

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MATHEW G. RAY, et al.,

Defendants.

NO. 3:11-cv-05056-BHS

MEMORANDUM OF AUTHORITIES  
IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS

INTRODUCTION

Defendants have moved the Court to dismiss this civil action or, in the alternative, to abstain from entertaining this cause or to stay further proceedings. For the following reasons, the motion should be granted.

FACTUAL BACKGROUND

The defendants are members of the Makah Tribe. The Government, on behalf of certain landowners, who are also members of the Makah Tribe, alleges that the defendants trespassed on their realty on the Makah Reservation.

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1 STANDARD OF REVIEW

2 For purposes of ruling upon a motion to dismiss, the Court accepts as true all  
3 well-pleaded allegations contained in the complaint, with doubts resolved in favor of  
4 the non-moving party.

5 SUMMARY OF ARGUMENT

6 The Makah Tribe, pursuant to a Self-Governance agreement with the United  
7 States Bureau of Indian Affairs, assumed the duties of administering the Realty  
8 program as to lands on the Makah Reservation. As such, implementation of federal  
9 functions was delegated to the Tribe by contract and is governed by the Constitution  
10 and laws of the Makah Tribe. The alleged trespass occurred on land whose beneficial  
11 owner is a member of the Makah Tribe. The land is located on the Makah  
12 Reservation. The defendants are members of the Makah Tribe. The Makah Tribe has  
13 a comprehensive code of laws approved by the United States Secretary of Interior and  
14 has a functioning tribal court. Trespass is prohibited by the Makah code. Trespass  
15 may also be the basis of a civil action in Makah Tribal Court. A civil action is  
16 currently pending in Makah Tribal Court, the parties being the principal defendant,  
17 Mathew G. Ray, and the landowner (his grandmother) Josephine Ray. Tribal criminal  
18 charges against all defendants were previously dismissed on technical grounds.  
19 Where such a factual scenario is apparent, case law in this Circuit provides that the  
20 federal court should refrain from hearing the case on grounds of comity unless and  
21 until all tribal court remedies have been exhausted. Consequently, the civil complaint

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herein should be dismissed. Additionally, all defendants timely filed an administrative appeal of the Government's administrative determination that they committed trespass, and the Government failed to respond to their notices of appeal. Consequently, this cause is also unripe for federal adjudication as ordinary administrative remedies and processes have not been exhausted.

### ARGUMENT

1. The Complaint should be dismissed as a matter of comity toward the Tribal Court.

This civil action is premised upon the Court's "federal question" jurisdiction, 28 U.S.C. 1331. In this Circuit, exhaustion of tribal remedies is required, as a matter of comity, before such a claim may be entertained by a federal court. National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985). *See also*, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); Stock West Corp. v. Taylor, 873 F. 2d 1221, 1227 (9<sup>th</sup> Cir. 1989); and Yellowstone County v. Pease, 96 F. 3d 1169 (9<sup>th</sup> Cir. 1996).

There are only three narrow exceptions to this exhaustion rule. Exhaustion of tribal court remedies is not required if the defendant asserts tribal jurisdiction in bad faith or for the mere purpose of harassing a litigant. Nevada v. Hicks, 533 U.S. 353, 369 (2001). Nor is exhaustion required if it "would serve no purpose other than delay." Id. Finally, if it is plain that tribal court jurisdiction is lacking, exhaustion of

tribal remedies is not required. Strate v. A-1 Contractors, 520 U.S. 438, 559-460 and n. 14 (1997). No such exceptions apply here.

The power and authority of the Makah Tribe are enumerated in its tribal constitution, as approved by the Secretary of the United States Department of the Interior in 1936 which provides *inter alia* that the governing body of the tribe has authority:

To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Makah Indian Tribe, and providing for the maintenance of law and order, and the administration of justice by establishing a reservation Indian court and defining its duties, powers, and limitations[;and]

To safeguard and promote the peace, safety, morals and general welfare of the Makah Indian Tribe by regulating the conduct of trade and the use and disposition of property upon the reservation; *Provided*, That any ordinances directly affecting nonmembers of the tribe shall be subject to review by the Secretary of the Interior.

Constitution and Bylaws of the Makah Tribe, Article VI, sections (i), (j) (May 7, 1936) (Exhibit A). On February 27, 1989, The Makah Tribe, with approval of the Secretary of Interior, enacted revisions to its code of laws. These revisions were:

...designed to modernize and improve the law and order system on the Makah Indian Reservation, the Makah Tribal Court and the administration of justice[.]

