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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: AUGUST 4, 2017

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REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Stillaguamish Tribe of Indians ("Tribe") hereby replies in support of its Motion for Summary Judgment, filed on June 27, 2017 (Dkt. # 28).

The Court should enter judgment in the Tribe's favor and against the State Defendants because there is no dispute of fact that there is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing anyone to waive the Tribe's sovereign immunity or to sign the Salmon Project Funding Agreement ("Agreement") in 2005. Without any such authorization, as a matter of Federal law, there is no valid waiver and the purported waiver of sovereign immunity in the Agreement is not enforceable against the Tribe.

The State's response, which relies heavily on the same flawed arguments advanced in their motion for summary judgment, does not alter this analysis. (Dkt. # 37). The two Tribal Board resolutions from 1998 and 2004, neither of which mentions or relates to the Agreement, nor expressly authorizes a waiver of sovereign immunity of any kind, have no bearing on the Court's sovereign immunity analysis at all. Similarly, the State's argument in favor of indemnification flies in the face of well-established law and the State's prior litigation positions, and cannot survive summary judgment.

ARGUMENT

A. The Tribe Has Not Waived Its Inherent Sovereign Immunity to the State

The sole issue in this case is whether the purported waiver of sovereign immunity in the 2005 Agreement is enforceable against the Tribe. To answer this question, the Court must consider whether there has been a waiver of Tribal sovereign immunity "unequivocally expressed" in the manner specified by the applicable Tribal governing documents. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Here, the only relevant facts to answer this question are straightforward and not in dispute: there is no Tribal Board resolution or other official Board action (let alone a discussion) expressly authorizing Mr. Stevenson to waive the Tribe's sovereign immunity in the Agreement or to sign the Agreement. Dkt. # 29 at 2 (Yanity Decl., ¶¶ 5-6); Dkt. # 31 at 1-2 (Connolly Decl., ¶¶ 2-3). There is also no Tribal Board resolution or

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other official Board action (let alone a discussion) expressly authorizing Mr. Goodridge, Jr. to waive the Tribe's sovereign immunity in the Agreement by directing Mr. Stevenson to sign the Agreement. Without such authorization, there is no valid waiver as a matter of Federal law. *Stillaguamish Tribe v. Pilchuck Grp. II, LLC*, No. 10-995 RAJ (W.D. Wash.) (concluding, where the person who signed the contract – a member of the Tribe's Board – did so without any authorization from the Tribe's Board, "no principle of federal common law supports a finding that the Tribe authorized a sovereign immunity waiver" in the agreement and entering judgment for Tribe); *see also Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-88 (11th Cir. 2001) (without a resolution authorizing a tribal official to do so, the tribal official did not have authority to waive the tribe's sovereign immunity).

That the waiver language in the Agreement is "unambiguous" is irrelevant because entry into the Agreement and the waiver were not authorized by the Tribal Board. Resp. at 11. Judgment should enter in favor of the Tribe.

1. The State Cannot Point To Any Tribal Board Act Waiving Immunity

The issue in this case really is that straightforward. Everything the State offers in response is at best noise; at worst, it is frivolous.

a There is No Relevant Resolution Waiving Immunity

Repeating the fatally flawed arguments made in their motion for summary judgment, the State erroneously relies on Tribal Board Resolutions 1998/41 and 2004/65 to argue that the Tribal Board authorized the Agreement and expressly waived its immunity therein. Resp. at 3-7. As explained at length in the Tribe's response (Dkt. # 33 at 3-7, filed July 21, 2017), the 1998 Resolution has nothing to do with the Agreement that came seven years later, and the 2004 Resolution relates to an October 2003 major flood event that had absolutely nothing to do with

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the Agreement or even salmon funding.[1] With these two resolutions properly discounted, the State has absolutely zero evidence of any Tribal Board action approving the Agreement and authorizing the waiver of sovereign immunity.

