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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BETH A. BODI, Plaintiff-Appellee, v. SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al., Defendants-Appellants.	)	No. 14-16121 D.C. No. 2:13-cv-01044-LLK-CKD U. S. District Court for the Eastern District of California (Hon. Lawrence K. Karlton)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE PUYALLUP TRIBE AND THE ARCTIC SLOPE NATIVE ASSOCIATION, LTD., IN SUPPORT OF APPELLANTS

INTRODUCTION

The Puyallup Tribe and the Arctic Slope Native Association, Ltd., request leave to file the attached amicus curiae brief in support of appellant, the Shingle Springs Band of Miwok Indians ("Tribe"). The Tribe consents to the filing of this brief. Appellee Beth A. Bodi has neither consented nor opposed the filing, despite amici's request that she consent. For that reason, amici present this motion. Fed. R. App. P. 29(a).

IDENTITY AND INTEREST OF AMICI CURIAE

Proposed amici are the Puyallup Tribe, a federally-recognized Indian tribe located in Pierce County, Washington, and the Arctic Slope Native Association, a tribal organization of the seven federally-recognized Native Alaskan Villages of Alaska's Arctic Slope Region, with its headquarters in Barrow, Alaska.

The Puyallup Tribe has more than 4,000 members and oversees a full-service outpatient health care center in Tacoma managed by the Puyallup Tribal Health Authority, a non-profit arm of the Tribe. The Puyallup Tribal Health Authority provides medical, dental, pharmacy, laboratory, X-ray, and behavioral health services to approximately 10,000 Native Americans in and around Tacoma, with about 200 employees, 40% of whom are Native. Similar to the Shingle Springs Band, the Puyallup Tribe has its own Tribal Court and a Tribal Ordinance

providing waivers of tribal immunity for certain claims brought against the Tribe in Tribal Court.[1]

The Arctic Slope Native Association carries out federal health care programs for approximately 10,000 Alaska Natives, American Indians and other eligible individuals on Alaska's North Slope and surrounding regions, including medical, dental, behavioral health, optometry, pharmacy and social services. The Arctic Slope Native Association operates the Indian Health Service's Samuel Simmonds Memorial Hospital in Barrow, under authority of the Alaska Tribal Health Compact and funding agreements with the Secretary of Health and Human Services, entered pursuant to Title V of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 458aaa *et seq.*, the Snyder Act of 1921, 25 U.S.C. § 13, and the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq*., and is a "tribal organization" within the meaning of 25 U.S.C. § 450b(*l*). Tribal organizations like the Arctic Slope Native Association enjoy tribal sovereign immunity absent unequivocal waiver or Congressional abrogation. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

[1] Puyallup Tribal Tort Claims Act, Chap. 4.

The Arctic Slope Native Association and the Puyallup Tribe have a strong interest in preserving the settled doctrine of tribal sovereign immunity in cases that are removed from state court to federal court. As (respectively) a federally-recognized tribe and an organization of federally-recognized tribes, operating federal health programs for federal beneficiaries, amici are not infrequently targets of state court litigation. For the reasons explained in the proposed brief, amici believe that issues relating to the federal tribal sovereign immunity defense should be decided in federal courts, and that amici and other tribes and tribal organizations should have the option of removing state court litigation to federal court, where appropriate, without losing the opportunity to raise that federal defense in federal court.

AMICI'S BRIEF WILL ASSIST THE COURT AND IS RELEVANT TO THE DISPOSITION OF THIS CASE

The amicus curiae's role is to assist in a case of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration. *Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *Funbus Sys., Inc. v. State of California Pub. Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). An amicus brief should be allowed where the amicus has a unique perspective that can help the

court reach its decision. *In re Heath*, 331 B.R. 424, 430 (9th Cir. BAP 2005) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

This Court's decision on the issue of whether removal constitutes waiver of tribal sovereign immunity will impact tribal communities across the country. The Puyallup Tribe and the Arctic Slope Native Association both provide a broad range of health care services to Native Alaskans and American Indians and operate in a nearly exclusive federal legal environment when providing those services. Their first-hand experience is that a federal judicial forum is critically important when resolving questions of federal law applicable to federally-recognized tribes and tribal organizations, federal health care programs, and federal beneficiaries. In particular, the resolution of tribal sovereign immunity questions in federal court is critically important, and should not be taken away.

