IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CADDO NATION OF OKLAHOMA, and BRENDA EDWARDS, in her capacity as Chairman of The Caddo Nation of Oklahoma,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-14-281-D
THE COURT OF INDIAN OFFENSES, FOR THE ANADARKO AGENCY,	)	
Defendant.	)	

MOTION TO DISMISS AND COMBINED BRIEF IN SUPPORT

The United States Attorney's Office moves to dismiss this action under Fed.R.Civ.P. 12(b) for failure to exhaust administrative remedies, lack of personal jurisdiction due to a defect in service, and, alternatively for failure to join a necessary party under Rule 19. In support of this motion, it is shown as follows:

STATEMENT OF THE CASE

1. The Caddo Nation of Oklahoma is currently engaged in an internal dispute as to leadership of the tribe which revolves around an internal recall petition and election. (Complaint, Doc. No. 1, ¶¶10-11 and Exs. 4 and 7).

2. The Court of Indian Offenses ("CIO") was "established to preside over the Caddo Nation pursuant to 25 C.F.R. §11.100(b)(2)." (Order, Doc. No. 17, p. 2).

3. Two competing factions have each claimed, exclusive of the other, to be the rightful leadership authorized to act and bring suit on behalf of the Caddo Nation of Oklahoma -- in two separate forums:

> CIO = *Caddo Nation of Oklahoma v. Brenda Edwards*, Case No. CIV-14-039 (Court of Indian Offenses for the Caddo Nation), is brought by a faction supporting Vice-Chairman Phillip Smith and represented by attorney Ryland Rivas. (Complaint, Doc. No. 1, Ex. 7).
>
> U.S. District Court = *Caddo Nation of Oklahoma and Brenda Edwards v. Court of Indian Offenses*, Case No. 14-CV-281-D, the instant action, is brought by a faction supporting Chairman Brenda Edwards. (Complaint, Doc. No. 1).

4. In the CIO action:

a. Both factions have appeared and are represented by legal counsel.

b. Edwards filed a motion to dismiss based on jurisdiction (Complaint, Doc. No. 1, Ex. 9) which was denied by the CIO Magistrate on March 25, 2014. (Minute Order from CIO, Ex. 1 attached).

c. On March 31, 2014, the CIO held another hearing where the Magistrate modified the temporary injunction on Edwards' motion. (Minute Order from CIO, Ex. 2 attached).

d. On April 30, 2014, a trial started and was continued to May 12, 2014, where, after hearing arguments and testimony, the Magistrate entered an Order appointing a Special Master to assume the duties and operations of the Caddo Nation. In addition, the CIO acknowledged Edwards' currently pending motion to dismiss setting a deadline for response. (Minute Order from CIO, Ex. 3 attached).

e. The CIO action is still pending.

5. At the conclusion of the CIO litigation, both factions will have the opportunity to appeal the CIO decision to the Court of Indian Appeals pursuant to 25 C.F.R. Subpart H, Appellate Proceedings.

6. By contrast, in the present district court action:

a. Edwards asks this court for a declaratory judgment that the CIO has no jurisdiction to entertain lawsuits against the Caddo Nation or over intra-tribal disputes. (Complaint, Doc. No. 1, p.7).

b. Edwards asserts, among other things, that Smith "allegedly held an illegal meeting to remove Chairman Edwards" and that members of the Smith faction "forfeited their positions" and "illegally set up a sham government." (Complaint, Doc. No. 1, ¶¶12-14).

c. Despite the assertions above and acknowledging the conflicting evidence in the resolutions attached to her complaint which support Smith's assertion of authority and the CIO Magistrate's decision, (Order, Doc. No. 17, p. 4), Edwards pursues this unilateral and collateral attack on the CIO proceedings without making the Smith faction a party here or giving them an opportunity to be heard.

7. In bringing this action, Edwards has filed returns of service showing service on the U.S. Attorney's Office, the Court of Indian Offenses in Anadarko, and Terry Bruner, Regional Director of the BIA in Anadarko. (Process Receipts Doc. Nos. 14-16).

