

Hon. Benjamin Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATHEW G. RAY; GARY RAY; CYNTHIA J.  
CASTANEDA; J. GUADALUPE CASTANEDA  
III; RALPH COX; ROBERT LONG; EUGENA D.  
HALTTUNEN; GLEN A. HALTTUNEN JR.;  
STEVEN W. MARKISHTUM; DONALD H.  
SWAN; AND HEATHER RAY-SWAN,

Defendants.

Civil Action No. 11-cv-5056-BHS

UNITED STATES' OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
AND ITS CROSS-MOTION TO DISMISS  
DEFENDANTS' COUNTERCLAIMS

(Please note Cross-Motion on Calendar  
for: May 20, 2011)

Plaintiff, the United States of America, by and through its undersigned counsel, hereby  
opposes Defendants' Motion to Dismiss (Dkt. 9, "Motion") and, additionally, respectfully cross  
moves this Court to dismiss the Counterclaims in Defendants' Answer (Dkt. 7 at 5-6, "Answer").

**I. INTRODUCTION**

In their Motion, Defendants ask this Court to dismiss this action "or, in the alternative, to  
abstain from entertaining this cause or to stay further proceedings" based primarily upon one and  
only one fact: that "a civil action is currently pending in Makah Tribal Court" between one  
defendant, Mathew G. Ray, and his grandmother, who is a former landowner of part of the  
property in question. *See* Dkt. 10 at 1-2 & 8 ("Memorandum").

The United States respectfully requests that this Court deny Defendants' Motion for three  
reasons. First, and most basically, Defendants are simply wrong on the facts: the referenced  
Tribal civil lawsuit was voluntarily dismissed with prejudice in October 2009 and the Makah  
Nations' statute of limitations would bar any future lawsuit in its Tribal Court. Second, even if a

1 new lawsuit could be brought by any Defendant or the landowners in Tribal Court -- which it  
 2 cannot -- this Court would have concurrent jurisdiction under the Makah Nations' own laws.  
 3 Third, the Tribal lawsuit was a breach of contract claim between one defendant and one former  
 4 landowner, not Plaintiff or the current landowners, on issues that predated the trespass in  
 5 question. To be applicable, the doctrine of comity requires more of a nexus.

6 Similarly, Defendants' secondary argument (that the Bureau of Indian Affairs ("BIA")  
 7 did not exhaust its own administrative process) is both factually and legally unfounded. It is  
 8 Defendants, not the United States, who had the burden to and failed to exhaust the administrative  
 9 process.

10 Finally, Defendants have stated that they will voluntarily dismiss their Counterclaims.  
 11 Nonetheless, in an abundance of caution, the United States respectfully asks this Court to dismiss  
 12 the Counterclaims in Defendants' Answer because the United States has not waived its sovereign  
 13 immunity with respect to the claims that Defendants have asserted against it.

## 14 **II. BACKGROUND**

15 In their Memorandum, Defendants rightly state that "[f]or purposes of ruling upon a  
 16 [12(b)(1)] motion to dismiss, the Court accepts as true all well-pleaded allegations contained in  
 17 the complaint, with doubts resolved in favor of the non-moving party." Dkt. 10 at 2; *see also*,  
 18 *e.g.*, *McGowan v. Scoggins*, 890 F.2d 128, 136 (9th Cir. 1989) (same); *Rennie & Laughlin, Inc.*  
 19 *v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1957) (when there are factual disputes, such  
 20 motions are disfavored).

21 The following are the only facts pertinent to the disposition of Defendants' Motion:<sup>1</sup>

### 22 **A. Brief Summary of Facts Underlying the Present Action**

23 This is a civil action for trespass, waste, conversion, and nuisance brought by the  
 24 United States -- acting on its own behalf and as trustee on behalf of the Makah Nation,  
 25 and at the request of the BIA and the Landowners -- against Defendants for their wanton  
 26

27 <sup>1</sup> The majority of the facts in support of the present Opposition are taken from Plaintiff's Complaint and Defendants'  
 28 Motion. Plaintiff also files herewith the Declarations of Stephanie Lynch and Steve Robins. Because Defendants' Motion  
 seeks dismissal on the basis of a lack of jurisdiction, the Court properly may consider these declarations in ruling on the  
 Motion. *See Drier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997).

1 and needless destruction, on September 22, 2007, of a house on and other damages done  
2 to Allotment 108-294, a 9.86-acre allotment that lies within the boundaries of the Makah  
3 Indian Reservation (the "Property"). *See* Dkt. 1 ¶ 1 ("Complaint").

