Consolidated Appeals No.'s 15-35261; and 15-35268

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT R. COMENOUT SR., and MARY LINDA PEARSON AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD A. COMENOUT JR.;

Plaintiffs-Appellants,

v.

ROBERT W. WHITENER JR.;

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, TACOMA WASHINGTON, NO. 3:15-cv-05054-BHS - THE HONORABLE BENJAMIN H. SETTLE

JOINT OPENING BRIEF OF APPELLANTS

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STATEMENT OF JOINDER

The two Appellants, Robert R. Comenout Sr. and the Estate of Edward R. Comenout Jr., Mary Linda Pearson, Personal Representative, pursuant to Ninth Circuit Rule 28-4, moved on June 25, 2015, to file a single Joint Opening Brief. The Motion was granted on June 26, 2015. The time set to file this Joint Opening Brief is August 5, 2015.

STATEMENT OF JURISDICTION

This appeal is from the United States District Court, Western Washington at Tacoma. The action was commenced by Robert R. Comenout Sr. and Mary Pearson, Personal Representative of the Estate of Edward A. Comenout Jr. The District Court had jurisdiction over the case pursuant to 25 U.S.C. § 345, 28 U.S.C. § 1353, *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010), and *U.S. v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The appeal is from the Order Denying Plaintiffs' Motion for Reconsideration, Excerpt 9 (hereafter "ER"), dated March 16, 2015, and Order Granting Motion to Dismiss on March 3, 2015. The notices of appeal, ER 1 and ER 2, were timely filed on April 6, 2015, and April 7, 2015. This single Opening Brief by multiple Appellant parties is due on August 5, 2015.

STATEMENT OF ISSUES

The ultimate issue is whether Indian tribe immunity and immunity to suit has any application to the case.

Whether a non member, an independent contractor of an LLC, who worked under an expired contract and who committed alleged personal torts, is entitled to tribal immunity, is also a core issue.

Whether an Indian tribe that intends to sell commercial cigarettes to the public, whose only interest was as a lessee on an off reservation site, is entitled to sovereign immunity, is an issue.

Whether the Quinault Indian Nation could have given authority to confiscate and impound property of allotment owners, one of whom lived on the property, and threaten criminal charges without an order from a court of jurisdiction, is also an issue.

Whether the allotment owners were entitled to a declaratory judgment declaring what government had what type of jurisdiction over the owners activity on the property, is an issue.

The First Amended and Supplemental Complaint should have been allowed as the Plaintiff had independent jurisdiction and the officers of the Indian tribe had no immunity.

STATEMENT OF THE CASE

The original Complaint, ER 8, alleged that Robert W. Whitener threatened Robert R. Comenout Sr.; that Comenout would be the subject to state or federal criminal proceedings if he did not sign a lease giving the Quinault Tribe permission to operate the business carried on at the property. (Page 9). Robert R. Comenout Sr., ER 12, page 3, stated that these threats were personally made to him by Whitener in face-to-face meetings. Whitener also promised to pay Comenout for the Comenouts' personally owned property (page 4). Whitener posted a sign on or near the property on January 8 or 9, 2015 (page 3). It ordered all goods, cars and trailers to be removed or they would be "impounded." No tribal government has authority over the property (page 3). A Motion for Temporary Restraining Order was filed with the Complaint. ER 10. It sought to restrain Whitener. The Motion was originally heard by Judge Ronald B. Leighton who denied the Temporary Restraining Order. ER 13. The case was reassigned to Judge Benjamin H. Settle. ER 14. After hearing arguments in open court, the Court granted the Motion to

Dismiss for a failure to join the Quinault Indian Nation as a "necessary" party. ER 5, page 8. The Order also denied Comenout's Motion for Preliminary Injunction "as moot". ER 5, page 8.

Robert R. Comenout Sr., on March 13, 2015, filed a Motion to File a First Amended and Supplemental Complaint ER 7. The Motion was denied. ER 4. This Appeal followed.

STATEMENT OF FACTS

Background Facts

Robert R. Comenout Sr. is a joint owner of land at 908/920 River Road, Puyallup, Washington, 98271. He resides on the land. It is a small parcel adjoining the busy highway River Road, the main road between Puyallup and Tacoma. ER 12, page 2. The Department of Interior, Bureau of Indian Affairs classifies it as Public Domain Allotment No. 130-1027. It is not located on any Indian reservation. ER 8, page 2. It is a restricted allotment defined in 18 U.S.C. § 1151(c), 25 U.S.C. §§ 334, 336 and 25 U.S.C. § 345. It was acquired in 1926 by Edward A. Comenout Sr., who died in 1929, at age 24. The property is less than 1.78 acres. ER 11, Exhibit C,

page 3 of 25. It needs to be guarded 24 hours a day. ER 12, page 2. Until his death on June 4, 2010, Edward A. Comenout Jr., was the majority owner of the land. He had no children. His Will devised his intent in the land to four Indian grand-nephews and a life estate to a non-Indian, Martina Garrison. ER 11, Exhibit A, Page 61 of 66. His Will did not name a personal representative. ER 8, page 2. The buildings were to be subject to state probate. ER 8, page 2. The BIA probated the land but did not probate the permanent buildings. A convenience store has been operated on the land. The store is named "Indian Country", ER 8, page 2.

