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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT Noted: August 4, 2017 **Set for Oral Argument on 8/4/2017 at 8:30 am**

I. SUMMARY

Having argued that ***no*** Board resolutions authorized the Project 04-1634 Agreement, now, faced with two such resolutions, the Tribe insists the resolutions do not mean what they say and asks the Court to sanction the undersigned for reading them according to their plain terms. Yet the Tribe does not say that the resolutions are ambiguous on their face or in context. It follows that they mean what they say: "negotiate" means discuss transactions with other parties, "execute" means sign a contract, and "all contracts" means, well, all contracts. Resolutions 1998/41 and 2004/65 authorized the Board's Vice-Chairperson and Mr. Stevenson to enter into the Project 04-1634 Agreement, and the Tribe is bound by the waiver it contains.

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The Tribe now concedes that Resolution 1998/41 authorized Mr. Stevenson to ***apply*** for the grant that was memorialized in the Project 04-1634 Agreement. But, as in *Pilchuck*, it offers no competent evidence that before 2010 a specific procedure or consistent practice required the Board to pass an additional resolution authorizing him to ***sign*** the Project 04-1634 Agreement. In the absence of a specific waiver procedure, *Memphis Biofuels* does not apply. Instead, courts examine "the Tribe's pre-litigation words and deeds." *Findleton v. Coyote Valley Band of Pomo Indians*, 205 Cal. Rptr. 3d 699, 714 (Cal. Ct. App. 2016). "By … treating th[e] agreement as valid, the Tribe expressly waived its immunity." *Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224, 228 (D.R.I. 2013). The State's motion should be granted.

II. ARGUMENT

A. The Plain Language of Resolutions 1998/41 and 2004/65 Gave Express Authority for the Tribe's Representatives to Enter into the Project 04-1634 Agreement

The Salmon Recovery Act set up "a coordinated framework for responding to the salmon crisis." RCW 77.85.005. The legislature required tribes to "provide local leadership in identifying and sequencing habitat projects to be funded by state agencies." *Id*.; *see also* RCW 77.85.050(3) ("[t]he lead entity shall submit the habitat project list"); RCW 77.85.130(2)(a)(iii) (preference to listed species). The Tribe was eager to participate. Board Resolution 1998/41 designated the Tribe as the lead entity "to submit any … [salmon] habitat restoration project lists and seek lead entity grants that may be available." Latsinova Decl. (Dkt. #27-14) at 281.

The Tribe now concedes that Resolution 1998/41 authorized the Tribe to ***apply*** for a state grant for the revetment wall. Tribe's Response in Opp. to Defs. Mot. For Summary J. (Dkt. #33) ("Tribe's Resp.") at 4-5. The Tribe argues that the Resolution failed to authorize anyone to ***sign*** the Project 04-1634 Agreement memorializing the grant on the Tribe's behalf. *Id*. ("'[S]eeking

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grants' is not remotely the same as authorizing or approving a specific contract…. [T]he resolution, at best, contemplated that any specific grant that was found would need to be brought back to the Tribe's Board for approval at that time."). The Tribe offers no evidence this two-step process ever existed before 2010. *Id*. Undisputed facts are to the contrary. The Tribe's admittedly valid April 29, 2004 "Application Authorization" seeking "financial assistance for the Salmon project" and "funding from such State … sources as may be available" nowhere mentioned the alleged two-step approval process and said nothing about the limited Board authorization under "Constraints and Uncertainties." Latsinova Decl. (Dkt. #27-16) at 292, 314.

Most importantly, the Resolution's text itself negates any two-step process. In addition to authorizing the Tribe to apply for the state grants, the Board "further resolved" that its Chairperson, Vice-Chairperson, or Executive Director were "authorize[d] … to negotiate and execute this resolution." Latsinova Decl. (Dkt. #27-14) at 281. To "*negotiate*" means "to transact business; to bargain with another respecting a transaction; to conduct communications or conferences with a view to reaching a settlement. It is that which passes between parties or their agents in the course of or incident to the making of a contract." *Negotiate*, *Black's Law Dictionary* (6th ed. 1990). To "*execute*" means "to complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of. To perform all necessary formalities, as to make and sign a contract." *Execute*, *Black's Law Dictionary* (6th ed. 1990). The Resolution's authorization to "negotiate and execute this resolution" thus means that the Tribe's Chairperson, Vice-Chairperson, and Executive Director were empowered to ***transact business with other parties*** and ***sign contracts*** if negotiations resulted in agreement.

