The Honorable Judge Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT SR., ET AL, Plaintiffs, v. ERIC BELIN, employee of the City of Puyallup; ET AL Defendants.	No. 3:16-cv-05464-RJB PLAINTIFFS' RESPONSE TO DEFENDANT PAUL W. JOHNSON'S MOTION TO DISMISS

Plaintiffs Respond to Defendant's Motion to Dismiss as Follows:

Defendant, Paul W. Johnson, seeks to be dismissed from this case contending that the Tax Injunction Act, 28 U.S.C. § 1341, applies; that Plaintiffs do not have Article III standing as their claim is not ripe; that Johnson is entitled to sovereign immunity and the claim is banned by comity principles.

None of these theories apply. They are rebutted in the paragraphs that follow.

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I. FACTS AND PLEADING STANDARD

All well pleaded facts in the Complaint are accepted as true. *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). All inferences are to be construed favorable to the non moving party. *Arizona Students' Association v. Arizona Board of Regents*, 824 F.3d 858, 864 (9th Cir. 2016); *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013).

Plaintiffs are fully-enrolled Indians and part owners of Public Domain Allotment No. 130-1027, located at Puyallup, Washington. The allotment is a restricted allotment and has been since 1926. Dkt. No. 79, pages 4, 11 and Exhibit A. Plaintiff, Edward Amos Comenout III, lives on the allotment. Dkt. No. 79, page 4. A convenience store is also located on the allotment. Dkt. No. 79, page 4. In the past, state government employees and agents seized the owners', including Robert Reginald Comenout Sr., money and inventory and arrested them without advance notice. Dkt. No. 79, page 5. The various state governments treat Plaintiffs as their deadliest enemies. Defendants, for many years, have instituted a policy to prevent Plaintiffs from contesting rights to be heard before their property is seized. See Declaration of Plaintiff, Robert R. Comenout Sr. filed with this Response. This policy destroys Plaintiffs' opportunity to earn a living and causes irreparable damage that cannot be remedied. They destroyed all the

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commerce at the convenience store "because of local ill feeling." Dkt. No. 79, page 5.

Paul W. Johnson is the Program Manager of the Prorate and Fuel Tax Services of the Washington State Department of Licensing. A prospective declaration and injunction is requested to confirm that Plaintiffs do not have to obtain a state license to store and use fuel for themselves or for retail sale. Dkt. No. 79, pages 12 and 22. Plaintiffs intend to import fuel shipped to the allotment. The fuel is both to be used personally and also for potential retail sale. On May 26, 2017, Plaintiff Edward Amos Comenout III, sought to meet with Defendant Paul W. Johnson to explain the intended commerce. He was denied the appointment. Dkt. No. 79, pages 20-21. He wants to transport fuel from Oregon to the allotment for personal consumption in vehicles and possible retail sale. He seeks a ruling that he will not be stopped en route "by the Department of Licensing and without seizure or assessment of state taxes." Dkt. No. 79, page 21. A declaratory judgment is sought. Dkt. No. 79, page 22.

II. BACKGROUND NECESSARY TO FACILITATE RESPONSE

A. Currently, No License is Needed for Indians Transporting, Storing, Using or Selling Fuel in Indian Country. Further, Indians in Indian Country Do Not Have to Pay or Collect State Gas Tax.

