No. 1034300

SUPREME COURT

OF THE STATE OF WASHINGTON

FLYING T. RANCH,

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS, et al.

Respondents,

Supplemental Brief of Respondent Stillaguamish Tribe

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1. INTRODUCTION

This case is about the application of well-settled federal Indian law in the context of Washington State's adverse possession law. The Stillaguamish Tribe, like all federally recognized Indian tribes, is a sovereign with common law sovereign immunity from unconsented suit as recognized in over 200 years of jurisprudence of federal Indian law. Under federal law, only Congress – not the courts – has the authority to abrogate tribal sovereign immunity without a tribe's consent.

Flying T Ranch ("Flying T") asks this Court to recognize a common law "immovable property" exception to tribal sovereign immunity when no such exception has ever been applied by American courts to other sovereigns as a matter of common law. The sovereign immunity traditionally enjoyed in American courts is absolute, and has no exception for *in rem* proceedings, for "immovable property" cases, nor for claims of prior ripened adverse possession. Historically, the courts relied on the political branches to determine sovereign immunity on a case-by-case basis, regardless of the nature of the claim, until Congress passed the Foreign Sovereign Immunities Act ("FSIA") to direct the courts in determining sovereign immunity for foreign sovereigns, which does not apply to tribal sovereign immunity.

As the Division One Court of Appeals correctly held, "[w]hen the Tribe is afforded immunity equal to a foreign sovereign, it may be sued over its objection only when allowed by Congress, and to hold otherwise would unfaithfully lessen its immunity in comparison to that traditionally enjoyed by sovereign powers." All the Stillaguamish Tribe asks is that this Court upholds well-established federal Indian law and extends to tribes the same common law sovereign immunity traditionally enjoyed by sovereigns in American courts.

2. STATEMENT OF THE CASE

In 2021, the Stillaguamish Tribe purchased land along the North Fork of the Stillaguamish River for conservation purposes. CP 99. The land is fee land outside the reservation but within the Tribe's traditional territory. In November 2022, Flying T brought suit against the Tribe, claiming to have held adverse possession over the land since as early as the 1960s. CP 22, 58, 109. The Tribe filed a Motion to Dismiss based on tribal sovereign immunity. CP 85. The Superior Court dismissed the case 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 due to tribal sovereign immunity. CP 004-5.

Flying T appealed, claiming an "immovable property exception" to common law sovereign immunity overcomes tribal sovereign immunity

and that there is an *in rem* exception to tribal sovereign immunity. Br. of App. at 17, 30. The Division One Court of Appeals held that there is no common law immovable property exception to sovereign immunity; that cases finding an *in rem* exception to tribal sovereign immunity are no longer good law; and that under well-settled federal Indian law, only Congress can abrogate tribal sovereign immunity. Op. at 1-2.

In its Petition for discretionary review of the Division One opinion, Flying T asserted a new argument not previously asserted that there is another "crucial reasoning" which overcomes tribal sovereign immunity: that prior ripened adverse possession has no "potential to deprive any party of land they rightfully own." Pet. for Rev. at 11, 14. This Court accepted discretionary review.

3. SUMMARY OF THE ARGUMENT

Determining "the limits on the sovereign immunity held by tribes is a grave question." *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018). It is well-settled that tribes possess common law immunity from suit as a matter of federal law, and only the tribe itself or Congress may waive that immunity – not courts and not states. *See, e.g., Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Flying T asks this Court to unfairly strip the Stillaguamish Tribe of its sovereign

immunity in this case based on a clearly overruled *in rem* exception, a nonexistent "immovable property" common law exception, and a never-before-seen "prior ripened adverse possession" exception raised for the first time on appeal.

There is no basis for an *in rem* exception to tribal sovereign immunity. Those courts that have recognized an *in rem* exception to tribal sovereign immunity did so by misinterpreting a United States Supreme Court decision, and the United States Supreme Court accepted review of one of these cases to clearly dispel this misinterpretation. *Upper Skagit Indian Tribe*, 584 U.S. 554 at 561. Absent the now dispelled misinterpretation, there exists no basis in case law, legislation, nor common law to assert an *in rem* exception to tribal sovereign immunity.

