Appeal No. 17-35722

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Stillaguamish Tribe of Indians,

Plaintiff-Appellee,

v.

State of Washington; Robert W. Ferguson, in his Official Capacity as Attorney General Of Washington,

Defendants-Appellants,

United States District Court
Western District of Washington, Seattle Division
Honorable Robert J. Bryan
Case No. 3:16-cv-05566-RJB

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INTRODUCTION

The State of Washington and Attorney General Ferguson (collectively "State") seek to convert a $497,000 Salmon Project Funding Agreement ("Agreement"), signed in 2005 for the Stillaguamish Tribe of Indians ("Tribe") to build a salmon habitat cribwall, into a $50 Million indemnification windfall to the State after it settled third-party tort claims relating to a 2014 landslide.

The District Court correctly entered judgment in the Tribe's favor because the purported waiver of the Tribe's sovereign immunity in the Agreement is not enforceable against the Tribe as a matter of federal common law. The Tribal employee who signed the Agreement was not authorized by Tribal law either to sign the Agreement or to waive the Tribe's sovereign immunity, nor was the Tribal official who instructed him to sign the Agreement authorized to do so under Tribal law. The State's effort to seek indemnification from the Tribe cannot proceed.

JURISDICTIONAL STATEMENT

This is an appeal from a ruling on cross-motions for summary judgment by the U.S. District Court for the Western District of Washington (Bryan, J.), dated August 9, 2017, which disposed of all claims from the proceeding below. ER 2-17. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (Federal Question).

STATEMENT OF THE ISSUES

This appeal presents the following issues for review:

1. Whether the District Court properly exercised jurisdiction over the Tribe's claim for affirmative relief arising under federal common law.

2. Whether the waiver of sovereign immunity in the Agreement is not enforceable against the Tribe because neither the Tribal employee who signed the agreement nor the Tribal official who instructed him to do so were authorized by Tribal law either to sign the Agreement or to waive the Tribe's sovereign immunity.

STATEMENT OF THE CASE

The Tribe filed its complaint on June 27, 2016 seeking declaratory and injunctive relief to prevent the State from enforcing the Agreement against the Tribe to indemnify the State and to compel the Tribe to participate in any dispute resolution arising out of the *Pszonka* litigation. ER 1036. The State filed an answer and counterclaims to the Tribe's complaint on July 14, 2016. ER 976-1029. The State did not raise a subject matter jurisdiction affirmative defense. *Id.*

On August 8, 2016, buried in its combined response to the Tribe's motion for summary judgment and to dismiss the State's counterclaims, and the State's Fed. R. Civ. P. 56(d) motion for discovery, the State for the first and last time until this appeal raised a subject matter jurisdiction concern. ER 738-40. The District

Court granted the State's Fed. R. Civ. P. 56(d) motion for its sought after fact discovery on the Tribe's sovereign immunity claim on September 9, 2016. ER 704-714.

The State and the Tribe cross-moved for summary judgment after the close of discovery on June 27, 2017. ER 680-703; ER 234-68. The State did not raise subject matter jurisdiction as an argument at any time during the summary judgment briefing or at oral argument. ER 680-703; SER 1102-14; SER 1115-27.

On August 9, 2017, the District Court granted summary judgment in favor of the Tribe and denied summary judgment to the State. ER 16. The District Court correctly noted the question presented for its consideration as whether the Agreement's sovereign immunity waiver could be enforced against the Tribe. ER 2. Agreeing with the Tribe, the District Court concluded that the Agreement is not binding on the Tribe because "The agreement was not entered into with the requisite authority…." ER 16.

STATEMENT OF FACTS

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

The Tribe is a federally-recognized sovereign Indian tribe with its reservation in Arlington, Washington. The Tribe gained federal acknowledgement in 1976 and adopted a Constitution on June 18, 1986. SER 1065-75.

Pursuant to the Constitution, the Tribe is governed by a six-member Board of Directors (the "Board"), from which a Chairman and other officers are selected. SER 1061, 1066. The Board is the body through which the Tribe exercises its sovereign powers and authority. SER 1069. The Constitution provides that the Board is vested with "[a]ll the powers and legal authority, express, implied, or inherent, which are vested or acknowledged by existing Federal Law in the Stillaguamish Tribe as a sovereign political entity[.]" *Id*. This grant of authority to the Board includes, but is not limited to, the power: "to administer the affairs and assets of the tribe . . . under appropriate contracts"; "to prevent the sale, disposition . . . or encumbrance of . . . tribal assets"; and "to have and exercise such other powers and authority as necessary to fulfill its obligations, responsibilities, objectives, and purposes as the governing body of the tribe." *Id*.

The Constitution further provides that the Board can act only at duly called meetings at which a quorum (consisting of four members of the Board) is present. SER 1073. At least a majority vote of Board members present at a meeting is necessary for the Board to make a decision and take official action. *Id*. Any Tribal rights and powers not specifically referenced in the Constitution can be exercised by the general membership of the Tribe "through the adoption of appropriate constitutional amendments." SER 1070.

A duly elected Board has governed the Tribe and conducted business on behalf of the Tribe since the adoption of its Constitution. SER 1061. The Board takes official action either through written resolutions or consensus vote, both of which are adopted when a motion is made at a Board meeting, and a majority (or more) of the Board members vote for passage of the motion. SER 1062; SER 1073. If the Board takes action through a consensus vote or by resolution, it is recorded in the Board's Minutes, and copies of resolutions and the Board's Minutes are kept in the Tribe's official records. SER 1062; *see also* SER 1072.

For a long period of time, including during 2005 to the present, the Tribe's Board has had a practice of protecting sovereign immunity and requiring resolutions when it exercised certain authorities. *See* SER 1062.[1] In 1987, the Tribe's Board passed Resolution 87-107 affirming the sovereign immunity of the Tribe "and those who act on behalf of the Tribe", recognizing that sovereign immunity is "necessary to protect the limited financial assets of" the Tribe. ER 128-29. Since at least 1999, the Tribe's Board has had a practice and policy of requiring that a written resolution be approved by the Board that explicitly waives the Tribe's inherent sovereign immunity (or specifically approves a document that purports to do so) before any such waiver is valid. SER 1062. The Tribe codified

[1] *See* ER 130-89; SER 1084-98.

this longstanding custom and policy in 2010 when the Board adopted a resolution that explicitly reaffirms that "any and all waivers of the Tribe's sovereign immunity . . . shall be granted only by the Board of Directors, shall be in writing, and memorialized in the official records of the Board of Directors." SER 1078. The Resolution reaffirms that any individual Tribal employee or official who attempts to waive the Tribe's immunity acts beyond the scope of his or her authority. *Id.* The Tribe's Board reaffirmed the policy again in 2014. ER 191-92.[2]

B. The Salmon Project Funding Agreement

On April 6, 2005, the Agreement for Project No. 04-1634R was signed by Laura E. Johnson, the Director of the State of Washington Interagency Committee for Outdoor Recreation on Behalf of the Salmon Recovery Funding Board and Pat Stevenson, who signed as "Environmental Manager" of the Tribe. ER 883-903. Mr. Stevenson was an employee of the Tribe at the time he signed the Agreement. ER 880. Mr. Stevenson testified that, at the time the Agreement was signed, the Tribe did not have in-house legal counsel. ER 199.

[2] Resolution 2014/107 states: "pursuant to Resolution 2010/142 . . . The Board affirmed long-standing Tribal policy on limited waivers of the Tribe's sovereign immunity, e.g. that they may only be granted by the Board of Directors pursuant to written resolution" and authorizing the Chairman, Executive Director and Chief Operations Officer to sign written instruments on behalf of the Tribe "provided that such instruments do ***not*** contain limited waivers of the Tribe's sovereign immunity." ER 191-92 (emphasis added).

