The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STILLAGUAMISH TRIBE OF INDIANS, a federally-recognized Indian tribe,

Plaintiff,

v.

STATE OF WASHINGTON; ROBERT W. FERGUSON, in his official capacity as Attorney General of Washington;

Defendants.

Case No.: 3:16-cv-05566-RJB

PLAINTIFF STILLAGUAMISH TRIBE OF INDIANS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: AUGUST 12, 2016

Plaintiff Stillaguamish Tribe of Indians ("Tribe") hereby respectfully replies in support of its Motion for Summary Judgment (Dkt. No. 9).

This is a simple case about a single contract – the 2005 Salmon Project Funding Agreement ("Agreement") with a dollar value of $497,000. Defendants State of Washington and Attorney General Ferguson (collectively "State") do not contest any of the salient facts offered by the Tribe ***as to this 2005 Agreement***. Rather, the State attempts to gin up a question of fact based on a plethora of other agreements between the Tribe and the State, 43 of which were entered into after 2005 (Dkt. Nos. 15 & 17-1). This effort fails to create a genuine material factual dispute concerning the sole issue before the Court: whether the Tribal employee who signed the Agreement was authorized by Tribal law either to sign the Agreement or to waive the

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Tribe's sovereign immunity. The State's effort to seek unlimited indemnification from the Tribe for a third-party tort claim asserted against the State 11 years after the Agreement was signed cannot proceed because of the Tribe's unwaived sovereign immunity.

I. ARGUMENT

A. The State Fails to Meet Its Burden to Defeat Summary Judgment

Responding to a motion for summary judgment, the non-movant bears the burden to set forth specific facts showing that there is a genuine issue for trial. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). A fact is "material" when it might affect the outcome of the suit under the applicable substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 48 (1986). A factual dispute is "genuine" where the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Id.* Here, the State has failed to put forth a single fact, either genuine or material, directed to the sole question presented by the Tribe's motion: whether the purported waiver of sovereign immunity in the 2005 Agreement is enforceable against the Tribe. *Accord* Dkt. No 13-7 at 3 (*Stillaguamish Tribe v. Pilchuck Group II, LLC*, No. 10-995 RAJ (W.D. Wash.) (ruling "[T]he sole dispute is whether the Tribe authorized the Agreement, and more particularly, whether it authorized the arbitration clause and sovereign immunity waiver")).

The following are the uncontroverted material facts relevant to the Court's inquiry:

- The Agreement was signed on April 6, 2005, by Pat Stevenson, an employee of the Tribe. Dkt. No. 11. ¶ 2. (Stevenson Decl.).
- Mr. Stevenson is not a Tribal member and he was not eligible to serve on nor has he ever served on the Tribe's Board. *Id.* ¶¶ 3-4.
- The Tribe's official records demonstrate that the Board passed no resolution or otherwise authorized Mr. Stevenson or anyone else to sign the Agreement on the Tribe's behalf. Dkt. No. 12 ¶¶ 2-3 (Connolly Decl.).
- There is also no evidence the Board passed a resolution approving the Agreement, or passed a resolution approving the Tribe's entry into the Agreement. *Id.*

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- There are no minutes of the Board around the time of the Agreement's signing or meeting minutes of the Board around the time of the Agreement's signing that make any mention of the Agreement or the project. *Id.* ¶ 3.
- Chairman Yanity has no recollection of the Agreement ever being discussed at any Board meeting between 1999 and 2014. Dkt. No. 10 ¶ 6 (Yanity Decl.).
- Including the time from 2005 to the present, the Tribe's Board had adopted the practice and policy of requiring that a written resolution be approved by the Board that explicitly waives the Tribe's inherent sovereign immunity (or specifically approves a document that purports to do so) before any such waiver is valid. *Id.*

The foregoing facts are completely uncontested by any fact offered by the State. There is no declaration from any State officer or employee. There is not even a declaration relating to events in 2005. The State has submitted no evidence to demonstrate the Tribe's Board of Directors ever discussed the Agreement, approved the Agreement, or agreed in writing for Mr. Stevenson to waive the Tribe's sovereign immunity. Similarly, the State has submitted no evidence that the Tribe's Board ever agreed in writing for Mr. Stevenson to sign the Agreement for the Tribe.

