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. 3:16-cv-5464-RJB

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs fail to state a claim against the Federal Defendants. Plaintiffs' numerous arguments and claims for relief essentially boil down to two: they ask the Court to enjoin their on-going state criminal prosecutions, and they seek declarations that the Federal Defendants cannot interfere in any way in their commercial activities involving cigarettes and cannabis.

Plaintiffs' claims are barred by collateral estoppel, they are unripe, and they fail on the merits. Moreover, to the extent that plaintiffs seek to enjoin or otherwise interfere with on-going state court proceedings, several comity-related doctrines preclude them from doing so in this forum, as the Court has already ruled.

II. ANALYSIS

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

A. The Federal Defendants' Employment Status

Plaintiffs continue to claim that the Federal Defendants were acting as state employees, despite the Federal Defendants' declarations to the contrary. Plaintiffs allege inconsistencies between a prior affidavit filed by one of the Federal Defendants and his declaration filed in this case. Reading both demonstrates that the two are entirely consistent. Dkt. # 57, 67.

Special Agent Goodpaster was, and is, a federal employee. Dkt. #56. Plaintiffs' failure to serve him as required by Fed. R. Civ. P. 4(i) deprives the Court of personal jurisdiction over him for the reasons set forth in the Federal Defendants' motion. Furthermore, the fact that all three Federal Defendants were acting as federal agents during all relevant events means that plaintiffs' claims are essentially claims against the United States.[1] As such, plaintiffs must allege a waiver of sovereign immunity, which they have not done. Fourth Amendment or *Bivens* claims cannot proceed against the United States, and the Federal Tort Claims Act explicitly excludes claims for false arrest, malicious prosecution, and the like.[2] 28 U.S.C. § 2680(h).

However, at the end of the day, defendants' employment status is irrelevant. As set forth below, plaintiffs' claims fail for legal reasons that are unrelated to whether defendants are federal or state actors.[3]

B. Many of Plaintiff's Claims Are Precluded by Collateral Estoppel

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[1] *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)).

[2] In their response, plaintiffs argue, "A federal officer cannot submit a state probable cause affidavit." Response at p. 4. Plaintiffs cite no authority in support, but regardless, the import of their statement, even if legally correct, is unclear. Plaintiffs have not disputed the factual allegation that they sold unstamped cigarettes and did not pay the applicable taxes, and there is no dispute that probable cause existed. Moreover, plaintiffs do not explain how the circumstances surrounding the affidavit support their current claims in this lawsuit, which seek injunctive and declaratory relief.

[3] Plaintiffs make vague assertions that they are entitled to discovery to ascertain the employment status of the Federal Defendants. Their claim must be denied because they have not specifically alleged what they seek or how it would defeat this motion to dismiss, particularly because the legal arguments apply regardless of whether they were state or federal employees.

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

As set forth in the Federal Defendants' motion to dismiss, many of plaintiffs' claims are precluded by collateral estoppel. Specifically, 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, 2016).

In their response, plaintiffs argue that collateral estoppel is inapplicable because one of the plaintiffs, Edward Comenout III, was not a party to the earlier action. While that fact is true, it does not undermine the application of collateral estoppel. To the contrary, the doctrine still applies because Edward Comenout III was in privity with the other plaintiffs. The privity requirement in collateral estoppel is based on the principle that "a stranger's rights cannot be determined in his absence from the controversy." *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960). Privity denotes a "mutual or successive relationship to the same right or property." *See Owens*, 56 Wn.2d at 568. In this case, plaintiffs are all family members. They share the same business interests and requests for relief, as set forth generally in the Complaint and their response to this motion. They also share a mutual ownership interest in the allotment, and the attendant rights on that allotment are the subject of this lawsuit. Complaint at ¶ 24 (explaining that plaintiffs are "joint owners" of the allotment). Therefore, privity exists.

