Sixth Circuit Case No. 18-2174

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOY SPURR,

Plaintiff-Appellant,

-V.-

MELISSA LOPEZ POPE, CHIEF JUDGE, TRIBAL COURT OF THE NOTTAWASEPPI HURON BAND OF POTAWATOMI;

THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI;

THE NOTTAWASEPPI HURON BAND OF POTAWATOMI,

Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Michigan
Case No. 1:17-cv-01083

REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS **PAGE** i

I. TABLE OF AUTHORITIES ii, iii

II. Introduction: A Brief Historical Overview of the Legislation 1

III. The Defendants' Statement that Section 1304 Does Not Grant a Tribal Court Jurisdiction to Issue Protection Orders is Incorrect 4

A. Section 1304 is Clearly Applicable to the Protection Order in This Case 5

B. The Defendants' Contention that the Personal Protection Order is not a "Criminal" Protection Order is Wrong 6

IV. Section 2265 Does Not Support the Position of the Defendants 9

A. Section 2265(b)(1) Supports Mrs. Spurr's Position 10

B. Section 2265(b)(2) Supports Mrs. Spurr's Position 11

V. The Defendants' Claim of Sovereign Immunity is Invalid 13

A. The Cases Cited by Defendants Do Not Support Their Claim of Sovereign Immunity 18

B. Table: The Scope of Sovereign Immunity Under Federal Common Law 22

VI. An Update on the Tribal Court Litigation 23

VII. CONCLUSION 24

VIII. CERTIFICATE OF COMPLIANCE 26

IX. CERTIFICATE OF SERVICE 27

X. DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS 28

I. TABLE OF AUTHORITIES

A. Cases Cited

Page

Aluminum Co. of America v. Department of Treasury, 522 F.2d 1120 (6th Cir. 1975) ……9

Brendale v. Confederated Tribes and Bands of the Yakima Indian nation et al., 492 U.S. 408 (1989)……18

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)… ……..…….....18, 19, 22

Crowe & Dunlevy v. Gregory R. Stidham, 640 F.3d 1140 (10th Cir. 2011) at 1157,……..……..…….....21, 22

Duro v. Reina, 495 U.S. 676 (1990)……..……....1

1st Source Bank v. Wilson Bank & Trust, 735 F.3d 500 (6th Cir. 2013) ……9

Kerr-McGee Corporation et al., v. Kee Tom Farley et al., 88 F. Supp. 2nd 1219 (D. New Mexico 2000)…… …...…...……...…21, 22

Kiowa Tribe of Okla. v. Mfg. Techs., Inc.523 U.S. 751 (1998)……..…...18, 19, 22

McKesson Corporation et al. v. Todd Hembree et al, 2018 U.S. Dist. LEXIS 3700 (N.D. Okla. 2018) at 37……....20, 22

Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917 (6th Cir. 2009) ……..……...…18, 19, 22

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014)……..……18, 19, 22

Montana v. United States, 450 U.S. 544 (1981)……..…passim

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)……...…...passim

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008)…….....….19, 20, 22

South Dakota v. Bourland, 508 U.S. 679 (1993)……..……18, 21

Stifel, Nicholaus & Company, Inc. v. Lac Du Flambeau Band of Lake…..….20, 22

Superior Chippewa Indians, 807 F.3d 184 (7th Cir. 2015)…….……20, 22

Strate v. A-1 Contractors, 520 U.S. 438, 441 (1997)……20, 22

UNC Resources, Inc., et al. v. Kee Joe Benally et al., 518 F. Supp. 1046 (D. Arizona 1981)……...….21, 22

United States v Wheeler 435 U.S. 313 (1978)…… …….....….15, 18

B. Constitutions and Statutes Cited

NHBPI Tribal Code Chapter 7.4 Domestic Violence, Article XII: Criminal Protection Orders, Harassment, concerning "special domestic violence criminal jurisdiction": ……..……..…..7, 11

