Hon. Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA

Plaintiff,

vs.

MATHEW G. RAY, *et. al.*,

Defendants.

Civil Action No. C11-cv-05056-BHS

DEFENDANTS' REPLY MEMORANDUM

According to the Government's complaint herein, the owners of the property allegedly trespassed upon for whom the United States holds in trust are: (1) Jesse A. Chartraw; (2) Dennis G. Leonard; (3) Betty Croy; and (4) JoDean Haupt (or Haupt-Richards). *See* Complaint, ¶ 2 and Government Exhibit 1, docket entry 13-1. Contrary to the Government's assertion that it brings its civil action as trustee for the Makah Nation (Complaint, ¶ 1), the foregoing individuals are the owners of the property involved in this case.[1]

[1] Presumably, the United States has cast its complaint to imply that there was trespass to lands owned by an Indian *tribe* to place its civil action within the scope of federal statutes authorizing the United States to bring civil actions for trespass to lands owned by an Indian tribe. See, e.g., 25 U.S.C. Sections 179, 3106, and 3713. The facts of this case do not, however, fall within the scope of those statutes.

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A. The Complaint should be Dismissed on Principles of Comity

Assuming *arguendo* that the United States District Court possesses concurrent *jurisdiction* to entertain this cause, the case must nevertheless be dismissed as a matter of *Comity* until tribal court remedies are exhausted. Not only is the doctrine of tribal comity firmly established in this Circuit, *see, e.g.*, *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F. 2d 1221 (9th Cir. 1989), Congress, which possesses plenary power over Indian affairs, has expressed this policy in statutes relating to trespass to Indian lands. As stated in 25 U.S.C. 3106 prohibiting trespass to Indian forest lands, Indian tribes possess concurrent civil jurisdiction to enforce federal statutes prohibiting trespass. 25 U.S.C. 3106 (c). *See also* 25 U.S.C. 3713 (c) (tribes possess concurrent civil jurisdiction to address trespass to Indian agricultural lands.

The fact that the United States is the plaintiff in this cause does not vitiate the requirement of exhaustion of tribal remedies. In this regard, this case is not strikingly different from what was involved in *United States v. Plainbull*, 957 F. 2d 724 (9th Cir. 1992). In *Plainbull*, the United States brought a civil action for trespass by livestock to tribal lands. Although acknowledging that the district court possessed concurrent jurisdiction over the cause, the Ninth Circuit held that the district court properly abstained from hearing the cause and reinforced that the deeply rooted federal policy favoring the promotion of tribal self-government. There, the Government made the same argument that the district court abused its discretion by abstaining from the merits of the case because there was no concurrent action pending in the tribal court. Id. As stated in *Plainbull:*

> Whether a tribal action is pending…does not determine whether abstention is appropriate.

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See also, Wellman v. Chevron U.S.A., *Inc.*, 815 F. 2d 577 (9th Cir. 1987) (presumption of tribal jurisdiction unless expressly limited by federal statute or term of a treaty).

The Government contends that, because the Makah Tribe voluntarily dismissed a criminal prosecution of the defendants for Criminal Mischief (see docket entry no. 13-5), with prejudice, and defendant Matt Ray similarly dismissed a civil action for breach of contract against his grandmother, Josephine Ray, tribal court remedies have been exhausted. First of all, the tribal court has *never* been presented with a *civil action* against the defendants alleging *trespass* such that the issue was even addressed by the tribal court. Secondly, the only litigation before the Makah Tribal Court was between defendant Matt Ray and Josephine Ray. *Josephine Ray* is not even alleged to be one of the property owners. *See* Complaint, page 2, ¶ 2, lines 1-3. In this civil action, there are not less than twelve parties, including a different plaintiff (the United States) and eleven defendants. It is a civil rather than criminal action, and the civil action voluntarily dismissed in tribal court between the Rays was for breach of a bill of sale, not a trespass action. Consequently, it is specious for the Government to argue that it is foreclosed from proceeding in tribal court because the tribal court action was dismissed with prejudice and therefore all tribal remedies have been exhausted. For that dismissal to be *res judicata* and foreclose subsequent suits, there must have been: (1) final judgment; (2) on the merits; (3) an identity of parties; and (4) the same claim. Manifestly, none of these elements are present.