In addition to challenging privity, plaintiffs claim that collateral estoppel is inapplicable because the law has changed since the prior cases were decided. Plaintiffs note, for example, that some Indian Tribes have entered into "cigarette compacts" with the state. Plaintiffs' Response (Dkt. #68) at p. 6. Plaintiffs, a group of family members, do not allege that they are

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SEATTLE, WASHINGTON 98101
(206) 553-7970

parties to any such compact between any tribe and the state. Plaintiffs also allege that they were entitled to some sort of notice before the seizures and arrests, but the law does not support their assertion.[4] Contrary to plaintiffs' argument, there has not been any change in the relevant law. As the Court has noted, the issue is "well-settled" that Washington's tax on cigarettes sold by Indian retailers to non-Indian purchasers is constitutional. Dkt. #64 at p. 2. Similarly, there has been no change in the law altering the state's criminal jurisdiction over plaintiffs. Dkt. # 18 at p. 5 (order finding that plaintiffs had not alleged any reason to deviate from *State v. Comenout*, 173 Wn.2d 235 (2011), which held that the State had nonconsensual criminal jurisdiction).

C. Plaintiffs' Request for Future Relief Is Speculative, Vague, and Unripe

In their response, plaintiffs state that plaintiff Edward Amos Comenout III seeks two types of prospective relief. First, they seek a declaration that the Federal Defendants "cannot go onto the allotment and arrest or regulate him for violations of state law." Response at p. 3; *see also* Response at p. 10 (seeking a declaration that "state courts cannot issue valid search warrants allowing the Defendants to arrest Plaintiffs for state law violations."). Second, they seek a declaration that Mr. Comenout "can sell cannabis and hemp products on the allotment and also without payment of state tax." *Id.* Both requests are vague, speculative, and unripe. As set forth in the Federal Defendants' motion, the Court has already ruled that plaintiffs' request for prospective relief is unripe, that ruling is the law of the case, and plaintiffs have shown no reason to depart from that ruling. Plaintiffs do not address the law of the case doctrine in their response.

[4] In support of this assertion, plaintiffs' cite RCW § 82.32A.005, which is a "Finding" statement, not any grant of rights. The same statute states that "taxpayers have a responsibility to inform themselves about applicable tax laws." RCW § 82.32A.005(2). Plaintiffs cannot claim that they were ignorant of the law, or that they were somehow immune from criminal consequences absent notice.

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Furthermore, the broad nature of plaintiffs' request further highlights that it is unripe. Plaintiffs are essentially seeking a declaration that they cannot be arrested or subject to state regulation on their allotment. Such a sweeping request is impossible for the Court to evaluate in any meaningful way. Similarly, regarding cannabis, plaintiffs' Complaint seeks a declaration that "commerce in industrial Hemp . . . is legally allowed on the allotment." Complaint at ¶ 63.10. Plaintiffs do not elaborate on what type of "commerce" they seek to engage, such as growing, producing, selling, or all three. In addition to the vagueness of their request, plaintiffs do not allege that they have attempted to comply with the detailed state regulatory scheme to seek a license to engage in marijuana-related commerce on their property. RCW 69.50.401 (requiring a license to manufacture, deliver, or possess with intent to manufacture or deliver, controlled substances, which include marijuana). Nor do they raise any challenge to the state regulatory scheme. Their claim is therefore unripe, and it fails to state a claim. Finally, even if the Court determines that plaintiffs' requests for prospective relief are ripe, they fail on the merits for the reasons set forth below.

D. Plaintiffs Are Not Entitled to Equitable Relief

For the reasons set forth in Federal Defendants' motion to dismiss, plaintiffs are not entitled to equitable relief because they have adequate remedies at law. In response, plaintiffs argue that they are in the process of settling both civil forfeiture actions in this district.[5] It is true that the parties have settled one of the civil forfeiture cases, *U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992

[5] In one of the civil forfeiture actions, the United States argued that plaintiffs' cigarettes was subject to forfeiture as contraband cigarettes, as defined by 18 U.S.C. § 2341(2), and were knowingly and unlawfully possessed in violation of 18 U.S.C. § 2341 *et seq.*, the Contraband Cigarette Trafficking Act because the cigarettes the Comenouts possessed and sold were unstamped in violation of state and federal law. *See also* 18 U.S.C. § 2342(a).

