Robert E. Kovacevich, WSBA No. 2723
ROBERT E. KOVACEVICH, P.L.L.C.
818 West Riverside Ave, Ste 525
Spokane, WA 99201-0995
Telephone: (509) 747-2104
Facsimile: (509) 625-1914
Email: kovacevichrobert@qwestoffice.net

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

THE QUINAULT INDIAN NATION Plaintiff, v. EDWARD A.COMENOUT, ROBERT R. COMENOUT, SR., ROBERT R. COMENOUT JR., DENNIS JACK HARRIS, JR., JAMES HARRIS, FLOURNOY HARRIS, VERNON HARRIS,CAROL ANN HARRIS, ELISIE A. WAHSISE AND JOHN DOES 1-20, AND JANE DOES 1-20 Defendants.	No. 10-CV-05345-BHS RESPONSE TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM

The Estate of Edward A. Comenout, by Mary L. Pearson, Administrator Ad Prosequendum, through her Attorney Robert E. Kovacevich, responds to Plantiff's Motion to Dismiss Counterclaim as follows.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

INTRODUCTION

The Quinault Indian Nation (hereinafter Nation) alleges sovereign immunity as a reason to dismiss the counterclaim. By bringing the action, the Nation waived any sovereignty it may possess in federal court. Further, the counterclaim (Doc. 28) requests a Declaratory Judgment. The case is set to be heard May 12, 2015. The Nation's Motion is brought under Fed.R.Civ.P. 12(b)(6), failure to state a claim upon which relief can be granted. The Nation brought suit in Federal Court pursuant to 28 U.S.C. § 1362. The counterclaim seeks a declaration that the Estate has not unlawfully possessed commercial cigarettes or sold them contrary to state and federal law. Page 4 of the complaint alleges future sales. On page 5, it is alleged that Robert R. Comenout Sr. manages the enterprise. The counterclaim seeks a Declaratory Judgment allowed by 28 U.S.C. § 2201, and statute § 2202 that allows any interested party to obtain a declaratory judgment. Comenout's Estate has ongoing litigation and needs a determination on the issue.

Since the case was filed in 2010, the Ninth Circuit decided the case of *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011), holding that Indian retailers are not "required" to collect the state of Washington Cigarette Tax. *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013) was also decided. It struck down a city tax on Indian property. In another 2013

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

case, *Magnan v. Trammell,* 719 F.3d 1159 (10th Cir. 2013), the Court held that an allotment granted under the General Allotment Act of 1887 was Indian country within the definition of 18 U.S.C. § 1151(c). *Cayuga Indian Nation of New York v. Village of Union Springs,* 293 F.Supp.2d 183 (N.D. N.Y. 2003) is on point and denies a Fed.R.Civ.P. 12(b)(6) motion brought by an Indian tribe for a declaratory judgment seeking a ruling that city zoning laws did not apply to the tribe. The city counterclaimed for a declaratory judgment that the Indian tribe had to comply with city zoning regulations. *Id.* at 195. The Court held it had federal jurisdiction under 28 U.S.C. § 1362 and that the pleadings allege that Indian country is not subject to state law. It creates a controversy that affects the parties. *Id.* at 193. The Court denied the Indian tribe's 12(b)(6) motion on the basis that tribal immunity is waived and "claims for recoupment are not limited to claims for monetary damages...as long as it arises out of the same subject matter as the original cause of action." *Id.* at 194.

Here, when the Quinault Indian Nation brought suit for 90 million, it waived its sovereign immunity on the counterclaim up to 90 million dollars. *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 874 F.2d 550 (8th Cir. 1989). "The counterclaims of the defendant must seek relief of a similar nature to that sought by the plaintiff and in an amount not in excess of the plaintiff's claim." *Id.* at 552-3. *Berrey v. Asarco Inc.*, 439 F.3d 636 (10th Cir. 2006) holds that waiver of sovereign immunity by a tribe in bringing the suit

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

extends to all claims arising from the same occurrence as plaintiff's suit. *Id.* at 645. The counterclaim waives immunity as to claims arising out of the same occurrences as alleged by the Nation. *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1244 (8th Cir. 1995). The Ninth Circuit adheres to this waiver rule. See *U.S. v. State of Or.*, 657 F.2d 1009, 1014 (9th Cir. 1981). "Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit." *Id.* at 1014.

