No. 101731-6

Supreme Court
of the State of Washington

Flying T Ranch,

Appellant,

v.

Stillaguamish Tribe of Indians, et al.,

Respondents.

Reply 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

Table of Contents

Table of Authorities

Federal Cases

Washington Cases

Regulations

Court Rules

Treatises

1. Introduction

The immovable property exception to sovereign immunity has been a fixture of the common law for centuries, predating the recognition of tribal sovereign immunity as a common-law doctrine. The scope of that common-law immunity is a proper matter for the courts' consideration. And particularly so here, where the U.S. Supreme Court has specifically invited this Court to consider whether the immovable property exception applies to tribal sovereign immunity.

Because the exception pre-dates the inception of tribal sovereign immunity and because the exception is a necessary, bedrock principle of territorial sovereignty, it must apply to all sovereigns, including Indian Tribes. The Tribe has not presented any compelling reason for this Court to find that the exception does not apply. This Court should hold that the exception applies and that it is met in this case. The Court should reverse the

trial court's erroneous dismissal of Flying T's claims and should remand for further proceedings.

2. Argument

Flying T's opening brief argued that the trial court erred in dismissing its claims under CR 12(b) because tribal sovereign immunity does not apply to a claim for adverse possession of real property located outside the reservation. Without tribal sovereign immunity, all of the alleged grounds under CR 12(b) fail.

Flying T argued that this Court reviews CR 12(b) decisions de novo, viewing the facts—including hypothetical facts—most favorably to Flying T, the nonmoving party, and only dismissing a claim if there are no conceivable facts that would justify recovery. Br. of App. 9-10. The Tribe does not disagree with this standard of review.

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

The reason tribal sovereign immunity does not apply to this action to determine rights of title to Washington land is the bedrock principle that ownership of real property must be adjudicated by the courts of the sovereign in whose territory the real property is located. Flying T's opening brief analogized tribal sovereign immunity to foreign sovereign immunity. Br. of App. 12-16. But even where this analogy might be imperfect, the bedrock principle remains: a sovereign cannot safely permit title to its territorial lands to be adjudicated by another sovereign. Br. of App. 17-25. Thus, even to the extent that tribal sovereign immunity is different from foreign sovereign immunity, tribal immunity still cannot overcome the immovable property exception. Because this case falls squarely within that exception, Br. of App. 37-38, tribal sovereign immunity cannot apply,

and this Court should reverse dismissal of Flying T's claims and remand for further proceedings.

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

Flying T's opening brief demonstrated that the U.S. Supreme Court has repeatedly explained that the scope of tribal sovereign immunity is based on, or at least similar to, the common-law immunity enjoyed by foreign nations. Br. of App. 12-14 (quoting, *e.g.,* *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) ("tribes possess … the common-law immunity from suit traditionally enjoyed by sovereign powers")). But the scope of that immunity and its exceptions remains a question of common law for the courts. Br. of App. 15-16 (citing, *e.g.,* ***Lewis v. Clarke***, 581 U.S. 155, 167-68, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) (holding that a

claim was outside the common-law scope of tribal sovereign immunity)).

The Tribe acknowledges that tribal sovereign immunity stems from the Tribe's "original natural rights as sovereign entities," which includes "the original, natural right of common-law immunity from suit." Br. of Resp. 8-9 (citing ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); ***Worcester v. Georgia***, 31 U.S. 515, 559, 6 Pet. 515, 8 L.Ed. 483 (1832)). It follows, then, that the scope of tribal sovereign immunity at its inception must have been at least similar to the sovereign immunity granted to foreign nations, as Flying T has argued. Indeed, "the similarities between foreign sovereign immunity and tribal immunity are … considerable." ***Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.***, 692 F.3d 1200, 1206 (11th Cir. 2012).

While the Tribe consistently repeats the refrain that tribal sovereign immunity can only be waived by the Tribe itself or by an act of Congress, *e.g.,* Br. of Resp. 9, this case *does not involve* waiver or diminution of tribal sovereign immunity. This case involves the question of the *scope* of sovereign immunity, which is an appropriate common-law question for the courts. *See, e.g.,* ***Kiowa Tribe of Okla. v. Mfg. Techs., Inc.***, 523 U.S. 751, 759-60, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) ("the Court has taken the lead in drawing the bounds of tribal immunity").