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(W.D. Wash.), as the Federal Defendants noted in their motion to dismiss. However, the other case has not settled, and is scheduled to begin trial August 29, 2017. *United States v. $249,640.12 in United States Currency*, Case No. 15-5586BHS (W.D. Wash.). Plaintiffs do not dispute that those actions provided them an adequate remedy to challenge the allegedly wrongful seizures.[6]

Plaintiffs have voluntarily entered into any settlement. They do not allege otherwise or allege that they did not have an adequate opportunity to pursue their defenses before they chose to settle. In fact, the Estate of Edward Comenout Jr. filed a motion for summary judgment in the now settled case. *U.S. v. Approximately One Million Seven Hundred Eighty-Four Thousand (1,784,000) Contraband Cigarettes*, Case No. 12-05992 (W.D. Wash.) (Dkt. #85, Order on Estate's Motion for Summary Judgment). Had the motion for summary judgment been successful, it would have benefited all claimants. In sum, some of the plaintiffs did challenge the forfeitures, albeit unsuccessfully, prior to settling.

Plaintiffs also bemoan the general state of the courts, claiming that the litigation process has denied them "access to the courts to gain knowledge of how to make a living and how to live on the allotment." However, as set forth above, plaintiffs are not entitled to an advisory opinion from the Court on how they may make a living on the allotment. To the extent that they are challenging their criminal convictions, they have an adequate remedy at law through their pending state court appeals.

E. Various Doctrines Apply and Encourage Abstention

[6] As set forth in the Federal Defendants' motion, any claim based on the 2008 seizure is time barred. Federal Defendants' Motion (Dkt. #65) at p. 11 n. 5.

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In light of the claims alleged and the procedural posture of the case, the Court should abstain under several comity-related doctrines. 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). Those rulings are the law 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.

In their response, plaintiffs argue that *Younger* and *Rooker-Feldman* do not apply to the claims of Edward Comenout III because he was not a party to the criminal cases. However, *Younger* does apply because his interests are "so intertwined" with those of the other Comenout plaintiffs that "interference with the state court proceeding is inevitable." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1035 (9th Cir. 2013) (quoting *Younger. Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc), overruled on other grounds, *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2005)). In this case, Edward Comenout III, with the other plaintiffs, expressly asks this Court to enjoin the ongoing state criminal proceedings. Complaint at ¶ 63.1 (seeking to have the state criminal prosecutions dismissed). Moreover, as the Court has already found, the injunctive and declaratory relief sought by all plaintiffs would overturn the four state court convictions by plaintiff's explicit request. Dkt. #18 at p. 7. It would also effectively overturn another state court decision that expressly held that the allotment is subject to state

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criminal jurisdiction. *Id.* Therefore, *Younger* applies to the claims of all plaintiffs. Even if it did not, Edward Comenout III would lack standing to pursue claims aimed at vacating the criminal convictions of other plaintiffs. *See, e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (explaining that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

F. Plaintiffs' Claims Fail on the Merits

Even if plaintiffs' claims are ripe, not subject to collateral estoppel, and the Court has jurisdiction to hear them, plaintiffs' claims all fail on their merits.

1. Cannabis-Related Claims

In their Complaint and their response to this motion, plaintiffs seek a declaratory judgment seeking a broad ruling from the Court that they may engage in "commerce" related to cannabis and hemp on their allotment. Complaint at ¶ 63.10. However, the Controlled Substances Act ("CSA") prohibits the sale and other commercial activities of marijuana and cannabinoids. 21 U.S.C. § 801 *et seq.* Marijuana is a Schedule I controlled substance under the Act. 21 U.S.C. § 812. It is a violation of federal law to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. 21 U.S.C. § 841(a). Doing so can result in the imposition of criminal penalties. 21 U.S.C. § 841(a). Therefore, in seeking a Court order that they are allowed to engage in cannabis-related commerce, plaintiffs are requesting that the Court rule that they are permitted to violate federal law.

To support their request, plaintiffs cite *Menominee Indian Tribe of Wisc. v. DEA*, 190 F. Supp. 3d 843 (2016). In that case, plaintiffs sought a declaratory judgment that they were entitled to cultivate industrial hemp for agricultural or academic research in connection with a

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(206) 553-7970

college. The *Menominee* plaintiffs relied on an exception to the CSA that allows "an institution of higher education" or a "State department of agriculture" to cultivate industrial hemp under some circumstances. Finding the exception inapplicable, the court denied the request for a declaratory judgment.

Here, too, the exception is inapplicable, and plaintiffs do not even argue otherwise. Plainly, these plaintiffs are neither "an institution of higher education" nor a "State department of agriculture." Therefore, the exception to the CSA is wholly inapplicable to them.

