

Appeal No. 19-1213

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**UNITED STATES OF AMERICA**  
Plaintiff-Appellee

vs.

**MERLE DENEZPI**  
Defendant-Appellant

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
THE HONORABLE ROBERT E. BLACKBURN, JUDGE  
DISTRICT COURT CASE NO. 1:18-CR-00267-REB-JMC-1

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**REPLY BRIEF OF APPELLANT MERLE DENEZPI**

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....II

ARGUMENT..... 1

    I.    BECAUSE THE COURT OF INDIAN OFFENSES IS A FEDERAL AGENCY, MR.  
          DENEZPI’S CONVICTION IN THAT COURT BARRED HIS SUBSEQUENT FEDERAL  
          PROSECUTION FOR A CRIME ARISING OUT OF THE SAME INCIDENT. .... 1

CONCLUSION..... 3

CERTIFICATION OF DIGITAL SUBMISSIONS ..... 4

CERTIFICATE OF SERVICE ..... 5

## TABLE OF AUTHORITIES

### CASES

<i>Colliflower v. Garland</i> , 342 F.2d 369 (1965).....	3
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).....	3
<i>Tillett v. Lujan</i> , 931 F.2d 636 (10th Cir. 1991).....	3
<i>United States v. Lara</i> , 541 U.S. 193 (2004).....	1, 2

### STATUTES

18 U.S.C. § 1153.....	1, 2
18 U.S.C. § 3598.....	2
18 U.S.C. §1152.....	1, 2

### REGULATIONS

25 C.F.R. § 11.100 <i>et seq.</i> .....	2
25 C.F.R. § 11.104.....	2

## ARGUMENT

### **I. Because the Court of Indian Offenses is a Federal Agency, Mr. Denezpi's Conviction in That Court Barred His Subsequent Federal Prosecution for a Crime Arising Out of the Same Incident.**

In its Answer Brief, the United States misapprehends Mr. Denezpi's double jeopardy argument. Mr. Denezpi is not arguing that the Ute Mountain Ute Tribe lacks sovereignty, lacks the inherent power to prosecute criminal offenses committed on its sovereign lands, or that its sovereignty is somehow diminished by the existence of the CFR court. Rather, he argues that the power to prosecute criminal offenses in the CFR courts and in the federal district courts (pursuant to Indian Country jurisdiction (18 U.S.C. §1152 and 18 U.S.C. § 1153)) is the same: the inherent sovereignty of the tribe as expressed through a federal court or agency. Like federal district courts and unlike tribal courts, CFR courts are a blend of federal and tribal prosecutorial power. In both CFR courts and federal district courts exercising Indian Country jurisdiction, the authority or power to prosecute stems exclusively from the alleged commission of the offense on Indian lands and the cases are brought in federal courts. Thus, double jeopardy applies to bar a prosecution in a federal district court where a defendant was previously convicted of an offense stemming from the same conduct in a CFR court.

This is not a case in which the sources of prosecutorial power are fundamentally different. *Compare United States v. Lara*, 541 U.S. 193 (2004)

(double jeopardy clause not violated where defendant prosecuted both for tribal offense of violence to a policeman and federal offense of assault on a federal officer); *United States v. Wheeler*, 435 U.S. 313 (1978) (double jeopardy clause not violated where defendant prosecuted for contributing to delinquency of a minor in tribal court and rape in federal court). The source of prosecutorial power for federal crimes of general applicability—such as carjacking or Hobbs Act robbery—is the federal government. But the source of prosecutorial power for crimes brought pursuant to 18 U.S.C. § 1152 and 18 U.S.C. § 1153 is inherent tribal sovereignty. *Cf.* 18 U.S.C. § 3598 (recognizing tribal authority to determine whether capital punishment may be imposed in cases where federal jurisdiction is predicated solely on Indian country). Thus, a federal prosecution of an Indian Country offense shares the same sources of prosecutorial power as the CFR courts.

Under *Wheeler* and *Lara*, if the Ute Mountain Ute Tribe had established a tribal court to punish infractions of its laws, it is undisputed that the Double Jeopardy Clause would not be offended by a federal prosecution subsequent to a tribal one based on the same conduct. But Mr. Denezpi was not prosecuted in a tribal court; he was prosecuted in a CFR Court established by the Bureau of Indian Affairs pursuant to 25 C.F.R. § 11.100 *et seq.* As this Court has previously recognized, “CFR courts that have not been supplanted by independent tribal courts pursuant to the provisions of 25 C.F.R. § 11(d) [now 25 C.F.R. § 11.104]

retain some characteristics of an agency of the federal government.” *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991). While CFR courts function as tribal courts, given their hybrid nature, they also “function in part as a federal agency.” *Colliflower v. Garland*, 342 F.2d 369, 379 (1965).

Thus, CFR courts differ from tribal courts and whether federal or tribal sovereignty or both is the source of their prosecutorial powers is a question of first impression. *See Wheeler*, 435 U.S. at 327 n. 26 (“We need not decide today whether [a CFR Court] is an arm of the Federal Government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the tribe.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n. 7 (1978) (distinguishing between tribal courts, traditional courts, conservation courts, and CFR Courts; “The case before us is concerned only with the criminal jurisdiction of tribal courts.”). The history and structure of the CFR Courts establish they are arms of the federal government despite also functioning as tribal courts in areas lacking independent tribal courts. Thus, the Double Jeopardy Clause prohibits a subsequent prosecution for conduct for which a defendant was previously convicted in a CFR Court.

## CONCLUSION

For the foregoing reasons, Mr. Denezpi’s conviction should be reversed and the case remanded for dismissal.

Respectfully submitted,

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### **CERTIFICATION OF DIGITAL SUBMISSIONS**

I hereby certify that (1) all required privacy redactions have been made; (2) the hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and (3) the ECF submission has been scanned for viruses with the most recent version of Avast Premium Security version number 14.3 (Virus Definition Version 20021906), last updated February 19, 2020, and according to the program, is free of viruses.

/s/ Theresa M. Duncan  
Theresa M. Duncan

**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 2020, a copy of the foregoing brief was served by (ECF) electronic service on all counsel of record.

/s/ Theresa M. Duncan  
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