HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT REGINALD COMENOUT SR., et al., Plaintiffs, v. RICKY JOSEPH, individually and as Acting Superintendent, et al., Defendants.	CASE NO. C15-01389RAJ ORDER

I. INTRODUCTION

This matter comes before the Court on Defendants' Motion to Dismiss. Dkt. # 5. For the following reasons, the Court finds that the claim at instant is not ripe for review and **GRANTS** Defendants' Motion to Dismiss. Dkt. # 5.

II. BACKGROUND

Public Domain Allotment 130-1027 ("Allotment") has, at all times relevant to this matter, been held by the United States in trust for twelve individuals and one estate. Dkt. # 6 (Lynch Decl.) ¶ 4. Plaintiffs Robert Reginald Comenout Sr. ("Comenout Sr.") and Edward Amos Comenout III ("Comenout III") reside on the Allotment and collectively own a 20.7 percent interest in the Allotment. *Id.* Ex. A. at 6.

In accordance with Department of Interior Regulations, Indian landowners of a fractional interest in trust land must obtain a lease that is approved by a certain percentage of the total number of owners in that trust land. 25 C.F.R. § 162.012. In this

instance, because there are thirteen owners, 60 percent of the owners must consent in order for a lease to be granted. *Id.* If an individual occupies the land without a lease or does not have a lease with the requisite percentage of approval, the Bureau of Indian Affairs ("BIA") may commence action to remove the violators. 25 C.F.R. § 162.023.

On or about August 12, 2015, Ricky Joseph, Acting Superintendent of the BIA's Puget Sound Agency sent a letter to Comenout Sr. by certified mail. The letter informed Comenout Sr. that although he was a fractional owner of the Allotment, he did not have the necessary lease or permission from the other owners to occupy the land. As a result, the letter to Comenout Sr. stated "you must vacate the premises. 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. In no event should you interpret the 20-say [sic] deadline to vacate the property as a grace period." Dkt. # 1 Ex. A at 2. No such letter was sent to Comenout III.

Plaintiffs filed their Complaint on September 1, 2015, 20 days after receiving the letter. Since the initial letter was sent, no additional action has been taken by the BIA to remove Plaintiffs from the Allotment. Defendants claim that to effectuate the expulsion of Plaintiffs from the Allotment, the BIA will need to file eviction papers, which, to date, has not occurred.

III. LEGAL STANDARD

Federal courts have limited jurisdiction, and limitations on the court's jurisdiction must neither be disregarded nor evaded. *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011). The Article III case or controversy requirement of the United States Constitution limits federal court subject matter jurisdiction to claims that are "ripe" for adjudication. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). Similar to other challenges to a court's subject matter jurisdiction, issues of ripeness may be brought under Fed. R. Civ. P. 12(b)(1). *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Evidence to support a 12(b)(1) motion to

dismiss may include "affidavits or any other evidence properly before the court." *Id.* It is then on the onus of the non–moving party, who is attempting to assert federal subject matter jurisdiction, to prove through affidavits and other evidence that the Court does, in fact, possess subject matter jurisdiction over the claim. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d at 1121; *St. Clair v. City of Chico*, 880 F.2d at 201.

IV. ANALYSIS

Courts take up issues of ripeness "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). To that end, the Court analyzes "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

An agency action "is fit for review if the issues presented are purely legal and the regulation at issue is a final agency action." *Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992). With respect to finality, "[c]ourts traditionally take a pragmatic and flexible" viewpoint. *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). The primary question at issue "is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). Accordingly, the Court considers the following factors when analyzing the finality of the agency action at issue: "whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Ass'n of Am. Med. Coll.*, 217 F.3d at 780.

The second prong—the hardship to the parties of withholding court consideration—is an exception carved out by the Supreme Court, which renders a claim ripe if the impact to the complaining party is "sufficiently direct and immediate." *Abbott Labs.*, 387 U.S. at 152. Generally, this exception is read "to apply where regulations require changes in present conduct on threat of future sanctions." *Ass'n of Am. Med. Coll.*, 217 F.3d at 780.

