No. 1034300

SUPREME COURT
OF THE STATE OF WASHINGTON

FLYING T RANCH,

Petitioner,

v.

STILLAGUAMISH TRIBE OF INDIANS, et al.

Respondents,

Respondent's Answer to Petition for Review

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Table of Contents

1. INTRODUCTION 1

2. COUNTERSTATEMENT OF THE CASE 4

3. ARGUMENT WHY REVIEW SHOULD BE DENIED 6

3.1 *The Court of Appeals properly held that there is no immovable property exception to tribal sovereign immunity.* 6

3.2 *The Court of Appeals properly determined that Lundgren, Anderson, and Smale are no longer good law.* 11

3.3 *Flying T's new arguments should not be heard.* ..15

3.4 *There is no alternative basis for an exception to sovereign immunity relating to prior ripened adverse possession.* 17

3.5 *Flying T confuses sovereignty to govern with sovereign immunity from suit.* 24

3.6 *There is no need for any court to address joinder issues in this case.* 26

3.7 *There is no issue of substantial public interest that needs to be determined by this Court.* 26

4. CONCLUSION 27

Table of Authorities

Federal Cases

Baker v. Delta Air Lines, Inc., 6 F.3d 632 (9th Cir. 1993).....15

Burlison v. United States, 533 F.3d 41(6th Cir. 2008).....20

City of Sherrill v. Oneida Nation of N.Y., 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005).....25

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)..... 2, 3, 12, 13, 17, 22, 23

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 16

FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L.Ed.2d 308 (1996).....12

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) 21

In re. Green, 980 F.2d 590 (9th Cir. 1992).....10

Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 118 S.Ct. 1700, 140 L.Ed.2d 981, 523 U.S. 751 (1998). 8

Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005) 8

Michigan v. Bay Mills Indian Community, 572 U.S. 782, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) 9

Oneida Indian Nation v. Phillips, 360 F.Supp.3d 122 (2nd Cir. 2018)..... 9

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 640 (1991).....14

Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670, 56 L.Ed.2d 106, 436 U.S. 49 (1978) 8, 9

State Oil Co. v. Khan, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).....14

U.S. v. Pappas, 814 F.2d 1342, (n. 3) (9th Cir. 1987)...19

Upper Skagit v. Lundgren, 584 U.S. 554, 200 L.Ed.2d 931, 138 S. Ct. 1649 (2018) 2, 3, 11, 12, 26, 27

Washington State Cases

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wn.2d 862, 929 P.2d 379 (1996)..... ..... 3, 11, 13, 14, 21, 22, 23

Comm'l Waterway Dist. No. 1 vs. Permanente Cement Co., 61 Wn.2d 509, 379 P.2d 178 (1963) 21

Gorman v. City of Woodinville, 175 Wn.2d 68, 283 P.3d 1082 (2012).....18, 19, 20

In re Yakima River Drainage Basin, 112 Wn.App. 729, 51 P.3d 800 (2002).....20, 21

Lundgren v. Upper Skagit Indian Tribe, 187 Wn.2d 857, 389 P.3d 569 (2017)..... 3, 13, 14, 17, 20, 22, 23

Smale v. Nortep, 150 Wn.App. 476, 208 P.3d 1180 (2009) 3, 11, 13, 14, 17, 20, 21, 22, 23

Spokane v. Rothwell, 166 Wn.2d 872, 215 P.3d 162 (2009) (n.9) 16

State v. City of Seattle, 57 Wash. 602, 107 P. 827 (1910) 20, 21, 23, 24

State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994) 14, 16

State v. Scott, 89 Wash. 63, 76 (1946) 21

Federal Statutes

25 U.S.C. Ch. 9 12

28 U.S.C. § 1602–1611 ..... 6, 11

28 U.S.C. § 2409a(n) 19

State Statutes

RCW 4.16.130 19

RCW 4.16.160 18

RCW 4.92.010 18

Court Rules

CR 12 4

CR 19 ..... 5, 26

RAP 10.2 16

RAP 10.3(f) 16

RAP 13.4 ..... 6, 15, 27

U.S. Constitution

***United States Constitution*, Art I, Sec. 8, Clause 3.**..... 9

Other Authorities

Bryan A. Garner, Black's Law Dictionary 12th Edition (2024) 12

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General, Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't St. Bull. 984 (1952).....10

