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 4, 2017

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MOTION FOR SUMMARY JUDGMENT

This case is about an effort by the State of Washington and Attorney General Ferguson (collectively "State") to convert a $497,000 contract providing funding for the Stillaguamish Tribe of Indians ("Tribe") to build a fish habitat cribwall into a $50 Million indemnification windfall to the State for a third-party tort claim relating to a landslide.

The Tribe, pursuant to the Court's September 29, 2016 Order (Dkt. # 25), hereby respectfully moves the Court pursuant to Fed. R. Civ. P. 56 to enter judgment in the Tribe's favor and against the 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 ("Agreement") signed in 2005. 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. As such, the State's effort to seek unlimited indemnification from the Tribe for a third-party tort claim asserted against the State eleven years after the $497,000 Agreement was signed cannot proceed in any forum. In addition, or in the alternative, the State is barred as a matter of law from seeking indemnification because of judicial estoppel and the indemnification provision of the Agreement has not been triggered.

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

MEMORANDUM IN SUPPORT OF MOTION

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

STATEMENT OF RELEVANT FACTS

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

The Tribe is a federally-recognized Indian Tribe with headquarters in Arlington, Washington. *See Indian Entities Recognized and Eligible To Receive Services From the United*

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States Bureau of Indian Affairs, 81 Fed. Reg. 26826, 26830 (May 4, 2016). The Tribe gained federal acknowledgement in 1976 and adopted a Constitution on June 18, 1986. *See* Constitution of the Stillaguamish Tribe of Indians of Washington ("Constitution"), attached as Ex. A to the Declaration of Shawn Yanity ("Yanity Decl.").

Pursuant to the Constitution, the Tribe is governed by a six-member Board of Directors (the "Board"), from which a Chairman and other officers are selected. Yanity Decl., ¶2; Ex. A at p. 2 (Art. IV). The Board is the body through which the Tribe exercises its sovereign powers and authority. *Id*. at p. 5 (Art. VII, § 1). The Constitution provides that the Board is vested with "[a]ll the powers and legal authority, express, implied, or inherent, which are vested or acknowledged by existing Federal Law in the Stillaguamish Tribe as a sovereign political entity[.]" *Id*. This grant of authority to the Board includes, but is not limited to, the power: "to administer the affairs and assets of the tribe . . . under appropriate contracts"; "to prevent the sale, disposition . . . or encumbrance of . . . tribal assets"; and "to have and exercise such other powers and authority as necessary to fulfill its obligations, responsibilities, objectives, and purposes as the governing body of the tribe." *Id*., at p. 5 (Art. VII, §§ 1(b), (c), and (h)).

The Constitution further provides that the Board can act only at duly called meetings at which a quorum (consisting of four members of the Board) is present. *Id*. at p. 9 (Art. XIII, §§ 1, 2). At least a majority vote of Board members present at a meeting is necessary for the Board to make a decision and take official action. *Id*. (Art. XIII, § 4). Any Tribal rights and powers not specifically referenced in the Constitution can be exercised by the general membership of the Tribe "through the adoption of appropriate constitutional amendments." *Id.* at p. 6 (Art. VII, § 2).

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

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Board's Minutes are kept in the Tribe's official records. *Id.*, ¶ 3; *see also* Ex. A at p. 8 (Art. XII, § 3).

For a long period of time, including during 2005 to the present, the Tribe's Board has had a practice of protecting sovereign immunity and requiring resolutions when it exercised certain authorities.[1] In 1987, the Tribe's Board passed Resolution 87-107 affirming the sovereign immunity of the Tribe "and those who act on behalf of the Tribe", recognizing that sovereign immunity is "necessary to protect the limited financial assets of" the Tribe. Smith Decl., Ex. I. The Tribe's Board adopted the practice and policy of requiring that a written resolution be approved by the Board that explicitly waives the Tribe's inherent sovereign immunity (or specifically approves a document that purports to do so) before any such waiver is valid. Yanity Decl., ¶ 4. The Tribe codified this longstanding custom in 2010 when the Board adopted a resolution that explicitly reaffirms that "any and all waivers of the Tribe's sovereign immunity . . . shall be granted only by the Board of Directors, shall be in writing, and memorialized in the official records of the Board of Directors." *Id.*, Ex. B at p. 2. The Resolution reaffirms that any individual Tribal employee or official who attempts to waive the Tribe's immunity acts beyond the scope of his or her authority. *Id.* The Tribe's Board reaffirmed the policy again in 2014. Smith Decl., Ex. R.[2]

