

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DASON MUSICK,
Plaintiff,

V.

PRAIRIE BAND OF THE POTAWATOMI
NATION; TANNER LEMERY, in his
individual capacity; DEREK TUCK, in his
individual capacity; TERRY CLARK, in his
individual capacity, THE BOARD OF
COUNTY COMMISSIONERS OF
JACKSON COUNTY, KANSAS; JACKSON
COUNTY SHERIFF TIM MORSE, in his
official capacity,
Defendants.

Case No.: 2:24-cv-02299

RESPONSE TO PRAIRIE BAND OF POTAWATOMI NATION'S MOTION TO DISMISS

This case arises from police officers of the Prairie Band of Potawatomi Nation (“PBPB” or Defendant) exercising law enforcement authority under K.S.A. § 22-2401a(b). Defendant seeks dismissal of the suit due to sovereign immunity and the related doctrine of tribal exhaustion and priority of the Federal Tort Claims Act.

But Defendant can claim none of these defenses because it has waived sovereign immunity under the express language of K.S.A. § 22-2401a(b), which provides: “The tribe shall waive its sovereign immunity solely to the extent necessary to permit recovery under the liability insurance, but not to exceed the policy limits.” In exchange for exercising law enforcement authority, the PBPB must submit to claims against it under the Kansas Tort Claims Act. *See id.*

Defendant presents no case law holding that its defenses are applicable when a Tribe has waived sovereign immunity. The Court should deny the motion.

A. Defendant Has Expressly Waived Sovereign Immunity

Defendant argues that the Court does not have jurisdiction to hear Plaintiff's claims. Defendant argues that jurisdiction does not exist because (1) Plaintiff's claims are barred by sovereign immunity (Def. Mtn. pp. 7-9); (2) Plaintiff's claims are barred by the tribal exhaustion rule (Def. Mtn. pp. 9-12); (3) Defendant is not subject to Kansas state law (Def. Mtn. pp. 12-14); and (4) the Federal Tort Claims Act is Plaintiff's exclusive remedy (Def. Mtn. pp. 14-15).

Each of Defendant's arguments come down to the same central issue – tribal sovereign immunity. The doctrines Defendant cites all arise from the premise that Defendant has sovereign immunity as a Native American Tribe. In most circumstances, Defendant's arguments might prevail. But not here, because Defendant has expressly waived its sovereign immunity in exchange for exercising law enforcement authority under K.S.A. § 22-2401a(b). Section 22-2401a(b)(2) contains the express waiver of sovereign immunity:

If a claim is brought against any tribal law enforcement agency or officer for acts committed by such agency or officer while acting pursuant to this section, such claim shall be subject to disposition as if the tribe was the state pursuant to the Kansas tort claims act, provided that such act shall not govern the tribe's purchase of insurance. **The tribe shall waive its sovereign immunity solely to the extent necessary to permit recovery under the liability insurance, but not to exceed the policy limits.**

Kan. Stat. Ann. § 22-2401a(b)(2) (emphasis added).

This Court already has examined the issue of express waiver under § 22-2401a(b) and concluded that the statute contains the Tribal waiver of sovereign immunity. In *Lewis v. Phropher*, No. 08-2403-JWL, the plaintiff brought suit against tribal officers, arguing they violated his civil rights. The Court found that the tribal officers were exercising authority to act as police officers under the same statute at issue here, K.S.A. § 22-2401a. The court concluded that **“This statute [K.S.A. § 22-2401a] further provides that a tribe waives its sovereign immunity with respect to a claim brought under the Kansas tort claims act;** plaintiff has not brought such a state law claim here,

however.” *Lewis v. Phropher*, No. 08-2403-JWL, 2009 WL 722027, at *2 n1 (D. Kan. Mar. 18, 2009)(attached as Exhibit A).

This Court also has examined the legal consequences of express waiver of sovereign immunity by this very same Defendant, the Prairie Band of the Potawatomi Nation, in its Gaming Compact with the State of Kansas. In *Beattie v. Smith*, No. 12-2596-JTM, a guest of the hotel operated by Defendant sued the PBPB and other defendants after he was arrested at the hotel and taken to jail. The Tribe argued that the court did not have jurisdiction because plaintiff failed to exhaust administrative procedures under the Federal Tort Claims Act.

The Court rejected this argument because the Tribe has waived immunity and subjected itself to the Kansas Tort Claims Act under its Compact with the State of Kansas:

By its Compact with the State of Kansas subjecting itself to the KTCA, it has done precisely that, and without any requirement of administrative exhaustion. Notably, the Tribe only cites cases applying FTCA exhaustion in general, and none holding that FTCA exhaustion is required as a condition precedent to actions against Tribes who have otherwise consented to state tort claims.

Beattie v. Smith, No. 12-2596-JTM, 2013 WL 467297, at *7 (D. Kan. Feb. 7, 2013), *aff’d*, 543 F. App’x 850 (10th Cir. 2013) (attached as Exhibit B). As this Court concluded, a Tribe’s express waiver of sovereign immunity meant that it has consented to suit under the Kansas Tort Claims Act, and that a plaintiff does not need to exhaust traditional administrative remedies or proceed under the Federal Tort Claims Act.

