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 REPLY BRIEF OF APPELLANTS

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OBJECTION TO QUINAULT NATION'S INTRODUCTION

FRAP 10 states that the record on appeal consists of "(1) The original papers and exhibits filed in the district court." The case was dismissed on Fed.R.Civ.P. 12, hence, there is no transcript. The Introduction of the Quinault Nation reviews other pending cases. It fails to note that Comenout prevailed in the cigarette tax

case as the state dismissed the charges on its own motion. See SER 20.

At page 9 of the Nation's Answering Brief, the Nation argues that *Confederated Tribes and Bands of the Yakima (sic) Yakama Indian Nation v. Gregoire,* 658 F.3d 1078 (9th Cir. 2011), held that Indian sellers were required to collect State cigarette taxes. The Nation states that "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." The Nation's argument is completely wrong on this seminal issue and provides the reason this case should be sent back for trial.

There is no longer a requirement that Indians in Indian Country collect cigarette tax. The old case of *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) imposed a "minimum" burden on Indian retailers in Indian Country to collect the Washington cigarette tax. It stated: "The state may validly require the tribal

smokeshops to affix tax stamps purchased from the state to individual packages prior to the time of sale to non members of the Tribe." (Underline added.) *Id.* at 158. The Colville case only imposed the minimum burden to collect the tax from non Indian purchasers. The case held: "We struck down the tax as applied to Indians." (Citing *Moe,* 425 U.S. at 475-581.) *Id.* at 151 and fn. 26. Since 1995, Indians, including the Comenouts, are not *required* to collect Washington State cigarette tax. Michael Minnis, "*Judicially Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville,"* 16 Am. Indian L. Rev. 289, 290 (1991), in commenting on the *Moe,* 425 U.S. 463 (1976) and *Colville* case, 447 U.S. 134 (1980), states that the Supreme Court created an "untenable dichotomy" by stating that states "may require," *id.* at 290, and emasculating the Indian Commerce Clause. *Id.* at 289. Robert N. Clinton, *"The Dormant Indian Commerce Clause,"* 27 Conn.L.Rev. 1055, 1212 (1995), states that these cases "significantly fractioned" the Supreme Court and that *Colville* was poorly reasoned. *Id.* at 1209. The Indian Commerce Clause "automatically excluded state

authority." (Then) Chief Justice Rehnquist was hostile to Indian cases. *Id.* at 1214. According to Michael Minnis, Rehnquist displeased Warren in a 1975 Supreme Court Christmas party skit. *Id.* at 290. The incident was reviewed by famous reporter Robert Woodward in his controversial book *The Brethren* (page 412), 1979, Simon and Schuster. "Rehnquist had nothing but contempt for Indian cases... Rehnquist turned an opinion that was in favor of Indians into an opinion that indicated in most cases they would lose." Minnis at 289, referring to *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S.Ct 1634, 48 L.Ed.2d 96 (1976).

Philip Lee Fetzer, "*Jurisdiction Decisions in Indian Law? The Importance of Extra Legal Factors in Judicial Decision Making,*" 9 Indian Law Review 253 (1981), observes that in the state of Washington "The state is well known to be the home of anti-Indian groups" to be the reason that the *Colville* case cannot "square" with prior Supreme Court holdings. *Id.* at 267.

This is all history as *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078, 1087 (9th Cir. 2011), brought the issue of state cigarette tax on Indians back into symmetry with *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). *McClanahan* holds that state taxes on Indians for income derived in Indian country as Congress intends to maintain the tax exempt status of Indians. *Id.* at 176. The Comenout allotment is also to be tax exempt. The allotments are "exempt from State and local taxation." 25 U.S.C. § 465. Indians not residing on reservations can own allotments. 25 U.S.C. § 334. Allotments are Indian country. 18 U.S.C. § 1151(c); Wash.Rev.Code § 82.24.010(6). *Yakama* granted the Indians examination from tax collecting, at least where the 1995 Washington State cigarette tax was involved, as it is here. The case carefully reviewed the entire 1995 State cigarette tax law and held that an Indian retailer was an exempt person as defined in Wash.Rev.Code § 82.24.080(2). *Id.* at 1087. The precise language in *Yakama* states the opposite and expressly rejects the Nation's