The Agreement, drafted by the State, facilitated the Tribe building a revetment to "eliminate[e] direct sediment discharge" into the North Fork of the Stillaguamish River in an area where sedimentation from past landslides was limiting salmon production. ER 885. To do so, the Agreement provided $497,000 in funding to the Tribe from the State to "improve instream morphology and habitat in salmon bearing areas." *Id.*

The Agreement's General Provisions were a standard form contract dated April 15, 2002. Among other standard provisions, Section 5 provides a general indemnification whereby the "Sponsor" agrees that "To the fullest extent permitted by the law, the Sponsor expressly agrees to and shall indemnify, defend and hold harmless the State . . . from and against all claims, actions, costs, damages or expenses of any nature arising out of or incident to the Sponsor's . . . performance or failure to perform the Agreement." ER 892. Section 5 concludes with this sentence: "The Sponsor expressly agrees to waive his/her immunity under Title 51 RCW to the extent required to indemnify, defend and hold harmless the State and its agencies, officials, agents or employees." *Id*. Title 51 of the RCW deals with "Industrial Insurance", also known as workers' compensation.

Section 41 of the Agreement provides a standard form "Governing Law/ Venue". However, part of Section 41 served as a special addendum to the General Provisions, providing that "In the cases where this agreement is between the

Funding Board and a federally recognized Indian tribe, the following Governing Law/ Venue applies." ER 903. Thereafter, the Agreement at Section 41.A provided that disputes "arising out of or relating to the performance, breach or enforcement of this agreement" would be brought in Federal Court. *Id*. The Agreement at Section 41.C also contained a provision as follows: "The Tribe hereby waives its sovereign immunity as necessary to give effect to this section." *Id*. The Agreement at Section 41.B provides that any money judgment against the Tribe "may not exceed the amount provided for in Section F-Project Funding of the Agreement", namely $497,000. *Id*.

The Tribe constructed the revetment in or around October 2006. ER 881; ER 893.

C. Tribal Board Records are Silent as to the Agreement

The Agreement was signed on April 6, 2005 by Mr. Stevenson. At the time the Agreement was signed, the Tribe's Board consisted of its Chairman, Shawn Yanity; its Vice-Chairman, Edward L. Goodridge, Jr.; its Secretary, Darcy R. Dreger; its Treasurer, Sara L. Schroedl; and two other Members, Jody R. Soholt and LaVaun E. Tatro. SER 1062. No Board member signed the Agreement. Mr. Stevenson is not a Tribal member and, although he is a valued staff member who reports to the Director of the Natural Resources Department, he was not eligible to serve on nor has he ever served on the Tribe's Board. ER 880-81; SER 1062.

The Tribe's official records demonstrate that the Board passed no resolution or otherwise authorized Mr. Stevenson, or anyone else, to sign the Agreement on the Tribe's behalf. SER 1080-81. There is also no evidence the Board passed a resolution approving the Agreement, or passed a resolution approving the Tribe's entry into the Agreement. *Id*. In fact there is no evidence that the Board was ever even aware of the existence of the Agreement at any time between 1999 and 2014. *See* SER 1062 (stating that Chairman Yanity has no recollection of the Agreement ever being discussed at any Board meeting between 1999 and 2014). Likewise, there are no minutes of the Board around the time of the Agreement's signing or meeting minutes of the Board around the time of the Agreement's signing or thereafter that make any mention of the Agreement or the project. SER 1081 (stating that Ms. Connolly found no mention of the Agreement or the project in any of the minutes or resolutions of the Board between 2000 and the present).

D. The 2014 Oso Landslide

On or about March 22, 2014, near Oso, Washington, a portion of an unstable hill collapsed, sending mud and debris across the North Fork of the Stillaguamish River engulfing a rural neighborhood, and covering an area of approximately one square mile with debris. ER 983. Like many members of the community, the Tribe responded to the tragedy by helping those in need, donating $100,000 to the relief effort. SER 1063.

E. The State is Sued Related to the Oso Slide

Subsequently, four lawsuits were filed in King County Superior Court which were consolidated into one case titled *Pszonka, et al., v. Snohomish County, et al,* No. 14-2-18401-8 SEA ("*Pszonka*"), alleging that certain acts or omissions of Grandy Lake LLC, the State of Washington, and Snohomish County caused injuries to plaintiffs. ER 986. Among other claims, the plaintiffs alleged that the State of Washington was liable because the revetment constructed by the Tribe was a cause of some of their injuries. *Id.* The Tribe was not a party to the litigation. ER 57.

F. The State Seeks Indemnity from the Tribe

On August 26, 2015, the State's Attorney General's Office wrote to the Tribe stating "The Stillaguamish Tribe is the Responsible Sponsor of the [revetment] project and executed defense, indemnity, and hold harmless agreement as part of receiving the grant. . . .The State believes the claims arising from the [revetment] project are covered by the defense, indemnity, and hold harmless clause of the agreement." ER 63-64. In response to the August 26 letter, on or about September 15, 2015, the State's Attorney General's Office and the Tribe held a conference call where the Tribe indicated to the State that the Tribe did not believe that the *Pszonka* plaintiffs' claims triggered the indemnification obligation in the Agreement. ER 58.

On September 30, 2015, the State's Attorney General's Office wrote to the Tribe again indicating the State's belief that "the claims asserted by the [*Pszonka*] plaintiffs related to the crib wall and sediment retention ponds constructed by the Stillaguamish Tribe as part of its [ ] project trigger the Tribe's duty to defend, identify, and hold harmless the State from these claims as provided by the funding agreement . . ." ER 67. On October 5, 2015, the Tribe responded to the State's Attorney General's Office. ER 73-74. The Tribe stated its position that it has no liability or duty to indemnify the State relating to the claims at issue in *Pszonka*. ER 74. The Tribe explained that the Agreement is invalid and cannot be invoked against the Tribe as a matter of both federal and Tribal law because Mr. Stevenson was not authorized by the Tribe to sign the Agreement and provide a waiver of the Tribe's inherent sovereign immunity. *Id*. Nevertheless, while reserving all rights and defenses, the Tribe agreed to approach its insurance carriers in good faith to discuss potential coverage for the State's claims. *Id*.

Notwithstanding the Tribe's position, the State increased its aggressive effort to pursue recovery from the Tribe in June 2016. On June 9, 2016, the State's Attorney General's Office wrote to the Tribe's insurance carrier, Tribal First/ Hudson Insurance, indicating that the *Pszonka* plaintiffs' claims "directly implicate the indemnity obligations of the Stillaguamish Tribe [ ] to the State" under the Agreement. ER 77. The State demanded that the Tribe's insurance carrier attend a

mediation scheduled for June 28-30, 2016 in *Pszonka* and provided a conservative estimate of damages potentially due to the plaintiffs, to the tune of $12 million. ER 77-78. The State's letter also asserted that the indemnity due to the State was not limited to the funding amount of the Agreement. ER 77.

On June 22, 2016, the Tribe reiterated its position that it retained its sovereign immunity from suit and neither the Agreement nor any of its provisions were enforceable against the Tribe. ER 100. The Tribe also explained that, even if the Agreement was valid, the limited waiver of the Tribe's immunity only applies to actions arising to enforce the Agreement brought by the State, which excludes the third-party claims in *Pszonka* alleged against the State. ER 101.