The Violence Against Women Reauthorization Act, 18 U.S.C. Sec. 2265 ……...……...passim

The Violence Against Women Reauthorization Act, 25 U.S.C. Sec. 1304 (2013)..……...……..passim

The Indian Civil Rights Act, 25 U.S.C. Secs. 1302 through 1304 (2013)……..10

Section 7.4-11 of the NHBP Code, concerning "special domestic violence criminal jurisdiction."……..……...…10

C. Legislative History

Senate Report No. 112-153 (2012), at 11……...…....…1, 3

D. Treatises and Periodicals Cited

Cohen's Handbook of Federal Indian Law, Section 9.04 at 765 (2012)..…….15, 20

The New York Times…….……...…1

II. Introduction: A Brief Historical Overview of the Legislation

The Violence against Women Reauthorization Act was enacted on March 7, 2013 because of a concern about inadequate efforts at law enforcement to protect Native American women who were victims of domestic violence by non-native men. The proposed law was a substantial extension of the jurisdiction of tribal courts, which formerly had no jurisdiction over such cases.[1] However opponents of the bill claimed that it would empower courts that were not equipped for the task, and deprive defendants of constitutional rights without nearly enough access to federal courts and without protections afforded by the Bill of Rights.[2] The New York Times stated that "The biggest sticking point is the expansion of tribal court authority, which many Republicans see as an unconstitutional power grab by the tribes that will deprive non-Indians of their fundamental constitutional rights."[3] To enable the bill to pass, its proponents included, among other provisions, the language of sections 25 USC 1304 and 18 USC 2265. One section was the language of 1304(d) concerning "Rights of defendants." This section provided that

[1] Federal common law imposes severe limits on both the criminal and civil jurisdiction of a tribal court over non-Tribal members. See, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), Duro v. Reina, 495 U.S. 676 (1990), and Montana v. United States, 450 U.S. 544 (1981). The reason given by the Supreme Court for these limitations is that non-tribal members should not be subject to trial by "political bodies that do not include them." 495 U.S. at 693.

[2] Weisman, Jonathan, "Senate Votes Overwhelmingly to Expand Domestic Violence Act," The New York Times, February 13, 2013, p.A21.

[3] Ibid. See also Weisman, Jonathan, "Measure to Protect Women Stuck on Tribal Land Issue," The New York Times, February 11, 2013, p. A11: "But conservative opponents say the Senate's language goes too far, empowering courts that are not equipped for the job and depriving defendants of constitutional rights without nearly enough recourse to federal courts and no guaranteed protections like those afforded by the Bill of Rights."

> " . . . the participating tribe shall provide to the defendant . . . (3) the right to a trial by an impartial jury that is drawn from sources that – (B) do not exclude any distinctive group in the community, including non-Indians; and (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."

Because of the concerns about constitutional rights of defendants, the amendments concerning special domestic-violence criminal jurisdiction did not take effect for two years, except in the case of "pilot projects" approved by the Attorney General.

As explained in our Brief, RE19PageID#23**,** 25 USC Section 1304(b)(4)(B) limits the jurisdiction of tribal courts to defendants who have certain specified ties to the Tribe: those who reside in the tribe, are employed by the Tribe, or have an intimate relationship with a tribal member. 18 USC Sections 2265(b)(1) and (2) provide additional requirements for protection orders; the Tribal Court's jurisdiction must be based on Tribal law, and must protect the defendant's right to due process, specifically the defendant's right to "reasonable notice and an opportunity to be heard."

Section 2265(e) 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. Congress wanted to ensure that a valid protection order, i.e. one that fully complied with Sections 1304, 2265(b)(1) and (2), would be given full faith and credit by other jurisdictions, and would have

access to means of law enforcement outside the Tribe, such as city, county, state and federal law enforcement personnel and resources such as the Law Enforcement Information Network of Michigan. Accordingly the Senate Report characterized Section 2265(e) as 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."[4] RE19PageID#27 The Senate Report also noted that this section "does not in any way alter, diminish or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land." RE19PageID#27-28.

