No. 103430-0

Supreme Court of the State of Washington

FLYING T RANCH, INC, a Washington Corporation

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe
Respondent,

SNOHOMISH COUNTY, a political subdivision of the State of Washington.
Defendant.

Supplemental Brief of Petitioner Flying T Ranch

Peter C. Ojala
WSBA#42163
Attorney for Petitioner
Ojala Law Inc., P.S.
PO Box 211
Snohomish, WA 98291
360 568 9825
peter@ojalalaw.com

Kevin Hochhalter
WSBA # 43124
Attorney for Petitioner
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Summary 1

2. Issues Presented for Review 2

3. Statement of the Case 3

   3.1 Introduction 3

   3.2 Facts: Off-Reservation Property Already Owned by Adverse Possession 4

   3.3 Procedural Posture 5

4. Argument 7

   4.1 De Novo Review 7

   4.2 The Court of Appeals Flipped the Immovable Property Exception Framework for Analysis of *Upper Skagit* 8

   4.3 The Primeval Territorial Sovereignty Was Not Waived On Off-Reservation Lands Related To Title, And So The Privilege of Recognizing Tribal Immunity From Suit Related To Such Claims Has Not Been Invoked 10

   4.4 In This Narrow Limited Case of Fully Ripened Adverse Possession Off Reservation, There Are No Political Reasons Like the War of 1812 or the Cold War To Waive Washington's Primeval Sovereignty Over Real Property Title Disputes. 17

4.5 The Courts, not Congress, should act here to quiet title. 19

4.6 The Logical Conclusion of the Court of Appeals Holding That Congress First Must Act Leads To Unfair, Untenable, and Unconscionable Results In The Interim. 21

4.7 Balancing Fairness for All Involved – "The correct answer cannot be that the tribe always wins no matter what" – Chief Justice Roberts..... 25

5. Conclusion..... 31

Table of Authorities

US SUPREME COURT CASES

City of Sherrill v. Oneida Indian Nation of N. Y., 544 U.S. 197 (2005) 16

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 134 S. Ct. 2024, 188 L.Ed.2d 1071 (2014)..... 27

Munday v. Wisc. Tr. Co., 252 U.S. 499, 40 S. Ct. 365, 64 L. Ed. 684 (1920) 20

Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007) 10, 25

Schooner Exchange v. M'Faddon, 7 Cranch 116, 11 U.S. 116, 3 L. Ed. 287 (1812).....11

State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) 29

United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)..... 20

Upper Skagit Indian Tribe v. Lundgren, 584 U.S. 554, 138 S. Ct. 1649, 200 L.Ed.2d 931 (2018) .....passim

FEDERAL CASES

Asociacion de Reclamantes v. United Mexican States, 237 U.S. App. D.C. 81 25

Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (1984) 10, 20

Burlison v. United States, 533 F.3d 419 (6th Cir. 2008) 26, 30

Spaeth v. United States Secretary for the Interior, 757 F.2d 937 (8th Cir. 1985) 26

Wildman v. United States, 827 F.2d 1306 (9th Cir. 1987) 27

STATE CASES

Auto. United Trades Org. v. State, 175 Wn.2d 214, 285 P.3d 52 (2012) 7

Edmonson v. Popchoi, 172 Wn.2d 272, 256 P.3d 1223 (2011) 19

El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962) 28

Gorman v. City of Woodinville, 175 Wn.2d 68, 283 P.3d 1082 (2012) 28

Lundgren v. Upper Skagit Indian Tribe, 187 Wn.2d 857, 389 P.3d 569 (2017).....28, 30, 32

Lyon v. State, 76 Idaho 374, 283 P.2d 1105 (1955) .. 29

Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria, 60 Cal. App. 5th 209, 274 Cal. Rptr. 3d 255 (2021) 12, 30

Smale v. Noretep, 150 Wn. App. 476, 208 P.3d 1180 (2009) 15, 28

STATE CONSTITUTIONAL PROVISIONS

Washington Article 4
§ 6..... 16

FEDERAL STATUTES

Title 25 U.S.C.
§ 5108..... 30

Title 28 U.S.C.
§ 2409a(a) 26
§ 2409a(n) 26

STATE STATUTES

Washington
Wash. RCW 77.85..... 5, **Error! Bookmark not defined.**, 29
Wash. RCW 77.85.005 18
Wash. RCW 77.85.010 29
Wash. RCW 77.85.050(1)(a) 18, 29

STATE RULES

Washington Court Rules
Rule 12(b)(1) 6, 7
Rule 12(b)(6) 6, 7
Rule 19 3

FEDERAL REGULATIONS

Title 25 C.F.R.
§ 151.10-.14 30

OTHER AUTHORITIES

Restatement (Second) of Foreign Relations Law of the United States § 77(4) (Am. L. Inst. 1965)) 17

1. Summary

This is a unique and narrow adverse possession case invoking the interrelationships between Washington's primeval interest in resolving title disputes within its territory in its court rooms, and the question of tribal sovereign immunity.

For the first time in history, a Washington appellate court has held an owner with fully ripened adverse possession title, related to off-reservation non-trust property, cannot clear title in court, even when a Tribe accepts a deed to said property on the open market (or in litigation from a co-defendant).

The Court of Appeals held a Tribe cannot be sued in a case like this without input from Congress or the political branches, though a Tribe's sovereignty is not broader than that of a foreign nation. The Court said the remedy is to petition Congress. This is error.

Taking the Tribe's arguments and the Court of Appeals holding to its logical next step leads to absurd consequences, such as a Tribe purchasing land at a discount in a pending judicial foreclosure, and then telling secured lien holders they are out of luck because of immunity. At oral argument, the Tribe conceded this was the nature of the sovereign immunity argument they espoused. The Court of Appeals granted them this immunity in Washington. Washington's primeval sovereign immunity over immovable property is not the Court of Appeal's immunity to waive.

