The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS MITCHELL and PATRICIA S, JOHANSON-MITCHELL, husband and wife, and Buckley Evans and TINA EVANS, husband and wife, ROBERT C. DOBLER and LIZBETH K. DOBLER, husband and wife,

Plaintiff,

v.

TULALIP TRIBES OF WASHINGTON,

Defendant.

Case No. 2:17-cv-1279 JCC

PLAINTIFFS' RESPONSE TO DEFENDANT TULALIP TRIBES' MOTION TO DISMISS

NOTED ON MOTION CALENDAR: OCTOBER 13, 2017
ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The Plaintiffs are among about 8000 non-tribal member property owners who hold fee title to real property located within the historical boundary of the Tulalip Reservation. The Defendant has taken 2 actions which cloud Plaintiffs' title: (1) caused to be recorded in the Snohomish County records of title an Ordinance which purports to create land use regulatory authority over non tribal member property owners who hold fee title to real property located within the historical boundary of the Tulalip Reservation and (2) have claimed an entitlement to an excise tax on the sale of such properties to non-tribal members. Plaintiffs seek a declaration that Defendant is acting outside the scope of its inherent sovereignty and is without jurisdiction over Plaintiffs' properties.

Defendant asserts three bases for dismissal: (1) the claim is barred by tribal sovereign

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immunity; (2) the Plaintiffs lack standing to assert an "unripe" claim; and (3) Plaintiffs' claims are barred by the prior state court ruling that the state court lacked *in rem* jurisdiction.

The Supreme Court has held that tribes lack the authority, without exception, to regulate sales of property non tribal member owners who hold fee title to real property located within the reservation boundaries. *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 128 S. Ct. 2709, 2712–13, 171 L. Ed. 2d 457 (2008) and, in the specific context of taxation: *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 645, 121 S. Ct. 1825, 1827, 149 L. Ed. 2d 889 (2001).

Other case law has extended this principal to efforts to impose tribal land use regulation. The 9th Circuit Court of Appeals has concluded that Tribal efforts to regulate landowners in the position of Plaintiffs are "presumptively invalid." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302–03 (9th Cir. 2013); citing to *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981).

There is no issue of sovereign immunity here. None of the cases in the preceding paragraph could have gone forward if a claim that a tribe has acted outside its jurisdiction was subject to immunity. A cause of action claiming a tribe has exceeded its jurisdiction is a well-recognized "federal question" under 28 USC §1331. "The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853, 105 S. Ct. 2447, 2452, 85 L. Ed. 2d 818 (1985); "Non–Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction." *Elliott v. White Mountain Apache Tribal Court,* 566 F.3d 842, 846 (9th Cir.2009) (quoting *Boozer,* 381 F.3d at 934). A cloud on title is injury in fact, the prerequisite for standing to assert the claim, as a matter of law.

Finally, the doctrine of res judicata is inapplicable here because the issues are entirely different. In the prior Snohomish County Action, the Court was asked to decide whether it had *in rem* jurisdiction over the real properties to extinguish a cloud on title under state law. There

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was no resolution of the principal issue- whether the Tribes conduct had caused injury to Plaintiffs. Here, Plaintiffs' assert a challenge to tribal jurisdiction arising under Federal law.

II. STATEMENT OF FACTS

The Plaintiffs' properties are in "Snoqualmie Jim's Plat." The Plat was originally "Tulalip Allote 56" to "Snoqualmie Jim and Jennie Snoqualmie, husband and wife." The allotment would have been made around 1899 because an allottee was required to hold the land for 25 years before it could be patented in fee.

> The legislative centerpiece of the allotment policy was the General Allotment Act (GAA), Under the GAA, parcels of land to be granted to individual Indians were initially held in trust by the United States. Section 5 of the GAA provided that after a twenty-five year trust period, the United States would convey the land in fee simple to the individual allottee. During the trust period the allottees were not permitted to convey the land. Section 6 of the GAA provided that the allottees would be subject to state civil and criminal law.

