NO.

IN THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

OLIVE OSHIRO, et. al.

Petitioners,

vs.

WASHINGTON STATE HOUSING FINANCE COMMISSION, et. al

Respondents.

ANSWER OF TRIBAL LIMITED PARTNERSHIPS TO MOTION FOR DISCRETIONARY REVIEW

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I. Introduction[1]

Petitioners[2] (hereinafter "Tenants") (and their Counsel) spent the last ten (10) years filing various lawsuits, appeals, administrative appeals, and formal complaints with federal, state and tribal agencies in an effort to retain their fraudulently-obtained enrollment within the Nooksack Indian Tribe, and the benefits derived therefrom. This current lawsuit is no less than the seventh attempt, four of which were to the state courts, aimed to delay Tenants' evictions from Tribal rental housing located on Indian trust lands.

II. Statement of the Case

The Nooksack Indian Tribe ("Tribe") is a federally recognized, sovereign Indian Tribe, located in Deming,

[1] Tribal Partnerships hereby moves to file overlength response pursuant to RAP 18.

[2] Plaintiffs Oshiro, Norma Aldredge, Michael Rabang, Michelle Roberts, Francisco Rabang, Alex Mills and Saturnino Javier are former Tribal Members of the Nooksack Indian Tribe. As former Tribal Members, they are listed as "Head of Household" within the Tribe's housing program and on leases executed with the Tribe. The remaining petitioners are other family members residing in the rental units are were never associated with the Tribe.

Washington. 87 FR 4636, 4638 (Jan. 28, 2022). The Tribe is the beneficial owner of land held in trust by the United States government, including the Rutsatz and Suchanon homesites situated in Whatcom County, Washington. ("Tribal Property"). Decl. of Malori Klushkan, Exhs. 2-3. The Tribe offers low-income rental housing through its Housing Department ("NHD") to Tribal Members meeting eligibility requirements. *Id*., Exh. 4. NHD manages a rental unit stock consisting of 179 units, all of which are occupied. *Id*. at 1; *see also* https://nooksacktribe.org/tribal-council/2022/over-60-low-income-nooksack-tribal-members-are-awaiting-housing-including-elders-and-those-experiencing-homelessness/ (last visited April 1, 2022). Over the years, the Tribe developed its Tribal housing utilizing a variety of funding sources. Through the low-income tax credit program, the Tribe partnered with an investor, forming Respondent Partnerships, Nooksack Housing Limited Partnerships #2-4, to construct many of its housing units.

During development of the rental units, the Nooksack Indian Housing Authority[3] obtained various federally-approved Master Leases from the Nooksack Indian Tribe for utilization of the Tribal lands for the purposes of residential development. Decl. of S. Gearhart, Exh. 1-2. Each Master Lease contains a provision wherein any "improvement" would remain with the lessee (or sublessee) only through the term of the lease (or sublease). *Id*. Following expiration, any improvement would then become the property of the underlying landowner, the Nooksack Tribe, by operation of law. See 25 C.F.R. 162-315(b).

The Tribe, through NHD, manages each of the residential developments on Tribal trust lands, and the entire rental stock, including Petitioners' rental units. *Id*. at 1-2. Tribal Member demand for land and housing is immense, and NHD has minimal resources and no available housing. *Id*. at 2.

[3] The Nooksack Indian Housing Authority has operated for a number of years as the Nooksack Housing Department pursuant to Tribal law, although its formal policies and many formal documents, still read the "Nooksack Indian Housing Authority" or "NIHA."

Currently, NHD's waiting list consists of 60 Tribal families, composed of the Tribe's most vulnerable populations (Tribal Elders, the disabled, the currently homeless, and children). *Id*. at 1.

