Hon. Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. MATHEW G. RAY, et al., Defendants.	Civil Action No. 11-cv-5056-BHS **UNITED STATES' MOTION FOR RECONSIDERATION** (Please note Motion on Calendar for: July 5, 2011)

Pursuant to Local Civil Rule 7(h), the United States of America, by and through its undersigned counsel, respectfully moves the Court to reconsider its Order of June 21, 2011 (Dkt. 18, "Order") granting Defendants' Motion to Stay (Dkts. 9 and 10, collectively "Motion").

I. INTRODUCTION

The United States recognizes that motions for reconsideration are disfavored and that reconsideration is appropriate "ordinarily" only when there is a "showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the court's] attention earlier with reasonable diligence." Local Civil Rule 7(h)(1). Even under that standard, the United States, nonetheless, believes that reconsideration is warranted here for the following two reasons:

First, the United States believes that the Court may have overlooked (a), that under the Makah Nation's own laws, this Court has concurrent jurisdiction over the United States' indisputably "valid" claim for trespass on United States trust property; (b) that the United States' action includes a claim to reduce an administrative penalty to judgment, which is unaffected by principles of comity; and that (c) referral to Makah Tribal Court would "serve no purpose other than delay," given the Tribal Court's great reluctance to hear prior, related cases.

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Second, Defendants' Motion was based on one fact: that "a civil action is currently pending in Makah Tribal Court." *See* Motion at 1-2 & 8. Upon learning that that case had been dismissed, Defendants then raised broader legal issues in their Reply brief for the first time, to which the United States was unable to respond under the Court's briefing rules. The United States submits that the Court would benefit from further briefing on those issues and submits relevant, new legal authority, which it could not bring earlier with reasonable diligence, and which supports the United States' fundamental duty to protect its trust property from damage, despite any initial -- but ultimately ungrounded -- concerns related to the doctrine of comity.

II. BACKGROUND FACTS

The United States brings this civil action against Defendants for the violent destruction of a house on and other damage done to property that the United States owns and holds in trust for four members of the Makah Nation. *See* Dkt. 1 at 8-10 ("Complaint"). The damage to the United States' trust property included damage to a culvert, the septic and electrical systems, a propane unit, and other resulting harm to the surrounding river and environment. *Id.* ¶ 34. In addition to tort claims, the United States brings suit to the reduce the civil penalty imposed by its agency, the Bureau of Indian Affairs ("BIA"), to judgment. *Id.* at 10-11.

III. EVIDENCE POSSIBLY OVERLOOKED BY THE COURT

The United States does not seek to re-litigate whether a new lawsuit in Makah Tribal Court by any landowner or the United States would be barred by the Makah's Nation's statute of limitations. Instead, as argued in its Opposition to Defendants' Motion, the United States brings the present motion to remind the Court, first, that, under the Makah Nations' own laws this Court has concurrent jurisdiction over this matter. *See* Dkt. 12 at 6. Specifically, the Makah Law and Order Code plainly states that, in cases where a United States District Court has "valid jurisdiction," the Tribal Court's jurisdiction "shall be concurrent," and not exclusive or primary. *See* Makah Code § 1.3.02 (http://www.narf.org/nill/Codes/makahcode/makahcodetoc.htm); *see also* Black's Law Dictionary 855 (7th ed. 1999) (concurrent jurisdiction is "jurisdiction exercised simultaneously by more than one court over the same subject matter and within the same territory, with the litigant having the right to choose the court in which to file the action")

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(emphasis added). In other words, not only federal law, but Makah law itself envisions and permits this case to be heard in this Court, if there is "valid" federal jurisdiction.

Here, there is no dispute that this Court has "valid jurisdiction," as federal law permits the United States to sue for damage done to its property, including property that it holds in trust on behalf of individual Indians. *See* 28 U.S.C. § 2415(b); *United States v. Torlaw Realty, Inc*., 348 Fed. Appx. 213, 217-218 (9th Cir. 2009); *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). Indeed, this Court has already correctly held that principles of comity do not affect its valid subject matter jurisdiction over this case. *See* Order at 3.

Therefore, this Court would not be usurping Makah jurisdiction, but acting in express conformance with, and due deference to, Makah laws by permitting this case to proceed at this time in this Court under the Tribe's own grant of concurrent jurisdiction.