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The Tribe offers a Declaration by Eric White (Dkt. #35), who joined the Board in 2012, more than a decade after the Resolution 1998/41 was passed. Mr. White claims to "have seen hundreds of Board resolutions … [and] certified some," presumably after 2012. *Id.* He maintains that "negotiate and execute the resolution" is "standard language" that "means that the Chairperson, Vice-Chairperson or Executive Director is directed to certify the Resolution, i.e., make the Resolution an official record of the Tribe." *Id*. Apart from lacking any stated basis for interpreting resolutions predating 2012,[1] Mr. White's interpretation makes no sense. It robs the terms "negotiate" and "execute" of any rational meaning and cannot be squared with the Tribe's 1986 Constitution. The Constitution states that "[t]he ***Secretary*** shall be responsible for … keeping complete record of minutes of all business conducted at meetings of the Board of Directors." Stillaguamish Const. art. XII, § 3 (Dkt. #27-2) at 031 (emphasis added). Resolution 1998/41 already carries a "Certification" by the Secretary of the Board (Richard Oxstein) as the Board's Chairperson (Priscilla A. Shipley) that it was "duly adopted at a meeting of the Stillaguamish Tribal Board of Directors held on July 7, 1998 at which time a quorum was present and a vote of Five (5) for and Zero" (0) opposed was cast." (Dkt. #27-14) at 281. Mr. White fails to explain what additional "certification" by the Chairperson, Vice-Chairperson, or Executive Director could possibly be required to make Resolution 1998/41 "part of the Tribe's official record," or why this "certification" required transacting business with third parties ("negotiate") and signing any agreement ("execute") and potentially took a long time to complete ("this resolution … shall continue until revoked by the Board").

[1] The White Declaration (Dkt. #35) should be stricken under ER 602 (lack of personal knowledge) and ER 701 (improper opinion by lay witness). *See* LCR 7(g).

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Unlike Humpty Dumpty, the Tribe cannot make the Resolution's terms mean whatever it wants them to mean. *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 904 (9th Cir. 2001).[2] In interpreting contracts, Washington courts give words their ordinary meaning "unless otherwise defined by the parties or by the dictates of the context." *Id.* at 908 (citations and internal quotation marks omitted).[3] Under these principles, "cause" as used in Scribner's contract could only mean "some shortcoming on that part of the employee," its ordinary meaning:

> [T]he term "cause" is ordinarily a performance-related concept. Unless WorldCom can point to something in the Plan, the contracts, or the context in which they were drafted that would define "cause" otherwise, we must give the word its ordinary meaning. We cannot allow one party's "double-secret" interpretation of a word to undermine the other party's justified expectations as to what that word means.

Id. (citation omitted).

It is the same here. The Tribe's argument that the Board's authorization to "negotiate and execute" Resolution 98/41 is "standard language" that means nothing at all or, at most, requires its Chairperson, Vice-Chairperson, and Executive Director to duplicate ministerial tasks performed by the Board's Secretary lacks any basis in the Resolution's text or its context. The words "negotiate" and "execute" thus can only mean what they ordinarily mean: the three tribal

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[2] The Ninth Circuit illustrated the limits of "fantasy" interpretations of ordinary terms with a famous quote from *Through the Looking Glass* by Lewis Carroll. *Scribner*, 249 F.3d at 905.

[3] The Project 04-1634 Agreement specifies the application of Washington law. (Dkt. 27-1) at 22. *See Tulalip Tribes v. Washington*, 783 F.3d 1151, 1156 n.1 (9th Cir. 2015) (applying Washington law to interpret state-tribal gaming compact); *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 932 (9th Cir. 2010) (applying Washington law to interpret state-tribal cigarette tax contract); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 752, 958 P.2d 260, 268 (1998) (applying Washington law to interpret state-tribal gaming compact). Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under that approach, courts determine the parties' intent by focusing on the objective manifestations expressed in the actual words used in the contract rather than on the parties' unexpressed subjective intentions. *Id.* A party's subjective intent is generally irrelevant. *Id.* at 504. Whether sovereign immunity has been waived is an issue of federal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

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officials, including the Board's Vice-Chairperson, were authorized to negotiate agreements related to the Tribe's grant application and sign them. The Tribe offers no argument why in his absence the Vice-Chairperson was not free to delegate the signing to Mr. Stevenson, the Tribe's Environmental Manager, who had been involved in the project from the beginning. "Under federal law, 'when a person has authority to sign an agreement ..., it is assumed that the authority extends to a waiver of immunity contained in the agreement.'" *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 2d 455, 462 (Cal. Ct. App. 2002) (citation and brackets omitted). Under Resolution 1998/41, Mr. Stevenson was authorized to sign the Project 04-1634 Agreement on behalf of the Tribe.

