No. 85739-8-I

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

Flying T Ranch,

Appellant,

v.

Stillaguamish Tribe of Indians, et al.,

Respondents.

Appellant's Answer to Amicus Brief of Sauk-Suiattle Indian Tribe

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1. Answer to Amicus Sauk-Suiattle Tribe

1.1 The trial court erred in failing to apply existing law to the new fact pattern presented in this case.

Amicus Sauk-Suiattle Tribe argues that the trial court could not have erred in failing to apply law that it says has never been established. But this argument reflects a misunderstanding of the common law, in which existing law is used as a guide to determine the correct outcome in new factual situations, clarifying or expanding the law in the process. Common law decisions are said to declare the law as it always was, but revealed for the first time by the new fact pattern.

So it is here. There has not yet been a case that has revealed whether the immovable property exception serves as a limit to tribal sovereign immunity. But the law of the immovable property exception already exists and is applied in comparable situations with foreign sovereigns. *See* Br. of App. 17-22. The trial court was presented with the reasons why

the exception should also apply to Indian Tribes. In failing to apply the exception, the trial court erred. This Court, on de novo review, can reveal, through its decision, that the exception does apply as a limit to the scope of tribal sovereign immunity just as it applied to foreign sovereign immunity at common law.[1]

1.2 While tribal sovereign immunity generally extends outside the reservation, it does not extend to questions of title and possession of real property that is located outside the reservation.

Flying T understands that, generally, tribal sovereign immunity can and does apply to many types of cases involving conduct that takes place outside of a tribe's reservation. But that does not mean that the same immunity covers questions of title or possession of real property that is located outside the reservation. Under the immovable property exception, it does not.

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[1] In a footnote, Sauk-Suiattle questions the validity of Flying T's adverse possession claim. This argument will be addressed below.

Sauk-Suiattle accuses Flying T of invoking racist tropes such as "going off the reservation." But the phrase appears nowhere in Flying T's briefs. Nowhere does Flying T accuse the Stillaguamish or any other tribe of "disruptive activity outside of normal orthodox bounds," or even of any conduct outside of its reservation other than its attempt to purchase the parcels at issue. This case is not about conduct. It is about nothing more or less than who is the true owner of the parcels at issue.

The only reason Flying T has emphasized that the parcels are located outside the Stillaguamish reservation's territorial boundaries is because that is a legally relevant fact—indeed the most legally relevant fact in this case. If the parcels were within the reservation, the immovable property exception likely would not apply. *See* ***Oneida Indian Nation v. Phillips***, 981 F.3d 157 (2d Cir. 2020). Because the parcels are outside the Stillaguamish reservation, they are

unquestionably within the territorial jurisdiction of the State of Washington. Questions of title and possession of Washington lands should be decided in Washington courts, regardless of who the parties with competing title claims may be.

Sauk-Suiattle appears to accept Flying T's argument that the scope of tribal sovereign immunity was established by common law. Br. of Sauk-Suiattle 6-7 (quoting ***In re Greene***, 980 F.2d 590, 596-97 (9th Cir. 1992)). The scope of sovereign immunity at common law was limited by the immovable property exception. A sovereign's immunity did not extend to an action regarding title or possession of real property located within the territorial jurisdiction of another sovereign. *See* Br. of App. 17-22 and authorities cited therein, *e.g.,* **Restatement (Second) of The Foreign Relations Law of the United States**, § 68 (1965). That same limitation in scope should apply to tribal sovereign immunity because it was part of the common law of sovereign

immunity at the time tribal sovereign immunity was established, as well as at the time of the Treaty of Point Elliott.

Sauk-Suiattle calls attention to the wars waged by Indian tribes in the Washington Territory after signing their treaties but before those treaties were ratified. Because the treaties had not yet been ratified, they were not yet effective, and the tribal land had not yet been ceded to the United States. Because the territorial boundaries had not yet changed, the tribes were justified in asserting sovereignty over those lands, which were legally still under the tribes' territorial jurisdiction.

These wars actually illustrate the policy concerns that motivate the immovable property exception: White settlers attempted to claim ownership of lands located outside of the United States. The tribes could not allow these foreign settlers or their government to determine who rightfully owned tribal lands, and therefore

asserted their own sovereignty and jurisdiction over the lands.

But in this case, the Tribe is on the other side of the territorial boundary. The parcels at issue here are Washington land, not tribal land. Washington should not permit any other sovereign to decide questions of title or possession of Washington lands.

1.3 Flying T asks this Court to uphold precedent, not avoid it.

Sauk-Suiattle accuses Flying T of asking this Court to depart from precedent. But the precedents that are binding on this Court favor Flying T, not the Tribe. *See* Br. of App. 30-37 and authorities cited therein; Reply Br. of App. 17-20. Even excising any reliance 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), what remains of the Washington precedents of *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 389 P.3d 569 (2017), and

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wn.2d 862, 929 P.2d 379 (1996), is still good law and is binding upon this Court. Similarly, *Smale v. Noretep*, 150 Wn. App. 476, 208 P.3d 1180 (2009), remains good law. In all three cases, Washington courts correctly held that tribal sovereign immunity did not apply to an action to determine title or possession of Washington land. This Court should follow that binding precedent.