…….

We provide a more detailed response to the Defendants' Brief below, which includes a number of examples of violations of Mrs. Spurr's right to due process by the NHBP Tribal Courts. These examples show the importance of enforcement of the provisions in the federal statutes cited above that are designed to safeguard the rights of non-Indian defendants.

[4] The legislative history states 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]

Before we discuss the law further, we wish to state that the Defendants' allegations that Mrs. Spurr waged a "campaign of harassment" against the petitioner Nathaniel Spurr, RE24PageID#10, are completely scurrilous, utterly untrue, and have never been substantiated at any stage of this litigation. For example, the petitioner has never introduced into evidence a single email to him from Mrs. Spurr, although the Defendants claim he has received a barrage of emails from her. Mrs. Spurr lives three hours away from Nathaniel's residence, and has never represented herself as him to any employer, or financial or governmental entity.

III. The Defendants' Statement that Section 1304 Does Not Grant a Tribal Court Jurisdiction to Issue Protection Orders is Incorrect

In their brief the Defendants either refer to Section 2265(e) or repeat the wording of the statute verbatim more than twelve times; they essentially bury Section 1304 in the discussion, not mentioning it until the last four pages. Finally, they state that ". . . Section 1304's reference to protection orders issued by a "civil or criminal court" is not a grant to issue protection orders at all" RE24Page ID#33. Let us compare this observation with the actual language of Section 1304:

> (b)(1) In general. Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USCS Secs. 1301 and 1303] 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."

Moreover in Section (c) Criminal conduct, the statute states that:

> A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories: . . .
>
> (2) violations of protection orders. An act that --
> (A) occurs in the Indian country of the participating Tribe; and
> (B) violates the portion of a protection order that –
> (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
> . . . and
> (iv) is consistent with section 2265(b) of title 18, United States Code.

This statutory language makes it abundantly clear that Section 1304, whose title is "Tribal jurisdiction over crimes of domestic violence," is indeed a grant to issue protection orders, and that it was enacted with full knowledge and understanding of the provisions of Section 2265. These two statutes were enacted on the same day and time, by the same committees of Congress. Dist.Ct.Reply&Resp.Mot. RE23PageID#307-309

A. Section 1304 is Clearly Applicable to the Protection Order in This Case

It is also clear that the protection order in this case reflects the language of Section 1304(c)(2)(B)(i) in that it "prohibits . . . violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person." With respect to threatening acts, the order

of February 17, 2017, Dist.Ct.Compl.RE#1-3PageID#31, prohibits "threatening to sexually assault, kill, or physically injure the petitioner or a named individual." With respect to contact or communication with another person, the order prohibits "sending mail or other communications, including electronic, to the petitioner," "posting an electronic message with the intent to cause others to contact the petitioner . . .," and "contacting the petitioner by telephone." With respect to prohibiting "physical proximity to another person," the February 17 order prohibits "approaching or confronting the petitioner in a public place or on private property," "entering onto or remaining on property owned, leased or occupied by the petitioner," "approaching or confronting the petitioner in a public place or on private property," " appearing at the petitioner's workplace or residence." and even "following the petitioner or appearing within the petitioner's sight."

B. The Defendants' Contention that the Personal Protection Order is not a "Criminal" Protection Order is Wrong

Now the Defendants contend that none of this matters, because the February 2017 order is in fact not a "criminal" protection order." On the contrary (so goes the argument), it is merely a "civil" protection order." RE24PageID#24 However, there are serious problems with this argument:

