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LISA WILSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

LISA WILSON,

Plaintiff,

v.

UMPQUA INDIAN DEVELOPMENT CORPORATION; SEVEN FEATHERS CASINO AND HOTEL CORPORATION; COW CREEK BAND OF UMPQUA INDIANS TRIBAL COURT; TRIBAL COURT JUDGE RONALD YOCKIM, IN HIS OFFICIAL CAPACITY; AND DOES 1-10,

Defendants.

Case No. 6:17-cv-00123-AA

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TELEPHONIC ORAL ARGUMENT REQUESTED

OPPOSITION

Plaintiff Lisa Wilson ("Plaintiff" or "Ms. Wilson") hereby opposes the Motion to Dismiss filed by Defendants Umpqua Indian Development Corporation, Seven Feathers Casino and Hotel Corporation, Cow Creek Band of Umpqua Indians Tribal Court and Tribal Court Judge Ronald Yockim, in his official capacity (hereinafter "Defendants" or "Tribe").

I. INTRODUCTION

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3 The Court has jurisdiction. Sovereign immunity does not bar this suit. Defendants rely on
4 sovereign immunity as if it were a mystical talisman that bars any and all scrutiny of the laws the
5 Cow Creek Tribe appliesto non-Indian casino patrons, like Lisa Wilson. On one hand, the Tribe
6 advertises throughout Southern Oregonto all people for a “casino hotel experience.”On the other,
7 when someone gets hurt, like Ms. Wilson, Defendants use an obscure and confusing tribal
8 ordinance to dispose of valid claims. The ordinance is at odds with federal law—which is a
9 federal question, conferring subject matter jurisdiction.
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12 Defendants portray Ms. Wilson’s complaint as something that it is not—she is not
13 seeking “super-appellate” review by this Court. She is seeking a determination as to what law
14 controls when a tribal ordinance collides with the mandates of federal law, specifically, the
15 Indian Gaming Regulatory Act, 25 U.S.C §2710 *et seq.* (IGRA). IGRA specifically requires a
16 Tribal-State Compact between the Tribe and State of Oregon in order for the Tribe to reap the
17 benefit of Class III casino gaming.
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19 The Tribe’s 2011 amended Compact itself appears to answer this question. It expressly
20 requires \$2 million dollars in insurance coverage for patron personal injury and property damage
21 claims and expressly waives immunity over these claims in Tribal, state or *federal court*.
22 However, despite the express language of the Compact, the Tribe’s Court has conveniently
23 interpreted the Compact insurance provisions as applicable to only State employees. This means,
24 what the IGRA and National Indian Gaming Commission-blessed Compact expressly giveth—
25 the Tribe and its Court taketh away.
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1 The Tribe's ordinance therefore frustrates the purpose of the IGRA-mandated Oregon
2 Compact requiring \$2 million in insurance for patron injury and property claims.

3 **II. FACTUAL ALLEGATIONS**

4 For over two and a half years Ms. Wilson faithfully prosecuted her personal injury claim
5 against the Cow Creek Band of Umpqua Indians. As required by federal law, she was in the
6 process of exhausting her Tribal remedies before the Cow Creek Tribal Court. At the eleventh
7 hour, some two years *after* she filed her claim, the Tribal Court determined that the absence of
8 one word, "Secretary," from a proof of service form forever foreclosed her personal injury claim
9 against the Tribe.
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11 Plaintiff Wilson, on no less than two occasions, one without counsel and one with,
12 presented her claim to numerous tribal officials and required tribal entities pursuant to the
13 Tribe's Tort Claims Ordinance (Ordinance) Section 4-40. ECF No 1-3. At no time did the Tribe,
14 its officials, or its entities *respond or acknowledge* whether Ms. Wilson's claim form was
15 acceptable at the time of filing. Ms. Wilson thereafter, consistent with the Ordinance, presented
16 her complaint for damages and Tort Claim before the Tribe's Business Board. The Board
17 thereafter, including its President and *Secretary*, approved the case for the Tribal Court where it
18 proceeded until it was dismissed by the Court on summary judgment for the alleged failure to
19 follow the Tribe's Notice requirements. The Court's dismissal was thereafter upheld by the
20 Tribe's business board, in a two paragraph statement, by the same individuals that approved Ms.
21 Wilson's claim in the first place.
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III. SUBJECT MATTER JURISDICTION

