IN THE UNITED STATES DISTRICT COURT

SOUTH DAKOTA

NORTHERN DIVISION

Brendan LaBatte,

Plaintiff

REPLY BRIEF TO DEFENDANT'S MOTIONS

Vs.

Karen Gangle, Prosecutor for the SWO; Gary Gaikowski, Chief of Police for SWO; Hon. Ruth Burns; Hon. Michael Swallow, Judges for SWO Tribal Court; All in Their Official Capacity.

Defendants

FACTUAL ALLEGATIONS

Plaintiff reasserts all factual and legal arguments as found in Plaintiffs Complaint (Amended) and Motion and Brief in Support of a Preliminary Injunction.

INTRODUCTION

I. THE MOTION TO DISMIS THE COMPLAINT ACCORDING TO FEDERAL RULE(S) OF CIVIL PROCEDURE RULE 12(b)(1), 12(b)(6) AND 12(b)(7) SHOULD BE DISMISSED.

II. LABATTE HAS ARTICLE III STANDING AND HIS CLAIM IS NOT MOOT.

III. TRIBAL OFFICIAILS DO NOT HAVE THE PROTECTION OF TRIBAL SOVEREIGNTY.

IV. LABATTE DOES NOT HAVE TO EXHAUST TRIBAL REMEDIES

V. THE SWO IS NOT AN INDESEPSABLE PARTY TO THIS LITIGATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 19.

VI. THE SWO DEFENDANTS DO NOT HAVE ABSOLUTE IMMUNITY FROM SUIT.

VII. LABATTE HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

VIII. THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE GRANTED.

IX. THE SWO DOES NOT HAVE EXTRA-TERRITORIAL CRIMINAL JURISDICTION OVER THEIR MEMBERS.

X. LABATTE'S COMPLAINT IS NOT ABOUT INTRA TRIBAL MATTERS OR MATTER OF INTERPERTATION OF TRIBAL LAW.

ARGUMENT

I. THE MOTION TO DISMISS THE COMPLAINT ACORRDING TO FEDERAL RULE OF CIVIL PROCEDURE RULE 12(b)(1), 12(b)(6) AND 12(b)(7) SHOULD BE DISMISSED.

Plaintiff reasserts all arguments against the Motion to Dismiss and the Motion to Dismiss the Preliminary Injunction motion based upon previous arguments and the arguments contained in this reply.

II. LABATTE HAS ARTICLE III STANDING AND THE CASE IS NOT MOOT

The Ex Parte Young, exception allows only for prospective relief, *Verizon,* 535 U.S. at 645, and thus the court has an obligation to ensure plaintiffs have Article III standing to request prospective injunctive and declaratory relief *See Randolph v. Rodgers,* 253 F.3d 342, 345-346 (8th Cir. 2001). "Under Article III of the Constitution, federal courts may decide only

actual, ongoing cases or controversies." *Hillesheim v. Holiday Station Stores, Inc.,* 953 F.3d 1059, 1061 (8th Cir. 2020) (*Hillsheim II).* There is no case or controversy when the issues presented are no longer live. *See SD Voice v. Noem,* 987 F.3d 1186, 1189 (8th Cir. 2020). "Generally a claim is moot when 'changed circumstances already provide the requested relief and eliminate the need for Court action.'" *Hillsheim v. Holiday Stationstores, Inc.,* 903 F.3d 786, 791 (8th Cir. 2018) (*Hillsheim I)* (quoting *McCarthy v. Ozark Sch. Dist.,* F.3d 1029, 1035 (8th Cir. 2004).

LaBatte's request is for an order for injunction and prospective declaratory relief. At first blush, it seems that LaBatte's claim is moot as Gangle dismissed the charges and the dismissal was approved by the Hon. Ruth Burns. The dismissal of note is "without prejudice" and can be brought back at any time. Although LaBatte's claim appears moot the federal courts have devised two exceptions to such mootness challenges. First, the voluntary cessation rule and the second capable of repetition yet evading review. Voluntary cessation yet evading review. *See Friends of te Earth, Inc. v. Laidlaw Env't Services (TOC) Inc.,* 528 U.S. 167, 189 (2000) (voluntary cessation). *Missourians for Fiscal Accountability v. Klahr,* 830 F.3d 789, 795 (8th Cir 2016) (capable of repetition yet evading review).