The Tribe attempts to draw distinctions between Indian Tribes and foreign nations but fails to demonstrate how any of these differences should result in a different scope of immunity in regards to real property located in the territory of another sovereign. Br. of Resp. 15-17.

The Tribe suggests that it is different because, through a "fee-to-trust process," it can acquire private

Washington land and re-convert it to " 'Indian Country' once again." Br. of Resp. 16-17. But there is no evidence that these parcels were ever a part of the Stillaguamish Tribe's "Indian Country." (The Treaty of Point Elliott does not distinguish between the lands of the separate Tribes.) There is no evidence that the Tribe has initiated the "fee-to-trust process" for these parcels, or that the parcels even qualify. The Tribe's limited citations on this issue fail to establish that it has any bearing on the scope of its tribal sovereign immunity. For this Court's purposes, the parcels are still within the sovereign territory of the State of Washington and have not taken on any special status just because they were purchased by the Tribe in fee. It is of note that **25 CFR § 151.1**—the same Part on which the Tribe relies—specifies, "Acquisition of land by … tribes in fee simple status is not covered by these regulations." The "fee-to-trust process" has no bearing on this case.

The Tribe argues that foreign sovereign immunity is different from tribal sovereign immunity in regards to commercial contracts. Br. of Resp. 17-18. But the commercial-acts exception to foreign sovereign immunity arose *after* tribal sovereign immunity had been established as a separate doctrine. *Compare* ***Kiowa***, 523 U.S. at 757 (tracing tribal sovereign immunity to the early 20th Century) *with* ***City of New York v. Permanent Mission of India to the United Nations***, 446 F.3d 365, 370 (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) (the 1952 "Tate Letter" announced U.S. adoption of the "restrictive theory" of sovereign immunity, which did not immunize commercial acts). In contrast, the immovable property exception to sovereign immunity was recognized in the common law long before tribal sovereign immunity was even recognized. *See, e.g.,* ***Permanent Mission of India***,

446 F.3d at 370 (according to the Tate Letter, "There is agreement by proponents of both [the classical and the restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property…"); ***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)) ("A sovereignty cannot safely permit the title to its land to be determined by a foreign power."). Tribal sovereign immunity should be subject to the immovable property exception, which preceded it in the common law.

The trial court erred in dismissing Flying T's claims of adverse possession because the common law has never provided any kind of sovereign immunity against actions affecting rights of ownership or possession of real property located in the territory of the state exercising jurisdiction. Tribal sovereign immunity does not apply.

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

Flying T's opening brief demonstrated that foreign sovereign immunity has never been extended to actions to determine ownership of real property. Br. of App. 17-22 (citing, *e.g.,* ***The Schooner Exchange v. McFaddon***, 11 U.S. 116, 145, 3 L. Ed. 287, 7 Cranch 116 (1812) (from the early days of foreign sovereign immunity, the Court also recognized an exception for property owned by a sovereign in the territory of another). This immovable property exception was based on a bedrock principle of territorial sovereignty: that a sovereign cannot permit disputes over ownership of lands within its domain to be adjudicated by any foreign power. Br. of App. 19-22 (citing, *e.g.,* ***Reclamantes***, 735 F.2d at 1521; ***Permanent Mission of India***, 446 F.3d at 373 (ownership of real property in a foreign country is made possible only by virtue of the internal law of the state of the situs)).

The Tribe's argument that the immovable property exception was not recognized under the classical theory of foreign sovereign immunity, Br. of Resp. 21-27, is simply incorrect. The Tate Letter itself recognized, "There is agreement by proponents of both [the classical and the restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property…" ***Permanent Mission of India***, 446 F.3d at 370.

While the Tribe claims that this immovable property exception was not consistently applied under the classical theory, it cites not a single example where the exception was *not* applied. The Tribe does not even attempt to challenge the centuries-old expressions of the rule cited in ***Upper Skagit Indian Tribe v. Lundgren***, ___ U.S. ___, 138 S.Ct 1649, 1657-58, 200 L.Ed.2d 931 (2018) (Thomas, J., dissenting); ***The***

Schooner Exchange, 11 U.S. at 145; or *Reclamantes*, 735 F.2d at 1521. *See* Br. of App. 18-19.

