No. 857398-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FLYING T RANCH,
Appellant
v.
STILLAGUAMISH TRIBE OF INDIANS, ET AL.
Respondents.

BRIEF OF JAMESTOWN S'KLALLAM , KALISPEL, MAKAH, NOOKSACK, PORT GAMBLE S'KLALLAM , PUYALLUP, QUINAULT, SAMISH, SNOQUALMIE, SQUAXIN ISLAND, AND SUQUAMISH TRIBES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

The Jamestown S'Klallam Tribe, Kalispel Indian Community of the Kalispel Reservation, Makah Indian Tribe, Nooksack Indian Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe of Indians, Quinault Indian Nation, Samish Indian Nation, Snoqualmie Indian Tribe, Squaxin Island Indian Tribe, and Suquamish Indian Tribe of the Port Madison Reservation (collectively "Amici Tribes") move the Court, in accordance with RAP 10.6, for leave to appear as amicus curiae to provide additional factual and legal context concerning the application of the immovable property exception to tribal sovereign immunity. The Amici Tribes submit this proposed Amicus Curiae Brief to provide further background on the distinct and "special" nature of tribal sovereign immunity and the similarly unique nature of tribal land ownership and tribal land reacquisition.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are federally recognized Indian tribes whose ancestral homelands and reservations are within Washington State. All the Amici Tribes have suffered the devastating loss of land and natural resources, since the early nineteenth century. Today, each Amici Tribe is actively working to restore its ancestral land base for cultural, subsistence, and governmental needs, both on- and off- reservation.

The Jamestown S'Klallam Tribe is a federally recognized Indian tribe with its governmental offices located at 1033 Old Blyn Highway, Sequim, Washington 98382.

The Kalispel Indian Community of the Kalispel Reservation (Kalispel of Tribe Indians) is a federally recognized Indian tribe with its governmental offices located at 1981 LeClerc Road N, Cusick, Washington 99119.

The Makah Indian Tribe is a federally recognized Indian tribe with its governmental offices located at 181 Resort Drive, Neah Bay, Washington 98357.

The Nooksack Indian Tribe is a federally recognized Indian tribe with its governmental offices located at P.O. Box 157, Deming, Washington 98244.

The Port Gamble S'Klallam Tribe is a federally recognized Indian tribe with its governmental offices located at 31912 Little Boston Road NE, Kingston, Washington 98346.

The Puyallup Tribe of Indians is a federally recognized Indian tribe with its governmental offices located at 3009 East Portland Avenue, Tacoma, Washington 98404.

The Quinault Indian Nation is a federally recognized Indian tribe with its governmental offices located at 1214 Aalis Drive, Taholah, Washington 98587

The Samish Indian Nation is a federally recognized Indian tribe with its governmental offices located at 2918 Commercial Avenue, Anacortes, Washington 98221.

The Snoqualmie Indian Tribe is a federally recognized Indian tribe with its governmental offices located at 9571 Ethan Wade Way SE, Snoqualmie, Washington 98065.

The Squaxin Island Tribe is a federally recognized Indian tribe with its government offices located at 10 SE Squaxin Lane, Shelton, Washington 98594.

The Suquamish Indian Tribe of the Port Madison is federally recognized Indian Tribe with its government offices located 18490 Suquamish Way, Suquamish, Washington 98392.

A ruling of this Court limiting the scope of tribal sovereign immunity will directly and adversely affect all twenty-nine federally recognized tribes in Washington State.

III. STATEMENT OF THE CASE

Amici Tribes adopt by reference Respondent Stillaguamish Tribe's Statement of Case.

IV. ARGUMENT

The immovable property doctrine is a common law exception to sovereign immunity that applies to certain property disputes. The doctrine was first articulated as dicta in *The Schooner Exchange v. M'Faddon,* 11 U.S. 116 (1812), where

Justice Marshall proposed that lands purchased by a sovereign acting in a private rather than governmental capacity within another sovereign's territory should not be immune from the other sovereign's jurisdiction.