Restatement (Second) of The Law - The Foreign Relations Law of the United States § 68 (Am. L. Inst. 1965).....7, 10

1. INTRODUCTION

In asking this Court to review the Appellate Court's decision, Flying T Ranch ("Flying T") misrepresents the Court of Appeals' holding, conflates legal issues, quotes dicta out of context, and distorts facts. Flying T's attempts to craft exceptions to tribal sovereign immunity have failed because they have no basis in the law. There is no reason for this Court to review the Court of Appeals' careful opinion.

Tribal sovereign immunity is a well-established matter of federal law; tribes have sovereign immunity from unconsented suit, which strips the courts of subject matter jurisdiction, unless, as is relevant here, Congress acts to abrogate that immunity. The Court of Appeals properly analyzed the limits of common law sovereign immunity and case law regarding *in rem* exceptions to tribal sovereign immunity, and correctly determined there is no exception to tribal sovereign immunity in this case.

Flying T's primary argument below was an immovable property exception to sovereign immunity exists in common law

that applies to tribes. However, Flying T failed to cite any case in which a court held that there was an immovable property exception to sovereign immunity in common law. The Court of Appeals correctly held there is no common law immovable property exception to sovereign immunity in American case law. Op. at 1, 17.

Second, Flying T argued that there is an *in rem* exception to tribal sovereign immunity, but again failed to cite a case in which a court held there was an *in rem* exception to tribal sovereign immunity that didn't ultimately rely on a flawed interpretation of the *County of Yakima* case. ***County of Yakima v. Confederated Tribes and Bands of Yakima Nation,*** 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (hereinafter "*Yakima*"). The Supreme Court of the United States has expressly dispelled the misunderstanding that *Yakima* creates an *in rem* exception to tribal sovereign immunity. ***Upper Skagit v. Lundgren***, 584 U.S. 554, 200 L.Ed.2d 931, 138 S. Ct. 1649 at 1652 (2018) (hereinafter "*Lundgren*"). The Court of Appeals

correctly held that the holdings finding an *in rem* exception to tribal sovereign immunity found in *Andersen, Smale,* and *Upper Skagit* are no longer good law because they all ultimately relied on a misunderstanding of *Yakima*, which has been overruled in *Lundgren.* Op. at 6-7. The Court of Appeals then correctly determined that no court is bound to follow cases that are no longer good law.

Third, Flying T presents a new argument not presented to the Appellate Court that there is a separate basis for subject matter jurisdiction: that prior ripened adverse possession has no potential to deprive any sovereign of land they rightfully own and therefore sovereign immunity does not apply. Pet. for Rev. at 14. In supporting this argument, Flying T cites dicta from inapposite cases interpreting the rules barring the tolling of adverse possession against a sovereign. By taking this dicta out of context, Flying T hopes to convince this Court that the well-reasoned Court of Appeals decision should be overturned.

This Court should not be so compelled. The law is clear—

tribes are immune from suit, unless the tribe consents or Congress acts to abrogate tribal sovereign immunity. Tribes retain their common law immunity from suit, which has no immovable property or *in rem* exception. This immunity strips the Court of subject matter jurisdiction altogether, regardless of the nature of the claim. Rules barring the tolling of adverse possession claims against a sovereign and cases discussing those rules are irrelevant to sovereign immunity from suit. The Court of Appeals made no mistake.

