No. _____

In the Supreme Court of the United States

FLYING T RANCH, INC., a Washington corporation,
Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS,
a federally recognized Indian tribe,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

PETER CORNELIUS OJALA
TANNER JAMIESON HOIDAL
Ojala Law Inc. PS
P.O. Box 211
Snohomish, WA 98291-0211

KEVIN HOCHHALTER
Olympic Appeals PLLC
4570 Avery Lane SE,
#C-217
Lacey, WA 98503

DAMIEN M. SCHIFF
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
916.419.7111
dschiff@pacificlegal.org

JEFFREY W. MCCOY
Pacific Legal Foundation
1745 Shea Center Drive,
Suite 400
Highlands Ranch, CO 80129

Counsel for Petitioner

QUESTION PRESENTED

The common-law immovable-property rule provides that sovereigns are not immune from suits relating to real property located in a foreign jurisdiction. In *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554 (2018), this Court left open the question of whether the immovable-property rule applies to an Indian tribe's assertion of rights in non-trust, non-reservation real property. *Id.* at 559-61.

The question presented is:

Under the immovable-property rule, may a party sue an Indian tribe, without the latter's consent, in a State court to quiet title to real property located in that State but which is not within the boundaries of the tribe's reservation and is not held in trust by the United States?

LIST OF ALL PARTIES

Petitioner Flying T Ranch, Inc., was the Plaintiff in the Superior Court of Washington for Snohomish County; the Petitioner before the Court of Appeals of Washington; and the Petitioner before the Supreme Court of Washington.

Respondent Stillaguamish Tribe of Indians was a Defendant in the state trial court and the Respondent in the state court of appeals and supreme court.

Snohomish County was a Defendant in the state trial court, but the County subsequently transferred its interest in the property at issue to Respondent Tribe and did not participate in any of the appellate proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Flying T Ranch, Inc., has no parent corporations and no publicly held company owns 10% or more of Petitioner's stock.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe, No. 22-2-07015-31, 2022 WL 22859181 (Wash. Super. December 22, 2022).

Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe, No. 85739-8-I, 549 P.3d 727 (Wash. Ct. App. June 4, 2024).

Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe, No. 103430-0, 577 P.3d 382 (Wash. October 9, 2025).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Flying T Ranch, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The opinion of the Washington Supreme Court was filed on October 9, 2025, is published at 577 P.3d 382, and is reproduced at Pet. App. 1a-35a.

The opinion of the Washington Court of Appeals was filed on June 4, 2024, is published at 549 P.3d 727, and is reproduced at Pet. App. 36a-67a.

The order of the Snohomish County Superior Court dismissing Petitioner's case was filed on December 22, 2022. It is unpublished but is available at 2022 WL 22859181 and is reproduced at Pet. App. 72a-73a.

JURISDICTION

The federal question of whether Respondent has sovereign immunity from Petitioner's quiet title suit was raised by Respondent in Respondent's motion to dismiss before the Snohomish County Superior Court. *See* Pet. App. 72a-73a. On December 22, 2022, the superior court granted the motion to dismiss, holding that Respondent enjoys sovereign immunity from suit. *Id.* *See* Pet. App. 68a-69a (denying motion for clarification or certification for appeal). Petitioner appealed, and the federal question was raised and argued before the Washington Court of Appeals. *See* Pet. App. 36a-67a. On June 4, 2024, the state court of appeals affirmed. *Id.* Petitioner sought review of the federal question in the Washington Supreme Court. *See* 1a-35a.

The judgment of the Washington Supreme Court affirming the case's dismissal on sovereign immunity grounds was entered on October 9, 2025. On December 15, 2025, Petitioner filed an application to extend the time to file a petition for writ of certiorari from January 7, 2026, to February 18, 2026. *See Flying T Ranch, Inc., a Washington Corporation, Applicant v. Stillaguamish Tribe of Indians, a Federally Recognized Indian Tribe, et al.*, No. 25A715. The application was granted on December 18, 2025.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

Petitioner Flying T Ranch, Inc., seeks review of a question of federal law that the Court has already recognized as important—whether, under the immovable-property rule, sovereign immunity does not bar an Indian tribe from being sued in a State court to quiet title to real property located in that State but outside of the tribe's reservation. *See Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560 (2018) ("Determining the limits on the sovereign immunity held by Indian tribes is a grave question . . . ."); *id.* at 563 (Roberts, C.J., concurring) ("consideration of the immovable-property rule" "need[s] to be addressed in a future case").

Under traditional common law principles, sovereign immunity does not extend to disputes over title to real property located in a foreign jurisdiction. *See Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting) ("The immovable-property exception [to sovereign immunity] has been hornbook law almost as long as there have been hornbooks."); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145

(1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . ."); *Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924) ("[Georgia] occupies the same position there [in Tennessee] as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity.").

To be sure, "unless and 'until Congress acts, [Indian] tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). But that "historic sovereign authority" does not include immunity from suit to determine ownership of real property located in another sovereign's territory. *See generally Cayuga Indian Nation of New York v. Seneca Cnty.*, 978 F.3d 829, 836 (2d Cir. 2020) ("American common law has long recognized an 'exception to sovereign immunity for actions to determine rights in immovable property.'" (quoting *Lundgren*, 584 U.S. at 563 (Roberts, C.J., concurring))).

Below, the Washington Supreme Court held that Indian tribes like Respondent enjoy by default an absolute immunity from suit and, because Congress has not expressly authorized suits against Indian tribes to resolve disputes over real property, Petitioner's action seeking to quiet title to its rangeland must be dismissed. Pet. App. 24a-25a. The court thus recognized an immunity from suit for Indian tribes that is enjoyed by no other sovereign on the planet. *Cf. Lundgren*, 584 U.S. at 576 (Thomas, J., dissenting).

This Petition presents the Court with an excellent vehicle for review of that momentous, yet deeply flawed, holding. The facts of Flying T's case are very similar to those in *Lundgren*: Flying T has a strong claim to ownership through adverse possession; the property at issue has never been part of any tribal reservation or trust; Flying T's dispute with the Tribe is not of Flying T's making—Flying T exercised dominion over the disputed property for three decades prior to the Tribe's unsolicited attempted acquisition; and, without the ability to bring a quiet title action, Flying T has no reasonably equivalent means to resolve its dispute with the Tribe. But unlike *Lundgren*, here the question of whether to apply the immovable-property rule was fully addressed below: by the trial court, the court of appeals, and the state supreme court. Hence, this Court can and should address the "grave question" presented by Flying T's petition.

STATEMENT OF THE CASE

I. Factual Background

Flying T runs a cattle ranch on about 165 acres in Snohomish County, Washington. *See* Pet. App. 97a ¶ 2.1. Owned and operated by the Blakey family, Flying T formally acquired the ranch in 1991, the year after the land had been purchased by Tammy Blakey and her late husband. Pet. App. 99a ¶¶ 3.3-3.6. Flying T's rangeland lies between, to the north, a former railroad easement that is now a public hiking trail and, to the south, the North Fork of the Stillaguamish River. Pet. App. 37a, 103a.

At the time of the Blakeys' purchase, the property was bordered on its north side by a three-stranded barbed wire fence running parallel to the old railroad

easement. Pet. App. 100a-101a ¶ 3.13. The fence, which has been maintained by Flying T or its predecessors in interest since 1962, encloses not only the 165 acres described in Flying T's deed, but also an additional, narrow strip located on the west side of Flying T's rangeland. This strip is the subject of the instant litigation. *Id.*

In 1995, Snohomish County purchased from a private landowner a parcel that lies to the west of Flying T's property. Pet. App. 100a ¶ 3.11. Like Flying T's property, the land that the County acquired lies between the barbed wire fence on the south side of the old railroad easement, and the river. Pet. App. 105a. In 2021, the Tribe purchased a narrow parcel that lies, in part, between the County's and Flying T's parcels.[1] Pet. App. 100a ¶ 3.8. Just like the County's, the Tribe's parcel includes a portion of land lying between the barbed wire fence on the south side of the old railroad easement, and the river. Pet. App. 104a. (These parcels, along with the hiking trail on the old railroad easement, the barbed wire fence, and the river, are depicted in an exhibit to Flying T's complaint which is reproduced at Pet. App. 106a). The Tribe's parcel has never been part of any reservation, nor has it been taken into trust by the United States. *See* Pet. App. 100a ¶ 3.9.

II. Procedural Background

When the County and the Tribe rebuffed a request for a quitclaim deed of the fenced portion of their

[1] At the same time, the Tribe purchased seven additional parcels, comprising about 140 acres, on the south side of the river. *See* Pet. App. 39a; Suppl. Br. of Pet'r Flying T Ranch at 4 & App. 1 at 8, No. 103430-0, Wash. S. Ct.

parcels, Flying T filed a quiet title lawsuit in Washington State Superior Court, alleging that it owned the fenced area through adverse possession. *See* Pet. App. 97a-106a; *cf. Wood v. Nelson*, 358 P.2d 312, 314 (Wash. 1961) ("Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence."). The Tribe moved to dismiss, arguing that, under federal law, it had sovereign immunity against any quiet title suit. *See* Pet. App. 72a-73a. The trial court granted the motion on this ground and the court of appeals affirmed.[2] *Id.*; Pet. App. 36a-37a, 67a.

On review of Flying T's petition for review, the Washington Supreme Court likewise affirmed. Pet. App. 1a-2a, 25a-26a. The Court held that, although Washington state courts have *in rem* jurisdiction over non-reservation land within the State, they lack subject matter jurisdiction to hear quiet title cases against tribal governments because Indians tribes have absolute immunity from any suit unless Congress has explicitly waived that immunity, which it hasn't done here. Pet. App. 25a. In reaching that conclusion, the court rejected Flying T's argument that the common-law immovable-property rule prevents the Tribe from asserting sovereign immunity

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[2] The superior court dismissed the County from the suit following the latter's transfer to the Tribe of the County's portion of the disputed property. *See* Pet. App. 68a. The transfer was effected while the Tribe's motion to dismiss was pending. Pet. App. 3a. The County did not participate in the appellate proceedings below.

over a dispute to real property on non-reservation land. *Id.*

REASONS FOR GRANTING THE PETITION

As several members of this Court have observed, the immovable-property rule's applicability to tribal sovereign immunity is an important issue of federal law that has not been, but should be, settled by this Court. *See Lundgren*, 584 U.S. at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). In *Lundgren*, this question was raised but, because the Court decided the dispute on a different ground, the question's resolution was left for an appropriate future case. *See id.* at 560 (majority opinion); *id.* at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). Flying T's dispute is that case.

I. The Washington Supreme Court's Absolute Immunity Ruling Answered The Question This Court Left Open In *Lundgren* And Merits Review

In *Lundgren*, the Upper Skagit Indian Tribe purchased non-reservation land and informed its new neighbors that a pre-existing fence trespassed upon its newly acquired property. *See Lundgren*, 584 U.S. at 557. In response, the neighbors filed a quiet title suit in Washington state court, alleging that they had acquired title to the fenced land through adverse possession. *Id.* Relying on this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the Washington Supreme Court rejected the tribe's sovereign immunity defense, holding that a tribe is never immune in cases in which courts exercise *in rem*

rather that *in personam* jurisdiction. *See Lundgren*, 584 U.S. at 557-58.

Vacating the Washington Supreme Court's decision, this Court held that "*Yakima* did not address the scope of tribal sovereign immunity" at all but instead was limited to the "more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887." *Id.* at 558. Although the *Lundgren* property owners in their respondents' merits brief had raised, as alternative grounds to affirm, arguments based on the immovable-property rule, this Court decided to "leave it to the Washington Supreme Court to address these arguments in the first instance[.]" *Id.* at 560.

On remand, the parties settled their dispute, Pet. App. 107a-11a, so the Washington Supreme Court did not have the opportunity to decide whether the immovable-property rule applies to tribal sovereign immunity. But the court did decide the issue in this case, holding that Indian tribes enjoy absolute immunity from suits unless Congress says otherwise. Pet. App. 24a-25a. As *Lundgren* indicates, that question merits definitive resolution in this Court. 584 U.S. at 560; *id.* at 563 (Roberts, C.J., concurring).

The need for review is bolstered by the conflicts between the Washington Supreme Court's ruling and decisions of this Court. A default rule of absolute immunity for Indian tribes is contrary to the principle, repeatedly followed by this Court, that tribal sovereign immunity is not *sui generis* but instead is to be construed consistent with the general common law of sovereign immunity. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the *common-*

law immunity from suit traditionally enjoyed by sovereign powers.") (emphasis added). *Accord Lewis v. Clarke*, 581 U.S. 155, 163-64 (2017) (holding that the lower court erred when it "extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees"). And pursuant to that common law, sovereign immunity does not extend to disputes over title to property located in a foreign jurisdiction. *See Lundgren*, 584 U.S. at 566-72 (Thomas, J., dissenting). *See also infra* Part II.

Indeed, this Court has repeatedly expressed concern over the extension of tribal sovereign immunity beyond what would have been recognized at common law, especially in circumstances, such as those that obtain here, where the plaintiff has not willingly entered into a relationship with an Indian tribe. *See Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 758 (1998) ("There are reasons to doubt the wisdom of perpetuating the doctrine."); *Bay Mills*, 572 U.S. at 799 n.8 ("We have never, for example, specifically addressed . . . whether immunity should apply in the ordinary way if a . . . plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation . . . conduct."). But despite these misgivings, lower courts are split over the question of whether Indian tribes enjoy, by default, absolute immunity from suit.

Some lower courts have refused to extend tribal sovereign immunity beyond what would have been recognized at common law, holding that tribes' immunity does not cover disputes over non-trust, non-reservation real property. *See Cass Cnty. Joint Water Resource Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 694 (N.D. 2002) ("The land at issue in this case is

essentially private land which has been purchased in fee by an Indian tribe. . . . [T]he State may exercise territorial jurisdiction over the land . . . and the Tribe's sovereign immunity is not implicated."). *Accord Miccosukee Tribe of Indians of Fla. v. Dep't of Env't Prot.*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (quoting *Cass County*).

Other lower courts, however, have adhered to a default rule of absolute immunity, thereby stretching tribal sovereign immunity well beyond any historical precedent. *See* Pet. App. 24a-25a; *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 244-45 (N.D.N.Y. 2020) (under this "avowedly broad principle" of "settled law," courts must "dismiss[ ] any suit against a tribe absent congressional authorization (or a waiver)" (quoting *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 220 (2d Cir. 2014))); *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 274 Cal. Rptr. 3d 255, 262 (Ct. App. 2021) ("For decades, the Supreme Court has set aside these and other concerns, treated tribal sovereign immunity as settled law, and deferred to Congress . . . . We see no reason to depart from this practice." (citation omitted)); *Haney v. Mashpee Wampanoag Indian Tribal Council, Inc.*, 205 N.E.3d 370, 2023 WL 2000259, at *2 (Mass. App. Ct. 2023) (table) ("We agree with the defendants that the issue is not ours to decide in the first instance but must be left to Congress.").

This Court should grant the Petition to decide the important issue left unresolved in *Lundgren*, thereby ensuring uniformity among the lower courts and their adherence to this Court's precedents.

II. The Washington Supreme Court's Absolute Immunity Ruling Is Wrong

The Petition should be granted because the Washington Supreme Court incorrectly held that tribes have absolute immunity from suit unless modified by Congress. Pet. App. 24a-25a. There is no basis at common law for a default rule of absolute immunity, and no treaty or statute supports such a rule either. *See Lundgren*, 584 U.S. at 566-75 (Thomas, J., dissenting).

As noted, Indian tribes enjoy the immunity from suit traditionally accorded to sovereigns. *Bay Mills*, 572 U.S. at 788. In determining the precise contours of that immunity, this Court has found "instructive the problems of sovereign immunity for foreign countries." *Kiowa*, 523 U.S. at 759.

One aspect of the common law of nations that has remained consistent over centuries is that a sovereign is not immune from a quiet title suit concerning real property owned in another sovereign's territory. *Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting). "Cornelius van Bynkershoek, a renowned 18th-century jurist, stated that it was 'established' that 'property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals.'" *Id.* at 567 (quoting De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946)) (footnote omitted). Although there is some debate about the outer limits of the immovable-property rule—"for example, whether it applies to tort claims related to the property or to diplomatic embassies"—"there is no dispute that it covers suits concerning ownership of a

piece of real property used for nondiplomatic reasons." *Id.* at 566 n.2.

The Foreign Sovereign Immunities Act (FSIA) reflects this longstanding rule. *See* 28 U.S.C. § 1605(a)(4). The FSIA codified the "international law" of sovereign immunity, including "the pre-existing real property exception to sovereign immunity recognized by international practice[.]" *See Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007) (quotations omitted). *See also id.* at 200 (observing that "a foreign sovereign's immunity does not extend to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction") (quoting Restatement (Second) of Foreign Relations Law of the United States § 68(b) at 205 (1965)). Although the FSIA does not apply to Indian tribes, it is probative of the common law of sovereign immunity and therefore supports the immovable-property rule's application to the historic sovereign authority retained by Indian tribes.

Drawing a remarkably divergent conclusion, the Washington Supreme Court reasoned that the FSIA's failure to mention Indian tribes means that the immovable-property rule does not apply to tribes. Pet. App. 21a, 24a. This contortion of the maxim *expressio unius exclusio alterius* is unconvincing. "[T]he canon does not tell us that a case was provided for by negative implication unless an item unmentioned would normally be associated with items listed." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 n.12 (2003). The FSIA pertains only to "foreign" nations, 28 U.S.C. § 1604, whereas tribes are "domestic" sovereigns, *Bay Mills*, 572 U.S. at 788; hence, the

FSIA's omission of Indian tribes does not suggest that Congress wished to exempt Indian tribes from common-law limitations on sovereign immunity. Supporting that conclusion is the fact that the immovable-property rule has long been recognized to apply not just to foreign nations but also to the United States and the individual States. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting); *Georgia*, 264 U.S. at 481. *See also United States v. Wilder*, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (Story, C.J.) (observing that "sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice"); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 260 & n.45 (discussing the longstanding distinction, recognized at the Founding, between *in rem* and *in personam* actions, relevant for determining sovereigns' immunity from suit).

That the immovable-property rule applies to the several States does not preclude its application to Indian tribes. True, limitations on the States' sovereign immunity do not always apply to Indian tribes. *See Lundgren*, 584 U.S. at 560 (majority opinion). The reason for this asymmetry is that Indian tribes did not participate in the Constitutional Convention and hence cannot be bound by the limitations on sovereignty that the States therein agreed to. *See Kiowa*, 523 U.S. at 755-56. Yet the immovable-property rule is a limitation on sovereignty that predates, and is independent of, anything negotiated by the States at the Constitutional Convention. Thus, the immovable-property rule's applicability to the States is no reason not to apply it to Indian tribes. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting).

Courts have consistently applied the immovable-property rule to sovereign immunity because ownership of property is not an inherently sovereign function. *Permanent Mission*, 551 U.S. at 199. Hence, the use of property merely for a valid governmental purpose—for example, restoring salmon habitat, as the Tribe proposes to do here, Pet. App. 20a—does not mean that disputes about the ownership of that property fall outside of the immovable-property rule. *See Lundgren*, 584 U.S. at 566 n.2 (Thomas, J., dissenting) ("[T]here is no dispute that [the immovable-property rule] covers suits concerning ownership of a piece of real property used for nondiplomatic reasons.") (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter)).[3] *Accord Agostini v. De Antueno*, 99 N.Y.S.2d 245, 248 (Mun. Ct. 1950) ("There appears to be no doubt that real property held by diplomatic officers in a foreign state, and not pertaining to [their] diplomatic status, is subject to local laws.").

Finally, no principle of deference to the political branches counsels a different outcome. The pertinent political branch—Congress—has not spoken to this issue. The Washington Supreme Court assumed that congressional silence must mean immunity for the tribes. *See* Pet. App. 24a. That erroneous conclusion alone merits review, as it contradicts this Court's settled practice of proceeding to adjudicate disputes about sovereign immunity when the pertinent political branch has declined to state a definitive

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[3] *Reprinted in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976).

position. *See Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."); *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 75 (1938) ("The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged."). *See also Lundgren*, 584 U.S. at 560 (majority op.) ("We leave it to the Washington Supreme Court," not Congress, "to address these arguments in the first instance."). Absent Congressional action, the tribes retain just their historic sovereign authority and—as is true of any other government—that authority does not provide immunity for quiet title suits over real property located in another sovereign's jurisdiction.

III. The Petition Presents An Excellent Vehicle To Address Whether Tribal Sovereign Immunity Is Subject To The Immovable-Property Rule

This case presents facts that are essentially the same as in *Lundgren*.

Like *Lundgren*, Flying T has a strong claim, under the doctrine of adverse possession, to non-trust, non-reservation land, allegedly owned by an Indian tribe. *Compare* 584 U.S. at 557, *with* Pet. App. 100a ¶ 3.13. Like the property owners in *Lundgren*, Flying T's dispute with an Indian tribe is not of Flying T's making. *Cf.* 584 U.S. at 562 (Roberts, C.J, concurring)

("I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests."). Flying T did not willingly choose to deal with the Tribe; it was the Tribe which chose to purchase property subject to Flying T's multi-decade adverse possession. Pet. App. 100a, 101a–102a ¶¶ 3.8, 3.14. Further, it was the County which chose to transfer its portion of the disputed property to the Tribe only after the dispute with Flying T had arisen. Pet. App. 3a. And like the property owners in *Lundgren*, Flying T has no other reasonably equivalent means to adjudicate its property dispute, which the lower courts' dismissal on sovereign immunity grounds does nothing to resolve. *Cf. Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983) (observing that a "title dispute remains unresolved" following a non-merits dismissal).

But unlike *Lundgren*, the issue of the immovable-property rule's application to Indian tribes was fully briefed by the parties and decided by the courts below. *Compare* 584 U.S. at 561 (noting that "the courts below and the certiorari-stage briefs before us said precisely nothing on the subject") *with* Pet. App. 15a-19a. Although the Washington Supreme Court did not address the question presented on remand in *Lundgren*, Pet. App. 107a-111a (*Lundgren* settlement documents), it did address the question here, Pet. App. 25a. Thus, the question presented has been subject to "the virtues of . . . full adversarial testing" and is ready for this Court's review. *Lundgren*, 584 U.S. at 561.

