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Upper Skagit Indian Tribe v. Lundgren

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Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018)

Brett Berntsen

Stemming from a property dispute between a private landowner and the Upper Skagit Indian Tribe, this action evolved into a debate concerning the scope of tribal sovereign immunity and whether Indian tribes should be bound by certain common law doctrines applicable to most other sovereigns. The Washington Supreme Court originally ruled against the Tribe, citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation* in holding that sovereign immunity does not apply to *in rem* actions. The United States Supreme Court granted certiorari to clarify that its ruling in *Yakima* did not support such a proposition. The case grew in significance on appeal, when the respondent landowners asserted an alternative argument based on the immovable property exception to sovereign immunity. While case law clarified that exception in the context of traditional sovereigns, none explored its applicability to tribes. Recognizing the novelty of the argument and its potentially sweeping consequences, the Court remanded the question to the Washington Supreme Court, prompting a spirited dissent accusing the majority of abdicating its judicial duties.

I. INTRODUCTION

In 2013, the Upper Skagit Indian Tribe (“Tribe”) purchased roughly 40 acres of land in an effort to expand its reservation.¹ A subsequent survey revealed a border discrepancy with neighbors Sharline and Ray Lundgren.² The Lundgrens filed a quiet title action in Washington state court against the Tribe, to which the Tribe asserted the defense of tribal sovereign immunity.³ The Washington Supreme Court ruled against the Tribe, relying on *County of Yakima v. Confederated Tribes and Bands of Yakima Nation* to hold that tribal sovereign immunity does not bar a state court from asserting jurisdiction over *in rem* actions against a tribe.⁴ The United States Supreme Court granted certiorari, clarifying that *Yakima* did not address the scope of sovereign immunity, but rather interpreted a “relic of a statute” involving the Indian General Allotment Act of 1887.⁵ Additionally, the Court discussed an alternative argument presented by the Lundgrens late in the case proposing that the immovable

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1. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018).
 2. *Id.*
 3. *Id.*
 4. *Id.* (citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992)).
 5. *Upper Skagit*, 138 S. Ct. at 1652-23 (*See* Indian General Allotment Act, Pub. L. No. 40-119, 24 Stat. 388 (1877) (codified as 25 U.S.C. §§ 331-358 (2012)) (authorizing the President to allot reservation lands and issue fee patents to individual allottees).

property exception to sovereign immunity should apply to tribes.⁶ Noting the late appearance of the argument and the sweeping consequences of applying the immovable property doctrine to tribes for the first time, the Court remanded the case to the Washington Supreme Court for further consideration.⁷ That decision prompted a concurrence raising concerns over the Lundgrens' potential lack of recourse, as well as a dissent criticizing the majority's inaction.⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

The Tribe consists of descendants from 10 Indian villages historically located along the Skagit and Sauk Rivers in Northwest Washington.⁹ In 1855, leaders from those villages and numerous other tribes in the region ceded their land to the United States through the Treaty of Point Elliot in exchange for money and other assurances.¹⁰ While the treaty established several joint reservations for the various tribes to occupy, the residents of the 10 villages were not considered a cohesive group and therefore did not receive land of their own.¹¹ The Tribe gained federal recognition in the early 1970's, but remained landless until the 1981 establishment of a 99-acre reservation.¹² In 2013, as part of an effort to recover lost territory, the Tribe purchased a 40-acre parcel of land bordering the reservation.¹³

Intending to place the land into trust, the Tribe conducted a formal survey which revealed the border discrepancy underlying this case. A misplaced fence erroneously marked the northern boundary of the parcel, leaving a one-acre strip of the Tribe's newly purchased land on the side originally thought owned by their neighbors, Sharline and Ray Lundgren.¹⁴

The Tribe notified the Lundgrens that it planned to clear-cut the disputed tract of land and reposition the fence, prompting the Lundgrens to file a quiet title action in Washington state court. The Lundgrens

6. *Id.*

7. *Id.* at 1654.

8. *Id.* at 1655-63.

9. Northwest Portland Area Indian Health Board, *Upper Skagit Tribe*, NPAIHB, <http://www.npaihb.org/member-tribes/upper-skagit-tribe/> (last visited Aug. 1, 2018).

10. *Upper Skagit*, 138 S. Ct. at 1651; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927 [hereinafter Treaty].

11. Northwest Portland Area Indian Health Board, *Upper Skagit Tribe*, NPAIHB, <http://www.npaihb.org/member-tribes/upper-skagit-tribe/> (last visited Aug. 1, 2018).

12. Brief for Petitioner at 6, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018); Northwest Portland Area Indian Health Board, *Upper Skagit Tribe*, NPAIHB, <http://www.npaihb.org/member-tribes/upper-skagit-tribe/> (last visited Aug. 1, 2018).

13. *Upper Skagit*, 138 S. Ct. at 1652.