Following each Petitioner-head of household's fraudulent enrollment with the Tribe, each Petitioner-head of household quickly applied for Tribal benefits, including housing. *Id*. at 2-3. From 2005 to 2009 , each Petitioner established eligibility for Tribal housing by demonstrating they were an enrolled member of the Tribe. *Id*. Following the Tenants selection for housing, each Petitioner-Head of Household executed a written rental agreement with the Tribe as required by program rules, and tribal and federal law. *Id*., Exhs. 5-11. Each Tenant's rental agreement acknowledged: (1) the landlord-tenant relationship, (2) the requirement that each household comply with program rules and tribal law, and (3) that disputes were to be submitted to the jurisdiction of the Nooksack Tribal Court. *Id*. Absent from the parties' rental agreements was any clause

or provision concerning a tenant purchase option, a future conveyance, or other legally recognized "promise" whereby the Tribe (or NHD) would convey the rental unit to a Plaintiff. *Id*.

After years of litigation concerning Petitioner-Head of Households' Tribal enrollment, the Tribe ultimately disenrolled the Petitioners in 2016 and again ratified in 2018 for fraud in their enrollment applications. *Id*., Exhs. 12-18. Loss of Tenants Tribal benefits soon followed, as Tenants eligibility for the underlying benefits was premised upon enrollment within the Tribe. *Id*. at 3-4. Tribal Housing Policy, and applicable Tribal and federal law, also required Tribal Membership in order to remain in Tribal housing. *Id*. at 4. NHD issued each of the affected households a Notice of Need to Reestablish Eligibility for services, providing each household thirty days to reestablish eligibility. *Id*., Exhs. 19-25. None of the Petitioners reestablished eligibility. *Id*. at 5.

NHD then issued each household a Notice to Terminate the rental agreement, providing thirty-days advance notice. *Id*.,

Exhs. 26-32. The notice provided each Petitioner a right to administrative review. *Id*., Exhs. 33-38. Every Petitioner except one[4] exercised their appeal rights, including an informal meeting with the Housing Director, followed by a Grievance Hearing before the Tribal Housing Committee. *Id*. at 5-6_. The Grievance Hearings continue today. *Id*., Exhs. 33-34, 36-38.

In addition to the delay tactics identified above, Petitioner Oshiro (through Tenants' legal counsel) filed an unsuccessful federal RICO action in 2017, and a similarly unsuccessful appeal in an effort to stave off Petitioner Oshiro's (and others') eviction. *Id*., Exhs. 39-40. *See Rabang v. Kelly*, 328 F.Supp.3d 1164 (W.D.Wa. 2018)(*aff'd Rabang v. Kelly*, 846 Fed.Appx. 594 (9th Cir. 2021). The federal court held: "*it is for the Nooksack Tribe, not this Court, to resolve Tenants claims*." *Rabang*, 328 F.Supp.3d at 1168.

[4] The one exception is Petitioner Javier who did not timely seek administrative review, NHD then issued a Notice to Vacate, and eventually filed a complaint for an unlawful detainer in the agreed-to forum, the Nooksack Tribal Court. Plaintiff Roberts exercised her rights to an informal conference, but to date, failed to submit a request for grievance hearing. Decl. of Malori Klushkan at 5-6.

In addition to the delay tactics identified above, Tenant Oshiro (through Tenants' counsel) filed an unsuccessful federal RICO action in 2017, and a similarly doomed appeal therefrom in an effort to stave off Plaintiff Oshiro's (and others') evictions. *Id*., Exhs. 39-40. *See Rabang v. Kelly*, 328 F.Supp.3d 1164 (W.D.Wa. 2018)(*aff'd Rabang v. Kelly*, 846 Fed.Appx. 594 (9th Cir. 2021). Tenants' counsel also filed two (2) separate civil actions in Whatcom County Superior Court, and an appeal therefrom in order to delay eviction from Tribal lands. Decl. of Malori Klushkan, Exhs. 41, 43, and 46. Each Whatcom County case was summarily dismissed for lack of jurisdiction, each citing to R.C.W. § 37.12.060 as a bar to the exercise of state court jurisdiction with regards to evictions on Tribal lands. Decl. of Malori Klushkan, Exhs. 42, and 44-45. Late 2021, in the last of Plaintiffs' counsel unsuccessful attempts to halt Tribal housing evictions, the Whatcom County Superior Court opined:

