

Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Thomas Mitchell and Patricia S. Johanson Mitchell,  
et. al,  
  
Plaintiffs,  
  
v.  
  
Tulalip Tribes of Washington, a  
federally recognized Indian Tribe,  
  
Defendant.

No. 2:17-cv-1279 JCC  
  
DEFENDANT TULALIP TRIBES’  
MOTION TO DISMISS  
  
NOTE ON MOTION CALENDAR:  
October 13, 2017

**I. INTRODUCTION**

Defendant, Tulalip Tribes of Washington (hereinafter “Tulalip Tribes” or “Tribes”), hereby moves this Court for an Order dismissing the above-captioned matter with prejudice. This Motion is based upon the Tulalip Tribes’ sovereign immunity and lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

1 **I. BACKGROUND**

2  
3 Plaintiffs bring this action directly against the Tulalip Tribes, a federally  
4 recognized American Indian tribal government, seeking declaratory and injunctive relief  
5 and quieting title of Plaintiffs' properties located on the Tulalip Indian Reservation. Dkt.  
6 #1 at p. 5-6.<sup>1</sup> The relief sought against the Tribes concerns the Tribes' ordinances  
7 regulating land use and providing for a real estate excise tax on Reservation properties,  
8 and a Memorandum of Ordinance recorded to give notice of the Tulalip Tribes' land use  
9 ordinance. Dkt. #1 at p. 3-5 Plaintiffs do not allege that any real estate excise tax has  
10 been assessed against them or their properties, or that the Tribes has sought to enforce  
11 any land use regulations concerning activities on their properties. *Id.* Plaintiffs do not  
12 allege any waiver of the Tulalip Tribes' sovereign immunity from suit in bringing this  
13 action. *Id.*

14 Prior to filing this case, Plaintiffs herein, along with two additional plaintiffs, filed  
15 a complaint on April 17, 2017 in Snohomish County Superior Court, naming the Tulalip  
16 Tribes of Washington as a defendant and seeking a determination that title to Plaintiffs'  
17 properties are impermissibly clouded by the same tribal land use ordinance and  
18 Memorandum of Ordinance, and the existence of the tribal real estate excise tax  
19 ordinance. Exhibit A at p. 1 & 4-6. The State court case raised essentially the same  
20 claims as those raised in this federal court complaint. *Id.* at 6. On June 8, 2017, the  
21 Snohomish County Superior Court dismissed that action with prejudice on the grounds of  
22 tribal sovereign immunity, failure to properly join the Tulalip Tribes as an indispensable  
23 party, and lack of jurisdiction. Exhibit B at p. 1-2. Plaintiffs did not appeal the Superior  
24 Court's order.

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25  
26 <sup>1</sup> Plaintiffs assert that their properties are "within the historic boundaries of the Tulalip Reservation." Dkt.  
27 #1 at p. 3. The boundaries of the Tulalip Reservation have not changed throughout history – the "historic  
28 boundaries" of the Tulalip Reservation are the current boundaries of the Tulalip Reservation. Plaintiffs'  
properties are located within the Tulalip Reservation.

1 **II. SUMMARY OF ARGUMENT**

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3 The Tulalip Tribes presents the following bases for granting this Motion to  
4 Dismiss: (1) Under Fed. R. Civ. P. 12(b)(1), this case should be dismissed because the  
5 Tulalip Tribes' sovereign immunity deprives this Court of subject matter jurisdiction, and  
6 Plaintiffs have made no allegation or showing that immunity from suit has been waived  
7 by the Tulalip Tribes or that subject matter jurisdiction otherwise exists; (2) Under Fed.  
8 R. Civ. P. 12(b)(6), Plaintiffs' claims are barred by res judicata because of the prior  
9 Snohomish County Superior Court Action, which was dismissed with prejudice; and (3)  
10 Plaintiffs do not allege any pending or imminent tribal regulatory or taxation actions, and  
11 thus fail to establish that a justiciable case or controversy exists.

