No. 19-16278

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRAWLDEF, a public benefit corporation; et al.,

Petitioners – Appellees,

v.

GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally recognized Indian tribe,

Respondent – Appellant,

CITY OF RICHMOND, a California municipality; et al.,

Respondents.

Appeal From a Decision of the United States District Court for the Northern District Of California, No.:18-cv-03918– Honorable Yvonne Gonzalez Rogers

---

GUIDIVILLE RANCHERIA OF CALIFORNIA'S OPENING BRIEF

Scott Crowell
Crowell Law Office-Tribal Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
Tel.: (425) 802-5369
Fax: (509) 290-6953
scottcrowell@hotmail.com

Sara Dutschke Setshwaelo
CA Bar. No. 244848
KAPLAN KIRSCH ROCKWELL
595 Pacific Ave., Fl. 4
San Francisco, CA 94133-4685
Tel.: (628) 209-4152
Fax: (303) 825-7005
ssetshwaelo@kaplankirsch.com

Attorneys for Respondent - Appellant

CORPORATE DISCLOSURE STATEMENT

Respondent-Appellant Guidiville Rancheria of California (the "Tribe"), pursuant to Fed. R. App. P. 26.1, certifies that it has no parent corporation and further certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

December 16, 2019 ,

s/ Scott Crowell
SCOTT CROWELL
Crowell Law Office-Tribal Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
Tel.: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@hotmail.com

Attorney for Respondent-Appellant Guidiville Rancheria of California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

Appellant/Respondent Guidiville Rancheria of California ("Tribe") appeals from the June 19, 2019 Order of the District Court denying the Tribe's Motion to Dismiss Appellees/Petitioners', SPRAWLDEF, a public benefit corporation, Citizens For East Shore Parks, a public benefit corporation, James Hanson, Tony Sustak, Paul Carman And Pamela Stello (collectively referred to as SPRAWLDEF) action claiming violations by Respondent City of Richmond of California's open meeting laws. The District Court erred in ruling that the Tribe has waived its sovereign immunity from unconsented lawsuits.

STATEMENT OF JURISDICTION

A recent intervening event has occurred that renders this appeal non-justiciable. Co-Respondent City of Richmond's November 5, 2019 approval of the Amended Final Judgment in *Guidiville Rancheria et. al v. United States et. al.*, CV 12-1326-YGR ("the *Guidiville* action") in a properly agendized open meeting renders the dispute moot, such that the issues on appeal are no longer justiciable. An order of vacatur is appropriate, vacating the District Court's June 19, 2019 Order (ER I, 1-8, Doc. 59)[1] and directing the District Court to dismiss the petition. The District Court just informed the parties on December 11, 2019 (three business days

[1] Citations to Record refer to the Excerpt of Record by volume and bate stamp page numbers, together with the corresponding entry in the District Court's docket. For example, the above reference for the June 19, 2019 Order is to Volume One of the Excerpts of Record, bate stamped pages 1 through 8, which docketed in the District Court as entry no. 59)

before the filing due date for this Opening Brief) that it will not entertain a motion to dismiss as moot because it lacks jurisdiction to hear the motion while this appeal is pending.

Accordingly, the Tribe intends to file, within the next ten days, a motion for this Court to issue an order of vacatur, based on the intervening developments mooting the underlying lawsuit, and instructing the District Court to dismiss the case. Such motion and related motion for judicial notice will provide argument and documentation establishing the mootness and the appropriateness of an order of vacatur. A brief summary of those grounds, however, is set forth herein to ensure that vacatur is included as an independent basis for vacating the District Court's June 19, 2019 Order.