Thus, the present matter is quite factually different from the cases Defendant cites. In a typical factual scenario, Defendant enjoys the broad protection of sovereign immunity, expressed through a variety of defensive doctrines. But, here, Defendant has expressly waived its immunity in exchange for the grant of law enforcement authority under K.S.A. § 22-2401a(b). Defendant cites no cases holding that any of its sovereign immunity defenses exist in the context of an express waiver.

B. The Doctrine of Exhaustion Does Not Apply

Defendant also argues that the doctrine of tribal exhaustion precludes suit in this Court. As explained above, Defendant's waiver of sovereign immunity under K.S.A. § 22-2401a(b) means that Defendant has subjected itself to suit under the Kansas Tort Claims Act in this Court.

But even if Defendant had not waived sovereign immunity, the tribal exhaustion doctrine would not apply here. Defendant tosses the defense out but does not explain its contours. Tribal exhaustion does not apply merely because a Tribe is involved in a lawsuit.

“The tribal exhaustion rule provides that as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, **if those cases are also subject to tribal jurisdiction**, until the parties have exhausted their tribal remedies.” *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) (citations omitted) (emphasis added). But tribal “civil jurisdiction generally does not extend to nonmembers, with two exceptions.” *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1243 (10th cir. 2017) (citing *Montana v. United States*, 450 U.S. 544, 565 (1981)). Defendant does not contend that the PBPB would have jurisdiction over Plaintiff, a non-member.

Further, as Defendant admits, the tribal exhaustion rule does not apply “where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay.” *See Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1239 (10th Cir. 2014). Here, the PBPB already has agreed to suit under the Kansas Tort Claims Act. Tribal courts do not have jurisdiction to hear state law claims, such as under the Kansas Tort Claims Act. *See Nevada v. Hicks*, 533 U.S. 353, 364 (2001) (holding that Tribal courts do not have jurisdiction to hear claims under state law or § 1983 against state employees). Thus, “adherence to the tribal exhaustion requirement” in cases where the Tribal courts lack jurisdiction “would serve no purpose other than delay.” *Id.* at 369.

C. Plaintiff Is Not Required to Proceed under the Federal Tort Claims Act

Finally, Defendant argues that Plaintiff must bring his claims against the PBPB under the Federal Tort Claims Act. As explained above, the Court has already ruled on this issue – in a case involving Defendant PBPB. In *Beattie*, this Court concluded that a plaintiff does not need to proceed under the FTCA when a Tribe has already waived sovereign immunity. *Beattie*, 2013 WL 467297, at *7.

In addition, just as with the tribal exhaustion doctrine, Defendant superficially raises the defense but without explaining how the FTCA applies in this instance. If Defendant had, it would be clear that Plaintiff would not need to proceed under the FTCA, regardless of the waiver of sovereign immunity.

The Ninth Circuit has explained that Congress extended applicability of the FTCA to claims against Tribes in certain limited circumstances:

In 1990, after it enacted the ISDEAA [Indian Self-Determination and Education Assistance Act], Congress extended the FTCA's waiver of sovereign immunity to claims “resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA] of 1975, as amended.” 25 U.S.C. § 450f (note). This provision is commonly referred to as § 314, an allusion to its location within the Act. See Department of Interior and Related Agencies Appropriation Act, Pub.L. 101–512, § 314, 104 Stat 1915 (1990). **However, the waiver of sovereign immunity is limited:**

[A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs ... while carrying out any such **contract or agreement** and its employees are deemed employees of the Bureau ... **while acting within the scope of their employment in carrying out the contract or agreement.**

The threshold question [. . .] thus becomes whether the actions of the Officers come within the ambit of § 314, thereby subjecting the United States to potential tort liability.

Shirk v. U.S. ex rel. Dep’t of Interior, 773 F.3d 999, 1003 (9th Cir. 2014) (emphases added).

The question of whether the FTCA applies to the actions of a Tribe proceed through a two-step analysis. Under the first step:

courts must determine whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement. The scope of the agreement defines the relevant “employment” for purposes of the scope of employment analysis at step two.

Id. at 1006. Under the second step: “courts must decide whether the allegedly tortious action falls within the scope of the tortfeasor’s employment under state law.” *Id.*

Defendant has not even attempted to demonstrate that the PBPB police officers’ behavior in arresting, testing, and then transporting Plaintiff to Jackson County, Kansas, to be prosecuted under State law is activity encompassed under the alleged 638 Contract with the Bureau of Indian Affairs. Having failed to satisfy this test, their FTCA argument fails.

Conclusion

WHEREFORE, for the reasons stated above, the Court should deny the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 11th day of November 2024, a true and correct copy of the above and foregoing was filed with the Clerk of Court via the electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/Christopher S. Dove

Christopher S. Dove #21251