Both exceptions apply to LaBatte. With the voluntary exception situation, a case is not moot simply because a defendant voluntarily ceases unlawful conduct after a plaintiff files suit. *Prowse v. Payne,* 984 F.3d 700, 702 (8th Cir. 2021). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating the cycle until he achieves all his unlawful ends." *Already v., LLC v Nike, Inc.* 586 U.S. 85,91 (2013). A defendant's actions that potentially render a controversy moot "must be viewed with a critical eye." *Knox v. Serv Emps. Int'l. Union,* 567

U.S. 307 (2012). "A defendant faces a heavy burden to establish mootness by way of voluntary cessation…" *Prowse* 984 F.3d at 703.

Here LaBatte falls under the voluntary cessation exception and his claim is therefore not moot. LaBatte complains about the exercise of jurisdiction of the Tribe. Although the DUI charge was dismissed, without prejudice to note, nothing prevents them from refiling the same charge again. Furthermore, no policy, legislative or judicial policy change has been affected that would mean LaBatte could never be charged for crimes on state lands in Tribal court again. LaBatte can easily be arrested for the charge complained of or another, additional charge that occurred on state fee land. It is entirely possible that LaBatte could be criminally charged again under the same or similar circumstances. None of the actions of the defendants has barred an additional prosecution for LaBatte.

The second exception to mootness also applies to Labette's claim. An issue is capable of repetition yet evading review if "(1) the challenged conduct is of too short a duration to be litigated fully prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Nat'l Right to Life Pol. Action Comm. V. Connor* 323 F.3d 684, 690 (8th Cir. 2003). The question is "whether the controversy was *capable* of repetition and not…whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Hoing v. Doe,* 484 U.S. 305, 318 n. 6 (1988) (Emphasis in the original).

With LaBatte the second exception applies as well. First, tribal courts are of limited jurisdiction and primarily limited to misdemeanor cases. The penalties for such cases tend to be short and do not have considerable sentences whereby a complainant's case is of such short duration review is almost impossible. Second, LaBatte being a Tribal member of the

Sisseton-Wahpeton Oyate (Hereinafter SWO) and an American citizen who resides in Roberts County, South Dakota can easily run afoul of tribal law while being on state lands. Therefore, both prongs of the "capable of repetition yet evading review" are applicable to LaBatte's case. A declaratory relief and injunction are not advisory orders as LaBatte has Article III standing and his case is not moot.

III. TRIBAL OFFICIALS DO NOT HAVE THE PROTECTION OF THE TRIBE'S SOVREIGN IMMUNITY.

In the Eighth Circuit, sovereign immunity presents a jurisdictional question. *Hagen v. Sisseton Wahpeton Cmty Coll*. 205 F.3d 1040, 1040-1043 (8th Cir 2000) It has long been recognized that Indian Tribes possess "common-law immunity from suit traditional enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the tribe or "Abrogation of tribal immunity by Congress." *Baker Elec. Co-op v. Chaske,* 28 F.3d 1466, 1471 (8th Cir. 1994). A tribe's sovereign immunity certainly extends to tribal officers or agencies. *Hagen,* 205 F.3d at 1043 (citing *Dillon v. Yankton Sioux Tribe Housing Auth,* 144 F.3d 581, 583 (8th Cir. 1998).

However, the United States Supreme Court has held tribal officers are not protected by the tribe's immunity from suits for declaratory or injunctive relief. *Santa Clara Pueblo,* 436 U.S. at 59, 98 S.Ct. 1670. The Eighth Circuit has recognized a tribe's sovereign immunity is subject to the well-established exception to *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908) that "a suit challenging the constitutionality of a state officials action is not one against the State." *Baker Elec. Co-op.,* 28 F.3d 1471. Therefore, as is the case with LaBatte tribal officers may be liable to suit when the complaint alleges:

> The named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked…If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority enforcing it…

N. States Power Co. v. Prairie Island Mdewakanton Sioux Cmty., 991 F.2d 458, 460 (8th Cir 1993) (quoting *Tenneco Oil Co v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir 1984)).

