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No. 101731-6

Supreme Court of the State of Washington

Flying T Ranch,

Appellant,

v.

Stillaguamish Tribe of Indians, et al.,

Respondents.

Brief of Appellant

Kevin Hochhalter
WSBA # 43124
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

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1. Introduction

Flying T Ranch and its predecessors in interest adversely possessed two parcels of land, with title ripening as early as 1971, though it was not adjudicated at the time. After the Stillaguamish Tribe of Indians acquired one of the parcels, Flying T commenced this action to quiet title. The Tribe acquired the second parcel after filing a motion to dismiss Flying T's claims due to tribal sovereign immunity.

The common law has long held that questions of title to real property can only be determined by the courts of the sovereign in whose territory the property is situated. In the realm of sovereign immunity, this rule has taken shape as the "immovable property exception," which holds that a sovereign who purchases property in the territory of another sovereign does so in the character of a private party and enjoys no

immunity from suit in actions regarding rights of possession or title to the property. This rule, necessary to maintain the territorial sovereignty of the state in which the land is located, must also apply to Indian tribes just as it applies to sister states and foreign nations. Tribal sovereign immunity must be limited by the immovable property exception.

The United States Supreme Court has not yet answered this question, leaving it to lower courts to consider in the first instance. For the reasons set forth herein, this Court should hold that tribal sovereign immunity does not extend to actions regarding rights of possession or title to Washington land located outside of any tribal reservation.

Because tribal sovereign immunity cannot apply to a quiet title claim for adverse possession of real property located outside the reservation, the trial court erred in dismissing Flying T's claims. This Court should reverse and remand for further proceedings.

2. Assignments of Error

Assignments of Error

1. The trial court erred in dismissing Flying T's claims for lack of subject matter jurisdiction due to tribal sovereign immunity.
2. The trial court erred in dismissing Flying T's claims for lack of personal jurisdiction due to tribal sovereign immunity.
3. The trial court erred in dismissing Flying T's claims for improper venue due to tribal sovereign immunity.
4. The trial court erred in dismissing Flying T's claims for failure to state a claim upon which relief can be granted due to tribal sovereign immunity.
5. The trial court erred in dismissing Flying T's claims for failure to join an indispensable party due to tribal sovereign immunity.

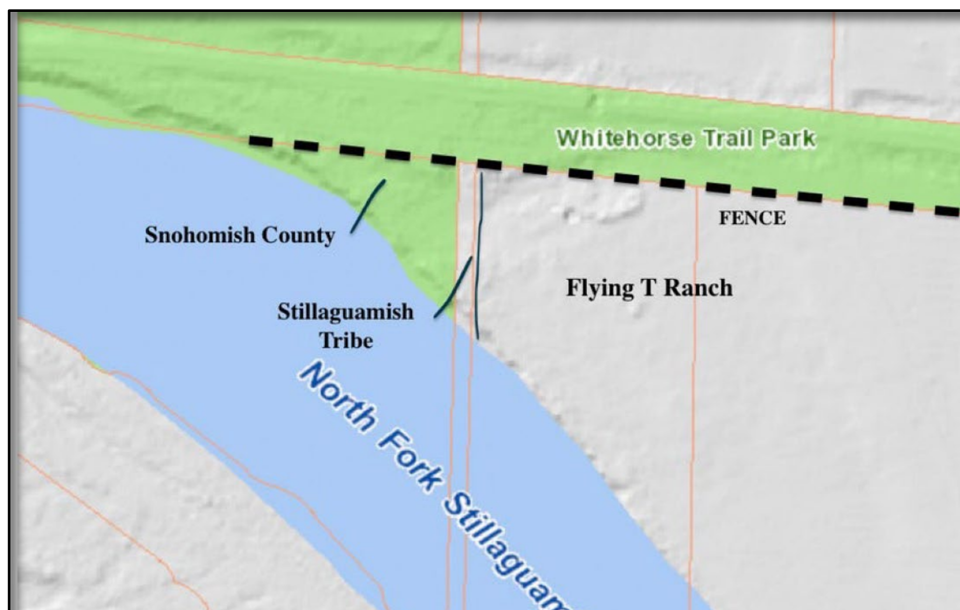
Issues Pertaining to Assignments of Error

