UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT SR., EDWARD AMOS COMENOUT III, ROBERT REGINALD COMENOUT JR., MARLENE COMENOUT, and LEE A. COMENOUT SR., Plaintiffs, v. J. MARK KELLER, Employee of the Washington State Liquor and Cannabis Control Board, LEE BOLING, Employee of the Washington State Liquor and Cannabis Control Board, AL ANDERSON, a Lieutenant of Washington State Liquor and Cannabis Control Board, Washington State 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.,	No. 3:16-cv-05464-RJB PLAINTIFFS' REPLY TO RESPONSES TO STATE AND JUDICIAL DEFENDANTS' MOTION AND UNITED STATES OPPOSITION OPPOSING PLAINTIFFS' MOTION TO FILE THIRD AMENDED COMPLAINT

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

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, or 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 and Cannabis Board in raids on Plaintiffs' Allotment and property at 908/920 River Road, Puyallup, Washington, or who may participate in the future,

Defendants.

Plaintiffs, through their attorneys, reply to the state and judicial Defendants' Motion Opposing Plaintiffs' Motion for Leave to File Third Amended Complaint.

The Lodged Third Amended Complaint responds to the Court's caution (Dkt 42) to follow CR 8. The Third Amended Complaint attempts to file a short and plain statement under CR 8.

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

Plaintiffs are sandwiched between CR 8 and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic v. Trombly*, 550 U.S. 554, 555 (2007). Plaintiffs point out, however, that "federal Indian policy is to say the least, schizophrenic and the confusion continues to infuse federal Indian law." *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (Justice Thomas concurrence, *Id.* at 219).

Cases in Progress May Apply

The pending *Tulalip* case may establish law that applies to this case. At the present time a case against the Department of Revenue, *Tulalip Tribes v. Department of Revenue*, No. 2:15-cv-00940-BJR filed June 12, 2015, seeks declaratory and injunctive relief against state taxes alleging Indian commerce clause and supremacy clause preemption. Dkt 1, page 2. Contrary to this case, the Federal Government has intervened on the side of the Tribe. Plaintiffs' Third Amended Complaint seeks similar state tax relief and like the Tulalip Tribe case, only seeks declaratory and injunctive relief. The relief in *Tulalip* could be similar to that sought here. While the outcomes could be different, the right to review a U.S. District Court is the same. A difference is that the tribe has district court jurisdiction under § 1362. Here, jurisdiction is alleged under 28 U.S.C. § 1353. The Lodged Complaint at page 4 alleges that two of the Plaintiffs, Robert R. Comenout Sr. and Edward Amos Comenout III are part owners of the Allotment. § 1353 grants them original jurisdiction. 25 U.S.C. § 349 is also alleged dictating exclusive jurisdiction to Congress when the restrictions, as in this case, are still in place. 25 U.S.C. § 345 also confers Plaintiff's federal jurisdiction of rights of allottees to their allotment.

The state Defendants at page 7 of their response argue that "tobacco" jurisdiction has

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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been declined. The Third Amended Complaint alleges that the permanent injunctions was entered in *Confederated Tribes v. State*, No. 3868, U.S. D.C. E. D. W.N., March 28, 1981. The state agreed that tobacco products "RCW 82.26" would not be enforced by the state against Indians in Indian country. The Courts's order (Dkt 42) cautions re-litigation. Throughout, both sets of Defendants fail to recognize that Edward Amos Comenout III is a Plaintiff and joint owner. He is alleged in the Third Amended Complaint to be an enrolled tribal member and is alleged in the Complaint not to be involved in operating or being a person raided by Defendants. He wants to make sure he can make a living. He wants to know his rights on sale of cannabis and hemp. There has been no ruling on this issue to the knowledge of Plaintiffs, this is a first impression issue in Washington. *Menominee Indian Tribe of Wisconsin v. D.E.A.*, 190 F.Supp.3d, 843 (D.C. E.D. Wis 2016) allows a declaratory judgment on the issue holding that the tribe had an actual controversy even though it was not growing hemp. "[Courts] do not require a plaintiff to expose himself to liability before bringing suit." *Id* at 850. *U.S. v. White Plume*, 447 F.3d 1067, 1075 (8th Cir 2006) also found standing where the United States sought declaratory and injunctive relief. The state allows cannabis and news reports dated December 2, 2015, Richard Walker "*Let It Be Pot Two Washington State Tribes on Board"* indicate that the Suqamish and Squaxin Tribe deal in cannabis. The case of *California v. Cabazon Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) applies and supports a declaratory judgment.