In this case, all of the parties are members of the Makah Tribe. The Makah Tribe has a functioning tribal court. It has a comprehensive code of laws approved by the United States Secretary of the Interior. The Makah Tribe, pursuant to an Indian Self-Determination Act

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contract, has assumed the responsibility for administration and regulation of Indian realty on the Makah Reservation, and the Makah tribal court has not had the opportunity to address the trespass issues between the tribal members.

As stated in ***Plainbull***, *supra*, federal courts should decline to exercise jurisdiction over transactions occurring within a reservation. "Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted." Id.:

> …unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs.

This case involves reservation-based internal intramural matters between members of the Makah Tribe which should be addressed in the first interest by the tribal court, consistent with longstanding federal policies favoring tribal self-government. To do otherwise runs the risk of the United States district court, vis-à-vis matters arising between Indians in Indian country, to become something in the nature of a small claims court.

It is disturbing to see the Government argue in its brief that the civil action in this cause must proceed in this court because "the Makah Nation's statute of limitations has run out and would bar criminal or civil trespass actions" (United States' Opposition, p. 5, lines 19-20). Such a preconception demonstrates the very type of arrogance which the Doctrine of Tribal Comity was developed to address. By this statement, the government has made its *own* subjective legal conclusion interpreting Makah Tribal law that the statute of limitations has run out—even though the Tribal Court has not even been presented with the opportunity to make its own determination as to whether such an action is barred from being heard by the Tribal

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Court. If the *tribal court* determines that it lacks jurisdiction to hear the cause because the limitations period has expired, that is one thing. However, for an outside government agent to determine that the issue need not be addressed by the tribal court because the United States has already concluded *for* the tribal court that that the tribal court lacks such authority demonstrates the same type of thinking behind paternal federal policies which denied tribes the opportunity to make their own decisions for some 150 years.

Like other jurisdictions, tribal courts have developed their own lines of precedential authority and a body of common law and case law which guides them in the determination of issues arising in litigation. Tribal courts should, in the first instance, have the opportunity to determine whether they have jurisdiction over a cause. The Government, by graciously interpreting the tribe's code for them would deny them even the opportunity to decide that issue.

The land alleged to have been trespassed upon in this case is beneficially owned by four individual Indian tribal landowners. Legal title, however, is vested in the United States. It is well established that neither state statutes of limitation nor *laches* runs against the United States, as the government possesses sovereign immunity against such statutes. It is also well established that statutes of limitation, for example "adverse possession" statutes do not run against Indian trust lands. It is well-settled that statutes of limitations do not run against the federal government when it is enforcing a public right or protecting a private interest. *United States v. Summerlin*, 310 U.S. 414, 416 (1940). *See also*, *Chesapeake and Delaware Canal Co. v. United States*, 250 U.S. 123, 125 (1919). The United States is only subject to a limitations period when Congress has expressly created one by federal statute. *United States v.*

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Thornburg, 82 F. 3d 886, 893 (9th Cir. 1996). In *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (9th Cir. 1956), a suit brought by the United States against persons allegedly misappropriating reservation water, the defendants unsuccessfully argued that the Government was barred from bringing suit by virtue of previous litigation. According to the Ninth Circuit, however, since the trustee, the United States, was not susceptible to suit, and could not be made a party to the prior litigation, neither statutes of limitation nor laches applied.