1. Indian tribes enjoy immunity similar to that of foreign sovereigns under the common law. Under the "immovable property exception," foreign sovereigns are not immune from suit in actions regarding rights of possession or title to real property. **Did the trial court err in applying tribal sovereign immunity to dismiss Flying T's claims?** (assignments of error 1-5)

2. CR 19 provides a prudential standard for courts to determine whether a case should go forward in a necessary party's absence. State sovereignty requires that the state's courts be able to determine questions of title to property even when a tribe refuses to participate. **Did the trial court err in dismissing Flying T's claims for lack of personal jurisdiction or failure to join an indispensable party?** (assignments of error 2, 5)

3. Statement of the Case

This Quiet Title action for adverse possession involves disputed land situated between the North Fork Stillaguamish River and Whitehorse Trail Park (formerly Burlington Northern right-of-way), depicted below. CP 109-10, 119.



Flying T Ranch acquired the eastern parcel on July 15, 1991. CP 108. Flying T alleges that both it and its predecessors in interest have maintained as a boundary line the barbed-wire fence marked in the diagram and openly, exclusively, and continuously

possessed and used both the County and Stillaguamish parcels to graze and keep livestock since at least 1961. CP 109-10.

The Stillaguamish Tribe of Indians acquired its record interest in the middle parcel on April 13, 2021, prior to which the parcel was not part of any Indian Land or Reservation (this parcel also includes land located north of the right-of-way, which is not at issue). CP 108. Snohomish County acquired its record interest in the western parcel on June 27, 1995, prior to which it had been privately held. CP 109.

Before any responsive pleadings were filed, the Tribe made a motion to dismiss under CR 12(b)(1), (2), (3), (6), and (7). CP 84. The Tribe argued that its tribal sovereign immunity deprived the trial court of subject-matter jurisdiction and personal jurisdiction, made venue improper, resulting in failure to state a claim and failure to join a necessary party. CP 85. The Tribe argued that neither it nor Congress had waived its

sovereign immunity for this case. CP 87-88. The Tribe argued that Washington precedent recognizing an exception to sovereign immunity for *in rem* actions had been overruled by the United States Supreme Court in *Upper Skagit v. Lundgren*. CP 88-89. The Tribe argued that the "immovable property" exception—which the Supreme Court left as an open question—does not apply to Indian Tribes. CP 89-92. The Tribe argued that it was an indispensable party that could not be joined because of its sovereign immunity. CP 93.

Flying T disagreed with the Tribe's interpretation of *Lundgren* and argued that the *Lundgren* court left open the possibility of exceptions to tribal sovereign immunity for *in rem* actions, including under the "immovable property exception." CP 54-55, 59-60. Flying T argued that Washington courts still have subject matter jurisdiction over property outside of a reservation, even after a tribe acquires an interest. CP 60-63. Flying T argued that under the immovable

property exception, no sovereign can claim immunity from an action regarding rights to real property in the courts of the state in which the real property is located. CP 63-66. Flying T argued that this exception applies equally to Indian Tribes. CP 66-68. Flying T argued that the Tribe was not an indispensable party. CP 68-69.

The trial court granted the Tribe's motion to dismiss. CP 35-36. The order further declared, "The case is dismissed WITH PREJUDICE." CP 36. Flying T filed a timely motion for reconsideration, which the trial court also denied. CP 8, 20-31. Flying T filed a timely notice of appeal to this Court. CP 1-7.

Just before the trial court granted the motion to dismiss, the County conveyed its parcel to the Tribe. CP 148, 175-77. Flying T sought clarification from the trial court regarding the applicability of the dismissal order to the former County parcel. CP 148-55. The trial court entered an order dismissing the County from the

case and dismissing with prejudice all claims against the Tribe (*i.e.,* claims to both parcels) due to tribal sovereign immunity. CP 122-23.

4. Argument

The trial court erred in dismissing Flying T's claims. Because tribal sovereign immunity does not apply to a quiet title claim for adverse possession of real property located outside the reservation, the trial court had subject matter jurisdiction, venue was proper, and Flying T's complaint stated a claim on which relief could be granted. Personal jurisdiction is not at issue in an *in rem* action such as this, and the Tribe was not an indispensable party under CR 19. The trial court erred in dismissing Flying T's claims. This Court should reverse and remand for further proceedings.

