UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

JOSEPH MUNDO,
Plaintiff,

v. Case No.: 1:25-cv-0136 JB-KK

SHELBY VANDEVER,

Defendant.

PLAINTIFF'S OPPOSITION TO NAVAJO NATION'S MOTION TO DISMISS

Plaintiff Joseph Mundo hereby files his Opposition to the Navajo Nation's Motion to Dismiss his claims on the grounds that they are barred by tribal sovereign immunity.

STATEMENT OF THE CASE

On or about February 10, 2025, Plaintiff Joseph Mundo originally filed his Amended Complaint in this Court seeking declaratory and injunctive relief against the Crownpoint Navajo Family Court, challenging the tribal court's exercise of jurisdiction over a child custody matter involving a father who is not a member of the Navajo Nation, in contravention, *inter alia*, of the federal common law governing the jurisdiction of tribal courts.

On February 24, 2025, the Navajo Nation filed its Motion to Dismiss, alleging that the Crownpoint Navajo Family Court, like the Navajo Nation itself, is entitled to tribal sovereign immunity from all of Plaintiff's claims, and further arguing that, "[b]ecause sovereign immunity

is a threshold issue of this Court's subject matter jurisdiction," the Plaintiff's claims must be dismissed under Fed.R.Civ.P. 12(b)(1). Motion to Dismiss, p. 1.

On or about February 24, 2025, Plaintiff filed his Motion for Leave to file an Amended Complaint to Add Necessary Parties, seeking, pursuant to Fed.R.Civ.P. 15(a)(2) "to add the following defendants in their official capacities":

> Hon. William Platero, in his official capacity as Judge of the Crownpoint Navajo Family Court;
>
> Jamie S. Mike, in her official capacity as Court Administrator of the Crownpoint Navajo Family Court; and
>
> Shawn Attakai, Esq., in his official capacity as Staff Attorney of the Crownpoint Family Navajo Court.

Plaintiff's Motion for Leave to File Amended Complaint, pp. 1-2.

In its Motion for Leave, Plaintiff acknowledged that he "failed to name the proper officials under *Ex parte Young*, 209 U.S. 123 (1908), and that, "[t]o cure this defect, Plaintiff seeks to amend the complaint to name Hon. William Platero, Jamie S. Mike, and Shawn Attakai, Esq., in their official capacities as necessary defendants under *Ex parte Young* for the requested injunctive relief." *Id.* at 2.

ARGUMENT

I. Tribal Sovereign Immunity Does Not Bar *Ex Parte Young* Claims Against Individual Tribal Officials.

The Navajo Nation contends that tribal sovereign immunity bars this suit. However, under the *Ex parte Young* doctrine, tribal sovereign immunity does not protect tribal officials who are acting beyond their lawful authority from injunctive and declaratory relief. *Ex parte Young* permits claims against individual tribal officials for prospective relief where they act in excess of

the amount of authority that the tribal sovereign is capable of bestowing. *See Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007). Thus, the Tenth Circuit has "expressly recognized *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). Furthermore, the Tenth Circuit has held that "*Ex parte Young* may be applied to enjoin a violation of federal common law, namely, the unlawful exercise of tribal court jurisdiction." *Id.* at 1155.

Here, Plaintiff does not seek damages against either the Navajo Nation or the Crownpoint Navajo Family Court. Under the Amended Complaint that Plaintiff has sought leave of court to file, Plaintiff seeks only prospective declaratory and injunctive relief preventing the named tribal officials of the Crownpoint Navajo Family Court, acting in their official capacities, from exceeding tribal court jurisdiction in direct violation of federal common law. Thus, the *Ex parte Young* exception recognized in *Crowe & Dunlevy* applies, and this suit is not barred by tribal sovereign immunity.

II. Tribal Court Jurisdiction Does Not Exist Over Child Custody Disputes Involving a Nonmember Spouse, Where Neither of the *Montana* Exceptions Applies.

"There is a presumption against tribal civil jurisdiction over non-Indians under *Montana v. United States*, 450 U.S. 544, 564–65 . . . (1981), and its progeny." *Crowe & Dunlevy*, 640 F.3d at 1150. "[W]hile the tribes have authority to exercise civil jurisdiction over their own members, '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.* (quoting *Montana*, 450 U.S. at 564). Thus,

generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

"There are two exceptions to *Montana*'s general rule against tribal court jurisdiction over nonIndians." *Crowe & Dunlevy*, 640 F.3d at 1150. Under the first exception, a tribe may regulate "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other agreements." *Montana*, 450 U.S. at 565. Under the second, a tribe may exercise authority over nonmember conduct where "the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the tribe*." *Id.* at 566 (emphasis added).

Neither exception plausibly applies on the facts of this case. First, Mr. Mundo never has either purposely availed himself of the jurisdiction of the tribal court, *see Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir.) (en banc) ("We hold that a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe ...."), *cert. denied*, 547 U.S. 1209 (2006), nor has he otherwise consented to such jurisdiction. Rather, Mr. Mundo initiated child custody proceedings in Florida state court, has domesticated the resulting Florida custody order in New Mexico state court, and consistently has objected to the tribal court asserting jurisdiction over the custody dispute.

