CROWELL LAW OFFICES-TRIBAL ADVOCACY GROUP
Scott Crowell (*pro hac vice)*
1487 W. S.R. 89A, Suite 8
Sedona, AZ 86336
Tel: (425) 802-5369
Email: scottcrowell@hotmail.com

LAW OFFICES OF MICHAEL P. SCOTT
Michael P. Scott (SBN 139188)
P.O. Box 3802
Santa Rosa, CA 95402-3802
Telephone: (707) 799-4678
Email: Michael_p_scott@yahoo.com
Attorneys for Plaintiff
GUIDIVILLE RANCHERIA OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally recognized Indian Tribe; and UPSTREAM POINT MOLATE LLC, a California Limited Liability Company,

Plaintiffs,

v.

UNITED STATES OF AMERICA; SALLY JEWELL, the Secretary of the Department of Interior; KEVIN WASHBURN-the Assistant Secretary-Indian Affairs; and THE CITY OF RICHMOND, a California Municipality, et al.,

Defendants,

THE CITY OF RICHMOND, a California Municipality,

Counterclaimant,

v.

UPSTREAM POINT MOLATE LLC, a California Limited Liability Company

Counterclaim-Defendant.

CASE NO.: CV 12-1326 YGR/KAW

GUIDIVILLE RANCHERIA'S RESPONSE IN OPPOSITION TO CITY OF RICHMOND'S MOTION FOR ATTORNEYS' FEES AND COSTS

DATE: April 21, 2015
TIME: 2:00 p.m.
PLACE: Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, CA

The Honorable Yvonne González Rogers

Plaintiff GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally-recognized Indian tribe ("Guidiville" or "Tribe"), hereby responds in opposition to the Motion for Attorneys Fees and Costs (DK# 255) filed by Defendant City of Richmond ("City").

Guidiville joins in Plaintiff Upstream Point Molate LLC's Opposition to City of Richmonds' Motion for Attorneys' Fees and Costs the opposition filed by, as if fully set forth herein. The Opposition submitted by Plaintiff UPSTREAM POINT MOLATE LLC, a California limited liability corporation ("Upstream") sets forth the reasons why the requested award should be denied or substantially reduced assuming the relief is otherwise allowable against Guidiville. This opposition brief is specifically directed to the Tribe's sovereign immunity, which has not been abrogated or waived. Absent an effective waiver, the City cannot recover attorneys fees against the Tribe.

I. Indian Tribes are Immune From Suit Absent an Effective Waiver.

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Com'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509-510, 111 S.Ct. 905, 909-910 (1991); *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110 (1919); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*,____U.S.____, 134 S. Ct. 2024, 2030 (2014); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313 (1986). A primary historical purpose for tribal sovereign immunity is to protect the sovereign tribe's treasury, preserving financial integrity and avoiding forced insolvency from private suits. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (citing *Alden v. Maine*, 527 U.S. 706, 750, 119 S.Ct. 2240, 2264 (1999)). Suits against Indian tribes are thus barred by sovereign

immunity absent a clear waiver by the tribe or congressional abrogation. *Citizen Band*, 498 U.S. at 509-510, 111 S.Ct. at 909*; Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702-03 (1998); *United States v. U.S. Fid. & Guar. Co*., 309 U.S. 506, 514, 60 S.Ct. 653, 657 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."). Recently, the U.S. Supreme Court admonished that federal courts may not "carv[e] out exceptions" to the broad protections sovereign immunity provides federally-recognized tribal governments. *Bay Mills Indian Community*, 134 S.Ct. at 2031 (2014). In light of Supreme Court precedent, the Ninth Circuit employs "a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

Any waiver must be construed narrowly, and is subject to the limitations set forth by the tribe. The Supreme Court has consistently held that "[a]waiver of sovereign immunity must be strictly construed in favor of the sovereign." E.g. *Orff v. United States*, 545 U.S. 596, 601–02, 125 S.Ct. 2606, 2610 (2005): *Dept. of Army v. Blue Fox, Inc*., 525 U.S. 255, 261, 119 S.Ct. 687, 691-692 (1991). A waiver of tribal sovereign immunity may not be implied from the tribe's actions, "but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S.Ct. at 1677. See also, *Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). *C & B Invs. v. Wis. Winnebago Health Dept*., 198 Wis.2d 105, 108, 542 N.W.2d 168, 169 (1995) ("a surrender of sovereign immunity by a nation must be advertent.") A tribe may prescribe the terms and conditions on which it consents to be sued, and

the manner in which the suit shall be conducted. *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001).