The State's Attorney General responded on June 27, 2016 rejecting the Tribe's position and reiterating that the Tribe appear at the mediation because "any money we offer to settle the *Pszonka,* et al., cases is ultimately yours." ER 104-05. The Tribe filed this action that day to enjoin the imminent threat of indemnification.

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

On October 9, 2016, it was reported by the *Seattle Times* that the *Pszonka* plaintiffs reached a $50 Million settlement with the State on the eve of trial (separately, Grandy Lake Forest Associates agreed to settle its liability claims for $10 million). Hal Bernton, *State reaches $50M settlement in Oso Landslide suit*, Seattle Times (Oct. 9, 2016), http://www.seattletimes.com/seattle-news/50m-

settlement-reached-in-oso-landslide-suit/. The settlement included an additional nearly $395,000 for attorneys' fees and costs for sanction motions against the State related to the destruction by State's experts of emails. *Id*. Separately, the King County Superior Court imposed a sanction of $788,664.04 against the State related to the email destruction fiasco. ER 202-05. The *Seattle Times* reported that the State "is expected to pay the first $10 million of the settlement, with insurers paying the other $40 million." Bernton, *supra*.

As part of the CR 2A Agreement reached by the State with the *Pszonka* plaintiffs, the State included the following language, indicating its continued desire to get the Tribe to pay for the State's misdeeds: "Counsel for plaintiffs agree to cooperate with the State at the sole expense of the State in any action by the State to recover indemnity from the Tribe, including but not limited to use of expert reports and data." ER 207-08. In any event, because of the settlement, there were never any findings of fact or conclusions of law entered relating to the cause(s) of the Oso landslide or who bore legal responsibility therefore.[3]

[3] Additional lawsuits have been filed against the State (but, not the Tribe) since the settlement. *See Bellomo v. Snohomish Co., et al.* (17-2-06738-5; King Co. Sup. Ct.); *Burrows v. Snohomish Co., et al.* (16-2-02922-0; Snohomish Co. Sup. Ct.); *Hadaway v. Snohomish Co., et al.* (17-2-06751-2; King Co. Sup. Ct.); *McPhearson v. Snohomish Co., et al.* (17-2-06726-1; King Co. Sup. Ct.).

SUMMARY OF ARGUMENT

Questions of federal common law present a federal question that can serve as the basis of federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Tribal sovereign immunity is a federal common law doctrine recognized by this and other Federal courts as raising a "matter of federal law" sufficient to support subject matter jurisdiction pursuant to 28 U.S.C. § 1331. In a case similar to this, completely ignored and not cited by the State, this Court last year affirmed that, where an Indian tribe alleges violations of federal common law, it has adequately pleaded a federal question providing the district court with subject matter jurisdiction under 28 U.S.C. § 1331. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017).

The District Court both correctly asserted jurisdiction and concluded that "by its own terms Salmon Project Agreement 04/1635 clearly waives the Tribe's sovereign immunity, ***but the agreement is not binding on the Tribe***." ER 16 (emphasis added). The Agreement is not enforceable against the Tribe because neither the Tribal employee who signed the agreement per the direction of Edward Goodridge Jr., nor Mr. Goodridge Jr., were authorized by Tribal law either to sign the Agreement or to waive the Tribe's sovereign immunity. There is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing Mr. Goodridge Jr. or Mr. Stevenson to waive the Tribe's sovereign immunity in

the Agreement or to sign the Agreement. Without such authorization, there is no valid waiver, and the Agreement's indemnification provision cannot be enforced against the Tribe.

In the alternative, although not reached by the District Court below, the Tribe is not contractually obligated to indemnify the State because there has been no finding of liability against the State in the third party tort litigation and the State is judicially estopped from claiming now, after repeatedly denying any liability related to the cribwall, that the Tribe's cribwall, funded in part by the Agreement, was the legal cause of the *Pszonka* plaintiffs' damages.

The District Court's decision should be affirmed.

STANDARD OF REVIEW

The Tribe generally agrees with the State that questions as to the existence of subject matter jurisdiction and a valid waiver of tribal sovereign immunity are both reviewed *de novo*. *See* Br. at 17. However, the State misstates the standard of review on cross-motions for summary judgment. Contrary to the State's claim, *Stahl v. United States*, 626 F.3d 520 (9th Cir. 2010) does not hold that rulings on cross-motions for summary judgment are reviewed "with all reasonable inference to be drawn against the ***prevailing party***". Br. at 17-18 (emphasis added). Rather, *Stahl* reiterates the well-known rule that summary judgment evidence is read in the light most favorable to the non-moving party. It would be error for this Court to

draw inferences against the prevailing party—here the Tribe. This Court reviews *de novo* a district court's decision on cross-motions for summary judgment. *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989 (9th Cir. 2005).

ARGUMENT

I. The District Court Properly Exercised Federal Question Jurisdiction

By this suit, the Tribe sought declaratory relief that the Agreement was void as a matter of federal law because the Tribe never granted and the State never obtained a valid waiver of the Tribe's sovereign immunity, and injunctive relief to bar any action for indemnification. The State tacks in a new direction on appeal.[4]

Having lost on the merits before the District Court, the State now recasts the Tribe's affirmative claims for relief as a defense in an attempt to divest the Court of subject matter jurisdiction. Br. at 21 ("[f]ederal defenses do not give rise to federal question jurisdiction under 28 U.S.C. § 1331."). Br. at 21. This argument is unmoored from the case. The State ignores the Tribe's well-pleaded complaint in order to rely on inapposite removal case law. Severing tribal sovereign immunity from its roots in federal common law conveniently ignores the rule that immunity serves as a basis for federal court jurisdiction where, as here, an Indian tribe seeks to preclude State enforcement.

[4] The State raises after an adverse judgment an issue that it should have raised at the onset of the case through a motion to dismiss, but did not. *See* Part IV *supra*.

A. Tribal Sovereign Immunity Is a Matter of Federal Common Law

It is well-settled that questions of federal common law present a federal question that can serve as the basis of federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."); *see also Gila River Indian Cmty. v. Henningson, Durham & Richardson,* 626 F.2d 708, 714 (9th Cir. 1980) (citing *Illinois,* 406 U.S. at 100 (noting that this principle applies in the context of federal Indian law)). In its complaint, the Tribe alleged that the case arose under "federal common law" because there is an imminent controversy as to "whether the Tribe waived its inherent sovereign immunity" to enable the State to demand indemnification. ER 1031, 1035; ER 77, 104-105. This question of sovereign immunity–which at its core is a dispute over tribal sovereignty–is a fundamental question of federal common law.

Sovereign immunity is a "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Indian law is uniquely federal. *Wilson v. Marchington,* 127 F.3d 805, 813 (9th Cir. 1997); *see also United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1173 (10th Cir. 1991) ("We are persuaded that an action such as this by a tribe asserting its immunity from the enforcement of

state laws is a controversy within § 1362 jurisdiction as a matter arising under the Constitution, treaties or laws of the United States."); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24–25 (1st Cir. 2006) (holding that a tribe's "claim of tribal sovereign immunity presents a 'colorable' claim of a federal cause of action").

In addition to two Supreme Court cases holding that tribe's immunity from suit constitutes "a matter of federal law", *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Bay Mills*, __ U.S. __, 134 S.Ct. 2024, 2031 (2014)), there is consensus among federal Circuit Courts of Appeal that tribal sovereign immunity is a matter of federal common law. *See, e.g.*, *Arizona v. Tohono O'odham Nation*. 818 F.3d 549, 562 (9th Cir. 2016); *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1228 (11th Cir. 2012). "Indian tribes have an interest in a uniform body of federal law in this area [of tribal sovereign immunity]" and their "interests in adjudicating tribal immunity claims in a federal forum are considerable." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1207 (11th Cir. 2012).

