No. 101731-6

SUPREME COURT
OF THE STATE OF WASHINGTON

FLYING T. RANCH,

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS, et al.

Respondents,

Respondent's Brief

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1. INTRODUCTION

The Stillaguamish Tribe of Indians ("Tribe"), as part of on-going conservation efforts aimed at protecting salmon habitat, purchased in 2021 property along the North Fork of the Stillaguamish River, property to which the Tribe held aboriginal title. In 2022, Flying T Ranch ("Flying T") brought a suit claiming to have held adverse possession over the land since as early as 1971, five years before the Tribe acquired federal recognition. Since 1976, the Tribe has acquired lands, created a reservation, acquired land outside the reservation which the Tribe had converted to trust property, created a residential community on trust property, and has engaged in a significant amount of habitat restoration for salmon in conjunction with both federal and state partners. In that same time, Flying T and their predecessors never made their adverse possession claim to the land known.

Federal Indian law has long held that tribes are immune from unconsented suit unless Congress has acted to waive tribal

immunity. Federal Indian law recognizes that tribes should be focusing their limited resources on self-governance and that, it is Congress' unique role—not states and not courts—to alter or limit tribal sovereign immunity as Congress sees fit. The Tribe asked the Snohomish County Superior Court ("Superior Court") to dismiss Flying T's quiet title action due to tribal sovereign immunity, and the Superior Court rightfully granted the motion.

Flying T now asks this Court to enforce a sometimes-used theory of international law, called the "immoveable property exception," onto the Tribe even though the reasoning behind the exception—that a prince purchasing lands in a foreign nation is not acting as a sovereign but as a private person—makes no sense in the context of a tribe purchasing its own aboriginal lands back for purposes of protecting a treaty protected resource. In addition, the immovable property exception was never universally applied against foreign nations until Congress codified it into law, but Flying T asks this Court to apply it universally against tribes with no Act of Congress

authorizing such a waiver of tribal sovereign immunity, as required under federal Indian law.

Given the hundreds of years of federal Indian law that exists to guide courts in making decisions regarding tribal sovereign immunity, and the uniqueness of the circumstances of tribes that is so unlike foreign nations, this Court should affirm the Superior Court's Orders dismissing the adverse possession claim against the Tribe due to tribal sovereign immunity because the Superior Court correctly applied federal Indian law.

2. STATEMENT OF THE CASE

This Quiet Title action for adverse possession involves land to which the Tribe had aboriginal title and which was conveyed to the United States in 1855. **Treaty of Point Elliot, 1855, Art. I.** In the Treaty of Point Elliot, the Tribe reserved the right of taking fish at all usual and accustomed grounds. ***Id.*** The Tribe became a federally recognized tribe in 1976.

On April 13, 2021, the Tribe purchased parcel no. 32061200301300 along the North Fork of the Stillaguamish

River for habitat restoration targeted at increasing the productivity and abundance of ESA-listed Puget Sound Chinook Salmon. **CP 99.** To purchase the parcels, the Tribe utilized funding from a conservation grant from NOAA, through the Washington State Recreation and Conservation Office ("RCO"), and was required to protect the land in perpetuity with a deed of right for salmon recovery. **CP 100.** As salmon in the Stillaguamish River face extinction, so do many aspects of the Tribe's culture, community, and treaty reserved rights. **CP 100.**

In November 2022, Flying T filed a complaint to quiet title by adverse possession of the Tribe's parcel and an adjoining parcel owned by Snohomish County, claiming that Flying T, and their successors in interest, have adversely possessed both parcels since the early 1960's. **CP 109, 58.** In other pleadings, Flying T claims adverse possession from 1971 (Appellant's Brief) or 1972. **CP 22.** On December 7, 2022, the Tribe filed a Motion to Dismiss based on tribal sovereign

immunity stripping the Court of subject matter jurisdiction, lack of jurisdiction over a person, improper venue, failure to state a claim upon which relief can be granted, and failure to join a necessary party. **CP 85.**

The Tribe's Motion to Dismiss argued that it was well-settled federal Indian law that tribes are immune from suit, unless the tribe's immunity is waived by the tribe or by an Act of Congress. **CP 87.** The Tribe argued that all Washington State Court precedent recognizing an exception to tribal sovereign immunity in *in rem* cases has been overruled by the Supreme Court of the United States in *Lundgren* because all of the Washington State cases relied significantly on an interpretation of *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation* that was expressly overruled by the United States Supreme Court in *Lundgren*. **CP 88.** Additionally, the Tribe argued that the "immovable property exception" does not apply to tribal sovereign immunity because it exists for states as a matter of mutual consent and it applies to

foreign governments through an Act of Congress, neither of which apply to tribes, nor is the immoveable property exception a settled matter of common law. **CP 89-91.**

