No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,
Petitioner,
v.
SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
SEPTEMBER 11, 2017
CERTIORARI GRANTED DECEMBER 8, 2017

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15-2-00334-1 | SHARLINE LUNDGREN, ET VIR VS UPPER SKAGIT INDIAN TRIBE

Case Number	Court
15-2-00334-1	Skagit

File Date	Case Tyle	Case Status
03/04/2015	QTI Quiet Title	Return from Appeal

Party

Plaintiff
LUNDGREN, SHARLINE

Plaintiff
LUNDGREN, RAY

Defendant
UPPER SKAGIT INDIAN TRIBE, NFN

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Robert
Retained

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HAWKINS, DAVID
Retained

Work Phone
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Attorney for Plaintiff/Petitioner (Participant)
Ellerby, Scott Martin

Events and Hearings

Date	#	Docket Text
03/04/2015		Filing Fee Received
03/04/2015	1	Summons
03/04/2015	2	Complaint to Quiet Title and Equitable Relief
03/24/2015	3	Upper Skagit Indian Tribe's Special Notice of Appearance
03/26/2015	4	Plaintiffs' Motion for Summary Judgment And, In the Alternative, Preliminary Injunction
03/26/2015	5	Declaration of Robert Thomas in Support of Plaintiffs' Motion for Summary Judgment
03/26/2015	6	Declaration of Sharline Lundgren in Support of Plaintiffs' Motion for Summary Judgment
03/26/2015	7	Declaration of Earline Swanson
03/26/2015	8	Declaration of Ray Brown
03/26/2015	9	Note for Motion Docket

03/27/2015	10	Recusal of Judge Rickert Notified by Court Admin; Judge Michael E. Rickert
03/27/2015	11	Void-Sub Number Voided
03/27/2015	12	Void-Sub Number Voided
03/27/2015	13	Praecipe Re Declaration of Robert Thomas in Support of Plaintiffs' Motion for Summary Judgment
03/30/2015	14	Acknowledgment of Receipt and Acceptance of Service
04/01/2015	15	Notice of Association of Counsel; Peter R. Dworkin
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04/10/2015	20	Note for Calendar Court Admin; Hawkins Motion to Dismiss
04/14/2015	21	Note for Calendar Court Admin; Hawkins Motion to Dismiss
04/20/2015	22	Plaintiffs' Opposition to Defendant Upper Skagit Indian Tribe's Motion to Dismiss

04/22/2015	23	Upper Skagit Indian Tribe's Reply in Opposition to Plaintiffs' Response
04/22/2015	24	Void-Sub Number Voided
04/22/2015	25	Void-Sub Number Voided
04/23/2015	26	Hearing Stricken: In Court Nonappear
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04/24/2015	28	Order Denying Defendant's Motion to Dismiss
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04/27/2015	32	Declaration of Robert A. Hayden
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06/04/2015	50	Affidavit/Declaration/Certificate of Service
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10/05/2015	63	Email Transmittal to Supreme Court
07/03/2017	64	Mandate from Supreme Court Denying Further Reconsideration

Appellate Court Case Summary

Case Number: 916225
Filing Date: 04-30-2015
Supreme Court

Event Date	Even Description	Action
04-30-15	Notice of Appeal	Filed
05-01-15	Motion for Stay	Filed
05-04-15	Case Received and Pending	Status Changed
05-04-15	Letter	Sent by Court
05-05-15	Affidavit - Other	Filed
05-05-15	Answer to motion	Filed
05-06-15	Ruling on Motions	Filed
05-06-15	E-mail	Sent by Court
05-06-15	Reply to Response	Filed
05-06-15	E-mail	Sent by Court
05-08-15	Notice of Discret Review to Supreme Crt	Filed
05-08-15	Motion to Extend Time to File	Filed
05-08-15	Ruling on Motions	Filed
05-12-15	Amended Notice of Appeal	Filed
05-12-15	Letter	Sent by Court
05-15-15	Motion for Discretionary Review	Not filed

Event Date	Even Description	Action
05-29-15	Statement of Grounds for direct Review	Filed
06-03-15	Designation of Clerks Papers	Filed
06-04-15	Amended DES	Filed
06-09-15	Answer to Stmt of Grounds for direct rev	Filed
06-09-15	Statement of Arrangements	Filed
06-12-15	Clerk's Papers	Filed
07-20-15	Report of Proceedings	Received by Court
07-27-15	Report of Proceedings	Received by Court
08-19-15	Motion to Extend Time to File	Filed
08-19-15	Ruling on Motions	Filed
09-30-15	Supplemental Designation of Clerk's Papers	Filed
10-02-15	Appellants brief	Filed
10-05-15	Supplemental Clerk's Papers	Received by Court
11-02-15	Respondents brief	Filed
12-02-15	Appellants Reply brief	Filed
12-11-15	Motion - Other	Filed
02-09-16	Set for Motion Calendar	Status Changed

Event Date	Even Description	Action
02-10-16	Other Order	Filed
02-10-16	Ready	Status Changed
03-01-16	Oral Argument Setting Letter	Sent by Court
03-01-16	Set on a calendar	Status Changed
04-21-16	Notice of Intent to Withdraw	Filed
06-09-16	Heard and awaiting decision	Status Changed
06-09-16	Oral Argument Hearing	Scheduled
02-16-17	Opinion	Filed
02-16-17	Decision Filed	Status Changed
03-08-17	Notice of Association of Counsel	Filed
03-08-17	Motion for Reconsideration	Filed
03-24-17	Calling for Response	Filed
04-07-17	Answer to motion for Reconsideration	Filed
06-08-17	Order Changing Opinion	Filed
06-12-17	Order on Motion for Reconsideration	Filed
06-29-17	Mandate	Filed

Event Date	Even Description	Action
06-29-17	Disposed	Status Changed
09-18-17	Letter	Received by Court
12-15-17	Letter	Received by Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	COMPLAINT TO QUIET TITLE AND FOR EQUITABLE RELIEF
v.	

UPPER SKAGIT INDIAN TRIBE,

Defendant.

COME NOW the above-named Plaintiffs, by way of complaint against Defendant Upper Skagit Indian Tribe, and allege as follows:

I. PARTIES

1.1 Plaintiffs Sharline Lundgren and Ray Lundgren, wife and husband, are the owners of Tax Parcel No. P33568 commonly known as 6315 Hobson Road, Bow, Skagit County, Washington, and legally described on attached Exhibit A.

1.2 Defendant Upper Skagit Indian Tribe is a federally-recognized Indian Tribe that currently owns Tax Parcel No. P33521, Skagit County, Washington, and legally described on attached Exhibit B.

II. JURISDICTION AND VENUE

The Court has jurisdiction over this in rem action pursuant to RCW 2.08.010. Venue is proper in Skagit County under RCW 4.12.010.

III. DESCRIPTION OF PROPERTY

The disputed property in this quiet title action consists of a strip of land spanning the width of Government Lot 1, on which Defendant is the record title holder, and described on Exhibit B, as shown on the survey map prepared on September 2, 2014 by professional land surveyor Peter Brands of Pacific Surveying & Engineering Inc. in Bellingham, Washington, a copy of which is attached hereto as Exhibit C. The disputed property is highlighted on the survey, which shows a "Barb Wire Fence" 19' North of the common property line on the East end and 25' North of the common property line on the West end (the "Disputed Property"). Plaintiffs and their predecessors in title have since the 1940s maintained the barbed wire fence North of the surveyed property line between Plaintiffs' and Defendant's properties. Photos of the fence are attached hereto as Exhibit D, which show that the fence is aged but maintained and standing. The photos show that the barbed wire, which is attached to fir trees along its length, has substantial tree growth over the wire occurring over many decades. Defendant obtained the property described on Exhibit B in 2013, which property has not been occupied for decades.

IV. NATURE OF CLAIMED TITLE

4.1 A right to title to the Disputed Property lays in Plaintiffs by virtue of decades of exclusive use and enjoyment by prior owners of the property, and by virtue of their own use. Record title to the Disputed Property lays in Defendants. Plaintiffs and their predecessors in title have used and been in actual possession of the Disputed Property which use and possession has been exclusive, hostile, open, notorious, continuous, adverse to Defendant and Defendant's predecessors in title, under a claim of right, and with the knowledge of Defendant and Defendants' predecessors in title at a time when they were able in law to assert their rights. That possession and use of the Disputed Property began decades ago and continues to the present day. Adverse possession and title to the Disputed Property ripened before Plaintiffs acquired the property in 1968 and has continued uninterrupted since 1968 to the present. Plaintiffs obtained the property by inheritance from Plaintiff Sharline Lundgren's grandmother Lola Brymer, who died in 1968 and owned and lived on the property since 1947.

4.2 During said time no persons other than Plaintiffs or their predecessors in title have claimed any right, title, or interest in or to the Disputed Property, Plaintiffs' title in and to the Disputed Property is superior to the title of Defendant in and to the same property. Plaintiffs are the true owners of the Disputed Property free and clear from all claims of Defendant and its successors and assigns.

4.3 On February 24, 2015, Defendant's workers and agents began to place new fence posts in alignment with the surveyed common property boundary, and to otherwise disturb and modify the Disputed Property. Counsel for Plaintiffs notified counsel for Defendant by email requesting that Defendant cease any work on the Disputed Property on February 25, 2015. A true and correct copy of the email is attached hereto as Exhibit E. Counsel for Defendant responded by email clearly stating that Defendant intends to terminate Plaintiffs' use and enjoyment of the Disputed Property. A true and correct copy of the email is attached hereto as Exhibit F.

4.4 Plaintiffs' and Defendant's predecessors in title defined their common boundary in good faith, and the common boundary so defined has been acquiesced in, ratified, acknowledged, recognized, approved and acted upon by Plaintiffs, Defendant, and their respective predecessors.

4.5 The common boundary acquiesced and defined by Plaintiffs' and Defendant's predecessors in title should govern the property rights of Plaintiffs and Defendant, and should be established as the legal common boundary line.

4.6 Plaintiffs, Defendant, and their respective predecessors actually demonstrated, by their possessory actions with regard to their properties, a genuine and mutual recognition and acquiescence in the agreed upon and mutually adopted common

boundary between their properties for more than ten (10) years prior to the commencement of this action.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. That Plaintiffs' title to the Disputed Property be established and quieted in them, terminating any inconsistent claim of Defendant, and ordering the removal of any encroaching structures, landscaping, or other barriers by Defendants at their cost;

2. For injunctive relief ordering Defendant to remove any fences, landscaping, improvements, barriers or other structures they erect or install on the Disputed Property;

3. For injunctive relief pursuant to RCW 7.40.030 ordering the abatement and removal of any fences, landscaping, improvements, barriers or other structures they install, from the Disputed Property;

4. That Defendant be forever barred from having or asserting any right, title, estate, lien, or interest in or to the Disputed Property, and that the Court award in equity to Plaintiffs the cost of returning the Disputed Property to its status quo ante;

5. An order reforming the above-referenced legal descriptions of Plaintiffs' and Defendant's properties to correct and clarify the ownership of the Disputed Property; and

6. That Plaintiffs be awarded their costs, attorney fees, disbursements, and all other and further relief as the Court deems just and equitable.

Dated this 4th day of March 2015.

MILLS MEYERS SWARTLING P.S.
Attorneys for Plaintiffs

By: Scott M. Ellerby
WSBA No. 16277
Janna J. Annest
WSBA No. 34378

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife, Plaintiffs, v. UPPER SKAGIT INDIAN TRIBE, Defendant.	NO. 15-2-00334-1 DECLARATION OF SHARLINE LUNDGREN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Sharline Lundgren declare as follows:

I. I am one of the plaintiffs in this lawsuit. I am above the age of majority, am competent to testify, and make this declaration based on personal knowledge.

2. The property that my husband and I claim in this quiet title action consists of a strip of land spanning the width of Government Lot 1, on which Defendant Upper Skagit Indian Tribe (the "Tribe") is the record title holder, and described on Exhibit A. It is also shown on the survey map prepared on September 2, 2014 by professional land surveyor Peter Brands of Pacific Surveying & Engineering Inc. in Bellingham, Washington, a copy of which is attached as Exhibit B. The disputed property is highlighted on the survey, which shows a "Barb Wire

Fence" 19' North of the common property line on the East end and 25' North of the common property line on the West end (the "Disputed Property"). My husband and I are the owners of the adjacent parcel immediately to the south of Defendant's parcel and legally described on attached Exhibit C.

3. My husband and I bought the 10 acres immediately south of the disputed fence line in 1981 and have occupied it and the Disputed Property continuously since that time. We and our extended family have, since 1947, maintained the barbed wire fence north of the surveyed property line between our property and the property now owned by the Tribe. Photos of the fence, attached as Exhibit D, show that the fence is well-maintained and standing. The photos show that the barbed wire, which is attached to a few cedar trees along its 1,306 feet length (the trees are standing on our side of the fence), has substantial tree growth over the wire that occurred over many decades.

4. The Tribe obtained the property described on Exhibit A in 2013 from the heirs of Annabell Brown, who received the property from her estate four months prior to the sale to Defendant. Annabell Brown had not occupied the property for many decades prior to her death, and her heirs had likewise not occupied it in the four months they owned it. Annabell Brown never disputed our ownership of the fence or the land south of the fence. She had timber cut on her property from time to time and always honored the fence line, cutting no trees on our side of the fence. Likewise, my family since 1947 only cut

trees on our side of the fence. My family consistently and continuously maintained the fence since 1947. Both Annabell Brown and my family relied on the fence as the boundary marker.

5. The survey described above was the first indication anyone in my extended family ever had that the fence line was not consistent with the legal description of our parcel and the parcel to the north. The survey was done after the Tribe purchased the property.

6. My husband has, since 1981, tended to the timber and cut firewood on our side of the fence each year. When windstorms knocked trees into the fence, Ray would cut up the wood and repair any damage to the fence. We also "parked out" the property on our side of the fence by culling dead trees, limbs and brush, and removing some timber. There was never any suggestion by Annabell Brown that she had any right to trees growing on our side of the fence. Likewise, when she had logging done on her property, the loggers never touched any of the trees on which barbed wire was attached, or any trees south of the fence. No one entered the property to the south of the fence without our permission. During the time my extended family has owned the property, 1947 to the present, no one owning property north of the fence has claimed ownership of the Disputed Property or attempted to enter it.

7. Attached hereto as Exhibit B is a copy of a letter dated September 18, 2014 from David Hawkins, Tribal Attorney. In his letter, Mr. Hawkins offers

permission from the Tribe to our continued possession of the Disputed Property, which permission can be revoked at any time, Neither I nor my husband requested any such permission. The Tribe has clearcut the property north of the fence line and stated to us their plans to clearcut the timber on our side of the fence. They had taken steps to achieve that clearcutting prior to our retaining legal counsel who commenced this lawsuit on our behalf. The Tribe has not rescinded its threat to recommence logging on its own timetable, to tear down our fence, and to continue with the installation of a new fence on the southerly boundary of the Disputed Property.

Signed under the penalty of perjury under the laws of the state of Washington this 26TH day of March 2015 in Bow, Washington.

s/ Sharline Lundgren
Sharline Lundgren

Exhibit D

00038

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife, Plaintiffs, v. UPPER SKAGIT INDIAN TRIBE, Defendant.	NO. 15-2-00334-1 DECLARATION OF ROBERT THOMAS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Robert Thomas declare as follows:

1. I am above the age of majority, am competent to testify, and make this declaration based on personal knowledge.

2. I have lived across Hobson Road from the Lundgrens since 1980.

3. I am familiar with the Lundgren fence separating their property from the parcel to the north now owned by the Upper Skagit Tribe. I know that the fence has remained in the same location since I have lived in the neighborhood, that the fence has never been moved, and that the fence has been treated by the Lundgrens and Annabell Brown, the prior owner of the north parcel, as the property line.

The fence is a typical barbed wire fence and kept in good condition.

4. I have knowledge of a large fir tree that blew over in a windstorm in the late 1990s. This fir tree was located very close to the fence on the south side. I recall that the Lundgrens had the tree milled into lumber and used it for their board fence along Hobson Road.

