

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.

No. 3:16-cv-05566-RJB

DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

Noted: August 4, 2017

**ORAL ARGUMENT REQUESTED**

**I. INTRODUCTION**

In 2005, the Stillaguamish Tribe of Indians (the "Tribe") entered into the Salmon Project Agreement #04-1634 ("Project 04-1634 Agreement") with the Washington State Salmon Recovery Funding Board ("SRFB") to improve Chinook salmon habitat on the North Fork Stillaguamish River ("NFSR"). To protect the Chinook spawning grounds, the Tribe proposed to build a large revetment wall to protect the NFSR from the sediment released by the slope at Steelhead Haven. In consideration for state funding, the Tribe ("Sponsor") agreed to indemnify the State for tort liability arising out of the wall's construction and expressly waived its immunity from suit:

DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT - 1  
(3:16-cv-05566-RJB)

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1 While the Funding Board undertakes to assist the Sponsor with the Project by  
 2 providing a grant pursuant to this Agreement, the project itself remains the sole  
 3 responsibility of the Sponsor.

4 ....

5 [T]he Sponsor expressly agrees to and shall indemnify, defend and hold harmless  
 6 the State and its agencies, officials, agents and employees from and against all  
 7 claims, actions, costs, damages, or expenses of any nature arising out of or  
 8 incident to the Sponsor's or any Contractor's performance....

9 Latsinova Decl. Ex. A at 11; *see also id.* at 22 (“***The Tribe hereby waives its sovereign***  
 10 ***immunity*** ....” (emphasis added)).

11 On March 22, 2014, a portion of the unstable slope near Oso, Washington, collapsed,  
 12 sending mud and debris across the NFSR and causing loss of life and destruction of the  
 13 Steelhead Haven neighborhood. The victims of the landslide sued the State and other  
 14 defendants, alleging, in part, that the revetment wall caused some of their injuries. *Pzonka v.*  
 15 *Snohomish County*, 14-2-18401-8-SEA. Pursuant to the Project 04-1634 Agreement, the State  
 16 sought indemnity from the Tribe and its insurer.

17 The Tribe filed this action to avoid its indemnity obligation. It argues that the waiver of  
 18 sovereign immunity in section 41 of the Project 04-1634 Agreement, while unambiguous, was  
 19 not authorized. According to the Tribe's Chair, Shawn Yanity, the proper procedures for waiver  
 20 were not followed because the Tribe “has had a practice of authorizing limited waivers of the  
 21 Tribe's sovereign immunity through written board resolutions” since 1999. Dkt. #10, ¶¶ 3-4.  
 22 Mr. Yanity offered a similar declaration in *Stillaguamish Tribe of Indians v. Pilchuck Grp. II,*  
 23 *LLC*, No. C10-995 RAJ, 2011 WL 4001088 (W.D. Wash. Sept. 7, 2011) (“*Pilchuck*”). There,  
 24 Judge Jones rejected Mr. Yanity's assertion as “flatly incorrect.” *Id.* at \*5 & n.4. Judge Jones  
 25  
 26

1 found that prior to 2010 “the Tribe had no consistent practice for authorizing people to enter  
2 contracts or waive sovereign immunity on its behalf.” *Id.* at \*5.

3 This Court denied the Tribe’s motion to establish its sovereign immunity as a matter of  
4 law and allowed the State to conduct discovery related to the issue of the Tribe’s assertion of  
5 sovereign immunity. Dkt. #22. The limited discovery having been completed, undisputed facts  
6 show, as in *Pilchuck*, that the Tribe had no consistent practice of waiving sovereign immunity.  
7 Contrary to Mr. Yanity’s “flatly incorrect” statement, the Tribe’s records show that before 2010  
8 the Tribe’s Board of Directors (the “Board”) routinely approved contracts that waived sovereign  
9 immunity without any mention of the waiver in the resolution.  
10

11 The Tribe’s records also show that the Project 04-1634 Agreement was authorized by two  
12 separate Board resolutions. Resolution 98/41 anticipated the passage of state salmon recovery  
13 legislation and directed the Tribe to identify habitat restoration projects and seek state grants to  
14 fund them. The Tribe chose the revetment wall as a priority project, applied for funding, and  
15 obtained the SRFB grant. The Tribe’s Vice-Chair, who was charged with “executing”  
16 Resolution 98/41 but was unavailable, instructed Pat Stevenson, the Tribe’s environmental  
17 manager, to sign the Project 04-1634 Agreement. Independently, Resolution 2004/065  
18 authorized Mr. Stevenson “to obtain federal and/or state emergency or disaster assistance funds”  
19 and to “execute all contracts” on behalf of the Tribe. By 2004, the status of Chinook salmon on  
20 the NFSR was “dire,” prompting the Tribe to seek federal and state assistance to restore its  
21 habitat.  
22

23  
24 The Tribe’s records show beyond dispute that the express waiver of sovereign immunity  
25 in the Project 04-1634 Agreement was authorized and, therefore, valid. The Court should grant  
26

the State's motion, dismiss the Tribe's complaint, and declare as a matter of law that the Tribe has waived its sovereign immunity and is bound by the Project 04-1634 Agreement.