12  
13 **III. ARGUMENT**

14  
15 *STANDARD OF REVIEW*

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17 A challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may be  
18 either facial or factual. 2 Moore's Federal Prac., ¶ 12.30[4], at 12-39. In a facial  
19 challenge, the party challenging jurisdiction asserts that the plaintiff's allegations on their  
20 face are insufficient to establish the court's jurisdiction. Thus, a trial court must assume  
21 the factual allegations in the complaint are true, construing them in favor of the plaintiff,  
22 and will not look beyond the face of the complaint to determine jurisdiction. 2 Moore's  
23 *supra*, ¶ 12.30[4], at 12-40; *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

24 Similarly, in reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6),  
25 the Court will accept all factual allegations in the complaint as true and construe the  
26 pleadings in the light most favorable to the nonmoving party. *Rowe v. Educ. Credit*  
27 *Mgmt. Corp.*, 559 F.2d 1028, 1029-30 (9th Cir. 2009) (quoting *Knievel v. ESPN*, 393

1 F.3d 1068, 1072 (9th Cir. 2005)). To survive dismissal, the complaint must allege  
2 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
3 *Twombly*, 550 U.S. 544, 570 (2007).

4  
5 **TRIBAL SOVEREIGN IMMUNITY DEPRIVES THIS COURT OF SUBJECT**  
6 **MATTER JURISDICTION**

7 The Tulalip Tribes is a sovereign Indian tribe recognized by the United States  
8 with governing authority over its citizens and territory. U.S. Const. Art. I, Section 8, cl.  
9 3; 82 Fed. Reg. 4915 (2017). Longstanding federal case law is clear, consistent, and  
10 unanimous that Indian tribes are immune from suit in the same manner as other  
11 governments. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); *Santa*  
12 *Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Kiowa Tribe of Oklahoma v.*  
13 *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v.*  
14 *Potawatomi Tribe of Oklahoma*, 498 U.S. 50 (1991); *Puyallup Tribe v. Department of*  
15 *Game*, 433 U.S. 165 (1977). Indian tribes enjoy immunity because they are sovereigns  
16 predating the United States Constitution, and immunity is necessary to preserve  
17 autonomous tribal existence. *U.S. v. State of Or.*, 657 F.2d 1009, 1013 (9th Cir. 1981)  
18 (citing *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940)). The United  
19 States government recognizes tribal sovereign immunity to further tribal self-governance  
20 and out of respect for tribal sovereignty. *See, e.g., Three Affiliated Tribes v. Wold Eng’g*  
21 *P.C.*, 476 U.S. 877, 890 (1986) (“[Both] the tribes and the Federal Government are firmly  
22 committed to the goal of promoting tribal self-government[.]”); *New Mexico v.*  
23 *Mescalero Apache Tribe*, 462 U.S. 324, 334-336 n.17 (1984) (same); *Santa Clara Pueblo*  
24 *v. Martinez*, 436 U.S. 49, 60 (1978) (acknowledging respect for tribal sovereignty and  
25 congressional plenary authority). Moreover, tribal sovereign immunity is “a necessary  
26 corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes*, 476 U.S. at  
27 890. When tribal sovereign immunity exists, the Court is without subject matter

1 jurisdiction. *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Plaintiffs have the  
2 burden of establishing that the Tulalip Tribes has waived its sovereign immunity. *U.S. v.*  
3 *Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009).

4 Importantly, tribal sovereign immunity extends to claims for declaratory and  
5 injunctive relief against a tribe, such as the claims presented by Plaintiffs herein. *See*  
6 *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir.  
7 1991) (tribal sovereign immunity “extends to suits for declaratory and injunctive relief.”)  
8 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59). An Indian tribe’s sovereign  
9 immunity “is not defeated by an allegation the tribe acted beyond its powers.” *Id.* (citing  
10 *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052  
11 (9th Cir. 1985), *rev’d on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985)).

12 Furthermore, even in cases where plaintiffs may have difficulty obtaining relief if  
13 the case is dismissed, when tribal sovereign immunity is at stake, that factor has little  
14 weight. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir.  
15 2002).

16 Tribal sovereign immunity protects Indian tribes from suit absent express  
17 authorization by Congress or clear waiver by the tribe. *Kiowa Tribe, supra*, 523 U.S. at  
18 754; *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (“[W]aivers of tribal sovereign  
19 immunity may not be implied”) (citing *Santa Clara Pueblo*, 436 U.S. at 58); *Demontiney*  
20 *v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (“There is a strong presumption  
21 against waiver of tribal sovereign immunity.”).