A. The Extent of Tribal Court Jurisdiction Over Non-Indians Is A Federal Question

Most of Defendants' brief focuses on subject matter jurisdiction. Defendants argue: no federal question—no jurisdiction. However, the extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law. *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008). Whether a tribal court has authority to adjudicate against a nonmember is a federal question within the jurisdiction of the federal courts. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct. 2709, 2716 (2008). Where tribal jurisdiction is not specifically authorized by federal statute or treaty, as here, a Tribe's authority stems from its "retained or inherent sovereignty." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50 (2011). The limits of that retained power as it relates to tribal civil jurisdiction has been established primarily through federal court decisions. *Attorney Process and Investigation Services, Inc. v. Sac Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 932 (8th Cir. 2010). Here, Ms. Wilson is a non-Indian. Whether the Tribal Court properly denied jurisdiction over her personal injury claim is therefore a federal question. Subject matter jurisdiction exists.

But Ms. Wilson's non-Indian status is not the only basis for federal court jurisdiction. Federal law requires that "[g]eneral principles of federal contract law govern compacts which were entered pursuant to the IGRA." *Pauma Band of Luiseno Mission Indians v California*, 2015 WL 9245245 at *4 (9th Cir. 2015) ["[A] contract must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the [contract]." *United States v Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005)]. Hence, this Court also has the federal question jurisdiction needed to apply federal law to the contract between Oregon and the Tribe as it relates to Ms. Wilson's personal injury claim.

1 Federal question subject matter jurisdiction exists. The motion to dismiss should be
2 denied.

3 **B. Whether Defendants' Waived Sovereign Immunity Is Also a Federal**
4 **Question And Does Not Shield Defendants**

5 The next portion of Defendants' brief focuses on sovereign immunity. But
6 sovereign immunity does not shield Defendants from District Court review of
7 Defendants' decision to dismiss Plaintiff's tort claim. This is because the Tribe and
8 Defendants have unequivocally waived the defense of sovereign immunity.
9

10 As a threshold matter, federal courts have jurisdiction to determine whether a
11 Tribe waived its immunity to suits brought in State and Federal court via its Indian Gaming
12 Regulatory Act ("IGRA") required Tribal-State Compact. *Cabazon Band of Mission Indians*
13 *v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) ("The Compacts quite clearly are a creation of
14 federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude
15 that the Bands' claim to enforce the Compacts arises under federal law and thus that we have
16 jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362."). Here, despite Defendants claims to
17 the contrary, district court jurisdiction exists for the court to determine whether tribal
18 sovereign immunity has been waived.
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22 This Court, therefore, must review and analyze the four corners of the Tribe's
23 Compact with Oregon. A plain reading of the Compact language demonstrates the clear
24 intentions of the parties (Oregon and Tribe). The Tribe waived immunity to claims in State,
25 Federal and Tribal court, *without notice restrictions*. Additionally, the Compact language
26 is clear and unambiguous in that the carrier, Tribe and tribal entities are barred from raising
27 sovereign immunity up to the limits of the insurance policy (\$2,000,000). The Tribe cannot
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2 now, by ordinance, narrow the conditions of the waiver of immunity granted in the
3 Compact via a Tribal Tort Ordinance that interprets a waiver more strictly and narrowly
4 than the waiver language granted by the Compact. In doing so, the Tribe is violating the
5 express terms of its Compact with Oregon.
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8 **C. Between A Tribal-State Compact and Tribal Ordinance, The Compact Controls,
And The Tribe Waived Its Sovereign Immunity**