Makah Tribal Council Resolution 52-89 (Feb. 27, 1989) (Exhibit B). As approved by the United States, section 1.3.01 of the Makah Law and Order Code provides as follows:

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1 The jurisdiction of the Tribal Court and the effective area of  
2 this Code shall include all territory within the Makah  
3 Reservation boundaries, including fee patent lands,  
4 allotments, assignments, roads, waters, bridges, and lands  
5 used for agency purposes, and lands outside the boundaries  
6 of the Reservation held in trust by the United States for  
7 individual Makah Indians or for the Makah Tribe, and it  
8 shall be over all persons therein, subject to the restrictions of  
9 federal law....

10 Id., (Exhibit C). See also, section 3.1.01 (Makah Tribal Court jurisdiction of all suits  
11 involving persons whose residence is within above territory). That federally approved  
12 tribal code also defines Trespass:

13 Any person who shall go upon or pass over any lands or  
14 premises of another person, which property is fenced or  
15 posted, or any person who shall refuse immediately to  
16 leave the property of another person upon the request of  
17 the owner or occupant thereof or a person acting under  
18 the authority of the owner or occupant thereof, or who  
19 shall willfully allow livestock to occupy or graze on the  
20 lands of another, shall be deemed guilty of trespass.

21 Id., section 5.2.08 (Exhibit D). Trespass may be the basis of a civil or criminal action  
is Makah Tribal Court.

The United States, in its complaint, fails to point out numerous pertinent facts.  
First, the United States, by entering into a self-governance agreement with the Makah  
Tribe pursuant to the Indian Self-Determination and Education Assistance Act, 25  
U.S.C. 450, *et seq.*, contracted the administration of the formerly federal U.S. Bureau  
of Indian Affairs Realty Program to the Tribe. According to such agreement,  
administration of realty issues involving Indian trust lands has been delegated by the

United States to the Makah Tribe and is governed by the laws of the Makah Nation. The chief complaining witness in this case, Dale Denney, is not a federal employee—he is a *tribal* employee.

A self-governance agreement between the United States and an Indian tribe such as the Makah provides *inter alia* as follows:

(a) This compact is to carry out Self-Governance as authorized by Title IV of Pub. L. 93-638, as amended, that built upon the Self Governance Demonstration Project, and transfer control to Tribal governments, upon Tribal request and through negotiation with the United States government, over funding and decision-making of certain Federal programs as an effective way to implement the Federal policy of government-to-government relations with Indian tribes.

(b) This compact is to enable the United States to maintain and improve its unique and continuing relationship with and responsibility to the Tribe through Tribal self-governance, so that the Tribe may take its rightful place in the family of governments; remove Federal obstacles to effective self-governance; reorganize Tribal government programs and services; achieve efficiencies in service delivery; and provide a documented example for the development of future Federal Indian policy. This policy of Tribal self-governance shall permit an orderly transition from Federal domination of Indian programs and services to allow Indian Tribes meaningful authority to plan, conduct, and administer those programs and services to meet the needs of their people.

25 C.F.R. Part 1000, Appendix A.

All of the landowners whose property was allegedly trespassed upon are members of the Makah Tribe. All of the defendants are members of the Makah Tribe. The Government fails to note in its complaint that there is no general federal statute

1 for Trespass to Indian lands. There is a provision in the Code of Federal Regulations  
 2 regarding trespass to Indian lands. 25 C.F.R. 163.29 provides:

3 (1) Cases in Tribal Court. For trespass actions brought in tribal  
 4 court pursuant to these regulations, the measure of damages,  
 5 civil penalties, remedies and procedures will be as set forth  
 6 in this 163.29 of this part. All other aspects of a tribal  
 7 trespass prosecution brought under these regulations will be  
 8 that prescribed by the law of the tribe in whose reservation  
 9 or within whose jurisdiction the trespass was committed,  
 10 unless otherwise proscribed under federal law. Absent  
 11 applicable tribal or federal law, the measure of damages  
 shall be that prescribed by the law of the state in which the  
 trespass was committed.

(2) Cases in Federal court. For trespass actions brought in  
 federal court pursuant to these regulations, the measure of  
 damages, civil penalties, remedies and procedures shall be  
 as set forth in this 163.29.