b *Pilchuck Group II* Favors the Tribe's Argument

The State finally acknowledges that Judge Jones's ruling in *Pilchuck Grp. II* was 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." Resp. at 3. Inexplicably, however, the State tries to argue that such evidence exists in this case. *Id.* As also explained at length in the Tribe's response (Dkt. # 33 at 7-13), the opposite is true. The ruling in *Pilchuck Grp. II* that there was no waiver of the Tribe's sovereign immunity as a matter of Federal law 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 at that Board meeting, that the agreement had been signed by a Tribal official after that Board meeting, and that Pilchuck II and it principals were well known to the Tribe and had worked on several projects with the Tribe. Dkt. # 32-7 (Smith Decl., Ex. G at 2-6). None of that evidence exists in this case, and the State does not point to any (aside from the two resolutions that have no bearing

[1] The State continues to misrepresent Resolution 98/41 through selective quotation to suggest that the Tribe is the only lead entity designated to seek grants. Resp. at 4. The Resolution states that both "Snohomish County and the Stillaguamish Tribe are hereby designated as lead entities to submit any such habitat restoration project lists and to seek lead entity grants that may be available...". Dkt. # 27-14 at 3. The State conveniently cuts Snohomish County out of the Resolution, which is crucial to understanding its context, i.e. that the Tribe and the County were to cooperate as lead entities on seeking habitat restoration funding. By the State's strained logic, the "negotiate and execute" language in the Resolution would have given a Tribal official the authority to sign any future contracts for the County as well. Of course, that is not the case. The "negotiate and execute" language was a directive to certify the Resolution. *See* Dkt. # 35 (¶ 3). The State cannot contort a 7-year-old general resolution about cooperative Tribe-County efforts at salmon restoration into a credible argument that the Tribe authorized the execution of the Agreement or granted a limited waiver of sovereign immunity in that Agreement. There is nothing in Resolution 98/41 that authorized any Tribal official or employee to sign the Agreement. Because the sovereign cannot be bound by the unauthorized actions of a subordinate, the Agreement is void *ab initio*.

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on the Agreement). Resp. at 3. Under the Court's reasoning in *Pilchuck Grp. II*, nothing the Tribe did related to the 2005 Agreement waived its sovereign immunity to the State.

c Equity Does Not Overcome the Sovereign Immunity

The State also cannot rely on any principles of equity to evade the Tribe's sovereign immunity. The Tribe's motion for summary judgment discussed at length how the concepts of course of dealing, apparent authority and ratification do not apply to the Agreement. Dkt. # 28 at pp. 18-20. This is because 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 Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 758 (1998); *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). In response, the State does not address any of these arguments, apparently waiving the equitable defenses it raised in its answer earlier in this case. *See generally* Dkt. # 37. Instead, the State makes repeated mention of the Tribe's insurance coverage, suggesting that, because the Tribe has insurance and its insurance carrier is honoring its defense-related obligations, the Tribe has impliedly waived its immunity and can be deemed liable for indemnification under the Agreement. Resp. at 11. This is not the law. [2]

Whether an entity is insured has no bearing on whether that entity is liable, as has been the general rule in Washington for 113 years. *E.g., Iverson v. McDonnell*, 36 Wash. 73, 78 (1904). The same holds true in the Tribal insurance context. Numerous state courts that have considered the issue have held that the purchase of insurance by an Indian tribe is not sufficient

[2] In July 2016, the Tribe filed a Rule 12(b)(1) motion to dismiss counterclaims advanced by the State, arguing that the State's counterclaims are barred by the Tribe's unwaived sovereign immunity, depriving this Court of subject matter jurisdiction to hear the State's counterclaims. Dkt. # 14. The motion to dismiss was deferred in the same order in which the Court granted limited discovery to the State under Rule 56(d). Dkt. # 22. The State's counterclaims proceed from the assumption that the Tribe did validly waive its sovereign immunity in the Agreement. Dkt. # 8 at 7 (¶ 2), 13 (¶ 25). This question is inextricably bound up with the sovereign immunity issue on summary judgment. To the extent that the Court agrees with the Tribe and enters judgment in its favor on the sovereign immunity question, the State's counterclaims would also be dismissed and the Tribe's motion to dismiss them would be moot. The Tribe asks the Court to rule accordingly.

