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7

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF WASHINGTON**

10 THE KALISPEL TRIBE OF INDIANS,)
11 a Native American Tribe,) No. 03-CV-0423-EFS
12)
13 Plaintiff,) DEFENDANTS
14) ORVILLE AND
15 v.) DEONNE MOE'S
16) MEMORANDUM IN
17 SPOKANE RACEWAY PARK, INC., a) OPPOSITION TO
18 Washington corporation;) PLAINTIFF'S
19 WASHINGTON MOTORSPORTS) MOTION FOR
20 L.P., a Washington limited) SUMMARY
21 partnership; ORVILLE MOE and) JUDGMENT
22 the marital community ORVILLE)
23 MOE and JANE DOE MOE,)
24 Defendants.)
25 _____)

26 Defendants, Orville and Deonne Moe, (hereafter "the

27 Memorandum In Opposition to
28 Motion for Summary Judgment - 1

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1 Moe's"), through their attorney Aaron Lowe, submit the following
2
3 points and authorities in opposition to Plaintiff's Motion for
4 Summary Judgment:

5
6 A summary overview of the reasons the Kalispel Tribe
7 cannot attempt to use sovereign immunity as a defense in this
8 case. There are nine independent factors, any one of which
9 would defeat the Plaintiff's Motion for Summary Judgment.
10
11 These factors are summarized as follows:

12
13 1. There is an issue of lack of control by the Kalispel
14 Tribe by agreeing to a majority vote of a governing board to
15 develop the property and the necessary factual development
16 requiring the Moe's to call witnesses to prove the Board's actions
17 is a genuine issue of material fact requiring a trial or evidentiary
18 hearing. Plaintiff contends that the Board only received money
19 and was not active. This is a genuine issue of material fact that
20 defeats Plaintiff's Motion for Summary Judgment.
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24

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1 2. By commencing this action as Plaintiff and requesting
2
3 damages, the Kalispel Tribe waived immunity at least to the
4 amount of the claim.

5
6 3. The express arbitration clause in the September 19,
7 1994, Joint Venture Agreement and the Tribe's two 1994
8 resolutions are a complete and unequivocal waiver of sovereign
9 immunity.
10

11 4. The express waivers of sovereign immunity by the
12 Kalispel Tribe in the September 19, 1994, Joint Venture
13 Agreement and the resolutions of the Tribe are alone a waiver of
14 tribal sovereign immunity.
15
16

17 5. The combination of the waiver by the arbitration
18 clause and the express waiver clause is a total unconditional
19 waiver of sovereign immunity.
20
21

22 6. In off-reservation, non-trust land agreements on
23 September 19, 1994, the Tribe could not rely on sovereign
24

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1 immunity.

2
3 7. By the express creation and delegation to a four (4)
4 person lifetime governing board, only one of which was a Kalispel
5 Indian and allowing for controlling majority vote to govern
6 decisions. The Kalispel Tribe waived their sovereign immunity.
7

8
9 8. Whether or not the joint venture was valid, the multi-
10 year recognition of the Board's action and acquiesce in the
11 Governing Board's decisions is sufficient to deny sovereign
12 immunity.
13

14 9. The decision of state court Trial Judge Robert Austin,
15 denying sovereign immunity as a defense in an action between
16 Spokane Raceway Park and the Kalispel Tribe operates as issue
17 preclusion as the same litigants were co-parties to the Moe's in
18 this litigation.
19
20

21
22 The Moe's seek damages for destroying Orville L. Moe's
23 right to be paid as a governing board member, a conspiracy to
24

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1 damage the reputation of Orville Moe, for tortuous interference
2
3 with his compensation as a board member, business
4 relationships and for defamation. (Answer and Counterclaim,
5
6 pages 15-16).

7 These Defendants answered the Plaintiff's allegations and
8
9 counterclaimed in a pleading filed in this case on November 21,
10
11 2005.

12 In their answer to paragraphs 7 and 8 of Plaintiff's
13 Amended Complaint, the Moe's allege that Plaintiff has waived
14
15 its sovereign immunity. (Answer and Counterclaim, page 4).
16 They allege that the immunity was waived by an arbitration
17
18 clause in the Joint Venture Agreement of September 19, 1994.

19 The Moe's also allege that all the land is controlled by a
20
21 joint venture, (Answer and Counterclaim, page 5); that the land
22
23 upon which the Plaintiff alleged that the damage occurred "was
24
25 designated by the controlling governing board to be land upon

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1 which a trade center and hotel would be built, owned and
2 controlled exclusively by Spokane Raceway Park, Inc. (Answer
3 and Counterclaim, page 6).

4
5 The Moe's allege that the damage was on land designated
6 for exclusive use by Spokane Raceway Park and that the
7 Caterpillar tractor always operated on 12.57 acres within the 40
8 acres. The 12.57 acres was designated for exclusive use by
9 Spokane Raceway Park. (Answer and Counterclaim, pages 6-8).
10 The Plaintiff wrongfully appropriated the 12.57 acres to Plaintiff's
11 use as a parking lot; that a joint venture agreement controlling
12 the 40 acres of land was agreed on September 19, 1994. The
13 Joint Venture was to be governed by a four person board. 49%
14 of the profits would be distributed to Washington Motorsports,
15 Ltd., a non-tribal, non-Indian entity.
16
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The Issue of Sovereign Immunity, under the Peculiar Facts of this Case, Cannot be Resolved on Summary Judgment Because Disputed Issues of Material Facts Exist.

