

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' MOTION FOR
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
AUGUST 12, 2016**

MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Stillaguamish Tribe of Indians ("Tribe"), by and through its attorneys of record, and hereby respectfully moves the Court pursuant to Fed. R. Civ. P. 56 to enter judgment in the Tribe's favor and against Defendants State of Washington and Attorney General Ferguson (collectively "State") because there are no genuine material facts in dispute that the Tribe did not waive its inherent sovereign immunity as to claims for indemnification by the State allegedly relating to a Salmon Project Funding Agreement signed in 2005. Because the Tribal employee who signed the agreement was not authorized by Tribal law either to sign the Agreement or to waive the Tribe's sovereign immunity, the State's effort to seek indemnification from the Tribe pursuant to the Agreement cannot proceed in any forum.

1 This Motion is supported by the Memorandum of Points and Authorities below, and the
 2 Declarations of Chairman Shawn Yanity, Alyssa Connolly, Patrick Stevenson and Rob Roy
 3 Smith and the exhibits attached thereto, and the [Proposed] Order filed herewith.

4 **MEMORANDUM IN SUPPORT OF MOTION**

5 The Tribe is entitled to judgment in its favor as a matter of law as there are no genuine
 6 material facts in dispute that neither the purported waiver of sovereign immunity nor any
 7 provision of the Salmon Project Funding Agreement is enforceable against the Tribe.

8 **STATEMENT OF RELEVANT FACTS**

9 **A. The Tribe's Constitution and the Authority of its Board of Directors**

10 The Tribe is a federally-recognized Indian Tribe with headquarters in Arlington,
 11 Washington. *See Indian Entities Recognized and Eligible To Receive Services From the United*
 12 *States Bureau of Indian Affairs*, 81 Fed. Reg. 26826, 26830 (May 4, 2016). The Tribe gained
 13 federal acknowledgement in 1976 and adopted a Constitution on June 18, 1986. *See Constitution*
 14 *of the Stillaguamish Tribe of Indians of Washington* ("Constitution"), attached as Ex. A to the
 15 Declaration of Shawn Yanity (filed herewith).

16 Pursuant to the Constitution, the Tribe is governed by a six-member Board of Directors
 17 (the "Board"), from which a Chairman and other officers are selected. Yanity Decl. ¶2, Ex. A at
 18 art. IV. The Board is the body through which the Tribe exercises its sovereign powers and
 19 authority. *Id.* at art. VII, § 1. The Constitution provides that the Board is vested with "[a]ll the
 20 powers and legal authority, express, implied, or inherent, which are vested or acknowledged by
 21 existing Federal Law in the Stillaguamish Tribe as a sovereign political entity[.]" *Id.* This grant
 22 of authority to the Board includes, but is not limited to, the power: "to administer the affairs and
 23 assets of the tribe . . . under appropriate contracts"; "to prevent the sale, disposition . . . or
 24 encumbrance of . . . tribal assets"; and "to have and exercise such other powers and authority as
 25 necessary to fulfill its obligations, responsibilities, objectives, and purposes as the governing
 26 body of the tribe." *Id.*, at art. VII, §§ 1(b), (c), and (h).

1 The Constitution further provides that the Board can act only at duly called meetings at
 2 which a quorum (consisting of four members of the Board) is present. *Id.* at art. XIII, §§ 1, 2.
 3 At least a majority vote of Board members present at a meeting is necessary for the Board to
 4 make a decision and take official action. *Id.*, at art. XIII, § 4. Any Tribal rights and powers not
 5 specifically referenced in the Constitution can be exercised by the general membership of the
 6 Tribe “through the adoption of appropriate constitutional amendments.” *Id.* at art. VII, § 2.

7 A duly elected Board has governed the Tribe and conducted business on behalf of the
 8 Tribe since the adoption of its Constitution. Yanity Decl. ¶ 2. The Board takes official action
 9 either through written resolutions or consensus vote, both of which are adopted when a motion is
 10 made at a Board meeting, and a majority (or more) of the Board members vote for passage of the
 11 motion. *Id.* ¶ 3; *id.*, Ex. A at Art. XIII, § 4. If the Board takes action through a consensus vote or
 12 by resolution, it is recorded in the Board’s Minutes, and copies of resolutions and the Board’s
 13 Minutes are kept in the Tribe’s official records. Yanity Decl. ¶ 3; *see also id.*, Ex. A at art.
 14 XII, § 3.