Squaxin Island Tribe v. Stephens, 400 F.Supp.2d 1250 (W.D.Wn. at

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Seattle, 2005) unequivocally holds that the state cannot collect its fuel tax on Indian retail sales of fuel products in Indian Country. "Absent clear congressional authorization, which does not exist in this case, it is impermissible to levy the fuel taxes on the Tribes for the sale of fuel products on Tribal lands." *Id.* at 1261. "Tribes and tribal members within Indian country have thus been found to be immune from a variety of state taxes, including excise taxes on motor fuels." *Cohen's Handbook of Federal Indian Law,* § 8.03[1][b], 697 (Nell Jessup Newton ed. 2012). The allotment is in Indian country and treated the same as an Indian reservation. 18 U.S.C. 1151 (c). See *State v. Jim,* 173 Wash.2d 672, 685, 273 P.3d 434 (Wash. 2012); *Cougar Den, Inc v. Washington State Department of Licensing,* 188 Wash.2d 55, 392 P.3d 1014 (Wash. 2017); *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518, 525 (10th Cir. 1974). "Public domain allotments have the same status as allotments created from tribal lands. They are held in trust for the allotee, subject to the same restrictions as allotments made under the General Allotment Act of 1887." *Cohen's Handbook of Federal Indian Law,* § 16.03[2][e] page 1076; *U.S. v. Jackson,* 280 U.S. 183, 196, 50 S.Ct. 143, 74 L.Ed. 361 (1930). *Automotive United Trades Organization v. State,* 183 Wash.2d 842, 357 P.3d 615 (Wash. 2015) reviews the Indian fuel tax history of the state since 1930 and upholds fuel tax refunds to Indian tribes. The case notes that the state made

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agreements with Indian tribes in refunding them of 75/25 fuel tax agreements as applied to the Comenouts. Plaintiff Edward Amos Comenout III wanted to discuss fuel tax agreements. The law is clear that fuel tax would not be capable of assessment under current law. Therefore, tax assessment is not the issue. *Demmert v. Demmert,* 115 F.Supp. 430 (D.C. Alaska 1953) applies "white man's law" to a co-ownership of a cannery by Indians. *Id.* at 429. Tribal law was also applied to the relationship and Indian customs. *Id.* at 431 and 432. Applying the case to the Comenouts easily establishes that Robert R. Comenout Sr. is the elder and would qualify as the managing partner. He could bind the allotment owners to an agreement with the State. The Comenouts are aware of the David and Goliath situation "in a country built on justice for all and the rule of law, we have created a legal system so expensive and so unwieldily that most Americans cannot afford it." Page 57, Barton and Bibas, *Rebooting Justice,* Encounter Books, 2017.

The Tax Injunction Act, 28 U.S.C. § 1341, Does Not Apply.

The Motion assumes that the state of Washington offers rights to administrative review to the Comenouts. As the Declaration of Plaintiff Robert R. Comenout Sr. proves, the state never makes tax assessments against the Comenouts. They arrest the owners and raid the property taking the inventory and money of the Comenouts. See *Matheson v.*

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Kinnear, 393 F.Supp. 1025 (D.C. Wash. 1974); *Comenout v. Washington,* 722 F.2d 574 (9th Cir. 1983) and *State v. Comenout,* 173 Wash.2d 235, 237, 267 P.3d 355 (Wash. 2011). Another reason is that the Comenout allotment is still restricted and exempt from encumbrance and sale. The lands are also exempt from state and local taxation. 25 U.S.C. §§ 349, 5108. While the restrictions remain on the property, the land is governed by federal law. *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wisconsin,* 732 F.3d 837 (7th Cir. 2013) states the reasons as follows:

> "Federal facilities of all sorts, ranging from post offices to military bases, are scattered throughout the United States, and are subject to only as much regulation by states and local governments as the federal government permits. A similar scatter is common to Indian country, primarily as a result of allotment acts (later repealed) in the late 1800's and early 1900's, notably the Dawes Act of 1887, 25 U.S.C. § 331- acts allotting reservation land to individual families to liberate them from tribal ownership that Congress in that era considered socialistic, to encourage their assimilation into mainstream American life." (Underlining added.)

Id. at 839. The Washington Constitution, Art. 26, Second, retains Indian land control exclusively to Congress. The Washington Constitution Art. IV Section 6 eliminates jurisdiction if the action is "vested exclusively in another court." The Comenouts have no physical taxing presence in the state, therefore, the Tax Injunction Act does not apply. *State v. Wayfair, Inc.,* 901 N.W.2d 754 (S. Dakota, 2017) applies. There is no duty to collect and remit sales tax if there is no "physical presence in the state." *Id.* at

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760. The Tax Injunction Act is not applicable.