4 The United States holds the Property in trust for Jesse Chartraw, Dennis Leonard, Betty  
5 Croy and JoDean Haupt (collectively, the "Landowners"), who are the current owners of the  
6 Property, who are members of the Makah Nation, and who also requested that this lawsuit be  
7 brought. *See* Dkt. 1 ¶ 2; *see also* Declaration of Stephanie Lynch ("Lynch Dec.") ¶ 3 & Exhibit 1  
8 thereto (Certified Title Status Report ("TSR")) filed herewith.<sup>2</sup>

### 9 **B. The Makah Civil Action**<sup>3</sup>

10 On June 10, 2008, Defendant Mathew Ray filed a civil complaint in Makah Tribal Court  
11 against his grandmother, Josephine Ray. *See* Declaration of Steve Robins ("Robins Dec.") ¶ 3 &  
12 Exhibit 1 thereto (Civil Complaint) filed herewith. Mrs. Ray is a former partial landowner of the  
13 property in question. *See* Dkt. 1 ¶¶ 11, 14, & 17 (detailing transfer to Landowner Chartraw); *see*  
14 *also* Lynch Dec. at Exhibit 1 thereto (TSR).

15 On October 27, 2009, the Makah Tribal Court entered an Agreed Order of Dismissal, in  
16 which Mr. Ray agreed to dismiss his claim with prejudice and Mrs. Ray agreed to dismiss her  
17 counterclaims with prejudice. *See* Robins Dec. ¶ 4 & Exhibit 2 thereto (Order of Dismissal). For  
18 reasons of judicial economy, the Tribal Court Judge had strongly suggested that the parties  
19 dismiss the case. *See* Robins Dec. ¶ 5. Additionally, the dismissal was not executed pursuant to  
20 any type of settlement agreement.<sup>4</sup>

21 //

22  
23 <sup>2</sup> A TSR is the record issued by BIA's Land Titles and Records Offices to document the status of Indian trust land. *See* 25 C.F.R. § 150.2 (j) & (o).

24 <sup>3</sup> As Defendants indicated in their Motion (Dkt. 10 at 2 & 7-8), the Makah Nation sought to criminally prosecute  
25 Defendants in Tribal Court, charging Defendants either with Criminal Mischief or Complicity with Criminal Mischief. *See*  
26 Lynch Dec. ¶ 8 & Exhibit 5 (sample Criminal Complaint, Letter of Makah Prosecutor, & Order of Dismissal); *see also* Makah  
27 Law and Order Code § 5.2.07 (available at <http://www.narf.org/nill/Codes/makahcode/makahcodetoc.htm>). In a letter dated  
28 October 10, 2008, the Makah Prosecutor reported, in pertinent part, that "the tribe needs to consider Judicial economy  
whereby a trial of this magnitude would be quite costly, additionally, we may not be able to seat a jury in this jurisdiction. . . I  
am still convinced the defendants are using the court system by requesting a jury trial, knowing it would be difficult to seat a  
jury." *Id.* The Makah prosecutors ultimately dismissed the criminal case in October 2008. *Id.*; Dkt. 10-1 at 12 (Exhibit F).

<sup>4</sup> The undersigned provided the Dismissal Order to counsel for Defendants, who declined to withdraw their Motion.

**C. The BIA's Administrative Process**

Concurrently, in late May 2008, BIA Northwest Regional Director Stanley Speaks sent administrative Trespass Demand Notice Letters to each of the Defendants based upon his (earlier) finding that the Defendants had trespassed and destroyed the home on the Property. *See* Lynch Dec. ¶ 4 & Exhibit 2 thereto (sample Trespass Demand Notice Letter). Specifically, after reiterating BIA's finding that Defendants had entered the Property without permission of the Landowners and "acted in concert" to wrongfully destroy the home on the Property, Regional Director Speaks assessed each of the Defendants \$502,800 in damages. *Id.* at Exhibit 2 thereto. Regional Director Speaks further informed them that failure to pay the assessment by June 30, 2008 would result in BIA referring the matter to the Regional Solicitor's Office "for appropriate legal action." *Id.*

