NO. 17-35722

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLAGUAMISH TRIBE OF INDIANS, a federally-recognized Indian tribe,

Plaintiff-Appellee,

v.

STATE OF WASHINGTON; ROBERT W. FERGUSON, in his official capacity as Attorney General of Washington,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
No. 3:16-cv-05566-RJB
The Honorable Robert J. Bryan, United States District Court Judge

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The substantive question presented in this appeal is whether the Stillaguamish Tribe (Tribe) should be bound by the Salmon Project Funding Agreement (Agreement) it entered into with the State of Washington in 2005. That agreement, like others before it, contained express, unambiguous provisions allowing the State to seek indemnification for claims, damages, and expenses arising from or incident to the Tribe's performance or failure to perform under the Agreement, and specifically waiving the Tribe's sovereign immunity to the extent needed to enforce the Agreement.

That question is not a federal question. The District Court nevertheless assumed subject matter jurisdiction, then ruled that the Agreement's waiver and indemnity provisions were unenforceable.

This Court should vacate the District Court's Orders and dismiss the action for lack of subject matter jurisdiction. Alternatively, if this Court finds that the District Court had subject matter jurisdiction, this Court should hold that the Tribe waived sovereign immunity when it entered into the 2005 Agreement and remand for judgment on the State's counterclaims.

II. ARGUMENT IN REPLY

A. The Stillaguamish Tribe Did Not Invoke the District Court's Subject Matter Jurisdiction

The Tribe argues that a question of federal common law can present a federal question under 28 U.S.C. § 1331, and that tribal sovereign immunity is a matter of federal common law. Appellee's Br. at 17-20. The State does not contest either argument.

But, whether the Tribe possesses sovereign immunity is not at issue in this case. The controversy, as pleaded in the Tribe's Complaint, is (1) whether the Tribe has a "duty to indemnify the State for liability against the State arising from an unrelated piece of litigation," and (2) "whether the Tribe waived its inherent sovereign immunity as to any liability of the State in the unrelated litigation." ER at 1035. Neither of these issues raises a question of federal common law. The first issue, that of a duty to indemnify under the Agreement, is a question of state law. ER 295. The second issue, whether the Tribe waived its sovereign immunity is an issue of tribal law applied to the facts, as the Tribe itself recognizes. Appellee's Br. at 29. Neither the interpretation of the Agreement nor the question of waiver depends on the resolution of a substantial question of federal law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) (federal-question jurisdiction extends over only those

cases in which a well-pleaded complaint "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.") (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27-28 (1983)); *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980) (rejecting contention that federal common law should extend to cover all contracts entered into by Indian tribes).

In its response brief, the Tribe claims to have alleged violations of federal common law in its Complaint. Appellee's Answering Br. at 19 (citing ER at 1031, 1035). It did not. It alleged only that the District Court had subject matter jurisdiction because "the causes of action arise under the Constitution, laws and treaties of the United States, including the federal common law, or are state law claims cognizable under this Court's supplemental jurisdiction" (ER at 1031) and because "[t]he Tribe's inherent sovereign immunity is a matter of federal common law" (ER at 1035). The Complaint did not allege any violation of federal common law.

Instead, the Tribe raises sovereign immunity as a defense to a state law contract claim that the Agreement contemplates, but which has not been filed.

As the State argued in the District Court (ER at 738-40) and in its opening brief to this Court (Appellants' Br. at 20-24), federal defenses to state law claims do not give rise to federal jurisdiction under 28 U.S.C. § 1331. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

1. This is not a case about the boundaries between state and tribal authority that must be resolved by reference to federal common law

In seeking to have the Tribe honor the terms of the Agreement it voluntarily entered into and benefited from, the State is not challenging the extent or parameters of tribal sovereignty, either in general or as applied to the Tribe. The Agreement itself acknowledges that the Tribe possesses sovereign immunity, which is why the State negotiated a waiver of that immunity as a condition for providing state funding for the Tribe's revetment project intended to protect migrating and spawning salmon in the Stillaguamish River.