When a case becomes moot on appeal, the standard practice is to reverse or vacate the decision below with a direction to dismiss. *NASD Dispute Resolution, Inc. v. Judicial Counsel of State of California*, 488 F.3d 1065 (9th Cir. 2007). Vacatur in such a situation eliminates a judgment the losing party was stopped from opposing on direct review. *Id.*; *NASD Dispute Resolution, Inc. v. Judicial Counsel of State of California*, 488 F.3d 1065 (9th Cir. 2007); *American Civil Liberties Union v. Masto*, 670 F.3d 1046, 1065 (9th Cir. 2012) ("That is the default approach because it prevents a judgment, unreviewable because of mootness, from spawning any legal consequences.").

Federal courts can only decide cases or controversies. U.S. Const. art III, s 2. This requirement has been distilled into the doctrine of justiciability. *Warth v. Seldin*, 422 U.S. 490 (1975). A tenet of justiciability, the mootness doctrine, requires that a controversy exists throughout the duration of the lawsuit. *U.S. v. Juvenile Male*, 940 U.S. 932, 936 (2006); *Karen MOU v. SSC San Jose Operating Co*., 2019 WL 6255452 (N.D. Cal. 2019). A case becomes moot when the issues presented are no longer live. *Id.* at *9 (citing *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir, 2004)). Corrective action by a governmental entity is one type of subsequent development that can moot a previously justiciable case. *Natural Resources Defense Counsel, Inc. v. United States Nuclear Regulatory Commission*, 680 F.2d 810, 814 (D.C. Cir. 1982); *Friends of Animals v. Zinke*, 373 F. Supp. 3d 70, 83 (D.D.C. 2019); *Flying J Inc. v. Pistacchio*, 2006 WL 906396 at *15 (E.D. Cal. 2008) (allegations that California Transportation Commission violated California's open meeting laws rendered moot by Commission's reconsideration in properly agendized open session).

The intervening event of the City of Richmond approving the First Amended Judgment moots the instant appeal for two straightforward reasons. First, the original April 12, 2018 Settlement Agreement / Stipulated Judgment is no longer in effect and has no potential to come into effect. Second, the First Amended Judgment was approved by the City of Richmond in a properly noticed and agendized public

meeting; hence, there are no longer grounds that the City of Richmond failed to comply with California's open meeting laws.

Justiciability notwithstanding, the District Court lacks jurisdiction because the Tribe has not waived its sovereign immunity from SPRAWLDEF's claims, as discussed in greater detail below.

This Court otherwise has jurisdiction over the Tribe's appeal from the District Court's June 19, 2019 Interlocutory Order denying the Tribe's Motion to Dismiss on grounds that the Tribe retains its sovereign immunity with respect to SPRAWLDEF's claims. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the litigation has become moot as a result of the intervening event of the City of Richmond's approval of the Amended Final Judgment in *Guidiville Rancheria et. al v. United States et. al.*, CV 12-1326-YGR, in a properly agendized open meeting.

2. Whether the District Court erred in finding that the Tribe, by executing the April 12, 2018 Settlement and Stipulated Judgment (ER IV, 375-523, Doc. 1-2), in *Guidiville Rancheria et. al v. United States et. al.*, CV 12-1326-YGR, expressly waived its sovereign immunity with respect to the lawsuit filed by SPRAWLDEF, who are not parties to the Settlement Agreement.

CONCISE STATEMENT OF THE CASE

A. Prior Litigation and Settlement

On March 16, 2012, Upstream Point Molate, LLC ("Upstream") and the Tribe filed the *Guidiville* action before the District Court. The *Guidiville* action sought declaratory relief with respect to certain federal agency decisions affecting the Tribe's rights, as relief arising from the City of Richmond's alleged breach of a land development agreement with Upstream. After lengthy litigation, including an appeal to the Ninth Circuit resulting in a reversal and remand to the District Court, *Guidiville Rancheria v. United States*, 704 Fed. Appx. 655 (9th Cir. 2017), the parties to the *Guidiville* action reached a settlement agreement and stipulated judgment, entered as the judgment of the District Court on April 12, 2018. ER IV, 375-523, Doc. 1-2).