The Dormant Commerce Clause is also violated. *Red Earth LLC v. U.S.*, 657 F.3d 138, 145 (2nd Cir. 2011); *Pioneer Packing Co. v. Winslow*, 294 P. 557, 560 (Wash. 1930) hold that transportation en route applies to exempt Indian property. *Chamber of Commerce of United States v. Internal Revenue Service*, 2017 WL 4682050 (U.S.D.C. Texas, 10/6/2017) applies. It holds that a prospective member of the Chamber of Commerce could challenge an IRS rule. The suit was not barred by the Tax Injunction Act. The case followed *Direct Marketing Assn. v. Brohl*, 135 S.Ct. 1124, 1131 -2 (2015) at *3. "Here Plaintiffs do not seek to restrain assessment or collection of a tax against or from them or one of their members. Rather, Plaintiffs challenge the validity of the Rule so that a reasoned decision can be made about whether to engage in a potential future transaction that would subject them to taxation under the Rule." *Id.* at *3. The Comenouts seek to be free of seizure by the state when they haul fuel from Oregon in an unbroken shipment onto their allotment. They seek two independent declarations. The first is when they use the motor fuel in their own vehicles. The second is if they sell to others on the allotment. Dkt. No. 79, page 22. Paul W. Johnson cites and attempts to apply *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983), a case on cigarette sales. Unlike the cigarette tax, there is no issue on an Indian's duty to collect the fuel tax.

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Additionally, there has never been a dispute that Indians cannot be taxed on their personal consumption. This case seeks a declaration that Plaintiffs can bring fuel onto the allotment and fill their vehicles with the fuel. No state tax applies to cigarette sales to Indians for personal consumption. *Id.* at 577 fn 3. Wash.Rev.Code § 82.24.260(1(c); *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 Comenouts, like all Indians in Indian country, cannot be taxed on their own consumption. All suits involve collection of taxes from non Indians. The Complaint alleges personal use. Therefore, the Tax Injunction Act has no application. *Comenout* did not decide the comity issue. 722 F.2d at 577. *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 180-1, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) denies state taxes on income derived from the reservation. States lack jurisdiction over Indians in Indian country. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) allowed seizures en route off reservation when Indians refused to collect taxes. The case no longer applies due to a change in state law. Further, the Court refused to decide whether the state could go onto the reservation. *Id.* at 162.

The allotment is Indian country. The suit against Paul W. Johnson is first impression and seeks a 75/25 agreement on fuel that current law

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holds cannot be collected from Indians in Indian country. Seeking a declaration, is at most, a precursor decision on hauling motor fuel from Oregon to the allotment. The Comenouts have federal jurisdiction on land that was deeded to allow the owners to live and make a living on the land. They wanted a meeting which was refused. This is not a tax collection issue. The Comenouts are trying to find out if they can get a 75/25 agreement. This would effect their decision on fuel transportation. *Id.* at *3. Judge Gorsuch, now Justice Gorsuch, in his concurrence, wrote at page 1148, in *Direct Marketing Assn v. Brohl,* 814 F.3d 1129 (10th Cir. 2016), a case on the remand of *Direct Marketing Assn v. Brohl,* ___U.S. ___, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015) agreed with Kennedy's concurrence, 135 S.Ct. 1134-35, that the Dormant Commerce Clause applied. Gorsuch clerked for Kennedy. *Direct Marketing Association v. Brohl,* 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015) limited the application of the Tax Injunction Act. Reporting requirements are not within the Tax Injunction Act. "After each of these notices or reports are filed, the State still has to take further action to assess a taxpayer's use-tax liability and to collect payment from him." *Id.* at 1131. While difficult to read, Dkt. No. 79, Exhibit A, the certified copy of the allotment deed states that the property shall not be alienated or encumbered without the consent of the Secretary of the Interior. Cases like *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983) and