[1] *See* Declaration of Rob Roy Smith ("Smith Decl."), Ex. J (providing a limited waiver of sovereign immunity to the extent of the value of the contract); *Id.*, Ex. K (denying waiver of sovereign immunity within a resignation and release agreement by stating "this Agreement is in no way intended to waive or otherwise affect the sovereign immunity of the Stillaguamish Tribe."); *Id.*, Ex. L (providing a limited waiver of sovereign immunity by stating and provided that "any damages awarded shall be payable from, and solely from, the proceeds of any venture to be established pursuant to the Lease . . ."); *Id.*, Ex. M (providing a limited waiver of sovereign immunity to enforce rights arising under a Note); *Id.*, Ex. N (providing limited waiver of sovereign immunity to the extent specified within the Resolution); *Id.*, Ex. O (providing waiver of sovereign immunity limited to the "interpretation and/or enforcement of this agreement, and/or for any complaints or counterclaims for monetary damages or equitable relief for any breach of this agreement, and/or for the enforcement of any final judgment entered by any court of the State of Washington regarding such matters."); *Id.*, Ex. P (providing a limited waiver of sovereign immunity in an operating agreement); *Id.*, Ex. Q (providing a limited waiver of sovereign immunity as stated in two terms of an operating agreement).

[2] Resolution 2014/107 states: "pursuant to Resolution 2010/142 . . . The Board affirmed long-standing Tribal policy on limited waivers of the Tribe's sovereign immunity, e.g. that they may only be granted by the Board of Directors pursuant to written resolution" and authorizing the Chairman, Executive Director and Chief Operations Officer to sign written instruments on behalf of the Tribe "provided that such instruments do *not* contain limited waivers of the Tribe's sovereign immunity." (emphasis added).

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B. The Salmon Project Funding Agreement

On April 6, 2005, a Salmon Project Funding Agreement ("Agreement") for Project No. 04-1634R was signed by Laura E. Johnson, the Director of the State of Washington Interagency Committee for Outdoor Recreation on Behalf of the Salmon Recovery Funding Board and Pat Stevenson, who signed as "Environmental Manager" of the Tribe. Declaration of Patrick Stevenson ("Stevenson Decl."), Ex. A. Mr. Stevenson was an employee of the Tribe at the time he signed the Agreement. *Id.*, ¶ 2. Mr. Stevenson testified that, at the time the Agreement was signed, the Tribe did not have in-house legal counsel.[3]

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

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

Section 41 of the Agreement provides a standard form "Governing Law/ Venue". However, part of Section 41 served as a special addendum to the General Provisions, providing

[3] Mr. Stevenson testified that "there was not [a legal department at the Tribe in 2004, 2005]". Smith Decl., Ex. T at p. 4 (ln. 23-25). There was clear unequal bargaining power between the State and the Tribe.

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that "In the cases where this agreement is between the Funding Board and a federally recognized Indian tribe, the following Governing Law/ Venue applies." *Id.*, Ex. A at p. 21. Thereafter, the Agreement at Section 41.A provided that disputes "arising out of or relating to the performance, breach or enforcement of this agreement" would be brought in Federal Court. *Id*. The Agreement at Section 41.C also contained a provision that purported to provide as follows: "The Tribe hereby waives its sovereign immunity as necessary to give effect to this section." *Id*. The Agreement at Section 41.B provides that any money judgment against the Tribe "may not exceed the amount provided for in Section F-Project Funding of the Agreement", namely $497,000. *Id*.

C. Tribal Board Records are Silent as to the Agreement

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

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

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

D. The 2014 Oso Landslide

As contemplated by the funding provided by the Agreement, the Tribe constructed the revetment in or around October 2006. Stevenson Decl., ¶ 5; Dkt. # 8 at p. 8 (¶ 8).

