

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

AVOYELLES WATER COMMISSION	*	CASE NO:1:24-CV-01400
Plaintiff,	*	
*	*	
VERSUS	*	JUDGE EDWARDS
	*	
WARD 3, AVOYELLES WATER WORKS DISTRICT	*	MAG. JUDGE PEREZ-MONTES
Defendants	*	

MEMORANDUM IN OPPOSITION TO MOTION FOR REMAND

MAY IT PLEASE THE COURT:

Here, we have quite a quandary. Please accept this as Ward 3, Avoyelles Water Works District's ("Ward 3") Memorandum in Opposition to Avoyelles Water Commission's ("AWC") Motion for Remand. Ward 3 respectfully requests that this honorable Court deny AWC's Motion for Remand or in the alternative, convert this matter to a declaratory judgment action in accordance with F.R.C.P. Rule 57 to allow this honorable Court determine whether the Tunica-Biloxi Tribal Court has subject matter jurisdiction over the non-Indian parties to this matter and to the underlying dispute. Ward 3 avers, as will be more fully set forth herein, that this honorable Court cannot remand this matter to the Tunica-Biloxi Tribal Court without first considering whether the Tunica-Biloxi Tribal Court has the authority to hear this matter, and Ward 3 further avers that All tribal remedies have been exhausted with respect to the question of the Tunica-Biloxi Tribal Court's subject matter jurisdiction and this matter is now ripe for consideration by this honorable Court. Ward 3 asserts that remanding this matter back to the Tunica-Biloxi Tribal Court will violate Ward

3's constitutional rights because the Tunica-Biloxi Tribal Court does not have standing to exercise subject matter jurisdiction over non-Indian parties, who are both political subdivisions of the State of Louisiana, in a dispute that hinges upon the assertion of ownership of a 12-inch water line.

REVIEW OF FACTS

This matter originates from a *Petition for Injunction* filed by AWC in the Tunica-Biloxi Tribal Court on July 11, 2023, attempting to prevent Ward 3 from accessing Ward 3's 12-inch water line that serves property held in trust by the United States of America Department of Interior for the benefit of the Tunica-Biloxi Tribe. Doc. Rec. 1-1, pgs 2-4. Ward 3 timely answered and asserted the affirmative defense of Lack of Subject Matter Jurisdiction. Doc. Rec. 1-1, pgs 6 -7 "Sixth Affirmative Defense". On December 6, 2023, the Tunica-Biloxi Tribal Court held a hearing on the matter, which included testimony and evidence presented by all named parties to the lawsuit. Thereafter, on or about May 22, 2024, after Ward 3 filed proceedings with this honorable Court against the City of Marksville for injunctive relief to prevent the city from installing water lines within Ward 3's federally protected service area (See. 1:24-cv-00384-JE-JPM) the Tunica-Biloxi Tribal Court issued a document styled as an "Opinion". Doc. Rec. 1-1, pgs 90-94. The Tribal Court states that Ward 3 did not file an exception of lack of subject matter jurisdiction and that upon asserting a reconventional demand against AWC and a third-party demand against the City of Marksville consented to the subject matter jurisdiction of the Tunica-Biloxi Tribal Court. *Id.* Further, in the Opinion, the Tunica-Biloxi Tribal Court asserts ownership of the 12-inch water main as the basis of subject matter jurisdiction. *Id.* On June 7, 2024, Ward 3 notified the Tunica-Biloxi Tribal Court of their intention to Remove this matter to the U.S. District Court for the Western District of Louisiana and requested a complete certified copy of the Tunica-Biloxi Tribal