## II. FACTS

### A. The Tribe's 1986 Constitution and Board Resolutions

The Tribe's predecessors lived on the Stillaguamish River. The Tribe gained federal recognition in 1976 and is headquartered in Arlington, Washington. The Tribal Council approved the Tribe's Constitution on January 31, 1953. The Constitution was amended in 1986 and again in 2011. Article IV of the 1986 Constitution states that "[t]he governing body of the Stillaguamish Tribe shall be a six (6) member Board of Directors which shall elect annually from its membership a Chairman, Vice Chairman, Secretary, Treasurer, and two (2) members. The Board may appoint such other officials and committees as are considered necessary." Latsinova Decl. Ex. B, at 25. The Constitution further provides that the Board of Directors shall exercise "all the powers and legal authority, express, implied, or inherent," including, without limitation, the power:

(b) to administer the affairs and assets of the tribe ... under appropriate contracts, leases, permits, loans, or sale agreements;

(f) to negotiate with ... federal, state, tribal and local governments and their departments and agencies ....

(g) to appoint necessary committees

(h) to have and exercise other powers and authority necessary to fulfill its obligations, responsibilities, objectives, and purposes as the governing body of the tribe ....

*Id.* at 28. The 1986 Constitution is silent about the procedure for waiving the Tribe's sovereign immunity.

In discovery, the State sought documents evidencing the Tribe's alleged "long-standing tribal policy that the power to grant waivers of the Tribe's sovereign immunity resides exclusively with the Board of Directors under Article VII, Sec. 1 of the 1986 Tribal Constitution." Latsinova Decl. Ex. C at 38. In response, the Tribe produced no Board resolutions or policy statements predating the Project 04-1634 Agreement that identify specific procedures for waiving the Tribe's sovereign immunity. The Tribe produced many Board resolutions approving specific contracts that, like the Project 04-1634 Agreement, contain express sovereign immunity waivers. *E.g.*, Latsinova Decl. Exs. D-K. But the resolutions themselves say nothing about sovereign immunity or the procedure for waiver. Three examples illustrate this pattern:

- Board Resolution 96/22 was adopted at the Board's meeting on May 7, 1996. It is silent on any waiver of sovereign immunity. The resolution states that the Board authorized "Board's Chairperson ... Vice-Chairperson or Executive Director" to "negotiate and execute" it. The related agreement is dated June 9, 2006. It is signed by Priscilla Shipley, the Board Chairperson, and "grants to the Contractor "a limited waiver of ... sovereign immunity ... to the extent of the value of the contract." *Id.* Ex. D.
- Board Resolution 2000/80 was adopted by the Board on June 1, 2000. It is silent on the waiver of sovereign immunity. The Board authorized "Board's Chairperson ... Vice-Chairperson or Executive Director" to "negotiate and execute" the Resolution. The related agreement with a California law firm is dated June 2, 2000. It is signed by Edward Goodridge, Sr., the Board Chairman. The agreement contains an arbitration clause and provides that the Tribe "expressly consents to the jurisdiction of any such arbitration or judicial tribunals ... and waives any and all claims of sovereign immunity." *Id.* Ex. E.
- Board Resolution 2004/043 was adopted by the Board on June 28, 2004. The Board authorized the "Board's Chairperson ... Vice-Chairperson or Executive Director" to "negotiate and execute" the Resolution "upon review by the Tribal Attorney." The related agreement contained an express and irrevocable limited waiver of sovereign immunity "for the purpose of permitting claims arising under the terms of the Agreement." *Id.* Ex. H.

1 *See also id.* Exs. F-G, I-K. The Tribe’s records contain no evidence of a “policy” that would  
 2 have been in effect when the Project 04-1634 Agreement was signed in 2005. The Board  
 3 routinely approved contracts that expressly waived sovereign immunity without any mention of  
 4 the waiver in the resolution.