This is not a case about the "boundaries between state and tribal authority." Appellee's Br. at 19 (quoting *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017). The issue is not whether the Tribe could assert its sovereign immunity to avoid a legal action to enforce a contract. Nor does the Tribe dispute that the waiver language in the Agreement is effective by its terms. ER at 10. The issue, rather, is whether the Tribe can avoid the effective

waiver language it agreed to by claiming post hoc that the order by the tribal Vice-Chair to execute the Agreement was ineffective to waive tribal immunity. That issue is not one of federal common law and it does not invoke the District Court's jurisdiction under 28 U.S.C. § 1331 or any other statute the Tribe cites.

The Tribe cites several decisions in support of its claim that any assertion of sovereign immunity presents a federal question. Appellee's Br. at 17-18. None of those decisions addressed a case like this one, where the Tribe disavows a specific waiver of sovereign immunity and seeks a declaration in reaction to an anticipated state action to enforce the waiver. Even those cases that might have some resemblance to this case do not assist the Tribe here.[1]

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Tribe defaulted on a promissory note that explicitly did not waive the Tribe's sovereign immunity. The holder of the note sued in state court, which rejected the Tribe's claim of sovereign immunity and held that Indian tribes are subject to suit in state court for breaches of contract involving off-

[1] The other cases the Tribe cited are factually and procedurally inapposite. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian Civil Rights Act of 1968 did not authorize a cause of action to challenge the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549 (9th Cir. 2016) (Indian Regulatory Gaming Act conferred subject matter jurisdiction over State's challenge to a new casino, but did not waive tribal sovereign immunity); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (refusing to recognize or enforce tribal court judgment where tribal court lacked subject matter jurisdiction).

reservation commercial conduct. The Supreme Court reversed, holding that, as a matter of federal law, a tribe can be sued only where Congress has authorized the suit or the tribe has waived its sovereign immunity, neither of which had occurred. *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. Three years later, however, in *C & L Enterprises Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the Court held that a tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes relating to the contract, agreed to the governance of state law, and agreed to the enforcement of arbitral awards "in any court having jurisdiction thereof." *Id*. at 414. The Court did not say in either decision that a federal question is presented where an Indian tribe waives sovereign immunity in a contract and agrees that the contract will be interpreted under state law.[2]

In *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006), the Tribe sought a declaration that Rhode Island could not enforce its cigarette sales and excise tax scheme against the Tribe for a tribal smoke shop located on

[2] The Tribe also cites *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). But that case is quite unlike this one. Michigan sued the Indian Community in federal court, arguing that a new tribal casino violated a federal statute, the Indian Gaming Regulatory Act. The Court held that the Act did not waive the Tribe's sovereign immunity and that tribal sovereign immunity barred the suit. Jurisdiction did not rest on a defensive allegation of sovereign immunity, but on the application of a federal statute.

the Tribe's Settlement Lands. The First Circuit, sitting en banc, found that the Tribe had waived sovereign immunity when it negotiated the Settlement Lands in 1978. "[T]he Tribe and the State negotiated a carefully calibrated agreement between sovereigns, memorialized that agreement in the J-Mem, and sealed the deal by obtaining Congress's imprimatur. It is not for the courts to rewrite the terms of that arrangement." *Id*. at 31. The Court held that state taxes were not preempted, that the Tribe waived its sovereign immunity in an agreement implemented by Congress, and that Congress abrogated sovereign immunity in this context—all direct questions of federal law.

In *United Keetoowah Band of Cherokee Indians v. State of Okl. ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991), the Band filed an action for declaratory judgment that Oklahoma lacked jurisdiction to enforce state laws on a restricted allotment on which a tribal bingo enterprise was located. The Tenth Circuit rejected Oklahoma's argument that the District Court lacked jurisdiction under 28 U.S.C. § 1362, holding instead that "§ 1362 serves as an adequate jurisdictional grant for this Indian gaming case where the tribe asserts its claim of immunity from state regulation." *United Keetoowah*, 927 F.2d at 1174. That

case involved federal preemption of state authority, not a tribe's assertion that an express waiver of tribal sovereign immunity is nonbinding.