15 For a long period of time, including during 2005 to the present, the Tribe’s Board has had
 16 a practice of requiring resolutions when it exercised certain authorities. In particular, the Tribe’s
 17 Board had adopted the practice and policy of requiring that a written resolution be approved by
 18 the Board that explicitly waives the Tribe’s inherent sovereign immunity (or specifically
 19 approves a document that purports to do so) before any such waiver is valid. Yanity Decl. ¶ 4.
 20 The Tribe codified this longstanding custom in 2010 when the Board adopted a resolution that
 21 explicitly reaffirms that “any and all waivers of the Tribe’s sovereign immunity . . . shall be
 22 granted only by the Board of Directors, shall be in writing, and memorialized in the official
 23 records of the Board of Directors.” Yanity Decl., Ex. B at 2. The Resolution reaffirms that any
 24 individual Tribal employee or official who attempts to waive the Tribe’s immunity acts beyond
 25 the scope of his or her authority. *Id.*

1 **B. The Salmon Project Funding Agreement**

2 On April 6, 2005, a Salmon Project Funding Agreement (“Agreement”) for Project
3 No. 04-1634R was signed by Laura E. Johnson, the Director of the State of Washington
4 Interagency Committee for Outdoor Recreation on Behalf of the Salmon Recovery Funding
5 Board and Pat Stevenson, who signed as “Environmental Manager” of the Tribe. Ex. A to
6 Declaration of Patrick Stevenson (filed herewith). Mr. Stevenson was an employee of the Tribe
7 at the time he signed the Agreement. Stevenson Decl. ¶ 2.

8 The Agreement facilitated the Tribe building a revetment to “eliminate[e] direct sediment
9 discharge” into the North Fork of the Stillaguamish River in an area where sedimentation from
10 past landslides was limiting salmon production. *Id.*, Ex. A at 3. To do so, the Agreement
11 provided \$497,000 in funding to the Tribe from the State to “improve instream morphology and
12 habitat in salmon bearing areas.” *Id.*

13 The Agreement’s General Provisions were a standard form contract dated April 15, 2002.
14 Among other standard provisions, Section 5 provides a general indemnification whereby the
15 “Sponsor” agrees that “To the fullest extent permitted by the law, the Sponsor expressly agrees
16 to and shall indemnify, defend and hold harmless the State . . . from and against all claims,
17 actions, costs, damages or expenses of any nature arising out of or incident to the
18 Sponsor’s . . . performance or failure to perform the Agreement.” *Id.*, Ex. A at 10. The
19 indemnity includes attorneys’ fees. *Id.* Section 5 concludes with this sentence: “The Sponsor
20 expressly agrees to waive his/her immunity under Title 51 RCW to the extent required to
21 indemnify, defend and hold harmless the State and its agencies, officials, agents or employees.”
22 *Id.* Title 51 of the RCW deals with “Industrial Insurance”, also known as workers’
23 compensation.

24 Section 41 of the Agreement provides a standard form “Governing Law/ Venue”.
25 However, part of Section 41 served as a special addendum to the General Provisions, providing
26 that “In the cases where this agreement is between the Funding Board and a federally recognized
27 Indian tribe, the following Governing Law/ Venue applies.” *Id.*, Ex. A at 21. Thereafter, the
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1 Agreement at Section 41.A provided that disputes “arising out of or relating to the performance,
 2 breach or enforcement of this agreement” would be brought in Federal Court. *Id.* The
 3 Agreement at Section 41.C also contained a provision that purported to provide as follows: “The
 4 Tribe hereby waives its sovereign immunity as necessary to give effect to this section.” *Id.* The
 5 Agreement at Section 41.B provides that any money judgment against the Tribe “may not exceed
 6 the amount provided for in Section F-Project Funding of the Agreement”, namely \$497,000. *Id.*

7 **C. The Tribe’s Board’s Records Are Silent As to the Agreement**

8 The Agreement was signed on April 6, 2005 by Mr. Stevenson. In 2005, at the time the
 9 Agreement was signed, the Tribe’s Board consisted of its Chairman, Shawn Yanity; its Vice-
 10 Chairman, Edward L. Goodridge, Jr.; its Secretary, Darcy R. Dreger; its Treasurer, Sara L.
 11 Schroedl; and two other Members, Jody R. Soholt and LaVaun E. Tatro. Yanity Decl. ¶ 5. No
 12 Board member signed the Agreement. Mr. Stevenson is not a Tribal member and, although he is
 13 a valued staff member who reports to the Director of the Natural Resources Department, he was
 14 not eligible to serve on nor has he ever served on the Tribe’s Board. *Id.* Stevenson Decl. ¶¶ 3-4.