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Begay v. Roberts, 807 P.2d 1111, 1117 (Ariz. 1990) make it highly unlikely that personal state tax judgments could be issued against Plaintiffs for on allotment activity. Presently, the state is enjoined from collecting its fuel tax from Indian retailers. Indian wholesalers are also exempt. *Cougar Den, Inc. v. Washington State Department of Licensing,* 188 Wash.2d 55, 392 P.3d 1014 (Wash. 2017). The Comenouts want to utilize the Mohawk's solution as written by Samuel Sewall in 1680, to bury the hatchet. "One for the state and another for themselves." *Brohl* applies for the reason that the state can not collect fuel taxes from Indians. They also cannot require state licenses from Indians. Assessments are never made where Indian liability for state taxes is the issue. Seizure without notice is not tax assessment. An injunction was issued in *Brohl.* The case applies to the Comenouts.

Mahoney v. State Tax Commission, 524 P.2d 187 (Idaho 1973) and *Wasden v. Native Wholesale Supply Co.,* 312 P.3d 1257 (Idaho 2013) held that an Indian corporation was not exempt from a wholesaler's license but if the transportation was by an Indian member living in Indian country no state wholesaler's license would be required. These cases also apply.

Plaintiffs Have Article III Standing.
The Issue of Fuel Tax is Ripe for Adjudication
as Future Prosecution by the State
will Result if Plaintiffs Transport onto the Allotment

Bishop Paiute Tribe v. Inyo County, 863 F.3d 1144 (9th Cir. 2017)

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easily rebuts Johnson's ripeness argument. In the case, the county sheriff warned the tribal police that they did not have authority to "enforce any state or federal laws within or outside tribal property." *Id.* at 1149. If tribal police did not cease and desist, they would be "subjected to arrest and criminal prosecution." *Ibid.* at 1149. The tribe brought suit for declaratory judgment and injunction. Federal jurisdiction was found under 28 U.S.C. § 1331. Federal common law supported federal jurisdiction. The Ninth Circuit found Article III standing, jurisdiction and ripeness. The court relied on *Oklevueha Native American Church of Hawaii, Inc. v. Holder,* 676 F.3d 829 (9th Cir. 2012). *Id.* at 1154. All that *Oklevueha* required was a plan of consumption. *Id.* at 835. Fear of criminal enforcement was sufficient to find ripeness. Even a demand letter threatening suit is sufficient to find ripeness. *Bitter v. Windsor Securities, LLC*, 2014 WL 1411219 at *5 (D.C. N.D. Cal. 2014). The Comenouts seek exemption from licensing and sought to meet with Paul W. Johnson to discuss the issue. He refused. Paul W. Johnson is named in this case as Program Manager of the Prorate and Fuel Tax Services. Dkt. No. 79, page 12. Plaintiffs do not request damages. They only request a declaration that they may import motor fuel "to be stored in a safe manner for Plaintiffs' personal use in their vehicles without state interference, state license or payment of state gas tax." Dkt. No. 79, page 22. The request is in the conjunctive. They seek

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an additional declaration that they can also sell fuel without state interference, without obtaining motor fuel licenses. Doc. #79, page 22. Ripeness does not apply where application for exemption of licensing is an issue, especially when requested by Indians who are exempt from state licensing. Due process was denied. *Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 900 (9th Cir. 2007) ruled that exhaustion was not required when a sign permit was denied as a 42 U.S.C. 1983 action is an exception. In *Menominee Indian Tribe of Wisconsin v. Drug Enforcement Administration,* 190 F.Supp.3d 843 (D.C. Wis. 2016), the DEA seized and destroyed the tribes industrial hemp crop even though it was never tested to determine if the concentration of genera cannabis exceeded permissible content. The court overruled a motion to dismiss as "there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (quoting cases). *Id.* at 851. Here the state is on record that not taxing Indians on fuel is a "parade of horribles destroying the state's tax base." *Cougar Den, Inc. v. Washington State Department of Licensing,* 188 Wash.2d 55, 67-8, 392 P.3d 1014 (Wash. 2017.)

Sovereign Immunity Does Not Apply

The suit against Johnson involves state policy and alleges Johnson's individual conduct by failing to meet with Edward Amos Comenout III.

