The Honorable 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 PAUL JOHNSON'S REPLY IN SUPPORT OF MOTION TO DISMISS NOTE ON MOTION CALENDAR: DECEMBER 1, 2017 WITHOUT ORAL ARGUMENT

I. INTRODUCTION

Plaintiffs' attempts to re-cast their Fourth Amended Complaint into valid claims over which this Court has jurisdiction should be rejected. Plaintiffs have filed suit against Paul Johnson "in order to obtain a prospective injunction against licensing or taxing Plaintiffs" for motor vehicle fuel. Dkt. No. 79 at ¶ 21. Plaintiffs fail to state a claim upon which relief can be granted and this Court does not have jurisdiction to grant the requested relief. Plaintiffs' claims are barred by the Tax Injunction Act and the Eleventh Amendment to the United States

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Constitution. Further, their claims are unripe and they do not have standing to bring them. Johnson's Motion to Dismiss should be granted.

II. ARGUMENT IN REPLY

A. Tax Injunction Act Bars Plaintiffs' Claims.

A plain reading of the Tax Injunction Act and federal case authority support the proposition that Congress has prohibited federal district courts from interfering with the collection of state taxes, which is the relief requested by the Plaintiffs. Dkt. No. 79 at ¶ 37. The Act provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341.

Plaintiffs are attempting to prospectively prevent the State of Washington from collecting possible fuel taxes on fuel bound for or purchased on the allotment. Dkt. No. 79 at ¶ 37. This is the type of action Congress sought to prevent and, as such, the Tax Injunction Act creates a "broad jurisdictional bar" which prohibits federal district courts from preventing collection of state taxes. 28 U.S.C. § 1341; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976).

The important public policy underlying the Tax Injunction Act is that federal courts should not interfere with a state's responsibility to collect taxes. The United States Supreme Court in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981), discussed this policy and stated:

> The statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.

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Rosewell, 450 U.S. at 522 (citations omitted). The Court reiterated this point more recently, emphasizing that "[t]he power to tax is basic to the power of the state to exist." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997) (citations omitted).

Washington has not imposed taxes on fuel purchased or sold by the Plaintiffs. If the State were to do so, Plaintiffs could avail themselves of the State's administrative process. The administrative process satisfies the requirement of the Tax Injunction Act that a "plain, speedy and efficient" remedy exist under state law and Plaintiffs make no argument to the contrary.[1] This requirement is narrowly construed. *California v. Grace Brethren Church*, 457 U.S. 393, 413, (1982). The exemption requires only "a state-court remedy that meets certain minimal *procedural* criteria." *Rosewell*, 450 U.S. at 503; *see Ashton v. Cory*, 780 F.2d 816, 819 (9th Cir. 1986). If an adverse ruling is entered at the administrative level, Plaintiffs have a speedy and efficient remedy under Wash. Rev. Code § 34.05.570: petitioning for judicial review. On judicial review, plaintiffs are explicitly authorized to raise and argue constitutional claims. Wash. Rev. Code § 34.05.570(3)(a).

In order to obtain the benefit of the "plain, speedy and efficient" exception, Plaintiff bears the burden of demonstrating that Washington courts will refuse to entertain the federal claims the plaintiff wishes to present. *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 340–41, (1990). Plaintiffs have not met this burden. Rather, Plaintiffs' response asserts, without

[1] Plaintiffs' Response states that Johnsons' 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." Dkt. No. 105, at 5. It is unclear to Johnson to what these statements reference. Plaintiffs by their admission do not currently purchase or sell fuel, Dkt. No. 79 at ¶ 9, and have heretofore not been subject to the collection of any fuel tax. Further, Plaintiffs make no assertion in their Complaint that either Johnson or the Department of Licensing have ever raided their property nor taken inventory or money. It appears Plaintiffs are conflating facts and claims made against other defendants with facts and claims made against Johnson.

