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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK PACINO,

Plaintiff,

v.

LUIS OLIVER, et al.,

Defendants.

Case No.: 3:18-cv-06786-RS

DEFENDANT CATHERINE OLIVER'S
SUPPLEMENTAL BRIEF IN RESPONSE
TO ORDER (DKT. 98); DECLARATIONS
IN SUPPORT THEREOF

Date: TBD
Time: TBD
Hon. Richard Seeborg
Courtroom 3 – 17th Floor

INTRODUCTION

This Court determined that it may review the General Allotment Act claims raised by Plaintiff Frank Pacino ("Pacino") against defendant Catherine Oliver ("Oliver"). *See* Order, Dkt. 90 at 7. The Court notes, however, that it cannot exercise its jurisdiction unless Pacino exhausted all available tribal remedies. *See id.* at 5-6. The Court noted that Pacino failed to file an appeal of the Tribal Court decision, *see id.*, which Pacino admitted. *See* Opp. MTD, Dkt. 88 at 5. In fact, Pacino stated that he did not have to file an appeal or exhaust tribal remedies. *See id.* Thus, Pacino consciously refused to follow the Round Valley Tribe's ("Tribe") clear rules for appealing a decision. He now has the heavy burden of showing this Court "that one of the [exhaustion] doctrine's *narrow* exceptions applies." *Alvarez v. Tracy*, 773 F.3d 1011, 1012 (9th Cir. 2014) (emphasis added). He cannot make such a showing and the Court cannot exercise jurisdiction in

1 this instance.

2 The Court must therefore dismiss the Second Amended Complaint on grounds that Pacino
3 failed to exhaust available tribal remedies in the Tribe's Court of Appeals.

4 **ARGUMENT**

5 **I. Round Valley Tribes Court System.**

6 The Tribe has established a court system for its tribal members and individuals subject to
7 the Tribe's jurisdiction that is fair and robust. The Tribe's courts afford individuals the rights and
8 protections under the Tribe's Constitution, and equal access according to the Tribe's laws and the
9 courts' rules and procedures. The Tribe's courts provide conflicts and dispute resolution, which is
10 critical to the functioning of the Tribe's government and the services it provides to its members.

11 **A. Structure and Composition of the Round Valley Tribes Judiciary.**

12 The Tribe's Constitution establishes a judicial branch under Article III and creates the
13 Tribal Court and the Tribal Court of Appeals ("Appellate Court") under Article VI. *See*
14 Declaration of Michelle Downey ("Downey Decl."), Ex. 1, Constitution at Art. III, VI. The Tribal
15 Court consists of one Chief Judge and associate judges, as needed. *See id.*, Ex. 2, Tribal Court
16 Code ("TCC") § 4.01(A). The current Chief Judge of the Tribal Court is The Honorable Joseph J.
17 Wiseman, appointed by the Tribe in 2016. Declaration of Laura Betts ("Betts Decl.") ¶ 3. He has
18 served as Chief Judge continuously since Pacino filed the original complaint in this action. *See id.*

19 The Appellate Court has one Chief Justice and two associate justices. *See Downey Decl.*,
20 Ex. 2, TCC § 4.01(B). Currently, The Honorable Jessica R. Bear is the Appellate Court Chief
21 Justice, and there are two *pro-tem* associate justices, The Honorable Richard Blake and The
22 Honorable Nicolas Mazanec, both experienced tribal court judges. *See Betts Decl.* ¶ 3. While the
23 Appellate Court hears few cases, it is an active and functioning appellate court for the Tribe. *See*
24 *id.* Currently, it has one case pending. *See id.*

25 In addition to the constitutional provisions that establish the Tribe's judiciary, the Tribe
26 enacted ordinances, rules and procedures governing the Tribe's courts. The Tribe enacted the
27 TCC, Rules of Court, and the Court of Appeals Rules of Court. *See id.* ¶ 4; *see also* Downey
28 Declaration, Ex.'s 2 – 4. The Constitution and the Tribe's laws, rules and procedures guarantee