5 **B. The Listing of Chinook and the Washington Salmon Recovery Act**  
 6

7 The Tribe sought the Project 04-1634 Agreement from the State to obtain funds for  
 8 improving salmon habitat, an issue of vital importance to the Tribe. In 1854 and 1855, Indian  
 9 Tribes in the Pacific Northwest entered into “Stevens Treaties,” negotiated by Isaac I. Stevens,  
 10 Superintendent of Indian Affairs and Governor of the Washington Territory. Under the Stevens  
 11 Treaties, the tribes relinquished land in what is now the State of Washington in exchange for a  
 12 right to off-reservation fishing. *Washington v. Washington State Commercial Passenger Fishing*  
 13 *Vessel Ass’n*, 443 U.S. 658 (1979) (“*Fishing Vessel*”). The Stillaguamish Tribe’s ancestors  
 14 signed the Point Elliott Treaty and reserved fishing rights in the Stillaguamish River. *United*  
 15 *States v. Washington*, 384 F. Supp. 312, 378-79 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir.  
 16 1975). Salmon were the Tribes’ central concern. *Fishing Vessel*, 443 U.S. at 667. Chinook  
 17 salmon is “the most important salmonid species in terms of cultural and economic significance  
 18 for tribes.” Latsinova Decl. Ex. L at 221.

19  
 20 In 1999, after years of population decline, Puget Sound Chinook was listed as a  
 21 threatened species under the federal Endangered Species Act (“ESA”). *See* 63 Fed. Reg. 11482  
 22 (Mar. 9, 1998) (proposed ESA listing for several populations of West Coast Chinook); 64 Fed.  
 23 Reg. 14308 (Mar. 24, 1999) (ESA listing of four populations of West Coast Chinook). Chinook  
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 25  
 26

1 salmon from the Stillaguamish River are part of the Puget Sound Chinook population. *See* 64  
2 Fed. Reg. at 14318.

3 In response to the ESA listings of Chinook and other salmonid species, the Washington  
4 Legislature adopted several key pieces of salmon recovery legislation over several legislative  
5 sessions, beginning in 1998. Most of this legislation is currently codified in chapters 77.85 and  
6 77.95 of the Revised Code of Washington. Additional salmon recovery legislation is codified in  
7 chapter 76.09 of the Revised Code of Washington. *See* RCW 76.09.055(1) (“The legislature  
8 finds that the declines of fish stocks throughout much of the state requires immediate action to be  
9 taken to help restore these fish runs where possible.... [T]he legislature believes that the  
10 immediate adoption of emergency rules is appropriate....”).  
11

12 The legislature adopted a watershed-based salmon recovery strategy, based on Water  
13 Resource Inventory Areas (“WRIAs”) as primary planning units of salmon recovery. RCW  
14 77.85.010(13). The Stillaguamish River watershed is WRIA 5. WAC 173-500-040. Local  
15 governments and tribes in each watershed must “jointly designate ... the lead entity that is to be  
16 responsible for submitting the habitat project list” for that watershed. RCW 77.85.050(1)(a).  
17 The co-lead entity for the Stillaguamish watershed is the Stillaguamish Watershed Council.<sup>1</sup> The  
18 SRFB evaluates the submitted project lists and makes grants for salmon habitat projects. RCW  
19 77.85.010(3), .110, and .120; WAC 420-04-020.  
20

## 21 **C. Resolution 98/41 and the Tribe’s WRIA 5 Lead Entity Strategy**

22 Pat Stevenson, who signed the Project 04-1634 Agreement, is the Tribe’s environmental  
23 manager of over 30 years. Mr. Stevenson testified that in the late 1990s Chinook in the  
24  
25

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26 <sup>1</sup> Previously known as the Stillaguamish Implementation and Review Committee.

1 Stillaguamish River were “down to the last 10 percent,” a situation he agreed was “dire.”  
2 Latsinova Decl. Ex. M at 26:1-21. The Tribe expected that Chinook would soon be listed under  
3 the ESA and identified its recovery as a high priority:

4 Q. [D]id the Tribe develop a plan to respond to this dire situation in the framework  
5 of the system that was created by the Salmon Recovery Act?

6 A. Yes, we did.

7 Q. And what was that?

8 A. The Stillaguamish Chinook Salmon Recovery Plan. And we co-lead the effort  
9 with Snohomish County.

10 ....

11 Q. [Y]ou were one of the main authors; is that fair to say?

12 A. I would say so.... [T]he component of the recovery plan that dealt with  
13 habitat fell ... within my scope of work....

14 ....

15 Q. Okay. And so would you say that protection of Chinook was a priority for  
16 the Tribe –

17 A. Yes.

18 Q. -- when it was listed?

19 A. Yes.

20 Q. And in subsequent years?

21 A. Yes.

22 Q. And does it remain a priority today?

23 A. Yes.

24 Q. And would you say that the tribal board is aware of that priority?

25 A. Oh, yeah.

26 Q. And is it spending a lot of time on that priority?



1 A. Yes, I would say so.

2 *Id.* Ex. M at 26:22-27:3, 27:11-23, 28:9-23.

