No. 17-35959

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS MITCHELL AND PATRICIA S. JOHANSON-MITCHELL, HUSBAND AND WIFE, AND BUCKLEY EVANS AND TINA EVANS, HUSBAND AND WIFE, AND ROBERT C. DOBLER AND LIZBETH K. DOBLER, HUSBAND AND WIFE,

Plaintiffs - Appellants,

v.

TULALIP TRIBES OF WASHINGTON,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE
(Hon. John C. Coughenour) No. 2:17-cv-1279 JCC

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

This Court should affirm the district court's dismissal of Homeowners' cases for lack of ripeness and, alternatively, on the basis of tribal sovereign immunity and res judicata. Appellee, the Tulalip Tribes, is a federally recognized American Indian tribe exercising governmental powers on the Tulalip Reservation adjacent to the City of Marysville, in Snohomish County, Washington. 82 Fed. Reg. 4915, 4919 (Jan. 17, 2017). Appellants are non-Indian fee owners of residential properties within the Tulalip Reservation. The Tulalip Reservation boundaries established by the 1855 Treaty of Point Elliott and the Executive Order of 1873 have never been altered or diminished. *See United States v. Celestine*, 215 U.S. 278, 284 (1909) (allotted or patented land within Tulalip Reservation remains part of the Reservation); 18 U.S.C. § 1151(a) ("Indian country" includes all lands within a reservation, notwithstanding issuance of any patent).

The district court appropriately dismissed the Homeowners' cases for lack of ripeness.[1] Ripeness is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). In cases

[1] Homeowners erroneously state that the district court's dismissal was based on lack of standing. *See* Op. Br. at 6. The district court plainly relied on a lack of ripeness in dismissing pursuant to Fed. R. Civ. P. 12(b)(1). ER at 2-5.

challenging statutes, ripeness requires a plaintiff to show that he or she has sustained or is in immediate danger of sustaining some direct injury as the result of challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Del Percio v. Thornsley*, 877 F.2d 785, 786-87 (9th Cir. 1989) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement," as it pertains to ripeness. *Ass'n of Am. R.R. v. Cal. Office of Spill Prevention & Response*, 113 F.Supp.3d 1052, 1057 (E.D. Cal. 2015) (citing *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996)). In the present case, Homeowners seek a declaration in the abstract that tribal land use and excise tax ordinances do not apply to their properties and cannot be enforced against them under any circumstance in the future. Homeowners do not allege any enforcement or threat of enforcement of tribal ordinances. The enactment of tribal laws does not constitute an adverse claim on title to Homeowners' properties. Homeowners do not allege harms that are real and immediate. The district court correctly concluded that Homeowners have not presented a ripe controversy, and dismissal should be affirmed on that basis.

In addition, this Court should affirm the district court's dismissal on the alternate basis of tribal sovereign immunity and res judicata. Indian tribes are immune from suit in the same manner as other governments. Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. Neither the alleged in rem nature of the Homeowners' action nor their invocation of 28 U.S.C. § 1331 overcome the Tulalip Tribes' sovereign immunity in this case. Where tribal sovereign immunity exists, the district court lacks subject matter jurisdiction.

Res judicata also bars Homeowners' claims because all parties to the present action were parties to a state superior court action presenting functionally identical claims, the superior court decided those claims adversely to the Homeowners with prejudice, and there was no appeal filed.

STATEMENT OF JURISDICTION

The Tulalip Tribes notes that *Appellant's Opening Brief* fails to identify any basis for this Court's jurisdiction, as required by Fed. R. App. P. 28(a)(4)(B). *See* Op. Br. at 7. Homeowners appeal from an Order of Dismissal issued by the district

court on November 2, 2017, and that order is a final order. ER 1-4. This Court has jurisdiction to review the district court's dismissal pursuant to 28 U.S.C. § 1291.

Homeowners allege that the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. *See* Op. Br. at 7. The district court was correct in declining to exercise jurisdiction in this case because Homeowners do not present a ripe claim. In addition, tribal sovereign immunity deprives the district court of subject matter jurisdiction. *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Furthermore, Homeowners base their claim on Tulalip Tribal law, and not federal law. The enactment of tribal laws does not confer federal question jurisdiction. *Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 (9th Cir. 1981). Accordingly, the district court did not have subject matter jurisdiction in this case.

COUNTERSTATEMENT OF THE ISSUES

(1) Did the district court properly dismiss Homeowners' claims as unripe because of the absence of any pending or threatened application of Tribal land use or excise tax laws to Homeowners' Reservation fee properties? **Yes.**

(2) Does the district court lack subject matter jurisdiction because defendant, the Tulalip Tribes, is a federally recognized American Indian tribe, and the Tribes' sovereign immunity has not been waived? **Yes.**

(3) Are the claims in this case barred under the doctrine of res judicata because functionally identical claims were the subject of a prior state court action involving the same parties that was dismissed with prejudice? **Yes.**

COUNTERSTATEMENT OF THE CASE

Appellee, the Tulalip Tribes, provides this counterstatement of the case pursuant to Fed. R. App. P. 28(a) & (b). The Tulalip Tribes does not intend for this to be a complete restatement of the case, nor does the Tulalip Tribes acquiesce to Homeowners' statement of the case. The following is provided to supplement Homeowners' statement of the case, as needed for this Court to rule on the issues presented for review.

I. Homeowners Allege No Pending or Threatened Application of Tribal Ordinances to Their Properties.

Plaintiffs-Appellants in this case are non-Indian homeowners seeking a declaration from the district court that the Tulalip Tribes is "without jurisdiction to regulate uses on Plaintiffs' lands" and has otherwise clouded title to Homeowners' properties through the recordation of a Memorandum of Ordinance. ER at 25-26. Homeowners further claim that the Tulalip Tribes is "without jurisdiction to levy a tax on transfer of non-native owned properties" and has clouded title to Homeowners properties by asserting a lien for excise tax on the transfer of Homeowners' reservation properties. *Id.* Homeowners' *Complaint for Declaratory and Injunctive*

Relief, ER at 21-26, does not allege that the Tulalip Tribes has taken or threatened to take any actions to enforce tribal land use regulations or tribal real estate excise taxes against Homeowners.

In addition, Plaintiff-Appellant Robert Dobler admits by declaration that he sold real property on the Tulalip Reservation in 2009 and no excise tax was collected by the Tulalip Tribes on that transaction. Supp. ER at SuppEx-1. Mr. Dobler also admits that he developed property on the Tulalip Reservation in 2010 and no tribal land use regulations were applied to his activities. *See* Supp. ER at SuppEx-1 & ER at 7. Mr. Dobler does not allege in his declaration that tribal ordinances impaired his ability to sell his property in 2009. Homeowners failed to include in their excerpts of record the page of Mr. Dobler's declaration where he discusses his sale and development of Reservation properties in 2009 and 2010. *See* ER at 6-7. The omitted page from the Dobler declaration is included in the Tulalip Tribes' supplemental excerpts of record at SuppEx-1.

II. Tulalip Tribes' Land Use Laws.

The Tulalip Tribes regulates zoning and land use on its reservation pursuant to an ordinance and comprehensive plan, first enacted in 1982 and subsequently

amended and codified. *See* Tulalip Tribal Code[2] ("TTC") ch. 7.05 & TTC tit. 7. Land use planning pursuant to Tulalip Tribal Code is partially overseen by a Planning Commission, which includes non-Indian residents of the reservation. TTC § 7.10.030. Land use actions pursuant to Tulalip Tribal law are appealable through administrative and judicial process. TTC ch. 7.180. The Tulalip Tribes' government includes a comprehensive court system, including a trial court and court of appeals. TTC ch. 2.05. Tribal jurisdiction is exercised within the confines of federal law. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); TTC § 2.05.020(1).

By a 1999 Memorandum of Ordinance recorded with the Snohomish County Auditor, the Tulalip Tribes gave notice to all reservation residents of the then-current tribal land use regulations. *See* ER at 32. The current Tulalip Tribes land use regulations are presently codified at TTC tit. 7, which supersedes the ordinance that is the subject of the Memorandum of Ordinance. Homeowners seek an order quieting title and allege that the Memorandum of Ordinance constitutes an encumbrance on their properties. ER at 26. Homeowners also claim that the Tulalip Tribes is otherwise entirely without jurisdiction to regulate uses on their lands. ER at 25. However, Homeowners do not allege that the Tulalip Tribes has applied or

[2] The codified ordinances of the Tulalip Tribes are published online at http://www.codepublishing.com/WA/Tulalip/.

attempted to apply its land use laws to activities related to their properties. *See* ER at 21-26. In addition, Plaintiff-Appellant Robert Dobler admits that tribal land use regulations were not applied when he developed property on the Tulalip Reservation in 2010. Supp. ER at SuppEx-1 & ER at 7. As Mr. Dobler notes, Snohomish County issues permits for land use activities on Reservation properties owned by non-Indians, in most cases. Supp. ER at SuppEx-1 & ER at 7. Mr. Dobler does not allege that the tribal land use ordinance impaired his ability to sell property in 2009.

III. Tulalip Tribes' Real Estate Excise Tax.

In 1987, the Tulalip Tribes enacted a real estate excise tax, which is now codified at TTC ch. 12.20. TTC § 12.20.170(16) provides that "the tax herein provided for and any interest or penalties become a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid." Homeowners allege that the Tulalip Tribes has clouded title to their properties by asserting a lien for excise tax, pursuant to the preceding Tribal Code section. ER at 25-26. However, the definition of "Sale" in the tribal ordinance provides that the real estate excise tax is generally *not* applicable "to sales by persons who are not enrolled members of the Tulalip Tribes, except (a) where authorized by Congress; or (b) where such nonmembers have consensual relationships with the Tribes through commercial dealing, contracts, leases, or other arrangements; or (c) where

such nonmembers' conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribes."[3] TTC § 12.20.040(1). In fact, Plaintiff-Appellant Robert Dobler states that the Tulalip Tribes did not collect an excise tax on his sale of land in 2009 after the Tulalip Tribes was informed that he was not a tribal member. Supp. ER at SuppEx-1. Mr. Dobler does not allege that a lien was placed on his property, or that his ability to sell property was otherwise impaired because of the tribal excise tax ordinance. The plain language of the tribal tax ordinance makes clear that a lien only arise in fact-specific situations wherein the excise tax is found to be applicable. Homeowners do not allege any basis for their contention that a lien encumbers their properties, other than the mere enactment of TTC § 12.20.170(16).