Accordingly, the Court of Appeals should be reversed.

2. Issues Presented for Review

1. Whether the sovereign immunity of a federally recognized Indian tribe bars or is offended by the superior court's exercise of in rem jurisdiction (whether under the immovable property doctrine or otherwise), in an adverse possession action to quiet title to an off-

reservation land which the Tribe obtained record title, after the adverse possession title clearly ripened into original title long before Tribal or governmental acquisition when the subject lands were under private ownership?

2. Did the Court of Appeals err in holding the common law immovable property doctrine cannot be applied in this case absent United State's Congressional action, where this matter is a clear cut in rem adverse possession case that ripened into original title before Tribal acquisition?

3. Whether the trial court erred in dismissing all of Flying T's claims to quiet title under CR 19 for lack of personal jurisdiction or failure to join an indispensable party?

3. Statement of the Case

3.1 Introduction

If tribal sovereign immunity is no broader than foreign sovereign immunity at common law, then in this mundane adverse possession case, where title has ripened well prior to the tribal acquisition of the strip of land in question, the immovable property exception that applied to foreign sovereigns must also apply to

Indian Tribes. Congress *may*, but has not, eliminated such an exception.[1] Accordingly, the Court of Appeals must be reversed.

3.2 Facts: Off-Reservation Property Already Owned by Adverse Possession

Flying T is and has been in exclusive adverse possession of the property in question, fully ripening prior to when Snohomish County or the Tribe accepted deeds to the land.

The Tribe accepted a statutory warranty deed for around 140 acres of land on the other side of the Stillaguamish River from Flying T's ranch. But a narrow 20' strip in the deed's legal description goes through part of Flying T's holdings, that had been adversely possessed long ago.

---

[1] If Congress were to eliminate the exception, with the result that the Tribe would effectively own the property due to its immunity from a quiet title suit, such an act might be an unconstitutional Taking of the adverse possessor's land.

The Tribe has not physically entered and taken possession of Flying T's land under any claim of right, and the Court of Appeals did not rule the Tribe owns fee simple title to the property.[2] The Deeds were acquired by the Stillaguamish Tribe as part of its acquisition of lands primarily across the river from Flying T, for a salmon restoration project, with planning, oversight, control, and funds from the state, and funds from the federal government under RCW 77.85 et seq.

3.3 Procedural Posture

The Complaint is one to quiet title in Flying T, as adverse possessor, to non-trust off-reservation property

---

[2] After dismissal by the trial court, the Tribe has subsequently granted the State of Washington a deed or covenant binding the land as a salmon habitat restoration land. Snohomish County Auditor's File No. 202308070117. Appendix 1 (the future possibility of doing this could be alleged hypothetically in the Complaint. CR 12(b)(6)).

purportedly acquired on the open market after the adverse title had already ripened in Flying T.

The trial court did not quiet title to the property; it merely dismissed Flying T's claims – leaving uncertainty.

After litigation commenced, for legal expediency, the Tribe accepted a quitclaim deed from Snohomish County for the other little strip at issue, that is part of Flying T's exclusive adverse possession, ripening prior to Snohomish County acquisition.

The trial court dismissed with prejudice pursuant to CR 12(b)(1)-(3) and CR 12(b)(6). Flying T sought review.

After the Supreme Court of Washington denied direct review, the Court of Appeals affirmed dismissal, holding that Tribal sovereign immunity is equal to that of a foreign nation, and because Congress has not abrogated Tribal immunity, the common law immovable property exception does not apply.

4. Argument

4.1 De Novo Review

The question of subject matter jurisdiction under CR 12(b)(1)-(3) and CR 12(b)(6) and sovereign immunity, even in a Tribal immunity context, is a *de novo* review. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 226, 285 P.3d 52 (2012).

At the heart of each of the issues raised in this matter, is the question:

Under the common law immovable property doctrine, does tribal sovereign immunity from suit act as a bar to a state court action to quiet and clear title, where the Tribe received a Washington statutory warranty deed, a small part of which covered land that had ripened into original title in Flying T before Tribal acquisition? Is the answer the same for a quitclaim deed from a now dismissed co-defendant to another sliver similarly previously adversely possessed, but

conveyed to the Tribe *after* quiet title litigation commenced for legal expediency reasons?

The answer is "yes" under common sense, fairness, and due process for all involved.

4.2 The Court of Appeals Flipped the Immovable Property Exception Framework for Analysis of *Upper Skagit.*

The Chief Justice of the United States laid out the framework for analysis of the immovable property exception in relation to Indian Tribes:

> Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual. The same rule applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States. **The only question**, as the Solicitor General concedes, is whether different principles afford Indian tribes a **broader immunity from actions involving off-reservation land**."

Upper Skagit Indian Tribe v. Lundgren, 584 U.S. 554, 563, 138 S. Ct. 1649, 200 L.Ed.2d 931 (2018) (Chief

Justice, Concurring) (emphasis added, citations omitted)("Upper Skagit").

Here, the Court of Appeals held, in pertinent part, that Tribes have the same sovereign immunity as foreign nations, not broader immunity.[3] Under the framework outlined by the Chief Justice in *Upper Skagit,* this recognition by the Court of Appeals necessarily means that the immovable property doctrine should apply to the Tribe, just as it has applied to foreign sovereigns for centuries.

But the Court of Appeals erred in saying that the court can only exercise this authority if authorized by Congress, particularly on the narrow and unique case before it (fully ripened clear cut adverse possession).

---

[3] The Court of Appeals went on to hold that the state cannot exercise its sovereignty through its superior courts when a Tribe asserts immunity from suit, unless expressly authorized by Congress, even in the context of an off-reservation mundane adverse possession case ripening before Tribal acquisition. This flips the common law on its head.

