No. 91622-5

SUPREME COURT
OF THE STATE OF WASHINGTON

UPPER SKAGIT INDIAN TRIBE,

Appellant,

v.

SHARLENE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents.

APPELLANT'S OPENING BRIEF

Harold Chesnin, WSBA# 398
David S. Hawkins, WSBA# 35370
Tribal Attorney
25944 Community Plaza Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com
Attorney for Appellant

Peter R. Dworkin, WSBA# 30394
Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225
(360) 734-6390
pete@belcherswanson.com
Attorney for Appellant

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I. INTRODUCTION

In 1855, the aboriginal bands to which the Upper Skagit Indian Tribe, a federally recognized Indian Tribe (hereinafter "Upper Skagit" or "Tribe"), is the adjudicated successor in interest, entered into the Treaty of Point Elliott (hereinafter "Treaty") with the United States of America. The United States, recognizing the Upper Skagit as a sovereign holding original title to the lands at issue in this matter, made the determination that it would not attempt to divest the Upper Skagit of its lands through adverse possession. Rather, the United States determined to treat with the Upper Skagit for said title.

While the history of the Treaty is replete with controversy, the constant has been the recognition by the United States of the standing of the Upper Skagit as a sovereign. This recognition—that the Upper Skagit ceded its lands in return for specific obligations owed to them by the United States, the future State of Washington, and the citizens of the State—is based primarily upon the recognition of the Upper Skagit as a sovereign.

After signing the Treaty, the Upper Skagit became landless and had no reservation for the benefit of its members. The Upper Skagit Tribe then engaged in a land reclamation process in an effort to establish a land base for its membership.

One hundred and fifty-eight years later, in September 2013, the Upper Skagit purchased the parcel of property now at issue in this case. It received a statutory warranty deed with no exceptions, transferring the entire historical record of title to the Upper Skagit. (CP 53). The property is in the historic territory of the Upper Skagit. It is adjacent to a tribal cemetery and abuts trust territories of the Upper Skagit Tribe. This area is of great cultural significance to the Tribe, and its Tribal members have inhabited this area for centuries.

The trial court ignored the fundamental legal rules and historical facts established by the Treaty. By asserting jurisdiction over the Tribe and finding adverse possession in favor of the Lundgrens, the trial court contravened the federally recognized inherent sovereignty of the Upper Skagit.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in denying the Tribe's CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and CR 19 failure to join a necessary and indispensable party, based upon the Tribe's inherent governmental sovereign immunity from uncontested suit.

2. Alternatively, if the trial court properly exercised jurisdiction, it erred in granting summary judgment to the Plaintiff below

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Upper Skagit Tribe possesses sovereign immunity from suit in this case?

2. Whether the Upper Skagit Tribe waived its sovereign immunity?

3. Whether the Upper Skagit Tribe is a necessary and indispensable party to a quiet title action claiming adverse possession of its real property?

4. Whether the court has jurisdiction over quieting title to the "land" at issue in this case without having jurisdiction over the Upper Skagit Tribe?

5. Considering the evidentiary presumptions and inferences at summary judgment in favor of the Tribe, should the trial court have granted summary judgment on the record before it?

6. Was the Tribe entitled to an expanded presumption of permissive use, as outlined in *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015)?

IV. STATEMENT OF CASE

A. Procedural Background.

On March 4, 2015 the Lundgren's filed their complaint to quiet title and for equitable relief. (CP 7-27). On March 24, 2015 the Tribe filed its notice of special appearance providing specifically that it was not waiving its inherent sovereign immunity from suit. The Lundgrens filed their Motion for Summary Judgment on March 26, 2015. (CP 191).

On April 10, 2015 the Tribe filed its Motion to Dismiss asserting that the Superior Court lacked subject matter over the claims against the Tribe, and that the Tribe was a necessary and indispensable party that could not be joined due to its sovereign immunity from suit. (CP 229). The trial court held a hearing on the Tribe's Motion on April 24, 2015 and issued an Order denying it on April 24, 2015. (CP 155).

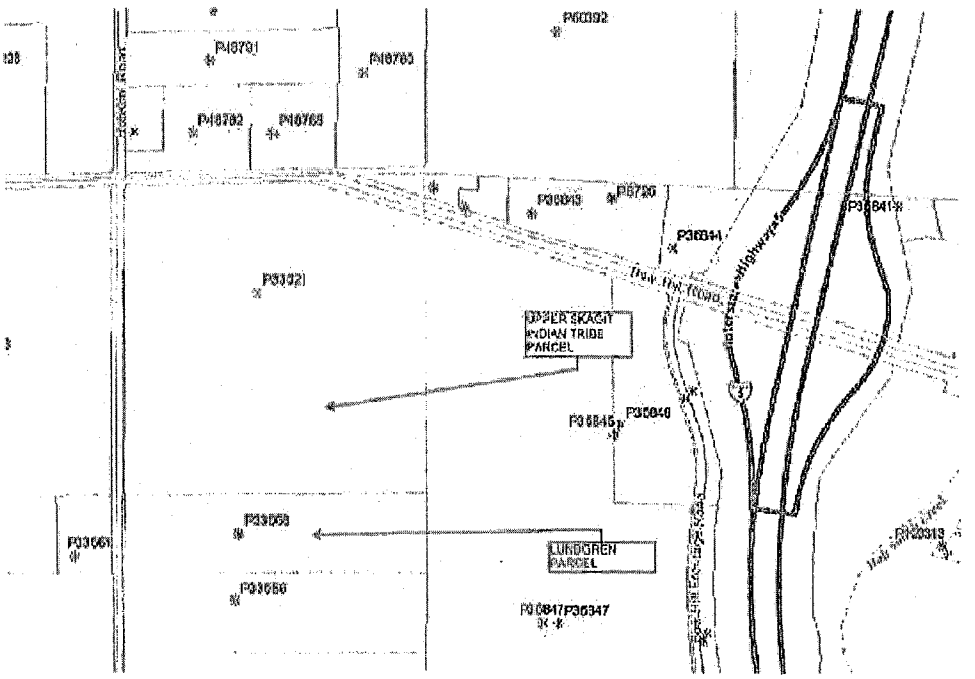
On April 27th the Tribe filed its Opposition to Lundgrens' Motion for Summary Judgment. (CP 119). Two days later on April 30, 2015, he Tribe filed a Notice of Discretionary Review to the Supreme Court for review of the trial court's denial of its motion to dismiss. (CP 149). On May 1, 2015 the Tribe filed an Emergency Motion to Stay Trial Court Proceedings. The Supreme Court Commissioner denied the Tribe's request on May 6, 2015[1] allowing the summary judgment to proceed.

The trial court held a hearing on the Lundgren's Motion for Summary Judgment on May 7, 2015, with the Court granting the Lundgren's Motion and entering a final order on the merits. (CP 158-160; 224). This appeal followed. (CP 141-148).

[1] Ruling Denying Emergency Stay, filed May 6, 2015.