Defendants Orville Moe and Deonne Moe assert that the issue of sovereign immunity cannot be determined by this summary judgment motion.

There was an express waiver of sovereign immunity that delegation of the land development was to a partnership named KNAEZ. This partnership was not controlled by the Kalispel Tribe, that the agreement was valid at the time it was formed, and if not, validated in operation by meetings of the partnership for over eight (8) years and by subsequent modifications. The composition of the partnership's governing board was one Kalispel Indian person and three non-members. Majority vote was controlling.

On or about January 22, 1993 the Kalispel Indian Tribe, represented by the Tribal Council Chairman, Glen Nenema, and

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1 SRP represented by Orville L. Moe, entered into a Memorandum
2
3 of Understanding for exploring the feasibility of a joint venture
4
5 between the Kalispel Tribe and SRP on land owned by SRP in
6
7 Airway Heights, Washington. See, e.g., Affidavit of Orville L. Moe
8
9 as Exhibit A. The Kalispel Tribe and SRP agreed that they would
10
11 not negotiate on the business or the site of the business until the
12
13 finalization of the Joint Venture Agreement. A copy of this
14
15 agreement is attached as Exhibit D. Orville Moe was to be paid
16
17 for his services in the joint venture by the venture (Section Two).
18
19 The appointment was lifetime (Section Eleven). Plaintiff's breach
20
21 caused to lose Mr. Moe his lifetime employment, and Mr. Moe
22
23 suffered damages as a result of Plaintiff's breach.
24

25 After executing the Memorandum of Understanding, SRP
26
27 and the Kalispel Tribe entered into negotiations. In 1994, Orville
28
L. Moe had many discussions with Chairman, Glen Nenema and
David Bonga, attorney for the Kalispel Tribe, requesting that the

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1 Kalispel Tribe waive sovereign immunity by the Tribal Council on
2
3 all matters concerning the subject real property and the joint
4
5 venture.

6 An agreement was reached that Washington Motorsports
7
8 Ltd., by SRP, its general partner, would deed the Indian Tribe
9
10 approximately forty (40) acres of real property located in Airway
11
12 Heights, Washington. It is impossible to immediately transfer
13
14 off-reservation land into trust at the same time as the deed is
15
16 executed. The reason is that a plan must be filed by a tribe and
17
18 comment period of at least 30 days is mandated, including
19
20 notice to the state and local governments on impact to these
21
22 governmental entities.

23 Cohen, *Handbook of Federal Indian Law* (2005 Ed.) §
24
25 15.07[1][b] states the procedure:

26 For on-reservation acquisitions by a tribe, the
27
28 Secretary must consider the need for the land, the
purposes for which it will be used, the impact on the
state and its subdivisions of removing the land from

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1 the tax rolls, Bureau of Indian Affairs is equipped to
2 discharge the responsibilities associated with placing
3 the land in trust status. Courts have rejected the
4 argument that the financial need of a tribe for land is
5 a prerequisite in determining whether to take land
6 into trust.

7 For off-reservation acquisitions, additional criteria
8 apply. In general, the farther the land from the
9 reservation, the greater the scrutiny the Secretary will
10 give to the tribe's "justification of anticipated benefits
11 from the acquisition." When off-reservation land is
12 acquired for business purposes, the tribe is required
13 to provide a plan specifying the anticipated economic
14 benefits of the proposed use.

15 For both on and off-reservation acquisitions, the
16 applicant is also required to provide information
17 sufficient to comply with applicable environmental
18 statutes. State and local governments with
19 jurisdiction over the land to be acquired are provided
20 notice of the proposed trust acquisition and given 30
21 days to comment on the proposal.

22 It was not until over two (2) years later, on October 19,
23 1996, that the property was part of the Kalispel Reservation. At
24 the time of the transaction, the land was off-reservation, non-
25 trust land.

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1 SRP agreed to this transaction on the condition that as
2
3 consideration for the conveyance of real property to the Kalispel
4 Tribe, the Tribe would simultaneously enter into a joint venture
5 agreement. That Joint Venture Agreement was entered into and
6
7 at the same time a deed to the 40 acres was executed.
8

