Consolidated Appeals No.'s 15-35263; and 15-35267

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUINAULT INDIAN NATION;

Plaintiff-Appellee,

v.

MARY LINDA PEARSON AND ROBERT R. COMENOUT SR.;

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, TACOMA, #3:10-cv-05345-BHS - THE HONORABLE BENJAMIN H. SETTLE

JOINT OPENING BRIEF OF APPELLANTS

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STATEMENT OF JOINDER

Pursuant to Ninth Circuit Rule 28-4, Appellants, Mary Linda Pearson and Robert R. Comenout Sr., being all the parties Appellant, thereby join in this single Brief. A motion was filed on June 25, 2015, and it was granted on June 26, 2015. An enlargement of 5 pages or 1,400 words has not been utilized. The

time now 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 the Quinault Indian Nation, a recognized Indian tribe. Therefore, the District Court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1353, 1362 and 1331 and *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1281 (10th Cir. 2010). The appeal is from the Court's Order granting Plaintiff's motions to dismiss and denying as moot the Motion to file First Amended Supplemental Answer and Counterclaim. Excerpt of Record 5 (hereafter "ER").

The Defendants-Counterclaimants have independent jurisdiction to file counterclaims pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353 conferring federal court jurisdiction to allotment owners involving the right to use the allotment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The appeal is from the judgment entered on March 23, 2015, ER 4, and Order Granting Motion to Dismiss on March 23, 2015, ER 5. The

Notices of Appeal, ER 1 and 2, were timely filed on April 5, 2015, and April 7, 2015. This single opening brief, by multiple appellant parties, is due on August 5, 2015.

STATEMENT OF ISSUES PRESENTED

Whether the Counterclaim filed December 30, 2010, ER 11, was subject to dismissal under Fed.R.Civ.P. 41(a)(2).

Who has the burden of proof or persuasion is also an issue.

Whether the allotment owners' Motion to file the First Amended and Supplemental Counterclaim lodged on February 26, 2015, should have been granted.

Whether sovereign immunity to a counterclaim is waived by an Indian tribe if a declaratory judgment is requested by the counterclaim.

Whether the Counterclaim filed December 30, 2010, sought recoupment.

Whether the filing of a supplemental counterclaim only required "some relationship" to the original counterclaim, not the "same transaction or occurrence" standard.

Whether the Quinault Indian Nation had any governmental jurisdiction of the allotment.

Whether the Tax Injunction Act applies may be an issue.

Whether the Quinault Indian Nation had any sovereign immunity as a prospective off reservation Lessee.

Whether the Quinault Indian Nation seeking to go into the business of selling commercial cigarettes off reservation at retail has any sovereign immunity against state seizure of cigarette shipments.

Whether an Indian tribe has any sovereign immunity from declaratory judgment relief.

STATEMENT OF THE CASE

The Quinault Indian Nation is a federally recognized tribe. ER 6, p. 1. Edward A. Comenout Jr., who died June 4, 2010, was an enrolled member of the Quinault Indian Nation and a majority owner of a convenience store that sold commercial cigarettes. ER 6, pp. 2, 3, ER 7. Plaintiff, Quinault Indian Nation, brought suit for damages against Edward A. Comenout Jr., Robert R. Comenout Sr.,

and others claiming fraud by Defendants for the failure to pay cigarette taxes to the Quinault Nation or the state of Washington on sales made by the Defendants at retail. ER 6. The other Defendants were never served and a motion to join was denied without prejudice and never resubmitted. ER 8, ER 9, ER 10, p. 7. The Estate of Edward A. Comenout Jr., on December 30, 2010, counterclaimed against the Quinault Nation seeking a Declaratory Judgment and lost profits from the Nation's interference in the retail convenience store business that sold commercial cigarettes at retail. ER 11. A First Amended and Supplemental Counterclaim was lodged by the Estate of Edward A. Comenout Jr. on February 26, 2015, repeating the interference and adding a claim for abuse of process occurring after the facts of the original complaint. ER 11.

On February 5, 2015, the Nation moved to dismiss the case and both counterclaims pursuant to Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 41. ER 12. In the Motion to Dismiss, counsel for the Quinault Nation states at page 3:

The Nation has maintained all along that its goal was to

> stop the illegal sales of untaxed cigarettes at the Indian Country Store. The Nation preferred the lease arrangement over litigation from the outset of this case. The Nation made it clear that once a lease for the property was obtained, it would dismiss the case.

In a footnote at 3, the statement is made "Should the lease somehow be ruled invalid, the Nation may be faced with instituting suit." ER 12, p. 3, footnote 2.

The Nation's Reply to Response to Plaintiff's Motion to Dismiss (ER 13, page 6) stating that the property has been leased notes an alternative that if the lease is declared void it will take additional action.

In its conclusion to the Motion, the Quinault Nation states:

> Based on the foregoing, the Nation's motions to dismiss the counterclaims with prejudice and its complaint without prejudice should be granted. The Nation is willing to dismiss its complaint in view of the lease that has been approved by the Bureau of Indian Affairs. Even though the lease is enforceable under federal law at this time, defendant Robert Comenout Sr. and one Edward Comenout are refusing to surrender possession. However, despite that difficulty, the Nation is going to await the outcome of the appeal of the lease pending before the Bureau of Indian Affairs. It is requesting the case be dismissed without prejudice because if the lease is declared void, it will have to employ whatever legal

> means are available to it as the state and the federal governments have taken no action to stop the unlawful sale of untaxed cigarettes at the Indian Country Store that continue to this day.

The District Court (ER 5) held that "the Estate fails to establish that its counterclaims are claims for recoupment," and granted the Quinault Nation's Voluntary Motion to Dismiss the Suit and denied the Motion to Amend the Counterclaims as moot. ER 5.

STATEMENT OF FACTS

Facts Common to Both Appellants

The undisputed facts of the appeal are that the Quinault Indian Nation is a federally recognized Indian tribe, ER 6, that Edward A. Comenout Jr. was a Quinault tribal member and died June 4, 2010; ER 10, ER 11; that he was a majority owner of a site in Puyallup, Washington located approximately 120 miles from the Quinault Indian Reservation. ER 11. The Puyallup site is a restricted trust allotment officially designated by the Bureau of Indian Affairs as Public Domain Allotment 130-1027. The Puyallup site is not on any Indian reservation. ER 6. The property adjoins River Road, a busy highway between Puyallup and Tacoma. It was

acquired from Indian Trust funds in 1926 by Edward A. Comenout Jr.'s father, Edward A. Comenout Sr., who died many years ago. ER 11.

Robert Comenout Sr. is the brother of Edward A. Comenout Jr., and lives and works on the property at Puyallup. ER 6. All of the activity and alleged activity in this case is on the Puyallup property that has both a convenience store that sells to the public, and residential living quarters. ER 18.

