Consolidated Appeal Nos. 15-35263; 15-35267

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUINAULT INDIAN NATION, Plaintiff-Appellee, v. MARY LINDA PEARSON, Administrator Ad Prosequendum for the Estate of Edward A. Comenout, And ROBERT R. COMENOUT, Sr., Defendants-Appellants.	District Court No. 3-10-cv-05345-BHS U.S. District Court for Western Washington, Tacoma

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Beginning in 1971 until his death in 2010, Edward A. Comenout ("Comenout") was engaged in the unauthorized sale of unstamped (untaxed) cigarettes and tobacco products to the general public at a retail store ("Indian Country Store") located on Tribal trust land outside the exterior boundaries of the Quinault Indian Reservation. ER 6 at 42. For decades, despite periodic seizure by the Washington State Department of Revenue and Liquor Control Board, Comenout refused to cease selling unstamped cigarettes, even after he was criminally charged for the sales. *Id*.

After years of unsuccessful attempts to achieve compliance with Comenout, in 2010 the Quinault Indian Nation ("Nation") filed suit against him and others involved in the unlawful sales, seeking $30 million in unpaid taxes. ER 6. The Nation claimed multiple violations of law under the Racketeer Influenced and Corrupt Organizations Act, as well as breach of contract for Comenout's violations of the terms of a closing agreement he entered into with the Washington Department of Revenue in 1977. *Id.* Shortly after the Nation filed its complaint, Comenout passed away and his Estate was substituted as a defendant. ER 7. The case was stayed for several years. SER 20. However, during this time, the heirs of Comenout continued to operate the Indian Country Store, selling untaxed cigarettes and failing to pay taxes as required by law. In 2012, federal agents executed a

search warrant on Indian Country Store and seized significant amounts of cigarettes and cash.

While the case was stayed, the Nation reached an agreement with a majority of the owners of the land on which the Indian Country Store was operated for a federally-approved business lease. SER 21 at 207. In November 2014, the business lease was formally approved by the United States Bureau of Indian Affairs. Following the execution of the business lease, which allowed the Nation to legally operate a business on the property, the Nation filed a motion to voluntarily dismiss the case in its entirety under Fed. R. Civ. P. 41(a)(2), and to dismiss the Estate's Counterclaims based on the Nation's sovereign immunity, failure to state a claim under Fed. R. Civ. P. 12(b)(6), and the Estate's lack of standing. ER 12.

On March 23, 2015, the U.S. District Court for the Western District of Washington granted the Nation's motion to dismiss, dismissed the Estate's counterclaims, and denied the Estate's motion to amend its counterclaim as moot. ER 4, 5. The Estate and Robert R. Comenout, Sr. ("Appellants") now appeal. ER 1, 2.

As a result of the Nation's unwaived sovereign immunity, Fed. R. Civ. P. 12(b)(6) and the Estate's lack of standing, the Nation respectfully requests the Court affirm the District Court's dismissal of the Estate's counterclaims. The

Nation further requests the Court affirm the District Court's denial of Appellants' motion to amend its counterclaims, as the motion is moot, futile, untimely, and made in bad faith.

JURISDICTIONAL STATEMENT

This is an appeal from the final Order and Judgment of the U.S. District Court for the Western District of Washington dated March 23, 2015, granting the Nation's motions to dismiss, dismissing the Estate of Edward A. Comenout's counterclaims, and denying the Estate's motion to amend its counterclaim. The basis for jurisdiction in the District Court was federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

The issues properly before this Court are:

1. Whether the District Court properly dismissed the Estate's counterclaims as barred by the Nation's unwaived inherent sovereign immunity; and
2. Whether the District Court properly denied the Estate's motion to amend its counterclaim as moot.

STATEMENT OF THE CASE

I. Comenout Begins Selling Untaxed Cigarettes; District Court Finds Indian Country Store Subject to Taxation.

Appellee Quinault Indian Nation is a federally recognized sovereign Indian tribe. Under the Nation's Constitution, Article I, Section 1, the Nation has jurisdiction and government power over all lands held in trust by the United States for the use and benefit of any member of the Nation, and all members of the Nation that are within the boundaries of the United States. ER 6 at 41. Appellant Edward A. Comenout, now deceased and represented by his Estate, was a member of the Nation. *Id*. at 42. Appellant Robert R. Comenout, Sr., is the brother of Edward A. Comenout.

In 1971, Comenout began operating the Indian Country Store, an enterprise located on land held in trust by the United States. ER 6 at 42. The land on which the store was operated was public domain purchased with funds from the estate of Comenout's father. *Id*. The land is not within the exterior boundaries of any federally recognized Indian Reservation. The business of the Indian Country Store consisted, in large part, of the retail sale of unstamped (untaxed) cigarettes and tobacco products to Indians and non-Indians. *Id*.

Beginning in 1977, agents of the Washington State Department of Revenue and the Liquor Control Board began periodically seizing and selling unstamped (untaxed) cigarettes and tobacco products found on the premises of the Indian

Country Store as contraband, under the provisions of RCW 82.24.130. *Department of Revenue v. Comenout,* No. 259241 (Pierce County Super. Ct., Apr. 27, 1977). Though Comenout sought to enjoin the searches and seizures as illegal on the grounds that the land in question and the cigarette sales business conducted thereon were exempt from the state excise tax, the District Court rejected his argument, ruling that while trust land could not be subject to tax, businesses operated thereon were subject to taxation. *Matheson, et al. v. Kinnear, et al.,* 393 F. Supp. 1025 (W.D. Wash. 1974).