On or about March 22, 2014, near Oso, Washington, a portion of an unstable hill collapsed, sending mud and debris across the North Fork of the Stillaguamish River engulfing a rural neighborhood, and covering an area of approximately 1 square mile with debris. Dkt. # 8 at p. 8 (¶¶ 6, 8). Like many members of the community, the Tribe responded to the tragedy by helping those in need, donating $100,000 to the relief effort. Yanity Decl., ¶ 9.

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

Subsequently, four lawsuits were filed in King County Superior Court which were consolidated into one case titled *Pszonka, et al., v. Snohomish County, et al,* No. 14-2-18401-8 SEA ("*Pszonka*"), alleging that certain acts or omissions of Grandy Lake LLC, the State of Washington, and Snohomish County caused injuries to plaintiffs. Dkt. # 8 at p. 11 (¶ 15). Among other claims, the plaintiffs alleged that the State of Washington was liable because the revetment constructed by the Tribe was a cause of some of their injuries. *Id.* (¶ 16). The Tribe was not a party to the litigation. Smith Decl., ¶ 3.

On August 26, 2015, the State's Attorney General's Office wrote to the Tribe stating "The Stillaguamish Tribe is the Responsible Sponsor of the [revetment] project and executed defense, indemnity, and hold harmless agreement as part of receiving the grant. . . .The State believes the claims arising from the [revetment] project are covered by the defense, indemnity, and hold harmless clause of the agreement." Smith Decl., Ex. A. In response to the August 26 letter, on or about September 15, 2015, the State's Attorney General's Office and the Tribe held

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a conference call where the Tribe indicated to the State that the Tribe did not believe that the *Pszonka* plaintiffs' claims triggered the indemnification obligation in the Agreement. Smith Decl., ¶ 5.

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

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

On June 22, 2016, the Tribe reiterated its position that it retained its sovereign immunity from suit and neither the Agreement nor any of its provisions were enforceable against the Tribe. *Id*., Ex. E at p. 1. The Tribe also explained that, even if the Agreement was valid, the limited

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waiver of the Tribe's immunity only applies to actions arising to enforce the Agreement brought by the State, which excludes the third-party claims in *Pszonka* alleged against the State. *Id*. at p. 2.

The State's Attorney General responded on June 27, 2016 rejecting the Tribe's position and reiterating that the Tribe appear at the mediation because "any money we offer to settle the *Pszonka,* et al., cases is ultimately yours." *Id*., Ex. F.

F. The State's $50 Million *Pszonka* Settlement

On October 9, 2016, it was reported by the *Seattle Times* that the *Pszonka* plaintiffs reached a $50 Million settlement with the State on the eve of trial (separately, Grandy Lake Forest Associates agreed to settle its liability claims for $10 million). Hal Bernton, *State reaches $50M settlement in Oso Landslide suit*, SEATTLE TIMES (Oct. 9, 2016), http://www.seattletimes.com/seattle-news/50m-settlement-reached-in-oso-landslide-suit/. The settlement included an additional nearly $395,000 for attorneys' fees and costs for sanction motions against the State related to the destruction by State experts of emails. *Id*. Separately, the King County Superior Court imposed a sanction of $ $788,664.04 against the State related to the email destruction fiasco. Smith Decl., Ex. U. The *Seattle Times* reported that the State "is expected to pay the first $10 million of the settlement, with insurers paying the other $40 million." Bernton, *supra*.

As part of the CR 2A Agreement reached by the State with the *Pszonka* plaintiffs, the State included the following language, indicating its continued desire to get the Tribe to pay for the State's misdeeds: "Counsel for plaintiffs agree to cooperate with the State at the sole expense of the State in any action by the State to recover indemnity from the Tribe, including but not limited to use of expert reports and data." Smith Decl., Ex. V (¶ 7). In any event, because of the settlement, there were never any findings of fact or conclusions of law entered relating to the cause(s) of the Oso landslide or who bore legal responsibility therefore.

STANDARD OF REVIEW

Summary judgment is appropriately entered when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The

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Court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The movant's burden is to establish "a prima facie case for summary judgment." *F.T.C. v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). Once the movant meets this burden, the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). When determining whether a genuine issue of material fact remains for trial, the Court "need not draw all possible inferences in [non-movant's] favor, but only all reasonable ones." *Villiarimo v. Aloha Island Air*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002) (internal citation omitted).