Resolution of the question presented in Flying T's favor would not, however, require this Court to revisit its other tribal immunity precedents, such as the broad commercial immunity recognized in *Kiowa* and *Bay Mills*. *See Kiowa*, 523 U.S. at 760; *Bay Mills*, 572 U.S. at 804. As the famed Tate Letter explains, there are "two conflicting concepts of sovereign immunity, each widely held and firmly established." Tate Letter, *reprinted at* 425 U.S. at 711. "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Id.* "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Id.* Under the classical, near-absolute theory of sovereign immunity, foreign sovereigns enjoyed immunity from all commercial activity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But both theories recognized an exception for suits involving immovable property. *Permanent Mission*, 551 U.S. at 199. Thus, this Court could affirm the application of the immovable-property rule to Indian tribes while also maintaining, without historical inconsistency, Indian tribes' broad immunity for commercial activities.

Such a distinction would be defensible given the plausible argument that Congress has ratified the Court's commercial immunity rulings, *see Bay Mills*, 572 U.S. at 801-03, whereas there is no basis to infer Congressional ratification for the absolute immunity rule adopted by the Washington Supreme Court. Similarly, although there are plausible reasons for why tribes need broad commercial immunity to

vindicate their basic governmental interests (e.g., tribes cannot sue the States, and tribes face unique obstacles to raising revenue, *see id.* at 806-13 (Sotomayor, J., concurring)), there is no such need with respect to title disputes, *see Lundgren*, 584 U.S. at 563 (Roberts, C.J., concurring) ("The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort."). Applying the immovable-property rule to Indian tribes might even enhance tribal authority and independence. *See* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 Mont. L. Rev. 11, 18-20 (2019). Moreover, this Court itself has recognized that, even in the commercial context, exceptions to tribal sovereign immunity may be warranted. *See Bay Mills*, 572 U.S. at 799 n.8. Hence, there should be no precedential objection to recognizing the applicability to Indian tribes of a well-established, real-property-based exception to sovereign immunity.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PETER CORNELIUS OJALA
TANNER JAMIESON HOIDAL
Ojala Law Inc. PS
P.O. Box 211
Snohomish, WA 98291

KEVIN HOCHHALTER
Olympic Appeals PLLC
4570 Avery Lane SE,
#C-217
Lacey, WA 98503

DAMIEN M. SCHIFF
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
916.419.7111
dschiff@pacificlegal.org

JEFFREY W. MCCOY
Pacific Legal Foundation
1745 Shea Center Drive,
Suite 400
Highlands Ranch, CO 80129

Counsel for Petitioner

FEBRUARY 2026

Appendix

Table of Contents

IN THE 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 Washington State municipal corporation, Defendant.	No. 103430-0 En Banc Filed: October 9, 2025

MADSEN, J.— Under federal common law, Indian tribes may be sued only under two circumstances: when a tribe waives its sovereign immunity or when Congress unequivocally abrogates tribal sovereign immunity. Here, Flying T Ranch (Flying T) filed suit in Snohomish County Superior Court to quiet title to nonreservation land purchased by the Stillaguamish Tribe of Indians (Tribe). Flying T contends it had acquired that land through adverse possession prior to the Tribe's purchase. The superior court dismissed the case with prejudice based on the Tribe's sovereign immunity.

The primary issue before us is a matter of first impression: whether a common law immovable property exception waives tribal sovereign immunity. The Court of Appeals held that tribal sovereign immunity is not subject to an immovable property exception absent a clear waiver by Congress or the

tribe itself. Congress has not clearly indicated its intent to abrogate tribal sovereign immunity here; therefore, we affirm the Court of Appeals.

FACTS

The Stillaguamish Tribe of Indians is a federally recognized Indian tribe. In 2021, the Tribe purchased a parcel of land located along the Stillaguamish River via statutory warranty deed. The Tribe purchased its parcel utilizing state and federal funding from a conservation grant from the National Oceanic and Atmospheric Administration, through the Washington State Recreation and Conservation Office. The main purpose of the grant is to protect the land in perpetuity with a deed of right for salmon recovery.

Upon acquiring title, the Tribe designated the plot as "conservation" land. Clerk's Papers at 86. The Tribe's interest in the land has been specifically for protecting the riparian habitat necessary for salmon, which is in turn tightly connected to the Tribe's treaty right to fish. As the Stillaguamish River salmon runs face extinction, so do many aspects of the Tribe's culture, community, and treaty reserved rights. By using these parcels as conservation land to protect and restore salmon in the Stillaguamish River, the Tribe seeks to preserve their way of life. Prior to purchase, the land had not been part of any reservation.

Flying T, a Washington corporation domiciled in Snohomish County, has owned a parcel of land running adjacent to that of the Tribe's and county's parcels since 1991.

Snohomish County had acquired its portion of the disputed parcel of land along the Stillaguamish River

in 1995. The land was privately owned prior to the county acquiring it.

In 2022, Flying T filed a complaint against Snohomish County and the Tribe in Snohomish County Superior Court, seeking to quiet title to a narrow strip of the two parcels of land described above by adverse possession. *Id.* at 84-85. Flying T contends that since at least 1962, it and its predecessors in interest have had continuous and exclusive possession over a narrow strip of both the Tribe's and county's parcels of land by and through their maintenance of a fence, which served to mark the boundary line, and their use of the land to graze and keep livestock. It contends that their possession has been actual, uninterrupted, open, notorious, exclusive, and hostile to any claim of right by all others.

The Tribe moved to dismiss pursuant to CR 12(b)(1)-(3), (6), and (7), based on tribal sovereign immunity. Before the court ruled on the motion to dismiss, Snohomish County conveyed its portion of the disputed parcel of land to the Tribe, and thus the Tribe acquired ownership of the entire disputed parcel. The superior court entered an order granting the Tribe's motion to dismiss. Flying T moved for reconsideration, which was denied.

Flying T appealed, seeking direct discretionary review in this court. We denied the motion and transferred the case to the Court of Appeals.[1] Flying

[1] After filing a notice of appeal, but before filing its statement of grounds for direct review, Flying T moved in the trial court to clarify whether the order dismissing the claims against the Tribe was a final, appealable order since Snohomish County was not dismissed from the suit. In April 2023, the trial court signed a

T argued that although tribes enjoy common law sovereign immunity, the scope of that immunity is limited by the common law immovable property exception, and since adverse possession claims affect title to real property, Washington superior courts have in rem jurisdiction over nonreservation land within state boundaries, even if owned by a tribe.

The Court of Appeals rejected Flying T's arguments and affirmed the superior court's dismissal of the quiet title action.[2] It concluded that "a foreign sovereign enjoys immunity as directed by the political branches of government and would not face process directed by the judiciary alone. When the Tribe is afforded immunity equal to a foreign sovereign, it may be sued over its objection only when allowed by

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new order stating that Snohomish County was dismissed from the action and that all claims against the Tribe were dismissed with prejudice. Flying T then filed a motion to clarify appealability or to extend time to file an amended notice of appeal in this court and filed an amended notice of appeal. The Tribe filed a motion to dismiss the appeal or any discretionary review based on Flying T's failure to timely appeal from the new April order. We transferred the case along with the motion to clarify and the motion to dismiss to the Court of Appeals.

[2] The parties dispute the Court of Appeals' holding. The Tribe states that the Court of Appeals held that there is no common law immovable property exception to tribal sovereign immunity, that cases finding an in rem exception to tribal sovereign immunity are no longer good law, and that only Congress can abrogate tribal sovereign immunity. Flying T states that the Court of Appeals correctly held that the immovable property exception should apply to tribes acquiring nonreservation land but erred when it deferred to Congress. The Court of Appeals in essence stated that even if a common law immovable property exception exists, it should not extend to tribal sovereign immunity absent some direction from Congress. *See Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 31 Wn. App. 2d 343, 359-62, 549 P.3d 727 (2024).

Congress, and to hold otherwise would unfaithfully lessen its immunity in comparison to that traditionally enjoyed by sovereign powers." *Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 31 Wn. App. 2d 343, 346, 549 P.3d 727 (2024). The court stated that Flying T has not shown "any history of the judiciary invoking the immovable property exception against a foreign nation to disallow foreign sovereign immunity without regard to the direction of the political branches." *Id*. at 358. It also noted that the codification of the Foreign Sovereign Immunities Act (FSIA) did not support application of a common law immovable property exception here absent congressional direction. Thus, Congress must act to limit tribal immunity. *Id*. at 371.

The court also recognized that prior Washington authority permitted quiet title claims like the one Flying T asserts here but stated that the rationale of the cases finding an in rem exception to tribal sovereign immunity was disapproved in *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 558, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018). *Id*. at 351. The court declined to reach any other issues raised by the parties after determining the Tribe has immunity. *Id*. at 371.

Flying T petitioned for review, which this court granted. *Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 3 Wn.2d 1031 (2024).

ANALYSIS

Questions of federal law regarding tribal sovereign immunity are reviewed de novo. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 226, 285 P.3d 52 (2012); *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 276, 333 P.3d 380 (2014)

(whether a court has subject matter jurisdiction is a question of law that appellate courts review de novo).

Tribal Sovereign Immunity

Indian tribes are "'separate sovereigns pre-existing the Constitution.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 58); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 84 L. Ed. 894 (1940) (holding that "Indian Nations are exempt from suit without Congressional authorization"). Tribal sovereign immunity is "'a necessary corollary to Indian sovereignty and self-governance.'" *Bay Mills*, 572 U.S. at 788 (quoting *Three Affil. Tribes of Fort Berthold Rsrv. v. Wold Eng'g, PC*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986)); THE FEDERALIST NO. 81, at 511 (A. Hamilton) (Benjamin F. Wright ed. 1961) (it is "inherent in the nature of sovereignty not to be amenable" to suit without consent).

Thus, as the United States Supreme Court has explained, the "baseline position" is tribal immunity, and federally recognized Indian tribes may be sued only when either a tribe has waived its immunity or Congress has "'unequivocally'" abrogated tribal immunity. *Bay Mills*, 572 U.S. at 790 (quoting C*&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.,* 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)); *see Santa Clara Pueblo*, 436 U.S. at 58 (waiver of sovereign immunity cannot be implied; it

must be unequivocally expressed). Tribal sovereign immunity "is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). The United States Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills*, 572 U.S. at 789 (alteration in original) (quoting *Kiowa*, 523 U.S. at 756).

Tribal sovereign immunity is broad. In fact, tribes enjoy broader immunity than foreign sovereigns in some contexts. For example, a tribe's immunity from suit extends to contracts, whether involving governmental or commercial activities and whether they are made on or off a reservation. *Kiowa*, 523 U.S. at 760; *cf.* 28 U.S.C. § 1605(a)(6) (contractual exception to the jurisdictional immunity of a foreign state).

While tribes enjoy immunity like other sovereigns do, the Court has long recognized the federal government's unique relationship with Indian tribes as compared to foreign nations. A tribal nation is not "foreign to the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19, 8 L. Ed. 25 (1831). Instead, the Court has referred to tribes as "domestic dependent nations" that engage in government-to-government relations with the United States. *Id.* at 17. Because of the unique relationship that tribes have with the federal government, sovereign immunity concepts applicable to foreign nations do not always apply identically in the tribal context. *E.g.*, *Kiowa*, 523 U.S. 751. Further, tribal sovereign immunity "is not coextensive with that of the States." *Id.* at 756. Thus, only Congress and the tribes

themselves retain the power to determine when tribal immunity may be waived.

Prior Limitations on Tribal Sovereign Immunity

Prior Washington case law held that superior courts in Washington may exercise in rem jurisdiction to settle disputes over tribally owned, nonreservation land. *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 865, 389 P.3d 569 (2017), *vacated and remanded*, 584 U.S. 554. In *Lundgren*, the issue was whether the Tribe's assertion of sovereign immunity required dismissal of an in rem adverse possession action to quiet title to a disputed strip of land on the boundary of property purchased by the Tribe. We held that the Tribe's sovereign immunity was no barrier to the in rem proceeding. However, in reaching this conclusion, the court relied heavily on a case that the United States Supreme Court later stated does not support our holding.

In *Lundgren* our court stated, "A court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." *Id.* at 865-66. We noted that the United States Supreme Court recognized this principle in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). *Id.* In *Yakima*, the county sought to foreclose property within the Yakama Indian Reservation for failure to pay ad valorum taxes. 502 U.S. at 256. The Yakama Nation argued that federal law prohibited these taxes on fee-patented reservation land. *Id.* The United States Supreme Court held that the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-358, *repealed in part by* Pub. L. No. 106-462, 114 Stat. 1991 (2000),

allowed Yakima County to impose ad valorum taxes on reservation land pursuant to the General Allotment Act. *Id*. at 270.

In *Lundgren* our court stated that in *Yakima*, the United States Supreme Court reached its holding by characterizing the county's assertion of jurisdiction over the land as in rem, rather than in personam jurisdiction over Yakama Nation. 187 Wn.2d at 866. The court further noted that Washington courts had similarly upheld a superior court's assertion of in rem jurisdiction over tribally owned land in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 929 P.2d 379 (1996), and *Smale v. Noretep*, 150 Wn. App. 476, 208 P.3d 1180 (2009). *Lundgren*, 187 Wn.2d at 866-76.

In *Anderson*, this court held that the Grays Harbor County Superior Court had in rem jurisdiction over an action in partition and quiet title to fee-patented lands within the Quinault Indian Reservation. 130 Wn.2d at 873-74. The *Anderson* court relied heavily on the *Yakima* case, stating that the court was exercising jurisdiction over the property, not over the Quinault Indian Nation, and thus the land was "subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Id*. at 873.

In *Smale*, the Smales sought to quiet title to property they claimed to have acquired through adverse possession against Noretep, the non-Indian original owner. 150 Wn. App. at 476-77. After the Smales sued, Noretep sold the property by statutory warranty deed to the Stillaguamish Tribe. *Id*. Smales added the Tribe as a defendant. *Id*. The Tribe argued that sovereign immunity barred the action. *Id*. In

holding that sovereign immunity did not bar the Tribe from being joined in the action, the court relied heavily on *Anderson*, stating, "The quiet title action in *Anderson* is similar to the quiet title action here in two crucial ways: both are proceedings in rem to determine rights in the property at issue and neither has the potential to deprive any party of land they rightfully own." *Id*. at 483. Since the Smales allegedly acquired title to the land via adverse possession before the original owner sold the land to the Tribe, the court reasoned that the Tribe never possessed the land and never had land to lose. *Id*. at 480-81. The court found that the holding in *Anderson* controlled the case before it. *Id*. at 478.

In *Lundgren* our court held that *Yakima*, *Anderson*, and *Smale* "establish the principle that our superior courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." 187 Wn.2d at 868. However, *Lundgren* was vacated by the United States Supreme Court in *Upper Skagit*, 584 U.S. 554, and remanded to our court. Specifically, the United States Supreme Court in *Upper Skagit* stated that it had accepted review to clarify that its decision in *Yakima* did not address the scope of tribal sovereign immunity but, rather, a question of statutory interpretation of the Indian General Allotment Act of 1887. *Id*. at 558. "*Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity." *Id*. at 559. The Lundgrens asked the United States Supreme Court to affirm the judgment based on an alternative ground: that sovereigns enjoy no immunity from actions involving immovable property located in the territory of another

sovereign. *Id*. at 559-60. Exercising judicial restraint, the Court stated, "We leave it to the Washington Supreme Court to address these arguments in the first instance." *Id*. at 560.

Flying T argues that the holdings in *Lundgren*, *Anderson*, and *Smale* are still controlling since they contain independent rationales aside from their reliance on *Yakima.* Flying T contends that the holding in *Anderson* is still good law and must be followed under stare decisis principles. It also argues that *Smale* presented two crucial bases for jurisdiction: in rem, which relied on *Yakima*, and prior ripened adverse possession.[3]

Adverse possession is based in both statutory and common law. Flying T claims that due to the unique nature of adverse possession law, once the elements

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[3] The Tribe states that Flying T's new argument that prior ripened adverse possession is an exception to sovereign immunity, was not presented below and should not be heard. Although Flying T mainly argued the immovable property doctrine is an exception to tribal sovereign immunity below, it also discussed the unique nature of adverse possession law, therefore, we consider its argument. The Tribe also notes that Flying T raises another new argument that "[t]his is a fn.8 case appropriate for the Courts." Pet. for Rev. at 5-6. This refers to footnote 8 in *Bay Mills*, 572 U.S. 799 n.8, which states that courts have not addressed whether immunity should apply when "a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." The court noted that the argument of whether there is a "'special justification'" for abandoning precedent in such circumstances was not before it. *Id*. (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984)) This new argument about lack of alternative remedies potentially being a reason not to abide by precedent was not raised below, and we have discretion not to consider it. *State v. Lazcano*, 188 Wn. App. 338, 361, 354 P.3d 233 (2015).

thereof have been met, original title vests without the need for court action. Therefore, contrary to the Court of Appeals' holding, there is no need for Congress to act to resolve such in rem adverse possession cases. In addition to *Smale* and *Anderson*, Flying T cites to *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012), to support his argument that here, the Tribe cannot lose land that it did not rightfully own, having been adversely possessed prior to its acquisition by the Tribe.

In *Gorman*, the plaintiff sought to acquire title to land that had been dedicated to the city of Woodinville. 175 Wn.2d at 70-71. Under RCW 4.92.010, Washington waived its own immunity, allowing a right of action against it in superior court. However, it had limited this waiver under RCW 4.16.160, which stated that the statute of limitations for adverse possession would not run against the State or a city acting in its governmental capacity. The court held that RCW 4.16.160 could not shield the city under the facts of the case since the statute of limitations ran while the land was privately owned before the land was dedicated to the city. *Id.* at 74.

Similarly, in *Burlison v. United States*, 533 F.3d 419, 421 (6th Cir. 2008), the plaintiffs sought to quiet title to an access road pursuant to the Quiet Title Act (QTA). *See* 28 U.S.C. § 2409a. The QTA provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." *Id.* § 2409 a(a). The QTA states that "[n]othing in this section shall be construed to permit suits against the United States based upon adverse possession." *Id.* § 2409a(n). The plaintiffs argued that the QTA did not foreclose

adverse possession claims that ripened before the government acquired title to the lands. *Burlison*, 533 F.3d at 428. The court found the argument to be cognizable but did not answer the question since the plaintiffs failed to meet their burden of proving adverse possession. *Id*.

Neither *Gorman* nor *Burlison* discussed the limits of common law sovereign immunity or involved tribes. *Gorman* was interpreting a state statute and *Burlison* focused on the QTA. Furthermore, both Washington and the United States have waived their immunity by allowing a cause of action to be brought against them in court related to real property. In contrast, the Tribe has not waived its own immunity and the statutes discussed in the cases above do not apply. Indeed, the fact that both Washington and the United States explicitly waived immunity suggests that such explicit waiver from the Tribe might similarly be necessary.

Even if we interpret *Smale* as providing two different rationales for its holding, one being that the Smales acquired title to the land through adverse possession before the Tribe was deeded the land, it was not sufficiently analyzed to support such a holding here. The court cited only one Idaho Supreme Court case, which did not deal with tribes, in support of the proposition that parties seeking to quiet title to land they allegedly own are not asserting claims against a sovereign. *See Lyon v. State*, 76 Idaho 374, 376, 283 P.2d 1105 (1955). Other cases specifically discussing tribes hold that tribal sovereign immunity is not waived with respect to real property. *See Cayuga Indian Nation v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) (declining to draw a distinction between in rem and in personam proceedings); *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 157

(2d Cir. 2010) (a tribe's immunity from suit is independent of its lands), *vacated and remanded*, 562 U.S. 42, 131 S. Ct. 704, 178 L. Ed. 2d 587 (2011); *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017-NM-007, 388 P.3d 977, 985 (2016) (regardless of whether claims are in rem or in personam, tribes still retain their sovereign immunity).

Flying T states that original title to real property vests once the elements of adverse possession are met. He cites *Gorman*; however, as previously noted, the facts in *Gorman* are distinguishable. The State had waived its immunity to suit and limited that waiver by providing that "'[n]o claim of right *predicated upon the lapse of time* shall ever be asserted against the state.'" *Gorman*, 175 Wn.2d at 70 (emphasis added) (quoting RCW 4.16.160). The court in *Gorman* stated that the statute barred claims that were "'predicated upon the lapse of time,'" however, Gorman's claim was that "the requisite period of time *already ran* against the private owner." *Id.* at 73. Therefore, the claim was not barred by the statute. Furthermore, the court stated that the city was the proper defendant as the current record titleholder of the disputed property. Here, the Tribe is the record titleholder to the disputed property and thus an interested party.

To formally establish that real property has been adversely possessed, a quiet title action is usually initiated, as is the case here. A court must have subject matter jurisdiction to decide a quiet title action against a tribe. Tribal sovereign immunity is an issue of subject matter jurisdiction. *See Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) (holding that the tribe was immune from suit and therefore affirming the lower court's dismissal of the case for lack of subject matter jurisdiction); *Acres Bonusing,*

Inc. v. Marston, 17 F.4th 901, 908 (9th Cir. 2021) ("when a defendant timely and successfully invokes tribal sovereign immunity, we lack subject matter jurisdiction"); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007) ("Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." (citation omitted)).

Thus, even if Flying T asserts the court has in rem jurisdiction, it still must show some authority vesting our courts with subject matter jurisdiction over quiet title actions against tribes. In rem jurisdiction grants courts authority to deal with land within its boundaries, however, jurisdiction over real property does not waive tribal sovereign immunity. Only Congress may abrogate tribal immunity; alternatively, a tribe may waive its immunity in "'clear' and unmistakable terms." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (quoting *C&L Enters.*, 532 U.S. at 418).

We hold that Washington and federal case law does not support finding in rem jurisdiction over land owned by tribes to determine if there is a viable adverse possession claim.