II. Comenout Enters Into Closing Agreement with the Department of Revenue; Files Civil Rights Action.

On March 23, 1977, the Washington State Department of Revenue and Comenout entered into a closing agreement. ER 6 at 42. Under the terms of the agreement, Comenout agreed to register with the Department of Revenue, and to collect, remit, and pay all state excise taxes arising out of the business conducted at the Indian Country Store, the same as any other business in the State of Washington. *Id*.

On October 28, 1981, Comenout filed a civil rights action against the State of Washington, alleging that enforcement of the Washington liquor and cigarette tax laws on Indian trust land was illegal and that state agents and local police had made unconstitutional arrests and searches and seizures. *Id*. at 43. The District Court granted summary judgment in favor of defendants on the grounds that the

Tax Injunction Act, 28 U.S.C. § 1341, barred the action. This Court affirmed the ruling. *Comenout v. State of Washington*, 722 F.2d 574 (9th Cir. 1983). Comenout and/or others acting with him or on his behalf nonetheless continued selling untaxed cigarettes and tobacco products to the general public through the Indian Country Store, in violation of law and of the express terms of the closing agreement. ER 6 at 43.

III. The Nation Enters Into Compact with State for Cigarette Taxes.

In the 2001 legislative session, the State of Washington passed RCW 43.06.450, which allows for compacts between the State and Tribal governments for the handling of cigarette taxes. On January 3, 2005, the Nation and the State entered into a Cigarette Tax Compact, under which the Nation retains one-hundred percent of the state excise taxes assessed on cigarettes. ER 6 at 41.

Additionally, under the terms of the Compact, the Nation agreed that it would require any member-owned smokeshop located in Indian Country to be in compliance with the Compact. *Id*. On May 8, 2006, the Nation enacted Title 86 – Cigarette Sales and Tax Code, implementing the Compact and assessing the state cigarette tax on non-Tribal members and an equivalent tax on Tribal members. *Id*.

IV. Comenout Is Criminally Charged for the Unauthorized Sale of Untaxed Cigarettes.

In September 2006, the Washington Liquor Control Board ("WLCB") began receiving complaints about the sale of untaxed cigarettes at the Indian Country

Store. ER 6 at 43. Following its investigation, the WLCB determined that, for at least ten years, no taxes were collected on cigarettes, nor were stamps purchased by the Indian Country Store. *Id*. The WLCB executed a search warrant on the enterprise and seized 37,000 cartons of unstamped cigarettes. Comenout was subsequently criminally charged with:

1. The unlawful possession or transportation of unstamped cigarettes;
2. Engaging in the business of purchasing, selling, consigning, or distributing cigarettes without a license; and
3. Unlawfully and feloniously obtaining control over property belonging to another, of a value exceeding $1,500, by color or aid of deception with intent to deprive the owner contrary to RCW 9A.56.020(1)(b) and RCW 9A.56.030(1)(1).

Id. at 43-44.

V. Nation Files Complaint; Case is Stayed.

On May 14, 2010, as a result of Comenout's continued refusal to cease the unauthorized sale of unstamped (untaxed) cigarettes and tobacco products, and despite the Nation informing him of his noncompliance and offering options to assist him coming into voluntary compliance, the Nation filed its lawsuit. ER 6. In addition to Comenout, the Nation's Complaint alleged claims against Robert R. Comenout, Sr., Robert R. Comenout, Jr., Dennis Jack Harris, Jr., James Harris,

Flournoy Harris, Vernon Harris, Carol Ann Harris, Elsie A. Wahsise, John Does 1–20 and Jane Does 1–20. *Id*. at 40.

The Nation's complaint alleged five causes of action, four of which were violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) arising from Comenout's defrauding the Nation of cigarette taxes. *Id*. at 45, 47-49. The Nation sought a total of $90 million in unpaid revenue. *Id*. at 50-51. The Nation also alleged a breach of contract claim for Comenout's violations of the terms of the closing agreement between him and the Department of Revenue, and sought $30 million in damage for such breach. *Id*. at 50.

On June 4, 2010, Edward A. Comenout passed away. Following his death, the Estate of Edward A. Comenout was substituted as a defendant. ER 7.

Seven months after the case was filed, on December 30, 2010, the Estate asserted counterclaims against the Nation. ER 11. The Estate alleged that the Nation wrongfully denied Comenout of "a right to have an interest" in land that he leased from a fellow Tribal member and sought damages for lost profits and "other damages proximately caused by Plaintiff's actions." *Id*. at 107, 109. The Estate also sought a declaratory judgment that Comenout did not violate the cigarette tax law. *Id*. at 108.

On May 11, 2011, the Court granted the parties' stipulated motion to stay the proceedings pending the appointment of a personal representative to Comenout's Estate. SER 20. The case was stayed for just over three years, until May 12, 2014.

VI. Ninth Circuit Court of Appeals Decides *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire.*

On September 23, 2011, this Court issued its decision in *Confederated Tribes and Bands of the Yakima Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011). In *Gregoire*, the Yakama Tribe brought action against various state officials, challenging the state's cigarette excise tax as violating Indian tax immunity by purportedly making retailers on Indian lands liable for payment of tax for sales to non-Indians. This Court held, however, that the "legal incidence" (i.e., the ultimate legal obligation to pay the tax to the taxing authority) of Washington State's excise tax on cigarettes did not fall upon Indian retailers on Indian lands, but instead upon non-Indian purchasers, and thus principles of Indian tax immunity did not bar the state's imposition of tax. *Id.* at 1089.