No return of service has been filed, however, showing service has been made on the United States Attorney General.[1]

ARGUMENT

PROPOSITION I

AS A MATTER OF COMITY, THIS COURT SHOULD NOT EXERCISE JURISDICTION UNTIL TRIBAL COURT REMEDIES ARE EXHAUSTED

Federal courts have recognized a non-statutory exhaustion requirement that generally applies to challenges to tribal court authority. *Valenzuela v. Silversmith,* 699 F.3d 1199, 1206 (10th Cir. 2012). "The tribal exhaustion rule 'provides that, absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court [authority] until tribal court remedies, including tribal appellate review, are exhausted.'" *Id. citing Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1149 (10th Cir.2011). This rule is based on "principles of comity" and applies regardless of the basis for federal jurisdiction. *Id. citing Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir.2006) and *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).*

The tribal exhaustion rule serves several purposes: "First, it reinforces Congress's strong interest in promoting tribal sovereignty, including the development of tribal courts." *Valenzuela,* 699 F.3d at 1206 *citing National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). "Second, it assists 'the orderly

[1] Earlier this date, the U.S. Attorney's office contacted the civil process clerk in the Department of Justice Civil Division in Washington D.C. who did not locate a record of service.

administration of justice in ... federal court[s] ... by allowing a full record to be developed in the [t]ribal [c]ourt before either the merits or any question concerning appropriate relief is addressed [in federal court].'" *Id.* "Third, the rule gives a tribal court "a full opportunity ... to rectify any errors it may have made." *Id.*

Tribal courts play a vital role in tribal self-governance. *See Tillet v. Lujan*, 730 F.Supp. 381 (W. D. Okla. 1990) ("*Tillet I*"), *aff'd* 931 F.2d 636 (10th Cir. 1991) ("*Tillet II*"), *citing Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 14-15 (1987). When challenging jurisdiction of the tribal courts, the Tenth Circuit has stated that "as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." *Tillet II*, 931 F.2d at 640 (citations omitted). "Exhaustion of tribal remedies requires at a minimum that tribal appellate courts must be given the opportunity to review the determination of the lower tribal courts before federal courts consider the issue." *Tillet I*, 730 F.Supp. at 384 (citations omitted).[2] In *Tillett II*, the Tenth Circuit also found that "the district court did not err in requiring Tillett to permit the lower and appellate tribal courts to address her

[2] "The tribal exhaustion rule provides that, absent exceptional circumstances, federal courts typically 'should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review are exhausted.' " *Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1149 (10th Cir.2011) (quoting Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170 (10th Cir.1992)); see also Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856–57, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).*

challenge to their jurisdiction before raising that challenge in federal court." *Tillet II*, 931 F.2d at 641.

It is undisputed that the CIO was "established to preside over the Caddo Nation pursuant to 25 C.F.R. §11.100(b)(2)." (Order, Doc. No. 17, p. 2). Here, the CIO did not exercise jurisdiction *sua sponte*, without argument or evidence. Rather, the two competing factions have presented resolutions and evidence supportive of their claim to act on behalf of the tribe. (*Id.* at pp. 3-4). Edwards has filed a motion to dismiss which was heard and specifically overruled. Edwards has counsel who has submitted legal arguments and evidence to the CIO through pleadings, hearings and trial. Edwards even has another motion to dismiss pending. If at the end of the CIO litigation Edwards still believes that the CIO erred in exercising its jurisdiction, she has a right to appeal that decision to the Court of Indian Appeals. The full record of all relevant factual evidence and legal argument from both factions will then be available for further review.

Yet, Edwards wants this court to ignore the CIO proceedings to date and ignore comity and exhaustion of her remedies currently being litigated in the CIO. Instead, she wants this court to summarily find that jurisdiction is lacking in the CIO simply because she asserts that the resolutions she submits are valid and the CIO decision was wrong. This is a unilateral attempt to circumvent the CFR trial and appellate court process and collaterally attack the CIO jurisdictional decision. This court need not wade into this dispute at this time. Rather, as in *Tillett I* and *II*, as a matter of comity the court should require Edwards to exhaust her pending tribal trial and appellate court remedies.

PROPOSITION II

PLAINTIFF HAS FAILED TO COMPLY WITH RULE 4(i)

To serve an agency of the United States, and acquire jurisdiction over the defendant, Edwards must serve the United States and the agency. Fed.R.Civ.P. 4(i)(2). In order to effect service on the United States, Edwards must serve the United States Attorney and the Attorney General of the United States in Washington, D.C. Fed.R.Civ.P. 4(i)(1). At this time, there has been no proof of service on the Attorney General. Defendant acknowledges under that under Rule 4(i)(4) this defect is not fatal as the court must allow Edwards a reasonable time to cure a defect in service on the United States. However, jurisdiction over the defendant is currently lacking until this defect is cured.