15 The Tribe’s official records demonstrate that the Board passed no resolution or otherwise
 16 authorized Mr. Stevenson or anyone else to sign the Agreement on the Tribe’s behalf.
 17 Declaration of Alyssa Connolly ¶¶ 2-3 (filed herewith). There is also no evidence the Board
 18 passed a resolution approving the Agreement, or passed a resolution approving the Tribe’s entry
 19 into the Agreement. *Id.*; *see also* Yanity Decl. ¶ 6 (stating that Chairman Yanity has no
 20 recollection of the Agreement ever being discussed at any Board meeting between 1999 and
 21 2014). Likewise, there are no minutes of the Board around the time of the Agreement’s signing
 22 or meeting minutes of the Board around the time of the Agreement’s signing that make any
 23 mention of the Agreement or the project. Connolly Decl. ¶ 3 (stating that Ms. Connolly found
 24 no mention of the Agreement or the project in any of the minutes or resolutions of the Board
 25 between 2000 and the present).

26 Without a Board resolution approving the Agreement or authorizing anyone to sign it on
 27 the Tribe’s behalf, the Tribe did not agree to be bound by the Agreement or any of the provisions
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1 therein, and the Tribe could not have waived its inherent sovereign immunity for claims arising
 2 out of the Agreement. The Agreement is thus void *ab initio* and is unenforceable against the
 3 Tribe.

4 **D. The 2014 Oso Landslide**

5 As contemplated by the funding provided by the Agreement, the Tribe constructed the
 6 revetment in or around October 2006. Stevenson Decl. ¶ 5; Dkt No. 8, ¶ 8.

7 On or about March 22, 2014, near Oso, Washington, a portion of an unstable hill
 8 collapsed, sending mud and debris across the North Fork of the Stillaguamish River engulfing a
 9 rural neighborhood, and covering an area of approximately 1 square mile with debris. Dkt. No. 8
 10 ¶¶ 6, 8. Like many members of the community, the Tribe responded to the tragedy by helping
 11 those in need, donating \$100,000 to the relief effort. Yanity Decl. ¶ 8.

12 **E. The State is Sued Related to the Oso Slide and Seeks Indemnity from the Tribe**

13 Subsequently, four lawsuits were filed in King County Superior Court which have been
 14 consolidated into one case titled *Pszonka, et al., v. Snohomish County, et al*, No. 14-2-18401-8
 15 SEA (“*Pszonka*”), alleging that certain acts or omissions of Grandy Lake LLC, the State of
 16 Washington, and Snohomish County caused injuries to plaintiffs. Dkt. No. 8, ¶ 15. Among
 17 other claims, the plaintiffs alleged that the State of Washington was liable because the revetment
 18 constructed by the Tribe was a cause of some of their injuries. *Id.*, ¶ 16. The Tribe is not a
 19 named party to the litigation. Declaration of Rob Roy Smith ¶ 3 (filed herewith).

20 On August 26, 2015, the State’s Attorney General’s Office wrote to the Tribe stating
 21 “The Stillaguamish Tribe is the Responsible Sponsor of the [revetment] project and executed
 22 defense, indemnity, and hold harmless agreement as part of receiving the grant. . . . The State
 23 believes the claims arising from the [revetment] project are covered by the defense, indemnity,
 24 and hold harmless clause of the agreement.” Ex. A to Smith Decl. In response to the August 26,
 25 2015 letter, on or about September 15, 2015, the State’s Attorney General’s Office and the Tribe
 26 held a conference call where the Tribe indicated to the State that the Tribe did not believe that
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1 the *Pszonka* plaintiffs’ claims triggered the indemnification obligation in the Agreement. Smith
2 Decl. ¶ 5.