Notably for the purposes of this case, and contrary to the erroneous assertion of Appellants, the Court did not hold that Indian sellers were not required to collect Washington State cigarette tax from purchasers (Opening Br. at 12); rather, the Court ruled only on the issue of on whom the legal incidence of the cigarette tax fell. The Court found that "[t]he overall intent of the Washington cigarette tax, with respect to on-reservation sales by Indian retailers, is for consumers to be

legally obligated to pay the cigarette tax. The pre-collection obligation is a minimal burden on the Tribes and their retailers and does not change the legal incidence calculation." *Id.* at 1089.

VII. Washington State Supreme Court Holds Comenouts Do Not Meet Definition of "Tribal Retailers" and Are Not Tax-Exempt.

On December 8, 2011, also while this case was stayed, the Washington Supreme Court entered its decision in *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (2011). That opinion was the result of an appeal by Edward A. Comenout, Robert R. Comenout Sr., and Robert R. Comenout, Jr., of the Pierce County Superior Court's denial of their motion to dismiss a criminal complaint filed against them for their failure to pay state cigarette taxes. The State charged all three Comenouts in Pierce County Superior Court with (1) engaging in the business of purchasing, selling, consigning, or distributing cigarettes without a license; (2) unlawful possession or transportation of unstamped cigarettes; and (3) first degree theft. Prior to his death, Edward A. Comenout, the alleged principal, moved to dismiss on grounds that the State lacked jurisdiction. 173 Wash.2d at 237.

In response to the Comenouts' argument that they were exempt from the state tax, the Washington Supreme Court ruled as follows:

> The flaw in their argument is that RCW 82.24.020(5) says that if the State "enters into a cigarette tax contract or agreement with a federally recognized Indian tribe . . . the terms of the contract or agreement take

> precedence over any conflicting provisions of this chapter while the contract or agreement is in effect." Significantly, the Quinault Indian Nation cigarette tax compact applies to the sale of cigarettes by "tribal retailers." The term "tribal retailers" is more limited than the statutory definition of "Indian retailer" in that it defines a "tribal retailer" as a "member-owned smokeshop located in Indian country and licensed by the Tribe." CP at 370. As we observed above, the Indian Country Store was not licensed by the tribe. Thus, while the Comenouts meet the definition of "lndian retailer" they do not meet the definition of "tribal retailer." In sum, ***the Comenouts are not exempt from Washington's cigarette tax*.**

Id. at 240-41 (emphasis added).

VIII. Nation Enters into a Federally-Approved Business Lease for Trust Property.

While this case was stayed pending appointment of a personal representative, the Nation sought to resolve its claims against Appellants. The Nation sought an agreement whereby the Nation would lease the trust property on which the Indian Country Store was located and assume legal operation of the business in accordance with the terms of the Nation's compact with the State of Washington.

In March 2014, the Nation reached an agreement with a majority of the allottees on the terms of a business lease. SER 21 at 207. Such a lease is required by Federal law. *See generally* 25 C.F.R. pt. 162 (leasing regulations); *see also* 25 C.F.R. §§ 162.401-.474 (business leases). On November 25, 2014, the Bureau of

Indian Affairs issued a letter formally approving the business lease. The business lease was effective as of November 20, 2014.[1]

The business lease cured the unlawful use of the property by giving the Nation, as of the effective date, the legal right to occupy the property, promote the legal sales of retail products, and provide increased enforcement and interaction with local law enforcement. The Nation has maintained throughout the proceedings that its goal has been to stop the illegal sales of untaxed cigarettes at the Indian Country Store. From the outset of the case, the Nation preferred a business lease over litigation. The Nation additionally made it clear that once a business lease for the property was obtained, it would dismiss its claims.

Consistent with that commitment, shortly after the business lease was executed, the Nation moved to voluntarily dismiss its suit in full under Fed. R. Civ. P. 41(a)(2), and to dismiss the Estate's Counterclaims based on the Nation's sovereign immunity, failure to state a claim under Fed. R. Civ. P. 12(b)(6), and the Estate's lack of standing. ER 12.

Importantly, no defendant, including the Appellants, opposed the Nation's motion to voluntarily dismiss the Nation's complaint under Rule 41. ER 3;

[1] On June 17, 2015, the United States Bureau of Indian Affairs Regional Director, considering Appellant Comenout's appeal of the Business Lease, rescinded the Business Lease "because the appraisal of the fair market rental erroneously relied on acreage listed in the Pierce County Assessor's office in determining the rental value of the property." SER 26.

SER 23. Appellants only wanted to preserve their counterclaims against the Nation.

IX. District Court Grants Nation's Voluntary Motion to Dismiss Its Complaint and Estate's Counterclaims; Denies Estate's Motion to Amend.

In response to the Nation's motion to dismiss, the Estate filed a motion opposing dismissal of its counterclaims and seeking leave to amend its answer and counterclaims. SER 24. The Estate also filed a proposed amended answer with modified counterclaims. ER 15. The Estate's proposed answer contained both ordinary and dramatic changes to the original answer and counterclaims. The proposed amended answer and counterclaims attempted to: add legal argument to the paragraph answering 2.4; add reference to the alleged illegal trespass first claimed in the *Comenout v. Whitener*, No. 15-5054 (BHS) litigation, a case that is now on appeal to this Court, in the Fourth Claim for relief; add an entirely new counterclaim, the Fifth Claim, for tortious interference with contract; and add a prayer for relief. ER 15 at 162-68. The Estate also added allegations throughout the proposed amended answer and counterclaims that the Nation lacked jurisdiction to govern the allotment. *See id*. at 145, 146, 154, 165, 166.

