

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

REPLY TO KONIAG, INC.’S OPPOSITION TO MOTION TO DISMISS

Koniag’s declaratory judgment lawsuit is an ill-disguised attempt by Koniag to defeat the defenses it anticipates Reft will raise in defense of Koniag’s state court ejectment and quiet title claims. The various assertions Koniag now claims it is entitled to have this court decide, independently of the ejectment and quiet title claims, were made by an individual who describes himself as the Karluk Tribal Attorney, Kurt Kanam, and a person who describes himself as Karluk Tribal Judge, Orbie Mullin. Koniag asserts that the Karluk Tribal Council remove a cabin it built on what Koniag alleges is its property. All of the issues that Koniag claims involve a federal question were raised in response to Koniag’s threat to evict Karluk and Kanam and Mullin’s response to it.

Law Office of
DAVID D. CLARK
805 W Fireweed Lane
Anchorage, AK 99503
Tel. 907-272-7989
Fax 907-274-9829
dclark@lawddc.com

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These factual basis of the declaratory claims Koniag is asserting in its complaint¹ at paragraphs 40, 42, 43, 44, 45, 46, 47, 48, were all originated by Kanam or Mullin. The bases of the claims have been adjudicated in *Koniag et al v. Kanam et al*, Case No. 3:12-cv-00077-SLG. (*Kanam Case*) These alleged claims made by Kanam and Mullin are raised by Koniag a second time in its anticipation of what Reft may assert as a defense to Koniag's state court claims. "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."² Reft, unequivocally, is not going to raise NAGPRA in relation to Koniag's allegations and Kanam only asserted NAGPRA as a misinformed possible defense to Koniag's threat to evict Karluk. Kanam's misinformed NAGPRA defense was tied directly to the cabin that Koniag is trying to evict Karluk from. Assuming NAGPRA applies, which it does not, Karluk's act of building the cabin on the land would be a greater violation of NAGPRA than removal of the cabin. There is no controversy regarding NAGPRA. Koniag cannot anticipate what defenses or claims that Reft will be raising to acquire federal question jurisdiction.

¹ Dkt 1

² *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985) citing *Franchise Tax Board*, 463 U.S. at 16-19, 103 S.Ct. at 2849-2851; *Public Service Commission v. Wycoff*, 344 U.S. 237, 248, 73 S.Ct. 236, 242, 97 L.Ed. 291 (1952); *Skelly Oil*, 339 U.S. at 671-72, 70 S.Ct. at 878-79; *Whittington v. Whittington*, 733 F.2d 620, 621 (9th Cir.1984).

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In regard to the Public Law 280 arguments, once again, Koniag is asking for relief from a non-existent claim. Public Law 280 is codified at 18 U.S.C.A. 1162 and gave states, including Alaska, jurisdiction over certain matters on Indian country. To retrocede from Public Law 280 is to give the power granted to the state back to the federal government.³ Although Karluk may have claimed it is “retroceding” using Public Law 280, it does not have the power to retrocede anything. This Court has already decided in the *Kanam* litigation that Karluk’s supposed exercise of jurisdiction over Koniag is unlawful. The Public Law 280 law citations cited in Koniag’s brief resolve around the issue of what power states have over Indian Country. Koniag’s declaratory action against Reft is feigned, and, even if it existed, Koniag is only trying to strip Karluk of a non-existent defense.

Koniag asserts that ANILCA preempts state law adverse possession claims and, as such, creates federal jurisdiction. Again, 43 U.S.C. §1636(d)(1)(A)(i) is a defense to any claim that Karluk may have for adverse possession. Provided that Koniag’s land is undeveloped, no third party can claim that they own the land through adverse possession. This statute was raised by Koniag as a defense, because Kanam in Exhibit E asserted Koniag’s property had been adversely possessed. Should Karluk claim in a legal pleading that it has

³ See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 150-51, 104 S. Ct. 2267, 2275-76, 81 L. Ed. 2d 113 (1984)

adversely possessed Koniag's land, then Koniag can defend that claim through the application of the statute, but a claim in a legal proceeding has to be made first. Kurt Kanam's August 29, 2012 letter⁴ does not invoke federal jurisdiction. Koniag is using the Declaratory Judgment Act to create a defense to non-existent claim.

Koniag's final argument is that Karluk's assertion of tribal jurisdiction, as set out in Exhibit E, invokes the federal common law and thus this court has jurisdiction⁵. This court has adjudicated that issue in the *Kanam* case.⁶ Assuming Reft is a shareholder of the Karluk Village Corporation or as a matter of descent would have been entitled to shares in the Karluk Village Corporation, she could attempt to set aside the merger which 30 years ago the Alaska Superior Court ruled fraudulent. Kanam's ridiculous letter, Exhibit E, does not raise an issue of federal common law.⁷

If this ejectment and quiet title action did not exist, Koniag claims that it independently can bring a claim for declaratory judgment for this court to declare that it has not violated the Native American Graves Protection and Repatriation Act (NAGPRA), that Public Law No. 83-280 creates no rights in the Karluk Tribal Council, that the Alaska National Interest Lands Conservation Act

⁴ Dkt 1 Exhibit E

⁵ Dkt 1, paragraph 46 and 58(e).

⁶ Dkts. 31, 78, 100

⁷ Kanam's assertion in Exhibit E would be similar to a taxpayer asserting the federal courthouse is his. The idea is ludicrous and this Court has dealt with the issue in the *Kanam* case.