The Immovable Property Doctrine

Flying T argues that the common law immovable property exception to foreign sovereign immunity applies to tribes acquiring off-reservation land, despite Congress not expressly or unequivocally waiving tribal immunity in such instances.

Prior to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611, immunity for

foreign nations was based on common law and primarily centered around deference to the political branches of government. Our nation's history illustrates that our common law foreign sovereign immunity was a matter of comity. *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) ("foreign sovereign immunity is a matter of grace and comity on the part of the United States"). Rather than assuming jurisdiction, the United States Supreme Court would defer to the political branches, specifically the executive branch, to determine whether to take jurisdiction over actions against foreign sovereigns. *Id*. The United States Department of State ordinarily requested immunity in all actions against friendly foreign sovereigns. *Id*. For example, in *Knocklong Corp. v. Kingdom of Afghanistan*, 6 Misc. 2d 700, 167 N.Y.S.2d 285 (County Ct. 1957), the Kingdom of Afghanistan acquired fee ownership of real property in New York. Since the property was being used to house the Chief Representative of Afghanistan to the United Nations, the State Department urged the New York state court to find that foreign sovereign immunity barred the action. *Id*. at 701.

In 1952, the State Department through the "Tate Letter" attempted to remove the discretionary application of sovereign immunity. *Verlinden BV*, 461 U.S. at 487 (citing Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to Acting U.S. Att'y Gen. Phillip B. Perlman (May 19, 1952)). It announced that it would be adopting a more "'restrictive' theory" of sovereign immunity, which confined immunity to suits involving a foreign sovereign's public acts but not extending it to cases

"arising out of a foreign state's strictly commercial acts." *Id.*

In 1976, Congress passed the FSIA to attempt to alleviate case-by-case diplomatic pressures. *Id.* at 488. The FSIA mainly codified the restrictive theory of sovereign immunity. However, Congress carved out an exception to foreign sovereign immunity in 28 U.S.C. § 1605(a)(4), which states, "A *foreign state* shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which . . . rights in immovable property situated in the United States are in issue." (Emphasis added.) The parties in this case agree that the FSIA, and its exceptions, do not extend to tribes.

While Flying T agrees that the FSIA does not apply to tribes, it argues that a common law immovable property exception exists, predating the FSIA, and applies to tribes. Flying T states that we should focus on the "product" of the political branches' decisions on foreign sovereign immunity, meaning the patterns emerging from the collection of individual decisions over time, to define the scope of tribal immunity in the context of non-reservation title to real property. Suppl. Br. of Pet'r Flying T Ranch at 15. That product, it contends, includes the immovable property exception, which limits the scope of tribal immunity. It asserts that Congress has taken no action to remove the immovable property exception and, therefore, it should continue to apply to tribes on off-reservation land. Flying T's argument attempts to shift the burden, urging this immovable property exception applies unless Congress later says otherwise. This is not how tribal sovereign immunity works. Tribal sovereign immunity applies unless Congress takes action stating otherwise.

Moreover, Flying T argues, territorial sovereigns have a primeval interest in resolving title disputes within their own domain. However, as previously discussed, before the FSIA, foreign national immunity was almost entirely determined by the executive branch. Thus, foreign nations could have acquired land within another state, claimed immunity, and been granted that immunity upon the recommendation of the State Department, not based on preferences of the state in which the property was located.

For support, Flying T cites to cases that do not involve tribes, such as *Asociacion de Reclamantes v. United Mexican States*, 237 U.S. App. D.C. 81, 735 F.2d 1517, 1521-22 (1984), and *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199-200, 127 S. Ct. 2352, 168 L. Ed 2d 85 (2007). In *Permanent Mission of India*, the court held that the FSIA does not immunize a foreign government from suit to declare the validity of tax liens on property held by the sovereign for purposes of housing its employees. 551 U.S. at 195. The court reasoned that the purpose of the FSIA was to find immunity only with respect to public acts of a state, but not with respect to private acts of a sovereign. *Id*. at 199. Additionally, the FSIA was meant to codify the real property exception recognized by international practice. *Id*. at 200; *see Asociacion de Reclamantes,* 735 F.2d at 1521 (recognizing that a territorial sovereign has a primeval interest in resolving all disputes over the use of real property in its own domain).

The flaw here is that the FSIA was not a codification of the common practice within American courts but rather was meant to codify the real

property exception as recognized by *international practice*. Prior to the FSIA and the Tate Letter, our common practice was to defer to the State Department regarding whether to find that there was immunity with respect to a foreign nation.

The Court in *The Schooner Exchange* recognized the common law immovable property exception in its first acknowledgment of foreign sovereign immunity. The case involved an American claimant asserting title to a national armed vessel that was commissioned by and in service of the emperor of France. *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146, 3 L. Ed. 287 (1812). The Court stated, "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . and assuming the character of a private individual." *Id.* at 145; *see also Georgia v. City of Chattanooga*, 264 U.S. 472, 479-80, 44 S. Ct. 369, 68 L. Ed. 796 (1924) (rejecting Georgia's claim of sovereign immunity over the land because it had "acquired land in another State for the purpose of using it in a private capacity"). While there is little case law discussing or applying the common law immovable property exception, these cases suggest that the purpose for which the property is being used is a consideration in applying the common law exception to sovereign immunity.

Assuming the use to which the subject property is put is germane, the Tribe here used state and federal funding from a conservation grant from the National Oceanic and Atmospheric Administration, through the Washington State Recreation and Conservation Office, to purchase the land. This was conditioned on the Tribe protecting the land in perpetuity with a deed

of right for salmon recovery. The Tribe is expected to take reasonable and feasible measures to protect, preserve, restore, and/or enhance the habitat functions on the property, which aim to support Puget Sound chinook, chum, coho, and pink salmon, and steelhead, cutthroat, and bull trout. Salmon in the Stillaguamish River are a keystone species that are essential for the continuation of the Tribe's living culture. As salmon runs in the Stillaguamish River face extinction, so do many aspects of the Tribe's culture, community, and treaty reserved rights. After acquiring the land, the Tribe designated it as conservation land as a way to preserve their way of life and protect and restore salmon in the Stillaguamish River.

Protecting the riparian habitat necessary for salmon is tightly connected to the Tribe's treaty right to fish. Although the land at issue is not part of a reservation, its purchase is conditioned on the Tribe agreeing to use the land for salmon recovery purposes. Thus, the land is being used to promote the interests of the Tribe as a whole, especially with respect to preserving their treaty rights to fish, as well as the public by helping restore salmon populations. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (stating that the test for determining whether land is Indian country does not turn upon whether that land is denominated "'trust land'" or "'reservation'" but, rather, "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government'" (quoting *United States v. John*, 437 U.S. 634, 648-49, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978))). It is unlikely Congress would have intended to waive

tribal sovereign immunity in these circumstances where the Tribe has used federal funding to acquire the land and is using the land for a specified purpose subject to the State's supervision.

More fundamentally, the immovable property exception discussed above has never been applied in the context of Indian tribes, and Flying T has not persuaded us that it is appropriate for the judicial branch to do so now. The immovable property exception is a doctrine that primarily emerged in the context of *foreign* sovereign immunity. But tribes are not foreign nations; the United States Supreme Court has described tribes as "domestic dependent nations" with a unique relationship to the federal government. *Cherokee Nation*, 30 U.S. at 13. Thus, the scope of sovereign immunity has never been coextensive between tribes, states, and foreign nations. Instead, as stated above, in the absence of a tribe's waiver of immunity, courts defer to Congress, which must "unequivocally" express its decision to abrogate tribal immunity. *Bay Mills*, 572 U.S. at 790. To this point, it is relevant that when Congress enacted the FSIA, it did not expressly include the tribes, suggesting it did not intend the immovable property exception, whether in the FSIA or common law, to apply to tribes.

In support of its position, Flying T cites to Chief Justice Roberts' concurrence in *Upper Skagit* to indicate that the Court believed that an immovable property exception should apply to tribes. "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." *Upper*

Skagit, 584 U.S. at 562 (Roberts, C.J., concurring).[4] However, even Flying T acknowledges that finding such an exception would be contrary to the primary holdings and rationales in *Kiowa* and *Bay Mills*, which upheld tribal immunity in off-reservation commercial business dealings.

In *Kiowa*, the Court helped clarify the bounds of tribal sovereign immunity. 523 U.S. 751. The Kiowa Tribe had agreed to buy stock from a company, and a tribal representative signed a promissory note in the name of the tribe. *Id.* at 753. A disputed issue was whether the note was signed on or off tribal trust land. *Id.* at 753-54. The tribe defaulted on the note and an action was brought in state court. *Id.* at 754. The Court held that the tribe was entitled to sovereign immunity from suit, regardless of where the note was signed and that sovereign immunity extended to the tribe's commercial activities. *Id.* at 754-55. It reasoned that precedent did not support finding a distinction between governmental and commercial activities. *Id.* at 755. In coming to its decision that tribal sovereign immunity applied, the Court reasoned that Congress has not acted to abrogate sovereign immunity and that Congress is in the best position "to weigh and accommodate the competing policy concerns and reliance interests." *Id.* at 757, 759. Therefore, the Court declined to revisit current case law on tribal sovereign immunity and chose to defer to Congress. *Id.* at 760.

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[4] Flying T also argues that requiring Congress to act first will lead to untenable and absurd results. However, we are bound by precedent. Moreover, Congress has acted to waive tribal immunity in more than one instance; therefore, it is not absurd for Congress to act here.

In *Bay Mills*, the Court further clarified that tribal immunity is the baseline. 572 U.S. at 790. If Congress intends to abrogate such immunity, it must do so unequivocally. *Id*.; *see Santa Clara Pueblo*, 436 U.S. at 58 (a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed). "Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. The State of Michigan had brought an action to enjoin the Bay Mills Indian Tribe from operating a casino on land outside of its reservation. The Court held that the State lacked the ability to sue the tribe for illegal gaming, even if occurring off the reservation. *Id*. at 795. In reaching that conclusion, the Court reasoned that as domestic dependent nations, tribes exercise sovereignty at the will of the federal government and that means tribes are immune from lawsuits unless Congress wishes to abrogate that immunity. *Id*. at 803. Congress had not abrogated that immunity under the Indian Gaming Regulatory Act with respect to off-reservation gaming: thus, Michigan could not sue the Tribe to enjoin the casino. *Id*. at 804.

Congress has chosen to limit tribal sovereign immunity in specific contexts through explicit statutory provisions. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(A)(ii) (abrogating tribal immunity in the context of class III gaming activities); 25 U.S.C. § 450f(c)(3) (relating to mandatory liability insurance). Courts have also found that Congress has waived tribal sovereign immunity when it has included Indian Tribes within its definition of "persons" within a national regulatory scheme. *See United States v. Weddell*, 12 F. Supp. 2d 999 (D.S.D.

1998), *aff'd*, 187 F.3d 645 (8th Cir. 1999) (congressional abrogation under 28 U.S.C. §§ 3001-3008, also known as the Federal Debt Collection Act, by virtue of its inclusion of Indian tribes under the definition of "person[s]" who may be garnishees); *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Lab.*, 187 F.3d 1174, 1182 (10th Cir. 1999) (Congress abrogated tribal sovereign immunity in the Safe Drinking Water Act); *see also Pub. Serv. Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994) (holding that tribes are subject to suit under the preemption provision of the Hazardous Materials Transportation Act since the provision specifically refers to tribes). When it has done so, it has typically, but not always, referenced tribes explicitly. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 395, 143 S. Ct. 1689, 216 L. Ed. 2d 342 (2023) (holding that the Bankruptcy Code unequivocally abrogated tribal sovereign immunity when it abrogated sovereign immunity for "other foreign or domestic government[s]").

Despite Washington's primeval interests in resolving disputes over land within its own boundaries, Congress has not unequivocally abrogated tribal sovereign immunity with respect to nonreservation property acquired by tribes. The parties agree that FSIA and its exception do not apply to tribes, and the common law immovable property exception has never been applied in the context of Indian tribes, which are domestic dependent nations. Furthermore, as the Supreme Court noted in *Santa Clara Pueblo*, *Kiowa*, and *Bay Mills*, the waiver of tribal sovereign immunity will not be inferred but must be unequivocal. We hold that a common law

immovable property exception to sovereign immunity does not apply here.

The Superior Court's Dismissal of Flying T's Claims

Flying T argues that the superior court erred in dismissing its case under CR 19 since the Tribe is not an indispensable party. CR 19(a) requires the joinder of necessary parties. However, as the Tribe notes, the superior court dismissed the case based on CR 12(b)(1)-(3), (6), and (7). Since we hold that the superior court properly dismissed the case based on, among other things, lack of subject matter jurisdiction, we do not reach this argument.

CONCLUSION

Federal common law has long established that tribes are immune from suit and may be sued only where a tribe waives its immunity or when Congress has unequivocally abrogated immunity. While the superior court has in rem jurisdiction over real property, it does not have subject matter jurisdiction over adverse possession claims involving nonreservation land owned by tribes.

Furthermore, a common law immovable property exception has never been applied to waive tribal sovereign immunity. An act of Congress is necessary to create such an exception to tribal sovereign immunity.

We hold that state courts do not have subject matter jurisdiction over adverse possession claims related to nonreservation land owned by tribes and that the common law immovable property exception does not apply to tribes.

Accordingly, we affirm the Court of Appeals.

/s/ Madsen, J.
Madsen, J.

WE CONCUR:

/s/ Stephens, C.J.
Stephens, C.J.

/s/ Yu, J.
Yu, J.

/s/ Johnson, J.
Johnson, J.

/s/ Montoya-Lewis, J.
Montoya-Lewis, J.

/s/ González, J.
González, J.

/s/ Whitener, J.
Whitener, J.

/s/ Gordon McCloud, J.
Gordon McCloud, J.

Flying T Ranch, Inc., v. Stillaguamish
No. 103430-0

MUNGIA, J. (concurring)—I concur with the majority's opinion.[1] And yet I dissent. Not from the majority's opinion, but I dissent from the racism embedded in the federal case law that applies to this dispute.

[1] The majority assumes, for the sake of argument, that the use the Stillaguamish Tribe makes of the property at issue is germane to its analysis. It analyzes whether the Tribe uses the property for private or public use under the immovable property exception and suggests that the use is public.

In my view, this analysis is irrelevant to the outcome of the case. As domestic sovereign nations, the immovable property exception does not apply to tribes *regardless* of what a tribe uses the property for. I depart from the majority to the extent that the opinion may suggest a narrower holding.

FEDERAL INDIAN LAW IS A PRODUCT OF THE RACIST BELIEFS ENDEMIC IN OUR SOCIETY AND OUR LEGAL SYSTEM

While it is certainly necessary to follow federal case law on issues involving Native American tribes and their members, at the same time it is important to call out that the very foundations of those opinions were based on racism and white supremacy. By doing this, readers of our opinions will have no doubt that the current court disavows, and condemns, those racist sentiments, beliefs, and statements.

Since the founding of our country, the federal government has characterized Native Americans as "savages": They were "uncivilized." They had little claim to the land upon which they lived. At times, the federal government attempted to eradicate Native Americans through genocidal policies. At other times, the federal government employed ethnic cleansing by forcibly removing children from their parents' homes to strip them from their culture, their language, and their beings.[2]

Federal Indian case law arises from those racist underpinnings.

The majority correctly cites to *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), which is one of the foundational cases involving tribal sovereignty. That opinion is rife with racist attitudes toward Native Americans. Chief Justice John Marshall, writing for the majority, describes a tribe's relationship to the federal government as one of "ward

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[2] For a description of the federal government's treatment of Native Americans from the founding through the early 1970s, see *In re Dependency of G.J.A.*, 197 Wn.2d 868, 884-85, 489 P.3d 631 (2021).

to his guardian." *Id.* at 17. In effect, the opinion presents tribal members as children, and the federal government as the adult. That theme would follow in later opinions by the United States Supreme Court—as would the theme of white supremacy.

Cherokee Nation began with the premise that Native American tribes, once strong and powerful, were no match for the white race and so found themselves "gradually sinking beneath our superior policy, our arts and our arms." *Id.* at 15. The white man was considered the teacher, the Native Americans the pupils:

> Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id. at 17.

This characterization of superior to inferior, teacher to student, guardian to ward, was repeated in later United States Supreme Court opinions.

In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903), often characterized as the "American Indian *Dred Scott*,"[3] the Court used that rationale to justify ruling that the United States could break its treaties with Native American tribes.

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From

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[3] *See* Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 530 (2021); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 5 (2002).

> their very weakness and helplessness . . . there arises the duty of protection, and with it the power.

Id. at 567 (quoting *United States v. Kagama*, 118 U.S. 375, 383-84, 6 S. Ct. 1109, 30 L. Ed. 228 (1886)).

Our court also carries the shame of denigrating Native Americans by using that same characterization: "The Indian was a child, and a dangerous child, of nature, to be both protected and restrained." *State v. Towessnute,* 89 Wash. 478, 482, 154 P. 805 (1916), *judgment vacated and opinion repudiated by* 197 Wn.2d 574, 486 P.3d 111 (2020).

Returning to *Cherokee Nation*, Justice William Johnson's separate opinion was less tempered in how he considered the various Native American tribes:

> I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.

Cherokee Nation, 30 U.S. at 21. Native Americans were not to be treated as "equals to equals" but, instead, the United States was the conqueror and Native Americans the conquered. *Id*. at 23.

In discussing Native Americans, Justice Johnson employed another racist trope used by judges both before and after him: Native Americans were uncivilized savages.

> [W]e have extended to them the means and inducement to become agricultural and civilized. . . . Independently of the general influence of humanity, these people were restless, warlike, and signally cruel.

. . . .

> But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes . . . which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

Id. at 23, 27-28.

This same characterization was used by Justice Stanley Matthews in *Ex parte Kan-Gi-Shun-Ca (otherwise known as Crow Dog)*, 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883). Justice Matthews described Native Americans as leading a savage life. They were people who did not have "the responsibilities of civil conduct." *Id.* at 571. Native Americans in fact were incapable of comprehending civility. *Id.* To Justice Matthews, there was a clear distinction between Native Americans and the white man. In comparing tribal courts to the white man's court, he stated that tribal courts have

> [T]he strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.

Id. at 571.

One other aspect of Justice Johnson's opinion in *Cherokee Nation* that must be noted and condemned is the "Doctrine of Discovery." Justice Johnson wrote:

> When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of

> organic government; the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as part of the matter ceded.

Cherokee Nation, 30 U.S. at 23.

In *Johnson v. M'Intosh*, 21 U.S. 543 (8 Wheat.), 5 L. Ed. 681 (1823), the United States Supreme Court recognized the Doctrine of Discovery. The doctrine provided the justification for European nations to claim title to certain lands "'then unknown to all Christian people.'"[4] *Id.* at 576. Chief Justice Marshall, writing for the majority, stated that while European countries may have legitimate claims to various parts of the United States, Native Americans retained only a right of occupancy to the land, which was subject to the conquering nation's right of appropriation. *Id.* at 574, 584.

Our court was guilty of adopting that mistaken ideology:

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent, ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be

[4] For a description of the doctrine and its origins, see *State v. Wallahee*, 3 Wn.3d 179, 181 & n. 1, 548 P.3d 200 (2024).

> had from them was always disdained. From France, from Spain, from Mexico, and from England we have ever proclaimed our title by purchase, by conquest, and by cession, in all of which great transactions the migratory occupant was ignored. Only that title was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands, occupied, to be sure, but not owned, by any one before. *Johnson v. McIntosh*, [21 U.S.]8 Wheat. 543[, 5 L. Ed. 681 (1823)]. If in *Worcester v. Georgia*, [31 U.S.]6 Pet. 515[, 8 L. Ed. 483 (1832)], the supreme court speaks of the Indians having something which the whites had yet to purchase, it was not title, but mere possessory uses for subsistence. Later cases continue to plant our title on discovery. *Martin v.* [*Lessee of*] Waddell, [41 U.S.]16 Pet. 367, 409[, 10 L. Ed. 997 (1842)]; *United States v. Rogers*, [45 U.S.]4 How. 567, 572[, 11 L. Ed. 1105 (1846)].

Towessnute, 89 Wash. at 481-82.

In short, European nations gained title to the land without ever setting foot on the land itself. Viewing the land from the ship was enough to give them title. The Doctrine of Discovery allowed Europeans to justify driving Native Americans from their homes and from their lands because the federal government, as conquerors, had the right to extinguish Indian title.

The tribes did not own the land but merely occupied it. They were not sovereigns in relation to the federal government. The United States controlled the land, and the sovereignty, of the various tribes.

The cases the majority cites, and indeed must cite, are based on the racist premises that Native American tribes were never sovereign nations, that they had no fee title to the land on which they lived, and that the United States had the ultimate power as to those issues. The justification for those holdings was that Native Americans were inferior and were savages, who became wards of the United States.

Each time a court cites a case that has as its foundation such racist fallacies, it is incumbent on us to call out that racism, even if just in a footnote.

THE UNITED STATES SUPREME COURT, AND OUR COURT, HAS TAKEN STEPS TO ADDRESS THESE PAST WRONGFUL ACTIONS

The United States Supreme Court, and our court, has taken steps to address some of the errors of the past.

The United States Supreme Court now recognizes "the sovereign authority of Native American Tribes and their right to 'the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 557, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014)); *see also Haaland v. Brackeen*, 599 U.S. 255, 276, 143 S. Ct. 1609, 216 L. Ed. 2d 254 (2023) (while Congress's Indian affairs power "is plenary within its sphere, . . . even a sizeable sphere has borders").

In this opinion, our court correctly holds that the Stillaguamish Tribe has sovereign immunity and that "only Congress and the tribes themselves retain the power to determine when tribal immunity may be waived." Majority at 7.

In recent years we have repudiated prior decisions that disregarded the rights of Native Americans and their treaty rights. In *Towessnute*, 197 Wn.2d at 577-78, we repudiated the prior *Towessnute* "case; its language; its conclusions; and its mischaracterization of the Yakama people." In *State v. Wallahee*, 3 Wn.3d 179, 187-88, 548 P.3d 200 (2024), we recalled the mandate and vacated the wrongful conviction of Jim Wallahee,[5] who had been convicted for exercising his treaty right to hunt on ceded Yakama land. We also properly called out the wrongfulness of the Doctrine of Discovery:

> The Doctrine of Discovery and its use in law to justify state-sponsored violence are a stain on this nation.