Rather, the State offers other funding agreements entered into between the Tribe and the State, specifically focusing on a handful of agreements entered into between the years 2011 and 2015. *See* Dkt No. 17. However, these after-the-fact agreements are not material to whether there was a valid waiver of immunity in the 2005 Agreement. Focusing on ***other*** contracts signed by ***others*** at the Tribe does nothing to contest the fact that Mr. Stevenson was not authorized by the Tribe's Board to sign the 2005 Agreement.

First, Exhibit Nos. B through I attached to the State's counsel declaration are other funding agreements entered into between 6 and 10 years ***after*** the Agreement at issue in this case. *See* Dkt No. 17. Because, as the Tribe explained in its motion, case law consistently holds that "any argument that subsequent acts, or acquiescence in carrying out [an otherwise invalid] contract . . . estop the Tribe from claiming sovereign immunity must fail," the Tribe's dealings with the State since 2005 are not relevant to the question of what the Tribe did when Mr.

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Stevenson signed the 2005 Agreement. *E.g. World Touch Gaming, Inc. v. Massens Mgmt, L.L.C.*, 117 F. Supp. 2d 271, 276 (N.D. N.Y. 2000) (internal citation omitted).

Second, Exhibit Nos. B through I attached to the State's counsel declaration do not even contain the same limited waiver language as the 2005 Agreement. *Compare* Dkt. No. 11-1 § 41 *with e.g.*, Dkt. Nos. 17-5 § 40 *and* 17-8 § 40. Thus, even if the subsequent commercial dealings between the State and Tribe were somehow relevant to explain what happened in 2005 (which they are not), their utility is limited by the fact that they contain more broad waivers of sovereign immunity than the one in the 2005 Agreement. Put simply, the State's facts do not matter.

Where, as here, "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotations and citation omitted). There is no dispute that there is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing Mr. Stevenson to waive the Tribe's sovereign immunity or to sign the Agreement. Dkt. No. 10 ¶¶ 5-6; Dkt. No. 12 ¶¶ 2-3. Without any such authorization, there is no valid waiver. *See Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-88 (11th Cir. 2001) (without a resolution authorizing a tribal official to do so, the tribal official did not have authority to waive the tribe's sovereign immunity); *Attorney's Process and Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 945-46 (8th Cir. 2010) (same). Because it is undisputed that Tribe's Board never passed a resolution authorizing Mr. Stevenson to waive the Tribe's sovereign immunity in the Agreement or to sign the Agreement, the Tribe's sovereign immunity remains intact. Summary judgment should enter in favor of the Tribe.

1. The State Is Not Entitled to Discovery on Course of Conduct and Ratification

Perhaps as a way to cover its inability to offer contemporaneous evidence from 2005 that addresses the Tribe's and/or Mr. Stevenson's actions, the State's counsel offers a declaration purporting to show what discovery might provide. Dkt. No. 16. This declaration of counsel is supported by a single speculative sentence in the "Combined Response" as follows: "It is extremely unlikely that the Tribe's Board had no role in its representatives applying for,

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obtaining, and spending millions of dollars in State and federal grants designed to improve the Tribe's key fisheries resource."[1] Dkt. No. 15 at 3. The Rule 56(d) "motion" is not well-taken.

First, the State has not properly made a Rule 56(d) motion. As the Ninth Circuit has explained, merely mentioning a need for further discovery in opposition to summary judgment does not constitute a proper Rule 56(f) motion. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986). Here, but for the State's counsel's declaration, the Tribe and this Court would not even know there is a Rule 56(d) motion embedded in the "Combined Response." Nowhere in the "Combined Response" does the State request Rule 56(d) relief.