The proposed amicus curiae brief is meant to give the Court a deeper and broader understanding of this important area of federal law, from the perspective of active participants in the federal health care system for Alaska Natives and American Indians, and to serve as a guide for the Court to reach an informed decision on the merits of the appeal.

CONCLUSION

For the reasons stated above, the Puyallup Tribe and the Arctic Slope Native Association respectfully request that the Court accept their proposed amicus curiae brief for filing.

Dated October 23, 2014.

/s/ Richard D. Monkman

By: _____

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CERTIFICATE OF SERVICE

This is to certify that on October 23, 2014, a copy of the foregoing has been served electronically with the Clerk of the Court by using CM/ECF system, and that service will be accomplished by the appellate CM/ECF system on all participants in the case who are registered CM/ECF users.

/s/ Richard D. Monkman

_____

Richard D. Monkman

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 14-16121

BETH A. BODI,

Plaintiff-Appellee,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants-Appellants.

Appeal from the United States District Court,
Eastern District of California
Case No. 2:13-cv-01044-LLK-CKD
(Honorable Lawrence K. Karlton)

AMICUS CURIAE BRIEF OF THE PUYALLUP TRIBE AND THE ARCTIC SLOPE NATIVE ASSOCIATION, LTD., SUPPORTING APPELLANTS SHINGLE SPRINGS BAND OF MIWOK INDIANS, ET AL., AND URGING REVERSAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

PAGE

STATUTES

RULES

OTHER AUTHORITIES

I. INTEREST OF AMICI.

Amici are the Puyallup Tribe, a federally-recognized tribe located in Pierce County, Washington, and the Arctic Slope Native Association, Ltd. ("ASNA"), a consortium of the seven federally-recognized Native Alaskan Villages of Alaska's Arctic Slope Region, with headquarters in Barrow, Alaska. The Puyallup Tribe oversees a full-service outpatient health care center in Tacoma that is managed by the Puyallup Tribal Health Authority, a non-profit entity of the Tribe. The Puyallup Tribal Health Authority provides medical, dental, pharmacy, laboratory, X-ray, and behavioral health services to approximately 10,000 Native Americans in and around Tacoma, with about 200 employees, 40% of whom are Native. The Puyallup Tribe has its own Tribal Court and a Tribal Ordinance providing for detailed waivers of tribal immunity for suits brought against the Tribe in Tribal Court.

ASNA is a "tribal organization" within the meaning of 25 U.S.C. § 450b(*l*), and carries out federal health care programs for Alaska Natives, American Indians and other eligible individuals, including medical, dental, behavioral health, optometry, pharmacy and social services. ASNA operates the Indian Health Service's Samuel Simmonds Memorial Hospital in Barrow, Alaska, under authority of the Alaska Tribal Health Compact and funding agreements with the Secretary of Health and Human Services, entered pursuant to Title V of the Indian

Self-Determination and Education Assistance Act, 25 U.S.C. § 458aaa *et seq.*, the Snyder Act of 1921, 25 U.S.C. § 13, and the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq*. Tribal organizations like ASNA enjoy tribal sovereign immunity, absent unequivocal waiver or Congressional abrogation. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998); *Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2012).

ASNA and the Puyallup Tribe have an interest in preserving the settled doctrine of tribal sovereign immunity in cases that are removed from state court to federal court. Access to a federal forum familiar with federal Indian law principles is essential for tribes and tribal organizations. The development of a uniform and consistent body of federal law is equally critical in this important area. Amici therefore support the position of appellant Shingle Springs Band of Miwok Indians (the "Tribe"), and urge this Court to find that the Band did not waive its sovereign immunity simply by removing this action to federal court.

Amici have been authorized to file this brief by their respective tribal administrations. Undersigned counsel authored the brief in whole. No party to the underlying litigation and no person other than amici contributed money to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

II. SUMMARY OF ARGUMENT.

The Supreme Court has repeatedly held that Indian tribes are immune from lawsuits in both state and federal court, unless Congress has authorized the suit or the tribe has expressly waived its immunity. *Michigan v. Bay Mills Indian Comty.*, 134 S. Ct. 2024, 2030-32 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Cohen's Handbook of Federal Indian Law* § 7.05, at 636 (Nell Jessup Newton ed., 2012) ("The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as governments in the Indian commerce clause.") (citing U.S. Const. Art. 1, § 8). "As separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978), Indian tribes have long relied upon this well-established rule.