5. In 2003, I also watched Ray Lundgren cut another fir tree that was dying that was located very close to the fence on the Lundgren side. The Lundgrens had that tree cut into lumber and beams, which I used to build an outdoor kitchen for them in 2004.

6. I have also witnessed the Lundgrens cutting older trees for firewood and maintaining the fence line during the time I have lived on my property across Hobson Road.

Signed under the penalty of perjury under the laws of the state of Washington this 26 day of March 2015 in Bow, Washington.

s/ Robert Thomas
Robert Thomas

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	DECLARATION OF PETER R. DWORKIN

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

I, PETER R. DWORKIN, do hereby declare and state as follows:

1. I am one of the attorneys of record for the Defendant in the above-captioned case, over 18 years of age and am competent to testify in this matter.

2. Attached as Exhibit A hereto is a true and correct copy of a Quit Claim Deed recorded on January 12, 1984 from Annabell Brown to David L. Brown, transferring a ¼ interest in what is now referred to in this case as the "Tribe's Property" Skagit County Parcel No. P33521. This document was downloaded from the Skagit County Auditor's Office via the internet.

3. Attached as Exhibit B hereto is a true and correct copy of Annabell Brown's death certificate as

filed in Whatcom County Superior Court (Probate) Cause No. 12-4-00362-2.

4. Attached as Exhibit C hereto is a true and correct copy of the Last Will and Testament of Annabell Brown, as filed in Whatcom County Superior Court (Probate) Cause No. 12-4-00362-2.

5. Attached as Exhibit D hereto is a true and correct copy of a Bargain and Sale Deed recorded on May 29, 2013, from the Estate of Annabell Brown to Paul S. Brown, Vivian Jennings, and Barbara Carrell, transferring the Estate of Annabell Brown's remaining ¾ interest in the subject Property. This document was downloaded from the Skagit County Auditor's Office via the internet.

6. Attached as Exhibit E hereto is a true and correct copy of a Statutory Warranty Deed recorded on September 26, 2013 from the Brown Family to the Upper Skagit Indian Tribe transferring the subject Property in fee to the Tribe.

7. Attached as Exhibit F hereto is a copy of a portion of the official Skagit County "iMap" available online, showing the Tribe's Property and the Plaintiffs' Property. The text boxes and arrows were added, but the remainder of the information on the map is from the Skagit County iMap website.

8. Attached as Exhibit G hereto is a true and correct printout from the Skagit County Aerial Map online archive available at http://www.skagitcounty.net/Maps/iMap/mapjs=buil

damap aerial, showing the properties at issue from an aerial photo taken in 2013. The yellow highlighting of the Tribe's parcel was generated by the website itself, indicating the approximate parcel boundaries for the Tribe's Property, Parcel No. P33521.

9. Attached as Exhibit H hereto is a true and correct computer screenshot from Mapquest, showing that the distance between the intersection of Bow Hill Road and SR 11 (Chuckanut Drive) and the intersection of Bow Hill Road and Hobson Road is 3.19 miles.

10. Attached as Exhibit I hereto are true and correct copies of several documents downloaded from the Skagit County Auditor's office relating to the Plaintiffs' Property, Parcel No. P33568:

a. Real Estate Contract from Donna Harem to Lundgren dated 1981;

b. Open Space Taxation Agreement No. 792550 from 1973;

c. County Assessor printouts for Parcel 33568 cross referencing Open Space Taxation Agreement No. 732550 and showing Market value of $119,900 minus market use adjustments of $118,400 and a net annual tax liability of $48.04 for the 9.88 acre Lundgren Property.

I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF

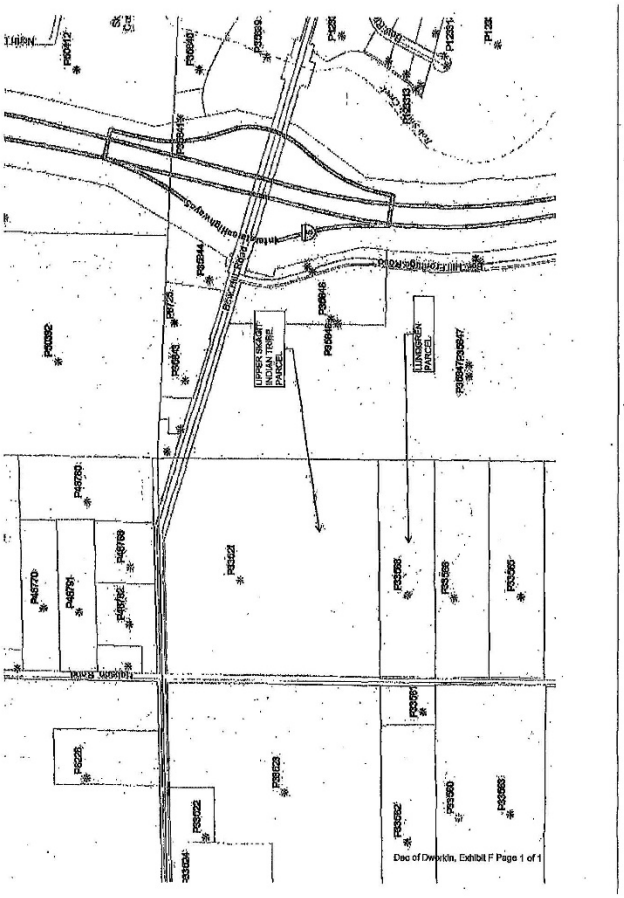
WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO BE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNED this 27th day of April 2015 at Bellingham, Washington.

s/ Peter R. Dworkin
PETER R. DWORKIN

EXHIBIT F

00089


UPPER SKAGIT INDIAN TRIBE PARCEL
UNASSIGNED PARCEL
Dec of Dwinkin, Exhibit F Page 1 of 1

00090

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	DECLARATION OF PETER K. BRANDS

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

I, PETER K. BRANDS, do hereby declare and state as follows:

1. I am over 18 years of age, am competent to testify in this matter, and have personal knowledge of the facts set forth herein.

2. I am a Licensed and Registered Professional Land Surveyor in the State of Washington, License No. 35147 and have been since 1998. I am also a Principal of Pacific Survey & Engineering Services, Inc. ("PSE") and serve as the Survey Manager.

3. In my capacity as a land surveyor, I have surveyed and observed many fences and dealt with many boundary disputes.

4. I am familiar with the real property purchased by the Upper Skagit Indian Tribe from the Brown

family, bearing Skagit County Parcel No. P33521 ("the Tribe's Property") as well as the property to the south, owned by Plaintiffs.

5. Attached as Exhibit A to this Declaration is a drawing PSE staff created (including myself) from measurements and other data collected by PSE survey crews in the field.

6. This drawing accurately depicts the location of the deed line between the Tribe's Property and the Plaintiffs' Property as described in the Statutory Warranty deed issued to the Tribe, by the Brown family, recorded at Skagit County Auditor's File No. 201309260073, a copy of which is attached as Exhibit B hereto.

7. Plaintiff's Property, bearing Skagit County Parcel Number P33568, is located directly south of and abutting the Tribe's Property.

8. The drawing at Exhibit A accurately depicts the location of a barbed wire fence located on the Tribe's Property. The fence runs almost parallel to the southern deed line, but as noted on the drawing, it is located northerly of the deed line, ranging from approximately 42 feet north of the deed line on the west side, narrowing to approximately 19 feet north of the deed line on the east side.

9. On the western side, the fence turns north near the right of way of Hobson Road, and continues to run north along the western property line of the Tribe's Property. At the southwest property corner, a

new gate and fence runs southerly along the right of way of Hobson Road.

10. I personally observed this fence in October 2012 and October 2013 when I was surveying the property, at the southeast and southwest angle points. The fence is a barbed wire fence, and is obviously old. I did not observe any areas that appeared to be recently replaced or repaired.

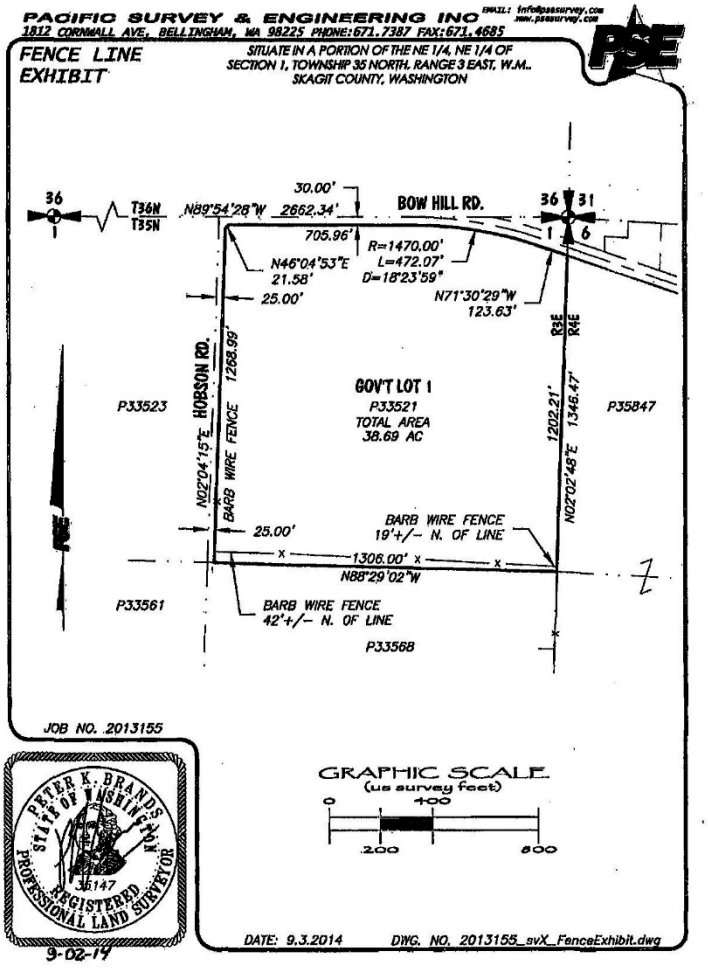
11. The fence that runs north-south along the western property line is connected to and of the same vintage as the fence running east-west along the southern deed line. From my observations, both the north-south fence and the east-west fence appear to have been installed at the same time.

12. Based upon my observations on site and my experience as a surveyor, I believe it is reasonable for me to infer from these facts that the fence line in dispute in this lawsuit was installed by the predecessors-in-interest of the Tribe's Property. This is my expert opinion only, and is not based on specific knowledge of who actually installed the fence.

I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO BE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNED this 27th day of April 2015 at Bellingham, Washington.

s/ Peter K. Brands
PETER K. BRANDS



Dec of Brands, Exhibit A Page 1 of 1

00105

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	DECLARATION OF ROBERT A. HAYDEN

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

1. I am over the age of eighteen, competent to testify, and make the following declaration based on personal knowledge.

2. I have been employed by the Upper Skagit Indian Tribe since March of 2002 as "Project Manager".

3. I performed due diligence in investigating whether the Tribe desired to purchase the property at issue in this case. I was not informed about the fence at issue prior to purchase.

4. In October of 2013, I received a call from our surveyors, Pacific Survey & Engineering ("PSE"), who were surveying the property commonly known as government lot 1 (hereinafter "Subject Property"), in an effort to take the land into Trust. They informed

me that they had discovered a fence on the southern end of the Tribe's property.

5. After this call I went to walk the property and verified the existence of the fence, during my reconnaissance I notice approximately half way along the fence line, walking west to east, there was an access gate approximately 12 feet wide. A picture of which is attached hereto as Exhibit "A".

6. I could I could not tell who the owner of the fence was so I went to the neighboring land owners to the south, who I subsequently learned were the Lundgrens, to inquire as to whether they knew about the fence.

7. When I told them that there was a fence on the Tribe's property they informed me that it was their fence and asked if the Tribe would be willing to trade or sell that portion of the Tribe's property that the fence occupied (hereinafter "Disputed Property"). In stating this, they implied that they knew the Tribe owner the property on "their" side of the fence.

8. I told the Lundgrens that I did not know if the Tribe would be interested in selling the property on the other side of the fence. We made arrangements to tour a parcel of land that they wanted to potentially trade with the Tribe for the Disputed Property.

9. As best I can recall, the next day after Mr. Lundgren got the key for the gate to the potential property to be traded. Myself and Carl Smith met Mr. Lundgren at the potential trade parcel. It is located

directly north of the Subject Property on the other side of Bow Hill Road.

10. The potential trade property contained substantial low-lying critical areas and was of a very low value to the Tribe, from my perspective.

11. In discussing the value of the proposed property to be traded, Mr. Lundgren was of the opinion that the proposed property was worth more than the Disputed Property. However, Mr. Lundgren agreed that in order for him to obtain ownership of the Disputed Property, the Lundgrens were willing to give value for it.

12. The Tribe ultimately decided it was not interested in any proposed trade, and Mr. Lundgren was informed of this position. It was only after this point that the concept of adverse possession was ever brought up, as far as I am aware.

I SWEAR AND AFFIRM UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING JS TRUE AND CORRECT.

Dated this 27th day of April, 2015, at Sedro-Woolley, WA.

s/ Robert A. Hayden
Robert A. Hayden

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and
RAY LUNDGREN, wife and
Husband

Plaintiffs,

v.

Cause No.
15-2-00334-1

UPPER SKAGIT INDIAN TRIBE,

Defendant.

VERBATIM REPORT OF PROCEEDINGS

ORAL ARGUMENT
FRIDAY, APRIL 24, 2015

The Honorable David R. Needy
Department IV
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES

For the Plaintiffs: MILLS MEYERS SWARTLING
By Mr. Scott M. Ellerby
Attorney at Law

For the Defendant: Mr. David S. Hawkins
Tribal Attorney
Upper Skagit Indian Tribe

Reported by: Eileen Sterns, CCR, RMR-CRR
Official Court Reporter

FRIDAY, APRIL 24, 2015

[2] THE COURT: Good afternoon. Mr. Ellerby?

MR. ELLERBY: Yes.

THE COURT: And Mr. Hawkins?

MR. HAWKINS: Yes.

THE COURT: Great. I've reviewed the briefing. I'm not going to tell you I've read every word of every case in the notebook, but I certainly took a look of those and some other authority as well. So Mr. Hawkins, your motion to dismiss.

MR. HAWKINS: Thank you, your Honor. Your Honor, this Court has been moved to dismiss this action based upon sovereign immunity Rule 19, and the basic premise of "sovereign" is not subject to this Court 's jurisdiction, the ramifications therein.

The Court has been provided significant case law to support the authority that sovereigns are not subject to a court' s jurisdiction absent specific waiver by the Tribe or congressional approval of abrogation of Tribe sovereignty. That has not occurred here, and therefor e this Court lacks the fundamental need to adjudicate the basic premise here, which is a claim for adverse possession against the Tribe.

Further, Rule 19 precludes action from going [3] forward, as the Tribe is in fact a necessary party. A necessary party under Rule 19 says an absent party is necessary if adjudication of the party's interest may, as a practical matter, impair or impede his ability to protect that interest, or (b), leave any person or persons already subject to this -- substantial risk of incurring double, multiple, or other inconsistent obligations by reason of his claimed interest.

What that means, your Honor, is that if the Tribe has a legal interest that is impacted by these proceedings, and they cannot be joined, or if they have a legal interest, they are a necessary party. The legal interest here, obviously, is the property interest the Tribe purchased, and that property interest relates back to the original date of the registered title here, which is -- predates 1947, which is the date that plaintiffs assert their time of adverse possession initiated.

Once it's been established that a party is a necessary party, you have to then take a second step --

THE COURT: Stop there, and explain that process to me again. The Tribe's deeds predate '47?

MR. HAWKINS: So when you purchase a property interest via deed, you're purchasing the entire chain of title, that entire chain of title. Unless there are exceptions set forth in the deed, that entire chain of [4] title relates back to the original

registration of title. The original registration of title predates 1947 in this matter, so the Tribe's interest runs prior to 1947, because the bundle of rights which the Tribe is entitled to relates to the entire chain.