3 On September 30, 2015, the State’s Attorney General’s Office wrote to the Tribe again
4 indicating the State’s belief that “the claims asserted by the [*Pszonka*] plaintiffs related to the
5 crib wall and sediment retention ponds constructed by the Stillaguamish Tribe as part of its []
6 project trigger the Tribe’s duty to defend, identify, and hold harmless the State from these claims
7 as provided by the funding agreement . . .” Ex. B to Smith Decl. On October 5, 2015, the Tribe
8 responded to the State’s Attorney General’s Office. Ex. C to Smith Decl. The Tribe stated its
9 position that it has no liability or duty to indemnify the State relating to the claims at issue in
10 *Pszonka*. *Id.* at 2. The Tribe explained that the Agreement is invalid and cannot be invoked
11 against the Tribe as a matter of both federal and Tribal law because Mr. Stevenson was not
12 authorized by the Tribe to sign the Agreement and provide a waiver of the Tribe’s inherent
13 sovereign immunity. *Id.* at 1. Nevertheless, while reserving all rights and defenses, the Tribe
14 agreed to approach its insurance carriers in good faith to discuss potential coverage for the
15 State’s claims. *Id.* at 2.

16 Notwithstanding the Tribe’s position, the State has continued to pursue recovery from the
17 Tribe. On June 9, 2016, the State’s Attorney General’s Office wrote to the Tribe’s insurance
18 carrier, Tribal First/ Hudson Insurance, indicating that the *Pszonka* plaintiffs’ claims “directly
19 implicate the indemnity obligations of the Stillaguamish Tribe [] to the State” under the
20 Agreement. *Id.*, Ex. D at 2. The State requested that the Tribe’s insurance carrier attend a
21 mediation scheduled for June 28-30, 2016 in *Pszonka* and provided a conservative estimate of
22 damages potentially due to the plaintiffs, to the tune of \$12 million. *Id.* at 2-3. The State’s letter
23 also asserted that the indemnity due to the State was not limited to the funding amount of the
24 Agreement. *Id.* at 2.

25 On June 22, 2016, the Tribe reiterated its position that it retained its sovereign immunity
26 from suit and neither the Agreement nor any of its provisions were enforceable against the Tribe.
27 *Id.*, Ex. E at 1. The Tribe also explained that, even if the Agreement was valid, the limited
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1 waiver of the Tribe's immunity only applies to actions arising to enforce the Agreement brought
 2 by the State, which excludes the third-party claims in *Pszonka* alleged against the State. *Id.* at 2.
 3 The State's Attorney General responded on June 27, 2016 rejecting the Tribe's position and
 4 reiterating that the Tribe appear at the mediation. *Id.*, Ex. F. This litigation followed.

5 STANDARD OF REVIEW

6 Summary judgment is appropriately entered when there is no genuine issue of material
 7 fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. Proc. 56(a).
 8 The Court must draw all inferences from the admissible evidence in the light most favorable to
 9 the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The
 10 movant's burden is to establish "a prima facie case for summary judgment." *F.T.C. v. Gill*, 265
 11 F.3d 944, 954 (9th Cir. 2001). Once the movant meets this burden, the burden shifts to the non-
 12 movant to set forth specific facts showing that there is a genuine issue for trial. *Horphag*
 13 *Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). When determining whether a
 14 genuine issue of material fact remains for trial, the Court "need not draw all possible inferences
 15 in [non-movant's] favor, but only all reasonable ones." *Villiarimo v. Aloha Island Air*, 281 F.3d
 16 1054, 1065 n.10 (9th Cir. 2002) (citing *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464,
 17 1466-67 (9th Cir. 1986)).

18 Here, the Tribe is entitled to summary judgment because the indemnity the State seeks
 19 from the Tribe runs afoul of the Tribe's unwaived inherent sovereign immunity. A sovereign can
 20 assert immunity "at any time during judicial proceedings." *In re Jackson*, 184 F.3d 1046, 1048
 21 (9th Cir. 1999); *California v. Quechan Indian Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979)
 22 ("Sovereign immunity involves a right which courts have no choice, in the absence of a waiver,
 23 but to recognize"). There is no genuine issue of material fact that the Tribe did not waive its
 24 inherent sovereign immunity as to the State in the Agreement, and the Tribe is entitled to a
 25 judgment permanently enjoining the State's efforts at indemnification as a matter of law.
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ARGUMENT

A. The Tribe Has Not Waived Its Inherent Sovereign Immunity to the State

Federally-recognized Indian tribes enjoy sovereign immunity from suit. *Pit River Home and Agric. Coop. Ass’n. v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994). Tribal sovereignty and its corresponding right of sovereign immunity from suit are inherent powers that can only be waived in one of two ways: (1) from a tribe’s express waiver; or (2) through a Congressional statute expressly abrogating tribal immunity. *E.g., id.; Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.), *aff’d*, 455 U.S. 130 (1982) (tribal council passed a formal resolution expressly waiving sovereign immunity). Here, there is no federal statute or other act by which Congress has waived tribal sovereign immunity from suit to the State in particular, or to any action involving the Oso Slide in general. Absent a valid waiver by the Tribe, therefore, the State is not entitled to enforce the Agreement or seek any indemnification from the Tribe.