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Lewis v. Clarke, ___ U.S. ___, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) applies as the real party of interest is Johnson and his personal conduct. "It is simply a suit against Clarke to recover for his personal actions." *Id.* at 1291. Likewise, the Comenouts were denied even a right to meet. They sought Johnson personally. He refused to meet. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) also applies as state Eleventh Amendment immunity is governed in the same way. *Ex Parte Young*, 209 U.S. 123, 155-56, 28 S.Ct. 441, 52 L.Ed 714 (1908). See also *Arizona Students' Association v. Arizona Board of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) and *Agua Caliente Bank of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000). Both cases allow declaratory relief against state officials.

The State Officials are the Comenout's Deadliest Enemies. Comity Does Not Apply.

The harsh reality the Comenouts face is that the person who can issue a 75/25 agreement will not even meet with them. The Motion to Dismiss by Johnson proves that personal meetings are not an alternative. Litigation satisfies the deadliest enemy syndrome by the state against Indians and the Comenouts in particular. See *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). "Because of the local ill feeling, the people of the state where they are found are often their deadliest

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enemies." *Id.* at 384. Law reviews confirm the existence of Washington State as a deadliest enemy. Matthew Deisen, *State v. Jim: A New Era In Washington's Treatment of the Tribes?* 38 Am. Indian L. Rev. 101 (2014) "Consequently state courts were and arguably are a 'potentially hostile forum' and congress has recognized the hesitancy of tribes to use state courts. Washington has been no exception." *Id.* at 117. *National Farmers Union Ins., v. Crow Tribe of Indians*, 471 U.S. 845, 856 n. 21, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) recognized that exhaustion was not required when the jurisdiction is motivated by a desire to harass or the case is conducted in bad faith. The footnote cites *Juidice v. Vail*, 430 U.S. 327, 338, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) which in turn, at 330, cites, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) a case that rejects state court proceedings if "the state proceeding is motivated by a desire to harass or is conducted in bad faith." *Id.* at 611. *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006) is analogous. Principles of comity do not apply if the tribal court is motivated by a desire to harass or the proceedings are conducted in bad faith. *Id.* at 1168. The same theory applies to state court proceedings. *Cougar Den, Inc. v. Washington State Department of Licensing,* 188 Wash.2d 55, 392 P.3d 1014 (Wash. 2017) holds that Indian tribes were entitled to import fuel without an importer's license and without paying state taxes. The fuel was hauled from out of state where it was sold on the reservation to a Yakama tribe member. *Id.*

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at 58. No tax was paid to the state as the tribal retailers were also exempt. *Id.* at 69. A similar case questioning the issue of interstate commerce on Indian transportation is *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992*8 (D.C. E.D. N.Y, 2016). The opinion also accepted the Indian country definition of 18 U.S.C. § 1151. *Id.* at *7. The Ninth Circuit rejected the state fuel tax in *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 696 (9th Cir. 2004). *Goodman Oil Co. of Lewiston v. Idaho State Tax Commission*, 28 P.3d 996 (Idaho 2001) also denied the state fuel tax on Indian sales in Indian country. *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) upheld the right to travel off reservation without payment of fees to the state. The Yakama Treaty was construed. All Indians in Indian country have a right to travel free of restriction. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) upheld federal preemption of discriminatory state law attempting to apply to off-reservation travel on to a reservation. *Id.* at 701. The Supreme Court rejected the fuel tax on sales by Indians in Indian country. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), attempts to amend state statutes to negate the effect of *Chickasaw* have not succeeded. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004).

In *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) the *en banc* decision rejected *fair assessment*, *id.* at 979, and sent the case back to

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determine whether the state decision was in good faith. *Id.* at 983. See also, *N Group LLC v. Hawaii County Liquor Commission*, 681 F.Supp.2d 1209, 1240-1 (D.C. Hawaii 2009). Plaintiff Robert R. Comenout Sr. establishes bad faith of the state. Comity does not apply.