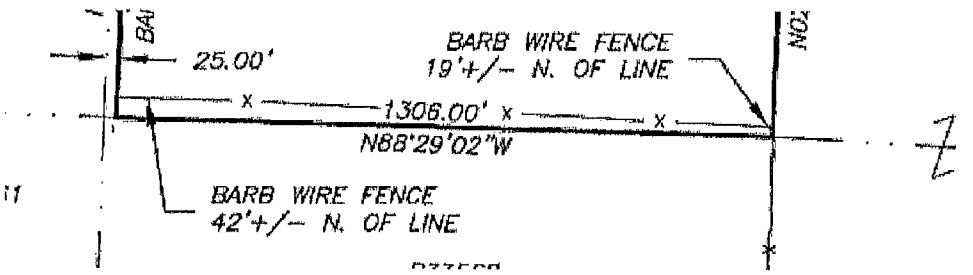
B. Factual Background.

In 2013 the Tribe purchased the parcel of land at issue in this case from the Brown family, receiving title via statutory warranty deed. (CP 85-88). The Property is located near the I-5 interchange at Bow, in Skagit County:



Robert Hayden, the Project Manager for the Tribe, was involved in the purchase, and performed the due diligence. (CP 114). In doing so, he was never informed of a fence being located along the southern boundary of the Tribe's Property by the previous owners. (CP 115). In October 2013, during a survey of the Property commissioned after purchase, the

Tribe was informed that a fence existed along the southern boundary of the Property, and that the fence was north of the deed line. (CP 115).



In response to the new information about the fence, Hayden visited the property in person, and walked the southern property line to observe the fence. (CP 115). He noted that a 12 foot wide gate is located in approximately the middle of the fence line along the southern boundary. (CP 115).

Not knowing who owned the fence located on the Tribe's Property, Hayden contacted the neighbors to the south, the Lundgrens. The Lundgrens told Hayden that the fence was theirs, and that they wished to sell or trade for the land located south of the fence-- acknowledging they did not own it. (CP115). Hayden did not know if the Tribe would be interested in this transaction, so he and the Lundgrens made arrangements to view a property the Lundgrens proposed in trade for the now-disputed area at issue in this case. (CP 115).

The next day or so, Hayden and the Lundgrens met at the location of the new property. Viewing it as significantly inferior to the land they had

already purchased, the Tribe chose not to negotiate further for the land south of the fence up to the deeded line. (CP116).

The title history to the Tribe's Property confirms what the Lundgrens assert: that the Property has been in the Brown family for decades. In 1984, Annabell Brown quitclaimed ¼ of the Property to her son, David L. Brown. (CP 68, CP 57). Annabell Brown passed away on July 1, 2012 at the age of 85. (CP 71). She passed away while in nursing care at Mira Vista nursing home, but her residence for the 60 before that years was in Bow, at 15427 Bow Hill Road. (CP 71). Annabell Brown bequeathed her residence in Bow to her son, David L. Brown. (CP 77). She bequeathed the remaining ¾ interest in what is now the Tribe's Property to all of her children in equal shares, per stirpes. (*Id.*)

In May 2013, the Estate of Annabell Brown, administered by her son David L. Brown, deeded the ¾ interest in the Tribe's Property to the beneficiaries—David Brown's brother Paul and two sisters, Vivian and Barbara. (CP 82-83). This act, coupled with the earlier Quitclaim deed to David in 1984, placed Annabell Brown's four children on title each having a ¼ interest.

The Tribe took title to the Property from the Browns via a Statutory Warranty Deed in September 2013. (CP 85-88). When acquired, the

Property was forested, with no residence located on it. (CP 65; CP 90).[2] Annabell Brown lived near Bow proper, over 3 miles away. (CP 65; CP 94). David Brown had been a part owner of the Property since 1984, and the Property was in his family since before he was born. Despite this, he had no idea the fence was even there, and he was never put on notice of the location of the fence: "[N]either I nor any of my family members ever received notice of any kind that the property owners directly to the south of the Subject Property ever intended to install or had installed a fence on the Subject Property." (CP 58). In fact, the Lundgrens contacted Brown, asking for a declaration to support their lawsuit and he refused, for lack of the very knowledge that they claim he had. (*Id.*).

The Lundgrens' Property abutting the Tribe's Property has been designated and used as Agricultural and Open space since at least 1973. (CP 66; CP 96-101). The Lundgrens have been receiving significant tax benefits since they purchased from Donna Harem in 1981 for maintaining this designation. (CP 66; CP 96-101) The property is designated as: 4.8 Acres of pasture land and 5 acres of "wooded" open space. (CP 66; CP 96-101).

The survey of the Property reveals that the fence in dispute actually turns north at the western property line. (CP 103-105). The fence that runs

[2] The Tribe has since logged the undisputed portion of the Property.

north-south is of the same vintage and barbed wire makeup, indicating that it was installed around the same time as the east-west fence. (CP 104). The Tribe presented expert opinon testimony that this fact indicates that the predecessors of the Tribe's Property actually installed the fence, not the Lundgrens. (CP 104).

V. STANDARD OF REVIEW

The existence of subject matter jurisdiction over a party asserting tribal sovereign immunity is a question of law which the Court reviews *de novo. Wright v. Colville Tribal Enter. Corp.* 159 Wn.2d 108, 111, 147 P.3d 1275 (2006)

An appeal of a summary judgment is reviewed by an appellate court *de novo*, and this Court performs the same inquiry as the trial court did. *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Summary judgment is appropriate only when the pleadings, affidavits, and depositions on file establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id., citing,* CR 56(c). The nonmoving party receives the benefit of all factual inferences and the motion should be granted only if, from all the

evidence, a reasonable person could reach only one conclusion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

VI. ARGUMENT

The trial court misapplied the doctrine of sovereign immunity and CR 19 to the Lundgrens' adverse possession claim against the Tribe. In its application of sovereign immunity to the case at issue, this Court must determine: (1) whether the Tribe has sovereign immunity from uncontested suit; (2) whether there has been a clear and unequivocal waiver of the Tribe's sovereign immunity by Congress or by the Tribe; and (3) whether the doctrine of tribal sovereign immunity is jurisdictional in nature.

The court below failed to recognize the jurisdictional question presented by sovereign immunity as being distinct from the merits of the underlying complaint. The Tribe has inherent sovereign immunity and the underlying action is barred because neither the Tribe nor Congress has waived that immunity. Without the required waiver, the trial court was compelled to dismiss the Lundgrens' suit under 12(b)(1). *Wright,* 159 Wn.2d at 108-111; *Foxworthy v. Puyallup Tribe of Indians,* 141 Wn. App. 221, 169 P.3d 53 (2007); *Lewis v. Norton,* 424 F.3d 959, 961 (9th Cir. 2005).

CR 12(b)(7) also obligated the trial court to dismiss the Lundgrens' complaint, as it was unable to join the Tribe as required by CR 19. CR19

includes a two part test to determine whether an action should be dismissed for failure to join an absent party. First, the court must determine if the absent party is necessary. CR19(a). Second, if the party is necessary, the court must determine if the party is indispensable, thereby subjecting the case to dismissal if the absent party is not joined. CR19(b). *Matheson v. Gregorie*, 139 Wn. App. 624, 161 P.3d 486 (2007) *review denied* 163 Wn.2d 1020, *cert. denied* 555 U.S. 881 (2008). The Tribe is both a necessary and indispensable party that cannot be joined and the complain should have been dismissed.

