IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE, Plaintiff, v. STAR TRUCKING CORPORATION., a Wyoming corporation, Defendant, v. JOHN HUBENKA and LeCLAIR IRRIGATION DISTRICT, Third-Party Defendants.	Case No. 11-CV-0364-J

ORDER GRANTING MOTION FOR REMAND

This matter came before the Court by Plaintiff *Northern Arapaho Tribe's Objection to Removal and Motion for Remand* (Doc. 5), which was filed pursuant to Defendant LeClair Irrigation District's ("LeClair") *Notice of Removal and Motion to Consolidate Cases* (Doc. 1). LeClair never responded to Northern Arapaho Tribe's ("NAT") motion. Having considered the parties' arguments, the pleadings of record and the applicable law, and being fully advised, this Court finds as follows:

Background

NAT's motion for remand opposes LeClair's attempt to remove to federal court two cases brought by NAT in the Shoshone and Arapahoe Tribal Court, filed there as *Northern Arapaho Tribe v. Star Trucking Corporation v. John Hubenka and LeClair Irrigation District*, CV-11-0075, and *Northern Arapaho Tribe and Eastern Shoshone Tribe v. John Hubenka, et al.*, CV-10-0080. In support of removal, LeClair argued that those cases related to the same events as the ones at issue in a case currently pending in this Court, *United States of America v. Northern Arapaho Tribe and Eastern Shoshone Tribe v. John Hubenka and LeClair Irrigation District*, 10-CV-0093, and indeed that the facts alleged in the complaints in all three cases were the same. For purposes of efficiency and to avoid inconsistent judgments, the tribal court cases should be removed to this Court and consolidated with and under 10-CV-0093, LeClair thus urged.

In this motion, NAT rejoins that the tribal court cases are not subject to removal and this Court lacks subject matter jurisdiction over them. Rather, NAT argues that the Shoshone and Arapaho Tribal Court has exclusive jurisdiction over claims arising under tribal law.

Analysis

Pursuant to the Local Rules for the United States District Court for the District of Wyoming, upon the filing of a dispositive motion,

> [e]ach party opposing the motion shall, within fourteen (14) days after service of said motion, serve upon all parties a written brief containing a short, concise statement of the argument and authorities in opposition to the motion, together with proposed findings of

> fact and conclusions of law . . . . Failure of a responding party to serve a response within the fourteen (14) day time limit may be deemed by the Court in its discretion as a confession of the motion.

D. Wyo. Civ. R. 7.1(b)(2)(A). On December 28, 2011, Nat filed *Northern Arapaho Tribe's Objection to Removal and Motion for Remand* (Doc. 5) and served it on LeClair. Over sixty days have thus passed and LeClair has still failed to oppose the motion, far exceeding the fourteen days Rule 7.1 allots for a response. This Court therefore deems LeClair's failure to serve a response to be "a confession of the motion." *Id.*

This Court also finds LeClair's position to be flawed on the merits. LeClair advocated for removal based on 28 U.S.C. § 1441(b). However, as NAT points out, "the removal jurisdiction granted in Sections 1441 and 1443(1) of Title 28[] speaks only of removal of actions brought in 'State' courts." *Becenti v. Vigil*, 902 F.2d 777, 779 (10th Cir. 1990). Moreover,

> it appears that Congress understands § 1441 to refer only to state courts in the strict sense, as when Congress has decided to bring other non-federal trial courts within the ambit of § 1441, it has enacted legislation expressly doing so. *E.g.* 28 U.S.C. § 1451 (defining "State court" to include the Superior Court of the District of Columbia); 48 U.S.C. § 864 (authorizing the removal of actions brought in the courts of Puerto Rico).

DeCoteau v. Sentry Ins. Co., 915 F.Supp. 155, 157 (D.N.D. 1996). Congress has never enacted legislation bringing tribal courts within the meaning of "State court," nor has it separately authorized the removal of actions brought in tribal courts. *Id.* Accordingly, "until and unless Congress includes tribal courts in the removal statute, federal courts cannot exercise jurisdiction over actions commenced in tribal courts," including those LeClair seeks to remove in this case. *Id.* at 156 (citing *Becenti*, 902 F.2d at 781).

LeClair's assertion that the original jurisdiction granted to the federal district courts under 28 U.S.C. § 1332 (along with the supplemental jurisdiction provided by 28 U.S.C. § 1367) gives this Court jurisdiction over the tribal court cases is also incorrect. As NAT argues, "an Indian tribe is not a citizen of a state within the meaning of 28 U.S.C. § 1332 and may not [sue or] be sued in federal court under the court's diversity jurisdiction." *Tenney v. Iowa Tribe of Kansas*, 243 F.Supp.2d 1196, 1198 (D. Kan. 2003) (citing *Garcia v. Akwesasne Housing Authority,* 268 F.3d 76, 80 n.1 (2nd Cir. 2001) and *Romanella v. Hayward,* 933 F.Supp. 163, 167 (D. Conn. 1996)). This Court thus would not have subject matter jurisdiction over the tribal court cases even if removal to federal court were proper under 28 U.S.C. § 1441.

Finally, and as NAT again suggests, it is a well-established rule that one must first exhaust tribal court remedies before proceeding to federal court. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Thus, even if this Court found subject matter jurisdiction present, it would likely remand to tribal court based on the comity considerations outlined in *National Farmers Union* and *Iowa Mutual v. LaPlante*, 480 U.S. 9, 15-17 (1987).

Conclusion

For the foregoing reasons, it is hereby ORDERED that Plaintiff *Northern Arapaho Tribe's Objection to Removal and Motion for Remand* (Doc. 5) is GRANTED, such that *Northern Arapaho Tribe v. Star Trucking Corporation v. John Hubenka and LeClair Irrigation*

District, 11-CV-0364, SHALL BE REMANDED to the Shoshone and Arapaho Tribal Court of the Wind River Reservation, Fort Washakie, Wyoming.

It is further ORDERED that NAT's counsel should submit an application for fees and costs of the motion to remand within ten days of the date of entry of this Order. LeClair shall have ten days thereafter to file any objections to NAT's fee application. A separate order deciding this matter will be entered by the Court, following review of the parties' written submissions, without further argument or hearing.

Dated this 8th day of March, 2012.

Alan B. Johnson
United States District Judge