On March 16, 2015, the Nation filed a response opposing the Estate's motion to file an amended answer and counterclaims. ER 19. The bases of the Nation's opposition were that the Estate's motion was untimely, futile, and made

in bad faith. *Id*. Further, the Nation contended that if the District Court granted its motion to voluntarily dismiss the case in full, it need not consider the Estate's motion to amend as it would be moot. *Id*. at 194.

On March 23, 2015, the District Court issued an order granting the Nation's motions to dismiss and denying as moot the Estate's motion to amend. ER 4, 5. In its Order, the District Court ruled that as a federally recognized Indian tribe, the Nation was immune from suit and that its sovereign immunity extended to the Estate's counterclaims. ER 5 at 37. Thus, "absent an express waiver of immunity by the Nation, the Court must dismiss any counterclaims brought by the Estate that are not claims in recoupment." *Id*. The District Court ruled that the Estate had failed to establish that its counterclaims were claims for recoupment because they did not arise out of the same transaction or occurrence and sought affirmative relief rather than to diminish the Nation's recovery. *Id*. at 38. As the District Court also found no evidence that the Nation had not expressly waived its sovereign immunity to the Estate's counterclaims, it found that the claims were barred by the Nation's sovereign immunity and granted the Nation's motion to dismiss. *Id*.

In regard to the Estate's motion to amend its answer and counterclaims, the District Court ruled that, having granted the Nation's motion to voluntarily dismiss the suit, the Estate's motion to amend was moot. *Id*. at 39. Further, the District Court found that even if the Estate's motion was not moot, the Estate's proposed

amendments would be futile in light of the Nation's sovereign immunity. *Id*. Accordingly, the District Court granted the Nation's motions to dismiss; dismissed the Estate's counterclaims; and denied the Estate's motion to amend its counterclaims. *Id*.

X. Notice of Appeal and Subsequent Events

Appellants filed a Notice of Appeal on April 5, 2015. ER 1, 2. Since that date, on May 26, 2015, the State of Washington filed a criminal information against Appellant Comenout and three co-defendants in Superior Court in Pierce County, Washington alleging, among other things: unlawful sale of cigarettes, unlawful possession of unstamped cigarettes, and criminal conspiracy to commit theft. *State v. Comenout, Sr., et al.*, Case No. 15-1-02002-3 (Pierce Co. Sup. Ct). The criminal action remains pending.[2]

In addition, on August 12, 2015, the Acting Superintendent for the Puget Sound Agency of the United States Bureau of Indian Affairs wrote to Appellant Comenout notifying him that he is in trespass on the real property and that he must "immediately cease [his] use of and occupancy of the Property." SER 27. On August 31, 2015, Appellant Comenout filed suit against the United States Bureau

[2] The Court should take judicial notice of this action. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (concluding that the court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'").

of Indians Affairs in the United States District Court for the Western District of Washington in Seattle seeking injunctive and declaratory relief. SER 28. Among other things, even though the Nation is not named as a party, the complaint seeks a declaration as to the jurisdiction of the Nation over the real property and alleges that the United States is engaged in a "conspiracy" with the Nation and its agents to remove Appellant Comenout from the property. *Id*. at 289, 294. This case is pending before the Honorable Judge Jones.[3]

SUMMARY OF THE ARGUMENT

There are two questions properly before this Court. The first is whether the District Court properly dismissed the Estate's counterclaims on the basis that the doctrine of sovereign immunity barred such claims absent express waiver from the Nation. This question must be answered in the affirmative.

Federally recognized Indian tribes enjoy sovereign immunity, a fundamental attribute of their status as sovereign nations. The precedent of this Court clearly establishes that tribal sovereign immunity extends to bar both counterclaims and declaratory relief, contrary to the Estate's bald assertions. Additionally, the doctrine of recoupment does not apply to this case because the Estate's counterclaims did not arise from the same transaction or occurrence as the Nation's

[3] The Court may take judicial notice of this action as well. *See* fn.2 *supra*.

claims. As the Estate could establish no exception to the Nation's sovereign immunity, its counterclaims were properly barred.

Moreover, the Estate's counterclaims failed to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6), the Estate lacked standing to bring its counterclaims, and the District Court lacked subject matter jurisdiction to hear the counterclaims because they did not present a federal question. Thus, even in the absence of the Nation's sovereign immunity, the Estate's counterclaims were properly dismissed by the Court.

The second question before this Court is whether the District Court properly denied the Estate's motion for leave to amend its answer and counterclaims, on the basis that such an amendment was moot, and even if not moot, was futile. This question should also be answered in the affirmative. As soon as the Court granted the Nation's motion to dismiss, the Estate's counterclaims no longer existed for it to amend. Thus, there was no reason for the Court to grant leave to the Estate. Furthermore, even if the Estate could have amended its counterclaims, there were no amendments that it could have made which would have overcome the Nation's sovereign immunity. Thus, the motion to amend was futile.