A. The Upper Skagit Indian Tribe Possesses Sovereign Immunity From Suit.

1. Tribal Sovereign Immunity is Derived from Inherent Sovereignty.

The doctrine of tribal sovereign immunity is deeply embedded in the federal common law and is reflected by the United States' treatment of Indian tribes as sovereigns. As "domestic dependent nations," Indian tribes "exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm v. Citizen Band Potawaatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *see also, Worester v. Georgia,* 31 U.S. 515, 558-59 (1832), 6 Pet. 515, 8 L. Ed.483; *Cherokee Nation v. Georgia,* 30 U.S. 1, 10, 5 Pet. 1, 8 L. Ed. 25 (1831). Indian tribes' sovereignty predates the U.S. Constitution, as acknowledged

in the Commerce Clause's grouping of the "Indian Tribes" with "foreign Nations" and "the several States," as well as the United States' practice of entering in to treaties with Indian Tribes. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

Washington courts agree that Indian tribes have common law immunity from state court jurisdiction. *Wright v. Colville Tribal Enter. Corp.* 159 Wn.2d 108, 147 P.3d 1275 (2006) (tribal immunity extends to activities of tribal commercial enterprises that occur off the reservation); *North Sea Products, Ltd. v. Clipper Seafoods Co.,* 92 Wn.2d 236, 238, 595 P.2d 938 (1979) ("absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *Foxworthy,* 141 Wn. App. 221, 169 P.3d 53 (2007) (court lacks subject matter jurisdiction to determine Dram Shop Act claim against tribe because the claim is barred by tribal sovereign immunity); *See Matheson v. Gregorie*, 139 Wn. App. 624, 161 P.3d 486 (2007) (applying doctrine of tribal sovereign immunity to bar legal and equitable claims).

Courts have long recognized that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.,* 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998); *see also Montana v. Gilham,* 133 F.3d

1133, 1136 (9th Cir. 1998). Both state and federal courts defer to Congress's plenary authority with respect to tribal sovereign immunity. *See, e.g., Unites States v. Lara,* 541 U.S. 193, 196, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). Accordingly, Congress dictates the bounds of Tribal sovereign immunity, and neither the nature of claims alleged in a lawsuit nor the perspective of a lower court judge of what is "right"[3] have any bearing on it.

2. Waivers of Tribal Sovereign Immunity.

Tribal inherent sovereignty necessarily includes immunity from suit "absent a clear waiver by the tribe or congressional abrogation." *Wright*, 159 Wn.2d at 112, *citing, Santa Clara Pueblo v. Martinex*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *Foxworthy*, 141 Wn. App. at 221. To be sued, a sovereign's immunity must first be waived. *Santa Clara Pueblo*, 436 U.S. at 58 (waivers of tribal sovereign immunity "cannot be implied but must be unequivocally expressed"). Waivers of tribal sovereign immunity can arise in only one two ways: (1) from a tribe's express waiver; or, (2) through a Congressional statute expressly abrogating tribal immunity. *Id.; Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.), *aff'd*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (formal

[3] In refusing to dismiss the case based on sovereign immunity, the trial court stated orally "I find it contrary to common sense, fairness, and due process for all involved." (RP 32).

resolution expressly waiving sovereign immunity).

3. Whether Sovereign Immunity has Been Waived is a Jurisdictional Question.

The issue of whether a tribe has consented to suit is jurisdictional. *Foxworthy,* 141 Wn. App. at 235 (absent waiver of sovereign immunity, lack of subject matter jurisdiction required dismissal of suit against tribe); *Chemehuevi Indian Tribe v. California Stte Bd. Of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985) ("the question of tribal sovereign immunity is jurisdictional"), *rev'd on other grounds*, 474 U.S. 9, 106 S. Ct 289, 88 L. Ed. 1d 9 (1985); *Parks v. Tulalip Resort Casino*, 2008 WL 786673 (No. C07-1406RSM, W.D. Wash., Mar. 20, 2008) ("the principle of sovereign immunity, which is a matter of subject matter jurisdiction..."); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (dismissing claims against tribal enterprise for lack of subject matter jurisdiction). Since the issue of tribal sovereign immunity is jurisdictional, courts are required to determine whether a tribe has waived its immunity "irrespective" of the merits of the opponents' claims. *Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418 (9th Cir. 1989).

Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers. It is undisputed in the instant

case that the Tribe possesses sovereign immunity by virtue of its sovereign governmental status. Therefore, the trial court was absolutely required to determine whether the Tribe had waived its immunity "irrespective" of the merits of the Lundgrens' adverse possession claims. As outlined below, the trial court failed to engage in any analysis related to Tribal sovereign immunity. Had it done so, it would have found that no clear and written expression of a waiver of Tribal sovereign immunity existed here.

B. The Tribe's Did Not Waive Its Sovereign Immunity.

The trial court conducted no inquiry or analysis and entered no finding that the Tribe waived its sovereign immunity, or that Congress abrogated Indian tribal sovereign immunity, to this specific suit, or any other adverse possession suit for that matter. Nevertheless, the trial court found *ipse dixit* that the Lundgrens' case could go forward. (CP 155-156). The record in this case plainly demonstrates that the Lundgrens did not allege a waiver of sovereign immunity, and in fact there has been no formal waiver of the Tribe's sovereign immunity from this unconsented suit. (CP 50).

The Lundgrens have not and cannot allege any facts establishing a waiver of the Tribe's sovereign immunity regarding their claims. As a matter of law then, the trial court lacked subject matter jurisdiction to entertain the Lundgrens' claim against the tribe and the matter should have

been dismissed with prejudice pursuant to CR 12(b)(1).

1. The Tribe Did Not Expressly Waive Its Sovereign Immunity.

Indian Tribes themselves generally determine whether they will waive their sovereign immunity. In the complaint, the Lundgrens acknowledge that the Tribe is a federally-recognized Indian tribe yet still claim that the Superior Court somehow had jurisdiction over this action due to the Court's "*in rem*" jurisdiction. (CP 7-8). This attempt to bootstrap the court's jurisdiction ignores the salient fact that the Tribe is immune, as a matter of subject matter jurisdiction, from such unconsented litigation. Importantly, the Lundgrens did not allege that the Tribe took any action whatsoever to waive its sovereign immunity. *Id.* The Lundgrens' complaint fails on its face to establish the Superior Court's subject matter jurisdiction over the claim against the Tribe, because the Lundgrens failed to even allege the Tribe waived its sovereign immunity.

The only remaining option for the Lundgrens to sustain their cause of action then, is that they must establish a waiver of tribal sovereign immunity by congressional abrogation. The Lundgrens also failed to plead this element of subject matter jurisdiction as outlined below.

2. Congress has Not Expressly or Impliedly Abrogated The Tribe's Sovereign Immunity.

Congress has rarely, if ever, enacted a statute abrogating tribal

sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 59. Here, the Lundgrens' claims derive from the common law doctrine of adverse possession. (CP 8-10) (Section IV of Plaintiff's Complaint). The Lundgrens have not alleged the existence of any, nor is there any, Congressional act that either explicitly or impliedly abrogates tribal immunity in the context of such private real property actions. *Id.*

Accordingly, the Lundgrens' pleadings before the superior court utterly fail to even allege that there has been a waiver of the Tribe's inherent sovereign immunity to this (or any) real property action. The Lundgrens' complaint fails to establish the trial court's subject matter jurisdiction against the Tribe. The trial court erred when it failed to dismiss the Lundgrens' claims against the Tribe with prejudice pursuant to CR 12(b)(1).