These decisions finding that tribal sovereign immunity is a "matter of federal law" are more than boilerplate pronouncements—tribal sovereign immunity

protects the balance of autonomy and authority between tribes, states and the federal government that is deeply rooted in federal common law and fundamental to tribes' exercise of self-determination today.[5] Federal courts' determination of the question whether a tribe has waived or preserved its immunity preserves the appropriate balance between state and federal jurisdiction over disputes involving tribes. In particular, tribal sovereign immunity effectuates "the policy of leaving Indians free from state jurisdiction and control" which "is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973). Indeed, "equitable jurisdiction under § 1331 has repeatedly been employed to police the boundaries between state and tribal authority." *Lawrence*, 875 F.3d at 543; *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). Importantly, federal courts "generally have jurisdiction to

[5] The backdrop of the federal doctrine of sovereign immunity compels federal court jurisdiction in this case. Tribal immunity "is rooted in the unique relationship between the United States government and the Indian tribes". *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). The doctrine is tightly tethered to the United States Constitution. *See* Cohen's Handbook of Federal Indian Law 635 (Nell Jessup Newton, et al., 2005 ed.) (tribal immunity "reflects the federal Constitution's treatment of Indian tribes as governments in the Indian commerce clause") (citing U.S. Const. Art. 1, § 8). Tribal sovereign immunity is commonly considered to be a 'residual' form of sovereignty" (*Wolfchild v. United States*, 72 Fed. Cl. 511, 536 (2006)) reserved by Indian tribes and recognized as a privilege of federal recognition. Today, tribal sovereign immunity is pillar of modern tribal self-determination. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) (tribal immunity is "a necessary corollary to Indian sovereignty and self-governance.").

enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law". *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017).

Because the Tribe has alleged violations of federal common law in its complaint (ER 1031, 1035), the Tribe has adequately pleaded a federal question that provides federal courts with subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *See Gila River*, 626 F.2d at 714.

B. This Court's Ruling in *Bishop Paiute* Last Year Controls

The Tribe's case is on all fours with this Court's recent 2017 decision in *Bishop Paiute v. Inyo County*, in which a panel reversed a district court's dismissal on jurisdictional grounds of an action brought by an Indian tribe seeking a declaration regarding the tribe's right to conduct law enforcement on its reservation. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017). Inexplicably, the State never cites this controlling decision rendered less than one year ago. *See generally* Br. at 18-27.

Like here, the tribe in *Bishop Paiute* alleged jurisdiction based on 28 U.S.C. §§ 1331, 1362, 2201, and 2202. *Id.* at 1152. The panel noted that "[o]f these provisions, the most important is 28 U.S.C. § 1331, because the Tribe clearly alleges violations of federal common law." *Id.* The tribe's allegation that "[t]he Defendants' arrest and charging of Tribal officer Johnson . . . violates federal

common law" was deemed sufficient for subject matter jurisdiction. *Id.* The panel held that, because the tribe had alleged violations of federal common law, it had adequately pleaded a federal question providing the district court with subject matter jurisdiction under 28 U.S.C. § 1331.

The same holds true here. In its complaint, the Tribe alleged that the case arose under "federal common law" because there is an imminent controversy as to "whether the Tribe waived its inherent sovereign immunity" to the State in light of the indemnification demands. ER 1031, 1035; ER 77, 104-105. This is sufficient under the reasoning of *Bishop Paiute*, as enforcement of the indemnification provision in the Agreement, which is void as a matter of federal common law, would be patently contrary to federal law. The District Court correctly never doubted its jurisdiction to resolve this federal common law dispute.

C. The State's Reliance on Removal Cases is Badly Misplaced

Not only does the State fail to cite to or discuss *Bishop Paiute*, the State's jurisdictional theory hinges on removal cases that are plainly inapplicable to the case at bar. Br. at 22 (citing removal cases).

1. *Oklahoma Tax Commission v. Graham* Does Not Control The Issue of Federal Jurisdiction in This Case

The State urges the Court to dismiss the Tribe's action primarily based on application of *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). Br. 21-22. In *Graham*, the state filed suit in state court to collect unpaid state

cigarette taxes from a tribe. *Id.* at 839. The tribe defended based on its sovereign immunity and removed the case to federal court on that basis, but the Supreme Court rejected federal jurisdiction because the defense of tribal sovereign immunity "does not convert a suit otherwise arising under state law into one which . . . arises under federal law." *Id.* at 841. This rule as to removal does not apply in this case. Cases where a plaintiff tribe sues for an affirmative declaration that an agreement is void as a matter of federal law, and to enjoin imminent state action, are distinguishable from *Graham*.

Applying *Graham* in this case would run afoul of the rule set forth in *Shaw v. Delta Air Lines, Inc.* In that case, the Supreme Court instructed that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. 85, 96 n.14 (1983). The Supreme Court subsequently extended this rule to federal common law claims. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985) (the grant of jurisdiction in § 1331 "will support claims founded upon federal common law as well as those of statutory origin".). Just last year, the Tenth Circuit applied *Shaw* to a case analogous to this one.

In *Ute Indian Tribe v. Lawrence*, an independent contractor sued the Ute Indian Tribe of the Uintah and Ouray Reservation for breach of contract in state court; the tribe responded by affirmatively filing suit against Lawrence in federal court seeking a declaration that (1) the state court lacked subject matter jurisdiction over the dispute, (2) the contract was void under federal and tribal law, and that (3) there was no waiver of the tribe's sovereign immunity for the claims asserted in state court. *Lawrence*, 875 F.3d at 541. The tribe also sought an injunction prohibiting further action in state-court proceedings. *Id.* Applying *Shaw*, the Tenth Circuit reversed the district court's ruling that it lacked jurisdiction over the tribe's claims. *Id.* at 543.

Specifically distinguishing *Graham*, the court noted "significant differences" between the procedural posture in its case and that in *Graham*. "*Graham* and Mr. Becker's appeal considered suits seeking declarations that federal law did not override state law, whereas the Tribe contends that state law must yield to federal law." *Id.* at 546. The Tenth Circuit reasoned that "a party claiming that federal law controls and that state law has been preempted . . can institute an action in federal court even though a suit by the other party who maintains state law still is valid . . . can neither be brought in federal court nor removed from state court to federal court." *Id.* at 547 (internal quotation omitted); *see also Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 69 (1st Cir. 2005), *overruled on other grounds by*

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) (holding that "the Band's claim of tribal sovereign immunity presents a 'colorable claim of a federal cause of action'" and reversing the district court's dismissal of the Band's claim).

Here, as in *Lawrence*, the Tribe seeks an affirmative declaration that the Agreement is void as a matter of federal law, and therefore, state court jurisdiction could not lie in an action seeking indemnity from the Tribe.[6] *See* ER 1035, 1036. The Tribe's right to have its legal liability determined "arises under" federal common law because "the complaint reveals a 'dispute or controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends'". *Id; c.f. Oneida Indian Nation of N. Y. State v. Oneida Cty.,*

[6] The State makes much of the fact that the Tribe filed suit prior to any claim being filed against it by the State in state court (Br. at 21, 23, 24). This is a distinction without difference. At the time that the Tribe filed its lawsuit, the State had demanded that the Tribe and the Tribe's insurance carrier attend mediation proceedings and threatened to seek indemnification. ER 1033-1034. Thus, *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129 (8th Cir. 2007) is distinguishable. Br. at 23. *Oglala Sioux* involved a lengthy dispute involving four different courts and one arbitral forum, including the federal action to bar an arbitration. To the extent the Eight Circuit's thin analysis relied on the "reactive nature" of the tribe's suit to bar jurisdiction, the decision is also inconsistent with *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 507 (1991), where the Supreme Court affirmed jurisdiction where the tribe sued after the state tax commission demanded that it pay $2.7 million in unpaid cigarette sales, though the commission had not yet filed a lawsuit against the tribe.