The *Nation* argues that the *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (2011) applies, but neglects to state that the state prosecution, on the prosecution's own motion, dismissed the case. See Appendix A attached. The *Nation*, in its pleading repeats that "the Nation maintained all along that its goal was to stop the illegal sales of untaxed cigarettes at the Indian Country Store." The Nation knew that it had no jurisdiction of the Puyallup site 120 miles from its reservation. For that reason, it wanted to have someone else to stop the Comenout's activity on the allotment. *Miami Tribe Of Oklahoma v. U.S.*, 656 F.3d 1129 (10th Cir. 2011) holds that an Indian tribe has no jurisdiction over off reservation allotted lands. This repeated admission by the Nation establishes abuse of process against the Nation. "To prove the tort of abuse of process against, the party must show both '(1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings'." *Saldivar*

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
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v. Moman, 145 Wash.App. 365, 388, 186 P.3d 1117 (Wash.App. 2008). The case also cites *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wash.App. 665, 699-700, 82 P.3d 1199 (Wash.App. 2004), stating that the case holds "abuse of process is the misuse or misapplication of the process, after the initiation of the legal proceeding, for an end other than that which the process was designed to accomplish." *Ibid.* at 388. The Nation could not, through the course of this litigation, force the Defendants to sign a lease. The filing or continuing to prosecute the case is an abuse of process by the Nation.

The Nation's admission gives rise to an award of legal fees to the Defendants and damages for bringing the suit.

State v. Comenout, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) is not binding.

The reason is that the case of *State v. Comenout,* 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011), a case that was later dismissed by the state on its own motion, held that the State has criminal jurisdiction of Indian Country at Puyallup even though the Indians were operating on their trust land located outside of an Indian reservation. The case is not binding precedent in this court. See *Hart v. Massanari,* 266 F.3d 1155 (9th Cir. 2001). State court decisions are not binding. *Id.* at 1169. The *Comenout* case decision was a criminal ruling on the specific land involved. It was based on a factual assumption on a motion to dismiss. The case failed to

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
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take into account that the Comenouts were operating and living on trust land and also had a license to operate from the Quinault Indian Nation. The reason is that since it was on appeal to dismiss the state information, it was not a decision on the merits. The Comenouts never presented the facts as the motion only tested the information filed by the state. An issue that is based on a motion to dismiss for lack of jurisdiction does not affect the merits of the controversy. *State ex rel. Bd. of Regents of University of Oklahoma v. Lucas*, 297 P.3d 378, 383 (Okla. 2013); *A C Storage Co. v. Madison Moving & Wrecking Corp.*, 155 N.W.2d 567, 571 (Wis. 1968). A judgment based on lack of jurisdiction does not involve the merits of a controversy and "cannot be made available as res judicata." *Powell v. Chastain*, 359 P.2d 336, 340 (Okla. 1961). Complete facts are needed to decide the core issues of jurisdiction. The Comenout case only construed the state allegations. The Second Circuit, United States Court of Appeals, considered the best in the country, in *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services*, 769 F.3d 105 (2nd Cir. 2014) reversed an internet Indian business case as the "wobbly foundation", based on affidavits, was not sufficient to determine the "fundamentally factual question" of whether the "Indian Commerce Clause" applies. *Otoe, id.* at 114, discusses and states that *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) conflicts with the later case of *California v. Cabazon Band of Mission Indians,*

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) on the issue of primarily marketing to non-native, non resident customers. The dispositive question in Indian business cases weighs the interests of state, federal, and tribal government by complete factual development of who is the target of the regulation and where the activity takes place. *Otoe, supra* at 114. The distinction depended on the fact that tribal casinos had "built...comfortable clean and attractive facilities" citing *Cabazon*, 480 U.S. at 219-21. This type of facility does not prevail today as many cigarette stores are modern, comfortable, clean and attractive." The *Cabazon* case, 480 U.S. at 210 applies. The additional reason in this case is that the operation was by an Indian, Edward A. Comenout Jr., operating on his own trust land, licensed by the tribe and that state cigarette tax collection was civil regulatory. The reason it was civil regulatory is that cigarette smoking is allowed in the state. It is not illegal. It is only regulated. Also, state cigarette tax is now an economic choice of the Indian trust land owner and not "required". See *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011). A tribal retailer in Indian country including a retailer on off reservation trust land is not "required" to comply with the State of Washington Cigarette Tax Act. *Id* at 1087. The Court decisions on these issues rarely reconcile as state of Washington decisions often ignore federal law and federal preemption of Art. 1, § 8, cl. 3 of the U.S. Constitution.

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

The *Comenout* case never cited 25 U.S.C. § 465 giving the BIA authority over the site. The Court wrongly assumed that Public Law 280 extended state jurisdiction to apply state tax on all Indian land outside an Indian reservation, even land held in trust.

The fundamental question in the *Comenout* case is whether Congress gave the state of Washington jurisdiction over all persons, including Indians on trust lands outside a recognized Indian reservation, by enacting Public Law 280, Act of August 15, 1953, 67 Stat. 588. It is codified at 28 U.S.C. § 1360, 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321-26. *Comenout, supra* at 238, observes "As a General rule...[s]tates lack...criminal jurisdiction over Indians within Indian country, absent federal legislation." (Citing *Cohen's Handbook of Federal Indian Law* § 604[1] page 53 (2005 ed.) Referring to Public Law 280, the *Comenout* opinion, *ibid.* at 238, also states "In 1963, in response to that Act of Congress, Washington amended a preexisting statute, RCW § 37.12.010, and asserted full criminal jurisdiction, with a few exceptions not relevant to this case, over all Indian country outside established Indian reservations." The Court noted that the Quinault Nation retroceded from state jurisdiction in 1965. The statute, RCW § 37.12.010, allowing assumption of state civil and criminal jurisdiction, did not apply "to Indians when on their tribal lands or allotted lands within an established Indian reservation." The *Comenout* opinion concluded that Congress delegated state jurisdiction except for lands and Indians within

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

the boundaries of Indian reservations. The state courts of Washington assume that they have civil jurisdiction over all lands "arising on Indian reservations as long as it does not infringe on the sovereignty of the tribe." See *Outsource Services Management, LLC v. Nooksack Business Corp.*, 181 Wash.2d 272, 333 P.3d 380 (Wash. 2014). This conclusion is indirectly in conflict with Article 26, Second of the State Constitution, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" and Article 1, § 8, cl. 3 of the U.S. Constitution "to regulate commerce. . .with Indian tribes." This conclusion also ignores the federal supremacy clause of the U.S. Constitution Article VI, cl. 2. "This constitution... and the laws of the United States which should be made in pursuance thereof...shall be the supreme law of the land." All cases involving jurisdiction of Indians and Indian land must first comply with these immutable principles. The words are not ambiguous, federal law applies to tribal Indians and Indian lands wherever situated. Washington state courts are colloquial on Indian cases; they try to invert the supremacy law to make state law preempt federal law. *Comenout, supra* at 240, held that the retrocession did not apply to lands outside the reservation. This conclusion is disputed by an often cited law review by Carole E. Goldberg, *Pub.L.280: The Limits of State Jurisdiction over Reservation Indians.* 22 U.C.L.A. L.Rev. 535, 557 (1975) stating:

The fourth alternative utilized by the states to minimize the

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

> financial hardship of PL-280—assumption of jurisdiction only over taxable non-trust lands within the reservations—is a unique feature of Washington's 1963 law accepting PL-280 jurisdiction. Since there is no pattern to the distribution of trust and non-trust lands on a reservation, Washington has created a jurisdictional labyrinth by mandating that on non-trust land state jurisdiction encompasses every subject matter, while on trust land, it applies only to certain enumerated subject matters unless the tribe ask for full state jurisdiction under PL-280. (Underlining added).