3 On July 7, 1998, the Tribal Board passed Resolution 98/41. *Id.* Ex. N. The resolution  
4 stated that the proposed listing of Puget Sound Chinook salmon would require coordinated action  
5 on the part of cities, counties, and tribal governments in each watershed. It also stated that the  
6 Legislature had enacted a bill to develop habitat restoration projects and to provide grants to lead  
7 entities in each designated area. *Id.* The Board designated WRIA 5 as the area for which a  
8 habitat restoration project list was to be developed, and designated Snohomish County and the  
9 Stillaguamish Tribe as “*lead entities*” for purposes related to the new legislation. The Board  
10 authorized the Tribe’s Chairperson, Vice-Chairperson, or Executive Director to “negotiate and  
11 execute” Resolution 98/41, which “continue[d] until revoked by the Board of Directors.” *Id.*  
12 Resolution 98/41 was never repealed.  
13

14 As “a co-lead ... of WRIA 5 ... response,” *see* Latsinova Decl. Ex. M at 30:105-32:15,  
15 40:17-22, the Tribe prepared the Stillaguamish Lead Entity Strategy, *id.* Ex. L. The strategy,  
16 finalized in 2004, prioritized on reducing continuous sediment input to Chinook spawning areas  
17 from the Steelhead Haven landslide. *Id.* Ex. L at 223, 255 (identifying the Steelhead Haven  
18 Landslide on the NFSR as “first priority for sediments projects”); *see also id.* Ex. M at 36:11-  
19 37:18 (“Sediment was a high priority.”). To protect the Chinook spawning grounds, the Tribe  
20 planned to “isolate the river from the landslide” by constructing a large revetment wall at the foot  
21 of the Steelhead Haven landslide. *Id.* Ex. O. The wall was estimated to cost \$1.4 million.  
22  
23  
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1 Mr. Stevenson represented the Tribe at WRIA 5 and authored habitat sections of the  
 2 Tribe's Lead Entity Strategy. On August 29, 2004, Mr. Stevenson submitted to the SRFB the  
 3 Tribe's application for financial assistance in constructing the revetment wall, stating:

4 The principal fact limiting salmon production within the North Fork is  
 5 sedimentation resulting from a major clay slide.... The habitat loss and water  
 6 quality impact will continue until the sediment source is reduced and the channel  
 7 storage is increased. The purpose of the project is to isolate the river from the  
 8 landslide thereby eliminating the undercutting of the slide and creating channel  
 9 storage behind a large wood revetment. The project goal is to build the revetment  
 500' from the toe of the slide, move the river south of the revetment and isolate  
 the landslide from the river eliminating the direct sediment discharge.

10 *Id.* Ex. P.

#### 11 **D. Resolution 2004/065 and Project Funding**

12 On August 31, 2004, the Tribe's Board of Directors passed Resolution 2004/065  
 13 designating John Drotts, the Tribe's Natural Resource manager, and Pat Stevenson as the Tribe's  
 14 "authorized representative[s] ... to obtain federal and/or state emergency or disaster assistance  
 15 funds." *Id.* Ex. Q. The resolution stated that they were "authorized on behalf the Stillaguamish  
 16 Tribal Board of Directors to execute all contracts, certify completion of projects, request  
 17 payments and prepare all required documentation for funding requirements." *Id.*

18 The SRFB approved the Tribe's grant application. The SRFB/RCO Grant for Project  
 19 04-1634, dated April 5, 2005, funded half the final cost of the revetment wall. The other half  
 20 was funded by a matching grant from the Centennial Clean Water Fund administered by the  
 21 Department of Ecology, dated February 2, 2006 ("CWA Agreement No. G0500137"). *Id.* Ex. R.  
 22 On January 13, 2005, the Tribe received two original sets of project agreement documents for  
 23 Project 04-1634. *Id.* Ex. S. The cover letter from the SRFB was addressed to Mr. Stevenson,  
 24 who had prepared the grant application. *Id.* The letter advised Mr. Stevenson to review the  
 25  
 26

1 Project 04-1634 Agreement materials, “have the appropriate person sign each [set], [and] return  
2 one signed original.” *Id.*

3 Mr. Stevenson consulted Edward Goodridge, Jr., who instructed him to sign the Project  
4 04-1634 Agreement:

5 Q: Did anybody tell you to sign the agreement?

6 A: Yes, at the time I approached the executive director of the Tribe.

7 Q: Okay. And who was that at the time?

8 A: Ed Goodridge, Jr. ... it was ... I’m not going to be around for the next week,  
9 to go ahead and sign it.<sup>2</sup>