New York, 414 U.S. 661, 676 (1974) (distinguishing *Gully v. First National Bank*, 299 U.S. 109 (1936)).

The Tribe's liability arising from the Agreement undoubtedly depends on the Court's federal law determination whether the Tribe provided a valid waiver of immunity. The District Court correctly assumed jurisdiction over this federal common law dispute.

2. The Other Cases On Which The State Relies Are Inapposite

The other cases relied upon by the State fare no better. Br. at 22-24. First, the State cites *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) and *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1023 n. 16 (9th Cir. 2016) (citing *Graham*, 489 U.S. at 841), for the proposition that a defense of sovereign immunity does not give rise to federal jurisdiction. Br. at 22. Both *Becker* and *Bodi* are analogous to the procedural posture and ruling in *Graham*, and fail to control for the same reason.

The procedural context in which tribal immunity arises in this case – as an affirmative assertion that indemnification under the Agreement must yield to federal common law – is distinct from *Graham, Becker* and *Bodi*. Indeed, as the State's citation to *Atay v. Cty. of Maui*, 842 F.3d 688 (9th Cir. 2016) makes plain, it is the character of this case that compels federal question jurisdiction. Br. at 22-

23. The timing and character of this dispute take it outside of *Graham* and its progeny.[7]

Numerous courts have also called the reach of *Graham* into question (*see Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 58 (1st Cir. 2005), *overruled on other grounds by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (distinguishing *Graham*)) or support distinguishing *Graham* in the circumstances like this one in which a tribe seeks injunctive and declaratory relief to bar a state action in violation of federal law or a state proceeding. *See Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1204 (D. Ariz. 2016).

In sum, in *Graham* and the cases relied upon by the State, the tribe was seeking a declaration that state law claims were not preempted by federal law. The Tribe, in contrast, is seeking injunctive and declaratory relief against the State being able to enforce the Agreement because it is barred by federal common law. Precedent supports distinguishing *Graham* in this context here. *See Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1062, 1063–65 (10th Cir. 1995) (affirming

[7] *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005) is irrelevant here as the Tribe never claimed that the "complete preemption doctrine" applies. Br. at 24.

permanent injunction preventing state-court proceeding against Tribe as barred by sovereign immunity); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165, 1171–72 (10th Cir. 1998) (court could grant injunction against pursuit of contract claims infringing tribal sovereign immunity). The District Court's assertion of jurisdiction was proper and this Court should not disturb its ruling.[8]

II. The District Court Correctly Ruled that the Agreement is Void As a Matter of Federal Law

All but conceding the merits, the State spends five short pages at the end of its brief to argue that the Tribe's course of conduct, as well as a "verbal consent" of a former Tribal Board member, are sufficient to overcome the fact that the Tribe did not validity enter into the 2005 Agreement and, therefore, did not waive its inherent sovereign immunity as to claims for indemnification by the State. Br. at 28-32. The State misstates the issue entirely. The issue in this case is not and never has been whether "the limited waiver of tribal immunity in the Project Agreement for the revetment is valid and enforceable" *Id*. at 30. Rather, as the

[8] The State also argues that the Tribe's complaint did not allege jurisdiction under 28 U.S.C. §§ 2201 and 2202. Br. at 26. This misses the point. The Declaratory Judgment Act permits the adjudication of rights before a claim for damages or injunctive relief arises. *Societe de Conditionnement v. Hunter Eng'g Co*., 655 F.2d 938, 942-43 (9th Cir. 1981). "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Id*. at 943. In other words, these sections authorize federal courts to grant relief in cases like this, and do not invest the courts with jurisdiction. What matters for jurisdictional purposes is whether there is a federal question presented, which is met through the allegations raising issues of federal common law.

District Court put it: "by its own terms Salmon Project Agreement 04/1635 clearly waives the Tribe's sovereign immunity, ***but the agreement is not binding on the Tribe***." ER 16 (emphasis added). Properly cast, the question for this Court is whether the Agreement is not enforceable against the Tribe because both the Tribal employee who signed the agreement, and the Tribal official directing him to sign the Agreement were not authorized by Tribal law either to sign the Agreement or to waive the Tribe's sovereign immunity. The answer is yes, the Agreement is not enforceable against the Tribe. The District Court's decision was correct as a matter of fact and law.

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

Federally-recognized Indian tribes enjoy sovereign immunity from suit. *Pit River Home and Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994). Tribal sovereignty and its corresponding right of sovereign immunity from suit are inherent powers that can only be waived in one of two ways: (1) from a tribe's express waiver; or (2) through a Congressional statute expressly abrogating tribal immunity. *E.g., id.*; *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.), *aff'd*, 455 U.S. 130 (1982) (tribal council passed a formal resolution expressly waiving sovereign immunity). Here, there is no federal statute or other act by which Congress has waived tribal sovereign immunity from suit. Absent an

express waiver by the Tribe, the State is not entitled to enforce the Agreement or seek any indemnification from the Tribe under the Agreement.

Waivers of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). For any waiver to be effective, it must be clearly expressed in the manner specified by the applicable tribal governing documents. Whether any individual tribal official or employee has authority to waive a tribe's sovereign immunity is determined by tribal law. *E.g., Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917, 922 (6th Cir. 2009) (finding a waiver of sovereign immunity ineffective when the tribe's charter required the governing body pass a resolution waiving immunity, and no such resolution was passed), *cited with approval Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) (finding, in absence of evidence that Board of Directors ever adopted a resolution waiving immunity, no waiver of immunity); *Sanderlin v. Seminole Tribe of Florida,* 243 F.3d 1282, 1287-88 (11th Cir. 2001) (no effective waiver of sovereign immunity without a resolution from the tribal council doing so, as required by tribal law); *World Touch Gaming, Inc. v. Massens Mgmt, L.L.C.*, 117 F. Supp. 2d 271, 275 (N.D. N.Y. 2000) (waiver of sovereign immunity only valid if, pursuant to the

tribe's constitution and code, the waiver is authorized by tribe's governing council).

The Tribe's Constitution vests the Board with "all the powers and legal authority, express, implied or inherent which are vested or acknowledged . . . in the Stillaguamish Tribe as a sovereign political entity." SER 1069. These powers include inherent sovereign authority over the Tribe's members and land, as well as the corresponding power to assert (or waive) an essential aspect of that sovereignty – immunity from suit. *See id.*; *see also Oklahoma Tax Comm'n. v. Citizen Band of the Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 509 (1991); *see also Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182-83 (10th Cir. 2010) (noting "sovereign immunity [is] an inherent part of the concept of sovereignty"). The Tribe's Board exercises this power to waive the Tribe's sovereign immunity through written resolutions that are formally approved by the Board. SER 1062. This practice is consistent with how tribes generally exercise their power to waive sovereign immunity. *See* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 406 (2009) (noting "[a]uthority to waive a tribe's sovereign immunity is usually exercised by the tribe's governing body pursuant to general or enumerated powers set out in the tribal constitution or other law").

Contrary to the State' position, that the language in the Agreement clearly waives immunity is irrelevant because entry into the Agreement and the waiver were not authorized by the Tribal Board. Br. at 11-12, 30. In other words, the problem is not the language of the Agreement, but rather that the Tribe did not validly enter into the Agreement in the first place as a matter of federal law. The District Court was correct when it found that the State's effort at indemnification from the Tribe arising under Agreement should be permanently enjoined.

1. Contrary to the State' Claim, There is No Resolution Waiving Immunity or Approving the Agreement

There is no dispute that there is no Tribal Board resolution or other official Board action (let alone a discussion) authorizing Mr. Stevenson or anyone else to waive the Tribe's sovereign immunity in the Agreement or to sign the Agreement. SER 1062; SER 1080-81. Without any such authorization, there is no valid waiver. *See* 42 *C.J.S. Indians*, at § 22 (Online Ed. 2008) ("A tribal official cannot waive the tribe's immunity unless authorized to do so by tribal law"); *see also Sanderlin*, 243 F.3d at 1287-88 (without a resolution authorizing a tribal official to do so, the tribal official did not have authority to waive the tribe's sovereign immunity); *Attorney's Process and Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 945-46 (8th Cir. 2010) (same). Because the Tribe's Board never passed a resolution or other authorization for Mr. Stevenson or anyone else to waive the Tribe's sovereign immunity in the Agreement or to sign

the Agreement, under Tribal law, the Tribe's sovereign immunity remains intact and the State's claims for indemnification arising from the Agreement cannot proceed against the Tribe in any forum. *See Memphis Biofuels*, 585 F.3d at 922; *see also Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 758 (1998) ("[t]his result may seem unfair, but that is the reality of sovereign immunity").

Acknowledging, and seeking to avoid, the fact that there is no Tribal Board resolution or other official Board action specifically addressing the Agreement, the State argues that the Tribe's immunity was nonetheless waived as to the 2005 Agreement because: (1) a 1998 Resolution of the Tribe's Board somehow effected the necessary waiver of the Tribe's immunity in the 2005 Agreement; and (2) Mr. Goodridge, Jr. directed Mr. Stevenson to sign the Agreement. Br. at 30. The State is wrong on both the facts and the law, and their argument fails a straightforward textual analysis of the 1998 resolution.

a. The 1998 Resolution Has Nothing to Do With the Agreement

The State argues that Resolution 1998/41's direction that "Snohomish County and the Stillaguamish Tribe are hereby designated as the lead entities to submit any such habitat restoration project lists and ***to seek lead entity grants*** that maybe available to fulfill ESHB 2496 requirements" means that the Tribe authorized Mr. Stevenson signing the 2005 Agreement and waiving the Tribe's

sovereign immunity therein.[9] Br. at 9, 30 (emphasis added). This argument that the resolution is an unfettered issuance of authority defies both ordinary principles of textual interpretation and common sense.

First, "seeking grants" is not remotely the same as authorizing or approving a specific contract, or approving a signature on such a contract by a Tribal staff member. To "seek" means to go in search of. By contrast, approval or authorization represents a delegation of legal authority to act. The Tribe's Board knew how to delegate authority to a Tribal official to sign contracts; it did not do so with respect to the Agreement. ER 194. A reading of Resolution 1998/41 indicates that the 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. As to this Agreement, it is undisputed that such approval never happened.

[9] The State suggests that the Tribe entered into the Agreement and waived its immunity because the Tribal Board approved other transactions before 2010 that waived sovereign immunity without those resolutions being memorialized in the authorizing Tribal document. Br. 7, n.2. It is true that the eight resolutions provided by the State to the District Court did not expressly reference the waivers of sovereign immunity in those contracts that were being approved by the Board. However, the State misses the point. For these contracts—unlike the Agreement—there is a Tribal Board resolution. In other words, these contracts—unlike the Agreement—were brought to the Tribal Board for consideration at official Tribal Board meetings. No such resolution exists for the Agreement and there is no evidence that the Agreement was ever discussed by the Board. SER 1062; SER 1080-1081. That resolutions exist for these other contracts supports the Tribe's position as to the invalidity of this Agreement.

Second, contrary to the State's argument, the resolution does not authorize the Chairperson, Vice-Chairperson or Executive Director to execute the grants; rather, the plain language of the Resolution only directs that Chairperson, Vice-Chairperson or Executive Director "negotiate and execute ***this resolution***." ER 566 *and* ER 488 (before the "negotiate and execute this resolution" language, Resolution 2006/006 includes a specific "approval" for the for the Vice-Chairperson to "sign[] said contract agreement")). This language simply means that these persons were to certify the resolution as accurate, nothing more. SER 1099-1100. The 1998 Resolution says nothing about authorizing anyone to execute the grants or execute contracts to actually obtain grant funding. The State cannot get away with re-writing the "Be it further resolved" clause of the Resolution in an effort to change the plain language of the Resolution. ER 566.

Third, it strains credulity to believe that, in 1998, the Board could have psychically anticipated the specific 2005 Agreement to construct the cribwall that was signed by Mr. Stevenson seven years later and/or granted some implicit prospective waiver of immunity. The title of this Resolution is "WRIA 5", which represents the entire 1774-km watershed; it has nothing to do with specific salmon program recovery projects or the Steelhead Haven area. ER 565. That the Tribe is interested in salmon restoration throughout the Stillaguamish Watershed is both obvious and startlingly irrelevant to this resolution of this case.

Finally, the State's legal argument tied to the 1998 Resolution fares no better. Even if this resolution was connected to the Agreement, which it is not, the resolution does not provide the required "unequivocally expressed" waiver of sovereign immunity required by Supreme Court precedent. To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). As discussed above, the 1998 Resolution neither clearly addresses the Agreement at issue nor does it clearly waive the Tribe's sovereign immunity. In fact, the resolution is silent as to both.

On appeal, the State now relies on a 2014 case from the Oklahoma State Court of Appeals to argue that a "broad mandate" to "transact business" included "the authority to contract for a waiver of sovereign immunity" Brief at 29; *Wells Fargo Bank, N.A. v. Apache Tribe of Oklahoma*, 360 P.3d 1243, 2015 Ok. Civ. App. 10 (Okla. App. 2014). This case is of no moment. First, the Ninth Circuit is under no obligation to follow the decision of an intermediate state court from Oklahoma. Second, the case is distinguishable. The language of the resolutions at issue in *Wells Fargo Bank* is far more clear in terms of direction to sign contracts than the 1998 Resolution. *See id.* at 1255-56. And, the Oklahoma court found compelling the fact that two lawyers representing the tribe's entities in this specific transaction held the legal opinion that the Business Committee was authorized by

the tribe to sign the Loan Agreement and waive the tribe's immunity to the extent stated therein. *Id.* at 1258. There is no such evidence here.

Following the guidance that waivers of sovereign immunity are narrowly construed "in favor of the sovereign," nothing the Tribe did related to the Agreement in 2005 waived its immunity to the State. *E.g.*, *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (noting "strong presumption against waiver of tribal sovereign immunity"). The State's factual construction conveniently contorts the resolution to yield the harsh result of granting the State a $50 million windfall based on their voluntary settlement of a third-party tort lawsuit 18 years after this resolution was passed by the Tribe. The State fails to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver of the Tribe's immunity through the resolution it offers.[10]

[10] Likewise, the State makes too much of the absence of a clear Tribal policy on signatures circa 2005. In *Stillaguamish Tribe v. Pilchuck Group II, LLC*, the Tribe litigated the exact question presented here – whether a document signed without Tribal authorization waived the Tribe's sovereign immunity – and won. Brief at 29. In *Pilchuck Group II*, the defendant attempted to invoke an arbitration provision contained in an agreement signed by a member of the Tribe's Board who, similar to the situation with Mr. Stevenson, was never authorized by the Board to sign such a document containing a waiver of the Tribe's sovereign immunity. The Court concluded that the Tribe did not waive its sovereign immunity because the person who signed the contract – a member of the Tribe's Board – did so without any authorization from the Tribe's Board. ER 114. In other words, the State cites a case that the Tribe won on exactly the same legal issue, to support a contention that the Tribe should lose here.