Accordingly, the Court of Appeals holding flips who is doing the waiving, what is being waived, and when it is waived.

4.3 The Primeval Territorial Sovereignty Was Not Waived On Off-Reservation Lands Related To Title, And So The Privilege of Recognizing Tribal Immunity From Suit Related To Such Claims Has Not Been Invoked.

The highest court in the land recognized, as also held under *Asociacion de Reclamantes,*[4] that there is a common-law or natural law primeval interest in a sovereign territory resolving title disputes within its domain as the baseline rule. *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007). The territorial sovereign *may* choose to waive *its own* sovereignty, to open the door to allow a foreign sovereign, for political reasons or comity purposes, the

---

[4] *Asociacion de Reclamantes v. United Mexican States,* 735 F.2d 1517, 1521-22 (1984).

privilege of immunity from such suits, but it is the territorial sovereign's choice to affirmatively waive, not the foreign sovereign's right. *See*, *Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 145, 11 U.S. 116, 3 L. Ed. 287 (1812).[5]

Therefore, absent a waiver from Congress or the State political branches (express or implied) of their own 'primeval' interest in resolving title issues to real property within their domain, tribal sovereign immunity from suit over legal title to non-trust off-reservation property adversely possessed by Flying T *well prior to* the Tribe's deeds, acquired on the open market, cannot be asserted to remove subject matter jurisdiction of the Washington Superior Court, because a Tribe's sovereign immunity from suit is not broader

---

[5] The Court of Appeals recognized these principles, but did not apply them correctly because the Court did not analyze first whether Congress or Washington expressly or implicitly waived their own sovereignty over such claims.

than a foreign nation's over such an action. *See Upper Skagit*, 584 U.S. at 566-576 (Justice Thomas, Dissent); *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 224, 274 Cal. Rptr. 3d 255, 265 (2021) (Reardon, Concurring) ("[T]he second sovereign's authority over issues of title to land within its boundaries supersedes the first sovereign's privilege to preclude a judicial challenge to the fact and scope of its ownership of that land.")

Accordingly, the Court of Appeals implicitly got it right that the immovable property doctrine applies at common law to Tribes[6], when viewed under the framework of analysis set forth by the Chief Justice

---

[6] Importantly, the Court of Appeals did not expressly hold that a common law exception for immovable property did not apply to Tribes per se, and merely stated in a footnote "that *Chattanooga* and *The Schooner Exchange,* together with related authorities, do not support extending a common law exception for immovable property to tribes." Op. at 27 n.13 (citing *Self,* 60 Cal. App. 5th at 216-18) (emphasis added).

and the Solicitor General in *Upper Skagit*. But the Court of Appeals reasoning that Congress must act first[7] is inconsistent with and wipes out the common law of the immovable property exception doctrine, particularly over the mundane off-reservation fully ripened adverse possession case presented.

The Court of Appeals focused too much on the *process* (of the political branches dictating the scope or waiver of their immunity) and ignored the *product* of the political branches' direction. The product was a theoretical framework for sovereign immunity—originally the "absolute theory"—that provided guidance for decisions on the appropriate scope of that immunity. This framework, described in depth in the Restatement Second of Foreign Relations Law, included the immovable property exception. Why? Because it had been applied consistently enough by the

---

[7] Whether Congress *should or could* act to change the common law baseline rule is a different question.

political branches that it had become the standard decisional rule by which the state department would make its recommendations and by which courts could make a waiver of immunity decision in the absence of specific direction in a particular case. This is what Flying T referred to in its prior appellate briefs as the "common law immunity" of foreign sovereigns—the decisional framework for the scope of immunity, established by decades of prior decisions, and presumably afforded to Indian Tribes as being no greater than foreign or domestic sovereigns when the judiciary created the doctrine of tribal sovereign immunity.

The United States Supreme Court has never held that the *process* of the political branches dictating the scope of immunity, related to state real property title, should apply to Indian Tribes. The Tribe did not request a recommendation of immunity from the political branches related to off-reservation real

property title, and those branches did not give one. Under the High Court's precedent, tribal immunity related to real property title is not determined on a case-by-case basis through recommendations from the political branches. Rather, the scope of immunity is fixed, unless and until it is modified by specific acts of Congress (or a state) through waivers with respect to immovable real property title.

Thus, it is the *product* of the political branches' decisions on foreign sovereign immunity—the pattern emerging from the collection of individual decisions over time[8]—that defines the scope of tribal immunity in the context of off-reservation title to real property. That product includes the immovable property exception. That exception limits the scope of the immunity that was ascribed to the Tribes. Congress has taken no action to remove the immovable property

[8] Which include *Smale v. Noretep,* 150 Wn. App. 476 (2009).

exception, particularly related to "title or possession of real property"[9], therefore it should continue to apply to the Tribes on off-reservation real property title issues.[10]

In addition to following the framework for analysis by the Chief Justice, Flying T urges this Court to consider and adopt Justice Thomas' analysis and reasoning in *Upper Skagit*, particularly under the narrow grounds presented here, where adverse possession fully ripened prior to the Tribe acquiring deeds for the disputed land, and where the adverse claimant remains in exclusive possession. There is no

---

[9] Nor has Washington. Washington Constitution Article 4 §6 (The superior court shall have original jurisdiction *in all cases* at law which involve title or possession of real property…")(emphasis added).

[10] A tribe "cannot unilaterally revive its ancient sovereignty, in whole or in part," without more, "through open- market purchases from current titleholders." *City of Sherrill v. Oneida Indian Nation of N. Y.*, 544 U.S. 197, 203 (2005).

need to plumb the outer limits of the immovable property exception.

4.4 In This Narrow Limited Case of Fully Ripened Adverse Possession Off Reservation, There Are No Political Reasons Like the War of 1812 or the Cold War To Waive Washington's Primeval Sovereignty Over Real Property Title Disputes.

The Court of Appeals recognized that "Under the [*Restatement (Second) of Foreign Relations Law of the United States* § 77(4) (Am. L. Inst. 1965))], sovereign immunity should not have protected the Kingdom of Afghanistan from a state court *determination* of title, though it would have afforded protection from *execution* of any judgment." (Op. at 14.) (emphasis added). Accordingly, many of the otherwise potentially meritorious political reasons the Court of Appeals cited, obtaining direction from the political branches in other contexts (imminent war, cold war, etc.), simply do not apply to the unique off-reservation

mundane adverse possession case such as we have here.[11]

In such a narrow case as this, there is no nation to nation, or horrible sticky problems like injunctive relief physically forcing someone (Flying T or Tribe) off the land with the disputed title, or other enforcement or execution of a judgment or collection, as Flying T has been, and remains in exclusive adverse possession of the small strips of land in question well prior to the Tribe's deeds. And the Tribe is fully protected from the costs and headache of litigation if and when they tender the dispute to the person who gave them the statutory warranty deed they purchased. *See,*

---

[11] The Court of Appeals notes it is a tribal sovereignty matter to acquire lands it had once ceded for salmon. (Op. at 24-27). However, the Court of Appeals does not consider the State's interest in this modern age, of inviting "tribal governments" to acquire lands for salmon recovery *with good title from willing owners* under state guidance and planning. RCW 77.85.005 – .240. Private property rights are specifically protected in this process. RCW 77.85.050(1)(a).

Edmonson v. Popchoi, 172 Wn.2d 272, 274, 256 P.3d 1223 (2011) (Under Washington law, a grantee is well protected by acquiring land on the open market against the perils of adverse possession by using a Washington Statutory Warranty Deed, as a Grantor has a duty to defend and pay for land it conveyed but does not own due to adverse possession).

This is the correct procedure under the statutory and real property law of Washington, not for Flying T to bother Congress with a "bill of procedure."

4.5 The Courts, not Congress, should act here to quiet title.

The Supreme Court in *Upper Skagit* indicated the Courts, not Congress, should answer the immovable property exception question, which the Chief Justice and the Solicitor General of the United States said turns on only one question: "whether different principles afford Tribes *broader* sovereign immunity from actions involving off-reservation land."

Upper Skagit, 584 U.S. at 563 (Chief Justice, Concurring) (emphasis added). As acknowledged by the Court of Appeals here, state courts (or federal courts applying substantive local state real property law) are the experts in resolving local mundane real property title issues, not Congress. Op. at 20-21 (Acknowledging Washington is the relevant sovereign for purposes of substantive real property law) (citing *Munday v. Wisc. Tr. Co.,* 252 U.S. 499, 503, 40 S. Ct. 365, 64 L. Ed. 684 (1920)).

The expertise, primeval interest, and forum, also the basis of the immovable property doctrine under the common law, *see Asociacion de Reclamantes*, 735 F.2d at 1521-22, is at direct odds with the Court of Appeals urging Flying T to instead file a "private bill procedure" with Congress to obtain clear title, Op. at 29-30 (citing *United States v. Mitchell*, 463 U.S. 206, 212-13, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983). The Court of Appeals reasoning is also at direct odds with Chief Justice

Robert's framework for analysis and concerns that it cannot be that the Tribe wins no matter what in a case like this.

4.6 The Logical Conclusion of the Court of Appeals Holding That Congress First Must Act Leads To Unfair, Untenable, and Unconscionable Results In The Interim.

If this Court adopts the Court of Appeals decision to hold the Stillaguamish Tribe immune from suit over land that was adversely possessed by Flying T years prior to their acquisition, unless Congress acts, this leads to untenable and absurd results in an orderly society.

Under the Tribe's candid admission of its theory of sovereign immunity, the Stillaguamish Tribe could purchase off-reservation distressed property in a pending state court judicial foreclosure, and then tell the secured lenders and mortgage holders they are out of luck because the Tribe has stepped into the shoes of

the property owner, and has sovereign immunity.[12] Judge Dwyer said, after the Tribe agreed this was its theory of the nature of sovereign immunity in this case, "I just want to be clear that we are understanding what you are urging us to put at stake here, thank you for your candor."[13]

---

[12] Oral Argument: https://tvw.org/video/division-1-court-of-appeals-2024021467/?eventID=2024021467 at 9:32 – 10:40. "[Judge Dwyer]: "Let's talk about where this leads us … Your position is, assuming as we must that the plaintiff's claims are meritorious, nevertheless, there is no court *in the world*, that they can go to have their rights vindicated?" [Tribal Lawyer]: "This is the nature of sovereign immunity…" [Judge Dwyer]: "So the next step is, Tribes, to obtain a commercial advantage, should approach every owner of every property engaged in a judicial foreclosure, and buy it at a discount, and then tell the affected lenders and holders of security interests, that they no longer have any remedy anywhere in the world?" [Tribal Lawyer]: "This is the nature of sovereign immunity." [Judge Dwyer]: "I just want to be clear that we are understanding what you are urging us to put at stake here, thank you for your candor." [Tribal Lawyer]: "That is the nature of sovereign immunity."

[13] *Id.*

The Stillaguamish Tribe's candid admission of the untenable result of its position that it has immunity from suit related to off-reservation real property it acquires, unless Congress acts, demonstrates their argument is erroneous. Accordingly, the absurd untenable result itself shows the correct framework for analysis is, (1) whether the sovereign over the territory in which the Tribe acquired off-reservation non-trust land has first waived its own sovereignty through political action by the United States and/or the State of Washington; and second, (2) whether Congress has otherwise abrogated Tribal sovereign immunity related to suit or acquiesced in states' traditional assertions of subject matter jurisdiction in their case law.