Second, there is no common law "immovable property" exception to sovereign immunity in the history of American case law. Prior to the enactment of the Foreign Sovereign Immunities Act ("FSIA") in 1976, the courts relied on determinations of the political branches to determine whether a sovereign's immunity should be recognized on a case-by-case basis. *See, e.g., The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 147, 3 L. Ed. 287 (1812); *Berizzi Bros. v. The Pesaro*, 271 U.S. 562, 575, 46 S. Ct. 611, 70 L. Ed. 1088 (1926); *Ex parte Republic of Peru*, 318 U.S. 578, 588-89, 63 S. Ct. 793, 87 L. Ed. 1014 (1943); *Knocklong Corp.*

v. Kingdom of Afghanistan, 6 Misc. 2d 700, 701, 167 N.Y.S.2d 285 (N.Y. Co. Ct. 1957). Flying T asks this court to unilaterally change the historic common law doctrine of sovereign immunity for the purpose of treating tribes as lesser sovereigns in contradiction to well-settled federal Indian law.

Finally, Flying T's arguments about prior ripened adverse possession are not properly before this Court because they were not argued below. Pet for Rev. at 14-18. An argument not raised in the Court of Appeals is not properly before the higher court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981). Regardless, prior ripened adverse possession is irrelevant to common law sovereign immunity because common law sovereign immunity does not concern itself with the nature of the case nor the validity of any title, but only with which party enjoys sovereign immunity from suit. Flying T cites cases analyzing sovereigns who have waived their immunity for prior ripened adverse possession claims and asks this court to extend dicta from those cases to a sovereign who has never given such a waiver. Pet. for Rev. at 14-18, 20. To do so would be a manifest injustice.

4. ARGUMENT

4.1.1 *Tribes have sovereign immunity from unconsented suit, and there is no* in rem *exception to tribal sovereign immunity absent an act of Congress.*

Tribal sovereign immunity is the rule, not the exception. Like any other sovereign, tribes enjoy common law sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). This is a matter of federal law, which is the supreme law of the land to which State courts are bound. *Kiowa Tribe of Oklahoma*, 523 U.S. at 756; U.S. CONST. art. VI, cl. 2. 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. *See, e.g., Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Tribal immunity is "not subject to diminution by the States." *Kiowa Tribe of Oklahoma*, 523 U.S. at 752. A well-established principle in federal Indian law is that only Congress has the authority to waive a tribe's immunity over the tribe's objection. *Santa Clara Pueblo*, 436 U.S. at 59; *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 789-791, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

Those courts that have recognized an *in rem* exception to tribal sovereign immunity did so by misinterpreting the United States Supreme Court's analysis of a very specific taxation waiver authorized by Congress as having authorized a much broader *in rem* exception to tribal sovereign immunity for matters far beyond that expressly authorized by Congress. *See, e.g., Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 929 P.2d 379 (1996); *Smale v. Noretep*, 150 Wn. App. 476, 208 P.3d 1180 (2009); *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 389 P.3d 569 (2017).

In 1877, Congress used its plenary power over Indian tribes to enact the General Allotment Act ("GAA"), which divided up the then-existing reservation lands into individual allotments. 25 U.S.C. §§ 331-358. These allotments were to be held in trust by the United States government for a period of time after which the United States would convey the land in fee patent to the Indian allottee. 25 U.S.C. § 348. The GAA states that when the allotted land became fee land "...thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed." 25 U.S.C. § 349.