9 The Kalispel Tribe waived its sovereign immunity by specific
10 Tribal Council resolution, namely Kalispel Resolution No. 1994-
11 58, dated September 6, 1994, and signed by Glen Nenema,
12 Chairman and Vicki Bowman, Secretary, which **expressly** waives
13 the Tribe's sovereign rights under Section 10 of the Joint
14 Venture Agreement. (Emphasis added). A copy is attached to
15
16 the Affidavit of Orville L. Moe as Exhibit B. Section 10 in part
17 provides, "The Kalispel Tribe agrees to a limited waiver of their
18 sovereign rights. Said waiver shall be limited to such actions
19 that arise through this agreement or its breach."
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1 The Kalispel waived its sovereign immunity by specific
2
3 written agreement and also agreed to arbitrate all matters
4 involving the joint venture. The deed executed by the Tribe and
5
6 executed at the same time as the Joint Venture Agreement is
7 attached to the Affidavit of Orville L. Moe as Exhibit E. Per the
8
9 Joint Venture Agreement, the Tribe owned 51% of the joint
10 venture and Spokane Raceway Park, Inc., (hereafter "SRP")
11 owned the other 49%. The Tribe was to then pay SRP for 51% of
12
13 the 40 acres appraised value. Five board members, the
14
15 Governing Board, were appointed. One member from the
16
17 Kalispel Tribe, consisted of Glen Nenema. Another member was
18
19 David Bonga, who is a native American, but is believed not to be
20
21 a member of the Kalispel Tribe. *In re Wellborn*, 114 Wn.App
22
23 1002 (2002). Discovery is needed to establish this fact. Two
24
25 were Orville Moe and Maynard Moe, with a fifth non-voting
26
27 member, Jose Urcia are not native Americans. The voting
28

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1 members each had an equal vote and in the event an agreement
2 could not be reached, the arbitration clause of the Joint Venture
3 Agreement would be invoked.
4

5
6 The original Complaint in this action sought a temporary
7 and permanent injunction against all the Defendants.
8 (Complaint, page 10). The Amended Complaint sought an
9 injunction, an order quieting title and "...damages in excess of
10 \$75,000. (Amended Complaint, pages 5-7).
11
12

13 Among many other genuine issues of material fact the
14 Plaintiff has ignored is the insurance purchased on an agreed
15 value or fair market value as required by the limited waiver of
16 immunity. These are material factual issues that bear on the
17 express waiver of sovereign immunity. If not proven, there is no
18 limit at all to the waiver.
19
20
21

22 The Joint Venture Agreement contained two independent
23 waivers of tribal sovereignty. Article Nine contained an
24

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1 arbitration clause stating in full as follows:

2
3 Any disputes among the governing board that cannot
4 be resolved shall be assigned to an independent
5 three-member arbitration board for settlement, this
6 decision being final. The arbitration board
7 membership shall consist of one member selected by
8 Spokane Raceway Park, Inc., one member selected by
9 the Kalispel Tribe and the third member selected by
10 the chosen arbitrators.

11 In the event Raceways finds it impracticable to remain
12 a party to this agreement, the Kalispel Tribe will agree
13 to purchase Raceways interest in the Joint Venture.
14 Value of such interest will be determined by a real
15 estate appraiser and business valuation expert
16 approved by the governing board.

17 Judge Robert Austin, in Spokane County Superior Court
18 Case No. 03-2-07706-7, *Spokane Raceway Park v. The Kalispel*
19 *Tribe of Indians*, held that this clause waived sovereign immunity
20 and ordered arbitration.

21 A second independent express waiver is contained in the
22 Joint Venture Agreement, Section Ten. It states:

23 The Kalispel Tribe agrees to a limited waiver of their
24 sovereign rights. Said waiver shall be limited to such

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1 actions that arise through this agreement or its
2 breach.

3
4 These clauses expressly waive sovereign immunity. Accordingly,
5 Plaintiff's motion based upon the concept of sovereign immunity
6 must be denied because the Tribe waived such a defense.
7

8 The Kalispel Tribe Reservation is located 50 miles from the
9 Casino on the Pend Oreille River near Usk, Washington. The
10 Kalispel Tribe is not a treaty tribe. The 40 acres at Airway
11 Heights were not trust or reservation land on September 19,
12 1994. The deed was not filed of record until October 4, 1994.
13 The Bureau of Indian Affairs did not, according to the exhibits
14 attached to the original complaint, hold the land in trust or add
15 it to the reservation until October 19, 1996 over two years later.
16
17
18

19 At the time of execution on September 19, 1994, the Joint
20 Venture was executed the Plaintiff Indian Tribe was off-
21 reservation dealing in non-trust fee land. *See e.g., Mescalero*
22 *Apache Tribe v. Jones*, 411 U.S. 145, 149, 93 S.Ct 1267, 36
23

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1 L.Ed.2d 114 (1973), a case that reviews essentially the same
2
3 enabling act and constitution as contained in the State of
4 Washington's Constitution, flatly rejects tribal immunity on off-
5
6 reservation land transactions. The court held that an Indian
7
8 tribe operating a ski resort outside a reservation had no
9
10 sovereign immunity. The often quoted language within federal
11
12 case is:

13 But tribal activities conducted outside the reservation
14 present different considerations. State authority over
15 Indians is yet more extensive over activities. . .not on
16 any reservation. *Organized Village of Kake*, supra,
17 369 U.S. at 75, 82 S.Ct at 571. Absent express
18 federal law to the contrary, Indians going beyond
19 reservation boundaries have generally been held
20 subject to non-discriminatory state law otherwise
21 applicable to all citizens of the State.