Even in the absence of mootness or futility, the Estate's motion to amend was also untimely and made in bad faith. Accordingly, the District Court properly

denied the Estate's motion for leave to amend, and the Nation respectfully requests that this Court affirm its ruling.

ARGUMENT

I. Standard of Review

This Court reviews de novo the issue of tribal sovereign immunity and dismissals based on sovereign immunity. *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011).

The trial court's decision to permit or deny amendment to a pleading is reviewed for an abuse of discretion. *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010); *Metzler Inv. GMBH v. Corinthian Colleges, Inc*., 540 F.3d 1049, 1072 (9th Cir. 2008). Mootness is reviewed de novo. *Southern California Painters & Allied Trades, Dist. Council Nov. 36 v. Rodin & Co*., 558 F.3d 1028, 1034 n.6 (9th Cir. 2009) (concluding declaratory relief and damages claims were moot); *United States v. Able Time, Inc*., 545 F.3d 824, 828 (9th Cir. 2008).

II. The District Court Properly Dismissed the Estate's Counterclaims

Dismissing the Estate's counterclaims against the Nation, the District Court held that the Nation enjoyed sovereign immunity from suit; that it had not expressly waived its immunity nor waived immunity by filing suit against the Estate; and that the Estate failed to establish that its counterclaims could be

classified as claims for recoupment. ER 5 at 37. Accordingly, the District Court held that it did not have jurisdiction over the Estate's counterclaims. The Estate's counterclaims were also properly dismissed for failure to state a claim under which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6); the District Court lacked jurisdiction over the counterclaims; and because the Estate lacked standing to pursue its counterclaims.

Appellants now make various unsupportable arguments as to why the Nation's sovereign immunity does not apply to bar their counterclaims. Opening Br. at 19-21, 32-33, 35-41, 4549. Chief among these are that an Indian tribe is not immune from declaratory judgment relief (*id.* at 39-41); that the Nation is not immune because it sells cigarettes at retail (*id.* at 45-48); and that the Nation's intent to lease the public domain property waived its sovereign immunity (*id.* 48-50). All these arguments lack merit. Despite their best efforts to obfuscate, Appellants have failed to provide any valid basis on which to reverse the District Court's Order. As the District Court properly dismissed Appellants' counterclaims as barred by the Nation's sovereign immunity, this Court should affirm.

A. The Nation Has Neither Expressly Nor Impliedly Waived its Sovereign Immunity.

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe. *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Both this Court and the U.S. Supreme Court have consistently held that a

waiver of sovereign immunity cannot be implied but must be "unequivocally expressed." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 456, 459 (9th Cir. 1994); *Oklahoma Tax Commission v. Citizens Band of Potawanomi Tribe of Okla*., 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (2001).

Here, the Nation has not expressly waived its sovereign immunity at any time for the purposes of the Estate's counterclaims, nor has the Estate alleged such an express waiver. ER 6 and 11; *see also* ER 15. Both are fatal to the Estate's case, and this should end the discussion.

Instead, Appellants argue that the Nation ***impliedly*** waived its sovereign immunity by filing suit in this case and that "[t]he general rule is that a tribe waives its immunity by commencing suit."[4] Opening Br. at 15, 21. Contrary to this erroneous assertion, this Court has held that a tribe's participation in litigation "does not constitute consent to counterclaims asserted by the defendants in those actions." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). A tribe does not waive immunity merely by initiating a law suit and "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action

[4] Appellants cite to *U.S. v. State of Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) in support of their claim that waiver of immunity by filing suit is the general rule. Opening Br. at 21. But in *U.S. v. Oregon*, this Court held that the Yakama Tribe had impliedly consented to suit by intervening in a suit to protect its treaty fishing rights ***and*** by signing an agreement to expressly submit issues to federal court for determination. There is no such agreement in this case.

filed by the tribe." *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940)). Thus, the fact of the Nation's suit against the Estate is of no moment; the Estate's counterclaims are nonetheless barred by the Nation's sovereign immunity and were properly dismissed.

1. The Nation is Immune from Declaratory Relief

Appellants also contend the Nation is not immune from suits seeking declaratory relief and, consequently, the Nation is subject to the Estate's counterclaim in which the Estate seeks declaratory relief that Comenout did not violate state tobacco laws, as allegedly stated by Building Inspector for the Nation in denying Comenout a building permit. Opening Br. at 39. This argument is wrong on the law. Appellants' contention that Indian tribes are not immune from declaratory relief is directly contradicted by precedent from this Court, which has held that a tribe's immunity extends to suits for both declaratory and injunctive relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *see also Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982) *rev'd on other grounds*, 463 U.S. 713 (1983).

In support of its argument, Appellants cite to *Santa Clara Pueblo v. Martinez,* in which the U.S. Supreme Court held that under *Ex Parte Young*, an

officer for the Tribe was not protected by the Tribe's sovereign immunity and could be sued. 436 U.S. 49, 59 (1978). Under *Santa Clara*, courts recognize an exception to the grant of sovereign immunity barring actions against tribes from being brought in federal court for suits for prospective declaratory and injunctive relief against officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000). Appellants imply that this doctrine somehow precludes dismissal of their counterclaim for declaratory relief against the Nation itself. Opening Br. at 21, 40.