Court Record, which to date has not been received. Rec. Doc. 1-1, pgs. 95 - 112. Thereafter, on August 26, 2024, Ward 3, through their attorney, received notice of signing of judgment by the Tunica-Biloxi Tribal Court. Rec. Doc. 1-1, pgs. 104 – 106. This resulted in Ward 3 filing a Motion for Reconsideration and Motion for Appeal with the Tunica-Biloxi Tribal Court on August 27, 2024. Rec. Doc. 1-1, pgs. 107 – 114. To date, Ward 3’s motions have not been considered by the Tunica-Biloxi Tribal Court. Thereafter, on or about August 29, 2024, the Honorable Judge Robert Johnson, Tunica-Biloxi Tribal Court Judge, advised Ward 3’s attorney, during a status conference regarding a different matter, that while the Tunica-Biloxi Tribe has the “framework for an appeals court” they have not appointed judges to the appeals court. As a means of follow-up, counsel for Ward 3 emailed the Tunica-Biloxi Tribal Court on September 9, 2024, seeking additional information about the status of the Tribal Appeals Court. See Exhibit “A” attached hereto *in globo*, pg.1. Finally, upon receipt of Avoyelles Water Commission’s email to the Tunica-Biloxi Tribal Court on October 9, 2024, requesting an updated status to the Motions filed by Ward 3 with no response from the Tunica-Biloxi Tribal Court, it became apparent that the Tunica-Biloxi Tribal Court does not intent to take any further action regarding this matter and has exhausted the remedies for which the Tunica-Biloxi Tribal Court is willing to extend. See Exhibit “A” attached hereto *in globo*, pg.2. Thereafter, this removal was filed three days later on October 12, 2024.

LAW AND ARGUMENT

SINCE TRIBAL COURT HAS BEEN AFFORDED THE FIRST OPPORTUNITY TO ADDRESS THE CLAIM OF LACK OF SUBJECT MATTER JURISDICTION, THE DISTRICT COURT CANNOT REMAND THIS MATTER WITHOUT DECIDING THE QUESTION OF TRIBAL COURT SUBJECT MATTER JURISDICTION BECAUSE TO REMAND TO A COURT THAT LACKS SUBJECT MATTER JURISDICTION WOULD VIOLATE WARD 3'S RIGHT TO DUE PROCESS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND THE REQUIREMENT THAT A COURT HAVE STANDING ACCORDING TO ARTICLE 3 OF THE U.S. CONSTITUTION.

The Tribal Exhaustion Doctrine¹ requires that challenges to a tribal court's subject matter jurisdiction over a dispute, should, as a matter of comity to promote tribal self-government and self-determination, be stayed or dismissed by a federal district court.² While prudential, not jurisdictional, it is favored to all the tribal court the first opportunity to evaluate the factual and legal bases for the challenge.³ This requires that the tribal appellate court have an opportunity to review the determinations of the lower tribal courts.⁴

Here, upon receipt of the judgment issued by the Tunica-Biloxi Tribal Court, a Motion for Court to Reconsider and Motion for Appeal. The Tunica-Biloxi Tribal Court was afforded 46 days from August 27, 2024, to October 12, 2024, to act or rule on the Motion to Reconsider or to set a return date for an appeal, but the Tunica-Biloxi Tribal Court failed to take any action. After receiving an email writing from counsel for AWC on October 9, 2024, requesting a status or a ruling on Ward 3's Reconsideration and Appeal Motions, without any response from the Tunica-Biloxi Tribal Court, Ward 3 filed this removal action three days later.

¹ Also occasionally referred to as the Tribal Abstention Doctrine. Each of these being the doctrine set forth in in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

² *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); see also *Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519 (W.D. La. 2004).

³ *Id.*

⁴ *Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519 (W.D. La. 2004) citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

Ward 3 allowed the Tunica-Biloxi Tribal Court and the Tunica-Biloxi Appeal Court, the first opportunity to evaluate the factual and legal bases for Ward 3's challenge to the subject matter jurisdiction of the Tunica-Biloxi Tribal Court. Due to the Tunica-Biloxi Trial Court or Tunica-Biloxi Appeals Court unwillingness or inability to move this matter forward, it is now ripe to present to this honorable Court. Whether Removal is the most appropriate procedure to present this to this honorable Court or if it is more appropriately styled as an injunction, or a declaratory judgment is a strictly procedural question.

The proper procedure notwithstanding, once all tribal remedies are exhausted the district court can decide the question of tribal jurisdiction because the determination of whether a tribal court has subject matter jurisdiction over a matter is a federal question which federal courts have jurisdiction to review.⁵ Tribal Court system has been provided an opportunity to respond to Ward 3's subject matter jurisdiction challenge; therefore, this matter is now properly before this honorable Court to answer the question of whether the tribal court has subject matter jurisdiction over a dispute between non-Indian political subdivisions of the State of Louisiana concerning movable property located outside of the Tunica-Biloxi Tribe's territorial jurisdiction and reservation.