22 *Maxa v. Yakima Petroleum, Inc.*, 83 Wash.App 763, 924 P.2d
23 372 (1996) holds that a contract executed off-reservation
24
25 between a Yakima (Yakama) Indian and a non-resident, non-
26
27 Indian, are subject to state law. *Powell v. Farris*, 94 Wash.2d

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1 782, 620 P.2d 525 (1980) also holds that a partnership contract
2 entered into off-reservation is subject to state law.

3
4 The Plaintiff Tribe entered into the Joint Venture Agreement
5 off it's reservation concerning non-reservation fee land. Under
6 these circumstances, it cannot claim sovereign immunity.

7
8 SRP conveyed the real property on the condition that the
9 acreage designated as a business enterprise zone could only be
10 used by mutual agreement of the Governing Board of the Joint
11 Venture for competing business. Orville L. Moe signed in his
12 capacity as president of SRP the Statutory Warranty Deed
13 drafted by the Tribe's attorney, Dave Bonga, dated September
14 19, (no year) at the same time Orville L. Moe signed the Joint
15 Venture Agreement, dated September 19, 1994. Orville L. Moe
16 signed both documents together as part of the same transaction.

17
18 Simultaneous to the Joint Venture Agreement and the
19 Statutory Warranty Deed, the parties entered into a Governing
20

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1 Board Agreement – Acquisition of Property, dated September 19,
2 1994. This agreement provided that the Kalispel Tribe agreed to
3 adequately compensate SRP for the twenty acres in the business
4 zone. The agreement was later changed to all the 40 acres.
5
6

7 Dave Bonga, the attorney for the Kalispel Tribe who
8 prepared the Statutory Warranty Deed, insisted that the
9 consideration for the conveyance was a “gift” which Mr. Moe
10 disputes. Dave Bonga, the tribal attorney, was the notary public
11 who incorrectly acknowledged Orville L. Moe’s signature as
12 Oroville L. Moe in his individual capacity. Moe’s signature was
13 notarized as an individual, not as a corporate officer.
14
15
16

17 Plaintiff SRP’s intent and the intent of the Kalispel Tribe
18 were to enter into the Joint Venture Agreement as consideration
19 for the conveyance of approximately 40 acres of commercial real
20 property. The Kalispel Tribe represented to Orville L. Moe that
21 they would pay SRP 51% of the appraised value upon getting a
22
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1 business loan. SRP never intended to “give” the Tribe the real
2
3 property for no value. The consideration was the formation of
4 the joint venture.

5
6 On or about September 28, 1998, the Kalispel Tribe and
7 SRP entered into another agreement pursuant to the Joint
8
9 Venture Agreement. The Kalispel Tribe agreed to pay 51% of the
10 total value of the 40 acres, being the amount of \$217,000.00
11 plus interest. This agreement was reached pursuant to the Joint
12
13 Venture Agreement and the Governing Board Agreement –
14 Acquisition of Property, dated September 19, 1994.

15
16 On or about February 27, 2002, SRP and the Kalispel Tribe
17 entered into a Supplemental and Modification to Agreement of
18
19 September 28, 1998, between the Kalispel Tribe and Spokane
20 Raceway Park. Said Agreement was also made and executed
21
22 pursuant to the Joint Venture Agreement. Said agreement
23 substituted 12.5690 acres for the 10 acres designated for the
24

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1 development of the casino by the Kalispel Tribe. When the
2 Casino was built it was on a portion of the acreage exclusively
3 allocated for development by SRP. This is the property in
4 contention whereby the Tribe alleges that Moe damaged their
5 property. The actual facts are that the Tribe trespassed and
6 damaged Moe's hotel site preparation. A map showing the
7 portion allocated is attached to the Affidavit of Orville L. Moe as
8 Exhibit J.
9
10
11
12

13 The agreement also increased the monthly payment from
14 the casino to the Tribe and from the Tribe to the Joint Venture
15 from \$26,000.00 per month to \$32,679.40 due to the acreage
16 increase to the casino.
17
18

19 This agreement was entered into, the Kalispel Tribe entered
20 into an agreement with Northern Quest Casino for the purpose
21 of paying monthly the amount of \$32,679.40 to the Kalispel
22 Tribe. Said agreement was not ratified by the joint venture or
23
24

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1 SRP. Monthly payments were made to the joint venture at least
2 through June 30, 2003.

3
4 On or about June 2002, Orville L. Moe employed attorney
5 Joseph P. Delay for the purpose of compelling the Kalispel Tribe,
6 specifically Glen Nenema and Dave Bonga to continue calling
7 joint venture meetings and/or giving notice thereof, attending
8 the meetings and subsequently drafting Minutes of the meetings.
9

10 Meetings of the Joint Venture Governing Board commenced
11 again on July 17, 2002, and thereafter on August 14, 2002,
12 September 25, 2002, December 9, 2002, May 15, 2002 and
13 September 10, 2003. A copy of the meeting minutes is attached
14 to the Affidavit of Orville L. Moe as Exhibit K.
15
16

17 Orville Moe, and Maynard Moe and Joseph P. Delay
18 attended these meetings. Glen Nenema, Dave Bonga, and Kent
19 Caputo represented the Kalispel Indian Tribe. Also present was
20 Pam Willmering who was the part time secretary of the Joint
21
22
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1 Venture.

