The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT REGINALD COMENOUT SR., EDWARD AMOS COMENOUT III, and THE ESTATE OF EDWARD AMOS COMENOUT JR., BY SPECIAL ADMINISTRATOR ROBERT E. KOVACEVICH,

Plaintiff,

v.

RICKY JOSEPH, individually and as Acting Superintendent, and THE UNITED STATES DEPARTMENT OF [THE] INTERIOR, BUREAU OF INDIAN AFFAIRS, PUGET SOUND AGENCY,

Defendants.

No. 2:15-CV-01389-RAJ

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Note for Motion Calendar: November 27, 2015

Plaintiffs' Opposition to Defendant's Motion to Dismiss is largely devoted to advocacy on the underlying substantive issues alleged – Plaintiffs' alleged rights to tenancy and use of the trust land at issue, Public Domain Allotment 130-1027 ("Allotment"). However, Defendants' Motion to Dismiss moots the need to resolve or even examine such issues. Defendants' motion addresses a threshold issue of jurisdiction – the fact that Plaintiffs' claims simply are not ripe. The Bureau of Indian Affairs ("BIA"), through its Acting Superintendent Ricky Joseph, has only taken one action relevant to these parties – the sending of an August 12,



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2015 letter to Plaintiff Robert Reginald Comenout Sr. ("Robert Comenout") advising him of BIA's belief that he is trespassing on the Allotment and warning him that if he does not cease trespassing within 20 days, BIA will take action against him in accordance with federal law. The Ninth Circuit has already definitively decided that such *advisory* letters are not final agency actions and, therefore, not judicially reviewable. *Air California v. U.S. Dep't of Transp*., 654 F.2d 616, 621-22 (9th Cir. 1981) (characterizing such letters as "reason to believe" letters and "intermediate agency action" not subject to judicial review). Indeed, BIA has still not taken the future acts its letter threatened – which would likely be a federal lawsuit for trespass/ejectment. If and when it does, Plaintiffs will have the opportunity to contest the suit and make any other substantive arguments they choose at that time. Until then, there is no harm to redress and the matter is not ripe. Nothing in the remainder of Plaintiffs' Opposition refutes or undermines that dispositive point. Accordingly, dismissal is still warranted under Fed. R. Civ. P. 12(b)(1) for the reasons set forth in Defendants' Motion to Dismiss.

**A. Plaintiffs Have Not and Cannot Meet Their Burden to Prove Subject Matter Jurisdiction**

It is presumed to be the case that a cause lies outside of federal courts' limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Columbia Riverkeeper v. United States Coast Guard*, 761 F.3d 1084, 1091 (9th Cir. 2014). To establish jurisdiction, the party bringing suit must provide a basis for federal court jurisdiction. Here, Plaintiffs have offered none. Rather, they have only offered bases for what may constitute *future* grounds for federal court jurisdiction (related to potential future claims of BIA's alleged interference with their land rights). But Plaintiffs have not offered any grounds by which the federal court would have jurisdiction over the only agency action taken to date – the issuance of Defendant's August 2015 letter threatening future action.



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Accordingly, there is no jurisdiction. Relatedly, the other threshold requirements of suit have also not been met. "The burden of establishing ripeness and standing rests on the party asserting the claim." *Colwell v. HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009). Because there has been no final agency action, Plaintiffs have also not established that their claims are ripe. Plaintiffs arguments regarding the Ninth Circuit case law on ripeness are unavailing for the reasons further discussed herein.

**B. Plaintiffs' Attempt to Distinguish the Ninth Circuit's Decision in *Air California* is Unavailing**

As discussed in the Motion to Dismiss, non-final agency actions are not ripe for review and the Ninth Circuit interpreted what constitutes non-final agency action in *Air California v. U.S. Dep't of Transp*., 654 F.2d 616, 620-22 (9th Cir. 1981). There, the Ninth Circuit held that a letter merely stating an agency's legal position and demanding action within a set time with a threat of legal consequences for failure to do so is not a final agency action suitable for judicial review. *Id*. Plaintiffs attempt to distinguish this matter from *Air California* by claiming that the agency in that case (the FAA), unlike here, made no demand for action in its letter. *See* Opp. at 3. This is false. In *Air California*, the FAA sent a letter to the board chairman containing precisely such a demand:

> On April 3, 1980, the FAA's Chief Counsel, Clark Onstad, sent a letter to the chairman of the Board announcing Onstad's concurrence in the conclusions reached in Lawson's report. Onstad warned that failure to undertake negotiations to accommodate new carriers 'will warrant our pursuance of contractual, injunctive, and civil penalty remedies.' He further stated that the FAA would take no formal action for a period of 30 days in order to permit the Board an opportunity to comply

*Id.* at 618-19 (emphasis added). Thus, there was, in fact, a demand for action contained in the *Air California* letter. Likewise, in the instant matter, the BIA notified Robert Comenout that he was in trespass and if he did not remedy that fact within 20 days BIA would take legal action.



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*See* Complaint, Exhibit A. Therefore, the cases are comparable and the holding of *Air California* is controlling – an agency letter advising the recipient of the agency's future intention to enforce legal rights is not judicially reviewable.