Id. at 189.

In those prior, repudiated decisions, we had followed United States Supreme Court precedent that Native American tribes were not sovereign entities and that Native Americans were merely occupants of the land. While we continue to be constrained to follow United States Supreme Court precedent, we must not be constrained from calling out the racism found within those opinions. We must do a better job.

CONCLUSION

In our letter dated June 4, 2020, we noted the "devaluation and degradation of [B]lack lives is not a recent event."[6]

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[5] *State v. Wallahee*, 143 Wash. 117, 255 P. 94 (1927).

[6] Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (Wash. June 4, 2020) https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%

The same holds true for Native Americans.

We noted, "The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will."[7]

The same holds true for Native Americans.

We noted, "As judges, we must recognize the role we have played in devaluing [B]lack lives."[8]

The same is true for Native Americans.

While we are bound by United States Supreme Court precedent, we are not bound to stay silent as to the underlying racism and prejudices that are woven into the very fabric of those opinions. Instead, every chance we get, we must clearly, loudly, and unequivocally state that was "wrong."

That was wrong.

/s/ Mungia, J.
Mungia, J.

20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7].

[7] *Id.*

[8] *Id.*

Filed June 4, 2024

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

FLYING T RANCH, INC., a Washington corporation, Appellant, v. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, Respondent, SNOHOMISH COUNTY, a Washington state municipal corporation, Defendant.	No. 85739-8-1 DIVISION ONE PUBLISHED OPINION

¶1 BIRK, J. — Flying T Ranch Inc. appeals the dismissal of its lawsuit to quiet title to certain land against the Stillaguamish Tribe of Indians (Tribe) based on tribal sovereign immunity. Flying T agrees the Tribe enjoys the immunity traditionally enjoyed by sovereign powers, but the parties dispute the scope of that immunity. The land is not tribal land, so Flying T argues the Tribe's immunity is equal only to the immunity a foreign sovereign would have, and that immunity, Flying T argues, does not bar its quiet title claim under the "immovable property" exception. We conclude a foreign sovereign enjoys immunity as directed by the political branches of government and would not face process directed by the judiciary alone. When 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. We therefore affirm.

I

¶2 Flying T filed a complaint in Snohomish County Superior Court, pleading it is a Washington corporation domiciled in Snohomish County, with its principal place of business at 18808 State Route 530 Northeast, Arlington, Washington. Flying T's complaint sought to quiet title to certain land against the Tribe, acknowledged in the complaint to be a tribal government.

¶3 According to its allegations, Flying T owns a parcel of land lying along the North Fork of the Stillaguamish River. Opposite the river, the parcel is bounded on the north by a former railroad right-of-way, now the White Horse Trail. To the west of Flying T's parcel, the river and the railroad right-of-way converge, making a triangular piece of land bounded on its three sides by Flying T's parcel, the river, and the railroad right-of-way. The triangular piece of land is composed of parts of two parcels west of Flying T's. It is accessible from Flying T's neighboring parcel, but cut off by the railroad right-of-way from the rest of the two westerly parcels of which it is part. Flying T asserts title to this piece of land by adverse possession.

¶4 To support its claim of adverse possession, Flying T alleges a former owner of its parcel, Robert Olsen, repaired and maintained a fence enclosing the disputed triangular piece of land together with Flying T's parcel starting in at least 1961. Flying T alleges that since at least 1962, this barbed wire fence has run in a straight, continuous line along the railroad right-of-way. It alleges that without permission of the true owners, the fence marked the boundary line

separating the area from the railroad right-of-way and from the portions of the westerly parcels lying north of the fence. Olsen used the land to keep and graze livestock. In 1974, Olsen conveyed the Flying T parcel to Edwin and Antoinette Tanis. Edwin Tanis continued Olsen's practice of repairing and maintaining the fence. In 1990, a court entered judgment against the Tanises and the sheriff sold the parcel to Bruce and Tammy Blakey. The Blakeys continued the practice of repairing and maintaining the fence, excluding others from the enclosed area, and using the land to keep and graze livestock. In 1991, the Blakeys conveyed their parcel to Flying T, and since then it has continuously repaired and maintained the fence, excluding all others from the enclosed area without the permission of the title owners and using the enclosed land to keep and graze livestock.

¶5 Flying T alleges that Snohomish County obtained title to one of the westerly parcels in 1995. After Flying T commenced this action and a week before the superior court heard the Tribe's motion to dismiss based on tribal sovereign immunity, Snohomish County conveyed its parcel to the Tribe. Flying T alleges that the Tribe obtained title to the other westerly parcel in 2021. Flying T alleges—and the Tribe has not controverted—that before Snohomish County and the Tribe came into title of these parcels, they were privately held and not part of any tribal land or reservation.

¶6 Flying T commenced this action to quiet title in November 2022. The Tribe moved to dismiss under CR 12(b)(1), CR 12(b)(2), CR 12(b)(3), CR 12(b)(6), and CR 12(b)(7), all based on its having tribal sovereign

immunity from Flying T's claims.[1] In support of its motion, the Tribe attached three documents, including a declaration by Sara Thitipraserth, director of the Tribe's Natural Resources Department. Thitipraserth stated the Tribe purchased its parcel along with seven other parcels, totaling about 143.4 acres along 1.2 miles of the North Fork of Stillaguamish River. The Tribe acquired these lands for habitat restoration actions aimed to increase the

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[1] A challenge to the court's subject matter jurisdiction under CR 12(b)(1) may be either "facial or factual." *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806, 292 P.3d 147 (2013), *aff'd on other grounds*, 181 Wn.2d 272, 333 P.3d 380 (2014). Once it is challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence. *Id.* at 807. A facial challenge puts at issue the sufficiency of the pleadings. *Id.* at 806-07. A denial of a facial challenge under CR 12(b)(1) based on the complaint alone or the complaint supplemented by undisputed facts is reviewed de novo. *Id.* at 807. A factual challenge requires the trial court to weigh evidence to resolve disputed jurisdictional facts, and its factual determinations will be accepted by an appellate court unless clearly erroneous. *Id.*

In determining a challenge to personal jurisdiction under CR 12(b)(2), the trial court has discretion to rely on written submissions, or it may hold a full evidentiary hearing. *Id.* Once it is challenged, the party asserting personal jurisdiction bears the burden of proof to establish its existence. *Id.* If the trial court determines personal jurisdiction based on the pleadings and the undisputed facts before it, this court reviews the determination de novo. *Id.*

Because we conclude federal law requires that Flying T's complaint be dismissed, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014), it is not necessary to determine whether the dismissal is properly characterized as a matter of Washington procedural law as a facial dismissal for lack of subject matter jurisdiction under CR 12(b)(1) or a dismissal for lack of personal jurisdiction under CR 12(b)(2).

productivity and abundance of Puget Sound Chinook salmon. The parcels were acquired using funds from a conservation grant from the National Oceanic and Atmospheric Administration, through the Washington State Recreation and Conservation Office, that required the Tribe to protect those lands in perpetuity with a deed of right for salmon recovery. Stillaguamish River salmon are a cultural keystone species that supports activities essential for the continuation of the Tribe's living culture. As the Stillaguamish River salmon runs face extinction, so do many aspects of the Tribe's culture, community, and treaty reserved rights. The Tribe preserves its way of life through the use of these parcels as conservation land to protect and restore salmon in the Stillaguamish River.[2]

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[2] In the superior court, Flying T objected to the Tribe's submission of documents outside the pleadings as improper to the extent its motion was based on CR 12(b)(6). Flying T did not assert that the Tribe could not rely on undisputed facts outside the pleadings under CR 12(b)(1) and CR 12(b)(2), and did not indicate that it disputed the extrinsic facts the Tribe proffered. Washington authority supports converting CR 12(b)(1) and CR 12(b)(2) motions to summary judgment motions if they rely on matter extrinsic to the pleadings. *See Ace Novelty Co. v. M.W. Kasch Co.*, 82 Wn.2d 145, 146, 152, 508 P.2d 1365 (1973) (noting the superior court considered the moving party's affidavit that stated at no time had it done business within Washington and treated the CR 12(b) motion for lack of personal or subject matter jurisdiction as a motion for summary judgment); *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, Inc.*, 9 Wn. App. 284, 289, 513 P.2d 102 (1973) ("If matters outside the pleadings are presented to the court on a motion to dismiss for lack of personal jurisdiction under CR 12(b)(2) the motion is to be treated as a motion for summary judgment."). Thus, any error in the consideration of extrinsic evidence lay only in the timing of

¶7 The superior court granted the Tribe's motion to dismiss pursuant to CR 12(b)(1)-(3) and CR 12(b)(6) and dismissed the action with prejudice. The court denied Flying T's motion for reconsideration. Flying T filed a notice of appeal or discretionary review directed to the Washington Supreme Court. The Washington Supreme Court transferred the appeal to this court. After Flying T filed its initial notice of appeal, it sought clarification in the superior court based on Snohomish County's conveyance of its parcel to the Tribe. The superior court entered a further order dismissing Snohomish County from the case and dismissing all claims against the Tribe based on tribal sovereign immunity. A commissioner of this court accepted Flying T's amended notice of appeal and denied the Tribe's motion to dismiss the appeal on timeliness grounds.

II

¶8 On appeal, Flying T contends the Tribe's sovereign immunity does not extend to Flying T's claims, arguing they fall within a traditional exception to the doctrine of sovereign immunity for "'immovable property.'" The Tribe disputes that an immovable property exception was ever "universally applied" to assertions of sovereign immunity and further argues the justifications for such a rule do not apply in the case of a domestic tribe. The Tribe asserts that, in the absence of its consent to suit, only

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hearing the motion to dismiss, which was heard as an ordinary civil motion, instead of with the 28 calendar days' notice afforded for a summary judgment motion under CR 56. Flying T articulates no prejudice based on the timing of the proceedings before the superior court and does not object to the consideration of these submissions on appeal.

Congress can abrogate its immunity.[3] Whether tribal sovereign immunity applies is a question of federal law this court reviews de novo. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 226, 285 P.3d 52 (2012).

¶9 Past Washington authority permitted quiet title claims like Flying T's against tribes, recognizing an "in rem" exception to tribal sovereign immunity. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 869, 929 P.2d 379 (1996), held the superior court had in rem jurisdiction over the plaintiff's lawsuit based on the language of the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-358, repealed in part by Pub. L. No. 106-462, 114 Stat. 1991 (2000), and *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 252, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). Relying on *Anderson*, *Smale v. Noretep*, 150 Wn. App. 476, 484, 208 P.3d 1180 (2009), held that exercising jurisdiction over in rem proceedings did not implicate tribal sovereign immunity and, therefore, a quiet title claim based on adverse possession could proceed against a tribe. But the rationale of these authorities was disavowed in *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 558, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018), which held *Yakima* did not justify an in rem exception to tribal sovereign immunity. *Yakima* interpreted the General Allotment Act to allow the imposition of in rem state taxes on land that had been fee-patented under that law. *Id.* at 559.

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[3] The court received amicus curiae briefs supporting affirmance from the Sauk-Suiattle, Jamestown S'Klallam, Kalispel, Makah, Nooksack, Port Gamble S'Klallam, Puyallup, Quinault, Samish, Snoqualmie, Squaxin Island, and Suquamish Tribes.

Yakima was a statutory interpretation case that "sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity." *Id.* Because tribal sovereign immunity is a question of federal law and the United States Supreme Court has disavowed the interpretation of federal law on which *Anderson* and *Smale* relied, those decisions do not now determine the outcome here. Indeed, Flying T argues that they are consistent with its argument, but it does not argue that they are controlling.[4]

III

A

¶10 Tribes "possess the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387, 143 S. Ct. 1689, 216 L. Ed. 2d 342 (2023) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). The United States Supreme Court has "repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the 'baseline position.'" *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014)). "[T]he suability of . . . the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514, 60 S. Ct.

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[4] If the United States Supreme Court had not clearly disavowed *Anderson*'s rationale, it would remain binding on this court. A decision by the Washington Supreme Court is binding on all lower courts in the state. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

653, 84 L. Ed. 894 (1940). "Congress has consistently reiterated its approval of the immunity doctrine." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). A court must dismiss an action against a tribe if entertaining it would contravene the tribe's federal tribal sovereign immunity. *Bay Mills*, 572 U.S. at 791. Tribal sovereign immunity may be waived by a tribe or abrogated by Congress, *id.* at 788-89, but the parties do not assert that either has occurred here.

¶11 The United States Supreme Court has applied tribal sovereign immunity in settings otherwise governed by federal statutory law, not confined to tribal lands, and involving commercial activities. In *Santa Clara Pueblo*, the plaintiffs filed lawsuits against a tribe under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. 436 U.S. at 52-53. The Court held that in the absence of any "unequivocal expression of contrary legislative intent," sovereign immunity barred the lawsuits against the Santa Clara Pueblo Tribe. *Id.* at 58-59. In *Kiowa*, the Court declined to "confine" tribal sovereign immunity to reservations or to noncommercial activities and deferred "to the role Congress may wish to exercise in this important judgment." 523 U.S. at 758. The Court held the Kiowa Tribe enjoyed immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation, because Congress had not abrogated this immunity. *Id.* at

760. In *Bay Mills*, the Court held Congress's abrogation of tribal immunity in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, applied to gaming on, but not off, tribal lands, so Michigan was barred from suing Bay Mills to enjoin the operation of a casino. 572 U.S. at 787, 804. The Court said, "[W]e have time and again" treated tribal sovereign immunity as settled law and dismissed any suit against a tribe absent congressional authorization or tribal waiver, and "[t]he baseline position, we have often held, is tribal immunity." *Id.* at 789-90. Under *Bay Mills*, the Tribe is immune from Flying T's claims given the absence of the Tribe's consent or abrogation of its immunity by Congress.

B

¶12 Flying T concedes the Tribe has immunity but argues its immunity does not extend to Flying T's claims to quiet title, because, Flying T says, its suit is "outside the scope of the common law immunity." Flying T argues that under the immovable property exception, "a sovereign who purchases property in the territory of another sovereign does so in the character of a private party and enjoys no immunity from suit in actions regarding rights of possession or title to the property." But none of Flying T's arguments establish that an immovable property exception has ever existed under which courts adjudicated claims independently of the direction of the political branches of government.

1

¶13 Flying T relies first on dicta in *The Schooner Exchange v. McFaddon*, a case in which American claimants asserted title to a ship that, by the time of

their lawsuit, was "a national armed vessel, commissioned by, and in the service of the emperor of France." 11 U.S. (7 Cranch) 116, 146, 3 L. Ed. 287 (1812). Extending immunity, the Court held it was "a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 145-46. In dicta, based on the possibility of a court's exercising jurisdiction over a foreign sovereign's property in its territory, the Court said, "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." *Id.* at 145. Based on this language, Flying T argues that in acquiring nontribal land on the open market in Washington, the Tribe comes to the land as a private party subject to the territorial jurisdiction of the Washington courts.

¶14 This argument overlooks the reasoning of *The Schooner Exchange* and the next century and a half of American practice. The Court in *The Schooner Exchange* never doubted the authority of a territorial sovereign over foreign sovereigns and their property within its territory and, thus, over the ship in question:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that

> sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 136. But the existence of this authority did not determine whether the judicial branch would exercise it.

¶15 As the Court later explained, "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). "[A] major consideration for the rule enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations." *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61, 75 S. Ct. 423, 99 L. Ed. 389 (1955). The doctrine of foreign sovereign immunity "is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Id.* at 362 (quoting *The Schooner Exch.*, 11 U.S. at 136-37, 143-44).

¶16 It became the practice of American courts to defer to the political branches on whether to take jurisdiction over actions against foreign sovereigns. *Verlinden*, 461 U.S. at 486. Until legislation by

Congress discussed below, "the State Department" was "the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."[5] *Nat'l City Bank*, 348 U.S. at 360. The State Department urged a state court to extend immunity in at least one reported case involving a title dispute. In *Knocklong Corp. v. Kingdom of Afghanistan*, the Kingdom of Afghanistan had acquired fee ownership of real property in Kings Point, New York. 6 Misc. 2d 700, 700, 167 N.Y.S.2d 285 (Nassau County Ct. 1957). The plaintiff claimed competing title based on a tax deed. *Id.* Because Afghanistan used the property "to house the person of the Chief Representative of Afghanistan to the United Nations" and "to serve as the office of, and repository of records for, the Permanent Delegation of Afghanistan to the United Nations," the State Department urged the New York state court to dismiss the action as barred by foreign sovereign immunity. *Id.* at 700-01. The court did so, explaining, "[I]f the claim of immunity is recognized and allowed by the executive branch of the government, in this case the Department of State, it is then the duty of the court to accept such claim upon appropriate suggestion made by the Attorney General of the United States." *Id.* at 701 (citing *Compania Espanola de Navegacion Maratima, SA v. The Navemar*, 303 U.S. 68, 74, 58 S. Ct. 432, 82 L. Ed. 667 (1938)).

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[5] In some cases, foreign sovereigns did not make requests to the State Department but asked the courts to extend immunity. *Verlinden*, 461 U.S. at 487-88. The question here is not whether a tribe might voluntarily subject itself to a court's determination of its immunity but may insist on leaving that decision to the branch the United States Supreme Court has repeatedly held has the prerogative to make it—Congress.

¶17 Flying T argues that *Knocklong* merely reflects an "exception to the exception" under which title disputes remained generally justiciable except in cases of diplomatic or consular property. But under *Restatement (Second) of Foreign Relations Law of the United States* § 77(4) (Am. L. Inst. 1965),[6] diplomatic premises were not exempt from determinations of title but only from "prescription or enforcement of any tax or levy of the receiving state." A deed of trust might be foreclosed, for instance, but regaining possession depended on the territorial state resorting to "the ultimate sanction of termination of diplomatic status." *Restatement (Second) § 77* cmt. e at 243; *see also Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 840 (2d Cir. 2020) (unnecessary to determine whether immovable property exception applied because, even if it did, county's tax enforcement proceedings fell "comfortably within the absolute immunity from execution of judgment that foreign sovereigns traditionally enjoyed at common law"); *City of New York v. Permanent Mission of India to United Nations*, 446 F.3d 365, 371 (2d Cir. 2006) (international convention still limits execution that would threaten a foreign sovereign's possession), *aff'd and remanded*, 551 U.S. 193, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 484 (3d ed. 2015) ("State immunity continues to bar to a very large extent the

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[6] The *Restatement (Second)* was the most recent restatement of foreign relations law when Congress enacted the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, and is therefore evidence of international practice predating the statute. *See Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 200, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007).

enforcement of judgments given by such courts against foreign States."). Under the *Restatement (Second)*, 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. The relevant point of *Knocklong* is that pursuant to then-current law the court abstained from adjudicating title against the foreign power at the direction of the executive branch.

¶18 In context, the dicta in *The Schooner Exchange* Flying T relies on establishes only that a territorial sovereign possesses authority over persons and property within its territory, including foreign sovereigns and their property.[7] The Court did not

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[7] The Enlightenment era sources on which *The Schooner Exchange* drew, *see Upper Skagit*, 584 U.S. at 567-69 (Thomas, J., dissenting), focused on the authority of the territorial courts, not the conditions justifying the exercise of that authority, and equally recognized the authority of the political branches to direct that the courts extend immunity or not based on a political determination of national interest. These sources date from before modern states, and looked at the issue initially through the lens of the authority of territorial courts over the persons of monarchs and their legates. *The Schooner Exchange* cites Emmerich de Vattel as maintaining, "'It is impossible to conceive' . . . 'that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power.'" 11 U.S. at 143 (quoting EMMERICH DE VATTEL, THE LAW OF NATIONS bk. 4, ch. 7, § 92 (1805)); *see also* ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW 34-38 (2d ed. 2022) (tracing 18th century discussions of immunity to medieval sources and ancient Roman law protecting the persons of imperial Roman legates). *The Schooner Exchange* dicta on which Flying T relies seems directed to the statement of Bynkershoek's, more recently translated into English, that "[t]hrough the practice of nations it has been established that

examine the circumstances in which territorial courts would proceed to adjudicate the ownership of property within their territory claimed by a foreign sovereign, or support that courts should do so independently of the direction of the political branches of government. Granted, after *The Schooner Exchange*, American courts did not defer absolutely to the suggestion of the

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property which a prince has purchased for himself in the dominions of another or has acquired through inheritance or in any other way, shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes." CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS 22 (G. Laing transl. 1946). This statement appears to have been made in discussion of securing personal jurisdiction through attachment of property, but in any event Bynkershoek then described cases in which immunity was directed by political branches of government. The first was a case refusing to attach moneys on deposit by the German emperor. *Id.* at 22-23. Although Bynkershoek criticized the decision, he said this was because the decision to extend immunity based on a political determination is not appropriately made by the judicial department. *Id.* at 23. He next described a case involving Spanish warships, relied on by *The Schooner Exchange*, 11 U.S. at 145, in which the court issued an attachment but on protest of the Spanish ambassador the legislature extended immunity, BYNKERSHOEK, *supra*, at 23, and a case in which the legislature refused consent to attach the property of the countess of the Palatinate, *id.* He described three more cases concerning the elector of Brandenburg, the Venetian Republic, and the Duke of Mecklenburg in which the legislature expressly allowed suits to proceed, and another involving the king of Prussia in which the case proceeded with the king's consent. *Id.* at 24-25. These cases all support the thesis that a foreign sovereign is subject to the authority of the territorial courts but the decision whether to exercise that authority in specific cases depends on the direction of the political branches of government. This comports with United States Supreme Court precedent and the Tribe's position that only Congress can abrogate tribal sovereign immunity.

