver exists. Accordingly, Plaintiff's claims against NHBP and the NHBP Supreme Court should be dismissed. The United States Supreme Court is emphatic on this point: "[W]e 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). . . . The upshot is this: Unless Congress has authorized [such a] suit, our precedents demand that it be dismissed." *Bay Mills*, 134 S. Ct. at 2030-32 (quotation marks and alterations omitted). *See also Memphis Biofuels*, 585 F.3d at 923

(affirming district court's dismissal for lack of jurisdiction under Rule 12(b)(1) in suit against "arm of the tribe" absent congressional abrogation and tribal waiver); *Fort Yates*, 786 F.3d at 670-71 (same in suit against tribal court).

Failing to allege either of the accepted exceptions to tribal sovereign immunity – or to even acknowledge them – Plaintiff instead contrives a third exception that finds no support anywhere in federal law. She contends that "[t]he 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." ECF No. 21 at PageID.147. The Court has said no such thing. To the contrary, it has made clear that federal question jurisdiction and sovereign immunity are "wholly distinct" concepts. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 and n.4 (1991) ("no one contends that § 1331 suffices to abrogate immunity for all federal questions"). And neither case cited by Plaintiff holds otherwise. *See* ECF No. 21 at PageID.147 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). *Plains Commerce Bank* did not even involve a claim against a tribe or tribal entity and accordingly said nothing – implicitly or explicitly – about tribal sovereign immunity. *See* 554 U.S. 316 (2008). While *National Farmers Union* held that whether a tribal court has, as a matter of federal law, overstepped its jurisdiction is a federal question under 28 U.S.C. § 1331, it went no further because the petitioners had failed to exhaust tribal remedies. *See* 471 U.S. at 857 ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief. *Whether the federal action should be dismissed* . . . is a question that should be addressed in the first instance by the District Court." (emphasis added)). The Ninth Circuit likewise declined to reach the immunity question

in that case. *See Nat'l Farmers Union*, 736 F.2d 1320, 1323 n.5 (9th Cir. 1984) ("We intimate no views on questions involving sovereign immunity[.]").

Because NHBP and the NHBP Supreme Court enjoy sovereign immunity from all of Plaintiff's claims, the Complaint should be dismissed in its entirety as to these Defendants for lack of subject matter jurisdiction under Rule 12(b)(1).[2]

B. This Court Lacks Subject Matter Jurisdiction to Hear Plaintiff's Claims Arising Under the NHBP Constitution and Laws

Plaintiff claims, amongst other things, that the Tribal Court issued the personal protection order ("PPO") without sufficient evidence as required by an NHBP statute and in violation of the NHBP Constitution. *See* ECF. No. 1-1 at PageID.13-16. These two claims are outside of this Court's subject matter jurisdiction and should therefore be dismissed under Rule 12(b)(1) as to all Defendants.

"Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). Plaintiff has not carried that burden for these claims. She asserts jurisdiction under 28 U.S.C. § 1331 (federal question), 18 U.S.C. § 1302 (Indian Civil Rights Act ("ICRA")), and 28 U.S.C. § 2201 (Declaratory Judgement Act). *See* ECF No. 1 at PageID.2. These are conclusory assertions of law, and under a Rule 12(b)(1) motion to dismiss, a "[c]ourt need not accept legal conclusions drawn in the complaint." *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993, 998 (W.D. Mich.

[2] Further, to the extent Plaintiff's Complaint seeks monetary damages against Judge Pope, the Judge enjoys judicial immunity from such claims. *See Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992).

1998). Plaintiff has not remotely alleged a basis for jurisdiction under these provisions, and no such basis exists.

1. 28 U.S.C. § 1331

Section 1331 confers jurisdiction on federal district courts over "civil actions arising under the Constitution, laws, or treaties *of the United States*." 28 U.S.C. § 1331 (emphasis added). Plaintiff's allegations that the Tribal Court issued the PPO without sufficient evidence are premised on the terms of "*the NHBPI statute*" pertaining to stalking and on her claim that "there is no evidence that comes close to justifying the Court's finding that the Plaintiff has engaged in stalking *within the statutory meaning of that term*." ECF No. 1-1 at PageID.13 (emphasis added). *See also id*. at PageID.15-16 (referring to "stalking as defined under" NHBP statute and asserting that evidence did not justify a finding of stalking "within the statutory meaning of that term."). She further asserts that the PPO was issued "contrary to . . . the Tribal Constitution." *Id*. at PageID.13.

These claims are grounded solely in the asserted requirements of *tribal* law. They nowhere allege violations of, or otherwise arise under, federal law. *See id.* at PageID.13-16. Accordingly, these claims do not "aris[e] under the Constitution, laws, or treaties of the United States" for purposes of federal question jurisdiction under § 1331.