In *Ute Indian Tribe*, a non-Indian filed suit in state court to enforce a contract with the Tribe. The Tribe responded by filing suit in federal court, seeking, *inter alia*, a declaration that the state court lacked jurisdiction over the dispute and that the Tribe had not waived its sovereign immunity for the claims asserted in state court. *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017). The District Court dismissed for lack of a federal question. The Tenth Circuit reversed, holding that the Tribe's allegations that several federal statutes preempted state court jurisdiction presented a federal question, regardless of whether the Tribe had a sovereign immunity defense. *Id*. at 543-44. The Court distinguished *Graham* on that basis. *Id*. at 545-47.[3] On remand, the District Court rejected the Tribe's preemption arguments and ruled that the Tribe had waived its sovereign immunity to suit in state court. *UTE Indian Tribe of Uintah v. Lawrence*, No.

[3] On the same basis, the Tenth Circuit distinguished its decision in *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944 (10th Cir. 2014), which the State cited in its opening brief to this Court. *Ute Indian Tribe*, 875 F.3d at 545-46.

2:16-CV-00579, 2018 WL 2002477 (D. Utah Apr. 30, 2018). The Tribe made no preemption claim.

In three cases the Tribe cites, specific federal statutes determined whether tribal sovereign immunity was waived, and the need to apply the federal statutes conferred federal-question jurisdiction. *See Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1207 (11th Cir. 2012) (entire lease agreement, including provision in which Tribe waived sovereign immunity, was legally invalid under 25 U.S.C. § 81); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012) (tribal sovereign immunity was not waived by 18 U.S.C. § 1161 or implied by Tribe's application for state liquor license); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) (tribal court lacked jurisdiction over tort action because tribal entity's federal charter under 25 U.S.C. § 477 did not waive its sovereign immunity).

Unlike the cases above, this case does not require the Court to determine whether the Tribe possesses sovereign immunity, or whether tribal sovereign immunity is broad enough to cover contract disputes, or whether some federal statute has waived tribal sovereign immunity as applied to this case. Here, the question is whether the Tribe's explicit waiver of sovereign immunity in the Agreement is valid. Because the waiver's validity in this case is not determined

by construction of a federal statute or resort to federal common law, but by this Tribe's course of dealing, it presents no federal question.

2. The *Bishop Paiute* decision does not control this case

The Tribe argues that this case is on all fours with *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144 (9th Cir. 2017). Appellee's Br. at 20. The State disagrees. In *Bishop Paiute*, the Tribe brought an action to enjoin county officials from interfering with tribal law enforcement. The Tribe sought a declaration that it has authority under federal common law to investigate violations of law by non-Indians within its reservation and to detain and deliver alleged violators to other law enforcement authorities, and that county officials had violated federal common law by interfering with tribal police officers' exercise of that authority. *Id*. at 1150. The scope of the Tribe's sovereign authority was put at issue. Because the Tribe's First Amended Complaint alleged specific violations of federal common law, this Court concluded it adequately pleaded a federal question under 28 U.S.C. § 1331. *Id*. at 1152. The case did not involve any claim of tribal sovereign immunity.

The allegations in the Bishop Paiute Tribe's First Amended Complaint stand in sharp contrast to those in the Stillaguamish Tribe's Complaint. As explained above, the scope of the Stillaguamish Tribe's sovereign authority is

not at issue, and the issues that are presented—waiver and indemnification—are not questions of federal law, as pleaded in this case. The Stillaguamish Tribe alleged no violation of federal common law.

The State did not cite *Bishop Paiute* because it does not apply to, much less control, this case.

3. The Tribe has not established subject matter jurisdiction for its declaratory judgment action

"Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27-28 (1983). *Accord Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006).