A trial court decision on a motion to dismiss under CR 12 is reviewed de novo. ***Outsource Servs.***

Management, LLC v. Nooksack Business Corp., 172 Wn. App. 799, 807-08, 292 P.3d 147 (2013). Courts should dismiss a claim "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). The plaintiff's allegations are presumed to be true, and the court may consider hypothetical facts not part of the formal record. *Id.* The scope of tribal sovereign immunity is a question of law reviewed de novo. *Smale v. Noretep*, 150 Wn. App. 476, 478, 208 P.3d 1180 (2009).

4.1 Tribal sovereign immunity does not apply to this quiet title claim to real property located outside the reservation.

The entire basis for the trial court's dismissal of Flying T's claims was the notion that the Tribe enjoys tribal sovereign immunity from suit, resulting in a lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, failure to state a claim,

and failure to join an indispensable party. *See* CP 33-34, 122. However, the trial court erred in finding that tribal sovereign immunity applied.

Indian tribes enjoy common law immunity similar to that of foreign nations. But foreign sovereign immunity has always been limited by the "immovable property exception," which requires foreign sovereigns to be subject to suit in actions to determine rights of possession or title to real property in the courts where the property is situated. The United States Supreme Court has left open the question of whether the immovable property exception limits tribal sovereign immunity, but the history of the two doctrines and concern for the sanctity of state sovereignty suggest that it should. Where Washington law also supports the underpinnings of the immovable property exception, this Court should hold that the exception applies to limit the scope of tribal sovereign immunity in this case.

4.1.1 Indian tribes, as sovereigns, enjoy common law immunity similar to that of foreign nations.

"It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." ***McClanahan v. State Tax Comm'n of Arizona***, 411 U.S. 164, 172, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). While not possessing "the full attributes of sovereignty," ***Id.*** at 173, Indian tribes are now conceived of as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories," ***Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma***, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). "As dependents, the tribes are subject to plenary control by Congress," but, "unless and until Congress acts, the tribes retain their historic sovereign authority." ***Michigan v. Bay Mills Indian Community***,

572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014).

"Among the core aspects of sovereignty that tribes possess … is the common-law immunity from suit traditionally enjoyed by sovereign powers." ***Bay Mills***, 572 U.S. at 788. This common-law sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." ***Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g***, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

Courts have commented that tribal sovereign immunity is "not congruent" or "not coextensive" with the immunity enjoyed by the United States or by the several states in state and federal courts. *E.g.,* ***Kiowa Tribe of Okla. v. Mfg. Techs., Inc.***, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); ***Three Affiliated Tribes***, 476 U.S. at 890. This incongruence is primarily due to the immunity's source in the common-law of foreign sovereign immunity.

Courts have observed that tribal sovereign immunity is "more analogous to foreign sovereign immunity" than to the immunity of the several U.S. states. ***Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.***, 692 F.3d 1200, 1206 (11th Cir. 2012). "[T]he similarities between foreign sovereign immunity and tribal immunity are … considerable." ***Id.*** This is consistent with the origin of tribes as "independent sovereign nations" "pre-existing the Constitution." ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); ***McClanahan***, 411 U.S. at 172. As such, tribes enjoy, as a baseline, the sovereign immunities traditionally extended to foreign nations under the common law. ***Santa Clara Pueblo***, 436 U.S. at 58.

This common law baseline is subject to alteration by Congress. ***Bay Mills***, 572 U.S. at 788. When courts speak of tribes as being only "quasi-sovereign" or "dependent nations," it is because of the plenary power

of Congress over the tribes' immunity and their other governmental powers and attributes. *See* ***Id.*** at 789. "Congress has always been at liberty to dispense with such tribal immunity or to limit it." ***Potawatomi***, 498 U.S. at 510. While making occasional limited exceptions, "Congress has consistently reiterated its approval of the immunity doctrine." ***Id.*** This is why it is often said that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." ***Kiowa***, 523 U.S. at 754.

However, because the baseline for tribal sovereign immunity is the common law sovereign immunity traditionally extended to foreign nations, there is one more situation in which sovereign immunity does not require dismissal: where the suit is outside the scope of the common law immunity. *See, e.g.,* ***Lewis v. Clarke***, 581 U.S. 155, 167-68, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) ("although tribal sovereign immunity is implicated when the suit is

brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities”). While Congress has authority to alter tribal sovereign immunity, it remains, at its core, a common law doctrine for which the United States Supreme Court “has taken the lead in drawing the bounds.” ***Kiowa***, 523 U.S. at 759. Absent a specific Congressional enactment, the scope of tribal sovereign immunity is a question of common law for the courts.