That's -- I will get to the significance of that later in terms of distinguishing this case from the *Smale* cases as a result of that division, but that is of import here because the claim for adverse possession and the notion that that claim arose prior to the Tribe purchasing its interest and therefore the Tribe has no interest is without merit, because we have the bundle of rights that the Tribe secured is the entire chain of title, not just when it came into title.

THE COURT: So any time someone, say, quiets title from adverse possession and then deeds the property to someone else, that would go back to the pre-adverse possession bundle of rights and affect -- in other words, are you saying you can never change what was once –

MR. HAWKINS: No, your Honor.

THE COURT: Okay.

MR. HAWKINS: As it relates to adverse possession, a claim for adverse possession, that title then would start at the date that the claimant met the requirements of adverse possession. So if a party secured [5] adverse possession in 1980, then their title would relate back to 1980.

THE COURT: Right. So you're not arguing that that would predate; you're just saying the bundle of rights here, you believe they predate '47, and the relevance is --

MR. HAWKINS: The relevance is that, unlike *Smale*, and unlike the *Quinault* case where those tribes took title with specific exceptions to the ongoing litigation, therefore they did not have a claim that related all the way back to the original registered title -- the Upper Skagit in fact are being dispossessed if adverse possession were pursued of a property interest here.

THE COURT: Okay.

MR. HAWKINS: I will go back to this -- the indispensable party test as a four-part test. The extent to which judgment rendered might be prejudicial to the absent party -- i.e., would the judgment here divest the Upper Skagit of the property interest, which is what we just discussed -- it's our position that because our bundle of rights relates back to the original date of registered title, if the adverse possession were to go forward and succeed, then Upper Skagit would be divested of its right here, so unquestionably it would impact our [6] interest.

Secondly, the request for injunctive relief here clearly impacts the Tribe's ability to take action necessary to move the property at issue into trust, requiring personal jurisdiction, but an injunctive -- an injunction necessarily relates to the party against

which the action is being taken. You can't escape that fact.

The second step is the extent to which judgment could be fashioned, narrowed to render the potential harm. Again, there's no alternative here. Either you make the decision that the court can go forward or you don't. There's no -- you know, there's no way to fashion a remedy here that would not limit the request -- requested by the plaintiffs here, to dispossess the Tribe of a property interest and to enjoin them from taking specific actions that relate to land at issue.

The third step, whether a judgment in the person's absence would be adequate, I just don't see how you could possibly have a judgment without the Tribe present, because you have to -- as case precedence has established, you have to establish the elements of adverse possession here before you can actually establish quiet title.

The cases are clear that it is a condition precedent, not something that automatically happens. You [7] have to come before the court and prove your case. So there's no way for you to not have the Tribe as a party pursuant to this -- to that step.

In terms of the alternatives to plaintiffs, alternative remedies to plaintiffs, we provided case law which clearly says that sovereign immunity supersedes the -- or overrides the notion that the plaintiff should have an alternative venue to seek relief. I think that's very clear in the *Clinton* case that

we've provided the Court, so that also weighs in favor of the Tribe.

I think the Tribe having met both 19A and 19B as a necessary and indispensable party precludes the action from going forward. Getting to kind of the heart of really what you were asking before, and the issues that plaintiff has raised, this whole notion of *in rem* jurisdiction is sufficient, that as long as the court has *in rem* jurisdiction, the court can go forward. The problem with that is that the case law doesn't in fact say *in rem* jurisdiction gives jurisdiction over the Tribe.

The case law that's been cited is very clear, in particular, I believe it's *Anderson* that says we're not deciding that jurisdiction resides over the Tribe; we're saying that jurisdiction over the Tribe is not necessary in this instance.

In the *Quinault* case you have the same [8] thing. You have the *Quinault* case, the court saying jurisdiction over the Tribe is not what's at issue here; it's a partition matter. It's not divesting the Tribe of an interest. The Tribe took their interest subject to this ongoing litigation; therefore, there's no interest that the Tribe has to protect, and they will not be impacted here, so we're not taking jurisdiction over the Tribe.

The *Smale* case, it's the same thing. The Tribe took their interest subject to the ongoing litigation. They did not have a legal interest to protect if adverse possession claim were to go forward.

Those cases have been overruled by the *Gorman* case. And the *Gorman* case is really quite specific. The *Gorman* case says a party has to go forward in the courts below and establish the elements as it relates to adverse possession. You can't merely say we've had this property for ten years, we've met the elements of adverse possession, and therefore we have title. There has to be a determination as to whether or not that's the case.

The RCW that's been cited clearly says that an action for quiet title requires the possessor, tenant in possession, to be present. The claim is one that is conditional. We cited specifically to the *Smale* case. It [9] says "if/then." If adverse possession is established, if adverse possession is established, how does one do that? One can only do that in a court of law before a fact finder while both parties are present to present their case.

Here, that's impossible, because this Court has no jurisdiction over the Tribe to bring the Tribe before the court. So as a matter of law, it is unquestionable, but that the Tribe, sovereign status precludes this Court from having subject matter jurisdiction, and it precludes this Court from joining the Tribe in order to adjudicate the merits of the claim.

THE COURT: And you're saying *Smale* -- I don't know if it's "SMAYLES" or "SMAHL" or whatever.

MR. HAWKINS: Yes.

THE COURT: Are you saying that there was a legal ruling of adverse possession prior to transfer of title?

MR. HAWKINS: There was a summary judgment action which the Smales -- I'm sorry, the Smales lost the summary judgment action below, your Honor.

THE COURT: Right. But the adverse possession, was it decided before the action started? Or wasn't it an adverse possession action?

MR. HAWKINS: It was an adverse possession [10] action that was taken by the prior landowner, to which the Tribe purchased the property subject to.

THE COURT: You're saying that was all established before the Tribe ever purchased the property.

MR. HAWKINS: The action was initiated before the Tribe came into title, yes. And the Tribe came into title subject to that action.

THE COURT: And here it is, the action.

MR. HAWKINS: Exactly. Exactly.

THE COURT: Okay.

MR. HAWKINS: Your Honor, I would like to reserve a few minutes to respond.

THE COURT: This is --

MR. HAWKINS: This is nothing -- okay.

THE COURT: What I'm saying, this is my afternoon, so I'm not going to cut off everyone for thirty seconds or a minute or two, and I will both give you both a chance to respond within reason.

MR. HAWKINS: All right.

THE COURT: All right. Mr. Ellerby.

MR. ELLERBY: Yes. Your Honor, I'm doing the briefing here, and listening to the argument, I feel like I've read the different cases, because they stand for almost exactly the opposite proposition for which the defendant has cited them here for. So I just have to say [11] that out loud.

I've never -- or rarely had to encounter such strained attempts to distinguish cases that are absolutely on nearly all fours with the current facts. In fact, it is rare to have a real estate case that has an appellate decision that's so close to the facts that we have here, and the facts that are different played absolutely no role in the *Smale* court's rationale.

So the plaintiffs and their family members have possessed this disputed property since 1947. My clients, the Lundgrens, have owned the property then since 1981. The Tribe obtained title in 2013 from the heirs of Annabell Brown, who only held title for four

months before conveying it to the Tribe, and then the Tribe had the property surveyed after they acquired it. And that was probably not terribly relevant here, but it was commented upon by the court in the *Anderson* and *Middleton Lumber Company vs. Quinault Nation*.

We filed a motion for summary judgment in this case on March 26th, and it's scheduled for hearing on May 7th. We, in our motion for summary judgment, dealt squarely head-on with the sovereign immunity Civil Rule 19 issue. The Tribe elected to bring this motion, which they're entitled to do. But I think that on a Civil Rule 12 motion to dismiss, the Court must assume the truth [12] of all the facts alleged in the complaint. So for purposes of this motion, the Court must assume that the Lundgrens can indeed establish adverse possess ion. I believe they've done so in their motion, and summary judgment that will be heard by the Court in another few weeks.

Your Honor, sovereign immunity does not apply to this action, which is purely an *in rem* action. There's no question that in Washington State Superior Courts have subject matter jurisdiction under RCW 4.12.010 on all issues concerning title to real property, so subject matter jurisdiction I don't think is controversial.

But contrary to the defendant's arguments, no Washington court has ever ruled that sovereign immunity, in this state, bars an *in rem* action. In fact, the opposite is true. And in the *Anderson vs.* -- and

Middleton Lumber Company vs. Quinault Indian Nation case, the state Supreme Court squarely held that superior courts have jurisdiction over a Tribe in a purely *in rem* action, and the fact that the title was transferred to the Tribe with sovereign immunity was of no consequence in that case, your Honor.

I will even read you the language. It says it is not disputed that the trial court had proper [13] jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property, or the *res*, *in rem*. Because the *res*, or property, is alienable and encumberable under a federally-issued fee patent, it should be subject to a state court *in rem* action, which does nothing more than divide it among its legal owners according to their relative interests.

That case is just indistinguishable from this case. You know, the issue about when title was transferred either before the action was stated or after the action was started played no role on the *Anderson* analysis on *in rem* jurisdiction. It played no role in the *Smale* court decision.

When you have an adverse possess ion claim, your Honor, the case law is quite clear that title ripens into original title at the conclusion of the ten-year possessory period, assuming that you can show all the other elements of hostility and so forth. Then you have actual title that you can convey to a buyer.

THE COURT: Short of a legal ruling?

MR. ELLERBY: Yes.

[14] THE COURT: Or an order.

MR. ELLERBY: I think we cited the *El Cerrito* case *vs. Rendale*, which is the person who develops original title -- it's not record title; it is original title -- can convey that interest prior to any judicial ruling that establishes adverse possession.

I thought I should also try to clear up one other thing. There seems to be an effort to draw some distinction between adverse possession and quiet title. Adverse possession is the claim. Quiet title is the relief. We're seeking quiet title here rather than ejectment because the defendant is not in possession of the property. So it's probably a distinct ion without a difference here, but I thought I should make that clear.

So I talked about *El Cerrito*. Here, your Honor, under *El Cerrito*, under *Smale*, under *Anderson*, the defendant never owned the property in question because original title was invested -- was vested in the plaintiffs decades before the defendant ever obtained statutory warranty deed to the property.

They make the argument that their title, their statutory warranty deed had no exceptions, and that's used as an attempt to distinguish the *Smale* case. But again, your Honor, whether or not their title had any

exceptions, and it is beside the point, it's not important [15] in the analysis of whether there's an adverse possession claim. They may have a claim against their seller to say, hey, you sold me a legal description that you actually didn't own the entire description. That doesn't affect my client. That doesn't affect this lawsuit.

In the *Smale vs. Nortep and Stillaguamish Tribe,* Division I reviewed a decision by the Snohomish County Superior Court that it -- holding that it had *in rem* jurisdiction in a quiet title case against the Stillaguamish Tribe. Division I squarely and unambiguously held that the Superior Court has *in rem* jurisdiction regardless of sovereign immunity and regardless of the fact that the Tribe acquired title after the adverse possession had matured. The case is not distinguishable on any grounds that make a difference here.

We cited the U.S. Supreme Court case, *County of Yakima vs. Yakima Indian Nation*, and the Supreme Court held there that courts in this state have *in rem* jurisdiction to enforce property taxes based on the alienability of allotted lands and not on the basis of *in personam* jurisdiction over the Tribe or tribal members.

So there, that *County of Yakima* case involved tribal lands, allotted lands, and this Superior Court was ruled to have authority to enforce property [16] taxes on allotted tribal lands. Here, we're not even talking about tribal land; we're talking about privately held property that was conveyed to the

Tribe. So this is a much stronger case for *in rem* jurisdiction than even existed in the *County of Yakima* case.

The argument that Civil Rule 19 prevents this case from going forward, it's a circular argument. I mean, *Smale*, *Anderson*, and other cases have held there's *in rem* jurisdiction, and have held that because it's *in rem* jurisdiction, sovereign immunity is not a bar to the court's jurisdiction.

So if sovereign immunity is not a bar to the court's jurisdiction, then it follows necessarily that Civil Rule 19 does not make the Tribe either a necessary -- well, does not make the Tribe an indispensable party with whom the case can't go forward; the case can go forward, because the Washington Superior Court and Division I in *Smale* have held that it can go forward with the Tribe as a defendant, because the Tribe is claiming an interest in this property.

We cited *Wright* and *Miller*, that recognized kind of federal law, where it's been held routinely that *in rem* proceedings are appropriate as an alternative, where jurisdiction over a party with a claim to property cannot be secured.

[17] And the U.S. Supreme Court has recognized that in bankruptcy cases, bankruptcy court orders can bind states where they couldn't otherwise get jurisdiction over the states, but because bankruptcy courts have *in rem* jurisdiction over the

property of the bankruptcy estate, they have the ability to make rulings that prejudice states.

I wanted to talk briefly about the *Gorman vs. City of Woodinville* case. I think that case stands squarely in favor of our position here. It's also been cited by the defendant for reasons that I don't understand.

In *Gorman*, the court, the state Supreme Court held that the city's immunity to suit in adverse possession claims didn't apply, because the adverse possession title ripened, became original title, not record title, but original title, before conveyance to the city. And the court went on to rule that the grantor could convey to the city only the interest that the granter owned. So in the *Gorman* case, as in this case, adverse possession applies because title was acquired against a private individual, not a Tribe or a city.

And here, my clients and their predecessor, family members who owned title before them, acquired adverse possession title decades ago against the Annabell [18] Brown owners, not the Tribe. So the Tribe has no -- no defense based on sovereign immunity.

THE COURT: Is your position that in *Smales* there was an actual legal ruling of adverse possession prior to the transaction?

MR. ELLERBY: No, there was not, your Honor.

THE COURT: So the word "ripened" is the same --

MR. ELLERBY: Yeah.

THE COURT: But you say there was.

MR. HAWKINS: Let me see, your Honor. I have the case here. It was my understanding that there was a summary judgment motion that the defense lost.

THE COURT: But that would have meant the action was --

MR. ELLERBY: Yeah, I mean, there was an argument that was an attempt to distinguish *Smales*, saying -- the court in *Smales* said, you know, that the case had to go back for the plaintiff to establish adverse possession, and therefore this case can't go forward, because we can't proceed in our adverse -- it doesn't make any sense, your Honor.

We're not saying that a ruling today ends the case, unless of course the court were to rule against us. But a ruling today just means that we've got to go [19] forward on the merits, and *Smale* and *Anderson* and other cases say we can do that. Because it's an *in rem* case, we can establish that we had a property interest that predates the Tribe's interest.

Let's see, what was I going to -- I think that if the Court, you know, contemplates the implications of a ruling upholding the defendant's argument here,

you know, the practical implication would be that an Indian Tribe in this state could claim any piece of real estate that it wants, and the owner of that real estate would be powerless to seek relief in superior court. That cannot be the law, and it's clearly not the law under all the authority that we've cited to you. The Lundgren s have established property rights attained via adverse possession, that doesn't -- and they' re not deprived of their right to seek relief in this Court.

There was another argument made by the defendant that seeking injunctive relief would require *in personam* jurisdiction over the defendant, but that argument suffers from the defect of having no citations to supporting authority. If the Court has *in rem* jurisdiction, the Court has, in its broad, implied powers, the power to enforce its rulings, and that would include enjoining parties from violating the court' s ruling. So there was -- there were no cases supporting that argument [20] cited, and I will move on.

Finally, I'm not sure if there is still a request, but in the motion there was a request that the Court stay its ruling in the event of a ruling against the defendant. But I think that there has been no showing that this case would be appropriate for interlocutory review, which is disfavored and rarely granted. They would have to show that there was obvious or probable error, that the Court departed from an accepted and usual course of judicial proceedings, or that this Court certifies that, that this matter involves a controlling question of law as to which there is substantial ground for difference of

opinion. I don't think there's substantial ground for difference of opinion here, when we have case law that is so on point that is dispositive of this issue. And even if there were, the Tribal Court retains full authority to act until review is grant, so that request should be denied.

Finally, your Honor, I still don't really understand the argument that the Tribe has a bundle of rights that go back to title, original title in 1947. That's not Washington law. The Tribe receives whatever interest its seller could convey to it, and it's as simple as that. They don't somehow go back to rights that existed prior to their seller. And here we have -- the [21] Court has to assume the truth of our complaint, the truth of all the facts asserted, and those facts are that the seller could not sell to the Tribe rights that had been lost through adverse possession decades ago.