Further, any purported waiver must be duly authorized as a matter of tribal law. The person or entity that allegedly waived the immunity must have the authority to waive that immunity. *United States v. USF&G*, 309 U.S. 506, 513, 60 S.Ct. 653 (1940); *Hydrothermal Energy Corp. v. Fort Bidwell*, 170 Cal.App3d 489, 496 (Cal. App. 1985); *MM&A Productions v. Yavapai Apache Nation*, 234 Ariz. 60, 316 P.3d 1248 (Ariz. App. 2014); *Harris v. Lake of the Torches Resort*, 2015 WL 1014778 (Wisc. App. March 10, 2015) (An attorney's attestations in court are insufficient to waive tribal immunity unless the attorney is duly authorized under tribal law to do so). The Guidiville Rancheria Constitution vests the Guidiville Tribal Council, as the governing body of the Tribe, with the sole authority to waive the Tribe's sovereign immunity. See Declaration of Donald Duncan, attached as Exhibit A. The Guidiville Tribal Council has never waived the Tribe's sovereign immunity so as to subject the Tribe to an award of fees or any other relief in favor of the City. *Id*. Further, the Guidiville Tribal Council cannot vest, and has not vested, the Tribe's attorneys or Upstream with the authority to waive the Tribe's sovereign immunity. *Id.*

Guidiville has not waived its tribal sovereign immunity with respect to the City's immediate request for a multi-million dollar award of attorneys fees. The City provides no argument whatsoever that a waiver exists in any form, much less one that has been duly authorized as a matter of tribal law.

A. The Filing of the Instant Lawsuit did not Constitute an Effective Waiver.

It is well-established, black-letter law that an Indian tribe does not waive its sovereign immunity from suit by affirmatively seeking relief in court. The Supreme Court has repeatedly

rejected the principle that a tribe exposes itself to claims against it by affirmatively seeking relief in the filing of a lawsuit. *Citizen Band Potawatomi,* 498 U.S. at 509-510, 111 S.Ct. at 909 (an Indian tribe's suit in federal court to enjoin a state from assessing a tax did not constitute a "clear waiver" of tribal immunity from the state's counterclaims); *United States Fidelity,* 309 U.S. at 511-513, 60 S.Ct. at 655-656 (1940) (a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe); see also*, McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Contour Spa v. Seminole Tribe*, 692 F.3d 1200, 1208 (11th Cir. 2012) ("It is clear that the Indian tribe [in *Potawatomi*] had voluntarily invoked the jurisdiction of the federal courts, yet **did not waive its sovereign immunity** against related counterclaims by doing so." (emphasis added)). To that end, Ninth Circuit decisions have long confirmed that Indian tribes may invoke a federal forum either to seek affirmative relief, or to defend litigation on the merits, while retaining their sovereign immunity. *McClendon*, 885 F.2d at 630 (holding the tribe's initiation of a lawsuit does not waive immunity to "related matters, even if those matters arise from the same set of underlying facts"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding a tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (holding sovereign immunity barred state's compulsory counterclaim in suit filed by tribe); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), rev'd on other grounds, 474 U.S. 9 (1985) (same); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154-55 (9th Cir. 1979) (holding tribal sovereign immunity barred suit even after tribe invoked the jurisdiction of the district court to litigate cross-motions for summary judgment on the merits

and then raised its sovereign immunity defense for the first time on appeal). Offsets and defenses that might otherwise be characterized as counterclaims against a plaintiff may be asserted in response to a lawsuit filed by a tribe, see *United States Fidelity*, 309 U.S. at 511-512, 60 S.Ct. at 656, but relief beyond the breadth of the tribe's claims is not available, particularly in the context of claims against tribal revenues (awards of money).

