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

Reply to Plaintiff's Response to Joint Motion to Dismiss

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

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I. INTRODUCTION

The Court directed the Parties to brief two issues: (1) the sovereign immunity of the Nottawaseppi Huron Band of Potawatomi ("NHBP") and the NHBP Supreme Court to all of Plaintiff's claims; and (2) this Court's subject matter jurisdiction over Plaintiff's claims arising under tribal law. As demonstrated below, Plaintiff's arguments on the first issue rely on clear misapplications of federal case law and provide no basis to deny Defendants' properly supported motion on that issue. As to the second issue, Plaintiff failed to address it in her Response and has therefore conceded the merits of Defendants' motion on that issue. On the remaining issue in the case – the Tribal Court's jurisdiction under federal law to issue the PPO – the Parties' briefing to date demonstrates that Plaintiff has no viable argument to evade Congress's clear mandate in 18 U.S.C. § 2265(e). Defendants therefore respectfully urge that Plaintiff's claim on this issue be dismissed as well, which would resolve the case in its entirety.

II. ARGUMENT

A. The Sovereign Immunity of NHBP and the NHBP Supreme Court

Plaintiff's sovereign immunity arguments, *see* Resp. at 4-10, are premised on an erroneous conflation of sovereign immunity with various other aspects of tribal sovereignty. Sovereign immunity is "[a]mong the core aspects of sovereignty that tribes possess." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014). But there are many others. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (a tribe's "right to regulate the use of its resources" is an "aspect of tribal sovereignty"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty"); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (referring to tribes' "sovereign power to punish tribal offenders" as an attribute of sovereignty). The various

"attributes" or "aspects" of tribal sovereignty are distinct, and the contours of each are independently subject to the authority of Congress. *See Wheeler*, 435 U.S. at 323.

Plaintiff does not appear to recognize this fundamental aspect of Indian law. She instead views tribal sovereignty as monolithic, which leads her to mistakenly assume that cases involving tribal "sovereignty" in any way must therefore pertain to tribal sovereign immunity in particular. Plaintiff's confusion, for example, leads her into an extended discussion of *Montana v. United States*, 450 U.S. 544 (1981), *see* Resp. at 5-9, as purportedly relevant to the boundaries of "tribal sovereignty, *including sovereign immunity*," *id*. at 6 (emphasis added). But whereas tribal sovereign immunity concerns whether a tribe may be haled into court, *Montana* addressed an entirely different attribute of tribal sovereignty – namely, the scope of tribes' "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations[.]" 450 U.S. at 565. *Montana* says nothing – explicitly or implicitly – about tribal sovereign immunity.

Nor has any federal court ever applied *Montana* to determine the scope of tribal sovereign immunity, as Plaintiff invites this Court to do. Instead, courts have soundly rejected invitations by litigants to do so. For example, in *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), a litigant alleged, as Plaintiff does here, that a tribe had exceeded its jurisdiction under *Montana* and that, therefore, the tribe "cannot assert tribal sovereign immunity against [Plaintiff's] claims." *Id*. at 1161. The Ninth Circuit rejected that proposition in terms directly applicable here:

> We disagree. Indeed, with this conclusion, [Plaintiff] appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases [Plaintiff] cites [*e.g.*, *Montana*] address only the extent to which a tribe may exercise jurisdiction over those who are nonmembers, *i.e.*, tribal sovereign authority. Those cases do not address the concept at issue here –

> our authority and the extent of our jurisdiction over Indian Tribes, *i.e.*, tribal sovereign immunity.

Id. Plaintiff makes precisely the same error here.[1]

Plaintiff's reliance on other Supreme Court cases suffers from the same confusion. *See* Resp. at 5-7 (citing *Wheeler*, 435 U.S. 313, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. 679 (1993)). None of those cases involved tribal sovereign immunity in any way. They, like *Montana*, involved *other* attributes of tribal sovereignty. *See Wheeler*, 435 U.S. at 322 (the "question in this case is the source of [a tribe's] power to punish tribal offenders"); *Brendale*, 492 U.S. at 421-22 ("We . . . examine whether the Yakima Nation has the authority . . . to zone the fee lands owned by [non-Indians]"); *Bourland*, 508 U.S. at 681 ("In this case we consider whether the . . . Tribe may regulate hunting and fishing by non-Indians").