2
3 The Kalispel Indian Tribe was desirous of leasing additional
4 property for the casino and the Kalispel Indian Tribe submitted
5 a commercial lease seeking to rent an additional 1.022 acres
6 adjoining the casino from the joint venture. The Tribe executed
7 the Lease Agreement and Glen Nenema signed the Agreement.
8
9 However, SRP, the other joint venturer, did not sign the
10 Agreement, contending that the lease rental was inadequate and
11 not at fair market. A copy of the proposed commercial lease is
12 attached to the Affidavit of Orville L. Moe as Exhibit L. The
13 parties were unable to agree on the fair market rent. SRP,
14 through their attorney, Joseph P. Delay, submitted a Demand for
15 Arbitration under date of March 5, 2003. A copy of that Demand
16 for Arbitration is attached to the Affidavit of Orville L. Moe as
17 Exhibit M. This Demand was forwarded to the Kalispel Indian
18 Tribe. Judge Austin, in the case of *Spokane Raceway Park Inc.*

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1 *v. The Kalispel Tribe of Indians*, Spokane County Court No. 03-2-
2
3 07706-7 denied sovereign immunity and held the agreement
4 valid. Joseph Delay and perhaps James Jordan will be called to
5
6 prove issue preclusion on these legal issues.

7 On March 28, 2003, attorney Delay sent a follow-up letter
8
9 advising that if he did not hear from the Tribe within ten (10)
10 days from the date of this letter, that he would presume that the
11 Tribe would not appoint an Arbitrator and the Arbitration would
12
13 proceed with just two Arbitrators. A copy of this letter is
14
15 attached to the Affidavit of Orville L. Moe as Exhibit N. No action
16 was taken as the Tribe wanted to attempt a compromise. But no
17
18 compromise was ever offered. Instead, the Tribe proceeded to
19
20 add to the additional acreage used and eventually encroached
21
22 upon the 12.56 acres allotted for development by SRP. As
23
24 stated, Moe had the exclusive right to this land and was on-site
preparation when the Kalispel brought this action contending

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1 that Moe damaged their site.

2
3 SRP observed that the Northern Quest Casino had further
4 expanded on property of the Joint Venture beyond the property
5 covered by the signed agreement and the proposed lease. SRP
6 made a second Demand for Arbitration on the 31st day of
7 October 2003; a copy of said Demand for Arbitration is attached
8 to the Affidavit of Orville L. Moe as Exhibit O. This demand
9 covered the additional property as well as the proposed lease
10 property. This Demand for Arbitration was transmitted to Kent
11 Caputo, attorney for the Kalispel Indian Tribe on October 31,
12 2003. The transmittal letter provided that if the Kalispel Indian
13 Tribe did not name an Arbitrator within 10 days from October
14 31, 2003, that SRP would seek the appointment from the
15 Presiding Department of Spokane County Superior Court. This
16 Demand for Arbitration resulted from an earlier inspection by
17 attorney Joseph P. Delay inspecting the intrusion by Northern
18
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1 Quest Casino onto the acreage allotted for development by SRP
2 beyond the scope of the Joint Venture Agreement as amended
3 and supplemented. The intrusion continued until Orville L. Moe
4 attempted to stop the intrusion by removing a strip of asphalt
5 intruding upon the acreage allotted to SRP for development.
6
7

8 It is Plaintiff's belief that the Kalispel Tribe's intent in the
9 Joint Venture was to associate with SRP for the purpose of both
10 parties gaining a profit. The Kalispel Tribe's past conduct
11 indicated that it was operating pursuant to the Joint Venture
12 Agreement.
13
14

15 If the Joint Venture Agreement was void from the
16 beginning, the Kalispel Tribe, Glen Nenema, and Dave Bonga
17 would not have continued to hold meetings of the Joint Venture
18 Governing Board, receive monthly payments to the Joint Venture
19 from the Tribe, make disbursements to the members of the Joint
20 Venture and maintained minutes of those meetings. Unless the
21
22
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24

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1 Plaintiff stipulates these facts, a genuine issue of material fact
2 exists requiring a trial or evidentiary hearing.
3

4 *Breakthrough Management Group Inc. B. Chukchansi Gold*
5 *Casino and Resort*, 2007 WL 2701995 (D.C.Colo 2007) a case
6 involving a waiver of Indian sovereign immunity at page 6, fn. 6,
7 states the factors as follows:
8
9

10 FN6. The factors are: (i) the announced purpose for
11 which the entity was formed; (ii) whether the entity
12 was formed to manage or exploit specific tribal
13 resources; (iii) whether federal policy protecting
14 Indian assets is furthered by extending sovereign
15 immunity to the entity; (iv) whether the entity is
16 organized under the Tribe's laws or under federal law;
17 (v) whether the entities purposes are similar to or
18 serve tribal government; (vi) whether the entity's
19 governance is drawn mainly from tribal officials; (viii)
20 whether tribal officials exercise control over the
21 organization; (ix) whether the Tribe has the power to
22 dismiss members of the organization's governance;
23 and (x) whether suit against the entity would impact
24 the Tribe's fiscal resources.