It has long been the rule that where a declaratory judgment action in federal court "seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237

(1952). "Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id*.

This is the rule applied in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). "Tribal immunity may provide a federal defense to Oklahoma's claims . . . . But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Id*. at 841.

The Tribe seeks to cabin *Graham* as a removal case. Appellee's Br. at 21-27. But *Graham* itself observed that the jurisdictional requirement is the same in removal as for any other case. *Graham*, 489 U.S. at 840 ("a case is not properly removed to federal court unless it might have been brought there originally.") (citing 28 U.S.C. § 1441(a)). The well-pleaded complaint rule has long governed both whether a case "arises under" federal law for purposes of 28 U.S.C. § 1331 and whether a case is removable from state to federal court pursuant to 28 U.S.C. § 1441(a). *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830,

830 n.2 (2002). Under that rule, jurisdiction must be determined from what appears in the complaint. *Id*. at 830.

No alleged violation of a federal statute or of federal common law appears in the Tribe's complaint. The Tribe alleges only its sovereign immunity as a basis for jurisdiction. ER at 1035. A tribal immunity defense does not provide an independent basis for federal jurisdiction. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1023 n.16 (9th Cir. 2016) (citing *Graham*, 189 U.S. at 841).[4]

The Tribe also alleges that applying *Graham* outside the removal context would run afoul of *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). It does not. *Shaw* was a preemption case that necessarily depended on the Court's

[4] The Court of Appeals cases the State cited in its opening brief are consistent with these Supreme Court decisions and, contrary to the Tribe's contention, directly applicable to this case. *Atay v. Cty. of Maui*, 842 F.3d 688, 697-98 (9th Cir. 2016) ("Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.") (quoting *Pub. Serv. Comm'n*, 344 U.S. at 248); *Becker*, 770 F.3d at 948 ("[T]he Supreme Court has singled out tribal sovereign immunity as a type of federal defense that "does not convert a suit otherwise arising under state law into one which, in the [§ 1331] sense, arises under federal law.") (quoting *Graham*, 489 U.S. at 841); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129, 1131-32 (8th Cir. 2007) (affirming dismissal of Tribe's declaratory judgment action seeking to interpose a federal defense to an impending or threatened state court action (citing *Graham*, 489 U.S. at 841, and *Pub. Serv. Comm'n*, 344 U.S. at 248)).

interpretation of a federal statute (the Employee Retirement Income Security Act), directly raising a federal question. In contrast, whether the Tribe waived its sovereign immunity by signing the Agreement does not depend on any federal statute or common law, but on the facts of this case.

The Tribe's reliance on *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017), is misplaced for the same reason: it is a preemption case. As explained above, the issue the Court decided was whether Public Law 83-280 and other federal statutes deprived the state court of jurisdiction over a pending breach-of-contract case. The Tenth Circuit held that the preemption claim presented a federal question that sustains federal jurisdiction under 28 U.S.C. § 1331.

Finally, the Tribe asserts that "[n]umerous courts" have called *Graham* into question. Appellee's Br. at 26. None of the cases the Tribe cites raises any question about *Graham* that is relevant to this case. In *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 58 (1st Cir. 2005), the First Circuit held that the District Court had jurisdiction over the Band's *Ex parte Young* challenge to regulatory action by the State of Maine that purportedly violated the Band's federal rights. But an important part of that Court's reasoning was overruled in *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (en banc)

(overruling *Aroostook's* treatment of tribal sovereignty as entirely preempting state laws). *Aroostook* is of questionable authority.

The Tribe cites four other cases as questioning *Graham*. Appellee's Br. at 26-27. Sovereign immunity was not the basis for subject matter jurisdiction in any of those cases, and none of them says anything about *Graham*.[5] Those cases do not assist the Tribe.

In a declaratory judgment action, the Tribe cannot establish federal-question jurisdiction under 28 U.S.C. § 1331 (or any other jurisdictional statute the Tribe cited) by asserting sovereign immunity to claims anticipated in

[5] In *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995), the Tribe went to federal court to enjoin a state court action against it, on the basis that its sovereign immunity barred the state court suit. Apparently, no one raised the issue of whether a claim based on sovereign immunity could support a federal cause of action.