Waivers of tribal sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). For any waiver to be effective, it must be clearly expressed in the manner specified by the applicable tribal governing documents. Whether any individual tribal official or employee has authority to waive a tribe’s sovereign immunity is determined by tribal law. *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 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 v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-88 (11th Cir. 2001) (no effective waiver of sovereign immunity without a resolution from the tribal council doing so, as required by tribal law); *World Touch Gaming, Inc. v. Massens Mgmt, L.L.C.*, 117 F. Supp. 2d 271, 275 (N.D. N.Y. 2000) (waiver of

1 sovereign immunity only valid if, pursuant to the tribe's constitution and code, the waiver is
 2 authorized by tribe's governing council).

3 Here, the Tribe's Constitution vests the Board with "all the powers and legal authority,
 4 express, implied or inherent which are vested or acknowledged . . . in the Stillaguamish Tribe as
 5 a sovereign political entity." Yanity Decl., Ex. A at art. VII, § 1. These powers include inherent
 6 sovereign authority over the Tribe's members and land, as well as the corresponding power to
 7 assert (or waive) an essential aspect of that sovereignty – immunity from suit. *See id.*; *see also*
 8 *Oklahoma Tax Comm'n. v. Citizen band of the Potawatomi Indian Tribe of Oklahoma*, 498 U.S.
 9 505, 509 (1991); *see also Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and*
 10 *Resort*, 629 F.3d 1173, 1182-83 (10th Cir. 2010) (noting "sovereign immunity [is] an inherent
 11 part of the concept of sovereignty"). The Tribe has a longstanding policy that the Board only
 12 exercises this power to waive the Tribe's sovereign immunity through written resolutions that are
 13 formally approved by the Board. Yanity Decl. ¶ 3. The Tribe's practice is consistent with how
 14 tribes generally exercise their power to waive sovereign immunity. *See* Patrice H. Kunesh,
 15 *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 406 (2009) (noting
 16 "[a]uthority to waive a tribe's sovereign immunity is usually exercised by the tribe's governing
 17 body pursuant to general or enumerated powers set out in the tribal constitution or other law").

18 There is no dispute that there is no Tribal Board resolution or other official Board action
 19 (let alone a discussion) authorizing Mr. Stevenson to waive the Tribe's sovereign immunity in
 20 the Agreement or to sign the Agreement. Yanity Decl. ¶¶ 5-6; Connolly Decl. ¶¶ 2-3. Without
 21 any such authorization, there is no valid waiver. *See* 42 *C.J.S. Indians*, at § 22 (Online Ed. 2008)
 22 ("A tribal official cannot waive the tribe's immunity unless authorized to do so by tribal law");
 23 *see also Sanderlin*, 243 F.3d at 1287-88 (without a resolution authorizing a tribal official to do
 24 so, the tribal official did not have authority to waive the tribe's sovereign immunity); *Attorney's*
 25 *Process and Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d
 26 927, 945-46 (8th Cir. 2010) (same). Because the Tribe's Board never passed a resolution or
 27 other authorization for Mr. Stevenson to waive the Tribe's sovereign immunity in the Agreement
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1 or to sign the Agreement, under Tribal law, the Tribe's sovereign immunity remains intact and
 2 the State's claims for indemnification arising from the Agreement cannot proceed against the
 3 Tribe in any forum. *See Memphis Biofuels*, 585 F.3d at 922; *see also Kiowa Tribe of Okla. v.*
 4 *Mfg. Tech. Inc.*, 523 U.S. 751, 758 (1998) ("[t]his result may seem unfair, but that is the reality
 5 of sovereign immunity").

6 Extending authority to waive sovereign immunity to a single individual, at least in this
 7 context, would be directly contrary to jurisprudence. As a matter of law, the Tribe retains its
 8 inherent sovereign immunity. The State's effort at indemnification from the Tribe arising under
 9 Agreement the should therefore be permanently enjoined. *See Memphis Biofuels*, 585 F.3d at
 10 923.

11 **B. This Court Has Affirmed the Tribe's Unwaived Immunity Under Similar**
 12 **Circumstances**

13 The Tribe has litigated this exact question – whether a document signed without Tribal
 14 authorization waived the Tribe's sovereign immunity – and won in this Court before. The case is
 15 *Stillaguamish Tribe v. Pilchuck Group II, LLC*, No. 10-995 RAJ (W.D. Wash.).

16 In *Pilchuck Group II*, the defendant attempted to invoke an arbitration provision
 17 contained in an agreement signed by a member of the Tribe's Board who, similar to the situation
 18 with Mr. Stevenson, was never authorized by the Board to sign such a document containing a
 19 waiver of the Tribe's sovereign immunity. Granting summary judgment for the Tribe on the
 20 question of whether the immunity waiver and the agreement were valid and enforceable, the
 21 Honorable Judge Jones held that "no principle of federal common law supports a finding that the
 22 Tribe authorized a sovereign immunity waiver" in the agreement at issue in that case.¹ Smith

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 24 ¹ In a companion case, *Stillaguamish Tribal Enterprise Corporation v. Pilchuck Group II, LLC*, No. 11-387 RAJ
 25 (W.D. Wash.), the same Court denied STECO's motion for summary judgment in part "solely because it finds that
 26 Pilchuck has not had an opportunity to pursue discovery in that case." Smith Decl. Ex. G at 2. The Court noted that
 27 "It is possible that discovery will reveal that STECO had a practice of binding itself to contracts to which only the
 28 Tribe was explicitly a party. It is possible that discovery will show that STECO and Pilchuck understood STECO to
 be a party to the Working Agreement. It is possible that discovery could show that Mr. Goodridge Sr. had the
 approval of the STECO board to enter the Working Agreement on behalf of STECO." *Id.* at 15. Here, there is no
 need to delay adjudication for discovery as these potential factual permutations involving a subordinate tribal entity
 are not at play in this action. Ultimately, no discovery took place in the STECO matter and judgment was entered in
 STECO's favor. Smith Decl., Ex. H.

Decl., Ex. G at 11. The Court concluded that “no disputed facts prevent the court from concluding as a matter of law that the Tribe did not waive its sovereign immunity” because the person who signed the contract – a member of the Tribe’s Board – did so without any authorization from the Tribe’s Board. *Id.* at 7.

The same should hold true here, and the result should be more straightforward given that Mr. Stevenson is not and never has been a member of the Tribe’s Board, and given that Agreement was never even discussed by the Board. Following the guidance that waivers of sovereign immunity are narrowly construed “in favor of the sovereign,” nothing the Tribe did related to the Agreement in 2005 waived its immunity to the State. *E.g., Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (noting “strong presumption against waiver of tribal sovereign immunity”).

C. The State Cannot Rely on Equity to Overcome the Tribe’s Sovereign Immunity

The State’s Answer raises equitable affirmative defenses of ratification and estoppel. Dkt. No. 8 at 6. However, the State cannot rely on any principles of equity to evade the Tribe’s sovereign immunity.

Federal courts consistently find that there can be no “waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.” *E.g., Kiowa*, 523 U.S. at 758; *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). This is because sovereign immunity is such an essential aspect of governmental sovereignty. *See Breakthrough Mgmt. Group*, 629 F.2d at 1182 (“sovereign immunity is an inherent part of the concept of sovereignty and what it means to be a sovereign”); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (noting that the United States’ sovereign immunity and tribal sovereign immunity are alike in that regard). In the tribal context, sovereign immunity is recognized to be essential to implementing federal policies of self-determination, economic development and cultural autonomy. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). Because of its importance, “Indian sovereignty, like that of

1 other sovereigns, is not a discretionary principle subject to the vagaries of the commercial
 2 bargaining process or the equities of a given situation.” *Pan Am. Co. v. Sycuan Band of Mission*
 3 *Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

4 Thus, in circumstances where apparent authority or other equitable defenses might
 5 otherwise apply, they do not apply to overcome tribal sovereign immunity. *World Touch*
 6 *Gaming*, 117 F. Supp.2d at 276 (neither apparent nor implicit authority can waive a tribe’s
 7 sovereign immunity). Indeed, it is axiomatic that “[a] tribal official cannot waive the tribe’s
 8 immunity unless authorized to do so by tribal law.” 42 C.J.S. *Indians*, § 22; *Memphis Biofuels*,
 9 585 F.3d at 922 (collecting cases that hold unauthorized acts of tribal officials cannot waive
 10 tribal sovereign immunity and refusing to find that equitable doctrines can defeat a tribe’s
 11 sovereign immunity); *Native Am. Distrib. Co.*, 546 F.3d at 1295 (refusing to defeat a tribe’s
 12 sovereign immunity on equitable principles because misrepresentations of the Tribe’s officials or
 13 employees cannot affect its immunity from suit”); *Sanderlin*, 243 F.3d at 1288 (rejecting
 14 argument that a tribal official had apparent authority to waive the tribe’s sovereign immunity);
 15 *Pan Am*, 884 F.2d at 419 (noting tribal sovereign immunity cannot be disregarded based on the
 16 equities of a given situation). Despite recognizing that enforcing tribal sovereign immunity can
 17 in certain circumstances hurt those who are not aware that they are dealing with tribes, the
 18 Supreme Court has consistently upheld tribal sovereign immunity in the face of equitable and
 19 policy arguments. *E.g. Kiowa Tribe*, 523 U.S. at 758; *Oklahoma Tax Comm’n.*, 498 U.S. at 509;
 20 *Santa Clara Pueblo*, 436 U.S. at 58.

21 **1. There is No Apparent Authority Exception to Sovereign Immunity**

22 Any apparent authority the State claims Mr. Stevenson might have had does not
 23 overcome the absence of a valid express waiver. As discussed above, there is no Board
 24 resolution or meeting minute indicating that the Tribe’s Board discussed, let alone approved,
 25 entry into the Agreement or authorized Mr. Stevenson or anyone to sign on the Tribe’s behalf in
 26 order to waive the Tribe’s sovereign immunity. Accordingly, Mr. Stevenson’s signature on the
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1 Agreement is unauthorized and any such waiver is ineffective.² *See, e.g., Sanderlin*, 243 F.3d at
 2 1287-88 (without a resolution authorizing a tribal official to do so, the tribal official “did not
 3 have actual or apparent authority to waive the [t]ribe’s sovereign immunity”).

4 Even if the State wrongly believed, or was somehow misled into believing, that Mr.
 5 Stevenson had the requisite authority to waive the Tribe’s immunity and sign the Agreement, any
 6 such alleged inequity cannot overcome the Tribe’s sovereign immunity. *See Memphis Biofuels*,
 7 585 F.3d at 922; *Contour Spa v. Seminole Tribe of Florida*, 692 F. 3d 1200, 1210-12 (11th Cir.
 8 2012) (rejecting argument that tribe waived immunity through misrepresentations about the
 9 status of a lease and holding that “estoppel cannot compel enforcement of any of a contract’s
 10 provisions when the contract is rendered legally invalid by operation of federal law”). Here, the
 11 State’s case is weaker than those of the parties in the cases cited above because Mr. Stevenson is
 12 not a “Tribal official”, such as a member of the Tribe’s Board of Directors; rather, he is an
 13 employee within the Tribe’s Natural Resources Department.³ Stevenson Decl. ¶ 1; *Baugus v.*
 14 *Brunson*, 890 F.Supp. 908, 911-12 (E.D. Cal. 1995) (holding that a tribal security officer, who
 15 was not a member of the tribe, was not a “tribal official” because the term “tribal official” was
 16 “virtually always used to denote those who perform some type of high-level or governing role
 17 within the tribe.”). There is no waiver of the Tribe’s sovereign immunity.