RCW § 37.12.010, the statute in question, applied jurisdiction to all lands within a reservation, but made special mention of "tribal lands" and lands "subject to a restriction on alienation." These trust lands granted jurisdiction only over the subject matter of school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and motor vehicles driven on public roads. RCW § 37.12.010 applied to trust lands within a reservation, but the federal law, 25 U.S.C. § 465, applies to lands "within or without existing reservations."

The reason that the Puyallup property is not subject to state jurisdiction is supported by the time it was purchased and the reason it was purchased, which was as a residence and for agriculture. In 1934, the entire allotment process was eliminated by the Indian Reorganization Act of 1934. See *Cohen's Handbook of Federal Indian Law,* § 1.05, pp. 80-81 (Nell Jessup Newton ed., 2012). The Bureau of Indian Affairs correctly labels the property. It is "Public Domain Allotment 130-1027." The land

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

when conveyed in 1926 was 2½ acres. The land was purchased as a homestead with trust funds and under the Quinault Treaty, 12 Stat 971 (1855) and the General Allotment Act. See *Williams v. Clark*, 742 F.2d 549, 551-553 (9th Cir. 1984) for a general discussion and review of Quinault Reservation allotments. The Puyallup site was declared a federal instrumentality by letter of the BIA dated October 4, 1977. See *Matheson v. Kinnear,* 393 F.Supp.1025, 1026 (U.S.D.C. 1975). It gives a history of the property and defines the site as a federal instrumentality. The federal instrumentality holding is res judicata of the specific land. Therefore, the case of *Concessions Co. v. Morris,* 109 Wash. 46, 51, 186 P. 655 (1919) applies. It holds that Fort Lewis is not within the state and cannot be taxed stating:

> Under our law, Rem. & Bal. Code, § 9101, only personal property in the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is in the state of Washington. It seems to use that the answer to this is clear, and that such property is without the state in both a jurisdictional and territorial sense, for, as we have seen by the Constitution of the United States, and the act of the Legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction.
>
> *Id.* at 51.

The Posner opinion, *Oneida Tribe of Indians of Wis. v. Village of*

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

Hobart, Wis., 732 F.3d 837, 839 (7th Cir. 2013), notes that Indian Country is similar to post offices and military bases, in that both are subject to U.S. sovereignty even though they are located in states.

Department of Labor and Industries of State of Wash. v. Dirt & Aggregate, Inc., 120 Wash.2d 49, 52, 837 P.2d 1018 (Wash. 1992) notes that Rainier National Park was established by federal statute, therefore the U.S. Const. art 1, § 8 gave exclusive federal jurisdiction over the park. Therefore, the states' worker compensation laws had no application. The case incorporates Indian law to the exclusive jurisdiction holding at footnote 3 at page 53 which applies when Indian tribes also regulate the activity. The footnote incorporates Indian law. It states:

> Any interest Washington might have in regulating activity on a federal enclave is diminished where alternate laws and channels of enforcement exist. *Confederated Tribes of Colville Reservation v. Washington,* 938 F.2d 146, 149 n. 2 (9th Cir. 1991), *cert. denied,* 503 U.S. 997, 112 S.Ct. 1704, 118 L.Ed.2d 412 (1992).

The statute, RCW § 37.08.200, is in the same federal area chapter as RCW § 37.12.010 on Indian reservations.

In *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 533, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938), the Court held that the state of California's liquor license laws did not apply within the national park. The concessionaires did not have to obtain a state license.

The Quinault Treaty, also known as the Treaty of Olympia [12 stat

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

971 (1855)], in Article Six ceded all lands occupied by the Quinault Indians for lands creating the reservation. Article Six allows the President to remove Indians from their reservation "to such other suitable place within said territory". The Article led to the Comenout's removal to Puyallup.