So your Honor, I think that I've probably become repetitive, so I will stop there, and I appreciate your close attention. Thank you.

THE COURT: Mr. Hawkins, any rebuttal?

MR. HAWKINS: Yes, your Honor, thank you. To be clear, the cases that are cited to allegedly submit the Tribe or Tribes to the jurisdiction of Superior Court they do not state that Tribes are subject to jurisdiction of the court. What they say is that because the actions are *in rem*, the jurisdiction over the Tribe was not necessary.

The *Anderson* case is very specific in the language that it provides. As sovereign entity, Indian Tribes are immune from suit in state or federal courts. It is well settled that a waiver of their sovereign immunity will not be implied, but must be unequivocally expressed. Because our decision is based upon *in rem* jurisdiction, we need not further consider *in personam* jurisdiction, immunity, and waiver.

There is not one case that has addressed the issue of whether or not a Tribe is subject to personal [22] jurisdiction, subject matter jurisdiction in an adverse possession case.

THE COURT: Well, are you suggesting this Court does not have jurisdiction over the real property?

MR. HAWKINS: I am not suggesting that, your Honor.

THE COURT: All right.

MR. HAWKINS: It is recognized that you have jurisdiction. The state has -- definitely the state has authority over the property that is within its exterior boundaries. However, the issue was not whether or not that jurisdiction applies; the issue was whether or not the relief sought requires additional jurisdiction. And it does.

The plaintiff has to establish -- has to establish adverse possession, that they've met the elements of

adverse possession. And how do they do that? They have to come before this Court.

Gorman has nine cites where it provides for that. I can provide them for the court. I've highlighted them. It is conditional.

We affirm the Court of Appeals remand for trial to determine the validity of James German's claim of title. Gorman filed an action to quiet title claiming he acquired Tract Y. Title vests automatically in the [23] adverse possessor if all of the elements are fulfilled. This granter could convey to the City whatever interest he had only at the time of dedication. If the dedicator's title had been extinguished by adverse possession. Title to the property vested in German's favor if, as the complaint asserts, he fulfilled all the requirements of adverse possession.

Therefore, if *Gorman* had title to Tract Y through adverse possession, his title was not extinguished through the previous owner's attempt to dedicate the land to the City. If claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possession is automatically vested.

He has to prove adverse possession.

THE COURT: All of these cases are then going down that road to quiet title and see if adverse possession is met or not. You' re trying to stop it before it goes.

MR. HAWKINS: What I'm suggesting is that -- may I present this to you, your Honor?

THE COURT: Yes, thank you. I don't have any dispute with what you just read, and it's exactly on point with the facts we have here.

MR. HAWKINS: But -- and how are you to proceed when you can't join the Tribe? How will the Court [24] proceed if they cannot bring the Tribe to the case?

THE COURT: And in *Smales*, did they have any such problem, when the Stillaguamish Tribe was named?

MR. HAWKINS: The Tribe didn't raise Rule 19, your Honor. The Tribe did not raise this legal issue. They simply relied on subject matter jurisdiction. They did not raise Rule 19, and that is a significant issue here.

THE COURT: Okay. I think I see your attempt at distinction, but I -- because the Court has jurisdiction over the land, *in rem*, we all agree with that, and the cases say that sovereign immunity is not a basis to deny the *in rem* jurisdiction, at that point it seems to me that the Tribe has a choice, to participate or not, but this Court does not need jurisdiction *in personam* over the Tribe in order to decide the outcome of the disputed land.

MR. HAWKINS: How would you -- how would you be able to get the necessary facts in order to determine that, if the Tribe wasn't a party?

THE COURT: In most of the Rule 19 cases, it's a situation where someone is left out, in other words, they didn't get notice, they weren't included in the process. And the courts have said, you know, usually, that that is not fair, everyone should have a right to [25] participate.

There's no doubt here that the Tribe is on notice, and should they wish not to participate, or claim that because of lack of jurisdiction they're not participating, you're basically going back to the argument that the Court can never do anything with land if the Tribe chooses not to engage in the litigation.

MR. HAWKINS: Your Honor, you are absolutely on point as it relates to individuals. There's no question about that. But as it relates to a federally recognized Indian Tribe, their sovereign immunity is different. It is different from foreign nations. It is different from states. It is unique. And the rationale for that is because United States have recognized that Tribes' interests in protecting its sovereign status and the action that it takes from –

THE COURT: I know all that.

MR. HAWKINS: Okay.

THE COURT: But this property is in dispute. You're saying it's the Tribe's, you can't do anything, Superior Court in the State of Washington, because we're here now, you can't join us, we're barring you from joining us, and therefore the property must be ours.

MR. HAWKINS: Your Honor, I'm not saying that. That's what the case law says.

[26] THE COURT: Well, I don't read that in any case I've read, in any of these.

MR. HAWKINS: And *Clinton* and *Babbitt*, it is very clear in that situation.

THE COURT: So everyone time a Tribe makes a claim, they automatically win and there can be no litigation.

MR. HAWKINS: No. The Tribe, if it's making a claim, has to come before the appropriate tribunal and prove its case.

THE COURT: Right.

MR. HAWKINS: The Tribe has to -- cannot take action that's adverse to its Constitution or the Constitution of the United States. But the Constitution of the United States allowed the United States to treaty with the Tribes, which they did. And they gave the Tribes sovereign immunity pursuant to that process, and the significance of that should not be overlooked here. And that's what we're requesting.

THE COURT: I have a piece of land -- well, and I haven't heard you dispute that the fence went up in 1947 and has been up ever since, continuously. I know that's merits of something we may or may not get to down the road.

MR. HAWKINS: Yes, your Honor.

[27] THE COURT: But I heard you deny on a factual basis, so what I read from these cases is the word "ripen," not a new deed, but "ripen," adverse possession is potentially ripened at that point. In my mind, we still need to go the next step and actually have the court process to determine if all the elements have been met.

But what you're saying is, despite the appearance that it's ripened, and that Ms. Brown, when she conveyed title to the Tribe, didn't have that land to convey, that there is no way anyone can dispute that because of sovereign immunity.

MR. HAWKINS: Your Honor, what I'm -- what I'm referring to is the significance that all of the federal court law and the Washington state court law has placed upon sovereign immunity and the implications therein. And while you are correct, we have not submitted any factual evidence as it relates to the claim, have not done that because we have wanted to make it absolutely clear that the Tribe is not acquiescing to the jurisdiction as it relates to the factual claims here.

I have two declarations right here that dispute substantial facts that are not issue, so there is -- although it's probably inappropriate to get into that now, I can absolutely assure this Court that the Tribe has evidence which, if it will be forced to go [28] forward with, can present to this Court, disputing the claims that adverse possession has been met here. But that's not the issue.

THE COURT: I understand.

MR. HAWKINS: The issue is whether or not the Tribe is subject to the jurisdiction of this Court under the existing case law when there is a dispute. Rule 19 was not raised in *Quinault*. Rule 19 was not raised in *Smale*. Rule 19 was raised in the *Comenout* case, where the court held that when a party was seeking injunctive relief trying to enforce a lease against a federally recognized Indian Tribe, that that party could not do that, and it specifically addressed your concern.

THE COURT: I don't think we have a dispute about that, injunctive relief versus the title settlement.

MR. HAWKINS: And the underlying claim of request for injunctive relief, your Honor, the complaint includes that.

THE COURT: I understand. But that's, again, on the merits. The question today is dismissal based on lack of jurisdiction, and whether the court's jurisdiction over the property is sufficient or not.

MR. HAWKINS: But he's not just asking for jurisdiction over the property. The injunctive relief necessarily requires injunction -- jurisdiction over the [29] person.

THE COURT: Right. Well, we're not quite here is what I'm saying, on the merits. And I don't know, Mr. Ellerby, if you want to address that, or if we' re getting too far ahead of ourselves.

MR. ELLERBY: I think we' re --

MR. HAWKINS: Your Honor, if I may --

THE COURT: Sure, go right ahead.

MR. HAWKINS: I just want to be sure that the briefing as it relates to our request, if our motion is denied, we would assert that we have presented you with sufficient briefing as it relates to the right to take jurisdiction subject matter and Rule 19 up. That is a -- that is, a jurisdiction is a fundamental requirement this Court has to have before it can settle any disputes, and to waste the time of the Court and the resources of the Court in a proceeding that would impact the rights of the party, before that is established --

THE COURT: And you don't believe that my ruling has to be dispositive of the case in order for that to be granted?

MR. HAWKINS: I believe that a ruling on jurisdiction is dispositive on the case.

THE COURT: But ...

MR. HAWKINS: And although your ruling, if [30] it was against us, would not be, should we take it up to the appellate level or Supreme Court level and succeed, it would be.

THE COURT: That's not my question. My ruling doesn't have to be dispositive; just that there is some potential ruling that if granted either way, would be dispositive? I don't read the rule that way. That's why I'm asking. Because I agree that if I were granting summary judgment, clearly dispositive ruling –

MR. HAWKINS: Sure.

THE COURT: And then you would be entitled to the stay.

MR. HAWKINS: No, you are correct.

THE COURT: If my ruling goes against it, it would just keep this case moving forward.

MR. HAWKINS: Your Honor, I understand.

THE COURT: Okay.

MR. HAWKINS: I understand.

THE COURT: But I'm not going to tell you I have a lot of experience with Rule 19 in these cases.

MR. HAWKINS: Again, I would emphasize that the distinction between the other case is significant, because 19 wasn't raised. If you're going to go forward on the merits, you would have to have the Tribe as a party. The notion that the Tribe could appear is [31] basically like telling the defendant not to use its best defenses and just come before the court.

Why should you give up the right -- why should the Tribe give up a right it has in these proceedings just because it could? That doesn't make any sense, and it denigrates the importance of sovereign immunity and the basis for it.

THE COURT: I understand that that is sort of the flip leverage, but if the Court is saying the Court has jurisdiction over the property, and I would very much like everyone who believes they have some claim in that to participate, versus the remedy that' s being sought is dismissing outright because a sovereign immunity body has a claim in the litigation, therefore everyone else is barred from being heard, also strikes me as contrary to the case law that I'm reading.

But I'm probably tipping my hand a little bit, but I will find, obviously, that from the facts before re this Court at this point in time, I find no distinction between the *Smales* case on the underlying facts of the property, the length of time, the at least preliminary indications that there is a valid

argument for adverse possession, that under those indications, because there's been no formal litigation, Ms. Brown could only transfer whatever she had to transfer to the Tribe, and [32] that if adverse possession did in fact occur, it occurred well before the Tribe became -- received this property from Ms. Brown.

I don't find that these cases, with us, Superior Court of the State of Washington, having *in rem* jurisdiction, bar further litigation regarding the title to the disputed property with the adverse possession.

In terms of Rule 19, I'm simply, while I understand your argument, I am not reading that as broadly as you are in terms of the Tribe's ability to participate or their -- the Court could not join the Tribe against its will. I understand that. But it seems to me that the Tribe is the one saying that this property, which by its appearance may be adversely possessed long before the Tribe came into it, is asking to bar litigation for the other side rather than the other way around, if I'm making myself at all clear, and I find that contrary to common sense, fairness, and due process for all involved.

I don't by that mean to indicate that I can or should or would enforce the Tribe to participate in any litigation, and I certainly agree, I do not have *in personam* jurisdiction over the Upper Skagit Tribe.

So I will deny the motion to dismiss. I will find that in my opinion, that motion is not dispositive of the case, but if there are any findings I [33] can make,

Mr. Hawkins, that you would like to seek emergency review for the sake of judicial economy and energy and effort and expense of the parties, to have this decision reviewed prior to further litigation at this level, I'm not opposed to that happening, but I don't think that becomes automatic in my ruling.

MR. HAWKINS: Thank you, your Honor, for the opportunity.

THE COURT: Thank you.

MR. ELLERBY: Your Honor, I do have an order.

(COUNSEL CONFER.)

THE COURT: You did not sign?

MR. HAWKINS: I did not, your Honor --

THE COURT: I never force anyone to. I guess in your -- to protect your position completely, you're not here.

MR. HAWKINS: Okay.

THE COURT: But if you wanted to, I just want to make sure you had the opportunity.

MR. HAWKINS: No, I appreciate that, your Honor.

THE COURT: Thank you. Very interesting issues, gentlemen. Thank you both.

Note for Motion Calendar:
Friday, April 24, 2015 at 1:30 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife,	NO.: 15-2-00334-1
Plaintiffs,	ORDER DENYING DEFENDANT'S MOTION TO DISMISS ~~[PROPOSED]~~
v.	
UPPER SKAGIT INDIAN TRIBE,	
Defendant.	

THIS MATTER came before the Court on Defendant Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review. The Court has considered the files and pleadings herein, including, without limitation, the following:

1. Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

2. Declaration of David S. Hawkins in Support of Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review with Exhibit;

3. Plaintiffs' Opposition to Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

4. The Declarations of Sharline Lundgren, Earline Swanson, Ray Brown and Robert Thomas filed in Support of Plaintiff's Motion for Summary Judgment; and

5. Reply, if any.

It is hereby ORDERED that Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review is DENIED.

DATED this 24th day of April, 2015.

DAVE NEEDY
Judge

Skagit County
Superior Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

Sharline Lundgren, et al.,	Skagit County Cause No.
Plaintiffs,	15-2-00334-1

vs.

Upper Skagit Indian Tribe,

Defendant.

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE SUSAN K. COOK
Department III
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

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DATE: May 7, 2015

REPORTED BY: JENNIFER CHRISTINE POLLINO, RPR, WA, CCR #2221, CA CCR #10176 OFFICIAL REPORTER

MOUNT VERNON, WASHINGTON
MA7 7, 2015
10:15 A.M.

[2] THE COURT: Alright. This brings us to the most interesting case on the calendar. Sorry. No offense to anybody. Lundgren versus Upper Skagit Indian Tribe.

MR. ELLERBY: Good morning, Your Honor. I'm Scott Ellerby on behalf of Plaintiffs, Sharline and Ray Lundgren. My client, Sharline Lundgren is here with me in the courtroom today.

THE COURT: Good morning.

MR. HAWKINS: Good morning, Your Honor. David Hawkins on behalf of Upper Skagit.

THE COURT: Good morning. Alright. So what we have here is a longstanding fence.

MR. ELLERBY: Yes, indeed. And, Your Honor, just to comment first on that procedural posture, our motion for summary judgment also included argument regarding the jurisdictional

defense. The jurisdictional defense was heard by Judge Needy a week or two ago and ruled on.

THE COURT: God bless him for taking that off my plate. Let's move to the much more interesting issue.

MR. ELLERBY: Okay. So this is an adverse [3] possession, mutual recognition and acquiescence case with two separate claims. We've cited to the Court case law that establishes that summary judgment is available on these claims like it's available on any other civil claim. There's no different standard.

We've come forward, Your Honor, with, I think, a pretty overwhelming case developing facts that more than sufficiently satisfy all of the elements of both of these claims. The burden then, of course, shifts to the non-moving party to come forward with specific facts, rebutting the moving party's facts that do support the elements of the claim. And the Courts will not allow the parties to rebut a showing necessary for summary judgment using speculation or argumentative assertions by factual issues.

So just very briefly on the facts, Your Honor. The Lundgren family has owned this property in question since 1947. There are no facts about who originally installed a fence. But the un rebutted facts are that this fence was in existence from the time the Lundgren family obtained the property in 1947 and has remained in this present location during that entire span of time.

My clients, Sharline and Ray Lundgren, obtained title to the northern acreage on their parcel from family members in 1981. By contrast the tribe obtained their adjacent parcel to the north of the Lundgren parcel in 2013 from the [4] heirs of Annabelle Brown.

The Annabelle Brown family had not occupied their property north of the fence line for many decades. And Annabelle Brown apparently quitclaimed a one quarter interest of her interest to her son, Mr. Brown and David Brown in 1984. And the remaining three quarters of interest in her property then was passed through her will to her other children; so they each owned one quarter. And then in 19 -- or excuse me -- in 2013 the three children conveyed title to the tribe. But the method of conveyance, whether it was by statutory warranty deed or quitclaim is not relevant to the issues before the Court today. The tribe may or may not have an issue with their sellers, but that's not before the Court.