In 1992, the United States Supreme Court accepted certiorari of a case where the Yakama Nation claimed Yakima County violated federal law by assessing *ad valorem* taxes on, and excise taxes on the sale of, fee

land within the reservation. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). The Supreme Court held that Congress had expressly authorized taxation of the fee land within the Yakama reservation when it "removed all restrictions... as to taxation of said land" in the GAA, but the Act did not authorize the imposition of excise taxes on individual Indian landowners. *Id.* In its reasoning, the Court recognized that the GAA authorizes only "taxation of...land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." *Id.* at 269; *Id.* at 694. Because *ad valorem* taxes are "taxation of...land," the Supreme Court held they are expressly authorized by Congress in the unambiguous text of the GAA. *Id.* at 266; *Id.* at 692. On the other hand, the Court reasoned that excise tax is "not a tax upon the subject matter of that sale" but rather upon the individual Indian's act of selling the land, and were not authorized by the GAA. *Id.* at 268. The Court did not address whether the real property tax was enforceable in state court.

In 1996, the Washington State Supreme Court misinterpreted the holding in *Yakima* as authorizing any and all State jurisdiction over fee land within the reservation, so long as the jurisdiction was *in rem*. *Anderson & Middleton,* 130 Wn.2d 862. The Court reasoned that *Yakima*

recognized state authority on *in rem* property within the reservation based on the alienability of the land, regardless of claims of sovereign immunity from a tribe. *Id.* at 876; *Id.* at 877. This same reasoning was applied in subsequent Washington State cases, ultimately and incorrectly establishing the principle that courts have subject matter jurisdiction over *in rem* proceedings in certain situations where sovereign immunity has been asserted. *Lundgren*, 187 Wn.2d at 868; *Smale*, 150 Wn. App. at 479.

The Supreme Court of the United States accepted certiorari of the Washington State Supreme Court ruling in *Upper Skagit* specifically to dispel the misunderstandings of the Washington State Courts regarding tribal sovereign immunity in *in rem* cases. *Upper Skagit Indian Tribe*, 584 U.S. at 560. 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 when analyzing the bounds of tribal sovereign immunity, 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 Indian Tribe*, 584 U.S. at 556. Indeed, the United States Supreme Court clarified that the *Yakima* case had nothing to do with tribal sovereign immunity at all. *Id.*

Absent the misinterpretation of *Yakima,* there is no basis to find an *in rem* exception to tribal sovereign immunity. Not a single case has been cited which recognizes an *in rem* exception to tribal sovereign immunity that does not rely on a misinterpretation of *Yakima.* Without an Act of Congress to waive tribal sovereign immunity for *in rem* cases, as Congress expressly did exclusively for taxation of the land purposes in the GAA, tribal sovereign immunity remains intact for *in rem* matters as a matter of federal law.

4.2.1 *There is no common law "immovable property" exception to sovereign immunity in American courts that can be applied to tribes.*

In determining the bounds of tribal sovereign immunity, federal Indian law directs courts to look to the common law of the forum the case is in, at some time in the past. *In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992). In this case, the Court should look to the common practice of American courts at "some time in the past."

In American courts, no "immovable property" exception to sovereign immunity was ever applied as a matter of common law. [1] Instead, the courts deferred to the political branches to make

[1] While *in rem* and "immovable property" both relate to real property, they are "distinct alternative" legal concepts that should not be conflated. *Upper Skagit Indian Tribe v. Lundgren,* 584 U.S. 554, 560, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018).

determinations on a case-by-case basis. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983); *Schooner Exch.*, 11 U.S. at 174. In 1943, the Supreme Court of the United States ruled 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." *Republic of Peru*, 318 U.S. at 588-89. The State Department ordinarily requested immunity in all actions against friendly foreign sovereigns, regardless of the subject matter of the case. *Verlinden*, 461 U.S. at 486; *Knocklong Corp.*, 6 Misc. 2d at 701. For example, in 1957 when a New York court was asked to determine title to land and the defendant was the Kingdom of Afghanistan, the Court did not engage in any analysis of a common law immovable property exception, or exceptions to the exception. The Court simply stated that when the claim of immunity is recognized by the executive branch, it is "the duty of the court to accept such claim." *Knocklong Corp.*, 6 Misc. 2d at 701.