The Quinault Nation's Complaint, ER 6, dated May 14, 2010, is titled "Complaint for Damages" (ER 6, page 2, dated May 14, 2010) contains facts specifically "pertaining to Edward A. Comenout." The nucleus of all the facts are the allegations that Edward A. Comenout Jr. and Robert R. Comenout Sr. sold commercial cigarettes without paying state or Quinault tribe cigarette excise taxes. The alleged failure to pay cigarette excise taxes is repeated throughout the 12 page Complaint. The Plaintiff, Quinault Nation, alleges that it has been "defrauded" of tax revenue and wants thirty million dollars in damages for the alleged fraud,

(page 12) including triple damages for RICO racketeering. The Estate's Answer and Counterclaim (ER 11) filed December 30, 2010, denies that any cigarette taxes are owed (pages 3 & 6). It requests a declaratory judgment that the Estate of Edward Comenout Jr. did not violate the cigarette tax law (page13) and seeks damages in the amount of "lost profits and other damages proximately caused by Plaintiff's actions." (Page 14). The lodged First Amended Supplemental Answer and Counterclaim, ER 15, repeats the facts of the filed counterclaim and seeks damages for abuse of process, price fixing and alleges that the Quinault Nation violated the civil RICO statutes. (Pages 18-25). Damages for these alleged violations are also sought by Edward A. Comenout's Estate against Plaintiff Quinault Nation (page 25). There is no dispute that both Edward A. Comenout Jr., while he was alive, sold commercial cigarettes at the Puyallup location that was majority owned by Edward A. Comenout Jr. during his lifetime. All the controversy arises from whether Edward A. Comenout Jr. and Robert R. Comenout Sr. were legally obligated to pay cigarette excise taxes on sales to non Indians and

if so, to what government. Edward A. Comenout Jr. was a Quinault Indian Nation tribal member. The Quinault Nation complains that since 1971, he sold unstamped cigarettes and, until his death on June 4, 2010, continued to sell untaxed cigarettes to date on the public domain allotment majority owned by him at 908/920 River Road, Puyallup, Washington.

The Complaint (ER 6) at pages 2 through 4 reviews actions by and against Edward Comenout alleging that he had agreed to pay Washington's cigarette taxes. At page 6 the Complaint alleges that Edward A. Comenout and Robert R. Comenout Sr. engaged in a RICO enterprise; "That enterprise's purpose and function was to defraud the Nation and the state of Washington of all taxes associated with and due on the sale of cigarettes and other tobacco products," page 6. "The Nation has been damaged in its business property by reason of violations of 18 U.S.C. §§ 1962 (c) and (d) by Edward A. Comenout out of $30,000,000" (page 9-10). The entire complaint alleges damages by fraud and seeks monetary damages. It also seeks an order to pay "all applicable taxes due the Nation on

their sales of cigarettes" (page 12). The second cause of action sought triple damages for costs of (sic) bringing the action (ER 6, page 9). The fifth cause of action was directly against Edward A. Comenout. It alleged a 1977 agreement by Edward A. Comenout with the state of Washington and contended that the tribe "is an assignee of the contract" with the state and the breach caused thirty million dollars damage to the tribe.

The Estate of Edward Comenout's Answer and Counterclaim filed December 30, 2010, ER 11, denied the allegations of RICO and alleged by first claim for relief that Edward Comenout did not violate any tobacco law. Edward A. Comenout's second claim for relief against the Quinault Nation sought "lost profits and other damages" proximately caused by Plaintiff's actions. The first claim sought relief for anti trust and price fixing between the state and tribe allowing agreement to fix "the wholesale and retail price of cigarettes by virtue of the compact."

The Answer and Counterclaim (ER 11) at page 3 admits the ownership of Edward A. Comenout, and at page 9, that no

recoveries can be made by the Quinault Nation for the state of Washington and at page 10, "Plaintiff loses all sovereign immunity." The Counterclaim also seeks money damages, page 13 and 15. It alleges anti-trust competition. (ER 11, p.15) The lodged First Amended and Supplemental Answer (ER 15, page 6) denies that any state cigarette tax is mandated on sales at the Puyallup site, citing *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087-8 (9th Cir. 2011), a case that holds that Indian sellers are not required to collect Washington State cigarette tax. It is their economic choice. It denies that the Quinault Nation has jurisdiction (page 11). Damages are requested including "threatened illegal trespass", page 17; for price fixing (page 18) and abuse of process (page 22, 25).

The Estate's First Amended Supplemental Answer and Counterclaim, ER 15, lodged February 26, 2015, sought to substitute the earlier counterclaim. It realleged the first, second, third and fourth claims that were the counterclaims in the December 30, 2010 Counterclaim. It added a fifth claim for

damages for conspiracy to tortuously interfere with the operation of the store at Puyallup 908/920 River Road. It alleged 2014 facts not in existence in 2010. It also alleged the death of Edward A. Comenout on June 4, 2010, and the fact that the Bureau of Indian Affairs probate of Edward A. Comenout's trust Estate did not appoint a Personal Representative (ER 15, page 20). The prayer sought a declaratory judgment holding that Edward A. Comenout did not violate state of Washington cigarette tax laws and damages for the Quinault Nation's tortuous interference with Edward A. Comenout Jr.'s use of his public domain allotment.

Specific Facts pertaining to Edward A. Comenout Jr. and his estate.

Edward A. Comenout Jr. died June 4, 2010. ER 7. Until his death, he resided on the public domain allotment . He owned over one half interest in the allotment. The Estate also seeks damages that occurred after the death of Edward A. Comenout Jr. First Amended Supplemental Counterclaim, ER 15, February 26, 2015.

Specific Facts pertaining to Robert R. Comenout Sr.

The Complaint filed May 14, 2010, (ER 6, page 5), alleges that

Robert Comenout is one of the owners of the public domain allotment. The Quinault Nation's Motion to Dismiss filed February 5, 2015, (ER 12, page 6), states that they (the Comenouts) "lacked a legal right to possession." These 2015 allegations contradict the Quinault Nation's own statement. Raymond G. Dodge Jr., counsel for the Quinault Nation, on April 11, 2014 (ER 16, page 1, 3), verifies that Robert R. Comenout Sr. is an allottee of the property sought to be leased. Attached to the Affidavit, page 6 of 11, is an E-Mail by Mr. Dodge stating "I was hoping to hear whether Mr. Comenout, Sr. had signed the lease." Plaintiff's Response to Defendant's Motion to Strike, dated May 5, 2014, ER 17, page 3, states "Defendants' signature on the lease may not even be required as the parties have over sixty percent (60%) of the owner/allottees' signatures." The Response to the Motion to File First Amended Supplemental Counterclaim, ER 17, filed March 16, 2015, at page 4, argues that "Mr. Comenout Sr.'s lawyer "questions" the authority to govern the property."