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

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

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

The Tribe's Constitution vests the Board with "all the powers and legal authority, express, implied or inherent which are vested or acknowledged . . . in the Stillaguamish Tribe as a sovereign political entity." Yanity Decl., Ex. A at p. 5 (Art. VII, § 1). These powers include inherent sovereign authority over the Tribe's members and land, as well as the corresponding power to assert (or waive) an essential aspect of that sovereignty – immunity from suit. *See id.*; *see also Oklahoma Tax Comm'n. v. Citizen Band of the Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 509 (1991); *see also Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182-83 (10th Cir. 2010) (noting "sovereign immunity [is] an inherent part of the concept of sovereignty"). The Tribe has a longstanding policy that the Board

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only exercises this power to waive the Tribe's sovereign immunity through written resolutions that are formally approved by the Board. Yanity Decl., ¶ 3. The Tribe's practice is consistent with how tribes generally exercise their power to waive sovereign immunity. *See* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 406 (2009) (noting "[a]uthority to waive a tribe's sovereign immunity is usually exercised by the tribe's governing body pursuant to general or enumerated powers set out in the tribal constitution or other law").

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

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

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

The Tribe has litigated this exact question – whether a document signed without Tribal authorization waived the Tribe's sovereign immunity – and won in this Court before. The case is *Stillaguamish Tribe v. Pilchuck Group II, LLC*, No. 10-995 RAJ (W.D. Wash.). Like here, the question at issue for this Court to decide is the same: whether the purported waiver of sovereign immunity in the 2005 Agreement is enforceable against the Tribe. *See* Smith Decl., Ex. G at 3 (*Stillaguamish Tribe v. Pilchuck Group II, LLC*, No. 10-995 RAJ (W.D. Wash.) (ruling "[T]he sole dispute is whether the Tribe authorized the Agreement, and more particularly, whether it authorized the arbitration clause and sovereign immunity waiver")).

In *Pilchuck Group II*, the defendant attempted to invoke an arbitration provision contained in an agreement signed by a member of the Tribe's Board who, similar to the situation with Mr. Stevenson, was never authorized by the Board to sign such a document containing a waiver of the Tribe's sovereign immunity. Granting summary judgment for the Tribe on the question of whether the immunity waiver and the agreement were valid and enforceable, the Honorable Judge Jones held that "no principle of federal common law supports a finding that the Tribe authorized a sovereign immunity waiver" in the agreement at issue in that case.[4] Smith Decl., Ex. G at p. 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 p. 7.

[4] In a companion case, *Stillaguamish Tribal Enterprise Corporation v. Pilchuck Group II, LLC*, No. 11-387 RAJ (W.D. Wash.), the same Court denied STECO's motion for summary judgment in part "solely because it finds that Pilchuck has not had an opportunity to pursue discovery in that case." Smith Decl., Ex. G at p. 2. The Court noted that "It is possible that discovery will reveal that STECO had a practice of binding itself to contracts to which only the 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 p. 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. *See* Smith Decl., Ex. H.

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1. The Absence of Clear Policy Does Not Cut Against the Tribe

Pilchuck Grp. II declined to find a waiver of sovereign immunity for purposes of arbitration with the Tribe, despite finding that the Tribe's policies for authorizing agents to enter contracts or waive sovereign immunity were "nebulous at best," including silence in the Tribal Constitution and "no consistent practice for authorizing people to enter contracts or waive sovereign immunity on its behalf." Smith Decl., Ex. G at pp. 8-9. The court declined to accept the Tribal Chairman's contention that the Board's practice was to authorize contracts and sovereign immunity waivers only in written resolutions of the Board, instead finding that "[t]he record reflects that many people have signed contracts purportedly on behalf of the Tribe without any Tribal Board resolution authorizing the act." *Id*. at p. 9. Nonetheless, based on the facts of that case, the court found that the Tribe did not waive its sovereign immunity for purposes of arbitration. *Id.*