Immunity from suit is an inherent attribute of sovereignty. This notion can be traced back to early English common law recognizing the King's immunity from suit in his own courts. William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1610 (2013). "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent." Alexander Hamilton, *The Federalist No. 81* (Jacob E. Cooke ed., Wesleyan U. Press 1961). Indian tribes were independent, self-governing societies long before European nations appeared on this continent. After contact, European

powers dealt with tribes by means of treaties, on a government-to-government basis. "The young United States continued the practice of treating tribes as sovereigns, negotiating and entering into treaties with them until 1871." Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 138-39 (2004). In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), Justice Marshall articulated what has become a touchstone of federal Indian law: tribes remain "distinct, independent political communities, retaining their original natural rights…" *Id*. Tribal sovereign immunity is "'a necessary corollary to Indian sovereignty and self-governance.'" *Bay Mills*, 134 S. Ct. at 2030 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

Sovereign immunity from suit protects tribal governments, which are historically underfunded, have limited taxing power and have limited revenue bases. Immunity allows tribal governments to focus their time and resources on governing and providing services to tribal members, not litigating. This is not to say tribal members and other individuals have no legal recourse against a tribal government. "Over the past thirty years, tribes have strengthened their court systems and have increased the availability of remedies against tribal governments." Struve, *supra*, at 181. Most tribes—including appellant Shingle Springs and amicus Puyallup Tribe—have tribal courts and have enacted tribal

codes with specific and carefully drafted waivers of tribal immunity. *See, e.g.*, Shingle Springs Rancheria Tribal Court Ordinance, Ch. 4 § 1 ("Sovereign Immunity").[1]

Tribal immunity "'is a matter of federal law.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). Having federal courts available to resolve questions of that immunity is critical, not only to amici but to all Indian tribes and Alaskan Native Villages.

III. ARGUMENT

A. WAIVERS OF TRIBAL SOVEREIGN IMMUNITY MUST BE EXPRESS AND UNEQUIVOCAL. THE DISTRICT COURT ERRED IN "CARVING OUT" AN EXCEPTION TO THIS RULE.

The Supreme Court's recent decision in *Bay Mills* strongly reaffirmed the "'settled law'" that tribal sovereign immunity can only be waived by a direct act of Congress or by a deliberate, clear and unequivocal waiver by the tribe. 134 S. Ct. at 2030-31 (quoting *Kiowa*, 523 U.S. at 756). Waiver cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58-59. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (citing *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416,

[1] *Available at* http://www.shinglespringsrancheria.com/content/resources/downloads/ordinances/public/Tribal%20Court%20Ordinance.pdf

419 (9th Cir. 1989)). In both *Kiowa* and *Bay Mills*, the Supreme Court directed judicial restraint, deferring to Congress the task of further defining tribal sovereign immunity through "explicit legislation" should Congress choose to do so, *Kiowa*, 523 U.S. at 759-60, and cautioning against judicially "carving out" exceptions to the rule. *Bay Mills*, 134 S. Ct. at 2031.

Here, the district court's decision—entered shortly before *Bay Mills* was decided, so the district court did not have the benefit of the Supreme Court's most recent admonition—did exactly what the Court cautioned against, "carving out an exception" and finding an implicit waiver of tribal sovereign immunity through federal question removal. The district court did not find abrogation by Congress, nor any deliberate and clear waiver of sovereign immunity by the Tribe. Instead, the district court held the Tribe waived sovereign immunity simply by removing this action from state court to federal court. The court noted that "at least three district courts" in the Ninth Circuit had previously addressed this issue, and "[t]hey have reached different conclusions."[2]

[2] May 13, 2014 Order, Dkt. 52 at 10-12 ("Order") (citing *Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians*, No. C-01-4125 VRW, 2002 WL 34727095 (N.D. Cal. Dec. 26, 2002) (Walker, J.) (removal does *not* waive tribal immunity); *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953, 961 (E.D. Cal. 2009) (Ishii, J.) (removal does *not* waive tribal immunity); *State Eng'r v. S. Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 66 F. Supp. 2d 1163, 1173 (D. Nev. 1999) (Reed, J.) (removal constitutes a "clear and unequivocal waiver" of tribal immunity)).

