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Court of Appeals
Division I
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No. 857398

In The
Washington State Court of Appeals
Division I

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FLYING T RANCH,

Appellant,
v.

STILLAGUAMISH TRIBE,

Respondent.

---------------------------------- ♦ ----------------------------------

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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BRIEF OF AMICUS CURIAE SAUK-SUIATTLE INDIAN TRIBE IN SUPPORT OF AFFIRMANCE

---------------------------------- ♦ ----------------------------------

Dillon L. Spiess
Jack W. Fiander
Counsel for Amicus Curiae
Sauk-Suiattle Indian Tribe
Office of Legal Counsel
5318 Chief Brown Lane
Darrington, WA 98241
(360) 436-0139
dspiess@sauk-suiattle.com
towtnuklaw@msn.com

TABLE OF CONTENTS

Table of Authorities.. ii

Introduction..1

Interest of *Amicus Curiae*...1

Statement of the Case..3

Argument...3

The Superior Court correctly dismissed appellant's complaint for lack of subject matter jurisdiction. The Stillaguamish Tribe possesses sovereign immunity from suit..3

Tribal sovereignty extends outside the tribe's reservation.4

No court has recognized an immovable property exception to tribal sovereign immunity. Therefore, no error was committed by the Superior Court................................7

Appellant's foreign sovereignty argument is without Merit..10

The avoidance canon favors affirming the superior court without the need to entertain appellant's anti-tribal sovereignty arguments..13

Statutory construction supports the superior court's decision dismissing appellant's complaint....................14

Conclusion..16

Certificate of Service..18

Certificate of Compliance..19

TABLE OF AUTHORITIES

Cases | Page

Aguirre v. AT&T Wireless Services,..3
109 Wn. App. 80, *review denied*,
146 Wn. 2d 1017 (Div. I, 2001)

Cherokee Nation v. Georgia,..10
30 U.S.1, 20 (1831)

Cougar Den, Inc. v. Department of Licensing,...........................8
188 Wn. 2d 55 (2017)

Ex Parte Young,..12
209 U.S. 123 (1908)

Hardin v. White Mountain Apache Tribe,..............................11n
779 F.2d 476 (9th Cir. 1985)

Idaho v. Coeur d'Alene Tribe of Idaho,...................................15
521 U.S. 261 (1997)

In Re Greene,..5
980 F. 2d 590 (9th Cir. 1992)

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,...4
523 U.S. 751 (1998)

Lac du Flambeau Band of Lake Superior.................................11n
Chippewa Indians v. Coughlin,
___ U.S. ___ (No. 22-227, June 15, 2023)

Leschi v. Washington Territory,...7, 8, 8n
1 Wash. Terr. 13 (1857)

Murray v. The Charming Betsey,..12
6 U.S. 64 (1804)

North Sea Products v. Clipper Seafoods,..................................3
92 Wn. 2d 236 (1979)

Santa Clara Pueblo v. Martinez,……………………………………11n
436 U.S. 49 (1978).

State v. Miller,………………………………………………………14
102 Wn. 2d 678 (1984)

State v. Scott,…………………………………………………………14
89 Wash. 63 (1916)

State v. Seattle,………………………………………………………..14
57 Wn. 602 (1910)

State v. Sturtevant,…………………………………………………14
76 Wash. 158 (1913).

State v. Tingdale,…………………………………………………..13
117 Wn. 2d 595 (1991)

State v. Towessnute,…………………………………………………8
89 Wash. 478, 482 (1916)

Talton v. Mayes,………………………………………………..…….15
163 U.S. 376 (1896)

The Schooner Exchange v. McFadden,……………………………….9
11 U.S. 116 (1812)

United States v. United States Fidelity & Guaranty Co.,……….2, 15
309 U.S. 506, 512 (1940).