SUMMARY OF THE ARGUMENT

The Quinault Nation, as the sole Plaintiff, brought suit for damages against Edward A. Comenout Jr. (then alive), and Robert R. Comenout Sr. based on failure to collect cigarette taxes owed to the state of Washington or the Quinault Nation. By bringing suit, they waived any immunity to a related counterclaim. The Comenout's Answer denied that they owed any taxes to any government as the allotment was Indian country. This Court sustained the Comenout's argument in *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011) that enrolled Indians selling in Indian country are not "required" to collect state cigarette taxes. "…the retailer would be shielded from civil and criminal liability" from collecting state cigarette tax. *Id.* at 1088. The Quinault Nation has never deigned to govern the site. They do not have any authority as an Indian tribe to govern the allotment. They cannot assert a cigarette tax on a restricted allotment created by the Bureau of Indian Affairs and governed by the BIA. 25 U.S.C. §§ 465, 348. The restrictions have

never been removed. Until removed "incumbrance or taxation" is prevented. 25 U.S.C. § 349, 28 U.S.C. § 1360(b). All the controversy emanates from the issue of collection of cigarette taxes on sales to non Indians, as the Comenouts are enrolled Indians and cannot be taxed when in Indian Country. When viewed correctly, recoupment is clearly present. Denying the filed counterclaim and the lodged First Amended and Supplemental Counterclaim as moot is contrary to well settled law, and the fact that as owners of the allotment the Comenouts have independent federal jurisdiction to bring suit. They can repel invaders of their right to protect their allotment. 25 U.S.C. § 345 is a complete grant of federal jurisdiction. 25 U.S.C. § 1a gives the BIA exclusive power and jurisdiction over the allotment's owners and use of the property.

The Quinault Nation tried to capture the allotment by a spurious long-term lease. They tried to use the court system to accomplish what only the BIA had jurisdiction to attempt. The Quinault Nation has no sovereign immunity where a declaratory judgment is sought.

ARGUMENT

A. Standard of Review.

The Appellants do not appeal the Quinault Nation's voluntary dismissal of its complaint. This appeal seeks reversal of the Trial Court's grant of Motion to Dismiss Counterclaims and denial of Defendant Appellant's Motion to File First Amended Answer and Counterclaim, (ER 5), by upholding a claim of sovereign immunity.

The issue of tribal sovereign immunity is reviewable de novo. *Pistor v. Garcia*, __F.3d__, 2015 WL 3953448 at *3. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007).

Dismissal based on sovereign immunity to suit is also reviewed de novo. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004). Tribal immunity outside Indian Country is a matter of federal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); an Indian tribe is subject to suit when it has waived its sovereign immunity. *Id.* at 754.

Waiver of tribal immunity by commencing suit is a question of law, reviewable de novo. *Berrey v. Asarco,* 439 F.3d 636, 642 (10th Cir. 2006), *U.S. v. State of Oregon,* 657 F.2d 1009 (9th Cir. 1981).

B. The allegations of fact in the pleadings are presumed true and construed most favorable to the Comenouts.

For purpose of the motion, all the factual allegations are presumed true. The pleadings are to be construed most favorable to the nonmoving party. *Taylor v. Yee,* 780 F.3d 928, 935 (9th Cir. 2015). Dismissal is granted only if no relief could be granted under any set of facts. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). All factual allegations contained in the counterclaim must be accepted as true. *Id.* at 508, fn. 1.

Therefore, the District Court's Order (ER 5) indicating the burden on the Estate of Edward A. Comenout Jr. to establish recoupment is contrary to the pleading rule as the pleadings are to be construed in favor of the Estate, the non moving party.

C. The burden to prove tribal sovereign immunity to the counterclaim is on the Quinault Nation.

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).

The burden of proving an exemption rests on the one that claims the benefit from the exemption. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001). This rule has been applied when the issue is tribal sovereign immunity. *F.T.C. v. AMG Services, Inc.*, 2013 WL 7870795 at *15 (D.C. Nev. 2013). *Javierre v. Central Altagracia*, 217 U.S. 502, 507, 30 S.Ct. 598, 54 L.Ed. 859 (1910), "when a proviso like this carves an exception out of the body of the statute on contrast, those who set up such exception must prove it," *id.* at 508. "It is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey v. U.S.*, 260 U.S. 353, 43 S.Ct. 132, 67 L.Ed. 301 (1922). The Plaintiff tribe had jurisdiction to file the case and now claims immunity to a counterclaim in which the Counterclaimants had independent federal jurisdiction. 25 U.S.C.

§ 345; 28 U.S.C. § 1353. The Comenouts are owners of restricted trust allotments and the use of the allotments is at issue. 28 U.S.C. § 1353, 25 U.S.C. § 345, 25 U.S.C. § 465 and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, ____U.S.___, 132 S.Ct. 2199, 2012, 183 L.Ed.2d 211 (2012) confer jurisdiction and standing to independently try the issues in the counterclaims. The burden is on the Plaintiff to prove the exception. The Counter-claimant's answers and counterclaims prove that the issue is all about selling cigarettes and whether any tribal or state tax is due on the sale. This paramount federal issue is well established by the pleadings in this case, ER 6, 10, 11, 13, 15, 16 and throughout. Even a casual reading of the Complaint and the Counterclaim would support the conclusion that the Quinault Nation sought damages for fraud and RICO violations from Edward Comenout Jr.'s alleged cigarette sales on his property without paying taxes to the Quinault Nation or the state of Washington. Edward A. Comenout Jr.'s estate counterclaimed stating it owed no taxes, that the Quinault Nation had no jurisdiction of the Puyallup site and that the Quinault

Nation also violated RICO laws and was interfering with Comenout's business as a competitor. All the controversy centers around Comenout's sale of cigarettes without tax. Until the restrictions are removed, there is a restriction against "sale, incumbrance or taxation." 25 U.S.C. § 349. Comenout has a clear right to go to trial on these issues. All of the claims of the Quinault Nation and the counterclaims arise from the retail business on the site and if taxes are to be collected from non Indian sales and be paid to the tribe or state. The aggregate facts are identical as the Quinault Nation brought suit to collect cigarette taxes it contended were owed to the Quinault Nation. Since the Quinault tribe brought the suit, there was no question of jurisdiction of its complaint. The general rule is that a tribe waives its immunity by commencing suit. *U.S. v. State of Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981). "Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit." *Id.* at 1014. Here, the Quinault Nation is relying on an exception to waiver by arguing that the counterclaim did not seek recoupment. The burden shifted to the Quinault Nation to

prove lack of recoupment as it defends on this exception.

The decision to refuse to allow the lodged Supplemental Answer and Counterclaim rests on a lesser burden.

