No. 15-17069

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

Appeal From a Decision of the United States District Court for the Northern District Of California, No.: 4:12-01326 – Honorable Yvonne Gonzalez Rogers

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APPELLANT GUIDIVILLE RANCHERIA OF CALIFORNIA'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Required by Rule 26.1 of Federal Rules of Appellate Procedure the undersigned, counsel of record for Appellant Guidiville Rancheria of California (the "Tribe") hereby certifies that neither the Tribe, nor any parent company, subsidiary, or affiliate thereof has issued any shares of capital stock to the public.

Dated: February 24, 2016

Respectfully submitted,

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I. JURISDICTIONAL STATEMENT

The District Court's jurisdiction arises under 28 U.S.C. §§ 1331, 1361, 1362, 1367; 5 U.S.C. §§ 701, 702, 704, 706; and 28 U.S.C. §§ 1346, 1491, 2201, 2202. Having granted the motion of Appellee City of Richmond ("City") for judgment on the pleadings and denied the motion of Guidiville Rancheria of California ("Tribe") and Upstream Point Molate LLC ("Upstream") for leave to amend, the District Court entered judgment on February 3, 2015, (ER 17 – Doc. 252) in favor of City. On February 4, 2015, Appellants timely filed a joint notice of appeal. On March 10, 2015, the District Court entered an amended judgment, adding express findings of no just reason for delay pursuant to Fed. R. Civ. P. 54(b). ER 15 - Doc. 269. That separate appeal is pending before this Appeal Court, Case No. 15-15221. This Court has appellate jurisdiction under 28 U.S.C. §1291.

Subsequently, on August 18, 2015, the District Court entered an Order granting Appellee's Motion for an award of Attorneys Fees. ER 1 - Doc. 289. On October 16, 2015, the Appellant Tribe timely[1] filed a Notice of Appeal from that Order awarding attorneys fees on October 16, 2015. ER 55 - Doc. 290. The Order from which this appeal is taken is an award of attorney's fees to Defendant/Appellee, the City of Richmond. The Tribe filed the Notice of Appeal to preserve its appeal of the August 18, 2015 Order (ER 1- Doc. 289) in the event it

[1] The United States is a party to the action filed in the District Court.

is incorrect in its belief that the Order is not appealable. The District Court's Order challenged in this appeal does not dispose of the action as to all claims and all parties, and the District Court has not "expressly determine[d] that there is no just reason for delay." See Fed. R. Civ. P. 54(b). The District Court has made such a determination on the order, (ER 15 - Doc. 269) the appeal of which is pending (Ninth Circuit, Case No. 15- 15221), but the Tribe does not interpret that determination to apply to the award separate order awarding attorney fees and does not seek such interlocutory certification. In an abundance of caution, however, the Tribe timely filed a Notice of Appeal.

If jurisdiction for this interlocutory appeal is not wanting of interlocutory certification, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES

Did the District Court err in finding that the Tribe's prayer for relief in its Complaint of an award of attorneys fees against the City of Richmond constituted a waiver of the Tribe's sovereign immunity as to the City of Richmond's claim for attorney fees against the Tribe?

III. STATEMENT OF THE CASE

This appeal addresses the narrow issue of whether the District Court erred in finding that the Tribe's prayer for relief in its Complaint of an award of attorneys fees against the City of Richmond constituted a waiver of the Tribe's sovereign immunity as to the City of Richmond's claim for attorney fees against the Tribe?

The appeal is brought in the context of litigation filed by Upstream Point Molate LLC. "Upstream" and the Tribe against the City of Richmond, the United States, and federal officials of the United States Department of the Interior ("DOI") regarding the failure to have certain lands that were part of a base closure transferred to the Tribe for certain purposes including the land being taken into trust status by the United States of the benefit of the Tribe, and the development and operation of a gaming facility under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA") to generate revenues necessary for clean-up of environmental waste at the former Naval Fuel Depot as well as to generate revenues for needed tribal governmental programs. Third Amended Complaint (ER 76 - Doc. 91). Because the issue on this interlocutory appeal is narrow, the Tribe foregoes an extensive discussion of the statement of the case. Appellants' Opening Brief in the related and pending appeal, Case No. 15-15221, arising out of the same matter goes into far greater detail, which the Tribe incorporates herein by this reference.