The State has no Jurisdiction of Plaintiffs, Who Have Exclusive Federal Jurisdiction

Paul W. Johnson cites *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 116 n. 8. Note 8 states in part "Both phrases refer to the obvious precept that plaintiffs seeking protections of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." *Fair Assessment* was a case involving due process on assessment of real property. *Fair Assessment*, 478 F.Supp. 1231 (1979). *Fair Assessment* cannot possibly apply here for the reason that the Comenout Allotment is free of real property tax and has been since its purchase in 1926. 25 U.S.C. § 5108. The federal law forbids the passage or enforcement of any law "denying any such Indian within its jurisdiction the equal protection of the law." Until a patent is issued the land is free of taxation. The land is "not subject to state jurisdiction." *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837, 839 (7th Cir. 2013). In order to join the Union, the state of Washington agreed that all "Indian lands shall remain under the absolute jurisdiction and control of the

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congress of the United States." Washington Constitution Article 26, Second. Allotments "are subject to only as much regulation by states as the federal government permits." *Oneida, supra* at 839. Despite the federal law, the state of Washington has enacted Wash.Rev.Code § 64.20.030 that removes the Comenout's federal restrictions and absolute jurisdiction to Congress. *Comenout v. State of Washington*, 722 F.2d 574, 577 (9th Cir. 1989) was decided on the basis that 28 U.S.C. 1362 did not apply to individual Indians. That is correct, but, individual Indians owning an allotment can bring suit in the U.S. District Court under 28 U.S.C. § 1353 and also against state officials. Reinhardt concurrence 578. Likewise, *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) failed to recognize that 28 U.S.C. 1360(b) did not allow state tax on Indian personal property on restricted allotments and the state law § 37.12.010 cannot apply to off reservation allotments for the reason that Public Law 280 does not apply to allotments whether on or off a reservation. Congress never granted state jurisdiction over allotments where the restrictions are still in place.

The fuel tax is specifically beyond the State's jurisdiction. *State v. Comenout*, 173 Wash.2d 235 failed to consider *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011) giving the Indian retailer an economic choice to decide whether

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he/she wants to collect the state cigarette tax. Indians cannot collet tax in any event as distributors must collect it. *Id.* at 1088, Wash.Rev.Code § 82.24.030(2) and (3). The fuel tax differs from the cigarette tax as the State has to refrain from taxing the entire chain of commerce on distribution of motor fuel to Indians in Indian country. The state does not have jurisdiction of Indians in Indian country. The allotment is Indian country and the restrictions are in place. Therefore, federal courts have exclusive jurisdiction. "Regardless of whether the original reservation was diminished, Federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. See 18 U.S.C. § 1151(c)." *Solem v. Bartlett*, 465 U.S. 463, 467 n.8, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). 25 U.S.C. § 349 states in part "*Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the Untied States." Allottees have the same rights to federal courts as Indian tribes. 28 U.S.C. § 1353. 25 U.S.C. § 5108, formerly 25 U.S.C. § 465. Washington law is irrelevant. *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2013); *Wesley v. Schneckloth*, 55 Wash.2d 90, 94, 346 P.2d 658 (Wash. 1959); *State v. Condon*, 79 Wash. 97, 139 P. 871 (Wash. 1914); *State v. Jim*, 173 Wash. 2d 673, 273 P.3d 434; *State v. Atcitty*, 215

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P.3d 90, 94 (New Mexico, 2009); *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518, 525 (10th Cir. 1974) and *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013) all hold that federal courts have exclusive jurisdiction. State search warrants and arrests by state officers of Indians on Indian land are invalid. See *U.S. v. Peltier*, 344 F.Supp.2d 546 (E.D. Mich., 2004); *Swain v. Hildebrand*, 36 P.2d 924 (Okla. 1934); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990); *U.S. v. Baker*, 894 F.2d 1144 (10th Cir. 1990). Shipments en route into or out of state of Indian property are not within state jurisdiction. *Pioneer Packing Co. v. Winslow*, 294 P. 557, 560 (Wash. 1930) and *Mahoney v. State Tax Commission*, 524 P.2d 187 (Idaho 1973) allow transportation of Indian goods out of Indian country and into Indian country to be within Indian interstate commerce and exempt from state law. The law clearly does not give the state courts any authority to adjudicate Plaintiffs' activity on their allotment. Comity cannot exist when federal courts have exclusive jurisdiction. Plaintiffs own use cannot be taxed or regulated. They ask for permission to import for their own use. Comity cannot be involved in personal use by Indians in Indian country.