So the elements of an adverse possession claim, Your Honor, are number one, exclusivity. Number two, actual and uninterrupted use. Number three, open and notorious use. And finally number four, hostility. The case law recognizes that there is a substantial overlap between those factors. I'll address the first factor exclusivity. The facts need not show that this use was absolutely exclusive. It only needs to be possession of the type that's expected of an owner under the circumstances. And the

circumstances depend on the nature and location of the property. Here, Your Honor, we're dealing with rural property. It's timbered [5] land. It's registered under agricultural registration. So the necessary use in that type of situation is different than the type of use that would be required for, you know, a developed residential neighborhood.

I think the important thing to consider here, Your Honor, is that there is absolutely no testimony before the Court that the Brown family has ever used the property to the south of this fence line. The record is devoid of any contention that there's been any use by the Brown family. On the contrary, the evidence is that the Lundgren family has indeed exclusively used this property for over 60 years since 1947. The only attempted fact that the tribe puts forward to create an issue of fact is the existence of a gate on that fence.

THE COURT: They give a big colored photograph of it, moss and all.

MR. ELLERBY: Right. But there's no testimony offered on the use of the gate, and it's, therefore, not material. It's speculative on whether or not that gate was ever used by the Brown family. It's tempting to respond to the, you know, the effort of the non-moving party created issues of fact about that. There are reasons for having a gate when you have, you know, farm animals. And sometimes farm animals get through the gate. But, again, we don't even need to go there because there's no testimony the Brown [6] family ever used the gate, ever used any of

the property south of this fence line. This is not a fence that would be difficult to see. It's a sturdy barbed wire fence. You've seen our photos showing that in addition to fence posts the barbed wire was also in certain locations where there were cedar trees. It was tacked to the cedar trees. And the cedar bark has grown over the barbed wire, which obviously takes many decades to happen. The consistent testimony from our witnesses is that this fence has been well maintained since 1940's.

The testimony of Ray Brown, who is the brother-in-law of Annabelle Brown is that Annabelle had workers cut timber on her side of the fence. In fact, Mr. Brown was even involved in cutting timber himself. She never cut timber south of the fence line. And the testimony is that the Lundgrens cut timber on their side of the fence, maintained the land, culled dead wood, and then maintained a fence. There's no testimony from the Brown family that they maintained the fence. However, if they had testified to that it, frankly, wouldn't interfere with a finding consistent with adverse possession because it would show that both property owners recognize the fence as a boundary fence.

So then moving on to the next element of actual and uninterrupted use. The defendant hasn't even challenged the existence or the elements. And we've cited case law saying [7] a showing of actual and uninterrupted use, you know, overlaps with the other elements exclusivity and open and notorious use.

So I'll move on to the open and notorious use. That element requires proof either that the true owner has actual notice of adverse use or that the claimants have used the land in a way that any reasonable person would assume or that the person to be -- the person using was the owner. And the use and occupancy need only be of a character that an owner would assert in view of the nature and location of the property. Here, again, we're dealing with rural land, timbered property. The Lundgren family has used it in a way consistent with the way owners of that type of property would use it.

The Defendant's assert that David Brown, who is the one quarter, who was the minority owner may not have had notice of this fence. And they assert that creates a material issue of fact. However, Your Honor, there's no evidence to refute the fact that the Brown and Lundgren families for generations have treated this fence as the boundary line. As I've pointed out, Ms. Brown never cut trees on the Lundgren side. Her brother-in-law, Ray Brown, confirmed that both families were aware of the fence all the way back to the 1940's. Mr. Ray Brown, a Brown family member observed the fence in the 1960's and 1980's. Then [8] the neighbor on the other side of Hobson Road, Robert Thomas, says he's lived there from the early 1980's that the fence has always been there, and was always treated by both the Lundgren family and the Brown family as the boundary line separating their properties.

So the element of open and notorious only means that the boundary must be visible and

discoverable. Washington law establishes that it doesn't have to be actually known by the record owner, in this case the Brown family. So David Brown's testimony that he wasn't aware of the fence is really not relevant. It's not material to the elements of adverse possession. Washington law establishes the true owner is charged with constructive notice of a boundary object that's visible and placed on the ground. And that's true even if it takes scrupulous examination or a professional survey to discover the demarcation object.

Finally, on adverse possession, Your Honor, the element of hostility, it sounds worse than it really is. Hostility is shown if the possessor treats the property like true owner would to the statutory 10-year period. Like the other elements, it depends on the nature and location of the land. The facts here I think absolutely demonstrate that the Lundgren family has acted like the true owners of this land since 1947.

There was an attempt to use the brand new Supreme [9] Court case of Gamboa to create an issue. Your Honor, Gamboa has no application to an adverse possession case, number one. It's a prescriptive easement case. Prescriptive easement cases are an entirely different animal. Number one, they don't deal with title. They deal with use of property. And the policy reasons to treat prescriptive easement claims differently are significant. In adverse possession cases, you know, the policy of Washington law is to, you know, reject stale claims and to promote the utilization of property. Those policy reasons don't exist in prescriptive easement cases.

Even if Gamboa applied, and this clearly does not. Gamboa only says that a presumption of neighborly sufferance arises only if there's a reasonable inference of neighborly sufferance or acquiescence necessary for that presumption to arise. And the cases that create a reasonable inference of neighborly sufferance deal with like a pathway created and used simultaneously by both neighbors. You have to have facts like that, and that just doesn't apply in an adverse possession case. And, moreover, even if Gamboa did apply there was no simultaneous neighborly use of this acreage. We cited to the Court the El Cerrito case, actually a couple of different propositions. But one of the propositions that it supports is the Court there held that the fact that neighbors were friendly and neighborly didn't [10] defeat an adverse possession claim. And, moreover, an offer by the adverse possessor party to the title owner to buy the disputed property didn't defeat hostility.

An interesting wrinkle of adverse possession cases, Your Honor, that I think is often misunderstood by parties is, and this was discussed in the El Cerrito case too, once you've established all four elements of adverse possession for a 10-year period Washington law recognizes that then there is ripe title on the side of the adverse possessor. And the adverse possessor can then just leave, go away, and can still, decades later establish their title under adverse possession. The record owner, the party who is being adversely possessed against must do

something to interrupt, to basically adversely possess the property back for ten years.

Well, here, Your Honor, the facts are that the Lundgren's family fence, whoever originally installed it, it's not relevant, has been there since 1947, used it openly and notoriously under a right of claim for ten years after 1947. So in 1957 adverse possession was established. Any evidence produced by the tribe in opposition to this motion at most goes back to the date when David Brown obtained his one quarter interest in the 1980's. They have no evidence to rebut the showing made here of the adverse possession for the many decades prior to that. And, therefore, as a matter [11] of law summary judgment is appropriate.

You know, I've already touched on the irrelevance of the negotiations. Number one, my clients dispute the testimony of the tribe's land agent, who testified there had been discussion about, you know, trading some other property. It wasn't necessary to respond to that because it's not a fact that the Court can even consider. It's not admissible under Evidence Rule 408 as an offer and settlement. El Cerrito held that an offer doesn't destroy the hostility element. And, moreover, under Washington law an adverse possessor's intent is not relevant. Their subjective intent is not relevant. So even if the adverse possessor is not sure whether they are dispossessing their neighbor it doesn't matter in Washington law. So an offer to buy the property also is irrelevant because it goes to the subjective intent.

All of the elements of adverse possession here, Your Honor, also support the claim of mutual recognition and acquiescence. The un rebutted evidence is that the Brown family and the Lundgren family recognize this fence line as the boundary separating their properties. All of their actions for many decades have been consistent with that, and it's been for well more than ten years. And so with that, Your Honor, I will end. And if there are any questions I would be happy to answer them.

[12] THE COURT: David Brown, the minority title holder, doesn't say that the fence wasn't there. He simply says he didn't know the fence was there.

MR. ELLERBY: That's correct. It's a little hard to believe that, Your Honor. He doesn't say how much time he ever spent on the property. I think you've seen the pictures of this fence. It's not something that anyone who was walking in that part of the property could miss.

THE COURT: Uh-huh.

MR. ELLERBY: And under Washington law whether or not Mr. Brown was aware of the fact is beside the point.

THE COURT: He doesn't say I went back there, and the fence wasn't there. He said I just didn't know it was there.

MR. ELLERBY: Yeah. Fences like this tend not to appear and disappear. So thank you.

THE COURT: Well, not when they are grown into a cedar tree.

Mr. Hawkins?

MR. HAWKINS: Thank you. The Plaintiffs in this matter have failed to meet their heavy burden of establishing that there are no material issues of fact before the Court. Plaintiffs carry the burden to prove all of the elements of adverse possession that they have laid forth, and they have failed to do so. There are significant [13] material issues that need to be addressed as they relate to each element.

When reviewing a motion for summary judgment the Court must consider all facts and reasonable inferences in the light most favorable to the non-moving party. Furthermore, where the material facts are based solely upon the moving party's summary judgment affidavit, as is the case here, credibility is especially important. In such a case, the non-moving party should have the opportunity to expose the moving party's demeanor while testifying at trial. The back and forth that you've just had, as it relates to the declaration of David L. Brown and the credibility of the statement that he has provided the tribe is exactly why the Court in Rodney v. Anders [ph] takes that position.

Adverse possession claims are latent with facts. It is significant for the trier of fact to have the opportunity to look at the witnesses and assess their demeanor in order to establish the reliability of the

statements that they are making. You have a number of contradictory statements here that relate to the elements. Those statements can only be determined as to their credibility, allowing this case to go forward to trial and permitting the tribe, should it elect to do so, engage in discovery and make inquiry as to the statements that have been made in support of each element herein, particularly as it relates to open and notorious.

[14] The requirement of open and notorious to satisfy that the title holder has actual notice of the adverse use throughout the statutory period. The acts showing such open and notorious use must be loud and clear with sufficient obtrusiveness that would be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention. Real property will only be taken away from the original owner by adverse possession when he was or should have been aware and informed that his interest was challenged. When you place that standard against the declaration of David Brown there is clearly an issue of fact that needs to be resolved.

Furthermore, when you put Mr. Brown's statement, David L. Brown's statement, in contrast to Ray Brown's statement, and Mr. Ray Brown's statement says: I am familiar with the fence that separated the two properties, and like everyone in the extended Brown family was aware of the boundary fence that was put in place in the 1940's and always treated it as the property line, a fact that they rely upon, that fact directly contradicts what David L.

Brown is saying. Therefore, discovery is needed. The credibility of both statements need to be assessed by this Court in order to determine which one the Court is going to rely upon in order to establish this claim of open and notorious.

[15] As it relates to use, not actual and uninterrupted, again, there are facts before this Court that need to be reviewed. What, in fact, was that fence used for? Was it permitted for the Browns to have access to both sides of the fence? Was it a fence installed by tribe successors in interest so that it would preclude animals from going over the line onto this portion of the land that they didn't want animals on? That's a reasonable inference. Under Riley, the standard when reviewing a summary judgment to consider all facts and reasonable inferences in the light most favorable to the nonmoving party. That's a reasonable interest in favor of the tribe as it relates to this element.

Next, as it relates to exclusivity. Possession must be of a type that would be of an owner under the circumstances. I completely agree with counsel for the plaintiffs as it relates to this El Cerritos case and the statement that the former owner intended to sell the property and how that does not apply in those circumstances. However, it does not speak to whether or not an individual making a claim for adverse possession is acting as an owner would act, a necessary element in this claim. And I do not believe that a party acting as an owner as soon as they receive notice that the tribe was asserting their property rights to the disputed property would make the

statement [16] that they understood this was not their property; that they wanted to trade for this property, and that they even took the steps of taking the tribe's agent to look at the property that they wanted to make a trade for.

Another material issue that needs to be reviewed and determined at trial, credibility. It's been contested. It's been contested by the plaintiffs that this ever occurred. Credibility, has to go to trial. Inferences under Wagg have to be read in the benefit of tribe in a summary judgment motion. They are relying upon to dispute this they are relying upon declarations. Under Riley it has to go to trial.

As it relates to hostility we do go back and rely upon the open lands doctrine. And the open lands doctrine simply does not permit this element to be met here. I'm sorry the vacant lands doctrine. It's permissive use among neighbors to residential property –

THE REPORTER: Mr. Hawkins, could you slow down for me please.

MR. HAWKINS: I'm sorry. In Gamoa the Court explains the vacant land doctrine and it's presumptive permissive use amongst neighbors to residential properties. The Court is expanding the vacant lands doctrine. In this the Court is starting to narrow the application of adverse possession. It's not going the other direction. In fact, [17] in the Gorman case, in the concurrent joined by a majority of the court said: As the facts of this case demonstrate it is

time to rethink the doctrine of adverse possession. Many of the beneficial purposes the doctrine is said to serve do not justify the doctrine in modern times. Moreover, the doctrine's basic premise is legalization of wrongful acquisition, acquisition of land by theft. Conduct is in our time. We can discourage not withstanding the possibility of putting land to a higher and better use.

Your Honor, there's been much discussion about this fence, and how long it's been there, and that it's obvious to everybody who has ever gone by it. But I will tell you I drove by this property before the tribe logged its portion of the property on the other side of the fence, and you could not from the road see this fence. It has been grown over by the trees as has been shown by these pictures. There was nothing to the common eye that you could observe. I understand this survey element and the authority cited by Plaintiffs here, but you have to take into consideration the land at issue, whether or not it's fair to allow an individual to have land that is vacant subject to a claim of adverse possession due to a hidden fence.

Finally, Your Honor, there is a question about what the fence was used for. Peter K. Brand, our surveyor, who went and did the survey, noted in his declaration that [18] the fence runs east and west with an access gate in it. Allowing or calling into question exclusivity. But then the fence turns to the north. If this, in fact, was a fence taken care of by the Lundgrens, used by Lundgrens, and a property line that the Lundgrens assert why didn't the Lundgrens

come forth and claim that portion of the fence that runs to the north? They didn't do that. This fence -- there's questions about whether or not this fence is a property line or not. All inferences have to be held in the light most favorable to the tribe when a claim for summary judgment is based solely on affidavit. The non-moving party should have the opportunity to expose the moving party's demeanor while testifying at trial.

Your Honor, we respectfully request that this motion be denied. And alternatively we would ask that this Court take into consideration the recent court ruling in Gorman, the findings. I would ask you to take note of the fact that in our motion to dismiss the Court held or found that it lacked personal jurisdiction with the tribe. That's significant. Because if we were going to move forward to trial the Court needs to have personal jurisdiction over the tribe. So alternatively understanding the factual disputes that are here we would ask the Court to act sue sponte and dismiss the underlying complaint. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hawkins.

[19] Mr. Ellerby?

MR. ELLERBY: I think I can be brief, Your Honor. I won't respond to the jurisdictional issues. I think that's law of the case already.

The quote that counsel read to you from the Gorman case was actually the dissent of the chief justice, and it was not part of the ruling of the Court.

The attempt to create an issue of fact over the surveyor's testimony that, you know, the fence curved around and then headed north again really is beside the fact. I mean here we have a case -- and I would say, Your Honor, I've been handing adverse possession cases for over 25 years, and this is the clearest most overwhelming set of facts that I've ever had to deal with. Because you have a fence that's obviously been there a long time, but well maintained. It spans the entire width of the property. So the fact that the fence either jogs up or jogs down on the other property line is not relevant. And, again, it doesn't matter. The only thing that the surveyor, Mr. Brand's testimony, might be able to be accepted for, it is speculative, but it might create the issue of who originally installed the fence, depending on, you know, if the fence jogs up or down. It doesn't matter. It doesn't matter who installed the fence.

You know, this insistence that the Lundgrens -- if you [20] assume the testimony of the property agent for the tribe that they offered to buy the property or trade other properties for it, again, that's not properly before the Court. And under Washington law it doesn't matter if the party is adversely possessing offers to buy the property from the record owner.