The *Comenout* decision failed to recognize that the property rights of the Comenout's could not be affected by Public Law 280. *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912) traces allotments into the state of Oklahoma constitution recognizing that Indian rights would remain intact. The case held that the allotted land to over 8,000 Indians was received as individual allotments in exchange of relinquishment of common tribal property that prohibited white settlement. In the meantime, Oklahoma was admitted into the Union. The state constitution provided that status of Indian lands would remain unchanged. The holding of the case is that the agreed status ran with the land and the rights acquired were not extinguished by subsequent legislation. Pertinent quotes from the case are:

> But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Id.* at 671. . .
>
> After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued. *Id.* at 674. . .

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

> It is conceded that no right which was actually conferred on the Indians can be arbitrarily bitrarily abrogated by statute. *Id.* at 674. . .
>
> His right of private property is not subject to impairment by legislative action, even while he is as a member of a tribe, subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones v. Meehan,* 175 U.S. 1, 44 L.Ed. 49, 20 Supp. Ct. Rep. *Id.* at 677.

The word "bitrarily", quoted above, is not a typo. Used in the context stated means it cannot be simultaneously changed. See Google's treatment.

The case cited in the text, *Jones v. Meehan,* 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899) held that the inheritance by the eldest son of land allotted to his father by the customs and usage of the Indian tribe vested title in the son and not a daughter or granddaughter. The later change in the law to comply with state laws of descent did not change the titles. The court held:

> The congressional resolution of 1894, and the subsequent proceedings in the Department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief; and the *decree is affirmed. Id* at 32.

A late recognition of elder rule found in *Jackson v. Payday Financial, LLC,* 764 F.3d 765, 776 (7th Cir. 2014), that although held invalid for other reasons, designated any elder as an arbitrator for online loan disputes involving non Indians.

These cases, never reviewed by the state courts, apply to the Comenout land. The land was allotted during the period in which Congress,

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

from 1887 until 1934, in an attempt to assimilate Indians into white society, allowed public domain allotments. In 1928, a report called the Meriam Report criticized the policy as actually harming Indian allottees. See *Cohen's Handbook of Federal Indian Law* § 16.03[2][c], page 1074 (Nell Jessup Newton ed., 2012).

The Indians, who at the time were not eligible to vote, could not acquire homesteads like non Indian persons. *Cohen's Handbook of Federal Indian Law* § 16.03[2][c] (Nell Jessup Newton ed., 2012) pages 1075-6. Therefore, Congress passed the General Allotment Act of 1887. This allowed allotments off reservation to provide a land base for landless Indian communities. The Handbook, *id.* at 1076, states "public domain allotments have the same status as allotments created from tribal lands. They are held in trust for the allottee, subject to the same restriction as allotments made under the General Allotment Act of 1887." 25 U.S.C. §§ 334, 336-337; 28 U.S.C. § 1353. *U.S. v. Jackson*, 280 U.S. 183, 189, 50 S.Ct. 143, 74 L.Ed. 361 (1930) involved a parcel of trust land issued under a now repealed law granting Indians homestead rights to public lands off reservation in the same manner as whites. The issue was whether this Indian Homestead Act was construed in the same way as the General Allotment Act. The Court held that all the trust lands are part of the same system and approved the BIA treatment of all the allotments the same way and approved the following statement: The control, jurisdiction and obligations of the

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

Department are the same in one case as in the other.

> The objects of the law relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same. Both the legislative and executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government.

Id. at 147.

From the foregoing authorities, it is clear that the state courts in interpreting this statute, RCW § 37.12.010, did not recognize that Edward Comenout Sr.'s title in 1926 contained a property right that could not be changed by any state or federal enactment concerning federal restrictions and jurisdiction by the Department of Interior. The state of Washington had general jurisdiction of public property outside of reservations by virtue of the state's constitution. Indian trust allotments are an exception. Wash. Const. art. 26, Second.

Restricted Public Domain Allotments are not within state Jurisdiction.

The distinction missed by the Washington Supreme Court in *Comenout, supra* at 238, is made in *Washington v. Confederated Tribes of Yakima (*now Yakama) *Indian Nation,* 439 U.S. 463, 475, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), as follows:

> Full criminal and civil jurisdiction to the extent permitted by Pub.L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
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> Indians were involved. Except for eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. (Underlining added.)

