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 Response to Defendants' Joint Motion to Dismiss

PLAINTIFF'S RESPONSE TO THE DEFENDANTS' JOINT MOTION TO DISMISS

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1. The Defendants' Claim that this Action is Barred by Sovereign Immunity is Invalid.

The Defendants contend that all claims against the Tribe, its Trial Court and Supreme Court are barred by sovereign immunity. *See* Def.4.9.2018 Motion to Dismiss at 2. There is no basis for this argument. In their brief (p. 2) the Defendants state that "Tribal sovereign immunity is subject to only two exceptions," which they explain are (1) when a lawsuit is authorized by Congress, and (2) when the tribe has waived its immunity. This is absolutely untrue as a general principle, although as we shall see, it is applicable to certain narrowly defined types of cases other than the case at bar. First, however, we show that the Defendants' theory has been rejected as a general principle repeatedly by the United States Supreme Court.

The scope of sovereign immunity of an Indian tribe is determined by federal common law, primarily by decisions of the United States Supreme Court, subject to the will of Congress as expressed in federal statutes. See, e.g., *Cohen's Handbook of Federal Indian Law*, Section 7.05[1][a] at 636 (2012); "The doctrine of tribal sovereign immunity is rooted in federal common law . . . " The theory that in general, an Indian tribe's sovereignty is limited only by treaties or statutes was forcefully rejected in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in

which the Supreme Court held that non-Indian citizens are not subject to tribal criminal jurisdiction:

> Indian tribes do retain elements of "quasi-sovereign" authority . . . But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status." Oliphant v. Schlie, 544 F. 2d, at 1009. 435 U.S. at 208.

The Supreme Court further clarified the distinct limits of tribal sovereignty in *Montana v. United States*, 450 U.S. 544 (1981). The Court first cited with approval the principles of tribal sovereignty set forth in its decision in *United States v. Wheeler*, 435 U.S. 313 (1978):

> This Court most recently reviewed the principles of inherent sovereignty in United States v. Wheeler, 435 U.S. 313 . . . . the [Wheeler] Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. *Id.*, [*564] at 326. The [Wheeler] Court distinguished between those inherent powers retained by the tribes and those divested: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.* (Emphasis added.) 435 U.S. at 563-564.

Thus the Court noted that with respect to a tribe's relations with nonmembers, the *Wheeler* decision stated there is "implicit divestiture of sovereignty." The *Montana* Court went on to clarify the crucial distinction, so far as tribal sovereignty is concerned, between (1) the relations of an Indian tribe with its members, and (2) its relations with nonmembers. We quote from the *Montana* opinion at some length because it is so crucial to this point:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at [**1258] 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. [citing cases] . . . . Though *Oliphant* only determined inherent tribal authority in criminal matters, [14] the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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] 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 or welfare of the tribe. 450 U.S. at 564-566.

The *Montana* Court thus held that in general, Indian Tribes lack civil authority over the conduct of nonmembers, subject to the two exceptions in the last two sentences quoted above, which have come to be known as the "Montana exceptions." When a case involves the relations *between an Indian tribe and its members*, there is a presumption of sovereignty unless Congress has decided otherwise, but when the case involves the relations *between the tribe and nonmembers*, there is no sovereignty without affirmative Congressional authorization. The instant case, of course, involves a lawsuit filed in tribal court against Joy Spurr, a non-tribal member, and the question whether the Tribal Court had subject matter jurisdiction of that action. The Supreme Court cases cited above clearly indicate that with respect to the relation between a tribe and nonmembers, the doctrine of tribal sovereignty, including sovereign immunity, is not applicable unless either (1) Congress has extended it to cover such a case, or (2) the case falls within one of the two "Montana exceptions." Neither condition (1) nor (2) applies to the instant case. With regard to condition (1), Congress has not given tribal courts jurisdiction to issue

personal protection orders over non-tribal members under the facts of this case, and with regard to condition (2), this case does not fall within either of the two Montana exceptions.

The lack of inherent sovereign immunity in the context of our case was confirmed in two more recent Supreme Court cases, *Brendale v. Confederated Tribes and Bands of the Yakima Indian nation et al*., 492 U.S. 408 (1989) and *South Dakota v. Bourland*, 508 U.S. 679 (1993). The Court in *Brendale* 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 425-426.

Finally, in *South Dakota v. Bourland* (1993), the Court noted that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' 450 U.S. at 564 and is therefore not inherent." 508 U.S.at 695 n. 15 (1993).

A. The Cases Cited by Defendants Do Not Support Their Claim of Tribal Immunity

What about the cases cited by the defendants? Do they provide any support for the Defendants' extremely broad view of tribal sovereignty? In support of their position they have cited *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* (1998), *C & L Enterprises, Inc. v. Citizen Band Potawatomi* (2001), *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* (2009), *Michigan v. Bay Mills Indian Cmty.* (2014). All of these cases involved lawsuits brought *against* Indian tribes based on commercial relationships and activities.[1] Thus these cases fall within the first

[1] 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. In C & L Enterprises a tribe was sued by a contractor with whom it had entered into a construction contract. 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.

Montana exception quoted above: "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." In this area the tribe retains "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations" unless Congress says otherwise. Accordingly, in this area of commercial relationships, a tribe has sovereign immunity only if Congress has not decided to eliminate it. In the instant case, of course, a lawsuit was filed in tribal court against Joy Spurr, and the lawsuit against her, for a personal protection order, has nothing to do with commercial matters.