I would say their surveyor had no difficulty finding the fence. It's clearly demarcated on their

survey map. And so the testimony is un rebutted that the fence was open to view by all regardless of the testimony of counsel that when he drove by from the street he didn't notice it. That's not testimony that's properly before the Court anyway. So, Your Honor, with that I would ask that the Court grant summary judgment to the Lundgrens.

Your Honor, counsel points out that the quote that he read was from a concurrence. I misspoke. I thank you for pointing that out.

THE COURT: Mr. Ellerby, your motion is granted. I would have to agree with you this is as clear as a case as I've had on the bench as well.

This fence has obviously been here for a great deal longer than the necessary ten years. And the witnesses' declarations indicate that the use that the Lundgrens made of the property was a use that was the type of activity that an owner would make use of this type of property for. They [21] cut trees. They trimmed trees. They took wood from the area. They cut up trees that had fallen on the fence. They used the property as their own. And the evidence also is that Ms. Brown, when she owned the property, recognized the fence as the boundary line because she took timber from her side of the fence but did not go over on to the other side and take any timber from there. She recognized that fence as the boundary line.

And so the exclusivity element has been met. The open and notorious element has been met. This fence is not hidden. It's not something that you

couldn't find if you walked back there. And that's all that is required under the law. It has been well maintained. It's not fallen into rack and ruin or covered with blackberry brambles. It's right there for all to see. And the neighbors obviously, or at least the neighbor across the street, knew that it was there; that it has been actual and uninterrupted use for at least a period of ten years, and the use has been hostile as that word is defined by the law; that is that the Lundgrens treated it as their own.

The vacant lands doctrine doesn't really apply here nor does the Gamboa case. This is not a case of neighborly accommodation. I don't know if the case -- it's hard for me to imagine a case that would involve neighborly accommodation of a vacant land doctrine where there was a [22] fence of this duration. I don't think those doctrines apply here.

And, frankly, as Mr. Ellerby points out, it doesn't matter if Mr. Brown, David Brown, knew the fence was there or not. That's not the issue. He doesn't say that the fence wasn't there. And he doesn't say get around to the other side of the fence or that anybody in the family did. Nobody says they used the gate. There just isn't anything to create a legitimate issue of fact on any of these elements.

And even looking at the possibility of inferences in the light most favorable to the nonmoving party there just aren't any. There is nothing to indicate that the Browns ever crossed over from their side of the fence or that they believe that anything on the Lundgren's side of the fence belonged

to them. And the Lundgrens certainly acted as though that parcel of property did belong to them. So adverse possession has been established.

The doctrine of recognition and acquiescence also applies here. The line is certain, well defined as designated by the fence. There are manifestations of mutual recognition and acceptance of the true boundary line, given that the parties conducted themselves as though they owned the property on each side of the fence and no more. And it continued for ten years or more, a great deal more actually. [23] So the motion is granted.

MR. ELLERBY: Okay. Your Honor, I'll show a proposed order to Mr. Hawkins and hand that up to the Court.

MR. HAWKINS: Thank you, Your Honor.

THE COURT: Thank you, counsel.

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,	No. 91622-5
Respondents.	Skagit County No. 15-2-00334-1
v.	OPINION
UPPER SKAGIT INDIAN TRIBE,	
Appellant.	

Appeal from the Superior Court of the State of Washington for Skagit County. No. 15-2-00334 – Dave Needy and Susan Cook, *Judges*.

ARGUED JUNE 9, 2016
FILED FEBRUARY 16, 2017
AMENDED JUNE 8, 2017
RECONSIDERATION DENIED JUNE 12, 2017

Before: En Banc: JOHNSON (Opinion), OWENS, WIGGINS, GONZÁLEZ, YU, STEPHENS (Dissenting), McCloud, Fairhurst, and Madsen, *Supreme Court Justices*.

JOHNSON, J.

***861¶**1 This case involves the relationship between in rem jurisdiction, Superior Court Civil Rule (CR) 19, and sovereign immunity. The issue is

whether the Upper Skagit Indian Tribe's (Tribe) assertion of sovereign immunity requires dismissal of an in rem adverse possession action to quiet title to a disputed strip of land on the boundary of property purchased by the Tribe. The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. An inquiry under CR 19, as required by our cases, involves a merit-based determination that some interest will be adversely affected in the litigation. Where no interest is found to exist, especially in an in rem proceeding, nonjoinder presents no jurisdictional barriers. We find that the Tribe does not have an interest in the disputed property; therefore, the Tribe's sovereign immunity is no barrier here to this in rem proceeding. The trial court properly denied the Tribe's motion to **571 dismiss and granted summary judgment to the property owner. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sharline and Ray Lundgren and the Tribe own adjacent properties in Skagit County, Washington. A barbed wire fence runs along the southern portion of the Tribe's land. The fence spans the width of the Tribe's lot, with a gate approximately halfway along the fence line. The land between the fence and the southern boundary of the Tribe's *862 lot is the land at issue in this case. For ease of reference, we refer to this land as the "disputed property."

¶3 The Lundgrens bought the 10 acres of land immediately south of the disputed property in 1981.

The property had been in their extended family since 1947, when Sharline Lundgren's grandmother first bought the property. The Lundgrens established that the fence on the disputed property has been in the same location since at least 1947, and that for as long as their property has been in the family, they have treated the fence as the boundary line. Since 1947, the Lundgren family exclusively has harvested timber, cleared brush, kept the fence clear of fallen trees, and treated the disputed property on the southern side of the fence as their own.

¶4 The Tribe's land had been previously owned by Annabell Brown for many decades. In 1984, she quitclaimed a 1/4 undivided interest in the property to her son David Brown. Upon her death, the rest of the property passed to her other children, Paul Brown, Vivian Jennings, and Barbara Carrell. In 2013 the Tribe bought the property from Paul Brown, Jennings, and Carrell, receiving a statutory warranty deed. The Tribe was evidently unaware of the fence when it purchased the property. The Tribe's surveyors alerted the Tribe to the presence of the fence in October 2013 while surveying the property "in an effort to take the land into Trust." Clerk's Papers (CP) at 115.

¶5 In September 2014, the Tribe notified the Lundgrens in a letter that the fence did not represent the boundary and that they were asserting ownership rights to the entire property deeded to them in 2013. The Lundgrens initiated this lawsuit in March 2015. They asked the court to quiet title in the disputed property to them and sought injunctive relief. The

Lundgrens moved for summary judgment, arguing they acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction *863 based on the Tribe's sovereign immunity and under CR 12(b)(7),[1] which requires joinder of a necessary and indispensable party under CR 19.[2]

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[1] **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense[ ] may at the option of the pleader be made by motion: ... (7) failure to join a party under [CR] 19.

[2] "**(a) Persons to Be Joined if Feasible.** A person who is subject to service or process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

"**(b) Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) or (2) of section (a)

****572** ¶6 In the trial court, Judge Dave Needy denied the Tribe's motion to dismiss. The Tribe moved for direct discretionary review of this ruling. Judge Susan Cook later granted the Lundgrens' motion for summary judgment, holding the Lundgrens' "claims of title ownership by adverse possession and mutual recognition and acquiescence is established. Legal title to the disputed property is owned by Plaintiffs." CP at 159. Judge Cook noted that the fence was not hidden. Both parties recognized the fence as the boundary line and that it had clearly been on the property for much longer than the necessary 10 years. She noted that the Lundgrens' labor on the property was established by *864 numerous witness declarations. Importantly, she stated that "this is as clear as a case as I've had on the bench." Verbatim Report of Proceedings (VRP) (May 7, 2015) at 20. The Tribe amended its motion for discretionary review to seek review of both Judge Needy's and Judge Cook's orders. We accepted direct review. *See* Order, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (Wash. Feb. 10, 2016).

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hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

ANALYSIS

¶7 The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. *See* VRP (Apr. 24, 2015) at 24. While it recognized it could not join the Tribe against its will, the court found the Tribe's attempt to use CR 19 to be "contrary to common sense, fairness, and due process for all involved." VRP (Apr. 24, 2015) at 32.

¶8 The Tribe argues that dismissal is required for two reasons. First, it argues the superior court lacks jurisdiction because the Tribe has sovereign immunity from suit, which neither the Tribe nor Congress has waived for quiet title actions. *See* Appellant's Opening Br. at 10. The Tribe differentiates between an in rem claim and in rem jurisdiction, asserting that "jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties. Thus, the mere fact of an *in rem* claim does not affect or somehow avoid threshold jurisdictional questions such as sovereign immunity." Appellant's Reply Br. at 5. Second, it argues that even if the lower court had in rem jurisdiction to hear the case, CR 19 requires dismissal because the Tribe is a necessary and indispensable party that cannot be joined due to sovereign immunity. *See* Appellant's Opening Br. at 24-30; Appellant's Reply Br. at 1.

¶9 The Lundgrens acknowledge that the Tribe has sovereign immunity. Resp'ts' Br. at 6 ("The Lundgrens admit that the Tribe is entitled to

sovereign immunity."). They argue *865 that because the court has in rem jurisdiction over the quiet title action, personal jurisdiction over the Tribe is unnecessary and its immunity is irrelevant. They also assert that because they obtained title by adverse possession before the Tribe purchased the property, "[t]he Tribe's sovereign immunity does not deprive the court jurisdiction over land the Tribe never owned." Resp'ts' Br. at 23. With regard to CR 19, the Lundgrens argue, "[b]ecause the Court has *in rem* jurisdiction, sovereign immunity is not a bar to jurisdiction, the Tribe is not an indispensable party, and Civil Rule 19 does not prevent the case from proceeding." Resp'ts' Br. at 29.

I. In Rem Jurisdiction

¶10 Superior courts in Washington have jurisdiction to exercise in rem jurisdiction to settle disputes over real property.[3] Quiet title actions are proceedings in rem. *Phillips v. Tompson*, 73 Wash. 78, 82, 131 P. 461 (1913); *see also* 14 Karl B. Tegland, Washington Practice: Civil Procedure § 5:1, at 155 (2d ed. 2009). In such proceedings, the court has jurisdiction over the property itself. *See* Tegland, *supra*. Personal jurisdiction over the landowner is not required. *In re Acquisition of Land & Other Prop. by City of Seattle*, 56 Wash.2d 541, 544-45, 353 P.2d 955 (1960); *see also* ***573 In re Condemnation Petition*

[3] Article IV, section 6 of the Washington Constitution expressly establishes that our state's superior courts "shall have original jurisdiction in all cases at law which involve the title or possession of real property." *See also* RCW 2.08.010.

City of Lynnwood, 118 Wash. App. 674, 679 & n.2, 77 P.3d 378 (2003) (noting that quiet title actions are proceedings in which the court can exercise in rem jurisdiction, and that "[c]ourts may have jurisdiction to enter judgment with respect to property . . . located within the boundaries of the state, even if personal jurisdiction has not been obtained over the persons affected by the judgment").

*****¶11 A court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion *866 of sovereign immunity. The United States Supreme Court has recognized this principle. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), the county sought to foreclose property within the Yakama Indian Reservation for failure to pay ad valorum taxes. The Yakama Nation argued that state jurisdiction could not be asserted over fee-patented reservation land. The Supreme Court held that the Indian General Allotment Act allowed Yakima County to impose ad valorum taxes on reservation land. 25 U.S.C. §§ 334-381. The Court reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 869-72, 929 P.2d 379 (1996) (describing *County of Yakima*, 502 U.S. 251).

¶12 This court has similarly upheld a superior court's assertion of in rem jurisdiction over tribally owned fee-patented land. In *Anderson*, this court held that the Grays Harbor County Superior Court had in rem jurisdiction over an action to partition and quiet title to fee-patented lands within the Quinault Indian Reservation. In that case, the Quinault Indian nation purchased a 1/6 interest in the surface estate of fee-patented land subject to a pending suit to partition and to a lis pendens. Relying on *County of Yakima*, and noting that an action to partition and quiet title is "a much less intrusive assertion of state jurisdiction over reservation fee patented land" than taxing and foreclosing fee lands, the court concluded the "Superior Court had proper in rem jurisdiction over [the] suit to quiet title and partition alienable and encumberable fee patented property situated within the Quinault Indian Reservation…. An action for partition of real property is a proceeding *867 in rem." *Anderson*, 130 Wash.2d at 872, 873, 929 P.2d 379. Furthermore, it was

> not disputed that the trial court had proper jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity in personam, but over the property or the "res" in rem.

Anderson, 130 Wash.2d at 873, 929 P.2d 379. The court was exercising jurisdiction over the property, not over the Quinault Indian nation, and thus the land was "subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Anderson*, 130 Wash.2d at 873, 929 P.2d 379. Because the court determined there was in rem jurisdiction, it did not need to address sovereign immunity.

¶13 Relying on *Anderson*, Division One of the Court of Appeals held that the court could exercise in rem jurisdiction in the quiet title action in which the Stillaguamish Tribe of Indians purchased land with notice of a pending quiet title action. *Smale v. Noretep,* 150 Wash. App. 476, 208 P.3d 1180 (2009). In *Smale*, the Smales sought to quiet title to property they claimed to have acquired through adverse possession against Noretep, the non-Indian original owner. After the Smales sued, Noretep sold the property by statutory warranty deed to the Stillaguamish Tribe. The deed noted the pending quiet title action, and the Smales added the Stillaguamish Tribe as a defendant. The Stillaguamish Tribe argued that sovereign immunity barred the action. The court found:

> Because courts exercise in rem jurisdiction over property subject to quiet title actions, our Supreme Court has held that transferring **574 the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the

> property. Accordingly, we hold that the superior court's continuing jurisdiction over the land claimed by the Smales for *868 the purposes of determining ownership does not offend the Tribe's sovereignty.

Smale, 150 Wash. App. at 477, 208 P.3d 1180.

¶14 The court noted, "The quiet title action in *Anderson* is similar to the quiet title action here in two crucial ways: both are proceedings in rem to determine rights in the property at issue and neither has the potential to deprive any party of land they rightfully own." *Smale*, 150 Wash. App. at 483, 208 P.3d 1180. The Smales alleged they acquired title to the land via adverse possession *before* the original owner sold to the Stillaguamish Tribe. If this were true, the Stillaguamish Tribe never possessed the land and thus never had land to lose. Nor were the Smales attempting to adversely possess against a sovereign. The court concluded that, as in *Anderson*, the doctrine of sovereign immunity did not apply and did not bar the quiet title action. *County of Yakima, Anderson*, and *Smale* establish the principle that our superior courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.

II. CR 19

¶15 Next, we turn to whether the Tribe must be joined to allow the action to proceed under CR 19. The Tribe asserts that even if the trial court had in rem

jurisdiction to hear the case, CR 19 requires dismissal because the Tribe is a necessary and indispensable party that cannot be joined due to sovereign immunity. Appellant's Opening Br. at 24. We disagree. In reaching our decision, we highlight the importance of CR 19 as a prudential standard that asks not whether a court has the *power* to decide a case, but rather whether it *should*.

¶16 CR 19(a) involves a three-step analysis. *Auto. United Trades Org. v. State,* 175 Wash.2d 214, 222-23, 285 P.3d 52 (2012). First, the court determines whether absent persons are "necessary" for a just adjudication. If the absentee parties are "necessary," the court determines whether *869 it is feasible to order the absentee's joinder. Joinder is generally not feasible when tribal sovereign immunity is asserted. *Auto. United Trades Org.,* 175 Wash.2d at 222 (citing *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.,* 400 F.3d 774, 780-81 (9th Cir. 2005)). "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)." *Auto. United Trades Org.,* 175 Wash.2d at 222. We have recognized that "[d]ismissal under CR 12(b)(7) for failure to join an indispensable party is a 'drastic remedy' and should be ordered only when the defect cannot be cured and significant prejudice to the absentees will result." *Auto. United Trades Org.,* 175 Wash.2d at 222-23 (citing *Gildon v. Simon Prop. Grp., Inc.,* 158 Wash.2d 483, 494, 145 P.3d 1196 (2006) (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1609, at 130 (3d ed. 2001))).

A. "Necessary" Party

¶17 A party must be joined if adjudication of the matter in the party's "absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." CR 19(a). The heart of the rule is the safeguarding of the absent party's legally protected interest. *Auto. United Trades Org.,* 175 Wash.2d at 223, 285 P.3d 52.