Here, the trial court erred in dismissing Flying T’s claims of adverse possession because the common law has never provided sovereign immunity against actions affecting rights of ownership or possession of real property located in the territory of the state exercising jurisdiction.

4.1.2 Foreign sovereign immunity under the common law did not extend to actions to determine rights in immovable property.

The doctrine of foreign sovereign immunity traces its roots to Chief Justice Marshall's opinion in ***The Schooner Exchange v. McFaddon***, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (1812). In *The Schooner Exchange*, the Court held that, as a matter of comity and long-standing (even at that time) international practice, the United States grants immunity from arrest or suit to friendly foreign sovereigns acting in their sovereign capacity in many types of cases. *See, generally,* ***Id.*** at 136-46. However, this immunity was never absolute.

One longstanding exception to such immunity was, and still is, the immovable property exception. "For centuries, there has been 'uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.'" ***Upper Skagit Indian Tribe v. Lundgren***, ___ U.S. ___, 138 S.Ct 1649, 1657, 200

L.Ed.2d 931 (2018) (Thomas, J., dissenting) (quoting Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y.B. Int'l Law 220, 244 (1951)). In the 18th Century, it was well-established that "property which a prince has purchased for himself in the dominions of another … shall be treated just like the property of private individuals." ***Id.*** at 1658 (quoting De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946)). Justice Marshall recognized this principle in *The Schooner Exchange*, although it was inapplicable in that case: "[T]here is a manifest distinction between the private property of the person who happens to be a prince, and that [property] which supports [his] sovereign power… 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." ***The Schooner Exchange***, 11 U.S. at 145.

The immovable property exception has its foundations in the principle that "A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. … 'A sovereignty cannot safely permit the title to its land to be determined by a foreign power.'" ***Asociacion de Reclamantes v. United Mexican States***, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (quoting 1 F. Wharton, Conflict of Laws § 278 at 636 (3d ed. 1905)). "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." ***The Schooner Exchange***, 11 U.S. at 136.

Since 1812, the United States Supreme Court "entertain[ed] no doubt" that "the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate[d]." ***United***

States v. Crosby, 11 U.S. 115, 116, 3 L. Ed. 287, 7 Cranch 115 (1812). The Court has been similarly emphatic ever since. *See, e.g.,* ***Munday v. Wisconsin Trust Co.***, 252 U.S. 499, 503, 40 S.Ct. 365, 64 L.Ed. 684 (1920) ("long ago declared," citing *Crosby*).

The state, in its sovereignty, "has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." ***Arndt v. Griggs***, 134 U.S. 316, 321, 10 S.Ct. 557, 33 L.Ed. 918 (1890) "The power of the State to regulate the tenure of real property within her limits … is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose

jurisdiction the property is situated." ***United States v. Fox***, 94 U.S. 315, 320, 24 L. Ed. 192, 4 Otto 315 (1876).

In keeping with this bedrock principle, "The acquisition and continued ownership of property in a foreign country is made possible only by virtue of the application of the internal law or private law of the State of the *situs*." ***City of New York v. Permanent Mission of India to the United Nations***, 446 F.3d 365, 373 (2nd Cir. 2006), *aff'd sub nom.* ***Permanent Mission of India to the United Nations v. City of New York***, 551 U.S. 193, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007). "[W]hen owning property here, a foreign state must follow the same rules as everyone else." ***Id.*** at 373-74.

The common law immovable property exception is expressed concisely in the **Restatement (Second) of The Foreign Relations Law of the United States**, § 68 (1965), as follows: "The immunity of a foreign state … does not extend to … (b) an action to obtain possession of or establish a property interest in immovable

property located in the territory of the State exercising jurisdiction." This immovable property exception was later codified by Congress. *E.g., **Reclamantes***, 735 F.2d at 1521.

The statute has been interpreted consistent with the common law existing at the time of its enactment as being "limited to disputes directly implicating property interests or rights to possession." ***Reclamantes***, 735 F.2d at 1522. While immunity may extend to "claims incidental to property ownership, such as actions involving an 'injury suffered in a fall' on the property," there is no immunity for "cases involving the possession of or 'interest in' the property." ***Permanent Mission of India***, 551 U.S. at 200.