> Plaintiffs tort claims originate from and depend

> upon (1) the plaintiffs right to continued residency in Tribal housing located on Tribal trust land, and (2) the propriety of the Tribe's manner of eviction.
>
> In adjudicating these claims, a state court would necessarily pass judgment on the Plaintiffs right to possession of real property belonging to the Nooksack Indian Tribe and held in trust by the United States. Such jurisdiction is flatly prohibited by RCW 37.12.060. It is for the Nooksack Tribe, not this Court, to resolve these claims. *Id*., Exh. 45

Petitioners' counsel recently appealed the dismissal of *Gilliland II* to the Washington Court of Appeals. Decl. of Malori Klushkan, Exhs. 41, 43, and 46.

Tenants also unsuccessfully solicited the assistance of regulatory agencies, including HUD, the Department of Interior (DOI), and the defendant Washington State Housing Finance Commission (WSHFC) in order to delay their evictions. Decl. of Malori Klushkan at 7. Immediately prior to the filing of this complaint, Tenants' plan backfired when the DOI (prompted by Tenants through continuous complaints to HUD) completed its investigation and issued its opinion finding that the Tribe (and NHD) complied with all applicable laws in the

Tenants' eviction process. Decl. of Malori Klushkan, Exh. 48. Dissatisfied with the results, Petitioners now frivolously seek state court relief to avoid eviction from Tribal housing in Whatcom County when the assumption of state jurisdiction is flatly preempted by federal law, and clearly impermissible under state law.

III. Argument and Authority.

A. Standard of Review.

Interlocutory appeals are disfavored. *Hartley v. State*, 103 Wn.2d 768, 773 (1985). Pursuant to RAP 2.3(b)(1) review is not permitted absent Petitioners demonstrating the Superior Court committed an obvious error which would render further proceedings useless, which it did not, and which the Petitioners cannot demonstrate. Further, even under the Petitioners' claimed standard of RAP 2.3(b)(2), the Petitioners fail to demonstrate that the Superior Court committed probable error which substantially alters the status quo or substantially limits the freedom of a party to act. Additionally, the reviewing court

may affirm the trial court on any basis supported by the briefing and record below. *LaMon v. Butler*, 112 Wn.2d 193, 200-01 (1989).

B. Argument.

1. Tenants Cannot Demonstrate Obvious Error Pursuant to RAP 2.3(b)(1)[5].

Pursuant to RAP 2.3(b)(1), review is not permitted absent Petitioners demonstrating that the Superior Court committed an obvious error which rendered further proceedings useless. Here, Petitioners fail to demonstrate the necessary showing that

[5] Even under the Petitioners' claimed standard of RAP 2.3(b)(2), Petitioners still cannot demonstrate that the Superior Court committed probable error. As evidenced herein, the Thurston County Superior Court found substantial questions existed as to whether the Petitioners could succeed on the merits. One of the issues cited by the lower court is a jurisdictional barrier to the state court's assumption of jurisdiction. The latter issue includes the Tenants' failure to join necessary parties (landlord, land owner) of their action seeking avoidance of an eviction. The Superior Court did not err, Petitioners are simply continuing their 10+ years of futile litigation in an effort to continue to take tribal benefits for which they are not entitled.

the Superior Court committed obvious error in denying the motion for preliminary injunction when they failed to demonstrate they had a “clear legal right” to avoid eviction.