In a more recent case, the Oklahoma Appeals Court opined that "the consistency of the tribe's practice is critical in determining whether the governing body authorized waiver of immunity when tribal policies and procedures are silent on the matter." *First Bank & Trust v. Maynahonah*, 313 P.3d 1044, 1053 (Okla. Civ. App. 2013). In *Maynahonah*, an Oklahoma Court of Appeals held that sovereign immunity barred an interpleader suit by a bank against a tribe. *Id*. at 1049. Although the bank argued that sovereign immunity presented no barrier to the trial court's award of attorney fees against the tribe, in part because Apache Tribal law was silent on how sovereign immunity could be waived, the court noted that:

> First Bank points to no facts—and we can discern none—in the present lawsuit concerning the words or conduct of the Tribal Council that demonstrate it conferred the authority to waive immunity on the Maynahonah Group. Instead, First Bank appears to be making the argument that, in the absence of an identified procedure or process by which the Tribe can authorize waiver of its immunity, anyone who is authorized to act on the Tribe's behalf for any particular purpose is by virtue of the authority to act, authorized to waive the Tribe's immunity. We do not read *Stillaguamish* or *Rush* as advocating such a far-reaching result and we decline to do so as well.

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Id. at 1053. The same should hold true here. In fact, 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 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").[5]

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. # 8 at p. 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

[5] In the *Pilchuck II* dispute there was evidence of a discussion of the Working Agreement at a Board meeting. Smith Decl., Ex. G at p. 5. No such evidence exists here. But, other aspects of *Pilchuck II* are directly on point. The Court in *Pilchuck II* ruled in favor of the Tribe that "no principle of federal common law supports a finding that the Tribe authorized a sovereign immunity waiver" in the agreement at issue in that case. *Id.* at p. 11. This ruling was made despite evidence that a project possibly contemplated by the agreement had been discussed at a Board meeting at length, had been given at least provisional approval by a Board member, that the agreement had been signed by a Tribal official, and that Pilchuck II and it principals were well known to the Tribe and had worked on several projects with the Tribe. *Id.* at p. 2-6.

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

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

1. Mr. Goodridge Jr.'s Direction to Mr. Stevenson Does Not Waive Immunity

It is likely that the State will argue that, because Eddie Goodridge, Jr. – a former Federal felon (*see* Dkt. # 17-11) who was the Tribe's Executive Director and Vice-Chairperson in 2005 – told Mr. Stevenson that he could sign the Agreement, the Tribe is somehow bound to the

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Agreement. Smith Decl., Ex. T at pp. 2-3 (ln.17—5). This fact does not alter the Court's analysis one iota. The Tribe has offered uncontroverted statements that Mr. Stevenson was never authorized to sign the Agreement in accordance with Tribal law and there is no evidence of any Board resolution or discussion concerning the Agreement. The same is equally true as to Mr. Goodridge, Jr. The Tribe's Board knows how to delegate authority to a Tribal official to sign contracts; it did not do so here. Smith Decl., Ex. S ("the Stillaguamish Tribal Board of Directors does hereby approve grant approval for the Executive Director to act as signer for the Stillaguamish Tribe of Indians."). Notwithstanding the Executive Director's signing authority, he or she is only authorized to sign written instruments on behalf of the Tribe "provided that such instruments do *not* contain limited waivers of sovereign immunity" otherwise, a resolution of the Board of Directors providing that limited waiver is required. *Id*., Ex. R at p. 2 (emphasis added).

Courts have generally required that a Tribal official have actual authority, pursuant to tribal law, before finding a waiver of sovereign immunity. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) (contractual provision purporting to waive tribal corporation's sovereign immunity was insufficient to waive immunity, where corporation's charter required board approval for waiver, and such approval was not obtained); *MMMG, LLC v. Seminole Tribe of Florida, Inc.*, 196 So. 3d 438 (Fla. Dist. Ct. App. 2016) (Native American tribal corporate entity did not waive its sovereign immunity in dispute with production company with which it had formed an advertising joint venture, where charter of the tribal corporate entity contained no waiver of sovereign immunity, the president of the entity did not have authority to waive sovereign immunity, and waiver of sovereign immunity could only be done through a tribal board resolution); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 316 P.3d 1248 (Ariz. Ct. App. 2014) (alleged apparent authority of Tribe casino's marketing director to waive tribe's sovereign immunity from suit did not constitute valid waiver of tribe's sovereign immunity in breach of contract action, since Tribe was immune from suit except to extent that tribal council expressly waived sovereign immunity). Mr. Goodridge, Jr. had no such authority.