Upper Skagit Indian Tribe v. Lundgren,…………………………….9
___ U.S. __ , No. 17-387 (May 21, 2018)

White Swan, Thomas Simpson and……………………………………14
United States v. Linneas Winans,
198 U.S. 371

Wright v. Colville Tribal Enterprise Corp.,……………………………4
159 Wn. 2d 108 (2006)

Statutes

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq*......10n

RCW 4.16.160..15

RCW 7.28.010..14

RCW 43.376.020..14, 15

RCW 84.36.010..15

Constitutional provisions

U.S. Const., Art. VI, Cl. 2...10

Washington State Constitution, Art. 1, § 2...............................10

Other Authority

Treaty of Point Elliott...7, 8, 8n, 14

P. Latovick, *Adverse Possession Against the States:*...................14
The Hornbooks Have It Wrong,
29 U. Mich. Journal of Law Reform 939 (1996)

K Malesky, *Should Saying Someone is "Off the Reservation"*.......5n
be Off-Limits? NPR (June 29, 2014)

A.J. Splawn, *Ka-mi-akin, the Last Hero of the Yakimas*,............8n
(1917).

W. Stoebuck, *The Law of Adverse Possession*.............................15
in Washington, 35 Wash. Law Review 53, No. 1
(March 1960)

Emmerich de Vattel, *The Law of Nations:*.................................8
Or, Principles of the Law of Nature Applied
to the Conduct and Affairs of Nations and Sovereigns (1758)

Webster's Dictionary...*8*

> *They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.*
>
> --Red Cloud
> Oglala Lakota Tribal Leader

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.
>
> --25 U.S.C. § 194

INTRODUCTION

The Sauk-Suiattle Indian Tribe submits this brief as *amicus curiae* in support of affirmance of the decision of the Snohomish County Superior Court that it lacked personal and subject matter over this cause.

INTEREST OF *AMICUS CURIAE*

The Sauk-Suiattle Indian Tribe is a tribal nation whose homelands are situated in the upper reaches of the Skagit River basin. Like respondent Stillaguamish Tribe, *amicus* has

a reservation but, in order to provide for the welfare of its People, the tribe has acquired land outside its reservation for the purpose of providing housing, economic development, administrative offices, and to use as habitat to promote access by the tribe's members to treaty resources. As such, ***amicus curiae*** is similarly situated to the Stillaguamish and is familiar with the issues involved in this appeal, since it owns land in Snohomish, Skagit and Chelan counties beyond the tribe's reservation borders.

Counsel for ***amicus curiae*** have read the briefs of the parties and are familiar with the issues herein. Their experience in dealing with off reservation lands will be helpful to the court, and the Brief of *Amicus Curiae* will be helpful to the court and not be duplicative of that of the parties. For the reasons stated herein, the decision below should be ***affirmed.***

STATEMENT OF THE CASE

Amicus accepts and incorporates by reference the facts stated in the brief of respondent. Respondent's argument addressing CR 19 are correct and will not be repeated herein.

ARGUMENT

The Superior Court correctly dismissed appellant's complaint for lack of subject matter jurisdiction. The Stillaguamish Tribe possesses sovereign immunity from suit.

It is hornbook law that, absent a clear, express and unequivocal waiver, tribal nations possess immunity from suit in the courts of this state. *North Sea Products v. Clipper Seafoods*, 92 Wn. 2d 236 (1979). *See also*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Allthough Appellant acknowledges that the doctrine of tribal sovereign immunity presents a roadblock to its suit (Brief of Appellant, 11-12), it then proceeds to try to construct a route around it by arguing that the doctrine is inapplicable outside tribal reservation boundaries or, alternatively, that an exception exists for immovable property (Brief of Appellant,

17)—the latter theory not having been espoused as governing law by any court. *See*, Brief of Appellant, 25 ("the Supreme Court has not yet decided whether the immovable property exception applies to tribal sovereign immunity"). As stated by appellant, the question remains "an as-yet unanswered question of law." Id., 30.

As to this latter argument, appellant assigns error to the trial court's failure to apply an "immovable property" exception to a defendant Indian tribe (Brief of Appellant at p. 4, no. 1). An "error of law" is an error in *applying the law* to the facts as pleaded and established. *Aguirre v. AT&T Wireless Services*, 109 Wn. App. 80, *review denied*, 146 Wn. 2d 1017 (Div. I, 2001). It is difficult to understand how the trial court declining to apply "law" that by appellant's own admission has not yet even been established constitutes error.[1]

[1] It is also difficult to understand appellant's claim to title. Appellant states that its adverse possession claim was "ripening" in 1971 "though it had not been adjudicated at the time" but its quiet title action was not filed until after the Stillaguamish Tribe had acquired one of the parcels from the county (Brief of Appellant, p. 1) while the other was purchased after the motion to dismiss in this cause. Id. It is similarly difficult to understand how appellant met the statutory requirement of paying taxes on the realty since the land was owned by the

Tribal sovereignty extends outside the tribe's reservation.