Rooker-Feldman and Collateral Estoppel Does Not Apply

Rooker-Feldman does not apply to Edward Amos Comenout III as he may have become an owner in 2010. *Beres v. U.S.* 92 Fed. Cl. 737 (ct. cl. 2010) applies state of Washington

ROBERT E. KOVACEVICH, P.L.L.C.
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law and rejects both collateral estoppel and *Rooker-Feldman*. *Rooker-Feldman* does not apply privity. If the party is not a party in the first action privity is not subject to privity issue. *Id* at 748 "the party against whom collateral estoppel will be applied must have had a full and fair opportunity to litigate the issue in a prior action." *Id* at 751. Edward Amos Comenout III was never involved in the convenience store. Further, somehow he would have to get the defendants to arrest him. He is not precluded from bringing the third party complaint. If the case is set for trial in October, no discovery has yet commenced. *Burlington Northern & Santa Fe Railroad Co. v. Vaughn,* 509 F.3d 1085, 1094 (9th Cir. 2007) applies to officials enforcing a tax. It also denies sovereign immunity where an injunction is sought against the official for pursuing an allegedly unconstitutional statute. *Id.* at 1092. The cases also hold that these matters are defenses and do not bar a suit. Further, *Burlington Northern and Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation,* 323 F.3d 767 (9th Cir. 2003) holds that each year of tax is the origin of a new liability and "a separate cause of action" even if the facts are the same. "The *Burlington I* court could not have established BN's tax liability forever." *Id.* at 771. The case follows *Commissioner v. Sunnen,* 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948). *Sunnen* holds that development in contradicting legal principles prevents claim preclusion. *Id.* at 599. The state cigarette tax law was changed in 1995 and 2003. The federal law was changed in 2006. Now most of Washington's 36 or more tribes sell cigarettes without Washington tax or stamps.

Crowe and Dunlevy v. Stidham, 640 F.3d 1140, (10th Cir. 2011) supports injunctive relief against Defendant Terry Schuh and other judges, when no jurisdiction exists for a

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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judge to act. *Id.* at 1154. In *ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) the Supreme Court carved out "an exception to Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law." Like the state defendants, these factual matters attempted to deny discovery. In case No. MS 5159 U.S. District Court W.D. WN (2012) J. Mark Keller states in an affidavit that he has been employed by the state liquor board for twenty years but for a few months he has not been assigned to the ATF office. The allegations are violations of state law, not federal law as the cases cited by the federal agents allege the "chameleon like" methods of the defendants are factual determinations not relevant in a motion to amend. They are officials acting as such in the state proceedings and have no sovereign immunity. In *Paeste v. Government of Guam,* 798 F.3d 1228 (9th Cir. 2015), the court upheld a suit against officials in charge of the refund relying on *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 214 (1908). *Committee to Protect our Agricultural Water v. Occidental Oil and Gas Corporation,* ___ F.Supp.3d ___, 2017 WL 272215 at *13, allowed a suit against an official for prospective relief. Sovereign Immunity was denied. *Id.* at 1234-5. *P.P. v. Compton Unified School District,* 135 F.Supp.3d 1098 (D.C. Cal. 2015) allowed prospective relief against persons who had more than general supervisory powers. *Id.* at 1121. J Mark Keller and Boyd Goodpaster had more than supervisory powers.

The law on lack of state jurisdiction was decided 274 years ago. Before the U.S. Constitution was approved, the English courts held that the colonies had no control over Indians. Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L.Rev. 434 (1981)* states:

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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> State and Indian tribal governments have been increasingly at odds over the legitimate scope of state power in Indian country involving matters of taxation, land use management, wildlife conservation, water regulation, and eve criminal law. Since the early colonial period, the law has respected the sovereignty and authority of Indian tribes over such matters and has precluded the exercise of state authority in Indian territory. (Underling added)

In support of this statement, Clinton cites the case of *Governor and Company of Connecticut and Moheagan Indians,* 126 (London 1769 opinion of Comm'ns Horsemanden Aug.1, 1743). *Clinton, id* at 435 then states:

> Ever since, one central theme in Indian law has been the effort to protect the autonomy of the Indian tribal community as a separate polity or sovereignty from competing claims to authority asserted by the colonial or state governments.

