No. 85739-8-I

Court of Appeals, Div. I, of the State of Washington

Flying T Ranch,

Appellant,

v.

Stillaguamish Tribe of Indians, et al.,

Respondents.

Appellant's Answer to Brief of Amici Tribes

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Table of Contents

Table of Authorities

Federal Cases

Cases from Other Jurisdictions

Treatises

Other Authorities

1. Answer to Brief of Amici Tribes[1]

1.1 Indian tribes' status as "dependent domestic nations" does not support extending tribal sovereign immunity beyond the common law immunities granted to foreign sovereigns.

The Amici Tribes correctly point out that Indian tribes are not foreign sovereigns. However, it does not follow that common law sovereign immunity principles like the immovable property exception "do not and cannot apply" to tribal sovereign immunity. The Amici Tribes fail to explain their untenable leap of logic.

The "Marshall Trilogy" explained the unique position of Indian tribes as a special kind of sovereign.

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[1] 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 refer to themselves collectively as "Amici Tribes" in their brief. This Answer will do the same.

"The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The 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 no where else." ***Cherokee Nation v. State of Ga.***, 30 U.S. 1, 16, 8 L. Ed. 25, 5 Pet. 1 (1831). "[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. … [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." ***Id.*** at 17.

This unique status derives from the history of European settlement of the New World. European

nations generally considered the Indian tribes "to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion…" ***Johnson v. M'Intosh***, 21 U.S. 543, 574, 5 L. Ed. 681, 8 Wheat. 543 (1823). However, "[w]hile the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves…" ***Id.*** The Europeans maintained "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest…" ***Id.*** at 587.

The purchases and conquests that followed resulted in the "domestic dependent nation" status that the Tribes inhabit today. *See* ***Johnson v. M'Intosh***, 21 U.S. at 588, 591. While Justice Marshall did not appear to agree with the "extravagant … pretension" of the theory, he pragmatically upheld it as the law of the land due to its long history and practical reality. ***Id.*** at

591; *See* ***Worcester v. State of Ga.***, 31 U.S. 515, 543, 8 L. Ed. 483, 6 Pet. 515 (1832).

Nothing in case law suggests that the "special brand of sovereignty" possessed by Indian tribes includes rights or immunities greater in scope than those of any other sovereign. To the contrary, the cases state that tribes inherited the "common-law immunity from suit traditionally enjoyed by sovereign powers." ***Michigan v. Bay Mills Indian Community***, 572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) (quoting ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)).

"[T]he scope of tribal immunity has to be measured at the common law as it existed at some earlier time…" ***In re Greene***, 980 F.2d 590, 595 (9th Cir. 1992). The common-law sovereign immunity "of independent states" was applied to Indian tribes by the 8th Circuit in the late-19th Century in ***Thebo v. Choctaw Tribe of Indians***, 66 F. 372, 375, 13 C.C.A. 519 (8th Cir.

1895). The origins of tribal sovereign immunity have alternatively been traced to the early-20th Century. ***Kiowa Tribe of Okla. v. Mfg. Techs., Inc.***, 523 U.S. 751, 757, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (citing ***Turner v. United States***, 248 U.S. 354 (1919), and ***United States v. United States Fidelity Guaranty Co.***, 309 U.S. 506 (1940)).

Determining the scope of tribal immunity is a two-step process. "A necessary first step in the analysis is determining the scope of sovereign immunity at the common law." ***Greene***, 980 F.2d at 593. The second step is determining whether Congress has limited or expanded that scope. *See* ***Id.*** at 594. In *Bay Mills*, the Supreme Court explained, "the qualified nature of Indian sovereignty modifies that principle [of common-law sovereign immunity] *only* by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." ***Bay Mills***, 572 U.S. at 789 (emphasis added).

The baseline for the scope of tribal sovereign immunity is defined by the common law of foreign sovereign immunity prior to any changes made by Congress. *See* Br. of App. 12-16; Reply Br. 5-6. Caselaw traces these origins to the 19th and early-20th Centuries, when the "absolute" or "classical" theory of immunity prevailed. *See* Br. of App. 22-24; Reply Br. 8-9. At that time, the immovable property exception limited the scope of foreign sovereign immunity. *See* Br. of App. 17-22; Reply Br. 11-12. It should continue to limit the scope of tribal sovereign immunity today.

Amicus Tribes, in a footnote, argue that the California Court of Appeals has held that the immovable property exception does not apply to tribal sovereign immunity. Br. of Amici Tribes 8 n.2 (citing ***Self v. Cher-Ae Heights Indian Cmty. Of Trinidad Rancheria***, 60 Cal.App.5th 209, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021)). But the *Self* decision is not binding on this Court and is not persuasive.