Defendants responded in letters dated June 17, 24 and 25, 2008. *See* Lynch Dec. ¶ 5 & Exhibit 3 thereto (referenced Letters). In his June 17, 2008 letter, Defendant Mathew Ray requested an additional 60 days to respond to the Trespass Demand Notice Letter, adding that, only if the BIA was not agreeable to granting an extension, to "consider this as a notice appealing the trespass determination contained in the May 27, 2008 letter." *Id.* at Exhibit 3. Despite the requested extension, on June 25, Defendant Mathew Ray sent the BIA a letter, on behalf of all Defendants, that provided additional information that he asked the BIA to consider "in determining whether to pursue Trespass" against Defendants. *Id.* Prior to receiving Defendants' June 25 letter, in a letter dated June 27, 2008, the BIA granted Defendants' requested extension. *See* Lynch Dec. ¶ 6 & Exhibit 4 thereto (June 27 BIA letter).

Defendants thereafter did not further respond to the Trespass Demand Notice Letters, except to send the BIA a letter dated November 6, 2008, notifying the BIA of the dismissal of the Criminal Complaint in Makah Tribal Court. *See* Lynch Dec. ¶ 7; *see also* Dkt. 10-1 at 12 (Exhibit F, Nov. 6, 2008 letter). At no time did Defendants appeal the BIA's determination to the Interior Board of Indian Appeals ("IBIA"), which has administrative jurisdiction to hear appeals of administrative determinations such as those made here. *See id.*; *see also* 43 C.F.R. § 4.1(b)(2)(I) (describing scope of IBIA's administrative jurisdiction).

### III. ARGUMENT

Defendants ask this Court to dismiss this lawsuit based upon the doctrine of comity and, secondarily, the BIA's alleged failure to exhaust its own administrative process. The United States respectfully submits that neither argument has merit and, therefore, this Court should deny Defendants' Motion.

#### **A. Defendants' Comity Argument is Factually Wrong and Legally Infirm**

Defendants claim that a civil lawsuit remains pending in Makah Tribal Court and, in turn, argue that "until such time as the Tribal court, which appears to have jurisdiction over the matter, has had the opportunity to address the matter, this court's exercise of jurisdiction over the subject matter would infringe upon the authority of the Tribal Court in a matter which clearly touches upon internal intramural relations among members of the tribe." Dkt. 10 at 8-9. Defendants' argument fails for three reasons.

First, and of fundamental importance, Defendants are just wrong on the facts. As detailed above, the referenced Tribal civil lawsuit was voluntarily dismissed with prejudice in October 2009, at least in part, for reasons of judicial economy. *See* Robins Dec. ¶¶ 4-5 & Exhibit 2. A Tribal Court for a Nation of approximately 1200 members apparently could not entertain an action, whether civil or criminal, involving potentially dozens of witnesses. *Id.*; Lynch Dec. ¶ 8; *see also* [http://en.wikipedia.org/wiki/Makah\\_people](http://en.wikipedia.org/wiki/Makah_people).

Moreover, no further lawsuit may be brought in Makah Tribal Court because the Makah Nation's statute of limitations has run and would bar criminal or civil trespass actions and any other similar causes of action. *See, e.g.,* Makah Law and Order Code ("Code") § 2.2.02 & § 3.2.02 (available at: <http://www.narf.org/nill/Codes/makahcode/makahcodetoc.htm>). Thus, any future such action would be "patently violative" of the Makah Nation's "express jurisdictional prohibitions" and this action exempt from considerations of comity. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).<sup>5</sup>

---

<sup>5</sup> In *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992), the Ninth Circuit held that abstention may be appropriate, "even in the absence of a pending tribal court action," if a lawsuit could be brought in tribal court. Here, again, that is simply not the case, not only because the referenced civil case was dismissed, but also because the statute of limitations would bar any future lawsuit and, as described *infra*, such a suit would not be a lawsuit with the required nexus of claims.

1 In short, there simply is no pending, and will be no future, civil suit in Tribal Court and  
 2 so, in Defendants' own words, "such time" has come for this Court to rightly exercise its  
 3 jurisdiction over this matter. **The United States and the Landowners have no other forum in**  
 4 **which to obtain justice.**

