

No. II-50376-0

Court of Appeals  
DIVISION II  
STATE OF WASHINGTON

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LESLIE W. ROBBINS AND HARLENE E. ROBBINS,

APPELLANT,

v.

MASON COUNTY TITLE INSURANCE COMPANY; and

RETITLE INSURANCE COMPANY,

RESPONDENTS.

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**APPELLANTS LESLIE W. ROBBINS AND HARLENE E. ROBBINS'**  
**OPENING BRIEF**

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## I. INTRODUCTION

Leslie W. ("Bill") Robbins and Harlene E. Robbins, Appellants, submit this opening brief.

The Robbins own waterfront property in Mason County. In 1978, when they purchased the property, Mason County Title Insurance Company, now known as ReTitle Insurance Company (hereinafter the "title insurer") issued the Robbins a title insurance policy in which the title insurer agreed to defend the Robbins against any demand founded upon a claim of encumbrance or defect in the fee simple title insured by the title policy.

In July, 2016, the Squaxin Island Tribe sent the Robbins a letter demanding that the Robbins recognize the Tribe's right, asserted pursuant to the 1854 Treaty of Medicine Creek, to come upon the Robbins' property and harvest 50% of the naturally occurring shellfish. The Robbins tendered a claim for a defense against the Tribe's demand to the title insurer, but the title insurer refused to defend.

The parties filed cross-motions for summary judgment. The trial court ignored the standard applicable to refusals to defend which the Washington Supreme Court set out in *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010)

("Alea"). In *Alea*, the Supreme Court held that an insurer must resolve all doubts about both the facts and the law in favor of providing its insured a defense. Instead, the trial court, wrongfully construing the general exception contained in the title policy applicable to "public or private easements not shown by the public record" in favor of the insurer, entered judgment in favor of the title insurer.

This Court should reverse the trial court's judgment. Following *Alea*, it should hold that the title insurer, in deciding whether or not to defend, was required to resolve all doubts about either the law or the facts in favor of providing a defense. Here, the law was, to say the least, doubtful. Under the *Alea* standard, the title insurer had the obligation to defend the Robbins against the Tribe's claim.

As in *Alea*, because the title insurer did not defend, this Court should hold that the title insurer wrongfully breached its duty to defend the Robbins, resulting in an estoppel to deny coverage for any loss or damage the Robbins sustain as a result of the Tribe's demand and claim. It should remand with instructions that the trial court enter judgment accordingly. And, it should award the Robbins all the attorney's fees and costs they incurred, both below and in connection with this appeal.

## II. ASSIGNMENT OF ERROR

Did the trial court err in resolving, as a matter of law, the issues presented below, based on which it granted the title insurer's motion for summary judgment and denied the Robbins' cross-motion for partial summary judgment?

## III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does the title insurance policy issued to the Robbins generally require the title insurer to defend the Robbins against the demand the Robbins received from the Squaxin Island Tribe?

**Short answer:** The title insurer owed the Robbins an extraordinarily broad duty to defend that included the obligation to defend the Robbins against the demand the Robbins received from the Tribe.

2. Did the title insurer have the duty to resolve any doubt or ambiguity about either the facts or the law in favor of providing the Robbins a defense?

**Short answer:** Pursuant to *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010) (hereinafter "*Alea*"), and *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017) (hereinafter, "*Xia*"), the

title insurer was required to resolve any doubt or ambiguity about the facts or the law in favor of providing the Robbins a defense.

3. The title insurance policy contained a general exception for:

"Public or private easements not shown by the public record."

Given the extraordinarily broad duty to defend that the title insurer assumed by its policy, and the standard imposed on the title insurer by *Alea*, was the title insurer entitled to refuse to defend based on vague language contained in this general exception in its policy? **Short answer:** The title insurer was not entitled to rely on the vague language of a general exception as a basis for denying the Robbins a defense against the Tribe's demand.

4. In light of the extraordinarily broad duty to defend which the insurer assumed in its policy, and in light of the *Alea* standard, did the Tribe's demand fall within the title policy's general exception for "public or private easements not shown by the public record"?

A. Did the Tribe assert a claim to an "easement"?

**Short answer:** The Tribe's demand is based on a claimed aboriginal right. To the extent it is classifiable under the common law, its right is in the nature of a *profit a prendre*, not an "easement." Therefore, the general exception, which applies only to "easements," does not apply to the Tribe's demand.

B. Given that the Tribe's demand was based upon rights derived from a treaty ratified and published in Congress's official book of statutes for the purpose of providing notice of the terms of the treaty to the world, is the basis for the Tribe's demand "shown by the public record"?

**Short answer:** Because the Tribe's demand was founded on rights set forth in a treaty ratified and published by Congress in a manner providing for constructive notice to the world of the Treaty's terms, the basis for the Tribe's demand was "shown by public record." Therefore, the general exception, which applies only to "easements" not "shown by the public record," does not justify the title insurer's refusal to defend the Robbins.

#### IV. STATEMENT OF THE CASE

A. The Treaty of Medicine Creek and tribal rights retained by the Treaty.

Prior to the colonization of the Washington Territory, the aboriginal people of western Washington (often described as "Indians") held all rights to the possession and use of land located in Washington. In and around the mid-1850s, representatives of the federal government and the Territory of Washington entered into a series of treaties with these tribes. By entering into these treaties, the tribes ceded much of their aboriginal title to lands located in Washington to the United States government. However, in entering into these treaties, the tribes retained certain of their aboriginal rights. Among other rights, the tribes and each of their members retained the right to continue to go upon and take fish and shellfish from their usual and accustomed fishing places.

In particular, on December 26, 1854, Isaac I. Stevens, governor of Washington Territory and its superintendent of Indian Affairs, and representatives of nine tribes, including the Squaxin Island Tribe, entered into the Treaty of Medicine Creek. CP 64-71. See Appendix A. Pursuant to the treaty of Medicine Creek, the signatory "Confederated Tribes and Bands of Indians hereby cede, relinquish and

convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. . . ." *Id.* at 66. However, the signatory Confederated Tribes and Bands of Indians reserved "the right of taking fish at all usual and accustomed grounds and stations . . ." *Id.* at 67.

The United States Senate formally ratified this Treaty. 10 Stat. 1132 (CP 70). As provided for by federal law, after Congress's ratification of the Treaty, the Treaty was published in the official compilation of United States Statutes at Large. *Id.*

Under federal law, the effect of the publishing of the Treaty in the official compilation of United States Statutes is to provide constructive notice of the terms of the Treaty to all of the world. 1 U.S.C. §113 (CP 73). See Appendix B. See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large . . .").

B. Federal courts have construed the Treaty of Medicine Creek as reserving to each individual member of the tribe the right to a servitude over each property constituting part of the tribe's usual and accustomed fishing places, allowing the tribe to come upon the owner's property and take 50% of the naturally occurring shellfish located thereon.

Federal courts have construed the Treaty of Medicine Creek as reserving to each individual member of the tribe a servitude over each

property constituting part of the tribe's usual and accustomed fishing places, allowing the tribe to come upon the owner's property and take 50% of the naturally occurring shellfish located thereon.

1. US v. Winans: The Supreme Court holds that such treaties impose a servitude upon every piece of land constituting the aboriginal tribes' usual and accustomed hunting and fishing grounds, enforceable against all subsequent grantees.

The United States Supreme Court has been called on to analyze and describe the rights in real property retained by aboriginal peoples, such as the Squaxin Island Tribe, by treaties similar to the Treaty of Medicine Creek. In particular, in *United States v. Winans*, 198 U.S. 371 (1905), the United States Supreme Court held that the aboriginal peoples entering into such treaties retained their aboriginal rights to fish on their usual and accustomed fishing grounds. CP 74-88.

In particular, the United States Supreme Court held:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathe. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the Treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form and the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and

could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. **They reserve rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein . . .** They were given "the right of taking fish at all usual and accustomed places, and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purposes mentioned. No other conclusion would give effect to the treaty. **And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.**

198 U.S. at 381-82 (emphasis added) (CP 85-86).

For purposes of this case, *Winans* stands for the following three key facts:

- Although by the Treaty of Medicine Creek the Squaxin Island Tribe ceded ownership of substantially all of its property in Washington State to the United States, the Tribe, and each of its members, reserved its right to continue to fish at all usual and accustomed places;
- The aboriginal right retained by the Tribe predates the introduction of English common law, but is best described by reference in that law as being in the nature of a servitude that benefits each individual member of the Tribe;
- The Tribe's and its members' servitude is a right continuing against the United States and its grantees as well as against the state and its grantees.

2. The Boldt decision: The federal court confirms that the Treaty of Medicine Creek granted the Squaxin Island Tribe a servitude allowing the Tribe and its members to come upon property constituting their usual and accustomed fishing places and harvest fish.

In 1970, the United States, on its own behalf and as trustee for several Indian tribes, brought suit against the State of Washington seeking an interpretation of the treaties to protect the tribes' share of anadromous fish runs. In that case, Federal District Court Senior Judge Boldt held that these treaties entitled the tribes party to them to a share of the harvestable fish that will at some point pass through recognized tribal fishing grounds. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979) at 671 (CP 103) (describing the "Boldt" decision). The 9<sup>th</sup> Circuit Court of Appeals affirmed Judge Boldt's decision. 520 F.2d 676. The United States Supreme Court denied certiorari. 423 U.S. 1086.

Further litigation ensued. The United States Supreme Court granted review of many of the litigated matters spawned by the Boldt decision, and issued a comprehensive decision. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979) (CP 89-140). The United States Supreme Court reaffirmed its holding in *Winans*. 443 U.S. at 679-81 (CP 111-113). The Court further held that the state may not assert its regulatory

powers or state property law concepts to defeat the tribe's right to a fair share of the fish preserved to any tribe by treaty. *Id.* at 682 (CP 114). The Court further affirmed Judge Boldt's decision that a "fair" share amounted to a 50% share of the anadromous fish run. *Id.* at 685-89 (CP 117-121).

3. The Rafeedie decision: The federal court recognizes that the servitude which the Indian tribes, including the Squaxin Island Tribe, retained over all property constituting their normal and accustomed fishing places also permits the tribe, and each of its members, to come upon and harvest 50% of the naturally occurring shellfish located on such properties.

Finally, in 1994, in response to further litigation seeking to clarify the nature of the tribes' rights under the treaties with respect to shellfish, United States District Court Judge Rafeedie issued a decision extending the tribes' right to a 50% share of the fish resource to shellfish. *United States v. Washington*, 873 F.Supp. 1422 (W.D. Wash. 1994).

On appeal, the Ninth Circuit Court of Appeals largely affirmed. *United States v. State of Washington*, 157 F.3d 630 (9<sup>th</sup> Cir. 1998) (CP 141-173). In its decision, the Ninth Circuit Court of Appeals explicitly recognized prior decisions holding that the tribe had reserved its aboriginal fishing rights such that the individual members of the Indian tribes retained an aboriginal interest in the nature of a servitude in all

tidelands constituting part of the tribes' usual and accustomed fishing places (recognizing the U. S. Supreme Court's holding in *Winans* that the treaties "imposed a servitude upon every piece of land as though described therein."). *Id.* at 646 (CP 158).

The cumulative effect of these federal decisions, stretching back to 1905, is clear: the Squaxin Island Tribe has, by the Treaty of Medicine Creek and at all times since, preserved its aboriginal right to take naturally occurring fish, including shellfish, at their usual and accustomed fishing places. This is an aboriginal right which predates the introduction of English common law. Analyzing this aboriginal right, federal courts have consistently held that this right is in the nature of a servitude, benefitting each individual member of the tribe, and burdening each property constituting part of the tribe's usual and accustomed fishing places. And this right, preserved to the tribe pursuant to treaty, continues in effect against the United States and its successors, and Washington State and its successors.

C. Mason County Title Insurance Company issues the Robbins title insurance.

On or about June 12, 1978, Mason County Title Insurance Company issued a policy of title insurance to Plaintiffs Leslie ("Bill") Robbins and Harlene Robbins. CP 228-232. See Appendix C.

The policy reads, in pertinent part:

MASON COUNTY TITLE INSURANCE COMPANY

Title Insurance Building

Shelton, Washington

hereinafter called the Company, a Washington corporation, for valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, together with the persons and corporations included in the definition of "the insured" as set forth in the conditions and stipulations, against loss or damage sustained by reason of:

1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in item 2 of Schedule A; or
2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; . . .

CP 229.

Schedule A describes the insured as "Leslie W. Robbins and Harlene E. Robbins, husband and wife." CP 230. It describes the "estate, lien or interest insured" as being a "fee simple estate."<sup>1</sup> *Id.* It identifies the real estate with respect to which the policy is issued as:

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<sup>1</sup> Black's Law Dictionary defines "fee simple" as being "the broadest property interest allowed by law . . ." Black's Law Dictionary (9<sup>th</sup> ed. 2009) at 691. A person who holds in "fee simple" holds free of any encumbrance. *Wingard v. Copeland*, 64 Wash. 214, 218, 116 Pac. 670.

Tracts three (3) and four (4), Plat of Skookum Point Tracts, including tidelands of the second-class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the above described tracts, as shown on said plat, according to the recorded plat thereof in the office of the Auditor for Mason County, Washington, Volume 4 of Plats, pages 54 and 55.

TOGETHER WITH a perpetual non-exclusive easement for road purposes only, over, along and across the East ten (10) feet of the South 543.04 feet of Tract two (2), Plat of Skookum Point Tracts, according to the recorded plat thereof.

*Id.*

The title insurance policy broadly obligates the insurer to defend the Robbins against any "demand" or "legal proceeding" asserting a right inconsistent with the title as insured:

#### CONDITIONS AND STIPULATIONS

1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein; . . .

CP 232.

Nothing in the Mason County Title Insurance Company's policy of title insurance specifically mentions, or purports to except from the coverage provided by the policy, the Squaxin Island Tribe's claimed aboriginal right, retained pursuant to the Treaty of Medicine Creek, to

come upon the Robbins' property or to harvest fish or shellfish therefrom.

D. The Robbins use the property.

Since the date of issuance of this policy of title insurance, the Robbins have occupied and utilized the property<sup>2</sup> insured by the title policy. CP 224 (Robbins Declaration, ¶3-4).

In particular, the Robbins entered into contracts whereby they leased the right to harvest shellfish from their property to private commercial shellfish harvesters, in exchange for which they received payment from said shellfish harvesters. CP 224-25 (Robbins Declaration, ¶5-7).

E. The Squaxin Island Tribe asserts the Robbins' property constitutes a part of its usual and accustomed fishing places as described in the Treaty of Medicine Creek, and therefore asserts a right, pursuant to the Treaty of Medicine Creek, to come upon the Robbins property and harvest shellfish therefrom.

In July 2016, the Squaxin Island Tribe notified the Robbins, through the new shellfish harvester with whom the Robbins had recently contracted, of the Tribe's claim that the Robbins' property constituted part of the Tribe's usual and accustomed fishing places within the meaning of the Treaty of Medicine Creek, and demanded

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<sup>2</sup> The Robbins gifted Tract 3 to their son. CP 224 (Robbins Dec., ¶4).

that the Robbins recognize the right of the members of the tribe, pursuant to the Treaty of Medicine Creek, to come upon, harvest, and remove 50% of the shellfish in naturally occurring shellfish beds on the Robbins' property. CP 225, 241-42 (Robbins Dec., ¶ 10 and Ex. D).

F. Robbins' tender to the title insurer and the title insurer denies the Robbins a defense against Tribe's claim.

The Robbins notified Mason County Title Insurance Company of their receipt of the Squaxin Island Tribe's demand, and asked Mason County Title Insurance Company for defense against the Tribe's demand, and for recovery under the title insurance policy for all loss or damage sustained as a result of this demand. CP 225, 236-42 (Robbins Dec., ¶9 and 10 and Exs. C and D). See Appendix D.

In response, Mason County Title Insurance Company refused to defend the Robbins against the Tribe's demand, and denied any obligation or liability to the Robbins to pay for any loss or damage the Robbins sustained as a result of the demand. CP 225-26, 243-45 (Robbins Dec., ¶11 and Ex. E). See Appendix E.

The Robbins subsequently notified Mason County Title Insurance Company and the Washington State Insurance Commissioner of their intent to bring a claim against Mason County Title Insurance Company under the Washington Insurance Fair Conduct Act, RCW

48.30.015, unless within 20 days Mason County Title Insurance Company had acted to resolve the Robbins' claim to the satisfaction of the Robbins. CP 226, 246-51 (Robbins Dec., ¶12 and Ex. F). See Appendix E.

G. Lawsuit.

Having been denied a defense against the Tribe's demand, the Robbins filed a complaint against the title insurer in Mason County Superior Court. CP 315-345.

The parties filed cross-motions for summary judgment. CP 252-73, 274-81. The Superior Court heard oral argument on January 30, 2017. CP 4-5. On May 8, 2017, the Superior Court entered an order granting the insurer's motion for summary judgment, and denying the Robbins' motion for summary judgment. CP 4-5.

The Robbins timely filed a notice of appeal. CP 346-49. See Appendix G.

## V. STANDARD OF REVIEW

The trial court decided this case based solely on a written record in response to cross-motions for summary judgment. Therefore, the Court's review is de novo. *Quinault Indian Nation v. Imperium Terminal Services, LLC*, 187 Wn.2d 460, 468 ¶14, 387 P.3d 670, 675

(2017) citing Michak v. Transnation Title & Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The Court should construe all facts, and all inferences to be drawn from those facts, in favor of the Robbins, as the parties against whom the trial court entered summary judgment. *Michak*, 148 Wn.2d at 794.

## VI. ARGUMENT

### A. The insurer breached its duty to defend the Robbins against the Tribe's claim.

This is a duty to defend case. The Robbins tendered a demand that the title company defend them against the Tribe's claim, and, despite the very broad defense obligation the title insurer assumed in its policy, the title company refused to provide the Robbins a defense. CP 225-26; 236-45.

Under Washington law, in responding to a tender of defense, the insurer must resolve any uncertainty about the facts or the law in favor of defending the insured. An insurer which refuses to defend its insured must be able to point to **clear** legal authority—such as directly on-point Washington case law—that justifies its refusal to defend in order to avoid being held to have wrongfully refused to defend. *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6,

229 P.3d 693 (2010). See also *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017).

Here, the title policy does not permit the insurer to refuse to defend based on the claimed applicability of general exceptions. And even if it did, the general exception for "public and private easements not disclosed by the public records" relied on by the insurer does not **clearly** justify its refusal to defend the Robbins, as *Alea* requires.

First, the general exception applies only to "easements" and the Squaxin Island Tribe did not claim an "easement." Second, the Squaxin Island Tribe's demand was based on treaty rights of "public record."

1. The title policy imposes an extraordinarily broad duty to defend upon the insurer.

This title insurer is subject to the same rules regarding its duty to defend as apply to all insurers. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 471 at ¶10, 209 P.3d 859 (2009) (because the business of title insurance, like other forms of insurance business, is also one affected by the public interest, "Our considerable body of case law concerning an insurer's duty to defend therefore applies.").

The title insurance policy imposes an extraordinarily broad duty to defend on the insurer:

The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein; . . .

CP 232 (Robbins Declaration, Exhibit A, (Title Insurance Policy, Condition ¶ 1)). Appendix C.

The policy provides that “the Company . . . will, at its own expense, defend the insured . . .” *Id.* There is nothing discretionary about this language. See *Batdorf v. Transamerica Title Ins. Co.*, 41 Wash. App. 254, 702 P.2d 1211 (1985) (holding policy with this exact language imposes a duty on title insurer to defend); *Nautilus Inc. v. Transamerica Title Ins. Co.*, 13 Wash. App. 345, 534 P.2d 1388 (1975) (*idem*).

Unlike many other forms of insurance, which only require an insurer to provide a defense against "suits," this policy explicitly requires the insurer to defend the insured with respect to both "demands" and "legal proceedings." When an insurance policy requires an insurer to defend, not merely against "suits," but also against pre-lawsuit claims or demands, the insurer must step in and provide the insured with a defense in response to such a claim or demand even prior to the institution of formal legal proceedings. *United Services Auto. Ass'n v. Speed*, 179 Wn.App 184, 195 ¶18, 317

P.3d 532 (2014). The title insurer had a duty to defend the Robbins against the Squaxin Island Tribe's demand here.

Second, the policy requires that a demand merely "be founded upon a claim of title, encumbrance or defect." CP 232. Again, this language is extraordinarily broad. It encompasses any claim inconsistent with the policy's explicit affirmation that the Robbins held "fee simple" title to the property—the most absolute right in property allowed by law. Therefore, it extends to the Squaxin Island Tribe's claim here.

Third, this language requires the insurer to defend against any claim of title, encumbrance or defect "which existed or is claimed to have existed prior to the date hereof." CP 232. Again, this extraordinarily broad language makes it clear that the insurer has a duty to defend any claim based on a right **which the claimant asserts** pre-existed the date of issuance of the policy—regardless of the actual facts. The Squaxin Island Tribe's claim—based on aboriginal rights preserved by the 1854 Treaty of Medicine Creek—meets that test here.

Finally, the duty to defend attaches to any demand based on a "claim of title, encumbrance or defect" that "is not set forth or excepted

herein." CP 232. The Squaxin Island Tribe's demand is not "set forth" in this policy. Nor is it specifically "excepted herein."

2. Under Washington law an insurer asked to defend its insured must resolve all uncertainty about either the facts or the law in favor of providing its insured a defense.

Under Washington law an insurer requested to defend its insured must resolve all uncertainty about either the facts or the law in favor of providing its insured a defense.

An insurer's duty to defend is very broad. *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010). "The duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint." *Alea*, 168 Wn.2d at 404, ¶6 citing *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, ¶16, 164 P.3d 454 (2007) (emphasis in original). Therefore, if "there is any reasonable interpretation of the facts **or the law** that could result in coverage, the insurer must defend." *Alea*, 168 Wn.2d at 405, ¶ 7, citing *Truck Ins. Exch. v. Van Port Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added).

An insurer may not put its own interests ahead of its insured's by refusing to defend when the applicable facts or law are at all disputed or unclear. *Alea*, 168 Wn.2d at 405, ¶6 citing *Mut. of Enumclaw Ins.*

*Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008); 408 ¶12 ("[A]ny uncertainty works in favor of providing a defense to an insured").

If the insurer is unsure of its obligation to defend in a given instance, they may defend under a reservation of rights, while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel.

*Id.* “[I]nsurers may not desert policy holders and allow them to incur substantial legal costs while waiting for an indemnity determination.” *Alea*, 168 Wn.2d at 405, ¶7, citing *Truck*, 147 Wn.2d at 761.

The Washington Supreme Court's decision in *Alea* illustrates how these standards work. In *Alea*, a claimant/patron had an altercation with another patron at a nightclub. 168 Wn.2d at 402, ¶2. This led the nightclub to eject both of them. *Id.* While they were just outside the nightclub, the other patron shot the claimant nine times. *Id.* The claimant staggered back into the nightclub. *Id.* The nightclub's manager instructed its employees to take the wounded claimant outside, where they dumped the claimant on the sidewalk. *Id.* at 402-403, ¶ 2.

The claimant sued the nightclub. *Id.* at 403, ¶3. He alleged both that the nightclub had failed to protect him from the shooter, and that

the nightclub had negligently exacerbated his injuries by dumping him on sidewalk. *Id.*

The nightclub tendered a claim for a defense against the claimant's lawsuit to its insurer. *Id.* The insurer refused to defend, citing an exclusion in its policy for injuries "arising out of" assault or battery. *Id.* The nightclub then sued its insurer. *Id.*, ¶4.

In examining the state of the law, the Washington Supreme Court first noted that "Washington courts have yet to consider the factual scenario before us today." *Id.* at 408, ¶ 12. The Court also noted that cases from other jurisdictions came to differing conclusions about whether an insurer had a duty to defend in the factual scenario presented. *Id.* at 407-08, ¶ 11-12.

Because Washington's law was not settled, the Court held that the insurer owed a duty to defend:

The lack of any Washington case directly on point and a recognized distinction between pre-assault and post-assault negligence in other states presented a legal uncertainty with regard to [the insurer's] duty. Because any uncertainty works in favor of providing a defense to an insured, [the insurer's] duty to defend arose when [the claimant] brought suit against [the nightclub].

*Alea*, 168 Wn.2d at 408, ¶ 12, citing *Truck Ins. Exch.*, 147 Wn.2d at 760.

Further, the Washington Supreme Court held the insurer's breach of the duty to defend had occurred in bad faith. The Court reasoned:

An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. This test is in the disjunctive.

*Alea*, 168 Wn.2d 412-413, ¶19 (case citations omitted). The *Alea* court held that the insurer's refusal to defend the nightclub met this test:

[The insurer] failed to follow well established Washington State law giving the insured the benefit of any doubt as to the duty to defend and failed to avail itself of legal options such as proceeding under a reservation of rights or seeking declaratory relief. [The insurer's] failure to defend based upon a questionable interpretation of law was unreasonable and [the insurer] acted in bad faith as a matter of law. *Id.* at 413.

The Court rejected the insurer's argument that it was entitled to justify its refusal to defend based on its own interpretation of case law:

[The insurer] is essentially arguing that an insurer may rely on its own interpretation of case law to determine its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations of the complaint. Here, [the insurer] did the opposite—it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

*Alea*, 168 Wn.2d at 412, quoting *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 60, 164 P.3d 454 (2007) (emphasis in original).

Finally, the Court in *Alea* noted that the remedy for the insurer's unreasonable breach of its duty to defend was coverage by estoppel. *Alea*, 168 Wn.2d at 411-12, ¶ 18, quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998). Pursuant to that remedy, the Court held the insurer to be estopped from asserting any coverage defenses, such that the policy covered all the claims asserted by the injured claimant in full. *Id.*

The Washington Supreme Court recently reaffirmed its commitment to the rule set forth in *Alea* in a case decided in late April 2017. *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017). In *Xia*, the Plaintiff fell ill shortly after moving into a new home she had recently purchased. 188 Wn.2d at 175, ¶3. An investigation determined that an exhaust vent attached to the hot water heater had not been installed correctly and was discharging carbon monoxide directly into the confines of the basement room. *Id.*

The Plaintiff made a claim for her injuries against the entity that had constructed and sold her the home. The construction company tendered a claim for defense and indemnity to its insurer. Based on the

pollution exclusion in its policy, the insurer refused to either defend or indemnify the construction company. *Id.* at 175-76, ¶4.

After citing *Alea*, the Washington Supreme Court stated that "an insurer takes a **great risk** when it refuses to defend on the basis that there is no reasonable interpretation of the facts or the law that could result in coverage." *Id.* at 182, ¶23 (emphasis added). The Court agreed with the insurer that "the plain language of its pollution exclusion applied to the release of carbon monoxide into [the Plaintiff's] home." *Id.* at 187, ¶34.

Nevertheless, the Court held that under Washington's "efficient proximate cause rule," because negligent installation of the exhaust vent led to the polluting event, the policy nevertheless arguably provided coverage. Although the Washington Supreme Court acknowledged that no Washington court had ever previously applied the "efficient proximate cause rule" to provide coverage for an excluded polluting event, the Court held that since it was possible that the insurer could reasonably anticipate that a court might do so, and in light of *Alea's* requirement that the insurer apply any uncertainty about either the facts **or the law** in favor of providing a defense, the insurer should have provided the construction company a defense against the

Plaintiff's claim. *Id.* at 189, ¶39. The Court held that the insurer had "wrongfully refused to defend its insured," such that Plaintiff was entitled to "judgment as a matter of law with regard to her breach of contract **and bad faith claims.**" *Id.* at 189-90, ¶39, 41 (emphasis added). *Xia* shows the Washington Supreme Court meant what it said in *Alea*: an insurer must provide its insured a defense when there is **any** uncertainty under either the facts or the law about whether its policy provides coverage, and the insurer acts in bad faith when it refuses to do so.

*Alea*, and now *Xia*, provide the standard this Court must apply to this case in examining the insurer's refusal to defend the Robbins against the Squaxin Island Tribe's claim. Just like the insurer in *Alea* and in *Xia*, the title insurer here took "a great risk" when it refused to defend the Robbins on the basis that no reasonable interpretation of the facts or the law could result in coverage.

Under *Alea/Xia*, the title insurer must establish that either directly on point Washington Case law supports the reasons that the title insurer gave for its refusal to defend the Robbins from the Tribe's claim, or that the weight of authority from other jurisdictions establish a clear rule that Washington Courts would apply here. But, if there is

any doubt or uncertainty about the law, the Court, following *Alea/Xia*, should hold that the title insurer breached its duty to defend the Robbins against the Squaxin Island Tribe's claim, and hold that the title insurer's refusal to defend the Robbins was unreasonable and in bad faith.

Here, the title insurer has not made the required showing. This case is factually unique. There is no case law, either in Washington or elsewhere, addressing the issue of whether title insurance policies in general (much less title insurance policies with extraordinarily insured-friendly terms like this policy) exclude claims like that asserted by the Squaxin Island Tribe.

As in *Alea/Xia*, **the law is not clearly established.** Accordingly, following *Alea/Xia*, the Court should hold that the insurer owed, and wrongfully breached, a duty to defend the Robbins from the Tribe's demand, such that the insurer is estopped to deny coverage.

3. The title policy does not permit the insurer to refuse to defend based on the claimed applicability of general exceptions.

The title policy does not permit the insurer to refuse to defend based on the claimed applicability of general exceptions.

The policy requires the title insurer to defend the insured with respect to any demand founded upon an encumbrance or defect that is

not set forth or excepted herein. The extraordinarily broad duty to defend allows the insurer to refuse to defend only if the insurer has *specifically* set forth the "claim of title, encumbrance or defect" subsequently asserted adverse the insured's fee simple interest, or if the insurer has *specifically* excepted the "claim of title, encumbrance or defect." Especially as construed in light of *Alea/Xia*, it does not allow the insurer to refuse to defend based on the claimed applicability of a vaguely-worded general exception.

At best, the policy is ambiguous on this point. Ambiguities in insurance policies must be construed in favor of the insured and against the insurer. *Alea*, 168 Wn.2d at 406, ¶9; *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014). Based on the extraordinarily broad language of the policy, the Court should hold that the title insurer simply was not authorized to refuse to defend based on a vaguely worded general exception.

The existence of ambiguity here is highlighted by the fact that this title insurer knew how to write an exclusion specifically applicable to tribal claims when it intended to exclude them. For example, this title insurer issued a title policy to a different insured which contained the following exclusion:

[Y]ou are not insured against loss, costs, attorney's fees and expenses resulting from:

...

(11) Indian Treaty or aboriginal rights, Indian tribal codes or regulations, including, but not limited to, fishing, harvesting of shellfish, commerce or navigation, including easements or equitable servitudes.

CP 49.

The title insurance company thus knew perfectly well how to effectively exclude claims based on tribal rights when the insurer wished to do so. The fact that the policy which the insurer issued to the Robbins contains no such similar language reinforces the conclusion that the insurer intended this policy to cover such claims, or, at the least, that the policy is ambiguous.

The Robbins made these arguments in their original Motion for Summary Judgment. CP 263-64 (Robbins Motion for Partial Summary Judgment, Section 2 at p. 12-13). The title insurer did not respond to them below. See CP 27-45. The title insurer's failure to respond is a tacit admission that the Robbins' argument is correct.

4. The general exception for "public or private easements not shown by the public record" does not apply.

In any event, even if a title insurer can generally refuse to defend based on the claimed applicability of a general exception, the

general exception for “public or private easements not disclosed by the public records” does not **clearly** justify its refusal to defend, as *AlealXia* require.

There are two reasons why this general exception does not **clearly** apply. First, the general exception applies only to "easements," and the Squaxin Island Tribe did not assert rights based on an "easement." Second, the Squaxin Island Tribe’s claim is expressly based on the Congressionally-ratified and published Treaty of Medicine Creek, which treaty constitutes a “public record.”

a. The Squaxin Island Tribe has not asserted it possesses an "easement."

First, the general exception applies only to "easements." But the Squaxin Island Tribe has not asserted it possesses an "easement" and did not found its demand upon "easement" rights.

Under Washington law, the term which properly describes the non-possessory rights that third parties may hold in real property as against someone who, in the absence of such rights would be described as holding title in “fee simple,” is a "servitude." *Lake Limerick Country Club Ass’n. v. Hunt Mfd. Homes*, 120 Wn.App. 246, 253, 84 P.3d 295 (2004).

Washington law recognizes three separate forms of "servitudes:" easements; covenants; and *profits a prendre*. *Id.*

Washington law defines an "easement" as:

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

*Beebe v. Swerda*, 58 Wn.App 375, 381, 793 P.2d 442 (1990), quoting Blacks Law Dictionary 599 (4<sup>th</sup> ed. 1968). See also *State ex rel. Shorett v. Blue Ridge Club, Inc.*, 22 Wn.2d 487, 494, 156 P.2d 667 (1945).

Washington law defines a "*profit a prendre*" as:

The right . . . to remove some substance from the land.

17 Stoebuck and Weaver, Wash. Prac.: Real Estate: Property Law, §2.1 at 80 (2004). See also *Layman v. Ledgett*, 89 Wn.2d 906, 577 P.2d 970 (1978) (describing a "*profit a prendre*" as a right to take the profits of the land by entering onto it and removing something from the land); Black's Law Dictionary (9<sup>th</sup> ed. 2009) at 1330 (defining *profit a prendre* as "A right or privilege to go on another's land and take away something of value from its soil or from the products of its soil.").

Consistent with the United State Supreme Court's decision in *Winans*, federal courts have interpreted the Treaty of Medicine Creek

as reserving to each of the members of the signatory tribes, including the members of the Squaxin Island Tribe, the aboriginal right, in the nature of a servitude, to take 50% of the naturally occurring shellfish from the tribe's usual and accustomed fishing places. *United States v. State of Washington*, 157 F.3d 630 (9<sup>th</sup> Cir. 1998).

In making its demand that the Robbins recognize the Tribe's right, preserved by the Treaty of Medicine Creek, to go upon the Robbins' land and harvest shellfish, the Squaxin Island Tribe has never described the tribe's right as being based on an "easement." And the tribe's right does not fit the definition of an "easement."

The Tribe's demand is based upon the aboriginal right of each tribal member to come upon any property constituting part of the Tribe's usual and accustomed fishing places and harvest shellfish therefrom. The Treaty reserves this aboriginal right to each and every tribal member. It is a personal right, not a right associated with the ownership of a parcel of land. Compare *Beebe v. Swerda*, supra. (easements are typically associated with the ownership of another parcel of land). For this reason, the tribe's aboriginal right, to the extent it can be classified at all, is properly classified as a "*profit a prendre*," not an "easement."

In addition, the Tribe's demand was that the Robbins recognize the Tribe's right to come upon their property and harvest shellfish—a product of the property's soil—therefrom. The Tribe's claim is not merely one of use. It is to take and carry off the products of the soil. This is characteristic of a *profit a prendre*, not an easement.

Here, the general exclusion which the title company relies upon does not apply to all "servitudes." It applies only to "**easements.**" The policy does not define the word "easement." That term must therefore be construed narrowly, in favor of the insured.

The trial court, citing the Restatement, Third, of Property (Servitudes) (2000) §1.2, held that a *profit a prendre* is a form of an easement. There are multiple reasons why the trial court erred in rejecting the Robbins' argument based on that rationale.

First, the trial court was required to apply Washington law. No Washington court has ever held that a *profit a prendre* is a form of an easement. To the contrary, this court has squarely distinguished between easements and *profits a prendre*, holding that easements, *profits a prendre*, and covenants all constitute distinct forms of "servitudes." *Lake Limerick Country Club Ass'n. v. Hunt Mfd. Homes*, 120 Wn.App. 246, 253, 84 P.3d 295 (2004).

Second, as the United States Supreme Court has squarely held, the right reserved to tribal members pursuant to the Treaty of Medicine Creek is the reservation of an aboriginal right, by which the Indians retained rights that are not strictly speaking classifiable under English common law. *United States v. Winans*, 198 U.S. 371 (1905) (CP 74-88). Federal courts have used the word "servitude" to refer to these retained aboriginal rights, without purporting to classify the Indians' rights further. *Id.* See also *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. at 684 (CP 116) (explicitly rejecting the application of common law "property law concepts" to the Indians' rights).

While the fishing rights reserved to the tribes by the Treaty of Medicine Creek appear to most closely resemble a common law *profit a prendre*, they are in fact a *sui generis* aboriginal right. They are not an "easement." Even the title insurer recognized this distinction when it issued policies containing an exclusion separately applicable to "Indian treaty or aboriginal rights" rights, thereby implicitly recognizing that these rights are distinctly different from common law easement rights. CP 49.

Third, the title insurer issued its policy to the Robbins in 1978. CP 230. The title insurer's policy could not incorporate distinctions adopted by a Restatement that was not promulgated until 22 years later. *Koop v. Safeway Stores*, 66 Wn.App. 149, 155, 831 P.2d 777 (1992) (court's duty in construing an insurance contract is to ascertain the intent of the parties at the time of contracting); *Clements v. The Traveler's Indemnity Co.*, 63 Wn.App. 541, 545, 821 P.2d 517 (1991) (*idem*).

Fourth, the Restatement of Servitudes itself expressly recognizes that American courts have **not** accepted the Restatement authors' earlier proposals to merge the term "easement" and "profit." Restatement, Third, of Property (Servitudes) §1.2, comment e at p. 15-16 (2000). The Restatement further recognizes that profits are significantly different from and more burdensome than an easement because profits not only entail the right to come onto another's land, but also confer "the right to remove something from the land." *Id.*

Finally, the trial court simply ignored the rule that undefined terms in insurance policies must be strictly interpreted in favor of the insured. See, e.g., *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 82, 882 P.2d 703 (1995). The title insurer, in

issuing this policy, chose to use the word "easement" without defining it. The title insurer therefore authorized any court construing the policy to construe the word "easement" narrowly, in a manner that provides the greatest amount of coverage to its insureds. *Alea*, 168 Wn.2d at 406, ¶9. Therefore, the Court should interpret the word "easement" in as narrow a manner as is reasonable, because doing so limits the scope of the general exception and provides the greatest amount of coverage under the policy to its insured.

Here, if the title insurer wished to include profits within the term "easement," it could and should have defined the word "easement" in its policy. Because the title insurer chose not to do so, the resulting ambiguity must be construed in favor of coverage for the Robbins as insureds.

In sum, in issuing its decision, the trial court simply ignored the numerous uncertainties that surrounded the title insurer's use of the undefined word "easement." And it ignored the Washington Supreme Court's squarely on-point decision in *Alea* which requires an insurer, in case of any doubt about either the facts or the law, to defend its insured. This Court should reverse the trial court, hold that the title insurer

wrongfully and in bad faith breached its duty to defend, such that it is estopped to deny coverage.

For this first, separate, independent reason, the Court should hold that the title insurer could not rely on this general exception as a basis for justifying its refusal to defend.

b. Because it is described in the Treaty of Medicine Creek, as published in Congress's official book of Statutes, the servitude claimed by the Tribe is "disclosed by the public records."

The general exception for "public and private easements not disclosed by the public records" does not apply to the Squaxin Island Tribe's demand for a second, separate and independent reason. Even if the demand could be characterized as based on an "easement," it is described by the Treaty of Medicine Creek, as published in Congress's official book of Statutes and is therefore "disclosed by the public records."

Here, the Tribe held an aboriginal right to take shellfish from the Tribe's usual and accustomed places, and the tribe preserved this right by entering into the Treaty of Medicine Creek. *Winans*, 198 U.S. at 381-82. Congress ratified that treaty and had it published in its official book of Statutes. 10 Stat. 1132. The effect of the publication of the Treaty in the federal statute book is to give notice of the Treaty and its terms to all the

world. 1 U.S.C. §113. See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large . . ."). The Treaty is therefore of "public record."

In response the title insurer pointed to the definition of "public record" contained in the fine print of its policy. CP 232. The policy defines "public record" as "records which, under the recording laws, impart constructive notice with respect to said real estate." Robbins Dec., Ex. A (Conditions, ¶ 4). However, the policy does not define the phrase "recording laws."

While there is no Washington case law squarely addressing the issue of whether a federal treaty or law constitutes a "public record" "under the recording laws" for the purpose of such a title policy exclusion, the Alaska Supreme Court has held that a Federal Public Land Order, published in the Federal Register but not recorded, constitutes a "public record" "under the recording laws" for the purpose of an identically-worded title insurance policy. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (1976). See Appendix H.

*Hahn* involved a title insurance policy that contained a general exception limiting the policy's coverage to claims disclosed by public

records. Like the policy in this case, the policy defined "public records" as records which, "under the recording laws, impart constructive notice with respect to said real estate." *Id.* at 144.

The title insurance policy insured certain property owned by the Hahns. *Id.* at 143. The policy contained a special exception excepting a right of way 33 feet wide. *Id.*

Prior to the issuance of the policy, the federal government had issued Public Land Order No. 601 increasing the width of the right of way to 50 feet, and filed the Public Land Order with the Office of the Federal Register, which published it. *Id.* at 144. However, the Public Land Order was not recorded under the Alaska Recording Act. *Id.*

After the title policy was issued, the State of Alaska took title from the federal government. *Id.* Relying on the Public Land Order, the state built a 50-foot wide roadway over the Hahns' property. *Id.*

The Hahns sued their title insurer seeking to recover for the loss caused by the 17 feet by which the road actually built exceeded the right of way specifically excepted in the policy. *Id.* The Alaska Supreme Court held that the title policy provided coverage.

The Alaska Supreme Court first noted the "paucity of case authority" addressing this issue. *Id.*, citing Patton on Land Titles, Volume

II, Ch. 12, §65 p. 575. The Court then noted that a federal law made documents published in the Federal Register a matter of public record. *Id.* at 145. Therefore, the Alaska Supreme Court concluded that a Public Land Order published in the Federal Register was a "public record" in the usual meaning of that phrase. *Id.*

However, the Alaska Supreme Court noted that the title policy, like the one issued to the Robbins here, contained a specific definition of "public records." *Id.* at 145. The Alaska Supreme Court characterized the portion of the definition referring to "recording laws" as "the only part of the definition which is not clearly in favor of the Hahns' construction." *Id.* Nevertheless, the Court construed this language in favor of coverage:

The title company would have us construe the phrase as meaning "the recording laws of Alaska," but nowhere is the definition so limited. The most that may be said in support of the title company's position is that the language might be ambiguous, in which event it must be construed in favor of the Hahns. We see no reason why the term does not incorporate federal recording laws insofar as they are applicable to Alaska property.

*Id.*

The Alaska Supreme Court reasoned that:

Black's Law Dictionary, revised 4<sup>th</sup> Ed., defines the verb, "record", as ". . . To transcribe a document . . . in an official volume for the purpose of giving notice of the same, of furnishing authentic evidence, and for

preservation." This is exactly what is accomplished by publication in the Federal Register.

*Id.* at 146.

The Alaska Supreme Court further noted:

Our construction of the policy has the additional function of requiring the companies to furnish that degree of protection which a purchaser of a title insurance policy is likely to expect. As we read the exception in the policy of "public or private easements not disclosed by the public records", it is intended primarily to protect against unrecorded easements or rights of way acquired by prescription which could only be discovered by physical inspection of the land itself. The title companies do not undertake such a burden and therefore should not be responsible for failure to note such encumbrances.

*Id.* at 147. The Alaska Supreme Court summed up its decision as follows:

By this opinion we do not require title companies to insure against all defects which would be revealed by all documents kept by public bodies. Title companies are chargeable, however, with revealing defects ascertainable from documents published under statutory authority for the purpose of giving constructive notice in places, including Alaska.

*Id.*

The Alaska Supreme Court subsequently reaffirmed this decision in response to a title insurer's request that the Court reconsider it. *State of Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714, 725 (1993).

Here, there is no Washington case squarely addressing this issue. Indeed, as the court in *Hahn* noted, there appears to be no cases, other than *Hahn* itself, which have **ever** addressed this issue. There is therefore **no clear legal rule**.

But the Alaska Supreme Court's decision in *Hahn* at least strongly suggests how the Washington Supreme Court would address and resolve this issue if it were ever presented for decision to the Washington Supreme Court. The Treaty of Medicine Creek, a document published in Congress's official compilation of Statutes, for the specific purpose of giving notice of those statutes to the world, constitutes a "public record."

In its Memorandum Decision, the trial court suggested that *Hahn* was not on point. The trial court erred.

Here, just as in *Hahn*, Congress published the Treaty of Medicine Creek in the United States Statutes at Large. 10 Stat. 1132. Here, just like federal law in *Hahn* made the publication of documents in the Federal Register a matter of public record, 557 P.2d at 145, both the federal statute, and on-point case law, provide that the publication of this treaty in Congress's official Book of Statutes has the effect of providing constructive notice of the terms of the treaty. 1 U.S.C §113; *Federal Crop Ins. Corp v. Merrill*, 332 U.S. 380, 384-85 (1947).

Thus, *Hahn*—the only court case that either party cited to the trial court relevant to this issue—is directly on point. At the very least, *Hahn* demonstrates that the applicability of the general exception to this case was, at the very best, unclear. Under the standard adopted by the Washington Supreme Court in *Alea/Xia*, because the law was, at the very least, unclear, the title insurer had the duty to defend the Robbins against the Squaxin Island Tribe's claim.

The title insurer should have provided the Robbins a defense, and wrongfully breached its obligation to defend when it refused to do so.

B. Because the title insurer wrongfully breached its duty to defend, following *Alea*, the Court should hold that the insurer is estopped to deny coverage.

Finally, because the title insurer wrongfully breached its duty to defend, following *Alea*, the Court should hold that the insurer is estopped to deny coverage.

In *Alea*, the court held that "well established Washington state law giv[es] the insured the benefit of any doubt as the duty to defend." 168 Wn.2d at 413. In *Alea*, the Washington Supreme Court held that what an insurer may not do is "put its own interests ahead of its insured" by denying "a defense based on an arguable legal interpretation of its own policy." *Id.* The Washington Supreme Court squarely held that an

insurer's refusal to defend based on a merely "arguable interpretation of its own policy" is unreasonable, and that an insurer who acts in this manner acts "in bad faith" as a matter of law. *Id.* The Washington Supreme Court held that an insurer asked by its insured to defend has the option of protecting both its own interests, and the interest of its insured by providing a defense and then, either by "proceeding under a reservation of rights or seeking declaratory relief." *Id.*

As the *Alea* court recognized, under Washington law, when an insurer refuses in bad faith to defend its insured, the insured is deemed to be harmed by the refusal, and the appropriate remedy is coverage by estoppel. *Alea*, 168 Wn.2d at 411-412, quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998). See also *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017). Pursuant to these decisions, the Court should hold the title insurer here is estopped to deny coverage, such that the insurer is liable to the Robbins for all loss or damage the Robbins have sustained as a result of the Squaxin Island Tribe's claim.

C. The Court should award the Robbins the attorney's fees they have incurred, both below and in connection with this appeal.

Assuming the Court holds that the title insurer was in fact required to defend the Robbins against the Squaxin Island Tribe's demand, the

Court should in addition award the Robbins the attorney's fees they have incurred, both below, and in connection with this appeal.

This is an action in which the Robbins seek to compel the insurer to provide the coverage it promised to them under its title insurance policy. An insured who prevails in a legal action against its insurer seeking to compel the insurer to provide coverage as promised by the insurer's policy is entitled to an award of the insured's reasonable attorney's fees. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Assuming the Robbins prevail on this appeal, they are entitled to an award of reasonable attorney's fees, both below and on appeal, pursuant to this rule.

In addition, if the Court agrees that the title insurer ignored the standards imposed on insurers under *Alea/Xia*, the title insurer necessarily refused to defend in bad faith. See *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017). Therefore, the title insurer unreasonably denied the claim within the meaning of the Washington Insurance Fair Conduct Act, RCW 48.30.015(1). It follows that the Robbins are entitled to an award of their reasonable attorney's fees under that Act. See RCW 48.30.015(3). The Robbins are entitled to

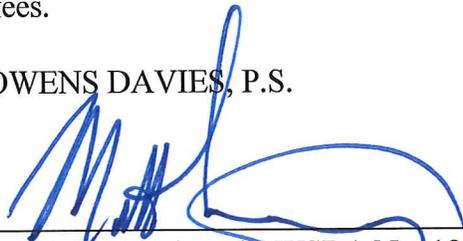
an award of their reasonable attorney's fees, both below and on appeal, for this second, independent reason.

In sum, for either or both bases cited, if the Robbins prevail, the Court should award them the attorney's fees that they have incurred, both below and on appeal.

## VII. CONCLUSION

The trial court's decision should be reversed. This Court should reverse and remand with instructions to the trial court that it grant the Robbins' motion for partial summary judgment, declare the title insurer to be estopped to deny coverage, and allow the Robbins to establish the amount of their claim and to pursue remedies under *Olympic Steamship* and/or the Insurance Fair Conduct Act. And, the Court should award the Robbins all of their attorney's fees.

OWENS DAVIES, P.S.



---

Matthew B. Edwards, WSBA No. 18332  
Attorney for Appellants Leslie W. Robbins  
and Harlene E. Robbins

### VIII. APPENDIX

A	Treaty of Medicine Creek, 10 Stat. 1132	CP 65-71
B	1 U.S.C. §113	CP 73
C	Title Insurance Policy	CP 228-232
D	Robbins' Tender of Defense	CP 237-238
E	Insurer's Refusal to Defend	CP 244-245
F	Superior Court Order	CP 4-5
G	Notice of Appeal	CP 346-49
H	<i>Hahn v. Alaska Title Guaranty Co.</i> , 557 P.2d 143 (1976)	CP 200-204

# Appendix A

BY AUTHORITY OF CONGRESS.

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THE

Statutes at Large and Treaties

OF THE

UNITED STATES OF AMERICA.

FROM

DECEMBER 1, 1851, TO MARCH 3, 1855,

Arranged in Chronological Order;

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE  
SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE MINOT, ESQ.,

COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed are hereby recognized, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1848.

VOL. X.

BOSTON:

LITTLE, BROWN AND COMPANY.

1855.

CP 65  
Appendix A-1

## FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Title.

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth-day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steil-acoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation; on behalf of said tribes and bands, and duly authorized by them.

Cession to United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

Reservation for said tribes.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be

set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

Removal there-  
to.Roads may be  
constructed.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Payments for  
said cession.

How applied.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Expense of re-  
moval, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Removal from  
said reservation.

Ante, p. 1044.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities not  
to be taken for  
debts.

Stipulations re-  
specting conduct  
of Indians.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Intemperance.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Schools, shops,  
&c.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Slaves to be  
freed.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Trade out of  
the limits of the  
U. S. forbidden.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Foreign Indians  
not to reside on  
reservation.

Treaty, when  
to take effect.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]

Governor and Superintendent Territory of Washington.

QUI-EE-METL,  
SNO-HO-DUMSET,  
LESH-HIGH,

his x mark. [L. S.]  
his x mark. [L. S.]  
his x mark. [L. S.]

SLIP-O-ELM,	his x mark.	[L. S.]
KWI-ATS,	his x mark.	[L. S.]
STEE-HIGH,	his x mark.	[L. S.]
DI-A-KEH,	his x mark.	[L. S.]
HI-TEN,	his x mark.	[L. S.]
SQUA-TA-HUN,	his x mark.	[L. S.]
KAHK-TSE-MIN,	his x mark.	[L. S.]
SONAN-O-YUTL,	his x mark.	[L. S.]
KL-TEHP,	his x mark.	[L. S.]
SAHL-KO-MIN,	his x mark.	[L. S.]
T'BET-STE-HEH-BIT,	his x mark.	[L. S.]
TCHA-HOOS-TAN,	his x mark.	[L. S.]
KE-CHA-HAT,	his x mark.	[L. S.]
SPEE-PEH,	his x mark.	[L. S.]
SWE-YAH-TUM,	his x mark.	[L. S.]
CHAH-ACHSH,	his x mark.	[L. S.]
PICH-KEHD,	his x mark.	[L. S.]
S'KLAH-O-SUM,	his x mark.	[L. S.]
SAH-LE-TATL,	his x mark.	[L. S.]
SEE-LUP,	his x mark.	[L. S.]
E-LA-KAH-KA,	his x mark.	[L. S.]
SLUG-YEH,	his x mark.	[L. S.]
HI-NUK,	his x mark.	[L. S.]
MA-MO-NISH,	his x mark.	[L. S.]
CHEELS,	his x mark.	[L. S.]
KNUTCANU,	his x mark.	[L. S.]
BATS-TA-KOBE,	his x mark.	[L. S.]
WIN-NE-YA,	his x mark.	[L. S.]
KLO-OUT,	his x mark.	[L. S.]
SE-UCH-KA-NAM,	his x mark.	[L. S.]
SKE-MAH-HAN,	his x mark.	[L. S.]
WUTS-UN-A-PUM,	his x mark.	[L. S.]
QUUTS-A-TADM,	his x mark.	[L. S.]
QUUT-A-HEH-MTSN,	his x mark.	[L. S.]
YAH-LEH-CHN,	his x mark.	[L. S.]
TO-LAHL-KUT,	his x mark.	[L. S.]
YUL-LOUT,	his x mark.	[L. S.]
SEE-AHTS-OOT-SOOT,	his x mark.	[L. S.]
YE-TAHKO,	his x mark.	[L. S.]
WE-PO-IT-EE,	his x mark.	[L. S.]
KAH-SLD,	his x mark.	[L. S.]
LA'H-HOM-KAN,	his x mark.	[L. S.]
PAH-HOW-AT-ISH,	his x mark.	[L. S.]
SWE-YEHM,	his x mark.	[L. S.]
SAH-HWILL,	his x mark.	[L. S.]
SE-KWAHT,	his x mark.	[L. S.]
KAH-HUM-KLT,	his x mark.	[L. S.]
YAH-KWO-BAH,	his x mark.	[L. S.]
WUT-SAH-LE-WUN,	his x mark.	[L. S.]
SAH-BA-HAT,	his x mark.	[L. S.]
TEL-E-KISH,	his x mark.	[L. S.]
SWE-KEH-NAM,	his x mark.	[L. S.]
SIT-OO-AH,	his x mark.	[L. S.]
KO-QUEL-A-CUT,	his x mark.	[L. S.]
JACK,	his x mark.	[L. S.]
KEH-KISE-BE-LO,	his x mark.	[L. S.]
GO-YEH-HN,	his x mark.	[L. S.]

## TREATY WITH NISQUALLYS, &amp;c. DEC. 26, 1854.

SAH-PUTSH,  
WILLIAM,his x mark. [L. S.]  
his x mark. [L. S.]

Executed in the presence of us:—

M. T. SIMMONS,  
*Indian Agent.*JAMES DOTY,  
*Secretary of the Commission.*C. H. MASON,  
*Secretary Washington Territory.*W. A. SLAUGHTER,  
*1st Lieut. 4th Infantry.*JAMES McALISTER,  
E. GIDDINGS, JR.,  
GEORGE SHAZER,  
HENRY D. COCK,  
S. S. FORD, JR.,  
JOHN W. McALISTER,  
CLOVINGTON CUSHMAN,  
PETER ANDERSON,  
SAMUEL KLADY,  
W. H. PULLEN,  
P. O. HOUGH,  
E. R. TYRALL,  
GEORGE GIBBS,  
BENJ. F. SHAW, *Interpreter,*  
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

“IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,  
“March 3, 1855.

Consent of  
Senate.

“Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Hom-amish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

“Attest:

ASBURY DICKINS,  
“Secretary.”

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

TREATY WITH NISQUALLYS, &c. DEC. 26, 1854.

1137.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L. s.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:  
W. L. MARCY, *Secretary of State.*

VOL. X. TREAT.—143

# Appendix B

section 21 of Title 2, The

This section is popularly Case-Zablocki Act.

-204, Title I, § 139, Dec. 22, at. 1347, provided that:

ction on use of funds.—If onal agreement, whose text o be transmitted to the Com- unt to the first sentence. of ) of section 112b of Title 1, s Code (commonly referred se-Zablocki Act) [subsec. (a) on], is not so transmitted -day period specified in that n no funds authorized to be . by this or any other Act ilable after the end of that od to implement that agree- ie text of that agreement has mitted.

ive date.—Subsection (a) ect 60 days after the date of : this Act [Dec. 22, 1987] and uring fiscal years 1988 and

itions. ority to Make International acy and Authority to Con- y Into Force of International

SEARCH

s of this volume.

ve Procedure Act (APA), to r Force's agreement with for- nent to beddown training air- ment at air base in United ve of the Case-Zablocki s did not have injury that

was within zone of interests sought to be protected by Act, which was meant to mediate between foreign relations powers

of Congress and the President. Lee v. U.S. Air Force, C.A.10 (N.M.) 2004, 354 F.3d 1229. United States ⇨ 28

§ 113. "Little and Brown's" edition of laws and treaties; slip laws; Treaties and Other International Acts Series; admissibility in evidence

The edition of the laws and treaties of the United States, published by Little and Brown, and the publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist of the United States, and the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence of the several public and private Acts of Congress, and of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

(July 30, 1947, c. 388, 61 Stat. 636; July 8, 1966, Pub.L. 89-497, § 1, 80 Stat. 271; Oct. 19, 1984, Pub.L. 98-497, Title I, § 107(d), 98 Stat. 2291.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1947 Acts. House Report No. 251, see 1947 U.S. Code Cong. Service, p. 1511.
1966 Acts. Senate Report No. 1310, see 1966 U.S. Code Cong. and Adm. News, p. 2473.
1984 Acts. Senate Report No. 98-373 and House Conference Report No. 98-1124, see 1984 U.S. Code Cong. and Adm. News, p. 3865.

Amendments
1984 Amendments. Pub.L. 98-497 substituted "Archivist of the United States" for "Administrator of General Services".

1966 Amendments. Pub.L. 89-497 made slip laws and the Treaties and Other International Acts Series competent legal evidence of the several acts of Congress and the treaties and other international agreements contained therein.

Effective and Applicability Provisions
1984 Acts. Amendment by Pub.L. 98-497 effective April 1, 1985, see section 301 of Pub.L. 98-497, set out as a note under section 2102 of Title 44, Public Printing and Documents.

LIBRARY REFERENCES

American Digest System
Evidence ⇨39.
Treaties ⇨7, 8.
Key Number System Topic Nos. 157, 385.

Research References

ALR Library
17 ALR, Fed. 725, Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad.
Encyclopedias
29A Am. Jur. 2d Evidence § 1199, Presumptions Under State or Federal Acts.

# Appendix C

5-14-77

POLICY OF TITLE INSURANCE

MASON COUNTY TITLE INSURANCE COMPANY

Title Insurance Building  
Shelton, Washington

hereinafter called the Company, a Washington corporation, for valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, together with the persons and corporations included in the definition of "the insured" as set forth in the conditions and stipulations, against loss or damage sustained by reason of:

1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in item 2 of Schedule A; or
2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; or
3. Any defect in the execution of any instrument shown in item 3 of Schedule A, or priority, at the date hereof, over any such instrument, of any lien or encumbrance not shown in Schedule B;

provided, however, the Company shall not be liable for any loss, damage or expense resulting from the refusal of any person to enter into, or perform, any contract respecting the estate, lien or interest insured.

The total liability is limited to the amount shown in Schedule A, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder.

In witness whereof, MASON COUNTY TITLE INSURANCE COMPANY has caused this policy to be authenticated by the facsimile signature of its President, but this policy is not valid unless attested by the Secretary or an Assistant Secretary.

MASON COUNTY TITLE INSURANCE COMPANY

By *[Signature]*

President

Attest

*[Signature]*

Assistant Secretary

CP 228  
Appendix C-1

EXHIBIT

A

SCHEDULE A

), 42134  
JUNE 12, 1978 at 8:00 A.M.

AMOUNT \$ 89,000.00  
PREMIUM \$ 351.00

- 1. INSURED  
LESLIE W. ROBBINS and HARLENE E. ROBBINS, husband and wife.
- 2. TITLE TO THE ESTATE, LIEN OR INTEREST INSURED BY THIS POLICY IS VESTED IN  
ELMER RANDALL IRWIN, as his sole and separate estate.
- 3. ESTATE, LIEN OR INTEREST INSURED  
FEE SIMPLE ESTATE.

For value received, Pioneer National Title Insurance Company, a California corporation,  
 hereby certifies that the foregoing contract of insurance.  
 BY: *[Signature]*  
 John S. Williamson, Vice Pr.

4. DESCRIPTION OF THE REAL ESTATE WITH RESPECT TO WHICH THIS POLICY IS ISSUED

IN MASON COUNTY, WASHINGTON.

Tracts three (3) and four (4), Plat of Skookum Point Tracts, including tidelands of the second-class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the above described tracts, as shown on said plat, according to the recorded plat thereof in the office of the Auditor for Mason County, Washington, Volume 4 of Plats, pages 54 and 55.

TOGETHER WITH a perpetual non-exclusive easement for road purposes only, over, along and across the East ten (10) feet of the South 543.04 feet of Tract two (2), Plat of Skookum Point Tracts, according to the recorded plat thereof.

SCHEDULE B

DEFECTS, LIENS, ENCUMBRANCES AND OTHER MATTERS AGAINST WHICH THE COMPANY DOES NOT INSURE:  
SPECIAL EXCEPTIONS

- 1. Real Estate Taxes levied for the last half of the year 1978, unpaid; original amount for said last half - \$409.63. Tray 26, page 819.
- 2. The within described tidelands of the second-class being subject to statutory provisions, provisions of Chapter 312 of the Session Laws of 1927, and the provisions, exceptions and reservations as expressed in the deeds from the State of Washington under which title to said tidelands is claimed, recorded in Volume 110 of Deeds, page 58, and Volume 110 of Deeds, page 467, records of Mason County, Washington, wherein the grant- or saves, excepts and reserves all oils, gases, coal, ores, minerals and fossils together with the right to enter upon said lands for the

no rights shall be exercised under this reservation until provision has been made by the State, its successors or assigns, for full payment of all damages sustained by the owner by reason of such entering; and the right of the State of Washington, or any grantee or lessee thereof, to acquire the right-of-way over said second class tidelands for lumbering and/or logging railroads, private railroads, skid roads, flumes, water courses or other easements for the purpose of and to be used in the transportation and moving of timber, stone, minerals or other products from other lands, upon paying reasonable compensation.

3. Any prohibition or limitation on the use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any waters which may cover the land.
4. The within described tidelands being subject to the terms and conditions of Release and Agreement of Settlement from Clarence H. Shively and Edna R. Shively, his wife, to the Rainier Pulp and Paper Company, a corporation, (now Rayonier Incorporated, a corporation), dated May 5, 1931, recorded May 18, 1931, in Volume 55 of Deeds, page 483, under Auditor's File No. 66962, releasing said corporation from all claims for damages, etc.; reference being hereby made to the record of said instrument for a particular statement of the terms and conditions thereof.
- 5\* As to Tract three (3): Subject to perpetual non-exclusive easement for road purposes only, over, along and across the West ten (10) feet of the South 543.04 feet thereof.
6. Contract of Sale, Elmer Randall Irwin, vendor, to Leslie W. Robbins and Harlene E. Robbins, husband and wife, vendees, recorded June 9, 1978, on Reel 189, Frame 918, under Auditor's File No. 345711; said contract providing for the sale and purchase of the within described real estate upon the terms and conditions set forth in said contract; Real Estate Excise Tax paid, Receipt No. 57910.
7. NONE.

#### GENERAL EXCEPTIONS

1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose; public or private easements not disclosed by the public records; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or liens under the Workmen's Compensation Act not disclosed by the public records; water rights or matters relating thereto; any service, installation or construction charges for sewer, water or electricity.
2. Exceptions and reservations in United States Patents; right of use, control or regulation by the United States of America in the exercise of powers over navigation; limitation by law or governmental regulation with respect to subdivision, use, enjoyment or occupancy; defects, liens, encumbrances, or other matters created or suffered by the insured; rights or claims based upon instruments or upon facts not disclosed by the public records but of which rights, claims, instruments or facts the insured has knowledge.
3. General taxes not now payable; matters relating to special assessments and special levies, if any, preceding the same becoming a lien.
4. Consumer credit protection, truth-in-lending, or similar law, or the failure to comply with said law or laws.

1.1

(End of Schedule B)

CONDITIONS AND STIPULATIONS

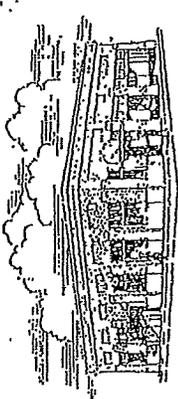
1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein, reserving, however, the option at any time of settling the claim or paying the amount of this policy in full. In case any such demand shall be asserted or any such legal proceedings shall be instituted the insured shall at once give notice thereof in writing to the Company at its home office and, if the insured is a party to such legal proceedings, secure to the Company, within ten days after service of first process upon the insured, the right to defend such legal proceedings in the name of the insured so far as necessary to protect the insured, and the insured shall render all reasonable assistance in such defense. If such notice shall not be given, or the right to defend secured, as above provided, then all liability of the Company with regard to the subject matter of such demand or legal proceedings, and any expense incident thereto, shall terminate; provided, however, that failure to give such notice shall in no case prejudice the claim of the insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice.

2. In the event of final judicial determination by a court of competent jurisdiction, under which the estate, lien or interest insured is defeated or impaired by reason of any adverse interest, lien or encumbrance not set forth or excepted herein, claim may be made as herein provided. A statement in writing of any loss or damage, for which it is claimed the Company is liable, shall be furnished to the Company at its home office within sixty days after such loss or damage shall have been ascertained. No right of action shall accrue with respect thereto until thirty days after such statement shall have been furnished and no recovery shall be had unless an action shall have been commenced thereon within one year after the expiration of said thirty days. Any rights or defenses of the Company against a named insured shall be equally available against any person or corporation who shall become an insured hereunder as successor of such named insured.

3. The Company may at any time pay this policy in full, whereupon all liability of the Company shall terminate. Every payment made by the Company, exclusive of costs incurred by the Company as an incident to defense or settlement, of claims hereunder, shall reduce the liability of the Company by the amount paid. The liability of the Company shall in no case exceed the actual loss of the insured and costs which the Company is obligated to pay. When the Company shall have paid a claim hereunder it shall be subrogated to all rights and remedies which the insured may have against any person or property with respect to such claim, or would have if this policy had not been issued, and the insured shall transfer all such rights to the Company. If the payment made by the Company does not cover the loss of the insured, such subrogation shall be proportionate. Whenever the Company shall be obligated to pay a claim under the terms of this policy by reason of a defect in the title to a portion of the area described herein, liability shall be limited to the proportion of the face amount of this policy which the value of the defective portion bears to the value of the whole at the time of the discovery of the defect, unless liability is otherwise specifically segregated herein. If this policy insures the lien of a mortgage, and claim is made hereunder, the Company may pay the entire indebtedness and thereupon the insured shall assign to the Company the mortgage and the indebtedness secured thereby, with all instruments evidencing or securing the same, and shall convey to the Company any property acquired in full or partial satisfaction of the indebtedness, and all liability of the Company shall thereupon terminate. If a policy insuring the lien of a mortgage is issued simultaneously with this policy and for simultaneous issue premium as provided in rate schedule, any payment by the Company on said mortgage policy with respect to the real estate described in Schedule A hereof shall reduce pro tanto the liability under this policy. All actions or proceedings against the Company must be based on the provisions of this policy. Any other action or actions or rights of action that the insured may have or may bring against the Company with respect to services rendered in connection with the issuance of this policy, are merged herein and shall be enforceable only under the terms, conditions and limitations of this policy.

4. The following terms when used in this policy mean: (a) "named insured": the persons and corporations named as insured in Schedule A of this policy; (b) "the insured": such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage shown in Item 3 of Schedule A, (2) any owner or successor in ownership of any such indebtedness who acquires title to the real estate described in Item 4 of Schedule A, or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any governmental agency or instrumentality which insures or guarantees said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said real estate as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c) "date hereof": the exact day, hour and minute specified in Schedule A; (d) "public records": records which, under the recording laws, impart constructive notice with respect to said real estate; (e) "home office": the office of the Company at the address shown herein; (f) "mortgage": mortgage, deed of trust, trust deed, or other security instrument described in Schedule A.

MASON COUNTY  
TITLE  
INSURANCE  
COMPANY



TITLE INSURANCE  
BUILDING  
SHELTON, WASHINGTON

# Appendix D

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OWENS  DAVIES  
ATTORNEYS AT LAW

Matthew B. Edwards  
medwards@owensdavies.com

*Street Address*  
1115 West Bay Drive, Suite 302  
Olympia, Washington 98502

*Phone (360) 943-8320*  
*Facsimile (360) 943-6150*  
*www.owensdavies.com*

July 8, 2016

Mason County Title  
PO Box 278  
Shelfon, WA 98584

Re: Leslie and Harlene Robbins—claim on title insurance policy—Squaxin Island Tribe shellfish rights

Dear Mason County Title:

I represent Leslie W. and Harlene E. Robbins. On June 12, 1978, you issued a policy of title insurance insuring their interest in the following described real property:

Tracts three (3) and four (4), Plat of Skookum Point Tracts, including tidelands of the second-class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the above described tracts, as shown on said plat, according to the recorded plat thereof in the office of the Auditor for Mason County, Washington, Volume 4 of Plats, pages 55 and 55.

TOGETHER WITH a perpetual non-exclusive easement for road purposes only, over, along and across the East ten (10) feet of the South.543.04 feet of Tract two (2), Plat of Skookum Point Tracts, according to the recorded plat thereof.

A copy of the title policy is attached as Exhibit A.

Unaware of any tribal interest in shellfish located on our tidelands, the Robbins leased the right to harvest shellfish to various shellfish growers. Between September 11, 2005 and September 10, 2015, the Robbins leased the shellfish to Dave R. and Patti A. Puhn. A copy of the tidelands lease is attached as Exhibit B.

In February 2013, the Squaxin Island Tribe notified the Robbins of their intent to survey the shellfish populations on their land. Exhibit C. This was the Robbins first notice that the Tribe *might* be asserting some interest in that property. However, the 2013 letter did not advise the Robbins exactly what, if any, interest the Tribe was asserting.

*A Legacy of Wisdom Heard*

Mason County Title  
July 8, 2016  
Page 2

After the shellfish lease with the Puhns expired, the Robbins negotiated with Dale A. Hall of Arcadia Shellfish Company, LLC to lease the right to harvest shellfish on the tidelands to him. Mr. Hall apprised the Robbins that in order to obtain harvest site certification, he was required to submit documentation to the Squaxin Island Tribe. The Robbins at this time learned that the Tribe was in fact asserting an interest in the shellfish on their property. Exhibits D-F.

Acting on behalf of the Robbins, Mr. Hall has attempted to negotiate an agreement with the Tribe regarding its claimed interest in the property. A draft agreement, which I understand the Tribe is prepared to sign, is attached to this letter as Exhibit G.

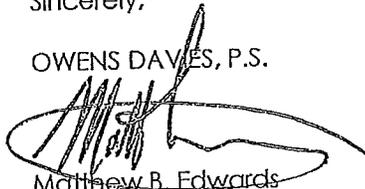
On behalf of the Robbins, I hereby tender and assert a claim against Mason County Title Insurance Company and demand a defense pursuant to the policy of title insurance it issued to the Robbins against the claims asserted by the Tribe. The policy insured the Robbins fee simple interest in the property. There is no exception to the policy's insurance of their title that would exclude coverage for the claim of the Tribe's asserted treaty right, based on events occurring well prior to the inception of the coverage provided by the policy, to harvest shellfish from the insured property.

I have advised the Robbins that they are not to take action with respect to the proposed 2016 tideland harvest plan until they have received a response from you, their title insurer, to this letter. Therefore, I request that you address and respond to this letter as promptly as possible.

Please do not hesitate to contact me if you require further information.

Sincerely,

OWENS DAVIES, P.S.



Matthew B. Edwards

MBE/ad  
Enclosures

# Appendix E

RETITLE INSURANCE COMPANY  
P. O. BOX 278  
SHELTON, WA 98584  
(360) 427-8088

August 9 2016

OWENS DAVIES, P.S.  
Attorneys at law  
Attn: Matthew Edwards  
1115 West Bay Drive, Suite 302  
Olympia, WA 98502

RE: Mason County Title Insurance Policy No. 42134 (Insured are Leslie W. Robbins and Harlene E. Robbins)

Dear Mr. Edwards:

This letter is a formal response to your submittal of a claim against the above-described policy of title insurance involving the Squaxin Island Tribe having rights to shellfish harvesting on tidelands owned by Leslie W. Robbins and Harlene E. Robbins.

As we understand the insured's claim, the issue involves Squaxin Island Tribe having the right to enter the property, the right of possession to conduct shellfish surveys, and the right to a percentage of the shellfish harvest. These fishing rights were granted by the Federal government to the tribe in the Medicine Creek Treaty, according to the Squaxin Island Website, and clarified in the federal decisions rendered in the 1990s, specifically in 1994 and 1998.

The right to enter and the right of possession were not established or recorded with the any of the public records in Mason County at the time that the policy in question was issued (June 12, 1978). Under the GENERAL EXCEPTIONS to the Policy No. 42134, there is specific language under paragraph No. 1 that excludes from policy coverage "public or private easements not disclosed by the public records; rights or claims of persons in possession, or claiming to be in possession not disclosed by the public records". These rights are defined, by any standard legal definition, as "easements". These "easements" were not recorded in the public records of Mason County.