Flying T argued that the *Lundgren* Court did not say there were no *in rem* exceptions to sovereign immunity, just that you cannot use *Yakima* as the means to do it. **CP 59.** Flying T argued that "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" and that the immovable property exception should apply to tribal sovereign immunity. **CP63.**

The Tribe responded arguing that federal Indian law is distinct from international law and state law, and has its own rules to apply. **CP 40.** The Tribe argued that under federal Indian law there are circumstances in which a tribe's sovereign immunity would extend further than that of a state, so arguments about state immunity rules are not relevant. **CP 40.** The Tribe argued that the rule set forth in centuries of federal

Indian law should be followed: that a tribe has sovereign immunity from unconsented suit, unless the immunity is waived by the tribe or through an Act of Congress. **CP 41.**

On December 15, 2022, Snohomish County transferred ownership of the County Parcel to the Tribe. **CP 175.** On December 20, 2022, the Superior Court heard oral argument on the Tribe's Motion to Dismiss. After the hearing, all attorneys spoke and Flying T was informed that the County had transferred ownership of its parcel to the Tribe. **CP 132.** The Superior Court issued its Order granting the Tribe's Motion to Dismiss for lack of subject matter jurisdiction, lack of jurisdiction over person, improper venue, and failure to state a claim upon which relief can be granted, all due to tribal sovereign immunity. **CP 35-36.**

3. ARGUMENT

1. *Federal Indian law is a distinct area of law due to the unique nature of the relationship between tribes and the federal government, and under federal Indian law, tribes are immune from unconsented suit unless the tribe unequivocally*

waives its immunity, or if the tribe's immunity is waived by an Act of Congress.

The sovereign immunity of tribes is a matter of federal law, which is the supreme law of the land to which State courts are bound. ***Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,*** 523 U.S. 751, at 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); **Art. VI, Clause 2 of the United States Constitution.** Under federal law, Indian tribes, like the Tribe, enjoy immunity from suit because they are sovereigns pre-dating the Constitution, and immunity is necessary to preserve autonomous tribal existence. ***U.S. v. State of Or.,*** 657 F.2d 1009, 1013 (9th Cir. 1981). The United States has repeatedly recognized that Indian tribes "retain[ ] their original natural rights" as sovereign entities, unless Congress has acted to abrogate those rights. ***Worcester v. Georgia,*** 31 U.S. 515 at 559, 6 Pet. 515, 8 L.Ed. 483 (1832); *see also* ***Holden v. Joy,*** 84 U.S. 211 at 242, 34 S.Ct. 659, 21 L.Ed. 523 (1872). It is well settled that Indian tribes continue to enjoy the original, natural

right of common-law immunity from suit. ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49 at 58, 98 S.Ct. 1670, 56 L.Ed.2d 106, (1978). This immunity extends to suits for declaratory relief and injunctive relief. ***Imperial Granite Co. v Pala Band of Mission Indians,*** 940 F.2d 1269 (9th Cir. 1991). Where a party is a tribe with sovereign immunity, the sovereign immunity of the tribe strips the court of subject matter jurisdiction. ***Lewis v. Norton,*** 424 F.3d 959, 961 (9th Cir. 2005). The Supreme Court has also held that tribal immunity is "not subject to diminution by the States." ***Kiowa Tribe of Okla., supra*** 523 U.S. 751, at 752.

Under federal Indian law, there are only two ways tribal immunity can be overcome. First, Congress has plenary power to authorize a waiver of tribal sovereign immunity through an Act of Congress. ***Santa Clara Pueblo v. Martinez, supra*** at 58. Second, an Indian tribe itself may waive its own sovereign immunity. ***Id.*** However, any waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed." ***Id.***

While there have been cases in Washington State that

held a tribe's sovereign immunity does not apply to an adverse possession case, all relied upon a misinterpretation of United States Supreme Court precedent and their reasoning has been expressly overruled by the Supreme Court of the United States. ***Upper Skagit v. Lundgren***, ___ U.S. ___, 138 S.Ct. 1649, 200 L.Ed.2d 931 (2018) (herein after "Lundgren") (holding that Washington State Supreme Court misinterpreted ***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) in ***Lundgren v. Upper Skagit Tribe,*** 187 Wn.2d 857, 389 P.3d 569 (2017); *See e.g.*, ***Anderson & Middleton Lumber Co. v. Quinault Indian Nation***, 130 Wn.2d 862, 929 P.2d 931 (1996) (relying on an interpretation of *Yakima* which was overruled by *Lundgren*); *See e.g.* ***Smale v. Nortep***, 150 Wn.App. 476, 208 P.3d 1180 (2009) (relying on *Anderson* which relied on an interpretation of *Yakima* that was overruled in *Lundgren*); *See e.g.*, ***Lundgren v. Upper Skagit Tribe, supra*** (relying on reasoning in *Anderson, Smale,* and *Yakima* all of which were

overruled in the United States Supreme Court case *Lundgren)*.

