Appellate Cause No. 17-35959

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUCUIT

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,

APPELLANTS,

V.

TULALIP TRIBES OF WASHINGTON,

RESPONDENT.

APPELLANTS' OPENING BRIEF

ON APPEAL FROM THE WESTERN DISTIRCT OF WASHINGTON
AT SEATTLE
CAUSE NO. 2:17-CV-1279
THE HON. JOHN C. COUGHENOUR

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EXCERPTS OR RECORD- VOLUME II OF II

APPEAL NO. CAUSE NO. 17-35959

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I. INTRODUCTION AND IDENTITY OF THE PARTIES

The Appellants are non-native fee owners of residential properties formerly part of the Reservation of the Tulalip Tribes of Washington ("Tulalip Tribes"). The Tulalip Tribes are the Respondents in this proceeding. The properties owned by the Appellants all were allotted under the Dawes Act to Tribal members, later patented in fee, platted and sold to non-Native owners. The sales to non-native fee owners were in the second quarter of the last century.

1999, the Tribe recorded an ordinance creating a cloud on title on any properties held in fee by non-Native owners within the historical boundaries of the Reservation. The Ordinance purports to create land use regulatory authority for the Tulalip Tribes over Appellants' properties. More recently, the Tulalip Tribes have adopted an Ordinance purporting to impose an excise tax on transfer of Appellant's properties.

Both Ordinances appear as Special Exceptions to Coverage in title insurance preliminary commitments for Appellants' properties. Under the policy language, the title insurers have determined that the Ordinances render Appellants' title unmarketable and have declined to insure Appellants' title over the Ordinances.

The Ordinances constitute a cloud on title under Washington law. RCW 7.28.010 provides a statutory remedy for removing clouds on title. There is no requirement under Washington law that the party claiming an adverse interest seek enforcement of that interest as a condition to the true owner seeking to remove the cloud on title. Under Washington law, *Lundgren v Upper Skagit Tribe*, 187 Wn. 2d 857, 389 P. 2d 569 (2017), the remedy is available even against a Native American Tribe in the face of sovereign immunity because jurisdiction is in rem.

Appellants brought an action for Declaratory Relief: 28 USC § 2201 seeking a declaration that the Tulalip Tribe lacked authority to enact Ordinances purporting to exercise regulatory/taxing authority over Appellants' properties. On Motion of the Tulalip Tribe to Dismiss under FRCP 12(b)(6) the District Court dismissed the case. The basis was: "Plaintiffs do not allege any pending or imminent tribal regulatory or taxation actions, and thus fail to establish that a justiciable case or controversy exists. DKT 6-3. In short, the District Court concluded that a cloud on title was not an "injury in fact" creating standing. However, the authority relied on by both the Tulalip Tribes and the Court is not current. Applying the holdings in *Spokeo v Robbins,* -- U.S. --, 136 S. CT. 1540, 194 L. Ed. 2d 635 (2016), the Court in *Bellino v JP Morgan Chase Bank, N. A.*, 209 F. Supp. 3d 601 (S.D. N.Y. 2016) and other Courts have concluded that a cloud on title was an "injury in fact" for the purposes of conferring standing in the Federal Court. In this appeal, Appellants contend that the outcome here should be the same: the allegations of Appellants' Complaint adequately alleged the necessary injury in fact.

II. JURISDICTIONAL STATEMENT

Whether the Trial Court had Article III Jurisdiction is the principal issue in this Appeal. Jurisdiction was alleged to exist pursuant to 28 USC § 1331; ER 23, based on authority that a cause of action relating to the scope of tribal 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).

The Order of Dismissal was entered on 11/02/2017; ER 01-4. The Notice of Appeal was filed on 11/22/2017; ER 05.

III. STATEMENT OF ISSUE PRESENTED

Issue: Did the Trial Court err in concluding that allegations that the Tulalip Tribe had clouded Appellants' title did not allege an immediate harm, a prerequisite for the "injury in fact" necessary for standing?