Plaintiff's attempts to distinguish Supreme Court cases that *do* address sovereign immunity fare no better. *See* Resp. at 7 and n.1 (discussing *Kiowa Tribe v. Mfg. Tech.*, 523 U.S. 751 (1998); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001); *Bay Mills*, 134 S. Ct. 2024). First, Plaintiff asserts that these cases are inapposite because they

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[1] As a result, while ostensibly addressing sovereign immunity, Plaintiff spends several pages on a topic the Court instructed the Parties to not brief on this motion: namely, the Tribal Court's jurisdiction under federal law to issue the PPO. *See* Resp. at 5-8. Defendants briefly note that *Montana* does not salvage Plaintiff's claim on this issue. *Montana* was a common law decision and, as such, applies "when Congress has not spoken to a particular issue." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) (quotation marks and emphasis omitted). Here, Congress spoke emphatically on the precise question at issue when it enacted the text of 18 U.S.C. § 2265(e). *See* ECF No. 13 at PageID.121; ECF No. 22 at PageID.190-193. Accordingly, that statutory provision – not *Montana* – governs this Court's analysis of this issue. *See United States v. Lara*, 541 U.S. 193, 207 (2004) (explaining that where Congress has legislated on the scope of an aspect of tribal authority, extant common law judicial decisions on the subject "are not determinative because Congress has enacted a new statute [addressing] the bounds of the inherent tribal authority that the United States recognizes. *And that fact makes all the difference*." (emphasis added)).

"involved lawsuits brought *against* Indian tribes," whereas "the instant case, of course, involves a lawsuit . . . against Joy Spurr[.]" Resp. at 7-8. On this point, Defendants refer Plaintiff to the caption of her own Complaint. *See also* ECF No. 22 at PageID.189-190.

Plaintiff further asserts that these cases are inapposite because they involved tribes' commercial activities. Resp. at 7-8. This argument is patently meritless. *Kiowa Tribe* – the seminal decision on which Plaintiff's other cited cases are grounded – accepted as axiomatic that tribal sovereign immunity protects governmental activities and addressed whether it *extends* to commercial activities:

> [A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. . . . To date, our cases have sustained tribal immunity from suit without drawing a distinction . . . between governmental and commercial activities of a tribe. . . . *Though respondent asks us to confine immunity from suit to . . . governmental activities, our precedents have not drawn these distinctions*.

Kiowa Tribe, 523 U.S. at 754-55 (emphasis added). *See Bay Mills*, 134 S. Ct. at 2031 ("The plaintiff [in *Kiowa*] asked this Court to confine tribal immunity to suits involving . . . noncommercial activities. . . . We said no."); *C & L Enters.*, 532 U.S. at 416 (tribal immunity extends to "governmental or commercial activities" (citing *Kiowa*, 523 U.S. at 760)). *See also, e.g.*, *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 675 (6th Cir. 2015) (describing *Kiowa* as "declining to draw a distinction between commercial and governmental activities for purposes of tribal sovereign immunity"); *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton*, 2010 U.S. Dist. LEXIS 3992, *5 (W.D. Mich., Jan. 20, 2010) ("tribal sovereign immunity is not dependent upon the distinction between . . . governmental and commercial activities"). Arguing for a distinction that has been expressly rejected by the Supreme Court in the very cases on which Plaintiff relies – and one that would implausibly result in immunity for a

sovereign's commercial but not its governmental activities – is the kind of frivolous argument that sovereign immunity should protect Defendants from having to address any further.

Plaintiff next asserts that "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" such relief. Resp. at 9. The cases cited by Plaintiff do not support that proposition. She first cites *Montana*. *Id*. But *Montana* did not involve a claim for injunctive relief against a tribal court. Instead, the United States had sued (on behalf of a tribe) for injunctive relief *against a state*. *See* 450 U.S. at 549. And *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316 (2008), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), were suits between private parties that did not involve an assertion of sovereign immunity by a tribal defendant. Accordingly, neither case put that question before the Court.