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explanation, that the Dormant Commerce Clause is violated. Dkt. No. 105 at 7. Plaintiffs' response also asserts they want to enter into a 75/25 fuel tax agreement. *Id.* at 8–9. These alleged facts and claims were not raised in their Complaint and the Court should not consider them now.

Most of the cases cited by Plaintiffs do not address the application of the Tax Injunction Act. *State v. Wayfair, Inc.*, 901 N.W.2d 754 (S. Dakota 2017), a South Dakota state court case, held that a state statute requiring internet sellers with no physical presence in the state to collect and remit sales tax violated the Dormant Commerce Clause. *Red Earth, LLC v. United States*, 657 F.3d 138 (2d Cir. 2011) upheld a preliminary injunction of the enforcement of a federal statute requiring mail-order cigarette sellers to pay state excise taxes because it was likely a due process violation.

Chamber of Commerce v. Internal Revenue Service, 2017 WL 4682050 (U.S.D.C. Texas, October 6, 2017), does discuss the Anti-Injunction Act, 26 U.S.C. § 741 and the Tax Injunction Act. But in that case, plaintiffs were not seeking to restrain assessment or collection of a tax against them or from them. *Id.* at *3. Rather, they challenged the validity of an IRS rule and a rule is not a tax so the claims were therefore not barred by the Anti-Injunction Act. *Id.* at *3.

Plaintiffs make no attempt to distinguish *Comenout v. Washington*, 722 F.2d 574, 575–77 (9th Cir. 1983) wherein the Ninth Circuit held that the relief sought was barred by the Tax Injunction Act since it was an attempt to enjoin, suspend, or restrain enforcement of the Washington tax scheme, and adequate state remedies were available. The holding of this case requires dismissal and the Plaintiffs have not asserted otherwise.

B. Plaintiffs Lack Standing and Their Claims Are Not Ripe

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Plaintiffs seek declaratory and injunctive relief for speculative future events. Plaintiffs do not allege they currently operate a fuel station. They do not allege they have purchased fuel from the Yakamas, or any other wholesaler, for further personal or retail use. They do not allege their property can be used as a fuel station or for fuel storage. They do not allege that State of Washington has sought to impose fuel taxes on them. Consequently, they have neither suffered nor been imminently threatened with a concrete and particularized injury in fact sufficient to confer them with standing to bring their claims. *See Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).[2]

Neither are their claims ripe for this Court's review. Federal courts cannot render advisory opinions, even if, as here, the request is couched as a request for declaratory judgment. *See* e.g., *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947). The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The broad and vague nature of Plaintiffs' requests for relief from the imposition of any

[2] Plaintiffs assert in their Response that they are seeking a 75/25 taxation agreement with the State. Dkt. No. 105 at 8–9. Wash. Rev. Code. § 82.38.310 authorizes the governor "to enter into an agreement with any federally recognized tribe located on a reservation within this state." The Comenouts are not a "federally recognized Indian tribe" and Wash. Rev. Code § 82.38.310 does not permit agreements with individual tribal members. Robert Comenout alleges that he is a member of the Tulalip Tribe. Dkt. 79 at ¶ 17. Edward Comenout III alleges he is a member of the Muckleshoot Tribe. *Id.* at ¶ 18. Tulalip and Muckleshoot have fuel tax agreements with the State. *See Auto. United Trades Org. v. State*, 357 P.3d 615, 619 nn. 4–5 (Wash. 2015). If Plaintiffs want to have a gas station on the allotment covered by a state-tribal fuel tax agreement, they may work with the Tulalip or Muckleshoot Tribes to get it covered under those agreements.

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fuel tax, effectively precluding future tax collection, demonstrates their claims are not ripe and should be dismissed.