Until the threshold question of whether both the United States and the state of Washington expressly or impliedly waive their own sovereignty and 'primeval' interest in real property disputes over title or possession of off-reservation property, there is no need

to even address the scope of tribal sovereign immunity and whether Congress has abrogated it, even assuming the Tribe was immune from suit over off-reservation property title issues, at common law after the Point Elliot treaties.

The Tribe also appears to have conceded at oral argument that its immunity from suit was not broader than a foreign nation's under the common law. The Tribe conceded *at common law* that it's sovereign immunity was not broader than France's, but argued under the *American* common law prior to Congress's codification, France did not have an immovable property exception,[14] and today the Tribe's sovereign immunity is broader than that of France *because*

---

[14] Oral Argument: https://tvw.org/video/division-1-court-of-appeals-2024021467/?eventID=2024021467 at 18:43 ([Tribal Lawyer]: "My second answer to your question is that there was no immovable property exception for France. Opposing counsel failed to cite a single case before 1976...")

Congress has not acted to abrogate the Tribe's sovereign immunity.[15] It appears the Court of Appeals agreed to this logic, contrary to the common law principles recognized in *Asociacion de Reclamantes v. United Mexican States,* 237 U.S. App. D.C. 81, 735 F.2d 1517, 1521-22 (1984) and approvingly cited by the highest court in the land. *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007).

4.7 Balancing Fairness for All Involved – "The correct answer cannot be that the tribe always wins no matter what" – Chief Justice Roberts.

Alternatively, should the Court find that tribal sovereign immunity somehow may bar some off-

---

[15] Oral Argument: https://tvw.org/video/division-1-court-of-appeals-2024021467/?eventID=2024021467 at 9:14. ("But in so far as it relates to this case the Tribe's immunity regarding immovable property is **not** broader than that of France's under common law, it is broader than France's because Congress did not act to abrogate the Tribe's sovereign immunity.")(emphasis added).

reservation real property title claims despite the bedrock common law immovable property exception, analogous quiet title actions in the adverse possession context against the United States when land is in or purportedly *in trust* for a Tribe provide a worst case procedural method or analogy for fairly determining whether a Tribe's claims to non-reservation, non-trust land are substantial or not, justifying the exercise of applying Washington law (subject matter jurisdiction) to clear title. *See e.g., Burlison v. United States*, 533 F.3d 419, 428 (6th Cir. 2008) ("[A]dverse possession claims against the United States that ripened before the government acquired title to the lands in question are not barred by 28 U.S.C. §2409a(n)) (citing three district court level cases); *Cf. Spaeth v. United States Secretary for the Interior,* 757 F.2d 937 (8th Cir. 1985) (To be immune from suit under 28 U.S.C. §2409a(a), the United States must show a "substantial claim" that land is trust or restricted Indian lands); *See also,*

Wildman v. United States, 827 F.2d 1306, 1310 (9th Cir. 1987) (ruling dismissal on immunity grounds because the United States had a substantial claim to the land, and acts as a "jealous fiduciary" over lands it holds "in trust" for tribes).

While noting that common law immunity from suit is actually a "necessary corollary to Indian Sovereignty and self-governance," *Bay Mills* did not answer the question of whether a Tribe's immunity related to off-reservation title issues is broader than a foreign nation at common law, such that the immovable property exception does not apply, or there are other reasons to allow suit to proceed. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 799 n.8, 134 S. Ct. 2024, 2030, 188 L.Ed.2d 1071, 1083 (2014)(citations omitted). And *Upper Skagit* remanded the question.

Adverse possession law is a unique blend of common law and statutory law in that Flying T has prior fully ripened "original title" to the land under the

Complaint all facts taken as true, and likely on a summary judgment motion. *See e.g., Gorman v. City of Woodinville,* 175 Wn.2d 68, 73-75 283 P.3d 1082 (2012); *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962) (owner gains "original title" upon adverse possession elements running automatically). A Tribe who acquires land after the adverse possession has already ran, has no valid interest under the Deed for its sovereign immunity to protect. *Smale v. Noretep,* 150 Wn. App. 476, 208 P.3d 1180 (2009) (recognizing this as one of two independent grounds for finding there was no offense to an assertion of tribal immunity from suit.) *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 868, 389 P.3d 569 (2017)(same) vacated and remanded on the other grounds by *Upper Skagit,* 584 U.S. 554; *Lyon v. State,* 76 Idaho 374, 376, 283 P.2d 1105 (1955)(Parties seeking to quiet title where the state is a defendant are asserting no claim against the

sovereignty, but are attempting to retain what they allegedly own.")

The Court of Appeals erred in not following the independent rationale of *Lundgren* and *Smale,* that adverse possession is not being claimed *against* the Tribe over a portion of *its* land during tribal occupation of the land, and the Tribe gained nothing due to the ineffective Deed, and so the Court of Appeals here should be reversed under *stare decisis* principles related to real property. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

At a minimum, though, here we are dealing with non-reservation non-trust land purportedly acquired with funds under RCW 77.85,[16] worst case there can be

---

[16] RCW 77.85.010 ("Project Sponsor" is a county, city, special district, tribal government, state agency, a combination of such governments…"); RCW 77.85.050(1)(a) provides in pertinent part: "No project included on a habitat project list shall be considered mandatory in nature **and no private landowner may be forced or coerced into participation in any respect.**"

no offense to sovereign immunity if Flying T's claims can prevail on summary judgment theoretically even against the United States attempting to process, accept, and hold the land in trust as a jealous fiduciary for the Tribe under 25 C.F.R. §151,[17] as the United States' and Tribe's claims to true actual title to the land in question under the Deeds would not be substantial nor marketable, given the unique nature of prior fully ripened adverse possession. *See, e.g. Burlison*, 533 F.3d at 428; *Cf. Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 868, 389 P.3d 569 (2017) (upholding decree of title based upon a plaintiff's motion for summary judgment of a clear cut adverse possession case accruing prior to purported tribal acquisition), vacated

[17] The Executive has passed rules inviting the political branches to weigh in on the fee to trust process, also requiring review and removal of any title matters that render title to land unmarketable under 25 U.S.C. § 5108 and 25 C.F.R. § 151.10-14 (2020). *See Self*, 60 Cal. App. 5th at 225 (Reardon, Concurring).

and remanded on the other grounds by *Upper Skagit,* 584 U.S. 554.