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to demonstrate a clear waiver by the tribe of its sovereign immunity. *Graves v. White Mountain Apache Tribe of Fort Apache Indian Reservation*, 117 Ariz. 32, 34, 570 P.2d 803, 805 (Ct. App. 1977) ("[W]e turn to the remaining question as to whether the existence of liability insurance purchased by the tribe amounted to a waiver by the tribe of its governmental immunity. We think not."); *Atkinson v. Haldane*, 569 P.2d 151, 167-170 (Alaska 1977) (a waiver of sovereign immunity "should [not] be implied from an act which was intended to protect the tribal resources" and concluding that an implication that a tribe's "sovereign immunity was waived to the extent of its insurance coverage would operate to defeat the purpose of the immunity"); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So.2d 1152, 1153 (Fla. 1st. Ct. App 2004) (rejecting an argument that tribe's purchase of workers' compensation insurance is an explicit waiver of tribal immunity); *Seminole Indian Tribe v. McCor*, 903 So.2d 353 (Fla. 2d Ct. App. 2005) (holding "the purchase of insurance by a tribe does not manifest a clear intention of the tribe to forgo the benefits of its status under federal law as a sovereignly-immune entity. To hold otherwise would risk penalizing a tribe for taking action to protect its resources against the potential that the tribe's sovereign immunity will be ignored or abrogated."). The same holds true here, and the fact that the Tribe may have insurance coverage has no bearing on whether the Tribe's immunity has been waived by the Tribal Board to the Agreement.[3]

The State also places undue emphasis on the fact that the Tribe's insurance carrier, Hudson Insurance Company ("Hudson"), has acknowledged potential coverage for, and has been honoring its defense-related obligations to the Tribe in connection with, the State's indemnification claim against the Tribe. Resp. at 8-9. The fact that Hudson has acknowledged its contractual obligations, under its insurance policies, to the Tribe is irrelevant to the Tribe's

[3] The Court would be well within its discretion to strike the State's insurance coverage discussion, and we invite the Court to do so. In ruling on the Tribe's motion, the Court is restricted to considering evidence that is both properly authenticated and admissible. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). Reference to potential liability insurance coverage in the instant case would not serve to demonstrate that the Tribe is liable to the State. It only serves to prejudice the finder of fact and there is no obvious admissible purpose for this evidence.

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alleged – but hotly disputed – obligation to the State. It is a matter of hornbook law that an insurance carrier's broad defense-related obligations to its policyholder is determined by the allegations in the underlying complaint or demand and that an insurance carrier position cannot waive the Tribe's immunity. As the Washington Supreme Court has held, a carrier's defense obligation is triggered when "a complaint against the insured, construed liberally, alleges facts which could, ***if proven***, impose liability on the insured within the policy's coverage." *Woo v. Fireman's Fund Insurance Co.*, 161 Wash.2d 43, 52-53, 164 P.3d 454 (2007) (emphasis added) (citations and inner quotation marks omitted).[4] A carrier's indemnity obligations, by contrast, "hinge[ ] upon the insured's *actual liability* to the claimant and *actual coverage* under the policy." *Id.* at 53 (emphasis in original) (citations and inner quotation marks omitted). In short, Hudson's defense-related obligation to the Tribe is a red herring that has no bearing on the existence or extent of the Tribe's alleged indemnity obligation to the State.

In sum, there is no dispute of fact that there is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing anyone – including, either Mr. Stevenson or Mr. Goodridge, Jr. – to waive the Tribe's sovereign immunity or to sign the Agreement. As a matter of Federal law, there is no valid waiver and the purported waiver of sovereign immunity in the Agreement is not enforceable against the Tribe.

