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' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Noted: August 4, 2017 **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

In response to Plaintiff Stillaguamish Tribe of Indians' Motion for Summary Judgment, at 13 ("Tribe's Motion") (Dkt. #28), Defendants incorporate their Motion for Summary Judgment (Dkt. #26), and the Declaration of Rita V. Latsinova in Support of Defendants' Motion for Summary Judgment, with exhibits (Dkt. #27) ("Latsinova Decl."). The Tribe asks the Court to consider the 2004 authorization for the Project 04-1634 Agreement under a standard that the Tribe itself admits it did not adopt or follow before 2010. When viewed in light of the Tribe's then contemporaneous policies and practices, which the Tribe agrees are "critical," the Project 04-1634 Agreement, including the waiver and general indemnity in Section 5, was valid and

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

authorized. The Tribe's motion seeking to renege on the Project 04-1634 Agreement should be denied.

II. ARGUMENT

A. Board Resolutions 98/41 and 2004/65 Explicitly Authorized the Tribe's Vice Chair and Mr. Stevenson to Enter into All Agreements Designed to Restore Chinook Salmon Habitat on Behalf of the Tribe.

The Tribe now concedes that the *Pilchuck* court "declined to accept the Tribal Chairman's contention that the Board's practice [prior to 2010] was to authorize … sovereign immunity waivers only in written resolutions of the Board." Tribe's Motion at 13. *See Stillaguamish Tribe of Indians v. Pilchuck Grp. II, L.L.C.*, No. C10-995 RAJ, 2011 WL 4001088, at *5 (W.D. Wash. Sept. 7, 2011) (finding that "[u]ntil 2010, no Board resolution or other formal document set forth policies and procedure for waiving sovereign immunity"). Yet elsewhere in its motion, the Tribe again insists (without any new evidence) that "only the Tribe's Board acting through a written resolution can approve an agreement waiving the Tribe's immunity." Tribe's Motion at 17. For the reasons discussed in *Pilchuck* and equally true here, the "policy" the Tribe insists the Board should have followed when entering into the Project 04-1634 Agreement did not exist. Before 2010 "the Tribe had no consistent practice for authorizing people to enter contracts or waive sovereign immunity on its behalf." *Pilchuck*, 2011 WL 4001088, at *5.

Absent a consistent pre-2010 policy for waiving sovereign immunity, the question here is, as in *Pilchuck*, whether the Tribe's Board, which had plenary power to bind the Tribe under the 1986 Stillaguamish Constitution, stood behind the Project 04-1634 Agreement. This question is answered in a practical, "real-world" way. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420, 422 (2001) ("The [tribal immunity] waiver … is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

explicit, must use the words 'sovereign immunity.' No case has ever held that"; "[t]he [arbitration] clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective.… The arbitration clause … would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed." (first and fourth brackets and first and third ellipsis in original; internal quotations marks and citations omitted)).

To repeat, *Pilchuck* involved a plan promoted by Mr. Goodridge Sr., the CEO of the Tribe's economic development arm, to contract with Pilchuck to develop an RV park; in time, Pilchuck would transfer the park to the Tribe's trust land and become a lessee. The Working Agreement memorializing the plan was styled as an agreement between Pilchuck and the Tribe and contained an arbitration clause and waiver of immunity. Judge Jones concluded that the Tribe was not bound by the waiver because Pilchuck offered no evidence that the Board was committed to the plan or approved the Working Agreement. "At no point in the [Board] meeting did anyone discuss drafting a contract memorializing the RV park agreement. At no point in the meeting did anyone discuss who would negotiate such an agreement on behalf of the Tribe. At no point in the meeting did anyone suggest that Mr. Goodridge Sr. would act as the Tribe's agent in further negotiations." *Pilchuck*, 2011 WL 4001088, at *3.