Appellant argues that tribal sovereign immunity does not apply to a quiet title claim for adverse possession of real property located outside the reservation. No appellate court which has considered the matter has held that tribal sovereignty is limited to the confines of a tribal nation's reservation. Perhaps unaware of its negative connotations, Flying T Ranch repeatedly objects to the Stillaguamish Tribe going off the reservation, a phrase used to describe one who engages in disruptive activity outside of normal orthodox bounds.[2] The Stillaguamish Tribe did no such thing.

In *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn. 2d 108 (2006), the Washington State Supreme Court *reversed* a decision of this court of appeals, which specifically held that a tribal business corporation lacked sovereign immunity because

County and/or the Tribe, neither of whose land is subject to Washington State real property taxes if held in a governmental capacity or held in furtherance of an essential government service.

[2]*See, e.g.,* K Malesky, *Should Saying Someone is "Off the Reservation" be Off-Limits?* NPR (June 29, 2014) https://www.npr.org/sections/codeswitch/2014/06/29/326690947/should-saying-someone-is-off-the-reservation-be-off-limits

it was engaging in commercial activities off the tribe's reservation. As such, appellant's first argument is meritless. *See also, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which held that Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation:

> To date, our cases have sustained tribal immunity from suit *without drawing a distinction based on where the tribal activities occurred.*

523 U.S. at 754 (emphasis added).

To the same effect is the decision of the United States Court of Appeals for the Ninth Circuit in *In Re Greene*, 980 F. 2d 590 (9th Cir. 1992), which involved a bankruptcy trustee's complaint that a furniture company owned by the Yakama Nation was subject to the jurisdiction of the bankruptcy court by virtue of having unlawfully repossessed furniture from a debtor located in Montana, well outside the Yakama Reservation. The panel noted that, because the Tribe existed by

virtue of a *Treaty*, its sovereignty is to be determined “by reference to common law at the time of the treaty”:

> We conclude from the above analysis that sovereign immunity, as it existed at common law, had an extra-territorial component. "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." Congress has not acted to limit the reach of this element of tribal sovereignty, so there is no general impediment to the existence of the immunity claim by the Yakima Nation.

590 F. 2d at 596-597.

The Stillaguamish Tribe is the successor in interest to the Stillaguamish who signed the Treaty of Point Elliott in 1855, just as Nisqually leader Leschi signed the Medicine Creek Treaty two months earlier. It is noteworthy that numerous tribes who had signed treaties in Washington Territory in 1854 and 1855 waged war against the United States because, although they had signed agreements to sell their lands, those treaties had not been ratified by Congress nor signed by the President and white settlers had taken up claims asserting

ownership of the lands the Tribes had agreed to cede.[3] Leschi's hanging for waging war upon the U.S. for allowing settlers to invade territory acknowledged to be tribal land for which the tribes had not been compensated for is unquestionably an example of tribes in what would become the State of Washington asserting sovereignty over tribal lands outside of any reservation which they had been promised—notwithstanding that these millions of acres of land were not "movable".[4] *Webster's Dictionary* defines "war" as an open and declared armed hostile conflicts *between states or nations*. According to international law, "the power to declare war is vested in the sovereign or state". *See, generally*, Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). The

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[3] The treaties were not confirmed by Congress until 1859. The treaty of Point Elliott under which the Stillaguamish Tribe claims rights was signed on January 22, 1855, at *Muckl-te-oh* or Point Elliott, now Mukilteo, Washington, and ratified 8 March and 11 April 1859. Between the signing of the treaty and the ratification, fighting continued throughout the region. Lands were being occupied by European-Americans since settlement in what became Washington Territory began in 1853.

[4] Leschi's hanging for waging war opposing the assertion of ownership by white settlers upon his tribe's lands is described in *Leschi v. Washington Territory*, 1 Wash. Terr. 13 (1857). The war waged by multiple Washington tribes asserting sovereignty over the unlawful entry of their lands is described in detail in A.J. Splawn, *Ka-mi-akin, the Last Hero of the Yakimas*, (1917).