IV. STATEMENT OF THE CASE

The Appellants' properties are in "Snoqualmie Jim's Plat." The legal descriptions identifying Appellants' properties as part of Snoqualmie Jim's Plat appear at ¶ 1-2 -1.4 of the Complain t. ER--. DKT 1—4. As reflected in those descriptions, the Plat was originally "Tulalip Allote 56" to "Snoqualmie Jim and Jennie Snoqualmie, husband and wife. Id. The original patent in fee to Snoqualmie Jim and Jennie Snoqualmie is dated May, 1924: ER 23 at ¶3.1. Snoqualmie Jim's Plat was recorded on December 31, 1924: ER 23 at ¶3.1. 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;

So, the properties at issue passed out of trust into fee ownership about 90 years ago. At that point, tribal jurisdiction over the properties ceased as a matter of law. ER --, DKT 1 at ¶ 3.2. Since then, the area has become a quiet residential neighborhood with on the order of 200 single family residences. ER --, 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." ER 23 at ¶ 3.6. This claim appears as a special exception to coverage in Plaintiffs' title commitments 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, ER 33 (Evans) ; ER 53 (Dobler).

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. ER 23 at ¶ 3.3. 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. ER 42 (Mitchell); and, ER 52 (Dobler). The Special Exception in the Evans Commitment references the Ordinance by the No. 99-054. ER 32.

In response to the Motion to Dismiss, Appellants offered evidence that the mere existence of the clouds impact Appellants' interests:

> The Tribal Ordinances placed on our titles have already had an impact. I recently inquired to a lender about refinancing of my home, the lender I approached informed me that the lender would not loan on properties located within the historical boundary of the Tulalip Reservation. Even on fee simple land. I am also engaged in the business of construction and sale of single family residences and am familiar with the Snohomish County market including properties located within the historical boundary of the Tulalip Reservation. Based on all the information available to me, including conversations with residential agents in this market, the title exceptions resulting from the Tribal Ordinances impact property owners by depressing the market value and increasing time on market. The uncertainty associated with tribal regulation is viewed as a negative by potential purchasers.

ER --, Dobler Dec. DKT 9-3. In addition:

> Recently, a number of homeowners have consulted with me about whether there is an enforceable obligation to pay the tax. However, until the issue of the Tribe's jurisdiction to claim the tax is resolved, it is a non – issue. This is because title companies in the area are refusing to close transactions without payment of the tax except under very onerous conditions.

ER 07, Brain Dec. DKT 8-1.

Under RCW 48.29.010, a title commitment is an offer to insure the marketability of title. This is stated expressly in the policies: see, e.g. ER 36, as "Condition 4: "This Commitment is a contract to issue one or more policies of title insurance policies…" 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. One of the impacts Appellants have suffered is that the Title Insurers have declined to provide insurance that covers the risk of loss arising from these special exceptions.

A cloud on title does necessarily render title unmarketable. If a cloud exists, the nature of the cloud is not material to the right to have it removed:

> The statute authorizing quiet title actions provides that a plaintiff may have judgment "quieting *or removing a cloud from* plaintiff's title".[7] 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). The defect in title created by the special exceptions is greater than a cloud under this definition because an unmarketable title would allow a potential purchaser not to close whereas a cloud may not.

RCW 7.28.010 provides a statutory cause of action. The statute provides that a party with an existing interest in real estate may have judgment "quieting *or removing a cloud from* plaintiff's title." (Emphasis added.)

Appellants' Complaint was filed on 8/23/17; ER 21. The Motion to Dismiss was filed on 9/15/17. ERThe basis for relief stated in the Motion was as follows:

> In the present case, there is no pending or impending enforcement of tribal land use or excise tax laws in relation to Plaintiffs' activities on their Reservation fee properties, nor is there any allegation that tribal government action is pending or imminent. Plaintiffs merely allege that they are entitled to relief because of the very existence of tribal ordinances that they speculate may be enforced against them or their properties in the future. Thus Plaintiffs' Complaint fails to establish that a justiciable controversy exists to support federal court jurisdiction.
>
> In pleading an injury sufficient to show an actual case or controversy, the asserted injury cannot be abstract. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Id. Article III confines federal courts to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Ibid. (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)). In the present case, Plaintiffs have failed to plead any injury that is not hypothetical or conjectural.

ER 20. As discussed below, the authorities relied on by the Tulalip Tribe are not current.

In addition to articulating the specific harms which are the subject of the Brain and Dobler Declarations referenced above; Appellants' response consisted of the discussion set forth above regarding Washington law with respect to removing clouds on title concluding:

> 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 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.