According to the doctrine of tribal comity, the Tribal Court gets to decide on its own whether it possesses jurisdiction over the cause in the first instance. For this Court to do otherwise is an unnecessary intrusion upon the sovereignty of another court. Rather than espousing its opinion as though it were a conclusive legal ruling, the Government's arguments should be presented to the Tribal Court. There are numerous arguments which conceivably be presented to the Tribal Court on this issue and it is contrary to judicial economy for this Court to consider them before a record is developed by the Tribal Court. For example, certain factual or legal developments can "toll" a statute of limitations. In this case, Jesse Chartraw, to whom the particular parcel upon which the house in this case was deeded, was, and may still be, a minor. During this period of legal incapacity, statutes of limitations are tolled until the plaintiff achieves the age of majority. Whether he was under any other disability or incapacity is unknown at present. Some tribal courts have developed bodies of law established by their own appellate courts to the effect that limitations periods are tolled when a defendant is outside the jurisdiction or off the reservation or that, in cases where violations of the customs and traditions of the tribe are implicated, there is no limitations period. This Court is not the best forum for litigation of such tribally-specific issues. As stated by the Supreme Court:

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> In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under [section 1302] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves" may "undermine the authority of the tribal court…and hence…infringe on the right of the Indians to govern themselves." A fortiori, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (internal citations omitted).

Additionally, it is a decision best left entirely up to the Tribal Court to determine whether its statute of limitations is an absolute "bar" to its jurisdiction, or whether it is in the nature of a "defense", which may be raised, or waived, by a defendant. It is unquestionable that courts of different jurisdictions have reached differing results on this issue. For this Court to set out to determine such issues for the Tribal Court is a serious intrusion upon tribal self-determination. As stated by the Supreme Court, vis-à-vis civil causes arising among reservation Indians, "reservation Indians have the right to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 217 (1959).

B. The Government Evades its Neglect and Lack of Processing of the Defendants' Administrative Appeals.

Finally, as to exhaustion of federal administrative remedies, the defendants have still received no answer as to why their timely appeals of the federal trespass determination and assessment of damages simply vanished in the halls of the U.S. Bureau of Indian Affairs. At the very least, notwithstanding the Comity issue, this court should stay its hand until an answer is given as to why those appeals, which they are entitled to by the Administrative Procedures

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Act, were never processed. The Government contends that the defendants failed to pursue their administrative appeals (United States' Opposition, docket entry no. 12, p. 2, lines 6-9) and, in support thereof, submits a letter dated June 27th (docket entry no. 13-4) granting an extension of time for Mathew and Gary Ray's response. However, the Government conveniently fails to disclose that, having received no response within the thirty day administrative appeal period (which expired June 26th), Mathew and Gary Ray had already submitted a response dated June 25, 2008 (see Appendix, Exhibit A, copy attached hereto). The Government also fails to note that, apart from Mathew and Gary Ray, each of the other defendants timely filed notices of appeal with the Bureau of Indian Affairs appealing the BIA's trespass determination and assessment of damages. These appellants were *pro se* and appealed separately from Mathew and Gary Ray, who were represented by counsel. None of these defendants received any further response from the United States to their timely appeals. The Government should not be rewarded for its lack of forthrightness in failing to disclose that none of these other defendants received any administrative due process whatsoever either.

CONCLUSION

Ninth Circuit and Supreme Court precedent militate in favor of this Court exercising discretion and dismissing the Complaint as a matter of Comity, and the guidance unequivocally expressed in such published opinions is that, rather than accepting the parties' assertions that the case should proceed because the Tribal Court lacks jurisdiction, those arguments must be presented in the first instance to the Tribal Court. To do otherwise, undermines Congressional policies favoring promotion of Tribal self-government and self-determination and impairs the ability of tribal government to manage its internal affairs.

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For the foregoing reasons this civil action should be dismissed.

Respectfully submitted this 26th day of April, 2011.

/s/ Jack W. Fiander
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Certificate of Service

The undersigned certifies that the foregoing was filed with the Clerk of Court using the CM/ECF system on the above date, with a copy served electronically upon Michael.Diaz@usdoj.gov.

s/Jack W. Fiander

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