Comity Does Not Apply if, as here, the State Court Denies Due Process

Comity requires freedom from prejudice by the reviewing court, "or in the system of laws under which it is sitting." *Hilton v. Guyot*, 159 U.S. 113,

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202, 16 S.Ct. 139, 40 L.Ed. 95 (1895). If the court rendering judgment "manifests express hostility' the court will decline to accord constitutional due process." *De la Mata v. American Life Ins., Co.*, 771 F.Supp. 1375, 1390 (D.C. Del. 1991). *De le Mata* references *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895) stating "*Hilton* articulates the requisite criteria for finding comity as: 1. Opportunity for a full and fair trial. . . . 6. No evidence to demonstrate a b. prejudice in the system of laws in which the court was sitting c. prejudice in the court." *Id.* at 1381. *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss Jena*, 293 F.Supp 892 (D.C. N.Y. 1968) states "To the extent that principles of comity provide a basis for adherence to the Wuerttenberg Decrees, defendants raise a more serious question in contending that the decrees violate due process concepts because they were enacted without any notice to Jena and opportunity to be heard." *Id.* at 914. The attached Declaration of Robert R. Comenout Sr. easily establishes the prejudice of the state governments against the allotment owners since 1926 to date. See *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, (Marshall dissent), 572, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983) . "Tribes which have sued under that provision should not lightly be remitted to asserting their rights on a state forum." Marshall referenced 28 U.S.C. § 1362 as congressional recognition of the "great hesitancy on the part of the tribes to use State courts." S.Rep. No. 1507 89th Cong. 2d Sess. 2

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(1966). See also Judith V. Royster "*A Primer on Indian Water Rights: More Questions than Answers*" 30 Tulsa L.J. 61 (1994). "These disadvantages, coupled with litigation in a potentially hostile forum, have led to increasing use of negotiated settlements." *Id.* at 100. The reference is to state forums. The state thinks it is a "parade of horribles" and failure to tax fuel would lead to "unimagined and unintended preemption of fundamental state powers", if the state cannot tax fuel sold by Indians in Indian country. *Cougar Den, Inc. v. Washington State Department of Licensing*, 188 Wash.2d 55, 68-9, 392 P.3d 1014 (Wash. 2017).

Justice Mary Fairhust, whose legal career included 16 years in the Attorney General's office, is concerned that the decision "would create a hole, bigger than that required to drive a tanker truck, on Washington's ability to tax goods consumed within the state." *Ibid.* At 69. The statement is concerning as it seeks to indicate that Indian reservations are governed by the state. To Plaintiffs, it is anathema.

The Comenouts Have Original Federal Court Jurisdiction. The State Court Has No Jurisdiction of the Allotment.

Johnson argues that Plaintiffs, as enrolled Indians, have to first bring the case in state courts under the doctrine of comity, citing *Fair Assessment in Real Estate Assn., Inc, v. McNary,* 454 U.S. 100. Plaintiffs seek to invalidate Wash.Rev.Code § 60.20.030 that removes federal control based

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on federal preemption. The Comenouts allege that they do not have the benefit of administrative review and the state administrative law does not allow constitutional arguments. See *Union Pacific R. Co. v. Department of Revenue of the State of Oregon,* 920 F.2d 581 (9th Cir. 1990) denying abstention. *U.S. v. Stands,* 105 F.3d 1565, 1572 (8th Cir. 1997) allotted lands outside Indian reservations are Indian Country; *Burlington Northern & Santa Fe Ry Co. v. Vaughn,* 509 F.3d 1085 (9th Cir. 2007).