On April 10, 2013, Appellants filed their Third Amended Complaint ("TAC"). ER 76 – Doc. 91. On June 4, 2013, the City filed its motion for judgment on the pleadings ("MJOP"). ER 128 – Doc. 113. On December 12, 2013, the District Court entered its order granting the City's motion for judgment on the pleadings ("Order"). ER 34 – Doc. 212. On January 24, 2014, Appellants filed their motion for leave to file a Fourth Amended Complaint ("FAC"). ER 120 – Doc. 221. On July 24, 2014, the District Court entered its order denying Appellants leave to file a Fourth Amended Complaint. ER 24 – Doc. 236. On February 3, 2015, the District Court entered judgment in favor of the City. ER 17 – Doc. 252. On February 4, 2015, Appellants Upstream and the Tribe jointly filed their notice of appeal, ER 117 – Doc. 253, which related appeal is pending (Case No. 15-15221).

On December 9, 2014, the District Court stayed remaining claims, namely the claims by the Tribe against the United States, pending appeal (ER 19 – Doc. 249). On February 17, 2015 the City moved an award of attorneys fees. ER 117 – Doc. 255. On March 17, 2015 Upstream opposed on numerous grounds, in which the Tribe joined. ER 116 – Doc. 270. Also on March 17, 2015, The Tribe opposed, asserting that the Tribe had not waived its sovereign immunity to allow for such an award against the Tribe. ER 116 – Doc. 271. On April 7, 2015, the City filed its reply. ER 116 - Doc. 273. On April 8, 2015, the District Court ordered

supplemental briefing by the City. ER 14 – Doc. 276. On April 21, 2015, the Tribe and Upstream filed a joint supplemental brief. ER 115 – Doc. 277. On April 28, 2015, the City filed a supplemental reply. ER 115 – Doc. 279.

On August 18, 2015 the District Court granted in large part the City's Motion for Attorneys fees, ruling that Upstream and the Tribe are jointly and severally liable to the City in an amount of $ 1,927,317.50. ER 1 – Doc. 289. The sole basis on which the District Court found the Tribe had waived its sovereign immunity as to the City of Richmond's claim for attorneys fees as against the Tribe is the prayer for relief in the Complaint (including the Third Amended Complaint, (ER 76 – Doc. 91) seeking *inter alia*, an award of attorneys fees. ER 76 – Doc. 91. The Tribe appeals from that August 18, 2015 Order and vigorously disputes the finding that it has waived its tribal sovereign immunity to allow for an award of attorneys fees against the Tribe.

IV. SUMMARY OF ARGUMENT

The District Court erred in finding that the Tribe's prayer for relief requesting an award of attorneys fees constitutes a waiver of the Tribe's sovereign immunity as to an award of attorneys fees against the Tribe. The District Court abruptly departs from applying the traditional and long-standing case law from the Supreme Court and this Appeals Court to find that the Tribe waives its immunity, exposing the Tribal treasury to a two million dollar award of attorneys fees. There

is no express statement by the Tribe that it is waiving its immunity as to such affirmative relief against it. Indeed, the Court ignores the undisputed evidence provided by the Tribe as to the Tribe's own laws as to how and when the Tribe's immunity may be waived. The District Court acknowledges that waivers are to be narrowly construed in favor of tribes, and acknowledges that a Tribe's initiation of legal proceedings does not constitute an express waiver of the Tribe's immunity as to counterclaims even over the exact same subject matter. That the City's claim for fees comes in the form of a motion for an award of fees, rather than a counterclaim, does not distinguish or diminish the applicability of decades of the court's jurisprudence.

The Tribe by filing the lawsuit against the City does waive its immunity such that it is bound by the District Court's determination regarding the obligations and enforceability of the contracts between the City and Upstream. The Tribe does waive its immunity to counterclaims sounding in recoupment such that any award of damages to the Tribe would be properly offset by such counterclaims arising out of the same events and circumstances. The case law cited by the District Court is consistent with the longstanding jurisprudence of this Court regarding waivers of tribal sovereign immunity. A close look at the case law upon which the District Court relies supports the Tribe's position that it has not waived its immunity as to affirmative relief in the form of an award of money damages.

To go beyond recoupment, where the Tribe is subjected to a two million dollar fees award, while otherwise being awarded nothing in the way of damages or other relief in its favor, constitutes clear error by the District Court. The Tribe has not expressly consented to waive its immunity as to affirmative relief against it. The Tribe's prayer for relief does not create an enforceable implied waiver of the Tribe's immunity.