Thus, while Plaintiff asserts that the sufficiency of the evidence under the NHBP statutory definition of stalking is "the key question for this Court," *id*. at PageID.15, this Court is not empowered to pass upon that question. *See, e.g.*, *Talton v. Mayes*, 163 U.S. 376, 385 (1896) ("[T]he determination of what was the existing law of the Cherokee nation . . . [was] *solely* [a] matter[] within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States." (emphasis

added)). The same reasoning applies to Plaintiff's allegations under the NHBP Constitution. Indeed, in another recent case in this District, Chief Judge Jonker affirmed this very principle and granted a motion to dismiss claims arising under tribal law for lack of subject matter jurisdiction under Rule 12(b)(1). *See Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713 (W.D. Mich. 2017). There, the court stated that "[w]hether the Tribe correctly interpreted and applied its own ordinance does not present a federal question," *id*. at 722, and that

> a claim based on a violation of a tribal constitution does not . . . present a federal question. . . . Accordingly, this matter is **DISMISSED** for lack of subject matter jurisdiction. The Court takes no position on the merits of the Tribe's interpretation and application of its own ordinance.

Id. at 724-25. This Court should do likewise here. *See also, e.g.*, *Shelifoe v. Dakota*, No. 92-1086, 1992 U.S. App. LEXIS 14670, at *3 (6th Cir. June 16, 1992) ("the district court lacks jurisdiction to review a challenge to the propriety or wisdom of a tribal court's decision"); *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004) ("A dispute over the meaning of tribal law does not 'arise under the Constitution, laws, or treaties of the United States,' as required by 28 U.S.C. § 1331"); *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 590 (8th Cir. 2005) ("an interpretation of tribal . . . law" does not raise federal question under § 1331); *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 279 (9th Cir. 1981) (finding "allegations in the[] complaint of violations of tribal law . . . insufficient to confer federal question jurisdiction" under § 1331). Accordingly, this Court does not have federal question jurisdiction over Plaintiff's tribal law claims.

2. 25 U.S.C. § 1302

Plaintiff additionally asserts that this Court has jurisdiction under § 1302 of ICRA. *See* ECF No. 1 at PageID.2. This assertion is mistaken. ICRA authorizes federal courts to review

tribal court actions "*only* in habeas corpus proceedings" under § 1303 and in no other context. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (emphasis added). *See also id*. at 69 (rejecting notion that Congress intended "injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302"); *Sandman*, 816 F. Supp. at 451 (stating that "Federal district court[s] do not have jurisdiction to review the judicial actions of tribal courts . . . under any statute, including the Indian Civil Rights Act" and that ICRA "provided only the remedy of habeas corpus") (citing *Santa Clara Pueblo*, 436 U.S. at 70). Accordingly, this Court does not have subject matter jurisdiction over Plaintiff's Complaint under 25 U.S.C. § 1302.

3. 28 U.S.C. § 2201

Plaintiff's assertion that this Court "has jurisdiction under the Federal Declaratory Judgment Act," ECF No. 1 at PageID.2, is likewise meritless. That Act is not a source of federal court jurisdiction. As the Sixth Circuit has explained:

> The Declaratory Judgment Act does not create an independent basis for federal subject matter jurisdiction. . . . The Act only provides courts with discretion to fashion a remedy. . . . Thus, before invoking the Act, the court must have jurisdiction already.

Heydon v. MediaOne of Se. Mich., Inc., 327 F.3d 466, 470 (6th Cir. 2003) (citing United States Supreme Court and Sixth Circuit cases). *See also Moher v. United States*, 875 F. Supp. 2d 739, 769 (W.D. Mich. 2012) (same). Because Plaintiff has not identified any independent source of federal subject matter jurisdiction, 28 U.S.C. § 2201 is not a permissible basis on which to adjudicate her tribal law claims.

* * *

Plaintiff's tribal law claims do not arise under federal law for purposes of 18 U.S.C. § 1331. Nor does ICRA, the Declaratory Judgment Act, or any other federal law confer

jurisdiction. This Court is accordingly not empowered to hear these claims, and they should be dismissed as to all Defendants under Rule 12(b)(1) for lack of subject matter jurisdiction.

C. Plaintiff's Challenge to the Tribal Court's Jurisdiction to Issue the PPO Should Likewise Be Dismissed

Finally, the Complaint also alleges that the Tribal Court lacked jurisdiction to issue the PPO as a matter of *federal* law. *See* ECF No. 1-1 at PageID.17; ECF No. 1-2 at PageID.18-21. Unlike Plaintiff's tribal law claims, federal question jurisdiction lies over this claim. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 853 ("a federal court may determine under § 1331 whether a tribal court has exceeded [as a matter of federal law] the lawful limits of its jurisdiction"). And while this claim is beyond the scope of this motion pursuant to the Court's directive, Defendants note that the claim turns on a pure question of law and that Plaintiff has had ample opportunity to brief its merits. *See* ECF No. 21 at PageID.149-154; ECF No. 23 at PageID.304-309. Therefore, the claim is suitable for disposition without further briefing. For the reasons stated by Defendants in ECF No. 22 at PageID.190-193, this Court should dismiss it against all Defendants under Rule 12(b)(6) because the claim is squarely foreclosed by Congress's unambiguous recognition of tribal jurisdiction in 18 U.S.C. § 2265(e). The claim is thus not "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

For the reasons stated above, the Defendants respectfully request that the Court dismiss with prejudice all of Plaintiff's claims against all Defendants.

Dated this 9th Day of April, 2018.

Respectfully submitted,

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