The district court reviewed but declined to follow the Eleventh Circuit's decision in *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200 (11th Cir. 2012), the only federal appellate court to yet consider the impact, if any, that removal to federal court has on tribal immunity. The Eleventh Circuit carefully examined the history of tribal sovereign immunity and distinguished *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), in which the Supreme Court held that removal by a State can, in certain limited circumstances, waive Eleventh Amendment immunity. The Eleventh Circuit held that *Lapides* does not apply to tribal sovereign immunity, because of the unique nature of tribal immunity, 692 F.3d at 1201 ("an Indian tribe's sovereign immunity is of a far different character than a state's Eleventh Amendment immunity"), because the "interests in adjudicating tribal immunity claims in a federal forum are considerable," *id*. at 1207, and because *Lapides* expressly distinguished tribal immunity from State immunity, *id.* at 1208. "In short, the Tribe's removal of the case to federal court did not, standing alone, waive the Tribe's sovereign immunity from suit." *Id*.

Contour Spa correctly interpreted *Lapides*. There, the State of Georgia was sued in its own state courts, where state law waived sovereign immunity for the claims asserted. The State's lawyers removed the case to federal court under 28 U.S.C. § 1441 and then pled Eleventh Amendment immunity, a peculiar argument

that smacked of artful pleading. 535 U.S. at 616-17. The Supreme Court denied immunity, holding that in limited circumstances, and in context of the unique development of Eleventh Amendment jurisprudence, removal by a State may waive its immunity.[3] The Court quickly dismissed the State's argument that its case was similar to those involving federal and tribal sovereign immunity:

> Those cases, however, do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (*i.e.*, the United States) to seek the protection of its own courts (*i.e.*, the federal courts), or *an effort to protect an Indian tribe.*

Id. at 623 (emphasis added).

Here, the Tribe has not expressly waived its immunity through tribal law, contract or any pleading. Nor has Congress abrogated the Tribe's immunity. The Tribe's removal to federal court signifies nothing more that the Tribe's desire for a

[3] The Supreme Court stressed that "more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity." *Id*. at 619 (citing *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906)). Based on the long historical development of Eleventh Amendment jurisprudence, the Court declined to "abandon the general principle just stated." *Id.* at 620. *See also Hess v. Port Authority Trans–Hudson Corp.*, 513 U.S. 30, 39, 39 n.9 (1994) (discussing origin of Eleventh Amendment immunity; "[a]doption of the [Eleventh] Amendment responded most immediately to the States' fears that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin") (internal quotations and citations omitted).

federal forum to litigate federal questions, including the federal defense of tribal sovereign immunity.

1. Congress has not waived the Tribe's immunity.

Congress has the power to waive tribal sovereign immunity, but must do so "unequivocally": "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 134 S. Ct. at 2031-32. There is no act of Congress applicable here that waives the Tribe's immunity.

The Tribe removed the case to federal court under 28 U.S.C. §§ 1441 and 1331, based on federal questions presented by the appellant's claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*. Neither the FMLA nor any provision of Title 28 abrogates tribal immunity. The district court, however, seems to have believed that a law affirmatively preserving a tribe's immunity upon removal must be found, or immunity is waived. It noted that "Congress provided foreign sovereigns with a statutory right of removal," and suggested that the Eleventh Circuit in *Contour Spa* "failed to satisfactorily explain why the absence of a statutory right of removal for tribes is not fatal to the comparison between the two forms of immunity, at least where waiver-through-immunity is concerned." Order at 14.

The district court recognized the "distinct foundations of tribal sovereign immunity," and concluded it should not "analog[ize]" to foreign sovereign

immunity and removal rights, *id*. at 15, but nonetheless the lack of a specific statute authorizing tribes to remove state court actions seems to have colored its views throughout.[4] The district court noted that this Circuit "has adopted 'a straightforward, easy-to-administer rule in accord with *Lapides*: Removal [by a State] waives Eleventh Amendment immunity.'" *Id*. at 12 n.1 (quoting *Embury v. King*, 361 F.2d 562, 566 (9th Cir. 2004)). The court appears to have concluded this approach to *Lapides* should be followed with tribes as well, reasoning that "[b]ecause there is no dedicated removal statute for Indian tribes (as there is for foreign states)"—and because the Tribe could have raised sovereign immunity as a defense in state court—"the Tribe has unequivocally waived any claim of sovereign immunity through removal." *Id.* Order at 13 – 17. (The district court was not confident in reaching this conclusion, however, and affirmatively encouraged the parties to "appeal this ruling so that a higher court may definitively resolve the issue." *Id.* at 17.)