Section 4 (d) of the Conditions and Stipulations of the policy define public records as: "...records which, under the recording laws, impart constructive notice with respect to said real estate;"

A treaty between the federal government and a Native American Indian tribe is not a record that imparts constructive notice pursuant to Washington law.

The lands under the waters of Hammersley Inlet where these tidelands are located are regulated by the State of Washington and the federal government. Under GENERAL EXCEPTIONS to Policy No. 42134, there is specific language under paragraph No. 2 that excludes from policy coverage "limitation by law or governmental regulation with respect to subdivision, use, enjoyment or occupancy". The federal government, through the federal court system and the resulting shellfish decisions rendered during the 1990s, exercised its power to regulate the harvesting of shellfish on tidelands under Puget Sound, and who, specifically, has the right to cultivate and harvest shellfish on these tidelands.

The 1854 treaty between the federal government and the Indian Tribes is not within the scope of this policy. The 2007 settlement agreement between the Indian Tribes, the state of Washington and the shellfish growers, which resulted in an "implementation plan" for harvesting of shellfish, flowed from the 1994 federal judicial decision, both of which occurred after the date of the policy. The policy does not provide coverage for matters which are created after the date the policy was issued.

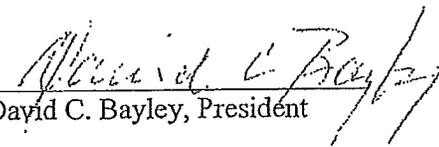
As a result, we respectfully decline to accept the defense of the claims asserted by the Squaxin Island Tribe, as outlined in your July 8, 2016 letter to us.

I would also like to indicate that in 1994, and thereafter, continuing to the present, significant litigation and implementation of shellfish harvesting has taken place between the United States on behalf of Northwest tribes against the State of Washington and many shellfish growers, including a number of growers located in Mason County. There has been widespread publicity regarding this litigation. We understand that the insured has been leasing their tidelands to shellfish growers for at least ten (10) years.

Please be advised that "Under Conditions and Stipulations" of the title policy, paragraph No. 1 requires notification of a claim, and we reserve the right to assert a limitation or bar to that claim based upon any actual prejudice resulting from the insured's failure to give timely notice of the claim.

Sincerely

**Retitle Insurance Company (formerly known as Mason County Title Insurance Company)**

By:   
David C. Bayley, President

Cc: Leslie and Harlene Robbins  
183 SE Morgan Road  
Shelton, WA 98584

# Appendix F

REC'D & FILED  
MASON CO. WA

2017 MAY -8 P 1:32

SHARON K. FRODOZ, CLERK

BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON  
FOR MASON COUNTY

LESLIE W. AND HARLENE E. ROBBINS,  
husband and wife,

Plaintiffs,

v.

MASON COUNTY TITLE INSURANCE  
COMPANY; and RETITLE INSURANCE  
COMPANY,

Defendants.

NO. 16-2-00686-1

ORDER GRANTING INSURER'S MOTION  
FOR SUMMARY JUDGMENT AND  
DENYING THE ROBBINS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT

THIS MATTER came on regularly for hearing on January 30, 2017.

The Court considered the following pleadings:

1. The Insurer's Motion for Summary Judgment;
2. Affidavit of Dennis Pickard;
3. The Robbins' Motion for Partial Summary Judgment;
4. Declaration of Leslie W. ("Bill") Robbins;
5. Declaration of Matthew Edwards in Support of Motion for Partial Summary Judgment;
6. Response to Plaintiffs' Cross-Motion for Partial Summary Judgment;
7. Declaration of David Bailey;
8. Declaration of Stephen Whitehouse.
9. Leslie W. ("Bill") and Harlene E. Robbins' Response to the Defendant's Motion for Summary Judgment;

ORDER GRANTING INSURER'S MOTION FOR SUMMARY  
JUDGMENT AND DENYING THE ROBBINS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT - 1 -

OWENS DAVIES, P.S.  
1115 West Bay Drive, Suite 302  
Olympia, Washington 98502  
Phone: (360) 943-8320  
Facsimile: (360) 943-6150

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- 10. Declaration of Matthew Edwards in Support of Leslie W. ("Bill") and Harlene E. Robbins' Response to the Defendant's Motion for Summary Judgment;
- 11. Reply Brief in Support of the Robbins Motion for Partial Summary Judgment; and
- 12. Defendant's Reply to Plaintiffs' Response for Summary Judgment.

In addition, the Court considered other pleadings on file, and the oral argument of counsel.

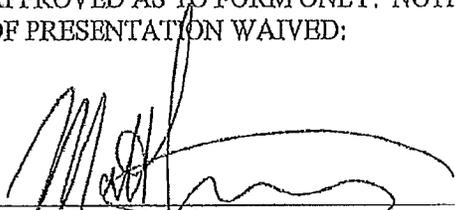
Based on the foregoing, the Court ORDERS as follows:

- 1. The Insurer's Motion for Summary Judgment is GRANTED;
- 2. Leslie W. ("Bill") Robbins and Harlene E. Robbins Motion for Partial Summary Judgment is DENIED;
- 3. The Court hereby DISMISSES all claims asserted by the Plaintiffs against Defendants with prejudice;
- 4. This constitutes the Court's FINAL JUDGMENT in this matter.

DATED this 8 day of May, 2017. **TOM A. SHELDON**

TOM A. SHELDON  
Judge

APPROVED AS TO FORM ONLY: NOTICE OF PRESENTATION WAIVED: PRESENTED BY:



Matthew B. Edwards, WSBA No. 18332  
Attorney for Plaintiffs Leslie W. ("Bill")  
Robbins and Harlene E. Robbins



Steven Whitehouse  
Attorney for Defendants Mason County Title  
Insurance Company/Retitle Insurance  
Company

# Appendix G

*Handwritten signature*

16-2-00686-1  
NACA  
Notice of Appeal to Court of Appeals  
1310169



REC'D & FILED  
MASON CO. WA.

2017 MAY -9 A 11: 14 (4)

SHARON K. FOGO CO. CLERK

BY *[Signature]* DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY	
LESLIE W. AND HARLENE E. ROBBINS, husband and wife,	Plaintiffs,
v.	
MASON COUNTY TITLE INSURANCE COMPANY; and RETITLE INSURANCE COMPANY,	Defendants.

NO. 16-2-00686-1  
NOTICE OF APPEAL TO COURT OF  
APPEALS, DIVISION II

Leslie W. and Harlene E. Robbins, Petitioner herein, seeks review by the designated appellate court of the Order Granting the Defendant's Motion for Summary Judgment, and Denying Plaintiff's Motion for Partial Summary Judgment, entered May 8, 2017.

A copy of the Decision appealed from is attached to this Notice.

DATED this 8<sup>th</sup> day of May, 2017.

OWENS DAVIES, P.S.

*[Signature]*

---

Matthew B. Edwards, WSBA No. 18332  
Attorneys for Plaintiffs, Leslie W. Robbins  
and Harlene E. Robbins

*32*

OWENS DAVIES, P.S.  
1115 West Bay Drive, Suite 302  
Olympia, Washington 98502  
Phone: (360) 943-8320  
Facsimile: (360) 943-6150

DECLARATION OF SERVICE

I, Matthew Edwards, certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on May 8, 2017, I caused service of the foregoing document to the following individuals in the manner described below:

Stephen Whitehouse  
P.O. Box 1273  
601 W. Railroad Ave., Ste. 300  
Shelton, WA 98584

*Via ABC Legal Services*

DATED this 8<sup>th</sup> day of May, 2017, at Olympia, Washington.



Matthew Edwards

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REC'D & FILED  
MASON CO. WA

2017 MAY -8 P 1:32

SARAH K. FRODOA, CLERK

BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY
LESLIE W. AND HARLENE E. ROBBINS, husband and wife,  <div style="text-align: right;">Plaintiffs,</div> v. MASON COUNTY TITLE INSURANCE COMPANY; and RETITLE INSURANCE COMPANY,  <div style="text-align: right;">Defendants.</div>

NO. 16-2-00686-1

ORDER GRANTING INSURER'S MOTION  
FOR SUMMARY JUDGMENT AND  
DENYING THE ROBBINS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT

THIS MATTER came on regularly for hearing on January 30, 2017.

The Court considered the following pleadings:

1. The Insurer's Motion for Summary Judgment;
2. Affidavit of Dennis Pickard;
3. The Robbins' Motion for Partial Summary Judgment;
4. Declaration of Leslie W. ("Bill") Robbins;
5. Declaration of Matthew Edwards in Support of Motion for Partial Summary Judgment;
6. Response to Plaintiffs' Cross-Motion for Partial Summary Judgment;
7. Declaration of David Bailey;
8. Declaration of Stephen Whitehouse.
9. Leslie W. ("Bill") and Harlene E. Robbins' Response to the Defendant's Motion for Summary Judgment;

ORDER GRANTING INSURER'S MOTION FOR SUMMARY  
JUDGMENT AND DENYING THE ROBBINS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT - 1 -

OWENS DAVIES, P.S.  
1115 West Bay Drive, Suite 302  
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- 11. Reply Brief in Support of the Robbins Motion for Partial Summary Judgment; and
- 12. Defendant's Reply to Plaintiffs' Response for Summary Judgment.

In addition, the Court considered other pleadings on file, and the oral argument of counsel.

Based on the foregoing, the Court ORDERS as follows:

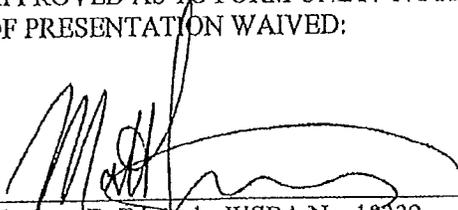
- 1. The Insurer's Motion for Summary Judgment is GRANTED;
- 2. Leslie W. ("Bill") Robbins and Harlene E. Robbins Motion for Partial Summary Judgment is DENIED;
- 3. The Court hereby DISMISSES all claims asserted by the Plaintiffs against Defendants with prejudice;
- 4. This constitutes the Court's FINAL JUDGMENT in this matter.

DATED this 8 day of May, 2017. **TOM A. SHELDON**

**TOM A. SHELDON**

Judge

APPROVED AS TO FORM ONLY: NOTICE PRESENTED BY;  
OF PRESENTATION WAIVED:

  
 Matthew B. Edwards, WSBA No. 18332  
 Attorney for Plaintiffs Leslie W. ("Bill")  
 Robbins and Harlene E. Robbins

151  
 Steven Whitehouse  
 Attorney for Defendants Mason County Title  
 Insurance Company/Retitle Insurance  
 Company

ORDER GRANTING INSURER'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE ROBBINS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 2 -

OWENS DAVIES, P.S.  
1115 West Bay Drive, Suite 302  
Olympia, Washington 98502  
Phone: (360) 943-8320  
Facsimile: (360) 943-6150

# Appendix H

Cite as, Alaska, 557 P.2d 143

crimes. *State v. Armantrout*, 483 P.2d 696, 698 (Alaska 1971). When this offense has been committed under aggravated circumstances we have sustained sentences calling for a substantial period of incarceration. *Stevens v. State*, 514 P.2d 3, 6 (Alaska 1973) (10 years); *Nielsen v. State*, 492 P.2d 122 (Alaska 1971).

Reviewing this sentence under the standards set forth in *Donlum v. State*, 527 P.2d 472 (Alaska 1974), *Asitonia v. State*, 508 P.2d 1023 (Alaska 1973), and *State v. Chaney*, 477 P.2d 441 (Alaska 1970), we are not convinced that the trial court was clearly mistaken in imposing the sentence upon appellant.

AFFIRMED.



Wolfgang HAHN and Janet Elaine Hahn,  
Appellants,

v.

ALASKA TITLE GUARANTY  
COMPANY, Appellee.

No. 2801.

Supreme Court of Alaska.

Dec. 6, 1976.

Action was brought against a title insurance policy to recover damages for a federal road right-of-way to the extent that the right-of-way was greater than that reflected in the title insurance policy. The Third Judicial District Court, James K. Singleton, J., granted summary judgment to the title company, and plaintiffs appealed. The Supreme Court, Boochever, C. J., held that a public land order filed with the office of the Federal Register constitutes a record which, under recording laws, imparts constructive notice with respect to the property in question, and that the title insurance company therefore was liable.