argument that an Indian retailer does not have to collect cigarette tax from sales to non Indians because "the act does not *require* it; rather that is an economic choice left to the Indian retailers." *Ibid.* at 1087. "Require" is italicized. The 1980 Colville case on this point (*Colville,* 447 U.S. at 159) "may require" is no longer the law. It is not an issue anymore as the Act does not require State cigarette tax collection. The *Yakama* case is not an off-hand statement on cigarette tax. It is a careful review and states:

> Indeed numerous provisions in the Act are written with the purpose of excluding Indian tribes and their members from compliance with the Act. After all, the cigarette tax applies only to the "first taxable event and upon the first taxable person" under RCW § 82.24.080. There is no dispute between the parties that as between an Indian retailer and a non-Indian purchaser, the latter is the *first* taxable person. *Id.* at 1087.

The additional text in *Yakama,* 658 F.3d at 1087, again leaves no doubt:

> The language also indicates that if an Indian retailer ever found itself facing a State collection effort for the retailer's non-payment of the tax, the retailer would be shielded from civil or criminal liability, except in the instance where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.

This comprehensive opinion on the state of Washington cigarette tax law binds this court. *Hart v. Massanari,* 266 F.3d 1155, 1170 (9th Cir. 2001). The irony is that the Nation wants to sell cigarettes at the same place without paying the State cigarette tax. Tribes are also challenging State excise taxes. See, *The Tulalip Tribes and the Consolidated Borough of Quil Ceda Village v. State of Washington,* No. 2:15-cv-00940, USDC, W.D.Wn. at Seattle. In that pending case, the United States has intervened citing the Indian commerce clause and trust ownership. (Document 14, filed August 4, 2015, page 2 of 14).

At page 10, the Nation cites *State v. Comenout,* 173 Wash.2d 236, 267 P.3d 355 (2011). The case is not precedent for anything for the reason that the case was dismissed solely on the State's information on the prosecution's ex parte motion. Comenout merely tested the State's allegations and did not present his side of the case. The State departed from it's own pleadings, a rare occurrence. *U.S. v. Real Property located at 475 Martin Lane, Beverly Hills, California,* 545 F.3d 1134 (9th Cir. 2013), holds that voluntary

dismissal "leaves the parties as though no action had been brought." *Id.* at 1145 (internal quotes omitted). The Court followed *In re Matthews,* 395 F.3d 477 (4th Cir. 2005). *Matthews* states: "But because the forfeiture action here was terminated by voluntary dismissal before any proper adjudication of ownership, we agree that Matthews has had no opportunity even to be heard on his claims, whatever their merit." *Id.* at 484. *Wilson v. City of San Jose,* 111 F.3d 688 (9th Cir. 1997), states: "such a dismissal leaves the parties as though no action has been brought." *Id.* at 692. Collateral estoppel cannot apply to issues that were not actually litigated. *Pueblo of Santa Ana v. Nash,* 972 F.Supp.2d 1254, 1259 (D.C. New Mexico 2013).

The federal courts are not bound by state court adjudications on Indian allotments. ". . .Congress has the power to preempt state law." Art. VI, cl. 2. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). If state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312

U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Obstacle preemption applies. Where the federal government purchases off reservation land for Indians, as in this case, obstacle preemption applies and invalidates state law. *Tohono O'Odham Nation v. City of Glendale,* ___F.3d___, 2015 WL 6774044 (9th Cir. 2015), *id.* at *5, *8.