The district court's conclusion was incorrect. The law does not require affirmative legislation by Congress to preserve tribal immunity. In the absence of abrogation (or express waiver) tribal immunity remains intact. "[U]ntil Congress

[4] *See, e.g.*, Order at 16 ("Because there is no dedicated removal statute for Indian tribes (as there is for foreign states), the defendants herein were only able to remove this action because plaintiff pled a federal claim along with her state claims.").

acts, the tribes retain their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (quotations omitted); *accord Kiowa*, 523 U.S. at 758-59; *see also Miller*, 705 F.3d at 923. It is certainly correct that tribal immunity is an affirmative defense in either state or federal court, but this defense is not lost simply by removal when grounds for removal indisputably exist.

2. The Tribe has not waived immunity to suit in state or federal courts.

Every sovereign has the power to define when and under what circumstances it will permit a suit against itself. Alex. Hamilton, *supra*. Congress has abrogated federal immunity in certain circumstances, but always carefully and with limits. For instance, in the Federal Tort Claims Act the plaintiff must begin with an administrative action and only after that may go to court. 28 U.S.C. §§ 1346, 2671 *et seq.* In the Quiet Title Act, time limits are prescribed, and Indian allotments and restricted title are immune from suit. 28 U.S.C. § 2409a.[5]

In the same manner, tribal governments have established "a myriad of mechanisms … to waive immunity in certain circumstances, thereby providing for redress by aggrieved individuals." Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*,

[5] *See also* 5 U.S.C. § 702 (Administrative Procedure Act); 28 U.S.C. § 1491 (Tucker Act).

37 Tulsa L. Rev. 661, 744 (2002); *see id.* at 745-46 (discussing the Navajo Sovereign Immunity Act); 746-48 (examples of other tribal government immunity waivers). The Shingle Springs Band of Miwok Indians Tribal Court Ordinance waives tribal sovereign immunity for a defined range of suits against the Tribe in its Tribal Courts. Shingle Springs Rancheria Tribal Court Ordinance, Chap. 4 § 1, *supra* at 5 n.1. Similarly, the Puyallup Tribe has a tribal ordinance providing immunity waivers for tort claims brought against the Tribe in Tribal Court. Puyallup Tribal Tort Claims Act, Chap. 4.12.[6] Many tribes provide remedies for civil rights, tort and contract claims against tribal governments. Struve, *supra*, at 157-61 (more examples of tribal law waivers for certain suits). This delineation of where, and how, claims may be brought against each tribe is a core attribute of each tribe's sovereign governmental authority. Here, the Tribe's Ordinance does not waive the Tribe's immunity from suit in the courts of any other sovereign, whether those of the State of California or of the United States.

3. The Tribe's voluntary removal to federal court did not waive immunity.

Since neither Congress nor the Tribe have waived immunity, there is no basis to find that waiver occurred by the simple removal of a state court action to

[6] *Available at* http://www.codepublishing.com/WA/puyalluptribe/html/PuyallupTribe04/PuyallupTribe0412.html

federal court. In closely related contexts, the Supreme Court and this Circuit have consistently held that an Indian tribe's voluntary invocation of federal jurisdiction does *not* act as a waiver. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, the Supreme Court held a tribe's filing suit in federal court to enjoin the assessment of state tax did not constitute a "clear waiver" of tribal immunity from the State Tax Commission's counterclaims. 498 U.S. 505, 509-10 (1991); *Contour Spa*, 692 F.3d at 1208 (in *Potawatomi* "the Indian tribe had voluntarily invoked the jurisdiction of the federal courts, yet did not waive its sovereign immunity against related counterclaims by doing so."). Similarly, in *United States v. U.S. Fidelity and Guaranty Co.*, 309 U.S. 506, 512-14 (1940), the Supreme Court held that a company's cross-claims against tribes were barred by tribal sovereign immunity, even though the United States, acting as trustee for the tribes, filed a claim for royalties due under leases.[7]