This statement cuts through the entire issue here involved. The Quinault Nation requested state jurisdiction on trust or restricted lands, but in 1965 it retroceded. *Comenout*, 173 Wash.2d at 357. *State v. Cooper,* 130 Wash.2d 770, 776, 928 P.2d 406 (Wash. 1996) relied on in *Comenout, supra* at 239, did not quote the exception in the *Yakima* case. The exception does not state "therein". The pervading flaw in state cases is failure to recognize the Indian country definition of preemptive federal law. *Comenout* held that state law jurisdiction exists for criminal enforcement of state law against Indian owners of off reservation lands held in trust by the owners. This is a direct conflict with *Magnan v. Trammell,* 719 F.3d 1159 (10th Cir. 2013) decided after Comenout. It held that federal law applies to an Indian crime on an off reservation allotment. *Washington v. Confederated Bands, supra* at 747, quotes Pub.L.280 at footnote 9. The (b) part now codified as 18 U.S.C. § 1162(b) states "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property held in trust by the United States or is subject to a restriction against alienation imposed by the United States." (Underlining added.) The Washington cases miss or ignore the exception to Public Law 280 and refuse to recognize off reservation restricted land. However, the code revisor drafting RCW §

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
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43.06.455(14)(b)(iii) did not miss the trust land exception when delegating the power to enter into Indian cigarette agreements. The revisor knew that restricted trust allotments could not be affected by state law. Simple logic confirms that the state cannot charge or tax enrolled Indians doing business on their trust land. Wash. Const. XXVI, Second states "Until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." The Article applies to "lands lying within the boundaries of this state." No distinction or exception is made on Indian reservations. Both off and on reservation state statutes are preempted by federal law when applied to Indians in Indian country. 18 U.S.C. § 1151. *Cabazon Band of Mission Indians v. Smith,* 388 F.3d 691, 701 (9th Cir. 2004).

The Indian Country site is free of all state taxes, including state cigarette taxes. Defendant did not make illegal sales.

There is no proof that sales of cigarettes occur. Assuming cigarettes are sold, the sales are not illegal. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) established the civil/regulatory test. If a state does not criminally prohibit the conduct, Indian retailers can sell the product. *Id.* at 209. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 at 155, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) was an exception. However, the 1995

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509/747-2104
FAX 509/625-1914

revisions to the state of Washington Cigarette Tax eliminated the "requirement" that Indian retailers, including the retailers selling on trust land off the reservation (see 1152(c)), must collect cigarette tax. The current law is that Washington State Cigarette taxes are not "required."

25 U.S.C. § 465 allows the Secretary of the Interior to purchase land "within or without" existing reservations. Title can be taken in the name of the individual Indian. "Such lands shall be exempt from State and local taxation." The land was purchased in 1926 with Indian Trust Funds and cannot be sold without BIA approval. It is a trust allotment defined in 18 U.S.C. § 1151(c). See *Magnan v. Trammell,* 719 F.3d 1159, 1163 (10th Cir. 2013).

These allotted lands are similar to federal facilities such as post offices and military bases; they are only subject to regulation as the federal government allows. See e.g., the *Posner* opinion in *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837, 839 (7th Cir. 2013) striking down a city storm sewer tax. See also 4 U.S.C. § 109 stating "nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from an Indian not otherwise taxable", making sure that Indians were exempt from state taxes on Federal instrumentalities. §§ 104-108. See also 18 U.S.C. § 1162(b) denying taxation of personal property on Indian trust lands; *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 685, 440 P.2d 442 (Wash. 1968) (federal

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

policy of non taxation of Indians to promote self sufficiency). The state allows purchases of cigarettes on military bases to be tax free, RCW § 82.24.290, but imposes quotas on Indians. WAC 458-20-192(9)(a)(ii). Indian allotments are not subject to state taxes. *Leading Fighter v. Gregory County,* 230 N.W.2d 114, 119 (S.D. 1975) (based on Art. 22 of the South Dakota Constitution, the same provision as in Art. 26 Second of the Washington State Constitution).