At page 15, the Nation requests that judicial notice of a subsequent information against Robert R. Comenout Sr. and others be noted. No proceeding can be brought against Edward A. Comenout Jr. as he died June 4, 2010. The new state cases are vigorously defended and are set for trial on February 1, 2016. The cited case by the Nation, *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,* 971 F.2d 244, 248 (9th Cir. 1992), was a case litigated to judgment. The 2015 proceedings, after a 2008 dismissal, do not have a direct relation to this case.

At this state, the credibility of Robert R. Comenout Sr. is not an issue as the facts of the complaint are presumed true. Judicial resolution of ongoing cases, if significant and when finally decided, can be supplied under FRAP 28(j).

ARGUMENT

A. The counterclaim is not moot. The action is not immune from declaratory relief as the Nation waived its immunity.

The Trial Court's order dismissing the counterclaim for lack of jurisdiction due to sovereign immunity, ER 5, page 38, and denying the Amended Answer and Counterclaim as moot, ER 5, page 39, is reversible error. The counterclaim, filed June 4, 2010, sought a declaratory judgment (ER 1, page 108). The lodged First Amended Counterclaim, ER 15, page 144, also sought a declaratory judgment that the tobacco law was not violated. If the law was not violated, the Estate of Edward A. Comenout Jr. would have a complete defense against the damage complaint of the Quinault Nation.

Oneida Tribe of Wisconsin v. Village of Hobart, 500 F.Supp.2d 1143 (D.C. Wis. 2007), holds that when state taxation is the issue and declaratory relief that the taxes were invalid, sovereign immunity is waived as the relief sought by declaratory judgment is a "mirror image" against the tax assessment. *Id.* at 1149. The case applies here as the Quinault Nation seeks damages as assignee of a contract in "which Edward A. Comenout (Jr.) agreed to pay all

applicable taxes assessed by the state of Washington on the sale of cigarettes." ER 6, page 50. If the counterclaim's declaratory judgment request is upheld, the damage claim of the Nation is defeated.

B. The Nation sought prospective relief. It waives immunity to declaratory relief.

The Quinault Tribe in its Complaint, ER 6 page 51, sought prospective relief "directing Defendants to henceforth pay all applicable taxes due the Nation on their sales of cigarettes." Fed.R.Civ.P. 15, the Estate of Edward A. Comenout Jr. sought a declaratory judgment "declaring the tobacco law was not violated." ER 11 page 108. The issue is the same. Allowing a supplemental counterclaim for a continuing course of conduct for prospective relief restating original allegations of the Nation is allowable. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.,* 668 F.2d 1014, 1058 (9th Cir. 1981), holds that a pleading based on new events that are a continuation of the old cause of action allows a supplemental pleading under Fed.R.Civ.P. 15(d). If a supplemental pleading is "merely part of the same old cause of

action" it should be granted under Fed.R.Civ.P. 15(d), including new parties. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 226, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964). The Quinault Nation expressly sought prospective relief to collect taxes. Comenout's Estate wanted a declaration on the same issue. Edward A. Comenout Jr. was living when the complaint was served. ER 6. His Estate continues to defend the action and seeks relief on its counterclaim. The waiver on prospective relief is an independent waiver. The Nation's own statements, at pages 29-30, establish a consistent attempt to get a declaration for permission for "continuing to collect taxes."

C. Recoupment applies as the counterclaim sought relief from the Quinault Nation and state of Washington cigarette taxes. The Nation's complaint sought the same taxes. The same subject matter is involved in all the pleadings. The counterclaims establish recoupment.

The doctrine of recoupment applies to Indian tribe's waiver of sovereign immunity. *Berrey v. Asarco Inc.,* 439 F.3d 636, 643 (10th Cir. 2006). "[W]hen a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment." *Id.* at

643. "The scope of the waiver under the doctrine of recoupment thus, is limited only by the requirements for a recoupment claim, i.e., that the claim arise from the same transaction as the plaintiff's claim, seek the same relief as the plaintiff's claim and seek an amount not in excess of the plaintiff's claim." *Id.* at 644-5.