This Circuit's opinions on tribal sovereign immunity confirm that a tribe's voluntary appearance in federal court does not constitute waiver. *See Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (tribe did not waive sovereign immunity with respect to state's counterclaims by initiation of suit for

[7] The only case in which the Supreme Court has found a clear waiver of tribal sovereign immunity involved a contract where the tribe agreed to binding arbitration, with the enforcement of the arbitrator's decision "in any court having jurisdiction thereof." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420-23 (2001).

injunctive relief or by continuing sale of liquor while preliminary injunction was in force); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (tribe's "initiation of a suit for declaratory and injunctive relief does not constitute consent to the Board's counterclaim"), *rev'd on other grounds*, 474 U.S. 9 (1985); *McClendon v. United States*, 885 F.2d 627, 630-32 (9th Cir. 1989) (tribe's initiation of lawsuit does not constitute waiver of tribal sovereign immunity for "related matters, even if those matters arise from the same set of underlying facts"); *see also Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (tribe's participation in administrative proceedings did not waive sovereign immunity in an action filed by another tribe seeking review of agency's decision).

This case presents an equally compelling, if not stronger, argument against finding waiver. The Tribe's participation in this matter was not voluntary: it is a defendant. Removal to federal court signifies nothing more than the Tribe's desire for a federal forum to litigate the federal affirmative defense of tribal immunity. After removal to federal court, the Tribe promptly and vigilantly guarded its rights, asserting immunity at every opportunity. *See, e.g.*, Dkt. 5 (Tribe's first motion to dismiss on the basis of sovereign immunity); Dkt. 18 (Tribe's motion to dismiss plaintiff's second amended complaint on the basis of sovereign immunity).

B. THERE ARE STRONG POLICY REASONS FOR TRIBAL IMMUNITY ISSUES TO BE RESOLVED IN THE FEDERAL COURTS.

"[T]ribal immunity 'is a matter of federal law.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). As the Eleventh Circuit noted, "Indian tribes have an interest in a uniform body of federal law in this area." *Contour Spa*, 692 F.3d at 1207. The Supreme Court has spoken to the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-15 (2005) (holding federal-question jurisdiction could apply to state-law claims that "implicate significant federal issues" because "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court."); *see also* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1241 (2004) (scholarly consensus that "there is a federal interest in having novel or open federal questions resolved in federal courts," and while state court courts may hear many federal questions, "disuniformity and assuring the supremacy of federal law are serious problems").

The district court observed that tribal sovereign immunity can—and has been, frequently—raised as a defense in state court, and reasoned "it is difficult to straightfacedly claim that encouraging the development of a 'uniform body of

federal law in this area' should be a dispositive factor, unless the 'area' in question is the narrow slice of cases that are removable under 28 U.S.C. § 1441(a)." Order at 17 (internal quotations original). Amici respectfully but strongly disagree with the district court's view. To adopt its approach would deny federal courts an opportunity to rule on an important, dispositive issue of federal law when a case has been properly removed.

Absent extraordinary circumstances, federal courts have a "'virtually unflagging obligation'" to exercise the jurisdiction conferred on them by Congress when called upon to do so, *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1147 (9th Cir. 2007) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 809, 817 (1976)), even if, as should have been the result here, exercising that jurisdiction means dismissing a case based on a federal affirmative defense. The concurrent jurisdiction of state courts does not diminish the duty of federal courts to exercise jurisdiction over federal claims nor the overarching policy preferring federal claims to be resolved in a federal forum. Friedman, *supra*, at 1241 (noting it is inevitable state courts are going to hear many federal questions, but ideally federal claims should be resolved in federal court). These principles are especially applicable when the rights of Indian tribes are at stake. We note three reasons below.

First, the Supreme Court has observed that state courts have historically been hostile to federal rights of Indian tribes. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566-67 (1983) (stating there is "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983) (stating that state laws may be "based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation"); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (recognizing that "[b]ecause of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies.").