In *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), the Consortium sued the Tribe, seeking recovery on a loan. The Eighth Circuit held that the Tribe's sovereign immunity barred the suit and did not address the Tribe's argument that the federal court lacked subject matter jurisdiction.

In *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998), the Tribe filed a 42 U.S.C. § 1983 action in federal court to block actions for breach of contract in state court the District Court held that the *Rooker-Feldman* doctrine barred the claims, and the Tenth Circuit reversed on that issue. This case is of little value because the Supreme Court has since held that an Tribe may not sue under 42 U.S.C. § 1983 to vindicate its sovereign rights. *Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).

In *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194 (D. Ariz. 2016), the Tribe sued the Director of the Arizona Department of Gaming, alleging that the federal Indian Gaming Regulatory Act preempted certain of his actions, a claim based on federal law. The Tribe asserted sovereign immunity as a bar to the Director's counterclaims.

a lawsuit that might be filed by the declaratory judgment defendant. The Tribe failed to invoke the District Court's subject matter jurisdiction.

B. The State Timely and Openly Challenged the Existence of Subject Matter Jurisdiction in the District Court and Properly Raised the Challenge Again on Appeal

The Tribe suggests the State sought to hide its concern about subject matter jurisdiction in the District Court, and did so as some kind of bad faith tactic, warranting a sanction against the State's attorneys. Appellee's Br. at 48-51. The Tribe is wrong.

The State's Answer was intended to alert the District Court that subject matter jurisdiction would require its attention; it did so by admitting (1) that the Agreement required the State to initiate any lawsuit "arising out of or relating to the performance, breach or enforcement of this agreement" in the District Court, but allowed the case to be filed in state court if the federal court determined it lacked jurisdiction; (2) that both the Tribe and the State waived sovereign immunity to the extent necessary to have such a lawsuit adjudicated; (3) that based on the Agreement, the District Court *may* have subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1362 and/or 1367, 28 U.S.C. §§ 2201 and 2202; and (4) that the parties had agreed the Agreement would be interpreted "according to the law of the State of Washington." ER at 977-78. The State's

admission that the District Court *may* have jurisdiction was tied specifically to the language of the Agreement, including the Tribe's explicit waiver of sovereign immunity as necessary to adjudicate enforcement of the Agreement; it was not an admission of subject matter jurisdiction to adjudicate the parameters of tribal sovereign immunity or any other aspect of federal common law.

Contrary to the Tribe's characterization, the State's challenge to subject matter jurisdiction was not "buried," nor did the State strategically wait to question subject matter jurisdiction. Appellee's Br. at 49-50. Seven days after the State answered the Tribe's Complaint, the Tribe filed two motions: a Motion for Summary Judgment and a Motion to Dismiss Defendant's Counterclaims. ER at 1044-45 (Complaint (Dkt. 1) filed June 27, 2016; Answer (Dkt. 8) filed July 14, 2016; Tribe's Motion for Summary Judgment (Dkt. 9); and Motion to Dismiss Defendant's Counterclaims (Dkt. 14) filed July 21, 2016). Eighteen days later, the State filed a timely combined Response to the motions, prominently arguing that the Tribe's Complaint alleged no basis for federal jurisdiction. ER at 724-41. The Argument section of that Response contains three main sections. The third section (titled, "Under the "Well-Pleaded Complaint" Rule, the Tribe's Complaint Alleges No Basis for Federal

Jurisdiction"), ER at 738-40, made the same jurisdictional arguments the State made in its opening brief to this Court.