Review of a Fed.R.Civ.P. 41(a)(2) motion granting dismissal is reviewed for abuse of discretion. *Sams v. Beech Aircraft Corp.,* 625 F.2d 273, 277 (9th Cir. 1980). The district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. *Westlands Water Dist. v. U.S.,* 100 F.3d 94, 96 (9th Cir. 1996). If a defendant files a counterclaim before the motion to dismiss was filed, the de novo standard of review is to determine whether the court made a legal error in dismissing the counterclaim. *Walter Kidde Portable Equipment, Inc. v. Universal Sec. Instruments, Inc.,* 479 F.3d 1330, 1336 (Fed.Cir. 2007).

The determination requires "some relationship between the newly alleged action and the subject matter of the original action." The Complaint, ER 6, page 5, alleges that Robert R. Comenout Sr. was charged by the state of Washington with unlawful possession of cigarettes and taking control of property belonging to another.

The Complaint, ER 6, page 5, alleges that Robert R. Comenout Sr. is in charge of cigarette sales. See also, the Quinault Nation's Motion to Dismiss, ER 12, page 6. The affidavit of counsel to the Quinault Nation, ER 16, states that counsel for the Quinault was hoping to get Robert R. Comenout's signature. The reply to Defendant Estate of Edward A. Comenout Jr.'s response, ER 13, page 6, states that the Quinault Nation will dismiss the case if Robert R. Comenout Sr. will sign it and surrender possession.

The lodged Supplemental Answer and Counterclaim, ER 15, pages 20-25, alleges subsequent conduct since the Complaint was filed on May 14, 2010. It denies illegality of selling untaxed cigarettes by the Comenouts and alleges an illegal scheme of leasing "to tortiously interfere with the operation of the store" (page 22) and threatens to alter or demolish the buildings at the site, page 24. Damages and a declaratory judgment are sought (page 25) for abuse of process and tortious interference (page 19).

The court's order, ER 5, page 1, denied the supplemental pleading as moot. It notes that a declaratory judgment is sought,

page 3. The reason of denial was that the counterclaims "do not arise out of the same transaction or occurrence." The holding was that the lodged pleading was moot. The Order (page 4) recognizes that if the lodged counterclaims "remain pending for independent adjudication", the counterclaims cannot be dismissed. *Donius v. Mazzetti,* 2010 WL 3768363 at *3 (D.C. Cal. 2010) holds that exceeding tribal authority waives immunity. *Burlington Northern & Santa Fe Railway v. Vaughn,* 509 F.3d 1085 (9th Cir. 2007) applies as the declaratory judgment was sought to determine whether the Indian tribe could tax the railroad. Like this case, the validity of federal law was at issue and ongoing conduct in the form of tax assessment was involved. The court held that the declaratory judgment (*id.* at 1088) and other remedies sought could be determined stating at 1092:

> In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether BNSF has *alleged* an ongoing violation of federal law and seeks prospective relief. *See Verizon Md., Inc.,* 535 U.S. at 645-46, 122 S.Ct. 1753. Clearly it has done so. BNSF's complaint states that "Defendants have acted, have threatened to

> act, or may act under the purported authority of the Tribe, to the injury of BNSF and in violation of federal law and in excess of federal limitations placed on the power of the Defendants" by seeking to enforce an unauthorized tax against BNSF that the Tribe lacks the jurisdiction to impose. Compl. ¶ 5. BNSF seeks a declaration that the tax is invalid as applied to its right-of-way and a permanent injunction prohibiting the tribal officials from enforcing the tax against it. Compl. ¶ 1. This is clearly the type of suit that is permissible under the doctrine of *Ex Parte Young.* (Underlining added).

In *Town of Browning v. Sharp,* 2015 WL 1246543 (D.C. Mont. 2015), a suit requesting prospective injunctive relief was not prevented by sovereign immunity.

The standard of "same transaction or occurrence," when applied to the supplemental pleading, was wrong. Only "some relationship" is necessary.

Here, the Quinault Nation states that if the lease is not upheld, it will "employ whatever legal means are available. . .to stop the unlawful sale of untaxed cigarettes." ER 13, page 6.

Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) upheld a decision that Fed.R.Civ.P. 15(d) allowed the supplemental pleading. The case rejected the "same transaction or occurrence" test, *id.* at 474. "While some relationship must exist between the newly alleged

matters and the subject of the original action, they need not arise out of the same transaction." *Ibid.* at 474. In *Volpe*, the same "concern", i.e., the availability of affordable housing, was the issue. *Ibid.* at 474. Similar to the allegation of the Quinault Nation, *Keith* ruled to retain jurisdiction as there was a relationship between the new matters and the subject of the original action. "The rule is a tool of judicial economy and convenience. ...its use is therefore favored. In this case, Hawthorne first challenges the supplemental complaint as an abuse of discretion because it raises new claims. The clear weight of authority, however, in both cases and the commentary, permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy." *Id.* at 473.

Cota v. Maxwell-Jolly (unreported), 2011 WL 2182724 (N.D.Cal. 2011) follows *Keith* on the basis that the original dispute has not been resolved and remains ongoing. *5. All the issues could be resolved here as an injunction was at issue.

In *Cabrera v. City of Huntington Park,* 159 F.3d 374 (9th Cir.

1998), a malicious prosecution claim arose after the original complaint was pending. The court reversed dismissal and sent the case back for trial relying on *U.S. for Use of Atkins v. Reiten,* 313 F.2d 673, 675 (9th Cir. 1963) stating: "This interpretation of Rule 15(d) is supported by the general purpose of the Rules to minimize technical obstacles to a determination of the controversy on its merits. . .to require appellant to commence a new and separate action in these circumstances would have been to insist upon an empty formalism." *Id.* at 675.

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1982) involved the same issue raised by the Comenouts, monopolization and price fixing by a competitor. ER 11, pages 15, 16. ER 15, pp. 17-19. The *Inglis* court allowed the supplemental pleading for injunction. "They alleged a continuing course of conduct and contained prayers for injunctive relief as well as damages." *Id.* at 1050. "The supplemental complaint merely restated the allegations of the initial pleadings and further alleged only that the claimed violations had continued." *Id.* at 1058.

Means v. Dunedin Apartments, 2010 WL 1490494 (D.C. Indiana 2010) allowed amendments to support a claim of retaliation against a tenant. When an injunction was sought and post suit conduct constituting some linkage or relationship to the original complaint, the supplemental pleading is allowed. *Mitchell v. Clayton,* 2014 WL 186026 at *1 (D.C. Mich. 2014). *McMillen v. Las Vegas Tp. Constable's Office,* 2015 WL 403563 at *5 (D.C. Nevada 2015) allowed an amendment to allege abuse of process.

Here, the continuous and seminal issue was whether or not the Comenouts were required to pay state or Quinault cigarette tax. The Quinault tribe alleged that it will continue in their efforts. The Comenouts allege abuse of process by the Quinault Nations five year effort to force the Comenouts to lease the business for 50 years to the Quinault Nation. They are trying to use the BIA's force to take the Comenout's property and eliminate a competitor. There is no dispute as to cigarette sales for the reason that the Quinault tribe wants to sell cigarettes at the same site. They can make more money than the Comenouts, as the Nation is cozy with the state tax

authorities. The cigarette tax controversy is ongoing and required the Supplemental Complaint including the resolution of the declaratory judgment that the Quinault's tobacco law was not violated. Clearly, the trial court used the wrong test to dismiss the supplemental pleading. Only some relationship is required.

