

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILMINGTON SAVINGS FUND  
SOCIETY, FSB, DOING BUSINESS AS  
CHRISTIANA TRUST, NOT IN ITS  
INDIVIDUAL CAPACITY BUT SOLELY  
AS TRUSTEE FOR BCAT 2014-6TT ,

Plaintiff,

v.

COREY FRYBERG, *et al.*,

Defendants.

No. 2:17-cv-01196 RSL

DEFENDANT'S REPLY IN SUPPORT  
OF MOTION TO DISMISS

Defendant, the Tulalip Tribes, respectfully requests dismissal of this action on the grounds of sovereign immunity, lack of diversity jurisdiction, and exhaustion of tribal court remedies. As demonstrated in *Defendant Tulalip Tribes' Motion to Dismiss for Lack of Subject Matter Jurisdiction*, Dkt. # 15, Plaintiff has failed to establish complete diversity of citizenship as required by 28 U.S.C. § 1332, or to demonstrate a waiver of tribal sovereign immunity to establish subject matter jurisdiction for this case to proceed against the Tulalip Tribes. Plaintiff's response in opposition to the Tribes' motion to dismiss, Dkt. # 21, does not dispute that complete diversity and a sovereign immunity

1 waiver are lacking in this case. Instead, Plaintiff concedes these points, but asks only that  
 2 the Tulalip Tribes be dismissed as a party to this case.

3 However, dismissing the Tulalip Tribes as a party does not resolve Plaintiff's  
 4 failure to exhaust remedies in the Tulalip Tribal Court. Plaintiff argues that exhaustion of  
 5 tribal court remedies is not applicable in this case. Dkt. # 21 at page 3. This analysis is  
 6 incorrect for two reasons. First, exhaustion of tribal court remedies does, in fact, apply in  
 7 diversity cases, contrary to Plaintiff's arguments. Second, 25 U.S.C. § 5135(a) requires  
 8 the application of Tulalip Tribal Law in this case, which requires action in tribal court.  
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 12 *Exhaustion of Tribal Court Remedies Applies to Diversity Cases*

13 Plaintiff argues that "exhaustion of Tribal Court remedies only applies to federal  
 14 question jurisdiction." Dkt. # 21 at page 3. This is incorrect. In *Iowa Mutual Insurance*  
 15 *Co. v. LaPlante*, the United States Supreme Court found that "[r]egardless of the basis for  
 16 [federal court] jurisdiction, the federal policy supporting tribal self-government directs a  
 17 federal court to stay its hand in order to give the tribal court a 'full opportunity to  
 18 determine its own jurisdiction.'" 480 U.S. 9, 16 (1987) (citing *Nat'l Farmers Union Ins.*  
 19 *Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)). The asserted basis for federal  
 20 court jurisdiction in the *Iowa Mutual Insurance* case was diversity of citizenship. 480  
 21 U.S. at 11. In other words, tribal exhaustion applies to diversity cases under 28 U.S.C. §  
 22 1332, as well as federal question cases under 28 U.S.C. § 1331.  
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25 Plaintiff has not asserted any exceptions to the doctrine of exhaustion of tribal  
 26 court remedies. *See Nat'l Farmers*, 471 U.S. at 856 n. 21 (exceptions to tribal court  
 27 exhaustion requirement). Instead, Plaintiff mistakenly claims that exhaustion is wholly  
 28

1 inapplicable because this case is premised on diversity of citizenship, rather than federal  
 2 question jurisdiction. Exhaustion of tribal court remedies is applicable in this case, and  
 3 no exception to the exhaustion requirement has been demonstrated. Therefore, Plaintiff  
 4 must file this action in the Tulalip Tribal Court.  
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 7 *Venue and Jurisdiction in Tribal Court is Required by Federal Statute*

8 Because this is ostensibly a diversity case, this Court acts as an adjunct of the  
 9 Washington State courts. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).  
 10 In Washington State courts, “[w]here an action is brought in the superior court of any  
 11 county of this state, and where, under the Laws of the United States, exclusive  
 12 jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal  
 13 court of a federally recognized Indian tribe, the superior court shall, upon motion of a  
 14 party or upon its own motion, dismiss such action pursuant to CR 12(b)(1), unless  
 15 transfer is required under federal law.” Wash. CR 82.5(a). By this Rule, state courts are  
 16 mandated to dismiss actions that are subject to the exclusive jurisdiction of a tribal court.  
 17 Acting as an adjunct of the state courts, this Court should do the same.  
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20 Pursuant to 25 U.S.C. § 5135(a), foreclosure of Indian trust lands within the  
 21 Tulalip Tribes’ jurisdiction are subject to the laws of the Tulalip Tribes. The applicable  
 22 law in this case is Tulalip Tribal Code (“TTC”) Chapter 6.10. Plaintiff asserts that the  
 23 Tulalip Tribal Code merely defers to the Revised Code of Washington (“RCW”) for  
 24 foreclosures, and does not provide for exclusive jurisdiction in tribal court. Dkt. # 21 at  
 25 page 3. This is incorrect. Although TTC Section 6.10.140(1)(a) provides that judicial  
 26 foreclosures be “in conformity with Chapter 61.12 RCW,” that code provision also  
 27 specifies that all references to courts in the RCW shall be deemed to mean “Tribal  
 28 Court.” The Tulalip Tribal Code also provides that “[t]he rules of decision of the Courts

1 of the State of Washington shall guide the Tribal Court's determination and interpretation  
2 relating to [foreclosure proceedings]." TTC Section 6.10.140(3). Nowhere does tribal  
3 law wholly defer to the application of RCW Chapter 61.12. Rather, tribal law adopts  
4 certain procedures and authorities of the state law, but applies those procedures in the  
5 Tulalip Tribal Court. TTC Chapter 6.10 further provides that the foreclosure remedies  
6 set forth in that Chapter are exclusive. TTC Section 6.10.140(4).

7 Therefore, 25 U.S.C. § 5135(a) requires Plaintiff to pursue this foreclosure action  
8 under the applicable laws of the Tulalip Tribes, which requires that this case must be filed  
9 in the Tulalip Tribal Court.

10  
11 *Conclusion*

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13 It is undisputed that Plaintiff has failed to establish diversity of citizenship as to  
14 the Tulalip Tribes, or a waiver of tribal sovereign immunity. Plaintiff attempts to resolve  
15 these deficiencies by dismissing the Tulalip Tribes from this case. However, dismissing  
16 the Tulalip Tribes from this case will not resolve Plaintiff's failure to exhaust tribal court  
17 remedies, or to follow tribal law as mandated by 25 U.S.C. § 5135(a). The applicable  
18 law in this case is TTC Chapter 6.10, which requires action in Tulalip Tribal Court. In  
19 addition, exhaustion of tribal court remedies applies in this case, which requires this case  
20 to be filed in tribal court as a matter of comity. Therefore, this case should be dismissed  
21 for Plaintiff to re-file in the Tulalip Tribal Court, pursuant to TTC Chapter 6.10.  
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1 DATED this 16th day of November, 2017.

2  
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*Attorney for Defendant*  
*Tulalip Tribes of Washington*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kimberly Hood, khood@robinsontait.com  
Craig Peterson, cpeterson@robinsontait.com

DATED this 16th day of November, 2017.

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