

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KONIAG, INC., an Alaska Corporation,)
)
Plaintiff,)
)
vs.)
)
ANDREW AIRWAYS, INC. et al,)
)
Defendants)
) CASE NO. 3:13-cv-00051-SLG

**MOTION AND MEMORANDUM TO DISMISS COMPLAINT AGAINST
ALICIA REFT IN HER CAPACITY AS PRESIDENT OF KARLUK
TRIBAL COUNCIL AND INDIVIDUAL CAPACITY**

Alicia Reft, by and through counsel, David D. Clark of the Law Office of David Clark, files this motion to dismiss because this court lacks federal question jurisdiction, no federal question has been presented, and the Native Village of Karluk is immune from suit because it is a federally recognized Indian tribe. As a tribal official, the president of Karluk IRA Tribal Council, Alicia Reft is indistinguishable from Karluk. Koniag's claims should be filed in the Alaska state court and its alleged federal questions are nothing more than anticipatory denials of Alicia Reft's possible defenses to a state law ejectment/trespass action.

1. Koniag has filed in federal court what should be a state court ejectment or trespass action. This court lacks federal question jurisdiction and the plaintiff's complaint should be dismissed. (FRCP 12(b)(1)).

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The plaintiff is attempting to bootstrap its state court claims into federal court by requesting the court rule, before any defense or counterclaim has been asserted by Alicia Reft, on what it believes Reft's defenses will be.

In order to determine whether federal jurisdiction exists one looks to the "well pleaded complaint"¹. Koniag's complaint alleges the following:

a. That the Defendants built a cabin (Mary's Creek Cabin) on Koniag's land (Lands) without permission. The claims against the defendants are for intentional trespass, ejectment and to quiet title in the Lands.

b. Koniag is also requesting that the court declare Reft's efforts to challenge the 1980 merger of Karluk, Inc. with Koniag are barred by either Alaska law or federal law.

c. The Lands are not "Federal lands" or "tribal land" as defined as 25 U.S.C. §3001(5) or (15) and are not subject to the Native American Graves Protection and Repatriation Act (NAGPRA).

d. Ownership of the Lands is not affected by Public Law No. 83-280, 67 Stat. 588 (1953) (Public Law 280) or any claim of retrocession made under it by Reft or persons acting in concert with her.

e. 43 U.S.C. § 1636(d)(1)(A)(i), bars adverse possession of the lands acquired by Koniag under the 1980 corporate merger.

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¹ *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2847-2848 (1983)

Koniag acknowledges that it is an Alaska Corporation and that Reft is an Alaska resident.² There is no diversity jurisdiction between Reft and Koniag so jurisdiction must be established through a federal question in dispute. Therefore, “[T]he presence or absence of federal-question jurisdiction is governed by the “well-pleaded complaint rule,” which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.³ Koniag has not pleaded a complaint which presents federal question jurisdiction. Koniag’s complaint is one for ejectment, trespass and quiet title, all state court claims and the balance of the complaint anticipates that Reft, in her official capacity as president of Karluk, will assert various defenses to Koniag’s actions. The “federal” allegations that the plaintiff attempts to assert in its complaint are nothing more than defensive allegations raised to defeat Reft’s claims before any such claim has even been asserted. The claims against Reft as an individual do not even pretend to pass muster to establish federal jurisdiction.

Before any defense or claim can be made by Reft against Koniag, Koniag wants this court to shut down Reft’s efforts to challenge the 1980 merger of Karluk, Inc. with Koniag and have this court declare that such claims are barred

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² Andrew Airways, Inc. is an Alaska Corporation and Dean Andrews is an Alaska resident. Both have been dismissed from this litigation.