Recoupment is a defensive action that operates to diminish the plaintiff's recovery. *Rosebud Sioux Tribe v. Val-U Const. Co. Of South Dakota, Inc.,* 50 F.3d 560, 562 (8th Cir. 1995)

In *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241 (8th Cir. 1995), the Indian tribe took over possession of lands claiming the lands were within the tribe's reservation and requested that the defendants set forth their sources of title. The defendants counterclaimed for quiet title and damages. *Id.* at 1246. The court held that allowing relief to the tribe, but not the defendants, on the core issue "would be anomalous and contrary to the court's broad equitable powers." *Id.* at 1245. When the defense is that the defendant is not violating the law the tribe is seeking to enforce, the doctrine of recoupment applies. *Santa Ynez Band of Mission Indians v. Torres,* 262

F.Supp.2d 1038, 1045 (D.C. Cal. 2002).

Where declaratory judgment is sought as to whether tax statutes apply, the tribe seeks to declare the rights of the parties. Equitable relief was sought and the doctrine of recoupment applies. "The same conclusion does not follow, however, with respect to the Village's counterclaim for declaratory relief . . . by invoking the jurisdiction of the Court to 'decline the rights and legal relations of the parties' the tribe has expressly waived its immunity from suit to that issue." *Id.* at 1149. Here the Quinault Nation wants a decision that the Comenouts pay the Nation taxes on future sales and also asked equitable relief. ER 6, page 51. The Complaint was frivolous as the tribe had no jurisdiction on the Puyallup property, 120 miles from the borders of the Nation's reservation. The Nation dismissed the suit since it had a lease to sell cigarettes on the Comenout's land. The lease was held invalid by the BIA. The unsavory conduct of the Nation bludgeoning the Comenout's protected allotment activities centers on the issue of cigarette taxes and who can charge

tax on the Comenouts. All the facts are about cigarette taxes. *In re Pegasus Gold Corp.,* 394 F.3d 1189, 1195 (9th Cir. 2005), holds that a waiver of immunity applies where the claims were based on the aggregate core of facts. *Id.* at 1196. When the issue is part of continued efforts on the same issue, the amendment is allowed. See *Keith v. Volpe,* 858 F.2d 467, 475 (9th Cir. 1988). Here, all the controversy is about imposition and collection of cigarette taxes. The Comenout's Supplemental Complaint alleges damages and also seeks a declaratory judgment that they did not violate any of the Nation's tobacco laws. ER 11, page 158. Recoupment is easily present. The court house door should open just as wide for the Counterclaimants as it does for the Claimants.

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, 500 F.Supp.2d 1143, 1150 (D.C. Wis. 2007). In this case, the Estate of Edward A. Comenout Jr. sought a declaratory judgment against Plaintiff that the tobacco law was not violated. ER 11, page 108. This was in defense to the allegations in the Complaint stating that the Quinault Nation was defrauded of taxes. ER 6, page 45. The

Defendant sought declaratory relief that the Estate was not subject to the Quinault Nation's tobacco laws. In this case, the court noted that Comenout's Counterclaim sought a declaratory judgment. ER 5. The court erred as the success of the declaratory judgement would not only diminish the recovery, it would eliminate the recovery. The declaratory judgment was a defense and occurred from the same transaction of occurrence, i.e. alleged cigarette sales, on Comenout's trust land. Here the Quinault Nation admits that it resorted to litigation in Federal Court to obtain a lease. ER 13, pages 119-120. Like *U.S. v. State of Oregon,* 657 F.2d 1009, 1016 (9th Cir. 1981), it submitted the dispute to the Federal Court and now wants to "renege", *id.* at 1016. It now must abide by a trial on the issue. Recoupment applies. One-way lawsuits are not allowed. *Id.* at 1014.

The complaint was filed against Edward A. Comenout while he was alive. The Estate substituted the counterclaim. ER 11, pages 98-101, denies liability for cigarette taxes and requires a declaratory judgment that no Quinault Nation tobacco law was violated by

Edward A. Comenout Jr. ER 11, page 108. It alleges price fixing by the Quinault Nation, ER 11, page 110, and waiver of immunity by filing suit, ER 11, page 111.