The novel issue here is whether this honorable Court can remand this matter to the Tribal Court without first deciding whether the Tunica-Biloxi Tribal Court has subject matter jurisdiction over the matter since all remedies associated with this question have been exhausted in the Tunica-Biloxi Tribal Court System. Ward 3 contends that this honorable Court cannot remand this matter to the tribal court without considering the question of subject matter jurisdiction because the tribal

⁵ *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) citing *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

court does not have authority to decide this matter if it does not have proper standing. Therefore, remand without verifying that the Tunica-Biloxi Court System has authority to hear this matter constitutes an infringement upon Ward 3's property and as such violates Ward 3's constitutionally protected right to due process under the Fourteenth Amendment of the United States Constitution because Ward 3 is being deprived of an opportunity to be heard before a neutral tribunal that has the authority to issue a judgment that affords relief through the exercise of power by the tribunal.⁶

DOES THE TUNICA-BILOXI TRIBAL COURT HAVE THE POWER UNDER 28 U.S.C. §1331 AND ARTICLE 3 OF THE UNITED STATES CONSTITUTION TO REDRESS A DISPUTE BETWEEN NON-INDIAN, MUNICIPAL, PARTIES OVER PROPERTY LOCATED OUTSIDE OF THE TUNICA-BILOXI TRIBE'S TERRITORIAL JURISDICTION, AND DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION TO HEAR THIS FEDERAL QUESTION.

Judicial Power shall extend to all cases, in law and equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.⁷ The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.⁸ The federal courts have concurrent subject matter jurisdiction over matters arising out of actions or conduct by non-members of the tribe in "Indian country."⁹ Federal law defines Indian Country in pertinent part to mean all land within the limits of any Indian reservation under the jurisdiction of the United States Government.¹⁰ Land is not Indian Country merely because a federally recognized tribe owns it.¹¹ Here, the dispute involved a 12-inch water main owned by Ward 3 primarily located outside of any land owned or possessed by the Tunica-

⁶ U.S. Const. Art. 3 §2, cl. 1.

⁷ U.S. Const. Art. 3 §2, cl. 1.

⁸ 28 U.S.C.A. §1331.

⁹ *Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519 (W.D. La. 2004) citing *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527, 118 S.Ct. 948, 104 L.Ed.2d 30 (1998) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

¹⁰ 18 U.S.C. §1151

¹¹ *Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519 (W.D. La. 2004) citing *Alaska v. Native Village of Venetie*, 522 U.S. 520, 530, 118 S.Ct. 948, 104 L.Ed.2d 30 (1998).

Biloxi Tribe that enters upon trust land and exits the ground on trust land owned by the United States Government for the benefit of the Tunica-Biloxi Tribe but where a right-of-way has been granted to Ward 3 to allow Ward 3 to install potable water lines and a water meter. Avoyelles Water Commission has asserted ownership of Ward 3's water line to allow the City of Marksville to take possession of the 12-inch water line, and the Tunica-Biloxi Tribal Court has claimed that the Tunica-Biloxi Tribe owns the 12-inch water line. More than 50% of the water line is outside of the Tunica-Biloxi Tribe's trust land boundaries. The Tunica-Biloxi Tribe is not a party to the litigation, and the dispute is solely between Ward 3, a political subdivision of the State of Louisiana through the Avoyelles Parish Police Jury, and AWC, also a political subdivision of the State of Louisiana through the Avoyelles Parish Police Jury. Therefore, this dispute does not arise in Indian country, and the Tunica-Biloxi Tribal Court does not have the authority to decide the rights to ownership of movable or immovable property located outside of the territorial jurisdiction of the Tunica-Biloxi Tribe. Therefore, the only proper court to hear this question of whether the Tunica-Biloxi Tribal Court has subject matter jurisdiction over this claim is this honorable Court.

IS REMOVAL THE PROPER PROCEDURE TO PRESENT THE FEDERAL QUESTION OF THE TRIBAL COURT'S SUBJECT MATTER JURISDICTION THE PROPER PROCEDURE TO PRESENT THIS QUESTION TO THE DISTRICT COURT.