A. Fitness of the Issue for Judicial Decision

Defendants' Motion to Dismiss specifically asserts that the letter sent to Comenout Sr. was not a final agency action. In a matter similar to the case at instant, the Chief Counsel of the Federal Aviation Administration ("FAA") sent a letter to the Orange County Board of Supervisors notifying them that failure to undertake negotiations with them will result in a variety of "contractual, injunctive, and civil remedies. *Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616, 618 (9th Cir. 1981). The letter further stated that noncompliance within 30 days warranted the commencement of those legal remedies available to them. *Id.* at 618–19. In response, Plaintiffs filed a Complaint that would later be dismissed by the district court for lack of ripeness. *Id.* at 22. The Ninth Circuit upheld the district court's decision analogizing that such a letter is akin to a "reason to believe" letter. *Id.* at 620. An agency sending a letter that states they have "reason to believe" that a violation had occurred is not reviewable because the action is not final. *Id.* Such letters do not have "a legal force comparable to that of a … regulation." *Id.* at 620.

While the language of the letter sent to Comenout Sr. clearly outlines the BIA's desire for Plaintiffs to vacate the premises, there is no legal force bolstering the potential eviction unless additional actions are taken. The BIA does not have the authority to expel Plaintiffs from the Allotment until proper legal action is taken by Defendants. 25 C.F.R § 162.023. Defendants' only action, to date, has been the service of the warning letter to

Comenout Sr. The mere delivery of this letter, which is analogous to a "reason to believe" letter, does not constitute final agency action.

Additionally, an agency action is only considered final if Plaintiff has exhausted their options for remedy through the agency's own appeals process. *Faras v. Hodel*, 845 F.2d 202, 203 (9th Cir. 1988). Once the BIA has issued an appealable action, Plaintiffs must exhaust their avenues of appeal through the BIA before bringing their claim to federal court. *See Sohappy v. Hodel*, 911 F.2d 1312, 1315–16 (9th Cir. 1990) (plaintiffs correctly challenged eviction through agency appeal). Alternatively, if an eviction action is commenced in tribal court, Plaintiffs may pursue the tribal court appeals process available to them. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810–12 (9th Cir. 2011) (plaintiffs properly appealed through the tribal court appeals process and finally up to the Ninth Circuit). In the context of the BIA, "there is a series of agency procedures mandated for exhaustion of administrative appeals; a decision must first be appealed to the BIA Area Director, next to the commissioner of Indian Affairs and finally to the Interior Board of Indian Appeals." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988).

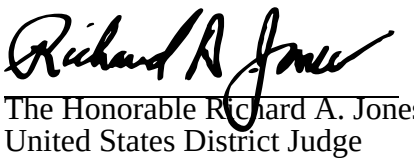
B. Hardship to the Parties of Withholding Court Consideration

Plaintiffs claim "defendant is exploiting Robert R. Comenout Sr. by seeking abandonment. This alone proves hardship." Dkt. # 8 (Response) at 3. To satisfy the hardship exception, Plaintiffs must show the impact is "sufficiently direct and immediate." *Abbott Labs.*, 387 U.S. at 152. The immediacy of injury required to confer ripeness is not present in this case. Defendants concede that in order for tangible action to manifest, they must serve a proper eviction notice on Plaintiffs. Furthermore, no action has been taken by the BIA since the delivery of the letter, despite the 20–day warning period being long overdue. The BIA's letter did not impose immediate hardship on Plaintiffs' lives such that urgent judicial action is warranted, particularly so when another avenue for relief—an appeal—may be available to Plaintiffs.

V. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Defendants' to Motion to Dismiss (Dkt. # 5) for lack of subject matter jurisdiction on the basis that the claims are not ripe for review.

DATED this 12th day of February, 2016.



The Honorable Richard A. Jones
United States District Judge