However, Appellants are badly misguided. Unlike *Santa Clara* and the others cases upon which they rely, the Estate sought declaratory relief in its counterclaim not from the Nation's Building Inspector in his official capacity, as would be required under *Santa Clara*, but from the Nation as a sovereign entity. ER 11 at 109. There is no allegation that an officer of the Nation violated federal law in his or her official capacity. *See* ER 11; *see also* ER 15. Thus, *Santa Clara* simply does not provide any legal basis for Appellants' claim. The Estate's claimed relief runs against the Nation, and the Nation has not waived its sovereign immunity.

Further, while Appellants now appear to argue that the Building Inspector violated federal law for purposes of *Santa Clara* by failing to issue Edward

Comenout a building permit, as the Comenouts "had an interest in an allotment granted by federal law," the Estate's Answer fails to plead any violation of federal law committed by the Building Inspector for which the Estate sought declaratory relief.[5] *See* ER 11; *see also* ER 15. It is too late for Appellants to recast their Answer now. Thus, Appellants' contention that sovereign immunity does not bar declaratory relief against the Nation is both factually and legally unsupported, and fails as a matter of law.

2. The Doctrine of Recoupment Does Not Apply to This Case

Appellants also argue that the Estate's counterclaims are not barred by sovereign immunity under the doctrine of recoupment. Opening Br. at 41. This argument too fails.

While a few circuit courts have recognized a limited equitable exception to a tribe's sovereign immunity from counterclaims where the party asserts counterclaims that arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff, this is not such a case. *E.g., Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995) (holding appellant not barred from asserting a counterclaim because the Tribe "does not waive immunity

[5] Rather, the only counterclaim in which the Estate sought declaratory judgment was that in which it requested relief from the Court granting building permits and declaring that Comenouts had not violated state Tobacco laws. ER 11 at 106-12; *see also* ER 15 at 158, 168.

for counterclaims . . . except for matters asserted in recoupment."); *Jicarilla Apache Tribe of Mescalero Reservation v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (same). As the District Court properly found, the Estate has failed to establish that its counterclaims were claims for recoupment because, contrary to its assertions, the counterclaims do not arise out of the same transaction or occurrence as the Nation's claims. ER 5 at 38. Simply saying that they do, as Appellants allege— "[t]he pleadings themselves proved the recoupment"—does not make it so. Opening Br. at 41.

The Estate's counterclaims, both as alleged in its Answer and as proposed in the amendment, are of a different nature than and in excess of the Nation's voluntarily dismissed claims. The Nation's Complaint alleged that Comenout sold unstamped (untaxed) cigarettes for retail sale without paying the required taxes in violation of RICO and in breach of his contract with the Department of Revenue. ER 6 at 42-43. The Nation sought unpaid taxes. *Id*. at 51. In contrast, the Estate's counterclaims sought declaratory relief, and damages for lost profits for alleged anti-trust and price fixing by the Nation, on the basis that the Nation allegedly wrongfully denied Comenout "a right to have an interest in" land. ER 11 at 107-13.

As such, the Estate's counterclaims do not fit within the narrow exception for recoupment. The Estate did not seek to diminish the Nation's recovery through its own claims, but rather alleged independent claims for damages unrelated to

those asserted by the Nation against Appellants. The Estate's counterclaims flowed from a completely different legal theory than the Nation's dismissed claims. A judgment in favor of the Estate would have amounted not as an off-set of any judgment to the Nation, but as a separate affirmative award of substantial damages in excess of those claimed by the Nation. It thus follows that the Estate's counterclaims were barred by the Tribe's sovereign immunity, not subject to the doctrine of recoupment, and properly dismissed by the District Court.

B. The Estate's Counterclaims Were Properly Dismissed as They Failed to State a Claim Upon Which Relief Could be Granted.

The Estate's counterclaims were properly dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), factual allegations must raise a right to relief above the speculative level, assuming all allegations in the complaint to be true (even if doubtful in fact). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The Estate's counterclaims were based on the premise that decedent Comenout had agreed to lease land from fellow Tribal member Misty Schmidt. ER 11 at 106; *see also* ER 15 at 156. The counterclaim asserted that the Estate was harmed because the Nation's Building Inspector denied Edward Comenout a building permit for the Schmidt property, as a result of Comenout's failure to comply with the Nation's laws regarding off-Reservation cigarette sales. *Id*. The

Estate claims that the failure to issue the permit "den[ied] Defendant a right to have an interest" in the land, allegedly in violation of the Nation's Tobacco Code. ER 11 at 107; *see also* ER 15 at 157. However, this claim is factually untrue.

Federal law at 25 C.F.R. § 162.005, which governs leases and permits for Indian trust lands provides, in relevant part, as follows:

> § 162.005 When do I need a lease to authorize possession of Indian land?
>
> (a) You need a lease under this part to possess Indian land if you meet one of the criteria in the following table, unless you are authorized to possess or use the Indian land by a land use agreement not subject to this part under§ 162.006(b) or by a permit.
>
> If you are ... (l) A person or legal entity (including an independent legal entity owned and operated by a tribe) who is not an owner of the Indian land then you must obtain a lease under this part from the owners of the land before taking possession of the land or any portion thereof.

Thus, in order to have the right to possession of the land or any interest in constructing any buildings on the premises, Comenout was legally required to enter into a lease with the owners of the land. However, no such lease has ever existed. *See* SER 27. Comenout could not have been granted a permit to build on the land even if the Nation had not denied him the permit based on his failure to comply with its laws. Thus, even if the Estate's counterclaims were not barred by the doctrine of sovereign immunity, they are barred by Comenout's absence of legal interest in the property which is the basis of his counterclaims.