The Supreme Court of the United States accepted certiorari of the Washington State Supreme Court ruling in *Lundgren v. Upper Skagit* specifically to dispel the misunderstandings of the Washington State Courts regarding tribal sovereign immunity in *in rem* cases. ***Upper Skagit v. Lundgren,*** 138 S.Ct. 1649 at 1654. In *Lundgren*, the Upper Skagit Tribe, like the Tribe, purchased a plot of land in Washington State. ***Id.*** at 1652. After conducting a survey, the Upper Skagit Tribe discovered that the boundary of the property purchased fell on the other side of a fence placed by a neighbor. ***Id.*** The neighbor filed a quiet title action against the Upper Skagit Tribe, claiming adverse possession of the portion of the property on the neighbor's side of the fence. ***Id.*** The Upper Skagit Tribe claimed sovereign immunity, but the Supreme Court of Washington State reasoned that under United States Supreme Court precedent in *Yakima*, tribal sovereign immunity could not apply to *in rem* suits. ***Id.*** (stating

that the Washington Supreme Court was interpreting ***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)).

The Supreme Court of the United States overruled the Supreme Court of Washington, stating that the Washington State Supreme Court made an error when it read *Yakima* as distinguishing *in rem* from *in personam* lawsuits and also erred in establishing the principle that courts have subject matter jurisdiction over *in rem* proceedings in certain situations where sovereign immunity has been asserted. ***Upper Skagit v. Lundgren***, 138 S.Ct. 1649 at 1652. Sovereign immunity strips the court of subject matter jurisdiction, both *in personam* and *in rem*.

It is important to note that the court in *Yakima* found the basis for the *in rem* exception to tribal sovereign immunity specifically in the General Allotment Act, which applied to the very specific facts of the case. ***County of Yakima, supra*** at 251. As previously stated, under federal Indian law, an Act of

Congress can waive a tribe's sovereign immunity without the tribe's consent. The holding in *Yakima* is in line with well-settled federal Indian law, that tribes are immune from suit (both *in personam* and *in rem*) unless an Act of Congress waived the tribe's immunity, or the tribe consents to suit.

At the Supreme Court of the United State in *Lundgren,* the Plaintiffs made a novel argument which had not been asserted previously in Washington State cases at all. The Plaintiffs argued that there was an "immovable property exception" to sovereign immunity in common law, which should apply to tribal sovereign immunity. ***Upper Skagit v. Lundgren, supra*** at 1653-4 (citing ***Schooner Exchange v. McFaddon,*** 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (1812)). While the United States Supreme Court noted it has discretion to affirm a ruling on any ground supported by the law, the Supreme Court declined to do so with this "immovable property" argument, concerned that determining "the limits on the sovereign immunity held by tribes is a grave question" and

that these arguments should have been made at lower courts. ***Upper Skagit v. Lundgren, supra*** at 1654.

Despite the Supreme Court refusing to expressly issue a ruling on the "immovable property exception" in *Lundgren*, the Supreme Court's previous rulings already unequivocally bar the courts from carving out any exception to tribal sovereign immunity, particularly because under federal Indian law, the carving out of exceptions to tribal sovereign immunity belongs to the legislative branch. In *Bay Mills*, the United States Supreme Court held "we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." ***Michigan v. Bay Mills Indian Community,*** 572 U.S. 782, 134 S.Ct. 2024, 2030-2031, 188 L.Ed.2d 1071 (2014). The United States Supreme Court has also "thought it improper suddenly to start carving out exceptions to that immunity, opting instead to defer to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from

suit." ***Oneida Indian Nation v. Phillips,*** 360 F.Supp.3d 122 (2nd Cir. 2018); ***Michigan v. Bay Mills, supra*** at 2030-2032; ***Kiowa Tribe of Okla.***, ***supra*** at 759-760 (stating "we decline to revisit our case law and choose to defer to Congress.").

The well-settled federal Indian law doctrine of tribal sovereign immunity holds that a tribe is immune from suit, which strips a court of subject matter jurisdiction, unless the tribe unequivocally expresses its waiver of its sovereign immunity, or if the tribe's immunity is waived by an Act of Congress. This is the law that should be followed in this case as well.