22 The present case is brought directly against the Tulalip Tribes as a named  
23 defendant, thus directly implicating the Tulalip Tribes’ sovereign immunity. Importantly,  
24 Plaintiffs have not even alleged any waiver of the Tulalip Tribes’ sovereign immunity to  
25 give this Court subject matter jurisdiction to hear this case. Therefore, this case must be  
26 dismissed pursuant to Fed R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction  
27

1 because the Tulalip Tribes' sovereign immunity has not been waived to allow this suit for  
2 declaratory and injunctive relief.

3  
4 *PLAINTIFFS HAVE FAILED TO ESTABLISH THIS COURT'S JURISDICTION*

5  
6 The federal courts of the United States have limited subject matter jurisdiction.  
7 *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). To invoke the  
8 jurisdiction of this Court, Plaintiffs must establish that a federal statute creates the cause  
9 of action, or that Plaintiffs' right to relief necessary depends on the resolution of a  
10 substantial question of federal law. *Franchise Tax Board v. Construction Laborers*  
11 *Vacation Trust*, 463 U.S. 1, 27-28 (1983). Plaintiffs have not identified any federal  
12 question to invoke the jurisdiction of this Court.

13 An ordinance enacted by a federally recognized Indian tribe is not federal law; the  
14 mere fact that a claim is based upon a tribal ordinance consequently does not give rise to  
15 federal question jurisdiction. *Boe v. Fort Belknap Indian Community* 642 F. 2d 276, 279  
16 (9th Cir. 1981). Here, where the complaint allegations challenge the enactment and notice  
17 of tribal laws rather than a specific tribal enforcement action or tax levy upon non-  
18 members, there is no federal question jurisdiction. *Id. See also Morongo Band of Mission*  
19 *Indians v. Rose*, 893 F.2d 1074 (9<sup>th</sup> Cir. 1990)

20 Furthermore, Plaintiffs cannot claim diversity jurisdiction because an Indian tribe  
21 is not considered a "citizen" for purposes for diversity jurisdiction. *American Vantage*  
22 *Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (2002).

23 Therefore, this Court lacks subject matter jurisdiction in this case, and dismissal  
24 should be granted pursuant to Fed. R. Civ. P. 12(b)(1).

1                    *PLAINTIFFS' CLAIMS ARE BARRED BY RES JUDICATA*

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3                    Plaintiffs' prior unsuccessful action in Snohomish County Superior Court bars  
4 this action under the doctrine of res judicata. Therefore, Plaintiffs have failed to properly  
5 state a claim, and dismissal should be granted pursuant to Fed. R. Civ. P. 12(b)(6).<sup>2</sup>

6                    As detailed herein above, in April 2017, Plaintiffs sued the Tulalip Tribes in  
7 Snohomish County Superior Court, seeking substantially the same relief sought in the  
8 present action, concerning the Tulalip Tribes' land use and real estate excise tax  
9 ordinances, and a Memorandum of Ordinance recorded to give notice of the Tribes' land  
10 use laws. Exhibit A at p. 6. The causes of action in the present case are nearly identical  
11 to those asserted by Plaintiffs in the prior state court case. The first cause of action  
12 asserted by Plaintiffs in this case is as follows:

13                    Plaintiffs are entitled to a declaration of this Court that Defendant is  
14 without jurisdiction to regulate uses on Plaintiffs' lands and, has  
15 impermissibly and without privilege clouded Plaintiffs' title to Plaintiffs'  
16 real properties by recording the Memorandum of Ordinance asserting  
17 jurisdiction for the purposes of land use regulatory authority over  
18 Plaintiffs' real properties which jurisdiction Defendant does not in fact  
19 have.

20                    Dkt. #1 at p. 5, ¶ 4.1.

21                    By comparison, the first cause of action asserted by Plaintiffs in State court was  
22 as follows:

23                    Plaintiffs are entitled to a determination of this Court that Defendant has  
24 impermissibly and without privilege clouded Plaintiffs' title to  
25 Plaintiffs' real properties by recording the Memorandum of Ordinance  
26 asserting jurisdiction for the purposes of land use regulatory authority  
27 over Plaintiffs' real properties which jurisdiction Defendant does not in  
28 fact have.

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26                    <sup>2</sup> With respect to the affirmative defense of res judicata, if the facts are admitted and nothing further can be  
27 developed by a trial of the issue, the matter may be disposed of on a motion to dismiss. *Larter & Sons, Inc.*  
28 *v. Dinkler Hotels Co., Inc.*, 199 F.2d 854 (9th Cir. 1952).