*****¶18 The Tribe asserts that it has a legally protected interest because it claims record title ownership of the disputed property. Appellant's Opening Br. at 25. An inquiry under CR 19, as required by our cases, involves a merit-based determination that an interest will be adversely affected in the litigation. In an in rem action, the property at issue is the focus of the proceeding. The nature and end result of an in rem action **575 determines often competing interests in the property. This analysis is in contrast to civil actions, where the nature and end result is relief or *870 judgment. This difference is important here in the context of a legally protected interest because the Lundgrens are not seeking to divest a sovereign of ownership or control. Rather, they are attempting to retain what they already own. Where no interest exists, nonjoinder presents no jurisdictional barriers. While this analysis seems, in a way, to put "the cart before the horse," this is the relevant CR 19 analysis. Here, as

our cases recognize, and as the trial court found, Sharline and Ray Lundgren acquired ownership by adverse possession long *before* the property was purchased by the Tribe. To find sovereign immunity, some impact on a sovereign's interest should exist. No such interest exists in this case. In the trial court, the Tribe challenged the Lundgrens' lawsuit to quiet title and defended against the motion for summary judgment.[4] The Tribe claimed material issues of fact existed and challenges the summary judgment order here. Considering the facts in the light most favorable to the nonmoving party, we will affirm the trial court's grant of summary judgment if we determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Lundgrens are entitled to judgment as a matter of law if the undisputed facts establish that the Lundgrens would have succeeded on an adverse possession claim. We hold that they have.

¶19 To succeed on an adverse possession claim, possession must be "(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." *ITT Rayonier, Inc. v. Bell,* 112 Wash.2d 754, 757, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984)). "Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years."

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[4] In rem actions require giving notice to any and all persons or entities who may claim an interest in the property to allow those potential claimants the opportunity to participate in the action and assert their interest.

ITT Rayonier, Inc., 112 Wash.2d at 757 (citing RCW 4.16.020). Additionally, we have *871 held that title becomes vested when the elements of adverse possession, specifically the 10 year time period, are established. In *Gorman v. City of Woodinville,* 175 Wash.2d 68, 283 P.3d 1082 (2012), we recognized this principle. In that case, the claim was asserted and we found that title was acquired before the government purchased the land in question. We held that, as long as the requisites of adverse possession were met before the property was transferred to the government, RCW 4.16.160—which otherwise shields the government from claims of adverse possession—did not control. We found that the quiet title lawsuit against the city could proceed since the legal determination only confirmed that the claim of adverse possession was satisfied before the city acquired the property. The principles recognized in *Gorman* are important here because the Lundgrens' claim is based on the fact that title to the land was acquired long before the Tribe purchased the adjacent land.

¶20 The trial court, in granting summary judgment, relied on numerous declarations to find in favor of the Lundgrens. The record establishes that the disputed property has been in the Lundgrens' extended family since 1947, first purchased by Sharline Lundgren's grandmother. A permanent, visible, 1,306 foot long fence marked the boundary between the two properties for decades. The Tribe argues that evidence exists that "shows a dispute as to the parties' knowledge of the existence of the fence." Appellant's Opening Br. at 34. Annabell Brown's

brother-in-law, Ray Brown, confirmed that both families were aware of the boundary fence and treated it as the property line. The Tribe asserts that Annabell Brown's son, David Brown, had no idea the fence was there. Assuming this is true, David Brown's lack of knowledge is not material to the legal issue in this case because the Lundgrens' use of the land was sufficient to satisfy the elements of adverse possession. "Open" and "notorious" mean that activities or objects on the land are visible and discoverable, if not actually known, to the true owner. 17 Wil **576 liam B. Stoebuck & John W. Weaver, *872 Washington Practice: Real Estate: Property Law § 8.11, at 523 (2d ed. 2004). "[T]he owner is charged with constructive notice of permanent, visible objects placed on the ground, even if they are only slightly upon the land and would be seen to intrude only by scrupulous inspection or even by professional survey." Stoebuck & Weaver, *supra*, at 525. The evidence shows that the Lundgrens exclusively possessed and maintained the disputed property. The Tribe asserted no evidence to rebut the testimony that the Lundgrens and their predecessors have gone onto the property, cut trees, trimmed branches, and perhaps mended the fence in the last 70-plus years. Significantly, Judge Cook, in granting summary judgment, stated that "this is as clear as a case as I've had on the bench." VRP (May 7, 2015) at 20. We find the material facts undisputed and affirm the entry of order of summary judgment.

B. "Indispensable" Party

**¶21 Because we have found that the Tribe is not

a necessary party, we need not continue the CR 19 analysis. However, it is important to note that the principle of indispensability is rooted in equitable considerations. *Auto. United Trades Org.*, 175 Wash.2d at 227 (citing *Crosby v. Spokane County,* 137 Wash.2d 296, 309, 971 P.2d 32 (1999)). The central question is whether an action can proceed "in equity and good conscience." CR 19(b). The CR 19 inquiry requires "careful exercise of discretion" and is "'heavily influenced by the facts and circumstances of individual cases.' " *Auto. United Trades Org.,* 175 Wash.2d at 229 (quoting Wright, Miller & Kane, *supra*, § 1604, at 39). Of importance here is that dismissal would result in no adequate remedy for the plaintiff. Because of a strong aversion to dismissal, great weight is given to this factor. There is no alternative judicial forum for the Lundgrens. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (June 9, 2016), at 11 min., 42 sec. to 12 min., 07 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org (explaining that although there is a tribal court, "the Upper Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs").

¶22 The purpose of CR 19 is to serve " 'complete justice' " by permitting disputes to go forward only when all parties are present to defend their claims. *Auto. United Trades Org.,* 175 Wash.2d at 233. But as we stated in *Automotive United Trades Organization,* " 'complete justice' may not be served

when a plaintiff is divested of all possible relief because an absent party is a sovereign." 175 Wash.2d at 233. In this instance, dismissal leads to no justice at all. In *Automotive United Trades Organization*, we emphasized that sovereign immunity is meant to be raised as a shield by a tribe, not as a sword. Here, a survey of the property was done a month after the property was deeded to the Tribe. *See* Appellant's Opening Br. at 5-6. A survey of the property *before* purchase would have disclosed the existence of the fence and at minimum put a purchaser on notice to determine the property boundaries. The Lundgrens had acquired title by adverse possession decades before the Tribe acquired record title in 2013. 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." VRP (Apr. 24, 2015) at 32. We affirm the superior court.

WE CONCUR:
Owens, J.
Wiggins, J.
**577 González, J.
Yu, J.

STEPHENS, J. (dissenting)

*874 ¶23 It is well established that "tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation." *Wright v. Colville Tribal Enter. Corp.,* 159 Wash.2d 108, 112, 147 P.3d 1275 (2006) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978)). " '[S]ociety has consciously opted to shield Indian tribes from suit,' " *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 230, 285 P.3d 52 (2012) (internal quotation marks omitted) (quoting *Fluent v. Salamanca Indian Lease Auth.,* 928 F.2d 542, 548 (2d Cir. 1991)), because tribes are " 'separate sovereigns pre- existing the Constitution,' " *Michigan v. Bay Mills Indian Cmty.,* __ U.S. __, 134 S.Ct. 2024, 2030, 188 L.Ed. 2d 1071 (2014) (quoting *Santa Clara Pueblo,* 436 U.S. at 56, 98 S.Ct. 1670). Brushing aside this fundamental principle, the majority concludes that the Upper Skagit Indian Tribe (Tribe) must either waive its sovereign immunity and defend against Sharline and Ray Lundgren's adverse possession claim, or else risk having judgment entered in its absence. The majority justifies this result on the ground that personal jurisdiction over the Tribe is unnecessary in an in rem action to quiet title. Majority at 579-80. It also insists that the Tribe has no interest in the disputed property because the Lundgrens' claim of adverse possession predates the Tribe's ownership, and therefore the Tribe is not a necessary party to this suit. *Id.* at 577, 581.

¶24 I respectfully dissent. While the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties, Civil Rule (CR) 19 counsels against exercising this authority in the face of a valid assertion of sovereign immunity. Proceeding without regard to the Tribe's defense, the majority gives "insufficient weight" to the sovereign status of the Tribe and erroneously "reach[es] and discount[s] the merits of [the Tribe's] claims." *Republic of Philippines v. Pimentel,* 553 U.S. 851, 855, 864, 128 S.Ct. 2180, 171 L.Ed. 2d 131 (2008).

*875 ¶25 Applying the analysis of CR 19, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined in this quiet title action. The result is clear under our precedent: we should dismiss this case without reaching the merits of the Lundgrens' claims. Accordingly, I would reverse the superior court and remand for entry of an order of dismissal under CR 12(b)(7).

ANALYSIS

¶26 The only difference between this case and others in which we have respected assertions of tribal sovereign immunity is that the superior court's jurisdiction to quiet title rests on in rem jurisdiction. Focusing on this jurisdictional basis, the majority looks to cases that recognize the superior court's power to proceed. *See, e.g., County of Yakima v. Confederated Tribes & Bands of the Yakima Indian*

Nation, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed. 2d 687 (1992); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 929 P.2d 379 (1996); *Smale v. Noretep*, 150 Wash. App. 476, 208 P.3d 1180 (2009). The majority reads these cases to support its conclusion that "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11; *cf. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land,* 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar "a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. Ex rel. Bd. of Trs. of Internal Improvement Tr. Fund,* 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] None of these cases

[1] It is worth noting, however, that recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills,* which reiterated the importance of sovereign immunity. *See Hamaatsa, Inc. v. Pubelo of San Felipe,* 2016 WL 3382082, at *7 (N.M. June 16, 2016) (holding "regardless of whether Hamaatsa asserts claims that lie *in rem* or *in personam,* its action against the Pueblo is barred in accordance with federal law. Because

address the impact of a tribe's CR 19 claim.

I. CR 19 Counsels against Exercising in Rem Jurisdiction in the Face of a Valid Assertion of Sovereign Immunity

¶27 The majority acknowledges that CR 19 reflects a prudential standard: "CR 19 ... asks not whether a court has the *power* to decide a case, but rather whether it *should*." Majority at 11. But the majority fails to acknowledge the significance of the Tribe's interest and the Lundgrens' inability to obtain personal jurisdiction over the Tribe. Instead, the majority seems to believe that because the court has in rem jurisdiction, there is no need to engage in a full CR 19 analysis. This reasoning is flawed. The court's

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tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether Hamaatsa's claim is asserted *in rem* or *in personam*" and specifically noting that while *Anderson* carved out an exception "to tribal sovereign immunity for *in rem* actions," that case was decided before *Bay Mills,* which "unequivocally bars us from carving out a similar exception"); *Cayuga Indian Nation v. Seneca County,* 761 F.3d 218, 221 (2d Cir. 2014) (finding *Bay Mills* reaffirmed the importance of sovereign immunity and that it protects a tribe from any suit absent waiver or congressional authorization, and declining "to draw ... a distinction between *in rem* and *in personam* proceedings"). Because I would decide this case under CR 19, I do not reexamine our precedent in light of *Bay Mills.* Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima,* though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*.

authority to exercise in rem jurisdiction does not obviate the need to determine which parties must be joined to fully and justly adjudicate the action. Which parties are necessary and indispensable is a separate question from the court's jurisdiction—one I find dispositive in this case given the Tribe's sovereign immunity.

*877 ¶28 Sovereign immunity affects personal jurisdiction. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (" '*Indian Nations are exempt* from suit' " (emphasis added) (quoting *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940))); *see also Anderson,* 130 Wash.2d at 876, 929 P.2d 379 (describing tribal sovereign immunity under the "personal jurisdiction" section).[2] Though personal jurisdiction does not impact a superior court's subject matter jurisdiction for in rem proceedings, *In re Acquisition of Land & Other Prop. by City of Seattle,* 56 Wash.2d 541, 544-45, 353 P.2d

[2] Sovereign immunity has been variously characterized as a matter of subject matter jurisdiction, and as a matter of personal jurisdiction. *See, e.g., Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009 (10th Cir. 2007) ("'Tribal sovereign immunity is a matter of subject matter jurisdiction.'" (quoting *E.F.W. v. St. Stephen's Indian High Sch.,* 264 F.3d 1297, 1302-03 (10th Cir. 2001))); *Wright,* 159 Wash.2d at 111, 147 P.3d 1275 ("The existence of personal jurisdiction over a party asserting tribal sovereign immunity is a question of law reviewed de novo."). It is not necessary to resolve this dispute here because this case can be resolved under CR 19. Under that standard, in quiet title actions where an absent sovereign may be stripped of land to which it has a legitimate claim, an assertion of sovereign immunity is dispositive and requires dismissal.

955 (1960), it does impact a superior court's ability to join a nonparty. *See Equal Emp'l Opportunity Comm'n v. Peabody W. Coal Co.,* 400 F.3d 774, 779 (9th Cir. 2005) ("Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, *when the absentee is not subject to personal jurisdiction,* and when joinder would destroy subject matter jurisdiction." (emphasis added)); *see also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial 7-37 (2010) ("Joinder is not 'feasible' where ... the party sought to be joined is *immune* from suit"). Personal jurisdiction is thus very relevant to a court's CR 19 analysis.

¶29 The Tribe is not subject to personal jurisdiction because, as is conceded, it has **579 sovereign immunity. Resp'ts' Br. at 6. Therefore, while the Tribe is incorrect that "[in rem] jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties," Appellant's Reply Br. at 5, it is *878 correct that personal jurisdiction, in part, dictates the outcome of this case. We must consider personal jurisdiction under the analysis of CR 19.

II. The Tribe Is a Necessary and Indispensable Party

¶30 We recently addressed CR 19 in a case implicating tribal sovereignty, noting that it applies "when the joinder of absent persons is needed for a just adjudication." *Auto. United Trades Org.,* 175 Wash.2d at 221, 285 P.3d 52. "Where the feasibility

of joinder is contested, courts engage in a three-step analysis." *Id.* First, the court determines whether the absent party is " 'necessary' " under CR 19(a). *Id.* at 222, 285 P.3d 52. If the party is "necessary," the court then determines whether joinder is feasible. *See id.* If it is not feasible to join the party, the court "determine[s] whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." CR 19(b). If the action cannot proceed "in equity and good conscience" without the absent party, that party is considered "indispensable." *Id.*; *Auto. United Trades Org.,* 175 Wash.2d at 229, 285 P.3d 52.

¶31 The party urging dismissal for failure to join a necessary and indispensable party bears the burden of persuasion. *See Auto. United Trades Org.,* 175 Wash.2d at 222, 285 P.3d 52. "We review a [superior] court's decision under CR 19 for an abuse of discretion and review any legal determinations necessary to that decision de novo." *Id.* We find an abuse of discretion "if the [superior] court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Gildon v. Simon Prop. Grp., Inc.,* 158 Wash.2d 483, 494, 145 P.3d 1196 (2006). Dismissal under CR 12(b)(7) is a " 'drastic remedy.' " *Auto. United Trades Org.,* 175 Wash.2d at 222, 285 P.3d 52 (quoting *Gildon,* 158 Wash.2d at 494, 145 P.3d 1196). Because our Civil Rule and Federal Rule of Civil Procedure (FRCP) 19 are substantially similar, we may look to federal case law for guidance. *Id.* at 223, 285 P.3d 52.

¶32 Here, the superior court denied dismissal based on CR 19 without engaging in the required analysis. In its oral *879 ruling, the court stated that although it understood it could not join the Tribe against its will,

> it seems to me that the Tribe is the one saying that this property, which by its appearance may be adversely possessed long before the Tribe came into it, is asking to bar litigation for the other side rather than the other way around ... and I find that contrary to common sense, fairness, and due process for all involved.