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

The State next argues that, because Eddie Goodridge, Jr. – a former federal felon (SER 1050-60) who was the Tribe's Executive Director and Vice-Chairperson in 2005 – told Mr. Stevenson that he could sign the Agreement, the Tribe is somehow bound to the Agreement. Br. at 15, 30; ER 197-98. This fact does not alter the Court's analysis one iota.

The State again grossly mischaracterizes the ruling below. Without citing to the District Court's opinion, the State claims "Ruling that express verbal consent to the Project Agreement by the Vice-Chairman to the Project Agreement and instruction for signature was ineffective unless the Vice-Chairman personally signed the Agreement was in error." Br. at 31. However, this "ruling" is nowhere in the District Court's opinion. *See generally* ER 2-17. Instead, the District Court correctly focused on the uncontroverted statements that Mr. Stevenson was never authorized to sign the Agreement in accordance with Tribal law and there is no evidence of any Board resolution or discussion concerning the Agreement. The same is equally true as to Mr. Goodridge, Jr. The Tribe's Board knows how to delegate authority to a Tribal official to sign contracts; it did not do so here. ER 194 ("the Stillaguamish Tribal Board of Directors does hereby approve grant approval for the Executive Director to act as signer for the Stillaguamish Tribe of Indians.")). Notwithstanding the Executive Director's signing authority, he or she

is only authorized to sign written instruments on behalf of the Tribe "provided that such instruments do ***not*** contain limited waivers of sovereign immunity" otherwise, a resolution of the Board of Directors providing that limited waiver is required. ER 192 (emphasis added).

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

was immune from suit except to extent that tribal council expressly waived sovereign immunity). Mr. Goodridge, Jr. had no such authority, and the State's argument fails.

Moreover, a number of courts have also held that tribal officials such as Mr. Goodridge, Jr., cannot effectively waive a tribe's sovereign immunity without the necessary authorization from the tribe's governing body. *E.g., See Baugus v. Brunson*, 890 F.Supp. 908, 911-12 (E.D. Cal. 1995) (defining "tribal official" as a "high-level or governing role within the tribe."); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Comm'y Council*, 170 Cal. App. 491, 496 (Cal. Ct. App. 1985) (holding Tribal Chairwoman's signature on contract could not waive tribe's sovereign immunity to an arbitration unless the tribe expressly delegated the chairwoman that power); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-42, 844 (N.J. Super. 1999) (holding that controller's signature on contract containing forum selection clause insufficient to waive immunity, in part, because the right to unequivocally waive immunity reserved to tribal council under a Tribal law process); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520-21 (Okla. 2011) (holding no waiver of immunity because no express waiver of sovereign immunity by the Business Committee, or consent to such waiver by the Business Committee, as required by the Tribe's Constitution); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 316 P.3d 1248, 1251 (Ariz. Ct. App. 2014) (holding that

Casino's marketing director did not have authority to waive the sovereign immunity of the Nation and rejecting apparent authority application). In the absence of evidence that Mr. Goodridge, Jr. had or was delegated authority to approve entry into the Agreement under Tribal law, the Tribe is not bound. In short, Mr. Goodridge Jr. is not the Tribe.

Ultimately, this case is about Mr. Stevenson not having had the power to do what the State wants to say he did. Even if the Agreement had been signed by Mr. Goodridge, Jr., the result would be the same – only the Tribe's Board acting through a written resolution can approve an agreement waiving the Tribe's sovereign immunity. As the State knows well, waiving sovereign immunity is an action that only the sovereign can take, as an exercise of the sovereign's power. *See, e.g.*, *Adamson v. Port of Bellingham*, 192 Wash. App. 921, ¶¶ 10, 17, 19, 374 P.3d 170 (Ct. App, Mar. 14, 2016) (finding "When public officials enter into contracts that are outside the scope of their authority, the contracts are void and unenforceable… ."); *State v. New Magnesite Co.*, 28 Wash.2d 1, 26, 182 P.2d 643 (1947) ("[E]stoppel may not be asserted to enforce the promise of one who had no authority to enter into that undertaking on behalf of the state").

Mr. Goodridge, Jr. had no more authority to approve the Agreement than Mr. Stevenson. Mr. Goodridge Jr.'s *ultra vires* act of telling Mr. Stevenson that he

could sign the Agreement – in violation of Tribal law – does not effect a waiver of the Tribe's sovereign immunity for an unlimited indemnification.

B. The State Cannot Rely on Equity to Overcome the Tribe's Sovereign Immunity

The State's brief also suggests in passing that principles of equity can evade the Tribe's sovereign immunity. Br. at 15, 30. However, this argument is at odds with the overwhelming weight of federal case law which consistently finds that there can be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *E.g., Kiowa*, 523 U.S. at 758; *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). This is because sovereign immunity is such an essential aspect of governmental sovereignty. *See Breakthrough Mgmt. Group*, 629 F.2d at 1182 ("sovereign immunity is an inherent part of the concept of sovereignty and what it means to be a sovereign"); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (noting that the United States' sovereign immunity and tribal sovereign immunity are alike in that regard). In the tribal context, sovereign immunity is recognized to be essential to implementing federal policies of self-determination, economic development and cultural autonomy. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). Because of its importance, "Indian sovereignty, like that of other sovereigns, is not a discretionary principle

subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 419 (9th Cir. 1989).

Thus, in circumstances where apparent authority or other equitable defenses might otherwise apply, they do not apply to overcome tribal sovereign immunity. *World Touch Gaming*, 117 F. Supp.2d at 276 (neither apparent nor implicit authority can waive a tribe's sovereign immunity).

1. There is No Apparent Authority Exception to Sovereign Immunity

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

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

The State also makes reference to the fact that the Tribe completed construction of the revetment that was funded through the Agreement; however, this does not amount to a waiver of the Tribe's immunity. Br. at 11, 15. There is no case finding a waiver of tribal sovereign immunity based on alleged course of conduct or course of dealing. "[W]aivers of sovereign immunity cannot be implied on the basis of a tribe's actions." *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999) (rejecting agreement that tribe waived immunity to compliance action by electing to engage in gaming subject to regulation under IGRA); *see also World Touch Gaming*, 117 F. Supp. 2d at 276 (*citing Merrion*, 455 U.S. at 148) (holding that "any argument that subsequent acts, or acquiescence in carrying out [an otherwise invalid] contract . . . estop the Tribe from claiming sovereign immunity must fail."). No act subsequent to the Agreement can be construed as ratification or can somehow substitute for an express waiver of the Tribe's immunity by the Tribe's Board.

3. There Can Be No Ratification of a Void Agreement

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

Wash.2d 118, 123, 233 P.3d 871 (2010). Neither Mr. Stevenson nor Mr. Goodridge, Jr. were authorized to waive the Tribe's immunity or sign the Agreement by the Board, rendering the Agreement void. As such, the Agreement cannot be ratified by his or anyone else's acts as a matter of law.

The Tribe's sovereign immunity was not validly waived in the Agreement. The State's veiled equitable arguments fail to cast doubt on the District Court's well-reasoned opinion.

C. Other Bases In the Record Support Affirming the District Court

In the alternative, the Court can still rule in the Tribe's favor as a matter of law because either (1) the contractual indemnity provision has not been and cannot be triggered or (2) the state is estopped from seeking indemnification. Although not reached by the District Court, the Court of Appeals "'may affirm on any basis supported by the record, whether or not relied upon by the district court." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007)).

