

The Honorable Judge Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT	)	No. 3:16-cv-05464-RJB
SR., EDWARD AMOS COMENOUT III,)	
THE ESTATE OF EDWARD AMOS	)	<u>MOTION FOR LEAVE TO FILE</u>
COMENOUT JR., BY SPECIAL	)	THIRD AMENDED COMPLAINT
ADMINISTRATOR ROBERT E.	)	FOR PRELIMINARY AND
KOVACEVICH, ROBERT REGINALD	)	PERMANENT INJUNCTIONS;
COMENOUT JR., MARLENE	)	AGAINST STATE
COMENOUT and LEE A. COMENOUT	)	ADMINISTRATIVE JUDGE PRO
SR.,	)	TEM, AND STATE OFFICIALS FOR
	)	ONGOING VIOLATIONS OF
Plaintiffs,	)	FEDERAL LAW; FOR
	)	DECLARATORY RELIEF
v.	)	INCLUDING ADJUDICATING
	)	FEDERAL OBSTACLE PREEMPTION
	)	OF WASH.REV.CODE 64.20.030
J. MARK KELLER, Employee of the)	
Washington State Liquor and Cannabis	)	NOTE ON MOTIONS CALENDAR:
Control Board, LEE BOLING, Employee	)	MARCH 17, 2017
of the Washington State Liquor and)	
Cannabis Control Board, AL)	
ANDERSON, a Lieutenant of)	
Washington State Liquor and Cannabis)	
Control Board, Washington State)	

Motion for Leave to File Third
Amended Complaint for Violation
of Preliminary and Permanent Injunction, etc. -1

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Liquor Board Officer RAJ
VELUPPILLAI, BOYD GOODPASTER,
Acting State Agent, TOM WALSH,
Acting State Liquor Board Agent,
DOUGLAS SMYTHE, Employee of the
Quinault Indian Nation, Pro Tem,
THOMAS J. FELNAGLE, Judge Pro
Tem Pierce County Superior Court,
DENNIS O'BRIAN, Pierce County
Probation Officer in charge of Plaintiffs
Robert Reginald Comenout Sr., Robert
Reginald Comenout Jr., Marlene
Comenout and Lee A. Comenout Sr.,
Administrative Law Judge TERRY A.
SCHUH, Administrative Law Judge of
the State of Washington Office of
Administrative Hearings now presiding
over State of Washington Office of
Administrative Hearings Forfeiture
Proceedings on Property owned by
Plaintiffs and seized from the public
domain allotment, JOHN AND JANE
DOES, 1-10, fictitious names of
employees of the Washington State
Liquor and Cannabis Board who
participated in raids on Plaintiffs'
Allotment and property at 908/920 River
Road, Puyallup, Washington, and who
may participate in the future, JOHN AND
JANE DOES 11 and 12, Post Falls, Idaho
Police Officers who acted as Agents of
the Washington State Liquor Control
Board in raids on Plaintiffs' Allotment
and property at 908/920 River Road,
Puyallup, Washington, or who may
participate in the future,

Defendants.

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COMES NOW Plaintiffs Robert Reginald Comenout Sr., Edward Amos Comenout III, Robert Reginald Comenout Jr., Marlene Comenout and Lee A. Comenout Sr., through their undersigned counsel, and hereby request leave of the Court to file a Third Amended Complaint in this action. The Third Amended Complaint is lodged with this Motion.

The reason Plaintiffs seek to file the Third Amended Complaint is that the Court, by Order filed January 3, 2017, (Dkt. 42), granted Defendants' Motion to Strike the First Amended Complaint on procedural grounds. Plaintiffs' Counter Motion to file the First Amended Complaint was denied without prejudice. The Court cautioned Plaintiffs to be prudent in filing the amended pleadings and also reminded Plaintiffs' Counsel that Fed.R.Civ.P. 8 requires "The Complaint to be a short and plain statement." Plaintiffs filed a Second Amended Complaint but later withdrew the Second Amended Complaint. The proposed Third Amended Complaint is substantially reduced.

ARGUMENT

The Plaintiffs' Motion satisfies the liberal standards for amending a pleading under Fed.R.Civ.P. 15(a). No Discovery has yet taken place and the case is not set for trial.

A. Amendment of the Complaint is Appropriate in this Case

Rule 15(a) provides that a Court should grant leave to amend a pleading "freely" and "when justice so requires." Fed.R.Civ.P. 15(a)(2). The grant or denial of an opportunity to amend is within the discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). The Ninth Circuit Court of Appeals has emphasized that, "this policy is to be applied with extreme liberality." *C.F. ex rel. Farnan v. Capistrano Unified School District*, 654 F.3d 975, 985 (9th Cir. 2011); *Owens v. Kaiser Found. Health Plan, Inc.*,

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244 F.3d 708, 712 (9th Cir. 2001); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); and *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

The Ninth Circuit has stated that leave to amend a party's pleading pursuant to Rule 15(a) "generally shall be denied only upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing party." *Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143, 1152 (9th Cir. 2011).

There is no undue delay in this case as no Discovery is calendared, no status report is due and the case is not set for trial. There is no bad faith as Plaintiffs have diligently sought to remedy any pleading defects. The allegations are not futile as facts and legal authority support the allegations. Plaintiffs have not filed similar complaints, causes or action and parties have been removed. New Defendants and new causes of action have been added. The issues in the Complaint cannot be litigated in state court as owners of allotments are entitled to federal court jurisdiction on any action involving their right to the allotment, 25 U.S.C. § 345, 28 U.S.C. § 1353. "Indian rights to a Congressional allotment are governed by federal - not state - law." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010). These include the rights of the Indian allottee on his allotment. *U.S. v. Mottaz*, 476 U.S. 834, 845, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). This also includes income rights. *U.S. v. Pierce*, 235 F.2d 885, 890 (9th Cir. 1956); *Loring v. U.S.*, 610 F.2d 649, 650 (9th Cir. 1979); *Scholder v. U.S.*, 428 F.2d 1123, 1126 (9th Cir. 1970). In addition to a specific grant of federal jurisdiction, a line of cases grant federal courts jurisdiction to quash state search warrants investigating Indian crime on allotments. *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990); *U.S. v. Peltier*, 344 F.Supp.2d 539, 547 (D.C. Mich. 2004). The federal courts

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also have jurisdiction to enjoin state courts prosecuting Indians on crimes that occur on allotments. *Magnan v. Trammell*, 719 F.3d 1159, 1176 (10th Cir. 2013); *U.S. v. Stands*, 105 F.3d 1565, 1574 (8th Cir. 1997); *Dickson v. Carmen*, 270 F.2d 809 (9th Cir. 1959); and *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518, 524 (10th Cir. 1974) allows federal courts preemption over state courts where allotments are the jurisdictional issue.

An Amendment is futile “only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.” The Third Amended Complaint alleges sufficient facts and violations to obtain prospective and Declaratory relief.

Accordingly, the Plaintiffs move that the Third Amended Complaint be allowed to be filed in this case.

DATED this 13th day of February, 2017.

s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH, #2723
Attorney for Plaintiffs

s/ Aaron L. Lowe
AARON L. LOWE, #15120
Attorney for Plaintiffs

s/ Randal B. Brown
RANDAL B. BROWN, #24181
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System.

s/Robert E. Kovacevich
ROBERT E. KOVACEVICH
Attorney for Plaintiffs

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