Second, the federal courts have long emphasized the importance of protecting tribal governments and their finances from unauthorized lawsuits. For example, in *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895), the Eighth Circuit dismissed a claim against the tribe for attorney's fees based on the doctrine of tribal sovereign immunity. The court observed that "[a]s rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it." *Id*. at 376. In *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908), the Circuit dismissed a breach of contract claim against the Creek Nation, reasoning that as a matter of public policy "such Indian tribes are exempt from civil suit." *Id.* at 308. Otherwise, "the tribes would

soon be overwhelmed with civil litigation and judgments" and "disastrous consequences…would result if the tribe were exposed to civil suit." *Id.* at 308-09. Half a century later, the Supreme Court relied on both *Thebo* and *Adams* to uphold the immunity of the Choctaw and Chickasaw Nations in *U.S. Fidelity and Guaranty Company*. 309 U.S. at 512, 512 n.11 ("These Indian Nations are exempt from suit without Congressional authorization."). Most recently, Justice Sotomayor in *Bay Mills* emphasized that many tribal governments struggle to operate with limited resources, are unable to generate revenue through taxation, and do not engage "in highly lucrative commercial activity." 134 S. Ct. at 2043-45 (Sotomayor, J., concurring).

Third, Congress has similarly long recognized that federal courts are the preferred forum for adjudicating cases involving Indian tribes. *See*, *e.g.*, 28 U.S.C. § 1362 (provides federal district courts with "original jurisdiction of all civil actions, brought by any Indian tribe … wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States"); 25 U.S.C. § 450m-1(a) (federal district courts and the Court of Claims have original jurisdiction over Indian Self-Determination and Education Assistance Act claims); 25 U.S.C. §§ 2710(d)) and 2713 (federal district court has jurisdiction over certain claims arising from the Indian Gaming Regulatory Act); 25 U.S.C. § 2103(d) (Secretary's

disapproval of an agreement under the Indian Mineral Development Act may be reviewed de novo by federal district court).

For these reasons, the vast majority of cases involving tribes are resolved in federal court, resulting in the development of a robust and uniform body of federal Indian law. The benefit of this federal jurisprudence has been extremely important to tribes and tribal organizations. As the Eleventh Circuit noted:

> Again, tribal immunity is a matter of purely federal law. Much like foreign sovereigns, Indian tribes have an interest in a uniform body of federal law in this area. These interests in adjudicating tribal immunity claims in a federal forum are considerable, and, thus, we are hard pressed to justify mechanically extending the decision in *Lapides* to this wholly different context—whether an Indian tribe has waived its immunity from suit. In fact, to do so would effectively mean that an Indian tribe that has been sued in state court for violations of federal law must either forego its immunity from suit by removing the case or assert its immunity—itself a matter of federal law— *only* in state court.

Contour Spa, 692 F.3d at 1207 (internal citations and quotations omitted).

Tribes should not be forced to race to the courthouse door to secure a federal forum to vindicate this critically important federal right. Yet that would be the result if the district court's ruling stands. Amici fail to see a basis for this result, and see only harm and confusion if it is allowed to stand.

IV. CONCLUSION.

The outcome of this case will impact all Indian tribes and Native Alaskan Villages, who have long relied upon the rule that tribal sovereign immunity can only be abrogated by a clear act of Congress or by a deliberate, express waiver by

the tribe itself. Tribal sovereign immunity is a matter of federal law, and federal courts have an obligation to decide this important issue when a case is removed from state to federal court. Amici, the federally-recognized Puyallup Tribe and the Arctic Slope Native Association, Ltd., a tribal organization of federally-recognized Alaska Native Villages, respectfully request that the district court's decision be reversed.

DATED October 23, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rules 32 and 32-1, the Amicus Curiae Brief of the Puyallup Tribe and the Arctic Slope Native Association, Ltd. is proportionately spaced, has a typeface of 14 point Times New Roman and according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 5,772 words.

DATED October 23, 2014.

By: */s/ Richard D. Monkman*
_____
Richard D. Monkman

CERTIFICATE OF SERVICE

I certify that on this 23rd day of October, 2014, I electronically filed the foregoing Amicus Curiae Brief of the Puyallup Tribe and the Arctic Slope Native Association, Ltd., with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served counsel of record by that means.

DATED October 23, 2014.

By: */s/ Richard D. Monkman*

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