1. The Tribe Is Not Contractually Obligated to Indemnify

The Attorney General Office's own words explain the State's problem: "However, ***if any of the plaintiffs' crib wall allegations are found to be true***, the Tribe could be contractually obligated to indemnify the State from such a finding." ER 70 (emphasis added); *see also id.*, ER 78 (""***To the extent the State is held***

liable for any damages caused by or contributed to by the cribwall; it will be seeking indemnity from the Tribe.") (emphasis added)). The *Pszonka* litigation ended in a voluntary settlement before trial. ER 207-08. There is no admission of liability by the State and no proof of the tort plaintiffs' allegations. Since the tort plaintiffs' negligence allegations were never adjudicated and the State was never held liable, the necessary trigger to indemnification under the Agreement has not been met.

The payment the State made on the *Pszonka* claims was wholly voluntary. Considering the situation pragmatically, the Tribe neither could have nor should have expected to have to indemnify the State for a voluntary settlement payment without a judicial determination that the State (and the Tribe) were liable on the underlying negligence claim.

2. The State Should be Judicially Estopped From Seeking Recovery

There is a further problem: judicial estoppel. In order to recover any indemnity, the State would need to put on a mini-trial to argue that the Tribe is negligent relating to the crib wall which the State should be judicially estopped from doing. This is because indemnification involves the necessity of proving that the indemnitee was liable for the amount paid. *Nelson v. Sponberg*, 51 Wash.2d 371, 376, 318 P.2d 951 (1957). Indeed, the CR2A seeks to preserve just that, as the State seeks to use plaintiffs' evidence to get indemnification from the Tribe.

ER 208 (plaintiffs agree to cooperate with the State "to recover indemnity from the Tribe" by providing expert reports and data)). After all, the State presented no testimony in *Pszonka* that the Tribe's actions in constructing the cribwall was either the sole cause or a partial cause of the landslide and, as the State admits, the settlement did not address causation or liability. Br. at 1. However, the State is estopped from presenting such evidence now.

"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749–50 (citation and internal quotation marks omitted); *see Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (accord). In *Pszonka*, among other things, the plaintiffs argued that the "State allowed the construction of, and then maintained, a cribwall and sediment ponds at the base of the Hazel Landslide, and these constructions destabilized the slide and enhanced the runout from the slide, thus causing or exacerbating damages to the people of Steelhead Haven." ER 86. The State repeatedly took the position that it was not liable for the torts alleged on this theory and moved for summary judgment. ER 211, 216-17, 225-26, 230. On May 11, 2016, the King County Superior Court denied summary judgment to the State in

large part and, as to the crib wall, the Court found that material issues of fact precluded summary judgment for the State. ER 94. The State moved for reconsideration, which was denied. ER 96-98.

For the State to seek indemnification from the Tribe under the Agreement, the State must not only argue, but actually prove, that the Tribe's cribwall, funded in part by the Agreement, was the legal cause of the *Pszonka* plaintiffs' damages. This the State cannot do, as it has vigorously argued to the contrary for years. ER 71 (letter from the Attorney General's Office to the Tribe stating "...there is no scientific evidence that plaintiffs have produced showing that the crib wall itself contributed to the cause of the 2014 Oso Landslide."). As late as June 9, 2016, the State made clear that "The State denies this claim and will vigorously defend against any claim that it was negligent to allow the project to be built or that it contributed to the devastation of the March 22, 2014, landslide." ER 77. The State's newfound position is directly contrary and clearly inconsistent with the position the State took in *Pszonka*. *New Hampshire,* 532 U.S. at 750 (noting that for judicial estoppel to apply, "a party's later position must be 'clearly inconsistent' with its earlier position."). The State cannot argue in one court that the cribwall played no role in liability and then try to pin liability on the Tribe related to the cribwall in another to secure indemnification.

Another consideration in weighing whether to apply judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751. Here, there is no question that the State is seeking to derive an unfair advantage by changing its position, and that the change would work an unfair detriment on the Tribe. The sole reason for the State's current posture is to get the Tribe to bankroll the State's $50 Million voluntary settlement agreement based on a $497,000 Agreement, allowing the State to recover roughly 9900% over the contract amount.

The Court may affirm the District Court on these bases as well.

III. The State's Lawyers Should Be Sanctioned Under 28 U.S.C. § 1927 For Raising a Jurisdictional Argument After An Adverse Judgment

The State was happy to litigate the merits of this case until it lost. If the Court agrees with the State, the State's convenient resuscitation of its subject matter jurisdiction argument after an adverse judgment should subject the State's lawyers to sanctions.

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 provides this Court

with authority "to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings." *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004). "Sanctions pursuant to section 1927 must be supported by a finding of subjective bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *Id.* (citation omitted). "Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith." *Id.* (internal citations omitted). Indeed, "[e]ven if an attorney's arguments are meritorious, his conduct may be sanctionable if in bad faith." *Id.* (citation omitted). Likewise, this Court has recognized that it may impose sanctions under the Court's inherent power where there is a determination of bad faith or conduct tantamount to bad faith. *See Fink v. Gomez*, 239 F.3d 989, 991–94 (9th Cir. 2001).

The State did not at file a motion to dismiss for want of subject matter jurisdiction. Rather, the State filed an answer and counterclaims to the Tribe's complaint on July 14, 2016. ER 976-1029. The State did not raise a subject matter jurisdiction affirmative defense at that time. *Id.* It was only on August 8, 2016, buried in its combined response to the Tribe's motions and the State's Fed. R. Civ. P. 56(d) motion for discovery, that the State for the first and last time until this appeal raised a subject matter jurisdiction concern. ER 738-40. The District Court

proceeded to grant the State its sought after fact discovery on the Tribe's sovereign immunity claim on September 9, 2016. ER 704-14. Subsequently, the Tribe spent months providing documents responsive to extensive discovery from the State, including a deposition. When the State and the Tribe cross-moved for summary judgment after the close of discovery on June 27, 2017, the State did not raise subject matter jurisdiction as an argument at any time during the summary judgment briefing or at oral argument. ER 680-703; SER 1102-14; SER 1115-27.

The result of the State's abandonment of its subject matter jurisdiction argument until after it lost on the merits was to subject the Tribe to six months of extremely costly fact discovery, and two months of merits briefing. The State had a duty to pursue this argument if it believed it had merit and did not do so, resulting in the prolonging of this litigation to the great expense of the Tribe. *E.g., Riley v. Philadelphia*, 136 F.R.D. 571, 574 (E.D. Pa. 1991) (counsel's failure to dismiss a case in a timely fashion supported an award of fees to the defendant under § 1927); *see Walter v. Fiorenzo*, 840 F.2d 427, 436 (7th Cir. 1988) (finding that where there is a factual or legal deficiency in a complaint that is made clear, the deficiency should be remedied or the defendant dismissed or an award of fees and costs are appropriate under § 1927). Indeed, the Tenth Circuit has awarded costs and attorney fees under similar circumstances as those here. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 911 (10th Cir. 1974) (costs and fees awarded

where defendant did not raise issue of jurisdictional defect until after adverse judgment had been issued).

The State could have moved to amend its answer. It did not. The State could have raised the jurisdiction argument on summary judgment. It did not. Instead, it waited until after six months of expensive discovery and an adverse judgment to raise the jurisdictional argument. In the event the Court agrees with the State on appeal, the State's lawyers should be ordered to pay the Tribe its costs and attorneys' fees from the September 29, 2016 Order granting discovery to the present.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

DATED: March 19, 2018

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STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

DATED: March 19, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Rebecca Horst
Rebecca Horst