Plaintiffs cite to *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144 (9th Cir. 2017) to assert they have standing and their claims are ripe. This case is distinguishable. In *Bishop Paiute Tribe*, an Indian Tribe alleged that it had been ordered by a county sheriff to cease and desist exercising its inherent authority to restrain, detain, and deliver to local authorities a non-Indian on tribal lands. 863 F.3d at 1149. The Tribe further alleged that a tribal police officer had been arrested and prosecuted for exercising that authority, and the county by letter threatened future prosecutions if the Tribe failed to cease and desist law enforcement of state statutes. *Id.* The Ninth Circuit held that the Tribe had standing and their claims were ripe because the Tribe's inherent sovereign authority to restrain, detain, and deliver to local authorities a non-Indian on tribal lands constituted a concrete and particularized legally protected interest. Further, the county's threats of prosecution were genuine and imminent, not generalized. *Id.* at 1154–55. These are not the facts here. Plaintiffs point to no legally protected interest that has been violated. Plaintiffs do not allege they are currently acquiring fuel that may be subject to fuel taxes or have any agreement with the Yakamas, or any other fuel wholesaler, to do so. Nor has the State of Washington expressed any intent to collect fuel tax from the Plaintiffs. Plaintiffs' claims are not ripe. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

C. Sovereign Immunity Applies to Bar Plaintiffs' Claims Against Johnson

Plaintiffs fail to state a claim upon which relief can be granted because sovereign immunity bars their suit. In determining whether sovereign immunity applies, courts should look

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to whether the sovereign is the real party in interest. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017).[3] Courts may not simply rely on the characterization of the parties in the complaint, but rather must determine "whether the remedy sought is truly against the sovereign." *Lewis*, 137 S. Ct. at 1290. Lawsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent" and may also be barred by sovereign immunity. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985)). In an official-capacity claim, the relief sought is only nominally against the official "and in fact is against the official's office and thus the sovereign itself." *Id.* (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989)).

Suits against state officers may be heard in federal court if the *Ex Parte Young* exception to sovereign immunity applies. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Ex Parte Young*, 209 U.S. 123 (1908). Ordinarily "[a]n allegation of ongoing violation of federal law where the requested relief is prospective is . . . sufficient to invoke the *Young* fiction." *Coeur d'Alene Tribe*, 521 U.S. at 281. But the Court must also examine the effect of the suit and its impact on state sovereignty interests in order to decide whether the *Ex Parte Young* fiction is applicable. *Id.*

The Supreme Court ruled *Ex Parte Young* was not applicable to a tribe's request for declaratory and injunctive relief against the State of Idaho, when the relief sought was a declaration that certain lands were not within the regulatory jurisdiction of the State. *Coeur*

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[3] Plaintiffs cite *Lewis* to assert that Johnson is the real party in interest. But in deciding that sovereign immunity did not apply to bar suit, the Supreme Court in *Lewis* found it of "paramount" importance that the defendant was sued for damages in his personal capacity, seeking to impose individual liability for his role in a traffic accident. *Lewis*, 137 S. Ct. at 1291. The Court found it persuasive that the suit would "not require action by the sovereign . . . ." *Id.* That is not the case here, where Johnson is being sued in his official capacity and Plaintiffs seek declaratory and injunctive relief against the State.

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d'Alene Tribe, 521 U.S. at 282. In essence, "the requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority of the disputed lands and waters." *Id.* Here, the Plaintiffs seek to divest the state of any authority it may have over activity on the allotment. The amended complaint plainly states, "[t]his amendment requests exclusive federal jurisdiction of Plaintiffs as off-reservation public domain allotment owners and lack of state jurisdiction." Dkt No. 79 at ¶ 1. The "basic issue" of the Complaint is to permit the Plaintiffs to carry on activities on the allotment "without state or local government interference." *Id.* Plaintiffs seek a declaration that the land and activity on the land "shall be subject to the exclusive jurisdiction of the United States," Dkt. No. 79 at ¶ 18, and assert the State must refrain from taxing the "entire chain of commerce on distribution of motor fuels to Indians in Indian Country." Dkt. No. 105 at 18.