1855-56 war engaged in by tribal nations against the United States and it citizens in what was then Washington Territory was an assertion of tribal sovereignty—and it was not confined to reservations any more than was the assertion of sovereignty by the Lakota Nation at the Battle of Little Big Horn.

No court has recognized an immovable property exception to tribal sovereign immunity. Therefore, no error was committed by the Superior Court.

Appellant tries to get around the decisions of both the Washington and United States Supreme Courts by urging this court of appeals to depart from precedent in order to establish *new* law carving out an exception to tribal sovereign immunity in actions involving "immovable property." Appellant pleads that, although there is no record of any case applying such an exception to tribal nations, it "must" somehow be applicable:

> 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.

Brief of Appellant, 2 (emphasis added). Essentially, Flying T Ranch implies that, unless such an exception is recognized, the

territorial integrity of state sovereignty will be threatened by tribal ownership of land. Such an argument against an Indian tribe smacks of arguing that a "parade of horribles" will result if the court rules in favor of a tribe:

> This same argument was made by the Defendants in [*United States v. Smiskin*]: if affirmed, the court's ruling would "preclude the State of Washington and the federal government from regulating tribal transportation of other 'restricted goods,' such as illegal narcotics and 'forbidden fruits [and] vegetables.'"

Cougar Den, Inc. v. Department of Licensing, 188 Wn. 2d 55 (2017). The Washington state supreme court rejected that attempt to appeal to prejudices ("this case does not present the 'parade of horribles' concern raised by the state.") Such views that state sovereignty will be threatened if a court rules in a tribe's favor should be relegated to a less enlightened past. *See, e.g., State v. Towessnute,* 89 Wash. 478, 482 (1916) ("the Indian was a child, and a dangerous child, of nature").

No such exception exists in Washington case law, nor has such an exception been established by the Supreme Court of the United States. In fact, in *Upper Skagit Tribe v. Lundgren,* the

United States Supreme Court *reversed* a decision of the Washington Supreme Court which had held that tribal sovereign immunity did not apply to actions ***in rem***, as opposed to actions ***in personam***:

> This Court has often declined to take a "first view" of questions that make their appearance in this posture, and we think that course the wise one today.

*Upper Skagit Indian Tribe v. **Lundgren***, ___ U.S. __ , No. 17-387 (May 21, 2018). There is no precedent, nor anything in the record below for this court to create such an exception. The appellant in this cause attempts to avoid the result of ***Lundgren***, which *reversed* the Washington supreme court's opinion that tribal sovereign immunity does not apply to "in rem" actions by cloaking itself in sheep's clothing by implying that there is a difference between an action to quiet title to "immovable" property and an ordinary action to quiet title. Land is always immovable, and a quiet title action is necessarily ***in rem***. In jurisprudential language this distinction is without merit.

If, on the other hand, the action is one to determine the relationship of the parties to the land, appellant's suit is characterizable as *in personam*. In which case, appellant has admitted that tribal sovereign immunity extends to such action. *See*, Brief of Appellant, at 35.

Appellant's foreign sovereignty argument is without merit.

Flying T advances a treatise on the sovereignty of foreign nationals who purchase land in America (Brief of Appellant, 17-22), as though tribal nations are equivalent to foreign nations subject to international law, going so far as to cite cases such as one involving the prince of a foreign nation who purchased land in the United States. *See* Brief of Appellant at 18-19, citing *The Schooner Exchange v. McFadden*, 11 U.S. 116 (1812). An Indian tribe or Nation within the United States is not a foreign state in the sense of the Constitution. *Cherokee Nation v. Georgia*, 30 U.S.1, 20 (1831). In this country:

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the

> other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

30 U.S. at 16. As stated in *Cherokee Nation, supra*, the United States Supreme Court has determined that an Indian tribe is not a foreign state in the sense of the Constitution. That Constitution, as construed by the Supreme Court is the supreme law of the land. Washington State Constitution, Art. I, § 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby,* any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, Cl. 2 (emphasis added). A tribe is not a foreign nation.[5]

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[5] Appellant repeatedly cites to cases dealing with other countries like Peru or Nigeria, but their sovereignty has been expressly limited by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq*. (FSIA). *See* Brief of Appellant, 18, 19. Yet the Appellant fails to cite to any act of Congress clearly, expressly and unequivocally waiving the Tribe's immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), the U.S. Court of Appeals for the Ninth Circuit held that a plaintiff's claims were so "patently barred by Supreme Court discussion of the scope of tribal sovereignty" as to merit the district court awarding the Tribe its attorney fees. *Cf.*, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, ___ U.S. ___ (No. 22-227, June 15, 2023) (Tribal immunity expressly waived by Congress in Bankruptcy proceedings).