Nor does *Stifel v. Lac Du Flambeau Band of Lake Superior Indians*, 807 F.3d 184 (7th Cir. 2015), support Plaintiff's position; rather, *Stifel* undercuts it. *See id*. at 188 ("the Tribal Entities effectuated a valid waiver of their sovereign immunity, and, *therefore*, the action against them may proceed" (emphasis added)). And in *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219 (D. N.M. 2000), and *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), plaintiffs sought injunctions not against a tribal court, but against non-immune tribal *members*, "enjoining [them] from pursuing their claims in Navajo Tribal Court." *Id*. at 1047; 88 F. Supp. 2d at 1223 (same).

Finally, *Crowe & Dunlevy v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), did not involve a claim against a tribe or a tribal court. It involved an official capacity suit against a tribal judge, and the court upheld prospective injunctive relief against the judge under the doctrine of *Ex parte*

Young. *See id*. at 1154-56. Here, only Defendants NHBP and the NHBP Supreme Court have asserted sovereign immunity. *See* Brief Accompanying Defendants' Motion to Dismiss ("Br. Mot. to Dismiss") at 2-5.[2]

In sum, Plaintiff has provided no valid response to the assertions of sovereign immunity by NHBP and the NHBP Supreme Court. She has evaded entirely the mandatory and straightforward inquiries of congressional abrogation and tribal waiver, *see* Br. Mot. to Dismiss at 2-3, in favor of arguments contrived from mischaracterized and/or inapposite case law and mired in doctrinal confusion. All claims against these Defendants should therefore be dismissed. *See Bay Mills*, 134 S. Ct. at 2030-32 ("[W]e have time and again . . . dismissed any suit against a tribe absent congressional authorization (or a waiver).").

B. This Court's Subject Matter Jurisdiction Over Tribal Law Claims

Defendants moved to dismiss all claims against all Defendants arising under NHBP statutory and constitutional law due to this Court's lack of subject matter jurisdiction over tribal law claims, and supported their arguments with governing statutes and case law. *See* Br. Mot. to Dismiss at 5-9. Plaintiff nowhere responded to those arguments in her Response. "Failing to respond to arguments properly raised in a motion to dismiss constitutes abandonment of that position." *Washington v. Roosen, Varchetti & Oliver, PLLC*, 894 F. Supp. 2d 1015, 1027 (W.D. Mich. 2012). *See also, e.g.*, *Doe v. Bredesen*, 507 F.3d 998, 1007 (6th Cir. 2007) ("Doe abandoned those claims by failing to raise them in his brief opposing the government's motion to

[2] Judge Pope has not done so because there are ample grounds to dismiss the entire suit against her, *see* Br. Mot. to Dismiss at 5-9, ECF No. 13 at PageID.119-121, and ECF No. 22 at PageID.190-193, without wading into a question the Sixth Circuit has yet to address. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 2013 U.S. Dist. LEXIS 188956, *17 (W.D. Mich., Mar. 5, 2013) ("The Sixth Circuit has not decided whether a plaintiff may sue tribal officers for relief under an *Ex Parte Young* theory."), *rev'd on other grounds*, 737 F.3d 1075 (6th Cir. 2013).

dismiss the complaint."); *Wypych v. Deutsche Bank Nat'l Tr. Co.*, 2017 U.S. Dist. LEXIS 54089, *15 (E.D. Mich., Apr. 10, 2017) ("Claims left to stand undefended against a motion to dismiss are deemed abandoned."). Accordingly, Plaintiff's claims arising under NHBP tribal law should be dismissed as to all Defendants.

CONCLUSION

Plaintiff has not alleged a legally viable exception to sovereign immunity. All claims against NHBP and the NHBP Supreme Court should accordingly be dismissed. Plaintiff has conceded the merits of Defendants' motion to dismiss her claims arising under tribal law by failing to respond to Defendants' properly supported arguments on those claims. Those claims should accordingly be dismissed as to all Defendants. On the only remaining issue in the case – the Tribal Court's jurisdiction under federal law to issue the PPO – the Parties' submissions to date amply demonstrate that Plaintiff has no viable response to the plain text of 18 U.S.C. § 2265(e), under which the Tribal Court's jurisdiction under federal law to issue the PPO is crystal clear. Defendants respectfully request that Plaintiff's Complaint be dismissed in its entirety, and with prejudice, with respect to all Defendants.

Dated this 4th Day of May, 2018.

Respectfully submitted,

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