B. In the Alternative, the Tribe Is Not Contractually Obligated to Indemnify Up to $50 Million

In the alternative, assuming *arguendo* the Agreement was validly entered into by the Tribe and the Tribe's immunity was waived, as a matter of law, the State is still not entitled to the unlimited indemnification they seek. Responding to the Tribe's argument that indemnity, if any, is limited to the Agreement funding amount, the State argues that Section 41 does not apply

[4] There are two exceptions to the rule that a carrier's defense obligation is determined solely from the allegations in the complaint, which provide no support for the conclusion that Hudson's obligation of its defense obligations to the Tribe somehow means that the Tribe actually is liable to the State. These exceptions require a carrier, under certain circumstances, to consider facts extrinsic to the complaint (although a carrier can rely on such facts only to trigger, rather than to dispute, its defense obligations). *Id.* at 53-54.

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because Section 41 is not about indemnification, only other kinds of contract disputes between the State and the Tribe. Resp. at 10-11. However, relying on the Section 5 language "to the fullest extent permitted by law" does not allow the State to overcome the language of Section 41 of the Agreement. Resp. at 7.

The State's letter of September 30, 2015 is an admission against interest that the State's exclusive remedy to enforce the Agreement against the Tribe is to be found in Section 41, not Section 5: "If informal resolution is not possible [under Section 39], then the State will necessarily turn to litigation in federal court as provided in Section 41 of the funding agreement". Dkt. # 32-2 at 1. The State was correct at that time when it cited to Section 39 and 41 of the Agreement to resolve the dispute about indemnification as they are the only dispute resolution provisions.[5] Section 41 applies to precisely the issue here – "in the event of a lawsuit involving this Agreement." Dkt. # 30-1 at 22.

Thus, assuming the Tribe's waiver in Section 41.C is valid, the State's attempt to enforce the indemnification obligation can only proceed under Section 41 (their September 2015 position), in which case all of the provisions of Section 41 apply, including the liability limitation in Section 41.B. To the extent the State is entitled to any indemnification, the State is not entitled to indemnification above and beyond the funding cap in the Agreement pursuant to the Agreement's plain language.

Section 41 expressly applies when the project "Sponsor" is a tribe, as is the case here. The relevant language in Section 41.B of the Agreement states:

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[5] In its June 9, 2016 letter, the State flatly contradicted its previous admission against interest in its September 30, 2015 letter. The State's position now became that Section 41.B (the limitation on liability) only applies to actions under Section 41, and that its attempt to seek indemnity for claims under *Pszonka* against the Tribe is not an action under Section 41. Dkt. # 32-4 at 2. The State cannot have it both ways. If the exclusive remedy is Section 41, even if the Court were to find a Tribal waiver of sovereign immunity, and were to find that the Tribe owes some indemnity to the State, then the maximum Tribal liability under the Agreement would be $497,000. If the latter is the case, i.e. that Section 41 does not apply at all here, then the Tribe is completely immune from any action brought by the State to seek indemnity for negligence claims in *Pszonka* under Section 5, which has neither a dispute resolution provision nor a waiver of sovereign immunity.

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> Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from such a lawsuit arising out of this agreement, shall be binding and enforceable on the parties. Any money judgment or award against a Tribe, tribal officers, employees, and members, or the State of Washington and its officers and employees ***may not exceed the amount provided for in Section F: Project Funding of the Agreement***.

Dkt. # 30-1 at 22 (emphasis added). The "amount provided for" in Section F is $497,000. *Id.* at 2. In other words, contrary to the State's litigation posture, the plain language of the Agreement says that any "relief" may "not" exceed the amount of the Agreement. *Id.* at 22. This Court must enforce the unambiguous language of the contract as written, and may not modify it. *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (2005). The contractual limitation on recovery to $497,000 is a far cry from the unlimited indemnity up to $50 Million the State seeks here by reading out Section 41.