Additionally, as described further in its Opposition, the United States, pursuant to 28 U.S.C. § 1355 and 25 U.S.C. § 201, seeks to reduce to judgment the civil penalty the BIA imposed upon Defendants. *See* Dkt. 12 at 4. The United States submits that the doctrine of comity does not and should not prevent the United States from proceeding upon this claim, which relates to the BIA's distinct, statutory authority to issue civil penalties and fines. In turn, the United States requests that this Court exercise its discretion to permit, at least, that portion of this case to proceed, independent, if necessary, of the other causes of action.

Finally, the Tribal Court twice "strongly suggested" that parties dismiss related matters in its Court for reasons of judicial economy. *See* Dkt. 12 at 3 and n.2. Indeed, the Tribal prosecutor stated that she was "still convinced the defendants are using the [Tribal] court system by requesting a jury trial, knowing it would be difficult to seat a jury." *See* Dkt. 13-5 at 3 (Letter); *see also* Dkt. 14 ¶ 4 (dismissal of civil complaint also for Tribal judicial economy). Accordingly, a stay to exhaust Tribal remedies "would serve no purpose other than delay," under *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.21 (1985).

To the extent that the Court may have overlooked any of these arguments, the United States asks it to reconsider its Order.

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IV. FULLER BRIEFING AND NEW LEGAL AUTHORITY ON COMITY

Defendants never acknowledged that their initial basis for dismissal was factually unfounded. Instead, they pivoted and unfairly (and incorrectly) briefed broader legal issues in their Reply, to which the United States was unable to respond under the Local Civil Rules. To correct any resulting misapprehension, the United States submits that: (A) the legal authority Defendants belatedly raised (and the Court relied upon) is distinguishable and (B) other more recent, relevant authority upholds the United States' fundamental duty to protect its trust property from damage, despite facial concerns related to the doctrine of comity.

A. Defendants' Authority is Distinguishable

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985), does not stand for the sweeping proposition that tribal courts must always "consider the issue of their own jurisdiction first." Order at 2. Rather, the Supreme Court held that when (1) a tribal court's on-going "jurisdiction is being challenged," the exhaustion rule should be applied because it (2) supports Congress' "policy of supporting tribal self-government and self-determination" and (3) promotes judicial economy, by providing United States courts "with the benefit of [tribal court] expertise" in cases involving tribal law. *National Farmer*, 471 U.S. at 856-57.

Here, none of these three (3) factors is present: (1) the United States is not challenging any on-ongoing assertion of tribal jurisdiction; (2) the United States supported Makah self-governance by staying its hand while the Makah Court entertained related actions (*see* Dkt. 12 at 3 and n.2); and (3) the Makah Court has no unique expertise in the present causes of action because this case is brought exclusively under federal and Washington state law, and not Makah law. Thus, the United States submits that *National Farmer*'s-type exhaustion is not required.

This understanding of *National Farmer*'s is confirmed by *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992), upon which Defendants heavily relied. *See* Dkt. 15 at 2ff. In *Plainbull*, the Ninth Circuit agreed with the district court that the underlying suit "essentially involve[d] the enforcement of a tribal resolution against a tribal member," rendering the federal aspects of the suit "immaterial." *Id.* at 725 & 728. In turn, as the suit was "an internal tribal

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matter," abstention was appropriate because it supported the Congressional policy encouraging Tribal self-governance and promoted judicial economy. *Id*. at 725 & 727-728 (*citing National Farmer*).

Again, there is no Makah "tribal resolution" or Makah law involved in the instant case; consequently, *National Farmer*'s-type exhaustion is not required. Indeed, the *Plainbull* Court itself recognized that "the doctrine of abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 727 (*citing County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 188 (1959)). Thus, this Court should not expand that narrow doctrine in this case because no tribal resolution or law is involved.