**C. The *Southern California Aerial Advertisers' Association v. FAA* Case Cited by Plaintiffs is Distinguishable**

Plaintiffs also attempt to distinguish *Air California*'s holding by claiming that this matter is more akin to the holding of another Ninth Circuit case -- *Southern* C*alifornia Aerial Advertisers' Association v. FAA*, 881 F.2d 672 (9th Cir. 1989). However, there are dispositive differences between the instant matter and *Southern California*.

For one, *Southern California* is legally distinguishable. Plaintiffs in *Southern California* established a potential ground for federal court jurisdiction by relying upon an FAA statute granting judicial review over agency orders when challenged by a party with a "substantial interest in such order." *Id*. at 675 (citing 49 U.S.C. Appx. § 1486(a)). This FAA statute does not apply to the instant BIA matter (and, as discussed, Plaintiffs have offered no alternative source of potential federal court jurisdiction). Thus, the reliance on *Southern California* is already misplaced.

In addition, *Southern California* is factually distinguishable with respect to the ripeness analysis. In *Southern California*, the FAA letter at issue created a new rule regarding the fly zones operated by the plaintiff companies. *Id*. at 674 (the "Holweger letter" stated that "the shoreline transition would no longer be an available route for fixed-wing aircraft"). Further, the FAA required that the plaintiffs immediately comply – with no period of warning or threat of future enforcement – giving the letter the force of an order. *Id*. at 676. The Court noted that, in this way, it was distinguishable from the circumstances in *Air California*. In *Air California*, the letter was "conditional, threatening sanctions if steps toward compliance [did] not occur"



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whereas "the Holweger letter required immediate compliance." *Id*. at 676. On this ground, the Ninth Circuit clarified that one (a letter requiring immediate compliance with a rule it created) was legally distinguishable from the other (a letter advising of the potential for future enforcement). *Id*. The former was reviewable as final agency action, the latter was not.[1] The Ninth Circuit also noted the practical reasons for this distinction. In *Southern California*, there was no room for the parties to find alternatives to enforcement. In *Air California* there was. The Court explained:

> Were we to have granted judicial review of the Chief Counsel's letter, we would thus have been intruding into the administrative process and challenging the Board's decision to acquiesce in the FAA's interpretation.

*Id.* (quoting *Air California*, "Where the regulator and the regulated can achieve accommodation without resort to litigation, as here, we are reluctant to intervene"); *see also Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) ("[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.")

The instant matter is akin to *Air California*, not *Southern California*. Unlike in *Southern California*, BIA's August 12, 2015 letter itself does not *create* a new agency rule that renders Plaintiffs' actions unlawful. Rather, it simply *notifies* Plaintiffs that their decision to continue to act in an unlawful manner will result in future litigation if unabated. *See* Complaint, Exhibit A (August 12, 2015 letter). Moreover, as in *Air California*, the letter was

[1] This holding was also consistent with *Air California*'s reliance on whether or not the letter itself constituted an "initiat[ion of] an agency process." *Air California*, 654 F.2d at 621. It found that a "reason to believe" letter referencing future enforcement was not initiation. The same is true here – by the terms of the BIA's own letter, further action is necessary to enforce the legal rights referenced. *See* Complaint, Exhibit A ("Your failure to do so within 20 days will result in the BIA taking action in accordance with 25 C.F.R. § 162.023 and applicable Federal law."). Accordingly, the letter is not an initiation of agency process.



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"conditional, threatening sanctions if steps toward compliance did not occur" within a set time; it did not require immediate compliance (as in *Southern California*). Again, this is particularly significant because of its practical effect – as in *Air California*, the Plaintiffs may well take actions that abate the need for such future litigation; for instance, by selling their interest in the land or negotiating a residential lease. Accordingly, this case presents exactly the type of inchoate controversy the ripeness requirement seeks to avoid. *See Bova*, 564 F.3d at 1096. The agency has not initiated trespass/ejectment proceedings and it is not yet clear whether such proceedings will be warranted or appropriate. Allowing pre-emptive litigation regarding the propriety of such possible ejectment is premature and runs the risk of interfering with the potential for a non-litigious resolution. *See Southern California*, 881 F2d at 676. Accordingly, the matter is not yet ripe for adjudication and the Court lacks subject matter jurisdiction to hear it at this time. On that ground, Defendants respectfully reiterate their request for dismissal of this matter.[2]

Dated this 27th day of November, 2015.

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[2] To the extent Plaintiffs are alleging any claims not stemming directly from this unripe controversy regarding the agency letter, Defendants submit that they do not state a claim upon which relief can be granted or have not been pleaded with particularity and, therefore, fail the *Iqbal* standard. *Iqbal v. Twobly*, 556 U.S. 662, 678 (2009) (requiring more than conclusive statements). They too are, therefore, dismissible at this time under Fed. R. Civ. P. 12(b)(6).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the United States Attorney's Office for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers. And that on this day, she electronically filed the above document using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for plaintiff and defendants as follows:

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DATED this 27th day of November 2015.

*/s/Brittany Cirineo*
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