This Court should not apply the immovable property exception to limit Tribal sovereign immunity from adverse possession suits because Tribes are not foreign sovereigns, Congress has not acted to abrogate tribal sovereign immunity, and, finally, because the reacquisition of land by Indian tribes within their ancestral homelands is an inherently sovereign action.

A. Indian Tribes Are Unique and Separate Sovereigns, Not Foreign Sovereigns

Indian tribal governments have a unique legal status established in the Commerce Clause of the United States Constitution. Congress was granted the power to "regulate Commerce . . . with the Indian Tribes" while the President was empowered to make treaties, including Indian treaties, with the consent of the Senate. U.S. Const. Art. I, §8, cl. 3; Art. II, §2,

cl. 2. The Constitution acknowledges the existence of four unique sovereigns: the federal government, states, foreign nations and Indian tribes. U.S. Const Art. I, § 8, cl. 3. Indian Tribes are recognized as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

It is well established in federal law that tribes have a different legal status compared to foreign nations because, while they are nations, they are not foreign to the United States. *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 19 (1831). Instead, tribes are "domestic dependent nations," retaining a "special brand of sovereignty", the contours of which exclusively "rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782 (2014); *see also See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 407 (2023) (Gorsuch, J., dissenting) ("Properly understood, Indian Tribes 'occupy a unique status' that is neither politically foreign nor domestic.") (quoting

National Farmers Union Ins. Cos. V. Crow Tribe, 471 U. S. 845, 851 (1985)).

The unique status of tribes, with certain sovereign rights including over their lands and citizens, was established in the Supreme Court's decisions in the Marshall Trilogy.[1] The retention of these rights, including sovereign immunity, has been repeatedly recognized. *See Kiowa Tribe of Okla. V. Mfg. Tech., Inc.* 523 U.S. 751 (1998). The separate mention of tribes in the Constitution, as distinct from foreign nations, removes any question as to whether they are to be treated as one and the same. *Cherokee Nation,* 30 U.S. at 19; *Bay Mills*, 572 U.S. at 800.

Simply put, tribes are not foreign nations. *Bay Mills*, 572 U.S. at 797-98 (Sotomayor, J., concurring) ("Indian Tribes have never historically been classified as 'foreign' governments in federal courts even when they asked to be."). As Chief Justice

[1] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 19 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

Marshall noted in *Cherokee Nation*: "[t]he term 'foreign nation' is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." 30 U.S. at 2.

International laws and domestic law concepts applicable to foreign nations, like the immovable property doctrine[2], do not and cannot apply to Indian tribes because tribes are not foreign sovereigns. Appellant's efforts to import the immovable property doctrine to undermine tribal sovereign immunity should be rejected by this Court.

B. Congress Has Never Limited Tribal Sovereign Immunity Through the Application of the Immovable Property Doctrine

Tribal sovereign immunity is the rule, subject only to two limited exceptions: when a tribe has expressly waived its own

[2] Two years ago, when faced with the same question in the context of a public easement for coastal access, the California Court of Appeals held that immovable property doctrine does not waive Tribal sovereign immunity. *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 216, 274 Cal. Rptr. 3d 255, 259 (2021), *cert. denied*, 142 S.Ct. 1107 (Feb. 22, 2022).

immunity, which is not applicable in this case, or when Congress expressly authorizes the suit. *Bay Mills*, 572 U.S. at 789-91. Put differently, "[i]t is fundamentally Congress's job, not [the courts']s, to determine whether or how to limit tribal immunity." *Id.* at 800.

With respect to congressional control, the same is also true as to the immunity enjoyed by foreign governments, as reflected by the history of the immovable property exception. Indeed, the Supreme Court has pointed to the Foreign Sovereign Immunities Act ("FSIA") as an example of its deference to Congress on *both* foreign-nation immunity and tribal immunity: "In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa*, 523 U.S. at 759. This is an appropriate comparison, as FSIA provides "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434 (1989).

FSIA recognizes a general rule that a foreign sovereign is immune from civil suit in the United States. 28 U.S.C. § 1604. FSIA also sets out limited exceptions to that grant of immunity. 28 U.S.C. § 1605. A court may exercise jurisdiction over a foreign state only if the suit falls within one of FSIA's specified exceptions to immunity. 28 U.S.C. § 1330(a).