As explained in our opening brief, the District Court did not address the State's argument that the Court lacked subject matter jurisdiction, except to note that jurisdiction had been challenged. ER at 704-14. Because the State understood the District Court to have accepted the Tribe's assertion of subject matter jurisdiction, the issue was not raised again to that court. The Tribe suggests the State had a duty to raise its jurisdictional argument a second time, despite having been unsuccessful the first time. It purports to find that duty in two out-of-circuit cases, *Riley v. City of Philadelphia*, 136 F.R.D. 571 (E.D. Pa. 1991), and *Walter v. Fiorenzo*, 840 F.2d 427 (7th Cir. 1988). No such duty is articulated in either case.

In *Riley*, a criminal defense attorney brought an action against an assistant district attorney in response to the prosecution of the defense attorney's client. *Riley*, 136 F.R.D. 571. The defense attorney persisted in the litigation even after the defense of absolute immunity for prosecutors was explained to him. Finally, the assistant district attorney moved for attorney's fees and sanctions under 28 U.S.C. § 1927. The Court granted the motion, concluding there was no possible basis for the plaintiff's claim at the outset, that the lawsuit was filed to

harass the assistant district attorney, and that the plaintiff did not dismiss the case in a timely fashion after learning it was groundless. *Riley*, 136 F.R.D. at 573-74. To the extent *Riley* imposes a duty, that duty is on a *plaintiff* to timely dismiss a suit that is groundless once the baseless premise is evident.

To the extent *Walter* applies, it also would be adverse to the Tribe. The court in *Walter* imposed § 1927 sanctions in large part because of the *plaintiff's* "steadfast refusal"—over a span of years—to acknowledge deficiencies in its complaint once they had been pointed out. *Walter*, 840 F.2d at 436. Nothing in *Walter* supports a sanction for arguing in good faith that a complaint fails to allege a basis for subject matter jurisdiction.

Finally, lacking any credible evidence of improper intent by the State, the Tribe seeks to assign bad faith by first citing three decisions of this Court that summarize the need for a supported finding of bad faith for a sanction under 28 U.S.C. § 1927 or the Court's inherent power,[6] then arguing that costs and fees were awarded under circumstances similar to those here in *Basso v. Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974). Appellee's Br. at 50. *Basso* is readily distinguished. The defendant company in *Basso* knew that both

[6] Appellee's Br. at 48-49, citing *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004); *Fink v. Gomez*, 239 F.3d 989, 991-94 (9th Cir. 2001); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989).

plaintiffs and defendant were citizens of Utah, thus defeating the plaintiffs' assertion of diversity jurisdiction, but the defendant strategically waited until the appeal to challenge diversity jurisdiction for the first time. *Basso*, 495 F.2d at 909-11. Here, in contrast, the State specifically raised the issue of subject matter jurisdiction to the District Court in its Answer and presented argument in full in its first brief to that Court as to why subject matter jurisdiction was lacking.[7]

Apart from comparisons to inapposite cases, the Tribe's core argument for bad faith is that if this Court finds the District Court lacked subject matter jurisdiction, the State's trial attorneys should have tried harder in the District Court to have the Tribe's case dismissed. No case supports a finding of bad faith on such a slender reed. There is no evidence at all supporting a finding of subjective bad faith by the State's attorneys.

C. The Board Authorized Its Officers To *Negotiate and Execute* Agreements To Obtain Salmon Funding Grants

[7] Moreover, the court in *Basso* did not award costs and attorney's fees against the defendant's counsel, but against the defendant itself. In making this observation, the State most certainly does *not* concede that any sanction is merited, either against counsel for the State or against the State.

1. The Tribe relies on restrictions for waiver of sovereign immunity that did not exist when the Funding Agreement was signed

The Board of Directors is the Tribe's governing body with authority to waive sovereign immunity and the Board exercises its authority through the adoption of Resolutions. ER at 289-301. Under the Tribe's constitution, the Chair and Vice-Chair of the Board are tribal officers and shall ". . . exercise any authority delegated to him/her by the Board of Directors." ER at 304. Signing agreements waiving sovereign immunity is within the broad constitutional mandate of the tribal Chair and Vice-Chair to "exercise any authority delegated by the Board."