Mr. Stevenson was also authorized sign it under Resolution 2004/65, dated August 31, 2004. The Tribe insists that under Resolution 2004/65, "***the only*** 'federal and/or state emergency or disaster relief assistance funds' that the Board authorized Mr. Stevenson to apply for related solely to the flood event in October 2003 that damaged Tribal property." Tribe's Resp. (Dkt. #33) at 6 (emphasis added). The Tribe misunderstands the State's argument. The 2003 flood may have prompted Resolution 2004/65, but the Resolution does not reference the 2003 flood or say that it is limited to any emergency. Instead, it states that the Tribe wished to "obtain federal and /or state emergency of disaster assistance funds" and further states that Mr. Stevenson "***is authorized on behalf of the Stillaguamish Tribal Board of Directors to execute <u>all</u> contracts, certify completion of projects, request payments, and prepare all required documentation for finding requirements***." Latsinova Decl. (Dkt. #27-17) at 319 (emphasis added).

The Tribe offers no competent evidence that Resolution 2004/065 applied only to some emergencies but not others. The Tribe's counsel has no personal knowledge on the matter and

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cannot be a witness in his own case. Paragraph 4 of the Second Smith Declaration (Dkt. #34) purporting to offer counsel's testimony about the alleged connection between Resolution 2006/065 and the 2003 floods is improper and should be stricken. ER 602; LCR 7(g). The Tribe also offers the Second Stevenson Declaration (Dkt. #34) stating that Resolution 2004/65 "has nothing to do with salmon or salmon habitat" and further stating that the Resolution "was about" the 2003 flood. The Tribe argues that if the undersigned had asked Mr. Stevenson additional questions about Resolution 2004/65 questions in his deposition he would have offered similar testimony. The Tribe misses the point. Mr. Stevenson's tenure as the Tribe's environmental manager notwithstanding, he was never a Board member and cannot testify about the Board's intent. ER 602. More fundamentally, the fact that Resolution 2004/65 was prompted by the Tribe's desire to get state funding for the 2003 floods is not disputed. The relevant issue is whether, based on its plain language – "all contracts" providing "state emergency … funds" – Resolution 2004/65 ***also*** applied to other emergencies. Mr. Stevenson testified without objection that the decline of chinook salmon on the NFSR ***was*** an emergency.[4] Under the plain language of Resolution 2004/65 no more is required. *Scribner*, 249 F.3d at 908.

B. The Tribe Had No Consistent Procedure of Waving Sovereign Immunity Before 2010

The Tribe's alternative argument is that the waiver is not "clear" unless it appears in both the resolution ***and*** the contract. Tribe's Resp. (Dkt. #33) at 7. The Tribe cites no authority because this argument has no legal merit. "[W]e do not interpret the reference in the Tribal ordinance to an 'explicit' waiver to mean that a resolution must use the magic words 'waiver' or

[4] Counsel has no duty to give opposing counsel a preview of the legal theories or explain the reasons for the questions posed to the opposing side's witnesses in a deposition. Even if the Tribe's sanctions "motion" was not procedurally defective, *see* Fed. R. Civ. P. 11(b)(2), it would fail on the merits.

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'sovereign immunity.'" *Smith*, 115 Cal. Rptr. 2d at 462 (holding that the waiver in the contract is sufficient); *see also C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420-21 (2001) (a contract need not use the term "sovereign immunity" to validly waive sovereign immunity when arbitration provisions undermine the concept of immunity).