(1) 25 U.S.C. 1304(5) defines the term "protection order" very broadly to include "any . . . order issued by a civil or criminal court . . ." This section of the statute

was designed to prevent exactly the sort of end run that Defendants want to make – an argument that Section 1304 applies only to "criminal" protection orders, and that the NHBP Trial Court's order is "only" a "civil" protection order. The proposed distinction between "civil" and "criminal" protection orders that do the same thing is found nowhere in the federal statutes nor anywhere else. Both Sections 1304 and 2265 speak only of "protection orders." Even Section 2265(e), on which the Defendants rely so heavily, speaks of "protection orders," not "civil protection orders." More fundamentally, however, Section 1304 designates the type of protection order involved in this case as being "criminal jurisdiction." Section1304(a)(4),(a)(6),(b),(b)(1),(b)(2),(b)(4)(A)(ii),(b)(4)(B),(c),(d),(d)(4),(f)(1) and (f)(3). In Section 1304 Congress has specifically stated that jurisdiction of tribal courts to issue personal protection orders *is* criminal jurisdiction.

(2) All sections of the NHBP Code concerning harassment protection orders,[5] Sections 7.4-71 through 7.4-78, appear in Article XII of Chapter 7.4, under the heading "Criminal Protection Orders." Dist.Ct.Reply&Resp.RE23-1PageID#324-328 If the order in this case is only a civil order, why is it classified as a Criminal Protection Order in the NHBP Code?

[5] The NHBP Trial Court has taken different positions from time to time on whether the Personal Protection Order is based on "stalking" or "harassment." In its order of July 21, 2017 the NHBP Trial Court changed the characterization of its original personal protection order from "Stalking" to "Permanent Harassment Protection Order." Complaint, RE 1.1, Page ID#9-10.

(3) For a civil order, the Order of February 2018 has rather unusual sanctions, to say the least. It states that

> Violation of this order subjects the respondent to immediate arrest and to the civil and criminal contempt powers of the court. If found guilty, the respondent *shall be imprisoned* for not more than 90 days and/or may be fined not more than $1000. [emphasis supplied].

In their brief, the Defendants make the remarkable statement that "Even had Mrs. Spurr been found in contempt for violating the PPO and incarcerated – which she has not – that fact alone would not have transformed the PPO from civil to criminal." RE24PageID#28 The Defendants go on to state that "The Tribal Court's characterization of its own PPO as civil is entitled to deference, particularly where, as here, its civil nature under NHBP law was affirmed by the NHBP Supreme Court . . ." RE24PageID#24 Thus the Defendants contend that this Court has no business questioning the Tribe's characterization of a PPO as "civil," regardless of the penalties imposed for its violation, because to do so would intrude on the Tribe's right to not only declare its law, but also take from this Court the authority to determine whether its law is consistent with federal law.[6] The position of the Defendants, then, is that so long as they take care to replace the word "criminal" with the word "civil" in all legal documents, the NHBP Trial Court is free to issue

[6] In footnote 9, Document 21, the Defendants state that "The Tribal Court's characterization of its own PPO as civil is entitled to deference, particularly where, as here, its civil nature under NHBP law was affirmed by the NHBP Supreme Court . . ."

personal protection orders for any reason against any and all respondents, whether non-tribal members or not, and throw them in jail too. Using the same logic, a State could impose the death penalty for speeding provided the violation was labeled as a "civil" offense rather than a crime. The Defendants should not be allowed to evade the procedural and constitutional requirements of federal law in this manner.

(4) The Defendants' argument would render Section 1304 meaningless and impotent. Section 1304 would become

> " . . . meaningless surplusage providing a hollow remedy. It is a cardinal rule of statutory construction that there is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience. *Aluminum Co. of America v. Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975)

This Court has held that "we are required 'to construe statutes, whenever possible, in a way which gives meaning to every portion of the statute, . . . '" *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500 (6th Cir. 2013).

IV. Section 2265 Does Not Support the Position of the Defendants

The Defendants ignore Section 1304 and contend that Section 2265€ gives the NHBP Tribal Court unlimited authority to issue protection orders against any person, whether or not he or she has any connection with the Tribe. RE24PageID #11. To the contrary, this Section does not in any way support the Defendants' position. Section 2265(a) states that a protection order is entitled to full faith and

credit only if it is consistent with subsection (b). Subsection (b) states the order is consistent if-

> (2) such court has jurisdiction over the parties *and matter* under the law of such . . .Indian tribe . . ., 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. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by . . . tribal law . . . , and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

We show below that Sections 2265(b)(1) and (2) each support the position of Mrs. Spurr, not the Defendants.