4.1.3 The immovable property exception applies to tribal sovereign immunity as well.

Tribal sovereign immunity had its origins long after the immovable property exception was already well-established. *See **Kiowa***, 523 U.S. at 757 (tracing

the doctrine's beginnings to the first half of the 20th Century, citing ***Turner v. United States***, 248 U.S. 354 (1919), and ***United States v. United States Fidelity Guaranty Co.***, 309 U.S. 506 (1940)).

Where "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," ***Santa Clara Pueblo***, 436 U.S. at 58, it cannot be claimed that a tribe should be entitled to *more immunity* than that provided by the common law to other sovereigns at the time that tribal sovereign immunity was adopted by the Court, *see* ***Lewis***, 581 U.S. at 164.

As illustrated above, the common law did not provide immunity to any sovereign against actions to determine the rights of possession or title to immovable real property. Rights of title or possession could only be decided in the courts of the state in which the land was situated. To grant immunity to a foreign sovereign in such cases would be to abdicate the state's jurisdiction

over its own lands. It would allow the foreign sovereign to annex lands into its own exclusive control merely by purchasing them from a private landowner. No state can tolerate such an erosion of its own territorial sovereignty. In this respect, the sovereignty of the state of the situs must remain supreme. No notion of comity can overcome the state's "primeval interest" in controlling the determination of title and possession to the lands within its own territory. No sovereign can afford to cede this authority to another by granting immunity. The immovable property exception must apply to all other sovereigns, including Indian tribes.

The proper resolution of this tension was explained in ***Georgia v. City of Chattanooga***, 264 U.S. 472, 480-81, 44 S.Ct. 369, 68 L.Ed. 796 (1924): "Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. … Tennessee, by giving Georgia permission to construct a line of railroad from the state boundary

to Chattanooga, did not surrender any of its territory, or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity."

The Supreme Court has not yet decided whether the immovable property exception applies to tribal sovereign immunity, but it is awaiting the opportunity. ***Lundgren***, 138 S.Ct at 1653-55 ("We leave it to the Washington Supreme Court to address these arguments in the first instance.").

The Tribe argued below that the Court's silence on the issue since *Lundgren* should be considered an indication that it has declined to apply the exception to tribal sovereign immunity, but no such conclusion can

be reasonably drawn because the Court has not yet been given a case that squarely presents the issue. *Lundgren* was settled by the parties before Washington could examine the question. *See* CP 76-81. The cases relied on by the Tribe did not even address the tribal immunity question because, as a threshold matter, the immovable property exception was not implicated.

In ***Cayuga Indian Nation of New York v. Seneca County***, 978 F.3d 829 (2nd Cir. 2020), Seneca County initiated foreclosure proceedings against tribal land in an attempt to collect unpaid property taxes. ***Id.*** at 831. After a preliminary injunction against the foreclosure was affirmed, *see* 761 F.3d 218, the trial court granted the tribe's motion for summary judgment and entered a permanent injunction. ***Id.*** The County argued the immovable property exception applied. ***Id.*** The appellate court held, "the Foreclosure Actions fall outside the ambit of the common law exception to

sovereign immunity for matters involving immovable property." ***Id.*** at 838.

The court highlighted **Restatement (Second) of The Foreign Relations Law of the United States**, § 65, comment (d) (1965), which explains that foreign sovereigns, while not immune from property tax obligations, were nonetheless immune from execution to collect, particularly by foreclosure. ***Cayuga***, 978 F.3d at 838-39. Because the foreclosure action was outside the scope of the immovable property exception, the court declined to address whether that exception could be applied to the tribe. ***Id.*** at 840. Because the immovable property exception did not clearly apply, the Supreme Court's denial of certiorari says nothing about the scope of tribal sovereign immunity.

In ***Oneida Indian Nation v. Phillips***, 981 F.3d 157 (2d Cir. 2020), the parties disputed title to real property belonging to the Nation and located within its reservation. ***Id.*** at 162-63. The district court dismissed

Phillips' claim in part based on tribal sovereign immunity. ***Id.*** at 164. On appeal, Phillips argued, among many other things, that the immovable property exception applied. ***Id.*** at 169. The appellate court quickly disposed of this argument, holding, "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. ***Id.*** at 170. Because the property was located within the Nation's reservation, the immovable property exception was not triggered. Because the exception could not apply—not to mention it was only a side issue in the case—there was no reason for the Supreme Court to take up the case.