25 *Warburton/ Buttner v. Superior Court*, 103 Cal.App.4th 1120,
26 127 Cal.Rptr.2d 706 (Cal. 2002), involved a partnership's

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1 commercial development of Indian casino property. The
2 development entity was owned 51% by an Indian tribe. The
3 Tribe claimed that the limited liability partnership had the same
4 sovereignty as the Tribe. The court held that the issue was
5 factual and allowed discovery on alter ego allegations.
6

7
8 *Dixon v. Picopa Construction Company*, 160 Ariz. 251, 772
9 P.2d 1104 (Ariz 1989) held that a corporation wholly owned by
10 an Indian tribe, but formed as a subordinate economic
11 organization did not have sovereign immunity. The court noted
12 that purchase of insurance which is also provided for by the joint
13 venture (772 P.2d at 1110) indicates a commercial purpose. The
14 court also noted that the members of the board did not have to
15 be enrolled Indians. The court stated at 1109:
16
17
18
19

20 Picopa has a board of directors, separate from the
21 tribal government, which exercises full managerial
22 control over the corporation. . . . Further, an
23 examination of the federal policies underlying the
24 immunity doctrine convinces us that we should not
25 grant immunity here. Tribal immunity should only

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1 apply when doing so furthers the federal policies
2 behind the immunity doctrine. Note, Tribal Sovereign
3 Immunity: Searching for Sensible Limits, 88
4 Colum.L.Rev. 173, 183, 186 (1988). Several of those
5 federal policies are implicated here: Protection of
6 tribal assets, preservation of tribal cultural autonomy,
7 preservation of tribal self-determination, and
8 promotion of commercial dealings between Indians
9 and non-Indians. Id. at 179, 186-91.

10 Extending immunity to Picopa would not further the
11 federal policy seeking to protect tribal assets.
12 Insurance protects the corporate liability, and the
13 corporate charter exonerates the Community from
14 corporate liability. Therefore, the Community's assets
15 are not threatened by refusing to recognize immunity
16 for an Indian corporation that does not meet the law's
17 definition of subordinate economic organization.

18 Cohen, *Handbook of Federal Indian Law*, (2005 Ed.) §
19 7.05[1](a), p. 636, states, "Although the immunity extends to
20 entities that are arms of the tribes, it apparently does not cover
21 tribally chartered corporations that are completely independent
22 of the tribe."

23 *Johnson v. Harrah's Kansas Casino Corporation*, 2006 WL
24 463138, denied sovereignty to a management company operating

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1 an Indian casino was not entitled to sovereign immunity. It
2 applied the factors of *Runyon ex rel v. Association of Village*
3 *Counsel*, 84 P.3d 437 (Alaska 2004) regarding liability for
4 financial obligations to determine that tribal sovereignty did not
5 apply.
6

7
8 Many independent reasons exist to deny the Plaintiff's
9 claim of sovereign immunity. One of the waivers is allegation to
10 another economic organization. The doctrine requires that the
11 joint venture is closely allied and was not conducting off-
12 reservation business. The joint venture agreement in this case
13 was not operated by reservation of control in the Tribe. The
14 Joint Venture Agreement was to develop business property by
15 both Indian entities and non-Indian entities. Provisions for
16 insurance is another indication of non-sovereignty.
17

18
19 *Breakthrough Management v. Chukchansi Gold Casino and*
20 *Resort*, 2007 WL 2701995 (D.C.Colo 2007) at page 7 ordered an
21

22
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1 evidentiary hearing to determine whether the management
2 company waived sovereign immunity by agreeing to arbitration.

3
4 In the case, the non-Indian owner sought discovery to
5 prove the development entity was not an alter ego of the limited
6 liability company. The Tribe only served partial answers to the
7 discovery requests and moved for summary judgment. The trial
8 court denied motions to compel discovery. The Court of Appeals
9 reversed and ordered discovery to proceed.

10
11
12
13 *Iowa Management Consultants v. Sac and Fox Tribe of the*
14 *Mississippi*, 656 N.W.2d 167, 173 (Iowa 2003) is a case involving
15 waiver of sovereignty of an Indian tribe. The court held that
16 genuine issues of material fact exist as to the type of contract
17 and reversed the holding on this point.
18
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The Issue of Sovereign Immunity was Determined in the State Court Action. The Doctrine of Estoppel or Issue Preclusion Prohibits ReLitigation of the Issue.

In *Spokane Raceway Park Inc. v. The Kalispel Tribe of Indians*, Spokane County Superior Court No. 03-2-07706-7, the Kalispel Tribe argued and lost the tribal sovereignty issue on the identical facts. The parties and their privity, along with the Moe's, are identical to the action. The Moe's allege the estoppel in their Answer and Counterclaim, page 13. Magistrate Monica Benton in *Northwest Administrators Inc. v. Midland Trucking*, 2007 WL 1893324 (D.C.W.D. Wash 2007) reviews Ninth Circuit law on application of claim preclusion.