A. Section 2265(b)(1) Supports Mrs. Spurr's Position

Section 2265(b)(1) requires that the NHBP Trial Court can issue a protection order only if it has jurisdiction of the matter under NHBP law. Under Tribal law the only possible basis for jurisdiction of the NHBP Trial Court to issue a personal Protection order against Ms. Spurr would have to have come from Chapter 7.4 of the NHBP Codes, which concerns "domestic violence." Section 7.4-11 concerns "Special Domestic Violence Criminal Jurisdiction." Dist.Ct.Exh.11RE24 Page ID#341-342 This section states that

> C. In all proceedings in which the Tribal Court is exercising special domestic violence criminal jurisdiction as a participating tribe, all rights afforded by Title VIII, Chapter 8, Criminal Procedure shall apply and those enumerated in the Indian Civil Rights Act, 25 U.S.C. Secs. 1302 through 1304 (2013) to all defendants. *Should there be any inconsistency between*

> *Title VIII, Chapter 8, Criminal Procedure and U.S.C. Secs. 1302 through 1304, those of 25 U.S.C. Secs. 1302 through 1304 (2013) shall apply.* [emphasis added] . . .
>
> E. The NHBP hereby declares its special domestic violence criminal jurisdiction over any person only if he or she:
>
> (1) Resides within the Indian Country of the NHBP; or
> (2) is employed within the Indian Country of the NHBP; or
> (3) is a spouse, intimate partner, or dating partner of
> (a) a member of the NHBP;
> (b) a member of another federally recognized Indian tribe who resides within the Indian country of the NHBP. Sec.7.4-11(C),(E).

It is undisputed that Mrs. Spurr did not fit within any of the above categories. Section 1304 is incorporated by reference into NHBP law! It is clear from the above two sections of the Tribal Domestic Violence Code that the NHBP Trial Court had no jurisdiction to issue either a temporary or permanent personal protection order against Mrs. Spurr on the facts of this case. Both the federal statute (25 U.S.C. Sec. 1304(2013)) and the NHBP Domestic Violence Code make it clear that the NHBP Trial Court had no jurisdiction to issue a personal protection order against a person who did not fit within the categories of Section 7.4-11 E(1), (2) or (3). The conclusion should be that the protection order in question here fails not only for lack of jurisdiction under Section 1304, but also for lack of jurisdiction under NHBP law under 18 USC 2265(b)(1). We show next that Section 2265(b)(2) also supports Mrs. Spurr's position.

B. Section 2265(b)(2) Supports Mrs. Spurr's Position

Section 2265(b)(2) requires that "reasonable notice and opportunity to be heard [must be] given to the person against whom the order is sought sufficient to protect that person's right to due process." Mrs. Spurr was certainly not given adequate time to prepare for the NHBP Trial Court hearing on a permanent protection order held on February 16, 2017. She first learned about the hearing date exactly one week before February 16. The NHBP Trial Court refused Mrs. Spurr's request for a postponement. In an Order of February 14, 2017, the Court stated that it could not adjourn the hearing beyond February 16, 2017 because that was prohibited by Sec. 7-4-75(B) of the NHBP Domestic Violence Code, which required that a hearing be set "not later than fourteen days" [after] the temporary order." Dist.Ct.Reply&Resp.RE23-1 Page ID#327 However Mrs. Spurr argued then and now that the NHBP Trial Court's interpretation of this statute was incorrect, and prejudicial to her. (If the Trial Court's interpretation was correct, the statute denied her due process). Although the hearing was to be set within 14 days, that should not mean it could not be postponed if Mrs. Spurr requested a postponement. The fourteen-day limit was clearly provided for the benefit of the defendant and should therefore have been subject to a waiver by Mrs. Spurr if she believed it was in her interest to do so. Mrs. Spurr learned at 5:30 P.M. on February 15, 2017 that the NHBP Trial Court would not reschedule the hearing scheduled for February 16th, 2017 at 10:00 A.M. In addition, Mrs. Spurr was never notified of the Petitioner's