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(ANILCA), 43 U.S.C. §1636(d)(1)(A)(i) has been implicated because of adverse possession threats and that Karluk has no jurisdiction over its land. The fact of the matter is that Karluk agrees with Koniag, in that it can exercise no jurisdiction over Koniag's land, NAGPRA does not apply to the Mary's Creek cabin, and Public Law 83-280 does not grant any jurisdiction to Karluk over Koniag in relation to the Mary's Creek cabin. The federal common law question has been adjudicated in the *Kanam* litigation and cannot be raised again here. Federal court jurisdiction cannot be created on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint.⁸

Koniag's claims of supplementary jurisdiction.

The weaknesses of Koniag's declaratory judgment arguments are apparent when it makes its supplemental jurisdiction arguments. First, it attempts to create federal causes of action out of non-existent defenses against Koniag's state court claims of ejectment and quiet title. It then asks the court to exercise its authority under 28 U.S.C. §1367(a) to exercise supplemental jurisdiction over the state court claims, because the quiet title and ejectment claims have a "common nucleus of operative fact" in common with the federal claims.⁹

A court may decline to exercise jurisdiction over a supplemental state law claim if:

(1) the claim raises a novel or complex issue of State law,

⁸ *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987)

⁹ *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004)

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- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.¹⁰

The quiet title and ejectment claims are the predominate claims, the feigned “federal” question claims raised by Koniag relate solely to the state question claims and have been adjudicated in the *Kanam* litigation. These feigned pre-adjudicated federal claims of Koniag do not support supplemental jurisdiction over Reft.

Koniag’s claims against Reft in her official capacity, no federal jurisdiction exists.

Koniag concedes that it “cannot sue the Karluk IRA Tribal Council directly because it has sovereign immunity.¹¹ Sovereign immunity bars suits against an Indian tribe, such as Karluk, in federal court.¹² Immunity protects tribal officials acting within the scope of their valid authority.”¹³ However, immunity “does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.”¹⁴ If tribal sovereign immunity

Law Office of
DAVID D. CLARK
805 W Fireweed Lane
Anchorage, AK 99503
Tel. 907-272-7989
Fax 907-274-9829
dclark@lawddc.com

¹⁰ *Id at 978*

¹¹ Koniag opposition at page 19.

¹² *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)

¹³ *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)

¹⁴ *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)

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exists, it precludes subject matter jurisdiction in an action against an Indian tribe.¹⁵ 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.¹⁶ Koniag alleges that it is entitled to a declaratory judgment that Reft may not exercise "governmental authority or proprietary jurisdiction over Koniag, the Lands or Cabin, because doing so would exceed the Native Village of Karluk's lawful authority under federal Common law...." Karluk is not and has not exercised governmental or proprietary jurisdiction over Koniag's land. Karluk does not have the authority to exercise jurisdiction over Koniag land. This court, in *Koniag et al v. Kanam et al*, Case No. 3:12-cv-00077-SLG, made certain determinations regarding Karluk, at dockets 31, 78, 100. This Court has ordered that claims asserted by Kanam, on behalf of the Karluk Tribal Council, be dismissed with prejudice. Once these tribal court claims are dismissed with prejudice, they have been adjudicated to finality and are no longer viable claims.¹⁷ Koniag cannot claim it is at risk of the Karluk Tribal Council attempting to obtain jurisdiction over it through tribal

Law Office of
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Fax 907-274-9829
dclark@lawddc.com

¹⁵ *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir.2005)

¹⁶ *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007)

¹⁷ *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008)

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court actions, as these claims have been dismissed with prejudice and cannot be re-filed.

The former shareholders of the Karluk Village Corporation may have standing to challenge the 30 year old merger with Koniag but the Karluk Tribal Council does not. 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. Koniag does not assert that Reft's violation of federal law is ongoing. Reft is not and has not violated NAGPRA. Reft is not and has not violated Public Law 280. The only allegation that Reft, as president of the Karluk Tribal Council, attempted to obtain jurisdiction over Koniag was through the Tribal Courts and Kurt Kanam. See Exhibits D and E attached to plaintiff's complaint. This issue has been resolved in the *Kanam* litigation. This court has ruled that the Karluk Tribal Court cannot exercise territorial jurisdiction over Koniag.¹⁸ There is no ongoing violation of law that Koniag has alleged, other than the ongoing trespass regarding the cabin. That is a state issue.

Conclusion

This court lacks federal question - subject matter jurisdiction to hear and adjudicate Koniag's complaint. This court has resolved, in the *Kanam* case, the feigned federal declaratory issues that Koniag has asserted. The federal common

¹⁸ *Kanam* at DKT. 31.

law question was resolved in the *Kanam* case by the series of orders issued by the District Court.

This case belongs in the Alaska state courts for what it is, a complaint to quiet title against and eject Karluk from Koniag's land.

Dated this 28th day of October, 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 October 28, 2013
a copy of the foregoing was served electronically on :

James E. Torgerson, Esq
Renea L. Saade
Attorneys for Plaintiff Koniag, Inc.

s/ David Clark

Law Office of
DAVID D. CLARK
805 W Fireweed Lane
Anchorage, AK 99503
Tel. 907-272-7989
Fax 907-274-9829
dclark@lawddc.com

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