C. The Subject Matter of the Lundgrens' Case Does Not Usurp the Trible's Sovereign Immunity.

The Lundgrens' claim against the Tribe is barred because the fundamental requisite for a waiver of tribal sovereign immunity is absent: there has been no clear and written expression of a waiver to the Lundgrens' suit. Had the trial court correctly applied the doctrine of tribal sovereign immunity, it would have dismissed the Lundgrens' claims. Rather than dismissing, the trial court completely failed to recognize the Tribe's immunity, failed to cite any evidence that the tribe expressly waived its

immunity, and rationalized permitting the case to go forward as follows: "I would very much like everyone who believes they have some claim . . . to participate, versus the remedy that's being sought is dismissing outright because a sovereign immunity [*sic*] body has a claim in the litigation. . ." (RP 31). The trial court also erred in failing to consider the Tribe's sovereign immunity, independent from the underlying merits of the Lundgrens' claims.

The Lundgrens' "land" claims should not have factored into the Superior Court's jurisdictional analysis. Whether the trial court had jurisdiction over the "land" was not the issue. Rather, the issue was whether the trial court had subject matter jurisdiction over the claims against the Tribe as a sovereign government. The result reached below turns the doctrine of sovereign immunity on its head by seemingly creating out of whole cloth an unwritten exception to Tribal sovereign immunity when adverse possession is alleged against a tribe. No such rule exists,[4] and the trial court's apparent creation of one was in error.

The Lundgrens will likely claim argue that tribal sovereign immunity somehow cannot act as a bar to this adverse possession case

[4] To allow such a broad implied waiver of tribal sovereign immunity through pleading would have a chilling effect on governmental immunity as it would allow lawyers to craft pleadings to make an end-run around the immunity bar. Such a result is disfavored. *See Snow v. Quinault Indian Nation*, 705 F.2d 1319, 1322 (9th Cir. 1989).

because it is an "*in rem*" proceeding. Neither Federal nor Washington case law supports this argument. Nevertheless, as they did below, the Lundgrens will likely rely on two cases for the proposition that their adverse possession case somehow evades tribal sovereign immunity: *County of Yakima v. Confederated tribes and Bands of the Yakama Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), and *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 929 P.2d 379 (1996). The Lundgrens' adverse possession case cannot be shoehorned into *County of Yakima* and *Anderson*, which are very different, and ultimately inapposite, cases from the one at bar.

County of Yakima has no bearing on the adjudicatory jurisdiction question raised by the Tribe's CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *County of Yakima* turned on a specific Federal statute that is not at issue here: the General Allotment Act of 1887. In *County of Yakima,* the U.S. Supreme Court found the Act authorized Yakima County's ad valorem tax on reservation land patented in fee pursuant to the General Allotment Act. There is no logical nexus to the case at bar because this is not a tax case. But even looking into the merits, the *in rem* jurisdiction at issue in *County of Yakima* dealt with the County's regulatory jurisdiction to hear the case, not its authority to quiet title. This distinction is critical as only the latter is presented by the Tribe's motion to

dismiss. Perhaps most importantly, the issue of tribal sovereign immunity was not before the Federal court in *County of Yakima*.

Anderson is also distinguishable from the instant case, in three important respects. First, *Anderson* was an action for partition and quiet title among tenants-in-common of real property. Here, the Tribe and the Lundgrens are not tenants-in-common, and the Lundgrens were strangers to the transaction by which the Tribe purchased the subject property. This distinction is important because right of partition by a tenant-in-common of real property is absolute in Washington. *Anderson*, 130 Wn.2d at 873; RCW 7.52.010 *et seq.* The Lundgrens' common law adverse possession claim has a different effect than simply dividing the property among acknowledged legal co-owners. *Anderson* pointed out that an action to partition real property "does nothing more than divide the [property] among its legal owners according to their relative interests." *Id.* In contrast, here, because the Tribe and the Lundgrens are not co-tenants, the effect of this quiet title action upon the Tribe would be to deprive the Tribe of its land and give it to the Lundgrens– an effect similar to the situation in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997). There, the United States Supreme Court found the case against the tribe jurisdictionally barred. Unlike *Anderson*, the Lundgrens' lawsuit seeks to make them legal owners of property they were never deeded, not

divide real property that all participating parties already agreed they jointly own.

Second, in contrast to the statutory right of the partition at issue in *Anderson*, it is well established that "there can be no adverse possession against the state" as sovereign. *State Dept. of Ecology v. Acquavella*, 112 Wn. App. 729, 746 51 P.3d 800 (2002);[5] *see* RCW 7.28.090 (no adverse possession against United States or the State); *see also United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (Indian Intercourse Act, 25 U.S. § 177, prohibiting alienation of Indian lands other than by treaty or convention, provides "special reason why the Indians' property may not be lost through adverse possession"); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th ir. 1939) (Indian water rights not subject to loss under state law of appropriation).

Since Indian tribes enjoy the same common law immunity as that of other sovereign powers (states and the United States), *e.g., Santa Clara Pueblo,* 436 U.S. at 58, it necessarily follows that, absent a waiver, Indian tribes must also be immune to an adverse possession action by virtue of their sovereign immunity. This was not an issue in *Anderson* because, although both partition and adverse possession are *in rem* actions, adverse

[5] Likewise, there can be no adverse possession against the United States. *See Skinner v. McCrackan*, 93 Wash. 43, 45, 159 P. 977 (1916); *Pioneer Nat. Title Ins. Co. v. State*, 39 Wn. App. 758, 695 P.2d 996 (1985).

possession of one's land by another has a very different legal effect than partition among co-tenants.

Third, *Anderson* raises serious doubt as to whether the question of tribal sovereign immunity was before the Washington State Supreme Court in the first place. The Court noted that once it decided that the proceeding was *in rem*, it did "not further consider...immunity and waiver. Besides, there was not sufficient briefing and argument on the issue to convince us of its relevance." *Anderson*, 130 Wn.2d at 877. As such, *Anderson*, is of limited precedential value as to the issue of sovereign immunity presented by the Tribe here. This is particularly so in light of more recent rulings of Washington State courts affirming tribal sovereign immunity. *Foxworthy*, 141 Wn. App. 221; *Wright*, 159 Wn.2d 108.

Finally, ample policy rationales militate in favor of the application of tribal sovereign immunity to bar the Lundgrens' claims. The trial court's erroneous denial of the Tribe's sovereign immunity claim threatens to subject the Tribe to litigation that, as a matter of law, it is immune from as a governmental entity. Since an immunity claim challenges a court's authority to hear a case, such immunity would be effectively meaningless if a suit against the tribe were erroneously allowed to go forward to trial. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1985) ("The entitlement is an immunity from suit rather than a mere

defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

Indeed, the rationale for enforcing sovereign immunity – reasons that may not always be particularly attractive [6] – is not subject to discretionary application and, in fact, is reinforced where, as here, lands owned by an Indian tribe are in question. *Pan Am. Co.*, 884 F.2d 416, 419 ("Indian sovereignty, like that of other sovereigns, is not a discretionary principle); *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (holding that there can be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case").

