The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT, SR., *et al.*, Plaintiffs, v. PIERCE COUNTY SUPERIOR COURT, *et al.*, Defendants.	CASE NO. 3:16cv5464-RJB FEDERAL DEFENDANTS' MOTION TO DISMISS NOTE ON MOTION CALENDAR: MAY 5, 2017

I. INTRODUCTION

Federal Defendants Boyd Goodpaster, J. Mark Keller, and Lee Boling, named only in their official capacities (collectively, the "federal defendants"), by and through their attorneys, Annette L. Hayes, United States Attorney for the Western District of Washington, and Sarah K. Morehead, Assistant United States Attorney for the District, move the Court to dismiss all claims against them under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6).

Plaintiffs have failed to state a claim against the federal defendants or to establish the Court's personal or subject matter jurisdiction. Plaintiffs allege what appear to be Fourth Amendment claims against the federal defendants, but the United States has not waived

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sovereign immunity for constitutional torts against the United States or its employees in their official capacities.

Even if the Court were to consider the specifics of plaintiffs' claims despite the jurisdictional issues, plaintiffs do not state a claim. Specifically, their claims are barred by collateral estoppel, the claims are unripe, and plaintiffs are not entitled to the equitable relief they seek because they have adequate remedies at law. Finally, plaintiffs are currently litigating the propriety of their convictions in state court, so several comity-related doctrines preclude them from doing so in this forum, as the Court has already ruled.

II. BACKGROUND FACTS

Plaintiffs filed their original complaint on July 26, 2016. Dkt. #1. In August 2016, the state prosecutorial and judicial defendants filed a motion to dismiss, which the Court granted. Dkt. #18. Thereafter, plaintiffs filed a First Amended Complaint without first obtaining leave of Court. Dkt. #26. The state defendants moved to strike the First Amended Complaint, arguing that plaintiffs had no right to amend as a matter of course, and they had not obtained the Court's permission to file an amended complaint. Dkt. #33. Plaintiffs then made a second attempt to amend. Dkt. #35. The Court struck plaintiffs' first amended complaint and denied their request to file their proposed second amended complaint. Dkt. #42.

Thereafter, plaintiffs made a third attempt to amend their complaint, Dkt. #43, but then withdrew that motion. Dkt. #44. Plaintiffs then filed a motion to file a fourth proposed amended complaint. Dkt. #46. The Court denied plaintiffs' motion to file the fourth amended complaint, so their original complaint is the operative pleading.

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III. ANALYSIS

A. Agent Goodpaster Is a Federal Employee, and Agents Keller and Boling Are Federal Employees for Purposes of This Litigation

As the United States noted in its opposition to plaintiffs' motion to amend, defendants Goodpaster, Keller, and Boling are not state employees as plaintiffs allege. Plaintiffs did not respond to this argument and appear to concede the point. Agent Goodpaster is, and was during all relevant times, a Senior Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), United States Department of Justice. Declaration of Boyd Goodpaster (Dkt. #56) at ¶ 2. Agent Goodpaster is therefore a federal, not state, employee.

Agents Keller and Boling are federal agents for purposes of this litigation because at all times relevant to the allegations in the Complaint, Agents Boling and Keller were commissioned Task Force Officers with ATF. Declaration of J. Mark Keller (Dkt. #57) at ¶ 2; Declaration of Lee Boling (Dkt. #55) at ¶ 2. All of their actions relevant to this case were undertaken in the course and scope of their work with ATF. Declaration of J. Mark Keller at ¶ 2; Declaration of Lee Boling at ¶ 2. As such, Agents Boling and Keller are treated as federal employees for purposes of this litigation. "Courts have consistently treated local law enforcement agents deputized as federal agents and acting as part of a federal task force as federal agents." *Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005); *see Farag v. United States*, 587 F. Supp. 2d 436, 471 (E.D.N.Y. 2008) (finding that city detective was acting under federal law because he was working on the FBI's Joint Terrorism Task Force). By statute, state employees commissioned by a federal agency are deemed to be federal employees for purposes of the Federal Tort Claims Act ("FTCA") and other federal tort liability statutes. 5 U.S.C. § 3374(c)(2). As such, all three agents are federal employees for purposes of this litigation.

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B. Plaintiffs Have Never Served the United States or the Federal Defendants

The Court lacks personal jurisdiction over the federal defendants because plaintiffs have not served the federal defendants. "A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4.'" *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986)). Federal Rule of Civil Procedure 4(i) requires that a plaintiff suing a federal government employee in his or her official capacity must also serve the United States. Fed. R. Civ. P. 4(i)(2). To serve the United States, a party "must" serve both the United States Attorney's Office and the Attorney General of the United States. Fed. R. Civ. P. 4(i)(1).