witness list, and thus not adequately prepared to question witnesses**.** Dist.Ct.BriefRE1-1Page ID#13 The personal protection order at issue in this case is invalid not only under Sections 1304 and 2265(b)(1), but also for violations of due process (including others discussed in our brief) under Section 2265(b)(2).

With respect to the numerous violations of due process cited in our prior brief, one example stands out: in the hearing on January 31, 2018, the NHBP Trial Court found Mrs. Spurr in contempt of court by providing a written communication to the Trial Court in another case, in which the Court had sought input from "interested persons" to enable the Court to decide whether Nathaniel Spurr should be appointed to administer a probate matter. The truthfulness and sincerity of this document was not questioned by the Trial Court; rather the grounds for the finding of contempt was that the petitioner Nathaniel Spurr might learn of the document, which opposed the proposal to appoint him, and that this might cause him distress! RE19PageID#12,Dist.Ct.Reply&Resp.RE23PageID#317**.** We could not find a case holding that submission of a document requested by a Court would violate a protection order, possibly because no other court has made such a decision.[7]

V. The Defendants' Claim of Sovereign Immunity is Invalid

[7] It would not qualify as harassment in a Michigan state court. MCL 750.411(h)(1)(c) provides that "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose."

The Defendants contend that the District Court "did not reach the question of the sovereign immunity of the Band or the NHBP Supreme Court, having dismissed all of Mrs. Spurr's claims on other grounds." RE24PageID#13 There is no basis for this statement. The District Court determined that it had "federal question jurisdiction under Section 1331 to determine whether the Tribal Court exceeded the lawful limits of its jurisdiction in issuing the PPO in this case." RE 33PageID#398 Recall that before making this decision the District Court had directed the parties to brief the issue of sovereign immunity fully, which they did.[8] It is implicit that the District Court rejected the Defendants' motion to dismiss the case on the grounds of sovereign immunity.

The Defendants contend that in any case, all claims against the Tribe and its Supreme Court are barred by sovereign immunity. RE27*See*Dist.Ct.Def.Mot.to Dismiss@2.4.9.2018. There is no basis for this argument. In their brief 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. RE24PageID#16. 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,

[8] On March 12, 2018 the District Court entered a pre-motion conference order that denied Mrs. Spurr's request for a Preliminary Injunction and set forth a briefing schedule, ordering that the briefs be limited to two issues: whether the Defendants had sovereign immunity, and whether the District Court had subject matter jurisdiction to hear the case. Pre-Motion Conference Order, RE 26 Page ID 344-345.

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 set forth 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, 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:

> . . . [E]xercise 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 Mrs. 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 Sovereign 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 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), and *Michigan v. Bay Mills Indian Cmty.* (2014). All of these cases involved lawsuits brought *against* Indian tribes based on commercial relationships and activities.[9] Thus these cases fall within the first 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 of commercial relationships, a tribe has sovereign immunity if Congress has not decided to eliminate it. In the instant case, of course, a lawsuit was filed in tribal court against Mrs. 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

[9] *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.

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. 554 U.S. at 341.

In the instant case a lawsuit for a personal protection order was filed in tribal court against Mrs. 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 Mrs. 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 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).