The Schooner Exchange cited by appellant is more like an action brought under *Ex Parte Young*, 209 U.S. 123 (1908). A prince purchasing land in a foreign country in his *individual* capacity is not exercising the sovereignty of a nation any more than is an official engaging in conduct *ultra vires* outside their official authority is not acting to benefit the state—and therefore not shielded by the State's Eleventh Amendment immunity from suit. The land which is the subject of this suit was purchased by the Stillaguamish Tribe in its official *governmental* capacity:

> [A]n individual acting *ultra vires* and commits an unlawful act may be sued, since they are not acting within the scope of their authority on behalf of the State. The use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity.

Ex Parte Young, 209 U.S. at 159. Appellant's reliance upon cases involving foreign nationals who were acting outside their sovereign authority is misplaced. "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. *See* Brief of Appellant, 18-19.

The avoidance canon favors affirming the superior court without the need to entertain appellant's anti-tribal sovereignty arguments.

Amicus Curiae Sauk-Suiattle Indian Tribe notes that it is perhaps neither necessary nor appropriate to decide this appeal on the basis of Appellant's tribal sovereignty arguments. The tribal sovereignty of the Stillaguamish Tribe arises by virtue of its treaty and the Supremacy Clause of the United States Constitution, according to which treaties are the Supreme Law of the nation. U.S. Const.. Art. VI, Cl. 2. Washington state courts should avoid deciding cases on *constitutional* grounds if it can be decided on other grounds. *State v. Tingdale*, 117 Wn. 2d 595 (1991). This Canon of Constitutional Avoidance traces back to *Murray v. The*

Charming Betsey, 6 U.S. 64 (1804). This appellate court may affirm the decision of the superior court to dismiss appellant's complaint without the need to address appellant's arguments in derogation of the scope and extent of tribal sovereignty. The United States recognized Stillaguamish as a sovereign when it executed and ratified the Treaty of Point Elliott, and nothing therein demonstrates a relinquishment of the Tribe's right of sovereignty or consent to be sued--other than its right as a sovereign to wage war:

> The said tribes and bands…promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens...Nor will they make war on any other tribe except in self-defence,

Treaty of Point Elliott, 12 Stat. 927 (1855), Art. IX. Rights not relinquished by tribes in a treaty are reserved. *State v. Miller*, 102 Wn. 2d 678, *passim* (1984). And those rights, including the right not to be sued, were "intended to be continuing against the United States and its grantees as well as against the state and its grantees. *White Swan, Thomas Simpson and United States v. Linneas Winans,* 198 U.S. 371, 381-82 (1905).

Statutory construction supports the superior court's decision dismissing appellant's complaint.

RCW 7.28.010 authorizes any person to maintain an action for quiet title against the person claiming the title or some interest therein:

> Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title[.]

Nowhere in the Revised Code of Washington is a tribal nation defined as a "person". Instead, it is a *government*. *See*, RCW 43.376.020 (establishing government-to-government relationship with Indian tribes). Governmental entities are not subject to adverse possession. *State v. Seattle*, 57 Wn. 602, 107 P. 827 (1910), 27 L.R.A. (N.S.) 1188 (adverse possession will not run against the state); *see also*, *State v. Scott*, 89 Wash. 63 (1916); *and see State v. Sturtevant*,76 Wash. 158 (1913). Additionally, in order to perfect title by adverse possession

certain requirements must be met for a prolonged statutory period. That statute of limitations does not run against the state. RCW 4.16.160. RCW 43.376.020 enunciates the public policy of the State of Washington to treat tribal nations as governments. As such, this court should decide this appeal against the backdrop of tribal sovereignty and the legislature's pronouncement that tribes should be accorded treatment on a basis equal to the State.