10 Q: Okay. So Mr. Goodridge instructed you to sign this agreement. Is that  
11 correct?

12 A: Yes.

13 Q: And you said he was the executive director of the Tribe at that time?

14 A: Yes.

15 *Id.* Ex. M at 88:14-89:8; *see also id.* at 103:25-104:9 (“Ed Goodridge, Jr., ... said to go ahead  
16 and sign it, and I just followed.”).<sup>3</sup>

17  
18 Shawn Yanity, the Tribe’s Vice-Chair and Fisheries Manager, signed CWA Agreement  
19 No. G0500137, which provided the matching grant for the Project 04-1634 Agreement, on April  
20 18, 2005. *Id.* Ex. R. The CWA Agreement No. G0500137 stated that the Tribe indemnified the  
21 State “from and against any liability for any and all injuries to persons or property arising from  
22

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23 <sup>2</sup> *But see* Yanity Decl. Dkt. #10, ¶ 5, stating that “[i]n April 2005, the Board consisted of me, Shawn  
24 Yanity as Chairman; the Vice Chairman, Edwards L. Goodridge Jr.; the Secretary, Darcy R. Dreger; the  
25 Treasurer, Sara L. Schroedl; and two other Members Jody R. Soholt and LaVaun E. Tatro.”

26 <sup>3</sup> Mr. Stevenson testified that in the same time frame the Tribe applied for other grants from the SRFB,  
including multiple grants for engineered log jams on the Stillaguamish River. Mr. Stevenson signed none  
of the other SRFB project agreements “because the ... executive director or fisheries manager was  
available.” Latsinova Decl. Ex. M at 98:17-99:9.

1 the negligent act or omission” of the Tribe or its agents or employees. *Id.* at 348. Disputes could  
 2 be resolved in state court under Washington law. *Id.*

3 Both the Project 04-1634 Agreement and the CWA Agreement No. G0500137 were  
 4 essential to funding the project. The Tribe coordinated spending from the two grants until the  
 5 project was completed:  
 6

7 Q: [D]id the Tribe ... try to keep the two grants synchronized?

8 A: Yes.

9 Q: [C]an you please elaborate?

10 A: Yeah. The way the billing worked was that in order to recoup a hundred percent of  
 11 the money in the invoice, you’d submit a claim half of it on the RCO grant and half  
 12 of it on the Department of Ecology grant, because they were a match for each  
 13 other.... So that way if you had a hundred thousand dollars invoice, you just put in  
 14 50 for each source and they matched....

15 *Id.* Ex. M at 94:18-95:5.

16 In January 2006, when the project design was complete and construction of the revetment  
 17 wall was about to start, the slope of Steelhead Haven landslide failed, pushing its way 700 feet  
 18 south across the North Fork of the Stillaguamish River. Debris from the landslide moved the  
 19 river channel approximately 500 feet, delaying the project and necessitating extensions of the  
 20 two grants. *Id.* Ex. T. Construction of the revetment wall began in July of 2006 and was  
 21 completed in August of 2007. *Id.* Ex. U.

22 While the revetment wall project was underway, the Tribe applied for additional  
 23 SRFB/RCO grants, including several grants for engineered log jams on the Stillaguamish River.  
 24 The additional SRFB/RCO grants involved the same SRFB project agreement. Mr. Stevenson  
 25  
 26

1 worked on the grant applications but did not sign the SRFB project agreements “because the ...  
 2 executive director or fisheries manager was available.” *Id.* Ex. M at 98:9-99:9.

### 3 **E. The Board Resolution 2010/142 and Subsequent Board Practice**

4 On October 26, 2010, the Tribe’s Board passed Resolution 2010/142. *Id.* Ex. V. The resolution  
 5 was prompted by court decisions holding that “limited waivers of tribal sovereign immunity in written  
 6 instruments may be expressed in many forms and need not include the term ‘sovereign immunity’ to be  
 7 effective.” *Id.* Resolution 2010/142 stated that “the power to grant waivers of the Tribe’s sovereign  
 8 immunity resides exclusively with the Board of Directors under Article VII, sec. 1 of the Constitution”  
 9 and that “any and all limited waivers of the Tribe’s sovereign immunity ... shall be in writing and shall be  
 10 memorialized in the official records of the Board of Directors.” *Id.* The resolution did not apply  
 11 retroactively.  
 12

13 In 2011, the Tribe hired an in-house attorney who began reviewing all contracts  
 14 containing waivers of sovereign immunity. *Id.* Ex. M at 126:6-127:15. Since 2010, contracts  
 15 containing waivers of sovereign immunity (including SRFB project agreements) have been  
 16 approved by Board resolutions that explicitly addressed the waiver. *See id.* Exs. W, X.  
 17

## 18 **III. ARGUMENT**

### 19 **A. The Summary Judgment Standard and the Tribe’s Burden of Proof**

20 Summary judgment is appropriate if there is no genuine dispute as to any material fact  
 21 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The  
 22 moving party bears the initial burden of demonstrating the absence of a genuine issue of material  
 23 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the  
 24 burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could  
 25 find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.  
 26

1 1986). On an issue where the nonmoving party will bear the burden of proof at trial, the moving  
 2 party can prevail merely by pointing out to the district court that there is an absence of evidence  
 3 to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party  
 4 meets the initial burden, the opposing party must set forth specific facts showing that there is a  
 5 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477  
 6 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the  
 7 nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson*  
 8 *Plumbing Prods.*, 530 U.S. 133 (2000).