Nor does the second *Montana* exception apply. "That exception is a narrow one which authorizes a tribe to exercise civil jurisdiction over a non-Indian *whose conduct implicates the* 'political integrity, the economic security, or *health or welfare of the tribe*.'" *Crowe & Dunlevy*, 640 F.2d at 1153 (quoting *Montana*, 450 U.S. at 566) (emphasis added). "To support jurisdiction under this exception, the conduct must 'imperil the subsistence *of the tribal community*.'" *Id.*

(quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008)) (emphasis added). While Mr. Mundo's conduct in attempting to enforce the Florida custody order, to allow him primary custody of his daughters while still affording Ms. Vandever substantial parenting time, will affect his children and Ms. Vandever, who are tribal members, it "does not [in any way] undermine the sovereignty or welfare of the [Navajo Nation], a separate tribal entity." *Crowe & Dunlevy*, 640 F.3d at 1153.

As neither of the *Montana* exceptions applies, the Crownpoint Navajo Family Court plainly lacks jurisdiction over a custody dispute involving a nonIndian father.

III. Exhaustion of Tribal Remedies Is Not Required Where Exhaustion Would Serve No Purpose But Delay, Where Ms. Vandever Asserted Tribal Jurisdiction in Bad Faith to Deny Mr. Mundo of His Parental Rights Under the Florida Custody Decree, and Where Delay Would Irreparably Damage Mr. Mundo's Parental Rights.

"As a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy*, 640 F.3d at 1150. First, exhaustion is not required if it is "clear that the tribal court lacks jurisdiction," such that "the exhaustion requirement would serve no purpose other than delay." *Burrell v. Armijo*, 456 F.3d at 1168.

The Crownpoint Family Court originally dismissed Ms. Vandever's child custody petition in 2020 for lack of jurisdiction, yet it has now asserted jurisdiction despite the lack of any material change in circumstances. In the absence of any plausible basis for asserting jurisdiction over Mr. Mundo, a nonmember of the Navajo Nation, under either of the *Montana* exceptions, the Navajo Nation's courts "plainly do not have jurisdiction" over the child custody dispute. *See Crowe & Dunlevy*, 640 F.3d at 1153. "Accordingly, the exhaustion requirement

would serve no purpose [other than delay], and there is no need to require further tribal court litigation before the exercise of federal jurisdiction in this case." *Id.*

An additional exception to the prudential rule of exhaustion of tribal remedies arises "where 'an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith[.]" *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n. 21 (1985)). In this case, Defendant Vandever has invoked the jurisdiction of the tribal court in bad faith for the sole purpose of depriving Mr. Mundo of his parental rights under the Florida court's custody decree and of evading her obligations under that decree, and she is motivated by a desire to harass Mr. Mundo to the point of forcing him to give up his parental rights so that he never sees his kids again.

A third exception to the exhaustion rule arises where "immediate federal court review is necessary to prevent irreparable damage." *See Valenzuela v. Silversmith*, No. CV 10-1127 MCA/GBW, 2011 WL 13284740, at *4 (D.N.M. Sept. 1, 2011) (recognizing exception, but finding it inapplicable on the facts before the court), *report and recommendation adopted*, 2011 WL 13284453 (D.N.M. Sept. 30, 2011), *aff'd*, 699 F.3d 1199 (10th Cir. 2012), *cert. denied*, 571 U.S. 831 (2013). This is not a case about money or about the nonIndian plaintiff's property or contractual rights. Rather, this case involves the nonIndian father's parental rights, which are priceless. If the father is forced to exhaust tribal court remedies, which could take two or more years, his parental relationship with his daughters is likely to suffer an irreparable breach, which harm cannot subsequently be repaired, especially given that the daughters are growing older by the day. Parenthood delayed is parenthood denied.

In short, because exhaustion would serve no purpose but delay, would enable Defendant Vandever to carry out her bad faith scheme of depriving Mr. Mundo of the exercise of his

parental rights recognized by the decree of a state court having jurisdiction over the custody dispute, and would cause irreparable damage to Mr Mundo's parental rights, exhaustion of tribal remedies is not required.

IV. Federal Question Jurisdiction Exists Under 28 U.S.C. § 1331.

Unquestionably, "the existence of tribal court jurisdiction present[s] a federal question within the scope of 28 U.S.C. § 1331." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15 (1987) (citing *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)). Nor is such jurisdiction defeated by tribal sovereign immunity, since, as argued above, tribal court officials may be sued in their official capacities for prospective declaratory and injunctive relief to prevent them from exceeding the tribal court's jurisdiction, under *Ex parte Young*.

CONCLUSION

In view of the arguments made and authorities cited above, Plaintiff Joseph Mundo respectfully requests that the Navajo Nation's Motion to Dismiss based on tribal sovereign immunity be denied.

Respectfully submitted,

/s/ Calvin Lee

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