State Department. In *Berizzi Brothers Co. v. Steamship Pesaro*, 271 U.S. 562, 576, 46 S. Ct. 611, 70 L. Ed. 1088 (1926), the Court extended immunity to an Italian government-owned vessel engaged in commerce, despite the State Department's view that such vessels were not entitled to immunity, *see* Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 609 (1954). But diverging from the direction of the State Department was the exception. *Id.* at 608; FOX & WEBB, *supra*, at 146. *The Schooner Exchange* does not support, and Flying T does not show, any history of the judiciary invoking the immovable property exception against a foreign nation to disallow foreign sovereign immunity without regard to the direction of the political branches.[8]

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[8] Flying T's position problematically calls for a nondeferential, judicially established outer boundary on the immunity generally accorded to foreign sovereigns. It is not surprising that it supports this position exclusively with secondary sources generally recognizing the need for territorial courts to retain the authority to determine such matters as title—a proposition with which we have no quarrel—but cites no history of the judiciary of any nation routinely exercising such authority against fellow nations without regard to its political authorities' direction. *The Schooner Exchange* runs against the proposition that the judicial branch might decide on its own and without the counsel of the political branches to adjudicate a foreign sovereign's interest in property within the United States. After all, it was a case in which the government appeared to urge the Court to extend immunity. *The Schooner Exch.*, 11 U.S. at 117-18, 147. The American ship at issue had been taken unlawfully as part of Napoleon's efforts to impose a blockade against Britain, a policy that had caused resentment among dispossessed American shipowners. *See* GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 10-14

2

¶19 Flying T points to a statutory provision allowing real property claims against foreign sovereigns. Congress codified the law of foreign sovereign immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611. *Verlinden*, 461 U.S. at 488. The FSIA contains an exception to immunity providing that a foreign state shall not be immune in any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). This provision was "meant 'to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice.'" *Permanent Mission of India*, 551 U.S. at 200 (alteration in original) (quoting *Asociacion de Reclamantes v. United Mexican States*, 237 U.S. App. D.C. 81, 735 F.2d 1517, 1521 (1984)). Under both theories of foreign sovereign immunity prevailing at the time,[9] "proceedings relating to

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(1984). But with war with the United Kingdom imminent—the War of 1812 was declared only three months after the decision in *The Schooner Exchange*—it was "politically inconceivable" that the American judiciary would seize a French warship to return it to its rightful American owners. *Id.* at 14. It is not difficult to imagine the State Department in *Knocklong* having similarly compelling concerns about a court proceeding against property claimed by the Kingdom of Afghanistan amidst 1950s Cold War tensions with the former Soviet Union. A nondeferential immovable property exception declaring such claims outside the scope of immunity would put such concerns beyond judicial accommodation.

[9] *The Schooner Exchange* came to be regarded as extending "virtually absolute" immunity to foreign sovereigns. *Verlinden*, 461 U.S. at 486. In 1952, the State Department's "Tate Letter" announced the United States' "decision to join the majority of other countries by adopting the 'restrictive theory' of sovereign

immovables located in the territory of the forum State" fell within one of the "earliest widely accepted exceptions to State immunity." FOX & WEBB, *supra*, at 427. As framed in *Restatement (Second)* § 68, "The immunity of a foreign state . . . does not extend to . . . (b) an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction."

¶20 But as *Knocklong* showed, no such rule was followed to the exclusion of the direction of the political branches. Foreign nations "often placed diplomatic pressure on the State Department in seeking immunity." *Verlinden*, 461 U.S. at 487. In some cases, "political considerations led to suggestions of immunity in cases where immunity would not have been available" under the prevailing theory. *Id.* Thus, even proponents of the restrictive view of immunity acknowledged that the practical inability to enforce judgments against coequal nations explained why questions of immunity turned on determinations of the political branches: the "'general inability of the judicial power to enforce its decisions'" against foreign sovereigns prompts questions that are "'rather questions of policy than of law,'" and "'for diplomatic rather than legal discussion.'" FOX &

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immunity, under which 'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Permanent Mission of India*, 551 U.S. at 199 (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter), *reprinted in* 26 DEP'T OF STATE BULL. 984 (1952), *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711, 712, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976) (appendix 2 to opinion of the Court)). The FSIA was meant to codify the restrictive theory. *Id.*

WEBB, *supra*, at 32 (quoting *The Schooner Exch.*, 11 U.S. at 146). With the passage of the FSIA, the former practice of looking to executive suggestion on a case-by-case basis gave way to determining the availability of immunity at Congress's direction. The parties agree the FSIA does not extend to tribes, but this only further justifies deferring to Congress's different approach to tribal sovereign immunity.

¶21 In the absence of comprehensive legislation by Congress regulating tribal sovereign immunity, the United States Supreme Court has upheld tribal sovereign immunity for claims for which the FSIA clearly waived foreign nations' immunity, such as for commercial claims. *Compare* 28 U.S.C. § 1605(a)(2) (exception to immunity for "commercial activity carried on in the United States"), *with Kiowa*, 523 U.S. at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."). *Kiowa* contrasted Congress's more limited waiver of tribal sovereign immunity compared to its treatment of foreign sovereigns, and cautioned, "In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." *Id.* at 759.

¶22 Congress periodically revisits tribal sovereign immunity. After *Kiowa*, Congress "considered several bills to substantially modify tribal immunity in the commercial context," but instead of these "chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's

approval." *Bay Mills*, 572 U.S. at 801-02 (citing Indian Tribal Economic Development and Contract Encouragement Act of 2000, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2))). And again, "[j]ust eight months after the Supreme Court issued its decision in [*Upper Skagit*], Congress reaffirmed its approval of tribal immunity in the context of a statute that, among other things, authorizes Indian tribes to grant rights of way over their land for energy resource development." *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 221, 274 Cal. Rptr. 3d 255 (2021) (citing Pub. L. No. 115-325, tit. I, §§ 103(a), 105(d) (Dec. 18, 2018), 132 Stat. 4447, 4454, codified at 25 U.S.C. § 3504(i)), *cert. denied*, 142 S. Ct. 1107 (2022). The real property exception in the FSIA, even when characterized as a codification of common law, does not support imposition of a similar limitation on tribal sovereign immunity by the judicial branch without regard to Congress's direction.

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¶23 Quoting *Asociacion de Reclamantes*, 735 F.2d at 1521, Flying T invokes a territorial sovereign's "'primeval'" interest in resolving title disputes within its domain. In *Asociacion de Reclamantes*, then-Judge Scalia wrote that the immovable property exception in the FSIA stemmed from the fact that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain," because "'[a] sovereignty cannot safely permit the title to its land to be determined by a foreign power.'" *Id.* (quoting 1 FRANCIS WHARTON, CONFLICT OF LAWS § 278, at 636 (3d ed. 1905)). The specter of a foreign sovereign laying claim to another's domestic realm and claiming

immunity from adjudication of title is complemented by the local action rule, which places venue to determine title exclusively in the local forum. *Id.* at 1521-22. It is clearly necessary that the territorial sovereign reserve the authority to determine title disputes notwithstanding a foreign putative owner's claims of immunity, because the operation of the local action rule would leave no forum competent to determine title. *Id.* at 1522. But this fails to justify departure from deferring the question of the Tribe's immunity to Congress for two reasons. First, as discussed above, that the territorial sovereign retains the authority to determine title does not mandate that it must necessarily do so at the behest of any claimant, at any time, apart from considerations reserved to its political branches. Second, the Tribe's claim of immunity is subject to abrogation domestically by Congress, so it poses no threat to the properly defined dual sovereignty governing this land.

¶24 "[W]hen the States entered the federal system, they renounced their right to the 'highest dominion in the lands comprised within their limits.'" *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 502, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656, 10 S. Ct. 965, 34 L. Ed. 295 (1890)). Washington is the relevant sovereign for purposes of substantive real property law. *See Munday v. Wisc. Tr. Co.*, 252 U.S. 499, 503, 40 S. Ct. 365, 64 L. Ed. 684 (1920) ("Where interstate commerce is not directly affected, a State may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute."); *United States v. Fox*, 94 U.S. (4 Otto) 315, 320, 24 L. Ed. 192 (1876) ("The power of the State to regulate the

tenure of real property within her limits, and the modes of its acquisition and transfer, . . . is undoubted."). But Washington is not the exclusive sovereign for a purpose touching a federal concern. As *Verlinden* explained, in addition to codifying the law of foreign sovereign immunity, the FSIA permissibly guaranteed foreign sovereigns the right to remove any civil action from a state court to a federal court because of "'the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area.'" 461 U.S. at 489 (quoting H.R. REP. NO. 94-1487, at 32 (1976)).

¶25 *Verlinden* held that, even in the absence of a federal claim, *id.* at 483, "an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction," *id.* at 494 (citing U.S. CONST. art. III). This followed from Congress's "authority over foreign commerce and foreign relations," and the recognition that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Id.* at 493. Thus, a case brought against a foreign sovereign alleging a state law quiet title claim and falling within the immovable property exception of 28 U.S.C. § 1605(a)(4) would be originally cognizable in federal court and removable if commenced in state court. *Id.* at 488-89 & n.11. And, if the claim did not fall within an FSIA exception, the foreign sovereign would be assured immunity at Congress's direction in both federal and state courts. *Id.* at 489. Therefore, it is already recognized that Washington's sovereignty over land within its boundaries is limited in that it may entertain suits against foreign sovereigns, even

those concerning real property, only to the extent consistent with Congress's direction.

¶26 The Tribe's claim to immunity as allowed or disallowed by Congress is no more an imposition on Washington's sovereignty than a foreign sovereign's entitlement to immunity as allowed or disallowed by Congress under the FSIA. Congress's authority over the nation's relationships with tribes is equally "plenary" as its authority over foreign relations. *Bay Mills*, 572 U.S. at 788; *see also County of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). Recognizing the Tribe's immunity does not cede any territorial sovereignty, because the determination of title remains subject to the state's sovereignty over real property law and the nation's sovereignty over the determination of the Tribe's immunity.[10]

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[10] That Congress may abrogate tribal sovereign immunity at will also answers any argument that honoring tribal sovereign immunity in real property cases might open up avenues for abuse. For instance, in *Cass County Joint Water Resource District v. 1.43 Acres of Land*, a landowner in an area affected by a forthcoming public works project deeded land to the Turtle Mountain Band of Chippewa Indians, who subsequently claimed immunity against condemnation. 2002 ND 83, 643 N.W.2d 685, 688. Relying, among other authorities, on *Yakima* and *Anderson*, the court allowed the condemnation to proceed based on the now discredited in rem exception. *Id.* at 692, 694. While not doubting the sincerity of the Turtle Mountain Band that it had no designs to frustrate public works, the court nevertheless expressed concern over the uncertainty that could result from tribes having what it called "veto power" over projects through the acquisition of a small tract within a project. *Id.* at 694. But Congress's

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¶27 Also lacking in the case of a tribe is the rationale on whose basis the United States Supreme Court has permitted certain actions by one state against another. In *Georgia v. City of Chattanooga*, the court held state sovereign immunity does not extend to "[l]and acquired by one State in another State." 264 U.S. 472, 480, 44 S. Ct. 369, 68 L. Ed. 796 (1924). Georgia undertook the construction of a railroad extending from Atlanta, Georgia, to Chattanooga, Tennessee. *Id.* at 478. Tennessee granted Georgia land for terminal facilities and the right to acquire the necessary right-of-way from the state line to Chattanooga. *Id.* Georgia did so, and Chattanooga later sought to take land from a railroad yard for a street. *Id.* at 478-79. The Court held the power of Tennessee to take land for a street was not impaired by the fact another state owned the land for railroad purposes; acquiring land in another state for a private purpose prevented Georgia from claiming sovereign immunity. *Id.* at 479-80. "The terms on

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plenary authority over tribal immunity provides a ready check against assertions of immunity that Congress deems inappropriate. Underscoring the sensitive political considerations involved, *1.43 Acres* rested its decision in part on the fact the land at issue was not part of the Turtle Mountain Band's aboriginal land. *Id.* In contrast, the land at issue here is part of the Tribe's ancestral land, and the Tribe's purposes in acquiring it serve protected treaty rights to take fish for ceremonial and subsistence purposes, and otherwise "'in common'" with nontreaty right fishermen, *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), and to preserve its heritage and culture. Balancing these profound interests against the need to adjudicate state law property rights lies with Congress.

which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings." *Id.* at 480. But the United States Supreme Court has not looked to the law of state immunity to determine that held by tribes and, to the contrary, has cautioned "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756. As between states, "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991).

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¶28 The baseline rule is that a tribe is immune from suit unless it has consented to the suit or Congress has waived its immunity. The foregoing discussion shows that this baseline rule of deferring the question of immunity to a political branch of the national government parallels the immunity foreign sovereigns have been granted in American courts. So far, however, the discussion has assumed that the Tribe's immunity is properly determined by reference to the law governing the relationship among nation states foreign to one another. But tribes are not foreign to this land, and the relationship between the three domestic sovereignties implicated in this case further counsels deference to Congress.

¶29 From time immemorial, ancestors of the Coast Salish people dwelt along the rivers in the coastal and riverine lands of Puget Sound. *See* BRUCE G. MILLER, THE PROBLEM OF JUSTICE, TRADITION AND LAW IN THE

COAST SALISH WORLD 1-2 (2001); *cf. Upper Skagit*, 584 U.S. at 556 ("Ancestors of the Upper Skagit Tribe lived for centuries along the Skagit River in northwestern Washington State."). Fishing constituted a means of subsistence for the tribal members in the area embracing the Stillaguamish River and its north and south forks, where the river system constituted the usual and accustomed fishing places of the tribe. *United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). The Tribe was identified as represented at the 1855 signing of the Treaty of Point Elliott, *id.* at 378, and in that treaty the Coast Salish tribes agreed to "cede, relinquish, and convey" the lands of present day northwestern Washington to the United States. Treaty Between the United States & the Dwámish, Suquámish & Other Allied & Subordinate Tribes of Indians in Washington, 12 Stat. 927, art. 1 (1855).[11]

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[11] When the treaties were negotiated, "the translation of the English words was difficult because the interpreter used a 'Chinook jargon' to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 667 n.10, 99 S. Ct. 3055, 61 L. Ed. 2d 823, *modified sub nom. Washington v. United States*, 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979). Beyond the problem of translation, the incoming American settler societies sought the treaties with the "express intention of undermining existing systems of leadership and spiritual values and practices" of the Coast Salish in the hopes of "quickly opening the area to settlement." MILLER, *supra*, at 81, 93-94. Territorial Governor Isaac Stevens and the treaty commission "were aware that village leaders did not have authority beyond their families and

¶30 The riparian lands of the Stillaguamish River are essential to the Tribe's interest in preserving its heritage and culture. "The anadromous fish constitute a natural resource of great economic value to the State of Washington," and "when the relevant treaties were signed, anadromous fish were even more important to most of the population of western Washington than they are today." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664, 99 S. Ct. 3055, 61 L. Ed. 2d 823, *modified sub nom. Washington v. United States*, 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979). Diminishing the force of Flying T's reliance on international law to avoid the Tribe's immunity, these considerations are recognized in international law in its protecting from execution "property 'of great importance to the cultural heritage of every people.'" FOX & WEBB, *supra*, at 532 (quoting Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention art. 1(a), May 14, 1954, T.I.A.S. No. 09-313.1 [https://perma.cc/UV2S-PDUH]).

¶31 This is particularly salient in regard to the Tribe's effort to regain lands its ancestors possessed and whose management is essential to preserving its

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friends," and therefore completed the treaties "by designating 'tribes and chiefs.'" OLYMPIC PENINSULA INTERTRIBAL CULTURAL ADVISORY COMM., NATIVE PEOPLES OF THE OLYMPIC PENINSULA 10-12 (Jacilee Wray ed., 2d ed. 2015). And when settlers began entering the Puget Sound region pursuant to the 1850s treaties, Upper Skagit leaders who believed settlers were encroaching on their lands were limited by territorial authorities to seeking assistance from Congress. MILLER, *supra*, at 94-95. With these background circumstances, the United States "has a responsibility to avoid taking advantage of the other side." *Wash. State Com. Passenger*, 443 U.S. at 675-76.

heritage and culture. The settlement of the 1850s treaties covering most of present day Washington[12] soon gave way to "Congress's late Nineteenth Century Indian policy: 'to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.'" *Upper Skagit*, 584 U.S. at 558 (quoting *Yakima*, 502 U.S. at 254). Later, Congress "reversed course" and sought to restore "'tribal self-determination and self-governance.'" *Id.* (quoting *Yakima*, 502 U.S. at 255). In *Self*, the court considered similar facts, where plaintiffs filed suit to quiet title to a public easement over coastal land that a tribe was seeking to bring into trust. 60 Cal. App. 5th at 213-15. The court explained that "supporting tribal land acquisition is a key feature of modern federal tribal policy, which Congress adopted after its prior policy divested tribes of millions of acres of land." *Id.* at 219. Congress's later reversal, among other things, "empowers the federal government to take land into trust for the benefit of a tribe." *Id.* at 220 (citing 25 U.S.C. § 5108). Congress's policy now "advances tribes' sovereign interests by helping them restore land they lost." *Id.*

¶32 When coupled with only targeted waivers of tribal sovereign immunity, *Self* explained, "This history weighs strongly in favor of deferring to Congress to weigh the relevant policy concerns of an immovable property rule in light of the government's solemn obligations to tribes, the importance of tribal land acquisition in federal policy, and Congress's practice of selectively addressing tribal immunity

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[12] *See* Treaty of Medicine Creek, 10 Stat. 1132 (1854); Treaty of Point Elliott, 12 Stat. 927 (1855); Treaty of Point No Point, 12 Stat. 933 (1855); Treaty of Neah Bay, 12 Stat. 939 (1855); Treaty of Olympia, 12 Stat. 971 (1855).

issues in property disputes." *Id.* at 221. We agree,[13] and the same is true here. Congress's land acquisition policy is especially relevant to riverine lands in the Puget Sound region, where degradation of salmon habitat and reduced abundance of salmon have resulted in continuing cultural, social, and economic harm to tribes. *United States v. Washington*, 20 F. Supp. 3d 986, 1020-21 (W.D. Wash. 2013). The Tribe has not indicated it has sought to take the land into trust, but it nevertheless avers it obtained the land with federal funds based on a commitment to protect the land for salmon recovery, an effort essential to preserving its culture and heritage. Deciding whether to subject tribal land acquisition to private suits thus requires balancing the long-standing and preconstitutional interests of the tribes, and national policy, against any competing state law property interests. This shows why the United States Supreme Court has deferred tribal sovereign immunity to Congress.

¶33 That Flying T may lack a present judicial remedy as long as the Tribe retains immunity is not a basis to decide the question differently. The United States Supreme Court has left open the possibility that tribal sovereign immunity might bow to a claimant lacking any alternative remedies. *Bay Mills*, 572 U.S. at 799 n.8. But it has rejected the proposition that the elimination of a claimant's "most efficient" remedy is a ground to set aside tribal sovereign immunity where there are "any adequate alternatives." *Potawatomi*, 498 U.S. at 514. Flying

[13] We also agree with *Self*'s conclusion that *Chattanooga* and *The Schooner Exchange*, together with related authorities, do not support extending a common law exception for immovable property to tribes. 60 Cal. App. 5th at 216-18.

T's remedy lies with Congress, and in this regard it is similarly situated to litigants in much of the nation's history who have been dependent on the national legislature's decision whether to authorize a remedy within its discretion to grant or withhold.

¶34 The United States claims the same immunity from claims such as Flying T's.[14] *See United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) ("It has long been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" (alteration in original) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941))); *United States v. Alabama*, 313 U.S. 274, 282, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States."). Under the Quiet Title Act, the United States allows some title claims to be brought against it, but it does not permit title to be determined against it "based upon adverse possession." 28 U.S.C. § 2409a(n). If the United States had acquired the land neighboring Flying T's parcel—instead of using its funds to support the Tribe to do so—Flying T would be limited to the remedies traditionally available in the absence of a waiver of sovereign immunity.

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[14] And Washington asserts the same prerogative. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 72, 283 P.3d 1082 (2012) ("State-owned land is statutorily protected from claims of adverse possession."); *State ex rel. Hamilton v. Superior Ct.*, 200 Wash. 632, 634-35, 94 P.2d 505 (1939) (allowing claim to set aside deed allegedly procured by the State by fraud to proceed in Cowlitz County rather than Thurston County).

¶35 Before the Quiet Title Act, these remedies furnished claimants asserting title to land claimed by the United States "only limited means of obtaining a resolution"—"they could attempt to induce the United States to file a quiet title action against them, or they could petition Congress or the Executive for discretionary relief." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). And for decades, petitioning Congress through the "private bill procedure" was the exclusive remedy for any claim against the United States. *United States v. Mitchell*, 463 U.S. 206, 212-13, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983). These same remedies are available to Flying T. Given the right to seek relief from Congress, even if doing so is inconvenient, and given Congress's history of periodic, targeted waivers of tribal sovereign immunity, Flying T does not lack "any adequate alternatives." *Potawatomi*, 498 U.S. at 514.

¶36 "[I]t is fundamentally Congress's job," not the judicial department's, "to determine whether or how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800. To hold otherwise would impermissibly lessen tribal sovereign immunity compared to the immunity afforded foreign nations. Until Congress provides otherwise, the Tribe has immunity from Flying T's claims, and the superior court properly dismissed those claims. With this conclusion, it is not necessary to reach any other issues raised by the parties.

¶37 Affirmed.

DWYER AND FELDMAN, JJ., concur.

Reconsideration denied July 31, 2024.

Review granted at 3 Wn.3d 1031 (2024).

Filed April 11, 2023

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

FLYING T RANCH, INC., a Washington Corporation, Plaintiff, v. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, and SNOHOMISH COUNTY, a Washington State Municipal Corporation, Defendants.	Case No. 22-2-07015-31 **ORDER ON MOTION FOR CLARIFICATION OR CERTIFICATION FOR APPEAL** [ ] PROPOSED [X] FINAL ORDER

THIS MATTER, having come before the court on the Plaintiff's Motion for Clarification or Certification for Appeal, the Court having reviewed the motion and response by the Defendants, and being otherwise fully advised in the premises, now, therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that (check all that apply):

[X] Defendant Snohomish County is dismissed as a party to this matter with prejudice.