ER 11-12.

An Order was entered on 11/02/2017 dismissing Appellants' Complaint. The basis for decision is stated as:

> Homeowners' case is not fit for judicial determination and the parties would suffer no immediate hardship from the Court withholding decision. The Tribes have not attempted to enforce the regulatory ordinance or real estate tax against Homeowners.

ER 3. In the end then, the issue is very narrow. Does an allegation of a defect in title rendering Appellants' title unmarketable satisfy the requirement of an immediate hardship?

V. APPLICABLE AUTHORITY AND DISCUSSION

A. Standard of Review:

The applicable standard of review of a dismissal under FRCP 12(b)(6) is as follows:

> We review de novo the district court's decision to grant St. Paul's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 899 (9th Cir.2007) (internal citation omitted). "When ruling on a motion to dismiss, we may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters *1031 properly subject to judicial notice.' " *Id.* at 899–900 (quoting *Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir.2007)). We accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Id.* at 900.

Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030–31 (9th Cir. 2008). Under this standard, this Court would accept as true that the defects in title created by the Tulalip Tribes render Appellants' title unmarketable. Under this circumstance, the Court would accept as true that a defect in title as would allow a purchaser to elect not to close.

B. Immediate Harm:

The most recent pronouncement on the requirement of "immediate harm" by the US Supreme Court is:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

Clearly, the harm alleged here, a defect in title caused by the conduct of the Tulalip Tribes, is a "harm that has traditionally been regarded as providing a basis for a lawsuit" under

Washington law. RCW 7.28.010 provides that a party with an existing interest in real estate may have judgment "quieting *or removing a cloud from* plaintiff's title." (Emphasis added.) There are no additional prerequisites enumerated in the Statute or in Washington case law beyond demonstrating ownership of property subject to a cloud. The existence of a defect interferes with the most fundamental rights of ownership – unfettered possession and the right to freely alienate. The Appellants' Complaint makes exactly that allegation.

Relying on *Spokeo*, the Court in *Bellino v JP Morgan Chase Bank, N. A.*, 209 F. Supp. 3d 601 (S.D. N.Y. 2016) concluded that a cloud on title was an "injury in fact" for the purposes of conferring standing in the Federal Court:

> First, the "alleged intangible harm"—a cloud on title—"has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S.Ct. at 1549. Actions to quiet title have a longstanding history in New York. *See, e.g., Greenberg v. Schwartz*, 73 N.Y.S.2d 458, 459 (Sup.Ct.1947), *aff'd*, 273 A.D. 814, 76 N.Y.S.2d 95 (2d Dep't.1948) ("This is an action to remove that mortgage as a cloud upon plaintiff's title .... [T]his form of action to erase it from the record is an ancient and proper remedy.").

Bellino v. JPMorgan Chase Bank, N.A., 209 F. Supp. 3d 601, 609 (S.D.N.Y. 2016), motion to certify appeal granted, No. 14-CV-3139 (NSR), 2017 WL 129021 (S.D.N.Y. Jan. 13, 2017). See, also *Jaffe v. Bank of Am., N.A.*, 197 F. Supp. 3d 523, 528 (S.D.N.Y. 2016) (, As alleged, when defendant violated plaintiffs' statutory right to a timely filed mortgage satisfaction notice, it created a "real risk of harm" by clouding the titles to their respective properties; Id at 528).

In *Zia v. CitiMortgage, Inc.*, 210 F. Supp. 3d 1334, 1340 (S.D. Fla. 2016), appeal dismissed, No. 16-16743-GG, 2017 WL 5178360 (11th Cir. June 26, 2017), the Court found that the failure to allege a "cloud on title" precluded a showing of immediate injury:

> He makes no allegation, for example, that there existed a cloud on the title to his property as a result of the Defendants' failure to timely file these documents

> or that he was in any other way prohibited or deterred from transferring the property or obtaining any additional lien. *Cf. Jaffe v. Bank of America, N.A.*, 197 F.Supp.3d 523, 528, 2016 WL 3944753, at *4 (S.D.N.Y. July 15, 2016) (in a case involving alleged violations of RPAPL § 1921 and RPL § 275, finding that the plaintiffs ***had*** established a concrete injury because they alleged that the defendant's failure to timely file a mortgage satisfaction notice "created a 'real risk of harm' by clouding the titles to their respective properties"). He has identified no tangible or intangible harm that he suffered, other than the fact that the delay in recording occurred; and he has identified no "material risk of harm" from the delay, *Braitberg*, 836 F.3d at 930—simply the delay itself.