Judge Bryan, like Judge Jones in the *Pilchuck*[8] decision, unequivocally rejected the tribe's repeated assertions that prior to 2010 there was a practice requiring that only the Board itself could authorize agreements waiving sovereign immunity. ER at 50. The tribal constitution does not restrict the Chair or Vice-Chair from signing agreements waiving immunity nor does the constitution impose conditions on how those officers are to exercise that authority. ER at 304. Significantly for this case, there is no constitutional

[8] *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, No. C10-995RAJ, 2011 WL 4001088, at *5 (W.D. Wash. 2011).

prohibition on tribal officers exercising their authority by ordering a subordinate to sign a document on their behalf.

The tribe argues that Mr. Goodridge as Vice-Chair could not exercise his authority to execute Resolution 98/46 by ordering his subordinate, Mr. Stevenson, to sign on his behalf. Appellee's Br. at 42-43. This ultra vires argument manufacturers a specific restriction on the Vice-Chair's broad constitutional authority to exercise all delegated authority. But the argument has no support in the tribal constitution nor in any Board resolution prior to the adoption of 2010/142 in 2010. The tribe's post-hoc arguments creating restrictions on the constitutional authority of its officers to exercise their discretion in executing Board directives should be rejected.

The resolution by the Board in 2010 specifically prohibiting its officers from signing agreements waiving sovereign immunity highlights the issue. ER at 940-41. That resolution for the first time established tribal policy for waiving sovereign immunity and reserved the authority for granting waivers exclusively to the Board itself. *Id*. The contrast between the authority of tribal officers pre-2010 and post-2010 becomes all the starker in the context of the near miss of the *Pilchuck* litigation. In *Pilchuck*, the Tribe was faced with the potential waiver of its immunity when the tribal Chair entered into a contract containing

a waiver of immunity provision. *Pilchuck*, at 1. Unlike this case, the tribe prevailed in *Pilchuck* because there was no Board resolution authorizing a tribal officer to execute the property purchase agreement. *Pilchuck*, at 6.

Contemporaneous with the *Pilchuck* litigation, the Board enacted Resolution 2010/142 providing that no tribal officers could sign an agreement waiving sovereign immunity and that the authority to grant waivers would reside exclusively with the Board itself. ER at 940-41. As noted above, the tribe's attempt to cast Resolution 2010/142 as a mere affirmation of prior policy fails in light of the undisputed record in this case and findings by Judge Jones in *Pilchuck* and Judge Bryan that the Tribe had no consistent policy or practice for waiving sovereign immunity prior to 2010. ER at 50.

It would have been ultra vires for Mr. Goodridge to order Mr. Stevenson to execute a funding agreement with a waiver of sovereign immunity post-Resolution 2010/142. ER at 940-41. It would also have been ultra vires for Mr. Goodridge to have signed the Agreement post-Resolution 2010/142 without express approval by the Board to sign an agreement with an immunity waiver. However, prior to Resolution 2010/142, the tribal constitution granted the Chair and Vice-Chair broad authority to exercise all delegated authority of the Board. ER at 304. Authority to execute agreements containing waivers of sovereign

immunity was not removed from the discretion of tribal officers and reserved solely to the Board until 2010. The Board's grant of authority to the Vice-Chair to execute funding agreements in Resolution 98/41, even agreements including immunity waivers, was fully effective in 2005 when the Vice-Chair ordered execution of the Agreement.

2. Unlike *Pilchuck*, the Board expressly authorized tribal officers to execute Salmon Funding Agreements

Resolution 98/41 describes the Board's intent to participate in obtaining the funding of salmon habitat restoration projects through the grants that would become available through EHSB 2649 (1998 Wash. Sess. Laws pp. 1169-79, ch. 246). Through Resolution 98/41 the Board expressly authorized specific officers to "negotiate and execute" the funding Agreements as necessary to fulfill the requirements for obtaining grants. ER at 564-66. The waiver of immunity and indemnity provisions of the funding Agreement were part of the State requirements. ER at 1001, 1012.

