

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

(1) THE CADDO NATION OF)
OKLAHOMA, and)
(2) BRENDA EDWARDS, in her capacity)
as Chairman of the Caddo Nation of)
Oklahoma,)
))
Plaintiffs,)
))
vs.)
))
(1) THE COURT OF INDIAN OFFENSES)
FOR THE ANADARKO AGENCY,)
))
Defendant.)

Case No. 14-CV-00281-D

**RESPONSE TO DEFENDANT’S MOTION
TO DISMISS AND BRIEF IN SUPPORT**

The Caddo Nation of Oklahoma and Brenda Edwards, in her capacity as Chairman of the Caddo Nation of Oklahoma, (collectively “Plaintiffs”) submit the following response to the Motion to Dismiss of the Defendant, The Court of Indian Offenses (the “Defendant” or “CFR Court”). Given the facts of this case, it is not necessary to exhaust administrative remedies. Moreover, the Plaintiffs are in the process of serving the Attorney General’s office in Washington, D.C. Finally, there are no additional parties needed for this case.

I. STATEMENT OF THE CASE

1. The United States Department of Interior (“DOI” or “Interior”) has established a system of Courts of Indian Offenses (“CFR Court”) in Oklahoma to provide judicial services to Indian Nations that have no judicial system. The regulations controlling the Court of Indian Offenses are outlined in 25 C.F.R. Part 11.

2. The CFR Court for the Anadarko Agency acts, in certain instances provided by regulation, as a tribal court for the Caddo Nation of Oklahoma pursuant to 25 C.F.R. § 11.100(b).

3. The CFR Court's jurisdiction is limited as laid out in 25 C.F.R. § 11.118. Specifically, the section provides that:

(b) A Court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, unless the relevant tribal governing body passes a resolution, ordinance, or referendum granting the court jurisdiction.

Further, the section provides that:

(d) A tribe may not be sued in a Court of Indian Offenses unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance.

4. The Caddo Nation has not granted authority to the CFR Court to adjudicate tribal disputes. Pursuant to Tribal Resolution 07-2005-02, which rescinded Tribal Resolution 07-2003-01, the Caddo Nation specifically revoked authorization for the Court of Indian Offenses to adjudicate any internal tribal disputes and election disputes. *c.f.* Exhibit 1, Resolution 07-2003-01 and Exhibit 2, Resolution 07-2005-02; Exhibit 3, Resolution 03-2014-01.

5. On March 20, 2014, Plaintiffs sought a declaratory judgment and an injunction against the CFR Court because the CFR Court does not have jurisdiction to determine intra-tribal disputes. *See generally*, Exhibit 4, Complaint.

6. The issue arose as the CFR Court has decided to exercise jurisdiction over the Caddo Nation and Brenda Edwards, in her capacity as Chairman of the Caddo Nation, in violation of the law. *See generally*, Exhibit 4, the Complaint, and Exhibits 1, 2 and 3 of Defendant's Motion to Dismiss.

II. ARGUMENT AND AUTHORITY

A. STANDARD OF REVIEW

In deciding a motion to dismiss this Court “must accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.” *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1178 (10th Cir. 2012) (internal quotation marks omitted). Thus, “[i]n order to survive a motion to dismiss brought under Rule 12(b)(6), the plaintiff must allege sufficient facts to make her claim to relief plausible on its face.” *Id.*

Further, with respect to a motion to join an indispensable party pursuant to Rule 19, “[t]he proponent of a motion to dismiss ... has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence.” *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). The moving party may satisfy this burden by providing “affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence.” *Collier*, 17 F.3d at 1293 (internal quotation marks omitted). The motion “will not be granted on the vague possibility that persons who are not parties may have an interest in the action.” *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1251, 1273 (D. Wyo. 2002) (internal quotation marks omitted).

B. THERE IS NO NEED FOR THE CADDO NATION OR BRENDA EDWARDS TO EXHAUST ADMINISTRATIVE REMEDIES

The underlying issue is that the CFR Court, which is created by Federal regulation, is not a “tribal court” in this instance and by resolution the Caddo Nation removed jurisdiction from the CFR Court to determine intra-tribal disputes pursuant to 25 CFR 11.118. The Caddo Nation has decided that it will decide intra-tribal disputes internally, as opposed to using the assistance of the United States. The Caddo Nation has opted out of the administratively created courts that are stocked with judges selected and hired by the United States and have no connection to the Nation or its people. The CFR Court, in this instance, is not a tribal court and there is no need to exhaust the United States administratively created remedies on issues related to intra-tribal disputes. The Defendant has no jurisdiction to decide any of the Caddo Nation’s intra-tribal disputes.