Leech Lake Band of Chippewa Indians v. Cass Cty., Minn., 108 F.3d 820, 822 (8th Cir. 1997), rev'd in part, 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998) (cites omitted). Under 25 U.S.C.A. § 349, following the issuance of the patent in fee the allottee, any subsequent conveyance, and any subsequent owner is subject to state laws and jurisdiction:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside;

The original patent in fee to Snoqualmie Jim and Jennie Snoqualmie is dated May 24, 1924: App. 1. Snoqualmie Jim's Plat was recorded on December 31, 1924. DKT 1 at ¶ 3.1. So, the properties at issue passed out of trust into fee ownership about 90 years ago. Since then, the area has become a quiet residential neighborhood with on the order of 200 single family residences. Dobler Dec. DKT 7.

TCC 12.20.170(16) purports to create a lien securing payment of an excise tax on Plaintiff's properties. TCC 12.20.070 provides that the tax may be enforced "in the manner prescribed for foreclosure of mortgages as provided in the Revised Code of Washington." DKT 1 at ¶ 3.6. This claim appears as a special exception to coverage in Plaintiffs' title commitments

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as follows:

> Payment of real estate excise tax, if required. The Land is situated within the boundaries of the Tulalip Indian Reservation. Present rate of excise tax as of the date herein is 1% (one percent).

See, e.g. DKT 1-14 at ¶ 12 and 13.

On April 9, 1999, the Defendant caused to be recorded a Memorandum of Ordinance under Snohomish County recording No. 9904090798 ("Memorandum of Ordinance"), purporting to give notice of land use regulatory authority over any and all properties owned in fee by non-tribal members located within the original boundaries of the Tulalip Reservation. DKT 1 at ¶ 3.3. The recorded instrument identifies the affected parcel by Snohomish County Tax Identification Numbers listing about 8000 separate numbers. The recorded Memorandum of Ordinance has been identified as a Special Exception to Coverage in each Plaintiffs' Title Commitment in the following form:

> Memorandum of Ordinance No. 99-054 and the terms and conditions thereof:
> Recording Date: April 9, 1999
> Recording No.: 9904090798
> Regarding: Zoning, minimum required lot sizes and subdivision requirements.

See, e.g. DKT 1-13 at ¶ 4.

III. EVIDENCE RELIED ON

This Response is based on the Declarations of Robert C. Dobler: DKT 7, and Paul Brain: DKT 8, filed herewith.

IV. AUTHORITY AND DISCUSSION

A. Sovereign Immunity

A cause of action claiming a tribe has exceeded its jurisdiction is a well-recognized "federal question" under 28 USC §1331. "The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853, 105 S. Ct. 2447, 2452, 85 L. Ed. 2d 818 (1985); "Non–Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction." *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir.2009) (quoting *Boozer*, 381 F.3d at

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934). "As a non-Indian, Mr. Jones 'may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction.' *Boozer v. Wilder,* 381 F.3d 931, 934 (9th Cir.2004) (citing *Nat'l Farmers Union Ins. Cas. v. Crow Tribe of Indians,* 471 U.S. 845, 850–53, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985))." *Jones v. Lummi Tribal Court*, No. C12-1915JLR, 2012 WL 6149666, at *4 (W.D. Wash. Dec. 10, 2012). Defendant has admitted as much:

> If Plaintiffs disagree with the Tribal judicial determinations concerning Tribal authority, they have the ability to raise issues related to Tribal authority, they have the ability to raise issues related to Tribal authority over their activities in the Federal Courts of the United States."

Brain Dec. Ex. 4 at 11; DKT 8-14.

It is worth noting that none of the reported opinions cited below on tribal jurisdiction would have been possible if a claim asserting that a tribe has exceeded its jurisdictional limits was barred by sovereign immunity.

If in fact the Tribe lacks the authority/jurisdiction to engage in the conduct at issue, there is no issue here which would justify sovereign immunity being invoked. This is because, in that case, the Tribe would be using what is intended as a shield for the protection of a Tribe's right to self- regulate, into an offensive weapon to expand its authority:

> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent).

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014) (citaitions omitted). If the Tribe is acting outside the scope of its lawful authority, what aspect of tribal self-governance would be impacted so as to justify immunity? Indeed, the regulations are specifically addressed to property interests of non-tribal members. So, the fundamental issue here is whether the Tribe is acting within the scope of its jurisdiction.