Similarly, because they do not have a license, plaintiffs would be violating state law if they sell or engage in other cannabis-related commercial activities on the allotment. RCW 69.50.401 (requiring a license to manufacture, deliver, or possess with intent to manufacture or deliver, controlled substances, which include marijuana). The Supreme Court has explained: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Plaintiffs concede that their allotment is "off-reservation." Response at p. 2; Complaint at ¶ 38. Plaintiffs do not challenge any part of the state cannabis regulation scheme, or claim that any part of it is discriminatory. Finally, they have not identified any federal law that exempts their cannabis-related activity from state regulation. To the contrary, the CSA prohibits commercial cannabis activity on the allotment. Plaintiffs site numerous cases applying the Yakama Treaty of 1855, but they do not argue, much less demonstrate, that the Treaty is applicable to them or contains any provision exempting them from complying with cannabis laws.

Accordingly, plaintiffs are not entitled to a declaratory judgment that they may engage in cannabis-related commerce.

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

2. Cigarette-Related Claims

The same analysis from the *Mescalero Apache Tribe* case applies to plaintiffs' claim that they are exempt from the cigarette tax law. *See generally King Mt. Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (2014) (following *Mescalero Apache Tribe* to analyze the legality of a state law requiring tobacco companies to place money from cigarette sales into escrow; finding that the provision was applicable to a company owned and operated by an enrolled member of the Yakama Indian Nation). Although plaintiffs seek a broad declaration that they can engage in cigarette sales without paying the state tax, they have not argued, much less shown, that the sales tax is discriminatory. As with their cannabis-related claim, plaintiffs have not identified any applicable federal law exception, and their activities are taking place off reservation. Plaintiffs cite to numerous treaty-related cases, without alleging that any treaty applies to them or relying on any specific treaty provision.[7] Therefore, the state may tax plaintiffs' cigarette sales. *Id.*

Furthermore, the Court has already ruled that it is "well-settled" that the state's tax on cigarettes sold by Indian retailers to non-Indian purchasers is constitutional. Dkt. #64 at p. 2. Even if the Federal Defendants are state actors as plaintiffs contend, then the arguments made in the Judicial and Prosecutorial Defendants' Motion to Dismiss are applicable and compel dismissal of the claims against them as well. Specifically, the Complaint fails to state a claim against them because Washington's criminal jurisdiction is authorized by law. Dkt. #11 at p. 4-5; *see Comenout*, 173 Wn.2d at 238-40 (interpreting RCW § 37.12.010 to have "asserted full criminal jurisdiction, with a few exceptions not relevant to this case, over all Indian Country outside established Indian reservations."); *Garmon v. County of Los Angeles*, 828 F.3d 837, 847

[7] Plaintiffs' Response at p. 11 (citing *U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) (analyzing the Yakama Treaty's application to a notice provision) and *Cougar Den, Inc. v. Dep't of Licensing*, 2017 Wn. LEXIS 334 (Mar. 16, 2017) (holding that the Yakama Nation had a treaty right to import fuel without taxes or fees)).

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

(9th Cir. 2016) (explaining that when interpreting state law, federal courts are bound by a decision of the state's highest court).

Therefore, plaintiffs' claims fail on the merits.

III. CONCLUSION

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

DATED this 5th day of May, 2017.

Respectfully submitted

ANNETTE L. HAYES
United States Attorney

s/ Sarah K. Morehead
SARAH. K. MOREHEAD, WSBA #29680
Assistant United States Attorney
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4067
Email: sarah.morehead@usdoj.gov

Attorney for the United States

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 May 5, 2017, I electronically filed the foregoing document 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):

Randal B. Brown brownees2@msn.com
Aaron L. Lowe aaronllowe@yahoo.com
Robert E. Kovacevich kovacevichrobert@questoffice.net
David M. Hankins david.hankins@atg.wa.gov
Andrew Krawczyk andrewK1@atg.wa.gov
Alicia O. Young alicia@atg.wa.gov

I further certify that on May 5, 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 5th day of May, 2017.

s/ Julene Delo
JULENE DELO, Legal Assistant
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206 553-4067
Email: julene.delo@usdoj.gov