Pursuant to the holding of *Santa Clara Pueblo,* 436 U.S. at 59, 98 S.Ct. 1670, tribal officials are not protected by the tribe's immunity in this type of suit for declaratory and injunctive relief. LaBatte alleges that the defendant(s) all act in concert to apply an unconstitutional law (the assertion of criminal jurisdiction over him) as official employees of SWO acting in their official capacities. As the Supreme Court concluded in *Michigan v. Bay Mills Indian Cmty.,* 134 S.Ct 2024, 2035, 188 L.2Ed.2d 1071 (2014) concluding "tribal immunity does not bar such a claim for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct". In the instant case, LaBatte is claiming constitutional deprivations by the named defendants, namely the assertion of criminal jurisdiction over him.

IV. LABATTE DOES NOT HAVE TO EXHAUST HIS TRIBAL REMEDIES

Defendants contend that LaBatte has to exhaust all of his tribal remedies before proceeding forth with a federal lawsuit. The rule of exhaustion of tribal remedies is prudential not obligatory. In *Strate v. A-1 Contractors,* the United States Supreme Court concluded that requiring the exhaustion of tribal court remedies is prudential. Specifically, the Supreme Court found in *Strate*, *National Farmers* cannot be read to exhaust tribal remedies as a requirement: "we do not extract from *National Farmers* anything more than a prudential exhaustion rule…" 520 U.S. 438, 450, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

Since *Strate* the Eight Circuit has not required litigants to adjudicate the full merits of their case before a federal court can exercise jurisdiction. Instead, "…federal court should stay it's hand until after Tribal Court has had a full opportunity to determine its own jurisdiction," but exhaustion of tribal remedies is not required, when it would serve no purpose other than delay. *Belcourt Pub. Sch. Dist v. Herman,* 786 F.3d 653, 656 n. 2 (8th Cir. 2015) *See also Nevada v. Hicks,* 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed2d. 398 (2001)

Here the attack is on SWO criminal jurisdiction. The plain reading of the complaint, the associated laws passed by the tribe and its tribal court decisions clearly express the fact that the tribe asserts jurisdiction on fee lands within the exterior boundaries of the reservation. As the Supreme Court has found, "While the development of a factual record may generally be required where a challenge to tribal court jurisdiction turns on disputed factual questions, factual development is generally not required for facial challenges to jurisdiction. Requiring the development of a factual record where jurisdictional challenge does not turn on issues of fact does not serve the orderly administration of justice. *Nat'l Farmers,* 471 U.S. at 856

Here LaBatte's case seeking tribal court exhaustion would be futile or just for delay. As pointed out in the plaintiff's complaint and motion for preliminary injunction the plaintiff has pointed out and plead two things. First, there are already two SWO Supreme Court cases that find criminal jurisdiction over tribal members on fee lands. *Lohnes* being the most applicable one as its events, just like LaBatte's occurred wholly on fee, non-Indian land. Second, as plaintiff's pleading points out this is not just as adjudicatory decision but a legislative one as well. The SWO in their very own codes assert tribal jurisdiction over tribal members on fee land within the exterior boundaries of the reservation. Thus, no judicial action would allow

for adjudication to be that the tribe does not have criminal jurisdiction over members on fee lands. A tribal court action would thereby be futile and a simple waste of time.

Although a civil case matter the Supreme Court in *Montana* held that while Indian tribes possess "attributes of sovereignty over both their members and their territory" they " have lost many of the attributes of sovereignty" through "their original incorporation into the United States as well as through specific treaties and statutes." 450 U.S. at 563 (quoting *United States v. Wheeler,* 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L.Ed 2d 303 (1978)) Thus, "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." *Id.* at 564 Here, in LaBatte is an exercise of tribal power that does not have expressed congressional intent.