This argument addresses the Supreme Court Chief Justice's concern that, even if the common law of the immovable property exception may not allow the claim to proceed, the correct answer cannot be that the tribe wins no matter what.[18]

5. Conclusion

Because an Indian tribe does not have broader immunity from suit than a foreign nation, and neither the United States nor Washington has elected to waive sovereignty over real property title issues for political

---

[18] "There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. **The correct answer cannot be that the tribe always wins no matter what**; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right." *Upper Skagit*, 584 U.S. at 563 (Chief Justice Roberts, Concurrence) (emphasis added).

reasons to depart from the bedrock common law immovable property doctrine, the Washington State trial court has subject matter jurisdiction to quiet title, particularly in this narrow mundane type of adverse possession case that ripened prior to Tribal acquisition of an ineffective deed.

Accordingly, the Court of Appeals and the trial court should be reversed for all the reasons articulated in Flying T's original appellate briefs, in the Petition for Review, and in this Supplemental Brief, and the matter should be remanded back to the trial court to proceed on the merits of Flying T's claims.

Finding there is no subject matter jurisdiction otherwise is "'contrary to common sense, fairness, and due process for all involved.'" *Lundgren*, 187 Wn.2d at 873, vacated and remanded on other grounds by *Upper Skagit*, 584 U.S. 554.

Pursuant to RAP 18.7(b), I certify that this document contains 4980 words per the word county calculation of the processing software used to prepare this brief.

Submitted this 17th day of January, 2025.

/s/ Peter C. Ojala

Peter C. Ojala, WSBA #42163
Attorney for Petitioner
peter@ojalalaw.com
Ojala Law Inc., P.S.
PO Box 211
Snohomish, WA 98291
360-568-9825

APPENDIX 1

202308070117
DEEDS (EXCEPT QCDS) **Rec: $210.50**
8/7/2023 11:30 AM 8 PG
SNOHOMISH COUNTY, WA

Upon Recording, Please Return To:
Washington State Recreation and Conservation Office
PO Box 40917
Olympia, WA 98504-0917
Attn: Elizabeth Butler

DEED OF RIGHT TO USE LAND FOR SALMON RECOVERY PURPOSES

Anderson Property

Grantor:	Stillaguamish Tribe of Indians (Sponsor Name)
Grantee:	STATE OF WASHINGTON, acting by and through the WASHINGTON STATE SALMON RECOVERY FUNDING BOARD and the WASHINGTON STATE RECREATION AND CONSERVATION OFFICE (RCO), including any successor agencies.
Abbreviated Legal Description:	Government Lot 7 of 11-32-6; Government Lot 3, ptn Government Lot 2 and W1/2 of 12-32-6; Government Lot 3, ptn Government Lot 4, NW of NW and N1/2 of SE of NW of 13-32-6; and ptn Government Lot 1 of 14-32-6 More particularly described in Exhibit "A" (Legal Description), and as depicted in Exhibit "B" (Property Map)),
Assessor's Property Tax Parcel Number(s):	320614-001-001-00, 320611-004-009-00, 320612-003-014-00, 320612-003-013-00, 320613-002-003-00, 320613-002-002-00, 320613-002-005-00 and 320613-001-004-00

The Grantor enters this Deed for and in consideration of grant funding coming in whole or in part from the State Building Construction Account - Salmon Recovery Funding Board; and the Puget Sound Acquisition and Restoration Accounts. Such grant and this Deed are made pursuant to the Grant Agreement entered into between the Grantor and the Grantee entitled Cicero Floodplain Acquisition, Project Number 21-1051 signed by the Grantor on the 22nd day of February 2022 and the Grantee the 12th day of May 2022 and supporting materials which are on file with the Grantor and the Grantee in connection with the Grant Agreement.

The Grantor hereby conveys and grants to the Grantee as the representative of the people of the State, the right to enforce the following duties:

1. The Grantor shall take such reasonable and feasible measures as are necessary to protect the Real Property as described in Exhibit A: Legal Description, in perpetuity. Such measures shall be consistent with the purposes in the Grant Agreement, including protecting, preserving, restoring and/or enhancing the habitat functions on the Real Property, which includesside channel, floodplain, riparian, and instream, upland forest. This habitat supports or may support priority species or groups of species including but not limited to Puget Sound Chinook, Chum, Coho, and Pink salmon, and Steelhead, Cutthroat, and Bull Trout.

2. The Grantor shall allow public access to the Property as provided in the Grant Agreement. Such access shall be subject to the restrictions allowed under the Grant Agreement, by written agreement between the Grantee and Grantor, or under state law.

3. Public access may be limited as necessary for safe and effective management of the property consistent with salmon recovery purposes, but only by written approval of the RCO or funding board.

4. The Grantor shall allow access by the Grantee to inspect the Real Property for compliance with the terms of this Deed and the applicable Grant Agreement to which the Grantor is a signatory. Such access shall be subject to the restrictions, if any, allowed under the Grant Agreement, by written agreement with the Grantee, or under state law. The Grantor warrants it has and shall maintain the legal right and means to reach the property.