10 Contractual waivers of tribal sovereign immunity must be clear. *C&L Enters., Inc. v.*  
 11 *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In this case, there is  
 12 no dispute that the Tribe waived sovereign immunity in the Project 04-1634 Agreement in clear,  
 13 express language. To avoid that express waiver, the Tribe has the burden to show that the waiver  
 14 was not authorized. *See Pilchuck*, 2011 WL 4001088 at \*6 (relying on Board meeting transcript  
 15 provided by Tribe to conclude that waiver was not authorized). It cannot meet that burden.

17 **B. The Tribe Is Estopped from Arguing That It Had a Consistent Policy of Waiving**  
 18 **Sovereign Immunity Pre-2010**

19 “[O]nce an issue is actually and necessarily determined by a court of competent  
 20 jurisdiction, that determination is conclusive in subsequent suits based on a different cause of  
 21 action involving a party to the prior litigation”; this “preclude[s] parties from contesting matters  
 22 that they have had a full and fair opportunity to litigate.” *Montana v. United States*, 440 U.S.  
 23 147, 153 (1979); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979)  
 24 (“Defensive [collateral estoppel] occurs when a defendant seeks to prevent a plaintiff from  
 25  
 26

1 asserting a claim the plaintiff has previously litigated and lost against another defendant.”);  
 2 *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987).

3 Here, the issue whether the Tribe had a specific procedure or consistent policy for waving  
 4 sovereign immunity prior to 2010 has been litigated. *Pilchuck*, 2011 WL 4001088. In *Pilchuck*,  
 5 Judge Jones ruled that the Tribe’s 1986 Constitution “is silent regarding who may waive the  
 6 Tribe’s immunity or the procedures for doing so.” *Id.* at \*5. Judge Jones further ruled that  
 7 “[u]ntil 2010, no Board resolution or other formal document set forth policies and procedure for  
 8 waiving immunity. At th[at] time ... the Tribe had no consistent practice for authorizing people  
 9 to enter contracts or waive sovereign immunity on its behalf.” *Id.* (footnote omitted).

11 Judge Jones rejected Mr. Yanity’s contention that the Board’s practice was to authorize  
 12 contracts and sovereign immunity waivers only in written resolutions of the Board:

14 This contention is flatly incorrect. The record reflects that many people have  
 15 signed contracts purportedly on behalf of the Tribe without any Tribal Board  
 16 resolution authorizing the act.... The record [also] reflects that while the Tribe  
 17 entered many contracts pursuant to a written resolution of the Tribal Board, it also  
 18 entered many contracts without a resolution or any other express approval from  
 the Tribal Board. The record also reflects that agents purporting to act on behalf  
 of the Tribe (most often members of the Board) frequently entered contracts on  
 behalf of the Tribe without the written approval of the Board.

19 *Id.* Judge Jones also rejected the Tribe’s reliance on Resolution 2010/142 as evidence of the  
 20 alleged pre-2010 practice, stating that “[a] resolution adopted years after Mr. Goodridge Sr.  
 21 signed the Working Agreement ... is of no value in illuminating the Tribe’s practices in 2006.”  
 22 *Id.* at \*5 n.4.

23 Collateral estoppel precludes the Tribe’s repeated attempt to relitigate these issues here.  
 24 In *Pilchuck*, the Tribe has raised—and lost—the issue whether it had a consistent practice of  
 25 waiving sovereign immunity only by Board resolutions before 2010. It cannot try again in this  
 26

1 case. The Tribe is now bound by Judge Jones' ruling that before 2010 it had "no consistent  
 2 practice for authorizing people to enter contracts or waive sovereign immunity on its behalf."  
 3 *Pilchuck*, 2011 WL 4001088 at \*5; *see also id.* (the alleged pre-2010 policy is "nebulous at  
 4 best").

5 The Tribe is also estopped from relying on Resolution 2010/142 to illuminate its  
 6 practices in 2005 and before. By its terms, Resolution 2010/142 operates prospectively, not  
 7 retroactively. *Pilchuck*, 2011 WL 4001088 at \*5 n.4 ("A resolution adopted years after Mr.  
 8 Goodridge Sr. signed the Working Agreement ... is of no value in illuminating the Tribe's  
 9 practices in 2006.").