2. *The relationship between tribes and the federal government is unique, and common law principles that apply to foreign sovereigns do not necessarily apply to tribes, especially when the international common law contradicts settled federal Indian law.*

The relationship between tribes and the federal government are uniquely different than that of foreign nations. Specifically, the relationship between the United States and tribes are based on, and built around the doctrine of trust and

responsibility. As the Supreme Court notes in 1983, a principle that "has long dominated the government's dealings with Indians.... [is] the undisputed existence of a general trust relationship between the Unites States and Indian people." ***United States v. Mitchell,*** 463 U.S. 206, 255, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). Chief Justice Marshall described the relationship between tribes and the United States as that of "a ward to his guardian." ***Cherokee Nation v. Georgia,*** 30 U.S. 1, 2, 8 L.Ed. 25, (1831) The trust doctrine extends back to the promises contained in the treaties, which the United States Supreme Court has held imposes on the federal government "moral obligations of the highest responsibility and trust." ***Seminole Nation v. United States,*** 316 U.S. 286, 296-97, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942). No such relationship exists with foreign states.

Another distinction between tribes and foreign nations is that tribes are able to reacquire their aboriginal land and through the fee-to-trust process, have the land become the

tribe's "Indian County" once again. **25 CFR § 151.11.** Once the land becomes the Tribe's "Indian Country," then the Tribe assumes jurisdiction over the land, to the extent allowed under federal Indian law. **18 U.S.C. § 1151.** No foreign nation can purchase land and through a legal process, acquire civil, criminal, and regulatory jurisdiction over land within the United States.

While courts will often look to international law as guidance for determining how to analyze federal Indian law cases, international common law does not control because the unique relationship with tribes have resulted in 200 years of federal Indian law that is distinctly different from international law. For example, in *Kiowa,* the Court stated "we find instructive the problems of sovereign immunity for foreign countries…" while ultimately holding that tribes enjoy immunity from suit on contracts, whether the contracts are governmental or commercial and whether they were made on or off reservation. ***Kiowa Tribe of Okla., supra*** at 759. Congress

has made a decision to retain tribal immunity in the commercial contract context. ***Michigan v. Bay Mills, supra*** at 801-802. Whereas under international law there would have been no immunity for the commercial contract at issue in *Kiowa*. ***National City Bank of New York v. Republic of China***, 348 U.S. 356, 361, 75 S.Ct. 423, 99 L.Ed. 389 (1955) (stating that the State Department has pronounced broadly against recognizing sovereign immunity for commercial operations of a foreign government); **28 U.S.C. §1605**(a)(2). Commercial contracts is just one of many examples where international law contradicts federal Indian law on the subject of sovereign immunity due to the uniqueness of the relationship between the federal government and tribes.

Another area in which international common law and federal Indian law are expressly different is in the rules regarding waiver of sovereign immunity. For a foreign nation, a waiver of sovereign immunity can be implied by conduct of the state, such as participation in a case. **Restatement (Third) of**

the Law Foreign Relations Law of the United States, § 456(b); ***National City Bank of New York v. Republic of China, supra*** at 363 (by appearing in a United States Court, foreign sovereign implied consent to jurisdiction). Federal Indian law, on the other hand, requires that any waiver of tribal sovereign immunity must be unequivocally expressed. ***Santa Clara, supra*** at 58. Mere participation in a case does not waive a tribe's immunity for counterclaims. ***Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,*** 498 U.S. 505, 509-510, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) ("We uphold the Court of Appeals' determination that the Tribe did not waive its sovereign immunity merely by filing an action…")

Flying T cites *Lewis v. Clark* for the assertion that international common law is "the baseline" for tribal sovereign immunity, and yet *Lewis v. Clarke* looked to cases "in the context of lawsuits against state and federal employees," Eleventh Amendment immunity, and to cases involving indemnification and diversity of citizenship in state law, not to

international law. ***Lewis v. Clarke,*** 581 U.S.155, 167-168, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) (citing ***Navarro Sav. Ass'n v. Lee,*** 446 U.S. 458, 460, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980)) (analyzing **28 U.S.C. § 1332** diversity of citizenship jurisdiction when the parties are from different states, not different countries). *Lewis v. Clarke* does not address the bounds of tribal sovereign immunity nor does it address sovereign immunity under international law, it stands for the assertion that the tribe must be the real party in interest for the tribe's immunity to apply, which is largely irrelevant to the instant case as it is undisputed that the Tribe is the party in interest claiming sovereign immunity.

Regardless, while courts may look to how foreign sovereigns are treated in the law, the treatment of other sovereigns is only a guide, and not a determining factor in how tribal sovereign immunity is to be treated due to the unique nature of the relationship between the United States and federally recognized tribes.

