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The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT R. COMENOUT, SR., Plaintiff, v. ROBERT W. WHITENER JR., an individual, dba as WHITENER GROUP, Defendant.	No. 3:15-cv-05054-BHS RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, through his attorneys, in opposition to Defendant Robert W. Whitener Jr.'s motion to dismiss (doc. 19 filed February 5, 2015), responds to the motion as follows.

The Quinault Nation Allegation did not trespass, post the sign or threaten. Thus, it cannot be a party.

Defendant seeks dismissal under Fed.R.Civ.P. 12 (b)(7) of the Complaint for failure to join the Quinault Nation (hereinafter Nation). On a motion to dismiss, all of plaintiff's material facts are taken as true and construed in the light most favorable to the non moving party. *Cousins v. Lockyer,* 568 F.3d 1063, 1067 (9th Cir. 2009). The Complaint only seeks to prevent trespass and seizure from Robert Whitener's continued violations of the law for the reasons outlined in Plaintiff's earlier pleadings. The Quinault Nation cannot and did not take the action complained of. Complete relief can be obtained against Whitener. The Nation is an unnecessary party.

The Complaint is sufficient. It alleges several causes of action.

The facts of the Complaint (doc.1) sufficiently allege a RICO action. On page 12 of the Complaint, it also alleges that additional discovery will be taken. The Complaint seeks temporary and permanent injunction against Defendant Whitener, and against threatened and intended trespass on a federal allotment granting the Court jurisdiction pursuant to 25 U.S.C. § 345 and other statutes. The facts are presumed true and are easily sufficient to withstand the motion attempting to create the Nation as a necessary party.

The suit alleges personal activities by Whitener in placing a sign and threatening to get Defendant arrested. (Complaint (doc. 1) Page 7-9.) Injunction is requested at Page 16. Obviously, since the Quinault Nation was not named as a Defendant, no monetary damages are requested from the

Nation. The Nation did not trespass. The sign threatens to remove and impound Plaintiff's property by January 31, 2015. The Quinault Indian Nation did not post the sign or give a deadline to remove property. The sign refers all questions to TWG, not the Nation, and gives only Whitener's phone number. The Complaint alleges unlawful trespass by Whitener's personal conduct. The Quinault Nation, an inanimate entity did not and cannot commit the acts. Essentially, the suit seeks an injunction against the threatened removal of property. In *Salt River Project Agr. Imp. and Power Dist. v. Lee,* 672 F.3d 1176 (9th Cir. 2012) the Court held that violating a private lease is not within a tribe's sovereign immunity when violation of federal law is alleged. Further, the Nation was not an indispensable party. *Id.* at 1181. *Salt River, supra,* is conclusive. The Ninth Circuit Decision was:

> We hold that the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interest in the action and because complete relief can be accorded among the existing parties without the tribe.

In this case, no Quinault Nation Tribal official is named a party. The Complaint seeks to restrain Whitener's individual acts. The Nation apparently consults Whitener on some of its business matters. If the Nation has an interest, Whitener can protect the interests. The Quinault Nation has not threatened removal and impound of Plaintiff's personal property, only Whitener has. If the Nation seeks an additional voice in the injunction, it could have moved to file an amicus brief. This suit does not seek to invalidate the lease. The BIA is reviewing the purported lease. At the present

time, the issue regarding the lease is with the BIA. Accordingly, under the circumstances, the Nation is not a necessary party.

The overriding fact of this case is that Plaintiff seeks relief from Whitener's personal activities of trespass and extortion. The Quinault Nation could not commit these personal activities. The Defendant cannot conflate a personal attempt at pre-seizure without permission into a lease hearing pending before the BIA. Removal of property belonging to others requires advance court permission which has not ever been requested. A lease does not require any court action if all parties agree. A lease does not require any pre deprivation legal proceeding. Ejectment, eviction or other proceedings that deprive an allotment owner of rights in the land are not to be undertaken by any other entity except the BIA against an owner.

The declaration of Roy Smith attaches a copy of a purported agreement between the Nation and a limited liability company. It is not authenticated by anyone with personal knowledge, especially not the Defendant. The purported lease expired on September 30, 2014. The declaration of Lawrence Ralston states that the contract was renewed, but the contract does not indicate that the LLC agreed to renew the lease. The declarations do not state the term of the renewal. The resolution of the Quinault Nation is undated and uncertified. There is no connection of the agreement of Robert Whitener's authority to bind the LLC only part of redacted self serving emails are attached. Whitener personally did not agree.

The Rules of Evidence Fed.R.Evid. 104 and 401 require a ruling on relevancy; 106 does not allow part of a writing. 602 requires personal knowledge. Rule 901 and Rule 902(4)(A) require certification. None of the attachments, including the purported contract, are admissible and cannot form the basis of any ruling since they violate the Rules of Evidence.

