

FILED
BILLINGS DIV.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

2008 SEP 12 PM 4 30

PATRICK E. DUFILM, CLERK

BY _____

DEPUTY CLERK

**PACIFICORP, an Oregon
corporation,**

Plaintiff,

vs.

**KENNARD REAL BIRD, HENRY
REAL BIRD, JAMES REAL BIRD,
RICHARD REAL BIRD, BIRDENA
REAL BIRD, and ROSE LEE REAL
BIRD,**

Defendants.

CV-07-14-BLG-RFC-CSO

**FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE**

Plaintiff PacifiCorp filed this action seeking declaratory and injunctive relief from an action for alleged trespass and violations of the American Indian Agricultural Resources Management Act ("AIARMA") brought against it in Crow Tribal Court by Defendants (collectively "the Real Birds"). Pending before the Court are PacifiCorp's Motion for Summary Judgment Re: Jurisdiction (*Court's Doc. No. 45*) and the Real Birds' Motion to Dismiss (*Court's Doc. No. 52*). On September 9, 2008, the Court heard oral argument from the parties. Having considered the parties' arguments in support of their respective positions, along with the applicable law, the Court will recommend¹ granting PacifiCorp's motion with one exception, and denying the Real Birds' motion with one exception.

¹By Order dated February 26, 2008, Chief United States District Judge Richard F. Cebull referred this case to the undersigned for all pretrial purposes pursuant to 28 U.S.C. § 636(b), including submission of proposed findings and recommendations. *Court's Doc. No. 12*.

I. BACKGROUND

PacifiCorp, an Oregon corporation, owns and operates three high-voltage electric transmission lines located in Bighorn County, Montana. *Complaint (Court's Doc. No. 1)* ¶1. The transmission lines were built in 1957 across the Crow Indian Reservation on a federally approved 50-year right-of-way granted to PacifiCorp's predecessor, Pacific Power and Light. *Court's Doc. No. 46, Ex. B*. The 50-year right-of-way was granted subject to renewal. *Id. at 4*.

The Real Birds are the beneficial owners of allotments 0463-A and 3602. *Complaint* ¶2. One of the high-voltage transmission lines owned by PacifiCorp crosses a portion of the Real Bird allotments on a 50-year right-of-way granted May 16, 1957. *Id.* ¶ 11. In 2006, PacifiCorp entered a right-of-way renewal agreement with the Crow Tribe, and negotiated additional individual agreements with approximately 1,500 individual allottees. *Id.* The Real Birds, however, did not consent to the right-of-way renewal. *Id.* On August 24, 2006, PacifiCorp filed an action to condemn the right-of-way across the Real Bird allotments. *See PacifiCorp v. Real Bird, et al., CV-06-122-BLG-RFC-CSO, Court's Doc. No. 1*. The initial right-of-way across the Real Bird allotments expired on May 15, 2007.

On November 22, 2006, the Real Birds filed in Crow Tribal Court a trespass action against PacifiCorp. *Court's Doc. No. 46, Ex. A*. On February 20, 2007, the Crow Tribal Chairman approved a bill passed by the Crow Tribal Legislature on January 16, 2007, adopting 25 C.F.R. § 166, subpart I. *Court's Doc. No. 46, Ex. F at 3*. The bill authorized the Crow Tribe and Crow Tribal members "to enforce and protect in Crow Tribal Court their grazing and trespass rights on trust property [and] to bring challenges to trespasses upon their respective agricultural lands to the Crow Tribal Court, where such challenges may be litigated and resolved in accordance with the provisions of 25

C.F.R. Part 166, Subpart I....” *Id.*

On January 25, 2007, PacifiCorp filed this action, seeking a preliminary and permanent injunction against the Crow Tribal Court trespass action, and a declaration that the Crow Tribal Court lacks jurisdiction over PacifiCorp. *Complaint at 9-10.*

II. PARTIES’ ARGUMENTS

A. PacifiCorp’s Motion for Summary Judgment

PacifiCorp moves for summary judgment on the basis that the Crow Tribal Court lacks jurisdiction over it. *PacifiCorp’s MSJ Re: Jurisdiction (Court’s Doc. No. 45) at 2.* PacifiCorp argues that the Real Birds lack authority to exclude PacifiCorp from the power line right-of-way and Indian Reservation Road (“IRR”) No. 52, and that no federal statute provides tribal court jurisdiction over PacifiCorp. *Br. Supporting MSJ (Court’s Doc. No. 46) at 4-5.* Thus, they conclude that the Tribal Court lacks jurisdiction over the Real Bird’s Complaint. *Id. at 6.*