9 In *Campo Band of Mission Indians v. Superior Court*, 137 Cal.App. 4th 175 (2016) the
10 California Fourth District Court of Appeal was faced with a similar situation as the one here.
11 In *Campo*, the court was asked whether a state compact or a Tribal ordinance controlled. *Id.* at
12 177. The Tribe argued that the Tribal ordinance controlled and therefore a patron tort claim
13 should be barred because it was untimely filed pursuant to a Tribal ordinance. *Id.* The patron's
14 position was that the Tribe waived immunity to all courts. The Court however, found middle
15 ground and while not allowing the case to proceed in the superior court ordered remand to the
16 Tribe's court as it was the Tribe's chosen forum. Further, the court held that as between the
17 Compact and Tribe's Ordinance, the compact controlled. *Id.*
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21 Here, this Court is faced with a similar issue: what controls—the compact that
22 provides for \$2 million in patron insurance and waives sovereign immunity to state, federal
23 and Tribal Court, or a tribal ordinance, that only provides for a Tribal Process and Ordinance
24 which must be strictly construed to disallow a properly filed tort claim? As stated in *Campo*
25 *Band*, as between the terms of the ordinance and terms of the Compact, the Compact controls.
26 *Id.* Therefore, the Tribe cannot interpret the Compact to permit it to include tribal ordinance
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1 terms that have the effect of denying patrons access to the policy of insurance for personal
2 injury claims.

3
4 If the Compact controls, then sovereign immunity has been waived in this matter. A
5 plain reading of the Compact, Section G (ECF Complaint, Exhibit 1-6, p. 41) indicates that
6 the waiver of immunity is contained in section VIII titled "**Additional Regulations**
7 **Regarding Class III Gaming.**" This section contains the following additional regulations:
8 Gaming, Identification Badges, Credit, Prohibition on Minor Play, Prohibition of Firearms,
9 Liability for Damages to Persons and Property and Indemnification. These regulations in
10 Section VIII are not limited to "Oregon government workers or agents."
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13 Further, while there are requirements that state actors be additional insureds and
14 have \$250,000/\$2 million in coverage, a plain reading of the text of "Liability for Damages
15 to Persons and Property" contains no such limitation. The section concerning additional
16 insureds supplements the general requirement for \$2,000,000 in A-rated insurance for
17 damages to "persons or property," generally—not damages to Oregon state workers or
18 agents. Further, the Tribal State Compact expressly states, in its preamble, that its contents are to
19 "protect the gaming public." Preamble section C (3) expressly states:
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22 **"[T]he Relationship between the state and the Tribe rests on a mutual trust**
23 **and the recognition that each has a duty to protect the gaming public through**
24 **separate responsibilities set forth in this IGRA compact."**

25 Thus, the entire Compact, including the insurance provision, was for the benefit of
26 plaintiff.
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1 **D. Because the Compact Does not Identify a Tribal Ordinance with which**
2 **Plaintiff Must Comply, the Tribe Cannot act to Frustrate the**
3 **Insurance Provision's Purpose**

4 The Compact does not identify an ordinance with which Plaintiff must comply.

5 Hence, the Tribe cannot enact an ordinance which frustrates the Compact's purpose of
6 requiring an insurance policy be made available to casino patron injuries and property
7 damage.

8 In this case, the Tribe did just that. It enacted an ordinance that frustrates the purpose of
9 the Compact. Moreover, other State Tribal gaming compacts, such as those required by the State
10 of California, provide patrons notice that they must comply with a Tribal ordinance as part of the
11 claims process and prior to arbitrating their case before a third party neutral. (See attached as
12 Exhibit 1, Section 10.2(d), 2015, compact pp. 18-19, 2004 Amended Compact 18-21). Here, the
13 Tribe's Compact provides no such notice. Moreover, as alleged in the Complaint, Defendants'
14 risk manager did not even give Ms. Wilson a copy of the tort ordinance prior to forwarding it to
15 the Tribe's insurance carrier for review and subsequent dismissal. ECF 1-Main, ¶ 28. Hence,
16 Defendants' lack of understanding of the casino's tort claim process is to blame for Ms. Wilson's
17 alleged failure to comply with the Tribe's ordinance.
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20 **E. As Plaintiff had No Notice of the Existence of an Ordinance in the**
21 **Compact when She Presented Her claim, the Tribal Court Cannot Now Dismiss**
22 **Plaintiff's Case**

23 The Tribal Court erred when it applied the strict and narrow construction language of the
24 Tribe's Ordinance 4-40. A reading of Ordinance Section 4-40 indicates that it is only applicable
25 to sovereign immunity waivers and not the presentation of Tort Claims. The Tribal Court
26 dismissed Ms. Wilson's case based on one reason: she, through her attorney, did not include the
27 word "secretary" on her Notice of Tort Claim proof of service. Ms. Wilson's Tort Claim
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1 complied with the Tribe's Tort Claim ordinance in every other way and was, in fact, considered
2 by the Tribe's "secretary." Again, no ordinance requires that the word secretary be included in
3 Tort Claim proofs of service.