The allegations in this case of prior litigation since 1974 concerning the allotment and the state cigarette law brings focus to the background reason that Plaintiffs seek a declaratory judgment. Defendants and in some instances the courts, do not want to be bothered to consider the obvious fact that the Washington State cigarette tax law has changed so materially that enrolled Indians in Indian Country can decide on their own without permission of the state whether they want to collect the state cigarette tax or not. See *Confederated Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). "[T]he act does not *require* it; rather that is an economic choice left to the Indian retailers." *Yakama, Id* at 1088, notes that the amended cigarette tax act only allows wholesalers to put tax stamps on cigarette packages. Wash. Rev. Code § 82.24.030(2).

The Department of Revenue cigarette tax bulletin states that non Indians who buy cigarettes in Indian country must, within 72 hours, send the state tax to Olympia along with a form. If the purchaser needs a form they can call 1.800.647.7706. The Plaintiff actually

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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cannot collect the tax, if collected it could be paid twice. *New York v. Mountain Tobacco*, 2016 WL 3962992 at *15. The violation may only be failure to ship to a state licensed agent. *King Mountain Id.* at *8 also questions whether state boundaries make any difference since Indian commerce and interstate commerce are different.

Michael Minnis *"Judicially Suggested Harassment of Indian Tribes: The Pottawatomis Revisit Moe and Colville"*, 16 Am. Indian L. Rev. 289, 290 (1991) notes that the 1980 Supreme Court cases invaded Indian Country by the departure from prior law prohibiting all state taxes on Indian Country. Very few cases involve off-reservation allotment Indian commerce, even though allotments are Indian Country. 18 U.S.C. § 1151 (c). The Third Amended Complaint does not request any monetary relief. It seeks injunctive and declaratory relief. It seeks preemption of the state statute that takes the protective provisions from the Comenout's deed. Wash.Rev.Code § 64.20.030. It seeks an injunction against ongoing violations of federal law by a state administrative law judge and seeks a declaratory judgement that cannabis and hemp can be sold on the allotment. Defendants continue to ignore the allegation that among the Plaintiffs is an owner, Edward Amos Comenout III, who has never participated in any way with any sales of anything on the allotment, but who understandably wants to know how he can use his ownership to make the living that Congress intended. The Allotment Act was enacted to allow Indians to live and make a living on the allotment so they could assimilate in non Indian society. The United States response, Dkt 54, at page 6 of 14, argues collateral estoppel and the *Rooker-Feldman* Doctrine. Both are rejected by the case cited above. The question of duty to take the cigarettes to a distributor and Indian to Indian commerce application of the state of

ROBERT E. KOVACEVICH, P.L.L.C.
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Washington cigarette tax law to Indians operating on off reservation restricted allotments has never been carefully considered and is first impression. The saying "you never get a second chance to make a first impression" is altered by Defendants response. Here they attempt to make certain that Plaintiffs never get a chance at a first impression.

The federal defendants contend that *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355 (Wash 2011) applies. The case was to determine whether Ed Comenout Jr., who died in 2010 had to have a Quinault Tribe license. Since 2010 no Quinault member owns the allotment. The federal defendants also insist that *Comenout v. Liquor Board*, 195 Wn.App. 1035 (2016) applies. The case is not supposed to be cited as the state lost its Motion to Publish. The case is still pending as it is on appeal. The federal defendants argue undue delay. The delay, if any, has been caused by successive motions of the defendants, not the Plaintiffs. Discover on the Third Amended Complaint will be minimal. The case will be ready for trial.