Second, even if the Rule 56(d) relief request was properly made, its fails the requirement that additional discovery is only allowed if it would preclude summary judgment. *See Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012). What the State's counsel wants is discovery on an irrelevant point of fact that will not change the outcome of this case, to wit:

> The purpose of this discovery would be to develop facts and testimony showing that the Tribe has had a consistent pattern and practice of waiving its sovereign immunity in contracts with the State, that it has consistently ***ratified*** all salmon funding contracts with the State including those containing indemnity clauses significantly similar or identical to that at issue in this litigation and that it has consistently granted authority to Mr. Stevenson and its other non-tribal agents and employees to act on behalf of the Tribe in entering into contracts with the State binding the Tribe. . . over an almost 20 year period.

Dkt. No. 16 ¶ 4 (emphasis added); *see also* Dkt. No. 15 at 8 ("The State is entitled to discover the Tribe's grant application history and related contracting practices and the Board's involvement."). This discovery is meaningless, as it will not provide the State with any facts to contest those offered by the Tribe as to the 2005 Agreement. The "grant application process" does not shed any light on whether the Board approved the signature on the 2005 Agreement.

[1] To be clear, this case is not about "millions of dollars" in contracts *Id*. Despite the State's effort to make this case into something it is not – a referendum on all the funding agreements between the State and the Tribe over the last 11 years – this case is about a single contract from 2005 with a dollar value of $497,000. There is no dispute concerning any of these other agreements. Taken in a light most favorable to the State, the other agreements at best show that various Tribal officials have signed contracts; critically, they say nothing about whether Mr. Stevenson was authorized to sign the 2005 Agreement and waive the Tribe's immunity.

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Moreover, facts of "ratification" or "course of dealing" is not relevant evidence and cannot create an issue of fact because these equitable defenses do not, as a matter of law, apply to overcome tribal sovereign immunity. *South Tacoma Way, LLC v. State*, 169 Wash.2d 118, 123, 233 P.3d 871 (2010) ("Ultra vires acts cannot be validated by later ratification or events."); *World Touch Gaming*, 117 F. Supp.2d at 276 (neither apparent nor implicit authority can waive a tribe's sovereign immunity); *Native American Distributing v. Seneca-Cayuga Tobacco Co*., 546 F.3d 1288, 1295 (10th Cir. 2008) (refusing to defeat a tribe's sovereign immunity on equitable principles because misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit); *Sanderlin*, 243 F.3d at 1288 (rejecting apparent authority waiver).

Third, nothing in discovery will enable the State to overcome the fundamental uncontested facts set forth above.[2] The State cannot get behind the sworn statement of the Recording Secretary Ms. Connolly that there are no Tribal Board records reflecting the Agreement at all, neither in the form of a discussion nor an approval.[3] Dkt. No. 12. Nor can the

[2] Even if the State could point to an occasional contract signed in contravention of Tribal policy, it does not make the 2005 Agreement valid nor does it create a material issue of fact as to the existence of the Tribe's policy. Certainly the State would never claim that the State is bound by agreements containing waivers of the State's sovereign immunity that were unauthorized, regardless of arguments about course of dealing. *See, e.g., Adamson v. Port of Bellingham,* 192 Wash. App. 921, ¶¶ 10, 17, 19, --- P.3d ---- (Ct. App, Mar. 14, 2016) (finding "When public officials enter into contracts that are outside the scope of their authority, the contracts are void and unenforceable… ."; "AMHS officials had no authority to subject Alaska to suits for which the legislature retained Alaska's sovereign immunity"; "The State does not 'act' and will not be held estopped based on the ultra vires acts of its officers"). "[E]stoppel may not be asserted to enforce the promise of one who had no authority to enter into that undertaking on behalf of the state". *State v. New Magnesite Co.,* 28 Wash.2d 1, 26, 182 P.2d 643 (1947).

[3] This fact fundamentally distinguishes this aspect of the case from the *Pilchuck II* dispute where there was evidence of a discussion of the Working Agreement at a Board meeting. Dkt. No. 13-7 at 5. No such evidence exists here. Of course, other aspects of *Pilchuck II* are directly on point. Despite the State's statement that "*Pilchuck* does not help the Tribe's motion" (Dkt. No. 15 at 6), the Court in *Pilchuck II* ruled in favor of the Tribe that "no principle of federal common law supports a finding that the Tribe authorized a sovereign immunity waiver" in the agreement at issue in that case. *Id.* at 11. This ruling was made despite evidence that a project possibly contemplated by the agreement had been discussed at a Board meeting at length, had been given at least provisional approval by a Board member, that the agreement had been signed by a Tribal official, and that Pilchuck II and it principals were well known to the Tribe and had

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State overcome the sworn statement of the Tribal Chairman Shawn Yanity, who has served as an elected member of the Board for nearly twenty years, that he has no recollection of the 2005 Agreement ever being discussed at a Board meeting. Dkt. No. 10.