The Comenouts have independent standing pursuant to 28 U.S.C. § 1353 and 25 U.S.C. § 345 as their rights to the allotment were at issue.

Indian owners of a restricted trust allotment have a right to bring suit by Indian allotees for declaratory judgment that were entitled to income from their allotments. 25 U.S.C. § 345 is construed to say for "the protection of the interests and rights of the Indian in his allotment or patent after he has acquired it." *U.S. v. Pierce,* 235 F.2d 885, 889 (9th Cir. 1956). See also *Scholder v. U.S.,* 428 F.2d 1123, 1129 (9th Cir. 1970).

The lease was within the jurisdiction of the BIA, 25 U.S.C. § 2. The BIA appeal would lie with the U.S. District Court. The activity of the Quinault Nation was not on its 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 ...this power to exclude, however, does not extend to actions taken beyond the confines of the reservation." *Boisclair v. Superior Court,* 801 P.2d 305, 316 (S.C. Cal. 1990). Tortious acts outside of reservation boundaries are not entitled to sovereign immunity. *Ibid.* at 316. The Comenouts have independent jurisdiction and there is no risk of a money judgment when a declaratory judgment is sought. 28 U.S.C. § 2201 allows any interrelated party a declaration of rights "whether or not further relief is or could be sought." The Quinault Indian Nation is acting off reservation in an attempt to enter into a commercial lease as a lessee. *American Property Management v. Superior Court,* 141 Cal.Rptr.3d 802 (Ct.App. 2012) and *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.,* 968 N.Y.S.2d 271 (A.D.N.Y. 2013) both support the principle of lack of sovereign immunity of an Indian tribe. The tribes were acting off reservation where they have no immunity to protect tribal assets. See e.g. *Keweenaw Bay Indian Community v. Rising,* 477 F.3d 881, 894-95 (6th Cir. 2007) where a declaratory judgment was sought on the

legality of state cigarette tax. The Court held that sovereign immunity did not prevent seizures off reservation. There is no finding that the Quinault Nation is not subject to state cigarette taxes on sales where they have no jurisdiction. They would merely be lessees. The jurisdiction of the BIA, the state of Washington, Pierce county, the Quinault Nation and the city of Puyallup is certainly a subject for declaratory judgment. *Tenneco Oil Company v. Sac and Fox Tribe of Indians,* 725 F.2d 572 (10th Cir. 1984) applies. In *Tenneco,* the Court granted jurisdiction as federal questions about a tribe canceling a lease was involved. The tribal officials named in the suit had no sovereign immunity as the officials acted beyond immunity. The Indian tribe wanted to tax Tenneco's oil leases. The BIA would not rule, but the issue was presented by federal and congressional regulations. The question of whether the tribe had jurisdiction to tax the leases was presented. The court stated: "If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it." *Id.* at 574.

In *Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) noted that states could seize cigarettes off reservation in absence of agreement. It also held that non member sales are taxable. *Id.* at 911, citing *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). The Comenouts assert that they do not have to collect state cigarette taxes. The Amended and Supplemental Complaint had independent federal jurisdiction, was related to the same issue of cigarette taxation and involved an issue where the tribe sought to sell cigarettes outside its reservation. At the least, the declaratory judgment should have been allowed as the pleading by both sides indicate an ongoing dispute of the application of federal law.

D. The Quinault Nation has no governmental authority over the Comenouts on the allotment.

The Quinault Nation's Motion to Dismiss, ER 12, and the Reply of the Quinault Nation states that they may come back into court to stop the Comenouts. On the Reply to Response to Motion to

Dismiss dated February 27, 2015, ER 13, at page 6 fn 2, the Quinault Indian Nation stated that it will not forceably evict the Comenouts. The assumption is made that the Quinault Nation has authority, but it has no governmental authority over the Comenouts or over the property. 25 U.S.C. § 415 delegates approval of leases to the Department of the Interior, Bureau of Indian Affairs. Any lease not approved by the BIA is void. 25 U.S.C. § 348. The BIA can establish restricted allotments. 25 U.S.C. § 465. It has management of allotments. 25 U.S.C. §§ 1a, 2. It has jurisdiction of lease appeals. 25 C.F.R. § 162.5(a). The BIA can remove owners. *Goodwin v. Pacific Regional Director, BIA,* 60 IBIA 46, 2015 WL 1090164 (IBIA 2015); *Brown v. U.S.*, 86 F.3d 1554 (Fed.Cir. 1996). This property is governed by the BIA. 25 U.S.C. § 465; 18 U.S.C. § 1151(c).

The Quinault Nation cannot control the restricted land nor its owners. The BIA is the fiduciary and is in full control.

E. The Tax Injunction Act, 28 U.S.C. § 1341, has no application to this case.

In its reply to Defendant's Response to Motion to Dismiss the

Counterclaim, ER 13, the Quinault Nation argues at page 3 that the claim is barred by the Tax Injunction Act. This argument ignores *Direct Marketing Ass'n. v. Brohl,* 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015) which struck down notice and reporting requirements on non collecting retailers to notify consumers of state tax liability. The case held that the Tax Injunction Act does not apply to notice and reporting of sales. *Id.* at 1132.

Wash.Rev.Code § 82.24.250 requires that notice of transportation be given by non licensed carriers. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078, holds that Indian retailers are not taxable for state cigarette tax. The only issue is tax collection from non Indians. It is an "economic choice left to the Indian retailers." *Id.* at 1087. The legal incidence of Washington's cigarette tax is on the non Indian consumer. *Id.* at 1089. Indians doing business in Indian Country do not have to obtain state tobacco licenses and are not liable for state cigarette tax on purchases. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 480, 96 S.Ct.

1634, 48 L.Ed.2d 96 (1976). The Tax Injunction Act, 28 U.S.C. § 1341, does not apply.

F. The case should not have been dismissed under Fed.R.Civ.P. 41(a)(2); the Comenout's counterclaims could have been independently adjudicated.

The standard of review on Counterclaim for a declaratory judgment is abuse of discretion. *Biotics Research Corp. v. Heckler,* 710 F.2d 1375, 1379 (9th Cir. 1983).