³ *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987)

by either Alaska law or federal law. What Koniag really wants to do is to sweep under the carpet its theft of Karluk Native Corporation lands in this federal court lawsuit. Koniag received 83,767 acres of valuable land from Karluk, and has received or will receive millions of dollars from the Fish & Wildlife Service by stealing and defrauding Karluk shareholders out of their ANCSA heritage. Koniag attached the Articles and plan of merger to its complaint, Exhibit A to plaintiff's complaint, but did not mention to this court that the merger had been accomplished by lies and fraud. Attached as Exhibit 1 to this motion is the State Court Order demerging Leisnoi, Inc., Akhiok-Kaguyak, Inc. and Old Harbor Native Corporations, corporations that were merged at the same time as Karluk in the Articles and Plan of Merger (see Exhibit A to plaintiff's complaint)⁴. The Alaska State Superior Court Judge Douglas Serdahely made findings in Exhibit 1⁵ that Koniag knowingly lied to the Village Corporations, including Karluk, to induce them to merge with Koniag regarding the value of the village corporation resources while cynically engaging in efforts to sell the resources for considerably more. Koniag's promise to pay each shareholder \$2,100 and give them 10 acres of land if the village corporations merged with Koniag was fraudulent because Koniag was going to use the merged village corporations' money and land to pay the shareholders. The money and land could have been

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⁴ Afognak Native Corporation sued before the merger took place and Koniag was enjoined from merging with Afognak until after the trial.

⁵ Exhibit 1 is offered for illustrative purposes only. Its existence is not necessary for this motion to be granted.

distributed to the village corporations' shareholders without merger. The president of the Karluk Native Corporation was on the Board of Directors of Koniag, and he convinced the Karluk shareholders that the merger was not fraudulent. The Karluk shareholders got \$2,100 of their own money, the Karluk IRA got 1,860 acres of land, and Koniag received 83,767 acres, (less the 1,860 given to the Karluk IRA), of valuable land. The merger of Karluk into Koniag is probably the largest land theft induced by fraud in the State of Alaska.⁶

With that said, in the context of this litigation, the only reason that Koniag is concerned about Karluk setting aside the merger is the Mary's Creek Land. If the merger was set aside, then the land would go back to the Karluk Native Corporation. In any event, the merger and its many facets are all governed by state law. Forcing Ms. Reft to litigate merger or de-merger by declaratory action is simply a way for Koniag to eliminate a potential affirmative defense and does not create a federal question.

Next, Koniag wants this court, in the declaratory action, to eliminate another possible defense to moving the cabin. Koniag asserts the Lands are not "Federal lands" or "tribal land" as defined as 25 U.S.C. §3001(5) or (15) and are not subject to the Native American Graves Protection and Repatriation Act (NAGPRA) and wants this court to so declare. First, there must be a controversy

⁶ While Leisnoi, Inc. Old Harbor, Inc. and Akhiok-Kaguyak, Inc. are thriving, the Karluk village is losing population because there are no economic activities to anchor the population.

in order to acquire jurisdiction. Koniag is anticipating that Reft will raise the NAGPRA as some defense to its trespass, ejectment and quiet title actions. Reft will not do so. There is no controversy regarding NAGPRA. Koniag cannot anticipate what defenses or claims that Reft will be raising to acquire federal question jurisdiction.

Koniag wants this court to determine that the ownership of the Lands is not affected by Public Law No. 83-280, 67 Stat. 588 (1953) (Public Law 280) or any claim of retrocession made under it, by Reft or persons acting in concert with her. Again this particular declaratory action is filed in anticipation of Reft raising this as a defense to the ejectment, trespass and quiet title action. This does not confer jurisdiction to Koniag. The only documents that plaintiff attached that officially referenced retrocession or retrocede are the votes taken wherein the Native Village of Karluk voted to assume exclusive tribal jurisdiction over Indian child custody proceedings. See Exhibit D to plaintiff's complaint.

Finally the plaintiff wants this court to declare that 43 U.S.C. § 1636(d)(1)(A)(i) bars adverse possession of the lands acquired by Koniag under the 1980 corporate merger. The only reason this issue is raised is because of the Mary's Creek Cabin and the assertion that the lands may be adversely possessed. To the extent that adverse possession is an issue, then that is a defense to the trespass, ejectment and quiet title action.