In sum, none of the information to be sought through discovery will raise any factual dispute as to whether a Tribal employee could waive the Tribe's sovereign immunity without written authorization from the Tribe's Board. As such, the State fails to meet the basic perquisites for a Rule 56(d) motion to continue the hearing to allow for discovery. Fed. R. Civ. P. 56(d). *Margolis v. Ryan*, 140 F.3d 850, 853-54 (9th Cir. 1998) (district court correctly denied motion for continuance under Rule 56 where plaintiff did not provide any basis or factual support for his assertions that further discovery would lead to the facts and testimony he described, and his assertions appeared based on nothing more than "wild speculation"); *Family Home and Finance Center, Inc. v. Federal Home Loan Mortgage Corp*., 525 F.3d 822, 827 (9th Cir. 2008) (allowing discovery where the facts sought are essential to oppose summary judgment.). The State's sought after facts will do nothing to rebut the uncontroverted facts.

Because the State fails to meet all the requirements of Rule 56(d), primarily by filing to show that the facts sought are essential to opposing summary judgment, this Court should deny discovery and proceed to summary judgment. *Id.* (citing *Cal. on behalf of Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)).

B. Under Governing Tribal Law, the Tribe Did Not Waive its Sovereign Immunity

As set forth in the Tribe's motion, whether any individual at the Tribe has authority to waive the Tribe's sovereign immunity is determined by Tribal law. Dkt. No. 10-2; *see e.g.*, *Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917, 922 (6th Cir. 2009) (finding a waiver of sovereign immunity ineffective when the tribe's charter required the governing body

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worked on several projects with the Tribe. *Id.* at 2-6. Given the *Pilchuck II* ruling, there are no facts that the State can find that would change the ultimate conclusion here that, as a matter law, the Tribe's immunity has not been waived. There is no evidence that can be deduced in discovery to show that Mr. Stevenson had authority to sign the Agreement, and no evidence that Mr. Stevenson is even a "Tribal official". *See Baugus v. Brunson*, 890 F.Supp. 908, 911-12 (E.D. Cal. 1995) (defining "tribal official" as a "high-level or governing role within the tribe.")

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pass a resolution waiving immunity, and no such resolution was passed), *cited with approval Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) (finding, in absence of evidence that Board of Directors ever adopted a resolution waiving immunity, no waiver of immunity); *Sanderlin*, 243 F.3d at 1287-88 (no effective waiver of sovereign immunity without a resolution from the tribal council doing so, as required by tribal law); *World Touch Gaming.*, 117 F. Supp. 2d at 275(waiver of sovereign immunity only valid if, pursuant to the tribe's constitution and code, the waiver is authorized by tribe's governing council).

Here, because the uncontroverted evidence before the Court is that Tribe's Board never passed a resolution or other authorization for Mr. Stevenson to waive the Tribe's sovereign immunity in the Agreement or to sign the Agreement, the Tribe's sovereign immunity remains intact. The State's legal arguments to the contrary are unavailing.

1. The State Court Cases Relied Upon By the State Are Inapposite

The State relies on three state court cases from California and Michigan to argue that equitable doctrines, specifically course of dealing, can be relevant in deciding a waiver of sovereign immunity under Tribal law. Dkt. No. 15 at 8-9. These non-Federal court decisions are, of course, not binding on this Court and are all factually distinguishable.