The Tribe has lost the litigation on the merits, which if not reversed by the related appeal pending before this Appeals Court, Case No. 15-15221, will have devastating consequences to the Tribe, regardless of an award of fees. The policy concern stated by the District Court, that not awarding fees against the Tribe will create a situation whereby a Tribe has no risk of losing litigation that it brings in federal court is baseless and wrong.

V. STANDARD OF REVIEW

The Ninth Circuit reviews an award of attorneys' fees for abuse of discretion. *Stanger v. McGee*, 2016 WL 191986 at *2 (9th Cir. 2016); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1011 (9th Cir. 2004). A district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision. *Stanger*, 2016 WL 191986 at *2; *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). The Appeals Court reviews underlying factual

determinations for clear error, *Stanger*, 2016 WL 191986 at *2; *Native Vill. of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002), and reviews whether the district court applied the correct legal standard *de novo*. *Stanger*, 2016 WL 191986 at *2; *Sea Coast Foods, Inc. v. Lu–Mar Lobster & Shrimp, Inc.*, 260 F.3d 1054, 1058 (9th Cir. 2001).

The standards applicable in the particular context of whether the Tribe waived its sovereign immunity are discussed at greater length in the Argument section below.

VI. ARGUMENT

The District Court erred in finding that the Tribe's prayer for relief in its Complaint, seeking an award of attorneys' fees against the City of Richmond, constituted a waiver of the Tribe's sovereign immunity as to the City of Richmond's claim for attorneys' fees against the Tribe. The District Court's analysis runs contrary to clear direction provided by the United States Supreme Court and the Ninth Circuit Court of Appeals in well-established and long-standing case law. The wheels left the track when the District Court held that the Tribe had waived its immunity and was subject to affirmative relief beyond the recovery it sought in this litigation.

A. 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 (1991); *Turner v. United States*, 248 U.S. 354, 358 (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 (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 (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 509-51*; Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (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 (2005): *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (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. *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).

1. A waiver of immunity is void if not made by a tribal official duly authorized under tribal law.

Any purported waiver must be duly authorized as a matter of tribal law. The person or entity that allegedly waived the immunity must have had the authority to waive that immunity. *United States v. USF&G*, 309 U.S. 506, 513 (1940); *Hydrothermal Energy Corp. v. Fort Bidwell*, 170 Cal.App.3d 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 (ER 60 - Doc. 271-1). 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. ER 60 - Doc. 271-1. 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. ER 60 – Doc. 271-1.

The District Court fails to address the authority issue in any respect. The City does not even attempt to refute the authority to waive issue. Accordingly, the District Court committed clear error – even if the filing of the prayer for relief is

(improperly) construed to waive the Tribe's immunity as to an award of attorneys' fees against the Tribe, the Tribe's attorneys had no authority to waive the Tribe's immunity as to such an award.

2. The filing of the lawsuit did not constitute an effective waiver.

It is well-established 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 (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 (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).

3. By filing the lawsuit, the Tribe accepts the risk of an adverse judgment on the merits: The tribe does not argue that sovereign immunity means it cannot lose or otherwise avoid the Court's ruling on the merits.

The District Court reasons that it needs to find a waiver as to an award of attorneys' fees against the Tribe because "[O]therwise "tribal immunity might be transformed into a rule that tribes may never lose a lawsuit." ER 1 – Doc. 289. The Tribe 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")[2], Third Amended Complaint (ER 76 ¶ 105; Doc. 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 the merits are upheld on appeal, even without any award of attorneys' fees against it, the Tribe will have suffered a major loss. The Tribe was approached by Upstream, at the City's urging, to work with the City to place a portion of the closed Navy Fuel Depot into trust for the benefit of the Tribe, enabling the Tribe to redevelop the property into tribal housing, retail, cultural, recreational, regional transportation facilities and own and operate a gaming facility on the trust lands. The Tribe's operation of the gaming facility, in turn, would have generated the revenue needed for the City to clean up the environmental damage caused by the Navy's operation of the Fuel Depot. The Tribe devoted millions of dollars towards preliminary clean-up of the Fuel Depot, undertook the process of assisting with the transfer funding and clean up of the remaining federal property to City under an

[2] The District Court's analysis of the LDA and authority allowing for awards of attorneys' fees is not the basis of the District Court's finding of a waiver of tribal sovereign immunity, but rather, having found a waiver, the District Court concludes that authority exists to award fees. The Tribe does not dispute that the District Court has the authority to award reasonable attorneys' fees to the prevailing party if an effective waiver of immunity is otherwise present. The District Court did not find (nor could it find without committing clear error) that the Tribe waived its immunity in the context of the LDA, to which the Tribe was neither a party nor a signatory. The Tribe alleges and the City disputes that the Tribe is a third-party beneficiary to the LDA).