14. Brief for Petitioner at 7, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018).

asserted claim to the land under the doctrines of adverse possession and mutual acquiescence.¹⁵ In defense, the Tribe asserted sovereign immunity and filed a motion to dismiss. The trial court denied the Tribe's motion and granted summary judgment for the Lundgrens.¹⁶

The Tribe appealed to the Washington Supreme Court, which granted review.¹⁷ Relying primarily on *Yakima*, the Washington Supreme Court affirmed the trial court's ruling, holding that sovereign immunity did not bar a state judge from deciding *in rem* actions against a tribe.¹⁸ The court reasoned that because the Lundgren's quiet title action did not deprive the Tribe of any land it rightly owned, deciding such an action would not constitute an impermissible violation of tribal sovereignty.¹⁹

The Tribe appealed once more, and the United States Supreme Court granted certiorari to clarify confusion surrounding its holding in *Yakima*.²⁰ On appeal, however, the Lundgrens asserted an alternative argument not discussed at earlier stages in the case. In their response brief, the Lundgrens urged the Court to affirm the Washington Supreme Court's ruling based on the immovable property exception to sovereign immunity, which had never previously been applied to tribes.²¹

III. ANALYSIS

In its analysis, the Court first addressed whether tribal sovereign immunity applies to *in rem* lawsuits, before discussing whether the immovable property exception to sovereign immunity should apply to tribes.

A. *In Rem Bar to Tribal Sovereign Immunity*

The Court quickly refuted the Washington Supreme Court's reading of *Yakima*, noting that the case in no way limited the scope of tribal sovereign immunity.²² Instead, the Court explained that *Yakima* concerned the ability of states to tax certain land within a reservation with respect to antiquated provisions contained within the Indian General Allotment Act of 1877.²³

To explain the misinterpretation of *Yakima*, the Court provided a brief review of the historical circumstances that created the complicated

15. *Id.*

16. *Id.*; Brief for Petitioner at 8, Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

17. Brief for Petitioner at 8, Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

18. *Upper Skagit*, 138 S. Ct. at 1652.

19. Brief for Petitioner at 8, Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

20. *Upper Skagit*, 138 S. Ct. at 1651.

21. *Id.* at 1653-54.

22. *Id.* at 1652.

23. *Id.* (See 25 U.S.C. § 349 (2012)).

land-ownership schemes on reservations.²⁴ Decades of federal policy designed to dissolve reservations, followed by the 1934 Indian Reorganization Act's about face on that topic, resulted in the checkerboarding of reservations, with tracts of private, fee-patented land interspersed among trust land held for tribes.²⁵

Yakima attempted to resolve conflicting statutory and judicial directives concerning what types of taxes states could levy on fee-patented land within reservations.²⁶ Although the General Allotment Act subjected allottees and their fee-patented land to state taxes and regulations, the Court later ruled in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* that the act should no longer be read to allow a state to impose *in personam* taxes on transactions between Indians on fee land within a reservation as a matter of impracticability.²⁷ In *Yakima*, the Court distinguished its holding in *Moe*, ruling that collecting *in rem* taxes on fee patented land within a reservation was not too burdensome and still permitted under the act.²⁸

Thus, the Court explained that *Yakima* did not concern the scope of tribal sovereign immunity, but rather interpreted a "relic of statute in light of a distinguishable precedent."²⁹ As it stands, the *in rem* nature of a suit does not by itself preclude a tribe from asserting the defense of sovereign immunity.³⁰

B. Immovable Property Exception

The Court then addressed the Lundgren's alternative argument presented in their response brief and at oral argument. Rather than requesting affirmation of the Washington Supreme Court's ruling based on *Yakima*, the Lundgren's appeal asserted that the Tribe could not claim sovereign immunity due to the historical doctrine known as the immovable property exception.³¹ That doctrine is based on the longstanding rule that a prince who purchases property within a foreign country relinquishes his privilege and assumes the role of a private individual.³² Accordingly, the Lundgrens argued that the Tribe qualified as foreign sovereign which purchased land within the State of Washington, making it therefore subject to the host sovereign's rules and regulations.³³ The Lundgrens further argued that the immovable property exception had applied to nearly all

24. *Id.* at 1652-53.

25. *Id.*

26. *Id.*

27. *Id.* (See *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976)).

28. *Id.* (citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 265 (1992)).

29. *Id.*

30. *Id.* at 1653.

31. *Id.*

32. *Id.* at 1654.