5 Second, even if a new lawsuit could be brought by any Defendant or the Landowners in  
 6 Tribal Court -- *which it cannot* -- this Court nonetheless would still have concurrent jurisdiction  
 7 under the Makah Nations' own laws. Specifically, the Makah Law and Order Code provides that  
 8 its Tribal Court's jurisdiction "shall include all territory within the Makah Reservation  
 9 boundaries, including fee patent lands, *allotments*, assignments, roads, waters, bridges, and lands  
 10 used for agency purposes . . . ." Makah Code § 1.3.01 (emphasis added) (available at:  
 11 <http://www.narf.org/nill/Codes/makahcode/makahcodetoc.htm> ). However, and crucially, the  
 12 Makah Law and Order Code specifies that, in cases where the United States has "valid  
 13 jurisdiction," the Tribal Court's jurisdiction "shall be concurrent." *Id.* § 1.3.02. Defendants  
 14 rightly have not challenged that this Court has valid personal and subject matter jurisdiction over  
 15 them.<sup>6</sup> Therefore, pursuant to the Makah's Tribal Code itself, this Court has, at a minimum,  
 16 concurrent jurisdiction over this matter that should alleviate concerns of comity.

17 Third, in Defendants' own words, the civil action allegedly "pending" was "a civil action  
 18 to determine the validity and legal effect of the 'bill of sale' between one of the [former] Indian  
 19 landowners [Mrs. Ray] and the principal defendant [Mathew Ray]." Dkt. 10 at 8. In other  
 20 words, the civil lawsuit was essentially a breach of contract action between one defendant and  
 21

---

22 <sup>6</sup> Nonetheless, it should be noted that, in addition to 28 U.S.C. §§ 1331, 1345, 1355 and 2201, 28 U.S.C. § 2415(b) grants  
 23 the United States authority to bring trespass actions on behalf of individual Indians in Federal court. Accordingly, the Ninth  
 24 Circuit repeatedly has held that jurisdiction over a trespass complaint brought by the United States is proper. *See, e.g., United*  
 25 *States v. Torlaw Realty, Inc.*, 348 Fed. Appx. 213, 217-218 (9th Cir. 2009) ("As the Government holds the allotment in trust  
 26 for allottees, it has the power to control occupancy on the property and to protect it from trespass"); *United States v. Milner*,  
 27 583 F.3d 1174, 1182 (9th Cir. 2009); *United States v. Pend Oreille PUD No. 1*, 28 F.3d 1544, 1550 n. 8 (9th Cir. 1994);  
 28 *United States v. Torres-Martinez Band of Mission Indians*, 799 F. Supp. 1052, 1056 (S.D. Cal. 1992); *see also generally*  
*United States v. Mitchell*, 445 U.S. 535 (1980) (the General Allotment Act of 1887 created a limited trust relationship  
 between the United States and the allottee); *County of Oneida v. Oneida Indian Nations*, 470 U.S. 226, 334 (1985) (federal  
 common law recognizes a variety of causes of action to protect Indian lands from trespass). Moreover, although the United  
 States has entered into a Self-Governance Compact with the Makah Nation, 25 U.S.C. § 458ff (b) provides that "Nothing in  
 [that] subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians  
 with trust allotments." *See also* 25 C.F.R. §§ 1000.228(f)-(g).



one former landowner, not the United States or the current landowners, and was based upon facts that preceded the destruction of September 22, 2007. Here, we have an action brought by the United States against eleven Defendants for trespass, waste, nuisance and conversion. That is hardly the claim nexus that comity assumes. *Cf., e.g., Nat'l Farmers Union Ins.*, 471 U.S. at 847.

**B. Defendants' Exhaustion Argument is Factually and Legally Unfounded**

Defendants secondarily argue that this Court should dismiss this lawsuit because "the Government has failed to exhaust its own administrative remedies before filing this action." Dkt. 10 at 9.

In response, first, as explained in detail above and as the evidence before this Court shows, Defendants simply did not file administrative appeals. *See* Lynch Dec. ¶ 7. At best, Defendants asked for a 60 day extension to respond to BIA's Trespass Demand Notice Letters and provided some additional information thereafter. *Id.* ¶ 5. However, it is uncontested that Defendants did not file an appeal with the IBIA, which could have heard the appeal, or follow any of its procedures. *Id.* at ¶ 7; *see also* 43 C.F.R. § 4.1(b)(2)(I) (administrative jurisdiction), 25 C.F.R. § 2.4(e) (deciding official), & 43 C.F.R. § 4 Subparts B & D (procedures).