B. Recent Authority Upholds the United States' Duty to Protect Trust Land

Far from involving tribal law, this case is, at its heart, a federal case: namely, a lawsuit based upon federal common and statutory law intended to protect United States trust property from damage. The Supreme Court repeatedly has recognized that such actions enforce long-held and important Congressional policies related to that unique trust relationship. *See, e.g., United States v. Jicarilla Apache Nation*, 564 U.S. ___, 180 L. Ed. 2d 187, 200-201, 2011 U.S. LEXIS 4381 at *25-26 (2011) (describing the "power existing in Congress to administer upon and guard the tribal property" and explaining the "real and direct interest in the guardianship [the United States] exercises over the Indian tribes, " including Congress's intent for "the United States to hold land in trust under the General Allotment Act) (citations omitted). The Executive Branch carries out those policies by, among other things, bringing actions such as the instant case.[1]

Accordingly, recent, relevant authority upholds this fundamental duty to protect government interests, despite potential -- but ultimately ungrounded -- exhaustion concerns. Specifically, two district courts have recently held the United States is not required to exhaust

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[1] It is also noteworthy that, in the decades since *National Farmers,* the United States has initiated many enforcement actions in federal court involving both tribes and individual Indians. *See, e.g., EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993); *United States v. Thompson*, 941 F.2d 1074 (10th Cir. 1991); *United States v. Brown,* 824 F. Supp. 124 (S.D. Ohio 1993); *United States v. Weyerhaeuser Co.*, 765 F. Supp. 643 (D. Or. 1991). These cases make no mention of the exhaustion rule. More pertinently, the United States has brought actions for trespass under the federal common law, again without exhaustion issues preventing their prosecution. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994); *United States v. Imperial Irrigation Dist*., 799 F. Supp. 1052 (S.D. Cal. 1992).

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tribal remedies prior to filing in federal court where, as here, it brings an action on its own behalf to protect government interests, even for actions arising on a reservation, if the action does not involve the tribe. *See United States v. American Horse*, 352 F.Supp.2d 984, 989 (D.N.D. 2005); *United States v. Vanderwalker,* 2010 U.S. Dist. LEXIS 131227, *10 (D.S.D. 2010). In particular, in *American Horse*, the district court held that tribal exhaustion was not required because, unlike *Plainbull*, the suit did not involve "an internal tribal matter" and was not brought on behalf of or have any "direct connection" to the tribe. *American Horse*, 352 F. Supp. 2d at 990.

This is the situation in the instant case. This action undoubtedly will benefit (and was requested by) the individual landowners. *See* Dkt. 12 at 3. Regardless, the United States is acting to protect its own vital, historic and, indeed, "moral" interests in its trust property, independent of the interests of the Tribe. *Jicarilla*, 180 L. Ed. 2d at 200-201. Indeed, Defendants have correctly argued that the Makah Nation is not implicated in this matter. *See* Dkt. 15 at 1 & n.1; see also Dkt. 7 (Answer) at ¶ 1 ("Defendants . . . deny that the Makah Nation has any interest in the property which is the subject matter of the suit herein."). Thus, "this is not an instance where either tribal self-government or self-determination is implicated" and exhaustion is not warranted. *Vanderwalker,* 2010 U.S. Dist. LEXIS at *10. In turn, like those courts, this Court should permit this matter to go forward because it advances Congressional policies of equal importance as the doctrine of comity: namely, the protection of United States trust property.[2]

V. CONCLUSION

Based on the foregoing, the United States respectfully requests that this Court reconsider its Order and permit it to defend its trust property in this Court.

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[2] Not insignificantly, the United States also asks this Court to consider the practical effect of its Order. If its Order stands, to protect trust property on Indian land, government attorneys -- currently required only to have an active membership in one bar -- potentially will have to join the 25 tribal bars in the Western District of Washington and learn 25 different rules of court procedure. Even a cursory review of the tribal codes for these tribes shows that this would be no small feat. As a 1992 tribal court procedural handbook for federally-recognized tribes in Washington State states, "fundamental differences are evident. First there is no consistency between the courts from tribe to tribe. Each tribe operates its own courts using its own code and procedures. Thus, a practitioner must be familiar with the unique scope and procedures of each tribal court in which she practices." Ralph Johnson & Rachael Paschal, Tribal Court Handbook for the 26 Federally Recognized Tribes in Washington State at I (2d ed., 1992) (available at http://www.msaj.com/papers/handbook.htm). Imposing such requirements on government attorneys will impact materially and adversely the federal government's ability to exercise its trust responsibilities and protect trust lands.

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Respectfully submitted,

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