PROPOSITION III

ALTERNATIVELY, PLAINTIFF HAS FAILED TO JOIN A NECESSARY PARTY UNDER RULE 19

In the alternative to dismissal, Edwards has failed to join a necessary party under Fed.R.Civ.P. 19. Rule 19 provides a three-step process for determining whether an action should be dismissed for failure to join a required party. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir.2001), *citing United States v. Bowen*, 172 F.3d 682, 688 (9th Cir.1999).

First, the court must determine whether the absent person is "necessary" or "required" under Rule 19(a)(1). *Id.* A person is necessary if the non-party claims an interest relating to the subject of the pending action and is so situated that the disposition

of the action in their absence may (i) as a practical matter impair or impede their ability to protect that interest or (ii) leave any of the current parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest of the non-party. Fed.R.Civ.P. 19(a)(1)(B); *Id.*

If a non-party is deemed to be required, the second step is for the court to decide if joinder is "feasible." *See* Fed.R.Civ.P. 19(a)-(b); *Norton,* 248 F.3d at 997. If joinder is feasible, then the court must order the absent party joined. Fed.R.Civ.P. 19(a)(2). If joinder is not feasible, the final step requires the court to decide under Rule 19(b) if the action can continue in the absence of the absent party. *Id.*

As stated above, two competing factions each claim to be the leadership authorized to act in an official capacity on behalf of the tribe. (Order, Doc. No 17, p. 2, fn. 2). The Smith faction not only claims an interest in this action, but has already prevailed on the jurisdictional question in the CIO after a review of the resolutions from both parties and is pursuing that action in the name of the Caddo Nation. Under Rule 19(a)(1)(B)(i), the disposition of this action as sought by Edwards would, as a practical and legal matter, not only "impair or impede" the ability of the Smith faction to protect that interest, it would completely negate the resolutions and other evidence they presented and the favorable decisions already rendered in their favor at the CIO.

In addition, the Smith faction is alleged to have "held an illegal meeting to remove" Edwards, "forfeited their positions" and "illegally set up a sham government." (Complaint, Doc. No. 1, ¶¶12-14). Under Rule 19(a)(1)(B)(i), the disposition of this

action as presented by Edwards would preclude the ability of the Smith faction to disprove these allegations.[3]

If this case is not dismissed for failure to exhaust, the Smith faction is a necessary party. Since they are currently unable to present and defend their interests here, this court gets only Edwards's one-sided argument. Since the Smith faction is currently litigating with Edwards in the CIO (within the Western District of Oklahoma) and joinder of Smith would be feasible, the court should order the absent party joined so that both of the two disputing factions can be heard in fashioning a result. Fed.R.Civ.P. 19(a)(2).

CONCLUSION

Based on the above, the undersigned requests the court to dismiss this action because Edwards failed to exhaust her pending tribal trial and appellate court remedies regarding her challenge to CIO jurisdiction before raising that challenge in federal court. In addition, jurisdiction is lacking until Edwards completes service pursuant to Rule 4(i). Alternatively, should the court allow this action to continue, it should require that the Smith faction be joined as a required party to this action under Rule 19.

[3] The responsibility of proving or disproving the facts under Edwards' complaint is not on the CIO, which is the only named defendant here.

Respectfully submitted,

SANFORD C. COATS
United States Attorney

s/ROBERT J. TROESTER
Assistant U.S. Attorney, OBA #12516
United States Attorney's Office
Western District of Oklahoma
210 Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102
(405) 553-8809 (Office)
(405) 553-8888 (Fax)
Robert.Troester@usdoj.gov

OF COUNSEL:
CHARLES R. BABST, JR.
Attorney Advisor
Office of the Solicitor
U.S. Dept of Interior
7906 East 33rd Street, Ste. 100
Tulsa, OK 74145

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Eugene Bertman, Counsel for Plaintiff

I hereby certify that on May 30, 2014, I served the attached document by mail on the following, who are not registered participants of the ECF System: None

s/Robert J. Troester
Assistant U.S. Attorney