Verbatim Report of Proceedings (Apr. 24, 2015) (VRP) at 32. While the superior court's concerns are understandable, they reflect a desire to reach the merits of the action so that both parties can have their day in court. The majority adopts this approach unapologetically, asserting without a full analysis of the rule's factors that CR 19 requires "a merit-based determination," even though this seems "to put 'the cart before the horse.' " Majority at 575. In fact, CR 19 *precludes* a court from considering the merits when one of the parties validly asserts sovereign immunity. *See, e.g., Auto. United Trades Org.*, 175 Wash.2d at 224, 285 P.3d 52 (noting the CR 19 analysis focuses "on whether a party *claims* a protected interest, not whether it *actually has* one"); *see also Gildon,* 158 Wash.2d at 494, 145 P.3 1196 (contrasting "[d]ismissal under CR 12(b) (7)" with "trials *on the merits*" (emphasis added)). As the Supreme

recognized in *Pimentel,* beyond the threshold determination that claims are not frivolous in evaluating the CR 19 factors, "consideration of the merits [is] itself an infringement on foreign sovereign immunity." 553 U.S. at 864, 128 S.Ct 2180. Indeed, it would make no sense that a court evaluating the interests of a party who cannot be joined to an action could summarily decide the party will lose, and therefore has no interests to protect.[3]

A. The Tribe Is a "Necessary" Party

**580 *880 ¶33 A party is "necessary" if "the

[3] The Court of Appeals analysis in *Smale,* on which the superior court and the majority rely, is problematic in this regard when read in light of the CR 19 cases. *See* VRP at 31. The *Smale* court broadly stated that the quiet title action at issue did not have "the potential to deprive any party of land they rightfully own" because the Smales asserted they acquired title by adverse possession before the Tribe bought the property. 150 Wash. App. at 483, 208 P.3d 1180; *see also id.* at 480-81, 208 P.3d 1180 ("[I]f the Smales acquired title before the suit was filed and Noretep attempted to convey the land, Noretep had no title to convey. Thus, the tribe never had any property to lose."). The court justified its consideration of the merits on the procedural posture of the case; the tribe moved to dismiss for lack of jurisdiction under CR 12(b)(1), so the court *assumed* the Smales could prove adverse possession. *Id.* at 481 n. 15, 208 P.3d 1180. The majority's reliance on *Smale* is concerning for two reasons. First, the majority goes further than *Smale* by actually *resolving* the merits. *Compare* majority at 581 (the Lundgrens "are attempting to retain what they *already* own" (emphasis added)), *with Smale,* 150 Wash. App. at 482, 208 P.3d 1180 ("the Smales are attempting to retain what they *allegedly* own" (emphasis added)). Second, no similar presumption to that under CR 12(b)(1) applies in considering CR 19 and a motion to dismiss under CR 12(b)(7).

person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest." CR 19(a)(2) (A). The claimed interest must be legally protected. *Auto. United Trades Org.,* 175 Wash.2d at 224, 285 P.3d 52. As noted above, the main inquiry here is "whether a party *claims* a protected interest, not whether it *actually has* one." *Id.*

¶34 In concluding that the Tribe has no interest because the Lundgrens satisfied the elements of adverse possession, the majority takes its CR 19 analysis too far. Majority at 581-82. The Tribe claims record title ownership of the disputed property. This is a cognizable claim for a legally protected property interest. *See Cady v. Kerr,* 11 Wash.2d 1, 8, 14-15, 118 P.2d 182 (1941) (stating that parties with a legal or equitable interest in property directly affected by a boundary dispute must be defendants in the boundary line adjudication); *Reitz v. Knight,* 62 Wash. App. 575, 585, 814 P.2d 1212 (1991) ("In the context of boundary line disputes, joinder ordinarily is required only of persons who own property adjacent to the disputed boundary line."); RCW 7.28.010 ("[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, *to be brought against the tenant in possession;* if there is no such tenant, then *against the person*881 claiming the title* or some interest therein" (emphasis added)); *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1458-59 (9th Cir. 1994) (finding

the Quinault Indian Nation was a necessary party because it had a claim to escheated property within its reservation). The Tribe is clearly a necessary party to this lawsuit.

B. The Tribe Cannot Be Joined Due to Sovereign Immunity

¶35 Having determined that the Tribe is a necessary party, the next question is whether the Tribe can feasibly be joined. "Joinder is not feasible when tribal sovereign immunity applies." *Auto. United Trades Org.,* 175 Wash.2d at 222, 285 P.3d 52. Because the parties agree that the Tribe has not waived its sovereign immunity, the Tribe cannot be joined.[4]

C. The Tribe Is an Indispensable Party

¶36 Because the Tribe is a necessary party that cannot be joined, we must determine if the Tribe is indispensable. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1499 (9th Cir. 1991).

¶37 Federal courts have consistently recognized "that when the necessary party is immune from suit,

[4] Sovereign immunity may be waived either by the tribe or congressional abrogation. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991). As noted above, the Lundgrens admit that the Tribe is entitled to sovereign immunity. *See* Resp'ts' Br. at 6. They do not argue that either the Tribe or Congress waived this immunity.

there may be 'very little need for balancing [FRCP] 19(b) factors because immunity itself may be viewed as the **581 compelling factor.' " *Quileute Indian Tribe,* 18 F.3d at 1460 (quoting *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1499)). Indeed, "comity and respect for sovereign interests often outweigh all other factors in disposing of the joinder question" because " 'society has consciously opted to shield Indian tribes from suit.' " *Auto. United Trades Org.,* 175 Wash.2d at 230, 285 P.3d 52 (internal quotation marks omitted) (quoting *882 *Fluent*, 928 F.2d at 548). Courts, however, may still apply the four factors to determine whether a tribe is an indispensable party. *Quileute Indian Tribe,* 18 F.3d at 1460. These factors are:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). Analyzing and balancing these factors,[5]

[5] The majority refuses to balance the parties' interests, choosing instead to ignore three of the four factors. Majority

I would conclude that the Tribe is an indispensable party.

1. CR 19(b)(1): Prejudice

¶38 Under CR 19(b)(1), we "assess[ ] the *likelihood and significance* of any prejudice." *Auto. United Trades Org.,* 175 Wash.2d at 229, 285 P.3d 52. This factor favors the Tribe for two reasons. First, this court has found that "[i]n evaluating the extent of prejudice, we accord heavy weight to the tribes' sovereign status." *Id.* "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991) (quoting *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). "Among the core aspects of sovereignty that tribes possess—subject ... to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Bay Mills,* 134 S. Ct. at 2030 (quoting *883 *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670). That sovereign immunity against suit "is 'a necessary corollary to Indian sovereignty and self-governance.' " *Id.* (quoting *Three Affil. Tribes of Fort Berthold Reservation v. Wold*

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at 582-83; *cf. Auto United Trades Org.,* 175 Wash.2d at 229, 285 P.2d 52 ("In examining *each* of the four factors ... the court determines how heavily the factor weighs in favor of, or against, dismissal." (emphasis added)). The sole factor the majority considers conveniently favors the Lundgrens (remedy for the plaintiffs), while the three it ignores favor the Tribe (prejudice, avoiding or reducing prejudice, and adequacy of the judgment).

Eng'g, PC, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed. 2d 881 (1986)). "Where tribal sovereign immunity is concerned, 'respect for the inherent autonomy Indian tribes enjoy has been particularly enduring.' " *Auto. United Trades Org.,* 175 Wash.2d at 230, 285 P.3d 52 (quoting *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126, 1130 (11th Cir. 1999)). This factor strongly favors finding the Tribe to be an indispensable party. *See id.* at 229-31, 285 P.3d 52; *cf. Pimentel,* 553 U.S. at 867, 128 S.Ct. 2180 (discussing cases of joinder and the governmental immunity of the United States; finding under the first factor that "[t]hese cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign").

¶39 Importantly, a judgment entered in the Tribe's absence would not bind the Tribe to a determination that the Lundgrens adversely possessed the disputed property. *See Cady*, 11 Wash.2d at 8, 118 P.2d 182, (explaining parties who have a direct interest in the result of a boundary line dispute must be joined "for otherwise such persons are not bound as to any determination of the location of the boundaries"); *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (finding the tribal council to be a necessary party in a dispute over the beneficial owners of trust property because "even if the Association obtained its requested relief in this action, it would not have complete relief, since judgment against **582 the government would not bind the Council, which could

assert its right to possess the Ranch"); *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1498 (finding that in an action challenging the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority for the Quinault *884 Indian Reservation that "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation").

¶40 A determination of title to the disputed property without the Tribe being a party to the litigation casts a shadow over the Tribe's ownership. *See Quileute Indian Tribe,* 18 F.3d at 1460 (agreeing with the lower court's conclusion "that the Quinaults 'would suffer severe prejudice by not being a party to an action which could deplete the Quinaults' land interests or jeopardize their authority to govern the lands in question' " (quoting *Quileute Indian Tribe v. Lujan,* C91-558C, 1992 WL 605423, at *3 (W.D. Wash. Aug. 28, 1992) (court order)). At the same time, proceeding without the Tribe could prevent the Lundgrens from providing marketable title should they someday wish to sell their property. *See Hebb v. Severson,* 32 Wash.2d 159, 166, 201 P.2d 156 (1948) ("[M]arketable title is one that is free from reasonable doubt and such as reasonably well informed and intelligent purchasers, exercising ordinary business caution, would be willing to accept."). It thus prejudices both the Tribe and the Lundgrens. *See* CR 19(b)(1); *Pimentel,* 553 U.S. at 869, 128 S.Ct. 2180 (FRCP 19(b)'s first factor "directs consideration of prejudice both to absent persons and those who are

parties"). This factor strongly favors dismissal.

2. CR 19(b)(2): Avoiding or Reducing Prejudice

¶41 A further relevant inquiry is whether the court could lessen or avoid prejudice by "protective provisions in the judgment, by the shaping of relief, or [by] other measures." CR 19(b)(2). The Lundgrens do not propose any way the court could lessen prejudice. I am unable to imagine a remedy that would lessen the prejudice that results from quieting title to disputed property in the absence of the record title holder. The majority fails to acknowledge that we cannot require the Tribe to waive its sovereign immunity *885 to lessen prejudice. *See Confederated Tribes of Chehalis Indian Reservation,* 928 F.2d at 1500 ("the ability to intervene if it requires waiver of immunity is not a factor that lessens prejudice" (citing *Makah Indian Tribe v. Verity,* 910 F.2d 555, 560 (9th Cir. 1990)). This factor also strongly favors dismissal.

3. CR 19(b)(3): Adequacy of the Judgment

¶42 The third factor—the adequacy of a judgment rendered without the Tribe—also weighs in favor of dismissal. *See* CR 19(b)(3). "Adequacy" here " 'refers to the public stake in settling disputes by wholes, whenever possible.' " *Auto. United Trades Org.,* 175 Wash.2d at 232, 285 P.3d 52 (internal quotation marks omitted) (quoting *Pimentel,* 553 U.S. at 870, 128 S.Ct.2180). "A party who seeks to quiet title to a piece of land must join all known persons who are

claiming title in order to settle the property's ownership without additional litigation." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1621, at 334 (3d ed. 2001). As noted above, the Tribe may not be bound by a determination made in its absence, and the Lundgrens may not be able to obtain secure title absent a judgment against the Tribe. The dispute cannot be completely and definitively settled without joining the Tribe.

4. CR 19(b)(4): Remedy for the Plaintiffs

¶43 Finally, I consider whether the Lundgrens would have a remedy if this case were to be dismissed. *See* CR 19(b)(4). I agree with the majority that this factor weighs in favor of the Lundgrens. It appears that the Lundgrens do not have another judicial forum in which they may seek relief if this claim were to be dismissed for failure to join the Tribe. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe,* No. 91622-5 (June 9, 2016), at 11 min., 42 sec., *recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org (explaining that although **583 there is a tribal court, "the Upper *886 Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs"). However, the majority fails to recognize that "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe,* 910 F.2d at 560. Courts respect the

need to dismiss claims for inability to join a necessary and indispensable sovereign even when doing so denies the plaintiff any remedy. *See, e.g., Pit River,* 30 F.3d at 1102-03; *Quileute Indian Tribe,* 18 F.3d at 1460-61; *Confederated Tribes of Chehalis Indian Reservation,* 928 F.2d at 1500; *cf. Pimentel,* 553 U.S. at 872, 128 S.Ct. 2180 ("Dismissal under [FRCP] 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."). This simply underscores that dismissal under CR 19 can be a drastic remedy, albeit a proper one.

D. Balancing the CR 19(b) Factors

¶44 Balancing these four factors, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined. The most logical result is that this case should be dismissed pursuant to the Tribe's CR 12(b)(7) motion, as the Lundgrens' interest in quieting title to the disputed property yields to the Tribe's interest in maintaining its sovereign immunity. I recognize that dismissal potentially leaves the Lundgrens without recourse. Although in our most recent CR 19 and sovereign immunity case we rejected dismissal due in part to the plaintiff's inability to obtain relief, that was a unique case in which the *State* attempted to assert tribal sovereign immunity "as a sword." *Auto. United Trades Org.,* 175 Wash.2d at 233, 285 P.3d 52. We explained, "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State." *Id.* Dismissal in that case "would have the effect of

immunizing *the State,* *887 not the tribes, from judicial review." *Id.* at 234.[6] Here, the Tribe has properly asserted its sovereign immunity as a shield to protect itself from suit. I would therefore respect the Tribe's status as a sovereign and dismiss the case without reaching the merits of the Lundgrens' claims.

CONCLUSION

¶45 I would reverse the superior court. Under the analysis of CR 19, the Tribe is a necessary and indispensable party that cannot be joined because of sovereign immunity. Accordingly, the Tribe is entitled to dismissal, and I would remand for entry of an order granting the Tribe's motion to dismiss under CR 12(b)(7).

WE CONCUR:

Gordon McCloud, J.
Fairhurst, C.J.
Madsen, J.

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[6] The majority misses the mark when it asserts that the "Tribe has wielded sovereign immunity as a sword in disguise." Majority at 576. This statement rests on the mistaken premise that the Tribe seeks to take from the Lundgrens "title to property they rightfully own." *Id.* Even accepting as established the Lundgrens' claim that they adversely possessed the disputed property for decades before the Tribe took ownership, they never brought a claim of ownership until now. As a putative defendant in the Lundgrens' quiet title action, the Tribe holds record title—and the validity of that ownership is not in question absent a merits adjudication. Thus, the Tribe is asserting sovereign immunity defensively, to resist being haled into court. The situation could not be more different from the State's offensive assertion of tribal sovereign immunity in *Auto.*

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,	No. 91622-5
Respondents,	ORDER AMENDING OPINION

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

It is hereby ordered that the following changes be made to the dissenting opinion of Stephens, J., in the above entitled case (page and line references are to the dissenting slip opinion filed on February 16, 2017):

1. Beginning on page 3, line 11 and continuing through page 4, line 7, the following language is deleted:

> The majority is correct that these cases support finding "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11. If these cases represented the sole

> line of relevant authority, I might affirm. *Cf. Cass County Joint Water Res. Dist v. 1.43 Acres of Land,* 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson***,** and holding tribal sovereign immunity does not bar" a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. ex rel. Bd. Of Trs. of Internal Improvement Tr. Fund***,** 78 So.3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] However, a finding that the court has in rem jurisdiction does not answer the issues before us. None of these cases address the impact of a tribe's CR 19 claim.

2. In place of the deleted language from pages 3 and 4, the following language is inserted:

> The majority reads these cases to support its conclusion that "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the

> status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11; *cf. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land,* 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar "a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. Ex rel. Bd. of Trs. of Internal Improvement Tr. Fund,* 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] None of these cases address the impact of a tribe's CR 19 claim.

3. On page 4, last line, the following sentence is inserted at the end of footnote 1:

> Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima,* though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills.*

DATED this 8th day of June 2017.

Fairhurst, CJ
Chief Justice

APPROVED:

Madsen, J.
Gordon McCloud, J.
Stephens, J.

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents,

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

Skagit County No. 15-2-00334-1

ORDER DENYING FURTHER RECONSIDERATION

The Court considered "APPELLANT'S MOTION FOR RECONSIDERATION". The Court entered an order amending opinion in the above cause on June 8, 2017.

Now, therefore, it is hereby **ORDERED:**

That further reconsideration is denied.

Dated at Olympia, Washington this 12 -day of June 2017, 2017.

For the Court

MARY FAIRHURST,
Chief Justice
Washington State
Supreme Court