The *Self* court rejected the notion that foreign sovereign immunity was a creature of common law. ***Self***, 60 Cal.App.5th at 218. This rejection is contrary to the U.S. Supreme Court precedents cited above holding that Indian tribes possess the same "common-law immunity from suit traditionally enjoyed by sovereign powers." *E.g.,* ***Bay Mills***, 572 U.S. at 788.

The *Self* court questioned the veracity of the immovable property exception based on a single New York trial court decision that accepted the suggestion of the U.S. State Department that immunity should be applied to an action challenging title to the property used by the Kingdom of Afghanistan as a residence for its representative to the United Nations. ***Self***, 60 Cal.App.5th at 218 (citing ***Knocklong Corp. v. Kingdom of Afghanistan***, 6 Misc. 2d 700, 167 N.Y.S.2d 285, 286-87 (Nassau County Ct. 1957)). But authorities extant at the time understood that there was not only a common law immovable property exception, but also an

exception to the exception, "where such property is employed for diplomatic or consular purposes." 2 Charles Cheney Hyde, ***International Law, Chiefly as Interpreted and Applied by the United States***, §258, 848 (2nd ed. 1945). Where the State Department's suggestion comported with the common law, it was no wonder that the trial court followed it. Because of the exception for diplomatic properties, this case is not an example of a court failing to apply the immovable property exception. The *Self* court's reasoning here does not hold up.

Finally, the *Self* court's reliance on the tribal land acquisition scheme of the Indian Reorganization Act has no application here, where there is no evidence that the Tribe has applied to convert the parcels to trust land and no evidence that the parcels would even qualify for that designation. Moreover, Congress's enactment of a detailed, discretionary process for creating new trust land demonstrates that Congress

does not intend for a tribe's purchase of non-reservation land to automatically remove that land from the jurisdiction of state courts. That is, Congress has not abolished the immovable property exception to tribal sovereign immunity.

1.2 Congress has never abolished the immovable property exception to sovereign immunity.

As argued above, tribal sovereign immunity was created as a common law doctrine in the courts, imported from the common law of foreign sovereign immunity. Congress has acted against that common law background, either changing or reaffirming various aspects of the immunity. *Kiowa*, 523 U.S. at 758-59. Yet Congress has never abolished the immovable property exception to sovereign immunity.

Amici Tribes' discussion of the foreign sovereign immunity background at Br. of Amici Tribes 9-13 confuses the "absolute" (or "classical") immunity of the common law period with the "restrictive" immunity of

the Tate letter and the FSIA. At page 11, Amici Tribes correctly note that, prior to the Tate Letter, "absolute" foreign sovereign immunity was limited by the immovable property exception. As stated in Hyde, *International Law*, at 848 n.33, " 'All modern [1928] authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals, whether as defendants or as plaintiffs.' … 'A State may be made a respondent in a proceeding in a court of another State when the proceeding relates to rights or interests in, or to the use of, immovable property which is within the territory of such other State and which the respondent State owns or possesses or in which it has or claims an interest.'"

Where Amici Tribes go wrong is on page 13, where they incorrectly assert that "absolute" immunity included an exception for private or commercial acts.

For this false notion they cite ***Asociacion de Reclamantes v. United Mexican States***, 735 F.2d 1517, 1521 (D.C. Cir. 1984), which says nothing about private or commercial acts, and Maryam Jamshidi, ***The Political Economy of Foreign Sovereign Immunity***, 73 Hastings L.J. 585, 616 (2022), which says the opposite of what Amici Tribes claim. Jamshidi's article describes the Tate Letter as advocating for a change from the policy of "absolute" immunity to a policy of "restrictive" immunity—so named because it would introduce restrictions on the immunity of foreign states for their private and commercial activities. ***Id.*** at 615-16.

The immovable property exception, which was a part of "absolute" immunity, did not have any roots in a "private" or "commercial acts" exception. Rather, it was based on concerns unique to immovable real property and the need for a sovereign to control ownership of real property within the sovereign's own territory. *See* Br. of App. 19-22 (citing, *e.g.,* ***Reclamantes***, 735 F.2d at

1521-22). The exception was recognized under the "absolute" theory of sovereign immunity that was extant at the time tribal sovereign immunity came into being. Because tribal sovereign immunity was based on foreign sovereign immunity at that time, it took on an equal scope with "absolute" sovereign immunity, including the immovable property exception.