LaBatte's complaint is no longer an intra-tribal grievance that should appropriately be handled by the SWO. LaBatte claims violations of his right under the 4th and 14th Amendment of the United States Bill of Rights and the corollary under the Indian Civil Rights Act. SWO has made their decision both judicially and legislatively. In short, that they have criminal jurisdiction on fee land over members for crimes committed on those lands. As such LaBatte's complaints which rise to the level of constitutional violations are properly heard by a federal court. LaBatte, as an American citizen has nowhere else to turn to vindicate his Constitutionally protected rights. LaBatte is seeking injunctive and declaratory relief not money damages.

V. THE SWO IS NOT AN INDESEPSABLE PARTY TO THIS LITIGATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 19.

Rule 19(a) defines 'required party' and Rule 19(b) provides the factors to consider determining if dismissal is required. In their motion to dismiss the defendants argue that the current action must be dismissed as SWO is an indispensable party to this action but for sovereign immunity grounds cannot be joined. However, as noted in *Kodiak Oil & Gas Inc. v. Burr*, 303 F. Supp. 3d 964, 373 n 6. "Whether a party is to be joined pursuant to Rule 19 of the Federal Rules of Civil Procedure does not present a threshold jurisdictional question." Fed. Rule Civ. Pro 19 is not applicable to the interests of the SWO. As previously held, "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp. Ltd.,* 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990). The rule, as announced in *Temple* "…instructs courts to examine the interests of an absent party in an effort to determine whether 'as a practical matter' its ability to protect those interests will be hindered." *Two Shields v. Wilkinson,* 790 F.3d 791, 797 *Citing to* Fed. R. Civ. P. 19(a)(1)(B)(i).

With LaBatte the interests of SWO can be easily protected. LaBatte simply asks the Court to enjoin the defendants and declare their policy unconstitutional. The SWO does not need to be a member therefore as it does not impinge on any right or sovereignty the SWO has. The question is simple, "Does the SWO have extra territorial authority to prosecute LaBatte outside of it's jurisdiction?" Answer to this question does not impact the tribe's day-to-day business as a sovereign. SWO continues the ability to police its members on trust land held for the benefits of the SWO Tribe and its members. In addition, SWO itself is not affected by a ruling as it is the defendants positions which carry out the policy the tribe *qua* tribe.

If the Court finds that SWO cannot be joined under Fed. R. Civ. Pro. 19(a) because of its sovereign immunity then the test regarding being an indispensable party must be analyzed

under Fed. R. Civ. Pro. 19(b) which sets out the factors to determine if a party is indispensable. The four factors are; (1) prejudice to any party or absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded with the absent party; and (4) whether there exists an alternative forum.

A. FIRST INDISPENSABILITY FACTOR: PREJUDICE TO ANY PARTY OR TO THE ABSENT PARTY.

In *American Greyhound* the Court examined Fed. R. Civ. Pro. 19(b) and the Court held that "the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that a party necessary under Rule 19(a); a protected interest will be impaired or impeded by the parties absence." *Am. Greyhound,* 305 F.3d at 1024-25 (citing to *Dawavendaewa v. Salt River River Project Ag. Improvement Power Dist.,* 276 F.3d 1150, 1162 (9th Cir. 2002) and *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1499 (9th Cir. 1991).

In this case, the SWO would not be prejudiced to proceed without it as the question revolves around a new and novel assertion of tribal criminal jurisdiction. An assertion of jurisdiction that is membership based not territorial based. Furthermore, the SWO has made its decision final by judicial act and by legislative act. All done absent a grant of authority from Congress to assert jurisdiction on non-Indian fee land.

B. SECOND INDISPENSABILITY FACTOR: THE EXTENT TO WHICH, BY PROTECTIVE PROVISIONS IN. THE JUDGMENT, BY THE SHAPING

OF RELIEF, OR OTHER MEASURES, THE PREJUDICE CAN BE LESSENED OR AVOIDED.

It is very possible to shape relief in a manner that is not prejudicial to SWO. LaBatte simply asks for injunctive relief and declaratory relief to the tribe's extra-territorial assertion of criminal jurisdiction over members. The defendants have not argued for any inherent right to have extra-territorial criminal jurisdiction in their pleadings. Nor have they argued that by any act of Congress that they have such an extra-territorial jurisdiction. Again, LaBatte is asking for a very slim piece of relief. That SWO does not exercise extra-territorial criminal jurisdiction over him. This does not implicate the day-to-day criminal proceedings or policing as it attacks only a sliver of asserted jurisdiction.