Defendants object to joining additional defendants. The state defendants at page 6 of their Response state: "The proposed Amended Complaint would reintroduce a State judicial defendant the Hon. Judge Felnagle, who had been previously dismissed as one of the unnamed judges John and Jane Doe." The state defendants are trying to put an impossible burden on Plaintiffs. The Complaint alleges John Does as persons who may later be identified. The relief sought is common to the additional persons sought to be named. *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980) applies. "[T]he plaintiff should be given the opportunity through discovery to identify the unknown defendants." *Id.* at 642. The additional defendants all are involved in the same conduct as the original defendants and are

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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subject to amendment as their actual names replace the John Doe defendants. All had reason to be named as they are part of the same task force. All had constructive notice. They all were in the task force. See *Krupski v. Costa Crociere*, 560 U.S. 538, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-103 (1st Cir 1979); and *Kirk v. Cronvich*, 629 F.2d 404, 407-8 (5th Cir 1980).

The Joint Plaintiff's Response ignores the relief sought by the Third Amended Complaint. Plaintiffs introduce a new request for declaratory relief by declaring Wash.Rev.Code. § 64.20.030 invalid by federal obstacle preemption. The statute strips the Comenout land from Congressional control. It states in part "it being the intention of this section to remove from Indians residing in this state all existing disabilities relating to alienation of their real estate. The Comenout Deed states:

> TO HAVE AND TO HOLD the above described real property to the said Edward Comenout, his heirs and assigns forever, UPON THE CONDITION that while the title thereto is in the grantees or heirs, the same shall not be alienated or encumbered without the consent of the Secretary of the Interior.

It is a direct conflict with the Federal Statute 25 U.S.C. § 349 that states:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; *Provided further*, that until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend

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

to any Indians in the former Indian Territory.

Restrictions are indefinite in duration. 25 U.S.C. § 5102. The additional federal statutes violated are 25 U.S.C. § 5108 that allows the BIA to establish "restricted allotments" "exempt from state and local taxation." This statute was upheld in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir 2013) reversing a case in this district and holding the state statute, Wash. Rev. Code 84.04.080 in violation of the U.S. Const. art. VI cl. 12. "Therefore, it is irrelevant whether permanent improvements constitute personal property under Washington Law." *Id* at 1158.

25 U.S.C. § 465 has been renumbered into 25 U.S.C. § 5108. The case struck down county tax on the Tribe's off reservation water slide. *Tohono Odham Nation v. City of Glendale*, 804 F.3d 1293, 1297 (9th Cir 2015) also cites the Supremacy Clause of the U.S. Const. art. VI, cl. 2 and applied obstacle preemption to a state statute as the intent of Congress was violated. *Id.* at 1298.

Cohen's Handbook of Federal Indian Law § 16.03[3](b) page 1077 (Nell Jessup Newton ed. 2012) states: During the trust or restricted period, federal law protects allotments against alienation, encumbrance and taxation without congressional consent." The quote cites 25 U.S.C. § 348 that provides that the BIA may issue patents on the allotted land but until such time "such conveyance or contract shall be absolutely null and void." The statute also allows the Indian owner to live on the property. This federal statute also conflicts with Wash. Rev. Code 64.20.030. Boyd Goodpaster is one of the defendants that used the state statute to ignore the restricted status and went upon the land to take property. He will do it again unless the preemption applies. To the knowledge of Plaintiffs this is a first impression

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

issue, and can only be obtained by declaratory judgment. In *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), the Sac and Fox Tribe obtained a permanent injunction against state excise tax on motor vehicles owned by enrolled Indians living on an off-reservation allotment. The Court held that Indian country applies to more than formal reservations. It also includes off reservation allotments. *Id* at 125. Cohen's Handbook of Federal Indian Law 2012 Edition § 16.03[3](c) page 1028 (Nell Jessup Newton ed 2012) states: Both allottees and the United States as trustee, may obtain judicial protection of allottees' rights, allottees can invoke jurisdiction to enforce both claims to ownership and protection of interests in allotted land."

CONCLUSION

Plaintiffs, enrolled Indians, seek a declaration of their rights to live and work on the Allotment. They have sufficiently pled the relief sought. The Motion should be denied.

Dated this 20th day of March, 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

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 the 20th day of March, 2017, I electronically filed the foregoing Plaintiffs' Reply to Responses to State and Judicial Defendants' Motion and United State's Opposition Opposing Plaintiffs' Motion to File Third Amended Complaint with the Clerk of the Court using the CM/ECF System.

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

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