Second, there is no basis upon which to assert that the BIA or United States must exhaust administrative remedies prior to suit. Defendants' Motion is bereft of any authority for such an assertion. *See* Dkt. 10 at 9. Moreover, there is no administrative mechanism by which the BIA itself can bring a claim for money damages against individuals before the IBIA. *See, e.g., Henderson v. Portland Area Director*, 16 IBIA 169, 176 (1988) (noting the IBIA is not a court of general jurisdiction and that it has not been delegated the authority to award money damages against BIA or "any other party"). Therefore, the United States could not have obtained the relief it herein seeks in some sort of procedurally tortured appeal to the IBIA.

Finally, and most importantly, because Defendants have not (yet) been deprived of any property interest, they have not been deprived of due process. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the Constitution requires "some form of hearing . . . before an individual is deprived of a property interest."). Indeed, it is this Court that will provide the

1 Defendants the due process, within the meaning of the Fifth and Fourteenth Amendment, to  
2 which they are entitled.

3 In short, Defendants' secondary exhaustion argument is both factually and legally  
4 unfounded and should be rejected.

5 **C. This Court Must Dismiss Defendants' Counterclaims**

6 Although Defendants have stated that they will voluntarily dismiss their Counterclaims  
7 (Dkt. 11 at 4), in an abundance of caution, the United States respectfully moves this Court to  
8 dismiss the Counterclaims in Defendants' Answer for the following reasons.<sup>7</sup>

9 The United States, as sovereign, is immune from suit unless it consents to be sued. *See*  
10 *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107  
11 (9th Cir. 1995). Any waiver of that immunity must be strictly construed in favor of the United  
12 States. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). If a claim does not  
13 fall squarely within the strict terms of a waiver of sovereign immunity, a district court is without  
14 subject matter jurisdiction. *See, e.g., Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993).

15 The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671-80, is such a  
16 limited waiver of sovereign immunity, rendering the United States liable for only certain torts of  
17 federal employees. *See* 28 U.S.C. § 1346(b). However, the FTCA does not waive sovereign  
18 immunity for so-called constitutional torts. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S.  
19 471 (1994); *Roundtree v. United States*, 40 F.3d 1036, 1038 (9th Cir. 1994) ("First, it is pellucid  
20 that the United States cannot be sued on the theory that there has been a violation of [Plaintiff's]  
21 constitutional rights."); *see also Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1985)  
22 (sovereign immunity precludes extension of *Bivens* to allow suits against the Government for  
23 alleged constitutional violations).

24 //

25 //

26 //

27  
28 <sup>7</sup> Plaintiff notes that, pursuant to Fed. R. Civ. P. 7(a), this Cross-Motion to Dismiss is not a "pleading."



1 Here, in their collective answer, Defendants asserted Counterclaims based exactly on  
2 such constitutional grounds, stating that the “Government’s conduct in bringing this action is  
3 contrary to defendant’s equal rights to enjoyment of property and constitutes discrimination” and,  
4 thus, “is a denial of due process and equal protection.” Dkt. 7 at 5-6.

5 Defendants’ Counterclaims are flatly outside any waiver of Plaintiff’s sovereign  
6 immunity and, therefore, outside this Court’s jurisdiction.

7 **IV. CONCLUSION**

8 Based on the foregoing, the United States respectfully requests that this Court deny  
9 Defendants’ Motion and dismiss with prejudice Defendants’ Counterclaims.

10  
11 Dated this 25th day of April, 2011.

12 Respectfully submitted,

13 JENNY A. DURKAN  
14 United States Attorney

15 /s/ J. Michael Diaz  
16 J. MICHAEL DIAZ, WSBA #38100  
17 Assistant United States Attorney  
18 United States Attorney’s Office  
19 700 Stewart Street, Suite 5220  
20 Seattle, Washington 98101-1271  
21 Phone: 206-553-7970  
22 Fax: 206-553-4067  
23 E-mail: [Michael.Diaz@usdoj.gov](mailto:Michael.Diaz@usdoj.gov)

24 Attorneys for the United States of America  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the United States Attorney Office for the Western District of Washington; that she is a person of such age and discretion as to be competent to serve papers; and that, on April 25, 2011, she electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the plaintiff(s):

Jack Warren Fiander  
Email: [townnuklaw@msn.com](mailto:townnuklaw@msn.com)

DATED this 25th day of April, 2011.

s/Tina Litkie  
TINA LITKIE  
Legal Assistant  
United States Attorney's Office  
700 Stewart Street, Suite 5220  
Seattle, Washington 98101-1271  
Phone: 206-553-8639  
Fax: 206-553-4073  
E-Mail: [tina.litkie@usdoj.gov](mailto:tina.litkie@usdoj.gov)