Early Transfer Agreement initiating environmental review under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), and supported and cooperated with the process under the California Environmental Quality Act, California Public Resources Code, Sections 21000 - 21178, and Title 14 CCR, Section 753, and Chapter 3, Sections 15000 - 15387 ("CEQA"), only to have the City receive a windfall from all those efforts and otherwise renege on its commitments to Upstream and the Tribe. Even if this Court reverses the order awarding the City nearly $2 million in attorneys' fees, the Tribe will still have lost tens of millions of dollars on this project, will have expended thousands of work hours for naught, will have no enforceable rights to cause the subject land to be transferred to the Tribe, and will have no means to recover the millions in damages and lost profits it has suffered.

Such consequences certainly constitute a very real loss by the Tribe. The District Court's conclusion that recognition of the Tribe's sovereign immunity against an award of attorneys' fees would allow the Tribe to transform the principle of sovereign immunity into a rule where "it may never lose," is baseless and wrong.

4. The Tribe's filing of the lawsuit does subject it to counterclaims and other set-offs sounding in recoupment.

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, 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). If money damages had been awarded in favor of the Tribe or Upstream, the Tribe does not dispute that the City could argue that such award should be offset, in whole or in part, by monies owing from the Tribe to the City.

The District Court appears to acknowledge that the waiver cannot be interpreted to allow for counterclaims beyond recoupment. The District Court expressly notes that the amount of the City's request for attorneys' fees is less than the Tribe's request for damages, fees and costs, (ER 1 – Doc. 289) and then includes a footnote in its opinion properly identifying the limitations to recoupment. ER 1 – Doc. 289. It is not the prayer for relief, but the actual award, that cannot be exceeded under recoupment; otherwise, a counterclaim sounding in recoupment becomes improperly elevated to impose affirmative relief. *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995); *Quinault Indian Nation v. Comenout,* 2015 WL 1311438 at *3 (W.D. Wash. 2015) ("Additionally, the Estate's counterclaims seek to obtain affirmative relief

rather than to diminish the Nation's recovery. For these reasons, the Estate's counterclaims are not claims for recoupment."); *Flandreau Santee Sioux Tribe v. Gerlach*, 2016 WL 589864 at *4 and *7 (D.S.D 2016) ("Recoupment is a defensive action that operates to diminish the plaintiff's recovery rather than to assert affirmative relief."); *Santa Ynez Band of Mission Indians v. Torres*, 262 F. Supp. 2d 1038, 1045 (C.D. Cal. 2002); *United States. v. Buckingham Coal Co.*, 2013 WL 1818611 at *7 (S.D. Ohio 2013) ("The purpose of a counterclaim for recoupment is to "reduce or defeat the government's recovery"); *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton*, 2010 WL 29948375 at *2 (W.D. Wis. 2010)*; see also United States v. American Color and Chem. Corp.*, 858 F. Supp. 445, 451 (M.D.Pa.1994) ("A recoupment claim can be asserted only when the plaintiff is seeking damages for a defendant's actions and the defendant counterclaims seeking to reduce any potential damage award because of the plaintiff's actions."); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1345 (10th Cir. 1982) ("counterclaims do not arise out of the same transaction or occurrence so as to come within the equitable recoupment principles"). Because the Tribe has been awarded nothing, the $2 million award of attorneys' fees cannot be considered recoupment, but rather is affirmative relief against the Tribe and is beyond the scope of the Tribe's limited immunity waiver.