Plaintiffs have not effected service against the United States as required by Fed. R. Civ. P. 4(i) because they not complied with either part of the rule. They have never served the Attorney General. Declaration of Sarah K. Morehead at ¶ 2. Nor have they served their original complaint, which is the operative one, on the United States Attorney's Office as required by Fed. R. Civ. P. 4(i)(2). *Id.* After the 90-day deadline to serve had already passed, plaintiffs belatedly served their amended complaint on the U.S. Attorney's Office (*id.)*, but the Court struck the amended complaint. Dkt. #42.

Plaintiffs cannot show good cause for their failure to serve in compliance with Rule 4(i). *See, e.g., United States ex rel. DeLoss v. Kenner Gen. Contractors, Inc.*, 764 F.2d 707, 711 (9th Cir. 1985) (explaining good cause requirement); *Diamond v. United States*, 2015 U.S. Dist. LEXIS 180204 (C.D. Cal. May 13, 2015). In fact, the Court already granted plaintiffs an extension to serve the United States, Dkt. #38, but plaintiffs still have not served the United

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States. Therefore, the Court should dismiss the claims against the federal defendants for lack of personal jurisdiction.

C. Plaintiffs Have Not Identified a Waiver of Sovereign Immunity that Would Allow Them to Pursue Their Official Capacity Claims Against the Federal Defendants

All three federal defendants are explicitly named in their official, not personal, capacities. (Dkt. #1 at ¶¶ 30, 31). A suit against a federal government employee in his or her official capacity is essentially a suit against the United States. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (citations omitted). In addition, plaintiffs' claims seek to restrain federal agents from acting, and as such, they are plainly claims against the United States. *See, e.g.*, *United States v. Yakima Tribal Court*, 806 F.2d 853, 858-859 (9th Cir. 1986) (citing *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 919 (9th Cir. 1986) (tribe's effort to enjoin work of any federal agent in the performance of his official duties is action against the United States)).

The United States, however, cannot be sued without its consent. "It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Gilbert*, 756 F.2d at 1458 (citing *United States v. Shaw*, 309 U.S. 495, 500–01 (1940) and *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982)). The United States' consent to be sued must be "unequivocally expressed" and is a "prerequisite for jurisdiction." *Gilbert*, 756 F.2d at 1458 (quoting *United States v. Mitchell*, 463 U.S. 206 (1983)). The plaintiff bears the burden of showing an unequivocal waiver of sovereign immunity, and where the plaintiff fails to meet this burden, the district court lacks subject matter jurisdiction and dismissal pursuant to Rule 12(b)(1) is required. *See, e.g., Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006); *Gilbert*, 756 F.2d at 1458.

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Plaintiffs' specific allegations regarding defendants Goodpaster and Boling are limited to paragraph 30 of the complaint. They allege that defendants Goodpaster and Boling "investigated and coordinated prosecution of Plaintiffs beyond territorial [sic] and without personal jurisdiction over Plaintiffs." Complaint at ¶ 30. Similarly, plaintiffs allege that Agent Keller filed affidavits but "failed to give a correct statement of the law application of the state cigarette law to Indians, thereby misleading the courts to issue invalid search warrants." Complaint at ¶ 31. Those allegations, though vague and conclusory, seem to attempt to state a Fourth Amendment claim. However, the United States has not waived sovereign immunity to be sued for constitutional torts. *See, e.g., Gilbert*, 756 F.2d at 1458-59 (finding that the bar of sovereign immunity applied to plaintiff's constitutional claims against official capacity defendants arising out of their tax collection efforts). Furthermore, even if the claims against Agents Goodpaster and Boling in their official capacities were construed as a claim under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), a *Bivens* claim cannot be asserted against the United States. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). As a result, the Court lacks subject matter jurisdiction over any Fourth Amendment related claim asserted against the federal defendants, and plaintiffs have not alleged any other specific claim against the federal defendants.

D. Plaintiffs Have Failed to State a Claim

Even if plaintiffs could establish the Court's subject matter jurisdiction, they have failed to state a claim because, as set forth below, their claims are barred by collateral estoppel. Moreover, the proposed claims are unripe, they do not entitle plaintiffs to the equitable relief

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they seek, and, as this Court has already held, plaintiffs' conviction-related claims are untenable.[1]

1. Plaintiffs' Claims Are Barred by Collateral Estoppel

The basis for plaintiffs' claims is unclear. They may be attempting to establish a waiver of sovereign immunity under 25 U.S.C. § 345 by claiming interference with their allotment. Even if the Court were to determine that it had subject matter jurisdiction over such a claim, plaintiffs' claims are barred by collateral estoppel. Plaintiffs have been litigating the same issues for over forty years. *See, e.g.*, *Matheson v. Kinnear*, 393 F. Supp. 1025 (W.D. Wash. 1975) (unsuccessfully challenging the state's jurisdiction to tax cigarette sales on the Comenout property); *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983) (rejecting plaintiffs' claims that "enforcement of state tax laws on Indian trust land was illegal and that state agents and local police had made unconstitutional arrests and searches and seizures."); *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355, 240 (2011) (holding that the state had jurisdiction over members of Indian tribes who sold unstamped cigarettes without a license on a trust allotment; finding, "the Comenouts are not exempt from Washington's cigarette tax."). Recognizing the long litigation history, the Court cautioned the Comenouts and their counsel about the prudence of making further attempts to relitigate their state court claims when the Court denied Plaintiffs' first two attempts to amend several months ago:

> The Court previously rejected the use of this case as a means to relitigate a prior case. Dkt. 18 at 5. Plaintiffs are cautioned to carefully consider the prudence of filing amended pleadings, if any.

[1] In addition, any claim based on the property seized in 2008 is time barred. Complaint at ¶ 10 ("Edward A. Comenout Jr.'s estate is also seeking the market value of 376,852 packs of cigarettes seized by the Washington State Liquor Control Board on July 28, 2008"). Any claim against the United States based on 25 U.S.C. § 345 is barred by the six-year statute of limitations in 28 U.S.C. § 2401. *See, e.g.*, *Christensen v. United States*, 755 F.2d 705 (1985). Plaintiffs did not file this action until June 2016. (Dkt. #1).

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Dkt. #42 at p. 3-4. Rather than heed that warning, plaintiffs have attempted to reassert the same claims based on the same issues.

Federal law "generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" *Haring v. Prosise*, 462 U.S. 306, 313 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). In order to decide whether such preclusive effect is warranted, federal courts apply the doctrine of collateral estoppel under the law of the state in which the action originated. *See, e.g.*, *Haring*, 462 U.S. at 314-315.

In Washington, "[t]he doctrine of collateral estoppel prevents a party from relitigating issues that have been raised and litigated by the party in a prior proceeding." *Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245, 249 (Wash. 2004). Washington courts have devised a four-part test to decide whether collateral estoppel should apply in a given case. Under this analysis:

> The party asserting collateral estoppel must prove: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

Id.

In this case, plaintiffs allege that the seizure of their property was unlawful because a Washington statute exempts Indian allotments from taxes for the sale of cigarettes, and the State lacks criminal jurisdiction over them. Complaint at ¶ 8. However, the state courts have already decided both of those issues against plaintiffs. *Comenout v. Washington State Liquor Control Bd.*, 195 Wn. App. 1035 (2016), affirming decision at 2016 Wash. App. LEXIS 1878 (Aug. 8,

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2016).[2] In that case, plaintiffs challenged the state's seizure of their cigarettes, alleging that plaintiffs were exempt from the cigarette tax as an "Indian retailer," the same argument they now make. The court of appeals explicitly rejected that argument. 2016 Wn. App. LEXIS 1878 at *11.[3] The court of appeals also explicitly rejected plaintiffs' argument that the state lacked criminal jurisdiction over them because of federal preemption. *Id.* at 5-8. The prior case resulted in a final judgment on the merits. In that case, both parties moved for summary judgment. An ALJ ruled against plaintiffs, and both the Superior Court and the state appellate court affirmed. *Id.* at *3-4. The determination of an issue on a motion for summary judgment satisfies the final judgment requirement for collateral estoppel. *Lee v. Ferryman*, 88 Wn. App. 613, 622, 945 P.2d 1159 (1997), *review denied*, 135 Wn.2d 1006 (1998). The plaintiffs were either parties or in privity with the plaintiffs in that action, who are their family members, and their interests are the same. Finally, applying collateral estoppel here would not work an injustice because plaintiffs had a full and fair hearing on the matter in state court. *Lee*, 88 Wn. App. at 625 (explaining the injustice element). Accordingly, collateral estoppel bars plaintiffs from relitigating their claimed exemption from the cigarette tax or the state's criminal jurisdiction over them.