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Moreover, a number of courts have also held that tribal officials such as Mr. Goodridge, Jr., cannot effectively waive a tribe's sovereign immunity without the necessary authorization from the tribe's governing body. *E.g., See Baugus v. Brunson,* 890 F.Supp. 908, 911-12 (E.D. Cal. 1995) (defining "tribal official" as a "high-level or governing role within the tribe."); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Comm'y Council,* 170 Cal. App. 491, 496 (Cal. Ct. App. 1985) (holding Tribal Chairwoman's signature on contract could not waive tribe's sovereign immunity to an arbitration unless the tribe expressly delegated the chairwoman that power); *Danka Funding Co. v. Sky City Casino,* 747 A.2d 837, 841-42, 844 (N.J. 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). In the absence of evidence that Mr. Goodridge, Jr. had or was delegated authority to approve entry into the Agreement under Tribal law, the Tribe is not bound.

Ultimately, this case is about Mr. Stevenson not having had the power to do what the State wants to say he did. Even if the Agreement had been signed by Mr. Goodridge, Jr., 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 knows well, waiving sovereign immunity is an action that only the sovereign can take, as an exercise of the sovereign's power. *See, e.g.*, *Adamson v. Port of Bellingham*, 192 Wash. App. 921, ¶¶ 10, 17, 19, 374 P.3d 170 (Ct. App, Mar. 14, 2016) (finding "When public officials enter into contracts that are outside the scope of their authority, the contracts are void and unenforceable… ."; "AMHS officials had no authority to subject Alaska to suits for which the legislature retained

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Alaska's sovereign immunity"; "The State does not 'act' and will not be held estopped based on the ultra vires acts of its officers"). "[E]stoppel may not be asserted to enforce the promise of one who had no authority to enter into that undertaking on behalf of the state". *State v. New Magnesite Co.*, 28 Wash.2d 1, 26, 182 P.2d 643 (1947).

This Court should not accept the State's invitation to be the first to make Mr. Goodridge's act of telling Mr. Stevenson that he can sign the Agreement – in violation of Tribal law – effect a waiver of the Tribe's sovereign immunity for an unlimited indemnification.

2. There is No Apparent Authority Exception to Sovereign Immunity

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

Even if the State wrongly believed, or was somehow misled into believing, that Mr. Stevenson had the requisite authority to waive the Tribe's immunity and sign the Agreement, any such alleged inequity cannot overcome the Tribe's sovereign immunity. *See Memphis Biofuels*, 585 F.3d at 922; *Contour Spa v. Seminole Tribe of Florida*, 692 F. 3d 1200, 1210-12 (11th Cir. 2012) (rejecting argument that tribe waived immunity through misrepresentations about the status of a lease and holding that "estoppel cannot compel enforcement of any of a contract's provisions when the contract is rendered legally invalid by operation of federal law"). Here, the State's case is weaker than those of the parties in the cases cited above because Mr. Stevenson is not a "Tribal official", such as a member of the Tribe's Board of Directors; rather, he is an employee within the Tribe's Natural Resources Department. Stevenson Decl., ¶ 1; *Baugus v. Brunson,* 890 F.Supp. 908, 911-12 (E.D. Cal. 1995) (holding that a tribal security officer, who

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was not a member of the tribe, was not a "tribal official" because the term "tribal official" was "virtually always used to denote those who perform some type of high-level or governing role within the tribe."). There is no waiver of the Tribe's sovereign immunity.