The Tribe's argument is also inconsistent with its own evidence. The Tribe offers several examples of admittedly ***valid*** waivers of sovereign immunity, *see* Smith Decl. (Dkt. ##32-10, 32-11, 32-12, 32-15), where none of the resolutions mentioned "sovereign immunity" or "waiver." Instead, as here, the waiver was contained in the contract. Under the Tribe's theory, the waivers in Dkt. ##32-10, 32-11, 32-12, and 32-15 it relies on as examples of valid waivers are themselves invalid. The Tribe's shifting position about which resolutions involve valid waivers of sovereign immunity confirms Judge Jones's finding in *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, No. C10-995RAJ, 2011 WL 4001088, at *5 (W.D. Wash. Sept. 7, 2011), that "[u]ntil 2010, no Board resolution or other formal document set forth policies and procedure for waiving immunity."[5] As the Tribe states ***in this case***, "[f]or every Tribal Board resolution that approves a contract with a waiver of sovereign immunity without mentioning waiver in the resolution, there are examples of resolutions before 2005 that expressly address a waiver." Tribe's Resp. (Dkt. #33) at 4; *see also* (Dkt. #28) at 13 (conceding 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.").

[5] The Tribe argues that this finding by Judge Jones has no preclusive effect in this case, citing an alleged difficulty in drawing parallels between "ultimate" issues. Tribe's Resp. (Dkt. #33) at 8-11. But collateral estoppel is not limited to ultimate issues. *See Restatement (Second) of Judgments* §27, comment j (1982). Judge Jones rejected as "flatly incorrect" Mr. Yanity's declaration purporting to establish an alleged pre-2010 practice of waiving immunity. *Pilchuck*, 2011 WL 4001088, at *5. The Tribe cannot have another bite at the same issue here, much less based on the identical declarations by Mr. Yanity (Dkt. ##10, 29).

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The Tribe implies that when, as here, it has no set practice of waiving sovereign immunity, the Court's inquiry ends and the Court must find as a matter of law that the waiver was not authorized regardless of the parties' conduct following the contract's execution. This is not the law. *See C & L Enters.*, 532 U.S. 411; *Luckerman*, 965 F. Supp. 2d at 227-28 ("[T]he Tribe does not dispute the fact that it … continued to accept Luckerman's legal services. While it is true that 'a waiver of sovereign immunity cannot be implied,' the Tribe's conduct … cannot fairly be characterized as an implied waiver. By receiving a proposed agreement that unequivocally purported to waive the Tribe's sovereign immunity, and treating that agreement as valid, the Tribe expressly waived its immunity." (citation omitted)); *see also Bates Assocs., LLC v. 132 Assocs., LLC*, 799 N.W.2d 177, 183-184 (Mich. Ct. App. 2010); *Smith*, 115 Cal. Rptr. 2d at 460; *Star Tickets v. Chumash Casino Resort*, No. 322371, 2015 WL 6438110 (Mich. Ct. App. Oct. 22, 2015); *Findleton*, 205 Cal. Rptr. 3d at 714 (examining "the Tribe's pre-litigation words and deeds" to decide whether immunity was waived).

To illustrate, in *Bates*, the court noted that the person who entered into the settlement agreement on behalf of the tribe was its CFO. The court then said:

> During the months following the execution of the settlement agreement, neither the Tribe nor the Tribe's attorney represented that the agreement was invalid, and $49,000 was paid to Bates pursuant to the agreement. Not until after Bates filed its complaint did the Tribe contend that the settlement agreement was unenforceable. These factors show that the Tribe was aware of the settlement negotiations and authorized [its CFO] to execute the agreement despite the waivers of sovereign immunity … therein.

Bates, 799 N.W.2d at 184; *see also Atl. Richfield Co. v. Pueblo of Laguna*, No. 1:15-cv-56-JAP/KK, 2016 WL 3574152, at *8 (D.N.M. Mar. 1, 2016) ("This is not a case where a rogue corporate official attempted to waive the corporation's immunity but lacked the power to

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actually do so. The parties both treat[ed] the Plan of merger as a valid document approved by the Pueblo."), *reconsideration on other grounds*, No. 1:15-cv-56-JAP/KK, 2016 WL 3574150 (D.N.M. May 20, 2016).

Star Tickets involved a dispute between a tribe-operated Chumash Casino Resort (CCR) and Star Tickets (Star) arising out of an alleged agreement that made Star CCR's exclusive agent in California. Faced with a "confusing maze" of CCR's requirements as to "what exactly must be done in order to accomplish an acceptable waiver of sovereign immunity," 2015 WL 6438110, at *2, the Court examined the facts of the parties' performance. The Court found them "extremely more compelling" than in *Bates* and concluded that CCR's attempt to disavow the agreement "border[ed] on the absurd" when the parties

> had operated under the agreement for several years, communicating regularly in relation to performances, ticket sales, and fees, … CCR had received at least $7 million dollars in revenue generated by ticket sales handled and managed by [Star] pursuant to the agreement, … [Star] had collected over $600,000 in charges and fees from CCR under the agreement …. Under the circumstances, CCR, the Tribe, and the various tribal councils and boards were certainly fully aware of the agreement … and reaped the benefits of the agreement for several years.