2. COUNTERSTATEMENT OF THE CASE

The Stillaguamish Tribe of Indians ("Tribe") lawfully purchased property along the North Fork of the Stillaguamish River in 2021. In 2022, Flying T Ranch ("Flying T") brought a suit claiming to have held adverse possession over the land since 1971. Under CR 12(b), the Tribe filed a Motion to Dismiss based on sovereign immunity *prior* to filing its responsive pleading.[1]

[1] Flying T's request that this Court remand "for limited proceedings, such as summary judgment" is procedurally improper. Pet. for Rev. at 27. The Tribe is entitled to ten days to file its responsive pleading should the Motion to Dismiss be denied. **CR 12(a)(4)(A).**

The Superior Court dismissed the case for lack of subject matter jurisdiction, lack of jurisdiction over person, improper venue, and failure to state a claim upon which relief can be granted due to tribal sovereign immunity. CP 004-5. The Court did *not* dismiss the case for failure to join a party. ***Id.*** Flying T appealed arguing that tribes enjoy immunity to the same extent as foreign sovereigns, that foreign sovereign immunity does not extend to cases involving immovable property, the immovable property exception applies to tribes, and Washington precedent supports application of the immovable property exception to tribes. Br. of App. At 12, 17, 22, 31, 37. Flying T alternatively argued that the Tribe is not an indispensable party under CR 19, even though the trial court did not dismiss the case for non-joinder of a party. Br. of App. at 38.

After full briefing and oral argument, the Court of Appeals held that there is no common law immovable property exception

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Flying T's request that this Court remand "for limited proceedings, such as summary judgment" is procedurally improper. Pet. for Rev. at 27.

to sovereign immunity, that cases finding an *in rem* exception to tribal sovereign immunity are no longer good law, and that under well settled federal Indian law, only Congress can abrogate tribal sovereign immunity. Op. at 1-2. The Court of Appeals properly dismissed, and under RAP 13.4, there is no basis to accept appellate review.

3. ARGUMENT WHY REVIEW SHOULD BE DENIED

3.1 The Court of Appeals properly held that there is no immovable property exception to tribal sovereign immunity.

The foundation of Flying T's request for review is a disingenuous claim that the Court of Appeals held there was an immovable property exception to tribal sovereign immunity. The Court of Appeals held no such thing. Instead, it determined that no immovable property exception was ever consistently applied by American courts to foreign sovereigns prior to the enactment of the ***Foreign Sovereign Immunities Act*, 28 U.S.C. § 1602–1611** ("FSIA"), and therefore no common law immovable

property exception exists for courts to apply to tribes. Op. at 1. This correct application of the law does not warrant review.

In response to Flying T's argument that there is an immovable property exception to tribal and foreign sovereign immunity, the Court of Appeals said:

> 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 can be sued over its objection only when allowed by Congress, and to hold otherwise would unfaithfully lessen its immunity in comparison to that enjoyed by sovereign powers.

Op. at 1. The Court of Appeals quoted the *Restatement (Second)* as saying that the "immunity of a foreign sovereign…does not extend to…immovable property…" but then noted that "no such rule was followed to the exclusion of the political branches." Op. at 17. The Court of Appeals found that the "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." Op. at 24. Therefore,

there is no foundation whatsoever to assert the court held that the immovable property exception applies to tribes.

There is a wall of authority that supports the Court of Appeals decision agreeing that tribes have sovereign immunity. Tribal sovereign immunity is a matter of federal law, to which state courts are bound, and is "not subject to diminution by the States." ***Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,*** 118 S.Ct. 1700, 140 L.Ed.2d 981, 523 U.S. 751 (1998). Tribes continue to enjoy the original right of common law immunity from suit. ***Santa Clara Pueblo v. Martinez***, 98 S. Ct. 1670, 56 L.Ed.2d 106, 436 U.S. 49 at 58 (1978). The effect of tribal sovereign immunity is that it strips the court of subject matter jurisdiction. ***Lewis v. Norton,*** 424 F.3d 959, 961 (9th Cir. 2005). There are only two ways tribal immunity can be overcome. First, Congress has plenary power under the United States Constitution to statutorily authorize a waiver of tribal sovereign immunity. ***Santa Clara***, *supra* at 58. Second, an Indian tribe may waive its own sovereign immunity. ***Id.*** Any waiver of

sovereign immunity "cannot be implied, but must be unequivocally expressed." ***Id.***

The United States Supreme Court's rulings already unequivocally bar the courts from carving out any judicial exception to tribal sovereign immunity, as that power is reserved exclusively to Congress. **United States Constitution, Art I, Sec. 8, Clause 3.** In *Bay Mills*, the United States Supreme Court held "we have 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)." ***Michigan v. Bay Mills Indian Community,*** 572 U.S. 782, 134 S.Ct. 2024, 2030-2031, 188 L.Ed.2d 1071 (2014). The United States Supreme Court has also "thought it improper suddenly to start carving out exceptions to that immunity, opting instead to defer to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit." ***Oneida Indian Nation v. Phillips,*** 360 F.Supp.3d 122 (2nd Cir. 2018); ***Michigan v. Bay Mills,*** *supra* at 2030-2032.

In determining the extent of common law immunity of tribes, the common law that is applicable is the common law of the sovereign providing the forum. ***In re. Green***, 980 F.2d 590, 593-4 (9th Cir. 1992). This is the fatal flaw of Flying T's position that there is a common law exception to tribal sovereign immunity for immovable property. Flying T put forth letters about the practice of foreign nations[2] and secondary sources about international law practice among foreign nations[3], while ignoring that the actual practice of American courts was deference to the political branches. The Court of Appeals recognized that "it became the practice of American courts to defer to the political branches." Op. at 12. The Court of Appeals noted that American courts never followed an immovable

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[2] The "Tate Letter" analyzed the common practice in foreign nations, including Czechoslovakia, Estonia, Poland, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, Portugal, the Netherlands, Sweden, Argentina, Germany, Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Romania, Peru, Denmark, the United Kingdom, and the Soviet Union. **Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General, Philip B. Perlman (May 19, 1952),** reprinted in 26 Dep't St. Bull. 984, 985 (1952)

[3] The *Restatement (Second)* Reporter's Notes on the inapplicabity of immunity to proceedings involving interests in real property include cases from courts in Chile, Austria, Czechoslovakia, France, and Germany. **Restatement (Second) of the Law - The Foreign Relations Law of the United States § 68** (Am. L. Inst. 1965).

property rule to the exclusion of the direction of political branches and when Congress passed the FSIA, the former practice of courts looking to executive suggestion gave way to courts following the directive of Congress when it comes to foreign sovereigns. Op. at 17-18.

Flying T's attempt to establish a common law immovable property exception also failed because Flying T repeatedly cited cases about sovereigns whose immunity had been waived either through an Act of Congress (FSIA) or through consent (states mutually waiving immunity in the Constitutional Convention) and then took a misguided leap to try to apply these cases to a tribe whose immunity remained intact. Op. at 19, 23. The Court of Appeals was correct to note the obvious difference between sovereigns whose immunity had been waived, and those whose immunity had not been waived.

3.2 *The Court of Appeals properly determined that Lundgren, Anderson, and Smale are no longer good law.*

Sovereign immunity is a matter of subject matter jurisdiction. ***FDIC v. Meyer,*** 510 U.S. 471, 475, 114 S. Ct. 996, 127 L.Ed.2d 308 (1996). Subject matter jurisdiction is "power of the court to rule on the conduct of persons or the status of things." **Bryan A. Garner, Black's Law Dictionary** 12th Edition (2024**)**. Therefore, sovereign immunity is a matter of the power of the court to rule, both *in rem* and *in personam*. The only Washington State cases that have ever determined there was an *in rem* exception to tribal sovereign immunity did so based on a misreading of *Yakima.* "That was an error," as the United States Supreme Court recently held. ***Lundgren,*** *supra* at 1652.

The first case in Washington to determine that tribal sovereign immunity does not bar a court from exercising *in rem* jurisdiction relied exclusively on "the language of the GAA[4] and the United States Supreme Court's decision in *County of Yakima v. Yakima Indian Nation*" to do so. ***Anderson & Middleton Lumber Co. v. Quinault Indian Nation***, 130 Wn.2d

[4] ***General Allotment Act*, 25 U.S.C. Ch. 9**

862, 871, 929 P.2d 379 (1996).[5] In *Anderson*, the court held a "broad statutory grant of *in rem* state jurisdiction over fee patented lands can be concluded from the Supreme Court decision in *County of Yakima*." ***Anderson***, supra at 875. Every subsequent case in Washington finding an exception to the bedrock principles of federal Indian law cited the *Anderson* case or used the same flawed reasoning. *See,* e.g., ***Smale v. Nortep***, 150 Wn.App. 476, 478, 208 P.3d 1180 (2009) (stating "*...Anderson...* essentially controls this case."[6]); ***Lundgren v. Upper Skagit Indian Tribe***, 187 Wn.2d 857, 865-868, 389 P.3d 569 (2017) (hereinafter "*Upper Skagit*") (stating "*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.")

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[5] As discussed later, the *Anderson* court did not determine that prior ripened adverse possession was a separate and distinct basis for overcoming tribal sovereign immunity.
[6] Flying T makes much of the Tribe admitting that *Smale* didn't rely exclusively on *Yakima.* Pet. for Rev. at 17 (n. 16). The Tribe has always noted *Smale* relies on *Anderson*, which relied exclusively on *Yakima* making both cases no longer good law.

The Court of Appeals considered whether *Anderson, Smale,* or *Upper Skagit* were controlling, and properly determined that they are not because they are no longer good law. Op. at 6-7.[7] Nevertheless, Flying T argues that the cases effectively overruled by the United States Supreme Court should still be followed due to *stare decisis.* Pet. for Rev. at 11. *Stare decisis* is "not an exorable command," particularly when governing decisions are "badly reasoned." ***State Oil Co. v. Khan,*** 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (quoting ***Payne v. Tennessee,*** 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 640 (1991)); ***Payne***, *supra* at 827-8. Moreover, courts are "bound by decisions" unless a "Supreme Court decision, or subsequent legislation undermines those decisions." ***Baker v.***

[7] Flying T takes issue with the Court of Appeals stating that Flying T did not argue these cases were controlling. Pet. for Rev. 18 (n. 17). Flying T previously conceded it had not made the argument these cases were controlling in its appellate brief. Motion for Reconsideration, at 7-8 ("Flying T presented *Anderson* and *Smale* not as binding but as persuasive"). Flying T now disingenuously claims it did present the cases as binding in initial briefing. Pet. for Rev. at 17 (n. 15). In reality, Flying T only raised this argument in a responsive pleading to Amicus Sauk-Suiattle Tribe. Ans. to Am. Br. of Sauk-Suiattle at 6-7. The Court of Appeals need not consider arguments raised for the first time in responsive pleadings. See, e.g., ***State v. Hudson***, 124 Wn.2d 107, 120, 874 P.2d 160 (1994). The Court of Appeals analyzed whether these cases were controlling nonetheless, making this entire line of argument moot. Op. at 6-7.

Delta Air Lines, Inc., 6 F.3d 632, 637 (9th Cir. 1993) (citations and internal quotation marks omitted). *Stare decisis* simply does not apply to cases whose reasoning the United States Supreme Court has clearly disavowed. It would turn discretionary review on its head for this Court to accept review because an Appellate Court correctly refused to follow overruled cases that are no longer good law. **RAP 13.4(b) (1) & (2)**.

3.3 Flying T's new arguments should not be heard.

Flying T's new arguments, not presented to the Appellate Court, should not be considered for review. The first new argument is that prior ripened adverse possession is in itself an exception to sovereign immunity. Pet. for Rev. at 14-18.

At the Court of Appeals, Flying T first mentioned prior ripened adverse possession in its answer to an amicus brief; at the time, Flying T did not present it as an exception to sovereign immunity, but rather in discussion about adverse possession law. Ans. to Am. Br. of Sauk-Suiattle at 13. Under

RAP 10.2, the Tribe was unable to reply to this new argument raised for the first time in a responsive pleading. Washington courts have cited RAP 10.3(f) for the proposition that arguments raised for the first time in a reply brief will not be considered because it would unfairly deprive the respondent of an opportunity to respond, and presents the appellate court with an issue that has not been fully developed. *See, e.g.*, ***State v. Hudson***, 124 Wn.2d 107, 120, 874 P.2d 160 (1994).

Flying T's second new argument is that "[t]his is a fn. 8" case. Pet. for Rev. at 5-6. This argument exists nowhere in the record.

An argument not preserved below or not properly raised in the Court of Appeals is not properly before the higher court. ***Delta Air Lines, Inc. v. August,*** 450 U.S. 346, 362, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981); *see also* ***Spokane v. Rothwell,*** 166 Wn.2d 872, 881, 215 P.3d 162 (2009) (n.9). Flying T's new arguments should not be entertained and do not provide any basis for review.

3.4 *There is no alternative basis for an exception to sovereign immunity relating to prior ripened adverse possession.*

In order to try to craft a new alternative exception to tribal sovereign immunity, Flying T argues that prior ripened adverse possession has no potential to deprive the Tribe of property and, therefore, sovereign immunity cannot strip the court of subject matter jurisdiction. Pet. for Rev. at 14-18, 20. Flying T argues this is so because: (1) that reasoning in cases regarding state or federal immunity in adverse possession cases should be extended to tribes; and (2) that *Smale* and *Upper Skagit* contain an alternative basis for jurisdiction that does not rely on a misinterpretation of *Yakima.* Both arguments are incorrect.

Reasoning in cases regarding state or federal immunity in adverse possession cases cannot and should not be extended to tribes because the situational context is wildly different. States and the federal government have made the sovereign decision to waive their immunity in these cases, while the Tribe has not.

The cases cited are not analyzing the bounds of common law sovereign immunity when it has not been waived, but rather the bounds of specific legislative *exceptions* to express waivers of sovereign immunity. These are apples and oranges.

Washington State waived its immunity in RCW 4.92.010.[8] The legislature also limited this waiver, stating "no claim of right predicated on the lapse of time shall ever be asserted against the state." **RCW 4.16.160**. The legislative purpose of this bar on tolling is to protect the sovereign from losing title due to the failure of public servants to monitor the property. ***Gorman v. City of Woodinville,*** 175 Wn.2d 68, 74, 283 P.3d 1082 (2012). Flying T's reliance on dicta about prior ripened adverse possession in *Gorman* to articulate a new exception to common law sovereign immunity is misplaced because *Gorman* was not about the limits of common law sovereign immunity. Instead, *Gorman* narrowly interpreted

[8] "Any person ...having any claim against the state of Washington shall have a right of action against the state..." **RCW 4.92.010**.

whether RCW 4.16.130's exception to the State's general waiver of sovereign immunity applied when the adverse possession ripened prior to the sovereign acquiring the land. ***Gorman*** *supra* at 72.

Similarly, the federal government waived its immunity in passing the Quiet Title Act ("QTA"), but also enacted a bar on suits based on adverse possession. **28 U.S.C. § 2409a(n)**. Federal courts interpret this bar on adverse possession to be based on the rule that no title to public lands can be gained through the federal employee's failure to monitor the property, and therefore the time necessary to claim adverse possession cannot toll on federally held lands. *See,* ***U.S. v. Pappas,*** 814 F.2d 1342, 1343 (n. 3) (9th Cir. 1987). So when the Sixth Circuit said "[a]dverse possession claims against the United States that ripened before the government acquired title are not barred by 28 U.S.C. § 2409a(n)", they were correct, but it is irrelevant to the instant case because the tribe is not subject to

QTA's waiver, nor its limitations. ***Burlison v. United States,*** 533 F.3d 419, 428 (6th Cir. 2008).

Unlike the city in *Gorman* and the federal government in *Burlison,* the Stillaguamish Tribe has not waived its immunity at all, nor has it adopted any exception to a waiver based on the tolling of adverse possession. To extend the reasoning in these cases to the Tribe would be a manifest injustice.