Specifically, PacifiCorp argues that Indian tribes possess very limited jurisdiction over non-members. *Id. at 6.* There is a presumption that a tribe lacks jurisdiction over a non-member. *Id. at 7.* PacifiCorp argues that there are two narrow exceptions to this general rule, neither of which applies. First, the consent to a federal right-of-way does not establish the consensual relationship exception. *Id. at 8-9.* The second, very narrowly construed tribal self-government exception, is not implicated by this trespass claim. *Id. at 9-12.*

Further, PacifiCorp argues that there is no express congressional grant of tribal jurisdiction. *Id. at 13.* AIARMA provides for tribal court jurisdiction only after tribal enactment of certain regulations; here the regulations were not enacted until 2007. *Id.* Further, AIARMA does not provide a private right of action to the Real Birds. *Id. at 13-14.* They further contend that, because the Crow Tribe plainly lacks jurisdiction over

PacifiCorp, PacifiCorp need not exhaust tribal remedies before proceeding in federal court. *Id.* at 15-16.

The Real Birds respond that PacifiCorp's undisputed facts are largely untrue or misleading. *Mem. Opposing PacifiCorp's MSJ (Court's Doc. No. 50)* at 1-3. The Real Birds argue that they do not claim PacifiCorp's past trespasses involve using Indian Reservation Road ("IRR") 52. Rather, they claim PacifiCorp's past trespasses occurred on their allotments between IRR 52 and the transmission line right-of-way corridor. *Id.* at 4.

The Real Birds also argue that AIARMA creates a private right of action, and that allottees historically have been allowed to litigate to protect their land rights, citing Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

The Real Birds argue that Montana v. United States, 450 U.S. 544 (1981), does not apply here, because Congress has provided for tribal court jurisdiction and tribal enforcement in AIARMA, and the Crow Tribe has fully implemented the required AIARMA regulations in order to do this. *Id.* at 5-6. Further, Montana applies only to non-Indian fee land within the exterior boundaries of a reservation. Here, the Real Birds' allotments are all federally owned and held in trust. *Id.* at 6-7.

The Real Birds also argue that, if Montana does apply, the exceptions are met here. There is a prior consensual relationship between PacifiCorp, the Real Birds, and their respective predecessors regarding the construction and operation of the transmission line. *Id.* at 8-9. Additionally, a trespasser's occupation of Indian lands, and dangerous high-voltage transmission lines, both implicate the political integrity, health, and welfare of the tribe. *Id.* at 9. At the very least, a more fully developed record is necessary regarding this last exception. *Id.* at 10.

Finally, exhaustion of tribal remedies should be required, especially since

AIARMA has not yet been definitively construed by any court. *Id. at 11-12*. Further, if PacifiCorp does not exhaust Crow Tribal Court remedies, the case must be dismissed for failure to join an indispensable party. *Id. at 12-14*.

PacifiCorp replies that the Crow Tribal Legislature cannot declare regulations to be retroactive and create jurisdiction for pre-2007 trespasses when federal law provides otherwise. *PacifiCorp's Reply Supporting MSJ (Court's Doc. No. 53) at 3*. Even if the regulations were retroactive, however, prior to 2007 PacifiCorp was not a trespasser even under the Real Bird's view, and AIARMA does not provide a private right of action. *Id. at 4-5*.

Further, Montana has subsequently been applied to trust lands. *Id. at 5*. Also, many cases have held, on similar facts, that Montana's exceptions were not met. *Id. at 6-8*. Thus, the lack of tribal jurisdiction is plain and exhaustion is not required. *Id. at 8*. Finally, the Ninth Circuit has rejected the argument that a tribe is an indispensable party when its jurisdiction is challenged. *Id. at 9*.

B. Real Birds' Motion to Dismiss

The Real Birds move for dismissal under Fed.R.Civ.P. 12(b), for failure to exhaust tribal court remedies and for failure to join an indispensable party. *MTD (Court's Doc. No. 52)*. The Real Birds argue that, pursuant to National Farmer's Union v. Crow Tribe, 471 U.S. 845 (1985), the Crow Tribal Court should be afforded the first opportunity to determine its own jurisdiction, especially since AIARMA has not yet been definitively construed by a court. *Mem. Supporting MTD (Court's Doc. No. 52-2) at 2-3*. No exception to the exhaustion requirement is alleged here. *Id. at 3*. Also, if there is any ambiguity in AIARMA's grant of tribal jurisdiction, AIARMA should be liberally construed in favor of tribal jurisdiction under the "Indian canon" of construction and because the statute is remedial. *Id.*

Further, the Real Birds argue that the Crow Tribal Court is an indispensable party because any judgment in favor of PacifiCorp would necessarily affect the scope of the Crow Tribal Court's jurisdiction. *Id.* at 5. Under Fed.R.Civ.P. 19(b), the relevant factors show that the Crow Tribal Court is an indispensable party. *Id.* at 7.