D. The Quinault Nation has no jurisdiction to collect cigarette taxes from the Estate of Edward A. Comenout Jr. or Robert R. Comenout Sr.

The Answer and Counterclaim of the Estate of Edward Comenout, ER 11 pages 107-108, states that the Quinault tobacco code applies only within the external boundaries of the Quinault Reservation and that Edward A. Comenout Jr., if in fact any cigarette sales were made, they were off the reservation. Comenout sought a Declaratory Judgment to this effect at ER 11, page 108. The allegations are to be accepted as true on this appeal.

Cohen's Handbook of Federal Indian Law, Chapter 5, § B2, page 278 (Strickland ed. 1982), states:

> Some small Indian reservations have been established for Indians lacking a functioning social organization at the time, and in most instances the residents have been able to organize a governmental structure. As a result, most areas of Indian country are subject to tribal authority.
>
> The principal exception is certain Indian allotments outside reservations. The majority of off-reservation

> allotments are governed by functioning tribal governments but a substantial minority are not. (Underlining added.)

Miami Tribe of Oklahoma v. U.S., 656 F.3d 1129 (10th Cir. 2011) held that an Indian tribe had no jurisdiction over an off reservation restricted Indian allotment. The land was originally within the reservation but Congress abrogated jurisdiction, *id*. at 1144. The tribe adopted the owners of the allotment as tribal members, leased the land from them and provided security, *id*. at 1145. The court held ". . . because the Reserve is outside of Miami Tribe's territory in Oklahoma and the tribe has no jurisdiction over the reserve." "Miami tribe cannot 'exercise jurisdiction' under 2216(a) without a Congressional grant of jurisdiction over the Reserve." *Ibid.* at ll45. 25 U.S.C. § 345, a statute applying to allotments, states that until the restrictions are removed, the land "shall be subject to the exclusive jurisdiction of the United States." The Comenout land was conveyed in 1926 by the Indian General Allotment Act of 1887, ch. 119, 24 Stmt. 389, to promote assimilation of Indians into mainstream society. *Cohen's Handbook of Federal Indian Law*,

16.03[2][a], page 1072 (Nell Jessup Newton ed. 2012). The Quinault Treaty of 1856, at Article 6, allowed the President to remove members of the reservation to other places "within the territory." SER 32. Edward A. Comenout Sr. was removed in 1926 to live and make a living on the Puyallup land. The law was enacted to allow assimilation into mainstream society. The Quinault tribe did not and could not ever have governmental control.

E. Comenout has independent jurisdiction to file counterclaims, pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353.

25 U.S.C. § 345 states in its relevant part "All persons . . .who are entitled to an allotment . . . may commence any . . . suit in relation to their right thereto in the proper district court of the United States." This provision is to give "Indians the maximum protection possible," *Antoine v. U.S.*, 637 F.2d 1177, 1179 (8th Cir. 1981). The Quinault Nation's Complaint seeks to collect state and tribal cigarette taxes from the Comenouts. ER 6, pages 46, 48, 49, 51. The Answer and Counterclaim, filed December 30, 2010, seeks a declaratory judgment that the Quinault Nation cannot tax the

Comenouts as the land at Puyallup is beyond the Nation's jurisdiction. ER 11, page 108. The lodged First Amended and Supplemental Answer, ER 15, pages 163-168 alleges illegal help in forcing a lease on the Comenouts. The purported lease is an "illegal trespass." ER 15, page 160. The prayer alleges tortious interference with the Estate's ownership. ER 15, page 168. Any disturbance of an allotment owners quiet possession confers jurisdiction under 25 U.S.C. § 345. *Nahno-Lopez v. Houser,* 627 F.Supp.2d 1269, 1274 (D.C. Okla. 2009). The case was affirmed. *Nahno-Lopez v. Houser,* 625.F.3d 1279, 1282 (10th Cir. 2010).