TTC ch. 12.20 provides both administrative and judicial review of challenges to a tribal real estate excise tax. If a tax is assessed on a property conveyed by a non-member of the Tulalip Tribes, the non-member may present an affidavit requesting an exemption from the tribal tax, pursuant to TTC § 12.20.150(2)(a)(viii). A taxpayer may also contest the tribal real estate excise tax by filing a refund request

[3] The foregoing factors are the same factors enumerated in the case of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), which is the leading case as to the fact-specific circumstances under which an Indian tribe may retain civil jurisdiction over non-Indians on reservation fee lands.

and requesting an exemption pursuant to TTC § 12.20.160(6)(a). Finally, a taxpayer may appeal the tribal Tax Administrator's decision to the Tulalip Tribal Court, pursuant to TTC §§ 12.20.160(7) & 12.20.130. In this case, Homeowners have not alleged that any tribal real estate excise tax has been, or will be, applied to any sale of their properties. *See* ER at 21-26. However, should this occur, Homeowners would have multiple remedies available at tribal law to challenge the tax, including a challenge to the Tulalip Tribes' jurisdiction to assess the tax.

IV. State Superior Court Found That Homeowners' Claims Are Barred By Sovereign Immunity.

On April 17, 2017, Homeowners and two additional plaintiffs filed a *Complaint to Quiet Title* in Snohomish County Superior Court, naming the Tulalip Tribes as the sole defendant. Supp. ER at SuppEx-2 to SuppEx-9. In that lawsuit, Homeowners sought an order quieting title as to the same tribal ordinances at issue in this case. Supp. ER at SuppEx-8. Homeowners argued in that case that tribal sovereign immunity did not apply because the superior court's jurisdiction was in rem. Supp. ER at SuppEx-5.

On June 8, 2017, the superior court dismissed that case with prejudice on three grounds, including lack of jurisdiction due to sovereign immunity. Supp. ER at

SuppEx-12. Homeowners did not appeal the superior court's dismissal. Instead, Homeowners attempted to re-litigate the issues by filing this case in federal court.

SUMMARY OF ARGUMENT

The district court correctly concluded that Homeowners' claims are not ripe because they do not allege any injury that is real and immediate, not conjectural or hypothetical. Homeowners do not allege any past, present, or pending attempts by the Tulalip Tribes to apply tribal ordinances to activities associated with their properties. There is no allegation of any pending sale or land use activity by Homeowners that is being impaired by the Tribes. Homeowners only contend that title to their properties is rendered unmarketable because of the enactment tribal ordinances. But zoning ordinances are not considered encumbrances that render title unmarketable. Additionally, an excise tax is not an encumbrance that renders title unmarketable unless a vendor is found to have a duty to pay said tax and the tax is overdue or unpaid. Furthermore, preliminary commitments for title insurance do not show that title is unmarketable because they are not an indication of the condition of title or encumbrances thereon. Under these alleged facts, the district court applied the proper test as to the ripeness of Homeowners' claims and found that Homeowners failed to present a ripe claim. This Court should affirm on that basis.

In addition, the record in this case is sufficient for this Court to affirm dismissal on alternate grounds. The Tulalip Tribes' sovereign immunity bars suits for declaratory and injunctive relief, and deprives the district court of subject matter jurisdiction.

Finally, Homeowners previously sought a declaration in state superior court that they and their properties are not subject to the Tulalip Tribes' land use ordinance and real estate excise tax. That lawsuit was dismissed with prejudice based, in part, on tribal sovereign immunity. Therefore, this case should be dismissed under the doctrine of res judicata.

For the foregoing reasons, the district court's dismissal should be affirmed.

ARGUMENT

I. THRESHOLD ISSUES

A. Standard of Review – Ripeness.

Whether a claim is ripe for adjudication is reviewed as a challenge to subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)[4]. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Ripeness is a question of law that this Court reviews de novo. *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir.

[4] Homeowners erroneously provide the standard for a 12(b)(6) motion. Op. Br. at 15. The district court granted dismissal pursuant to Fed. R. Civ. P. 12(b)(1). ER at 2-5.