[X] All claims against Defendant Stillaguamish Tribe of Indians are dismissed with prejudice due to Tribal sovereign immunity.

DONE IN OPEN COURT this 4th day of April, 2023.

/s/ Marybeth Dingledy
JUDGE DINGLEDY

Presented by:

/s/ Raven Arroway-Healing

Raven Arroway-Healing, WSBA #42373
Attorney for Defendant Stillaguamish
Tribe of Indians

Filed January 24, 2023

SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

FLYING T RANCH, INC., a Washington Corporation, Plaintiff, v. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, and SNOHOMISH COUNTY, a Washington State Municipal Corporation, Defendants.	No. 22-2-07015-31 **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION** [ ] PROPOSED [X] FINAL ORDER

THIS MATTER, having come before this court upon Plaintiff's Motion for Reconsideration of the Courts grant of Defendants' Motion to Dismiss and this Court having examined Plaintiff's written motion, Defendant's response, and all supporting and opposing submissions, as well as the relevant pleadings/papers on file and deeming itself fully advised in the premises. IT IS HEREBY ORDERED THAT Plaintiff's Motion for Reconsideration is DENIED.

DONE IN OPEN COURT this 23 day of January, 2023.

s/ Marybeth Dingledy
Honorable Marybeth Dingledy

Presented by:

/s/ Raven Arroway-Healing

Raven Arroway-Healing, WSBA #42373
Attorney for Stillaguamish Tribe

Filed December 22, 2022

SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

FLYING T RANCH, INC., a Washington Corporation, Plaintiff, v. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, and SNOHOMISH COUNTY, a Washington State Municipal Corporation, Defendants.	No. 22-2-07015-31 **ORDER GRANTING DEFENDANT STILLAGUAMISH TRIBE OF INDIAN'S MOTION TO DISMISS** [ ] PROPOSED [X] FINAL ORDER

I. BASIS

This matter came before the Court upon the Stillaguamish Tribe of Indian's ("Tribe") Motion to Dismiss pursuant to CR 12 (B)(l), (2), (3), (6), and/or (7). The court has reviewed the documents on the file in the above captioned matter.

II. FINDINGS

The Court having reviewed the Tribe's Motion to Dismiss and relevant court records and having heard oral argument today now finds:

[X] Plaintiff's claims must be dismissed as the Court lacks subject matter jurisdiction pursuant to CR 12(B)(1) due to tribal sovereign immunity.

[X] Plaintiff's claims must be dismissed for lack of jurisdiction over person pursuant to CR 12(B)(2) due to tribal sovereign immunity.

[X] Plaintiff's claims must be dismissed for improper venue pursuant to CR 12(B)(3) due to tribal sovereign immunity.

[X] Plaintiff's claims must be dismissed for failure to state a claim upon which relief can be granted pursuant to CR 12(B)(6) due to tribal sovereign immunity.

Plaintiff's claims must be dismissed for failure to join an indispensable party under CR 12(b)(7) for failure to join the Stillaguamish Tribe of Indians due to tribal sovereign immunity.

Plaintiff's claims must be dismissed for failure to join an indispensable party under CR 12(B)(7) for failure to join Puget Sound Power & Light company and/or its successor in interest which has an interest in the property since 1935.

III. ORDER

Being fully advised on the matter, the Court does hereby FIND and ORDER:

Stillaguamish Tribe of Indians Motion to Dismiss is GRANTED.

The case is dismissed WITH PREJUDICE.

DATED this 20 day of Dec., 2022.

/s/ Marybeth Dingledy

JUDGE DINGLEDY

Filed December 16, 2022
Hearing Date: December 20, 2022
Hearing Time: 9:30 a.m.
Department 5B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

FLYING T RANCH, INC., a Washington Corporation, Plaintiffs, vs. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, and SNOHOMISH COUNTY, a Washington State Municipal Corporation, Defendants.	No. 22-2-07015-31 OBJECTIONS AND PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION TO DISMISS

I. OBJECTION

Plaintiff objects to Defendants' Motion to Dismiss based on its improper filing. The Washington Supreme Court has consistently held that, while either party may submit documents not included in the original complaint for the court to consider in evaluating a CR 12(b)(6) motion, doing so generally converts it into a motion for summary judgment. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25, 29 (2016). Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may be considered in ruling on a CR 12(b)(6) motion to dismiss and the court may take judicial notice of public documents if

their authenticity cannot be reasonably disputed. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168, 176 (2008). Here, Defendant Stillaguamish Tribe of Indians ("The Tribe") attached to its motion three documents: (1) a 1935 express easement granted to Puget Sound Power & Light Company; (2) a declaration from the director of the Tribe's Department of Natural Resources; and (3) an e-mail from the Tribe's attorney to the undersigned. None of these documents were alleged in the complaint and the latter two are not a matter of public record. The distinction matters.

In the context of summary judgment, courts view all facts and inferences in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment motions and any supporting affidavits, memoranda of law, or other documentation must be filed and served no later than 28 calendar days prior to the hearing. CR 56(c). Here, the Tribe set the hearing on its motion for just 13 calendar days after filing and service. That is too few days' notice by more than half.

Plaintiff, as the nonmoving party, is entitled to the full process afforded to it by the Civil Rules. Defendant Tribe cannot so deprive an opposing litigant of such protections by simply invoking CR 12(b)(6). Because Defendant Tribe failed to properly follow summary judgment procedure, Plaintiff asks this court to deny its motion to dismiss.

Plaintiff further objects to The Tribe's characterization of its complaint. The Tribe accuses Plaintiff's complaint of being disingenuous when it Defendant Tribe as a Washington Nonprofit. There is

nothing disingenuous about the complaint. The Stillaguamish Tribe of Indians is a Washington Nonprofit Corporation. See *Exhibit 1*. It is, in fact, where Plaintiff found the appropriate address to effect original service of process.

II. INTRODUCTION

This case is about the ownership of real property located within the territory of the United States, in the State of Washington, in the County of Snohomish. Defendant Tribe absurdly argues that it has deprived U.S. courts of jurisdiction over such real property for no other reason than that it purchased it; even where it has never, by operation of law, actually acquired ownership over the Disputed Property. No court takes this position.

To support its position, Defendant Tribe relies on a gross misstatement of the import of the United States Supreme Court ruling in *Upper Skagit Indian Tribe v. Lundgren* and its impact on the caselaw of Washington State. *Lundgren* does not prohibit all assertions of *In Rem* jurisdiction to defeat a Tribe's assertion of sovereign immunity. Neither does it overrule any Washington cases on the subject. The Court's of Washington State maintain subject matter jurisdiction over real property located within its boundaries, especially where (1) such property is not on Indian Land and (2) ownership of the property passed to an adverse possessor prior to a Tribe ever acquiring title to it.

The Immovable Property Exception provides another exception to The Tribe's assertion of sovereign immunity. When the Tribe purchased real property located outside Indian Land and within the boundaries of the United States, it acted as a private

entity purchasing real property, thereby subjecting itself to the laws of the United States, its political subdivisions, and the jurisdiction of its courts. The Tribe claims the Immovable Property exception to its sovereign immunity does not apply because that exception is based solely on a statute that does not apply to native tribes because they are domestic dependent nations.

First, the Immovable Property exception has a long common law history that remains good law. Second, if the Immovable Property exception does not apply, then Native Tribes would have greater sovereign immunity than even the United States, which acts as their guardian. This is absurd and it is not the law. This Court has personal jurisdiction over The Tribe by virtue of the Immovable Property Exception.

The Tribe cannot undermine this case by claiming immunity from this Court's *in personam* jurisdiction and then calling itself a necessary party. First, *in personam* jurisdiction is not required because Plaintiff seeks to assert its rights over the disputed property for the purposes of this property; no one is seeking a judgment against the Tribe personally and none can be had absent its waiver of immunity. Second, The Tribe never had ownership of the disputed land, it has no interest in it; therefore, it is neither a necessary nor an indispensible party. Third, even if The Tribe is deemed a necessary party, equity and good conscience dictate that this case proceeds.

Finally Defendant Tribe attempts to avoid this case by claiming that Puget Sound Power & Light ("PSP&L) holds an easement to the property for its power lines which would be negatively impacted by the requested relief and therefore it is a necessary

party. This is a red herring. The complaint does not seek to impinge on any easement rights from PSP&L, which doesn't have any power lines on the Disputed Property anyway.

III. FACTS

The Complaint alleges the following undisputed facts:

The Tribe acquired Snohomish County tax parcel 32061200301300 ("Stillaguamish Parcel") on April 13, 2021 from the Clara A. Anderson Family Limited Partnership, a private property owner. Prior to that acquisition, this parcel was privately held and not part of any Indian Land or Reservation.

Plaintiff Flying T Ranch ("Flying T") is the legal owner and fee title holder of Snohomish County tax parcel 32061200300800 ("Flying T's Parcel"), which is located adjacent to the Disputed Property's eastern boundary. It acquired said parcel on July 15, 1991.

Since at least 1962, there has existed a barbed wire fence ("The Fence") which runs in a straight, continuous line 50 feet from the center, and along the south side of, the Burlington Northern, Inc. right-of-way ("BNSF ROW") from Flying T's parcel, to the Stillaguamish Parcel, to Snohomish County parcel number 32061200301200 ("County Parcel") marking the boundary line, enclosing, and separating the portions of the County and Stillaguamish Parcels located south of The Fence ("Disputed Property") and the portions of the County and Stillaguamish Parcels located north of The Fence.

Since its 1991 acquisition of the Flying T Parcel, Flying T. Ranch, Inc. has continuously repaired and maintained The Fence, excluded all others from the

Disputed Property without the permission of the title holders and used the enclosed land to graze and keep livestock. Flying T has had continuous and exclusive possession of the Disputed Property and has consistently treated the property as its own since 1991. Its possession has been actual, uninterrupted, open, notorious, exclusive, and hostile to any claim of right by all others.

Flying T Ranch, Inc. gained ownership of the Disputed Property by adverse possession no later than July 15, 2001, 20 years before The Tribe came on the scene.

IV. ANALYSIS

While The Tribe predicates its motion to dismiss on CR 12(b)(1),(2),(3),(6), and (7), its basis rests almost entirely on The Tribes' claim of absolute sovereign immunity. It argues that The Tribe's sovereign immunity deprives this Court of: (1) subject matter jurisdiction over the property, which makes venue improper and deprives Plaintiff of any claim against it; and (2) Personal jurisdiction over The Tribe, which prevents Plaintiff from joining it, a necessary party, to the suit. Setting aside the fact that The Tribe converted its motion to a summary judgment when it included materials extraneous to the Complaint, we must recognize that this motion is essentially a motion for judgment on the pleadings, especially give The Tribe does not dispute any facts alleged in the Complaint.

Washington Courts treat a motion for judgment on the pleadings identically to a CR 12(b)(6) motion for failure to state a claim. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638, 641 (2012). On a CR 12(b)(6) motion, *no matter outside the pleadings*

may be considered, and the court in ruling on it must proceed without examining depositions and affidavits. *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 673-74, 288 P.3d 48, 53 (2012). A CR 12(b)(6) motion "***must be denied*** unless ***no state of facts which plaintiff could prove***, consistent with the complaint, would entitle the plaintiff to relief on the claim (***emphasis added***)." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). The plaintiff's inability to prove any set of facts must be "beyond doubt." *See Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). "Given this high standard, CR 12(b)(6) motions should be granted sparingly and with care where plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wn.2d 563, 571, 444 P.3d 582, 585 (2019). "[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Halvorson*, 89 Wn.2d at 674. A hypothetical situation can be, but does not have to be, one the complaining party claims to exist, and hypothetical facts can be from outside the formal record. *Id.* at 674-75. The complaint alleges facts sufficient to establish that Flying T adversely possessed the Disputed Property no later than July 15, 2001.

To establish ownership of a piece of property through adverse possession, a claimant must prove that his or her possession of the property was: (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; (4) hostile and under a claim of right; and (5) for a period of ten years. *Shelton v. Strickland*, 106 Wn. App. 45, 50, 21 P. 3d 1179, 1182 (2001). Possession is established if it is such a character as a

true owner would exhibit considering the nature and location of the land in question. *Id.* Once an adverse possessor has fulfilled the conditions of the doctrine, title to the property vests in his or her favor. *Gorman v. City of Woodinville*, 160 Wn. App. 759, 763, 249 P.3d 1040, 1042 (Div. 1, 2011), *aff'd* 175 Wn.2d 68 (2012). The adverse possessor need not record or sue to preserve his rights in the land adversely possessed. *Id.* Rather, the law is clear that title is acquired upon passage of the 10-year period. *Id.*

Here, the complaint alleges sufficient facts to establish that Flying T acquired title to the Dispute Property by operation of the law of adverse possession no later than July 2001. It used and maintained the fence to serve, in part, as a boundary separating the north portions of the Tribe's Parcel from that located south of the BNSF ROW. This was done openly and notoriously, continuously and without interruption, excluding all others, adverse and hostile to the rights of the true owner, and without the permission of the owner of the property since it acquired the property in 1991: and by its predecessors in interest since 1962 (making title by adverse possession actually occurring in 1972). These facts are not in dispute.

Thus, if The Tribe sovereign immunity argument fails for any reason in anyway, then its motion fails too. If there is subject matter jurisdiction, then Snohomish County is the proper venue because the Disputed Property is located in Snohomish County. If there is subject matter jurisdiction, then there is no CR 12(b)(6) failure to state a claim because the court will have the authority to enter orders on this straightforward adverse possession case. If the court has subject matter jurisdiction, it doesn't need *in personam* jurisdiction because Plaintiff does not seek

a judgment personally against the tribe. If the Immovable Property doctrine applies, then the court has both subject matter and *in personam* jurisdiction because, in purchasing the property, The Tribe will have subjected itself to the laws of this State and the Jurisdiction of this Court.

1. This Court has subject matter jurisdiction over the Disputed Property.

Subject matter jurisdiction exists where "the court has the authority to adjudicate the *type of controversy* in the action" *Matter of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66, 69 (1996). The superior court has original jurisdiction in all cases at law which involve the title or possession of real property. RCW 2.08.010.

In its efforts to strip the Court of this jurisdiction over non-Indian real property within Snohomish County, The Tribe grossly and egregiously misstates the law. It claims that the United States Supreme Court Opinion in *Upper Skagit Indian Tribe v. Lundgren* overruled all Washington State Court precedent recognizing an exception to tribal sovereign immunity for adverse possession claims. This is not at all what the *Lundgren* court said or did.

The Court was very clear why it took the case, what it was doing, and what it was not doing. In the very first sentence of the opinion, Justice Gorsuch, writing for the majority, states that certiorari was granted to resolve disagreement among lower court's about the significance of The U.S. Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1651 (2018). Some courts, Washington's among them, misunderstood the *Yakima* decision to establish an automatic exception

to Tribal Sovereign Immunity based solely on the fact that a proceeding is *in rem*. *Id.* at 1652. The entire purpose in granting certiorari was to simply say that "*Yakima* . . . resolved nothing about the law of sovereign immunity. *Id.* at 1653. In other words, the *Ludngren* [sic] Court is not saying there is no exception to sovereign immunity based on *in rem* proceedings, just that you cannot use *Yakima* as the only means to do it. This is not the same thing as saying that there is no exception to sovereign immunity for adverse possession cases or that *in rem* suits can never fall outside the scope of a tribe's sovereign immunity.

In fact, the court explicitly left to the Washington Supreme Court on remand the determination of alternate grounds for exceptions to a tribe's sovereign immunity other than Yakima. *Id.* at 1653 - 1654. It is notable that the *Lundgren* opinion came out on May 21, 2018. The Upper Skagit Tribe quitclaimed the disputed parcel to the Lundgrens in settlement of the dispute on July 26, 2018, and then it subsequently moved the Washington State Supreme Court to dismiss the case. *Exhibit 2*. *Lundrgen* [sic] did not overturn Washington caselaw.

In *Anderson & Middleton Lumber Company v. Quinault Indian Nation*, a lumber company brought an action to partition and quiet title to fee-patented lands within the Quinault Indian Reservation in which it held five-sixths interest as a tenant-in-common. *Anderson & Middleton Lumber Company v. Quinault Indian Nation*, 130 Wn.2d 862, 864 - 865, 929 P.2d 379 (1996). The property in question was formerly tribal land held in trust by the United States with federal restrictions on alienation. *Id.* at 865. It acquired its fee simple status in 1958 when the United

States issued a "fee-patent" under the Indian General Allotment Act of 1887. *Id.* The sole question presented to the Washington State Supreme Court, was whether the Grays Harbor County Superior Court retained jurisdiction after the tribe acquired the interests of the 10 individual owners. *Id.* at 864. In reaching its conclusion, the Court did not rely exclusively on *Yakima.* In holding that the Grays Harbor Superior Court retained jurisdiction to decide ownership of the property, the Court reasoned that:

> It is not disputed that the trial court had proper jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam,* but over the property or the "res" *in rem*. Because the res or property is alienable and encumberable under a federally issued fee patent, it should be subject to a state court *in rem* action which nothing more than divides it among its legal owners according to their relative interests. Reacquisition of a portion of the land by a federally recognized Indian tribe does not alter this result because tribal reacquisition of fee land does not affect the land's alienable status.

Id. at 873-874. This reasoning recognizes that even historic Indian Land are subject to state court *in rem* jurisdiction, where and because such land has been made alienable and encumberable. The Court does not lose that jurisdiction just because an Indian Tribe purchased it. This reasoning stands with or without *Yakima.*

Here, the Disputed Property was not part of Indian Land; it is has been subject to the laws of the State of Washington and its courts and so it remains under *Anderson*. Otherwise, there is nothing stopping a Tribe from buying as much land as it can afford and then shielding it from all claimants without even applying to the federal government to make it part of Indian trust land. This is not the law.

In *Smale v. Noretep*, Plaintiffs Smales initiated a quiet title action in Snohomish County Superior Court alleging that they acquired title through adverse possession to the portion of the neighboring property, owned by Noretep, a Washington State General Partnership, which had been on their side of the original fence line. *Smale v. Noretep*, 150 Wn. App. 476, 478, 208 P.3d 1180 (Div. 1, 2009) *aff'd* 150 Wn. App. 476 (2009). After the Smales filed suit, Noretep sold the property to the Stillaguamish Tribe of Indians who promptly moved to dismiss the amended complaint for lack of jurisdiction. *Id.* at 477.

The Washington Court of Appeals held that the superior court's continuing jurisdiction over the land claimed by the Smales for the purposes of determining ownership does not offend the Tribe's sovereignty. *Id.* In holding that the Smales' claims were not barred, the Washington State Supreme Court reasoned that the doctrine of sovereign immunity does not apply because (1) the proceedings were to determine rights in the property at issue, (2) there is no potential to deprive either party of land they rightfully own, and (3) the Smales acquired title to the land in question through adverse possession *before* The Tribe acquired the property: parties seeking to quiet title to land they allegedly own are not asserting claims against a sovereign. *Id.* at 482 - 483 (*emphasis added*).

Here, like in *Smales* and *Anderson*, the purpose of this suit is to determine the rights in the Disputed Property. And there is no potential to deprive The Tribe of any land that rightfully belongs to it because the whole purpose of the suit is to determine whether it ever had any rights to the land to begin with. If it is found, as is uncontested, that Flying T adversely possessed the property prior to The Tribe's purchase of the land, then The Tribe never had any interest in the Disputed Property. This Court has subject matter jurisdiction over the Disputed Property.

Bay Mills is distinguishable in that it was a suit to enjoin commercial gaming activities taking place off of reservation land. The United States Supreme Court ruled that there is no exception to sovereign immunity based on where the tribe conducts it [sic] activities. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785 (2014). That case was not about determining the rights of ownership to land located in the territory of the United States and not part of any Indian trust lands. It was about the conduct of a tribe and whether or not its sovereign immunity deprived the court of *in personam* jurisdiction.

The Tribe misplaces its reliance on *Hamaatsa*, a New Mexico Supreme Court case from 2016. *Hamaatsa* involved the Bureau of Land Management (BLM), an agency within the Department of the Interior, conveying to Pueblo of San Felipe, fee simple land, reserving for itself use a 40 foot wide strip of land along an existing road. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 979 (NMSC, 2016). About a year later, BLM conveyed that easement to the Tribe. *Id.* Hamaatsa alleged in its complaint that the easement was owned by BLM since 1906, the road was constructed using public funds from at least 1935

until the date of the complaint, Hamaatsa, Inc. and its predecessors in interest used the road to access its property, and it was a public road since at least 1935. *Id.* at 979 - 980.

Hamaatsa urged the Court to recognize an exception to the doctrine of sovereign immunity in matters pertaining to the public's use and access to public roads located on fee-owned tribal lands without tribal interference. *Id.* at 984. It premised its arguments on the *in rem* nature of the proceedings. *Id.* The New Mexico Supreme Court, relying on *Bay Mills* refused to find such an exception based solely on the fact that the suit involved land. *Id.* at 986. Such an exception would have been novel because Hamaatsa's claim was based solely on the form of the suit rather than its substance, which was that Hamaatsa was seeking, to take property owned by the Tribe under a theory unsupported by the law.

Hamaatsa alleged nothing that would undermine the 2002 conveyance of the easement by the BLM to the Tribe. And, in reality, its claim reduces to nothing more than a prescriptive easement. But prescriptive easements cannot be obtained against the federal government. *U.S. v. Vasarajs*, 908 F.2d 443, 447 n.3 (9th Cir. 1990) and BLM is an agency of the federal government. So Hamaatsa never acquired any interest of any kind in the conveyed property. Moreover, being federal land, it never fell under the jurisdiction of the State of New Mexico.

Here, unlike in *Bay Mills* there is no commercial activity at issue. And unlike in *Hamaatsa*, Flying T's complete ownership interest in the Disputed Property was established more than 20 years ago. The Tribe has no interest in that property to protect.