Under Federal law, comity requires the exhaustion of **tribal court** remedies. *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991). An important aspect of comity is whether this Court should defer to hear the case – not dismiss it. *LePlante*, 480 U.S. at n.8. “Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.” *Nev. v. Hicks*, 533 U.S. 353, 399, 121 S.Ct. 2304, 2331 (2001)(citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, n.8, 107 S.Ct. 971, n.8 (1987)). In this case, with respect to 25 C.F.R. 11.118, the issue boils down to which governing body this Court is going to give comity too (the Caddo Nation’s Tribal Council or the Federal CFR Court).

“The basic dilemma the doctrine of comity is meant to solve is that “[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority

derived.” *MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. Utah 2007)(citing *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895)). “Thus, comity ‘is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.’” *Id.* In this case, the jurisdiction derives from the Caddo Nation, not CFR Court.

Plaintiffs are seeking a declaratory judgment and an injunction that the CFR Court lacks jurisdiction to even entertain an underlying intra-tribal dispute because the Caddo Nation did not authorize jurisdiction in the CFR Court to resolve the issue. The Caddo Nation, or its officials, should not have to exhaust the CFR Court’s administratively created remedies, which it did not create or sanction, where the Caddo Nation has not given authority to the CFR Court. Comity should be given to the Caddo Nation’s Tribal Council which enacted a resolution that the CFR Court’s lack jurisdiction to resolve this very issue.

Tribal governance disputes must be resolved by Tribal procedures, not by the Federal or State Government or its courts including this Court where jurisdiction has not been specifically authorized by the Tribe. *See, e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65; *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 386-89 (1976); *Wheeler v. United States Dep’t of Interior, Bureau of Indian Affairs*, 811 F.2d 549 (10th Cir. 1987). “Internal matters of a tribe are generally reserved for resolution by the Tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341.” *Timbisha Shoshone Tribe v.*

Joseph Kennedy, 2009 WL 3615971, at *11 (E.D. Ca. 2010). Federal interference in internal Tribal affairs diminishes the powers of Tribal Sovereignty and Tribal self-governance recognized by the Federal Government. *See, Fisher*, 424 U.S. at 387-88. Federal intrusion also subjects disputes arising on Indian reservations among tribal members to a forum other than the one they have set up for themselves, risks conflicting adjudication, and diminishes Tribal authority. *Id.*

The underlying reasoning is that “Congress is committed to a policy of supporting tribal self-government and self-determination.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 2454 (1985). Whether the CFR Court has jurisdiction over an intra-tribal dispute strikes at the very heart of self-governance and self-determination where the Caddo Nation has declared otherwise. Fundamentally, “[i]nternal matters of a tribe are generally reserved for resolution by the Tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341.” *Timbisha Shoshone Tribe v. Joseph Kennedy*, 2009 WL 3615971, at *11 (E.D. Ca. 2010). Further, as held by the United States Court of Appeals for the Eighth Circuit, “jurisdiction to resolve internal Tribal disputes and interpret Tribal Constitutions and Laws lies with Indian Tribes and not in the District Courts.” *Sac & Fox Tribe of the Miss. v. BIA*, 439 F. 3d 832, 835 (8th Cir. 2006)(internal citations and quotations omitted). “Unless surrendered by the tribe, or abrogated by Congress, tribes possess an inherent and exclusive power over matters of internal tribal governance.” *Timbisha Shoshone Tribe*, 2009 WL 3615971, 11, *citing Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989).

This is recognized by 25 C.F.R. 11.118. Under 11.118, the Tribe has the sovereign authority to remove jurisdiction of intra-tribal disputes from the CFR Court. The Tribe, in an exercise of its sovereign authority, should not have to subject itself to the CFR Court for a determination of whether that jurisdiction exists when the Caddo Nation already removed the intra-tribal disputes from the CFR Court's jurisdiction. The CFR Court's jurisdiction in this area is derived from the Caddo Nation – not vice versa.