Even if foreign sovereign immunity itself was not uniformly applied prior to enactment of the FSIA, that does not change the historical fact that **no sovereign** was granted immunity from actions to resolve possession and ownership of real property located within the United States. The Tribe has not presented even a single example of a sovereign that was granted immunity in a case determining title to real property.

The FSIA did nothing more than codify a centuries-old common-law rule. *Reclamantes*, 735 F.2d at 1521. This common-law rule should continue to apply to tribal sovereign immunity, without the need of any act of Congress.

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

Flying T's opening brief argued that, because tribal sovereign immunity had its common-law basis in

foreign sovereign immunity, it must be subject to the same limitations in scope that were recognized at the time of the inception of tribal sovereign immunity, including the immovable property exception. Br. of App. 22-24 (citing, *e.g.,* ***Kiowa***, 523 U.S. at 757 (tracing the common-law origins of tribal sovereign immunity to the early 20th century—long after the immovable property exception had become well-established)). Flying T demonstrated that this question—whether tribal sovereign immunity is subject to the immovable property exception—is an open question that this Court can address in the first instance. Br. of App. 25-30 (citing, *e.g.,* ***Cayuga Indian Nation of New York v. Seneca County***, 978 F.3d 829, 834 (2nd Cir. 2020) (noting that this remains an unanswered question of law)).

The Tribe would have the Court believe that this question has already been foreclosed. But, with the U.S. Supreme Court's express invitation to this Court

to consider the immovable property exception, it cannot be said, as the Tribe claims, that such an exception is "already unequivocally bar[red]." Br. of Resp. 14. To the contrary, the Court has been nothing but equivocal as to when it will defer to Congress and when it will play its common-law role of defining the scope of tribal sovereign immunity. *Compare, e.g.,* ***Kiowa***, 523 U.S. at 759-60 (deferring to Congressional inaction on the subject of a commercial-acts exception, while acknowledging that "the Court has taken the lead in drawing the bounds of tribal immunity.") *with* ***Lewis***, 581 U.S. at 162-64 (holding under common law, without any mention of Congress, that tribal sovereign immunity does not extend to a claim against a tribal employee in their individual capacity).

Contrary to the Tribe's argument at Br. of Resp. 19-20, Flying T did not cite *Lewis* for the assertion that foreign sovereign immunity is the baseline for tribal sovereign immunity. That point was made by

numerous citations above it, at Br. of App. 13-14 (*e.g.,* ***Santa Clara Pueblo***, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Flying T cited *Lewis* as an example of a case that demonstrates that some claims are simply outside the scope of common-law sovereign immunity.

Just as an action against an employee in their individual capacity was outside the common-law scope of sovereign immunity in *Lewis*, so, here, is an action for title to real property situated in the State of Washington outside the common-law scope of sovereign immunity, tribal or otherwise, under the immovable property exception. The Courts are the arbiters of the common law. This Court is well within its authority to determine (subject, of course, to possible review in the U.S. Supreme Court) that this action for adverse possession of Washington land is outside the common-law scope of tribal sovereign immunity.

The Tribe takes issue with Flying T's citation of cases regarding jurisdictional conflicts between sister states, claiming that the basis for all of these cases is the mutual surrender of immunities between the several states inherent in the U.S. Constitution. Br. of Resp. 30-32. But Flying T did not cite these cases to compare a state's immunity with tribal immunity. Indeed, tribes are, with regard to immunity, more like foreign nations than like sister states. ***Contour Spa***, 692 F.3d at 1206. Flying T cited the interstate cases because they demonstrate the centuries-old, bedrock principle that undergirds the immovable property exception. Br. of App. 19-21, 24-25. In each of these cases, the courts emphatically declare that the jurisdiction to adjudicate ownership of real property belongs only to the state in which the property is situated. *E.g.,* ***United States v. Fox***, 94 U.S. 315, 320, 24 L. Ed. 192, 4 Otto 315 (1876).

Moreover, the fact that sister states surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained—or, indeed, ever had—any sovereign immunity from actions regarding ownership of real property located in another state. *See* ***Kiowa***, 523 U.S. at 765 (Stevens, J., dissenting).