Robert R. Comenout Sr. and his family live on the property and own personal property including vehicles that are located on the property. ER 8, page 6. Robert R. Comenout Sr. took over the Indian Country Store as the ruling elder pursuant to the wishes of Edward A. Comenout Jr., ER 11, Exhibit A, page 62 of 66. Robert R. Comenout Sr. is over 82 years of age and suffered a debilitating stroke years ago; he is physically handicapped and a majority of the time is confined to a wheelchair. ER 8, page 7.

Specific Facts

The property is located a few hundred feet from the boundaries of the Puyallup Indian Reservation. It is about 120 miles from the Quinault Indian Reservation. The Puyallup Tribe has been trying to get rid of the cigarette sales competition of the Comenouts for at least two years. ER 8, page 4. Defendant/Appellee Robert W. Whitener Jr. is an owner of the Whitener Group LLC, a company formed under Washington law UBI No. 602890070. Robert Whitener is the "primary consultant" to the Whitener Group LLC. The Whitener Group LLC, on December 10, 2013, entered into a contract to furnish services to the Quinault Indian Nation from August 1, 2013 through September 30, 2014. The Whitener Group LLC agreed to provide services for two ventures, a marina project and the Comenout property. The LLC was to "identify and look for opportunities that would work well on the property." This would, at a minimum, include selling cigarettes and other tobacco products. The LLC also would "identify and meet with the owners of the property to negotiate a mutually beneficial lease and or purchase

agreement." ER 11, Exhibit D, page 1. The contract limited the Whitener Group LLC to 20 hours a week. The contract did not contain any renewal options. ER 11, Exhibit D, pages 1 to 4. Robert W. Whitener Jr. worked for over two years to obtain a lease agreement with Robert R. Comenout Sr., ER 8, page 6. Several provisions of the lease were objectionable to Robert R. Comenout Sr., including a clause that limits pricing. Concern was that it would violate a conspiracy to set prices like *U.S. v. Apple, Inc.*, ___F.3d___, 2015 WL 3953243 (2nd Cir. 2015). ER 8, page 5. Robert R. Comenout Sr., the Estate of Edward Comenout and other owners refused to sign the lease. ER 12, page 4, ER 11, Exhibit A, page 43 of 66. The BIA approved the lease, subject to review. ER 11, Exhibit C. Robert W. Whitener Jr. personally threatened Robert R. Comenout Sr. with arrest if Comenout did not agree to lease the property to the Quinault Nation. ER 8, pages 6 & 7. ER 12, page 3. On January 9, 2015, Whitener personally, or at his direction, without notice to Comenout or his advisors, tacked a sign (ER 8, page 7) on a telephone pole on or near the property stating:

> **This property is leased to the Quinault Indian Nation - as of January 31 all personal or other property must be removed from this parcel. Only limited personal property may remain for Robert Comenout and his immediate family. This notice includes personal goods, commercial goods, cars, and trailers. Any property remaining on this site will be impounded or moved. For questions or concerns contact Tessa, TWG at 360 688 1004.**

TWG was the phone number of the Whitener Group. The Quinault Nation, in a pleading in another court, stated that it did intend to employ self help and force to evict Robert R. Comenout Sr. ER 9, page 7. Subsequent events, not yet on the record, are relevant to this appeal concerning the lease.

Plaintiff, Robert R. Comenout Sr., in his Declaration of Support of Motion for Temporary Restraining Order (ER 12), verified that he was part owner of the trust allotment; that Edward A. Comenout III is an owner, he is 21 or 22 years of age; that the property has been held in trust since 1926; that Robert R. Comenout Sr. is 82 years old and cannot care for himself; that the eldest son succeeds to the powers of the father and that he, Robert R. Comenout Sr., is "in charge of the land as an elder" under Indian custom. He also

explained that the land needs to be occupied 24 hours a day to avoid vandalism, and that "the Quinault tribe has never protected the property" and the Quinault Nation Constitution "has never been fully accepted by the BIA." He also declared:

> I have met with Defendant, Robert Whitener Jr., in face to face meetings. He has repeatedly stated in meetings that if I do not sign a lease turning my rights over to the Quinault Indian Nation, that the state or federal government will charge me with a crime. . .I am personally concerned with threats of Robert W. Whitener for many reasons. One is the fact that many raids have been made by state and federal agents over the years. In 2008, I was arrested by the Pierce County Prosecutor, but the Pierce County Prosecutor dismissed the case. I have been arrested by the Puyallup police on the property. Although the various governments raid and arrest owners of the property, including me, they will not give us police protection or enforce any requests we have on the property.