Here, you have to separate the two issues. With respect to the excise tax issue, the answer is clearly no:

> The general rule that tribes do not possess authority over non-Indians who come within their borders, restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity

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> occurs on land owned in fee simple by non-Indians. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. Moreover, when the tribe or its members convey fee land to third parties, the tribe "loses any former right of absolute and exclusive use and occupation of the conveyed lands." Thus, "the tribe has no authority itself ... to regulate the use of fee land."
>
> [T]he Tribe lacks the civil authority to regulate the Bank's sale of its fee land, and "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Montana* does not permit tribes to regulate the sale of non-Indian fee land. Rather, it permits tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. With only one exception, this Court has never "upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land," Nor has the Court found that *Montana* authorized a tribe to regulate the sale of such land. This makes good sense, given the limited nature of tribal sovereignty and the liberty interests of nonmembers. Tribal sovereign interests are confined to managing tribal land, protecting tribal self-government, and controlling internal relations, Regulations approved under *Montana* all flow from these limited interests. ***None of these interests justified tribal regulation of a nonmember's sale of fee land.***

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 128 S. Ct. 2709, 2712–13, 171 L. Ed. 2d 457 (2008)(emphasis added, citations omitted). See, also: *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 645, 121 S. Ct. 1825, 1827, 149 L. Ed. 2d 889 (2001). [1]

While *Montana*; 450 U.S. 544, recognizes exceptions to lack of tribal jurisdiction over the conduct of non-tribal members on fee lands, *Plains Commerce Bank*, holds that the exceptions are not applicable in the context of an attempt to regulate sales of property by non-tribal members with fee title to lands: "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land." Id at 554 U.S. 316, 332, 128 S. Ct. 2709, 2721, 171 L. Ed. 2d 457 (2008). The excise tax ordinance is without question outside the jurisdiction conferred by the inherent sovereignty of the Tribe.

Land use regulation is a little different. The 9th Circuit Court of Appeals has concluded

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[1] "The first source of tribal court jurisdiction-the inherent sovereignty of the tribe—is limited and centers on the land held by the tribe or tribal members within the reservation. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 327, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). The Supreme Court has stated "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." Jones v. Lummi Tribal Court, No. C12-1915JLR, 2012 WL 6149666, at *6 (W.D. Wash. Dec. 10, 2012).

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that Tribal efforts to regulate landowners in the position of Plaintiffs are "presumptively invalid." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302–03 (9th Cir. 2013) but that the exceptions in *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981) may be applicable.

With respect to those exceptions:

> ***The burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land."*** *Plains Commerce,* 554 U.S. at 330, 128 S.Ct. 2709 (citing *Atkinson,* 532 U.S. at 654, 121 S.Ct. 1825). For a tribe to have authority over such nonmember conduct, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce,* 554 U.S. at 341, 128 S.Ct. 2709 (quoting *Montana,* 450 U.S. at 566, 101 S.Ct. 1245). Thus, "*Montana*'s second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.' " *Burlington N. R.R. Co. v. Red Wolf,* 196 F.3d 1059, 1064–65 (9th Cir.1999) (quoting *Brendale,* 492 U.S. at 431, 109 S.Ct. 2994 (opinion of White, J.)). Rather, the challenged conduct must be so severe as to "fairly be called catastrophic for tribal self-government." *Plains Commerce,* 554 U.S. at 341, 128 S.Ct. 2709 (internal quotation and citation omitted).

Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1305–06 (9th Cir. 2013)(emphasis added). If the Tribe wished to assert that one of the *Montana* exceptions is applicable here, it should have done so in its opening Brief so that Plaintiffs would have a fair opportunity to respond.

Nevertheless, one of the principal factors the *Evans* Court looked at, drawing on *Brendale*; 492 U.S. at 443–44, 109 S.Ct. 2994 as the authoritative basis for its conclusion that there was no tribal jurisdiction was: 'To begin with, the area contains many residential properties owned and inhabited by nonmembers." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1304 (9th Cir. 2013). There are over 8000 tax parcel numbers in the recorded Ordinance purporting to establish land use regulatory authority. The Mission Beach neighborhood where the Plaintiffs reside has been a single family neighborhood since the mid to late 1920's containing on the order of 200 fee owned residences.