The relief sought thus implicates any authority of the State to collect revenue on any petroleum bound for or purchased on the allotment, by seeking to abrogate all State authority over the allotment. Dkt. No. 79 at ¶¶ 1, 9, 37. As such, the State is the true party in interest, and sovereign immunity applies to bar this suit in federal court.

Plaintiffs cite *Agua Caliente*, which allowed a tribe to sue state officials for a declaratory judgment that federal law precludes imposition of the sales and use tax on food sold on reservation land. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000). In that case, the Ninth Circuit clarified that the question is not whether a suit implicates a core area of sovereignty, but whether the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Agua Caliente*, 223 F.3d at 1048. It held that the potential effect on the State's taxing authority was not as intrusive to the state's sovereignty interests as the requested relief in *Coeur d'Alene*. *Id.* at 1048–

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49. Although Plaintiffs seek to enjoin the state from taxing fuel bound for or purchased on the allotment, they do so by seeking a declaration that the State has no authority whatsoever over the allotment or the activities thereon. Dkt. No. 79 at ¶¶ 1, 18, 21; Dkt 79 at 22, ¶ 5. Their requested relief implicates more than the State's taxing authority—it seeks a *divestiture* of the State's jurisdiction over the allotment. The relief Plaintiffs request renders this suit as one against the state itself, and sovereign immunity applies.[4] Plaintiffs' claims should be dismissed.

D. The Comity Doctrine Bars Plaintiffs' Claims

Under the comity doctrine, federal courts are restrained from entertaining claims for relief that risk disrupting state tax administration so long as an adequate state remedy exists. *Levin v. Commerce Energy, Inc.,* 560 U.S. 413, 417 (2010). Plaintiffs make no argument that the available state remedies for their claims are inadequate. To the contrary, Plaintiffs have an adequate state remedy and the comity the doctrine warrants dismissal of Plaintiffs' Complaint.

E. Plaintiffs Have Remedies in State Courts

Plaintiffs appear to argue that the allotment is not part of the State of Washington and cannot be subject to its jurisdiction or laws and that jurisdiction is exclusively federal. Dkt. No. 105 at 6, 16–19, 21–24. They are incorrect. The U.S. Supreme Court has indicated that Indian reservations, and by extension other types of Indian country, are ordinarily considered part of the territory of the state unless expressly excluded by federal law. *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980)); *see Neah Bay Fish Co. v. Krummel*, 101 P.2d 600

[4] In their Response, Plaintiffs allege this is a suit against Johnson based upon his "individual conduct," by "refusing" to meet with Edward Amos Comenout III, and that the failure to meet constitutes a due process violation. Dkt. No.105 at 12. The Complaint does not allege refusal to meet and the Complaint makes no claim that Johnson violated the Plaintiffs' due process rights, nor does it request relief based on this theory.

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(Wash. 1940) (Makah Reservation is part of the State of Washington); *see also* RCW 82.38.020(12) ("Fuel distributed to a federally recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state"). Plaintiffs point to no federal law that excludes the allotment from the State of Washington. Federal and state courts have repeatedly treated the Plaintiffs' allotment as part of the State of Washington. *E.g.*, *United States v. Approximately 1,784,000 Contraband Cigarettes*, 2016 WL 7387094 (W.D. Wash. 2016); *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1975); *State v. Comenout*, 267 P.3d 355 (Wash. 2011); *Comenout v. Liquor Control Bd.*, 2016 WL 4184367 (Wash. Ct. App. Div. I Aug. 8, 2016). The allotment is part of the State of Washington.

