APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS MITCHELL, husband and wife; et al., *Plaintiffs-Appellants,* v. TULALIP TRIBES OF WASHINGTON, *Defendant-Appellee.*	No. 17-35959 D.C. No. 2:17-cv-01279-JCC MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted October 12, 2018**
Seattle, Washington

Before: BLACK,*** TALLMAN, and BEA,
Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Susan H. Black, United States Circuit Judge for the U.S. Court of Appeals for the Eleventh Circuit, sitting by designation.

Thomas Mitchell, his wife, and two other married couples are non-tribal property owners in fee simple of residences within the historical boundaries of the Tulalip Indian Reservation in Snohomish County, Washington. They appeal dismissal of their claims for declaratory and injunctive relief seeking to quiet title against the Tulalip Tribes of Washington ("the Tribes") regarding tribal ordinances that they allege create a cloud on their title. The district court dismissed the claims as unripe and did not address the Tribes' alternative grounds for dismissal including res judicata and tribal sovereign immunity. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the dismissal on grounds of tribal sovereign immunity.

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017). We review de novo issues of tribal sovereign immunity, *see Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007), and a district court's dismissal based on res judicata, *see Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). We "can affirm the district court's dismissal on any ground supported by the record, even if the district court did not rely on the ground." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005).

When the district court dismissed on grounds of ripeness, it did not address Washington law that recognizes cloud on title as a hardship fit for judicial

determination. *See, e.g.*, *Robinson v. Khan*, 948 P.2d 1347, 1349 (Wash. Ct. App. (1998); Wash. Rev. Code § 7.28.010.

Nevertheless, we affirm because this case must be dismissed under the doctrine of tribal sovereign immunity, which protects Indian tribes from suit absent congressional abrogation or explicit waiver. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.*; *see also McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) ("Because they are sovereign entities, Indian tribes are immune from unconsented suit in state or federal court."). This common-law immunity from suit applies to actions for injunctive and declaratory relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Congress must "unequivocally express" its intent to abrogate immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (internal quotation omitted). "The tribe's immunity is not defeated by an allegation that it acted beyond its powers." *Imperial Granite Co.*, 940 F.2d at 1271. The claims here are not brought under any federal law that abrogates tribal immunity and the Tribes have not waived their immunity. The Tribes, therefore, cannot be sued in federal court.

AFFIRMED.

(October 25, 2018)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS MITCHELL, *et al.,* Plaintiffs, v. TULALIP TRIBES OF WASHINGTON, Defendant.	CASE NO. C17-1279-JCC ORDER

This matter comes before the Court on Defendant's motion to dismiss (Dkt. No. 6). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

Plaintiffs are three married couples, each of whom own a house on the Tulalip Indian Reservation in Snohomish County, Washington ("Homeowners"). (Dkt. No. 1 at 1–3.) Defendant Tulalip Tribes of Washington ("The Tribes"), is a federally recognized American Indian Tribe. (Dkt. No. 6 at 2.) Homeowners are not members of The Tribes. (Dkt. No. 1 at 1–3.) Homeowners seek declaratory and injunctive relief against The Tribes in regard to tribal ordinances that they allege are unlawfully encumbering their property. (*Id.* at 5–6.)

Although Homeowners' property is located on the Tulalip Reservation, they own title in fee simple. (Dkt. No. 1 at 3.) In 1999, The Tribes recorded a Memorandum of Ordinance that states The Tribes have land use regulatory authority over all properties located within the Reservation's boundaries. (*Id.*)[1] This regulatory ordinance appears as a special exception to coverage on Homeowners' title. (*See* Dkt. Nos. 1 at 4, 13, 23, 33.) In addition, the Tulalip Tribal Code contains a real estate excise tax provision that requires payment of 1% of the sale price of any transfer of real property within the boundaries of the Tulalip Reservation. (Dkt. No. 1 at 4–5.)[2] This excise tax is also listed as a special exception on Homeowners' title. (*See* Dkt. Nos. 5, 14, 23, 34.) Homeowners allege that the regulatory ordinance and real excise tax place a cloud on their title and render it unmarketable. (Dkt. Nos. 1 at 4–5; 7 at 10.)