3. There is No Waiver of Immunity Through Course of Dealing

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

4. There Can Be No Ratification of a Void Agreement

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

Mr. Stevenson was not authorized to waive the Tribe's immunity or sign the Agreement by the Board, rendering the Agreement void. As such, the Agreement cannot be ratified by his or anyone else's acts as a matter of law. There is no unilateral power vested in Tribal employees to enter into contracts that waive the Tribe's sovereign immunity, especially as the Tribe's

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Constitution vests such power solely in the Board. Smith Decl., Ex. T at p. 5 (ln. 4-9) (testifying that he did "not generally" sign contracts on behalf of the Tribe); Yanity Decl., Ex. A at p. 5 (Art. VII), and Ex. B ("the authority to protect the Tribe as a sovereign political entity is vested in the Stillaguamish Tribe of Indians, Board of Directors under Article VII, Sec. 1 of the Constitution" and authorizing the Chairman, Executive Director and Chief Operations to sign written instruments on behalf of the Tribe, "provided that they do *not* contain limited waivers of the Tribe's sovereign immunity") (emphasis added). And, in any event, there was no act taken by the Tribe's Board to specifically ratify any aspect of the Agreement. Yanity Decl., ¶ 7.

Likewise, acting pursuant to the Agreement does not create a waiver after the fact. All the work under the Agreement was done by the Tribe; the State supplied the funding and there is no dispute that the Tribe performed the work. *But see Luckerman v. Narragansett Indian Tribe*, 965 F.Supp.2d 224, 227-28 (D. R.I. 2013) (waiver found where ongoing legal representation for a tribe, involving two agreements over the course of four years). This is not an action to enforce the Agreement as between the State and Tribe under Section 41 – it is a an action for indemnity to cover the State's voluntary settlement in a case to which the Tribe is not a party. The weight of authority holds that "waivers of sovereign immunity cannot be implied on the basis of a tribe's actions." *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999) (rejecting agreement that tribe waived immunity to compliance action by electing to engage in gaming subject to regulation under IGRA); *see also Sac & Fox Nation v. Hanson,* 47 F.3d 1061, 1063 (10th Cir. 1995) (finding that "a waiver of sovereign immunity cannot be inferred from the Nation's engagement in commercial activity").

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

D. In the Alternative, the Tribe Is Not Contractually Obligated to Indemnify

Even if the Court finds that the Tribe's sovereign immunity was waived in the Agreement, the Court can still rule in the Tribe's favor as a matter of law because the contractual indemnity provision has not been triggered. The Attorney General Office's own words explain

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the problem: "However, ***if any of the plaintiffs' crib wall allegations are found to be true***, the Tribe could be contractually obligated to indemnify the State from such a finding." Smith Decl., Ex. B at 6 (emphasis added); *see also id.*, Ex. D (""***To the extent the State is held liable for any damages caused by or contributed to by the cribwall***; it will be seeking indemnity from the Tribe.") (emphasis added). The *Pszonka* litigation ended in a voluntary settlement before trial. *See* Smith Decl., Ex. V. There is no admission of liability by the State and no proof of the tort plaintiffs' allegations. Since the tort plaintiffs' negligence allegations were never adjudicated and the State was never held liable, the necessary trigger to indemnification under the Agreement has not been met.

The payment the State made on the *Pszonka* claims was wholly voluntary. Considering the situation pragmatically, the Tribe neither could have nor should have expected to have to indemnify the State for a voluntary settlement payment without a judicial determination that the State (and the Tribe) were liable on the underlying negligence claim. As a matter of law, there is no requirement that the Tribe indemnify the State under the Agreement.[6]

E. In the Alternative, the State Is Estopped From Seeking Indemnification

Even if the Court finds that the Tribe's sovereign immunity was waived in the Agreement and the Court rejects the indemnity trigger argument, the Tribe is still entitled to summary judgment in its favor because the State is estopped from seeking indemnification based on the State's litigation position in *Psznoka.* Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts, which is exactly what the State is doing here.

[6] In order to recover any indemnity, the State would need to put on a mini-trial before this Court to argue that the Tribe is negligent relating to the crib wall which, as discussed, the State should be judicially estopped from doing. This is because indemnification involves the necessity of proving that the indemnitee was liable for the amount paid. *Nelson v. Sponberg*, 51 Wash.2d 371, 376, 318 P.2d 951 (1957). Indeed, the CR2A seeks to preserve just that, as the State seeks to use plaintiffs' evidence to get indemnification from the Tribe. *See* Smith Decl., Ex. V at p. 2 (¶ 7) (plaintiffs agree to cooperate with the State "to recover indemnity from the Tribe" by providing expert reports and data). After all, the State presented no testimony in *Pszonka* that the Tribe's actions in constructing the crib wall was either the sole cause or a partial cause of the landslide. In any event, the State could not seek 100% indemnification. The Agreement provides that "If the claims or damages are caused by or result from the concurrent negligence of (a) the State . . . and (b) [the Tribe] . . . this indemnity provision shall be valid and enforceable only to the extent of the negligence of [the Tribe]." Stevenson Decl., Ex. A at p. 10.