Therefore, "[f]or the most part," FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 488 (1983). The so-called restrictive theory was announced for the United States in 1952 in the "Tate Letter." *See* Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) ("Tate Letter") *reproduced in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976). The Tate Letter stated the Department of State's policy that foreign states should thenceforth be granted immunity only for their sovereign or public acts, and not for their commercial acts. *Verlinden*, 461 U.S. at 486-87. "This focus on commercial

activity also comported with broader U.S. interests in combatting communism and promoting free trade" at the time. Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 HASTINGS L.J. 585, 615 (2022). Prior to the Tate Letter, the United States followed the rule that "a foreign power which acquires" immovable property in the territory of another sovereign is "deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants." 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945); *Alfred Dunhill*, 425 U.S. at 711 (quoting Tate Letter) ("[t]here is agreement by proponents of both [the absolute and restrictive] theories . . . that sovereign immunity should not be claimed or granted in actions with respect to real property").

This immunity exception for immovable property was codified in FSIA in 28 U.S.C. § 1605(a)(4). Treatises on

international law that pre-dated FSIA emphasized the narrow nature of the exception, describing the exception as permitting a foreign state to be sued to resolve "questions pertaining to title or the adverse interests of individual claimants." *Hyde* at 848. Similarly, the Restatement (Second) of Foreign Relations Law of the United States emphasized that the exception did not abrogate immunity "with respect to a claim arising out of a foreign state's ownership or possession of immovable property" that did "not contest[] such ownership or the right to possession." Second Restatement § 68 cmt. d at 207 (1965); *see also Asociacion de Reclamantes, v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984) (noting that the traditional real property exception was "limited to disputes directly implicating property interests or rights to possession").

That the immovable property exception pre-dates both FSIA and the restrictive theory of immunity is instructive regarding the narrowness of the exception's scope. The Tate Letter noted that "[t]here is agreement by proponents of both

[the absolute and restrictive] theories . . . that sovereign immunity should not be claimed or granted in actions with respect to real property." *Alfred Dunhill*, 425 U.S. at 711 (quoting Tate Letter). Thus, the immovable property exception is *not* rooted in the restrictive theory of immunity. Rather, the exception traces its roots to the time of absolute immunity and reflects the need to make a foreign sovereign subject to suit for *only* its private and commercial acts. *Reclamantes*, 735 F.2d at 1521; *see also* Jamshidi, 73 HASTINGS L.J. at 616. Appellant's claims that foreign sovereign immunity has "always" been limited by the immovable property exception are unfounded, as too are Appellant's efforts to render tribal government land acquisition "private" as opposed to sovereign action.

With respect to tribal sovereign immunity and whether any exceptions should be created, similar to FSIA, Congress is in the best "position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive

legislation counsels some caution by us in this area." *Kiowa*, 523 U.S. at 759. Exceptions to tribal sovereign immunity lie with Congress, as "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 572 U.S. at 803. Here, as with the Supreme Court in *Bay Mills* and *Kiowa*, this Court must yield to Congress, which has not spoken on this issue.

C. In The Context Of Tribal Self-Governance, Land Acquisition and Property Ownership Are Inherently Sovereign Functions and, Therefore, the Immovable Property Exception Does Not Apply to Limit Tribal Sovereign Immunity

The immovable property exception applies only to land and property permanently attached to that land. As such, any discussion of whether the exception should apply to tribal sovereign governments must be viewed within the context of tribal land ownership. The immovable property exception requires consideration of the capacity in which one sovereign purchases land in the territory of another sovereign—if the

purchase is made in a governmental capacity, as an exercise of sovereign authority, governmental immunity is preserved. *See The Schooner Exchange,* 11 U.S. at 145 ("A prince, by acquiring private property in a foreign country, *may possibly* be considered as subjecting that property to the territorial jurisdiction; he *may be* considered as so far laying down the prince, and assuming the character of a private individual; *but this he cannot be presumed to do with respect to* any portion of that armed force, which upholds his crown, and *the nation he is entrusted to govern.*") (emphasis added). Such is the case here. For Respondent Stillaguamish Tribe and Amici Tribes, land reacquisition and real property ownership are inherently sovereign functions.

