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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' REPLY TO DEFENDANTS' RESPONSE TO ITS MOTION FOR RECONSIDERATION** (Re-noted on Motion on Calendar for: August 3, 2011)

Pursuant to this Court's Orders of July 11 and 21, 2011 (Dkt. Nos. 20 and 24), the United States files this Reply to Defendants' Response (Dkt. 23, "Response") to the United States' Motion for Reconsideration (Dkt. 19, "Motion").

I. INTRODUCTION

In their Response, Defendants cite no new case law, provide no new evidence, and do not attempt to distinguish the new legal authority the United States cited in its Motion. Instead, Defendants misconstrue the United States' arguments in an unsuccessful attempt to avoid the following two undisputed facts: (1) that the Makah Nation's own laws anticipate this type of case and expressly authorize this Court to entertain it without any suggestion of "disrespect" to the Nation's sovereignty or its courts' jurisdiction; and (2) that the legal principles underlying the doctrine of comity do not require exhaustion of tribal remedies because no Makah law is implicated when the United States is merely seeking, as here, to protect its own trust lands. For these reasons, the United States respectfully requests that this Court grant its Motion and permit this matter to proceed.

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II. ARGUMENT

Defendants claim that the United States asserted in its Motion that this "Court's authority was [] conferred upon it by the Makah Tribe." *See* Response at 2, line 5. Defendants misconstrue the United States' argument regarding tribal law. There is no dispute that the question here is not whether this Court has jurisdiction under federal law, but, rather, whether the doctrine of exhaustion of tribal remedies requires that this Court abstain from exercising jurisdiction. The United States argued that, as expressed in its Tribal Code, the Makah Nation itself anticipated and preemptively approved that a case such as this one -- where there is undisputed underlying "valid" federal jurisdiction -- could be heard in this Court without offending tribal prerogatives. *See* Makah Code § 1.3.02. Defendants do not contest this plain reading or the applicability of that Makah statute. Consequently, the United States concluded in its Motion that this Court would not be "disrespecting" Makah sovereignty or usurping its courts' jurisdiction, but rather would be acting in express conformance with Makah laws if it were to permit this case to proceed at this time in this Court. Defendants provide nothing that questions that conclusion.

Similarly, Defendants misconstrue the United States' presentation of the doctrine of comity. The United States is not here arguing that, under Ninth Circuit law, the doctrine of comity requires the exhaustion of tribal remedies only when there is a "case currently pending in the [] Tribal Court," nor that the doctrine of comity should be applied only when it may "expedite cases," create a "better record," or only when the government "is assured of a favorable result." *See* Response at 1, lines 22-23, at at 3, lines 15-16, & at 4, line 5, respectively.

Rather, it is the United States' position that binding case law holds 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 Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

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As argued more fully in its Motion, the United States respectfully submits that none of these three factors is present here because: (1) the United States is not challenging any assertion of tribal jurisdiction; (2) the United States supported Makah self-governance and self-determination by staying its hand while the Makah Court entertained, but ultimately declined, related actions;[1] 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, not Makah law. Thus, the United States submits that the doctrine of comity is not applicable and does not require the exhaustion of tribal remedies.

As also argued more fully in its Motion, both (a) *United States v. Plainbull*, 957 F.2d 724, 725, 728 (9th Cir. 1992), upon which Defendants continue to rely in their Response, and (b) the two cases that the United States submitted for the first time in its Motion (*Vanderwalker* and *American Horse*) support this understanding of the doctrine. In *Plainbull*, the Ninth Circuit required the exhaustion of tribal remedies only after finding 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" and the suit "**an internal tribal matter**." *Id.* (emphasis added). Similarly, in *United States v. Vanderwalker,* 2010 U.S. Dist. LEXIS 131227, *10 (D.S.D. 2010), the district did not require the exhaustion of tribal remedies precisely because the case was "not an instance where either tribal self-government or self-determination is implicated." *See also United States v. American Horse*, 352 F.Supp.2d 984, 989 (D.N.D. 2005) (same). It is noteworthy that Defendants did not even attempt to distinguish those two new cases or challenge the United States' presentation of *Plainbull*.

In contrast, without new supporting authority, Defendants appear to advocate that the doctrine of comity requires exhaustion of tribal remedies in all cases because "the mere invocation of the doctrine [of comity] by the district court itself fulfills the primary purpose of

[1] Defendants assert that "[t]here is no basis for the plaintiff's prejudgment that the Tribal Court was 'reluctant' to hear prior related cases." Response at 3, lines 2-3. That is factually incorrect. The United States submitted the declaration of Steve Robbins -- the only competent evidence herein on the matter -- which states that "[t]he Tribal Court Judge had strongly suggested that the parties dismiss the case for reasons of judicial economy." Dkt. 14 ¶ 4. Defendants submitted no evidence to the contrary. Also, there can be no real dispute that the two tribal court matters were, at a minimum, "related" to the present action.

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the doctrine—which is to foster respect for and the development of tribal forums, in recognition of strong federal policies favoring tribal self-government and self-determination." Response at 3, lines 17-19. In other words, Defendants argue that, any time a district court can invoke the doctrine for purposes of "fostering respect for" the tribal courts, the district court, not only should, but must invoke the doctrine. *Id.* at 3-4.

First, this is in flat contradiction to Defendants' own admission that the Makah Nation is, in fact, not implicated in this matter and, as such, this case does not involve matters of self-governance. *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."). Second, the two cases Defendants cite (*LaPlante* and *Yellowstone County*) do not stand for the sweeping proposition that a district court must stay any case which could in any way foster respect for and the development of tribal forums. On the contrary, they are both fully consistent with the United States' presentation of *National Farmer*s and *Plainbull*.

Unlike here, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 12-13 & n.4 (1987), involved a collateral challenge to a tribal court's assertion of its exclusive jurisdiction. Likewise, unlike here, *Yellowstone County v. Pease*, 96 F. 3d 1169 (9th Cir. 1996), involved a direct challenge to a tribal court's assertion of its jurisdiction. Consistent with *National Farmers*, both cases stand for the proposition that tribal courts should have the opportunity to address any challenge to their jurisdiction first, before the federal courts consider those issues. Both, however, are inapplicable here because the present case does not involve a challenge, whether direct or collateral, to the Makah Court's jurisdiction. This case also is not a case in which tribal self-governance or expertise is relevant, *i.e.,* an "internal" matter.

Thus, this Court should reject the Defendants' unrestrained understanding of the doctrine of comity and recognize this matter for what it is: a lawsuit based upon federal common and statutory law intended to protect United States trust property from damage, which is an action that the Supreme Court repeatedly has recognized advances the important Congressional policy to "administer upon and guard the tribal property." *See 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).

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III. CONCLUSION

Based on the foregoing, the United States respectfully requests that this Court reconsider its Order of June 21, 2011 (Dkt. 18) and permit it to defend its trust property in this Court.

Dated this 3rd day of August, 2011.

Respectfully submitted,

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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 August 3, 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
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DATED this 3rd day of August, 2011.

s/Tina Litkie
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