A. 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).]

VI. An Update on the Tribal Court Litigation

In our prior brief we noted that in its opinion of July 21, 2017, the NHBP Trial Court essentially invited the petitioner Nathaniel Spurr to apply for a renewal of his Personal Protection Order. We stated in our brief 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 [the Sixth Circuit Court of Appeals] addresses the fact that the NHBP Trial Court lacked jurisdiction." RE19PageID#15 Unfortunately our prediction seems to be coming true, and then some. On or about January 24, 2019 a person purporting to deliver a package appeared at Mrs. Spurr's home and handed her a "Notice of Hearing on Motion to Extend Personal Protection Order" from the NHBP Trial Court to be held on January 30, 2019.RE28PageID#7. As for the petitioner's prospects for renewal of the protection order, NHBP Law states that "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." RE19ADDENDUM II, Applicable NHBP Statutes, Section 7.4-76(B and D).

The Notice of Hearing is accompanied by an "Order for Respondent's Compliance with Outstanding Court Orders" by the NHBP Trial Court indicating that it was filed in the NHBP Trial Court on January 22, 2019.RE28PageID#19-25. This Order imposes fines for court costs in the amount of $1000. However the Order, such as it is, does not indicate that these substantial fines and other

sanctions were determined in a hearing. An unusual feature of this Order, aside from the lack of notice and hearing, is that it orders Mrs. Spurr to pay the petitioner's attorney fees. Mrs. Spurr and her lawyer attended a hearing on January 31, 2018, in which the NHBP Trial Court determined that Mrs. Spurr was in contempt, (findings with which Mrs. Spurr strongly disagrees), imposed a fine of $518.95, another fine of $200 for court costs, and ordered community service at the Capuchin Soup Kitchen. Dist.Ct.Reply&Resp.MotionRE23-PageID#317. The Court told Mrs. Spurr to wait for further instructions on the community service which were never provided. Mrs. Spurr paid the fines and this Order of January 22, 2019 simply reopens the matter after it had been resolved, and is yet another example of a lack of due process.

VII. Conclusion

First, and most fundamentally, the NHBP Trial Court does not have jurisdiction of this case under 25 USC 1304(b)(4)(B). The NHBP Trial Court has engaged in numerous violations of judicial norms and rules of due process required by the U.S. Constitution and the federal statutes cited above; and imposed sanctions including costs on Mrs. Spurr for alleged violations that did not occur. The NHBP Trial Court has acted extremely aggressively in claiming jurisdiction that it does not have, in imposing sanctions for alleged violations of NHBP Statutes and Court Rules without reasonable notice and a hearing, and going full speed ahead with

enforcement actions as if there were no appeal pending. These kinds of actions are exactly what led Congress to adopt the clear limits on jurisdiction and procedural safeguards in Sections 25 U.S.C. 1304, 18 USC 2265(b)(1) and (2).

Accordingly, Mrs. Spurr respectfully requests that this honorable Court find that the NHBP Tribal Courts had no jurisdiction to issue or enforce these personal protection orders, and order the NHBP Trial Court to remove the protection order from the Michigan Law Enforcement Information Network.

Respectfully submitted by,

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Sixth Circuit Case No. 18-2174

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOY SPURR,

Plaintiff-Appellant,

-V.-

MELISSA LOPEZ POPE, et. al

Defendant-Appellee

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(i) because, according to the word-count feature of Microsoft Word 2010, it contains less than 6500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

Respectfully submitted,

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Dated: February 10, 2019

Sixth Circuit Case No. 18-2174

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOY SPURR,

Plaintiff-Appellant,

-V.-

MELISSA LOPEZ POPE, et. al

Defendant-Appellee

CERTIFICATE OF SERVICE

I certify that I electronically filed this Brief of Plaintiff-Appellant Joy Spurr with the Clerk of the Court using the CM/ECF system, which sent electronic notification to all counsel of record.

Respectfully submitted,

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Dated: February 10, 2019

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Description of Entry	Date Document Entered
RE-1	Complaint	12/11/2017
RE-19	Emergency Motion for T.R.O.	1/31/2018
RE-23	Reply to Response to Motion	3/7/2018
RE-24	NHBP Article V. Jurisdiction	3/9/2018
RE-27	Cert. of Serv. & Briefs for Defs' Motion to Dismiss	4/9/2018