4
5 Specifically, on March 27, 2014, less than three months after her January 10, 2014 fall,
6 Ms. Wilson prepared a "Notice of Tort Claim." This document described the location of injury,
7 description of occurrence, cause of the injury, and nature of the injury. The Notice of Tort Claim
8 included a cover letter addressed to Travelers' Insurance Company—the Tribe's insurer.

9
10 The Notice of Tort Claim included a proof of service, sent by certified mail. It was
11 mailed to the Umpqua Indian Development Corporation's Chief Executive Officer, the Seven
12 Feathers Hotel and Casino's General Manager/Loss Prevention Division, and Travelers
13 Insurance Company. It was also sent by certified mail, in separate envelopes, to the Cow
14 Creek Band of Umpqua Indians, attention Tribal Chairperson and General Counsel. It was
15 not sent to the Tribe's "secretary" of the Board of Directors. ECF Complaint, Ex.1-4.

16
17 Tribal Ordinance 4-40 is called "Procedure for Giving Notice of Claims and Filing
18 Actions." To comply with this ordinance, Ms. Wilson had to do three things. First, she had to
19 send by certified mail, return receipt requested, a written Notice of Claim to two agents of the
20 Tribe: "the Secretary of the Board of Directors *and* the Office of Tribal Attorney" within 90
21 days. ECF Complaint, Ex. 1-3.

22
23 Since the injury involved a Tribal Business Corporation—the Seven Feathers Hotel &
24 Casino, a division of the Umpqua Indian Development Corporation—the Notice of Claim also
25 had to be sent to the Chief Executive Officer of the Umpqua Indian Development Corporation.
26 *Id.* Ms. Wilson did send the Notice of Claim to the Chief Executive Officer of the business
27 corporation, but instead of addressing her envelope to the "Secretary" of the Tribe's Board of
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1 Directors she addressed it to "Tribal Chairperson." ECF 1-4. The Notice of Claim was also sent
2 within the 90-day period required by 4-40 which ran from January 10, 2014, Wilson's injury
3 date. The 90-day period would have expired on **Thursday, April 10, 2014**. The Tribal Court
4 stated in its decision that the Notice of Claim *was late*, when the notice's proof of service was
5 **dated March 27, 2014, some fourteen days BEFORE the 90-day period would have**
6 **expired.** This holding is clearly erroneous. The Tribal Court dismissed Ms. Wilson's case
7 because instead of sending the Notice of Claim to the "Secretary" and "Tribal Attorney," she
8 sent it to the "Tribal Chairperson" and "General Counsel." The Tribal Court ruled that not
9 sending the Notice of Claim to the "Secretary" violated the Tribal Ordinance 4-40(a).
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12 It held:

13 **"The Court has jurisdiction over civil matters pursuant to Title 4 of the Tribal**
14 **Code, however before this court can exercise any civil jurisdiction the**
15 **procedural requirements of Section 4-40 must be strictly complied with."**
16 **ECF 1-7, p.2**

17 In so ruling, the Court held that Ms. Wilson did not comply with Tribal Ordinance
18 450(e), which says: "The procedures and standards for giving notice of claims and
19 commencing actions in Tribal Civil Court provided in Section 4-50 of this Code are
20 integral parts of the limited waiver of sovereign immunity provided by this Code and shall
21 be strictly and narrowly construed. . ." ECF 1-7, p.2, emphasis added. The strict and
22 narrow construction the court relies on applies to Tribal Ordinance 4-50, not Ordinance 4-
23 40, the claims presentation ordinance. Ordinance 4-50 concerns limitations on waivers of
24 sovereign immunity. Subdivision (e) of Ordinance 4-50 references a strict and narrow
25 construction provided in Section 4-50, but not 4-40. Section 4-50(e), says: "A tort claim for
26 monetary damages against the Tribe shall be forever barred unless written notice of the claim
27 is presented to the Tribe and an action for monetary damages relating to any such claim is
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1 commenced in Tribal Civil Court in compliance with Section 4-40 of this Code." ECF 1-3, p.
2 3.