Flying T's reliance on dicta in *Smale* and *Upper Skagit* is similarly misplaced. In *Smale,* one of the Tribe's alternative arguments was that there can be no adverse claims against a sovereign, citing *In re Yakima River Drainage Basin.* ***Smale,*** *supra* at 483, 484 (n. 30). The rule articulated in the *In re Yakima River Drainage*, was first articulated in *State v. City of Seattle* where the Washington State Supreme Court stated "the general statute of limitations… did not have the effect of enabling property rights to be acquired in adverse use or possession in land held by the state for such public purpose" and "a party cannot *acquire title by adverse possession* to

property held by a municipality in its governmental capacity for public purposes."[9] ***State v. City of Seattle,*** 57 Wash. 602, 615, 612, 107 P. 827 (1910) (emphasis added).

Smale's dicta is not a "recognition that subject matter jurisdiction came from ...adverse possession law" as claimed by Flying T. Pet. for Rev. at 14. The dicta in *Smale,* that prior ripened adverse possession means there is no assertion of a claim of adverse possession against a sovereign, is not about subject matter jurisdiction at all. Rather, it is recognizing that prior ripened adverse possession does not offend the rule that the statute of limitations for adverse possession cannot toll against a sovereign.[10]

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[9] ***In re Yakima River Drainage Basin,*** 112 Wn.App. 729, 746. 51 P.3d 800 (2002) (citing ***McLeary v. Dep't of Game*** , 91 Wn.2d 647. 652, 591 P.2d 778 (1979) (citing ***Comm'l Waterway Dist. No. 1 vs. Permanente Cement Co.,*** 61 Wn.2d 509, 512. 379 P.2d 178 (1963) (citing ***State v. Scott***, 89 Wash. 63, 76 (1946) (citing ***State v. Seattle,*** 57 Wash. 602.107 P. 827 (1910) (1910))))

[10] The Tribe also argued that a court cannot deprive a sovereign of property, relying on *Idaho v. Coeur d'Alene Tribe of Idaho*. ***Smale***, *supra* at 482 (citing ***Idaho v. Coeur d'Alene Tribe,*** 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)). The court noted the Eleventh Amendment barred the claim in *Idaho*. and the *Ex Parte Young* exception didn't apply because the state was the party who would actually lose land. ***Id***. at 482. The dicta that the claims would not deprive a sovereign of rightfully owned land is not a basis for overcoming tribal sovereign immunity. Rather, it was to distinguish the facts in *Idaho* from those of *Smale,* in support of the court's determination that *Idaho* doesn't "render *Anderson* inapplicable" in *Smale*. ***Id.*** at 481-2.

Like in *Smale,* the court in *Upper Skagit* determined first that the court has subject matter jurisdiction for *in rem* proceedings against a tribe's objections, relying on *Yakima* and *Anderson,* which relied exclusively on *Yakima,* to find this *in rem* exception to tribal sovereign immunity. ***Upper Skagit,*** *supra* at 865-867. The *Upper Skagit* court noted that in *Anderson,* the parties did not dispute that the court had jurisdiction when it was filed, and that the *Anderson* court reasoned that subsequent sale to a tribe is "of no consequence" specifically "because the trial court's assertion of jurisdiction is not over the entity in personam, but over the property...in rem." ***Upper Skagit,*** *supra* at 867.

In discussing *Smale,* the *Upper Skagit* court said "[n]or were the Smales attempting to adversely possess against a sovereign." ***Id.*** at 868. Again, the *Smale* dicta was about the rule that adverse possession cannot toll against a sovereign owning land in its governmental capacity, not about any exception to sovereign immunity.

It is noteworthy that in the first case in Washington to find an *in rem* exception to tribal sovereign immunity, the court only mentioned prior ripened adverse possession to note that the facts involved "a much less intrusive assertion of state jurisdiction …than in *County of Yakima…*" because the tribe would "lose no property or interest for which it holds legal title." ***Anderson***, *supra* at 872-3. The *Anderson* court did not reason that prior ripened adverse possession was a basis for subject matter jurisdiction despite tribal sovereign immunity, only that it made sense to follow *Yakima* when the imposition seemed "less intrusive."