B. The District Court's Analysis is Flawed.

The District Court's opinion begins on the correct path of analyzing the City's claim, noting that the Tribe possesses sovereign immunity, and that federal courts should not "carve out" exceptions to the broad sovereign immunity provided to federally-recognized tribal governments. ER 1 – Doc. 289. The District Court acknowledges the strong presumption against finding a waiver. ER 1 – Doc. 289. The District Court properly acknowledges the governing case law holding that a tribe which avails itself of the federal courts by filing a lawsuit does not waive its immunity from counterclaims, except as they stand in the context of recoupment, seeking to offset any award to the tribe. ER 1 – Doc. 289. While correctly citing those cases and principles, the District Court proceeds to disregard them and concludes:

> Rather, the Tribe's liability to the City for attorneys' fees is directly reciprocal of, and arising from, the Tribe's claim against the City for attorneys' fees on the contract. Stated differently, the Tribe affirmatively availed itself of the attorneys' fees provision of the agreement. The Tribe cannot now declare that the same provision cannot be construed to operate against it.

ER 1, p. 9– Doc. 289. That very reasoning was argued and rejected in the cases that the District Court expressly cites as controlling authority: *Oklahoma Tax Com'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509–510 (1991); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511 (1940); and *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir.1989). In each of those cases, the

argument raised and defeated is whether the tribe, by filing the claim, waived its immunity as to counterclaims arising out of the same subject matter. Each court found that the tribe, by affirmatively availing itself of resolution of the merits, did not expose itself to affirmative relief against it. *See also Beecher v. Mohegan Tribe*, 282 Conn. 130, 147 (Conn. 2007) (" the perceived inequity of permitting the tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the tribe simply must be accepted much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted"). The Tribe's sovereign immunity did not prevent the District Court from construing the written contracts to operate against the Tribe, but by doing so, the District Court was not at liberty to order affirmative relief against the Tribe absent an express waiver.

The District Court then cites to certain court cases purportedly supporting its position. None of the cases cited by the District Court, upon close review, are availing.

First, the District Court looks to cases in the context of bankruptcy proceedings. *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998), involves bankruptcy proceedings wherein the Confederated Tribes of the Colville Reservations filed a claim in a Chapter 11 reorganization proceeding. The debtor

was an enrolled member of the Confederated Tribes who had entered into a loan with a tribally-owned credit business. *Id.* at 1270. The Chapter 11 reorganization was converted to a Chapter 7 liquidation and the Confederated Tribes' claim was discharged. *Id*. at 1272. The Ninth Circuit held that the Confederated Tribes consented to suit by filing the claim, and the conversion from Chapter 11 to Chapter 7 did not constitute a separate proceeding that would otherwise void the Confederated Tribes' waiver. *Id.* at 1273. The Confederated Tribes lost the right to pursue collection of the loan. The District Court correctly quotes *In re White* for the proposition that the Confederated Tribes, by filing their claim, assumed the risk of an adverse judgment. But the risk at stake was whether the Confederated Tribes could collect on the loan to the debtor – not the risk that the Court could award money damages or other affirmative relief as against the Confederated Tribes. No affirmative relief against the Confederated Tribes, in the form of fees or otherwise, was awarded. The case does not support the District Court's analysis.

The District Court also cites *In re Vianese*, 195 B.R. 572 (N.D.N.Y. Bankr. 1995), wherein the Oneida Indian Nation of New York sought to discharge a debt in a patron's bankruptcy estate. The Bankruptcy Court did find that the Oneida Nation waived its immunity by bringing the claim, but also found that Congress abrogated tribal sovereign immunity in passage of the Bankruptcy Reform Act of

1994, and that the Bankruptcy Reform Act of 1994 expressly allowed for the award of attorneys' fees in adversary proceedings. 195 B.R. at 575.

The District Court then cites *In re National Cattle Congress*, 247 B.R. 59 (N.D. Iowa Bankr. 2000), which expressly rejects the Congressional abrogation analysis of *In re Vianese*. 247 B.R. at 267 ("the Court concludes that Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code").[3] In this case, the Bankruptcy Court did give the Sac and Fox Tribe the option to withdraw its claim, but went further to find that absent the Sac and Fox Tribe's waiver, the court was without jurisdiction to extinguish the Sac and Fox Tribe's lien on the debtor's property. 247 B.R. at 271-272 ("Regardless of how the proceeding is postured, any attempt by Debtor to extinguish the Tribe's lien on its property is a suit against the Tribe which is barred by the Tribe's sovereign immunity"). No award of attorneys' fees or other affirmative relief was ordered against the Sac & Fox Tribe in *In re National Cattle Congress*.