Most telling, in recent years, the form Resource Conservation Office salmon project funding agreements contain different provisions with broader waivers of sovereign immunity and broader recovery options than the 2005 Agreement. For example, below are a few highlighted changes to Section 41 (now Section 46) as they now read:

> B. Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from such a lawsuit arising out of this agreement, ***including any third party claims relating to any work performed under this agreement***, shall be binding and enforceable on the parties. Any money judgment or award against a Tribe, tribal officers, employees, and members, or the State of Washington and its officers and employees ***may exceed the amount provided for in Section F: Project Funding of the Agreement in order to satisfy the judgment***.
>
> C. The Tribe hereby waives its sovereign immunity for suit in federal and state court for ***the limited purpose of allowing the State to bring such actions as it determines necessary to give effect to this section and to the enforcement of any judgment relating to the performance, or breach of this Agreement***. This waiver is not for the benefit of any third party and shall not be enforceable by any third party or by any assignee of the parties. In any enforcement action, the parties shall bear their own enforcement costs, including attorneys' fees.

http://www.rco.wa.gov/documents/manuals&forms/SampleProjAgreement.pdf. (emphasis added). The bold language above does not exist in the 2005 Agreement. The State's litigation position seeks to import the language from the new agreements not at issue in this case – which

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appears to fix the very problem the State now faces – into the 2005 Agreement. But, the State cannot re-write the 2005 Agreement now.

As a matter of federal law, tribal waivers of sovereign immunity must be express and are narrowly construed. *E.g.*, *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (noting "strong presumption against waiver of tribal sovereign immunity"). To that end, the Tribe only could have waived sovereign immunity (if it validly did so at all) in strict accordance with the provisions of Section 41 because there is no waiver of sovereign immunity anywhere else in the Agreement. The State has no recourse against the Tribe for the full value of settlement in *Pszonka* as a matter of contract interpretation. The best they can do is $497,000. No amount of tortured argument by the State can change this.

C. In the Alternative, the State is Estopped From Seeking Indemnification

Finally, also in the alternative, the Tribe is entitled to summary judgment in its favor because the State is judicially estopped from seeking indemnification due to the State's litigation position in *Psznoka* where the State repeatedly denied any liability related to the crib wall constructed and maintained pursuant to the Agreement. Dkt. # 32-2 (Smith Decl., Ex. B at p. 6); Dkt. # 32-4 (*id.*, Ex. D at p. 2). In a passing response, the State argues that "judicial estoppel does not apply" because "the State's position is consistent with the *Pszonka* court's denial of summary judgment on the revetment/crib wall claim." Resp. at 8 (emphasis omitted). This argument, conflating the Court's ruling with the State's contrary litigation position, is not the standard and the holding of King County Superior Court is thus not relevant.

To determine whether a party is judicially estopped, the inquiry focuses solely on the party's litigation position. *Hampshire v. Maine*, 532 U.S. 742, 49-750 (2001). In *Pszonka*, among other things, the State repeatedly took the position that there was no tort liability based on alleged on the crib wall theory. Dkt. # 32-23 (Smith Decl., Ex. W at p. 2, 7-8, 16-17, 21); Dkt. # 32-4 (*id.*, p. 2 n.1) (as of June 9, 2016, the State indicated "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***.") (emphasis added).

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Now, the State seeks to solely place the blame for the State's voluntary settlement of its liability on the Tribe. This is precisely the type of shenanigans that judicial estoppel is designed to prevent. As a matter of law, the Court should also grant summary judgment in favor of the Tribe.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court enter judgment in favor of the Tribe, granting the Tribe's motion for summary judgment and denying the State's cross motion for summary judgment, and thereby dismissing the State's counterclaims as moot.

DATED this 3rd day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I electronically filed the foregoing **PLAINTIFF STILLAGUAMISH TRIBE OF INDIANS' REPLY IN SUPPORT OF 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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