The restrictions against incumbrance and taxation have not been removed. As owners, Plaintiffs have federal court jurisdiction. 28 U.S.C. § 1353, 25 U.S.C. § 349. They do not have to reside on an established Indian reservation to own or occupy an allotment. 25 U.S.C. §§ 334, 5108. The Plaintiffs, as owners and enrolled Indians, have jurisdiction to commence actions in relation to their rights in the federal district court. 25 U.S.C. § 345. The state courts have had no jurisdiction over allotments on or off a reservation. See *Swain v. Hildebrand,* 36 P.2d 924, 927, 169 Okla. 327 (1934) and *Ahboah v. Housing Authority of Kiowa Tribe of Indians,* 660 P.2d 625 (Okla. 1983). The allotments were off reservation and defined by 18 U.S.C. § 1151(c). "Individual trust allotments have long been recognized as Indian Country whether within or without continuing reservation boundaries." *Id.* at 629. "Public Law 280 did not oust federal and tribal control over allotments." *Id.* at 633. *Aboah* at 632 reviews *Washington v.*

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Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 493, 99 S.Ct. 740 (1979) and *Bryan v. Itasca County*, 426 U.S. 373, 391, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976), and concluded that Congress enacted exceptions to exclusive federal jurisdiction. No forcible entry on detainer actions could be commenced in state courts to go onto allotments. *Aboah, Id.* at 633-4, adopted the language of *In re Humboldt Fir, Inc.,* 426 F.Supp. 293, (N.D. Cal. 1977). "Indian trust lands are a Federal instrumentality held to effect the federal policy of Indian advancement, and therefore may not be burdened or interfered with by the State . . .where a dispute involves trust or restricted property, the state may not adjudicate the dispute, nor may its laws apply." *Id.* at 296. Paul W. Johnson cites *Chippewa Trading Co. v. Cox*, 365 F.3d 538 (6th Cir. 2009). The case held that Indians were not involved as the entity was a private corporation. *Id.* at 545. The Comenouts are individual Indians.

Congress Has Exclusive Control of the Allotment. Comity Does Not Apply.

State courts do not play a role in Indian issues involving federal exclusive jurisdiction. *Bowen v. Doyle,* 230 F.3d 525 (2nd Cir. 2000). State court proceedings do not involve Indian issues. The cases do not extend Indian issue exhaustion to state courts. *Id.* at 530. "Giving the Supreme Court's rational for imposing the tribal exhaustion rule, we see no reason

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to extend the rule drastically by requiring a federal court to stay its hand until the conclusion of *state court* proceedings that happen to involve tribal issues." *Bowen* rejected the principle of comity as state courts had no rule at all. *Ibid* at 530. The holding in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) is applicable by analogy. The Court stated that federal courts should not enforce tribal court judgments if the "tribal Court did not have both personal and subject matter jurisdiction." *Ibid.* at 810. The Court recognized Indian law on comity and applied *Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979). *Id.* at 810. *Cougar Den, Inc. v. Washington State Department of Licensing*, 188 Wash.2d 55, 69, 392 P.3d 1014 (Wash. 2017) indicates that Congress has control and the state must look to a change in the law. Congress exclusively controls the Plaintiffs' allotment. *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (Wash. 1968) states that state taxation of Indians "is a problem for the Congress and the President to solve." *Id.* at 687. The case enjoined personal property tax sought to be imposed on Indians. Federal courts have exclusive jurisdiction, hence exhaustion by the state court is not required. *Blue Legs v. United State Bureau of Indian Affairs*, 867 F.2d 1094, 1097-1098 (8th Cir. 1989) rejected exhaustion where the exclusive remedy was in federal court.

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CONCLUSION

None of Paul W. Johnson's reasons to dismiss apply. The Court has jurisdiction of him. The Motion should be denied.

DATED this 25th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2017, I electronically filed the foregoing Plaintiffs' Response to Defendant Paul W. Johnson's Motion to Dismiss with the Clerk of the Court using the CM/ECF System.

s/*Robert E. Kovacevich*
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