1 Exhibit A at p. 6, ¶ 4.1.

2 Similarly, the second cause of action asserted by Plaintiffs in this case is as  
3 follows:

4 Plaintiffs are entitled to a declaration of this Court that Defendant is  
5 without jurisdiction to levy a tax on transfer of non-native owned  
6 properties and, has impermissibly and without privilege clouded  
7 Plaintiffs' title to Plaintiffs' real properties by asserting a lien for excise  
8 tax on the transfer of Plaintiffs' real properties.

9 Dkt. #1 at p. 5-6, ¶ 4.2.

10 As with the first cause of action, the claim previously presented by Plaintiffs in  
11 State court was nearly identical:

12 Plaintiffs are entitled to a determination of this Court that Defendant  
13 has impermissibly and without privilege clouded Plaintiffs' title to  
14 Plaintiffs' real properties by asserting a lien for excise tax on the  
15 transfer of Plaintiffs' real properties.

16 Exhibit A at p. 6, ¶ 4.2.

17 As to each cause of action asserted by Plaintiffs herein, the claims presented in  
18 this Court are the same as the claims that were previously presented in State court, even  
19 using identical wording in some instances.

20 On June 8, 2017, the Snohomish County Superior Court dismissed Plaintiffs'  
21 complaint therein with prejudice on the grounds of tribal sovereign immunity, failure to  
22 properly join the Tulalip Tribes as an indispensable party, and lack of jurisdiction.

23 Exhibit B at p. 1-2. No appeal of the Superior Court's order was filed within the time  
24 required by Washington State Rule of Appellate Procedure 5.2(a). Therefore, the  
25 Superior Court's order is now final.

26 Res judicata bars lawsuits on "any claims that were raised or could have been  
27 raised" in a prior action. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713



1 (9th Cir. 2001). The doctrine of res judicata “applies to jurisdictional issues as well as  
2 substantive issues.” *Americana Fabrics, Inc. v. L&L Textiles, Inc.*, 754 F.2d 1524, 1529  
3 (9th Cir. 1985). Res judicata, also known as claim preclusion, applies when there is “(1)  
4 an identity of claims; (2) a final judgment on the merits; and (3) identity or privity  
5 between parties.” 244 F.3d at 713 (internal quotations omitted). Federal courts are  
6 “required to give *res judicata* effect to the judgments of state courts.” 754 F.2d at 1529  
7 (citations omitted).

8 It is beyond dispute that Plaintiffs in this case, and the Defendant, were also  
9 parties to the Snohomish County Superior Court action earlier this year. Therefore, the  
10 identity or privity of parties requirement is met. Furthermore, the claims presented by  
11 Plaintiffs in State court sought the same relief that Plaintiffs now seek from this Court,  
12 indicating that there is identity of claims. In fact, the two causes of action asserted by  
13 Plaintiffs in this case are nearly identical to those presented in State court, and even use  
14 identical wording in some instances. Lastly, dismissal on the basis of tribal sovereign  
15 immunity is a final judgment on the merits for purposes of claim preclusion.

16 In the case of *Miller v. Wright*, the Ninth Circuit Court of Appeals found that a  
17 federal court action against a tribe and tribal officials was barred by res judicata. 705  
18 F.3d 919, 928. This was based, in part, on a prior tribal court action, wherein the Ninth  
19 Circuit found that the tribal court had reached final judgment. *Id.* Elsewhere, the Ninth  
20 Circuit noted that the tribal court action “was dismissed by the tribal court because of the  
21 Tribe’s sovereign immunity.” *Id.* at 922. Therefore, dismissal of a prior action on the  
22 basis of tribal sovereign immunity is considered a final judgment for purposes of res  
23 judicata.

24 Furthermore, it is significant that the Snohomish County Superior Court granted  
25 dismissal “with prejudice.” Exhibit B at Page 2, Line 1. Generally, “final judgment on  
26 the merits” may be considered interchangeable with “dismissal with prejudice.” *Stewart*  
27 *v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002); *In re Marino*, 181 F.2d 1142, 1144

1 (9th Cir. 1999) (“There can be little doubt that a dismissal with prejudice bars any  
2 further action between the parties on the issues subtended by the case.”). The order of  
3 dismissal from Snohomish County Superior Court should, therefore, be considered a final  
4 judgment on the merits because it was issued with prejudice.