2. Plaintiffs' Claims Are Unripe and Fail to State a Case or Controversy

Even if plaintiffs could establish this Court's jurisdiction over their claims against the federal defendants and avoid the reach of collateral estoppel, their claims would still be subject

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[2] The federal defendants are not arguing that collateral estoppel applies to plaintiffs' criminal convictions because they made *Alford* pleas in those cases. *See, e.g.*, *Clark*, 150 Wn.2d at 916-917.

[3] The court of appeals case involved the 2008 seizure, but although plaintiffs now challenge additional seizures, the legal issues plaintiffs raise are the same. The court of appeals also noted that in *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355 (2011), the state supreme court "upheld the State's exercise of nonconsensual criminal jurisdiction over tribal members selling unstamped cigarettes from an unlicensed store located on trust allotment property lying outside the borders of an Indian reservation."

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to dismissal as unripe and failing to state a case or controversy. Plaintiffs' only allegation against defendant Keller is that he "is named in his official capacity to afford him opportunity to debate jurisdiction of Indian Country and related issues brought by Plaintiffs' Declaratory Judgment." Complaint (Dkt. #1) at ¶ 31. In their claim for declaratory and injunctive relief, plaintiffs seek a variety of declarations and injunctions regarding the type of actions defendants may take at some undefined future point, including permanently preventing "all Defendants . . . from bringing any action in the future seeking to obtain or adjudicate cases that are based on state jurisdiction of enrolled Indian operation on the allotment." *Id.* at ¶ 63.6. Plaintiffs also seek broad rulings that they may, among other things, sell cannabis without being subject to the state's taxing authority. Complaint at ¶ 15.[4] They also seek a broad injunction against law enforcement activity on their allotment related to the sale of cigarettes or cannabis. *Id.* at ¶ 9. These claims are unripe and fail to state a case or controversy.

Federal courts cannot render advisory opinions, even if, as here, the request is couched as a request for a declaratory judgment. *See, e.g., United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947). Rather, federal courts can only consider ripe matters "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and 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 Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The broad and vague nature of plaintiffs' request for relief, effectively precluding future law enforcement activity related to

[4] Plaintiffs do not allege that they have attempted to obtain a license to sell cannabis or otherwise complied in any way with the state regulatory scheme.

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plaintiffs' future sale of cigarettes or cannabis, highlights that their claims are not ripe for judicial review.

Furthermore, the Court has already ruled that "the request for prospective relief" is not ripe for decision. Dkt. #18 at p. 7. That ruling is the law of the case and plaintiffs have shown no reason to depart from it. *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 830-831 (9th Cir. 1988) (explaining that the court's prior rulings in a case are settled absent "extraordinary circumstances" such as when the prior decision was "clearly erroneous and would work a manifest injustice") (internal quotation and citation omitted). Accordingly, plaintiffs' claim for injunctive and declaratory relief is unripe.

3. Plaintiffs Are Not Entitled to Equitable Relief

In their Complaint, plaintiffs seek various forms of equitable relief including an injunction prohibiting defendants from taking certain future actions. Plaintiffs are not entitled to equitable relief because they have an adequate remedy at law. *See, e.g., Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009) ("[E]quitable relief is not appropriate where an adequate remedy exists at law."). Plaintiffs can present their claims and defenses regarding the propriety of the seizure of their property in the two civil forfeiture matters pending in this district.[5] *See U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992 (W.D. Wash.);[6] *United States v. $249,640.12 in United States Currency*, Case No. 15-5586BHS (W.D. Wash.). Pending civil

[5] In addition, any claim based on the property seized in 2008 is time barred. Any claim against the United States based on 25 U.S.C. § 345 is barred by the six-year statute of limitations in 28 U.S.C. § 2401. *See, e.g., Christensen v. United States*, 755 F.2d 705 (1985). Plaintiffs did not file this action until June 2016. (Dkt. #1). Therefore, their claims based on the 2008 seizure are futile.

[6] On April 10, 2017, the parties in *U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992 (W.D. Wash.) filed a Judgment of Forfeiture As to All Remaining Defendant Property, Dkt. #104.

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forfeiture cases provide an adequate remedy at law to challenge forfeitures, so the court should not exercise its equitable jurisdiction in response to a request to return the seized property. *See, e.g., United States v. United States Currency, $83,310.78*, 851 F.2d 1231 (9th Cir. 1988); *United States v. Elias*, 921 F.2d 870, 873 (9th Cir. 1990).