1995). The party asserting jurisdiction in federal court bears the burden of proving the existence of subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the Court assumes that all material allegations in the complaint are true. *Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). However, the district court may review information outside of the complaint in resolving a factual attack on subject matter jurisdiction without converting a motion to dismiss to a motion for summary judgment, and in such cases the district court need not presume the truthfulness of a plaintiff's allegations. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In this case, Homeowners supplied declarations in opposition to the Tulalip Tribes' motion to dismiss to support their contention that their claims were ripe. ER at 6-9 & Supp. ER at SuppEx-1. Homeowners' complaint and declarations fail to establish that their claims are ripe, and, therefore, the district court properly found that it lacked jurisdiction.

B. Grounds For Affirmance On Alternate Basis.

The Tulalip Tribes requested the district court to dismiss Homeowners' case based on (1) tribal sovereign immunity, (2) res judicata, and (3) lack of ripeness. ER at 2. The district court dismissed based on lack of ripeness and did not reach the

other two bases for dismissal. *Id.* However, the district court's decision may be affirmed on any ground supported in the record, even if not relied upon by the district court. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th Cir. 2017). In deciding whether to affirm the district court on an alternate basis, this Court considers "the adequacy of the record and whether the issues are purely legal, putting [the Court] in essentially as advantageous a posture to decide the case as would be the district court." *Golden Nugget Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987). The Court also considers whether there is a lack of disputes as to material facts. *Id.* In this case, the district court's dismissal should be dismissed on the alternate grounds of sovereign immunity and res judicata because the record is sufficient, and there are only legal issues to be resolved, placing this Court in as advantageous a posture as the district court to resolve this case on such grounds.

C. Standard of Review – Alternative Ground – Sovereign Immunity.

A motion to dismiss based on tribal sovereign immunity is also properly brought pursuant to Fed. R. Civ. P. 12(b)(1). *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). Tribal sovereign immunity is a legal issue that is reviewed de novo. *Id.* at 1110.

D. Standard of Review – Alternative Ground – Res Judicata.

Res judicata may be raised through a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court will accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.2d 1028, 1029-30 (9th Cir. 2009) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)). To survive dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Res judicata is reviewed de novo. *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005).

II. District Court Correctly Applied Ripeness Test And Found That Homeowners' Claims Do Not Allege Real And Immediate Harms.

A. Ripeness Standard.

Ripeness derives from the case or controversy requirement of Article III of the United States Constitution, and is the doctrine by which federal courts "dispose of matters that are premature for review because plaintiff's purported injury is too speculative and may never occur." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citing Erwin Chemerinsky, FEDERAL JURISDICTION § 2.4.1 at 117 (5th ed. 2007)). In an action for declaratory judgment, the constitutional element of ripeness is not met unless the facts alleged show that there

is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *See United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). Prudential ripeness requires consideration of two factors in assessing whether a claim is ripe for judicial resolution: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see also Braren*, 338 F.3d at 975.[5] In this case, Homeowners fail to meet their burden of showing that their claims meet either the constitutional or prudential ripeness standards.

In evaluating a claim for lack of ripeness, "the 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (citation omitted).

In the case of statutes, ripeness requires that a plaintiff has sustained or is in immediate danger of sustaining some direct injury as the result of challenged official conduct and the injury or threat of injury must be both real and immediate, not

[5] This two-part analysis is in contrast to the three-prong test applicable to issues of standing. The *Spokeo* case cited by Homeowners concerns the "injury in fact" prong of the standing test, and not the hardship factor addressed in the ripeness test. *See Spokeo Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016).

conjectural or hypothetical. *Del Percio v. Thornsley*, 877 F.2d 785, 786-87 (9th Cir. 1989) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).

In the present case, Homeowners allege that they are harmed despite the absence of application of tribal law to them because the Tulalip Tribes' land use laws and real estate excise tax ordinance render title to their properties unmarketable. However, Homeowners have not shown that these harms are real or immediate, that there exists sufficient hardship in the absence of a remedy, or that the issues in this case are fit for judicial review. Taken together, the complaint and declarations provided by Homeowners do not properly allege a ripe controversy because the sole alleged injury of unmarketability title is not real or immediate. Neither the 1999 land use ordinance nor the real estate excise tax ordinance constitute an encumbrance as a matter of law which renders title to Homeowners' properties unmarketable. Furthermore, the absence of any fact-specific application of tribal law makes this case unfit for judicial determination at this time. In the absence of a sufficient hardship or a real or immediate harm, the district court properly found Homeowners' claims to be unripe, and dismissal should be affirmed on that basis.

B. District Court Correctly Found No Ripeness Because There Is No Allegation That Tulalip Tribes Has Applied Or Threatened to Apply Ordinances To Homeowners

In this case, the district court correctly concluded that Homeowners' claims are not ripe because the Tulalip Tribes has not attempted to enforce its land use ordinance or real estate excise tax against Homeowners. ER at 3. In fact, Appellant Robert Dobler admits that he sold property on the Tulalip Reservation in 2009 and the Tulalip Tribes did not collect a real estate excise tax for that sale. Supp. ER at SuppEx-1. Mr. Dobler also admits that no tribal land use regulations were enforced on his Reservation property when he constructed a new waterfront home in 2010. Supp. ER at SuppEx-1. In the absence of any enforcement action by the Tulalip Tribes against Homeowners, Mr. Dobler merely asserts that "[t]he uncertainty associated with tribal regulation is viewed as a negative by potential purchasers." ER at 7. In other words, any alleged injury of which Homeowners complain derives from the fact that their properties are located within an Indian reservation.