As a basis for its motion, the Defendant cites to *Tillet v. Lujan*, 931 F.2d 636 (10th Cir. 1991), which arose over the leadership of the Kiowa Tribe. The 10th Circuit Court of Appeals held 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.” *Id.* at 640. *Tillet* is distinguishable because there was no dispute that the CFR Court was authorized to determine the underlying intra-tribal dispute. *Id.* at 639. Specifically, in *Tillet*, the Plaintiff sought to have a determination of intra-tribal dispute resolved in the federal court and, specifically, attacked the overall validity of the CFR Court scheme. *Id.* at 642. However, there was no issues between the CFR Court and the Tribe itself because there was no issue over the Tribe's grant of jurisdiction to the CFR Court to resolve intra-tribal disputes. The Kiowa Tribe had not removed itself from the CFR Court's jurisdiction and permitted the CFR Court to be a Tribal court. Here, however, it is evident that the Caddo Nation removed itself from the CFR Court's jurisdiction pursuant to 25 CFR 11.118. Thus, there is no need to exhaust the Federal administratively created remedies within the CFR Court. The Caddo Nation has not submitted this issue to Defendant.

The Caddo Nation has withdrawn jurisdiction for the CFR Court to hear intra-tribal disputes pursuant to Tribal Resolution 07-2005-02, which rescinded Tribal Resolution 07-2003-01. *c.f.* Exhibit 1, Resolution 07-2003-01 and Exhibit 2, Resolution 07-2005-02; Exhibit 3, Resolution 03-2014-01. Thus, in accordance with United States Supreme Court decisions, “[a]djudication of such matters by any nontribal court ... infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S.Ct. 971, 977 (1987). The CFR Court has been excluded by the Tribe’s lawmaking authority as a tribal court. Under *LePlante*’s rationale, the Caddo Nation should not be subjected to the CFR Court after the lawmaking authority of the Caddo Nation removed jurisdiction and there is no issue of comity or exhaustion of remedies.

Thus, this Court has jurisdiction to stop the CFR Court from exercising the fundamental governmental power of a judiciary. In general, federal jurisdiction exists to decide the federal question whether the CFR court has exceeded the lawful limits of its jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). This Court has jurisdiction to determine this issue where the root issue is a matter of federal law over which the CFR courts lack jurisdiction. *Muhammad v. Comanche Nation Casino*, 2010 U.S. Dist. LEXIS 114945, 4, 2010 WL 4365568 (W.D. Okla. Oct. 27, 2010); *See also Nevada v. Hicks*, 533 U.S. 353, 367-68, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (holding in an action under 42 U.S.C. § 1983 that tribal courts are not courts of “general jurisdiction” that can decide a federal claim or issue without an express federal grant of such authority). The CFR Court is not a tribal court

and is not an Article II Court. Since the Nation removed jurisdiction pursuant to 25 C.F.R. 11.118, the CFR Court lacks authority to exert jurisdiction over the Caddo Nation. Moreover, it is inappropriate for the CFR Court to make a decision of its own jurisdiction. That is an issue left to this Court.

Comity and exhaustion or remedies should not apply to an intra-tribal dispute where it is clear that the CFR Court had no jurisdiction when the dispute arose. A tribal dispute is at its very essence a struggle amongst the leadership of a Tribal Nation as to who has authority to act and each of those factions should not be able to exert their will over the other faction in violation of Tribal law. It would seem illogical and inequitable that the CFR Court could review issues and matters that arose before it was granted jurisdiction. Thus, it would create an *ex post facto* situation. It leads to results unintended by the Nation that in order to determine jurisdiction the CFR Court would have to adjudicate the proper leadership of the Nation to determine if the grant of authority was proper – exactly what was out of bounds in the beginning.

Further, it is appropriate that the status of jurisdiction of the CFR Court be determined at the time when the dispute arose – not the whim of either party. To allow later enactments granting jurisdiction and removing jurisdiction leads to a never ending struggle between the factions in the CFR Courts. Such an approach overrides the sovereignty of the Nation and the decision of the Caddo Nation's Tribal Council. There is no dispute that at the outset of the intra-tribal dispute the Nation did not grant jurisdiction to the CFR Court to adjudicate this issue.