In ***Self v. Cher-Ae Heights Indian Cmty. Of Trinidad Rancheria***, 60 Cal.App.5th 209, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021), the plaintiffs sought to

quiet title to a public easement for access over coastal property owned by the tribe. ***Id.*** at 215. The tribe had not interfered with plaintiff's access, but the plaintiff filed the case "out of an abundance of caution." ***Id.*** When the tribe claimed immunity, the plaintiff argued that the immovable property exception applied. ***Id.*** at 216. In affirming dismissal of the case, the California appellate court explained, "[T]he facts of this case make it a poor vehicle for extending the immovable property rule to tribes. As far as property disputes go, this is something of a non-event. … Self and Lindquist do not claim an ownership interest in the property. They allege no injury." ***Id.*** at 221-22. Moreover, the State of California had already "secured assurances from the Tribe to preserve coastal access" and "has remedies if there are problems in the future." ***Id.*** at 222. No doubt it was this lack of a justiciable controversy that induced the Supreme Court to deny certiorari.

Thus far, none of the cases presented to the Court has been a suitable vehicle for examining whether the immovable property exception should apply to limit tribal sovereign immunity. Thus, the question remains, as the 2nd Circuit recognized, "an as-yet unanswered question of law." ***Cayuga***, 978 F.3d at 834. This Court is now presented with the opportunity to "address these arguments in the first instance." ***Lundgren***, 138 S.Ct. at 1654. For the reasons stated above, this Court should hold that the immovable property exception applies to this adverse possession case and bars the Tribe's assertion of tribal sovereign immunity.

4.1.4 Washington precedent supports application of the immovable property exception to sovereign immunity.

This Court should also consider Washington precedent regarding the jurisdiction of our courts to determine questions of title to real property within the state. Under Washington law, subject matter

jurisdiction exists where "the court has the authority to adjudicate the type of controversy in the action" ***In re Fleming***, 129 Wn.2d 529, 533, 919 P.2d 66 (1996). The superior court has original jurisdiction "in all cases at law which involve the title or possession of real property." **Wash. Const.** art. IV § 6; **RCW 2.08.010**. Nothing in the Constitution or statutes authorizes the courts of this State to abdicate this jurisdiction. Actions affecting title to real property must be brought in the superior court of the county in which the property is situated. **RCW 4.12.010**.

Washington courts have held to the common law rule that questions of title to real property must be decided by the courts of the sovereign in whose territory the land is situated. "[I]t is settled without conflict of authority that the courts of one state or country have no authority to divest title to the real estate of an involuntary defendant, situated in a foreign state, or to entertain an action for trespass or

ejectment, it being most aptly said in the books that such actions 'touch the title,' and are purely local in character." ***Olympia Mining & Milling Co. v. Kerns***, 64 Wash. 545, 550, 117 P. 260 (1911). "It is a universal rule that the courts of one state cannot pass judgment on the title to land in another state." ***Smith v. Fletcher***, 102 Wash. 218, 220, 173 P. 19 (1918). "No one would question that an action brought to try the naked question of title to land must be brought in the state where the land is situate." ***Silver Surprize, Inc. v. Sunshine Min. Co.***, 74 Wn.2d 519, 526, 445 P.2d 334 (1968).

Quiet title actions are proceedings in rem. ***Phillips v. Tompson***, 73 Wash. 78, 82, 131 P. 461 (1913); *see also* Karl B. Tegland, 14 **Washington Practice: Civil Procedure** § 5:1, at 155 (2d ed. 2009). In such proceedings, the court has jurisdiction over the property itself. *See* Tegland, supra. Personal jurisdiction over the landowner is not required. ***In re***

Acquisition of Land & Other Prop. by City of Seattle, 56 Wn.2d 541, 544-45, 353 P.2d 955 (1960); *see also* ***In re Condemnation Petition City of Lynnwood***, 118 Wn.App. 674, 679 & n.2, 77 P.3d 378 (2003) (noting that quiet title actions are proceedings in which the court can exercise in rem jurisdiction, and that "[c]ourts may have jurisdiction to enter judgment with respect to property ... located within the boundaries of the state, even if personal jurisdiction has not been obtained over the persons affected by the judgment").