Homeowners appear to allege that they are injured merely because the Tulalip Tribes may retain some jurisdiction over non-Indian fee lands on the reservation. This is not an injury traceable to the Tulalip Tribes' enactment of land use and taxation ordinances – rather, concurrent tribal jurisdiction under specific factual circumstances is simply a fact of life on Indian reservations with "checkerboard" patterns of tribal and non-tribal land ownership, and federal courts have recognized this. *See, e.g., Montana v. United States*, 450 U.S. 544, 565-66 (Indian tribes may

retain civil jurisdiction over non-Indians on fee lands in certain fact-specific situations); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842,850 (9th Cir. 2009); *Montana v. EPA*, 137 F.3d 1135, 1139-40 (9th Cir. 1998).

Critically, any challenge to tribal jurisdiction over non-Indians depends upon the fact-specific circumstances under which tribal law is applied. In this case, Homeowners allege no such specific facts because there has been no application of tribal laws. In the absence of specific facts and circumstances to demonstrate an actual case or controversy, Homeowners' claims are not fit for adjudication.

C. The Mere Existence of Land Use or Tax Ordinances Does Not Constitute Encumbrance of Homeowners' Properties.

Although Homeowners allege no application of the tribal laws of which they complain, they nonetheless attempt to meet their burden to demonstrate a ripe claim by alleging that title to their properties is unmarketable because of the mere enactment of tribal laws that may potentially be enforced against them at some unspecified time in the future.

Under this theory, Homeowners argue that they are harmed because a 1999 Memorandum of Ordinance giving notice to reservation residents of the then-current land use regulations of the Tulalip Tribes constitutes an encumbrance that renders title to their properties unmarketable. However, restrictions on land use in existence at the time of a contract for sale of property are not considered encumbrances as a

matter of law. Sale of real property is subject to the general rule that "[a] zoning law in itself, as distinguished from a zoning law violation, is not an encumbrance." *Goldfarb v. Dietz*, 506 P.2d 1322, 1325 (Wash. Ct. App. 1973), *overruling on other grounds recognized by Scott v. Petett*, 816 P.2d 1229, 1235 (Wash. Ct. App. 1991) (mutual mistake of law may be grounds for rescission). In general, "when a person agrees to purchase real estate, which, at the time, is restricted by laws or ordinances, that person is deemed to have entered into the contract subject to the same and cannot thereafter be heard to object to taking the title because of such restrictions." 77 Am.Jur.2d VENDOR AND PURCHASER § 159 (2018). For this reason, "zoning restrictions are not considered to constitute an encumbrance on or defect in the title of real property." *Id.*

Applying the foregoing rule to the present case, Homeowners have not alleged facts that demonstrate they are harmed in a manner that gives rise to a justiciable controversy because the tribal land use ordinance is not an encumbrance that would render title to property unmarketable. The general rule, which Washington State follows, provides that any purchaser is subject to the restrictions of any applicable laws or ordinances in effect at the time of sale, and may not object to the sale based on such restrictions. 77 Am.Jur.2d VENDOR AND PURCHASER § 159 (2018). Notably, Plaintiff-Appellant Robert Dobler sold property on the reservation in 2009, and he

does not allege that the 1999 memorandum of the tribal land use ordinance impaired that sale in any way. Supp. ER at SuppEx-1.

The applicability of the Tribes' land use and excise tax laws to Homeowners' reservation activities is governed by both tribal and federal laws and is dependent on specific facts and circumstances. Here, there is no alleged application of these laws to Homeowners' activities or properties. Therefore, there is no ripe controversy as to the Tulalip Tribes' ordinances.

D. Excise Tax Is Not An Encumbrance Rendering Title Unmarketable Until Vendor Has A Duty To Pay And Tax Is Overdue Or Unpaid.

The foregoing rule that laws in existence at the time of a contract for sale of real property do not constitute encumbrances rendering title unmarketable is equally applicable to a real estate excise tax. Accordingly, the black letter law regarding encumbrances to property provides that "[w]here it is the duty of the vendor of real property to pay taxes and assessments on the property, overdue and unpaid taxes and special assessments constitute encumbrances which render the title of the property unmarketable and justify the purchaser's refusal to accept the title unless they are discharged." 77 Am.Jur.2d VENDOR AND PURCHASER § 145. The mere existence of an excise tax law is not enough to show that a property is encumbered.