C. THIRD INDISPENSABILTY FACTOR: WHETHER A JUDGMENT RENDERED IN THE PERSON'S ABSENCE WILL BE ADEQUATE.

To this the answer is a resounding, yes! An injunction and/or declaration of relief would be adequate to address the harms LaBatte claims. The exercise of extra-territorial criminal jurisdiction does not interfere with internal tribal affairs or the ability to run their government. SWO can continue carrying out its normal territorial criminal jurisdiction. An adjudication in this case, absent the tribe, is wholly and perfectly available.

D. FOURTH INDISPENSABILITY FACTOR: WHETHER THE PLAINTIFF WILL HAVE AN ADEQUATE REMEDY IF THE ACTION IS DISMISSED FOR NON-JOINDER.

LaBatte has no other forum to adjudicate his constitutional rights. The Supreme Court for SWO has already ruled twice regarding their extra-territorial jurisdiction and the SWO has made

it part of their official policy. If dismissed LaBatte will have no where to turn to have the matter of whether or not the tribe has extra-territorial criminal jurisdiction over members. He has no legislative or adjudicatory means to address his criminal charge.

VI. THE SWO DEFENDANTS DO NOT HAVE ABSOLUTE IMMUNITY FROM SUIT.

First, Gangle the prosecutor for SWO, does not have immunity from declaratory and injunctive relief. In almost all cases where prosecutorial immunity is brought up are 42 U.S.C.A 1983 claims that are for money damages. Here Labatte does not bring a Sec. 1983 action for damages but one for declaratory and injunctive relief for violating constitutional rights.

As a threshold matter, although prosecutors enjoy absolute immunity from damages liability in certain circumstances, absolute prosecutorial immunity does not extend to actions for declaratory or injunctive relief. *See Supreme Court v. Consumers Union of United States,*446 U.S. 719, 736, 100 S. Ct. 1967, 64 L.Ed 2d 641 (1980) ("Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for Sec. 1983 injunctive suits" (citations omitted) *Heartland Acad. Cmty. Church v. Waddle,* 427 F.3d 525, 531 (8th Cir. 2005) (citing and quoting *Consumers Union* for the proposition that "prosecutors, as state enforcement officers, are natural targets for Sec. 1983 injunctive suits); *Bishop Paiute Tribe v. Inyo Cty.,* No. 1:5-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643 at 21 (E.D. Cal. Jan. 10, 2018) (holding absolute prosecutorial immunity defense was unavailable in suit arising under federal common law and seeking only injunctive and declaratory relief.)

Throughout the Eight Circuit District Courts have also held that absolute prosecutorial immunity does not apply in an action for declaratory and injunctive relief. *See Richter v. Smith,*

No. C16-4098-LTS, 2018 U.S. Dist. LEXIS 215431, at 21 (N.D. Iowa Dec. 21 2018) ("absolute immunity bars recovery of money damages only") *Kurtenbach v. S.D.* AG, 2018 U.S. Dist. LEXIS 53208, at 7 (D.S.D. 2014). ("Immunities, i.e. absolute, prosecutorial or qualified immunity are not a bar to plaintiffs action for injunctive and declaratory relief under Section 1983" (internal quotations and citations omitted); *Oglala Sioux Tribe v. Hunnik* 993 F. Supp 2d 1017, 1033 (D.S.D. 2014) (holding that State's Attorney was "not entitled to prosecutorial immunity for prospective injunctive or declaratory relief" where plaintiff did not seek money damages); *Hayden v. Nev. Cnty.,* No. 08-4050, 2009 U.S. Dist. LEXIS 22004, at 11 (W.D. Ark. Mar. 6. 2009) "absolute immunity does not protect a prosecutor for injunctive relief). LaBatte seeks exactly that type of injunctive and declaratory relief from Prosecuter Gangle.