One of appellant's claims involves property owned or formerly owned by Snohomish County. As one scholar has noted:

> Adverse possession against a city or county is not possible as to lands it holds in a "governmental capacity," but it has been said adverse possession is possible as to lands held in a nongovernmental capacity, though none such has yet been identified for adverse possession purposes.

W. Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. Law Review 53, No. 1 (March 1960), 58-59.[6] The

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6 https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=3343&context=wlr#:~:text=One%20may%20not%20possess%20adversely,that%20year%20removed%20this%20possibility.

Stillaguamish Tribe apparently acquired the land involved in this case prior to perfection of appellant's claim of ownership. In addition to other statutory requirement to perfect such a claim, a person must have paid taxes upon the property for a statutory period. No such tax is imposed by counties upon land they own, nor is land owned by a federally recognized tribal nation taxed. RCW 84.36.010.

Scholar Paula Latovick has noted that, although adverse possession may be justified as applied against private individuals, justification for its application to governments is questionable.

> Although these justifications may support the application of adverse possession against a private landowner, they do not appear universally convincing when applied to public property held by governmental entities. Stark differences exist between private and public ownership…Private developers may well take the chance that the state will not discover in timely fashion their trespass, hoping thereby to acquire title.

P. Latovick, *Adverse Possession Against the States: The*

Hornbooks Have It Wrong, 29 U. Mich. Journal of Law Reform 939, 944-45 (1996).[7] Flying T Ranch's effort to assert ownership of Stillaguamish tribal land by "adverse possession" involving "open and notorious" use hostile to the owner is horrifyingly reminiscent of Pope Alexander VI's *Demarcation Bull* of 1493, which declared *inter alia* that:

> "[T]he Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself."

A premise justifying acquisition of indigenous land which Jorge Mario Bergoglio (Pope Francis), himself has repudiated.[8]

CONCLUSION

Where states have not waived their Eleventh Amendment immunity they are not subject to suit in a quiet title action. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). The sovereignty of tribal nations does not derive from

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[7] https://repository.law.umich.edu/cgi/viewcontent.cgi?params=/context/mjlr/article/1596/&path_info=#:~:text=The%20hornbook%20rule%20is%20that,state%20land%20from%20adverse%20possession.

[8] March 30, 2023 (repudiating the doctrines of "discovery" and *terra nullius* established by previous papal bulls. *See, e.g.,* E. Provoleto, *Vatican Repudiates 'Doctrine of Discovery', used as Justification for Colonization*, New York Times (March 30, 2023).

the United States Constitution. ***Talton v. Mayes***, 163 U.S. 376 (1896). However, essentially the same rule applies: Tribes retain their immunity from suit unless expressly waived in clear and express language of themselves or Congress. ***United States v. United States Fidelity & Guaranty Co.***, 309 U.S. 506, 512 (1940).

The Superior Court did not commit reversible error in declining appellant's invitation to depart from existing law and establish new law recognizing an exception to the doctrine of tribal sovereign immunity which no court has ever recognized.

For the foregoing reasons, the decision of the Superior Court that it lacks subject matter jurisdiction should be ***affirmed***.

Respectfully submitted,
SAUK-SUIATTLE INDIAN TRIBE

S/ Dillon L. Spiess, Attorney General
WSBA No. 56102

S/ Jack W. Fiander, Solicitor General
WSBA No. 13116
Counsel for *Amicus Curiae*
Sauk-Suiattle Indian Tribe

CERTIFICATE OF SERVICE

The foregoing Brief of Amicus Curiae Sauk-Suiattle Indian Tribe in support of affirmance was filed with the Clerk of Court and served upon all counsel on the above date using the Court's efiling portal, addressed to:

Raven Arrow-Healing
rhealing@stillaguamish.com
kevin@olympicappeals.com

Kevin Hochhalter

George B. Marsh
George.marsh@co.snohomish.wa.us

S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

The foregoing Brief of Amicus Curiae consists of 3,977 words and was typed in 14 point Century Schoolbook font.

S/Jack W. Fiander

TOWTNUK LAW OFFICES

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Comments:

(Proposed) Brief of Amicus Curiae Sauk-Suiattle Indian Tribe in support of affirmance. Submitted.

Sender Name: Jack Fiander - Email: towtnuklaw@msn.com
Address:
5808-A SUMMITVIEW AVE #93
YAKIMA, WA, 98908-3095
Phone: 509-969-4436

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