Issue preclusion prevents the relitigation of the same issue in subsequent proceedings. *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct 715, 92 L.Ed 898 (1948). The application is upheld in the Ninth Circuit. *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), amended on rehearing 75 F.3d

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1 1391 (9th Cir. 1996). *Stein v. John Hancock*, 106 F.3d 904, 910
2
3 (9th Cir. 1997) applies the doctrine to privities and co-parties
4 stating on 911, "In this circuit, however, the fact that two parties
5 were co-parties in prior litigation is not a bar to the application
6 of collateral estoppel."
7

8 The doctrine applies against the Plaintiff as the identical
9 facts and co-parties were involved in both sets of litigation.
10 Since Plaintiff lost regarding this identical issue with the same
11 parties, this Court is also bound to follow the earlier ruling in
12 denying Plaintiff's Motion for Summary Judgment.
13
14

15
16 **Commencement of the Action by the Kalispel Tribe for**
17 **Quiet Title and Damages is an Independent Waiver of**
18 **Sovereign Immunity.**

19 *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244-45 (8th
20 Cir. 1995) held that a request by an Indian tribe to quiet title is
21 a waiver of sovereign immunity. The court stated on 1245, "We
22 will not transmogrify the doctrine of tribal immunity into one
23
24

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1 which dictates that the tribe never loses a lawsuit.” This
2
3 observation was gleaned from *United States v. Oregon*, 657 F.2d
4 1009, 1014 (9th Cir. 1981). The Ninth Circuit held that the
5 Yakama (Yakima) Tribe, by intervention in a suit involving
6 fishing rights, waived its sovereignty by asking for judicial relief.
7 The court stated on 1015, “By intervening, the Tribe itself would
8
9 be bound by an order it deemed adverse.”
10

11 Ninth Circuit Judge William C. Canby Jr., in his book
12
13 “*American Indian Law in a Nutshell*”, 4th Ed., Thompson West
14
15 2004 at pages 102-3, states:

16 A tribe may also waive its immunity by its conduct,
17 particularly in litigation. By bringing an action, a
18 tribe consents to a full adjudication of the claim it
19 sues upon, *United States v. Oregon*, 657 F.2d 1009 (9th
20 Cir. 1981), and claims of recoupment or set-off that
21 arise from the transaction sued upon and do not
22 exceed the tribe’s claim.

23 *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. 2006)
24
25 unequivocally holds that counterclaims for damages that arise

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1 from the same transaction waive tribal sovereign immunity. It
2
3 also holds that claims in contribution as a joint tortfeasor must
4
5 await final resolution as pendent appellate jurisdiction was not
6 involved.

7 *Wyandotte Nation v. City of Kansas City, Kansas*, 200
8
9 F.Supp.2d 1279, 1284 (D.Kansas 2002) a case in which an
10 Indian tribe sought to quiet title and monetary damages for
11 trespass claims.
12

13 *Washoe Tribe of Nevada and California v. Brooks*, 175
14
15 F.Supp.2d 1255 (D.Nevada 2001) upheld counterclaims where
16 the plaintiff Indian tribe sought to quiet title. The holding was
17 that the affirmative request waived sovereign immunity.
18

19 *Agua Caliente Band of Cahuilla Indians v. Superior Court*,
20
21 148 P.3d 1126 (Cal. 2006) held that an Indian tribe has no
22 sovereign immunity from reporting campaign contributions to
23 California election campaigns. The opinion reviews the recent
24

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1 case law and historical basis of tribal sovereign immunity and
2
3 concludes that the 10th Amendment of the federal constitution
4 reserving powers to the state preempts Indian tribe sovereign
5 immunity. By analogy, the same preemption applies to this case
6 as the Moe's have a right to rely on the state constitution, art §
7 1, 3, 16, preserving and maintaining individual rights and
8
9 prohibiting right of ways for use of corporations without first
10
11 paying just compensation.
12

13 All the case law on the subject unequivocally holds that
14 when an Indian tribe, like the action of Plaintiff in this case,
15 seeks to quiet title and requests damages, it waives sovereign
16 immunity for damages arising, as here, from the same
17
18 occurrence which is the subject matter of the suit.
19

20 **The Plaintiff has Expressly Waived its Sovereign**
21 **Immunity.**

22 *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523
23
24 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) held that

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1 an Indian tribe is not subject to suit in state court unless it has
2 waived its immunity. The case noted that tribal sovereign
3 immunity was developed not by statute, but by accidental mis-
4 reliance on *Turner v. United States*, 248 U.S. 354, 355, 63 L.Ed
5 291, 39 S.Ct. 109 (1919); *Kiowa*, 523 U.S. at 756-758.
6
7

8 Three years later the Supreme Court decided *C & L*
9 *Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S.
10 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) holding that a
11 written arbitration clause is a waiver of a tribe's sovereign
12 immunity. The waiver is a consent for state court enforcement.
13 *Citizen Band*, 532 U.S. at 423. This case is binding precedent.
14 This Court is bound to follow binding precedent. *Hart v.*
15 *Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).
16
17
18
19

20 When waiver of tribal immunity is established, federal court
21 subject matter jurisdiction must be separately determined.
22 *Weeks Construction v. Oglala Sioux Housing Authority*, 797 F.2d
23
24

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1 668, 672 (8th Cir. 1986).