11 **C. Before 2010, the Board Routinely Approved Transactions, Which Waived Sovereign**  
 12 **Immunity Without Memorializing the Waiver in the Resolution**

13 In any event, the record in this case points to the same conclusion as was reached in  
 14 *Pilchuck*. The 1986 Constitution is silent as to the procedure for waiving sovereign immunity.  
 15 Article VII delegates "all the powers and legal authority ... vested ... in the Stillaguamish Tribe"  
 16 to the Board of Directors. The Tribe produced no pre-2010 Board resolutions establishing  
 17 specific policies or procedures for tribal contracts with waivers of sovereign immunity.  
 18 Moreover, numerous Board resolutions prior to 2010—and specifically around 2005—show that  
 19 the Board routinely approved contracts that contained waivers of sovereign immunity *without*  
 20 *memorializing the waiver in the resolution*. *See* Latsinova Decl. Exs. D-K. Mr. Yanity's  
 21 recollection that the Board "had the practice of authorizing limited waivers of the Tribe's  
 22 sovereign immunity through written Board resolutions" since 1999 is "flatly incorrect." *See* Dkt.  
 23 #10, ¶ 4; *Pilchuck*, 2011 WL 4001088 at \*5 & n.4.  
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Where the nonmoving party will bear the burden of proof at trial, the moving party can prevail on summary judgment by pointing to an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. Here, no competent evidence supports the Tribe's contention that prior to 2010 the Board had the policy or practice of approving all waivers of sovereign immunity. To the contrary, the evidence is undisputed that before 2010 the Board routinely approved contracts, which waived sovereign immunity, without any mention of the waiver in the Board resolution. Latsinova Decl. Exs. D-K.

**D. Board Resolutions Specifically Directed the Tribe as the Co-Lead Entity for WRIA 5 to Seek Salmon Recovery Grants and Authorized Mr. Stevenson to Enter into Contracts on the Tribe's Behalf**

Mr. Yanity also states that "between 1999 and 2014" the Board never discussed the Salmon Project Funding Agreement and never passed a resolution "authorizing Pat Stevenson, or any other person, to sign the Salmon Project Finding Agreement on the Tribe's behalf." Dkt. #10, ¶ 6. This statement too is incorrect—and incomplete. The Board started planning for the passage of the Salmon Recovery Act—and the opportunity to obtain state grants it presented—before 1999.

"The constitution invests the Board with plenary power to take action on behalf of the Tribe.... (Stillaguamish Const. Art. VII)." *Pilchuck*, 2011 WL 4001088 at \*5. The Board's powers "include[] the power to waive sovereign immunity." *Id.* They also include the power "to negotiate with and represent the tribe before Federal state ... and local governments and their departments and agencies." Stillaguamish Const. art. VII, § 1(f); 25 U.S.C. § 5123(e) (tribal constitution shall vest in tribal council the power "to negotiate with the Federal, State, and local governments"). The Board may choose to delegate its authority. Stillaguamish Const. art. VII,

§ 1(h) (Board is invested with “powers and authority necessary to fulfill its obligations, responsibilities, objectives, and purposes as the governing body of the tribe”); *see also Pilchuck*, 2011 WL 4001088 at \*5 (discussing the Tribal constitution and stating that “nothing in the constitution ... dictates how the Board must take action” (emphasis added)).

The Board passed Resolution 1998/41 in July 1998. Acting “in the best interests of its people ... embarked on a course of self determination,” the Board designated the Tribe as the WRIA 5 co-lead entity and specifically directed the Tribe, in its capacity as the WRIA 5 lead entity, “to submit any ... habitat restoration project lists and to seek lead entity grants that may be available.” Latsinova Decl. Ex. N (emphasis added). The Board authorized the Tribe’s Chair, Vice-Chair, or Executive Director to “negotiate and execute” Resolution 98/41. It placed no limitation on this authorization. The Resolution “continue[d] until revoked.” *Id.* The Tribe identified the revetment wall as a priority project in WRIA 5. *Id.* Ex. L.

In April 2005, Mr. Yanity and Edward Goodridge, Jr., served as the Board’s Chair and Co-Chair, respectively. Dkt. #10, ¶ 5. They executed Resolution 98/41 by obtaining matching grants for the construction of the revetment wall and by entering into related agreements. Mr. Goodridge, Jr. delegated the signing of the Project 04-1634 Agreement to Mr. Stevenson, while Mr. Yanity signed the CWA Agreement No. G0500137 himself. Each agreement indemnified the State from tort liability, and provided for disputes to be governed by Washington law and heard by courts in this state. The Project 04-1634 Agreement included an unambiguous, mutual waiver of sovereign immunity. “The Tribe hereby waives its sovereign immunity as necessary to give effect to this section, and the State of Washington has waived its immunity to suit in state

1 court. These waivers are only for the benefit of the Tribe and State and shall not be enforceable  
 2 by any third party....” Latsinova Decl. Ex. A at 22.

