

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILMINGTON SAVINGS FUND SOCIETY,  
Plaintiff,  
v.  
COREY FRYBERG, *et al.*,  
Defendants.

Case No. C17-1196RSL

**ORDER GRANTING  
TULALIP TRIBES'  
MOTION TO DISMISS**

This matter comes before the Court on “Defendant Tulalip Tribes’ Motion to Dismiss for Lack of Subject Matter Jurisdiction.” Dkt. # 15. Having reviewed the memoranda submitted by the parties and the remainder of the record, the Court finds as follows:

## BACKGROUND

Plaintiff Wilmington Savings Fund Society brings this foreclosure action against defendant Corey Fryberg. Corey Fryberg is a member of the Tulalip Tribes, a federally recognized Indian tribe, and the property at issue is trust land within the Tulalip Indian Reservation. Dkt. # 8 ¶¶ 2.1, 3.2. The Tulalip Tribes is also a named defendant for having a possible interest in the property.

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1 Plaintiff's initial complaint was filed on August 8, 2017. Dkt. # 1. On August 17,  
2 2017, the Court *sua sponte* issued an Order to Show Cause for plaintiff's failure to  
3 provide the citizenship of the parties to establish diversity jurisdiction. Dkt. # 6. On  
4 August 25, 2017, plaintiff filed an amended complaint (Dkt. # 8), and on September 28,  
5 2017, the Court vacated the Order to Show Cause. Dkt. # 14. Now, defendant Tulalip  
6 Tribes moves to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject  
7 matter jurisdiction.

10 **DISCUSSION**

11 "Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins.  
12 Co. of Am., 511 U.S. 375, 377 (1994). "Unless the jurisdictional issue is inextricable  
13 from the merits of a case, the court may determine jurisdiction on a motion to dismiss for  
14 lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. . . . Once  
15 challenged, the party asserting subject matter jurisdiction has the burden of proving its  
16 existence." Robinson v. United States, 586 F.3d 683, 685 (9th Cir. 2009) (internal  
17 citations and quotations omitted). Here, the Tulalip Tribes argues that dismissal is  
18 appropriate because diversity jurisdiction is lacking, the Tulalip Tribes is immune from  
19 suit, and plaintiff failed to exhaust tribal remedies. The Court addresses each of these  
20 arguments below.

21 **A. Diversity Jurisdiction**

22 Plaintiff asserts that this Court has jurisdiction pursuant to 28 U.S.C. § 1332. The  
23 diversity statute applies when the amount in controversy exceeds \$75,000 and when the  
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1 action is between “citizens of different States” or “citizens of a State and citizens or  
2 subjects of a foreign state[.]” 28 U.S.C. § 1332(a)(1), (2). As a threshold matter, the  
3 Tulalip Tribes is not a foreign state. See Stock West, Inc. v. Confederated Tribes of the  
4 Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. 1989) (citing Cherokee Nation v.  
5 Georgia, 30 U.S. 1 (1831)). Therefore, diversity jurisdiction only exists if the Tulalip  
6 Tribes is a “citizen” of Washington state within the meaning of § 1332.<sup>1</sup>  
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8       The Ninth Circuit recognizes that “unincorporated Indian tribes cannot sue or be  
9 sued in diversity because they are not citizens of any state.” Am. Vantage Cos. v. Table  
10 Mountain Rancheria, 292 F.3d 1091, 1095 (9th Cir. 2002); see also Cohen’s Handbook of  
11 Federal Indian Law § 7.04 (2012 ed.). Because the Tulalip Tribes is not a citizen of  
12 Washington or any other state, complete diversity is lacking, and this Court has no  
13 subject matter jurisdiction.<sup>2</sup> To hold otherwise would not accord with the Tulalip Tribes’  
14 status as a “domestic dependent nation” exercising inherent sovereign authority over  
15 members and territories. See Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian  
16 Tribe, 498 U.S. 505, 509 (1991).

21       **B. Sovereign Immunity**

22       The Tulalip Tribes also argues that plaintiff’s lawsuit is barred by tribal sovereign  
23 immunity. The Tulalip Tribes possesses “inherent powers of a limited sovereignty which  
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26       <sup>1</sup> Except for defendant Tulalip Tribes, there appears to be complete diversity between the parties.  
See Dkt. # 8 ¶¶ 1.2-2.5.

27       <sup>2</sup> Plaintiff’s amended complaint merely posits that “[o]n information and belief Tulalip Tribes of  
28 Washington is a sovereign tribal nation located in Washington.” Dkt. # 8 ¶ 2.5.