In the case at hand, the Tribe purchased land in fee; Tribally-owned land is the essential base of tribal culture, development, and society. The nature of the Lundgrens' claims would burden the land and the Tribe's use of the land which, in turn, runs counter to Congressional goals of encouraging tribal self-determination, self-sufficiency, and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). This action, similar to a quiet title action against Washington State, implicates sovereignty

[6] *Cook v. AVI Casino Entrs.*, 548 F.3d 718 (9th Cir., 2008) (dismissing for want of subject matter jurisdiction money damage claims on basis of tribal sovereign immunity, but, in concurrence, acknowledging policy concerns).

interests and would divest the government of its resources. *Coeur d'Alene Tribe,* 521 U.S. at 281. As explained by the U.S. Supreme Court, sovereign immunity from suit prevents such an unwanted incursion. *Id.* The Tribe's sovereign immunity barred the Lundgrens' claims and deprives the courts of subject matter jurisdiction.

D. Dismissal Was Required Because The Tribe is a Necessary and Indispensable Party and it Could not Be Joined Under Tribal Sovereign Immunity.

1. Upper Skagit is a Necessary Party.

CR 12(b)(7) obligated the superior court to dismiss the Lundgrens' complaint, as they were unable to join the Tribe as mandated by CR 19. CR19 contains a two part test for determining whether an action should be dismissed for failure to join an absent party. First, the court must determine if the absent party is necessary. CR19(a). Second, if the party is necessary, the court must determine if the party is indispensable thereby subjecting the case to dismissal if the absent party cannot be joined. CR19(b). *Matheson v. Gregorie*, 139 Wn. App. 624, 161 P.3d 486 (2007) *review denied* 163 Wn.2d 1020, 180 P3d 1292 (2008), *cert. denied* 129 S.Ct. 197, 172 L.Ed. 2d 140 (2008). The court below failed to apply the two part test, and instead found:

> In terms of Rule 19, I'm simply, while I understand your argument, I am not reading that as broadly as you are in terms of the Tribe's ability to participate . . . the Court could

> not join the Tribe against its will. I understand that. But it seems to me that the Tribe . . . is asking to bar litigation for the other side rather than the other way around, if I'm making myself at all clear, and **I find that contrary to common sense, fairness, and due process** for all involved. (RP 32) (Emphasis added).

Whether a party is necessary under CR 19(a) focuses on whether the absent party has a legally protected interest relating to the action. An absent party is necessary if adjudication of the matter in the party's absence "may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." CR19(a).

For purposes of CR 19(a), proof of actual impairment of an absent party's interest is not required. A party is deemed necessary as long as the requested relief may impair their interest. *Burt v. Dep't of Corrections,* 168 Wn.2d 828, 833, 231 P.3d 191 (2010). In this case, the relief requested—injunctive relief— is not speculative as to its impact on Upper Skagit. Imposing the injunctive relief requested precluded Upper Skagit from furthering its efforts to take the subject property into trust, in direct conflict with the precedent established in *Wright v. Colville Tribal Enter. Corp.* 159 Wn.2d 108, 147 P.3d 1275 (2006):

> Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent

> express waiver of immunity by the tribe or Congressional abrogation.... Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation. ... Tribal sovereign immunity protects tribes from suits involving both 'governmental and commercial activities,' whether conducted 'on or off a reservation.'

Furthermore, the claim of adverse possession would dispossess Upper Skagit of its former aboriginal lands to which it now holds registered title. Accordingly, the relief requested would directly impair Upper Skagit's interest. Upper Skagit is indisputably a necessary party to both the request for injunctive relief and Lundgrens' complaint for adverse possession.

2. The Tribe is an Indispensable Party Mandating Dismissal of Both the Request for Injunctive relief and the Underlying Complaint of Adverse Possession .

Having established that Upper Skagit is a necessary party pursuant to CR 19(a) the court must then discern whether Upper Skagit is an indispensable party, which would mandate denial of both the injunctive relief as well as the dismissal of the underlying complaint. *See Matheson v. Gregorie*, 139 Wn. App. 624, 161 P.3d 486 (2007); *See also Confederated Tribes of the Chehalis Reservation v. Lujan* 928 F.2d 1496, 1498 (9th Cir. 1991) (affirming the district court's dismissal of the case for failure to join the tribe as an indispensable party.) In determining whether a party is indispensable, the Court must weigh the following factors:

(1) The extent to which a judgment rendered in a person's absence might be prejudicial to that person or those already parties;

(2) The extent to which any prejudice can be reduced or avoided by the shaping of relief, protective provisions in the judgment, or other measures;

(3) Whether a judgment rendered in the person's absence will be adequate; and,

(4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

a. The Absence of Upper Skagit to these Proceedings Would be Prejudicial to its Interest.

The first factor analyzes the extent to which a judgment rendered in the tribe's absence might prejudice the tribe or the existing parties. CR 19(b)(1). "[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made the party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence." *Wilbur v. Locke*, 423 F.3d 1101 at 114 (9th Cir. 2005), *cert. denied,* 546 U.S. 1173, 126 S. Ct. 1338, 164 L. Ed. 2d 53 (2006) (quoting *American Greyhound,* 305 F.3d at 1024-25 (2002)). Both requests for relief in this matter will impair the interest of Upper Skagit as to the potential loss of its property interest, placing the property into the trust, and its regulation of its employees in placing the fence in question.

b. *Upper Skagit's Interest Cannot be Protected Through Drafting Protective Provisions in the Relief Requested.*

The second factor is "the extent to which any prejudice could be lessened or avoided" by including protective provisions in the judgment, or the specific relief requested, or other measures. CR 19(b)(2). The relief sought by the Lundgrens is: (1) an injuction precluding Upper Skagit from employing its workers to engage in various activities to take the subject property into trust; and, (2) quieting title dispossessing Upper Skagit of its property. These remedies cannot be lessened or avoided at all by the Court by crafting some "protective" language. The only way these remedies can be lessened or avoided is to not grant them at all.

c. *A Judgment in the Absence of Upper Skagit Will Not Be Adequate.*

The third factor, "whether a judgment rendered in the [party's] absence would be adequate". This factor also militates in Upper Skagit's favor as without Upper Skagit there can be no order which has the force and effect sought by Plaintiffs. Any order issued without Upper Skagit present could not be enforced against Upper Skagit as it is not subject to the jurisdiction of this Court. The efficacy of an order "quieting title" that Upper Skagit need not adhere or honor is nil.

d. The Absence of an Alternative Forum Does not Preclude Dismissal of This Case.

Courts in numerous other matters have determined that tribes, as sovereigns, are not subject to joinder as a result of their sovereign immunity. As the Court of Appeals noted in *Matheson,* "the Ninth Circuit has regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs." *Matheson,* 139 Wn. App. at 636, citing, *Wilbur,* 423 F3d. at 1115; *see also American Greyhound,* 305 F3d. at 1025 (dismissal under Fed. R. Civ P. 19 is a "common consequence of sovereign immunity" and "we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.") *Clinton v. Babbitt,* 180 F3d 1081, 1090 (9th Cir. 1999).