To avoid a sandbagging tactic of the City[1], the Tribe informs the Court that the Ninth Circuit decision in *United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981) is consistent with the Tribe's position in the instant litigation. In *Oregon,* an Indian tribe, the Yakama Nation, intervened as a party plaintiff to assert certain fishing rights, and then asserted immunity to avoid an unfavorable ruling on those rights for which it affirmatively sought adjudication. *Id*. The Ninth Circuit ruled that the Yakama Nation's voluntary intervention in the litigation constituted a waiver of the Tribe's sovereign immunity that required the Nation to accept the case as it found it upon intervention, and be bound by the Court's exercise of its equity jurisdiction regarding the allocation of fishing rights to a certain anadromous salmon. *Id*. at 1013-15. In finding a waiver, the Oregon Court noted that its imposition on tribal sovereignty was very narrow because it was exercising *in rem* equity jurisdiction over a fishery in the constructive custody of the Court. *Id.* Since that decision, the Ninth Circuit has, no less than three times, rejected efforts to expand *Oregon* to provide for a waiver of coercive relief against a tribe, and *Oregon* has never been interpreted to allow for an award of money damages, or otherwise for an award against a tribe's treasury. In *McClendon*, the Ninth Circuit noted that the Yakama Nation's intervention

[1] The City fails to address the issue of sovereign immunity in its supporting memoranda despite the Tribe being clear, prior to the City's filing of the instant motion, that sovereign immunity barred any award of attorney's fees. The City's counsel informed the Tribe's counsel that it was relying on *Oregon* for the proposition that the Tribe consented to this Court's jurisdiction to award attorneys fees against the Tribe by filing the Complaint in this litigation.

constituted consent to the Court's equitable jurisdiction over the anadromous salmon fishery, and thus Yakama consented to be bound by the Court's constructive custody of the fishery. 885 F.2d at 631. The *McClendon* Court expressly rejected the invitation to extend *Oregon* to find a waiver over collateral issues to a lawsuit filed by the Colorado River Indian Tribes over title to certain lands. Any such waiver is strictly "limited to the issues necessary to decide the action brought by the tribe." 885 F.2d at 630. See also, *Chemehuevi Indian Tribe*, 757 F.2d at 1053 n.7. In *Pan American Co. v. Sycuan Band,* 884 F.2d 416 (9th Cir. 1989), the Ninth Circuit, in refusing to find an implied waiver from the contract at issue, noted that "*Oregon's* finding of waiver probably tests the outer limits of *Santa Clara Pueblo's* admonition against implied waivers." *Id* at. 420 (citing *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1380 (8th Cir. 1985*),* which is highly critical of the *Oregon* analysis). Similarly, in *Quileute Tribe,* the Ninth Circuit refused to extend *Oregon* to find that the Quinault Tribe waived its immunity by participating in an administrative proceeding regarding fractional property interests. 18 F.3d at 1459. The City's reliance on *Oregon* is unavailing.

Guidiville does not dispute that bringing the lawsuit against the City binds it to the Court's determination, if upheld on appeal, that the Land Disposition Agreement ("LDA"), Third Amended Complaint ¶ 105; Dkt.# 91**,** was not breached, and that the Tribe lacks the ability to cause the City to transfer the property to Upstream or to the United States to be held in trust for the benefit of the Tribe. If money damages had been awarded in favor of the Tribe or Upstream, Guidiville does not dispute that the City could argue that such award should be offset, in whole or in part, by monies owing from Guidiville to the City. Accordingly, Guidiville's position is consistent with *Oregon*. Guidiville's consent to this Court's jurisdiction, by its participation in these proceedings, should be narrowly construed to allow for such adjudication. The City's

invitation to this Court to carve out a broader exception, that the Tribe's limited consent to this Court's jurisdiction extends to allow a multi-million dollar award of attorneys fees against it, however, is exactly the type of action that the Supreme Court admonished in *Bay Mills Indian Community*, 134 S. Ct. at 2031 (2014).

II. The LDA Does Not Form the Basis of an Award of Attorney Fees against Guidiville.

The City argues that the LDA forms the basis of the City's claim for attorney fees. DK#255-1 at p.5. Guidiville, however, is not a signatory to the LDA. Indeed, the City admits that the Tribe is not a signatory, and denies that the Tribe is a third-party beneficiary to the LDA. Dk.# 50 at p. 7, ¶ 49. The City even went so far as to allege as its Thirteenth Affirmative Defense that the Tribe lacked standing to bring the instant lawsuit. DK# 50 at p. 16. No determination has been made by this Court as to whether the Tribe is a third-party beneficiary or has standing. Both are requirements that the City must establish to be entitled to the award of attorneys fees sounding in contract. Both are requirements that the City, by its own representations to this Court, is lacking.