Liked the United States Supreme Court, this Court should follow the rules set forth in federal Indian law and dismiss any suit against a tribe absent congressional authorization or a waiver by the tribe, and this Court should not begin carving out exceptions to tribal immunity, and instead defer to Congress to define and otherwise abrogate tribal sovereign immunity from suit. ***Michigan v. Bay Mills, supra*** at 2030-2031; ***Oneida Indian Nation v. Phillips, supra; Kiowa Tribe of Okla., supra***

3. *Even if the Court were to apply international common law regarding sovereign immunity to tribes, the immovable property exception was never consistently applied to foreign nations prior to the Foreign Sovereign Immunities Act because the immovable property exception fell under only one of two equally acceptable views of sovereign immunity and was a matter of comity with friendly nations determined by the Executive Branch on a case-by-case basis.*

The immunity of a foreign sovereign from the jurisdiction of the courts of another sovereign is an undisputed principle of customary international law. For over a century and

a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. ***Verlinden B.V. v. Central Bank of Nigeria,*** 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983). The Supreme Court of the United States recognized that the 1812 opinion of Chief Justice Marshall in the *Schooner Exchange* was widely regarded as extending virtually absolute immunity to foreign sovereigns. ***Id.*** at 486 (discussing ***Schooner Exchange v. McFaddon***, ***supra*** (Chief Justice Marshall discussing a prince purchasing land in another sovereign "[w]ithout indicating any opinion on the question…")). As sovereigns began engaging in more commercial activities in the early 21st Century, countries such as Belgium and Italy began to determine that strict immunity was no longer necessary in such circumstances. **Restatement of the Law (Third) Foreign Relations Law of the United States, 390-391**. Despite this, in 1921 the United States Supreme Court reaffirmed the strict, or "absolute," theory of sovereign immunity holding that a foreign state and

its property are immune from jurisdiction of the court in all cases, "though such property be within its territory." ***Berrizzi Brothers Co. v. S.S. Pesaro,*** 271 U.S. 562, 575, 46 S.Ct. 611, 70 L.Ed. 1088 (1926).

Under traditional practice, a foreign sovereign that was sued in a court in the United States, or whose property was the subject of an *in rem* proceeding, commonly made a special appearance to assert immunity. **Restatement of the Law (Third) Foreign Relations Law of the United States,** 392 (1987). The court, applying international law as domestic law, dismissed the suit. ***Id.*** As early as the 1812 *Schooner Exchange*, a United States Attorney would make a "suggestion" of immunity to the Court. ***Schooner, supra*** at 174. The Executive Branch was advising courts on whether to extend sovereign immunity to foreign nations because sovereign immunity of foreign nations was understood to be a matter of grace and comity, not a Constitutional matter. ***Verlinden B.V. v. Central Bank of Nigeria, supra*** at 486. By 1943, the Supreme Court of

the United States was ruling that any suggestion of immunity from the Executive Branch "must be accepted by the courts as a conclusive determination of the political arm of the government." ***Ex Parte Republic of Peru***, 318 U.S. 578, 588-89, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns. ***Verlinden B.V. v. Central Bank of Nigeria, supra*** at 486. In 1952, the State Department made a policy decision to switch to the more restrictive theory of sovereign immunity for foreign states, stating that "[a] study of the law of sovereign immunity reveals the existence of two different concepts of sovereign immunity… According to the newer or restrictive theory of sovereign immunity, the immunity of a sovereign is recognized with regard to sovereign or public acts (*jure imperii)* of a state, but not with the respect to private acts (*jure gestionis)*… [I]t will hereafter be the Department's policy to follow the restrictive theory…in the consideration of requests of foreign

governments for a grant of sovereign immunity." **Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General, Philip B. Perlman (May 19, 1952),** ***reprinted in*** 26 Dep't St. Bull. 984, 985 (1952) (hereinafter called the "Tate Letter").

Despite this assertion of a policy change, foreign nations often placed diplomatic pressure on the State Department in seeking immunity and, on occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory of sovereign immunity. ***Verlinden B.V. v. Central Bank of Nigeria, supra*** at 487. To complicate matters further, foreign nations didn't always seek a determination from the State Department on immunity, which left courts to decide the matter based on previous State Department determinations. ***Id.*** Thus, sovereign immunity decisions for foreign governments were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. ***Id.*** To complicate matters

further, there were two equally acceptable common law interpretations of sovereign immunity under international law- the absolute theory of sovereign immunity, and the "newer or restrictive" theory, as described in the Tate Letter.

It was in this environment that Congress passed the Foreign Sovereign Immunities Act ("FSIA") in 1976 to free the Government from making foreign sovereign immunity determinations on a case-by-case basis and to "assur[e] litigants that … decisions are made on purely legal grounds and under procedures that ensure due process." ***Id.*** The FSIA codified the more restrictive theory of sovereign immunity for foreign nations, not tribes, and includes an immovable property exception. **28 U.S.C. § 1605(a)(4).**

Given this history, it is disingenuous for Flying T to assert that "foreign sovereign immunity has always been limited by the immovable property exception." There is no such consistent history in how the United States courts applied sovereign immunity to foreign nations, and it wasn't until

Congress passed the FSIA which codified an "immovable property exception" that the courts began to consistently apply the immovable property exception.