5 Accordingly, this case should be dismissed on the basis of res judicata because of  
6 the prior Snohomish County Superior Court action involving the same parties and an  
7 identity of claims, which was dismissed with prejudice on the basis of tribal sovereign  
8 immunity.

9  
10 *PLAINTIFFS’ COMPLAINT FAILS TO ESTABLISH A JUSTICIABLE CASE OR*  
11 *CONTROVERSY*

12 To invoke the jurisdiction of a federal court, a litigant must establish the existence  
13 of an actual, ongoing case or controversy. U.S. Const. art. III, § 2; *Lewis v. Continental*  
14 *Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990). In order  
15 for a court to have subject matter jurisdiction, there must be a matter “ripe” for  
16 adjudication, and if a case is not “ripe” then it should be dismissed. Fed. R. Civ. P.  
17 12(b)(1); *Chandler v. State Farm Mutual Automobile Insurance Co.*, 598 F.3d 1115,  
18 1121-1122 (9th Cir. 2010). Plaintiff “must show that he personally has suffered some  
19 actual or threatened injury as a result of the putatively illegal conduct of the defendant.”  
20 *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60  
21 L.Ed.2d 66 (1979). A litigant ““does not have to await the consummation of threatened  
22 injury to obtain preventive relief. If the injury is certainly impending, that is enough.””  
23 *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60  
24 L.Ed.2d 895 (1979). However, in the case of statutes, “neither the mere existence of a  
25 proscriptive statute nor a generalized threat of prosecution satisfies the ‘case or  
26 controversy’ requirement.” *Association of American R.R. v. California Office of Spill*  
27

1 *Prevention & Response*, 113 F.Supp.3d 1052, 1057 (E.D. Cal. 2015) (citing *San Diego*  
2 *County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996)).

3 In the present case, there is no pending or impending enforcement of tribal land  
4 use or excise tax laws in relation to Plaintiffs' activities on their Reservation fee  
5 properties, nor is there any allegation that tribal government action is pending or  
6 imminent. Plaintiffs merely allege that they are entitled to relief because of the very  
7 existence of tribal ordinances that they speculate may be enforced against them or their  
8 properties in the future. Thus Plaintiffs' Complaint fails to establish that a justiciable  
9 controversy exists to support federal court jurisdiction.

10 In pleading an injury sufficient to show an actual case or controversy, the asserted  
11 injury cannot be abstract. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38  
12 L.Ed.2d 674 (1974). "The injury or threat of injury must be both 'real and immediate,'  
13 not 'conjectural' or 'hypothetical.'" *Id.* Article III confines federal courts to resolving  
14 "'real and substantial controvers[ies] admitting of specific relief through a decree of a  
15 conclusive character, as distinguished from an opinion advising what the law would be  
16 upon a hypothetical state of facts.'" *Ibid.* (quoting *Aetna Life Insurance Co. v. Haworth*,  
17 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)). In the present case,  
18 Plaintiffs have failed to plead any injury that is not hypothetical or conjectural.

19 Under the standards required to invoke the federal court's jurisdiction as set forth  
20 in Article III of the United States Constitution, Plaintiffs' Complaint fails to establish a  
21 requisite case or controversy. Accordingly, this case must be dismissed.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Plaintiffs' Complaint against the Tulalip Tribes  
3 should be dismissed with prejudice. Plaintiffs have failed to properly invoke the  
4 jurisdiction of this Court, or to demonstrate a waiver of the Tulalip Tribes' sovereign  
5 immunity. Therefore, this Court lacks subject matter jurisdiction. Furthermore,  
6 Plaintiffs' claims are barred by the doctrine of res judicata and failure to establish a  
7 requisite case or controversy.

8  
9 DATED this 15th day of September 2017.

10  
11 TULALIP TRIBES OFFICE OF RESERVATION ATTORNEY

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24 *Attorneys for Defendant*  
25 *Tulalip Tribes of Washington*

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed the foregoing motion, together with all attachments, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Paul Brain  
pbrain@paulbrainlaw.com

DATED this 15th day of September 2017.

TULALIP TRIBES OFFICE OF RESERVATION ATTORNEY

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