The other issue that the Tribe raised in the prior Snohomish County Superior Court action not raised here is "exhaustion of tribal remedies." In other words, that the defendant

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asserts that these issues should have been addressed in Tribal Court before being raised here. What the Tribe said there was:

> If Plaintiffs disagree with the Tribal judicial determinations concerning Tribal authority, they have the ability to raise issues related to Tribal authority, they have the ability to raise issues related to Tribal authority over their activities in the Federal Courts of the United States."

Brain Dec. Ex. 4 at 11; DKT 8-14. Defendant misstates the situation. Exhaustion is not an absolute requirement. There are exceptions.

If the Tribe wished to assert that the doctrine of exhaustion of tribal remedies is applicable here, it should have done so in its opening Brief so that Plaintiffs would have a fair opportunity to respond. Nevertheless, as discussed below, exhaustion is not required when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay. Again, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,..." With respect to the excise tax issue, there can be no adjudicative jurisdiction because there is absolutely no legislative jurisdiction to tax the transfer of fee lands.

As to land use authority:

> "Exhaustion is prudential; it is required as a matter of comity, not as a jurisdictional prerequisite." To this end, the Supreme Court has recognized four exceptions to the exhaustion requirement: "(1) when an assertion of tribal court jurisdiction is 'motivated by a desire to harass or is conducted in bad faith'; (2) when the tribal court action is 'patently violative of express jurisdictional prohibitions'; (3) when 'exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction'; and (4) when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay.' "
>
> Evans contends that he is not required to exhaust tribal remedies because the tribal court plainly lacks jurisdiction. To determine whether tribal court jurisdiction is plainly lacking, we analyze whether such "jurisdiction is colorable or plausible...." The plausibility of tribal court jurisdiction depends on the scope of the Tribes' regulatory authority, as "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."

Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1302 (9th Cir. 2013) (citations omitted).

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In *Evans*, a property owner, contractor, and subcontractor commenced an action against Indian tribe, seeking a declaratory judgment that tribal court lacked jurisdiction over his construction of single family dwelling within reservation and preliminary injunction barring further tribal court proceedings against them. To determine whether tribal jurisdiction was plausible, the Court applied the following standard:

> To determine whether *Brendale* supports tribal court jurisdiction, we consider the character of the area in which Evans' property is located and the nature of Evans' project. Tribal zoning authority over non-Indian fee land is plausible only if (1) there is an arguable similarity between the area surrounding the fee land and the closed portion of the reservation described in *Brendale*; and (2) the intended use of the fee land would place the character of the surrounding area of the reservation "in jeopardy." *Atkinson,* 532 U.S. at 658, 121 S.Ct. 1825 (quoting *Brendale,* 492 U.S. at 443, 109 S.Ct. 2994 (opinion of Stevens, J.)).

Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298, 1304 (9th Cir. 2013).

The Mission Beach neighborhood within which Plaintiffs' homes are located was platted for use as a single family residential neighborhood in the 1920's and, has been a single family residential neighborhood for over 90 years. There is no similarity between this neighborhood and the adjacent tribal property. That owning a home on fee land in a residential neighborhood established for almost a century would place the adjacent tribal property in jeopardy under these circumstances is not plausible.

B. Lack of Standing:

What is really being argued here is an issue of standing of which ripeness is just a part:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." The party invoking federal jurisdiction bears the burden of establishing these elements.
>
> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the

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> manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136–37, 119 L. Ed. 2d 351 (1992) (citations omitted). Defendant's argument focuses on the following portion of the standard: "actual or imminent, not 'conjectural' or 'hypothetical,'... At this stage, the Court is required to "presume" "general factual allegations of injury resulting from the defendant's conduct suffice" to satisfy the requirements of CR 12(b)(6).

Defendant's argument boils down to: "plaintiffs haven't been hurt yet." However, Defendant acknowledges that "a litigant 'does not have to await the consummation of threatened injury to obtain preventative relief.' " DKT 6 at 10. Plaintiffs contend that the allegation that Defendant has already clouded Plaintiffs' title satisfies the "injury in fact" requirement as a matter of law because there is simply no debatable issue as to whether Plaintiffs' rights in property have been invaded by the Tribe.