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

Flying T argued that Washington precedent recognizes the same bedrock principles that underlie the immovable property exception, and therefore this Court should also recognize and apply the exception to tribal sovereign immunity. Br. of App. 30-32 (quoting, *e.g.,* ***Silver Surprize, Inc. v. Sunshine Min. Co.***, 74 Wn.2d 519, 526, 445 P.2d 334 (1968) ("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.")). Flying T also argued that this Court can reassert its precedent that *in rem* jurisdiction over Washington real property is not affected by tribal sovereign immunity. Br. of App. 33-37 (citing, *e.g.,* ***Anderson & Middleton Lumber Co. v. Quinault Indian Nation***, 130 Wn.2d 862, 880, 929 P.2d 379 (1996)). Flying T argued that the reasoning in *Anderson* can stand on its own, without relying on ***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). Br. of App. 34-35. Although the U.S. Supreme Court decision in ***Lundgren***, 138 S.Ct 1649, prohibits reliance on *Yakima*, it left open the possibility of an *in rem* exception on other grounds. Br. of App. 36-37. This Court should reaffirm its conclusion in ***Lundgren v. Upper Skagit Indian Tribe***, 187 Wn.2d 857, 389 P.3d 569 (2017)—only without any reference to *Yakima*—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.

The Tribe argues that all of Washington's *in rem* jurisdiction cases were overruled by the U.S. Supreme Court in *Lundgren*, Br. of Resp. 10-13, but that is not so. Nothing in the *Lundgren* opinion says anything about overruling Washington precedent. *See, generally,* ***Lundgren***, 138 S.Ct. 1649. The only thing the Court said about this Court's *Lundgren* decision was that this Court's reading of *Yakima* as establishing an *in rem* exception to sovereign immunity "was error." ***Lundgren***, 138 S.Ct. at 1652. The Court acknowledged that this Court's reasoning relied only "in part" on *Yakima*. ***Id.***

Flying T stands by its argument that the remainder of this Court's *Lundgren* analysis—with *Yakima* excised—remains logically and legally sound. *See* ***Lundgren***, 187 Wn.2d 857. The same is true for

Anderson, 130 Wn.2d 862, and ***Smale v. Noretep***, 150 Wn. App. 476, 208 P.3d 1180 (2009). *See* Br. of App. 33-37.

The Tribe claims, without citing any authority, "Sovereign immunity strips the court of subject matter jurisdiction, both *in personam* and *in rem*." Br. of Resp. 12. It appears that this is the Tribe's interpretation of ***Lundgren***, 138 S.Ct. 1649, but the *Lundgren* Court never said any such thing. The *Lundgren* Court only said that *Yakima* did not address the scope of tribal sovereign immunity. ***Id.*** at 1652. Far from holding that sovereign immunity strips a court of *in rem* jurisdiction, the Court specifically left the question of the scope of tribal sovereign immunity for another day. ***Id.*** at 1654.

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

Finally, Flying T argued that its claims in this case fall squarely within the immovable property exception. Br. of App. 37-38. If the immovable property exception applies to tribal sovereign immunity, as it should, then the Tribe is not immune, and this action can proceed on its merits. Br. of App. 38.

The Tribe argues that the exception does not apply here because the Tribe's ownership of these parcels is a sovereign, not private, act, and is for a public purpose. Br. of Resp. 32-37. This argument is based primarily in the Tribe's incorrect understanding of the origins of the exception. As noted above, the immovable property exception was a part of the classical theory of foreign sovereign immunity long before the restrictive theory was adopted. The exception is not based on any distinction between the

public or private purposes of the owning sovereign. Rather, it is based in the "primeval interest" of the territorial sovereign "in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521.

As demonstrated in *Georgia v. City of Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924), even a purpose as useful to the public good (at least in its day) as a railroad did not transform Georgia into anything more than a private owner of land within the sovereign territory of another. Georgia did not obtain any immunity or other special privileges as a result of its purpose for the land. Neither does the Tribe's purpose here grant it any special privileges to resist Flying T's long-ripened claim for adverse possession.