Second, the District Court looks to *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), wherein the Yakama Nation intervened in litigation brought by the United States against the States of Oregon and Washington, regarding the

[3] The issue of whether Congress abrogated tribal sovereign immunity in the context of the Bankruptcy Reform Act continues to be in dispute amongst federal courts that have looked at the issue. Compare, *In re Greektown Holdings*, 532 B.R. 680 (E.D. Mich. Bankr. 2015), with *In re Womelsdorf* , 2015 WL 3643477 (D. Ore. Bankr. 2015).

anadromous salmon fishery in the Columbia River. The District Court in *United States v. Oregon* found that the Yakama Nation waived its immunity by intervening in the litigation and signing on to a conservation agreement. *Id.* at 1015-1016. The Ninth Circuit in *United States v. Oregon* then noted that the District Court took custody over the fishery in the case, and issued an injunction as to who could fish and when. *Id.* at 1016. In the context of the litigation, the Yakama Nation entered into a conservation agreement wherein it expressly consented to the court's jurisdiction to modify the injunction. *Id*. Accordingly, the Yakama Nation was bound by that injunction. *Id*. At no place in the litigation did the court award attorneys' fees or money damages, or otherwise award affirmative relief, against the Yakama Nation.

The *McClendon* Court expressly recognized *United States v. Oregon*, noted the distinctions regarding the Yakama Nation's consent, and expressly declined to extend *United States v. Oregon* to find a waiver that subjected the Colorado River Indian Tribes to an action for breach of lease, when the Colorado River Indian Tribes had brought an action to quiet title. 885 F.2d at 630-632. In addition to the *McClendon* Court, the Ninth Circuit has subsequently commented that *United States v. Oregon* "probably tests the outer limits of *Santa Clara Pueblo*'s admonition against implied waivers," and that since *United States v Oregon*, the Ninth Circuit has reaffirmed the requirement that tribal consent to suit must be

unequivocally expressed. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989). One District Court has expressly commented that *United States v. Oregon* does not hold that the Yakama Nation was subject to monetary awards against it. *United States v. Washington*, 909 F. Supp. 787, 793 (W.D. Wash. 1995), *rev'd in part on other grounds*, 135 F.3d 618 (9th Cir. 1998). Indeed, several courts have criticized *United States v. Oregon* for finding that intervention constituted an implied waiver of the Yakama Nation's sovereign immunity. *See e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994); *American Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1380 (8th Cir. 1985); *White v. University of California*, 2012 WL 12335354 at *8 (N.D. Cal. 2012).

The District Court accords a 1995 case from the Eighth Circuit, *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995). In *Rupp*, the Omaha Indian Tribe filed suit in federal court to quiet title to land in its favor. "The Tribe affirmatively requested the district court to order the defendants to assert any claims in the disputed lands they possessed against the Tribe and exercise its equitable powers to, among other things, quiet title in the Tribe's name." *Rupp*, 45 F.3d at 1244. The *Rupp* court found that "language explicitly requesting [the defendants] to assert any 'right, title, interest or estate' they may have in the disputed land [was] an unequivocal consent to any counterclaims asserted by [the

defendants] to quiet title and award damages in [the defendants'] respective names." *Id*. at 1244-45. Additionally, the Eighth Circuit rejected efforts to impose interest and punitive damages on the Omaha Tribe. *Id.* at 1246-1247. No similar invitation to defendants to bring claims was made by the Tribe's request for an award of attorneys' fees in the present case. *Rupp* is inapposite.

At least four courts have expressly refused to extend *Rupp* to find a waiver absent an affirmative invitation by a plaintiff tribe for the filing of counterclaims. *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015) ("the counterclaims ask us to do much more than deny that relief—they demand, among other things, the affirmative relief of an injunction barring the Tribe from bringing lawsuits against county officials in federal or tribal courts"); *Flandreau Santee Sioux Tribe*, 2016 WL 589864 at *7 (dismissed counterclaims seeking that "Tribe be ordered to pay additional sums"); *Oneida Tribe of Wis. V. Village of Hobart*, 500 F. Supp. 2d 1143, 1148-1150 (E.D. Wis. 2007) (dismissed counterclaims "for injunctive relief, which is really a claim for money damages"); *Tunica-Biloxi Tribe of Louisiana v. Blalock*, 23 So.3d 1041, 1047- 48 (La. App. 2009) ("To find that the Tribe waived its sovereign immunity against River View in light of its prayer for damages and a determination as to ownership interest of the property against the Blalocks would require a determination of implied waiver").