Since first contact, Indian tribes have been dispossessed of their lands, while having far fewer resources than the federal and state governments. *See Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (upholding tribal sovereign immunity while recognizing that the Choctaw Nation "would

soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to [bring] against it").

The tragic history of tribal land loss is known by every tribe, including all the Amici Tribes. The historical divestment of tribal lands is still felt financially by tribes and Indian people today. *See generally* David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (2017) (investigation into the murders of Osage allottees by non-Indians to acquire their valuable headright to the Osage Mineral Estate. Today, nearly one-quarter of all Osage headrights are held by non-Osage.). Congressional actions in the nineteenth century, including the Indian Removal Act of 1830 and the Dawes Severalty Act of 1887, were designed to open tribal lands for settlement by non-Indian.[3] The breaking up of

[3] Indian Treaties and the Removal Act of 1830, n.d., p. 2, https://nhbp-nsn.gov/timeline/the-indian-removal-act/ (describing the law as a "a shifty, underhanded method usurped the previously established approach and involved forcing tribes into smaller areas where their only real income was annuities."); General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, 25 U.S.C. § 331; https://www.archives.gov/milestone-documents/dawes-act (a "policy focused specifically

reservation lands into individually owned allotments in the early twentieth century has resulted in today's checkerboarded reservations consisting of tribal trust, individual trust, tribal fee, individual Indian fee, and non-Indian fee lands, and has resulted in a quagmire of jurisdictional issues for tribes and Indian people.

While federal government action and policies resulted in a huge loss of tribal lands, much of the loss started with illegal occupation or acquisition by private individuals through fraudulent foreclosures and tax sales of individually owned allotments. This case involves a similar, albeit more subtle, form of dispossession of tribal land. If tribes are divested of their ability to avoid the taking of their lands by adverse possession, a right that normally rests with sovereigns, it will reward those who trespass on tribal lands and justify the continued divestment of Indian land by non-Indians. The

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on breaking up reservations and tribal lands by granting land allotments to individual Native Americans and encouraging them to take up agriculture").

application of adverse possession to tribal lands will weaken all tribes' ability to create and develop a land base for the well-being of their people, including the ability to protect lands, habitats, and species for future generations.

Unlike other sovereigns or private actors, tribal land acquisition is a key feature of modern federal Indian policy and the policy of many tribal governments. Since passage of the Indian Reorganization Act of 1934, the federal government has identified the intrinsic connection between tribally held land and tribal sovereign authority and has enacted legislation to facilitate tribal land acquisition. Act of June 18, 1934, 48 Stat. 984; *see* H.R. Rep. No. 73-184 (1934) (declaring purpose of act to "conserve and develop Indian lands" and purchase lands for landless Indians). The United States has furthered its policy of protecting and enhancing the tribal land base through numerous programs. *See* Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2517 (1983); American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (Oct.

27, 2004), both *codified as amended at* 25 U.S.C. §§ 2201-2221. A 2012 Report from the Senate Committee on Indian Affairs notes that "[r]eversing the history and circumstances of land loss and the economic, social, and cultural consequences of that loss are at the core of the government's federal trust responsibility toward Indian tribes." S. Rep. No. 112-166, at 4 (2012).

Sovereign immunity generally protects government property. For tribes, maintaining sovereign immunity with respect to tribally-owned land is critical because of the causal connection between property ownership and the practical capacity of tribes to exercise sovereignty over that land. This connection between land ownership and sovereignty is unique to Indian tribes, as demonstrated by the near loss of tribal existence with the historical loss of tribal lands. Only through modern federal policy and tribal self-determination has this problem begun to be remedied through concerted efforts at land reacquisition.

Until relatively recently, tribes have experienced the loss of their ancestral homeland generation after generation. This loss also includes significant suburbanization and development throughout Washington State that has significantly reduced the lands and habitats that support tribal natural resources including fish and wildlife. The loss of these lands and habitats has diminished the ability of tribal people to meet their subsistence, cultural, and spiritual needs by exercising their treaty and other federally protected rights to fish, hunt, and gather as their ancestors had done.