Unlike foreign nations, tribes have always been treated as having strict or absolute immunity from suit, unless an Act of Congress has waived the tribe's immunity or the tribe consented to the suit. ***Santa Clara, supra*** at 58; See also, **Marilyn E. Phelan, Kimberly Mayfield, & Judge Jay M. Pat Phelan, Sovereign Immunity Law**, (Vandeplas Publ'g., 2019) ("Tribal nations are domestic "nations" and, as such, have absolute sovereign immunity.") In *Yakima,* for example, the Act of Congress that authorized the jurisdiction to tax was the General Allotment Act. ***County of Yakima, supra*** at 251.

Indeed, sometimes even with an Act of Congress, if the intent to waive tribal sovereign immunity isn't unequivocally expressed in the Act itself, tribal immunity is not considered waived. For example, the Supreme Court of the United States held that even though Congress passed the Indian Civil Rights

Act ("ICRA"), nothing "on the face" of the Act "subjects tribes to the jurisdiction of federal courts in civil actions" and the provisions of ICRA "can hardly be read as a general waiver of the tribe's sovereign immunity." ***Santa Clara, supra*** at 58-59.

Another case cited by Flying T to assert that tribal sovereign immunity should not extend beyond that of a foreign nation actually was addressing that tribal sovereign immunity could not be used when the tribe is not a party in interest, and the case certainly does not stand for the assertion that tribal sovereign immunity should be limited to the same extent as foreign nations under the FSIA, or under the Tate Letter, neither of which apply to tribes. ***Lewis v. Clarke, supra.***

The immovable property exception can hardly be considered a firmly established common law exception to sovereign immunity and was never universally applied by the United States courts against foreign sovereigns until Congress passed the FSIA in 1976. Notably, there is no such similar Act of Congress waiving tribal sovereignty for "immovable

property" suits. Though there is case after case after case stating that an Act of Congress would be needed to waive a tribe's sovereignty against the tribe's consent. *See, e.g.*, ***Kiowa Tribe of Okla., supra***; ***Worcester, supra***; ***Santa Clara , supra***; ***Michigan v. Bay Mills***, ***supra***.

For these reasons, this Court should follow the rule established under federal Indian law to defer to congress to define and otherwise abrogate tribal sovereign immunity from suit and recognize that it is exclusively Congress' role to determine the bounds of tribal sovereign immunity. ***Oneida Indian Nation v. Phillips***, ***supra***; ***Michigan v. Bay Mills***, ***supra*** at 2030-2032; ***Kiowa Tribe of Okla. , supra*** at 759-760 (stating "we decline to revisit our case law and choose to defer to Congress.").

4. *The immovable property exception to sovereign immunity applies to States not as a matter of common law, but as a matter of mutual waiver by consent in an agreement to which tribes are not a party and, for this reason, any precedent regarding state immunity is irrelevant to the analysis of tribal sovereign immunity.*

In arguing that the immovable property exception should apply to tribes, Flying T cites numerous cases specifically about land acquired by one state of the United States in another state of the United States. *See, e.g.*, ***Georgia v. City of Chattanooga,*** 264 U.S. 472, 480-481, 44 S.Ct. 369, 68 L.Ed. 796 (1924) (Georgia and Tennessee); ***Olympia Mining & Milling Co. v. Kerns,*** 64 Wash. 545, 117 P. 260 (1911) (Idaho and Washington State); ***Smith v. Fletcher***, 102 Wash. 218, 173 P. 19 (1918) (Idaho and Washington State); ***Silver Surprize, Inc. v. Sunshine Mn. Co.,*** 74 Wn.2d 519, 445 P.2d 334 (1968) (Idaho and Washington State). While it is true that states may be subject to other state courts when there is "immovable property" at issue, this is utterly irrelevant to the issue of tribal sovereign immunity.

The basis for one state to have jurisdiction over another state is not "common law" of sovereign immunity, but rather the fact that the states have all mutually surrendered their

immunity to their sister states in order that states may sue each other. ***Blatchford v. Native Village of Noatak and Circle Village***, 501 U.S. 775 at 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). For example, the Supreme Court of the United States held that a State cannot claim immunity for an *in rem* suit from another state -not because there is some common law exception-but because the States "agreed in the plan of the Constitutional Convention not to assert that immunity." ***Central Virginia Community College v. Katz,*** 546 U.S. 356 at 357, 126 S.Ct. 990, 163 L.Ed.2d 945(2006).

The Supreme Court of the United States knows that tribes are not parties to the United States Constitution and notes that "[t]here is no such mutuality with tribes, which have been held repeatedly to enjoy immunity against suits by states." ***Blatchford, supra*** at 775. The Supreme Court of the United States has noted that Indian tribes' sovereign immunity is not co-extensive with that of the States, and a tribes' sovereign immunity can extend further than that of a state's. ***Blatchford,***

supra at 775. The Supreme Court has also held that tribal immunity, again, is a matter of federal law and "not subject to diminution by the States." ***Kiowa Tribe of Okla., supra*** at 752. For these reasons, any arguments about how state sovereignty is treated in the court of another state is irrelevant to determinations about tribal sovereign immunity and should be wholly ignored.