Sauk-Suiattle again accuses Flying T of racism, calling Flying T's arguments a "parade of horribles." But Flying T has not presented any parade of horribles or slippery slope arguments. Flying T has merely pointed out the logical result of the Tribe's position. If the immovable property exception does not apply to tribal sovereign immunity, then Washington courts become powerless to decide any conflicts regarding Washington land any time an Indian tribe makes any claim to the land. All authority over the land would be

de-facto ceded to the tribe by the mere act of the tribe's purchase of an alleged interest.

It is not that Flying T thinks that Indian tribes would do something horrible to the land or use it in a horrible way. The problem is that land should not automatically transfer from Washington's sovereign territory to that of a tribe without some official act of Washington State or the United States.

Congress appears to agree. In enacting the Indian Reorganization Act of 1934 (**25 U.S.C. § 5108**), Congress provided a process by which tribes could apply to transfer purchased lands to be held in trust by the United States. The process is governed by **25 C.F.R. part 151**, and requires, among other things, consideration of the impact on state and local governments and of any clouds on title. This detailed process suggests that Congress did not intend for a tribe's purchase of non-reservation land to automatically remove that land from the jurisdiction of

state courts. The mere purchase of land by a tribe does not remove the land from a state's jurisdiction. *See* ***Lummi Indian Tribe v. Whatcom Cnty.***, 5 F.3d 1355, 1359 (9th Cir. 1993).

As was stated in Judge Reardon's dissenting opinion in ***Self v. Cher-Ae Heights Indian Cmty. Of Trinidad Rancheria***, 60 Cal.App.5th 209, 224, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021), "Quite obviously, the tribe's assertion of sovereign immunity to suit would operate to undermine the very foundation of the state's sovereignty. Congress could endorse such a result, but it has not, either explicitly or implicitly."

Sauk-Suiattle incorrectly claims that Flying T has admitted that tribal sovereign immunity would extend to an *in personam* action regarding land, citing Br. of App. 35. Flying T made no such admission. At Br. of App. 34-35, Flying T quoted *Anderson* as stating that any personal immunity enjoyed by a party with an interest in land was irrelevant to an *in rem* action to

determine title to the land. The action here is *in rem*, Washington courts have jurisdiction, and any personal immunity of the Tribe is irrelevant.

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

Sauk-Suiattle misreads ***The Schooner Exchange v. McFaddon***, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (1812). The case has nothing to do with whether a foreign sovereign is acting within its authority. Rather, it asserts that a foreign sovereign who purchases land in the territory of another sovereign necessarily does so in the character of a private individual, subjecting the property to the territorial jurisdiction, and abandoning any claim of immunity from suit regarding its ownership.

Justice Marshall expressed a similar sentiment in ***Johnson v. McIntosh***, 21 U.S. 543, 572 (1823), which helps clarify the point: "… the right of society, to

prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; … the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie…"

None of the cases dealing with the immovable property exception has ever made the tribe's intended use of the property a relevant consideration. For example, in ***Oneida Indian Nation v. Phillips***, 981 F.3d 157 (2d Cir. 2020), the court declined to apply the immovable property exception, not because the tribe had a "sovereign purpose" for the land, but because the land was located within the tribe's reservation. ***Id.*** at 170. It was the *location* of the property that mattered, not the tribe's subjective intent.

Judge Reardon's dissent in *Self* appropriately summarized the exception: "Suffice to say, when one sovereign owns land of another sovereign, the second sovereign generally retains the authority to adjudicate

disputes respecting that land, at least with regard to questions like the one before us over title. Thus, the second sovereign's authority over issues of title to land within its own boundaries supersedes the first sovereign's privilege to preclude a judicial challenge to the fact and scope of its ownership of that land." *Self*, 60 Cal. App. 5th at 223-224.

Sauk-Suiattle's arguments at 10-13 are unhelpful because they misunderstand the basis for the immovable property exception.

1.5 Sauk-Suiattle misinterprets adverse possession law.

Suak-Suiattle misinterprets adverse possession law. Title by adverse possession vests automatically upon completion of the ten-year period, even if that title is not ratified by a court until much later. *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.

By operation of law, Flying T's adverse title ripened no later than 1971, long before the Tribe or the County acquired any interest. Flying T became the true owner. Subsequent purchasers through the prior owners acquired no title, because full title was already vested in Flying T. The Tribe is not shielded by the claim that it or the County is a government, because Flying T's title ripened prior to their ownership.

Contrary to Sauk-Suiattle's argument, paying taxes is not a requirement for adverse possession.

2. Conclusion

Sauk-Suiattle's arguments are unhelpful and incorrect. The immovable property exception is a well-

established limit on the scope of sovereign immunity and should apply to Indian tribes just as it applies to any other sovereign. This Court should reverse dismissal of Flying T's claims and remand for further proceedings.

I certify that this document contains 2,046 words.

Submitted this 15th day of December, 2023.

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I certify, under penalty of perjury under the laws of the State of Washington, that on December 15, 2023, I caused the foregoing document to be filed with the Court and served on counsel listed below, and all others entitled to receive service, by way of the Washington State Appellate Courts' Portal.

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