The Tate Letter introduced the policy of restricting immunity for the commercial activities of foreign sovereigns, which Congress then enacted in the FSIA, altering the prior common law of near-absolute immunity with respect to foreign states. ***Kiowa***, 523 U.S. at 759. Congress has taken no such action with respect to tribal sovereign immunity, leaving intact the prior "absolute" common law immunity for both governmental and commercial activities. ***Id.*** at 759-60. In *Kiowa*, the Court upheld the common law immunity for commercial activities in the tribal context because Congress had not acted to restrict it.

The same result should obtain here. Because, as Amici Tribes note, Congress has not spoken on the issue of the immovable property exception, it remains a limitation on tribal sovereign immunity, inherited from its common law roots. This Court should uphold the common law immovable property exception to tribal sovereign immunity because Congress has not removed it.

1.3 Applicability of the immovable property exception depends on the location of the property, not on the sovereign owner's intended use of the property.

Amici Tribes misread *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (1812). The famous quote has nothing to do with whether a foreign sovereign subjectively believes it is purchasing property for a sovereign purpose. Rather, it asserts that a foreign sovereign who purchases land in the territory of another sovereign *necessarily does so in the character of a private individual*, because the

location of the property in the territory of another sovereign means that it cannot be held for a sovereign purpose, unless the territorial sovereign allows it to be so.

While some commentators suggest that Justice Marshall may have been making a private-vs.-sovereign-purpose distinction, they do not carry that distinction over to the immovable property exception. *Compare, e.g.,* ***International Law***, 844 n.17 (commenting on *Schooner Exchange* and ultimately concluding that sovereigns always act in a sovereign capacity) with 848 ("The relationship between a State and some forms of property within its territory may, however, be such that a foreign power which acquires that property is to be 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… This seems to be acknowledged in the case

of immovable property by reason of its permanent physical connection with the territory where it is located…"). The immovable property exception applies because of the *location of the land*, not because of any subjective intent of the purchasing sovereign.

The "Marshall Trilogy" recognized that the principles behind the immovable property exception were based on the location of the land. In an illustrative example, Justice Marshall noted that an individual who attempted to purchase a parcel of Indian land from a tribe could only hold it subject to Indian laws: "still it is a part of their territory, and is held under them, by a title dependent on their laws. … the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws." ***Johnson v.***

M'Intosh, 21 U.S. at 593. By the same token, any interest the Tribe acquired in the parcels in this case is held by them subject to the laws of the State of Washington, where the parcels are located. The courts of Washington should have jurisdiction to determine questions of title to the parcels, regardless of who might assert a claim.

Amici Tribes assert a "unique connection" between tribal land ownership and sovereignty, but the courts have rejected any such connection. The mere purchase of land in fee by a tribe does not remove the land from the sovereignty of the state in which the land is located. *See* ***Lummi Indian Tribe v. Whatcom Cnty.***, 5 F.3d 1355, 1359 (9th Cir. 1993). Similarly, the mere alienation of reservation land in fee to non-Indians does not diminish a tribe's sovereignty over that portion of its reservation. ***McGirt v. Oklahoma***, 591 U.S. ___, 140 S. Ct. 2452, 2464, 2468, 207 L. Ed. 2d 985 (2020) (at 2468: "[o]nce a block of land is set aside for

an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). The addition of land to a reservation can only be accomplished by an act of Congress or the Executive, including by a BIA proclamation pursuant to 25 U.S.C. §5110 (for which a fee-to-trust transfer is but a preliminary step). Conference of Western Attorneys General, ***American Indian Law Deskbook***, §2:12, 130-31 and n.6 (2023). The State of Washington remains the territorial sovereign over these parcels. The Tribe is not immune from this action to determine title because the immovable property exception applies to tribal sovereign immunity due to the location of the land, regardless of any subjective intent of the Tribe.

2. Conclusion

Indian tribes are not foreign sovereigns, but the scope of tribal sovereign immunity was derived from and equal to the scope of "absolute" foreign sovereign immunity under the common law prior to the Tate Letter. That immunity is limited by the immovable property exception. Congress has not abolished that exception. It applies based solely on the location of the land at issue, regardless of the Tribe's purposes.

Because the immovable property exception applies, the Tribe is not immune from this action to quiet title. This Court should reverse dismissal of Flying T's claims and remand for further proceedings.

I certify that this document contains 2,742 words.

Submitted this 2nd day of January, 2024.

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I certify, under penalty of perjury under the laws of the State of Washington, that on January 2, 2024, I caused the foregoing document to be filed with the Court and served on counsel listed below, and all others entitled to receive service, by way of the Washington State Appellate Courts' Portal.

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January 02, 2024 - 4:57 PM

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Appellate Court Case Title:	Flying T Ranch, Inc., Appellant v. Stillaguamish Tribe of Indians, et al., Respondents
Superior Court Case Number:	22-2-07015-1

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