Reversed and remanded.

1. Insurance ⇨ 146.7(5, 6)

Provisions of coverage should be construed broadly, while exclusions are interpreted narrowly against insured.

2. Insurance ⇨ 146.3(1), 146.7(1)

Insurance policies are to be looked upon as contracts of adhesion for purpose of determining rights of parties thereto; result is to construe policy so as to provide that coverage which layman would reasonably have expected given his lay interpretation of policy terms.

3. Insurance ⇨ 426.1

For purpose of provision of title insurance policy limiting coverage to claims disclosed by "public records," defined in policy as "records, which under the recording laws, impart constructive notice with respect to said real estate," public land order filed with office of Federal Register constituted such "public record" and title insurance company was therefore liable under policy to extent that federal roadway right-of-way across insured land exceeded that indicated in policy. Federal Register Act, 44 U.S.C.A. §§ 1505(a)(1), 1507; AS 21.66.200.

See publication Words and Phrases for other judicial constructions and definitions.

Lee S. Glass, of Johnson, Christenson, Shamberg & Link, Inc., Anchorage, for appellants.

John P. Irvine, Anchorage, for appellee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, ERWIN and BURKE, J.

BOOCHEVER, Chief Justice.

Wolfgang and Janet Elaine Hahn purchased a title insurance policy from Alaska Title Guaranty Company. The policy, which was issued in 1969, indicated that there was a reservation for a right-of-way for roadway and public utility purposes over the east 33 feet of the premises as contained in the United States patent.

Subsequently, the State of Alaska claimed an easement 50 feet in width, 17 feet more than the 33 foot easement indicated in the policy, along the easterly boundary of the premises. The State claimed the easement under Public Land Order No. 601, issued by the Secretary of Interior on August 10, 1949<sup>1</sup> and filed with the office of Federal Register on August 15, 1949 in Washington, D.C. The public land order was not recorded under the Alaska Recording Acts, and neither the order nor the easement created by it is referred to in the original patent issued on June 28, 1961. The order was published in the Federal Register.<sup>2</sup>

In 1974, the State of Alaska, as successor in interest to the United States Government, constructed a paved road which occupied land 50 feet in width along the eastern boundary of the Hahn's property. The Hahns brought suit against the title company for the damages attributable to the loss of the 17 foot strip of property in excess of the 33 foot easement specified in the title policy. After the Hahns filed a motion for summary judgment, the trial court granted summary judgment to the title company. From that judgment, the Hahns appeal.

The basic issue to be determined is whether the title company was obligated to list the wider 50 foot easement as an encumbrance. The title company contends that their coverage is limited, by General Exception # 1, to claims disclosed by "public records" as defined in the policy and that the definition does not include public land orders published in the Federal Register. "Public records" are defined in Paragraph 4(d) of the policy to be "records, which under the recording laws, impart constructive notice with respect to said real estate". Thus, we must decide whether a public land order filed with the office of the Federal Register constitutes a

record which, under recording laws, imparts constructive notice with respect to the property in question.

Oddly enough, neither the efforts of counsel nor our independent research has uncovered a case squarely on point. This paucity of case authority may be explained in part by the introduction to Chapter 12 of Patton on Titles.

A generation ago, there was only about half as many kinds of liens imposed by federal statute as at present. And of the classes then in existence, judgments, liens, mortgages, etc., the volume of items was so small in comparison to the number of land transfers that one seldom heard of a tract which was incumbered by a federal lien. To such an extent was this the case that, though in the majority of counties abstractors and examiners ignored them, there appear to have been but few losses from that source. Everyone recognizes however, that the United States, the same as the state in which a tract of land is situated, is a sovereignty, with power to prescribe the effect of judgments of its courts and of charges imposed by its statutes, and that such judgments and charges are now of considerable prevalence. A present-day examiner cannot, therefore, do his duty to his client without considering the possibilities of incumbrance on account of provisions of the federal statutes. . . . [Emphasis added] Patton On Titles, Vol. II, ch. 12, § 65 page 575.

Patton on Titles does not, however, discuss the effect of encumbrances arising under federal executive orders, which are published in the Federal Register.

[1, 2] In determining the construction of insurance policy provisions, it is well established that ambiguities are to be construed in favor of the insured.<sup>3</sup> Also in

1. The order was issued pursuant to the power granted the Secretary of Interior under Executive Order No. 9337 of April 24, 1943.

2. 14 Federal Register at 5048.

3. *Gillespie v. Travelers Insurance Co.*, 486 F.2d 281, 283 (9th Cir. 1973); *Pepsi Cola Bottling Co. of Anchorage v. New Hampshire Insurance Co.*, 407 P.2d 1009, 1013 (Alaska 1965); *Lumbermen's Mutual Casualty Co. v.*

the insured's favor is the rule that provisions of coverage should be construed broadly while exclusions are interpreted narrowly against the insured.<sup>4</sup> These rules of construction have evolved due to the unequal bargaining power of insureds relative to insurance companies. Usually, as in this case, the insured is presented with a form policy and has no choice as to its provisions.<sup>5</sup>

Here, as indicated by the trial judge, in the absence of the definition portion of the policy, there would be little difficulty in construing the term "public records" to include material published in the Federal Register. 44 U.S.C. § 1507 indicates that such material is a matter of public record.

[u]nless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it.

*Continental Casualty Co.*, 387 P.2d 104, 108 (Alaska 1963).

4. *State Farm Mutual Automobile Ins. Co. v. Partridge*, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123, 128 (1973).

5. We have held that insurance policies are to be looked upon as contracts of adhesion for the purpose of determining the rights of parties thereto. The result of such a finding is to construe the policy so as to provide that coverage which a layman would reasonably have expected given his lay interpretation of the policy terms. *Graham v. Rockman*, 504 P.2d 1351, 1357 (Alaska 1972); *Continental Ins. Co. v. Bussell*, 498 P.2d 706, 710 (Alaska 1972); *of. National Indemnity Co. v. Flesher*, 469 P.2d 360, 366 (Alaska 1970).

6. There is no question that Public Land Order No. 601 was authorized to be published under 44 U.S.C. § 1505(a)(1), which provides in part for publication in the Federal Register of Executive Orders.

7. Public Land Order No. 601 provided in part:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in

[3] This appeal focuses on the definition in the policy of public records as "records, which under the recording laws, impart constructive notice with respect to said real estate". As indicated by 44 U.S.C. § 1507, the publication in the Federal Register does impart constructive notice. When Public Land Order No. 601 appeared in the Federal Register, constructive notice was furnished with respect to the real estate described therein. The description of the easement reserved included a portion of the Hahns' property.<sup>7</sup>

The only part of the definition which is not clearly in favor of the Hahns' construction is the portion which refers to "the recording laws". The title company would have us construe the phrase as meaning "the recording laws of Alaska", but nowhere is the definition so limited. The most that may be said in support of the title company's position is that the language might be ambiguous, in which event it must be construed in favor of the Hahns. We see no reason why the term does not incorporate federal recording laws

Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and revised for right-of-way purposes:

THROUGH ROADS

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

FEEDER ROADS

Stees Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok-Eagle Road, Ruby-Long-Poorman Road, Nome-Soffmoir Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

LOCAL ROADS

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

insofar as they are applicable to Alaska property.

Whether the statute providing for publication of orders, such as Public Land Order No. 601, in the Federal Register may be regarded as a "recording law" depends on the meaning to be given that quoted term. While we have been unable to find a case squarely on point, dictum in *Hotch v. United States*, 212 F.2d 280, 14 Alaska 594 (9th Cir. 1954) indicates that the Federal Register Act is a recording statute. In that case, Hotch appealed from a conviction for fishing in violation of a regulation of the Department of Interior extending the period closed to commercial fishing on the Taku Inlet, Alaska. He argued that the regulation was ineffective since it had not been published in the Federal Register. The government argued that the defense was inapplicable since Hotch had actual knowledge of the regulation. The court discussed two functions of the Federal Register Act; one, the requirement of publication in order to establish the validity of certain documents; and the other, the furnishing of actual and constructive notice of government acts. It held the regulation to be invalid due to failure to comply with the statutory requirements of publication. Actual notice was held not to obviate the requirement that the regulation itself must be published. As pertains to the notice function of the Federal Register Act, the court's statement is particularly applicable here.

While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the Acts are *more than mere recording statutes* whose function

8. See, 44 U.S.C. § 1507, quoted in part, *supra*.  
 9. Other cases holding that the Federal Register is a recording statute imparting constructive notice under varying circumstances, are *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, 68 S.Ct. 1, 92 L.Ed. 10, 15 (1947); *United States v. Millsap*, 208 F. Supp. 511, 516 (D.Wyo.1962); *Graham v. Laarimore*, 185 F.Supp. 761, 763-64 (D.S.C.1960); *Lynsly v. United States*, 126

is solely to give constructive notice to persons who do not have actual notice of certain agency rules. *Hotch v. United States, supra*, at 283. [Emphasis added] [Citations omitted]

The United States Court of Appeals for the Ninth Circuit thus clearly indicated that the Federal Register Act was a recording statute. There is no question but that publication of a record therein imparts "constructive notice".<sup>8</sup> Public Land Order No. 601 referred to the real estate in question. It follows that publication of Public Land Order No. 601 complies with the policy definition of "records which, under the recording laws, impart constructive notice with respect to said real estate".<sup>9</sup>

Moreover, this construction conforms to the general meaning of the terms used. Black's Law Dictionary, Revised 4th ed. defines the verb, "record", as ". . . To transcribe a document . . . in an official volume, for the purpose of giving notice of the same, of furnishing authentic evidence, and for preservation."<sup>10</sup> This is exactly what is accomplished by publication in the Federal Register. Since such publication is authorized by statute, it constitutes a record under a "recording law(s)".

If it were an insurmountable burden to have title companies ascertain whether property has been affected by orders published in the Federal Register, we might have some difficulty with construing the policy language so literally and might find more persuasive an argument that we should look only to the Alaska recording laws. We note that the trial judge specifically inquired at the time of argument as to the difficulties that would be encountered by title companies in reviewing rele-

F.Supp. 453, 455, 130 Ct.Cl. 149 (1954); *Bohannon v. American Petroleum Transport Co.*, 86 F.Supp. 1003, 1005 (D.N.Y.1949); *Toledo P.&W R.R. v. Stover*, 60 F.Supp. 587, 596 (D.Ill.1945); *Marshall Produce Co. v. St. Paul Fire and Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280, 291 (1959).

10. Black's Law Dictionary, Fourth Revised Ed. 1487.

vant public land orders. Counsel, in response, submitted affidavits indicating that such reviews were not customarily made. The affidavits, however, are significantly silent as to any burden involved in checking the Federal Register. Alaska's statutes regulating title insurance companies require that "[a] title insurance company shall own and maintain in the recording district in which its principal office in the state is located a title plant consisting of adequate maps and fully indexed records showing all instruments of record affecting all land within the recording district for a period of at least 25 years immediately before the date a policy of title insurance is issued by the title insurance company. . . ." <sup>11</sup> A public land order published in the Federal Register would appear to be such an instrument of record affecting the land, and therefore, copies should be available in the title company's plant.

Our construction of the policy has the additional function of requiring the companies to furnish that degree of protection which a purchaser of a title insurance policy is likely to expect. As we read the exception in the policy of "public or private

easements not disclosed by the public records", it is intended primarily to protect against unrecorded easements or rights of way acquired by prescription which could only be discovered by physical inspection of the land itself. The title companies do not undertake such a burden and therefore should not be responsible for failure to note such encumbrances.

By this opinion, we do not require title companies to insure against all defects which would be revealed by all documents kept by public bodies. Title companies are chargeable, however, with revealing defects ascertainable from documents published under statutory authority for the purpose of giving constructive notice in places, including Alaska.

In view of our discussion in this matter, it is unnecessary to reach the other issues raised on this appeal.

The summary judgment in favor of the title company is reversed and the case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

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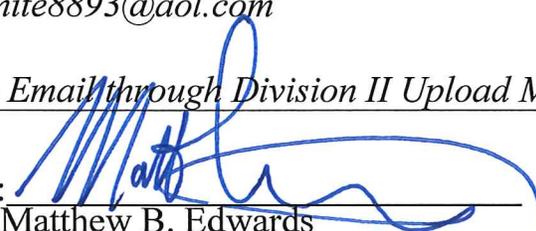
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