Any buildings constructed on the parcel by Comenout were done so illegally, without the right to possession and without the proper permits or authorization. *Id*. The Estate may never assert any claims upon which relief could be granted for the alleged deprivation of interest for a parcel in which Comenout had no legal right to possession. The Estate's counterclaim based on a non-existent lease was properly dismissed, as the Estate is precluded from benefitting from Comenout's unlawful conduct.

C. The Estate Lacked Standing to Pursue Its Counterclaims Against the Nation.

In order to present a justiciable case or controversy under Article III, a party must have standing. The constitutional minimum of standing contains three elements, as follows: (1) an "injury in fact"—an "invasion of a legally protected interest" that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The standing inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). If the injury is too abstract, or otherwise not appropriate, to be considered judicially cognizable, the party will

not have standing. *Id.* Similarly, if the line of causation between the illegal conduct and injury is too attenuated, or the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative, no standing will be found to exist. *Id.*

Appellants claim standing under 28 U.S.C. §§ 1353 and 345, alleging that Comenout's rights as to the allotment were at issue and claiming the right to seek declaratory relief. Opening Br. at 29. Comenout, however, lacks a legal right to possession of the parcel from which the Estate's counterclaim arose; thus, it could never have properly asserted "an invasion of a legally protected interest" to establish standing. SER 27. Moreover, there could be no causal connection between the Estate's alleged injury (loss of profits) and the conduct complained of (failure of the Nation to issue a building permit), because the conduct complained of was in fact caused by Comenout's own unlawful conduct, and not by any act of the Nation in its sovereign capacity.

Lastly, the Estate's claim fails because the Estate is barred from recovering anything due to Comenout's unlawful occupancy of the parcel without a lease approved by the Bureau of Indian Affairs. *See* 25 C.F.R. pt. 162; *see also* SER 27. As the Estate did not and does not now have standing to assert its counterclaims against the Nation, the claims were properly dismissed by the District Court.

D. The District Court Lacked Subject Matter Jurisdiction Over the Counterclaims.

The Estate's Counterclaims were properly dismissed for the additional reason that they did not state a federal question to allow the District Court to exercise subject matter jurisdiction over the claims under 28 U.S.C. § 1331. The Estate bears the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because the Estate's counterclaims and proposed counterclaims did not arise out of the same transaction or occurrence as the Nation's claims, they were permissive counterclaims under Fed. R. Civ. P. 13. The Estate cannot meet its burden to establish jurisdiction for its permissive counterclaims.

The Estate's original counterclaims as asserted in 2010 were as follows: (1) a declaration that the Nation's Tobacco Code was not violated; (2) lost profits and damages resulting from an alleged due process violation arising from the Nation's Tobacco Code; (3) a mandamus order that the Nation issue building permits to the Estate; (4) price fixing under Washington law. ER 11 at 106-12. The Estate's proposed amended counterclaims were as follows: (1) a declaration that the Nation's Tobacco Code was not violated (ER 15 at 158); (2) a declaration that the Nation's actions relating to the alleged absence of a pre-denial hearing "violate the law" (*id*. at 159); (3) an order that the Nation issue building permits under Tribal law to the Estate (*id*.); (4) price fixing under Washington law (*id*. at

161); and (5) trespass and tortious interference with right to contract (*id*. at 162-68). On the face of both the original and the proposed amended counterclaims, none allege a single cause of action "arising under the Constitution, laws, or treaties of the United States," as required by 28 U.S.C. § 1331. Federal jurisdiction typically exists only when a federal question is presented on the face of a properly pleaded counterclaim. *Balcorta v. Twentieth Century-Fox Film Corp*., 208 F.3d 1102, 1106 (9th Cir. 2000) (internal citation omitted).

Having failed to plead any counterclaim or proposed counterclaim where a federal question existed, the Estate failed to establish subject matter jurisdiction of the District Court to hear its claims. For that reason, the counterclaims were properly dismissed as they cannot be heard by the District Court.

III. The District Court Properly Denied the Estate's Motion to Amend Its Answer and Counterclaims.

Denying the Estate's motion to amend its answer and counterclaims, the District Court held that Estate's motion was moot following its decision to dismiss the Nation's suit and the Estate's counterclaims. As the Court noted, even if the Estate's motion had not been moot, the proposed amendments would have been futile in light of the Nations' sovereign immunity. ER 5 at 39. In addition to the grounds of mootness and futility, the motion to amend was properly dismissed

because it was untimely and made in bad faith.[6] This Court should therefore affirm the District Court's denial of Appellants' motion to amend its answer and counterclaims.

A. The Motion for Leave to Amend Was Moot Upon the Grant of Dismissal.

Mootness "can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (citing *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999)). If the only remedy available to a party would not redress any injury it claims to suffer, the case becomes moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 179 (2000). Mootness is a jurisdictional issue; courts have no jurisdiction to hear a case that is moot, because no actual or live controversy exists. *Foster*, 347 F.3d at 745.

The District Court's primary reason for denying the Estate's motion to amend its Answer and Counterclaims is that the motion was moot as soon as the Court granted the Nation's motion to voluntarily dismiss its claims and the Estate's

[6] The Court may affirm on any basis in the record. *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007) (the court of appeals "'may affirm on any basis supported by the record, whether or not relied upon by the district court.'").

counterclaims. ER 5 at 39. If filed prior to the District Court's Order, the Estate's motion for leave to amend might have at least in theory redressed the insufficiency of its counterclaims; however, that remedy was no longer available following voluntary dismissal of the claims. Thus, because the Court's Order concluded the case in its entirety by granting the Nation's motion to dismiss in full, the Court did not need to consider the Estate's motion for leave to amend. The Estate's motion for leave to amend was correctly denied as moot.