2
3 Here, the Plaintiff Kalispel Tribe agreed in writing to have
4 the officers of Spokane Raceway Park to co-manage the joint
5 venture, agreed to arbitrate and also expressly waived sovereign
6 immunity. Any one of three contractual elements waives
7 sovereign immunity.
8
9

10 In *C & L Enterprises Inc. v. Citizen Band Potawatomi*, 532
11 U.S. at 417, the Court cited *Sokaogon Gaming Enterprise Corp.*
12 *v. Tushie-Montgomery Associates Inc.*, 86 F.3d 656, 661 (CA 7
13 1996), as conflicting with this Court's case, *Pan American Co. v.*
14 *Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989).
15

16
17 The Supreme Court noted that it granted certiorari to resolve the
18 conflict. *C & L* resolved the conflict in favor of the *Sokaogon*
19 case, a Judge Posner opinion that states at 660, "The arbitration
20 clause could not be much clearer. It says that if there is a
21 dispute under the contract it must be submitted to arbitration
22
23
24

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1 and that the arbitrator's decision is final and is enforceable in
2 court. No one reading this clause could doubt that the effect
3 was to make the tribe suable." *Sokaogon* also notes that it
4 makes a difference if the tribe is the one bringing the suit, rather
5 than defending, but did not decide the issue. *Sokaogon*, 86 F.3d
6 at 661. The intervening decision of the U.S. Supreme Court
7 resolving a circuit conflict clearly indicates that *Sycuan Band* is
8 no longer good precedent.
9

10 The two cases cited with approval by *C & L Enterprises*, 532
11 U.S. at 417, *Native Village of Eyak v. G C Contractors*, 658 P.2d
12 756 (Alaska 1983) and *Val/Del, Inc. v. Superior Court In and For*
13 *Pima County*, 145 Ariz. 558, 703 P.2d 509 (Ariz.App.Div. 2 1985)
14 held that an express arbitration contract is a waiver of
15 immunity. *Val/Del*, 703 P.2d at 609 holds that the proper court
16 of jurisdiction is state court even if the tribal court may also
17 have jurisdiction of the management contract.
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1 In *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974,
2
3 981 (9th Cir. 2006), the Ninth Circuit adopted a “plain meaning”
4 approach to a waiver of sovereign immunity. The case holds that
5 an enabling ordinance was sufficient to waive immunity. The
6 court reversed the dismissal of the tribal housing authority
7 holding that the enabling ordinance waived sovereign immunity.
8
9

10 *Smith v. Hopland Band of Pomo Indians*, 95 Cal.App.4th
11 (Ct.App.Cal 2002) holds that an arbitration clause waives tribal
12 immunity following *C & L Enterprises v. Potawatomi Indian Tribe*,
13 532 U.S. 411, 121 S.Ct 1589, 149 L.Ed.2d 623 (2001).
14
15

16 *Rosebud Sioux Tribe v. Val-U Construction Company of South*
17 *Dakota*, 50 F.3d 560, 562 (8th Cir. 1995) held that an express
18 waiver, even though simple and spare, was sufficient to waive
19 immunity for contract and possibly an arbitration award.
20
21

22 William L. Canby, Jr., *American Indian Law in a Nutshell* (4th
23 Ed. 2004, Thompson- West) Preface III, indicates that the
24

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1 Supreme Court is “narrowing” its approach to questions of tribal
2
3 sovereignty “generally” which is a significant change
4 necessitating his 3rd edition. He also concludes at 101, “There
5 is no longer any doubt that a tribe can waive its own immunity.
6 One method is by contract.”
7

8
9 The Moe’s urge this Court to consider the aggregate of the
10 reasons that immunity of the tribe was waived in this case as
11 they appointed a management board of only one member of the
12 Kalispel Tribe and one member of another tribe and two officers
13 of Spokane Raceway Park to manage the joint venture; agreed to
14 arbitrate and also expressly waived tribal immunity.
15
16

17 A casino was established as part of the land. Any one of
18 the four contractual elements would waive immunity and
19 prevent jurisdiction. When the subject matter of injunction and
20 quiet title to non tribal land is also considered, the waiver is
21 unequivocal.
22
23
24

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1 The Joint Venture Agreement in this case includes the
2
3 explicit words waiver of immunity in the same document that
4 submits "any disputes" to arbitration whose decision is "final."
5
6 The Section on waiver preserves tribal trust lands from a
7 "judgment" and provides for insurance. A court decision
8 enforcing the value be set by arbitration establishes issue
9 preclusion. The statute of the State of Washington,
10 Wash.Rev.Code 7.04.060, permits any party to an arbitration to
11 confirm the award. Notice must be given to the adverse party.
12
13 The judgment entered has the same force and effect "as if it had
14 been rendered in an action in the Court in which it is entered."
15 Wash.Rev.Code 7.04.210. The courts of the state have
16 jurisdiction to enter the judgment. Wash.Rev.Code 7.04.020.
17
18 The clerk of the court registers the judgment. Wash.Rev.Code
19
20 7.04.200.
21
22
23
24

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum In Opposition to Plaintiff's Motion for Summary Judgment was served on all counsel on January 22nd, 2008 using ECF which will send such notification to the opposing counsel.

DATED this 22nd day of January, 2008.

/s/ Aaron Lowe
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