5. Without prior written consent by the Grantee or its successors, through an amendment to the Grant Agreement or the process set forth below, the Grantor shall not use or allow any use of the Real Property (including any part of it) that is inconsistent with the salmon recovery grant purposes herein granted and as stated in the Grant Agreement. The Grantor shall also not grant or suffer the creation of any property interest that is inconsistent with the salmon recovery grant purposes herein granted

STD

and as stated in the Grant Agreement or otherwise approved in writing by the RCO or funding board.

Grantee's consent to an inconsistent use or property interest under this Deed shall be granted only to the extent permitted by law and upon the following three conditions, which ensure the substitution of other eligible land. The conditions are: (1) the substitute salmon recovery land must be of reasonably equivalent habitat qualities, characteristics and location for the salmon recovery purposes as the Real Property prior to any inconsistent use; (2) the substitute salmon recovery land must be of at least equal fair market value to the Real Property at the time of Grantee's consent to the inconsistent use; and (3) the fair market value of the Real Property at the time of the Grantee's consent to the inconsistent use shall not take into consideration any encumbrances imposed on or alterations made to that land as a result of the original state grant and other grants if such encumbrances or alterations reduce the value of the Real Property from what it would be without them.

For purposes of this Deed, the Grant Agreement includes any amendments thereto that occurred prior to or may occur subsequent to the execution of this Deed.

This Deed contains covenants running with the land and shall be binding upon the Grantor, its successors and assigns, and upon any person acquiring the Property, or any portion thereof, or any interest therein, including a leasehold interest, whether by operation of law or otherwise. If the Grantor sells all or any portion of its interest, the new owner of the Property or any portion thereof (including, without limitation, any owner who acquires its interest by foreclosure, trustee's sale or otherwise) shall be subject to applicable covenants and requirements under the Deed.

This Deed may not be removed or altered from the Real Property, or the Real Property further encumbered, or any property rights in or appurtenant to the Real Property transferred or sold, unless specific written approval has been granted by RCO and/or the Washington State Salmon Recovery Funding Board or its successors. No sale or transfer of the Real Property including less than fee conveyance of property interest, or changes to this Deed, shall be made without the written approval of the RCO. Any such sale or transfer of any property interest or rights in the Real Property, or changes to this Deed, or the recording of any encumbrance, covenant, etc. upon the Real Property shall be void when made unless approved in writing by RCO and made part of the Grant Agreement by amendment.

The Washington State Recreation and Conservation Office and the Washington State Salmon Recovery Funding Board and/or its successors shall each have a separate and independent right to enforce the terms of this Deed.

REMAINDER OF PAGE IS INTENTIONALLY BLANK; SIGNATURE PAGES FOLLOW

GRANTOR:

Stillaguamish Tribe of Indians

By: _____

Name: Eric White

Title: Chairman, Board of Directors

Dated this 3rd day of August, 2023

STATE OF WASHINGTON)
) ss
COUNTY OF Snohomish)

I certify that I know or have satisfactory evidence that Eric White is the person who appeared before me, and said person acknowledged that they signed this instrument, on oath stated that they were authorized to execute the instrument and acknowledge it as the Chairman, Board of Directors for the Grantor, Stillaguamish Tribe of Indians and to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: 08/03/23

Signed: _____

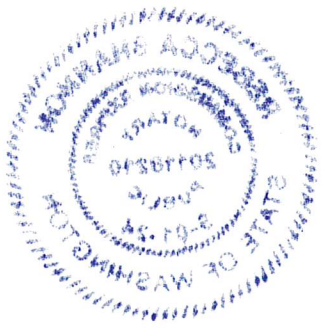
Notary Public in and for the State of Washington,

residing in Snohomish County.

My commission expires 09-01-24.

REBECCA SHANNON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 20118210 9-01-24

REMAINDER OF PAGE IS INTENTIONALLY BLANK; ADDITIONAL SIGNATURE PAGE FOLLOWS



GRANTEE:

STATE OF WASHINGTON, acting by and through THE WASHINGTON STATE SALMON RECOVERY FUNDING BOARD, administered by the WASHINGTON STATE RECREATION AND CONSERVATION OFFICE

By: _____

Name: Scott T. Robinson

Title: Deputy Director

Dated this 6TH day of July, 2023

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I certify that I know or have satisfactory evidence that Scott T. Robinson is the person who appeared before me, and said person acknowledged that they signed this instrument, on oath stated that they were authorized to execute the instrument and acknowledge it as the Deputy Director for the Recreation and Conservation Office and to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

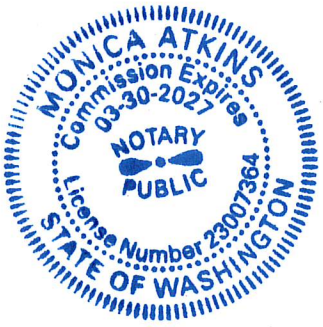
Dated: 7/6/2023

Signed: _____

Notary Public in and for the State of Washington,

residing in THURSTON COUNTY.

My commission expires 3/30/2027.



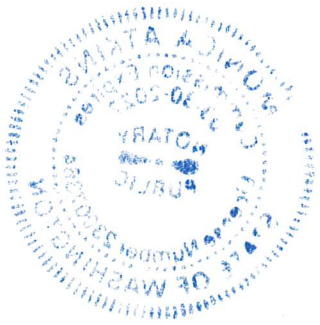


EXHIBIT A
Legal Description

Parcel A:
Government Lot 7, Section 11, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington;
Less that portion thereof in the Southwest quarter of the Southeast quarter of said Sections lying South of the Stillaguamish River.
Situate in the County of Snohomish, State of Washington.

Parcel B:
The North half of Government Lot 1, Section 14, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

Parcel C:
Government Lot 3, Section 12, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

Parcel D:
The Northwest quarter of the Northwest quarter of Section 13, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

Parcel E:
Government Lot 3, Section 13, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

Parcel F:
The North Half of Government Lot 4, Section 13, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

Parcel G:
The North half of the Southeast quarter of the Northwest quarter of Section 13, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington.
Situate in the County of Snohomish, State of Washington.