2. The immovable Property Exception applies to The Tribe.

For centuries, there has been "uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y.B. Int'l Law 220, 244 (1951). The immovable-property exception is a corollary of the ancient principle of *lex rei sitae*. Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." F. Wharton, Conflict of Laws § 273, p. 607 (G. Parmele ed., 3d ed. 1905). It reflects the fact that a sovereign "cannot suffer its own laws . . . to be changed" by another sovereign. H. Wheaton, Elements of International Law § 81, p. 114 (1866). It is "self-evident" that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (C.A.D.C.1984). And because "land is so indissolubly connected with the territory of a State," a State "cannot permit" a foreign sovereign to displace its jurisdiction by purchasing land and then claiming "immunity." *Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l L. Supp. 451, 578 (1932). An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of "the State of the situs." *Id.*

The United States Supreme Court held, nearly 200 years ago, that "the nature of sovereignty" requires that "[e]very government" have "the exclusive right of regulating the descent, distribution, and grants of the

domain within its own boundaries." *Green v. Biddle*, 8 Wheat. 1, 12, 5 L.Ed. 547 (1823).

The acceptance of the immovable-property exception has not wavered over time. In the 20th century, as nations increasingly owned foreign property, it remained "well settled in International law that foreign state immunity need not be extended in cases dealing with rights to interests in real property." Weber, The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect, 3 Yale J. Int'l L. 1, 33 (1976). Countries around the world continued to recognize the exception in their statutory and decisional law. See Competence of Courts 572-590 (noting support for the exception in statutes from Austria, Germany, Hungary, and Italy, as well as decisions from the United States, Austria, Chile, Czechoslovakia, Egypt, France, Germany, and Romania). "All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals." C. Hyde, 2 International Law 848, n. 33 (2d ed. 1945) (internal quotation marks omitted).

Given the centuries of uniform agreement on the immovable-property exception, it is no surprise that all three branches of the United States Government have recognized it. Writing for a unanimous Court, Chief Justice Marshall noted that "the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual." *Schooner Exchange v. McFaddon*, 7 Cranch 116, 144–145, 3 L.Ed. 287 (1812). Thus, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that

property to the territorial jurisdiction . . . and assuming the character of a private individual." *Id.*, at 145. The Court echoed this reasoning over a century later, holding that state sovereign immunity does not extend to "[l]and acquired by one State in another State." *Georgia v. Chattanooga*, 264 U.S. 472, 480, 44 S.Ct. 369, 68 L.Ed. 796 (1924). In 1952, the State Department acknowledged that "[t]here is agreement[,] supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property." Tate Letter 984. Two decades later, Congress endorsed the immovable-property exception by including it in the Foreign Sovereign Immunities Act of 1976. See 28 U.S.C. § 1605(a)(4) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue"). This statutory exception was "meant to codify the *pre-existing* real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 200, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007) (emphasis added; internal quotation marks omitted).

There is an argument to be made that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (emphasis deleted). Yet "property ownership is not an inherently sovereign function," *Permanent Mission*, supra, at 199, 127 S.Ct. 2352, and Hamilton's general statement does not suggest that immunity is automatically available or is not subject to longstanding exceptions. Because the immovable-

property exception clearly applies to both state and foreign sovereign immunity, the only question is whether it also applies to tribal immunity. It does.

In 2017, the United State Supreme Court refused to "exten[d]" tribal immunity "beyond what common-law sovereign immunity principles would recognize." *Lewis v. Clarke*, 197 L. Ed. 2d 631, 137 S. Ct. 1285, 1292 (2017)(tribal sovereign immunity is no broader than the protection offered by state or federal sovereign immunity). Tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831), that "no longer posses[s] the full attributes of sovereignty," *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (internal quotation marks omitted). Given the "limited character" of their sovereignty, *Id.*, Indian tribes possess only "the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). That is why the US Supreme Court declined to make tribal immunity "broader than the protection offered by state or federal sovereign immunity." *Lewis*, 137 S. Ct. at 1292. Accordingly, because States and foreign countries are subject to the immovable-property exception, Indian tribes are too. "There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Id.* The other counterargument raised by The Tribe for why the exception should not extend to tribal immunity has no merit.

The Tribe notes that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." But the authority for that proposition merely states that tribal immunity "is not coextensive with that *of the States*." *Kiowa Tribe of Okla. v.*

Manufacturing Technologies, Inc., 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)). Even assuming arguendo that is so, it does not mean that the Tribe's immunity can be more expansive than any recognized form of sovereign immunity, including the immunity of the United States and foreign countries. See *Lewis*, supra, at 1659 - 1660, 137 S.Ct., at 1291-1292. No one argues that the United States could claim sovereign immunity if it wrongfully asserted ownership of private property in a foreign country—the equivalent of what The Tribe attempts to do here in this case. The United States plainly would be subject to suit in that country's courts. See Competence of Courts 572-590.

The Founders would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction. Tribal immunity is "a judicial doctrine" that is not mandated by the Constitution. *Kiowa*, 523 U.S., at 759, 118 S.Ct. 1700. It "developed almost by accident," was reiterated "with little analysis," and does not reflect the realities of modern-day Indian tribes. See id., at 756-758. Extending it even further by eliminating the Immovable Property Exception would contradict the bedrock principle that each State is "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228, 11 L.Ed. 565 (1845); accord, *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 9, 8 S.Ct. 811, 31 L.Ed. 629 (1888). Since 1812, the United States Supreme Court "entertain[ed] no doubt" that "the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate [d]." *United States v. Crosby*, 7 Cranch

115, 116, 3 L.Ed. 287 (1812). Justice Bushrod Washington declared it "an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated." *Kerr v. Devisees of Moon*, 9 Wheat. 565, 570, 6 L.Ed. 161 (1824). The US Supreme Court has been similarly emphatic ever since. See, e.g., *Munday v. Wisconsin Trust Co.*, 252 U.S. 499, 503, 40 S.Ct. 365, 64 L.Ed. 684 (1920) ("long ago declared"); *Arndt v. Griggs*, 134 U.S. 316, 321, 10 S.Ct. 557, 33 L.Ed. 918 (1890) ("held repeatedly"); *United States v. Fox*, 94 U.S. 315, 320, 24 L.Ed. 192 (1877) ("undoubted"); *McCormick v. Sullivant*, 10 Wheat. 192, 202, 6 L.Ed. 300 (1825) ("an acknowledged principle of law").

Allowing the judicial doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution's design, which "leaves to the several States a residuary and inviolable sovereignty." *New York v. United States*, 505 U.S. 144, 188, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting The Federalist No. 39, at 256). The Immovable Property Exception applies to the Tribes too.

3. Neither The Tribe nor Puget Sound Power & Light are necessary parties; even if so, equity and good conscience require this case to proceed.

Dismissal under CR 12(b)(7) for failure to join an indispensable party under CR 19 is a drastic remedy, courts prefer trials on the merits, it should be employed sparingly when there is no other ability to obtain relief. See*, Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196, 1202 (2006) *citing*

e.g., 7 Wright & Miller § 1609, at 130 (in general, dismissal should be ordered only when a defect cannot be cured and serious prejudice or inefficiency will result). The CR 19 analysis is two parts: (1) whether a party is needed for just adjudication; and (2) if an absent party is needed but it is not possible to join the party, then the court must determine whether in "equity and good conscience" the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. Id. at 495.

If joinder of a party is necessary and joinder is not feasible, the court considers: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) if there is prejudice, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. CR 19(b).

a. The Tribe is not a necessary or indispensible party.

Flying T acquired ownership interest in the Disputed Property no later than July 2001. Therefore, The Tribe has no interest in that property to protect. Moreover, Plaintiff does not seek a judgment personally against The Tribe. There is no way this case could result in The Tribe losing anything to which it has a right. Even if The Tribe is deemed a necessary party and that it cannot be joined, equity and good conscience dictate that this case proceed, otherwise, the rightful owner (Flying T) by operation of law

(Adverse Possession) of the Disputed Property will have its land taken from it by a party (The Tribe) that has no interest in that property.

b. Puget Sound Power & Light is not a necessary or indispensible party.

In an obvious reference to § 4.1 of the Complaint, The Tribe claims that PSP&L is a necessary party because "any decision of this Court determining that petitioner has 'exclusive' and 'complete' possession of the land would affect [its] interests." The Tribe fails to mention that the very next sentence states, in §4.2 of the Complaint, "[t]hat such title quieted in Plaintiff shall be subject to any easement, including those, if any, held by Puget Sound Power & Light Company." The complaint seeks nothing that will impinge on the rights of Puget Sound Power & Light. The Tribe cannot have failed to notice this. Second, the power lines which are the subject of the easement can in no way be affected because they are not even located on the property. They run to the east of the disputed property. *Exhibit 3.*

V. CONCLUSION

The Tribe's assertion of sovereign immunity is meritless. The Court had jurisdiction over the property before The Tribe purchased it in 2021. Flying T has owned through adverse possession the Disputed property for 20 years before The Tribe acquired it from the Anderson Trust. The Anderson Trust, a private family trust, by virtue of the adverse possession, had no interest in the Disputed Property to convey to The Tribe. Therefore The Tribe has never had any interest in that property.

The Immovable Property Exception to sovereign immunity is rooted in centuries old case law that remains good law and applicable to The Tribes. Ruling otherwise would ignore hundreds of years of caselaw and confer a greater immunity to Native Tribes than is enjoyed by any other sovereign power, including the United States.

The Court has subject matter jurisdiction over the Disputed Property because it was subject to its authority before the sale to The Tribe and purchasing the property alone is insufficient to take it out of the Court's jurisdiction. The Court has subject matter jurisdiction over the Disputed Property because it is not owned by the Tribe but rather by the adverse possessor, Flying T.

The Court has personal jurisdiction over The Tribe because it purchased property within the domain of the United States thereby subjecting itself to its jurisdiction and that of its political subdivisions under the Immovable Property doctrine.

Neither The Tribe nor PSP&L are necessary or indispensable parties: the former because it has no interest in the Disputed Property; the latter because the complaint seeks no relief that will impinge on its easement rights.

For the above-stated reasons, Plaintiff respectfully requests this Court deny Defendants Tribe's motion to dismiss the Complaint.

RESPECTFULLY SUBMITTED this 16th day of December, 2022.

LAW OFFICES OF VIC S. LAM, P.S.

/s/ Jules R. Butler

Jules R. Butler, WSBA #41772
Attorney for Plaintiff

Filed November 15, 2022

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

FLYING T RANCH, INC., a Washington Corporation, Plaintiffs, vs. STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, and SNOHOMISH COUNTY, a Washington State Municipal Corporation, Defendants.	No. 22-2-07015-31 **COMPLAINT TO QUIET TITLE BY ADVERSE POSSESSION**

COMES NOW Plaintiff Flying T Ranch, Inc. asserting a cause of action against Defendants Stillaguamish Tribe of Indians and Snohomish County, and alleges as follows:

I. JURISDICTION AND VENUE

1.1 This Court has jurisdiction, and venue is properly laid with this Court, because this action involves quieting title to certain real property located within Snohomish County, Washington.

II. PARTIES

2.1 Plaintiff Flying T. Ranch, Inc. (hereinafter "Flying T"), is a Washington corporation, incorporated under the laws of the State of Washington, having paid all licenses and fees due the State of Washington, and being domiciled in Snohomish County with its principal place of business being 18808 State Route

530 NE, Arlington WA 98223. Flying T is a corporation wholly owned by Tammy S. Blakey.

2.2 Defendant Stillaguamish Tribe of Indians (hereinafter the "Stillaguamish Tribe") is a Washington Non-Profit Corporation organized and existing under the laws of the State of Washington as a Tribal Government and domiciled in Snohomish County with its principal location being 3322 236th Street NE, Arlington, WA 98223.

2.3 Defendant Snohomish County (hereinafter "Snohomish County") is a home rule charter county and a political subdivision of the State of Washington.

III. PERTINENT FACTS

3.1 Flying T is the legal owner and fee title holder of Snohomish County tax parcel 32061200300800 ("parcel 32061200300800"), depicted by the yellow highlighted area in **Exhibit A** attached hereto, and legally described as follows:

> BEGINNING AT THE NORTHWEST CORNER OF THE NE ¼ SW ¼ OF SECTION 12, TOWNSHIP 32 NORTH, RANGE 6 EAST OF THE WILLAMETTE MERIDIAN; THENCE WEST 297 FEET; THENCE SOUTH 660 FEET; THENCE WEST 33 FEET; THENCE SOUTH TO THE SOUTH LINE OF THE BURLINGTON NORTHERN, INC. RIGHT OF WAY, THE TRUE POINT OF THE BEGINNING; THENCE SOUTH TO THE NORTH BANK OF THE STILLAGUAMISH RIVER; THENCE EASTERLY ALONG SAID BANK TO THE WEST BOUNDARY OF GOVERNMENT LOT 1; THENCE NORTH TO THE SOUTH LINE OF THE BURLINGTON NORTHERN, INC. RIGHT OF WAY; THENCE

WESTERLY ALONG THE SOUTHERLY LINE OF SAID RIGHT OF WAY TO THE TRUE POINT OF BEGINNING.

3.2 On March 29, 1974, Edwin and Antoinette Tanis purchased and thereby acquired title to parcel 32061200300800 from Robert and Doris Olson.

3.3 On February 2, 1990, judgment was entered against Edwin and Antoinette Tanis in Snohomish County Superior Court cause number 88-2-04964-3. On February 9, 1990, the Court ordered a Special Execution & Order of Sale.

3.4 On April 6, 1990, the Snohomish County Sheriff sold at auction, inter alia, parcel 32061200300800 to Bruce and Tammy Blakey.

3.5 On April 19, 1990, the Sheriff of Snohomish County conveyed title via Sheriff's Deed to Real Property to Bruce and Tammy Blakey.

3.6 On July 15, 1991, Bruce and Tammy Blakey conveyed and quitclaimed parcel 32061200300800 to Flying T, which has owned said parcel since then.

3.7 The Stillaguamish Tribe is the legal owner and fee title holder of Snohomish County tax parcel 32061200301300 ("parcel 32061200301300"), depicted by the yellow highlighted area in **Exhibit B** attached hereto, and legally described as follows:

SEC 12 TWP 32 RGE 06RT-19) A STRIP OF LAND 20FT WIDE RUN FROM NBANK OF STILLAG. RIV. N TO CO RD ALG E SIDE OF LAND OWNED BYHECTOR FRASER BEING ABOUT 20FT WIDE X 725FT LONG LESS TH PTNOF ABOVE DESCPTY LY NLY OF A LN BAAP OPPOSITE HES 491+ 00 ON SR530 SURVY LN OF SR 530 CICERO VIC. TO OSO VIC. & 50FT SLY THRFR THELY PLW SD

SRVY LN TAP OPPOSITEHES 498 + 00 THON & END OF LNDESC PER WD REC'D AF 8908250382

3.8 On April 13, 2021, the Clara A. Anderson Family Limited Partnership conveyed to the Stillaguamish Tribe title to parcel 32061200301300 via Statutory Warranty Deed.

3.9 Prior to April 13, 2021, parcel 32061200301300 was privately held and not part of any Indian Land or Reservation.

3.10 Snohomish County is the legal owner and fee title holder of Snohomish County tax parcel 32061200301200 ("parcel 32061200301200"), depicted by the yellow highlighted area in **Exhibit C** attached hereto, and legally described as follows:

SEC 12 TWP 32 RGE 06RT-18A) W 990FT OF GOVT LOT 2 LY S OF NP R/W & N OF STILLAGUAMISH RIVER.

3.11 On June 27, 1995, Walter and Marian Farer conveyed to Snohomish County title to parcel 32061200301200 via Statutory Warranty Deed.

3.12 Prior to June 27, 1995, parcel 32061200301200 was private held and not part of any public lands.

3.13 Since at least 1962, there has existed a barbed wire fence ("The Fence"), marked in the image contained in **Exhibit D** as bold dash marks, which runs in a straight and continuous line 50 feet from the center, and along the south side of, the Burlington Northern, Inc. right-of-way ("BNSF ROW") from Flying T's parcel 32061200300800 to Stillaguamish Tribe's parcel 32061200301300 to Snohomish County's parcel 32061200301200 enclosing those portions of the Stillaguamish and Snohomish parcels, marked in the image contained in **Exhibit D** respectively as

"Stillaguamish Tribe" and "Snohomish County," (hereinafter "Enclosed and Separated Land") with the Flying T parcel. The Fence also marked, without the permission of the true owners, the boundary line separating the Enclosed and Separated Land from the BNSF ROW and the portions of the Stillaguamish and Snohomish parcels located north of The Fence.

3.14 Robert Olsen, who owned Flying T's parcel 32061200300800 until March 29, 1974 had repaired and maintained The Fence, excluding all others from the Enclosed and Separated Land without the permission of the true owners, and used the Enclosed and Separated Land as part of his own to graze and keep livestock since at least 1961.

3.15 Edwin Tanis continued Robert Olsen's practice of repairing and maintaining The Fence, [sic]

3. Bruce and Tammy Blakey continued Robert Olsen's and then Edwin Tanis' practice of repairing and maintaining The Fence, excluding all others from the enclosed area without the permission of the title holders, and using the enclosed land to graze and keep livestock until they conveyed title to Flying T. Ranch, Inc. in 1991.

4. Since acquiring the property in 1991 through the present, Flying T. Ranch, Inc. has continuously repaired and maintained The Fence, excluding all others from the enclosed area without the permission of the title holders, and using the enclosed land to graze and keep livestock.

3.14 Plaintiff and its predecessors in interest have had continuous and exclusive possession of the area of the Snohomish and Stillaguamish parcels running south of and enclosed by The Fence since at least 1962 and have consistently treated the property as their

own throughout their respective periods of ownership. Their possession has been actual, uninterrupted, open, notorious, exclusive, and hostile to any claim of right by all others.

IV. PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants and of them known or unknown including any one claiming by through and/or under them as follows:

4.1 That all title, estate, rights, and entitlement, including possession to the portions of Snohomish County parcel numbers 32061200301200 and 32061200301300 that lie south of and area enclosed by The Fence be quieted exclusively in the name of Flying T. Ranch, Inc.

4.2 That such title quieted in Plaintiff shall be subject to any easements, including those, if any, held by Puget Sound Power & Light Company.

4.3 For such costs and fees as are allowed by law.

4.4 For such other and further relief as the Court may deem just and proper.

any, held by Puget Sound Power & Light Company. [sic]

4.3 For such costs and fees as are allowed by law. [sic]

4.4 For such other and further relief as the Court may deem just and proper. [sic]

DATED on this 14th day of November, 2022.

LAW OFFICES OF VIC S. LAM, PS

/s/ Jules R. Butler

Jules R. Butler, WSBA No. 41772
Attorney for Plaintiff

Exhibit A

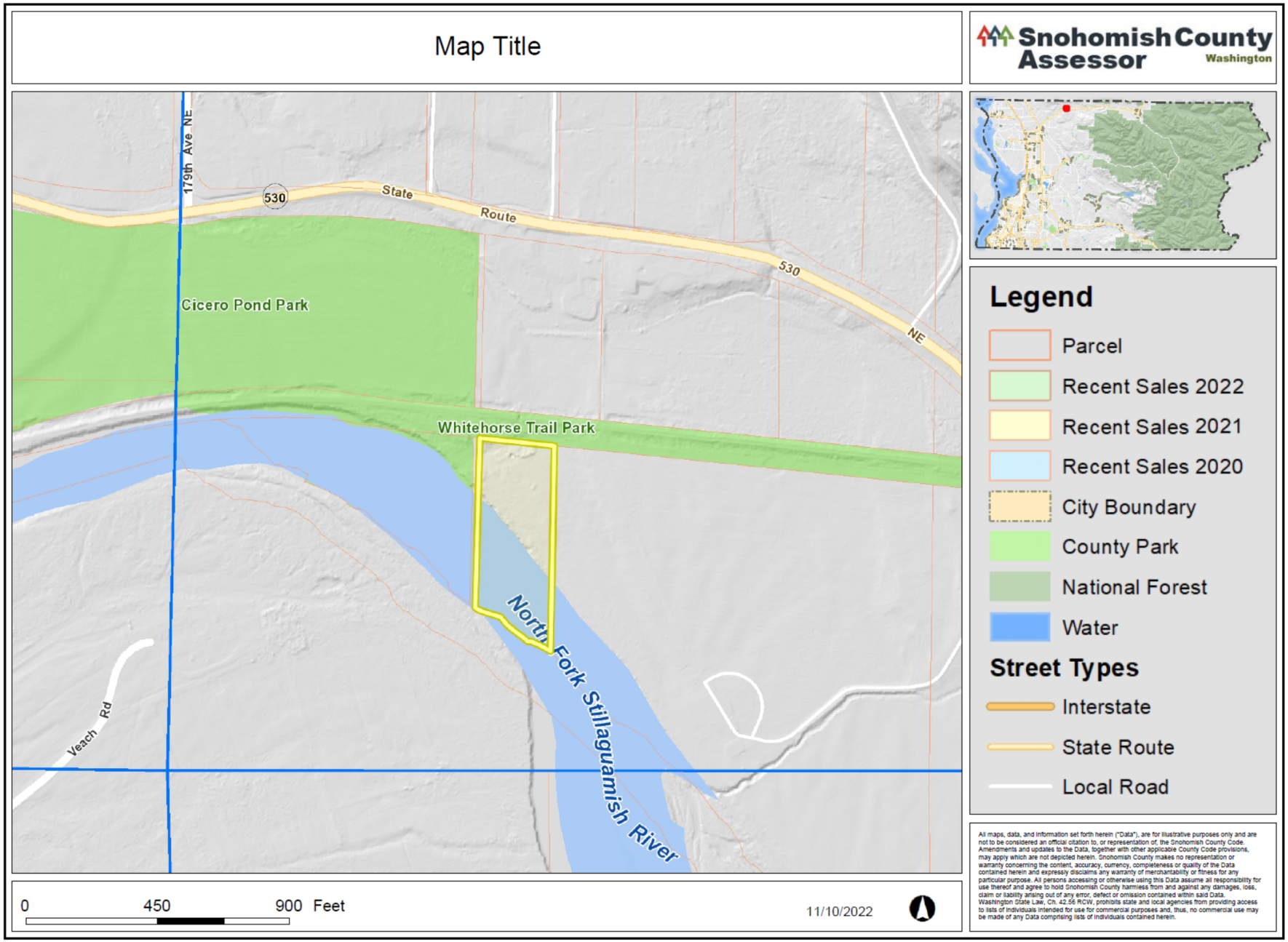
Map Title
Snohomish County Assessor
Washington
179th Ave NE
530
State Route 530
NE
Cicero Pond Park
Whitehorse Trail Park
North Fork Stillaguamish River
Veach Rd
0
450
900 Feet
11/10/2022
Legend
Parcel
Recent Sales 2022
Recent Sales 2021
Recent Sales 2020
City Boundary
County Park
National Forest
Water
Street Types
Interstate
State Route
Local Road
All maps, data, and information set forth herein ("Data"), are for illustrative purposes only and are not to be considered an official citation to, or representation of, the Snohomish County Code. Amendments and updates to the Data, together with other applicable County Code provisions, may apply which are not depicted herein. Snohomish County makes no representation or warranty concerning the content, accuracy, currency, completeness or quality of the Data contained herein and expressly disclaims any warranty of merchantability or fitness for any particular purpose. All persons accessing or otherwise using this Data assume all responsibility for use thereof and agree to hold Snohomish County harmless from and against any damages, loss, claim or liability arising out of any error, defect or omission contained within said Data. Washington State Law, Ch. 42.56 RCW, prohibits state and local agencies from providing access to lists of individuals intended for use for commercial purposes and, thus, no commercial use may be made of any Data comprising lists of individuals contained herein.