Many of the Amici Tribes, including Respondent, are signatories to the Stevens Treaties,[4] in which the tribes ceded millions of acres of their homelands to the United States in exchange for the "right of taking fish at usual and accustomed grounds and stations" as well as the "privilege of hunting and gathering roots and berries on open and unclaimed lands."

[4] Treaty of Medicine Creek, 10 Stat. 1132 (1854); Treaty of Point Elliott, 12 Stat. 927 (1855); Treaty of Point No Point, 12 Stat. 933 (1855); Treaty of Neah Bay, 12 Stat. 939 (1855); Treaty of Olympia, 12 Stat. 971 (1855).

Treaty of Point Elliott, 12 Stat. 927. The Western District of Washington recognized in *United States v. Washington* that salmon stocks in Puget Sound have declined "alarmingly" since the Treaties were signed, noting: "A primary cause of this decline is habitat degradation, both in breeding habitat (freshwater) and feeding habitat (freshwater and marine areas)." 20 F. Supp.3d 986,1020 (W.D. Wash. 2013). The court also noted that "[t]he reduced abundance of salmon and the consequent reduction in tribal harvests has damaged tribal economies . . . and has *caused cultural and social harm* to the Tribes in addition to the economic harm." *Id.* at 1021. (emphasis added).

The Amici Tribes, and Respondent Stillaguamish Tribe, have worked tirelessly at protecting fish and wildlife habitat through land acquisition and associated habitat restoration. The land at issue in this case was purchased for the specific purpose of salmon conservation and recovery. Respondent's Br. at 34. Respondent's land acquisition is inherently an exercise of its

sovereign authority, both as a means of protecting and enhancing treaty-protected salmon and habitat and as step toward restoring aboriginal lands as part of its contemporary land base.

Acquisition of property for the benefit of tribal people is an inherently governmental function. The parcel in question is part of the Respondent's aboriginal territory, over which the Tribe and its members retain the right to hunt, fish, and gather under the Treaty of Point Elliott and it was purchased to protect salmon habitat for future generations. As part of the acquisition, Respondent was required to include a conservation easement for salmon recovery and, in so doing, has covenanted that the land serve the public purpose of fisheries management. In addition to asserting the Tribe's treaty reserved rights and exercising the sovereign role of land management for a public benefit, Respondent's purchase is part of the process of restoring its ancestral land base.

The Amici Tribes each suffered significant losses of territorial jurisdiction throughout the colonial period; remedial measures taken by tribal governments, facilitated and supported by longstanding federal policy, are sovereign activities, which are unique in their very nature and historical context, and therefore distinct from the activities of other sovereign entities. As such, the immovable property doctrine should not apply to a tribe's land.

Even for the sake of argument, if the immovable property exception did apply to Indian tribes generally, lands purchased by Respondent and Amici Tribes are purchased by a sovereign "for sovereign purposes" and would still not be subject to the immovable property doctrine. *See Oneida Indian Nation v. Phillips*, 981 F.3d 157, 170 (2d Cir. 2020) ("even if the exception applied to tribal sovereign immunity generally, it would not apply here, where it is undisputed that the Nation did not purchase the 19.6 Acre Parcel in "the character of a private individual" buying lands in another sovereign's territory.")

Respondent is a sovereign that purchased the lands at issue for sovereign purposes – reclaiming territory lost nearly 170 years ago and securing a future for the Tribe's exercise of traditional harvest activities and the salmon on which the Tribe has always relied. As such, Respondent Stillaguamish Tribe is entitled to retain its sovereign immunity in this case.

V. CONCLUSION

Amici Tribes urge this Court to affirm the trial court decision in favor of Respondent Stillaguamish Tribe and reject application of the immovable property exception to tribal sovereign immunity.

Certificate of Compliance: Pursuant to RAP 18.17(b), the foregoing document contains 3,814 words.

DATED November 30, 2023.

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

I certify that on November 30, 2023, I caused the foregoing **TRIBES' AMICUS CURIAE BRIEF** to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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