More than four months after becoming aware of the then-eminent Settlement Agreement and Stipulated Judgment, SPRAWLDEF sought intervention in the *Guidiville* action on June 6, 2018 (ER II, 100-131. Doc. 45 at 17). The District Court on July 6, 2018 denied that motion to intervene without prejudice, noting SPRAWLDEF's failure to address standing (ER II, 100-131. Doc. 45 at 17). Yet, to date, no effort to address standing has ever been submitted by SPRAWLDEF in the *Guidiville* action.

Both the *Guidiville* action and SPRAWLDEF's lawsuit are pending before the

Hon. Yvonne Gonzalez Rogers in the United States District Court for the Northern District of California.

B. Procedural History of this Action

Petitioners SPRAWLDEF et al. filed their Petition for Writ of Mandate against Respondent City of Richmond. The Petition alleges that the City of Richmond violated the Brown Act, California's open meeting law, because its entry into the settlement of the *Guidiville* action was allegedly a land-use policy decision requiring a public process, including notice, open meetings, findings, and adoption, but instead, the City of Richmond allegedly entered into the Settlement Agreement/ Stipulated Judgment without public notice and in a closed-session city council meeting.

At a September 11, 2018 hearing on the Motion to Dismiss filed by the City of Richmond, the District Court directed SPARAWLDEF and the City of Richmond to meet and confer as to whether then-non-parties Upstream and/or the Tribe should be joined in Petitioners' claims as necessary parties or real parties in interest (ER III, 141-171, Doc. 24; ER I, 1-8, Doc. 59 at 2). Thereafter, on October 23, 2018, SPRAWLDEF filed a First Amended Petition (ER II, 132-140, Doc. 32), naming Upstream and the Tribe as respondents. The City of Richmond and SPRAWLDEF proceeded to file pleadings on the merits of the Petitioners' claims, despite the fact that the Tribe and Upstream had yet to file responsive pleadings to the First

Amended Petition.

After allegedly being served with the First Amended Petition, the Tribe timely filed its Notice of Motion and Memorandum of Points and Authorities in Support of Specially Appearing Guidiville Rancheria of California's Motion To Dismiss (ER II, 100-131, Doc. 45), pursuant to Fed.R.Civ.P. 12(b)(1) and (7), setting forth that the Tribe was a required party under Fed.R.Civ.P. 19[2] that had not waived its sovereign immunity from unconsented lawsuits, and accordingly, that the case could not proceed without the Tribe.

On June 19, 2019, the District Court issued an Order which found that the Tribe was both necessary and indispensable, and that the case could not proceed without the Tribe as a party-respondent, but that the Tribe could be joined into the lawsuit because it had waived its sovereign immunity from SPRAWLDEF's claims by agreeing to the Settlement Agreement / Stipulated Judgment in the *Guidiville* action. June 19, 2019 Order (ER I, 1-8, Doc. 59).

The Tribe properly filed a timely interlocutory appeal.

---

[2] Many of the cases cited in support of the Tribe's motion were issued prior to 2007. When Rule 19 was amended in 2007, the word 'necessary' was replaced by 'required' and the word 'indispensable' was removed. The changes were intended to be 'stylistic only' and 'the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of Philippines v. Pimental*, 553 U.S. 851, 855-56 (2008); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 969 n.6 (9th Cir. 2008).

SUMMARY OF ARGUMENT

The recent intervening event of the City of Richmond approving, in a properly noticed and agendized public session of the city council, an Amended Stipulated Judgment, also executed by Upstream and the Tribe and approved by the District Court in the Guidiville action, moots the instant appeal. Accordingly, the Court should order vacatur, vacating the District Court's June 19, 2019 Order and directing the District Court to dismiss SPRAWLDEF's petition.