Likewise the SWO Judges are not immune from suit as it is declaratory in nature and it seeks to curtail their assertion of jurisdiction when they do not have extra-territorial criminal jurisdiction over LaBatte. "A judge is immune from suit including suits brought under section 1983 to recover for alleged deprivation of civil rights , in all but two narrow exceptions. *Schottel v. Young*, 687 F.3d 370, 373 (8th Cir 2012)(citing *Mireles v. Waco,* 502 U.S. 9, 11-12 (1991) "First a judge is not immune from liability for nonjudicial actions, *i.e.* actions not taken in judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles* 502 U.S. at 11-12. It is the second exception that applies here. SWO Judge(s) have acted clearly outside of their jurisdiction by upholding and continuing to uphold jurisdiction over members who commit crimes on fee land in an act of extra-territorial criminal prosecution.

"A judge will not be deprived of his immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he, will be subject to liability only

when he has clearly acted in the "clear absence of jurisdiction". *Stump v. Sparkman,* 435 U.S. 349, 356-357 (1978). Tribal court is a court of limited jurisdiction and does not have the authority to adjudicate crimes outside of its territorial jurisdiction and authority. Thus, the SWO Judges by acting outside of their jurisdiction are not immune from suit.

VII. LABATTE HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

LaBatte in his complaint points to two different grounds for adjudication of his claim. First, the federal constitutional guarantees of the 4th and 14th amendment. LaBatte does cite the Indian Civil Rights Act as the corollary to the Bill of Rights for purposes of possible interpretation. LaBatte still makes his claims under the United States Constitution a case which a federal court can hear. LaBatte asserts that the court has jurisdiction as jurisdiction of an Indian tribe is a federal question.

VIII. THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE GRANTED

LaBatte has met all of the standards set forth for a preliminary injunction to be issued. As the Eight Circuit has found, "Our review of a preliminary injunction is layered: fact findings are reviewed for clear error, legal conclusions are reviewed de novo, and the 'ultimate decision to grant an injunction' is reviewed for abuse of discretion." *Comprehensive Health of Planned Parenthood Great Plains v. Hawley,* 903 F.3d 750, 754 (8th Cir 1018). (quoting *McKinney ex rel. NLRB v. S. Backeries, LLC.*786 F.3d 1199, 1122 (8th Cir. 2015)). The factors for evaluating whether a preliminary injunction should be issued are: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys. Inc. v. C L Sus Inc.*

640 f.2d 109, 113(8th Cir. 1981)(en banc) "While no single factor is determinative , the probability of success factor is the most significant." *Home Instead Inc. v. Florance* 721 F.3d 494, 497 (8th Cir. 2013)

At the heart of LaBatte's claim and pleading is that the tribe is exerting extra-territorial criminal jurisdiction and question is certainly a federal question. LaBatte has shown he has been charged with a crime that occurred wholly on fee land and the only nexus between LaBatte and the tribe is that he is tribal member of SWO.

LaBatte's criminal complaint has been dismissed without prejudice and can just as easily come back. Launching a cycle of criminal allegations while evading the most basic of reviewing jurisdiction. LaBatte has a large probability of success on the matters. (1) The court has federal jurisdiction over determining the jurisdiction of federal Indian tribes; (2) A harm in fact that has no other way of being redressed is occurring; (3) The proper parties have been named as they are the tribal officials who enforce the rule; (4) Finally all of the tests set forth from *Dataphrase* have been met.

IX. THE SWO DOES NOT HAVE EXTRA-TERRITORIAL JURISDICTION OVER TRIBAL MEMBERS ON FEE, NON-INDIAN LANDS.

In the defendants brief the defendants attempt to assert a sovereignty that is based on membership not territory Doc. 27 P.27. The defendants go to cite to *United States v. Wheeler* 353 U.S. 313, 323 (1978). As well to a much misleading quote from COHEN'S HANDBOOK OF FEDERAL INDIAN LAW Sec 7.02[1][c], at 603 Nell Jessup Newtown et al. eds. 2012) arguing that the SWO has criminal jurisdiction based on it's territory and membership. "Tribal court subject matter jurisdiction over actions arising outside Indian