Washington State Courts are open to claims raised by the plaintiffs. If Plaintiffs want a declaration that state fuel taxes cannot be applied to fuel brought to the allotment, they have the option of filing a petition for declaratory order with the Washington Department of Licensing under Wash. Rev. Code § 34.05.240, followed, if necessary, by judicial review under Wash. Rev. Code Chapter 34.05 Part V. Indians who reside within Indian country in Washington State, such as the Plaintiffs, have access to the Washington State courts in cases or controversies that arise within the State of Washington unless exercise of state jurisdiction would interfere with a tribe's right to govern itself. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 333 P.3d 380, 382 (Wash. 2014). For example, *Cougar Den* was litigated in the Washington State courts. *Cougar Den, Inc. v. Dep't of Licensing*, 392 P.3d 1014 (Wash. 2017), *petition for cert. filed* (U.S. June 16, 2017) (No. 16-1498).[5] On judicial review in that case, venue was proper in

[5] Plaintiffs also assert that *Cougar Den* prevents the State from imposing tax on fuel bound for Indian country. Dkt. No. 105 at 16–19, 21–24. This is a mischaracterization. In *Cougar Den*, the Washington Supreme Court held that the Yakama Treaty preempts Washington fuel taxes on fuel imported from Oregon by a Yakama Indian wholesale fuel supplier. *Cougar Den*, 392 P.3d at 1020. The reasoning in the case pertained to the "right to travel" clause contained in the Yakama's treaty. *Id.* at 1014–15. The holding is unique to that treaty language, which

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Yakima County under Wash. Rev. Code § 34.05.514 because Cougar Den's principal place of business, though within the Yakama Reservation, was in Yakima County. Similarly, the Comenouts themselves sought and obtained judicial review of the Liquor Control Board's forfeiture of their cigarettes under the Washington APA. *Comenout v. Liquor Control Bd.*, 2016 WL 4184367 (Wash. Ct. App. 2016).

Plaintiffs' assertion that the federal courts have exclusive jurisdiction over the allotment is also incorrect. Dkt. No. 105 at 16–19, 21–24. The Court in *State v. Comenout*, 267 P.3d 355 (Wash. 2011), *cert. denied* 132 S. Ct. 2402 (2012), determined that the State assumed jurisdiction over the allotment, via RCW 37.12.010 pursuant to Public Law 280. Plaintiffs challenge Washington's Public Law 280 authority. Dkt. No. 105 at 17. However, the Yakama Indian Nation already challenged the State's adoption of RCW 37.12.010 under Public Law 280. *Washington v. Confed. Bands & Tribes of the Yakima Nation,* 439 U.S. 463 (1979). The Supreme Court held that Washington properly invoked federal consent to assume civil and criminal jurisdiction geographically over Indian country. *Id.*

Plaintiffs' citations to Oklahoma cases such as *Ahboah* are inapposite. *Ahboah* recognized that Oklahoma did not assume Public Law 280 jurisdiction over Indian country. *Ahboah v. Hous. Auth. of Kiowa Tribe*, 660 P.2d 625, 634 (Okla. 1983). Washington, by contrast, has assumed P.L. 280 jurisdiction over Indian country including off-reservation allotted trust land. *State v. Cooper*, 928 P.2d 406, 410 (Wash. 1996). State courts would have authority to adjudicate a fuel tax controversy arising from activity on the allotment, if or when a concrete controversy arises. *See* Wash. Rev. Code § 37.12.040; Wash. Rev. Code § 37.12.010; Wash.

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is contained in the treaties of only two other tribes which reside outside Washington's borders. In sum, *Cougar Den* applies to travel engaged in by Yakama members pursuant to their treaty right. 392 P.3d at 1020.

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Rev. Code § 34.05.570; *Comenout v. Liquor Control Bd.*, 2016 WL 4184367, at *2 (holding State courts had personal and subject matter jurisdiction over Robert Reginald Comenout's administrative appeal of a cigarette forfeiture on the allotment pursuant to the APA).

In sum, Federal courts do not have exclusive jurisdiction over the allotment, and plaintiffs like the Comenouts have recourse in Washington State courts under the APA.

III. CONCLUSION

For the foregoing reasons, Defendant Paul Johnson requests that this Court enter an order dismissing all claims asserted against him with prejudice.

DATED December 1, 2017.

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PROOF OF SERVICE

I, hereby certify that on December 1, 2017, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of December, 2017.

/s/Jennifer Bancroft
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