The District Court erred in finding that the April 12, 2018 Settlement Agreement / Stipulated Judgment constituted an effective waiver of the Tribe's sovereign immunity from unconsented suit. It is not sufficient that SPRAWLDEF seeks to void or force modification of the Settlement Agreement/ Stipulated Judgment. An overwhelming tidal wave of case law in analogous circumstances establishes that the Settlement Agreement / Stipulated Judgment falls far short of the requisite express intent that the immunity waiver applies to third parties' claims, including SPRAWLDEF's claims. Accordingly, the Court should vacate the June 19, 2019 Order and direct the District Court to dismiss SPRAWLDEF's petition altogether pursuant to Fed.R.Civ.P. 19, as the Tribe is a necessary and indispensable party that cannot be joined into SPRAWLDEF's lawsuit.

STANDARD OF REVIEW

Appellate review regarding Rule 19 motions addressing joinder are generally reviewed for abuse of discretion, but legal conclusions underlying the decision are reviewed *de novo. E.E.O.C. v. Peabody Coal Co*., 610 F.3d 1070, 1076 (9th Cir. 2015); *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2010). Because the appeal turns on whether the District Court erred in finding that the Tribe waived its sovereign immunity against SPRAWLDEF's claims, the appropriate standard is to review the District Court's decision *de novo*.

ARGUMENT

A. Vacatur is appropriate: the intervening event of the City of Richmond approving, in a properly-noticed and agendized open session, the Amended Judgment in the *Guidiville* action moots the instant litigation.

For the reasons set forth in the Jurisdictional Statement set forth above, and in the forthcoming Motion for Order of Vacatur, this Court should vacate the District Court's Order of June 19, 2019 and direct the District Court to dismiss the Petition as moot.

B. The District Court erred in finding that the Tribe, by executing the Judgment in the *Guidiville* action, expressly waived its sovereign immunity to the lawsuit filed by SPRAWLDEF, which are not parties to the Settlement Agreement / Stipulated Judgment.

This case cannot proceed to the merits of SRAWLDEF's claims, because the Tribe has not waived its sovereign immunity to unconsented lawsuits brought by

non-parties to the Settlement Agreement in *Guidiville,* and the Tribe should not be subject to or affected by a forum that adjudicates the merits of SPRAWLDEF's claims.

The Tribe's Rule 19 Motion was brought pursuant to Fed.R.Civ.P. 12(b)(1) and (7). Rule 12(b)(1) is the vehicle to seek dismissal based on sovereign immunity. *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014). Suits against sovereign governments are barred for lack of subject matter jurisdiction unless the government expressly and unequivocally waives its sovereign immunity from suit. *Id.*; *E.V. v. Robinson*, 906 F.3d 1082, 1090 (9th Cir. 2018).

The Tribe's Rule 19 motion (ER II, 100-131, Doc. 45) was both a facial attack and a factual attack on the District Court's jurisdiction. The First Amended Petition (ER II, 132-140, Doc. 32), on its face, fails to make any allegation whatsoever that the Tribe's sovereign immunity has been expressly and unequivocally waived or abrogated. The Tribe submitted evidence in support of its motion to make clear, as a matter of both federal law and tribal law, that its sovereign immunity has not been waived regarding SPRAWLDEF's claims. *See* Declaration of Vice-Chairman Donald Duncan In Support of Tribe's Motion to Dismiss (ER II, 56-94, Docs. 45-1 through 45-5).

The Tribe is immune from SPRAWLDEF's lawsuit and has not waived that immunity. Accordingly, it is not feasible for the Tribe to be joined in

SPRAWLDEF's lawsuit.

1. Tribes are presumptively immune from unconsented lawsuits.

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Com'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509-510 (1991); *Turner v. United States*, 248 U.S. 354, 358 (1919); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Under the common-law doctrine of tribal sovereign immunity, Indian tribes are protected from suits for monetary damages and from declaratory or injunctive relief. *Quinault Indian Nation v. Pearson for Estate of Comenout*, 888 F.3d 1093, 1096 (9th Cir. 2017).