For an excise tax to become an encumbrance which renders title to property unmarketable, there would first need to be a sale in which the seller is found to have a duty to pay the tax, which duty the seller did not fulfill. None of these speculative future events has come to pass. In fact, in the only instance that is a matter of record, Plaintiff-Appellant Robert Dobler states that the Tulalip Tribes did not require him to pay a real estate excise tax on his sale of property on the Reservation in 2009. Supp. ER at SuppEx-1. Mr. Dobler does not allege that the tribal excise tax ordinance impaired his ability to sell property on the reservation in 2009 in any way. *Id.* In the absence of a duty to pay an excise tax, or an unpaid or overdue tax, the mere existence of an excise tax ordinance that may be applicable is not an encumbrance that renders title to property unmarketable. Therefore, Homeowners have failed to properly allege any facts that would support their claim that title to their properties is unmarketable. Accordingly, Homeowners' claims are not ripe.

E. Homeowners' Preliminary Title Commitments Do Not Support Contention That Title To Properties Is Unmarketable.

Homeowners point to preliminary commitments from title insurance companies in an attempt to support their contention that they have presented claims ripe for adjudication. *See* ER at 52-53. Homeowners misstate the meaning and purpose of a preliminary title commitment, and the preliminary commitments cited

by Homeowners do not support the contention that title to their properties is unmarketable.

The state statute governing issuance of preliminary commitments provides as follows:

> "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. ***The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.***

Wash. Rev. Code § 48.29.010(3)(f) (emphasis added). By this definition, a preliminary commitment is not an offer to insure the marketability of title, or a representation of the condition of title to property.

Homeowners rely on *Dave Robbins Construction, LLC v. First American Title Company*, 249 P.3d 625 (Wash. Ct. App. 2010), but that case is in accord with Wash. Rev. Code § 48.29.010 in finding that a preliminary commitment is *not* an indication of the condition of title:

> "[A] preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a policy." *Barstad v. Stewart Title Guar. Co. Inc.*, 145 Wash.2d 528, 536, 39 P.3d 984 (2002) (citing RCW

> 48.29.0100(3)(c)). "Significantly, the Legislature clearly established that a preliminary commitment is not a representation of the condition of title, but a 'statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.' " *Id*. (quoting RCW 48.29.010(3)(c)). As such, these preliminary reports "are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report." *Barstad*, 145 Wash.2d at 540, 39 P.3d 984. The purpose of the investigation before the preliminary commitment is to help the title insurance company set the scope of the policy. *Id*. at 540, 39 P.3d 984 ("title insurance companies conduct the necessary research to determine the scope of the policy that they will offer to the potential insured").

249 P.3d at 626-27.

The plaintiff in the *Dave Robbins* case relied upon language in a title insurance policy form, just as Homeowners do in this case, to argue that title to its properties was unmarketable because of an undisclosed historical district designation (i.e., a land use control that was in effect at the time of sale). *Id.* However, the court in that case drew a distinction between economic marketability and title marketability, the latter of which relates to defects affecting legally recognized rights and incidents of ownership. *Id.* 627-28. On this issue, the *Dave Robbins* court held that because no other party had a recorded ownership interest in the property at issue, "there were no

defects affecting legally recognized rights and incidents of ownership of [plaintiff's] properties, and title was not 'unmarketable' under the policies." *Id.* at 902.

In the present case, there is no title defect affecting legally recognized rights and incidents of ownership of Homeowners' properties. Homeowners do not allege that the Tulalip Tribes has asserted any ownership interest in their properties. They merely allege that the existence of special exceptions in preliminary title commitments that reference tribal ordinances make their properties unmarketable.[6] However, *Dave Robbins* holds that such preliminary title commitments are not an indication of unmarketability of title. Accordingly, the facts alleged by Homeowners do not support the harm that they claim, and Homeowners have failed to demonstrate that their claims are ripe.

F. Spokeo Case Is Inapplicable Because District Court Did Not Find Lack of Standing.

Homeowners argue that the district court failed to apply the case of *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016), and that that case supports the exercise of jurisdiction in this case. However, the *Spokeo* case plainly addresses the injury

[6] The preliminary commitments contain several special exceptions unrelated to specific tribal ordinances, and Homeowners do not allege that title is unmarketable as a result of those exceptions. *See, e.g.*, ER at 52 (land subject to rights of Indian tribe to exercise governmental powers). These special exceptions are presumably included because Homeowners' lands are on a reservation, and not because of specific actions of the Tulalip Tribes.

in fact requirement for Article III standing, and not the harm requirement for purposes of ripeness. *Id.* at 1547-48. In *Spokeo*, the respondent sued a consumer reporting agency and alleged as an injury a statutory violation of the Fair Credit Reporting Act. *Id.* at 1544-1546. The district court dismissed his claim for lack of standing, but this Court reversed that dismissal. *Id.* at 1544.

In analyzing the case, the Supreme Court enumerated the three elements of standing: (1) injury in fact; (2) that is fairly traceable to conduct of the defendant; and (3) that is likely to be redressed by a favorable decision. *Id.* at 1547. The Court noted that the primary concern in that case was the "injury in fact" element of standing. *Id.* The Supreme Court ultimately held that the Ninth Circuit did not adequately address the requirement that an injury in fact for purposes of standing must be "concrete," and remanded the case on that basis. *Id.* at 1550. Nowhere does that case address the standards for constitutional or prudential ripeness, which are the grounds upon which the district court dismissed Homeowners' claims here. The *Spokeo* case and its progeny simply have no relevance to the district court's determination that Homeowners' claims are not ripe.