Zia v. CitiMortgage, Inc., 210 F. Supp. 3d 1334, 1340 (S.D. Fla. 2016), appeal dismissed, No. 16-16743-GG, 2017 WL 5178360 (11th Cir. June 26, 2017). It is clear that if the allegation of a cloud had been made, the matter would not have been dismissed.

There is also an alternative basis for concluding g the allegations are sufficient. The action complained of ultimately is the assertion of sovereign authority by the Tulalip Tribes over Appellants' properties equivalent to government action. However, as the Supreme Court has held, a party faced with a risk of harm from government action does not have to wait until the harm actually materializes before the harm satisfies the "immediate harm" materializes:

> Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction. For example, in *Terrace v. Thompson,* 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923), the State threatened the plaintiff with forfeiture of his farm, fines, and penalties if he entered into a lease with an alien in violation of the State's anti-alien land law. Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action. *Id.,* at 216, 44 S.Ct. 15. See also, *e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Likewise, in *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), we did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution. *Id.,* at 458–460, 94 S.Ct. 1209. As then-Justice Rehnquist put it in his concurrence, "the declaratory judgment procedure is an

> alternative to pursuit of the arguably illegal activity." *Id.,* at 480, 94 S.Ct. 1209. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute handbills at the shopping center). That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. See *Terrace, supra,* at 215–216, 44 S.Ct. 15; *Steffel, supra,* at 459, 94 S.Ct. 1209. The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 152, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29, 127 S. Ct. 764, 772–73, 166 L. Ed. 2d 604 (2007). The Tulalip Tribes acknowledged this principal in the Motion to Dismiss:

> A litigant "'does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'"Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60L.Ed.2d 895 (1979).

ER--. Motion to Dis miss, DKT 6-10.

In *Lundgren*, the Washington Supreme Court concluded that a dismissal of a claim that a Tribe had clouded Plaintiffs' title would "lead to no justice at all" for the following reason:

> After the Lundgrens commenced the quiet title action, the Tribe claimed sovereign immunity and joinder under CR 19 to deny the Lundgrens a forum to acquire legal title to property they rightfully own. The Tribe has wielded sovereign immunity as a sword in disguise. While we do not minimize the importance of tribal sovereign immunity, allowing the Tribe to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder. *See Auto. United Trades Org.,* 175 Wash.2d at 233-34, 285 P.3d 52. Finding otherwise, as correctly articulated by the trial court, is "contrary to common sense, fairness, and due process for all involved."

Lundgren v. Upper Skagit Indian Tribe, 187 Wash. 2d 857, 873, 389 P.3d 569, 576 (2017). In effect, the Tribe is doing the same thing here, using a claim of lien backed by sovereign immunity to strong arm non-native fee owners into paying a tax the Tribe is clearly not entitled

to collect. With respect to the Memorandum of Ordinance, creating a cloud on title was the deliberate purpose of recording the Memorandum.

So what the Trial Court and the Tulalip Tribes are really saying is that Appellants should be compelled to wait until they are actually facing the prospect of either losing a sale or paying an illegal tax before going to Court and obtaining a result. However, to obtain such a purchaser would be obtained only after the Appellants accept the diminution in value, reduced buyer pool and increased holding time to get a sale before getting relief. To require the Appellants to suffer this kind of injury is a manifestly unjust result.

V. CONCLUSION

Accordingly, the Appellants respectfully request that this Court reverse the decision by the Trial Court and remand the matter for further proceedings.

Counsel, by the signature below, hereby certifies that this Brief complies with all requirements on page length and word count.

DATED this 20th day of January, 2018.

BRAIN LAW FIRM PLLC

By: _____

Paul E. Brain, WSBA #13438

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of January, 2018, served a true and correct copy of the Appellants' Opening Brief upon counsel of record, via the methods noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of January, 2018, at Tacoma, Washington.

BRAIN LAW FIRM PLLC

By: _____
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Attorney for Appellants