Finally, prudential limitations favor dismissal. An injunction would interfere with the exercise of sovereign power and prevent the Real Birds from seeking redress in Tribal Court for grievances they apparently cannot bring in federal court. *Id.* at 7-8.

PacifiCorp responds that cases following National Farmer's Union plainly show that there is no need to exhaust tribal court remedies here. *PacifiCorp's Br. Opposing MTD (Court's Doc. No. 54)* at 2-3. Further, the preconditions for tribal court jurisdiction under AIARMA are not present, and rules of construction and remedial statutory interpretation are inapplicable where the language of a statute is clear. *Id.* at 4-5. Finally, as argued in PacifiCorp's Motion for Summary Judgment, the Crow Tribal Court is not an indispensable party here. *Id.* at 5-8.

The Real Birds reply that a title search currently reveals no encumbrance on their lands. *Defs.' Reply (Court's Doc. No. 55)* at 2. Thus, Montana is inapplicable because there is no valid right-of-way over the lands subject to this dispute. *Id.* at 3. PacifiCorp's argument that filing a lawsuit somehow prevents the right-of-way from expiring, and PacifiCorp from becoming a trespasser, is unsupported by the law. *Id.* at 4-5.

The Real Birds also argue that the retroactivity of legislation simply depends on legislative intent, and here the Crow Tribal Legislature unmistakably intended to make its adoption of the AIARMA regulation retroactive. *Id.* at 5.

Finally, the Real Birds reiterate that the Crow Tribal Court is an indispensable party, and that PacifiCorp itself recognized this by initially making the Crow Tribal Court

a party to this action. *Id.* at 6-9.

III. STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©. Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." Celotex Corp., 477 U.S. at 323.

B. Motion to Dismiss

A complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege the "grounds" of his "entitlement to relief." Bell Atlantic Corp. v.

Twombly, 127 S.Ct. 1955, 1964-65 (2007). The Court must take all allegations of material fact as true and construe them in the light most favorable to the plaintiffs. Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999) "The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice[.]" Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001).

A complaint may be dismissed without leave to amend only "when it is clear that the complaint cannot be saved by further amendment." Big Bear Lodging Ass'n, 182 F.3d at 1101 (citing Dumas v. Kipp, 90 F.3d 386, 389 (9th Cir. 1996)).

IV. DISCUSSION

A. PacifiCorp's Motion for Summary Judgment

In light of Chief Judge Cebull's prior ruling in the closely related condemnation action, PacifiCorp v. Real Bird, et al., CV-06-122-BLG-RFC, the Crow tribal court lacks jurisdiction over matters already at issue in the condemnation action. Additionally, the Court concludes that the Crow tribal court is not an indispensable party under Fed.R.Civ.P. 19(a).

1. Judge Cebull's Prior Order

Chief Judge Cebull previously held that the federal court possessed exclusive jurisdiction over the condemnation action. "[I]t is well-established that the United States is an indispensable party in an action seeking to dispossess an allottee of any interest in an allotment. Additionally, 25 U.S.C. § 357 contains no permission to litigate condemnation of allotments in Crow Tribal Court Any proceedings in Crow Tribal Court under 25 U.S.C. § 357 would be void for lack of jurisdiction and Defendant-

allottees are incorrect that this matter must be litigated in that venue.” *Order (Court’s Doc. No. 55), PacifiCorp v. Real Bird, et al., CV-06-122-BLG-RFC-CSO, at 3.*

Here, all issues raised by the trespass action in Crow Tribal Court with respect to the transmission line corridor and the access roads fall within the scope of the condemnation action. The two actions essentially correlate entirely – the parties and the issues with respect to PacifiCorp’s use of the transmission line corridor across the Real Bird allotments and the access roads thereto are identical. If PacifiCorp obtains a preliminary condemnation order, as the Court has recommended in the condemnation action, these issues in the tribal court action are resolved. Upon obtaining a preliminary condemnation order, PacifiCorp would not be a trespasser, either upon the transmission line corridor or access roads. Additionally, any damages the Real Birds may have resulting from PacifiCorp’s condemnation and use of the transmission line corridor and access roads would necessarily be at issue and resolved in the condemnation action.