The dicta in *Upper Skagit* and *Smale* is not an "independent rationale" for subject matter jurisdiction, as claimed by Flying T. It was about the rule articulated in *State v. City of Seattle* that the statute of limitations in adverse possession cannot not "have the effect of enabling property rights to be acquired in adverse use or possession in land held by the state for such public purpose." ***State v. City of Seattle,***

supra at 615. This Court should not be compelled by Flying T's misguided arguments based on decontextualized dicta to accept discretionary review of the Court of Appeals well-reasoned opinion.

3.5 *Flying T confuses sovereignty to govern with sovereign immunity from suit.*

Flying T's claim that "immunity may trigger if the Tribe seeks to put the land into trust" evidences a profound misunderstanding of federal Indian law, sovereignty, and sovereign immunity. Pet. for Rev. at 27. The trust status of land has nothing to do with sovereign immunity from suit and everything to do with the governmental authority over the land.

Flying T states there is no basis to "invoke the Tribe's full aboriginal sovereign title" and quotes Justice Ginsburg in support of this assertion. Pet. for Rev. at 28. However, when Justice Ginsburg said that a tribe "cannot unilaterally revive its ancient sovereignty" through purchase of lands, she wasn't discussing sovereign immunity from suit, but rather the tribe's

governmental regulatory authority over the land. ***City of Sherrill v. Oneida Nation of N.Y.,*** 544 U.S. 197, 203, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) (hereinafter "*Oneida*").

The Oneida Indian Nation ("OIN") didn't claim sovereign immunity in *Oneida*. ***Id.*** at 212. OIN purchased fee land in the City of Sherrill, located in disputed land outside the reservation, and argued that by purchasing land in the disputed territory, OIN had full sovereignty over the land ("aboriginal title") and therefore the City was prohibited from taxing the land. ***Id.*** at 197-199. Justice Ginsburg rejected OIN's argument and noted that Congress has provided an avenue for tribes to "reestablish sovereign authority over territory," specifically the fee-to-trust process. ***Id.*** at 220. When land is put in trust, the tribe reestablishes "sovereign authority" over the territory. ***Id.***

Arguments about the inalienability of trust land and aboriginal title have no place in this case; Flying T raises them in a last ditch effort to confuse the issues and convert this case into something it is not to secure discretionary review. The

Tribe has never argued the land at issue is not in the regulatory jurisdiction of Washington State. The Tribe's sole argument is that the Tribe is immune from suit as a matter of federal law.

3.6 *There is no need for any court to address joinder issues in this case.*

The trial court did *not* dismiss the case for failure to join a party under CR 19,[11] and Flying T has appealed a non-existent order. Br. of App. at 38. The Tribe's immunity removes the court's power to hear the case; without subject matter jurisdiction, the case cannot move forward regardless of joinder.

3.7 *There is no issue of substantial public interest that needs to be determined by this Court.*

Flying T misconstrues the directive of the United States Supreme Court in *Lundgren*.[12] Pet. For Rev. at 21. In

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[11] CP 0035-6

[12] The directive was for lower courts to determine if an immovable property exception exists to sovereign immunity in common law, not for courts to assume such an exception exists and apply it against tribes in adverse possession cases. Pet. for Rev. at 21. *See,* ***Lundgren***, *supra* at 1654.

Lundgren, the Supreme Court declined to address the "immovable property exception" because the argument was not raised nor briefed in the lower courts and because determining "the limits on the sovereign immunity held by tribes is a grave question." ***Lundgren***, *supra* at 1654. While the United States Supreme Court opted to not make a ruling without proper briefing on a grave matter, the United States Supreme Court did not direct the Washington State Supreme Court to hear a case that has no basis whatsoever in the law. Flying T's unsupported argument does not present an issue of substantial pubic interest that should be determined by this Court under RAP 13.4(b)(4).

4. CONCLUSION

This Court should not accept discretionary review because the Court of Appeal's opinion was well-reasoned and supported by federal law, common law, and adverse possession law.

I certify that this document contains 4987 words.

Submitted this 27th day of September, 2024.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 27, 2024, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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STILLAGUAMISH TRIBE OF INDIANS

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