B. The Proposed Amendment Was Futile.

The District Court correctly held that, even if the Estate's motion was not moot, the proposed amendments would be futile in light of the Nation's sovereign immunity. ER 5 at 39. A proposed amendment is futile "only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *See also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (holding proposed amendment to add United States futile because of unwaived immunity).

The Estate's proposed amendments failed to address the legal deficiencies of its counterclaims, namely: the Nation's sovereign immunity from suit, the failure to state a claim on which relief could be granted, the Estate's lack of standing, and the lack of federal subject matter jurisdiction. Perhaps most important, there was

no amendment that could have changed the fact that the Estate cannot counterclaim against the Nation because of the Nation's unwaived sovereign immunity. *See* sec. II.A *supra*. The proposed amendment is futile because the Estate's counterclaims lack an independent ground of federal jurisdiction. As there was no independent basis conferring subject matter jurisdiction to the District Court over the Estate's counterclaims, the Estate's counterclaims were properly dismissed and the denial of leave to amend should be affirmed.

C. The Proposed Amendment Was Untimely

Leave to amend was also properly denied because the proposed amendment was untimely. Prior to the Nation's voluntary dismissal, trial was set to begin in this case on May 12, 2015. The Estate's motion to amend was filed on February 26, 2015, over two weeks after the deadline for dispositive motions. SER 24. These facts alone support the District Court's denial of the requested leave to amend. *DZ BANK v. Choice Cash Advance, LLC*, 918 F. Supp. 2d 1156, 1170 (W.D. Wash. 2013) (denying leave to amend answer to add counterclaims because waiting "to amend on the brink of trial and after the deadline for filing dispositive motions . . . weigh against granting the motion to amend.").

Where the deadline for amendments to pleadings has passed, the Court must determine whether there is good cause for amending the scheduling order before deciding whether amendment of the counterclaim is proper under Rule 15. *See,*

e.g., *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 948 (8th Cir. 2012) (concluding that the primary measure of good cause is the movant's diligence in seeking leave to amend). No such showing was made by the Estate.

The Estate did not clearly indicate any cause to allow for an amendment more than eight months past the deadline for such amendments. Perhaps most troubling, the proposed amendments appeared to be little more than a tactic by the Estate to use the counterclaims in this action to re-litigate issues already decided by the same District Court less than three weeks earlier in *Comenout v. Whitener*, No. 15-5054 (BHS), a case that is now on appeal to this Court; namely, the authority of the Nation to govern the property at issue, illegal trespass, and the validity of the federally-approved Business Lease. This was an abuse of Rule 15; amendment of pleadings is not designed to effectuate an appeal of a different case or to end-run the doctrine of tribal sovereign immunity.

Moreover, the Estate lacked standing to assert claims on behalf of another Appellant, Robert Comenout, Sr., and, in any event, was estopped from either collaterally attacking the Court's March 3, 2015 order dismissing the claims in *Comenout v. Whitener* or seeking to litigate questions of the validity of the Business Lease, the review of which was pending before Regional Director of the Bureau of Indian Affairs. ER 15 at 163-67. As there was no good cause to permit

an untimely amendment to the Estate's answer and counterclaims, the Estate's motion to amend was properly denied.

D. The Proposed Amendment Was Made in Bad Faith

Finally, leave to amend was properly denied because the proposed amendment was made in bad faith. The Estate made clear to the District Court that the only reason it wanted its counterclaims to remain viable was because "Comenout's Estate has ongoing litigation and needs a determination on the issue." SER 23 at 217. This statement clearly indicates that the counterclaims were not asserted for purposes of this litigation, but for some other pending litigation to which the Nation is not a party. Again, this is not the purpose that Rule 15 is meant to serve.

One of the primary reasons the Estate advanced for why it should be granted leave to amend—that "the amendments encompass subsequent events"—is the very same reason it argued against the Nation's motion to amend earlier in this case. *Compare* SER 25 at 249 *with* SER 22 at 211 (arguing that the Nations' motion to amend should be denied under Rule 15 because "Appellant has not and will not consent to the amendment and objects to the amendment for the reason that it attempts to allege subsequent conduct after the original pleading."). The Estate cannot both advance and oppose the same argument where convenient for itself, and its motion to amend was properly denied.

Denial of the requested leave should be affirmed, and the case dismissed in its entirety, because the proposed amendments were futile, untimely, and made in bad faith.

CONCLUSION

For all of the foregoing reasons, the Nation respectfully requests that the Ninth Circuit affirm the District Court's dismissal of Appellant's counterclaims and the denial of Appellant's motion for leave to file amended counterclaims.

RESPECTFULLY SUBMITTED this 7th day of October, 2015.

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STATEMENT OF RELATED CASES

This case is related to Robert R. Comenout, Sr. and Mary Linda Pearson (Plaintiff-Appellant) v. Robert W. Whitener, Jr. (Defendant-Appellee), Ninth Cir. Appeal Nos. 15-35261 and 15-35268 (consolidated). The appeal is currently pending before this Court.

DATED this 7th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 and is 14-point font, Times New Roman.

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