The Quinault Nation's reply to Defendant's Response to Plaintiff's Motion to Dismiss, ER 13, page 5, argues that the Estate does not have standing. The damage occurred during Edward A. Comenout Jr.'s lifetime. Also, the Estate has an interest in buildings on the Public Domain Trust Allotment. 28 U.S.C. § 1353 states: "The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part, of Indian blood or descent, to any allotment of land under any act of congress or treaty." 25 U.S.C. § 345 confers original jurisdiction in federal court if an allotee's rights are involved. Robert R. Comenout, Sr. owned an interest in the allotment and still does. ER 6, pages

2, 3 and 5. The Estate of Edward A. Comenout Jr. is still in probate. ER 14. The action was filed by an Indian tribe. 28 U.S.C. § 1362 applies. The answer was joined. The tribe seeks to take over the property. Indian rights to a congressional allotment are governed by federal law. *Id.* at 1282. 25 U.S.C. § 345 applies. Even a claim of entitlement allows prosecution of a federal suit. Robert R. Comenout Sr. has owned an interest in the allotment long before the facts of the case arose. This is sufficient. An adjoining landowner can object to the use of an allotment established by the BIA under 25 U.S.C. § 465. The Comenouts are owners and parties in interest, hence, clearly have standing. *Nahno-Lopez v. Houser,* 625 F.3d 1279 (10th Cir. 2010) applies. It held that the presence of tribal officials on the allotment gave standing and jurisdiction for a trespass suit by the allotees, including injunction, declaratory relief and damages. The tribal members were sued in their individual capacities. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012).

Fed.R.Civ.P. 41(a)(2) can be granted "only if the counterclaim

can remain pending for independent adjudication." The trial court's order, ER 5, page 4, noted that the Estate's counterclaim must remain pending for independent adjudication, but dismissed the counterclaim as the court dismissed the Comenout's motion to "amend the counterclaim", ER 15, as moot based on sovereign immunity. ER 5, page 7. The Estate's counterclaim requested declaratory relief. ER 10, page 12. The First Amended and Supplemental Answer and Counterclaim also sought a declaratory judgment. ER 11. It is reversible error to dismiss a counterclaim on Plaintiff's Fed.R.Civ.P. motion to dismiss when the counterclaim is pending. *Trico Products Corp. v. Anderson Co.,* 147 F.2d 721 (7th Cir. 1945). "If a counterclaim has been pleaded by a defendant prior to service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." *Id.* at 723. The complaint should have been dismissed but not the counterclaim. The counterclaim sought a declaratory judgment, *id.* at 722.

The court failed to follow the requirements of the rule. Like *Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc.*, 142 F.R.D. 179 (N.D. Ga. 1991), the counterclaim should not have been dismissed. The rule does not "require the dismissal of the counterclaim." *Id.* at 181. *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339 (9th Cir. 1966). The court held that dismissal under Rule 41(a)(2), where the counterclaim requested a declaratory judgment cited the act (28 U.S.C. § 2201), the declaratory judgment relief is for early adjudication. "Without having to wait until his adversary should decide to bring suit, and act in his place in the interim." *Id.* at 342.

Document Generation Corp. v. AllMeds, Inc., 2009 WL 2849076 (S.D. Ill. 2009) upheld a counterclaim for declaratory judgment stating: "The general and well established rule is that a counterclaim for a judicial declaration is an independent adjudication." *Id.* at *2. Dismissal of a counterclaim for unfair competition and interference with business relations was not warranted. *H.R. Technologies, Inc. v. Astechnologies, Inc.*, 275 F.3d

1378, 1386 (Fed. Cir. 2002). A plaintiff cannot dismiss a counterclaim over the defendant's objection to a Rule 41(a)(2) motion to dismiss unless the counterclaim can remain pending for independent adjudication. *Chamfer Engineering, Inc. v. Tapco Intern., Inc.*, 498 F.Supp. 129, 131 (S.D. Tex. 1980).

G. An Indian Tribe has no Sovereign Immunity from Declaratory Judgment Relief.

Cohen's Handbook of Federal Indian Law, § 705[1][a], page 638 (Nell Jessup Newton ed. 2012) states the rule:

> The immunity protects tribal officials acting within the scope of their authority, as well as tribal employees. *Santa Clara Pueblo v. Martinez,* however, suggested that the doctrine of *Ex parte Young* extends to the tribal context allowing suits against tribal officials in their official capacities for declaratory or injunctive relief.

The Comenouts had an interest in an allotment granted by federal law. 25 U.S.C. §§ 345, 349, 465, 25 U.S.C. §§ 334, 335. Indian rights against trespass on their federal allotment are governed by federal law. *Nahno-Lopez v. Houser,* 625 F.3d 1279, 1282 (10th Cir. 2010). "Indeed, a contrary holding would effectively gut the *Ex Parte Young* doctrine. That doctrine permits actions for

prospective non monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune tribe." *Salt River Project Agr. Imp. and Power Dist. v. Lee,* 672 F.3d 1176, 1181 (9th Cir. 2012) also holding that a tribe was not a necessary party. Where injunctive relief was sought, the tribal officials did not have sovereign immunity in a case involving dispute over a lease by a non Indian. *Arizona Public Service Co. v. Aspaas,* 77 F.3d 1128 (9th Cir. 1995). The allegation was made: "that certain Navajo officials violated federal law by acting beyond the scope of their authority." *Id.* at 1134. "Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officials allegedly active in violation of federal law." *Id.* at 1134-5. The suit was for injunctive and declaratory relief. *Id.* at 1131. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir. 2007) also holds that tribal officials sued for prospective relief allegedly acting in violation of federal law where declaratory judgment is sought. Fed.R.Civ.P. 41(a)(2) does not apply for two independent reasons. The

counterclaims could have independently adjudicated as the Comenouts had jurisdiction and declaratory relief was sought. If declaratory relief is sought, sovereign immunity does not apply to tribal officials acting within the scope of their authority if federal law is violated.

H. The Counterclaim by the Estate is not barred by the doctrine of recoupment. It arose from the same set of operative facts.

The lower court's Order granting the Nation's Motion to Dismiss (ER 5, page 6) stated the reasons. The Court held that "The Estate fails to establish that its counterclaims are claims for recoupment." The pleadings themselves proved the recoupment. The facts alleged made Edward A. Comenout a person operating a RICO enterprise (ER 6, page 6), and the retail store was an enterprise that Edward Comenout engaged in, an 18 U.S.C. § 1962 violation. The Nation sued for damages for RICO violations for thirty million dollars. The Quinault Nation's Complaint and the answer admitting operation of Edward A. Comenout's Estate and the counterclaims, all support that the entire controversy was about

Edward A. Comenout's charging or not charging taxes at the operation of his store at 908/920 River Road, Puyallup, Washington. The property was majority owned by him and at all times since 1926 is a public domain Indian restricted allotment located outside existing Indian reservations.