Exhibit B

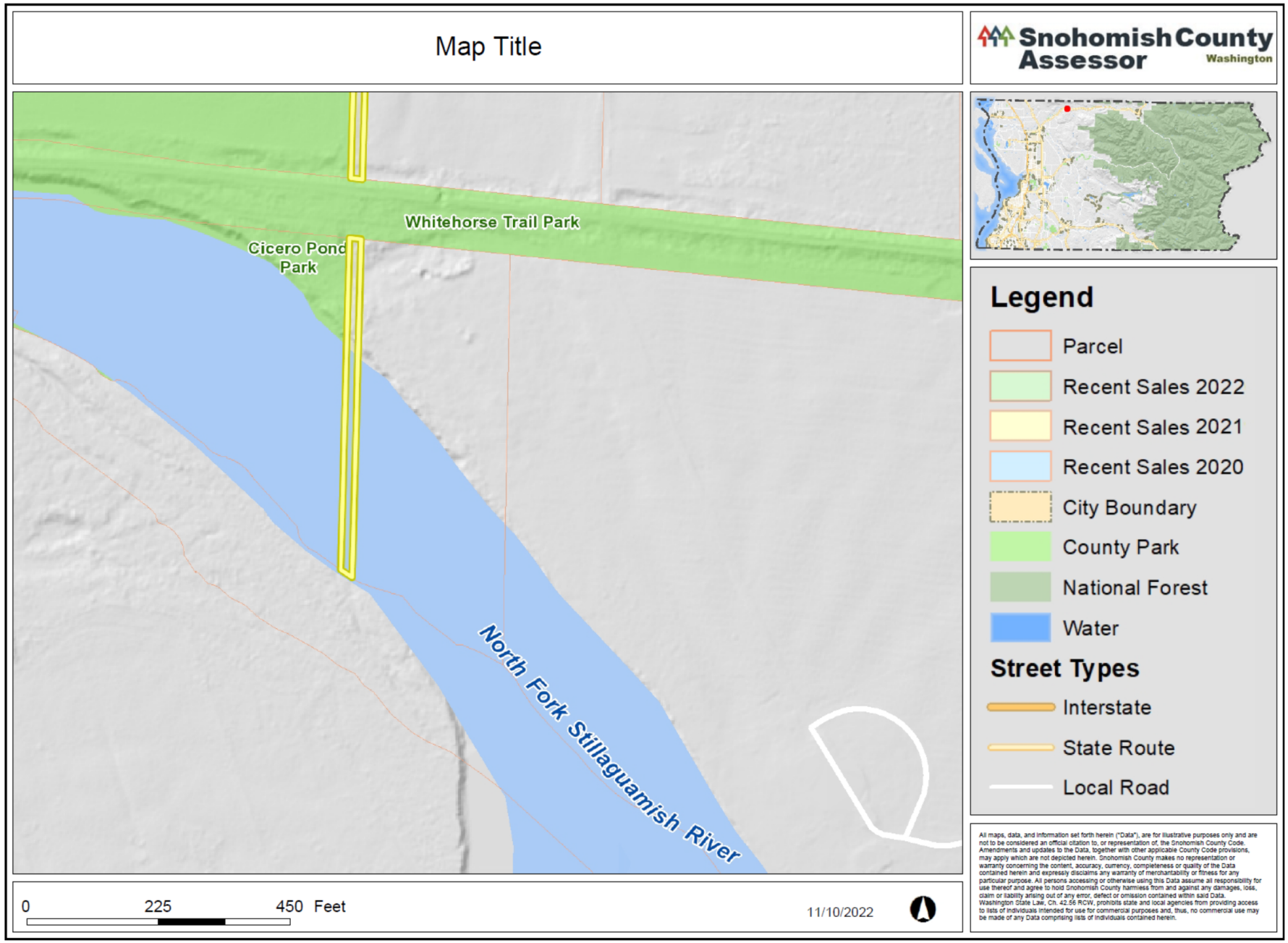
Map Title
Snohomish County Assessor
Washington
Whitehorse Trail Park
Cicero Pond Park
North Fork Stillaguamish River
Legend
Parcel
Recent Sales 2022
Recent Sales 2021
Recent Sales 2020
City Boundary
County Park
National Forest
Water
Street Types
Interstate
State Route
Local Road
0
225
450 Feet
11/10/2022
All maps, data, and information set forth herein ("Data"), are for illustrative purposes only and are not to be considered an official citation to, or representation of, the Snohomish County Code. Amendments and updates to the Data, together with other applicable County Code provisions, may apply which are not depicted herein. Snohomish County makes no representation or warranty concerning the content, accuracy, currency, completeness or quality of the Data contained herein and expressly disclaims any warranty of merchantability or fitness for any particular purpose. All persons accessing or otherwise using this Data assume all responsibility for use thereof and agree to hold Snohomish County harmless from and against any damages, loss, claim or liability arising out of any error, defect or omission contained within said Data. Washington State Law, Ch. 42.56 RCW, prohibits state and local agencies from providing access to lists of individuals intended for use for commercial purposes and, thus, no commercial use may be made of any Data comprising lists of individuals contained herein.

Exhibit C

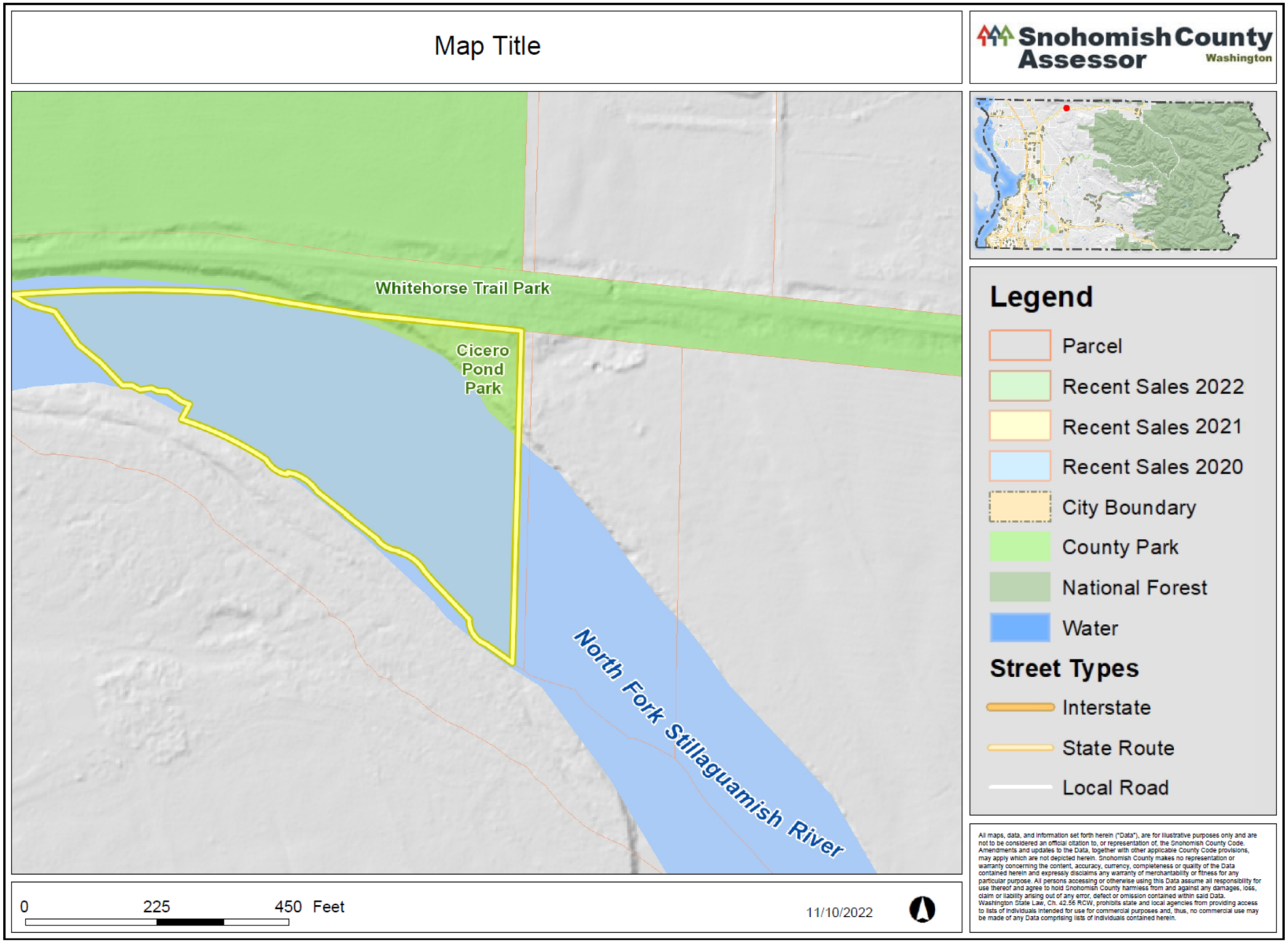
Map Title
Snohomish County Assessor
Washington
Whitehorse Trail Park
Cicero Pond Park
North Fork Stillaguamish River
Legend
Parcel
Recent Sales 2022
Recent Sales 2021
Recent Sales 2020
City Boundary
County Park
National Forest
Water
Street Types
Interstate
State Route
Local Road
0
225
450 Feet
11/10/2022
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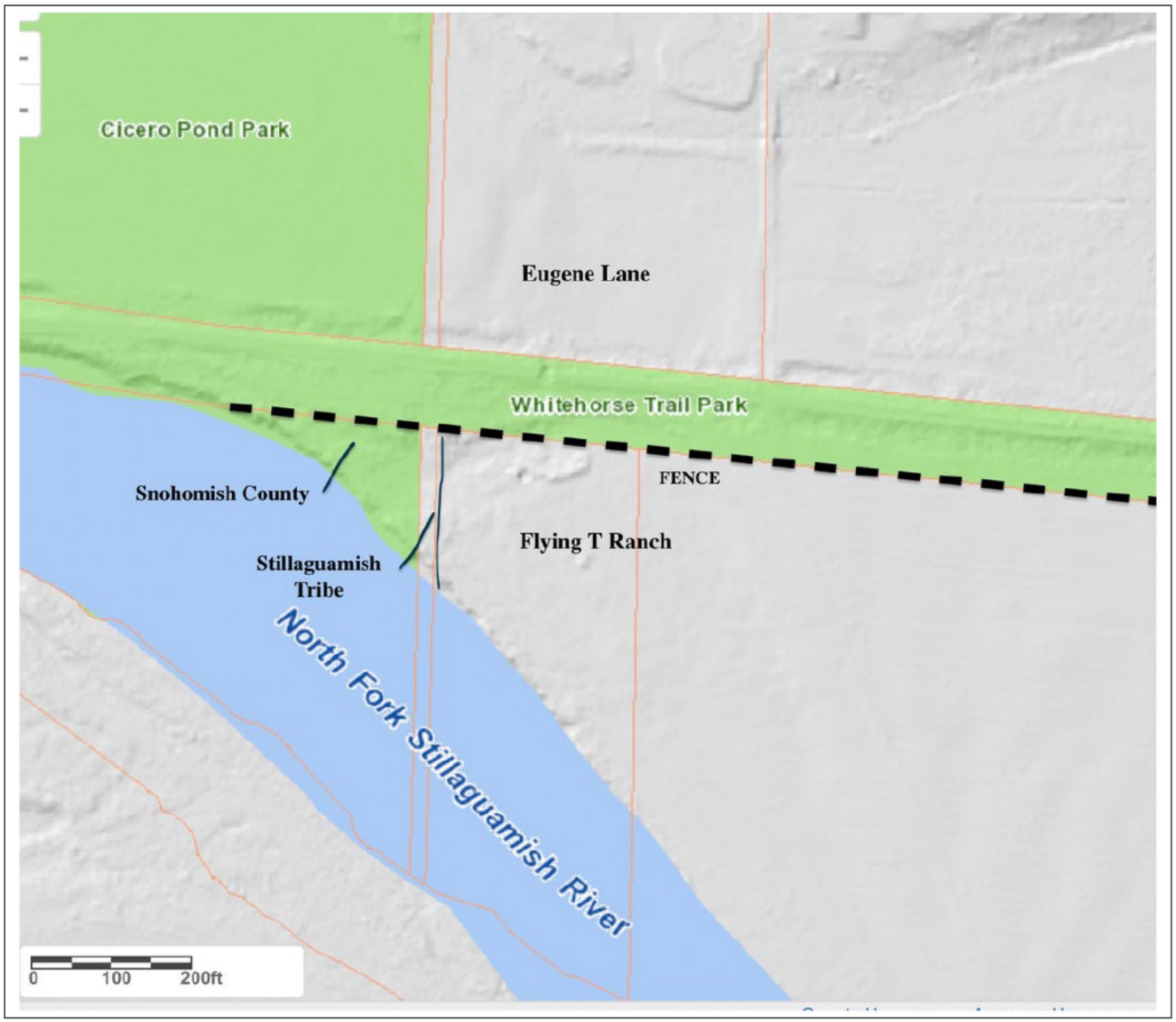
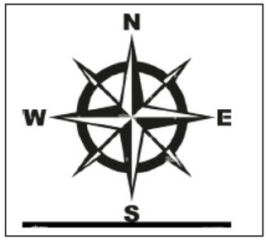
Exhibit D


Cicero Pond Park
Eugene Lane
Whitehorse Trail Park
FENCE
Snohomish County
Flying T Ranch
Stillaguamish Tribe
North Fork Stillaguamish River
0
100
200ft


N
W
E
S

201807260080
07/26/2018 03:42 PM
Fees: $102.00
Skagit County Auditor

After recording return to:

Scott M. Ellerby
Mullavey, Prout, Grenley & Foe, LLP
PO Box 70567
Seattle, WA 98127-0567

DOCUMENT TITLE: Quit Claim Deed

GRANTOR: Upper Skagit Indian Tribe

GRANTEE: Sharline Lundgren and Ray Lundgren, wife and husband

---

LEGAL DESCRIPTION: Portion of Government Lot 1, Section 1, Township 35 North, Range 3 East, W.M., Skagit County, Washington

---

ASSESSOR'S PROPERTY TAX PARCEL NOS.: P33521, ~~P33568~~

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07/26/2018 03:42 PM

QUIT CLAIM DEED

The Grantor, Upper Skagit Indian Tribe, to settle litigation involving disputed claims to the following described real estate, hereby conveys and quit claims to Sharline Lundgren and Ray Lundgren, wife and husband, as Grantee, all of Grantors' right, title, and interest in and to the following described real estate situated in the County of Skagit, State of Washington, including any after acquired title:

See attached Exhibit A.

Dated: July 26 2018.

[Skagit County Treasurer stamp]

GRANTOR
Upper Skagit Indian Tribe
By: /s/ Jennifer R. Washington
Its: Tribal Chairman

STATE OF WASHINGTON)
) ss.
COUNTY OF SKAGIT)

I certify that I know or have satisfactory evidence that Jennifer R. Washington of the Upper Skagit Indian Tribe, personally appeared before me, and said person signed this instrument and executed the within and foregoing instrument to be her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 26 day of July 2018.

[notary stamp]

/s/ Donna M. Schopf
Print Name: Donna M. Schopf

Notary Public in and for the state of Washington, residing at Skagit County
My appointment expires 11-1-2018

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07/26/2018 03:42 PM

Pacific Surveying & Engineering, Inc
land surveying • civil engineering • consulting
• planning • gis
909 Squalicum Way, Ste 111, Bellingham, WA 98225
Phone 360.671.7387 Facsimile 360.671.4685
Email info@psesurvey.com

Exhibit 'A'

QUIT CLAIM PROPERTY DESCRIPTION

THAT PORTION OF GOVERNMENT LOT 1, SECTION 1, TOWNSHIP 35 NORTH, RANGE 3 EAST, W.M., SKAGIT COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT I; THENCE NORTH ALONG THE EAST LINE THEREOF NORTH 02°02'48" EAST 20.04 FEET; THENCE DEPARTING SAID EAST LINE NORTH 87°15'45" WEST 271.52 FEET; THENCE NORTH 87°12'50" WEST 722.85 FEET; THENCE NORTH 88°29'28" WEST 336.65 FEET, MORE OF LESS, TO A POINT ON THE WEST LINE OF SAID GOVERNMENT LOT 1 AND THE CENTERLINE OF HOBSON ROAD; THENCE SOUTH ALONG SAID WEST LINE SOUTH 02°04'15" WEST 41.81 FEET TO THE SOUTHWEST CORNER OF SAID GOVERNMENT LOT 1; THENCE EAST ALONG THE SOUTH LINE OF

SAID GOVERNMENT LOT 1 SOUTH 88°29'02" EAST 1331.01 FEET, MORE OR LESS, TO SAID SOUTHEAST CORNER AND THE POINT OF BEGINNING.

TOGETHER WITH THE BARBED WIRE FENCE AS LOCATED BY PACIFIC SURVEYING AND ENGINEERING IN 2013 RUNNING FROM EAST TO WEST WITHIN GOVERNMENT LOT 1, BEING CONTAINED WITHIN THE ABOVE PROPERTY DESCRIPTION.

EXCEPT RIGHT OF WAY FOR HOBSON ROAD.

CONTAINING 44,765 SQUARE FEET, MORE OR LESS.

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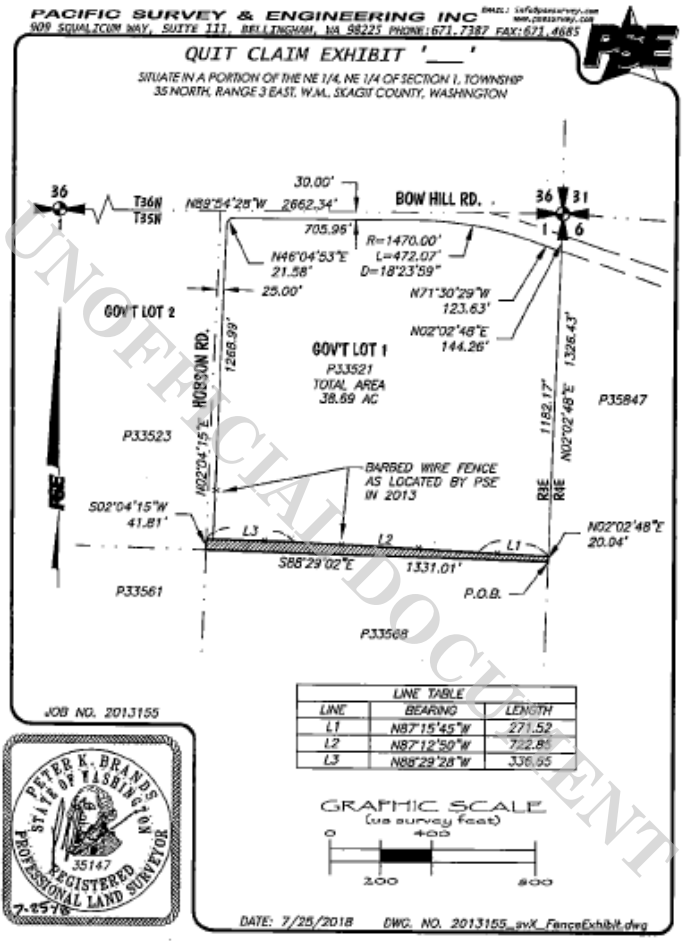
07/26/2018 03:42 PM Page 4 of 4



No. _____

In the Supreme Court of the United States

FLYING T RANCH, INC., a Washington corporation,

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS,
a federally recognized Indian tribe,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State of Washington

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 4,643 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2026.

DAMIEN M. SCHIFF
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
dschiff@pacificlegal.org
Counsel for Petitioner

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. ___

----------X

FLYING T RANCH, INC., a Washington corporation,

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian tribe,

Respondent,

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Ann Tosel, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioner*.

That on the 17th day of February, 2026, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

Counsel for Respondent Stillaguamish Tribe of Indians
Raven Arroway-Healing
Stillaguamish Tribe of Indians
3322 - 236th St. NE
Arlington, WA 98223
360.572.3074
rhealing@stillaguamish.com

Counsel for Respondent Snohomish County
George Bradley Marsh,
Civil Division, Snohomish County Pros. Attorney's Office
3000 Rockefeller Ave.
Everett, WA, 98201-4046
425.388.6361
gmarsh@snoco.org

by sending three copies of same, addressed to each individual respectively, through Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* and three hundred dollar filing fee check through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of February, 2026.

Ann Tosel

Ann Tosel

Sworn to and subscribed before me
this 17th day of February, 2026.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026