In 1952, the State Department adopted a policy of following a specific theory of sovereign immunity which recognized an immovable property exception in a document called the Tate Letter. Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of State (May 19, 1952), reprinted in 26 Dep't State Bull. 984, 985 (1952) [hereinafter Tate Letter]. The Tate Letter

did not analyze the practice in American courts, but rather analyzed the common practice in foreign nations, including Czechoslovakia, Estonia, Poland, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, Portugal, the Netherlands, Sweden, Argentina, Germany, Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Romania, Peru, Denmark, the United Kingdom, and the Soviet Union. *Id.* The entire purpose of the Tate Letter was for the Department of State to adopt an internal policy of how to respond to courts because the common law in American courts had always been to defer to the political branches on determinations of sovereign immunity.[2]

As with tribal sovereign immunity, Congress has authority to act to create exceptions to the immunity extended to foreign nations by American courts. In 1976, Congress did just that and adopted the FSIA to free the government from making determinations of the sovereign immunity of foreign nations on a case-by-case basis. 28 U.S.C. §§ 1602-1611. As an Act of Congress, the FSIA codified an immovable property exception to sovereign immunity for *foreign sovereigns*. 28 U.S.C. § 1605(a)(4) . Congress did not make the FSIA immunity exceptions apply

[2] Flying T also relies on The *Restatement (Second)* to assert there is an "immovable property" exception in American common law, but the Restatement (Second)'s analysis of immovable property relied on cases from courts in Chile, Austria, Czechoslovakia, France, and Germany. Restatement (Second) of Foreign Relations Law § 68 (Am. Law Inst. 1965).

to tribes. In all the cases cited by Flying T, there is not a single court case in which an American court actually held that a sovereign's immunity was overcome by a common law immovable property exception, only cases that discuss the FSIA immovable property exception (which does not apply to tribes) or dicta describing the FSIA as adopting *internationa*l common law. *City of New York v. Permanent Mission of India to the U. N.*, 446 F.3d 365, 371 (2d Cir. 2006) (stating "FSIA was intended codify an already existing practice... that [State Department] policy was itself meant to bring the United States into conformity with *other countries*") (emphasis added); *Permanent Mission of India to the U. N. v. City of New York*, 551 U.S. 193, 199, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007) (referring to FSIA as "codification of international law at the time of the FSIA's enactment); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (stating "[t]he immovable property exception was enacted to codify... the pre-existing real property exception to sovereign immunity recognized by international practice").

Furthermore, despite assertions that the *Schooner Exchange* recognized an "immovable property" exception, Chief Justice Marshall's opinion never made any distinction between real (immovable property) and personal property when analyzing the application sovereign immunity. *Schooner Exch.*, 11 U.S. (7 Cranch) 116. The U.S. Attorney argued in

Schooner Exchange that while there is implied consent to jurisdiction when a prince acquires property in another country "whether real or personal," such implication is excluded by the law in every case where the sovereignty is concerned. *Id.* at 175. Similarly, Chief Justice Marshall's analysis focused not on whether the property was "real or personal," but on whether the property was "*public*" or "*private.*" *Id.* at 143-45. The oft cited portion of *Schooner* to justify an "immovable property" exception is not about immovable property at all, it is about *private* property. *Id.* at 145 ("[a] prince, by acquiring *private* property in a foreign country… may be considered as so far laying down the prince, and assuming the character of a private individual").[3]

Finally, Flying T confuses cases about the state's authority over land in its own jurisdiction as standing for the assertion that Tribes are not immune from suit when a matter involves immovable property in Washington State. Br. of App. 19-22. The Tribe is not arguing that a different sovereign's law applies to this case as in *U.S. v. Crosby*. *U.S. v.*

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[3] With all due respect to Justice Thomas, his dissent in *Upper Skagit v. Lundgren* makes this same error by equating Bynkershoek's discussion of property a prince "purchased for himself" (private property) with the concept of real or immovable property. *Upper Skagit Indian Tribe*, 584 U.S. at 565-67. In addition, Justice Thomas cites a 1951 British book of international law for the assertion that there is "uniform authority" for an immovable property exception, but the same source goes on to say "[h]owever, that particular aspect of immunity is not altogether free of doubt- it is significant that there is no English decision directly supporting this exception from the principle of immunity…" *Id.* (quoting Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l Law 220, 244 (1951)).