Id. at *6. The court also rejected the argument that the employee who executed the agreement on CCR's behalf lacked specific authority and held that CCR "effectively ratified the agreement on the basis of its conduct over the years in accepting the benefits of the agreement, paying plaintiff for its fees, and regularly interacting with plaintiff with respect to carrying out the agreement." *Id*. at *8.[6]

[6] The court's ratification holding was based on both state and federal common law. *Star Tickets*, 2015 WL 6438110, at *8 (citing *Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998) (government may ratify and be bound by its agents' unauthorized prior promises or agreements by accepting benefits flowing from the promises or agreements)); *cf. Pilchuck*, 2001 WL 4001088, at *7 (Pilchuck failed to identify any principle of federal common law in which course of conduct is relevant to question of who has authority to sign the agreement).

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Memphis Biofuels, LLC v. Chicksaw Nation Industries, Inc., 585 F.3d 917 (6th Cir. 2009), the principal case the Tribe relies on, involved entirely different facts. Unlike in *Star Tickets*, *Luckerman*, and this case, the tribal corporation (CNI) had an established procedure for waiving foreign immunity. MBF, a company that negotiated an agreement to deliver fuel to CNI, was fully aware of that procedure and was also aware that it was not followed:

> Throughout the negotiations, the parties exchanged draft versions of the agreement.… CNI forwarded MBF a draft … that CNI's in-house lawyers had reviewed and electronically edited.… ***[T]wo of the comments addressed the sovereign-immunity waiver provision and said that CNI board approval was necessary to waive tribal-sovereign immunity***. Ultimately, however, both parties signed the agreement, and the board did not waive immunity.

Id. at 918-19 (emphasis added); *see also id*. at 921 (CNI charter required board approval).

Here, nothing in the Tribe's 1986 Constitution, Board resolutions, or consistent practices before 2010 established a set procedure for waiving sovereign immunity. *Pilchuck*, 2011 WL 4001088, at *5; *see also* Tribe's Resp. (Dkt. #33) at 4 (admitting inconsistent practices of waiving sovereign immunity). Under *C & L Enters.*, as construed in *Luckerman*, *Bates*, *Star Tickets*, *Smith*, and *Atl. Richfield*, this does not mean that the Court's inquiry ends. It means that the Court should examine the parties' conduct.[7] The waiver of immunity is not established (or lost) by "magic words" but depends on the "real world" facts of the parties' contracting. *C & L Enters.*, 532 U.S. at 413.

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[7] The Tribe is wrong that agency principles do not apply in the context of waiver. *See Richman v. Sheahan*, 270 F.3d 430, 442 (7th Cir. 2001); *Storevisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 279-80 (Neb. 2011) (applying "agency principles" to determine that signatory had apparent authority to waive the tribe's immunity); *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407 (Colo. App. 2004) (holding that the signatory had apparent authority to waive immunity after concluding that "the general laws of agency govern here").

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For the same reasons the arbitration clause in *C & L Enterprise*s evidenced an actual waiver, the Project 04-1634 Agreement and the Tribe's conduct does the same. The following facts are undisputed: the Tribe's Board authorized its representatives to seek the grant that was memorialized in the Project 04-1634 Agreement, the Tribe's application did not mention any contingency about approval, the Tribe's Vice-Chairperson directed Mr. Stevenson to sign the Project 04-1634 Agreement, the Tribe's Chairperson signed an agreement for a matching grant, the Tribe accepted the $497,000 grant and received the funds, the Tribe (by Mr. Stevenson) twice sought amendments to the Project 04-1634 Agreement, the Tribe's representatives regularly communicated with the state about the project milestones, the Tribe completed the project and sought additional grants from the state on similar terms. This is not "a game lacking practical consequences." *C & L Enters.*, 532 U.S. at 413. "[B]y … treating th[e] agreement as valid, the Tribe expressly waived its immunity." *Luckerman*, 965 F. Supp. 2d at 228.

III. CONCLUSION

For the reasons stated in Dkt. #26, and for the additional reasons discussed in this reply, Defendants' Motion for Summary Judgment should be granted.

DATED: August 3, 2017.

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CERTIFICATE OF SERVICE

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