In deciding whether a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits. *Wash. Fed'n of State Emps., Council 28 v. State*, 99 Wn.2d 878, 887 (1983).; *Tyler Pipe Industries, Inc. v. State, Dept. of Revenue*, 96 Wn.2d 785, 793 (1982). An injunction will not be issued in a doubtful case. *Washington Fed'n,* 99 Wash.2d at 888. Review of a trial court's decision on a preliminary injunction is for an abuse of discretion. *Wash. Fed'n*, 99 Wash.2d at 887. Discretion is abused if the decision is based on untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id.* In ruling on a request for a preliminary injunction the trial court must reach the merits of purely legal issues for purposes of deciding whether to grant or deny the preliminary injunction, and a reviewing court must similarly evaluate purely legal issues in assessing the propriety

of a decision to grant or deny a preliminary injunction. *Rabon v. City of Seattle*, 135 Wn.2d 278, 286 (1998).

Here, the Thurston Superior Court correctly denied the Petitioners' request for a preliminary injunction because of substantial doubt as to the Petitioners likelihood of success based upon (1) the presence of an insurmountable jurisdictional hurdle, R.C.W. § 37.12.060 and (2) the Tenants' failure to join indispensable parties, including the Tribe and United States of America, land owners, and lessor in the Petitioners' Rental Agreements.

i. DISMISSAL IS WARRANTED PURSUANT TO 28 U.S.C. § 1360(b) AND ITS STATE COUNTERPART, R.C.W. § 37.12.060.

Tenants cannot demonstrate obvious error because state courts lack jurisdiction to adjudicate their claims pursuant to 28 U.S.C. § 1360(b) and R.C.W. § 37.12.060. The Tenants seek a state court adjudication of their claims: (1) to continued residency upon and (2) to ownership of housing units located upon Tribal Trust lands.

In 1953, Congress enacted Public Law 280 ("PL-280") which authorized the transfer of federal criminal jurisdiction and certain civil jurisdiction over Indian country to certain states, including Washington. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][a] at 537 (Nell Jessup Newton ed. 2012). The State of Washington adopted enabling legislation to assume partial civil jurisdiction within Indian Country. *Cordova v. Holwegner and Yakima Logging II, Inc.*, 93 Wash. App. 955 (Div. 3 1999); *see also* R.C.W. § 37.12.010 *et. seq*. Notwithstanding the grant of jurisdiction, PL-280 (and Washington's enabling legislation) contained clear limitations to a state's assumption of jurisdiction. *See* 28 U.S.C. § 1360(b); R.C.W. § 37.12.050-.060. Section 1360(b)'s jurisdictional bar should also be read in conjunction with the grant of federal jurisdiction to adjudicate Indian allotment claims (25 U.S.C. §§ 345–346), which the United States Supreme Court has interpreted as exclusive of state court jurisdiction. *McKay v. Kalyton* 204 U.S. 458 (1907). Both 28

U.S.C. § 1360(b) and 25 U.S.C. §§ 345–346 embody the principle that the exclusive federal-Indian trust relationship is best maintained by ***channeling all disputes about such land into federal court***. *Boisclair*, 801 P.2d at 311.

Section 1360(b) states:

> *Alienation, encumbrance, taxation, use, and probate of property*
> ***Nothing in this section shall authorize the alienation***, encumbrance, or taxation of ***any real or personal property***, including water rights, ***belonging to any Indian or any Indian tribe***, band, or community that is ***held in trust*** by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or ***shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property*** or any interest therein. (emphasis added).

The U.S. Supreme Court has held this provision precludes states from exercising any authority, civil or criminal, which would affect the use of trust land. *Bryan v Itasca County*, 426 U.S. 373, 379-393 (1976).

Further, Washington state courts have similarly struck down efforts to adjudicate matters of Indian property. *See Snohomish County v. Seattle Disposal Co.*, 70 Wn.2d 668 (1967), *cert. denied* 389 U.S. 1016 (1967)(striking down local governmental zoning controls deemed an encumbrance on Tribal lands); *see also Landauer v. Landauer*, 95 Wash.App. 579 (Div. 1 1999)(striking down an otherwise valid community property agreement containing a provision attempting to convert Tribal lands to community property); *see also Heffle v. State*, 633 P.2d 264 (Alaska 1981) (state court without jurisdiction to issue preliminary injunction preventing interference with a valid right of way); *Krause v. Neuman*, 943 P.2d 1328 (Mont. 1997)(dismissing breach of contract and tort claims non-severable from issue of who held title to Indian lands). The impact of the limitations within PL-280 and R.C.W. § 37.12.060 is clear, state courts are without jurisdiction to adjudicate matters concerning real or personal property on Indian trust lands.