The Tribal Exhaustion Doctrine, as referenced herein, requires litigants to first assert jurisdictional arguments in tribal court unless (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or (2) where the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of lack of an adequate opportunity to challenge the court's jurisdiction.¹² Exceptions 2 and 3 above apply here. First, as

¹² *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)

set forth more completely in the arguments before the Tribal Court and before this Court in Docket 1:24-cv-00384-JE-JPM, this matter hinges upon the ownership of a 12-inch water line primarily located outside of the territorial boundaries of property controlled, governed, owned, or possessed by the Tunica-Biloxi Tribe. Therefore, the Tunica-Biloxi Tribe does not have jurisdiction to decide disputes concerning matters outside of the Tunica-Biloxi Tribe's territorial jurisdiction.

Next, according to Judge Robert Johnson, Tunica-Biloxi Tribal Court Judge, the Tunica-Biloxi Tribe has the framework in place for a Tribal Appeals Court, but they have not appointed the requisite number of judges to the court. Therefore, exhaustion would be futile because there is no opportunity to challenge the Tunica-Biloxi Trial Court's jurisdiction at an appellate level.

Generally, the arguments asserted by AWC regarding the inapplicability of removal from tribal courts are correct, it is normally not authorized. However, the Tunica-Biloxi Tribe, nor an arm of the Tribe, is not a party to this matter, and this case, as removed, solely presents a federal question regarding the subject matter jurisdiction of the Tunica-Biloxi Tribal Court. This is a novel question as well. The U.S. District Court for the Northeastern District of North Dakota found removal from tribal court authorized based partially on the fact that the tribe, or an arm of the tribe was not a party, and that the case predominantly presented issues of federal law.¹³ For complete transparency, in *Myrick* the tribal court's jurisdiction was not challenged; however, the claim alleged by the plaintiff was that of age and race discrimination under Title VII of the Civil Rights Act. The Court held that the federal claims which form the basis of the lawsuit are properly heard in federal court. Similarly, here, Ward 3, has asserted that AWC, as a strawman for the City of Marksville, is violating

¹³ *Myrick v. Devils Lake Sioux Mfg. Corp.*, 719 F.Supp. 753 (D.N.D. 1989) and cited in *Gourneau v. Love*, 915 F. Supp. 150 (D.N.D. 1994).

7 U.S.C.A. §1929(b) and such a violation of federal law is properly addressed in federal court, which would make removal proper in this matter.

CONCLUSION

Is removal proper in this matter? Generally, no it would not be and would require that this honorable Court remand this case. However, we have a novel issue to consider, can a federal court remand a case to a court that does not have standing to hear the underlying matter? Ward 3 asserts that this court cannot remand this case back to the Tribal Court without determining if the Tribal Court has subject matter jurisdiction over this dispute. Since tribal remedies have been exhausted as required by the Tribal Exhaustion Doctrine and since the Tribal Court does not have a functioning appeals court, remand without determining that the Tribal Court has standing to redress the claims in this dispute would violate Ward 3's Constitutional Right to Due Process under the Fourteenth Amendment.

Since this honorable Court cannot remand this matter without addressing the question of the Tribal Court's authority, if this honorable Court finds that removal is not the proper procedure to address this claim, Ward 3 moves this honorable Court to convert this matter to a Declaratory Judgment in accordance with 28 U.S.C. §2201 as a declaratory judgment concerning the authority of the Tribal Court will terminate the controversy giving rise to this proceeding as is required by Rule 57 of the Federal Rules of Civil Procedure.

Therefore, Ward 3 prays that Avoyelles Water Commission's Motion to Remand be denied and allow this matter to proceed before this honorable Court, or for Avoyelles Water Commission's Motion to Remand be denied and this matter be converted to a Declaratory Judgment Action in accordance with 28 U.S.C. §2201.

Respectfully submitted,

S/ Kirk P. LaCour

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has been served this day upon all known counsel of record through electronic mail transmission and copy of the above and foregoing has also been sent to the Tunica-Biloxi Tribal Court.

Bunkie, Louisiana, this 15th day of November, 2024.

S/ Kirk P. LaCour

Kirk P. LaCour