Finally, Defendant attempts to make an issue about the fact that Brenda Edwards and the Caddo Nation have been forced to litigate in the CFR Court. The CFR Court is not a true Article III or Tribally authorized Court. It is a creation of federal regulatory law. The Caddo Nation and Brenda Edwards, as a matter of comity and Federal law, should not be forced to go through the CFR Court. Moreover, the Defendant's ignore the fact that if Plaintiff's ignored the CFR Court, then the CFR Court, with its enforcement arm – the BIA, would do as it will against the Caddo Nation under the guise of judicial decisions. Thus, Defendant's argument that the Plaintiffs should ignore the Court is really a "Catch 22."

This Court should not give the CFR Court authority to do what it could not previously do – decide the intra-tribal dispute. In essence the CFR Court would have to decide which Tribal Council is the proper Tribal Council to determine whether jurisdiction could be found in the CFR Court. That would require the CFR Court to inquire into the genesis of the dispute and essentially decide the issue to determine if it has jurisdiction. That cannot be the law. The CFR Court cannot review issues that were, at the time, outside its jurisdiction. The CFR Court cannot be permitted to make that decision. Moreover, the Caddo Nation and its officials should not have to subject themselves to the CFR Court to make this determination.

C. THE PLAINTIFFS ARE IN THE PROCESS OF SERVING THE ATTORNEY GENERAL

The Plaintiffs have sent process, via certified mail, to the United States Attorney General pursuant to the Federal Rules. Exhibit 5, Certified Mail Receipt.

D. THERE ARE NO OTHER PARTIES NECESSARY FOR ADJUDICATION OF THE ISSUES IN THIS CASE

The Smith Faction is not a necessary party to this litigation. The only issue presented by Defendant is whether the Smith faction is required to be a party to this lawsuit. There is no issue of whether the Smith faction could be joined. Defendant admits that the Smith Faction can be joined to the lawsuit.

Under this Court's jurisprudence, when determining whether a party is necessary, "[t]he court must consider (1) whether complete relief would be available to the parties already in the suit, (2) whether the absent party has an interest related to the suit which as a practical matter would be impaired, and (3) whether a party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations." *Rishell v. Jane Phillips Episcopal Memorial Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir.1996). Certainly, this Court can provide complete relief as the Bureau of Indian Affairs, through the CFR Court, is exercising jurisdiction over the Plaintiff. Thus, this Court can determine the legal issues and order the CFR Court not to exercise jurisdiction. Also, there is no issue of multiple or inconsistent results. Thus, the only issue is whether an absent party has an interest related to the suit which as a practical matter would be impaired.

In determining whether the absent party has an interest related to the suit which as a practical matter would be impaired, the Court must look at the interest and determine if it will be impaired. Here, the United States has not shown an interest that needs protected. The Smith faction will still be able to present their issues to the Caddo Nation. Moreover, the United States has not provided any affidavits or other evidence of any interest of the

Smith faction that needs protection. The party necessary for this suit is the party that has gone beyond its authority which is the United States *vis-a-vie* the CFR Court.

Further, even if there was a protectable interest, the Court must also look to determine whether the interests would not be protected by the parties in the suit. “[T]he fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present.” *Sac and Fox Nation*, 240 F.3d at 1259 (quoting 3A James Moore, *Moore's Federal Practice* ¶ 19.07 (2d ed. 1995)). This is especially true where the absent party's interests are aligned with an existing party. *Id.* (rejecting contention that absentee was indispensable party where existing party's “interest in defending his determinations [was] ‘virtually identical’ to the interests of the [absentee]”). Here, there is nothing presented by Defendant that would suggest that it would not present sufficient arguments regarding the jurisdiction of the CFR Court. Thus, Defendants should be in a position to protect any interest that the Smith faction might argue.

III. CONCLUSION

Plaintiffs have shown a sufficient basis for the suit to go forward and corrected any issues relating to service. This Court must not dismiss this lawsuit as it is properly before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certifies that on June 25, 2014, I electronically transmitted the foregoing pleading to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Robert J. Troester, Assistant U.S. Attorney,
Attorneys for Defendant
The Court of Indian Offenses for the Anadarko Agency

/s/ Eugene Bertman