The City has failed to establish the privity of contract required to enforce the contract against the Tribe. California[2] recognizes the traditional common-law rule that only parties in privity of contract can sue on a contract. 13 Williston on Contracts (4th ed. 2000) § 37.1, p. 5., *Burr v. Sherwin Williams Co*. 42 Cal.2d 682, 695, 268 P.2d 1041, 1048 (Cal. 1954); *Howard Contracting, Inc. v. G.A. MacDonald Construction Co*., 71 Cal. App.4th 38 (Cal. App. 1998).

[2] The City asserts that California law applies based on a provision in the LDA. The Tribe, not being a party to the LDA, cannot be bootstrapped into a state diminution of tribal sovereign immunity. *Bay Mills Indian Community*, 134 S.Ct. at 2032; *Kiowa,* 523 U.S. at 756, 118 S.Ct. at 1703-04. However, the application of California law, if accurate, is not helpful to the City's argument.

California does recognize limited exceptions to this rule. The City alleges that the Tribe fails to meet the third-party beneficiary exception to the privity requirement, the most widely litigated exception. See *Gulf Ins. Co. v. TIG Ins. Co*. 86 Cal.App.4th 422, 428 (2001). Further, the City provides no analysis that any other exceptions to the privity requirement, such as exceptions based upon assignment of contract or covenants running with the land, have been established. Absent the City establishing privity of contract, or establishing that Guidiville falls into one of the exceptions to the privity requirement, the City cannot use the LDA contract as the basis for an award of attorney fees and costs against the Tribe.

Additionally, the contract provision relied upon by the City, by its own terms, is limited to the contract's "parties" (DK# 255-1 at p.5). The term "parties" is used throughout the LDA and clearly applies to the City and Upstream to the exclusion of any other persons or entities. Thus, the Tribe, not being a party to the contract, is not subject to the contract provision at issue.

Finally, as the Tribe is not a party to the contract, it is clear that the contract does not contain the requisite waiver of the Tribe's sovereign immunity, discussed *supra.* Nor can the City's citation to Cal. Civ. Code § 1717(a) form the basis of an abrogation or waiver of the Tribe's sovereign immunity. Tribal immunity "is a matter of federal law and is not subject to diminution by the States." *Bay Mills Indian Community*, 134 S.Ct. at 2032; *Kiowa,* 523 U.S. at 756, 118 S.Ct. at 1703-04.

For all of these reasons, even if the Tribe's filing of the instant lawsuit constituted its express intent to waive sovereign immunity as to all matters collateral to its claims (which it does not), the City's claims for attorneys fees based on the LDA must still fail.

CONCLUSION

There being no express waiver of Guidiville's sovereign immunity from suit that was specifically authorized in writing by the Guidiville Tribal Council, the governing body of the Tribe, that exposes Guidiville to an award of attorneys fees in favor of the City, the City's motion should be denied. Further, because the City fails to establish a contractual right under the LDA to collect an award of attorneys fees against Guidiville, the City's motion should be denied. Finally, for the reasons set forth in Upstream's Opposition to the City's motion, the City's motion should be denied, or alternatively, significantly reduced. These arguments, independently and collectively, support an Order denying the City's request.

DATED: March 17, 2015

MICHAEL P. SCOTT
SCOTT CROWELL
CROWELL LAW OFFICES – TRIBAL ADVOCACY GROUP

By: */s/ Scott Crowell*
SCOTT CROWELL

Attorney for Plaintiff GUIDIVILLE RANCHERIA OF CALIFORNIA

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on March 17, 2015 GUIDIVILLE'S RESPONSE IN OPPOSITION TO THE CITY OF RICHMOND'S MOTION FOR ATTORNEYS' FEES AND COSTS, DECLARATION OF DONALD DUNCAN, EXHIBIT A TO DECLARATION OF DONALD DUNCAN and PROPOSED ORDER was filed through the ECF System and will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

DATED: March 17, 2015

s/s *Scott Crowell*
SCOTT CROWELL