The counterclaims were not moot. Further, the terms of Fed.R.Civ.P. 41(a)(2) confirm the counterclaim must remain standing. Especially when the counterclaimant, as here, has independent federal court jurisdiction. The Quinault Nation waived its immunity by bringing the action. The Estate sought relief by equitable recoupment in the form of declaratory relief. The Nation waived its immunity to declaratory relief.

The argument of the Quinault Nation at page 29, "the Estate cannot meet its burden to establish jurisdiction for its permissive counterclaims ignores these laws that grant independent jurisdiction to the Comenouts." The independent jurisdiction requires that the counterclaim not be dismissed. Fed.R.Civ.P. 41(a)(2) states: ". . .the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication." This issue is also covered in Comenout's Opening Brief at pages 19-22 and are not rebutted.

The Nation's argument ignores the facts that the Nation commenced suit against Edward A. Comenout Jr. and Robert R. Comenout Sr. for selling cigarettes, alleging a RICO enterprise and somehow depriving the Quinault Nation of tax revenue. ER 6, page 46. The Nation, at page 1 of its Brief, admits that its complaint was filed when Edward A. Comenout Jr. was living. The State charge, which was dismissed by the prosecution ex parte, was cited as a crime. ER 6, page 44. The Estate filed a counterclaim, ER 11, page 96, that alleged the dismissal of the State charge, ER 11, page 100,

and failure of the Quinault Nation to have jurisdiction to apply cigarette taxes to Edward A. Comenout Jr. ER 11, page 108. Unlawful competition on cigarette sales is alleged. ER 11, page 110. The Nation's complaint, ER 6, pages 41-2, admits that Edward A. Comenout Jr. owned a trust allotment. This ownership grants individual federal court jurisdiction to an allotment owner to defend his rights to the allotment. 25 U.S.C. § 345; 28 U.S.C. § 1353.

F. The Supplemental Complaint was not futile; it was timely, alleged material relief and was made in good faith.

The Supplemental Counterclaim can be amended at any time, even during trial. *U.S. v. Hickox,* 356 F.2d 969, 974 (5th Cir. 1966). *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 190 (9th Cir. 1987). In *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209 (9th Cir. 1988) an amendment to include settlement offers was allowed as amendments should be "freely given." *Id.* at 214. The Court's order, ER 5, page 39, noted that more facts were sought to be pled and that the amendment added abuse of process. It noted that since the Motion of the Nation was granted on sovereign immunity, the Motion was material since the court dismissed on sovereign

immunity. The Supplemental Counterclaim was an amendment to the original counterclaim filed December 30, 2010. Fed.R.Civ.P. 15(b)(1) allows amendments during trial. The Amended and Supplemental Counterclaim was the first amendment including admissions made by the Nation's attorney on June 14, 2014, ER 15, page 163, and statements on January 15, 2015, ER 15, page 165. About a month before the pleading was filed, the pleading included facts within 40 days of filing. It could not have been filed earlier as the facts did not exist. The Comenouts were diligent as the facts recently occurred. The court did not rule on timeliness in its order. ER 5. The case was dismissed on motion of the Nation five years after the case was filed. The Comenouts did not delay and the Nation's Motion was granted. It was not prejudiced. The issues were never reached so it cannot be an issue on appeal. The amendments would not be futile. If the counterclaim is in recoupment, as the Comenouts urge, the case is reversed on sovereign immunity. The claims of timeliness and bad faith were never reached and are not subject to review at this time.

CONCLUSION

The case should be reversed and sent back for further proceedings.

DATED this 18th day of November, 2015.

Respectfully Submitted,

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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 REPLY BRIEF OF APPELLANTS is: proportionately spaced, has a typeface of 14 point or more, and contains 4,336 words.

DATED this 18th day of November, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Joint Reply Brief were served on Counsel for Appellee, by ECF and mailing the same by regular mail on November 18th, 2015, in a postage-paid envelope addressed as follows:

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