country extend to matters involving the exercise of *off-reservation treaty rights." Id.* But off reservation treaty rights are about hunting and fishing rights not general criminal jurisdiction. The *usufructuary rights* that are held by a tribe after a cessation of part of the reservation so members can hunt and fish on those former lands. These occur on diminished reservations not on disestablished one's like the SWO. In fact, usufructuary rights are almost always a part of treaties made with the tribes of northern Minnesota. The Sioux and Dakota have never had any claim to lands they ceded via treaty. Not in the Treaty of Lake Traversie 1867; Treaty of Traverse de Sioux1851; Treaty of Mendota 1851; or to the first recorded treaty of 1805. In all these treaties all interest in land is ceded to the United States of America. Furthermore, the exercise of usufructry rights are all civil in nature if they exist at all.

Even the disestablishment of the Lake Traverse Reservation would hold only those lands allotted to be under tribal and federal jurisdiction. "It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than a simply a major portion of, of the affected tribe's unallotted lands. But as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the government were. Satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. *In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments.*" *DeCoteau v. Dist. County Court for the Tenth Judicial Dist.* 420 U.S. 446-447 (1975) (citing to 18 U.S.C. Sec 1151(c) *See United States v. Pelican,* 232 U.S. 442.The disestablishment was a complete cessation of all interest in non allotted land.

X. LABATTE'S CASE IS NOT INTRATRIBAL AND OR REGARD THE INTERPERTATION OF TRIBAL LAW.

In the Eighth Circuit a general rule proscribes federal district interference with internal matters of tribal concern. As held "Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue with tribal membership determinations lies with Indian tribes and not in district courts." *In re Sac & Fox Tribe of Mississippi in Iowa,* 340 F.3d 749, 763 (8th Cir. 2003) *Citing to United States v. Wheeler,* 435 U.S. 313, 323-36, 55 L.Ed .2d 303, 98 S. Ct. 1079 (1978). LaBatte's complaint does not fall under any of the proscribed areas that are wholly the maintain of tribal court and political systems.

First, LaBatte's complaint is not about an "internal tribal dispute". Rather LaBatte's complaint arises under federal question jurisdiction namely does the SWO have extra-territory criminal jurisdiction over its members. Especially in light of the *DeCoteau* decision which hinged its determination of tribal law and disputes based upon an act of congress. As the Court held, "But the 1891 Act before us is a very different instrument. It is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented." *DeCoteau.* at 448. The remaining lands of the SWO and the extent to their right have them becomes a federal question as it hinges upon determining what the Act of Congress of 1891 means. The lynch pin of LaBatte's claim is that the Act of 1891 divested any and all interest that the SWO might have to the ceded lands. As the court held, "In the present case, by contrast [The Court contrasting previous acts of Congress and Indian country] the surrounding circumstances are fully consistent with an intent to terminate the reservation, and inconsistent with any other purposes *DeCoteau* 420 U.S. at 448. This is not an "internal tribal dispute" but an attempt to find the meaning and contours of the SWO in light of 1891 act of congress.

Second, LaBatte is not asking for an interpretation of tribal law or constitutionality but rather how *DeCoteau* shapes the criminal jurisdiction of a terminated reservation. The Court in *DeCoteau* opined in discussing the termination of the reservation and what it means, "But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation undiminished, but rather the because the tribe and the Government were satisfied that the retention of allotments would provide an adequate fulcrum for tribal affairs. *In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments." DeCoteau* at 446-447. (citing to 18 U.S.C. Sec 1151 (c) See *United States v. Pelican,* 232 U.S. 442. (Emphasis Added). Therefore, criminal jurisdiction or the lack thereof it, hinges about the Courts decision and federal legislation.

CONCLUSION

For the foregoing reasons LaBatte's Motion for a preliminary injunction should be granted and the complaint not dismissed.

Respectfully submitted this 13th day of August, 2024

/S/ Robert J. Doody

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2024 I electronically filed the REPLY BRIEF TO DEFENDANT'S MOTIONS with the Clerk of Court via the ECF filing system, which will send notification to all the filing parties of record.

/S/ Robert J. Doody

Attorney for Plaintiff