3 Here, Ms. Wilson did present the notice of claim to the Tribe. The strict and narrow
4 construction applies to Ordinance 4-50, **not** the claims ordinance 4-40. Accordingly, the Tribal
5 Court erred when it applied the strict and narrow construction to Ms. Wilson's Notice of Claim.
6 The Tribal Court's grant of summary judgment should be reversed. Further, the Ordinances own
7 language at Section 4-20 (i) states that for purposes of the Ordinance, "Tribe" means "any branch,
8 office, department, agency, commission, utility, authority, instrumentality, enterprise, tribal
9 business corporation, or other entity of the Tribe." ECF 1-3, p. 3. Thus, under the Tribe's own
10 Tort Ordinance Definitions, notice of the claim was sufficient if presented to any of the entities
11 on the Proof of Service.
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13
14 Based on the foregoing, this Court has subject matter jurisdiction to decide whether the
15 Tribal Court exceeded its authority in dismissing Ms. Wilson's personal injury case.
16

17 **IV. PLAINTIFF'S COMPLAINT IS NOT SUBJECT TO DISMISSAL**
18 **UNDER 12(b)(5) BECAUSE THE TRIBE'S SERVICE RULES DO NOT**
19 **APPLY TO THIS ACTION**

20 Defendants provide no support for their assertion that in order for this matter to be
21 properly served, Plaintiff must comply with the Tribe's service requirements, as opposed to the
22 orders of the Oregon District Court and the Federal Rules of Civil Procedure (specifically, Rule 4
23 of the Federal Rules of Civil Procedure). For the Court to require service pursuant to Tribal
24 rules, such Tribal rules would circumvent the Federal Rules of Civil Procedure and allow
25 Defendants to again escape District Court jurisdiction, as there was no way a Plaintiff could
26 comply with both rules. Further, Defendants could merely have their attorneys deny acceptance
27 of service, as Defendants did here, requiring Plaintiff to play the game of *hide and seek*, in order
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1 to serve the Tribal Defendants. Plaintiff does however concede that if this matter were before
2 the Tribe's court, then the Tribe's means of service may be applicable. As such, Plaintiff's filing
3 of her complaint in the Tribal Court, as against the Tribe, was in full compliance with the Tribal
4 Court's service requirements.
5

6 **V. PLAINTIFF HAS STATED A CLAIM UPON WHICH RELIEF CAN BE**
7 **GRANTED**

8 In this case, due to the Tribe's express waiver of immunity to federal, state or tribal court
9 actions, and because Plaintiff is not seeking enforcement of the Compact, but a clarification of its
10 provisions to this case, Ms. Wilson has stated a valid claim for relief. Plaintiff has included a
11 plethora of facts that point to the Tribe's own unfamiliarity with its own Tort Claims process and
12 the requirement of an ordinance, which was not initially presented to Ms. Wilson at the onset of
13 the case.
14

15 The Tribe's insurance carrier thereafter denied the claim, which made it ripe for appeal.
16 The ordinance, which was used by the Tribal Court to dismiss her claim, is ineffective to the
17 extent that it conflicts with the Compact and frustrates the IGRA and NIGC-approved purpose of
18 Oregon's Compact with the Tribe—to provide insurance to injured casino patrons. The
19 Complaint states a claim.
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22 **VI. CONCLUSION**

23 Federal question jurisdiction exists. Sovereign immunity does not bar this claim. The
24 language of the applicable Compact verifies Ms. Wilson's Complaint has merit and should not
25 be dismissed. The Complaint was properly served. Defendants' motion to dismiss should be
26 denied.
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CERTIFICATE OF COMPLIANCE

This opposition complies with the applicable word-count limitation under LR 7-2(b) because it contains 3,365 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and certificate of counsel.

Respectfully submitted March 23, 2017.

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