3 No additional specific reference to the waiver sovereign immunity in Resolution 98/41  
 4 was required. Before 2010, the Tribe routinely approved transactions containing limited waivers  
 5 without memorializing the waiver in the resolution. *Id.* Exs. D-K. The tribe admits that these  
 6 resolutions and related contracts are representative of its “long-standing tribal policy that the  
 7 power to grant waivers of the Tribe’s sovereign immunity resides exclusively with the Board of  
 8 Directors under Article VII, Sec. 1 of the 1986 Tribal Constitution.” *Id.* Ex. C. Resolution 98/41  
 9 and the Project 04-1634 Agreement are no different.  
 10

11 **E. Resolution 2004/065 Explicitly Authorized Mr. Stevenson to “Execute All**  
 12 **Contracts” Seeking State Emergency and Disaster Relief**

13 Independently, Mr. Stevenson had authority under Board Resolution 2004/065 to  
 14 “execute all contracts ... and prepare all required documentation for funding requirements” in  
 15 connection with obtaining federal and/or state emergency or disaster assistance funds. *Id.* Ex. Q.  
 16 That the Tribe was facing a Chinook emergency on the NFSR is not in dispute. By 2004, Puget  
 17 Sound Chinook was an ESA-listed species, and the Washington Legislature had enacted salmon  
 18 recovery funding legislation. The 1999 act creating the SRFB declared an emergency, stating  
 19 that the act was “necessary for the immediate preservation of the public peace, health, or safety.”  
 20 1999 Wash. Laws ex. sess. ch. 13, § 25 (codified as a note to RCW 77.85.005). *See also* RCW  
 21 76.09.055(1) (“The legislature finds that the declines of fish stocks throughout much of the state  
 22 requires immediate action to be taken to help restore these fish runs where possible.... [T]he  
 23 legislature believes that the immediate adoption of emergency rules is appropriate....”).  
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26 The Tribe itself viewed the Chinook’s decline as an emergency:

1 Q. So was the state of Chinook in WRIA 5, would you call it – after it was listed  
2 and through the early 2000s, was it an emergency situation?

3 A. Yes, I would say so.

4 Q. [W]hat were the responses to that emergency that were developed by the  
5 staff, including you?

6 A. Well, the Salmon Recovery Funding Board was formed around 2000 ... right  
7 at the time of the listing.... So we started developing priorities based on the  
8 Chinook recovery plan.

Latsinova Decl. Ex. M at 30:6-18; *see also id.* at 26:1-21 (Chinook status was “dire”).

#### 9 **F. Summary**

10 In sum, the Tribe’s attempt to renege on the Project 04-1634 Agreement (and the explicit  
11 waiver of sovereign immunity it contains) fails. The Board has “plenary power to take action on  
12 behalf of the Tribe.” *Pilchuck*, 2001 WL 4001088 at \*5 (citing Stillaguamish Const. art. VII).  
13 The Board exercised this power when it passed Resolution 98/41, stating that obtaining grants  
14 for salmon recovery projects was the Tribe’s priority. Resolution 98/41 directed the Tribe’s  
15 Chair, Co-Chair, and Executive Director to execute that priority. The Tribe’s Vice-Chair did  
16 precisely that, instructing Mr. Stevenson to sign the Project 04-1634 Agreement on April 6,  
17 2005. In addition, and independently, Mr. Stevenson had authority to “execute all contracts”  
18 providing emergency funding by Resolution 2004/065. There is no dispute that the Tribe viewed  
19 near-extinction of Stillaguamish River Chinook salmon as a “dire” emergency.  
20

21 Resolutions 98/41 and 2004/065 and the Project 04-1634 Agreement followed a pattern  
22 of many similar Tribal resolutions, which did not specifically reference the waiver, and related  
23 agreements, which did. The Project 04-1634 Agreement was authorized by the Board, and the  
24 waiver it contained could not be any more explicit. No more is required.  
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**IV. CONCLUSION**

For the reasons stated, the Motion for Summary Judgment should be granted. The Court should dismiss the Tribe's Complaint and declare as a matter of law that the Tribe is bound by its waiver of sovereign immunity in the Project 04-1634 Agreement.

DATED: June 20, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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DATED: June 27, 2017, at Seattle, Washington.

s/Sherry R. Toves

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