1 has never been extinguished.” United States v. Wheeler, 435 U.S. 313, 322 (1978)  
2 (internal citations and quotations omitted) (superseded by statute as recognized in United  
3 States v. Lara, 541 U.S. 193 (2004)). “The common law sovereign immunity possessed  
4 by the Tribe is a necessary corollary to Indian sovereignty and self-governance.” Three  
5 Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g, 476 U.S. 877, 890  
6 (1986). “As a matter of federal law, an Indian tribe is subject to suit only where Congress  
7 has authorized the suit or the tribe has waived its immunity.” Kiowa Tribe of Okla. v.  
8 Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). “[A] waiver of sovereign immunity cannot  
9 be implied but must be unequivocally expressed.” Santa Clara Pueblo v. Martinez, 436  
10 U.S. 49, 58 (1978) (internal citations and quotations omitted). “In the context of a Rule  
11 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, the party asserting  
12 subject matter jurisdiction has the burden of proving its existence, i.e. that immunity does  
13 not bar the suit.” Pistor v. Garcia, 791 F.3d 1104, 1111 (9th Cir. 2015) (internal citations  
14 and quotations omitted).

15 Plaintiff concedes that the Tulalip Tribes has not waived immunity. Dkt. # 21 at 2.  
16 Further, plaintiff does not point to any source indicating that Congress has authorized this  
17 lawsuit against the Tulalip Tribes. Therefore, the Court lacks jurisdiction because the  
18 Tulalip Tribes is entitled to sovereign immunity.

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20 **C. Exhaustion**

21 “Principles of comity require federal courts to dismiss or to abstain from deciding  
22 claims over which tribal court jurisdiction is colorable, provided that there is no evidence

1 of bad faith or harassment. Exhaustion of tribal remedies is mandatory.” Marceau v.  
2 Blackfeet Hous. Auth., 540 F.3d 916, 920 (9th Cir. 2008) (internal citations and  
3 quotations omitted). “Tribal courts play a vital role in tribal self-government, and the  
4 Federal Government has consistently encouraged their development.” Iowa Mut. Ins. Co.  
5 v. LaPlante, 480 U.S. 9, 14-15 (1987) (internal citations omitted). The exhaustion  
6 requirement applies even if no tribal court proceedings are pending. Marceau, 540 F.3d at  
7 921.

10 The Tulalip Tribal Court meets the requirement of having colorable jurisdiction  
11 over this action: defendant Corey Fryberg is a tribal member, the Tulalip Tribes is a  
12 named party, and the land at issue lies within the Tulalip Indian Reservation and is held  
13 in trust by the United States for the benefit of the Tulalip Tribes.<sup>3</sup> Further, plaintiff’s  
14 initial complaint seems to acknowledge the jurisdiction of the Tulalip Tribal Court. See  
15 Dkt. # 1 ¶ 3.2 (“Normally, actions are to be commenced in Tulalip Tribal Court when the  
16 subject property is located within Tulalip Indian Reservation[.]”). Plaintiff has not  
17 alleged that the exhaustion requirement is being asserted in bad faith or to harass.<sup>4</sup> Out of  
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22 <sup>3</sup> The Tulalip Tribal Court’s jurisdiction extends to “(a) all persons natural and legal of any kind  
23 and to (b) all subject matters which, now and in the future, are permitted to be within the  
24 jurisdiction of any Tribal Court of a sovereign Indian tribe or nation recognized by the United  
25 States of America and to (c) all matters having to do with rights in or encumbrances to lands  
26 within or without the Tulalip Indian Reservation held by the United States in trust for the Tulalip  
Tribes or its members, in restricted fee by the Tulalip Tribes, or lands held in fee by members of  
the Tulalip Tribes located within the Tulalip Reservation[.]” Tulalip Tribal Code Section  
2.05.020(1).

27 <sup>4</sup> In addition to instances of bad faith and harassment, the Supreme Court has noted that  
28 exhaustion of tribal remedies is also not required “where the action is patently violative of  
express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an

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1 respect for the Tulalip Tribes' sovereignty, and recognizing the jurisdiction of the Tulalip  
2 Tribal Court to adjudicate this dispute, the case is DISMISSED for failure to exhaust  
3 tribal remedies.  
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5 **CONCLUSION**

6 Each of defendant's arguments independently supports dismissal: there is no  
7 complete diversity between the parties; the Tulalip Tribes is immune from suit; and  
8 plaintiff failed to exhaust tribal remedies.<sup>5</sup> For all of the foregoing reasons, defendant's  
9 motion (Dkt. # 15) is GRANTED. The case is DISMISSED.  
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13 DATED this 12th day of December, 2017.  
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18 Robert S. Lasnik  
19 United States District Judge  
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25 adequate opportunity to challenge the court's jurisdiction." Nat'l Farmers Union Ins. Cos. v.  
Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985). These exceptions do not apply.

26 <sup>5</sup> Plaintiff suggests that to cure the issues related to diversity jurisdiction and tribal sovereign  
27 immunity, the Court can simply dismiss the Tulalip Tribes as a party and let the action proceed.  
28 Dkt. # 21 at 3. This does not resolve the issue of exhaustion of tribal remedies, however, and the  
Court declines to adopt this suggestion.

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