First, in *Smith v. Hopland Band of Pomo Indians*, the California Court of Appeal expressly states that "we are not presented with a circumstance in which a tribal agent has signed a contract without authority to act on the tribe's behalf." 95 Cal.App.4th 1, 115 Cal. Rptr.2d 455, 461 (2002). There, numerous declarations admitted that the Tribal Council had "authorized [the official] to negotiate and execute the contracts" and that the Tribal Council had "by resolution, approved the contracts finally negotiated." *Id.* at 460. Here, exactly the opposite is true, as the Tribe has offered uncontroverted statements that Mr. Stevenson was never authorized to sign the Agreement and there is no evidence of any Board resolution or discussion concerning the Agreement. Similarly, *Findleton v. Coyote Valley Band of Pomo Indians*, is also distinguishable as that case involved various Tribal Council and General Council Resolutions

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concerning the contract that the tribe sought to disavow. No. A142560, --- Cal.Rprt3d ---, 2016 WL 4120780 * 6-7 (Cal.Ct. App., July 29, 2016). Again, no such Tribal actions exist here.

Second, *Bates Associates v. 132 Associates LLC* is simply inapposite. Contrary to State's representation that the Michigan case "distinguished *Memphis Biofuels*" (Dkt No. 15 at 9), the Michigan court state correctly noted for state law purposes that "We are not bound by the decision of the United States Court of Appeals for the Sixth Circuit." 290 Mich. App,. 52, 59, 799 N.W.2d 177 (2010). In addition, like *Smith* and *Findleton*, the court in *Bates* found that "there was a tribal resolution . . . pertaining to the agreement" and that the Tribe had conceded in litigation that "the waivers . . . were valid" *Id.* at 63-64. Here, there is not only no Board resolution, the Tribe expressly maintains that the waiver of immunity is not valid.

Nothing offered by the State should lead this Court to reject Federal precedent which holds that unauthorized acts of tribal officials cannot waive tribal sovereign immunity and that equitable doctrines cannot defeat a tribe's sovereign immunity. *E.g., Contour Spa v. Seminole Tribe of Florida*, 692 F. 3d 1200, 1210-12 (11th Cir. 2012) (rejecting estoppel argument that tribe waived immunity through misrepresentations about the status of a lease).

2. The Dispute Resolution Provision Does Not Waive the Tribe's Immunity

Next, the State argues that, because Section 41 of the Agreement contains a choice of law and venue provision, these sections of the Agreement provide independent evidence of a waiver of sovereign immunity. Dkt. No. 10-11. Here too the State is wrong.

The State's argument ignores a fundamental problem – if Mr. Stevenson did not have Board authority to sign the Agreement and waive the Tribe's immunity, he also lacked authority to agree to the choice of law and venue provision. It does not matter that Section 41 of the Agreement contains a choice of law and venue provision because those provisions of Section 41 are just as legally meaningless as the rest of Section and the Agreement. Because Mr. Stevenson was not authorized to waive the Tribe's immunity or sign the Agreement by the Board, Section 41 and the entire Agreement is void. *See, e.g., In re Estate of Romano*, 40 Wash.2d 796, 803, 246 P.2d 501 (1952).

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Second, the State reads too much into *C&L Enterprise v. Citizen Band Potawatomi Indian Tribe* and its specific holding that agreement to AAA arbitration provisions effects a waiver of immunity. Dkt. No. 15 at 10. *C & L Enterprises*'s clarification that a tribe need not use any particular words to effect a clear waiver did not alter settled principles of tribal sovereign immunity that, without a resolution authorizing a tribal official to do so, the tribal official did not have authority to waive the tribe's sovereign immunity. *See* 532 U.S. 418, 420 (2001); *Demontiney v. United States*, 255 F.3d 801, 812-13 & n.5 (9th Cir. 2001) (holding that venue provisions in a contract "establish[ed] only the Tribe's willingness to face suit in tribal court and not an *explicit* waiver of tribal immunity" like that in *C & L Enterprises*) (emphasis added) (internal quotation marks omitted)); *Sanderlin*, 243 F.3d at 1287-88. Agreeing to face suit in a particular court is not the same as waiving immunity. *E.g., Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, No. 06-CV-01596 MS, 2007 WL 2701995 (D. Colo. Sept. 12, 2007) (holding that "venue provision [ ] is insufficient, of itself, to demonstrate that the Tribe clearly waived its sovereign immunity.").