1 the right of due process. *See id.*

2 A Tribal Court judge presides over all cases filed in the Tribal Court and applies the
3 Tribe's Constitution, codes, rules and, when applicable, federal and state laws. *See id.* ¶ 5. All
4 cases are decided by the presiding Tribal Court judge. *See id.* There are no jury trials. *See id.* A
5 party may be represented by an attorney or lay advocate. *See id.*

6 **B. Assignment of Cases for Appellate Review.**

7 Cases are assigned to the Appellate Court according to the Rules of Court and Court of
8 Appeals Rules of Court. *See id.* ¶ 6. Appeals to the Appellate Court may be taken but must be
9 filed in the Tribal Court within 30 days after a final order or final judgment, or within five days
10 after a written or oral decision or order of the Tribal Court. *See Downey Declaration, Ex. 4, Ct.*
11 *Ap. R. Ct. 3(a); see also Betts Decl. ¶ 6.* Untimely appeals deprive the Appellate Court of
12 jurisdiction to hear an appeal and must be rejected by the Tribal Court Clerk of Court. *See id., Ct.*
13 *Ap. R. Ct. 4.* Timely appeals that are properly filed pursuant to a Notice of Appeal are delivered
14 to the Appellate Court by the Clerk of the Tribal Court. *See id. Ct. Ap. R. Ct. 3; see also Betts*
15 *Decl. ¶ 6.*

16 All cases before the Appellate Court are decided by a panel of three justices, including the
17 Chief Justice, by applying the Tribe's Constitution, codes, rules and, when applicable, federal and
18 state laws. *See id. Ct. Ap. R. Ct. 15; See also id. ¶ 7.*

19 **C. The Tribal Court grants *pro se* parties greater flexibility with filings.**

20 *Pro se* parties in the Tribal Court are granted flexibility in their filings and held to
21 standards less stringent than standards applied by federal district courts and state courts. *See id. ¶*
22 *8.* Unlike federal district courts, most parties in the Tribal Court, possibly up to 95 percent, appear
23 *pro se. See id.* Nearly all the litigants in the Tribal Court live and work on the Tribe's Reservation
24 or in the vicinity of the Reservation. *See id.* For these reasons, the Tribal Court exhibits great
25 patience with all *pro se* parties who fail to adhere strictly to the rules of civil procedure or Court
26 Rules so that their disputes are effectively adjudicated like those of represented parties. *See id.*
27 For example, after Pacino filed a deficient complaint in the Tribal Court, Judge Wiseman granted
28 Pacino leave to file an amended complaint and ordered the Tribe to deliver documents related to

the allotment at issue. *See* SAC, Ex. C, Dkt. 27-1 at 16.

II. The Court must dismiss this case because Pacino failed to file a timely appeal and because he has not and cannot make a showing that an exception to the exhaustion doctrine applies here.

A plaintiff has a “duty to exhaust tribal remedies prior to proceeding in federal court.” *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), amended, 197 F.3d 1031 (9th Cir. 1999). Exhaustion of tribal remedies includes appellate review by a tribe’s courts. *See* Order, Dkt. 90 at 5 (“Until a tribal judicial system’s ‘appellate review is complete,’ the tribe ‘ha[s] not had a full opportunity to evaluate the claim and federal courts should not intervene.’” (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987))). As this Court correctly found, “Pacino thus is obliged to afford the ‘tribal appellate courts . . . the opportunity to review the determinations of the lower tribal courts[.]’” *Id.*

Pacino admits that he did not appeal the Tribal Court’s decision to dismiss his case. *See* Opp. MTD, Dkt. 88 at 5. He argued that he was not obligated to exhaust tribal remedies. *See id.* Pacino attempted to file an appeal three and one-half years after it should have been filed, and the Tribal Court properly rejected it as time barred.¹ *See* Resp. OSC, Dkt. 96 at 4. Now, that Pacino cannot file an appeal, he disingenuously argues that “he fulfilled his obligation as ordered by the Court” and that filing an appeal in the Tribe’s Court of Appeals is futile. *See id.* Clearly, he is mistaken.