Most recently in a matter involving a parallel set of facts and issues of law, the United States District Court for the Western District of Washington dismissed an action seeking injunctive relief against the Makah Nation based upon the legal conclusion that the Makah Nation was a necessary and indispensable party to the case, in *Comenout v. Whitener* Case No. C15-5054BHS, 2015 WL 917631 (March 3, 2015). There, the court held that dismissal was mandated given that as a matter of law, Makah could not be joined in the case. The court affirmed the precedent above:

> Although it is unclear whether there is truly an alternative forum available to protect [plaintiff's] due process rights, the lack of an

> alternative forum does not automatically prevent dismissal of suit. In any event, the Court finds that the [Makah's] interest in maintaining its sovereign immunity outweighs [plaintiff's] interest in litigating his claims. (Internal quotations omitted; internal citations omitted).

The trial court should have dismissed both the request for injunctive relief and the underlying complaint for adverse possession because it was required to join the Tribe as a necessary and indispensable party, yet had no jurisdiction to do so under the Tribe's sovereign immunity.

E. *Smale* Does Not Justify the Trial Court's Rulings.

In *Smale v Noretep*, 150 Wn. App 476, 208 P.3d 1180 (2009), the Stillaguamish Tribe took title to real property through a deed that specifically excluded from their recorded interests the claim of adverse possession that was being litigated at the time the property was deeded to Stillaguamish. The court found that, under the specific facts of that case, Stilliguamish did not have a legal interest to protect as their chain of title, and the bundle of rights associated therewith, did not include immunity from the plaintiff's claim of adverse possession.[7]

Smale is limited in its application and certainly not dispositive in this matter. The court in *Smale* was not presented with CR 19 and the fatal

[7] The *Smale* court's rationale concerning "original title" is limited by the special facts of Stilliguamish's acquisition of title. But, even more importantly, the "original title" analysis, if deemed applicable in some way here, is only the beginning and not the end of the analysis required under the controlling case law on sovereign immunity and joinder.

effect it has on the relief sought herein. Further, the Tribe in *Smale* was granted title with a deed that specifically exempted its interest from the claim of adverse possession, which narrowed Stillaguamish's legal interest in the property at issue. Here, Upper Skagit's real property interest was granted through a Statutory Warranty Deed with no exceptions and no notice of an adverse possession claim.

Lundgrens' reliance on *Smale* is misplaced. The Lundgrens asserted below that as a result of holding "original title" arising (allegedly) from the claim of having met the time element of adverse possession, that Upper Skagit has no interest in the disputed property and, therefore, is not being dispossessed of a legal interest. The Lundgrens then reason that if Upper Skagit is not being dispossessed of a legal interest, Upper Skagit is not a necessary party. This sophistic attempt to syllogize ignores the binding legal reality that unlike Stillaguamish in *Smale,* Upper Skagit holds legally recognized "title of record" relating back to the beginning of the recorded title of the disputed property. It is this competing interest to the Lundgrens attempted claim of "original title" that is ultimately at issue in this quiet title action. It is this fundamental dispute between the presumed holder of record title— here, Upper Skagit— against the Lundgrens alleged claim to "original title" that requires the court's jurisdiction. *Gorman v. City of Woodinville* 175 Wn.2d 68, 283 P.3d 1082 (2012) (A party claiming

"original title" through adverse possession is required to litigate said claim if a dispute as to the rights of said title arises.)

In *Gorman,* the Washington State Supreme Court definitively held how claims of "original title" are resolved when confronted with a "recorded title" that does not except out the disputed property: there must be a lawsuit between the parties. Lundgrens' reliance on *Smale* has been effectively superseded by *Gorman* with the clear statement that a court of competent jurisdiction must exercise that justidiction over Upper Skagit in order to take away the rights it was conveyed through "recorded title." Given the established legal authority that precluded the trial court from joining Upper Skagit as a party to the litigation, there was no alternative but to dismiss the Lundgrens complaint in its entirey.

F. If The Trial Court did Not Err Failing to Dismiss the Case on Jurisdictional Grounds, Summary Judgment Should Still Not Have Been Granted.

If this Court reaches the substantive issues raised in Plaintiffs' lawsuit, it still must reverse the trial court's grant of summary judgment and remand for trial on the quiet title issue. The trial court quieted title in the Lundgrens to real estate the Lundgrens admit they were never deeded. The trial court did this despite the fact that adverse possession is one of the more fact-intensive causes of action related to real property, and ignoring that

"[w]hether use is adverse or permissive is a *question of fact*." *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (emphasis added).

In granting Summary Judgment, the trial court misapplied the legal standards and burdens the Lundgrens were required to meet at trial. The Court essentially held that because a fence existed—with no further evidence—the Lundgrens were entitled to take ownership of the disputed property.

As outlined below, when all the facts and inferences therefrom are taken in a light most favorable to the non-moving party—the Tribe—it becomes readily apparent the trial court erred in granting summary judgment. The Tribe is entitled to a trial in this adverse possession/boundary line case.

1. Burden of Proof and Summary Judgment Standard.

Plaintiff has asserted two legal theories upon which it claims title: adverse possession, and mutual recognition and acquiescence. Under both legal theories asserted, the Plaintiffs have the burden to prove all elements by clear cogent and convincing evidence. *See, Merrimen v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010) (burden of proof in mutual recognition and acquiescence) *and Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997) (burden of proof in cases involving prescriptive rights over real property).

The determination of adverse possession, and/or mutual recognition and acquiescence is a mixed question of law and fact. "Whether the necessary facts exist is for the trier of fact, but whether those facts constitute adverse possession is an issue of law for the court to decide." *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998), *citing, Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). The question of whether the nature of the possession itself was in fact adverse is an issue of fact. *Id.*

Plaintiff's summary judgment should have only been granted if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom v. Burger King,* 135 Wn.2d at 663. A court may not determine the credibility of a witness at summary judgment when the party opposing summary judgment has put forth facts to impeach the veracity of the witness or the facts that witness asserts are true. *Laguna v. Washington State Dep't of Transportation,* 146 Wn. App. 260, 266, 192 P.3d 374 (2008); *Riley v. Andres,* 107 Wn. App. 391, 398, 27 P.3d 618 (2001) (Where "the material facts are based upon the moving party's affidavits, credibility is especially important. In such a case, the nonmoving party should have the opportunity to expose the moving party's demeanor while testifying at trial.")

Here, the evidence on the record shows a dispute as to the parties' knowledge of the existence of the fence. It also calls into question the

veracity of the Lundgrens' testimony by virtue of testimony regarding who built the fence and why. When the factual inferences the trial court was required to make in a light most favorable to the Tribe are actually evaluated in that manner, the trial court's error in granting summary judgment is patently evident.