However, even assuming that the "concreteness" requirement for purposes of standing was in issue in this case, Homeowners have not alleged a concrete injury. The Supreme Court in *Spokeo* noted that, although an injury may be intangible, the

concreteness requirement means that the alleged injury must "actually exist" – i.e., it must be "real" and not "abstract." *Id.* at 1548-49. In this case, the facts alleged by Homeowners, if proven, would not support a conclusion that Homeowners have suffered the harm that they allege – i.e., unmarketability of title. Homeowners have not alleged a concrete injury.

G. If A Dispute Over the Application of Tribal Law Arises In The Future, Exhaustion of Tribal Court Remedies Is Required.

Although the district court dismissed Homeowners' claims for lack of ripeness, the district court also noted that no excise tax or land use regulatory disputes have been litigated by Homeowners through the Tulalip Tribes' court system or administrative processes. ER at 3. In the event that a dispute arises in the future regarding enforcement of the Tulalip Tribes' land use or excise tax ordinances against Homeowners, federal courts have found that any examination of tribal jurisdiction should be conducted in the first instance in tribal court, pursuant to the doctrine of exhaustion of tribal court remedies. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Considerations of comity generally require that tribal remedies be exhausted before tribal jurisdiction is litigated in the federal courts. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987). Federal courts generally require that tribal courts be given the opportunity

to interpret their own laws and determine their own jurisdiction in the first instance to promote tribal self-government and self-determination. *Id.* at 16.

In this case, the district court did not dismiss based on the doctrine of exhaustion of tribal court remedies, nor does the Tulalip Tribes argue that exhaustion is proper at this stage because Homeowners do not present a case or controversy that is ripe for determination in any forum. However, if a case or controversy arises in the future because tribal laws are applied to Homeowners, both administrative and judicial appeals are available to Homeowners under Tulalip Tribal law, pursuant to TTC § 12.20.130 and TTC ch. 7.180. If such a case or controversy ripens in the future, the Tulalip Tribal Court is the proper forum to interpret tribal laws and decide a challenge to tribal jurisdiction in the first instance.

III. Dismissal Should Be Affirmed On Alternate Basis That This Case Is Barred By Tribal Sovereign Immunity.

Sovereign immunity provides a firmly established alternative legal ground to affirm the district court's dismissal. Federal courts have long recognized that Indian tribes are immune from suit in the same manner as other governments. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998). When tribal sovereign immunity exists, the district court is without

subject matter jurisdiction to proceed. *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

Tribal sovereign immunity extends to claims for declaratory and injunctive relief against a tribe, such as the claims presented by Homeowners in this case. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribal sovereign immunity "extends to suits for declaratory and injunctive relief.") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59). An Indian tribe's sovereign immunity "is not defeated by an allegation the tribe acted beyond its powers." *Id*. (citing *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985)).

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

Homeowners have the burden of establishing that the Tulalip Tribes has waived its sovereign immunity. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009). They have not met this burden. Neither the alleged in rem

nature of this action nor the invocation of 28 U.S.C. § 1331 overcomes the Tulalip Tribes' sovereign immunity in this case.

A. *Lundgren v. Upper Skagit Indian Tribe* Does Not Support Waiver of Sovereign Immunity In This Action for Declaratory and Injunctive Relief.

Homeowners state that Wash. Rev. Code § 7.28.010 allows a suit to quiet title even against an Indian tribe because jurisdiction is in rem, citing to *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017), *cert. granted*, 138 S.Ct. 543 (Dec. 8, 2017) (No. 17-387). Op. Br. at 6.[7] However, *Lundgren* only held that sovereign immunity did not bar a claim for adverse possession where an Indian tribe acquired record title decades after adverse possession was established. *Id.* at 576. In this case, the superior court already held that there was no in rem exception to sovereign immunity to allow Homeowners' claims to proceed as an action to quiet title. Supp. ER at SuppEx-5. Therefore, Homeowners may not rely on the *Lundgren* case to establish a sovereign immunity waiver in this case.

B. 28 U.S.C. § 1331 Does Not Waive Sovereign Immunity.

Homeowners will also argue that a challenge to tribal jurisdiction is a proper federal question pursuant to 28 U.S.C. § 1331, despite the assertion of tribal

[7] Homeowners fail to mention that the United States Supreme Court has granted certiorari to review the *Lundgren* case.

sovereign immunity. In cases addressing the exhaustion of tribal remedies requirement, federal courts have stated in dictum that federal question jurisdiction may exist to review tribal *court* jurisdiction pursuant to 28 U.S.C. § 1331. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009). These cases do not hold that 28 U.S.C. § 1331 waives sovereign immunity.