The Court must dismiss this case because Pacino failed to file a timely appeal and because he has not and cannot make a showing that an exception to the exhaustion doctrine applies here. *See Iowa Mut.*, 480 U.S. at 12; *Alvarez*, 773 F.3d at 1023-24 (Court declined “to assert jurisdiction over . . . claims” where *pro se* plaintiff failed to file timely appeal in tribal court of appeals); *see also Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 954 (9th Cir. 1998) (a tribal member “is bound to follow the procedures of the tribe if they are consistent

¹ The Tribal Court issued its decision on September 10, 2018. A timely appeal must have been filed on or before October 10, 2018. Ct. Ap. R. Ct. 3(a) (“An appeal to the Court of Appeals shall be made no later than thirty (30) calendar days after the entry of the final written judgment or order of the Tribal Court.”).

with the [ICRA]”); *Wilbur v. Makah Tribal Court*, Case No. C12-5484 BHS, 4 (W.D. Wash. 2012) (dismissal for failure to exhaust tribal remedies where *pro se* plaintiff failed to perfect appeal by filing a brief); *Fritcher v. Armento*, Case No. 1:12-CV-02033-LJO-SMS, 7 (E.D. Cal. 2013) (citing earlier dismissal finding *pro se* plaintiff “failed to make any effort to raise her claims before the appropriate tribal authority”).

There is no evidence that Oliver is motivated by a desire to harass or that she is acting in bad faith, or that this case is patently violative of express jurisdictional prohibitions. In fact, requiring exhaustion in this case is particularly appropriate because it involves a case brought by Pacino, a tribal member, against a non-Indian who is the widow of a member. *See* SAC, Dkt. 27 at 2, 4, Ex. E, Dkt. 27-1 at 21. More importantly, the Tribe’s Tribal Council expressly supports Oliver’s residence at the allotment in question. *See* SAC, Dkt. 27 at 2, 4, Ex. F, Dkt. 27-1 at 29; *see also* Resp. OSC, Dkt. 96 at 5. By comparison, *National Farmers Union* and *Iowa Mutual* involved suits against non-Indian insurance companies, and in those cases, the Supreme Court upheld the exhaustion requirement. *See Nat’l Farmers Union*, 471 U.S. 845; *see also Iowa Mut.*, 480 U.S. 9. If Pacino successfully avoids the requirement of appellate review of a matter in which the Tribe’s government itself is deeply invested, it would damage the legitimacy of the Tribe’s judicial system and the Tribe’s right to self-determination and self-governance. *Nat’l Farmers Union*, 471 U.S. at 856. There is no viable way to grant an exception without severely injuring the independence of the Tribe’s courts to address disputes between their members and the Tribe.

Further, Pacino knew he had the right to file an appeal in the Appellate Court, but he chose not to exercise that option, and instead filed the instant action. *See* Betts Decl. ¶¶ 9-10. Pacino represented litigants as a lay advocate in the Tribal Court for several months prior to filing suit in the Tribal Court against Oliver in 2018. *See id.* ¶ 9. The Tribal Court may grant a license to a non-attorney to practice in the Tribal Court if he files an affidavit stating that he “has studied and is familiar with the Tribe’s Constitution, this Ordinance and all other Tribal laws.” *See* Downey Decl., Ex. 2, TCC § 5.02(A). Pacino became a lay representative in 2018 after submitting the affidavit, paying the license fee and taking an oath to practice in the Tribal Court. *See* Betts Decl. ¶ 9. Further, during a hearing in his Tribal Court case against Oliver, Judge Wiseman informed

Pacino of his right to appeal. *See id.* ¶ 10. Therefore, Pacino was familiar with the courts' rules, including the right to appeal, which was reiterated by the Court during his case against Oliver.