Robert R. Comenout Sr. states that Whitener promised to buy some of his store inventory, shelving, and a trailer "that I and my brother's estate own", but Whitener has never listed the detail on what he wanted to buy or what he would pay. The lease promised would have required that payment for the property would have to be shared with others who do not own the property. "I have refused to

sign a lease. A lease depriving me and others from use of the property for 50 years. One owner, Edward A. Comenout III, is only 21 or 22 years old. The lease would terminate his living area."

SUMMARY OF THE ARGUMENT

The Quinault Nation is not a Defendant. The Defendant, Robert W. Whitener Jr., is an independent contractor and the primary consultant of an LLC that had an expired contract with the Quinault Nation. The expired contract did not include any direction for Whitener to threaten Robert R. Comenout Sr. or remove his property from the leased premises. The Complaint alleges trespass and illegal acts of threats amounting to extortion made personally by Whitener. The Complaint (ER 8) also seeks an injunction and declaratory judgment. The Trial Court's application of sovereign immunity goes far beyond existing case law and especially *Pistor v. Garcia*, ___F.3d ___, 2015 WL 3953448 at *3 (9th Cir. 2015). The dismissal, based on prejudice to lease rights of the Quinault Nation as a required party, is also reviewable for the reason that the tribe, as lessee, was already participating in a review of the lease by the

Department of the Interior (BIA), the agency that had exclusive jurisdiction over lease matters of the off reservation restricted allotment.

A request for declaratory relief by the Comenouts is not within an Indian tribes sovereign immunity to suit. The land is a restricted public domain allotment established and governed by the BIA. 25 U.S.C. § 465. The Plaintiffs/Appellants are owners and have direct access to the federal courts pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353. They are entitled to their federal court trial.

ARGUMENT

A. Standard of Review.

Defendant/Appellee Whitener moved to dismiss based on Fed. R. Civ. P. 12(b)(7) or 12(b)(6), failure to join a party under Rule 19 and failure to state a claim on which relief can be granted. ER 15. The Court granted the Motion based on its conclusion that the Quinault Indian Nation was an "indispensable party" and that it could not be joined as it was entitled to sovereign immunity from suit. ER 5, pages 4, 7.

Dismissal based on sovereign immunity to suit is reviewed de novo. *Pistor v. Garcia*, ___F.3d___ 2015 WL 3953448 at *3 (9th Cir. 2015); *Burlington Northern* & Santa *Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007).

Jurisdiction of a counterclaim against an Indian tribe is reviewed de novo. *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). Dismissal based on lack of subject matter jurisdiction based on sovereign immunity is also reviewable de novo. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 (9th Cir. 2003); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004).

The question of Indian tribe sovereign immunity is a question of law reviewable de novo. *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs,* 255 F.3d 801 (9th Cir 2001); "We review de novo whether an Indian tribe possesses sovereign immunity." *Id.* at 805.

The Court denied the Motion for Temporary Injunction as moot. The Court also denied Comenout's lodged Motion to File an

Amended and Supplemental Complaint as moot. ER 4.

A motion to dismiss based on sovereign immunity under Fed. R. Civ. P. 12(b)(6) requires the trial court to review allegations in declarations before the court, including, in this case, the Declaration of Robert R. Comenout Sr. *Thornhill Publishing Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979), see also, *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

A motion under Fed. R. 12(b)(6) requires that no relief can be granted under any set of facts. "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The motion assumes that the factual allegations are true "...What rule 12(b)(6) does not contain are dismissals based on a judge's disbelief or a complaints factual allegations." *Id.* at 326-327. When supplemental jurisdiction and claims for sovereign immunity are made, the trial court reviews affidavits filed and also reviews other pleadings. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039, 1040 (9th Cir. 2003), see also, *McCarthy v. U.S.*, 850

F.2d 558, 560 (9th Cir. 1988) and *Black v. U.S.*, 2014 WL 3337466 at *2 (U.S.D.C. at Tacoma 2014).

B. The Quinault Nation is not a named defendant; the activity Plaintiff alleged against Robert W. Whitener Jr. was based on his personal conduct, some of which were verbal abuse and threats. The Quinault Nation contracted with an LLC. Reliance on tribal immunity to dismiss is erroneous and reversible error.

The moving party has the burden of persuasion when arguing for dismissal under Fed.R.Civ.P. 19. *Shermoen v. U.S.,* 982 F.2d 1312, 1317 (9th Cir. 1992). *Ninilchik Native Ass'n, Inc. v. Cook Inlet Region, Inc.,* 270 F.R.D. 468 (D.C. Alaska 2010).