This Court observed, in *Boozer v. Wilder*, 381 F.3d 931 (9th Cir. 2004), that sovereign immunity presents a "possible jurisdictional problem[]" distinct from the question of jurisdiction under 28 U.S.C. § 1331. 381 F.3d at 934 n. 2. District courts that have encountered this issue have expressly ruled that 28 U.S.C. § 1331 does not waive or abrogate sovereign immunity. *See, e.g., W. Shoshone Nat'l Council v. United States*, 408 F.Supp.2d 1040, 1047 (D. Nev. 2005) (28 U.S.C. § 1331 creates federal question jurisdiction but does not waive the United States' sovereign immunity); *Grondal v. United States*, No. CV-09-0018-JLQ, 2012 WL 523667, at *5 (E.D. Wash. Feb. 16, 2012) (28 U.S.C. § 1331 does not abrogate tribal sovereign immunity).

C. Dismissal Should Be Affirmed Based On Sovereign Immunity.

The record is adequate in this case for the Court to affirm dismissal on the alternate basis of tribal sovereign immunity. The Tulalip Tribes is an Indian tribe,

and is named as the defendant. ER at 21 & 23; 82 Fed. Reg. 4915, 4919. The Court only needs to make a legal determination as to whether Homeowners have met their burden of identifying a waiver of sovereign immunity. In this regard, the Court is in as advantageous a position as the district court to decide this legal issue.

Homeowners point to nothing in the record to establish a waiver of tribal sovereign immunity. 28 U.S.C. § 1331 does not waive tribal sovereign immunity, nor does the *Lundgren* case provide an exception to sovereign immunity that is applicable in this case. The state superior court already held that Homeowners' claims are barred by tribal sovereign immunity, and Homeowners are bound by the superior court's final determination in this regard. *See*, § IV, below. Therefore, this Court should affirm the district court's dismissal on the alternate basis of tribal sovereign immunity.

IV. Dismissal Should Be Affirmed On Alternate Basis That Homeowners' Claims Are Precluded Under Doctrine of Res Judicata

Although the district court also did not reach the issue of res judicata in its dismissal order, the record is adequate to affirm the district court's dismissal on this alternate ground as well. The doctrine of res judicata precludes lawsuits on "any claims that were raised or could have been raised" in a prior action. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). The doctrine of res judicata "applies to jurisdictional issues as well as substantive issues." *Americana*

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

In this case, these same Homeowners previously brought a quiet title action against the Tulalip Tribes in Snohomish County Superior Court, seeking to invalidate the same land use and excise tax ordinances cited in the federal district court complaint. Supp. ER at SuppEx-2 to SuppEx-9. All parties to the present action were also parties to the state superior court action. *Id.* The claims presented in each case were functionally identical. Both the district court *Complaint for Declaratory and Injunctive Relief* and the superior court *Complaint to Quiet Title* are included in the record, allowing the Court to assess the identity of claims and identity of parties. ER at 21-26; Supp. ER at SuppEx-2 to SuppEx-9.

In addition, Homeowners cite to the Washington quiet title statute, Wash. Rev. Code Ch. 7.28, as the basis for the relief requested in this case. Op. Br. at 5. Accordingly, Homeowners seek the same relief in this case regarding their flawed

title claims that they sought in state superior court. The identity of claims element of res judicata is fulfilled in this case.

Lastly, the state superior court dismissed Homeowners' prior claims with prejudice and no appeal was filed. Supp. ER at SuppEx-12. The state superior court decision is preclusive on the issue of lack of subject matter jurisdiction due to sovereign immunity because res judicata applies to jurisdictional issues. *See Americana Fabrics, Inc. v. L&L Textiles, Inc*., 754 F.2d 1524, 1529 (9th Cir. 1985). Furthermore, this Court has previously given res judicata effect to a tribal court action that was found to be a final judgment on the merits wherein the tribal court had dismissed similar claims because of tribal sovereign immunity. *See Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013). Accordingly, the district court's dismissal should be dismissed on the alternate basis of res judicata.

CONCLUSION

For the reasons stated above, the district court's order dismissing Homeowners' complaint under Fed. R. Civ. P. 12(b)(1) should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of February, 2018.

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STATEMENT OF RELATED CASES

The Tulalip Tribes is not aware of any related cases presently pending in this Court that must be identified pursuant to Circuit Rule 28-2.6. The Tulalip Tribes notes that Homeowners rely upon the Washington State Supreme Court decision in *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017), to argue that there is a general exception to tribal sovereign immunity for in rem actions. The holding in the *Lundgren* case does not support such a broad exception to tribal sovereign immunity, nor is the present case an in rem action. However, the Tulalip Tribes notes that the United States Supreme Court has granted certiorari in the *Lundgren* matter. 138 S.Ct. 543 (2017) (Dec. 8, 2017) (No. 17-387).

DATED this 20th day of February, 2018.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the undersigned counsel for Appellee hereby certifies that the text of this brief is double-spaced, except for quotations and footnotes, in a proportionately-spaced font, no less than 14 point, and contains 7,935 words, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service.

DATED this 20th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018 I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 20th day of February, 2018.

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