5. *Even if the Court were to determine the immovable property exception should apply to tribes, the immovable property exception would not apply in this case because the Tribe purchased this land in its role as sovereign for the benefit of the public of Washington State and of the Stillaguamish Tribe.*

Even if this Court were compelled to apply the "immovable property exception" to tribal sovereign immunity, it would not apply in the instant case because the Tribe is not acting as a "private person" but as a government and the land is being used for a public purpose. The immovable property exception arises in the "new or restrictive theory" of sovereign immunity which waives immunity "with the respect to private

acts (*jure gestionis*)..." but it does not apply when the acts are public acts. ***Tate Letter, supra.*** Chief Justice Marshall in contemplating what is now called the "immovable property exception" stated that there is a difference between the private property of a prince, and those things that support a sovereign power. ***Schooner, supra*** at 145. The Washington State legislature followed this same logic when it codified that "lands held for any public purpose" may not be subject to an adverse possession claim. **RCW 7.28.090.**

When the legislature enacted RCW 7.28.090, it shielded government "lands held for any public purpose" against being taken by adverse possession, and this includes cases like the instant case where the plaintiff claims to have adversely possessed the land for ten years or more. ***Michael v. City of Seattle,*** 19 Wn.App.2d 783, 793-4, 498 P.3d 522 (2021). The Supreme Court of Washington has interpreted the phrase "lands held for any public purpose" as covering public easements, and determined that when an adverse possession claim interferes

with the public's potential or actual use of the easement, the adverse possession claim is barred. ***Kiely v. Graves***, 173 Wn.2d 926, 935-6, 940, 271 P.3d 226 (2012). Washington Courts have determined that "lands held for public use" means land actually used or planned for use in a way that benefits the public as shown by the benefits directly or indirectly from governmental ownership of the property. ***Michael, supra*** at 799.

In purchasing the property at issue here, the Tribe was very much acting as a government and not as an individual. The land was purchased for public benefit and is being held for public benefit. Specifically, the land was purchased as part of a conservation project and the agreement requires a conservation easement for salmon recovery. **CP 100.** The Standard Terms & Agreements of the Washington State Recreation and Conservation Office ("RCO") Contract used to purchase the property requires a Deed of Right to be included in an easement held by Washington State "the right to preserve, protect, access, and/or use the property for public purposes consistent with the

funding source and agreement…" and Washington State's RCO must approve the language of the public use easement. **App. 2.** The public of Washington State benefits from the public use of this land as habitat restoration for salmon recovery and from public access to conservation properties on the North Fork of the Stillaguamish River. The public of the Tribe also benefit from the land being held for conservation and habitat restoration purposes because as salmon in the Stillaguamish River face extinction, so do many aspects of the Tribe's culture, community, and treaty reserved rights. **CP 100.** Preservation of the Tribe's culture and treaty reserved right is a benefit to the public of the Tribe.

In addition to the public benefits of the conservation of the land, the Tribe was acting in its capacity as sovereign in reacquiring aboriginal Stillaguamish lands that may become the Tribe's "Indian Country" again. The land purchased was aboriginal Stillaguamish Land prior to 1855. Under the fee-to-trust process, the Stillaguamish Tribe has the ability to turn the

land into the Tribe's "Indian Country" once again. **25 CFR § 151.11, 18 U.S.C. § 1151.** Once the land becomes the Tribe's "Indian Country," then the Tribe assumes jurisdiction over the land, to the extent allowed under federal Indian law, including criminal jurisdiction over all Indians, criminal jurisdiction over non-Indians to the extent allowed under the Violence Against Women Act, and civil jurisdiction to the extent permitted by federal Indian law. ***Montana v. United States***, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

The act of assuming jurisdiction over land, albeit through a federal process, is an exclusively governmental activity, and cannot be done by a private person. While Chief Justice Marshall in *Schooner* indicated that a prince who purchases land in a foreign nation is said to be laying down his crown and acting as a private person, he would have clearly recognized that a tribal government reacquiring land to which they had aboriginal title under a federal fee-to-trust process is acting, as he described the Cherokee Nation, as a "sovereign and

independent state… with the right of self-governance." ***Cherokee, supra*** at 2. For this reason, the immovable property exception should not apply to the instant case.