Even if the contract was in force and properly identified, the defined work does not include any direction that the LLC agreed to post any signs on the property, impound anything, especially not inventory, cars or any other property. The only acquisition contemplated is marina property at Grays Harbor. Robert Whitener is allegedly only a consultant. The agreement limits Whitener personally to twenty (20) hours a week. At most, Whitener's duties to the Quinault Nation are as an independent contractor. The agreement does not request Whitener to trespass on the property or threaten a vulnerable adult like Plaintiff. To date, no agreements of indemnity have been produced by Whitener.

The Quinault Nation's pending suit against Robert R. Comenout is based on the same or similar issue. Issues between these two parties can be joined.

Defendant's motion at page 1 refers to the pending case in this court, *Quinault Indian Nation v. Robert R. Comenout et al,* No. 3:10-cv-05345-BHS. Robert R. Comenout Sr. is a named and served Defendant, represented by the same attorneys as this case. At page 5 of the Nation's Complaint in 05345, the allegations include the following: "Robert Comenout Sr. is in

charge of the enterprise" referring to the Indian Country store at 908/920 River Road in Puyallup, Washington. The same site where Defendant Whitener posted the sign. The allegations state that Robert R. Comenout "manages and oversees the daily operation." The Complaint also alleges a state charge against Robert R. Comenout Sr. which was dismissed. The Complaint at 6 alleges that Robert R. Comenout is "capable" of a beneficial interest in the property. At 8, it is alleged that the business, including Robert R. Comenout, "threatens to continue in the future." The entire Complaint throughout alleges actions by Robert R. Comenout Sr. on the same property. The Quinault Indian Nation has a pending case against Plaintiff in the same court, it cannot join this case.

Fed.R.Civ.P. 18 applies. It states:

RULE 18. JOINDER OF CLAIMS

> **(a) In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.
>
> **(b) Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

In this case, Defendant Whitener alleges illegal use of the property by Robert R. Comenout Sr.'s alleged selling of cigarettes and not paying cigarette

taxes. The identical issue between the Quinault Nation and Plaintiff in 05345 BHS is pending. The first claim for relief of the counterclaim (doc. 28), in that case, requests a declaratory judgment on the issue of cigarette sales. The first claim in the counterclaim states: "Defendant requests the Court to enter a declaratory judgment against plaintiff that the tobacco law was not violated by defendant." The same issue by the Quinault Nation's suit is pending in this same court before the same Judge between the Comenout's and the Nation. The 1937 committee notes on Fed.R.Civ.P. 18 states "Recent development, both in code and common law states, has been toward unlimited joinder of actions." The 1996 committee notes on the rule state "Accordingly, Rule 18 has permitted a party to plead multiple claims of all types against an opposing party." "This permitted joinder of claims is not affected by the fact that there are multiple parties to the action." Rule 18 has permitted a party to plead multiple claims of all types against an opposing party. Whether or not on claim has been prosecuted to a conclusion is not an issue. Retrospective inquiry is allowed.

A five (5) year lapse of time between scheduling a trial and enforcing a settlement is not a factor. *Figueroa v. City of New York,* 2011 WL 309061 (S.D.NY. 2001) aff'd 475 Fed.Appx. 365 (2nd Cir. 2012). Where claims were derived from the same alleged practices, amendments are allowed where the same claims are similar to earlier claims between the same parties. *Soler v. G & U, Inc.,* 86 F.R.D. 524 (D.C.NY 1980). The first action can be tried with

the second action as no burden will be imposed on either litigant. *Greenhood v. Orr & Sembower, Inc.,* 158 F.Supp. 906 (D.C. Mass. 1958). The first to file rule applies to suits between the same parties on the same issues. The second case is stayed. *Alltrade, Inc. v. Uniweld Products, Inc.,* 946 F.2d 622 (9th Cir. 1991). The Quinault Nation has commenced a suit involving the same or similar facts over use of the same allotment. Offensive use of collateral estoppel cannot be used against a defendant when the issue could easily have been joined in the first action. Even if the first action is not final, the second action cannot be commenced. *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). "There will in respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result." *Id.* at 332.

The Quinault Indian Nation has no jurisdiction of the property.

The Quinault Nation has no right to govern the property as it has no jurisdiction. *Miami Tribe of Oklahoma v. U.S.,* 656 F.3d 1129 (10th Cir. 2011) held that an Indian tribe had no jurisdiction over a fractional 1/3 interest of an allotment located outside the reservation. The Court held "We can safely say that the tribe does not have jurisdiction." *Id.* at 1143. Unlike the Quinault Indian Nation, the tribe in *Miami* actively tried to develop the property and received consent from the landowners to assert tribal jurisdiction. *Id.* at 1145. Regardless of the approval, the Court held that the

Act of Congress abrogated tribal control.

The Comenout property was established as an allotment by abrogation of the Nations jurisdiction. The Quinault Treaty of January 25, 1856 (U.S. Statutes at Large Vol. XXIV, p. 388 ff) at Section 6, allowed the President of the United States to "remove" (the Indians) "from said reservation or reservations to such other suitable place or places within said territory as he may deem fit." The Secretary of the Interior, pursuant to 25 U.S.C. § 465, acquired the land for Edward Amos Comenout Sr. in 1926. The Dawes Act of February 8, 1887 states at section 6 "and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein." (Underlining added.)

