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

MOTION TO DISMISS

Note for Motion Calendar:
November 27, 2015

I. INTRODUCTION AND RELIEF REQUESTED

Defendants hereby move the Court to dismiss the claims against all Defendants in this matter pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs' causes of action relate to Acting Puget Sound Agency Superintendent Ricky Joseph's August 12, 2015 letter to Robert Reginald Comenout Sr. ("Robert Comenout") notifying him that he is trespassing on "trust land" (*i.e.* land owned by the United States but held in trust for Indian

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tribes or individuals) and stating that failure to vacate the premises will result in the Bureau of Indian Affairs taking further action against him. Agency actions are only considered ripe for judicial review when they are final in nature. The Ninth Circuit has determined that agency correspondence espousing a legal theory and instructing the recipient to take an action in a set timeframe or face further legal action is not a "final" agency action subject to judicial review. *See Air California v. U.S. Dep't of Transp.*, 654 F.2d 616 (9th Cir. 1981). Because that is all that has transpired in this matter with respect to Robert Comenout, his claims are not ripe and subject matter jurisdiction is lacking. In addition, neither Edward Amos Comenout III ("Edward Comenout") nor the Estate of Edward Amos Comenout ("Estate") were even served with such a letter, so their claims are also by no means ripe. If and when Defendants actually serve Plaintiffs with an eviction complaint, the controversy will have matured and Plaintiffs will have the opportunity for judicial review. Until then, the controversy is not ripe and dismissal of Plaintiffs' claims are warranted under Fed. R. Civ. P. 12(b)(1).[1]

II. STATEMENT OF FACTS

A. Background Regarding the Bureau of Indian Affairs

While not necessary to the resolution of this matter, Defendants provide the following information for context. The Department of Interior's Bureau of Indian Affairs ("BIA") is a federal agency that interacts in a government-to-government relationship with Indian tribes and Alaska Native entities pursuant to the Constitution of the United States, treaties, court

[1] Plaintiff The Estate of Edward Amos Comenout Jr. ("Estate")'s claims are also subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing because the Estate does not have an ownership interest in the property. This matter should be dismissed in its entirety on the ripeness grounds alleged here. However, if the claims survive, Defendants will assert this defense as well.

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decisions, and federal statutes. *See* Declaration of Stephanie Lynch, at ¶ 3.[2] In accordance with these legal authorities, the BIA, among other things, provides services to about 1.9 million American Indian and Alaska Natives, including services associated with education, economic development, housing, disaster relief, and land and water resource management. One of these services is assistance to Indian tribes or individuals holding property interests in land, including trust lands. This matter relates to the use of one such trust land and BIA's actions in supporting tribal members in their lawful use of that land. *Id*.

B. Background Regarding the Allotment at Issue

Again, though not necessary to resolution of this matter, Defendants provide this overview of the trust land at issue, known as Public Domain Allotment 130-1027 ("Allotment 1027" or "Allotment"). The Allotment has, at all times relevant to this matter, been held by the United States in trust for 12 individuals and one estate. Lynch Dec. at ¶ 4. Plaintiffs Robert Comenout and Plaintiff Edward Amos Comenout III ("Edward Comenout") both reside on the Allotment and, collectively, hold a .207 or "minority" interest in the Allotment. *Id*., Exhibit A (BIA Administrative Appeal Decision) at 6.

Pursuant to Department of Interior regulations (namely, 25 C.F.R. § 162.005(a) and 25 CFR § 162.012(a)(1)), Indian landowners of a fractional interest in trust land must obtain a lease to possess or use the land from the owners of other interests in the land unless all the owners have given the individual permission to take or continue in possession without a lease.

[2] When considering a motion to dismiss for lack of jurisdiction, the Court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Biotics Research Corp v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). Indeed, the Court may receive competent evidence such as declarations to determine jurisdiction and, under Rule 12(b)(1), the receipt of such evidence does not convert a motion to dismiss into one for summary judgment. *Kamen v. American Tele. & Telegraph Co*., 791 F.2d 1006, 1010 (2d Cir. 1986). Regardless, the facts established by declaration are not necessary to find a lack of jurisdiction in this instance and are provided simply for context.

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When a fractional owner fails to do so, the BIA has authority to commence eviction proceedings against him or her. *See* 25 C.F.R. § 162.023 (BIA "may take action to recover possession, including eviction, on behalf of the Indian landowners"); s*ee also United States v. Torlaw Realty, Inc.*, 348 Fed. App'x. 213, 2009 U.S. App. LEXIS 19854 (9th Cir. 2009) (the United States holds allotments in trust for individuals and in its capacity as trustee "[h]as the power to control occupancy on the property and to protect it from trespass."), citing, *United States v. West*, 232 F.2d 694, 698 (9th Cir. 1956). Plaintiff Robert Comenout and Edward Comenout do not dispute, nor can they, that they have not obtained either a lease or the permission of the majority landowners to occupy the land at issue. *See* Lynch Dec. at 6. Accordingly, BIA is appropriately in a position to evict Plaintiffs from the Allotment.[3] However, pertinent to this motion is the limited action BIA has already taken to enforce that right, and whether it constitutes reviewable, final agency action.