4. CONCLUSION

This Court should (1) affirm the Superior Court's Order granting the Tribe's Motion to Dismiss Flying T's quiet title action due to tribal sovereign immunity and (2) hold the immovable property exception is inapplicable to the doctrine of tribal sovereign immunity because doing so is consistent with long-standing precedent in federal Indian law. Namely, the United States Supreme Court has continuously and repeatedly made itself clear—the doctrine of tribal immunity is settled law and any suit against a tribe absent congressional abrogation or the Tribe's express, unequivocal waiver must be dismissed. This Court should follow that precedent. Finally, this Court should reject Flying T's various, desperate arguments regarding the immovable property exception as Tribes are

neither foreign nations nor states and thereby should not be treated as such by this Court.

I certify that this document contains 6,304 words.

Submitted this 21st day of June, 2023.

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Standard Terms and Conditions of the Recreation and Conservation Office

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ceremonies.

PROVISIONS APPLYING TO ACQUISITION PROJECTS

The following provisions shall be in force:

A. **Evidence of Land Value.** Before disbursement of funds by RCO as provided under this Agreement, the Sponsor agrees to supply documentation acceptable to RCO that the cost of the property rights acquired has been established according to all applicable manuals and RCWs or WACs.

B. **Evidence of Title.** The Sponsor agrees to provide documentation that shows the type of ownership interest for the property that has been acquired. This shall be done before any payment of financial assistance.

C. **Legal Description of Real Property Rights Acquired.** The legal description of the real property rights purchased with funding assistance provided through this Agreement (and protected by a recorded conveyance of rights to the State of Washington) shall be delivered to RCO before final payment.

D. **Conveyance of Rights to the State of Washington.** When real property rights (both fee simple and lesser interests) are acquired, the Sponsor agrees to execute an appropriate document (provided or approved by RCO) conveying certain rights and responsibilities to RCO or the Funding Entity on behalf of the State of Washington or another agency of the state, or federal agency, or other organization. These documents include a Deed of Right, Assignment of Rights, Easements and/or Leases as described below. The Sponsor agrees to use document language provided by RCO, to record the executed document in the County where the real property lies, and to provide a copy of the recorded document to RCO. The document required will vary depending on the project type, the real property rights being acquired and whether or not those rights are being acquired in perpetuity.

    1) **Deed of Right.** The Deed of Right as described in RCO Manual #3 conveys to the people of the state of Washington the right to preserve, protect, access, and/or use the property for public purposes consistent with the funding source and project agreement. Sponsors shall use this document when acquiring real property rights that include the underlying land. This document may also be applicable for those easements where the Sponsor has acquired a perpetual easement for public purposes.

    2) **Assignment of Rights.** The Assignment of Rights as described in RCO Manual #3 document transfers certain rights to RCO and the state such as public access, access for compliance, and enforcement. Sponsors shall use this document when an easement or lease is being acquired under this Agreement. The Assignment of Rights requires the signature of the underlying landowner and must be incorporated by reference in the easement document.

    3) **Easements and Leases.** The Sponsor may incorporate required language from the Deed of Right or Assignment of Rights directly into the easement or lease document, thereby eliminating the requirement for a separate document. Language will depend on the situation; Sponsor must obtain RCO approval on the draft language prior to executing the easement or lease.

E. **Real Property Acquisition and Relocation Assistance.** In the event that housing and relocation costs and procedures are required by local, state, tribal, or federal law, or rule; the Sponsor agrees to provide such housing and relocation assistance as a condition of the Agreement and receiving grant funds.

F. **Buildings and Structures.** In general, grant funds are to be used for outdoor recreation, conservation, or salmon recovery. Sponsors agree to remove or demolish ineligible structures. Sponsor must consult with RCO regarding treatment of such structures and compliance with COMPLIANCE WITH APPLICABLE LAW SECTION, Archeological and Cultural Resources paragraph.

G. **Hazardous Substances.**

    1) **Certification.** The Sponsor shall inspect, investigate, and conduct an environmental audit of the proposed acquisition site for the presence of hazardous substances, as defined in RCW 70.105D.020(13), and certify:

        a) No hazardous substances were found on the site, or

        b) Any hazardous substances found have been treated and/or disposed of in compliance with applicable state and federal laws, and the site deemed "clean."

    2) **Responsibility.** Nothing in this provision alters the Sponsor's duties and liabilities regarding hazardous substances as set forth in RCW 70.105D.

    3) **Hold Harmless.** Subject to the limitations provided in this Agreement, the Sponsor will defend, protect and hold harmless RCO and any and all of its employees and/or agents, from and against liability, cost (including but not limited to all costs of defense and attorneys' fees) and loss of any nature from any and all claims or suits resulting from the presence of, or the release or threatened release of, hazardous substances on the

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on June 21, 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.

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SIGNED at Snohomish, Washington, this 21st day of June, 2023.

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STILLAGUAMISH TRIBE OF INDIANS

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Appellate Court Case Title:	Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians et al.
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