Robert W. Whitener Jr., did not personally contract with the Quinault Nation. He agreed only to be one of the consultants to the Quinault Nation of Whitener Group, LLC. The contract stated that Whitener would be the Primary Consultant. ER 11, Exhibit D, page 2. Whitener signed the contract as Contract Manager and General Manager. ER 11, Exhibit D, page 4. The LLC was limited to 20 hours a week and the pay was hourly. Whitener could not be an employee of the LLC or the Quinault tribe as he controlled the

manner of work. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003). If the shareholder-directors operate independently and manage the business, they are proprietors and not employees. *Id.* at 448. Lack of control, lack of full-time services performed off the reservation; Whitener's ability to work for others and the short-term expired contract easily classify Whitener as a non-employee of the Quinault Nation. See Rev.Rul. 87-41, 1987-1, CB 296. Further, the contract did not contain any activity for Whitener to prepare the property for a 50 year takeover. The property included living quarters occupied by Robert R. Comenout Sr., Edward A. Comenout III, both property owners, and others in the family. It did not contain any language that even remotely could be construed as ordering Whitener to threaten Robert R. Comenout Sr., or remove and impound the property of the Estate of Edward A. Comenout Jr., or Robert R. Comenout Sr.

The BIA has control over the owners of the trust allotment, 25 U.S.C. §§ 1a, 2, *Smith v. U.S.*, 113 F.2d 191, 193 (10th Cir. 1940).

The BIA authority applies to leases of allotments, 25 U.S.C. §§ 415, 349, 348. *Wade v. Fisher*, 39 App.D.C. 245, 248 (D.C. Cir. 1912); *U.S. v. Comet Oil & Gas Co.*, 202 F. 849, 850 (8th Cir. 1913). The LLC contract with the Quinault Indian Nation had expired. It never authorized Robert W. Whitener Jr. to threaten Robert R. Comenout Sr. with state and federal prosecution if he did not sign the lease. Robert W. Whitener Jr. also tried to take over and impound personal property of both the Estate of Edward A. Comenout Jr. and Robert R. Comenout Sr., that was on the property. (Complaint, ER. 8). These allegations are to be taken as true for purposes of the Motion to Dismiss. The Quinault Nation was never sued, hence its tribal immunity from suit is not an issue. It's treasury was not liable as the Comenouts sought an injunction and declaratory judgment. ER 8, page 8, 16. Robert W. Whitener Jr. did not join the Quinault Nation. It is doubtful that Plaintiffs could recover from the Quinault Nation as Whitener was the tortfeasor. See e.g. *Monell v. Department of Social Service of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "To this day, there is disagreement about the

basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship." *Id.* at 693. Whitener was not an employee of anyone.

C. *Pistor v. Garcia*, 2015 WL 3953448 at *6 (9th Cir. 2015) and *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013) are conclusive and require reversal.

Both cases cited involve actual employees of the Nation. Here, Robert W. Whitener Jr.'s LLC was obviously an independent contractor and Whitener personally had no official capacity with the Quinault Nation. The officers in *Maxwell,* similar to Robert W. Whitener Jr., tried to control the area and ordered the injured person to stay on the property for interrogation. Unreasonable seizure was an issue in *Maxwell, supra,* at 1083. The court noted that the suit was brought individually and denied sovereign immunity. "The Viejas Band is not the real party in interest in this suit. The Maxwells have sued the Viejas Fire paramedics in their individual capacities for money damages. Any damage will come

from their own pocket, not the tribal treasury." *Id.* at 1089.

The court also rejected indemnification by an Indian tribe. Indemnification does not "make the officer immune from liability." *Id.* at 1090. The facts of *Pistor v. Garcia,* 2015 WL 3953448 at *1 (9th Cir. 2015) are even closer as the defendants seized property from the claimants. Here, Whitener, if suit was not commenced, would have seized property of the Comenouts. *Pistor, id.* at *6, followed *Maxwell*:

> The principles reiterated in *Maxwell* foreclose the tribal defendants' claim to tribal sovereign immunity in this case. The gamblers have not sued the Tribe. The district court correctly determined that the gamblers are seeking to hold the tribal defendants liable in their individual rather than in their official capacities. They "seek[ ] money damages 'not from the [tribal] treasury but from the [tribal defendants] personally.'" *Maxwell,* 708 F.3d at 1088 (quoting *Alden,* 527 U.S. at 757). Given the limited relief sought, the tribal defendants have not shown that "the judgment sought would expend itself on the [tribal] treasury or domain, or interfere with [tribal] administration, … [or] restrain the [Tribe] from acting." *Id.* (quoting *Shermoen,* 982 F.2d at 1320). Even if the Tribe agrees to pay for the tribal defendants' liability, that does not entitle them to sovereign immunity. "The unilateral decision to insure a government officer against liability does not make the officer immune from that liability." *Id.* at 1090. (Underlining added.)