Washington courts have held on multiple occasions that the exercise of *in rem* jurisdiction over real property situated in the state is not affected by an assertion of tribal sovereign immunity. ***Lundgren v. Upper Skagit Indian Tribe***, 187 Wn.2d 857, 868, 389 P.3d 569 (2017), *vacated and remanded by* ***Lundgren***, 138 S.Ct. 1649 (2018); ***Anderson & Middleton Lumber Co. v. Quinault Indian Nation***, 130 Wn.2d 862, 880, 929 P.2d 379 (1996); ***Smale v. Noretep***, 150 Wn. App. 476,

208 P.3d 1180 (2009). Although these cases relied in part on a misunderstanding of ***County of Yakima v. Confederated Tribes and Bands of Yakima Nation***, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), they also relied on the bedrock principle that questions of title to real property must be decided by the courts of the sovereign in whose territory the land is situated. Because jurisdiction over such cases is *in rem*, the personal immunity of a putative owner is irrelevant to the jurisdiction of the court to determine questions of title. Thus, these cases can still stand on their own merits without relying on *Yakima*.

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

personam, but over the property or the 'res' *in rem*. Because the res or property is alienable and encumberable under a federally issued fee patent, it should be subject to a state court *in rem* action which does nothing more than divide it among its legal owners according to their relative interests." ***Anderson***, 130 Wn.2d at 873. While the *Anderson* court observed that this conclusion was "consistent with" its understanding of *Yakima*, the reasoning stands on its own even without *Yakima*.

In vacating and remanding *Lundgren*, the U.S. Supreme Court's decision was narrow: "Like some courts before it, the Washington Supreme Court read *Yakima* as distinguishing *in rem* from *in personam* lawsuits and 'establish[ing] the principle that ... courts have subject matter jurisdiction over *in rem* proceedings in certain situations where claims of sovereign immunity are asserted.' … That was error. *Yakima* did not address the scope of tribal sovereign

immunity." ***Lundgren***, 138 S.Ct. at 1652. "The source of confusion in the lower courts that led to our review was the one about *Yakima*, and we have dispelled it." ***Id.*** at 1654-55. Thus, the only affect of the U.S. Supreme Court's decision in *Lundgren* was to remove any reliance on *Yakima* as establishing an *in rem* exception to tribal sovereign immunity.

That does not mean that no *in rem* exception can exist. To the contrary, the *Lundgren* court left that question specifically to lower courts to "address … in the first instance." ***Lundgren***, 138 S.Ct. at 1654. What remains viable in our courts' decisions in *Lundgren*, *Anderson*, and *Smale* are the same bedrock principles that underlie the immovable property exception and the established rule that *in rem* proceedings do not require personal jurisdiction over any alleged owner. These principles stand on their own and remain good law in Washington. This Court's conclusion in *Lundgren* was ultimately correct, even though its

reliance on *Yakima* was not. This Court should reaffirm its conclusion in *Lundgren*, based either on the immovable property exception or on Washington superior courts' exclusive *in rem* jurisdiction over actions affecting title to real property in the State. Either way, tribal sovereign immunity is not a bar to Flying T's claims. This Court should reverse the trial court's dismissal of those claims and remand for further proceedings.

4.1.5 Tribal sovereign immunity does not apply to this action because Flying T's adverse possession claims fall squarely within the immovable property exception.

As noted above, the immovable property exception applies to actions to determine rights of possession or title to real property. That is exactly what we have in this case. Flying T claims to own the two parcels by adverse possession prior to the Tribe ever obtaining ownership. The parcels are outside of the Tribe's reservation. The purpose and effect of the action

is to determine who holds title to the two parcels. It is precisely the sort of action that is at the center of the immovable property exception to sovereign immunity.

If the immovable property exception applies to tribal sovereign immunity, as it should, then the Tribe is not immune. Washington courts retain subject matter jurisdiction. Venue is proper. Flying T's complaint states a claim on which relief can be granted. The trial court erred in dismissing Flying T's claims. This Court should reverse and remand for further proceedings.

4.2 The Tribe is not an indispensable party under CR 19.

The U.S. Supreme Court left untouched this Court's analysis of the applicability of CR 19, which was based entirely on Washington precedent interpreting our own court rules. *See* ***Lundgren***, 187 Wn.2d at 868-73. The rule requires that any necessary party that can be joined in an action should be joined,

and if not, the court must determine whether the action should go forward in the party's absence. **CR 19**. The rule provides "a prudential standard that asks not whether a court has the *power* to decide a case, but rather whether it *should*." ***Lundgren***, 187 Wn.2d at 868 (emphasis in original).