The Board's mandate to "negotiate and execute" is unmistakably authorization to take action. The meaning of the term "execute" is plain in this context and further definition is provided in Black's Law Dictionary as:

> To complete; to make; to sign; to perform; to do; to follow out; to carry out according to its purpose; to fulfill the command or

> purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note.

Black's Law Dictionary, 5th Ed. (1979). Regardless of the plain language enacted by the Board, the tribe argues that Resolution 98/41 did not authorize anyone to sign a funding agreement. Appellee's Br. at 39-40. The argument simply cannot be squared with clear mandate of the Board. Indeed, the Board did not merely order its officers "to seek" grants, but to go get them. As stated by the Board:

> BE IT FURTHER RESOLVED, that the Stillaguamish Tribal Board of Directors hereby *authorizes* its Chairperson, and in her absence the Vice-Chairperson or Executive Director *to negotiate and execute* this resolution which shall continue until revoked by the Board of Directors.

ER at 566 (emphasis added).

The Tribe argues the "negotiate and execute this resolution" phrase means only that the Chair, Vice-Chair, or Executive Director were the persons authorized "to certify the resolution as accurate, nothing more." Appellee's Br. at 34. The argument cannot be squared with the plain meaning of the term 'execute' in the context of Resolution 98/41. The argument is further undermined in light of the fact that every Board resolution includes a separate

provision certifying the accuracy of the resolution.[9] The separate certification language used by the Board, included in Resolution 98/41, provides:

CERTIFICATION

> As Chair and Secretary of the Stillaguamish Tribal Board of Directors, we hereby certify that the above resolution was duly adopted at a meeting of the Stillaguamish Board of Directors held on the ____ day of ___ [year] at which time a quorum was present and a vote of ____ for , ____ opposed and ____ abstain was cast.

The certification is signed by the Chair and by the Secretary. The "negotiate and execute" language is authorization for specific officers to act, and has nothing to do with certifying the accuracy of a resolution.

3. Resolution 98/41 did not instruct tribal officers 'to negotiate and bring back' Funding Agreements for Board approval

The Tribe argues that in Resolution 98/41 the Board "contemplated that any specific grant that was found would need to be brought back to the Tribe's Board for approval at that time." Appellee's Br. at 33. The argument has zero textual support anywhere in the language adopted by the Board's Resolution. Once again, the tribe's argument is incompatible with the plain directive by the Board to *execute* the Agreements required for funding.

[9] ER at 429, 471, 488, 566, 605 and 650.

Resolution 98/41specifically authorizes the Tribe to work on developing the project lists for WRIA 5. ER at 564. Developing the engineering plans for habitat restoration projects would obviously take some time, but the directive of the Board was to seek grants for the projects that were developed and then negotiate and execute the required Agreements for funding. ER at 564-66. There is nothing in Resolution 98/41 that requires, or even suggests, an intent by the Board to review the funding agreements prior to execution.

The Tribe's arguments to avoid a finding of waiver are based on restrictive language that appears nowhere in the tribe's constitution or Board resolutions that were operative when the Vice-Chair ordered execution of the funding Agreement. In Resolution 98/10 the Board expressed clear intent to seek funding grants for its list of salmon habitat projects and authorized the Vice-Chair to execute the funding Agreements for the projects. That is precisely what happened. A valid waiver of sovereign immunity occurred on the order of a tribal officer who had specific authority to execute the Agreement. The contrary judgment of the District Court should be reversed.

III. CONCLUSION

The Stillaguamish Tribe failed to establish the District Court's subject matter jurisdiction. Its Complaint should be dismissed and the District Court's

Orders vacated. In the alternative, the ruling of the District Court should be reversed because the limited waiver of tribal immunity in the Project Agreement is valid and enforceable. The case should be remanded to determine what amounts, if any, are owed by the Tribe to the State for claims arising from the revetment project.

RESPECTFULLY SUBMITTED this 4th day of May, 2018.

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