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Federal court jurisdiction cannot be created on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint.⁷ The plaintiff's first claim, declaratory relief in Count 1, is nothing more than an attack on what the plaintiff believes will be the Reft defendants' defenses. Plaintiff is trying to disguise its attacks on what it believes Reft's potential defenses to be as a declaratory judgment. Plaintiff's claims are for trespass, ejectment and quiet title, all state law claims and nothing more.

The Declaratory Judgment Act is not an independent source for federal question jurisdiction.⁸ But for the availability of the declaratory judgment procedure, the alleged federal claims asserted by Koniag would arise only as a defense to a state created action (trespass, ejectment and quiet title), and therefore, federal jurisdiction is lacking.⁹ Koniag is trying to defeat any possible defense to its trespass, ejectment and quiet title action by nixing those possible defenses in a declaratory action. It is trying to create federal jurisdiction by raising these improper defensive allegations.¹⁰

B. Sovereign Immunity bars plaintiff's lawsuit against the Karluk Tribal Council and against Alicia Reft because she is the president of Karluk Tribal Council. (FRCP 12(b)(1)).

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⁷ *Caterpillar Inc. v. Williams*, at 392

⁸ *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672, 70 S. Ct. 876, 879, 94 L. Ed. 1194 (1950)

⁹ "A declaratory judgment plaintiff may not assert a federal question in his complaint if, but for the declaratory judgment procedure, that question would arise only as a federal defense to a state law claim brought by the declaratory judgment defendant in state court." *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985)

¹⁰ *Caterpillar Inc. v. Williams*, at 390

Absent congressional abrogation or explicit waiver, sovereign immunity bars suits against an Indian tribe, such as Karluk, in federal court.¹¹ Immunity protects tribal officials acting within the scope of their valid authority.”¹² *Id.* (citing *Hardin*, 779 F.2d at 479–80). However, immunity “does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.”¹³ If tribal sovereign immunity exists, it precludes subject matter jurisdiction in an action against an Indian tribe.¹⁴ Koniag has not alleged that Reft has acted in an unconstitutional manner or that an unconstitutional law has been applied to Koniag by Reft. In determining whether Koniag can overcome Reft’s assertion that she is immune, the only relevant inquiry is whether Koniag has alleged an ongoing violation of federal law and seeks prospective relief.¹⁵ Koniag has not alleged any ongoing violations of federal law. Its complaint does not allege that Reft is violating federal law. The complaint alleges that Reft acted outside her lawful authority as president of the Karluk IRA Tribal Council by permitting Andrews to build and use the cabin on the Lands. This is not a violation of federal law. Koniag does not assert that Reft exceeded her lawful

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¹¹ *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007)

¹² *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)

¹³ *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir.1991), overruled on other grounds by *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944,953 (9th Cir.2000)

¹⁴ *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir.2005)

¹⁵ *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007)

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authority in relation to any federal law, nor does it allege that Reft's violation of federal law is ongoing. Although Koniag questions whether certain laws apply in its declaratory action, there is no allegation that Reft is violating any federal law. Reft is not and has not violated NAGPRA, Reft is not and has not violated Public Law 280. The only ongoing violation of law that Koniag has alleged is the ongoing trespass regarding the cabin.

3. Conclusion

This court lacks federal question - subject matter jurisdiction to hear and adjudicate Koniag's complaint. It is common knowledge that the federal venue is friendlier to native corporations than the Alaska state courts venue. Koniag's claims are not an adjudication of federal law. Koniag is asking this court to determine state court claims. While under the guise of declaratory judgment action it is trying to eliminate any claims or defenses Reft may have to the state court claims. Koniag is inappropriately forum shopping.

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Reft is immune from suit. Koniag has not alleged any ongoing violations of federal law by Reft against it. This case belongs in the Alaska state courts

Dated this 3rd day of September, 2013

LAW OFFICE OF DAVID D. CLARK
Attorneys for Alicia L. Reft

By: s/ David Clark
David Clark
AK Bar No. 8310110

I HEREBY CERTIFY that on September 3, 2013
a copy of the foregoing was served electronically on :

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s/ David Clark

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