In addition, plaintiffs could present their claims regarding the propriety of their criminal convictions to the state Court of Appeals, and later to the Washington Supreme Court and the United States Supreme Court. Plaintiffs who have been convicted of crimes could also seek relief through a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (explaining that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."); *see also Maleng v. Cook*, 490 U.S. 488, 491 (1988) (applying this principle to individuals like plaintiffs who are on community custody) (citing *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)). Because remedies at law are available, plaintiffs are not entitled to equitable relief.

4. This Court Has Already Ruled that Various Doctrines Preclude Plaintiffs' Conviction-Related Claims

To the extent that any of plaintiffs' conviction-related claims implicate the federal defendants and the issues are not barred by collateral estoppel, they would fail to state a claim because the Court has already ruled that several doctrines preclude relitigating the propriety of their criminal prosecutions or convictions in this case. Specifically, this Court previously held in ruling on a motion to dismiss by other defendants, plaintiffs' claims should be dismissed under *Younger* abstention, the Anti-Injunction Act, and the *Rooker-Feldman* doctrine. (Dkt. #18, Order on Judicial and Prosecutorial Defendants' Motion to Dismiss). Those rulings are the law

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of the case. The Court's prior holding rests on legal grounds and applies regardless of the nature of the defendants. Therefore, it applies equally to the federal defendants and supports abstention as to the claims against them as well.

E. The Court Should Deny Leave to Amend

The Court should dismiss this matter against the federal defendants without granting plaintiffs leave to amend because plaintiffs have already had ample chances to amend. The Court recently denied plaintiffs' motion to file a fourth amended complaint because they had engaged in undue delay. Dkt. #63 at p. 3.

Furthermore, any proposed amendment would be futile. *See, e.g., Moss v. U.S. Secret Service,* 572 F.3d 962, 972 (9th Cir. 2009) (explaining that courts have discretion to deny leave to amend to add a futile claim). In essence, plaintiffs have already litigated all possible claims or are in the process of litigating them in other forums. Any claim they could possibly assert here is similarly untenable.

For example, if plaintiffs were to try to assert a *Bivens* claim against the federal defendants in their personal capacities, it would be barred by collateral estoppel as set forth above regardless of how the claim is titled. Moreover, a *Bivens* claim will not lie because to the extent that any of the federal defendants seized property, they did so pursuant to a valid warrant. *U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992 (W.D. Wash.), Dkt. # 24-2. Where, as here, "the search or seizure is executed pursuant to a warrant, the fact that a neutral magistrate issued the warrant is the clearest indication that the officers acted in an objectively reasonable manner." *Armstrong v. Asselin*, 734 F.3d 984 (9th Cir. 2013) (internal citation and quotation omitted); *see also Smith v. Almada*, 640 F.3d 931, 937-38 (9th Cir. 2011).

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Furthermore, the *Heck* doctrine would bar plaintiffs' *Bivens* claims, if asserted, regarding their convictions. In *Heck v. Humphrey*, 512 U.S. 477, 496-97 (1994), the Supreme Court held that a civil rights complaint must be dismissed if a judgment in favor of a plaintiff would undermine the validity of a plaintiff's conviction or sentence, unless a plaintiff can demonstrate that the conviction or sentence has already been invalidated. The *Heck* Court explained that

> [I]n order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for a sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486-87. The *Heck* doctrine applies to *Bivens* actions. *See United States v. Crowell*, 374 F.3d 790, 795 (9th Cir. 2004); *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (applying *Heck* to *Bivens* action). In this case, plaintiffs cannot show that their convictions have been invalidated; to the contrary, plaintiffs are currently appealing them. Dkt. #18 at p. 2 (citing Dkt. #15 at FN 2, and Dkt. #16). A judgment in favor of plaintiffs as they request would undermine their convictions because plaintiffs are expressly seeking a declaration that the state lacked jurisdiction to issue a warrant for their arrests and that the statute under which they were prosecuted is either void or inapplicable to them. Complaint at ¶ 63.2, 63.3; *see also id.* at ¶ 64 (alleging that the "county prosecutor has no jurisdiction to prosecute Indians in Indian Country" and seeking dismissal of all such prosecutions "for want of representative authority to proceed to prosecute on activity within an Indian allotment").

Accordingly, the Court should dismiss without leave to amend.

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IV. CONCLUSION

For all of the foregoing reasons, the Court should dismiss plaintiffs' claim against the federal defendants.

DATED this 13th day of April, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on April 13, 2017, I electronically filed the foregoing Motion to Dismiss, the Proposed Order, and the Declaration of Sarah K. Morehead with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on April 13, 2017, I mailed by United States Postal Service the said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 13th day of April, 2017.

s/ Linda Seilinger

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