Crosby, 11 U.S. (7 Cranch) 115, 3 L. Ed. 287 (1812). The Tribe is arguing that Washington State law itself recognizes the Tribe's immunity from suit in this case.

Flying T asks this court to recognize American common law that does not exist in order to apply it unfairly against Indian tribes and in direct contradiction of well-established federal Indian law – law which states that courts should not carve out exceptions to tribal sovereign immunity, as only Congress has the authority to do so.

4.3.1 *New arguments raised for the first time on appeal are not property before this court.*

Flying T's arguments about prior ripened adverse possession were not argued in the Appellant's Brief in the Court of Appeals and are not properly before this Court. *Delta Air Lines*, 450 U.S. at 362. At the Court of Appeals, Flying T first mentioned prior ripened adverse possession in its answer to an amicus brief. At the time, Flying T did not present it as an exception to sovereign immunity, but rather in discussion about adverse possession law. Ans. to Am. Br. of Sauk-Suiattle at 13. Under RAP 10.2, the Tribe was unable to reply to this responsive pleading. Washington courts have cited RAP 10.3(f) for the proposition that arguments raised for the first time in a reply brief will not be considered because it would unfairly deprive the respondent of an opportunity to respond, and presents

the appellate court with an issue that has not been fully developed. *See, e.g., State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994). Because Flying T did not mention prior ripened adverse possession until a responsive pleading, and because Flying T has not previously argued that prior ripened adverse possession is in and of itself a basis for review, the argument is not property before this Court. Furthermore, the argument is without merit, as there is no "prior ripened adverse possession" exception to common law sovereign immunity in American courts.

4.3.2 *There is no exception to common law sovereign immunity for prior ripened adverse possession.*

Flying T failed to present a single case where an American court held that a sovereign who did not waive sovereign immunity was subject to a law suit based on prior ripened adverse possession. Instead, Flying T put forth cases about sovereigns who waived their immunity generally for quiet title actions, while specifically excluding from the waiver any claims based on the tolling of time against the sovereign. Pet. for Rev. at 13, 20.

For example, Washington State waived its immunity generally for claims against the state. RCW 4.92.010. The legislature also limited this waiver, stating "no claim of right predicated on the lapse of time shall ever be asserted against the state." RCW 4.16.160. The legislative purpose of this bar on tolling is to protect the sovereign from losing title due to the

failure of public servants to monitor the property. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 74, 283 P.3d 1082 (2012). Flying T's reliance on dicta about prior ripened adverse possession in *Gorman* to articulate a new exception to common law sovereign immunity is misplaced because *Gorman* was not about the limits of common law sovereign immunity. Instead, *Gorman* narrowly interpreted whether RCW 4.16.130's exception to the State's general waiver of sovereign immunity applied when the adverse possession ripened prior to the sovereign acquiring the land. *Gorman*, 175 Wn.2d at 74.

Similarly, the federal government waived its immunity in passing the Quiet Title Act ("QTA"), but also enacted a bar on suits based on adverse possession. 28 U.S.C. § 2409a(n). Federal courts interpret this bar on adverse possession to be based on the rule that no title to public lands can be gained through the federal employee's failure to monitor the property, and, therefore, the time necessary to claim adverse possession cannot toll on federally held lands. *See, United States v. Pappas*, 814 F.2d 1342, 1343 (9th Cir. 1987). When the Sixth Circuit said "[a]dverse possession claims against the United States that ripened before the government acquired title are not barred by 28 U.S.C. § 2409a(n)," it was indeed correct, but it is irrelevant to the instant case because the tribe is

not subject to QTA's waiver, nor its limitations. *Burlison v. United States*, 533 F.3d 419, 428 (6th Cir. 2008).