C. Actions at Issue in This Matter

On August 12, 2015, Ricky Joseph, Acting Superintendent of the BIA's Puget Sound Agency sent a letter to Robert Comenout by certified mail. See (Dkt. #1-1) (Complaint, Exhibit A). It notified Robert Comenout of BIA's position that although he owned some

[3] This right was also noted during an Administrative Appeal decision issued by BIA Pacific Northwest Regional Director Stanley Speaks. *See* Lynch at ¶ 5, Exhibit A (2014 BIA Administrative Legal Decision) at 11. In 2014, BIA approved a business lease of the Allotment between the majority owners (holding a .63 interest) and the Quinault Indian Nation. Lynch Dec. at ¶ 5. The approval was subject to administrative appeal rights, which Plaintiffs to this action exercised. Id. In his decision on appeal, the Regional Director addressed a related argument raised by Plaintiffs' (then Appellants') that they are entitled to fair market rent for any use of the Allotment based upon their minority ownership interest in it. In rejecting that claim, Regional Director Sparks stated:

> Appellants' argument fails because the landowners who are living on the allotment are occupying the property without a lease. Under Interior Board of Indian Appeals (IBIA) precedent they are, therefore, considered trespassers and subject to eviction. See, e.g. Helene Dorene Goodwin v. Pacific Regional Director, 60 IBIA 46, 47 (2015) (Finding co-owner's decade-long occupation of allotment without a lease to be a continuing trespass). I, therefore, am denying this portion of the appeal. In addition, I am ordering the Acting Superintendent to take immediate steps to address what appears to be the unauthorized occupation of the allotment by appellants.

Id. (emphasis added).

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interest in the property, as a minority owner he needed to obtain either a lease or consent of the majority owners to occupy the property. *Id*. Further, it stated BIA's position that because no such lease or permission had been obtained, Mr. Comenout needed to vacate the property and stated that "failure to do so will result in the BIA taking action in accordance with 25 C.F.R. § 162.023 and applicable Federal law." *Id*. No such letter was sent to Edward Comenout or the Estate. Lynch at ¶ 6. When Plaintiffs filed the instant complaint on September 1, 2015, BIA had taken no further action and, to date, BIA has still not taken any further action against any of the Plaintiffs. *Id.* In fact, in order to avail itself of the legal remedies available to it, BIA will need to file eviction complaints against the Plaintiffs (with the exception of the Estate, which has no property interest in, nor resides on, the Allotment), at which point the Plaintiffs will have their opportunity for judicial review. *See* Lynch at ¶ 7.

III. LEGAL ARGUMENT

A. Ripeness is a Threshold Legal Issue That, When Absent, Warrants Dismissal

Under the Article III case or controversy requirement of the U.S. Constitution, federal court subject matter jurisdiction is limited to cases in which the claims alleged are "ripe" for adjudication. *Chandler v. State Farm Mut. Auto. Ins. Co*., 598 F.3d 1115, 1121 (9th Cir. 2010). If the controversy is not ripe, the federal court lacks jurisdiction to review the matter, and the case warrants dismissal under Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction). *See Chandler*, 598 F.3d at 1121. Such is the case here.

B. A Claim Against an Agency is Only Ripe When it Pertains to *Final* Agency Action

Courts have expressly defined what constitutes "ripeness" for purposes of actions taken by federal agencies. As an overarching matter, the Supreme Court has explained that:

> ripeness is a justiciability doctrine designed "to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract

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> 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."

Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 807-808 (2003) (emphasis added), *quoting, Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The Ninth Circuit further defined the standard of ripeness to include a need to demonstrate "fitness of the issues for judicial decision." *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 933 (9th Cir. 2015). In order to be "fit for review," the Ninth Circuit stated, there must be final agency action. *Id.*, citing *Ass'n of Am. Med. Colleges v. U.S.*, 217 F.3d 770, 780 (9th Cir. 2000).

The Ninth Circuit has examined what constitutes a "final" agency action in a circumstance closely analogous to this case. In *Air California v. U.S. Dep't of Transp.*, the Chief Counsel of the Federal Aviation Administration ("FAA") issued a warning letter to the Orange County Board of Supervisors stating that a failure to engage in negotiations to accommodate new airlines at regional airports "will warrant our pursuance of contractual, injunctive, and civil penalty remedies." 654 F.2d 616, 618 (9th Cir. 1981). The letter warned that if the board did not participate in the negotiations within 30 days, the FAA would pursue those legal remedies. *Id*. at 618-19. The board did not comply and instead filed suit challenging the letter. *Id*. at 619. The District Court dismissed the claim for lack of jurisdiction on the grounds that the issues were not ripe for review and that no case or controversy had been presented. *Id*. at 622. The Ninth Circuit upheld the dismissal noting that the letter was a notification of an agency's interpretation of the law (akin to a "reason to believe" letter) and did not have "a legal force comparable to that of a . . . regulation." *Id*. at

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620; *see also Pacificorp v. Thomas*, 883 F.2d 661 (9th Cir. 1988) (holding an EPA notice of violation is not a final agency action). The facts of this case warrant the same result.

C. There Has Been No Final Agency Action in This Matter

The only action taken by BIA relative to this dispute to date is to send a letter to one Plaintiff (Robert Comenout) indicating BIA's belief that he is in trespass and warning him of the potential consequences of his failure to vacate the Allotment within 20 days. *See* Complaint, Exhibit A. BIA has not issued such a letter to Edward Comenout as of the date of this filing. Lynch Dec. at ¶ 6. Since the issuance of the letter, BIA has not taken any further action to address the trespass. *Id*. Accordingly, as in *Air California*, the agency has only stated a legal position and its intent to pursue legal remedy absent future action. 654 F.2d at 620. This does not constitute a "final" agency action. *Id*. And Plaintiffs have not suffered any concrete effects. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 807-808 (requiring effects of agency action to be felt in a concrete way before controversy is ripe). Judicial review will become appropriate if and when BIA commences eviction proceedings against Plaintiffs. In the meantime, as in *Air California*, there has been no final agency action and the matter is not ripe for judicial review.

IV. CONCLUSION

For the foregoing reason, Defendants respectfully requests that the Court dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1).

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Dated this 3rd day of November, 2015.

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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 3rd day of November 2015.

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