On the issue of Washington State Cigarette Tax on Indians a Law Review, Michael Minnis "*Judicially - Suggested harassment of Indian Tribes: the Potawatomis revisit Moe and Colville*" 16 Am. Indian L.Rev. 289 (AMINDLR) 1991, the author points out at 290 that the case of *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) enunciated a "requirement" to add Washington's cigarette tax to the sales price. The author also concludes that *Colville* ignored "the constitutional prerogative of Congress to regulate commerce with Indian tribes." *Id.* at 316. The requirement has now been removed when the 1995 amendments to Washington's cigarette tax were recently reviewed in *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078 (9th Cir. 2011). The Ninth Circuit cited *Colville, supra,* and noted the case "required" state cigarette tax compliance, *id.* at 1086. *Gregoire, supra* at 1087, then stated that the 1995 act "Does not *require;* it is an economic choice left to the Indian retailers." The Court

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

also noted that "numerous provisions are written with the purpose of excluding Indians from compliance with the act." *Ibid.* at 1087. Cited is Wash.Rev.Code § 82.24.080, 260 and 900. The court then concludes the language also indicates that "if an Indian retailer ever found itself facing a State collection effort for non payment of the tax, the retailer would be shielded from civil or criminal liability." *Id.* at 1089. The reason is the Indian retailer is exempt so the tax must be paid by the consumer. The result is that the Indian commerce clause has been implemented and the law review's criticism is now the law in Washington. Wash.Rev.Code § 82.24.900 prohibits the cigarette tax when it violates either constitution. The cigarette tax is now within the rule of *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), member Indians living in Indian Country are free of all state taxes.

State and federal agents often seize and prosecute under the Contraband Cigarette Tax Act. 18 U.S.C. § 2341-6. This act has been amended so that no state can bring civil action against an Indian in Indian Country. 18 U.S.C. § 2346(b)(1) states "No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian Country (as defined in section 1151)." The change was added in 2006. H.R. Conf.Rep. No. 1778, 95th Cong.2d Sess 1, 9 reprinted in 1978. U.S. Code and Cong. Admin. News 5535, 5538 stated in part that "This legislation is not intended to affect transportation or sale by Indians or Indian tribes

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

acting in accordance with legally established rights." The 2006 legislation now follows congressional intent. *City of New York v. Gordon,* 1 F.Supp.3d 94, 112 (S.D.N.Y. 2013) upheld this exemption. *Hemi Group, LLC v. City of New York, N.Y.,* 559 U.S. 1, 10, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010) holds that the purchaser is the one violating the law, and the city has no direct proximate connection to the purchaser. All cases hold that the consumer bears the incidence of the cigarette tax. See *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 455, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

Wholesalers who transport into a state destined to deliver cigarettes to an Indian in Indian country need not obtain a state wholesalers tobacco license, *State et rel. Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257 (Idaho 2013). *Red Earth LLC v. U.S.*, 657 F.3d 138, 145 (2nd Cir. 2011) holds that delivery of cigarettes to an Indian retailer is not a minimum contract requiring state cigarette taxes. *Hemi Group, LLC v. City of New York, N.Y.,* 559 U.S. 1, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010) holds that a RICO action cannot be maintained against a wholesaler as the proximate cause of lost cigarette taxes is a consumer's failure to pay. The City had no direct contact with the consumer.

CONCLUSION

The allegations of illegal sale of cigarettes assume that the Washington State Cigarette Tax amended in 1995 has to be paid by Indian

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

allottees. The issue is immaterial to the lease of this allotment. However, it is an outmoded assertion no longer correct under current law. The case should not be dismissed, as contemporary law does not require the Defendant to pay the Washington State Cigarette Tax. The counterclaim is valid and the Declaratory Judgment and damages to Defendant are allowable.

DATED this 11th day of February, 2015.

s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH #2723
Attorney for Defendant Estate of
Edward A. Comenout

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to opposing counsel and the appropriate parties.

s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH #2723
Attorney for Defendant Estate of
Edward A. Comenout

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914