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Citizen Band*, 498 U.S. at 509-510*; Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."). Recently, the U.S. Supreme Court admonished that federal courts

may not "carv[e] out exceptions" to the broad protections sovereign immunity provides to federally recognized tribal governments. *Bay Mills Indian Community*, 572 U.S. at 788-89. In light of Supreme Court precedent, the Ninth Circuit employs "a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

A waiver of tribal sovereign immunity may not be implied from the tribe's actions, "but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59. *See also Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *C & B Invs. v. Wis. Winnebago Health Dept.*, 198 Wis.2d 105, 108, 542 N.W.2d 168, 169 (1995) ("a surrender of sovereign immunity by a nation must be advertent.").

Further, any purported waiver must be duly authorized as a matter of tribal law. The person or entity that allegedly waived the immunity must have the authority to waive that immunity. *United States v. USF&G*, 309 U.S. 506, 513 (1940); *Hydrothermal Energy Corp. v. Fort Bidwell*, 170 Cal. App. 3d 489, 496 (Cal. App. 1985); *MM&A Productions v. Yavapai Apache Nation*, 234 Ariz. 60, 316 P.3d 1248 (Ariz. App. 2014); *Harris v. Lake of the Torches Resort*, 2015 WL 1014778 (Wisc. App. March 10, 2015) (An attorney's attestations in court are insufficient to waive tribal immunity unless the attorney is duly authorized under tribal law to do so). The

Guidiville Indian Rancheria Constitution vests the Guidiville Tribal Council, as the governing body of the Tribe, with the sole authority to waive the Tribe's sovereign immunity. *See* Duncan Declaration at 2, ¶¶ 8-9 (ER II, 96, Doc. 45-1). The Guidiville Tribal Council has not waived the Tribe's sovereign immunity regarding SPRAWLDEF' claims. *Id.* at 2, ¶ 11.

2. The District Court improperly found that the Tribe's execution of the Settlement Agreement in the *Guidiville* action constitutes an effective waiver of the Tribe's immunity from SRAWLDEF's Petition.

The District Court reasoned that the Tribe waived its sovereign immunity by signing the Settlement Agreement and Stipulated Judgment:

> Here, the Tribe previously invoked the jurisdiction of this Court by entering into the settlement agreement and stipulated judgment in the Guidiville Rancheria action. The terms of the agreement state, in pertinent part,
>
> > 47. The Court shall retain jurisdiction over this Action to enforce the terms of this Judgment. To avoid doubt, this Judgment applies to and is binding upon the Tribe and Upstream and the City, and their respective heirs, successors, assigns and future councils for the City and the Tribe. Consistent with settled law, any change in the composition of the City Council for the City shall not alter the City's obligations under this Judgment.
>
> (AR 5101, Settlement Agreement and Stipulated Judgment, ¶ 47.) The petition herein is a collateral challenge to the enforceability of that judgment on the grounds that the City did not have proper authority to enter into it at the time due to the public entity notice requirements in the Brown Act. The instant action falls within this Court's jurisdiction to modify and enforce the stipulated judgment. The Tribe expressly submitted to the Court's continued jurisdiction to enforce, and

> implicitly to modify, the judgment under the terms of the settlement agreement. The Court therefore finds that the Tribe's waiver of its immunity was clear for purposes of the instant action.

June 19, 2019 Order at 5-6 (ER I, 5-6, Doc. 59).

The Tribe does not take issue with the District Court's continuing jurisdiction over the Judgment – indeed it embraces such jurisdiction to resolve any future disputes between the City of Richmond, the Tribe and/or Upstream, the parties to the Settlement Agreement / Stipulated Judgment. Any waiver of sovereign immunity contained in the Settlement Agreement / Stipulated Judgment, however, is to be narrowly construed and is subject to the presumption against waivers and the canons of construction set forth above.

3. The District Court erred in finding an effective waiver of the Tribe's sovereign immunity from unconsented lawsuits.

The District Court identifies four cases from which it extrapolates that the Tribe has waived its immunity to SPRAWLDEF's lawsuit. All four cases are inapposite.