To determine the aggregate core of facts based on the same subject matter "what matters is not the legal theory but the facts." *Mattel, Inc. v. MGA Entertainment, Inc.*, 705 F.3d 1108, 1110 (9th Cir. 2013). To determine whether the claim is one for recoupment, the court only has to determine whether "It arises out of the same subject as the original cause of action and is based on the issues asserted in the complaint." *Cayuga Indian Nation of New York v. Village of Union Springs,* 293 F.Supp.2d 183, 194 (D.C.N.Y. 2003). "Recoupment allows a defendant to deduct from the claim the amount the Plaintiff could otherwise recover *if* the claim arises out of the same transaction or subject matter on which the Plaintiff sued." *In re Terry*, 687 F.3d 961, 963 (8th Cir. 2012). Where, as here, a declaratory judgment is sought on the same issue, i.e.

whether Edward A. Comenout had to pay state of Washington cigarette tax on his public domain allotment retail sales, is especially applicable, *id.* at 194. The Quinault Nation sought ninety million dollars in damages. The counterclaim can proceed to offset the recovery sought. *Round Valley Indian Tribes v. McKay,* 2005 WL 552545 (N.D. Cal. 2005).

The Amended and Supplemental Complaint should not have been dismissed. Fed.R.Civ.P. 15(d) allows supplemental pleadings setting out any transaction occurrence or event that happened after the date of the original pleading. The Complaint was filed on this case on May 14, 2010; the Amended and Supplemental Counterclaim, ER 15, was lodged February 26, 2015. It alleges conduct in 2014 and 2015. ER 15, pages 20, 22. The Plaintiff, Quinault Nation, in its Motion to Dismiss on February 5, 2015, ER 12 page 3 fn.2, states continuing lease activity. It is anticipating future events that have not yet taken place. *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) holds that Fed.R.Civ.P. 15(a) requires amendments to be freely given. *Id.* at 230. Outright

refusal without any justifying reason "is an abuse of discretion." *Id.* at 182. The district court's order in this case merely announced that the counterclaims were moot, but did not give a reason for the conclusion. ER 5. Failure to consider the claims made is reversible error. *Frazier v. Coughlin,* 850 F.2d 129, 130 (2nd Cir. 1988). When a supplemental counterclaim has some relationship to the original action, it must be allowed. It does not even have to be part of the "same transaction or occurrence associated with the original lawsuit." *General Elec. Capital Corp. v. Ten Forward Dining, Inc.,* 2012 WL 458467 at *2 (D.C. Cal. 2012) citing *Keith v. Volpe,* 858 F.2d 467 (9th Cir. 1997) "While some relationship must exist between the newly alleged matters and the subject of the original action, they need not arise out of the same transaction." *Id.* at 474. In *Volpe*, the issue was over housing to be build and, like this case, the housing disputes were ongoing. The court upheld the supplemental complaint. Retained jurisdiction was also an issue. *Id.* at 474. Delay was not a reason to deny a supplemental complaint where the supplemental pleadings are related to the

original issues. *San Luis & Delta-Mendota Water Authority v. U.S. Dept. of Interior,* 236 F.R.D. 491 (D.C. Cal. 2006).

I. The lodged First Amended and Supplemental Complaint alleges that the Quinault Nation sells commercial cigarettes at retail; it has no immunity from this activity.

At page 18 of the Estate's lodged First Amended and Supplemental Complaint and Counterclaim (ER 15) alleges that the Quinault Nation is a conspirator in the market area. The trial court's Order, ER 5, page 14, upheld sovereign immunity. *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007) held that an Indian tribe selling cigarettes has no sovereign immunity from seizure. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1140 (S.C. Cal. 2006) claim sovereign immunity to prevent seizure of shipments of cigarettes. The statement in the opinion is "Thus contrary to the Communities argument, the Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies." "...sovereign immunity only provides immunity from suit, not from seizures." *Id.* at 895. Violation of the Indian Gaming Regulatory Act

violates sovereign immunity. *Idaho v. Coeur d' Alene Tribe*, 49 F.Supp.3d 751 (D.C. Idaho 2014). The Quinault Nation entered into state agreements and asserted off reservation governmental authority when it had none. The Quinault Nation seeks damages and is in the business of selling cigarettes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) denied sovereign immunity on occupational health and safety laws and applied the laws to tribal farm workers. The Court stated "the operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government." *Id.* at 1116. The action against the Comenouts by the Quinault Nation in this case was based on off reservation activity at Puyallup. *Hollynn D'Lil v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 2002 WL 33942761 (N.D. Cal. 2002) held that the hotel owned by an Indian tribe located far outside their reservation cannot claim sovereign immunity for failure to comply with state health and safety laws. The Court held that off reservation conduct was clearly an issue, *id.* at *8. *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 155 (2d

Cir. 2012), denied sovereign immunity to a non reservation issue where the tribe sought to build a casino. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 310 P.3d 631, 635 (New Mexico 2013) denied off reservation sovereign immunity on a request for declaratory relief. The Court denied "carte blanche" off reservation immunity. *Id.* at 636. *F.T.C. v. AMG Services, Inc.*, 2013 WL 7870795 (D.C. Nev. 2013) denies sovereign immunity to Federal Trade Commission regulations.

Failure to allow the Declaratory Judgment relief requested in the Counterclaim is reversible error. Both the original Counterclaim (ER 11, page 13) and the First Amended Supplemental Answer and Counterclaim (ER 15, pages 14, 15 and 25) sought a declaratory judgment. Edward A. Comenout Jr. did not violate the Quinault Nation's tobacco law. "The question where the legal incidence of tax lies is decided by federal law." *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2014). An Indian tribe's sovereign immunity by seeking to apply an unauthorized tax and seeking prospective relief is not protected by a Tribe's sovereign

immunity from suit. *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007).

J. Intent to Lease waives the Quinault Nation's Sovereign Immunity.

The Quinault Nation had admitted in the pleadings in the case that they intend to lease the public domain property. ER 17, page 3; ER 16 page 6 of 11. When the use of an allotment is the issue and an Indian tribe seeks to use the land to operate a business, it waives sovereign immunity. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, ____U.S.___ 132 S.Ct. 2199, 2208 183 L.Ed.2d 211(2012). The Comenouts are not prosecuting a quiet title action. The Estate of Edward A. Comenout Jr. no longer has an interest in the real estate property, but has an interest in the buildings and personal property on this site and seeks a declaration of jurisdiction. Under these conditions, sovereign immunity does not apply. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Salazar*, 2013 WL 417813 (U.S.D.C. Cal. 2013). In *High Point, LLLP v. U.S. National Park Service*, 2015 WL 858150 at *11 (D.C. GA. 2015) the dispute centered on use of a dock. The

Park Service was destroying the deep water needed for the dock. Only use, not ownership, was in question. Sovereign immunity did not apply. *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1994) held that a smoke shop operation was entitled to declaratory relief from cancellation of a lease. The tribe filed a suit in tribal court seeking a refund of money paid. The smoke shop operation counterclaimed for damages for keeping the operator from selling gasoline. *Id.* at 679. The Court held that "tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief. *Id.* at 681. *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001) also denies sovereign immunity as a bar to declaratory and injunctive relief. The tribe cannot narrow its participation as the occasion demands it is "in for a penny, in for a pound." *Neder v. U.S.*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Where there is no realistic way to recoup payment to a tribe, sovereign immunity will not apply. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011).