Third, acting pursuant to the Agreement does not create a waiver after the fact and the State's reliance on the non-binding District of Rhode Island case of *Luckerman v. Narragansett Indian Tribe*, 965 F.Supp.2d 224 (D. R.I. 2013) is misplaced. Dkt. No. 15 at 11. *Luckerman* involved ongoing legal representation for a tribe, involving two agreements over the course of four years. *Id*. at 227-28. In contrast, here, all the work under the Agreement was done by the Tribe; the State supplied the funding and there is no dispute that the Tribe performed the work under the Agreement. Dkt No. 8, ¶ 8. This is not an action to enforce the Agreement as between the State and Tribe under Section 41 – it is a an action for indemnity to cover the State's costs in a case to which the Tribe is not a party. *Luckerman* is also an outlier; the weight of authority is to the contrary, holding that "waivers of sovereign immunity cannot be implied on the basis of a tribe's actions." *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999) (rejecting agreement that tribe waived immunity to compliance action by electing to engage in gaming subject to regulation under IGRA); *see also Sac & Fox Nation v. Hanson*, 47 F.3d 1061,

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1063 (10th Cir. 1995) (finding that "a waiver of sovereign immunity cannot be inferred from the Nation's engagement in commercial activity").

In sum, there are no equitable arguments available to defeat the Tribe's unwaived sovereign immunity. Summary judgment in the Tribe's favor is warranted.

C. The Tribe's Complaint Alleges Federal Jurisdiction

In a last ditch effort, the State imbeds within its a response a disguised Rule 12(b)(1) motion[4] for affirmative relief asking that the Tribe's complaint be dismissed because the Court lacks subject matter jurisdiction. Dkt. No. 15 at 15-16. This argument fails.

Whether the Tribe's sovereign immunity has been waived in the Agreement raises a federal question under 28 U.S.C. § 1331. "For a case to 'arise under' federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law." *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27-28 (1983)). Here, the Tribe's asserted right to relief depends on the resolution of a substantial question of federal law.

The Tribe filed this action for declaratory and injunctive relief after the State sent the Tribe a letter dated June 27, 2016 stating, in part, that the Tribe should "reconsider [its] participation in tomorrow's mediation since any money [the State] offers to settle the *Pszonka*, et al., cases is ultimately yours." Dkt. No. 13-6 at 2. This, taken in conjunction with the State's June 9, 2016 demand that the Tribe indemnify the State for in excess of $12 million, created a justiciable controversy as to whether the Tribe could, in fact, be liable to the State for those third-party tort claims, given its inherent sovereign immunity. Dkt. No. 13-4 at 2-3. This question presents a federal question for this Court because the Tribe's right to relief – to avoid having to indemnify the State – turns on sovereign immunity, and tribal sovereign immunity is the

[4] This appears to be a litigation tactic. The State has avoided moving to dismiss, which would enable the Tribe the time and ability to fully respond under Local Civil Rule 7. Moreover, the State answered the complaint, electing not to pursue such relief when it could have.

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quintessential "substantial question of federal law." After all, "tribal immunity 'is a matter of federal law,'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2010 (2014) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)); *see also Contour Spa at the Hard Rock, Inc..*, 692 F.3d at 1207 (recognizing that tribes have an "interest in a uniform body of federal law in [the] area" of tribal immunity).

It would defy logic for this Court to hold that the Tribe must wait to be sued before invoking sovereign immunity. This is especially true since Section 41.A of the Agreement expressly contemplated that the State would "initiate any lawsuit . . . arising out of or relating to . . . this agreement in Federal Court." Dkt. No. 11-1 § 41A. The Court would be rejecting this case only to have it back at a later date or through an adjudication of the State's counterclaims. The Tribe has sufficiently alleged subject matter jurisdiction for this Court to decide the Tribe's claims and rule in the Tribe's favor on summary judgment.

II. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court grant the Tribe's Motion to for Summary Judgment and declare and order that the State cannot obtain from the Tribe relating to the State's liability for the Oso tragedy.

DATED this 11th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I electronically filed the foregoing **PLAINTIFF STILLAGUAMISH TRIBE OF INDIANS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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