Third, the District Court cites to cases where tribes have affirmatively consented to have disputes resolved by arbitration. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the Supreme Court found that the Citizen Band Potawatomi Tribe had waived its sovereign immunity in a contract wherein it expressly consented to have disputes resolved by arbitration. *Id.* at 418. Such a finding is fundamentally and distinctively different from finding that a tribe's prayer for attorneys' fees against its adversary constitutes a waiver of immunity as to an award of attorneys' fees against the tribe. Here, there is no contractual provision at issue wherein the Tribe affirmatively waived its immunity in any respect, much less agreed to a specific dispute resolution process where it consented to a court awarding affirmative relief against it.

The arbitration cases of *C&L Enterprises* and its progeny are also distinctively different because the tribes in each case affirmatively consented to the alternative dispute resolution process of arbitration, which, by rule and by common practice, provides for the award of attorneys' fees. Indeed, the District Court cites *Kenneth H. Hughs, Inc. v. Aloha Tower Development Corp.*, 654 F. Supp. 2d 1142 (D. Hawaii 2009), as precedent for an award of attorneys' fees in the context of an arbitration award where a state had waived its Eleventh Amendment immunity. The court specifically noted that the state had agreed to enforcement under the

Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA"), and that the FAA "grants wide authority to the arbitrator to determine entitlement to attorney fees." *Id.* at 1150.

Timely, informative and on point is the very recent decision of the Idaho Supreme Court in *In re Doe*, 2016 WL 369450 (Idaho February 1, 2016). In *In re Doe*, the Shoshone-Bannock Tribes intervened in a child custody matter. The trial court initially ordered that the Shoshone-Bannock Tribes pay one-half of the fees of the attorney appointed by the court to represent the child, and the adoptive parents sought a further award of attorneys' fees on appeal. *Id.* at *6. In the lower court proceedings, the Shoshone-Bannock Tribes had sought an award of attorneys' fees. *Id.* at *8. The Idaho Supreme Court, applying the case law set forth above, reversed the lower court's award of attorneys' fees, stating:

> Indian tribes are immune from claims brought in both state and federal court unless Congress has authorized the suit or the tribe waived its immunity. Further, any such waiver of immunity must be expressed and cannot be implied; a rule which the United States Supreme Court has extended to mean that even when a tribe initiates proceedings, it does not waive immunity to counter-claims or cross-claims. A waiver of sovereign immunity is analyzed the same whether the immunity belongs to the federal government or an Indian tribe. Even when a sovereign entity waives immunity with respect to declaratory or injunctive relief claims, that waiver does not extend to awards of monetary damages. To be liable for monetary damages, a sovereign entity must unambiguously and expressly waive its immunity specifically with respect to those damages. Therefore, grants of statutory attorney fees against Indian tribes are barred by sovereign immunity unless the tribes waive immunity with respect to those claims. The Tribes in this case did not waive their immunity

> with respect to attorney fees, either by agreement **or by requesting attorney fees of their own.** . . . The order of the trial court granting attorney fees against the Tribes is reversed. The Does and Child request attorney fees on appeal, but the Tribes do not. Sovereign immunity bars any award of attorney fees against the Tribes. Therefore no attorney fees are awarded on appeal.

2016 WL 369450 at *8 (emphasis added) (citations omitted). *See also Guthrie v. Circle of Life*, 176 F.2d 919, 924 (D. Minn. 2009) (Tribe's acceptance of federal funds did not waive its immunity in an action for attorneys' fees).

VII. CONCLUSION

The District Court erred in finding that the Tribe's prayer for relief requesting an award of attorneys fees as against the City constitutes a waiver of the Tribe's sovereign immunity from an award of attorneys fees against the Tribe. The Tribe, by filing the lawsuit, did expose itself to off-sets sounding in recoupment, but did not waive its immunity as to an affirmative award of two million dollars in attorneys fees against it. Accordingly, the District Court's Order granting an award of attorneys fees against the Tribe should be vacated and on remand, the District Court should be instructed that it may not award attorneys fees as against the Tribe.

Dated: February 24, 2016

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that *GUIDIVILLE RANCHERIA OF CALIFORNIA, et al v. UNITED STATES, et al*, Case No. 15-15221, is related to this appeal. Both appeals are interlocutory appeals from the same matter currently pending in the United States District Court for the Northern District of California, *GUIDIVILLE RANCHERIA OF CALIFORNIA, et al, V. UNITED STATES* et al., Case No. CV 12-1326 YGR.

Dated: February 24, 2016

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