We now turn to the question whether the Defendants can claim sovereign immunity based on the second Montana exception. The scope of this exception was 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. 554 U.S. at 341.

In the instant case a lawsuit for a personal protection order was filed in tribal court against Joy Spurr. Her questioning the tribal court's jurisdiction in federal court, pursuant to federal law, certainly does not qualify under the second Montana exception as something that "imperils the subsistence" of the tribe or is "catastrophic" to tribal self-government.

If there were any remaining notion that sovereign immunity could bar Joy Spurr from bringing this action in federal court, it is dispelled by a simple fact: there are many cases in which a challenge to the jurisdiction of a tribal court has led a federal court to issue an injunction or declaratory judgment against the tribal court. None of these courts thought that tribal sovereign immunity would bar the plaintiff from obtaining an injunction or declaratory judgment. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *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).

The Table set forth on the next page summarizes the applicability of sovereign immunity under federal common law, when Congress has not taken a position on it. Federal common law, established by decisions of the Supreme Court, the Circuit Courts of Appeal, and the Federal District Courts, overwhelmingly confirm the principle that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' 450 U.S. at 564, and is therefore not inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n. 15 (1993).

The Scope of Sovereign Immunity Under Federal Common Law

Subject at Issue:	**The Tribe's Relations with Tribal Members**	**The Tribe's Relations with Non-Tribal Members**
Commercial Dealings, in Which a Plaintiff Files a Lawsuit Against the Tribe	Tribal Immunity Unless It is Waived	Tribal Immunity Unless It is Waived [*Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* (1998), *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi* (2001), *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* (2009), *Michigan v. Bay Mills Indian Cmty.* (2014)]
The Lawsuit Imperils the Subsistence of the Tribe, or Threatens the Political Integrity of Tribal Government	Tribal Immunity Unless It is Waived	Tribal Immunity Unless It is Waived
All Other Legal Disputes, Including Lawsuits Alleging Lack of Tribal Court Jurisdiction	Tribal Immunity Unless It is Waived	**Tribe is Not Immune** [*Oliphant v. Suquamish Indian Tribe* (1978); *Montana v. United States* (1981); *Plains Commerce Bank v. Long Family Land & Cattle Co.* (2008); *Strate v. A-1 Contractors* (1997). *McKesson Corporation et al. v. Todd Hembree et al.*(2018); *Stifel, Nicholaus & Company, Inc. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians* (2015); *Kerr-McGee Corporation et al., v. Kee Tom Farley et al.* (2000); *Crowe & Dunlevy v. Gregory R. Stidham* (2011); *UNC Resources, Inc., et al. v. Kee Joe Benally et al.* (1981).]

2. The Defendants' Statement that this Court Has Federal Question Jurisdiction to Hear This Case is Correct.

The Defendants concede, See Def. 4.9.2018 Motion to Dismiss at 9, that this Court has subject matter jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction) to determine whether the Tribal Court had jurisdiction to issue the personal protection order against Joy Spurr. We agree and commend the defendants for being forthright on this issue. The Defendants also state, *see* Def. 4.9.2018 Motion to Dismiss at 9:

> *. . . while this claim is beyond the scope of the 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 Page ID. 304-309. Therefore, the claim is suitable for disposition without further briefing.*

We also agree with the Defendants' statement that Joy Spurr's claim is suitable for disposition without further briefing, apart from the issues of damages, costs and attorney fees.[2] However, if the Defendants should reply to this response, and include in that reply any discussion of issues beyond those listed by this Court in ECF No. 26: PageID.344 at 1, namely issues of sovereign immunity and this Court's subject matter jurisdiction, Joy Spurr requests an opportunity to respond to any such discussion.

The only remaining issue is whether Congress has affirmatively authorized tribal courts to issue personal protection orders against non-tribal members. The Defendants argue that Congress

[2] On page 5 of the Defendants' Motion to Dismiss there is a footnote 2 stating "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)." However, the Court there stated: "The federal court does not have jurisdiction to review child custody decisions that are within the jurisdiction of the tribal court. . . . There is no dispute that the tribal court had jurisdiction to determine custody for plaintiffs' children." *Sandman* is not controlling here, where the NHBP Tribal Courts lacked jurisdiction to issue a personal protection order against Joy Spurr, a non-tribal member without connections to the Tribe.

has done so, under 18 U.S.C. Sec. 2265(e). We contend, to the contrary, that Congress has clearly indicated its intent *not to do so*, under 25 U.S.C. 1304. We would respectfully urge the Court to consider the discussion of this issue in Joy Spurr's ECF No. 23 , at pp. 11-16 and 26-27 (Appendix I) We would further respectfully request that the Court grant Joy Spurr a declaratory judgment that the NHBP Courts lacked jurisdiction to grant the personal protection order against her, and issue a corresponding permanent injunction against the Defendants, in view of the unambiguous language of 25 U.S.C. 1304 on "Tribal Jurisdiction over crimes of domestic violence."

III. CONCLUSION

For the reasons stated above, the Plaintiff Joy Spurr respectfully requests that the Court issue a declaratory judgment and a permanent injunction, ordering the Defendants to dismiss with prejudice all proceedings against her based on the permanent personal protection order issued by the NHBP Trial Court. The Plaintiff further requests that the Court award 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.

Dated: April 20, 2018

Respectfully submitted,

/s/ Stephen J. Spurr

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