There is no evidence that exhaustion would be futile because of a lack of an adequate opportunity to challenge the court's jurisdiction. Pacino has not explained why he failed to appeal the Tribal Court order to the Appellate Court. He cannot, therefore, demonstrate that an appeal would have been futile or that the Appellate Court would not have provided an adequate remedy. *See Alvarez*, 773 F.3d at 1017. Even though an appeal was time barred 31 days after the Tribal Court issued its decision, Pacino cannot now claim that the remedy is futile, as explained by the Ninth Circuit:

if we were to assume jurisdiction over an unexhausted claim solely on the basis that it is now too late (“futile”) for [Alvarez] to bring it, this would eviscerate the tribal court exhaustion requirement—at least in cases where parties have a limited period of time in which to file an appeal. Therefore, we decline to consider the appeal of a judgment in the tribal courts futile just because the dissatisfied party has neglected to file a timely appeal.

Id. at n.5 (quoting *Selam*, 134 F.3d at 954 n.6).

Pacino cannot show that the Tribe's appeal process somehow denied him his due process rights under the Tribe's Constitution. Pacino had the opportunity to file an appeal up to 30 days after the Tribal Court's decision. By any measure, 30 days to perfect an appeal is a reasonable amount of time. *See id.* at 1018 (five days to file an appeal to a criminal conviction is reasonable). The Tribe's Constitution, laws and rules do not require a period longer than 30 days to file an appeal. Therefore, the Tribal Court correctly rejected Pacino's untimely notice of appeal filed 3.5 years after the statutory deadline. *See Ct. Ap. R. Ct. 4(a); see also Alvarez*, 773 F.3d at 1017.

Because Pacino failed to file an appeal, the Appellate Court never had the opportunity to hear his claims and “rectify any errors [the Tribal Court] may have made.” *Alvarez*, 773 F.3d at 1022 (quoting *Selam*, 134 F.3d at 953). If Pacino had filed an appeal in the Appellate Court, it is possible that the Appellate Court would have reversed the decision of the Tribal Court or granted other relief. *Id.* at 1022.

Nor may this Court apply an exception to exhaustion based on incompetence or bias. In

1 *Iowa Mutual* the Court rejected an exception for incompetence and local bias, finding that it would
 2 be “contrary to the congressional policy promoting the development of tribal courts.” *Iowa Mut.*
 3 *Ins. Co.*, 480 U.S. at 18-19. Pacino seems to suggest that he was wrongfully denied an opportunity
 4 to appeal, related somehow to Judge Wiseman’s confirmation of his rejected notice of appeal,
 5 because Judge Wiseman presided over the case in the Tribal Court. *See* Resp. OSC, Dkt. 96 at 4
 6 (“Plaintiff filed a Notice of Appeal with the Round Valley Indian Tribes Court of Appeals, which
 7 was denied as untimely, and signed by Chief Judge Joseph J. Wiseman, whom previously issued
 8 the Decision of the Court (Amended) dismissing Plaintiff’s case for lack of subject matter
 9 jurisdiction in the lower tribal court.”). Notwithstanding Pacino’s unsupported suggested
 10 implications, the Court cannot apply an exception to Pacino’s requirement to file an appeal based
 11 on incompetence or bias.

12 Pacino offers no explanation for his failure to file an appeal. The Court should, therefore,
 13 “require full exhaustion in this case” and it should not assert jurisdiction over Pacino’s claims.
 14 *Alvarez*, 773 F.3d at 1022 (citing *Selam* 134 F.3d at 953).

15 **III. Pacino has other available remedies to pursue his claim against Oliver.**

16 As this Court noted, Pacino has not pursued other available remedies to address his claims
 17 against Oliver, which may include an appeal of the BIA’s inaction and suit under the
 18 Administrative Procedures Act, U.S.C. § 551 *et seq.*; *see* Order, Dkt. 90 at 4 (“Pacino has not so
 19 much as formally appealed the BIA’s inaction, let alone elicited an APA-oriented final agency
 20 action”).

21 **CONCLUSION**

22 For the foregoing reasons, the Court should not assert jurisdiction over Pacino’s claims.
 23 Pacino failed to exhaust available tribal remedies, and there is no exception that would apply to
 24 waive the exhaustion requirement.

25 DATED: October 25, 2022

26 /s/ David B. Dehnert

David B. Dehnert

27 Attorney for Defendant

28 Catherine Oliver