Here, Petitioners unsuccessfully sought a preliminary injunction keeping them in possession of Tribal lands, and, Petitioners' complaint in this case seeks to quiet title to property on Tribal lands – both claims are outside the jurisdiction of the superior court[6]. In making their request, Petitioners hide facts and relevant law from the court's review, such as (1) the existence of binding Rental Agreements between them and the Tribe; (2) the status of the underlying land

[6] Although Petitioners' frequently attempt to conceal the true identity of their complaints – the true nature is the same and cannot be saved by their "artful pleading". Although the plaintiff is generally considered the "master of his complaint" and is free to choose the forum for his action, this principle is not without limitation. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 190 (9th Cir. 1983). A plaintiff will not be allowed to conceal the true nature of a complaint through "artful pleading." Artful pleading utilized to capture state court's jurisdiction is equally susceptible to dismissal. *Joy v. Kaiser Aluminum and Chemical Corp.*, 162 Wash.App. 909 (Div. 3 1991); *see also Boisclair*, 801 P.2d at 314 ('look[ing] " 'beyond the verbiage of the state court complaint to the substance of plaintiff's claimed grievance.' " The court concluded that the state court had been asked in essence to adjudicate the validity of a native ownership claim, which section 1360(b) barred.) Here, the Plaintiffs' aim is to avoid eviction and obtain an order quieting title to housing units on Tribal trust lands. PL-280, and the state's enabling statute, R.C.W. § 37.12.060, are clear; state courts lack the authority to adjudicate "the ownership *or right to possession* of [Indian] property or any interest therein". Plaintiffs' efforts must fail.

ownership – Indian lands; (3) Petitioners' previous unsuccessful lawsuits in both federal and state court wherein each court found it lacked jurisdiction; (4) Petitioners' current exercise of legal remedies in the Tribal forum (administrative appeals re: eviction); (5) Petitioners' refusal to exercise Tribal administrative processes concerning conveyancing; and (5) DOI investigation results wherein the DOI found Petitioners' eviction was lawful. Despite Petitioners' concealment of applicable law and relevant facts, the current claims are outside of the jurisdiction of Washington state courts.

ii. DISMISSAL IS WARRANTED WHEN TENANTS SEEKING TO AVOID EVICTION FAILED TO JOIN THEIR LESSOR AND THE UNDERLYING LANDOWNERS IN THE ACTION.

Here, the Superior Court correctly denied Tenants' request when it found the Tenants failed to join indispensable parties. When dismissal on CR 19 grounds is contested, courts engage in a three-step analysis, first determining whether absent parties are "necessary" for a just adjudication. *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 221-222 (2012).

If the absentees are “necessary,” the court determines whether it is feasible to order the absentees’ joinder. *Id*. If joining a necessary party is not feasible, the court then considers whether, “in equity and good conscience,” the action should still proceed without the absentees under CR 19(b). *Id*. Here, the landowners of record are necessary parties, their joinder is not feasible due to sovereign immunity, and the action cannot proceed, as no adequate remedy can be fashioned without the absent parties present.

First, the Tribe and United States are “necessary” pursuant to CR 19, because they are the landowners of record and Tenants claim an interest in housing located on the Tribal lands. To determine whether a party is “necessary”, the Court must determine first whether the absent party claims a legally protected interest in the action and second, and whether the absentee's ability to protect that interest will be impaired or impeded. CR 19(a)2; *Automotive United Trades Organization*, 175 Wash.2d at 223-224.