The opposite is true here. Building the revetment wall on the NFSR was not a business scheme hatched by a single tribal official and a private developer, but the product of the Board's long-standing, purposeful campaign to obtain ***state*** funding to address the "dire" decline of Chinook salmon, the Tribe's most important natural resource. The Board had "plenary power to take action on behalf of the Tribe." *Id.* at *5 (citing Stillaguamish Const. art. VII). The Board

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

also has the plenary power "to negotiate with Federal, State, and Local governments." Stillaguamish Const. art. VII, § 1(f). Anticipating the passage of the state salmon recovery legislation, the Board exercised these plenary powers by passing Resolution 98/41. The Resolution is explicit:

> WHEREAS, ESHB 2496 has been enacted by the legislature to address habitat restoration projects, and to provide grants to lead entities designated by official resolution of cities, counties and tribal governments within the areas to be designated for submitting a list of habitat restoration projects, and
>
> WHEREAS, WRIA 5 encompasses major parts of Skagit and Snohomish counties and includes eleven cities such that the identification of projects and submission of a project list pursuant to ESHB 2496 will require funding for compliance.
>
> NOW THEREFORE BE IT RESOLVED:
>
> **1.** The Stillaguamish Council hereby designates WRIA 5 as the geographic area for which a habitat restoration project is to be developed pursuant to ESHB 2496.
>
> **2.** [S]tillaguamish Tribe [is] hereby designated ***as the lead entit[y] to submit any such habitat restoration project lists and to seek lead entity grants that may be available*** to fulfill ESHB 2496 requirements.

Latsinova Decl. (Dkt. #27) at Ex. N (emphasis added). The Board further resolved that the Tribe's Chair (Shawn Yanity), Vice Chair (Ed Goodridge Jr.) and Executive Director were to "***negotiate and execute***" Resolution 98/41. *Id*. (emphasis added).

Resolution 98/41 addressed each of the questions left open in *Pilchuck*. It required the Tribe, through appropriate representatives, "to submit any habitat restoration project lists and to seek lead entity grants that may be available," and delegated to the Tribe's Chair, Vice Chair and Executive Director the broad authority to "negotiate" the resolution's goals and "execute" any resulting agreements. As "[t]he governing body of the Stillaguamish Tribe" that "may appoint such other officials … as are considered necessary," the Board clearly had the power to do so. Stillaguamish Const. art. IV.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

The Tribe implemented Resolution 98/41 by developing its Lead Entity Strategy for WRIA 5, by identifying the revetment wall on the NFSR as the "first priority" project, and by applying for and obtaining an SRFB grant and the Centennial grant to construct it. Mr. Yanity, the Tribe's Chair, executed the agreement related to the Centennial grant. Stillaguamish Const. Art. XII, §§ 1-2 (the Chairman "shall ... exercise any authority delegated to him … by the Board of Directors"; "the Vice-Chairman shall act as Chairman and perform the duties of Chairman in Chairman's absence"). Mr. Goodridge Jr., the Tribe's Vice Chair, would have acted squarely within Resolution 98/41 if he had "executed" the resulting Project 04-1634 Agreement himself. *Id.* Nothing in the Tribe's Constitution or any Board procedures produced by the Tribe limits the Chair's or Vice Chair's authority to delegate the signing authority to others.

In any event, Board Resolution 2004/65 independently authorized Mr. Stevenson to "execute ***all*** contracts" related to federal or state emergency or disaster assistance on behalf of the Tribe. Latsinova Decl. (Dkt. #27) at Ex. Q (emphasis added). There is no dispute that the decline of Chinook salmon on the NFSR was an emergency, *id*. Ex. M at 30:6-18, and that the Project 04-1634 Agreement provided the Tribe funds to address it.

The Tribe argues 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.'" Tribe's Motion at 13 (citing *First Bank & Trust v. Maynahonah*, 313 P.3d 1044, 1053 (Okla. Civ. App. 2013)). *Maynahonah* does not help the Tribe's argument. In that case, the bank argued 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***

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

behalf for any particular purpose is by virtue of the authority to act, authorized to waive the Tribe's immunity." 313 P.3d at 1053 (emphasis added). That is not the State's position here.

When, as here and in *Maynahonah*, the tribal policies and procedures are silent on the waiver of sovereign immunity, consistency of the tribe's practice ***is*** important. But ultimately each case is limited to its own facts. *Id.* ("The *Stillaguamish* and *Rush* Courts specifically looked to the particular circumstances before them, including the words or conduct of the requisite governing body …."). Here, documents produced by the Tribe demonstrate that before 2010 the Board routinely passed resolutions that made no mention of sovereign immunity when approving agreements that waived it. Latsinova Decl. (Dkt. #27) Exs. D-K; *see also* Smith Decl. (Dkt. #32) Exs. J, L, O. The Tribe admits that these resolutions evidence valid waivers of sovereign immunity. Latsinova Decl. (Dkt. #27) Ex. C at 038. Resolution 98/41 is consistent with this practice.

In passing Resolution 98/41, the Board unequivocally committed the Tribe to seeking state funding for salmon recovery. The Board designated the Tribe as the WRIA 5 lead entity and directed it to identify "any" habitat restoration projects and to "seek lead entity grants that may be available" to complete them. The Board expressly authorized the Chair, Vice Chair and Executive Director to implement these objectives. Because the Board could not have predicted which of the habitat restoration projects would receive funding and go forward, their authority continued prospectively, "until revoked by the Board." *Id.* Ex. N at 280-81.

"That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." *C & L Enterprises*, 532 U.S. at 413. The Board had the plenary power to act on behalf of the Tribe and to represent the Tribe before federal, state and

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

local governments. Stillaguamish Const. art. IV, art. VII, § 1(b), (f), (h). The Board exercised this plenary power by authorizing three tribal officials to obtain state grants for salmon habitat restoration and to "negotiate and execute" their terms. *Id*. art. VII, § 1(h). Pursuant to Resolution 98/41, the Vice Chair had ***actual authority*** to enter into the Project 04-1634 Agreement on behalf of the Tribe, directly or by delegation. This authority encompassed the power to waive the sovereign immunity in the same way as Resolutions 96/22, 2000/80 and 2004/43, among many others, conferred ***actual*** authority on tribal officers to enter into contracts that included waivers of sovereign immunity as the Tribe admits. Latsinova Decl. (Dkt. #27) Exs. D, E, H; Smith Decl. (Dkt. #32) Exs. J, L, O.

B. The Tribe's Alternative Argument Fails; Under Section 5, the Tribe's Indemnity Agreement Extends "to the Fullest Extent Permitted by the Law."

In the alternative, the Tribe argues that the indemnity contained in the Project 04-1634 Agreement "has not been triggered" or, if triggered, was limited to $497,000. Tribe's Motion at 20-22. The Tribe is wrong on both counts. The indemnity provisions in the Project 04-1634 Agreement are unambiguous:

> SECTION 4. RESPONSIBILITY FOR THE PROJECT.
>
> While the Funding Board undertakes to assist the Sponsor with the project by providing a grant pursuant to this Agreement, the Project itself remains the sole responsibility of the Sponsor.… The responsibility for the implementation of the project … is solely that of the Sponsor, as is the responsibility for any claim or suit of any nature by any third party related in any way to the project.
>
> SECTION 5. INDEMNIFICATION.
>
> ***To the fullest extent permitted by the law***, the Sponsor expressly agrees to and shall indemnify, defend and hold harmless the ***State and its agencies***, officials, agents and employees from and against ***all claims, actions, costs, damages, or expenses of any nature*** arising out of or incident to the Sponsor's or any Contractor's performance or failure to perform the Agreement.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Latsinova Decl. (Dkt. #27) Ex. A at 011 (emphasis added).