The Tribe is mistaken when it argues that its alleged public purpose shields the parcels from adverse possession. Br. of Resp. 33-34. Title by adverse

possession vests automatically upon completion of the ten-year period. ***Gorman v. City of Woodinville***, 175 Wn.2d 68, 72, 283 P.3d 1082 (2012). Where that ten-year period has already run against a private owner, the private owner has nothing to convey to a subsequent public owner. ***Id.*** at 72. Transfer of property to a public entity does not bar a claim against the public entity for adverse possession that ripened prior to the public entity's ownership. ***Id.*** at 74-75. Neither ***Kiely v. Graves***, 173 Wn.2d 926, 271 P.3d 226 (2012), nor ***Michel v. City of Seattle***, 19 Wn. App. 2d 783, 498 P.3d 522 (2021), contradicts *Gorman*. *See also* ***Neighbors v. King County***, 15 Wn. App. 2d 71, 85, 479 P.3d 724 (2020) ("RCW 7.28.090 forecloses a claim of adverse possession against a government entity unless the possession vested against a previous private owner."). Because Flying T claims adverse possession ripening no later than 1971, CP 109-10, long before the

Tribe or the County obtained any ownership interest, the Tribe's "public purpose" argument necessarily fails.

It is of note here that the Tribe's "public purpose" argument relies heavily on matters not only outside of the Complaint but also outside of the appellate record. Because this argument relates to the merits of Flying T's claim for adverse possession, consideration of this additional information would require transforming the Tribe's CR 12(b)(6) motion into a motion for summary judgment, which the trial court did not do. *See* CR 12(b)(6); CP 35-36. Where the trial court did not consider this additional information, this Court should not, either.

The Tribe also fails to demonstrate, as noted above, that its ownership of these parcels is, as a matter of fact, former Stillaguamish land, part of the "fee-to-trust process," or even qualifies for such process. The Tribe fails to demonstrate that such process would result in the parcels being removed from Washington's

territorial jurisdiction. And, in any event, until that ultimate result occurs, if indeed it can, the parcels remain subject to Washington's territorial jurisdiction and to Flying T's claim of adverse possession that ripened long before the Tribe gained any interest in either parcel.

Nothing about the Tribe's ownership of the two parcels at issue qualifies the Tribe for any defense to Flying T's claim of adverse possession or removes the parcels from the operation of the immovable property exception to sovereign immunity. The exception applies, Washington courts have subject matter jurisdiction, venue is proper, and Flying T's Complaint states a claim upon which relief can be granted. The trial court erred in dismissing Flying T's claims. This Court should reverse and remand for further proceedings.

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

Flying T also argued that there was no fault in the trial court's personal jurisdiction and that the Tribe was not an indispensable party under CR 19. Br. of App. 38-43. This Court's analysis in *Lundgren*, 187 Wn.2d at 868-73, remains good law. Br. of App. 38-40. Regardless of whether the tribe still enjoys immunity from *personal* jurisdiction, this case can and should continue even in the Tribe's absence, because to do otherwise would be a miscarriage of justice. Br. of App. 41-43.

The Tribe has not responded to these arguments, apparently conceding that the trial court erred in dismissing for lack of personal jurisdiction and for failure to join an indispensable party. Because the Tribe has conceded these errors, this Court should reverse and remand for further proceedings.

3. 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 3,966 words.

Submitted this 21st day of July, 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 July 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.

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 21st day of July, 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

July 21, 2023 - 4:48 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,731-6
Appellate Court Case Title:	Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians et al.
Superior Court Case Number:	22-2-07015-1

The following documents have been uploaded:

- 1017316_Briefs_20230721164800SC269873_0332.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Brief - Appellant Reply 2023-07-21.pdf

A copy of the uploaded files will be sent to:

- george.marsh@co.snohomish.wa.us
- gmarsh@snoco.org
- rhealing@stillaguamish.com
- rrysemus@snoco.org

Comments:

Sender Name: Rhonda Davidson - Email: rhonda@olympicappeals.com
Filing on Behalf of: Kevin Hochhalter - Email: kevin@olympicappeals.com (Alternate Email: rhonda@olympicappeals.com)

Address:
4570 Avery Ln SE #C-217
Lacey, WA, 98503
Phone: (360) 763-8008

Note: The Filing Id is 20230721164800SC269873