Under RCW 48.29.010, a title commitment is an offer to insure the marketability of title. In Washington, the coverage is based on an American Land Title Association form: See, e.g., *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wash. App. 895, 900–01, 249 P.3d 625, 627 (2010):

> The 2006 form defines "Unmarketable Title" as follows:
>
> > Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

Id at 901. That these matters are scheduled as exceptions to coverage means the title insurers on each of Plaintiffs' properties has concluded that these clouds render Plaintiffs' title unmarketable, which is why they are expressly excepted from coverage. They are recognized by the title insurers as matters which would allow a purchaser to decline to close if marketable title is a condition to closing.

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Washington law defines a cloud on title as follows:

> Washington case law has not addressed cloud on title as a concept distinct from an encumbrance, but we have no reason to believe a court may remove only an actual encumbrance. The word "cloud" does not denote a hard-edged limitation. It is more appropriate to focus on whether the recorded document has any tendency to impair the fee owner's ability to exercise the rights of ownership. An 1891 decision of the Michigan Supreme Court ably articulates a definition of cloud on title, which we hereby adopt:
>
> > A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. ***Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove.***

Robinson v. Khan, 89 Wash. App. 418, 422–23, 948 P.2d 1347, 1349 (1998)(emphasis added).

> A "cloud" on a title may be an encumbrance or a recorded document that "has any tendency to impair the fee owner's ability to exercise the rights of ownership." Even a contract, or other document that does not actually encumber a party's title, may be a cloud if it would create "an unnecessary complication that [would] have to be explained to a buyer or title insurer."

Inglewood Holdings, LLC v. Jones Engineers, Inc., 197 Wash. App. 1055, 2017 WL 398696 (2017). Defendant has unquestionably already affected the fee owners' [Plaintiffs'] ability to exercise the rights of ownership. There is injury in fact.

If this matter goes forward, in addition to the evidence that the Tribe's conduct has rendered Plaintiffs' title unmarketable, Plaintiffs will offer proof that certain single family lenders will not loan on non-native fee owned properties within the original boundaries of the Tulalip Reservation because of the uncertainty of tribal regulation, viewed as a negative by potential purchasers. These clouds have the effect of reducing the pool of potential purchasers, dramatically increasing time on market and, having a chilling effect on price. Moreover, escrow companies are declining to close transactions involving fee lands without payment of the excise tax (see Dobler Dec. DKT 7 at ¶ 6; Brain Dec. DKT at 8-7). As a result, the tribal ordinances represent an interference with Plaintiffs' rights in property including the ability to alienate their properties. Under

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the standard governing motions to dismiss under CR 12, this Court is required to assume these facts to be true.

C. Res Judicata

The standards governing the application of res judicata under both Washington and Federal law are basically the same:

> Because res judicata ensures the finality of judgments and eliminates duplicative litigation, dismissal on res judicata grounds is appropriate where the subsequent action is identical with a prior action in four respects: "(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made."

Ensley v. Pitcher, 152 Wash. App. 891, 902, 222 P.3d 99, 104 (2009)

> "Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties."

Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1, 824 F.3d 1161, 1164 (9th Cir. 2016). Neither standard is met here.

The first question would be is there an identity of issues/claims between the two cases. The Complaint in the prior state court action is Ex. A to the Motion to Dismiss (DKT 6-1 pages 2-8). At ¶ 2.1 that Complaint alleges:

> This is an action *in rem* to determine the respective rights of the parties in the above described real estate. Accordingly, this Court has jurisdiction under RCW 2.08.010 in that all the real properties at issue are located within Snohomish County.

The jurisdictional basis in the prior state court action was that state courts have *in rem* jurisdiction over fee lands within the state. Washington case law is that sovereign immunity does not bar an *in rem* action. *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 865, 389 P.3d 569, 573 (2017). The Order; Motion to Dismiss Ex. B (DKT 6-2 at pages 1-3), only addresses whether the state court has *in rem* jurisdiction. [2]

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[2]Defendant points to Plaintiffs' election not to appeal the ruling of the State Court as relevant to this issue. Given the position of the Trial Court, as stated in the Court's oral ruling, that this really was a Federal matter and, Defendant's admission that a Federal law remedy was available, Plaintiffs elected not to appeal.