Under this analysis, there is a presumption that a landowner is an indispensable party in a case that would affect the <u>use</u> of the landowners property." *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn.App 221, 228 (Div. 2 1995)(aff'd 130 Wn.2d 862); *see also North Quinault Properties, LLC v. State*, 197 Wn.App. 1056, 1057-58 (Div. 1 2017). Because of federal preemption in the arena of Indian trust property, Washington courts have rarely addressed the indispensability of an Indian tribe or the federal government in relation to property issues. *See infra*. However, federal court precedent is extensive, and the Ninth Circuit has frequently concluded that the United States (and/or Tribe) is an indispensable parties in claims stemming from Tribal trust lands. *See generally Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272, n.4 (9th Cir. 1991).

The indispensability of the United States is not restricted simply to a quiet title action, but extents "to any action in which the ***relief sought might interfere*** or otherwise impair its

governmental obligations to protect Indian lands. *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (1975); see also *Jackson v. Sims*, 201 F.2d 259, 262 (10th Cir. 1953). This indispensability extends to eviction and ejectment actions. *See Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993 (9th Cir. 2011)(United States was a "required party" in an action in which an Indian tribe sought to have the city ejected from land previously possessed by the tribe and to restore the tribe to possession).

Here, Tenants seek injunctive relief which would maintain their continued illegal occupancy upon Tribal lands and prevent the Tribe from utilizing its lands as the Tribe sees fit. The underlying land owner is the United States, who holds the lands in trust for the benefit of the Tribe. Tenants efforts to disguise ownership and their intentional nondisclosure of the identity of the landowners do not alter the presumption that the Tribe and United States are necessary and indispensable parties, and a

judgment made in the absence of the Tribe and the United States is procedural error. *Krell v. Port Ludlow Townhome Assoc.*, 2022 WL 168118 (Div. 2). Inability to join the Tribe and United States as an indispensable party must result in dismissal. *Carlson v. Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir. 1975). *See Imperial Granite*, 940 F.2d at 1272, n.4. Here, the Superior Court correctly determined that Tenants failed to demonstrate likelihood of success on the merits wherein they failed to join the landowner and lessor to their Rental Agreements.

2. Petitioners Fail to Demonstrate That the claimed Error substantially altered the Status Quo or Substantially Limited their Freedom to Act.

Petitioners past (and continuing) fraud upon Tribal (and other) governments is what limits their freedom to act, not any fictitious claimed error by the lower court. They seek to (1) ensure continued illegal occupation of the housing units on Tribal lands and (2) obtain a court-ordered conveyance of the

housing units from a state court, but fail to defend these same claims in Nooksack Tribal Court proceedings wherein they consented to the Tribal Court's jurisdiction.

Here, Tribal forums (1) are available to resolve the Petitioners' complaints against their lessor, the Nooksack Indian Tribe. The available Tribal forums are empowered by federal and tribal law for the specific purpose of resolving Petitioner grievances and in the past, were utilized by each Petitioner to resolve their complaints. Petitioners are well aware of the appropriate forum to air their grievances and have utilized the tribal forums for various lawsuits for more than ten years.

Here, each Petitioner (1) is a tenant of Tribal housing (2) who executed a written rental agreement whereby each (a) agreed to be bound by Tribal housing laws and policies, and (b) consented to the jurisdiction of the Tribal Court, and wherein the lessor, is the Nooksack Indian Tribe, who has yet to be named as a party. Pursuant to Tribal policies and laws, each

Petitioner receives various safeguards prior to eviction, including advance notice of termination, an opportunity to seek reconsideration, and an administrative appeal therefrom, then an unlawful detainer trial in Tribal Court, and an appeal therefrom. Petitioners are not without a remedy nor are they in need of any orders from this Court, Petitioners simply wish to avoid the tribal forum in which any remedy exists. For the above reasons, dismissal is warranted.

IV. Conclusion

The Tribe respectfully requests this Court deny Tenants' request.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of RAP 18.17 and contains (3503/24 pgs)(5000/20pg) words, excluding the parts of the brief exempted by RAP 18.17(b)-(c).

Respectfully submitted on this 18 day of April, 2022.

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