[LEGAL DESCRIPTION CONTINUED ON NEXT PAGE}

STP

EXHIBIT A
Legal Description
(continued)

Parcel H:

A strip of land 20 feet wide running from the North bank of the Stillaguamish River North to the South boundary of County Road (now state highway), along the East side of the West 990 feet of the Northwest quarter of the Southwest quarter and of Government Lot 2, Section 12, Township 32 North, Range 6 East of the Willamette Meridian, Snohomish County, Washington;

Except railway right of way;

Except that portion conveyed to the State of Washington per deed recorded under Auditor's File No. 8908250382, records of Snohomish County, Washington.

Situate in the County of Snohomish, State of Washington.

Parcel I:

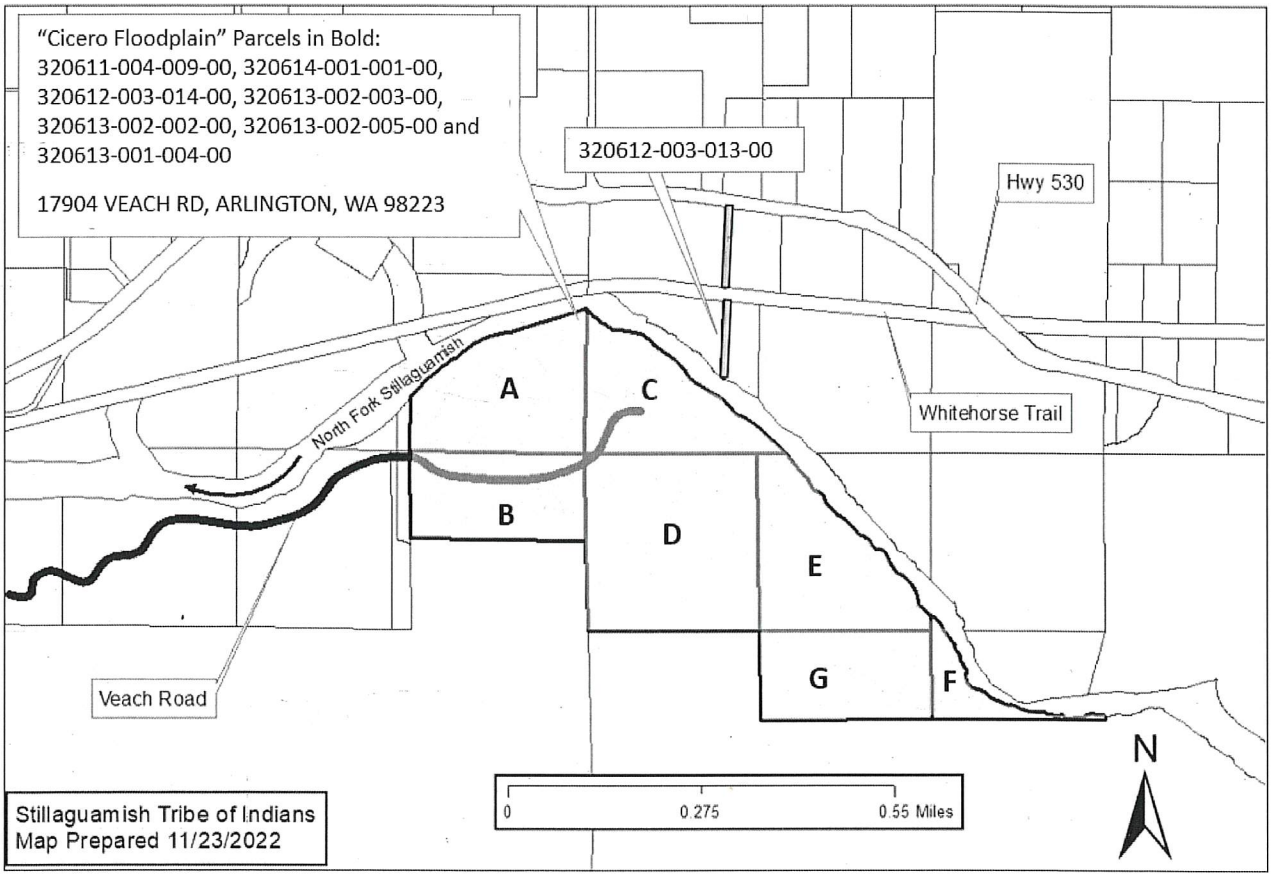
A non-exclusive easement for ingress and egress as described in and created by Easement, upon and subject to the provisions therein contained, dated July 17, 1964, recorded on August 7, 1964, under Auditor's File No. 1717216, records of Snohomish County, Washington, EXCEPT that portion thereof lying within Parcel A and B.

Situate in the County of Snohomish, State of Washington.

STR

EXHIBIT B
Property Map

Anderson Property
Project #21-1051 Cicero Floodplain Acquisition



January 17, 2025 - 11:09 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,430-0
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:

- 1034300_Briefs_20250117110829SC110274_5853.pdf
  This File Contains:
  Briefs - Petitioners Supplemental
  The Original File Name was Petitioner Supplemental Brief Final.pdf

A copy of the uploaded files will be sent to:

- gmarsh@snoco.org
- kevin@olympicappeals.com
- nikki.michel@snoco.org
- peter@ojalalaw.com
- rhealing@stillaguamish.com
- rhonda@olympicappeals.com

Comments:

Sender Name: Tanner Hoidal - Email: tanner@ojalalaw.com
Address:
PO BOX 211
SNOHOMISH, WA, 98291-0211
Phone: 425-367-1691

Note: The Filing Id is 20250117110829SC110274