Plainly, the Tribe's duty to indemnify the State is triggered by "claims" or "actions"—rather than judgments—arising out of the Tribe's construction of the revetment/cribwall. That the *Pszonka* case involved such claims is not in dispute. In fact, the claim related to the revetment wall was the only claim that survived the defendants' summary judgment motions and was set to proceed to the jury trial:

> There is sufficient evidence that the cribwall and sediment ponds were a "but for" cause of the damage to Plaintiffs as result of the trapped sediment at the base of the slide. Based on the totality of this evidence, a jury can infer that the level of damage to the people of Steelhead Haven was caused, in part, by the excess sediment trapped at the base of the landslide by the cribwall and sediment ponds. The apportionment of that damage is a matter for the Jury after hearing all the evidence.

Smith Decl. (Dkt. #32) at Ex. D (citing Judge Rogoff's Order on Summary Judgment Motions).

The State's summary judgment motion directed at that claim in *Pszonka* and its subsequent decision to settle the *Pszonka* claims is no more of a "conflict" or "inconsistency" than any party's decision to enter into a settlement agreement rather than take the case to trial ***after its summary judgment motion is denied***. *See* 18B Charles A. Wright et al., *Federal Practice and Procedure* § 4477, at 609 n.96 (2002) ("[O]nce a court has adopted one theory the litigant cannot seek an inconsistent advantage on another theory."). Because the State's position is ***consistent*** with the *Pszonka* court's denial of summary judgment on the revetment/cribwall claim, judicial estoppel does not apply.

Because the Tribe's indemnity obligation is triggered by "claims" against the State or "expenses of any nature" incurred by the State in defending against such claims, the State does not have to "actually prove" in this case that "that the Tribe's cribwall, funded in part by the

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Agreement, was the legal cause of the *Pszonka* Plaintiffs' damages." Tribe's Motion at 22. The Tribe's duty to indemnify was triggered when the allegations related to the cribwall were first made in the *Pszonka* lawsuit. *See* Smith Decl. Ex. B (September 15, 2015 letter from Rene Tomisser to Scott Mannakee, stating that "under the language" of the indemnity provisions in Section 5 of the Project 04-1634 Agreement the ***allegations*** related to the cribwall triggered the Tribe's "duty … to defend, indemnify and hold harmless the state ***from these allegations***" (emphasis added)). At that point, the State requested that the Tribe "negotiate a cost-sharing formula for the portion of the defense expenses associated with the cribwall-related theories of liability." *Id.* The Tribe declined, causing the State to incur additional expenses related to the cribwall theory of liability.[1]

On October 5, 2015, the Tribe's counsel wrote to the State, stating that "without waiving any legal rights or defenses … the Tribe has provided notice of claim to each of its insurance carriers for the applicable time periods" and agrees to keep the State "apprised of their responses and reservations of rights upon receipt." *Id.* at Ex. C. On February 18, 2016, Tribal First, the third-party claims administrator for Hudson Insurance Company ("Hudson"), wrote to the Tribe's counsel acknowledging that during each of the years between 2008 and 2014, Hudson issued to the Tribe insurance policies and further acknowledging "potential General Liability

[1] Since *Pszonka*, new lawsuits have been filed against the State:

1. *Burrows v. Snohomish County, et al.*, Snohomish Superior Court, Cause No. 16-2-02922-0;
2. *Bellomo v. Snohomish County, et al.*, King County Superior Court, Cause No. 17-2-06738-5 SEA;
3. *Hadaway v. Snohomish County, et al.*, King County Superior Court, Cause No. 17-2-06751-2 SEA; and
4. *McPhearson v. Snohomish County, et al.*, King County Superior Court, Cause No. 17-2-06726-1 SEA.