2. Adverse Possession.

The doctrine of adverse possession arose in order to assure the "maximum utilization of the land, encourage the rejection of stale claims, and quiet titles. *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012) (citations omitted). The doctrine was originally adopted to ensure land use being utilized, and not sitting just idle. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 77, 283 P.3d 1082 (2012) (Concurrence). "[C]ourts will not permit the "theft" of property by adverse possession unless the owner had notice and an opportunity to assert his or her right." *Id.*[8] As a result, the Lundgrens gain no evidentiary benefit as they are entitled to "no presumption in favor of the adverse holder because possession is presumed to be subordinate to the true owner's title." *Id.*

[8] Adverse possession has been described by several courts as "theft," *See, Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012), *citing, Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998), *quoting, Roy v. Cunningham*, 46 Wn. App. 409, 412, 731 P.2d 526 (1986). Justice Madsen has used this same terminology. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 75, 283 P.3d 1082 (2012) (Concurrence).

"Adverse possession requires 10 years of possession that is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile." *Herrin v. O'Hern*, 168 Wn. App. at 310-11 (citations omitted). The Lundgrens have failed to meet their burden of proof of these elements under the well-established standards of CR 56.

a. Exclusive.

To establish exclusivity, the Lundgrens were required to prove by clear cogent and convincing evidence a use similar to that of a "true owner." *Bryant v. Palmer Coking Coal, Co.*, 86 Wn. App. 204, 218, 936 P.2d 1163 (1997). Here, their sole claim to ownership is that they allegedly maintained the fence and the trees in the area. However, the Plaintiffs ignore the fact that a gate exists in the fence, and that the fence was likely built by the Tribe's predecessors. The presence of the gate along the disputed fenceline leads to a reasonable inference that possession up to it was not exclusive. The existence of the gate leads to the inference that access was gained, or intended to be gained, from the beginning. The land was used for decades for hay and pasture, as well as timber. The gate itself is 12 feet wide—big enough for farm equipment or a herd of cattle to get through.

The Washington State Supreme Court has specifically held that allowing access from one side of a property to the other can defeat the exclusivity element. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773,

613 P.2d 1128 (1980), *overruled on other grounds by, Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Combine this precedent with the factual inferences the Tribe is entitled to at summary judgment from the mere existence of the gate, and the Lundgrens' arguments of exclusive possession fail.

b. Actual and Uninterrupted.

The Tribe has no facts to rebut the testimony that the Lundgrens and their predecessors have gone onto the disputed property, cut trees, trimmed branches, and perhaps even mended the fence in the last 70+ years. This does not mean the testimony is true and cross examination on these points would vet such self-serving testimony.

Further, this fact alone is insufficient to prove this element of adverse possession. A claim of actual and "uninterrupted" possession of the property can be defeated by acts which are too sporadic. In *Peeples v. Port of Bellingham*, the occasional mooring of boats and the dreding of a channel were not continuous enough possession to qualify as "uninterrupted." *Peeples v. Port of Bellingham*, 93 Wn.2d 766. A break in the possession by the claimant included with a re-entry by the title holder may also serve to defeat this element. *George v. Columbia & P.S.R.*, 38 Wash. 480, 80 P. 767 (1905).

c. Open and Notorious.

In granting summary judgment, the trial court had to have impliedly found the Lundgrens used the disputed property in such a way as to lead a reasonable person to assume that the claimant was the owner. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. at 211-212. Acts demonstrating such open and notorious use must be loud and clear:

> The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention.... Real property will be taken away from an original owner by adverse possession only when he was or should have been aware and informed that his interest was challenged.

Bryant v. Palmer Coking Coal Co., 86 Wn. App. at 212.

Here, disputed facts permeate the case. What the Tribe's predecessors knew or should have known is at best in dispute. The Lundgrens' affidavits on this subject are contradicted by the observable facts on site and the history of ownership as well as the affidavits presented by the Tribe. The fence is located in a rural wooded area—not in a yard between two houses. The Tribe's predecessor lived over three miles away, and the Property was vacant land, not frequently used. The Plaintiffs' property was used as agriculture and open space, not on a daily or even weekly basis. The fence was installed potentially 70 plus years ago.

One of the predecessors to the Tribe, David Brown, testified by affidavit that he had no knowledge of the location of the fence or that a fence even existed. If the Lundgrens' or their predessors' possession was so open and notorious, surely David Brown would have known about it: the property was in his family since before he was born, he was on title since 1984, and he was the executor of his mother's estate. David Brown's statements and all reasonable inferences arising from it must be taken in a light most favorable to the Tribe.

The trial court granted summary judgment despite these facts and reasonable favorable inferences from them. It based summary judgment solely on the self-serving testimony of the Lundgrens. The Lundgrens' proffered evidence cannot be used to rebut the inferences arising from the character of the property (rural), the frequency of use (rare), and the inclusion of a gate and fence that was likely installed by the Tribe's predecessors, not the Plaintiffs.[9]

d. Hostile.

Permission negates any proof of the element of hostility in an adverse possession claim. *Herrin* v. *O'Hern*, 168 Wn. App. at 311. There is no evidence of actual hostility or actual permission in this case. As in

[9] CP 102-109

many adverse possession cases, there is simply a history of alleged use that is disputed by the parties and characterized by one side as hostile and the other as not. This is a case suited for trial, not summary adjuciation on affidavits.

As recently as April 16, 2015, the Washington State Supreme Court confirmed and expanded the legal presumption of permissiveness amongst neighbors in a quiet title scenario. In *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015), the Court expanded the "vacant lands doctrine" and its presumption of permission amongst neighbors to residential property. The land involved in this case is vacant land (the Plaintiffs' home is not even located on the 10 acre parcel). As outlined in *Gamboa,* this presumption of permission has historically been applied in prescriptive easement cases; but the rationale behind the presumption applies equally to adverse possession.

When one enters another's land, it is presumed to be done with true owner's permission. *Gamboa*, 183 Wn.2d at 44. This presumption of permission can only be rebutted "when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right...." *Gamboa*, 183 Wn.2d at 44-45.

There is no "presumption" of adverse use; rather, there only may be an "inference" of adverse use. *Id* at 46. It is this inference that the

Lundgrens' case is based upon and upon which the trial court mistakenly relied.[10] On summary judgment, with the facts as presented, the Lundgrens were not entitled to any such inferences.

This is a case about neighbors in the country, who were on all accounts to date, friendly with each other. The Tribe, through its predecessors, is the beneficiary of a presumption of permissive use via neighborly acquiescence:

> "The law should, and does encourage acts of neighborly courtesy; a landowner *who quietly acquiesces* in the use of a path, or road, across his uncultivated land , resulting in no injury to him, but in great convenience to his neighbor, out not to be held to have thereby lost his rights.

Gamboa, 183 Wn.2d at 48 (citation omitted).

The policies giving rise to the doctrine of adverse possession—maximizing the utilization of land, encouraging the rejection of stale claims, and quieting titles—are questionable at best in a society where GPS, online satellite photo databases and GIS land records can show ownership and contact information of real property seconds. "[R]ather than the "dull tool" of adverse possession, better tools are available, including title insurance, marketable title acts, occupying claimant statutes, and low-cost methods of

[10] There is no direct evidence of adverse use in this case, such as the Tribe's predecessor specifically telling the Plaintiffs or Plaintiffs' predecessors they cannot use the disputed property.

surveys." *Gorman v. City of Woodinville*, 175 Wn.2d at 78 (concurrence). Applying a strong presumption of permission to the Upper Skagit at this stage of the proceedings is wholly appropriate.