Homeowners ask the Court to: (1) declare The Tribes are without right to regulate or levy tax on Homeowners' property; (2) permanently enjoin The Tribes from excising a tax against Homeowners' property; and (3) quiet title to Homeowners' title free and clear of any encumbrances arising from the regulatory ordinance or real estate excise tax. (Dkt. No. 1 at 5–6.)

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[1] Memorandum of Ordinance No. 9904090798, Snohomish County, Washington.

[2] Tulalip Tribal Code, Chapter. 12.20, *et seq.* (Dkt. No. 1 at 5.)

II. DISCUSSION

The Tribes argue that Homeowners' claims should be dismissed for three reasons. First, The Tribes assert the Court lacks subject matter jurisdiction because Homeowners are barred from bringing the lawsuit under the doctrine of tribal sovereign immunity. (Dkt. No. 6 at 3.) Second, it argues that Homeowners' claims are barred by res judicata because the Snohomish County Superior Court previously dismissed the identical claims with prejudice. (*Id.*) Third, The Tribes assert that Homeowners' claims do not represent an Article III case or controversy because they are not ripe (*Id.*) As discussed below, the Court finds that Homeowners' claims are unripe and therefore does not address the issues of tribal sovereign immunity and res judicata.

A. The Rule 12(b)(1) Standard and Ripeness

Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if the court lacks subject matter jurisdiction. In reviewing a Rule 12(b)(1) motion, the Court assumes all material allegations in the complaint are true. *Thornhill Publ'g Co. v. General Tel. Elec.,* 594 F.2d 730, 733 (9th Cir. 1979). The party asserting federal subject matter jurisdiction bears the burden of proving its existence. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Ripeness is properly raised on a Rule 12(b)(1) motion because it deals with the district court's subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Article III of the Constitution, allows federal courts to hear only actual "cases" and "controversies." *See Allen v. Wright*, 468 U.S. 737, 750 (1984). The ripeness doctrine derives from the case and controversy requirement and allows district courts to dispose of matters that are premature for review because the 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) (citation omitted). The question of whether a case is ripe requires courts "to evaluate both 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).

B. The Homeowners' Claims are not Ripe

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. There is no evidence the parties have attempted to adjudicate the dispute through The Tribes' court system or administrative process. Homeowners ask the Court to interpret tribal law and declare, in the abstract, that the ordinances do not apply to their property and cannot be enforced against them in the future. (Dkt. No. 1 at 4.) District courts are cautioned not to resolve issues "involving contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). Homeowners assert the ordinances have

rendered their title unmarketable, but that concept represents an injury contingent on multiple future events: first, a real estate transaction, and second a contract that would require marketable title in order to close the transaction. (Dkt. No. 7 at 10) (citing *Dave Robbins Const., LLC v. First Am. Title Co.*, 249 P.3d 625, 627 (Wash Ct. App. 2010)). Homeowners have not alleged either event has occurred.

The Court perceives no hardship to the Homeowners from withholding a decision because the facts do not demonstrate they would suffer immediate harm. Homeowners do not allege that the ordinances have prevented them from developing or conveying their property. They do not allege that there is a pending transaction, or even an anticipated future transaction, that would implicate either of the ordinances. Regarding the excise tax, Homeowners allege "on information and belief escrow companies are treating the claimed tax as an enforceable lien requiring payment of the tax as a condition to closing transactions involving non-native fee owned properties within the original boundaries of the Tulalip Reservation." (Dkt. No. 1 at 5.) But there is no allegation that Homeowners have plans to sell or convey their property or that an escrow company has treated the tax as an enforceable lien on their property.

The Court will not issue a declaratory judgment because Homeowners' complaint does not demonstrate "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." *United States v.*

Braren, 338 F.3d 971, 975 (9th Cir. 2003) (internal quotations omitted).

III. CONCLUSION

For the foregoing reasons, The Tribe's motion to dismiss (Dkt. No. 6) is GRANTED. Homeowners' claims are DISMISSED without prejudice.

Dated this 2nd day of November, 2017.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE