IN THE COURT OF APPEALS

OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

OF THE FLATHEAD INDIAN RESERVATION, PABLO, MONTANA

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL, MISSION IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT,	)	CAUSE NO. AP-95-343-CV
Appellant,	)	
vs.	)	OPINION
MEMBER OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES; MICHAEL PABLO, RHONDA SWANEY; CAROLE McCREA; LLOYD IRVINE; LOUIS ADAMS; ELMER MORIGEAU, JR.; HENRY BAYLOR, D. FRED MATT; DONALD DUPUIS; and MARY LEFTHAND; SAM MORIGEAU, DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES; LLOYD JACKSON, ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES; JOE SNYDER, HENRY NORMANDEAU, EUGENE PITTS, DONALD LUCAS, GEM MERCER, AL HEWANKORN, WILHELMINA BRUEGGMAN, MEMBERS OF SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES,	)	
Appellees.	)	

Argued April 22, 1996

Decided June 29, 1996

Jon Metropoulos, Helena, Montana for Appellants Ross Middlemist, et al.

John B. Carter, Joe Hovenkotter, Confederated Salish and Kootenai Tribal Legal Department, Pablo Montana for Appellees Members of the Confederated Salish & Kootenai Tribal Council, et al.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes; Gary Acevedo, Trial Judge, Presiding.

Before: EAKIN, DESMOND and GAUTHIER, Justices.

EAKIN, Acting Associate Justice:

At issue before this court is whether a litigant must exhaust tribal administrative remedies under the Aquatic Lands Conservation Ordinance, Ordinance 87-A, (ALCO) prior to challenging the applicability of the ordinance to lands held in fee simple by non-Indians.

This matter already has an extensive history. Appellants, Ross Middlemist, Wayne Maughan, the Joint Board of Control (JBC), Flathead Irrigation District, Mission Irrigation District and Jocko Irrigation District (collectively referred to as Middlemist or Appellants), initially filed an action in federal district court, seeking to challenge the Appellees' assertion of jurisdiction over them under ALCO. The district court dismissed without prejudice, holding that Middlemist must first exhaust tribal administrative and judicial remedies. *Middlemist v. Babbitt*, 824 F.Supp. 940 (D. Mont), cert. denied, ___ U.S. ____, 113 S.Ct. 2950 (1993).

The Federal District Court held that requiring Plaintiffs (Appellants here) to exhaust tribal remedies advanced each of the purposes for the exhaustion rule set forth in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). *Middlemist*, 824

F.Supp at 945. Specifically, the District Court found that tribal self-government would be advanced by requiring appellants to use the tribal "governmental mechanisms" established "for protection of aquatic habitat on the Reservation." The District Court also held that the "policy imperatives concerning judicial efficiency and tribal expertise would also be advanced in this case through exhaustion." The Court found that the Tribes are in the best position to establish a factual record and provide the "benefits of tribal explanation and expertise." *Id.*

The Federal District Court decision was affirmed on appeal. *Middlemist v. Babbitt*, 19 F.3d 1318 (1994), cert denied, ____ U.S. ____, 115 S.Ct. 420 (1994).

Appellants then filed this action in the tribal trial court against the Confederated Salish and Kootenai Tribal Council and various other tribal government officials seeking a declaratory judgment that ALCO did not apply to them. The trial court dismissed without prejudice, holding that Middlemist must first exhaust tribal administrative remedies. Middlemist appealed that decision to this court.

We Affirm.

BACKGROUND

In 1985 the Confederated Salish and Kootenai Tribes (the Tribes) adopted ALCO which requires a permit, issued by the Shoreline Protection Board (SPB), before commencement of any "project," defined as the physical alteration of aquatic lands. The permit is required for the maintenance or repair of existing

projects as well as for initial construction of a project. The ordinance does not draw any distinction between projects on trust or fee land, between Indian or non-Indian owned land, or between projects constructed by Indians or non-Indians.

As of September 30, 1991, the latest date for which figures were provided to the trial court, there had been 315 applications for permits under ALCO. Sixteen applications (5%) were held not to require permits; 137 (43%) were approved as submitted; 160 (51%) were approved with modifications, 2 (less than 1%) were denied. Of the applications, 217 were for activities on trust land in whole or in part; 98 were for projects only on fee land. A majority of the applications, 236, were made by non-Indians. There had been 32 cases of noncompliance of which 30 were resolved without a hearing.

Appellant Ross Middlemist is a non-Indian who desires to repair and improve a stock tank on land he owns in fee simple. The stock tank holds water from a naturally occurring spring. Water flows from the spring for about 100 yards and then disappears into the ground, all within Middlemist's property. The stock tank does not change the pattern of flow.[1]

Appellant Wayne Maughan is a non-Indian who has a dam on Maughan Creek on land he owns in fee simple. He desires to repair and improve the dam to provide for greater storage capacity and other benefits stemming from that increased capacity. He and the

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[1]This project may be exempt from ALCO under 3.3 of the Final Regulations for the Aquatic Lands Conservation Ordinance of the Confederated Salish and Kootenai Tribes, (December 5, 1986).

Joint Board of Control have applied, or will apply, for at least six permits from various federal and state agencies if he undertakes the improvements on the dam.

The Joint Board of Control is composed of members from three irrigation districts on the reservation. It has authorized funds for the Maughan project and sought authority from the state for the project. The JBC maintains that the members of the irrigation districts and the public at large would benefit from the Maughan project.

Appellant Ross Middlemist has obtained approval from all required non-tribal sources except the United States Army Corps of Engineers which will not issue its permit until a tribal permit is obtained. No tribal permit has been sought by Middlemist. Similarly, Maughan and the JBC have not applied for a tribal permit. All appellants assert that the Tribes lack jurisdiction to regulate their water-related activities.

STANDARD OF REVIEW

The trial court declined to afford declaratory relief to Appellants, ruling they must exhaust administrative remedies. Declaratory relief is not an absolute right of a litigant, but is a matter of discretion that lies with the trial court. *Reno v. Catholic Social Services*, ___ U.S. ___113 S.Ct. 2485 (1993). Trial courts also have discretion in requiring exhaustion of administrative remedies. *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081 at 1086 (1992). Therefore we review the decision of the trial court for an abuse of discretion.

DISCUSSION

I. The Trial Court's Dismissal of the Declaratory Action Was a Proper Exercise of Discretion.

The Tribes urge us simply to hold that Middlemist must exhaust administrative remedies because the federal court had so directed in its opinion. The issue is not so simple. Middlemist is correct when he notes that whether ALCO requires exhaustion administrative remedies is a question of tribal law. The tribal court is the forum that is the final arbiter of questions of tribal law. *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), cert. denied 490 U.S. 1110 (1989). Therefore, it is incumbent upon this court to decide if exhaustion is required by tribal law.

The parties do not cite us to any decisions of this court discussing the either declaratory actions or necessity of exhaustion of administrative remedies, and we have found none. In the absence of applicable tribal law, this court may draw upon the case law of other jurisdictions interpreting similar remedies provided by those jurisdictions. *See,* Ordinance 36B, Confederated Salish and Kootenai Law and Order Code, Chapter II 3.

To determine if a case is suitable for declaratory relief, a court looks to factors such as whether: (1) declaratory relief would serve a useful purpose in clarifying the legal relations at issue or settle the controversy; (2) declaratory relief is being sought for "procedural fencing;" and (3) there is an alternative remedy that is better or more effective than declaratory relief. *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*,

791 F.2d 460 (8th Cir. 1986).[2] An examination of this case illustrates that the trial court did not abuse its discretion by dismissing the petition for declaratory relief.

First, declaratory relief is not likely to clarify the legal issues at this stage of the proceedings. The recent pronouncements of the United States Supreme Court in the field of tribal civil jurisdiction over non-Indians have indicated that no broad demarcations exist. The cases tend to be fact specific. As Justice Stevens noted in his opinion in *Brendale*, "the factual predicate to these cases is itself complicated." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 at 447 (1989). The regulation of aquatic lands is even more factually complex than the zoning ordinance addressed in *Brendale*. Water flows and wildlife travels. Changes in aquatic lands can disrupt an ecosystem. For example, even a simple stock tank might cause the water flowing back into the ground to have particles and bacteria from the excrement of the livestock drinking at the tank. This could, but not necessarily would, affect the health and safety of neighbors tapping the aquifer for drinking water.