But even without this additional presumption, the Lundgrens' case failed at summary judgment on the hostility element. The true history behind who installed the fence, and for what purpose it was installed, is not on the record—yet. It may never be known. But the existence of the gate and the testimony of who likely installed the fence cannot be ignored. The facts and circumstances surrounding the property, taken in a light most favorable to the Tribe, do not here support a legal determination that any possession by the Lundgrens and their predecessors was "hostile" as a matter of law. At a minimum, the Tribe should have benefitted from an "inference" that the Lundgrens' and their predecessors' use was permissive. Arguably though, as outlined in the Concurrence in *Gorman v. City of Woodinville* the Tribe should have benefitted from an evidentiary presumption of permission.

The "theft" of the Tribe's property by adverse possession is improper without the true vetting of all testimony and evidence. The Lundgrens and Annabell Brown's brother, Raymond, must undergo the rigors of cross-examination before any court is legally permitted to employ

inferences or deductive reasoning favoring the Lundregns' claims. Summary Judgment was improperly granted.

2. Mutual Recognition and Acquiescence.

Plaintiffs have also plead to quiet title based on the doctrine of "mutual recognition and acquiescence." This theory fails on summary judgment for the same reasons as adverse possession: the trial court failed to take the facts and inferences in a light most favorable to the Tribe.

A plaintiff claiming ownership under the doctrine of mutual recognition and acquiescence must prove each of the following elements by clear cogent and convincing evidence:

> (1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Green v. Hooper, 149 Wn. App. 627, 641, 205 P.3d 134 (2009), *citing Generally, Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

a. Certain, Well Defined Boundary.

Plaintiffs' case is based on the concept that the location of the fence (varying from 20 to 42 feet of the actual property line) is indicative of someone indicating to identify the boundary. There is no direct evidence of this fact. The only evidence is that there is a fence, with a gate, that appears to be installed by the Tribe's predecessors in interest.[11] From these facts, a reasonable inference in favor of the Tribe is that the installers of the fence intentionally set it off from the property line—hence the gate, to access the other side. A fence with a gate is not indicative of a party's intent to exclude the other and at summary judgment it cannot be presumed as such.

b. Agreement or Good Faith Mutual Recognition of Fence as Boundary.

The mere existence of a fence does not a boundary make. In the absence of an express boundary line agreement, the fence must not only exist, but additional evidence of the parties' mutual intent for it to serve as a boundary must be provided. Acquiescence in the fence's mere location alone is insufficient to prove this element. *Lamm v. McTighe*, 72 Wn.2d 587, 592, 434 P.2d 565 (1967). The Lundgrens' case is based merely on acquiescence and as a result they must prove that the Tribe's predecessors manifested "an acquiescence in recognition of the fence as a boundary line,

[11] The only evidence of who installed the fence and gate comes from the Tribe's expert witness. (CP 102-109).

and not mere acquiescence in the fence as a barrier." *Id.* The Lundgrens failed to do this at summary judgment.

No physical improvements in the area assist the court with this determination. The only evidence is the testimony of the Lundgrens' and their non-owner relative witnesses, who say that the now-deceased and unidentified predecessors acquiesced in and acknowledged the boundary line. The admissibility of this hearsay evidence is questionable at best, and should carry very little if any weight, particularly in light of the "clear cogent and convincing" burden of proof.[12]

The only evidence in the record at this point from any of the Tribes' predecessors on title is the declaration of David Brown, on title since 1984 and Annabell Brown's son. He testified that he had no idea of the fence's location in comparison to the property line and in fact did not know of its existence. This statement must prevail against competing hearsay testimony of the Lundgrens' family and friends. Moreover, the fact that the Tribe's predecessors are the ones to have likely installed the fence *and*

[12] A lack of historical direct evidence of a predecessors acquiescence in the fenceline as the true boundary is likely the death knell of the Lundgrens' case on summary judgment. Some measure of admissible evidence presented by the Lundrengs was required to show some mutual acquiescence. *See Green v. Hooper*, 149 Wn. App. at 644 ("The only owner of [the disputed property] to testify at trial was Mr. Green, who purchased the property with his wife only four years earlier. As a result there was insufficient evidence to support any conclusion that a common boundary had ben mutually recognized by the parties and their predecessors for the requisite 10 -year period.")

construct the gate in it is circumstantial evidence that the fence served merely as a barrier, not a boundary line.

In short, issues of fact on "acquiesce" exist, and the trial court erred in granting summary judgment. The live testimony of the witnesses at trial will give rise to a fact finder's conclusions as to what the truth was. The trial court erred in finding that the Lundgrens were entitled to judgment as a matter of law on the record before it; the trial court should be reversed.

G. Costs.

This Court should award costs to the Tribe as the prevailing party on appeal, contingent on its compliance with RAP 14.4.

VII. CONCLUSION

For the foregoing reasons, the Upper Skagit Indian Tribe respectfully requests that this Court reverse the trial court, Dismiss this matter with prejudice for lack of subject matter jurisdiction, and failure to join a necessary and indispensable party. Alternatively, the trial court's ruling on summary judgment should be reversed and the matter remanded for trial. The Tribe should be awarded all taxable costs as prevailing party.

Respectfully submitted this 2nd day of October 2015.

PETER R. DWORKIN, WSBA# 30394
Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225
(360) 734-6390
pete@belcherswanson.com
Attorney for Appellant

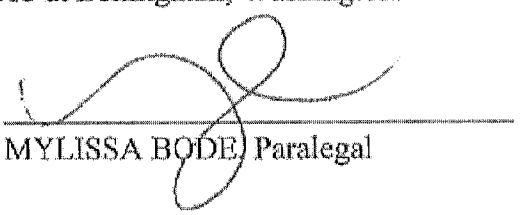
David Hawkins, WSBA #35370
Harold Chesnin WSBA # 398
25944 Community Plaza Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com
Attorneys of Appellant

DECLARATION OF SERVICE

On said date below, I sent via email (pursuant to agreement) a true and correct copy of Appellant's Opening Brief to Scott Ellerby, Mills Meyers Swartling, PS, 1000 Second Ave., 30th Floor, Seattle, WA 98104 via email to: sellerby@millsmeyers.com; aarmitage@millsmeyers.com.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to my best knowledge and belief.

DATED October 2, 2015 at Bellingham, Washington.



MYLISSA BODE, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Mylissa Bode
Cc: Pete Dworkin; David Hawkins; sellerby@millsmeyers.com; aarmitage@millsmeyers.com; hjeffers@millsmeyers.com
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From: Mylissa Bode [mailto:mylissa@belcherswanson.com]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Pete Dworkin <prd@belcherswanson.com>; David Hawkins <dhawkins@UPPERSKAGIT.com>; sellerby@millsmeyers.com; aarmitage@millsmeyers.com; hjeffers@millsmeyers.com
Subject: Upper Skagit v Lundgren, No. 91622-5

Please find attached Upper Skagit Indian Tribe's Opening Brief in the above referenced matter. Thank you.

Sincerely,

Mylissa Bode
Paralegal to Peter R. Dworkin
Belcher Swanson Law Firm
900 Dupont Street
Bellingham, WA 98225
Ph: (360) 734-6390
Fax: (360) 671-0753
mylissa@belcherswanson.com