Complaints in these new lawsuits include claims related to the construction of the cribwall. They are public records subject to judicial notice. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

coverage for the State's indemnification claim" under one or more of these policies. *See* Latsinova Declaration in Support of Defendants' Response to Tribe's Motion for Summary Judgment, Ex. A. Hudson Policy No. NACL00350-01 provides General Liability coverage of $5 million for each "Occurrence" and $7 million of Annual Aggregate. *Id*. at Ex. B.[2]

On June 9, 2016, the State advised Todd Moote of Tribal First that Judge Rogoff in *Pszonka* had dismissed most of the plaintiffs' claims against the State, and that "the predominant claim remaining against the State is its potential liability as a landowner for negligently allowing the construction and maintenance of the Stillaguamish Tribe's cribwall." Smith Decl. (Dkt. #32) Ex. D. "This cause of action directly implicates the indemnity obligation of the Stillaguamish Tribe … to the State under the Salmon Project Agreement for Steelhead Haven Landslide Remediation … contained in Section 5 of the General Provisions to that Agreement." *Id*. The State explained that that the indemnity in Section 5 is not limited to the amount of State funding. "The limiting language of Section 41B of the Agreement applies only to an action initiated under that section; it says nothing about limiting the indemnity contained in Section 5 of the Agreement, nor does the indemnity contain any limiting language to refer to Section 41." *Id.*

Section 41B of the Project 04-1634 Agreement contemplated a limited indemnity in addition to that provided for in Section 5. *See* Latsinova Decl. (Dkt. #27) Ex. A at 022. In disputes between the Funding Board and the Tribe—for example, in a potential claim by the Tribe against the Funding Board for failure to fund the project or the Funding Board's claim against the Tribe for misusing the grant funds—"any money judgment or award against the Tribe … or the State may not exceed the amount provided for in Section F-Project Funding of the

[2] The State's discovery authorized by this Court's September 19, 2016 Order (Dkt. #22) has been limited to the issue of sovereign immunity and did not address the full scope of the Tribe's insurance coverage.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Agreement." *Id*. In contrast, the general indemnity in Section 5 applies "***to the fullest extent permitted by the law***" and extends to "all claims, actions, costs, damages, or expenses of any nature arising out of or incident to the Sponsors or any Contractors' performance or failure to perform the Agreement." *Id*. at 011 (emphasis added). The Tribe's hold harmless obligation under Section 24D is equally broad and nowhere limited by the amount of funding for the project. *Id*. at 017 ("[T]he Sponsor will defend, protect and hold harmless the Office … from and against any and all liability, cost (including but not limited to all costs of defense and attorneys' fees) and any and all loss of any nature … resulting from the presence of, or the release … of hazardous substances.").

This stands to reason: the potential claims between the Funding Board and the Tribe were reasonably anticipated to be narrow and unlikely to implicate liability beyond the amount of the grant itself. In contrast, the size and nature of potential third-party tort claims, such as the claims in *Pszonka*, could not be predicted and were outside the parties' control. As such, the State reasonably required the Tribe to provide it an indemnity "to the fullest extent permitted by the law," and the Tribe wisely purchased insurance that covers its indemnification obligation.

The Tribe admits that the waiver of immunity in the Project 04-1634 Agreement is unambiguous. For the reasons discussed above and in Defendants' Motion for Summary Judgment, the waiver was authorized and the indemnity under Section 5 of the Project 04-1634 Agreement is enforceable against the Tribe and its insurers. [3]

[3] The specific amount of the indemnity is outside the scope of the Tribe's motion and this response.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

III. CONCLUSION

For the reasons stated and for the additional reasons discussed in Defendants' Motion for Summary Judgment, the Tribe's motion should be denied.

DATED: July 21, 2017.

STOEL RIVES LLP

/s/Stevan D. Phillips
Stevan D. Phillips, WSBA No. 2257
stevan.phillips@stoel.com

/s/Rita V. Latsinova
Rita V. Latsinova, WSBA No. 24447
rita.latsinova@stoel.com
600 University Street, Suite 3600
Seattle, WA 98101

Attorneys for Defendants

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:

- **Scott Owen Mannakee**
  smannakee@stillaguamish.com,mrobbins@stillaguamish.com
- **Rob Roy Smith**
  rrsmith@kilpatricktownsend.com,shoekema@kilpatricktownsend.com, rhorst@kilpatricktownsend.com

DATED: July 21, 2017, at Seattle, Washington.

s/Sherry R. Toves
Sherry R. Toves
Practice Assistant

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900