To create the allotment, the BIA had to satisfy the condition that the allotment could provide a home and furnish a livelihood by farming. See *Pallin v. U.S.*, 496 F.2d 27, 34 (9th Cir. 1974). The Comenout allotment when established had these qualifications. The Quinault Nation has routinely stated that it has no jurisdiction over the site on River Road. Moreover, the Nation still has not jurisdiction over this allotment and only the BIA has the authority to bring suit in this matter, and not Whitener or the Nation.

The BIA, not the Quinault Nation has authority to review the lease and bring suit.

The Quinault Indian Nation has never attempted to assert any jurisdiction over the property. The BIA has acknowledged the failure of the

Nation to assert jurisdiction over this allotment. Any suit to determine the validity of a lease between allotees must be brought by the Department of Interior (BIA). In *U.S. v. Tsosie,* 92 F.3d 1037 (10th Cir. 1996), one allotee claimed a lease right. The suit was brought in tribal court and a temporary restraining order was entered preventing the allotee from being removed from her home. The Court held that the United States waived its sovereign immunity by filing the suit. The federal court had concurrent jurisdiction with the Indian tribal court as it involved tribal members. Robert R. Comenout Sr. may be a Quinault tribal member, however, to date the Quinault Indian Nation has not agreed that he is a member. The Quinault Indian Nation cannot impose any conditions on the right to live or do business on the property. 25 U.S.C. § 334-337 also established allotment rights to allotees. The Secretary of Interior, through the U.S. attorney, not the Nation, has authority to litigate disputes on ownership of allotments. See *U.S. v. Taunah,* 730 F.2d 1360 (10th Cir. 1984).

All other owners involved are not Quinault Indian tribal members. None of the owners live on the Quinault Indian reservation or on the allotment. In *Nahno-Lopez v. Houser,* 627 F.Supp.2d 1269 (W.D. Okla. 2009) aff'd 625 F.3d 1279 (10th Cir. 2010), the individual lease holders of an allotment brought suit alleging trespass by the tribal counsel of a different tribe. The Court held that tribal immunity did not extend to the individual defendants in their individual capacities. "These claims remain but are

limited to claims for money damages for wrongful conduct fairly attributable to the individual himself or herself." *Id.* at 1285. The Court also held that the tribe was not a necessary party to the action for damages due to the wrongful conduct of the individuals. *Id.* at 1286. The Appeal, 625 F.3d at 1282 held that the Complaint could not be dismissed. A federal common law trespass claim was pled. Here Robert R. Comenout Sr., also alleges trespass. (Doc. 1, page 15).

Even if Whitener is a tribal official, injunctive relief against him, the only person who committed extortion and who threatens to trespass again, is not clothed with tribal immunity for injunctive relief. *Vann v. Kempthorne,* 534 F.3d 741 (D.C. Cir. 2008). "Faced with allegations of ongoing constitutional and treaty violations, and a prospective request for injunctive relief, officers of the Cherokee Nation cannot seek shelter in the tribe's sovereign immunity." *Id.* at 750. See also *Big Horn County Elec. Co-op., Inc. v. Adams,* 219 F.3d 944 (9th Cir. 2000) granting a permanent injunction against a tribal tax despite allegation of tribal immunity. See also *Burlington Northern & Santa Fe Ry. Co. v. Vaughn,* 509 F.3d 1085, 1094 (9th Cir. 2007), an injunction suit allowed against tribal officer accused of violating federal law.

In *Arizona Public Service Co. v. Aspaas,* 77 F.3d 1128 (9th Cir. 1995), the tribe entered into a lease that specified that lease matters would be arbitrated. Here, the Tribe waived immunity. The purported lease states if

a claim is made by one of the lessors, page 16 of 30, number 30, and agreed to arbitration, *Aspaas* held that the immunity was waived where a limited waiver of immunity was agreed on. *Id.* at 1135. *Outsource Services Management LLC v. Nooksack Business Corp.,* 181 Wash.2d 272, 281, 333 P.3d 380 (Wash. 2014) also upheld waiver of tribal immunity. The case applies and is determinative.

Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) holds that Indians going beyond reservation boundaries are subject "to any generally applicable state law." *Id.* at 2034. Citing *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005), the Court also held that an injunction can be brought against tribal officials. *Id.* at 2035. Where a tribe built a golf course off reservation operated by a wholly owned tribal corporation, it had no tribal immunity.

CONCLUSION

Defendant Whitener is at most a member of a state formed LLC that contracted with the Quinault Nation to develop off reservation economic opportunities. Whitener alone, however, threatens to remove and impound Defendant's property. No case has ever held that a non Indian member of the tribe who works for an LLC not owned by the tribe has tribal immunity for off reservation activity immunizing him from wrongful personal conduct. Defendant's motion is frivolous, and Plaintiff's request for a Preliminary Injunction must be granted.

DATED this 11th day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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DATED this 11th day of February, 2015.

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