"Under CR 19(a), the court first determines whether absent persons are 'necessary' for a just adjudication. If the absentees are 'necessary,' the court determines whether it is feasible to order the absentees' joinder. Joinder is not feasible when tribal sovereign immunity applies. If joining a necessary party is not feasible, the court then considers whether, 'in equity and good conscience,' the action should still proceed without the absentees under CR 19(b)." ***Auto. United Trades Org. v. State***, 175 Wn.2d 214, 221-22, 285 P.3d 52 (2012).

Under facts nearly identical to those here—adverse possession of real property before a tribe ever

acquired any interest—the *Lundgren* court held that the tribe was not a necessary party under CR 19(a). ***Lundgren***, 187 Wn.2d at 869-70. The court noted the unique "nature and end result of an *in rem* action." ***Id.*** As noted above, in *in rem* proceedings, the focus is on the property, and personal jurisdiction over the parties is not required. ***In re Condemnation Petition City of Lynnwood***, 118 Wn.App. at 679.

But even if the Tribe is a necessary party, it is not an indispensable party. Although "[j]oinder is not feasible when tribal sovereign immunity applies," ***Auto. United Trades Org.***, 175 Wn.2d at 222, it does not apply here. Rather, the Tribe, having subjected itself to the jurisdiction of Washington courts in a quiet title action by purchasing an interest in Washington land, is not immune from the court's personal jurisdiction and must appear. Joinder is feasible, and therefore the indispensable party analysis is unnecessary.

But even if joinder is not feasible, the Tribe is still not an indispensable party. As this Court explained in *Auto. United Trades Org.*, " '[C]omplete justice' may not be served when a plaintiff is divested of all possible relief because an absent party is a sovereign entity. In such an instance, the quest for 'complete justice' ironically leads to none at all. … [O]ur respect for sovereign immunity [does not] compel this result. … An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal." ***Auto. United Trades Org.***, 175 Wn.2d at 233.

In this case, dismissal for nonjoinder would entirely undermine the purposes of the immovable property exception. If the exception applies, and tribal sovereign immunity is not a bar to subject matter jurisdiction, that same immunity cannot be permitted to require dismissal for failure to join an indispensable party. That would allow the Tribe to achieve the same

intolerable result, just by a different means. If no quiet title action could go forward, the courts of this State could never exercise their exclusive subject matter jurisdiction over title to non-reservation property in this State. As a matter of state sovereignty, Washington courts must be able to proceed with quiet title actions even where a tribe with a claimed interest refuses to participate. A tribe's refusal to accept this State's exclusive subject matter jurisdiction cannot be permitted to be used by the tribe as a sword to cut off any competing claims to title. "In equity and good conscience," this action must be allowed to proceed.

This Court should assert Washington's exclusive jurisdiction over actions affecting title to non-reservation real property located within the State and hold that the Tribe is not an indispensable party, and this quiet title action can proceed in its absence. The trial court erred in dismissing the case for lack of personal jurisdiction and failure to join an

indispensable party. This Court should reverse and remand for further proceedings.

5. Conclusion

The trial court erred in dismissing Flying T's claims. Because tribal sovereign immunity does not apply to a quiet title claim for adverse possession of real property located outside the reservation, the trial court had subject matter jurisdiction, venue was proper, and Flying T's complaint stated a claim on which relief could be granted. Personal jurisdiction is not at issue in an *in rem* action such as this, and the Tribe was not an indispensable party under CR 19. The trial court erred in dismissing Flying T's claims. This Court should reverse and remand for further proceedings.

I certify that this document contains 6,510 words.

Submitted this 18th day of May, 2023.

/s/ Kevin Hochhalter

Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on May 19, 2023, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Raven Arroway-Healing
Stillaguamish Tribe of Indians
rhealing@stillaguamish.com

George B. Marsh
Civil Division, Snohomish County Prosecutor's Office
George.marsh@co.snohomish.wa.us

SIGNED at Lacey, Washington, this 19th day of May, 2023.

/s/ Rhonda Davidson

Rhonda Davidson, Paralegal
rhonda@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Lane SE, #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

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