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Here jurisdiction is predicated on a "federal question" under 28 USC § 1331, a cause of action apparently recognized by defendant:

> If Plaintiffs disagree with the Tribal judicial determinations concerning Tribal authority, they have the ability to raise issues related to Tribal authority, they have the ability to raise issues related to Tribal authority over their activities in the Federal Courts of the United States."

Brain Dec. Ex. 1 at 11: DKT 8-14. Jurisdiction here is personal jurisdiction under 28 USC § 1331, not *in rem* as was the case in the prior state court action.

The Complaint in the prior state court action then invokes a remedy arising under state law, specifically: "an order quieting title to Plaintiffs' properties free and clear of … Defendant's claim of authority to levy excise tax through a lien on Plaintiffs' properties" and, "an order quieting title to Plaintiffs' properties free and clear of … the Memorandum of Ordinance." Quiet title is a statutory cause of action:

> Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county … and *may have judgment* in such action …. *removing a cloud from plaintiff's title*;

RCW 7.28.010. Here, Plaintiffs seek declaratory relief under 28 USC § 2201 as to the scope of tribal jurisdiction – a recognized federal cause of action entirely distinct from the state law issues in the prior state court action.

The Superior Court made no resolution of any issue on the merits. The dismissal was based entirely on considerations of the jurisdiction of the state court. DKT 6-2 at pages 1-3. The Superior Court did not address whether a Federal Court would have jurisdiction over the issue of the scope of tribal jurisdiction. In essence, Defendant is asserting that the Order of the Superior Court precludes this Court from addressing an issue the Superior Court couldn't decide in the first place.

Under the Federal standard, a dismissal based on a lack of jurisdiction is issue preclusive only as to the issue of jurisdiction:

> A party may move to dismiss for failure to state a claim under either Rule 12(b)(6) or, where the movant asks the court to consider materials outside the pleadings, under Rule 56. However, a party may move to dismiss for lack of

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> subject matter jurisdiction only under Rule 12(b)(1). There is good reason for requiring parties to plead these motions differently. A ruling that a party has failed to state a claim on which relief may be granted is a decision on the merits with full res judicata effect. A party may therefore seek summary judgment, which is on the merits, on this issue. In contrast, a ruling granting a motion to dismiss for lack of subject matter jurisdiction [under CR 12(b)(1)] is not on the merits; its res judicata effect is limited to the question of jurisdiction.

Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987). The Superior Court's dismissal for lack of jurisdiction is expressly predicated on CR 12(b) (1). Motion Ex. B at ¶ 2 (DKT 6-2 at pages 1-3).

Applying this standard here, Federal Court jurisdiction was before the Superior Court only to the extent Defendant admitted that the Federal Court would have jurisdiction:

> If Plaintiffs disagree with the Tribal judicial determinations concerning Tribal authority, they have the ability to raise issues related to Tribal authority, they have the ability to raise issues related to Tribal authority over their activities in the Federal Courts of the United States."

Brain Dec. Ex. 1 at 11; DKT 8-14. To the extent there is an issue preclusion, Plaintiffs' would only be precluded from re-litigating issues of state court jurisdiction.

V. CONCLUSION

It is obvious that what the Defendant is trying to do is re-assert tribal authority over what was once part of the Tulalip Reservation. But, the Allotment Act in original form was adopted in 1882 – 135 years ago. The properties at issue here passed into fee in 1924 - 93 years ago. There is no living memory of the time when these properties were trust property, even as allotments, before passing into fee.

While the desire of the Defendant to restore the original reservation is understandable, the law is absolutely clear that the mechanisms the Defendant has chosen to do so are simply outside the jurisdiction of the Defendant to implement.

While the Defendant contends that Plaintiffs have not suffered an injury because Defendant's conduct has not injured Plaintiffs, the Defendant's conduct has in fact injured Plaintiffs in perhaps the most fundamental way – by degrading the value of Plaintiffs' properties

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and interfering with Plaintiffs' right to freely alienate their property. In the context of this Motion, the Court is bound to assume this injury exists.

The idea that a state court order determining that a state court lacked in rem jurisdiction is issue preclusive as to whether a Federal Court has federal question jurisdiction is consistent with the formulation of the doctrine of res judicata under either the state of Federal standard.

For these reasons, Plaintiffs respectfully request that this Court deny Defendant's Motion.

DATED this 9th day of October, 2017.

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