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) states:

> As an officer of the Pueblo, Petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Dept. of Game Supra,* 433 U.S. at 171-172, 97 S.Ct. at 2620-2621 cf. *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *Id.* at 59.

Black v. U.S., 2014 WL 3337466 at *2 (U.S.D.C.W.D.Wn at Tacoma 2014) applies. A tribal police officer who entered the victims home without a warrant and shot him could not claim tribal immunity as the officer was sued in his individual capacity. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) was followed.

In *Town of Browning v. Sharp*, 2015 WL 1246543 (D.C. Montana 2015), the town brought suit against several individuals for declaratory judgment and injunction; sovereign immunity was alleged by the Defendants. The Motion to Dismiss was denied. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) was followed.

D. The Quinault Nation could not give permission to Whitener to remove property or post signs as it would be beyond any authority the Nation could confer.

The Quinault Nation could not authorize Whitener to remove any property, impound property or even post the sign. It had no governmental or lease authority to remove anything. The proposed action was criminal conversion. It is a violation of state law. Wash.Rev.Code § 4.24.230, prohibits taking of any goods without consent of the owner. It is also a violation of federal law, 25 U.S.C. §§ 345, 357. Indian land condemnation must be authorized by Congress. 25 U.S.C. § 341; *U.S. v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1004 (8th Cir. 1976).

Tenneco Oil Company v. Sac and Fox Tribe of Indians, 725 F.2d 572 (10th Cir. 1984) involved an attempt by a tribe to cancel a lease with a non Indian company, Tenneco Oil. *Tenneco* commenced a declaratory judgment and injunctive relief complaint in federal court against the Indian tribe, who asserted sovereign immunity. The court held that the tribe had no authority to cancel the lease, *id.* at 575. The case held that sovereign immunity did not apply stating:

> If the sovereign did not have the power to make the law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Id.* at 574.

The Amended and Supplemental Complaint lodged in this case, ER 9, at page 7, alleges that the named tribal officials acted beyond any authority that the Quinault Nation had any power to confer. The amended complaint allegations prevent any assertion of tribal sovereign immunity.

Muscogee (Creek) Nation v. Henry, 867 F.Supp.2d 1197 (D.C. Okla. 2010), follows *Tenneco* and holds that when cigarettes leave tribal jurisdiction, tribal immunity is not available as a defense. The Nation's theory would require the Court to afford "the protection of Indian Country from coast to coast." *Id.* at 1208.

E. The Quinault Nation has no authority to determine the validity of the lease. The exclusive jurisdiction to approve or disapprove the lease is with the Department of Interior, Bureau of Indian Affairs.

Review of Rule 19 joinder is reviewed for abuse of discretion, but legal conclusions underlying the determinations are reviewed de

novo. *Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013). However, a court abuses its discretion when it makes an error of law on Rule 19(b). *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008), *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 969 (9th Cir. 2008).

Legal conclusions regarding indispensable (required) party are reviewable de novo, *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1067 (9th Cir. 2010).

The Quinault Indian Nation has no governmental authority over the allotment at all. The BIA has complete management of all Indian affairs. BIA approval must be obtained on all leases of any restricted lands. 25 U.S.C. § 415. The allotment is restricted land. 25 U.S.C. § 465. The BIA has authority to promulgate regulations. 25 U.S.C. §§ 1a, 2. The BIA has delegated regulations that must be followed to obtain leases on allotted lands. 25 U.S.C. § 465 authorizes assignments of the allotment. The Secretary of Interior was specifically granted the authority to approve allotment leases,

25 U.S.C. § 2218. Lease decisions of the BIA may be appealed. 25 CFR § 162.025. See *Goodwin v. Pacific Regional Director, BIA*, 60 IBIA 46, 2015 WL 1090164 (IBIA 2015). Department of Interior cases can be appealed to the district court naming the Department of Interior as Defendant and ultimately the decisions can be heard by certiorari to the U.S. Supreme Court. See *Babbitt v. Youpee,* 519 U.S. 234, 242, 117 S.Ct. 727, 136 L.Ed.2d 696 (1997). The Quinault Nation, as lessee, had a right to and did appeal to the BIA to support the decision to lease. They had an economic interest. 25 CFR § 162.025. Declaration of Rob Roy Smith, ER 11, page 2, Exhibit B, page 2 of 31.

F. The Quinault Nation has a complete BIA remedy in this case. Therefore, it is not a required party.

The Quinault Nation has admitted that it does not intend to use self help in removing property of either of the Comenout's property. The Quinault Nation, in a filed reply in No. #3:10-cv-05345 on February 27, 2015 (Docket 67, now on Appeal No.'s 15-35261; 15-35268) stated, "It has been alleged in the case of

Comenout v. Whitener, Case No. 3:15-cv-05054-BHS, that the Nation will employ self-help and forcibly evict the Comenouts. The Nation has no such intentions." This statement clarifies that no authority was given by the Quinault Nation for Whitener's actions and that the Nation would rely on the BIA procedures. This part of the pleading is quoted in Defendant's First Amended and Supplemental Complaint, ER 9, page 7.

Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024, 2029, 188 L.Ed.2d 1071 (2014) notes that *Puyallup Tribe* is a remedy. *Puyallup Tribe v. Dept. of Game,* 433 U.S. at 174, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) states: "On the other hand, the successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained jurisdiction."

This suit originally sought a preliminary and permanent injunction only against Robert W. Whitener Jr. and no one else. ER 8. The Quinault Nation cannot be a required party as the BIA has jurisdiction of the appeal.

The Quinault tribe has no jurisdiction. The facts, ER 8, pages 2, 3 and 5, were all facts alleging Whitener's personal conduct. A temporary and permanent injunction was sought. ER 8, page 16.

Alto v. Black, 738 F.3d 1111 (9th Cir. 2013) was an appeal seeking dissolution of a preliminary injunction. The court held that the Indian tribe was not a required party to determine whether the injunction prohibiting disenrollment of persons who claimed to be tribal members. The 2007 "stylistic" amendments to Rule 19 changed "indispensable party to required party," *id.* at 1118, fn 6. A required party was step one in Rule 19. It was not a required party, hence compulsory joinder was not required. Only BIA agency action was involved. The Court noted that judicial enforcement of the BIA was the issue and that the Indian tribe would abide by the BIA decision. *Id.* at 1127. The theory applies here as the BIA has approved a lease subject to abrogation. The BIA has jurisdiction to determine lease appeals, 25 C.F.R. § 162.025. It also has jurisdiction to remove owners. See *Goodwin v. Pacific Regional Director, BIA*, 60 IBIA 46 (IBIA. 2015). The Quinault Nation

participated in the BIA lease appeal. The court in *Alto v. Black, supra* at 1131, reviewed all the factors of Fed.Civ.P. 19 and held that the tribe was not a required party, that its interests would be protected by the existing party, and that the tribe took no active role in the facts so complete relief can be afforded without the presence of the Indian tribe. *Id.* at 1126-1130. The court also noted that the BIA had no conflict with the tribe. *Id.* at 1128. Here, the First Amended and Supplemental Complaint was denied. It only names tribal officers, ER 9. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008) rejected the determination that Indian tribes were required parties, concluding that Rule 19(a) does not apply if the interest is only financial and speculates on a future event. "At the same time, an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Id.* at 971, citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990). ("The absent tribes would not be prejudiced because all the tribes have an equal interest in the administrative process that

is lawful"). *Id.* at 971. When the party is not required under 19(a) no further review is necessary including any 19(b) determination of whether the party cannot be joined. *Id.* at 970. *Makah, supra,* at 559, noted that the tribes had procedural administrative rights before an administrative board in which a tribe could appeal. The Quinault tribe, in this case, had no authority to govern but appealed the decision on the lease to the BIA. The tribe has an administrative BIA remedy. ER 11, Declaration of Counsel of the Quinault Nation, Exhibit B. The tribe has an interest in the administrative process that has jurisdiction of the site and its owners. *Goodwin v. Pacific Regional Director BIA*, 60 IBIA 46, 2015 WL 1090164 (IBIA 2015). The BIA has jurisdiction of the site and can manage it, 25 U.S.C. § 2. The Quinault Nation and Whitener have attempted to take action against the Comenouts within the Department of the Interior acting through the BIA who has exclusive jurisdiction. Trite as it sounds, they tried to take the law in their own hands that legally only the BIA could take. The Comenouts are trying to stop Whitener from self help that only the BIA can

implement, if in fact the Comenouts did anything wrong. At this juncture, it appears the Comenouts were entirely lawful in not collecting any cigarette taxes. At the least, they should be provided a forum to obtain guidance on the issue. When relief is sought only against tribal officers, the official can adequately protect the tribe. The Quinault Nation is not a necessary party for the reason that Whitener's interests are identical to the Quinault Nation. They both will profit from the lease.

In this case, counsel for Whitener is the same firm as representing in the Quinault Nation, the pending appeal in *Quinault Tribe v. Robert R. Comenout Jr. and the Estate of Edward A. Comenout Jr.,* No.'s 15-35263 and 15-35267. Joint motions were made to this Court. Washington Rules of Professional Conduct 1.8(f)(2) would apply. Ethical conduct is presumed. There is no conflict and Robert W. Whitener Jr. is adequately representing any interest the tribe may have. In *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012) the court held that the tribe was not a necessary party as "...there is no reason to believe

the Navajo official defendants cannot or will not make any reasonable argument that the tribe would make if it were a party." *Id*. at 1180. In this case, the Quinault Nation actively participated in the lease appeal, ER 11, Exhibit B. The Nation has already protected the only interest it has as lessee. The Trial Court committed reversible error holding that the Quinault Nation was an "indispensible" party. ER 5, page 8.