Unlike the city in *Gorman* and the federal government in *Burlison*, the Stillaguamish Tribe has not waived its immunity at all, nor has it adopted any exception to a waiver based on the tolling of adverse possession. To extend the reasoning in these cases to the Tribe would be to waive the tribe's immunity without its consent, something that only Congress has the authority to do.

The text of the QTA itself shows that prior ripened adverse possession is not a bar to common law sovereign immunity. 28 U.S.C. § 2409(a). For example, the United States waived its sovereign immunity for quiet title claims but retained its sovereign immunity for any claim that isn't brought within 12 years of the claim's accrual. 28 U.S.C. § 2409(a)(g). Had the United States purchased the land at issue here in 2004, this case would not be able to move forward regardless of Flying T's claim of prior ripened adverse possession because the United States' sovereign immunity remains intact for any case that hasn't been brought within 12 years of the accrual date, regardless of the nature of the claim.

In addition, the United States government has not waived its immunity from suit for prior ripened adverse possession claims when those claims are being made against property held in trust. 28 U.S.C. §

2409(a)(a) ("The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property… [t]his section does not apply to trust or restricted Indian lands"). Had the United States placed this land into trust at any time prior to 2022, this case could not move forward because the United States' common law sovereign immunity from suit would bar it, regardless of whether the adverse possession claim ripened before the land was put into trust or not.

It is true that adverse possession law recognizes transfer of title upon accrual of time, but this is simply irrelevant to the common law of sovereign immunity. The common law doctrine of sovereign immunity does not require that the sovereign have a "substantially justified" claim to title before immunity can apply. For example, in *Schooner Exchange*, Chief Justice Marshall was fully aware that the Schooner Exchange was the "property of the libellants, whose claim is repelled by the fact" that the vessel had been "violently and forcibly taken" under orders of Napoleon. *Schooner Exch.*, 11 U.S. at 117, 146. While it was argued in *Schooner* that there was no bar to an enquiry into the validity of the title held by the Emperor, Chief Justice Marshall noted that as a sovereign, France has "an implied promise… she would be exempt from the jurisdiction of the country." *Id.* at 146. Ultimately, Chief Justice Marshall, knowing full well

the Schooner Exchange was the property of the libellants and was violently and forcibly taken from them, dismissed the case at the suggestion of the Attorney for the United States. *Id.* Similarly, in *Knocklong*, there was a legitimate question as to who held title to the land in question because the plaintiff claimed to have purchased a tax deed, but the court nonetheless dismissed the case at the suggestion of the political branches. *Knocklong Corp.*, 6 Misc. 2d 700.

The simple fact is that even when the validity of the sovereign's title to property (whether real or personal) is substantially in question – whether based on theft, tax lien foreclosure, prior ripened adverse possession, or otherwise – under American common law, a sovereign's immunity still prevails. If the Stillaguamish Tribe is afforded immunity equivalent to that of a foreign sovereign, it may not be sued – even if the claim to title is substantially in question – over its objection. To hold otherwise would indeed unfaithfully lessen its immunity in comparison to that traditionally enjoyed by sovereign powers.

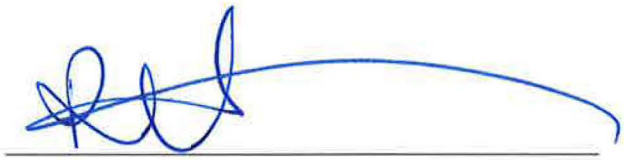
5. CONCLUSION

The common law immunity afforded foreign sovereigns in American courts was absolute, regardless of the nature of the claim, subject only to the suggestion of the political branches until Congress passed the FSIA. Tribal sovereign immunity is common law sovereign

immunity and no exception to that immunity exists in American common law for immovable property, for *in rem* cases, nor for claims of prior ripened adverse possession. For all the foregoing reasons, the Court should uphold the Court of Appeals decision.

I certify that this document contains 4,508 words.

Submitted this 17th day of January, 2025.



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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on January 17, 2025, 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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STILLAGUAMISH TRIBE OF INDIANS

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