Deciding whether tribes have jurisdiction to regulate non-Indian conduct on fee land involves a delicate balancing of tribal interests against the interests of the owner of the fee land. When those interests are balanced, there will be cases in which the Tribes lack requisite interest to regulate non-Indian land use.

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[2] The *Manley* court also found one other test, i.e. whether a federal declaratory judgment would encroach upon state jurisdiction. This test does not apply here.

Yet in other instances, the existence of substantial tribal interests will support an assertion of tribal jurisdiction. Because this determination rests upon fact-specific questions, a declaratory judgment would do little to resolve an issue other than for the particular case involved.

The second factor cited by the *Manley* court was whether a declaratory judgment is being used for "procedural fencing." We note that the related federal action was initially filed in 1991. In 1996 the merits of the Appellants' proposed water projects remain undecided. Additionally, Middlemist argues that the projects might be approved by the SPB without modification, depriving this court of the opportunity to decide the jurisdictional issue. We need not decide whether this is "procedural fencing" or a true choice of conscience since the other factors support the trial court's exercise of discretion in denying declaratory relief.

Turning to the third *Manley* factor, we find that a more effective remedy exists in an ALCO proceeding. When the development of specific facts for an individual case is involved, there is a superior remedy to declaratory relief. The Shoreline Protection Board is in a better position than a court to weigh the impact of a project upon the Tribes' land, water and botanical and zoological wildlife.

> [I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions . . . frequently require expertise, the agency should be given the first chance . . .to apply that expertise."

McKart v. United States, 395 U.S. 185, 194 (1969). The Tribal Council has established a procedure that allows those with more expertise in the field to pass upon the factual questions. This court should be hesitant to bypass those with the expertise selected by the Council.

In addition, the non-adversarial administrative procedure may be better suited for the development of facts. Litigation might force the Tribes initially to contest every action or run the risk of allowing a default to be entered. Having every project contested in litigation, when many are not contested at the administrative level, serves neither party. After the Shoreline Protection Board decides the factual issues, the tribal court will have the benefit of that expertise if it must rule upon the legal issues[3].

The trial court did not abuse its discretion in requiring exhaustion of administrative remedies.

II. The Tribes Have Jurisdiction to Require An Application.

This court recognizes that affirming the trial court's decision requiring exhaustion of administrative remedies implies that the Tribes have sufficient jurisdiction to require non-Indians to make application for the permit required by ALCO. Even when challenging the jurisdiction of the forum, one must follow the

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[3]This is not to indicate that the SPB cannot pass upon legal questions, including its own jurisdiction. Under 25 of Tribal Administrative Procedures Ordinance, Tribal Ordinance 86B, the Board can and must rule upon each issue presented, which in this case would include jurisdictional issues.

procedure of the forum. For example, a district court could impose a sanction for failure to comply with discovery procedures against a defendant that was challenging the jurisdiction of a that court. *Insurance Corp. of Ireland v. Compaigne des Bauxite de Gueina*, 456 U.S. 694 (1982).

Requiring an application from a non-Indian should not be confused with a holding that the Tribes have jurisdiction to regulate land use by non-Indian land owners. It is only when the Tribes deny a permit or require non-consensual modifications to a project on land owned by a non Indian that this court would be faced with the question of the Tribes' jurisdiction to regulate land use by non-Indians. The Tribes have yet to deny Middlemist the opportunity to do exactly what he wants with his land. He has not felt the effects of ALCO in any concrete sense.

As the Court noted in *Reno v. Catholic Social Services*:

> Declaratory judgment remedies, ..., are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution, that is to say, unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties.

Supra at 2495, quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136 at 148-149 (1967).

Middlemist has not sought a declaration that ALCO is invalid, nor has he made allegations that the application process is so burdensome or expensive as to deny him the opportunity to undertake the project he proposes. He sought only a declaration that ALCO does not apply to him. The Tribes may impose at least minimal burdens on non-Indian owners of fee land to aid in the

implementation and enforcement of ALCO.