33. *Id.*

sovereigns throughout history, and excluding tribes from the list would afford them a sort of “super-sovereign” immunity.³⁴

The Tribe and the United States, on the other hand, maintained that Indian tribes enjoy a unique form of sovereignty to which historical and wide-sweeping doctrines do not always neatly apply.³⁵ Additionally, the Tribe and United States argued that since inception, the political branches, rather than the judiciary, have been considered the proper venue for determining whether foreign sovereigns “may be sued for their activities in this country.”³⁶

The Court noted the novelty and potential gravity of the Lundgrens’ argument.³⁷ Of particular import, the Court had never discussed the immovable property exception in relation to tribal sovereign immunity. Moreover, the argument emerged late in the case, after the Tribe and many of its “amici had their say.”³⁸ While this procedural posture does not prevent a court from addressing an argument, the Court nevertheless determined “restraint [was] the best use of discretion.”³⁹ Calling proposed limits to tribal sovereign immunity a “grave question,” the Court recognized that ruling on the immovable property exception in this case would affect all tribes, not just the Upper Skagit.³⁸ With these concerns in mind, the Court remanded the case to the Washington Supreme Court to resolve the immovable property exception argument at first instance.⁴⁰

Finally, the Court justified its decision to remand in anticipation of a critical dissent, stating that it had not shirked its duty by declining to answer what some might consider a straightforward question.⁴¹ The Court countered that if the question was truly so simple, the Washington state justices should have no problem answering it themselves.⁴² The Court also noted that its decision resolved the initial question of whether tribal sovereign immunity applies to *in rem* actions. “That is work enough for the day,” the Court concluded.⁴³

C. Concurrence

Justices Roberts and Kennedy agreed with the majority’s decision to “forgo consideration” of the immovable property exception; however, they expressed concern over the Lundgren’s lack of recourse

34. Brief for Respondents at 27, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (citing *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995)).

35. *Upper Skagit*, 138 S. Ct. at 1654.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

38. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1654-55.

should that rule not be extended to tribes.⁴⁴ The Justices called for a method of resolving “mundane dispute[s] over property ownership” with tribes.⁴⁵ If tribes were to “always win[]” based on sovereign immunity, Justices Roberts and Kennedy warned, the doctrine could become a mechanism to “seize property with impunity, even without a colorable claim of right.”⁴⁶

Additionally, the concurrence took issue with the Solicitor General’s suggestion that the Lundgrens take measures to “induce [the Tribe] to file a quiet-title action,” therefore waiving its sovereign immunity.⁴⁷ While cutting trees or building a structure on the disputed property “may well have the desired effect,” the Justices expressed skepticism that “the law requires private individuals . . . to pick a fight in order to vindicate their interests.”⁴⁸ In conclusion, the Justices recommended the Lundgrens “examine the full range of legal options . . . before . . . firing up their chainsaws.”⁴⁹

D. Dissent

Dissenting Justices Thomas and Alito criticized the majority for not ruling on application of the immovable property exception to tribes.⁵⁰ To that end, the Justices engaged in their own analysis of the question they deemed “grave,” yet “also clear.”⁵¹

First, the dissent noted that the immovable property exception is “hornbook law” and predates the founding of the United States and its subsequent treaties with tribes.⁵² The rule mirrors the ancient principle of *lex rei sitae*, meaning “land is governed by the law of the place where it is situated.”⁵³ Citing scholarly works dating to the 16th century as well as the Court’s own cases, the dissent illustrated “six centuries of consensus” supporting the doctrine’s validity.⁵⁴

After highlighting broad acceptance of the immovable property exception, the dissent concluded that it should undoubtedly apply to tribes.⁵⁵ Justices Thomas and Alito noted the Court’s recent refusal to grant tribes anything “beyond what common-law sovereign immunity principles would recognize.”⁵⁶ The Justices then characterized tribal sovereign

44. *Id.* at 1655-56.

45. *Id.* at 1655.

46. *Id.*

47. *Id.* (quoting Brief for United States as Amicus Curiae at 23–24, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018)).

48. *Id.*

49. *Id.* at 1656.

50. *Id.*

44. *Id.* at 1657.

52. *Id.* at 1658.

53. *Id.* (citing F. WHARTON, *CONFLICT OF LAWS* § 273, 607 (3rd ed. 1905)).

54. *Id.* at 1658-61.

55. *Id.* at 1661.

56. *Id.* (citing *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017)).

immunity as a judicial construct unwarranted under the Constitution.⁵⁷ Indeed, per the dissent, the founding fathers would likely be “shocked” to learn an Indian tribe could claim immunity from a suit like the Lundgrens’.⁵⁸

Justices Thomas and Alito also used the dissent to discount arguments cited by the majority against applying the immovable property exception to tribes, deeming them inconclusive and distinguishable from case law.⁵⁹ Finally, the dissenting Justices warned that the Tribe is asserting a “sweeping and absolute immunity that no other sovereign has ever enjoyed.”⁶⁰

IV. CONCLUSION

The Court’s decision is significant primarily for what it did not do. By rejecting the Washington Supreme Court’s interpretation of *Yakima*, the Court left intact a tribe’s potential defense of sovereign immunity against *in rem* claims. Moreover, the Court’s decision to remand the immovable property exception to the Washington Supreme Court will allow for a more thorough analysis of a novel and potentially sweeping proposition. While the dissent accused the majority of abdicating its judicial duties, the decision to remand suggests a reluctance to issue a hasty ruling on a “grave question” only raised at the tail end of proceedings.

57. *Id.* at 1662 (citing *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998)).

58. *Id.*

59. *Id.* at 1661-62.

60. *Id.* at 1663.