In *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) the U.S. brought suit on behalf of an Indian against another Indian for trespass and ejectment on an allotment classified as Indian country. The occupant counterclaimed for a declaratory judgment. The Court noted that right of occupancy was based on issues in the Complaint for trespass and ejectment are based "on issues assented by the United States in its Complaint," so sovereignty was waived as the issues are related.

The tax case of *Freeman v. U.S.*, 265 F.2d 66 (9th Cir. 1969) is in point. The facts of the case were based on the "identical and uncontroverted facts." *Id.* at 69. The court held the issues were precisely the same. Here, the business location and the tax issues are identical, hence, recoupment is allowable. *Freeman* also covers the issue of cancellation of one claim. You do not have to pay first to obtain recoupment. No payment of tax that is not owed is required. *Ibid.* at 69.

K. The Ninth Circuit determines that the test for same transaction or occurrence is gleaned from the aggregate set of operative facts in Rule 13.

Berrey v. Asarco, 439 F.3d 636 (10th Cir. 2006) supplies the reason this case should be reversed and sent back to trial. It applies the standard to determine whether counterclaims arise from the same occurrence. "Counterclaims arise from the same transaction or occurrence if they are compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure." *Id.* at 645.

In re Pegasus Gold Corp, 394 F.3d 1189 (9th Cir. 2005) applies the logical relationship test to determine whether a counterclaim is compulsory under Fed.R.Civ.P. 13. The test is "a logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise, dormant in the defendant." *Id.* at 1196. See e.g. *Donoho v. Space Craft Components Corp.,* 2015 WL 3795757 at *2 (D.C. Nev. 2015). "The Ninth Circuit has adopted the 'logical relationship test' for

determining whether a counterclaim is compulsory." "However, it is well established that when the United States or an Indian tribe initiates a lawsuit, a defendant may assert counterclaims that sound in recoupment even absent a statutory waiver of immunity." *Oneida Indian Nation of New York v. New York*, 194 F.Supp.2d 104, 136 (N.D.N.Y. 2002). An Indian tribe alleging damages for breach of a logging contract subject to a counterclaim for payment owned the logger. *U.S. v. Timber Access Industries Co.,* 54 F.R.D. 36 (D.C. Ore. 1971). Fed.R.Civ.P. 13(a) mandates that any claim "which at the time of serving the pleading the pleader has against any imposing party, if it arises out of the same transaction or occurrence." The occurrence must be the subject matter of the plaintiff's suit. *Id.* at 644. The tribe in *Berrey* commenced an environmental clean-up against mining companies that mined lead and zinc from the tribe's land pursuant to mining leases. The debris from mining "known as chat" became the property of the tribe as landowner. The tribe sold the chat for road base. *Id.* at 640. The mining companies filed counterclaims based on water

contamination from the chat piles. *Ibid.* at 640. The court allowed the counterclaims as compulsory for the reason that the same evidence will be used to support or deny the claims, both sought money damages; the claims were logically related and the relief sought was not in excess of the tribe's claims. The case applies to Edward A. Comenout's counterclaim as all the issues stem from facts and claims by the Quinault Nation that Ed Comenout must pay state of Washington cigarette excise tax on cigarettes at Comenout's store in Puyallup. The entire controversy revolves around whether Comenout has to pay cigarette tax to the state or Indian tribe. *Berrey, supra,* at 644 follows *Bull v. U.S.,* 295 U.S. 247, 260-63, 55 S.Ct. 695, 79 L.Ed. 1421 (1935). *Bull* holds that even though a suit may not have been brought against the United States "but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny him the right of setting up a claim in a court of justice, and turn him around to an application to congress. . .this is because recoupment is in the nature of a

defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." *Bull, supra,* at 262.

In *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989) the tribe brought suit against a contractor it retained to build an irrigation project. Like the Quinault Nation, it sought damages for fraud and conspiracy. The irrigation contractor sought payment of its retainage. The court allowed the counterclaim as it sought relief that arose out of the same transaction. "The *Rosebud Sioux Tribe* initiated this lawsuit because A & P Steel's counterclaim arises out of the same contractual transaction, seeks monetary relief, and is for an amount less than sought and recovered by the Tribe, we conclude that the Tribe has specifically waived its immunity to the counterclaim." *Id.* at 553. If the counterclaim seeks the same relief as the tribe and the counterclaim does not seek a greater amount, equitable recoupment applies and the counterclaim is allowed. *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F.Supp.2d 1279, 1285 (D.C. Kansas 2002). Recoupment is proper where the plaintiff tribe seeks damages and

the defendant by a counterclaim seeks to diminish the amount of damages, "It is difficult to imagine any more apt descriptions of recoupment." *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York,* 278 F.Supp.2d 313, 354 (D.C.N.Y. 2003).

Voluntary dismissal of a tribe when it had recovery on its claims from a bonding company does not result in dismissal of the counterclaims. In *Rosebud Sioux Tribe v. Val-U Const. Co.,* 50 F.3d 560 (8th Cir. 1995), the Indian tribe brought suit against the contractor who built housing units for the tribe. The tribe brought suit for, among other claims, RICO violations. *Id.* at 561. In an arbitration, the contractor obtained an award against the tribe, but the tribe refused to participate. The court deferred the decision to award judgment against the tribe as it could not yet determine the extent of the recoupment. The tribe voluntarily dismissed its claim against the contractor as it was paid by the contractor's bond. The dismissal of the counterclaims was reversed. The court stated: "We remand this case to the district court to hear those counterclaims." *Id.* at 564. It also ruled "As we have removed the Tribe's immunity

defense by finding a waiver, the district court now has jurisdiction over Val-U's counterclaims." *Ibid.* At 564.

In *U.S. v. Martin,* 267 F.2d 764 (10th Cir. 1959), where river water rights was the issue, the court allowed a counterclaim against the United States who had intervened to bind owners who had water rights. The owner counterclaimed for damages against the United States for diverting natural water flow. The court held that the issues presented "common questions of law and fact" and was allowable. *Id.* at 769. Likewise, where Indian heirs sought to settle an allotment, a counterclaim for equitable relief was allowed. *U.S. v. Taunah,* 730 F.2d 1360, 1362 (10th Cir. 1984).

CONCLUSION

The Quinault Nation sought damages; the counterclaim denied taxes were owing and sought damages. Recoupment applies to deny tribal sovereignty. Sovereign immunity from suit does not apply where declaratory judgment is sought.

The counterclaims alleged independent jurisdiction, standing and related to the complaint's allegations. The case must be reversed.

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. *Comenout v. Whitener,* No.'s 15-35261 and 15-35268, Ninth Circuit, Western Washington District Court No. 3-15-cv-05054-BHS.

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, contains 10,721 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 5, 2015, in a postage-paid envelope addressed as follows:

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