This minimal burden is similar to the state-imposed burdens placed on Indian-owned business to keep records of cigarette sales to Indians. Even though a state has no jurisdiction over the transaction or individuals, it may nevertheless require Indian retailers to report sales to the state. Such minimal burdens were upheld by the United States Supreme Court in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 at 160 (1980). Similarly, Montana requires an member of a tribe to pay a tax while challenging the jurisdiction of the state to impose the tax. *Jefferson v. Big Horn County*, 235 Mont. 148, 766 P.2d 244 (1988). The Tribes have sufficient jurisdiction to require a non-Indian land owner to proceed through the application process.

III. Exhaustion of Administrative Remedies is Beneficial.

The trial court's decision requiring exhaustion of administrative remedies has several other desirable effects. The administrative procedure allows the Tribes to implement the Ordinance in a more traditional manner. "Tribal policy on major issues . . . was typically developed by consensus... Tribes generally were guided by consensus oriented leaders who achieved control over members by persuasion and inspiration, rather than preemptory commands." Cohen, Handbook of Federal Indian Law (1982 ed.) at 230.

Having the initial application made in a non-adversarial setting allows a consensus to be reached. The Tribes have been able to reach consensus with the land owner in almost all

instances. Less than 1% of the applications have been denied. Of those approved with modifications, none have been appealed to this court.

The application process allows the parties to learn of the interests of the other. In instances when the Tribes have jurisdiction over a non-Indian application, the Tribes may be willing to allow projects that have some adverse effect on Tribal interests if the Tribes have a full understanding of the interests of the non-Indian. And, when the Tribes are without jurisdiction, non-Indian landowners may be willing to accommodate the Tribal interests if they know what those interests are. The application process also allows the Tribes to learn of a project so that they may take ameliorative steps at their own costs to offset the effects of a project the Tribes lack jurisdiction to deny.

We are not so naive as to believe that peace and harmony will reign in all matters as a result of each party understanding the position of the others. However, we do believe that some unnecessary litigation will be avoided.

Middlemist argues that one reason to grant a declaratory judgment is that this matter might be mooted if the proposed projects were approved without modification. Middlemist invites the court to give a broad pronouncement on the fundamental nature of the relationship between the Tribes and non-Indians owning land on reservation.[4] Tribal jurisdiction over non-Indians is

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[4]Middlemist even invites us to rule that the Reservations was disestablished. That issue was already addressed by the Ninth Circuit in *Confederated Salish and*

undoubtedly one of the most controversial issues that this court faces. Sound judicial policy counsels that such cases be decided on the narrowest possible grounds. Rather than viewing the opportunity to pass on such questions as grounds to forego exhaustion, we believe this cases exemplifies the wisdom of requiring exhaustion. The issues may not reach this court and if they do, they may be presented on much narrower grounds.

Justice Brandeis, in his famous concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 at 346-348 (1936), clearly enunciated the traditional policy of avoiding constitutional issues when possible. This court would be wise in following the same policy in addressing jurisdictional issues.[5]

Kootenai Tribes v. Namen, 665 F.2d 951 (1982), and no later ruling has limited the effect of that decision.

[5]The exercise of tribal jurisdiction over non-Indians is replete with constitutional issues. Some exercise of inherent tribal authority over non-Indians is inconsistent with various allotment acts or other acts of Congress. In those instances the Supremacy Clause requires that tribal jurisdiction not extend to non-Indians. The Indian Civil Rights Act also gives rise to pseudo-constitutional issues.

CONCLUSION

The principles discussed above suggest that the trial court's decision in this case, requiring exhaustion of administrative remedies, was not only within that court's discretion, but also that it was the most prudent action.

AFFIRMED.

Dated this 29 day of June, 1996.

D. MICHAEL EAKIN, Acting Associate Justice

We concur.

ROBERT GAUTHIER, Associate Justice

Brenda C. Desmond

Brenda C. Desmond, Acting Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 3rd day of July, 1996.

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