19 _____
 20 ² A number of state courts have also held that tribal officials cannot effectively waive a tribe’s sovereign immunity
 21 without the necessary authorization from the tribe’s governing body. *E.g., Hydrothermal Energy Corp. v. Fort*
 22 *Bidwell Indian Comm’y Council*, 170 Cal. App. 491, 496 (Cal. Ct. App. 1985) (holding Tribal Chairwoman’s
 23 signature on contract could not waive tribe’s sovereign immunity to an arbitration unless the tribe expressly
 24 delegated the chairwoman that power); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-42, 844 (N.J.
 25 Super. 1999) (holding that controller’s signature on contract containing forum selection clause insufficient to waive
 immunity, in part, because the right to unequivocally waive immunity reserved to tribal council under a Tribal law
 process); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520-21 (Okla. 2011) (holding no waiver of immunity
 because no express waiver of sovereign immunity by the Business Committee, or consent to such waiver by the
 Business Committee, as required by the Tribe’s Constitution); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234
 Ariz. 60, 316 P.3d 1248, 1251 (Ariz. Ct. App. 2014) (holding that Casino’s marketing director did not have authority
 to waive the sovereign immunity of the Nation and rejecting apparent authority application).

26 ³ Ultimately, this case is about Mr. Stevenson not having had the power to do what the State wants to say he did.
 27 Even if the Agreement had been signed by the Chairman, the Vice-Chairman, the Executive Director, the Chief
 28 Operations Officer, the Directing Attorney of the Legal Department and the Natural Resources Director in addition
 to Mr. Stevenson, the result would be the same – only the Tribe’s Board acting through a written resolution can
 approve an agreement waiving the Tribe’s sovereign immunity. As the State can surely appreciate, waiving
 sovereign immunity is an action that only the sovereign can take, as an exercise of the sovereign’s power.

1 **2. There is No Waiver of Immunity Through Course of Dealing**

2 Likewise, the fact that the Tribe did in fact complete construction of the revetment that
 3 was funded through the Agreement does not amount to a waiver of the Tribe's immunity. There
 4 is no case finding a waiver of tribal sovereign immunity based on alleged course of conduct or
 5 course of dealing. "[W]aivers of sovereign immunity cannot be implied on the basis of a tribe's
 6 actions." *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999) (rejecting
 7 agreement that tribe waived immunity to compliance action by electing to engage in gaming
 8 subject to regulation under IGRA); *see also Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063
 9 (10th Cir. 1995) (finding that "a waiver of sovereign immunity cannot be inferred from the
 10 Nation's engagement in commercial activity"). Case law consistently holds that "any argument
 11 that subsequent acts, or acquiescence in carrying out [an otherwise invalid] contract . . . estop the
 12 Tribe from claiming sovereign immunity must fail." *E.g. World Touch Gaming*, 117 F. Supp. 2d
 13 at 276 (*citing Merrion*, 455 U.S. at 148). No matter what the Tribe or its employees did
 14 subsequent to the Agreement, none of those acts can be construed as ratification or can somehow
 15 substitute for an express waiver of the Tribe's immunity by the Tribe's Board.

16 **3. There Can Be No Ratification of a Void Agreement**

17 As a matter of Washington State law, a contract that is void *ab initio*, never existed and
 18 therefore cannot be ratified. *See, e.g., In re Estate of Romano*, 40 Wash.2d 796, 803, 246 P.2d
 19 501 (1952). Moreover, "Ultra vires acts cannot be validated by later ratification or events."
 20 *South Tacoma Way, LLC v. State*, 169 Wash.2d 118, 123, 233 P.3d 871 (2010).

21 Here, Mr. Stevenson was not authorized to waive the Tribe's immunity or sign the
 22 Agreement, rendering the Agreement void. As such, the Agreement cannot be ratified as a
 23 matter of law. There is no unilateral power vested in Tribal employees to enter into contracts,
 24 especially as the Tribe's Constitution vests such power solely in the Board. Yanity Decl., Ex. A
 25 at art. VII. And, in any event, there was no act taken by the Tribe's Board to specifically ratify
 26 any aspect of the Agreement. Yanity Decl. ¶ 6.

1 There is no genuine dispute of material fact and judgment as a matter of law may issue in
2 the Tribe's favor because the Tribe's sovereign immunity was not waived in the Agreement.

3 **CONCLUSION**

4 For the foregoing reasons, the Tribe respectfully requests that this Court enter judgment
5 in favor of the Tribe concluding that there is no valid waiver of the Tribe's inherent sovereign
6 immunity and permanently enjoining the State's efforts at indemnification under the Agreement.

7 DATED this 21st day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I electronically filed the foregoing **PLAINTIFF**
STILLAGUAMISH TRIBE OF INDIANS' MOTION FOR SUMMARY JUDGMENT with
the Clerk of the Court using the CM/ECF system, which will send notification of such filing to
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