Thus, the Court concludes that the Crow Tribal Court cannot hear claims for trespass by PacifiCorp on the transmission line corridor or the access roads between IRR 52 and the transmission line corridor. These claims are at issue in the federal condemnation action over which this Court has exclusive jurisdiction.

The exception is any claim for trespass on IRR 52. At oral argument, PacifiCorp acknowledged that its condemnation complaint does not mention IRR 52, and that PacifiCorp is not seeking to condemn any portion of IRR 52 in the pending condemnation action. Accordingly, Judge Cebull’s order does not prevent the Real Birds from attempting to prosecute their claims for trespass on IRR 52 in Crow Tribal Court.

2. Crow Tribal Court is not an Indispensable Party under Fed.R.Civ.P. 19(a)

Fed.R.Civ.P. 19(a) requires joinder of persons as a party if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (I) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed.R.Civ.P. 19(a).

The Ninth Circuit has held that a tribe, or its court, is not an indispensable party when that tribe's jurisdiction is challenged. See Yellowstone County v. Pease, 96 F.3d 1169, 1173 (9th Cir. 1996) (tribal court lacks "a legally protected interest in maintaining a court system" and "concluding that courts are necessary parties under Rule 19(a) whenever their jurisdiction is challenged will lead to absurd results."); McDonald v. Means, 309 F.3d at 541 (same).

The Real Birds misplace their reliance on Confederated Tribes of Chehalis Indian Res. v. Lujan, 928 F.2d 1496 (9th Cir. 1991). In Confederated Tribes, the Ninth Circuit held that the Quinault Indian Nation was an indispensable party where several individuals and other tribes filed an action seeking, *inter alia*, "to enjoin federal officials from dealing with the Quinault Indian Nation ... as the governing body of the Quinault Indian Reservation." Id. at 1498 (quotations omitted). The Ninth Circuit panel reasoned that the Quinault Nation was a necessary party for two reasons. First, success by the plaintiffs would not afford them complete relief because a judgment against the federal officials would not bind the Quinault Nation. Id. Second, the Quinault Nation had a legal interest in the litigation because the plaintiffs sought "a complete rejection of the Quinault Nation's current status as the exclusive governing

authority of the reservation." Id.

In this case, the Crow Tribe's governing authority on the reservation is not directly challenged. Rather, as in Yellowstone County v. Pease and McDonald v. Means, the primary argument that the Crow Tribe and Tribal Court are indispensable parties is based on the plaintiff's challenge to tribal court jurisdiction. The Ninth Circuit has already ruled that such an argument is not a basis for finding that a tribe is an indispensable party to a lawsuit. The Court concludes that the Crow Tribe and Crow Tribal Court are not indispensable parties under Fed.R.Civ.P. 19(a).

B. Real Birds' Motion to Dismiss

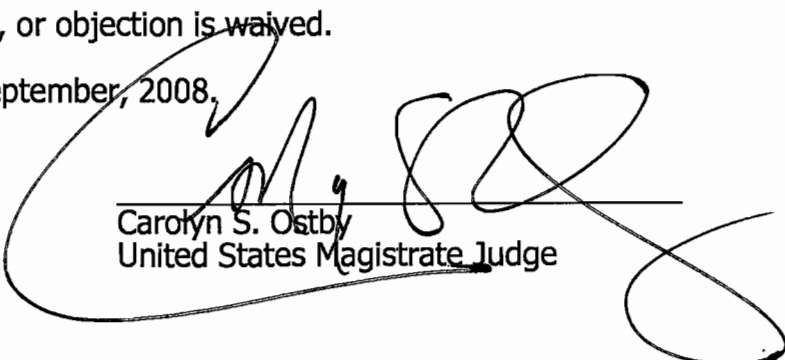
It follows from the Court's conclusions above that the Real Birds' Motion to Dismiss should be denied. As above, the Court's conclusion does not reach any issues regarding trespass on IRR 52.

V. CONCLUSION

Based on the foregoing, IT IS RECOMMENDED that PacifiCorp's Motion for Summary Judgment (*Court's Doc. No. 45*) be GRANTED as set forth herein, and that the Real Birds' Motion to Dismiss (*Court's Doc. No. 52*) be DENIED as set forth herein.

The Clerk of Court shall serve a copy of the Findings and Recommendation of the U.S. Magistrate Judge upon the parties. The parties are advised that, pursuant to 28 U.S.C. § 636, any objections to these findings must be filed with the Clerk of Court within ten(10) days after receipt, or objection is waived.

DATED this 12th day of September, 2008.



Carolyn S. Ostby
United States Magistrate Judge