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"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749–50 (citation and internal quotation marks omitted); *see Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (accord). In *Pszonka*, among other things, the plaintiffs argued that the "State allowed the construction of, and then maintained, a cribwall and sediment ponds at the base of the Hazel Landslide, and these constructions destabilized the slide and enhanced the runout from the slide, thus causing or exacerbating damages to the people of Steelhead Haven." Smith Decl., Ex. D at p. 11 (p. 8 of Order). The State repeatedly took the position that it was not liable for the torts alleged on this theory and moved for summary judgment. Smith Decl., Ex. W at p. 2, 7-8, 16-17, 21. On May 11, 2016, the King County Superior Court denied summary judgment to the State in large part and, as to the crib wall, the Court found that material issues of fact precluded summary judgment for the State. *Id.*, Ex. D at p. 19 (p. 16 of Order). The State moved for reconsideration, which was denied. *Id.*, Ex. D at pp. 21-23.

The posture of *Pszonka* litigation – and the State's repeated denial of any liability related to the crib wall – is relevant because, for the State to seek indemnification from the Tribe under the Agreement, the State must not only argue, but actually prove, that the Tribe's crib wall, funded in part by the Agreement, was the legal cause of the *Pszonka* plaintiffs' damages. This the State cannot do, as it has vigorously argued to the contrary for years. The September 30, 2015 letter from the Attorney General's Office to the Tribe puts it best:

> The State strenuously denies that it could possibly be negligent given its limited involvement as a partial funding source for the crib wall project. Further, there is no scientific evidence that plaintiffs have produced showing that the crib wall itself contributed to the cause of the 2014 Oso Landslide.

Smith Decl., Ex. B at p. 6. As late as June 9, 2016, the State made clear that "The State denies this claim and will vigorously defend against any claim that it was negligent to allow the project to be built or that it contributed to the devastation of the March 22, 2014, landslide." *Id.*, Ex. D

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at p. 2. The State's new found position is directly contrary and clearly inconsistent with the position the State took in *Pszonka. New Hampshire,* 532 U.S. at 750 (noting that for judicial estoppel to apply, "a party's later position must be 'clearly inconsistent' with its earlier position."). The State cannot argue in one Court that it has no fault and the crib wall played no role in liability and then try to pin liability on the Tribe related to the crib wall in another.

Another consideration in weighing whether to apply judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751. Here, there is no question that the State is seeking to derive an unfair advantage by changing its position, and that the change would work an unfair detriment on the Tribe. The sole reason for the State's current posture is to get the Tribe to bankroll for the State's $50 Million voluntary settlement agreement based on a $497,000 Agreement. Allowing the State to recover roughly 9900% over the contract amount after vigorously denying liability shocks the conscience and unjustly enriches the State. As a matter of law, the Court should also grant summary judgment in favor of the Tribe on the basis of judicial estoppel.

CONCLUSION

There is no dispute that there is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing Mr. Stevenson to waive the Tribe's sovereign immunity or to sign the Agreement. Yanity Decl., ¶¶, 5-6; Connolly Decl., ¶¶ 2-3. Without any such authorization, there is no valid waiver. Because it is undisputed that Tribe's Board never passed a resolution authorizing Mr. Stevenson to waive the Tribe's sovereign immunity in the Agreement or to sign the Agreement, the Tribe's sovereign immunity remains intact. In addition, or in the alternative, the State is barred as a matter of law from seeking indemnification because of judicial estoppel and the indemnification provision of the Agreement has not been triggered because of the settlement. Summary judgment should enter in favor of the Tribe.

For the foregoing reasons, the Tribe respectfully requests that this Court enter judgment in favor of the Tribe.

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DATED this 27th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2017, 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 the following:

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