In the absence of applicable federal law, the measure shall be  
 that prescribed by the law of the tribe in whose reservation or  
 within whose jurisdiction the trespass was committed, or in the  
 absence of tribal law, the law of the state in which the trespass  
 was committed.

15 25 C.F.R. 163.29. Clearly, the federal regulation regarding trespass to Indian lands  
 16 contemplates that, where a tribe has assumed responsibility for administration of  
 17 federal regulation of Realty functions by virtue of a Congressionally authorized self-  
 18 governance agreement with the United States, tribal prosecution or civil actions to  
 19 remedy trespass is the appropriate action. In this case, there were both. The  
 20 defendants were subjected to criminal prosecution for Trespass in Makah Tribal Court,  
 21 and that prosecution was dismissed due to the failure of prosecution witnesses to

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1 appear and testify. A civil action to determine the validity and legal effect of the “bill  
2 of sale” between one of the Indian landowners and the principal defendant remains  
3 pending in Makah Tribal Court. Until such action is exhausted, it is not consistent  
4 with principles of comity toward tribal courts in this circuit for this action to proceed.

5 The Plaintiff premises the courts basis for entertaining its complaint upon 28  
6 U.S.C. sections 1331, 1345 and 1355. These are federal jurisdictional statutes of  
7 general applicability. As applied to the facts of this case, however, the law of this  
8 Circuit disfavors their application. A general federal statute that does not expressly  
9 apply to Indians does not apply if its application would “touch exclusive rights of self-  
10 governance in purely internal matters.” Lumber Industry Pension Fund v. Warm  
11 Springs Forest Products Industries, 939 F. 2d 683 (9<sup>th</sup> Cir. 1991).

12 This cause involves whether a Makah Indian purchaser of a modular kit-  
13 assembled home from one of several Makah Indian landowners obtained good title to  
14 the house notwithstanding that the seller failed to obtain the consent of other co-  
15 owners and whether the purchaser’s attempted disassembly and relocation of it  
16 constituted trespass under the laws of the Makah Tribe which pursuant to a self-  
17 governance agreement assumed the responsibility for administering Bureau of Indian  
18 Affairs Realty functions. Clearly, until such time as the Tribal court, which appears to  
19 have jurisdiction over the matter, has had the opportunity to address the matter, this  
20 court’s exercise of jurisdiction over the subject matter would infringe upon the  
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1 authority of the Tribal Court in a matter which clearly touches upon internal intramural  
2 relations among members of the tribe.

3 2. This civil action is unripe for adjudication as  
4 administrative remedies have not been exhausted.

5 Apart from principles requiring federal courts in this Circuit to refrain from  
6 entertaining actions involving Indian tribal litigants in the absence of exhaustion of  
7 tribal remedies, the Government has failed to exhaust its own administrative remedies  
8 before filing this action. A civil action alleging violation of a federal regulation is  
9 unripe for litigation where there has been a failure to first exhaust federal  
10 administrative remedies. Contrary to the Government's assertion in ¶ 40 of the civil  
11 complaint that "to date, none of the Defendants has appealed" the administrative  
12 determination that they were in trespass, each of the defendants timely filed a notice of  
13 appeal of the determination made by Portland Regional Director of the U.S. Bureau of  
14 Indian Affairs (Stan Speaks), that they were in trespass and assessed damages. For  
15 example, *see* attached Exhibit E ("...please consider this as a notice appealing the  
16 trespass determination contained in the May 27, 2008 letter"). *See also* Exhibit F  
17 ("This is to supplement the record in the above appeal"). Contrary to the  
18 Government's claim that no defendants appealed, all defendants timely appealed their  
19 trespass determination and it was the Bureau of Indian Affairs who failed to provide  
20 them with any due processing of their appeals.  
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CONCLUSION

For the foregoing reasons, the Court, as a matter of comity and as a matter of the doctrine of unripeness, must dismiss this civil action on grounds that tribal and federal administrative remedies have not been exhausted.

DATED this \_\_2<sup>nd</sup>\_\_ day of April, 2011.

/s/ Jack W. Fiander  
Jack W. Fiander  
Counsel for Defendants  
Mathew G. Ray, et al.

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CERTIFICATE OF SERVICE

I hereby certify that on the above date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: michael.diaz@usdoj.gov

/s/Jack W. Fiander

WSBA No. 13116

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