G. The First Amended and Supplemental Complaint sought injunctive and declaratory judgment relief and should have been allowed. It was not moot.

This issue is reviewed de novo. *Burlington Northern & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007).

The First Amended and Supplemental Complaint filed March 31, 2015, at page 7, quoted a pleading in another case, *Quinault Nation v. Comenout*, No.3:15-cv-05054 BHS, stating that the Quinault Indian Nation has no intention to evict Robert R. Comenout or to employ such help. The Complaint added officers and employees of the Quinault Nation. The First Amended and Supplemental Complaint also sought a declaratory judgment (ER 9

pages, 19-21) to determine that the Quinault Nation has no jurisdiction of the property, that the Estate of Edward A. Comenout Jr., has control of the personal property of the Estate located on the property and to determine whether the city of Puyallup, Pierce County, State or Department of Indian Affairs has jurisdiction. An injunction against any and all named Defendants was sought. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) applies and requires that the Amended and Supplemental Complaint be allowed. The court stated in 1092:

> In determining whether *Ex Parte Young* is applicable to relevant inquiry is only whether BNSF as *alleged* an ongoing violation of federal law and seeks prospective relief. . .

H. The Amended Complaint has independent federal jurisdiction.

The Amended Complaint alleges a violation of federal law (ER 9, page 11) and seeks an injunction to prevent interference with the allotment owners. It also sought a declaratory judgment. This issue is reviewable de novo. *Burlington, supra,* at 1091. These allegations grant independent jurisdiction of the Amended

Complaint under 28 U.S.C. § 1353, and 25 U.S.C. §§ 345 and 349. It also alleged that the Quinault tribal officials acted outside and beyond any authority that the Quinault Nation could give them. (ER 9, page 9). The legality of state cigarette tax is at issue as the Quinault Nation's intent to sell cigarettes on a trust allotment, 120 miles from its reservation, destroys sovereign immunity from state seizure. See *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007). In *Keweenaw*, the tribe sought and obtained a declaratory judgment that seizures of cigarettes could not be prevented by a tribes sovereign immunity, *id.* at 895. By acting off reservation, an Indian tribe who engages independent contractors for management uses sovereign immunity. *American Property Management Corp. v. Superior Court*, 141 Cal. Rptr.3d 802, 206 Cal.App.4th 491 (Ct. App. Cal. 2012). The First Amended and Supplemental Complaint denied control of Robert W. Whitener Jr., ER 9, page 7. *Sue/Perior Concrete and Paving v. Lewiston Golf Course*, 968 N.Y.S.2d 271 (A.D.N.Y. 2013) held that the golf course management did not have authority over tribal financials that

created employment of tribal members or improve quality of life on the reservation. "It would only serve as an 'economic engine'." *Id.* at 278, 279. The court held that the Indian tribe had no sovereign immunity against suit. In *Rogers-Dial v. Rincon Band of Luiseno Indians,* 2011 WL 2619232 (D.C.S.D.Cal. 2011), the Plaintiffs sued the Indian tribe for declaratory relief to keep the Indian tribe from erecting barriers on non tribal land owned by their landlord. Plaintiffs requested declaratory and injunctive relief against the tribe and the tribe's council members. The allegations also asserted that the Indian tribe had no authority over the property. The individual council members could not rely on sovereign immunity as prospective relief was sought. *Id.* at *5. *Burlington Northern* was followed.

Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir. 1984) holds that tribal members were not protected by sovereign immunity from declaratory judgment.

In *Boisclair v. Superior Court,* 51 Cal.3d 1140, 801 P.2d 305 (S.C. Cal. 1990), the trucks transporting granite from mines drove

across a dirt road. Three of the four lots were on an Indian allotment. The fourth lot was owned by a non Indian, Bradford. One lot was leased by the allottee to the granite miner. Bradford, the non Indian, welded the gate shut so the road that ran across the four lots could not be used. Bradford did not join in the suit, but the Indian tribe officials were joined. The granite miner sought a declaratory judgment to have the gate removed and prospectively to enjoin the Indian and non Indian defendants from interfering with the use of the road. The court noted that part of the land in question was owned by a non Indian and that it was outside the borders of an Indian reservation. *Id.* at 1145. The court stated: "Indian tribes may of course exercise sovereign power over non Indians who enter tribal land. . .they may also exercise control over their boundaries and exclude those seeking access. . .this power to exclude, however, does not extend to actions taken beyond the confines of the reservation." The sovereign power of Indian tribes to act on land that is neither tribal land nor within the confines of the reservation is a fortiori minimal. *Id.* at 1158. The court held that

sovereign immunity did not apply as the action was alleged to be tortious if the acts were outside their territorial boundaries.

Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas, 261 F.3d 567 (5th Cir. 2001) applies. The court held that neither the tribe or the tribal officials were entitled to sovereign immunity. "As. . .the oil companies sought declaratory relief against the tribe. . .the district court erroneously concluded that the Tribe was entitled to sovereign immunity against the oil companies' claims for equitable relief." *Id.* at 572. "Thus, while the district court correctly dismissed the damage's claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory judgment." *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Cir. 1999) was followed, *id.* at 570. *TTEA* held that sovereign immunity does not prevent declaratory relief. *Washington v. Daley,* 173 F.3d 1158 (9th Cir. 1999) also upholds denial of Rule 19, the same issue, injunctive prospective relief, was present. The district court's dismissal under Rule 19 was reversed. The court held there was no direct conflict

with the present defendants: "Because we conclude that the tribes are not necessary parties, we need not consider whether they are indispensable parties under Rule 19(b)." *Id.* at 1169. *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 2004) held that tribes were necessary parties to challenge quotas of ocean fishing, but not necessary parties to a challenge to the legality of the regulatory process where injunctive relief was requested. "The district court's order regarding the *Makah's* procedural claims is reversed and the action is remanded." *Id.* at 561. The allegations were that tribal officials acting outside of their official authority prevent dismissal on the basis of sovereign immunity. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006). The pervading irony of this case is that the Quinault tribe accused the Comenouts of not paying taxes on cigarette sales. It now wants to sell cigarettes the same way. The facade of charging its own tax merely adds to its profit.

I. The Trial Court's Order made a material factual error.

The trial court's order, ER 5, page 5, wrongly concluded that the Quinault tribe claimed a legally protected interest in the action.

The Court quotes paragraph 35 of the Complaint, ER 8, as "alleging that Whitener has engaged in a conspiracy." This is wrong as the statement is that Whitener "in common with the Quinault Indian Nation to create an economic development enterprise." The state of Washington Department of Commerce has an economic development department that promotes opportunities for all citizens of the state, as part of growth management, especially for unemployed and disadvantaged persons. Wash.Rev.Code § 36.70A.020, Ch 36.70A, and Wash.Rev.Code § 36.70A.010 provide for economic development programs. While not in the record, early drafts of the lease had provisions for compliance in an economic development plan for the business. This is not illegal. The court's quote at paragraph 32 is that Whitener has conspired with members of the Quinault Indian Nation, their attorneys and others. The tribe was not alleged to be an anti-trust conspirator. Even if it was, a joint tortfeasor need not be joined under Rule 19. *Ward v. Apple, Inc.*, ___ F.3d ___, 2015 WL 3938072 (9th Cir. 2015) held that the interested parties need not be joined even if they played a central

role. *Id.* at *7. A conspiracy with tribal members over non tribal lands is allowable and not within tribal immunity. *Boisclair v. Superior Court*, 51 Cal.3d 1140, 801 P.2d 305 (S.D.Cal. 1990) states: "In the case at bar it is alleged that the Indian defendants conspired to commit tortious actions on non-Indian land." *Id.* at 1158. "...may maintain its action for damages against both the Bradfords and against the Indian Defendants." *Id.* at 1159. The Quinault Nation has no jurisdiction of the site. ER 11, Exhibit C, page 2 of 25, page 17 of 25. The Court allowed documents relied on by Plaintiffs, ER 5, page 3. The Plaintiffs relied on the letters attached as Exhibit C. The Complaint, ER 8, did not request any relief against the Quinault tribe and did not contain any factual conduct by the tribe. The posting of the notice did not refer to the Quinault Nation. The tribe stated that it did not intend to use self help, hence alleged that Whitener was not acting within any scope of delegated authority. The Court abused its discretion as the Complaint did not allege any wrongful actions by the Quinault tribe or its officers.

CONCLUSION

The trial court committed reversible error in upholding tribal immunity to apply to the personally alleged tortious conduct of Robert W. Whitener Jr. The Quinault Nation cannot be a required party. The case must be reversed and sent back for further proceedings.

DATED this 5th day of August, 2015.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel hereby certifies that, to the best of his knowledge and belief, that there is one case that has issues related to this case. *Quinault Indian Nation v. Pearson, etal.*, No's. 15-35263 and 15-35267, raises closely related issues to this case.

DATED this 5th day of August, 2015.

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BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32(a)(7)

Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the JOINT OPENING BRIEF OF APPELLANTS is: proportionately spaced, has a typeface of 14 point or more, and contains 7,349 words.

DATED this 5th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Joint Opening Brief and Excerpts were served on Counsel for Appellee, by ECF and mailing the same by regular mail on August 5th, 2015, in a postage-paid envelope addressed as follows:

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