Two of the cases, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) and *Kenneth H. Hughes, Inc. v. Aloha Tower Dev. Corp.*, 654 F. Supp. 2d 1142 (D. Haw. 2009), found effective waivers in contractual provisions, which provide that disputes will be resolved by binding arbitration. *C & L Ent.,* 532 U.S. at 418; *Aloha Tower*, 654 F.Supp.2d at 1149 – 50. There is no such comparable language in the Judgment. More importantly, the

waiver at issue was limited to the parties of the contracts at issue. *C & L Ent.,* 532 U.S. at 411; *Aloha Tower*, 654 F. Supp. 2d at 1145.

Two of the cases, *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 2019), and *In re White*, 139 F.3d 1268 (9th Cir.1998), correctly noted that tribes, by affirmatively invoking the jurisdiction of the federal courts, are subject to and bound by any adverse judgment in that litigation. *Oregon*, 657 F.2d at 1015; *White*, 139 F.3d at 1271. This Court has since clarified that *White* is to be narrowly applied only to the claims over which the sovereign invoked the Court's jurisdiction. *In re Pegasus Gold Corp*., 394 F.3d 1189 (9th Cir. 2005).

The Tribe acknowledges that its bringing litigation against the City of Richmond subjects the Tribe to being bound by any adverse judgment in that litigation, but this appeal is brought in separate litigation by SPRAWLDEF, which were NOT parties to that litigation. Indeed, SPRAWLDEF sought to intervene in the *Guidiville* action (ER II, 117, Doc. 45 at 17), which motion was denied "for failure to address standing to intervene." *Id.*

While the *Oregon* litigation was still pending, the parties to the *Oregon* litigation (the United States, Oregon, Washington and the Yakama Nation) entered into a conservation agreement wherein the District Court retained post-judgment jurisdiction to modify its decree (an *in rem* decree regarding the Court's constructive custody of anadromous salmon), 657 F.2d at 1010. Notably, the waiver was applied

to a post-judgment motion brought by a party to the lawsuit, the State of Washington, *Id.* at 1011, not by a non-party plaintiff in a separate lawsuit. Washington State had intervened in the litigation, and thereafter, signed onto the conservation agreement. *Id.* In sharp contrast, SPRAWLDEF sought intervention in the *Guidiville* action, after the Settlement Agreement/ Stipulated Judgment was entered, and lost and/or abandoned their efforts to intervene. None of the entities within SPRAWLDEF or SPRAWLDEF itself are signatories to the Settlement Agreement / Stipulated Judgment at issue.

The District Court cites to *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) for the general proposition that a tribe's waiver of its immunity in the filing of litigation is not a waiver as to related matters. June 19, 2019 Order at 4 (ER I, 4, Doc. 59). *McClendon* reveals *Oregon's* inapplicability to the circumstances here. The tribe in *McClendon* filed a lawsuit to resolve the ownership status of certain land, which litigation was resolved by a settlement agreement amongst the parties, and which settlement included an agreement by the tribe to lease the land to certain parties. 885 F.2d at 628. Subsequently, that lease was assigned to McClendon, who thereafter sued both the tribe and the United States over a dispute regarding the lease. McClendon, relying on the decision in *Oregon*, argued that the tribe waived its immunity by initiating the initial lawsuit and by agreeing to the terms of the Stipulated Judgment. *Id.* The *McClendon* court refused to extend *Oregon* to

find the required waiver:

> The rationale of *United States v. Oregon* does not extend to this case. The 1972 action merely sought a declaration of land ownership. Unlike the initial action in *United States v. Oregon*, no ongoing equitable remedy was necessary; there was no res over which the district court had to maintain control in order to do equity. By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question. The initiation of the suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation, such as interpretation or enforcement of the lease agreement. See *Jicarilla Tribe,* 821 F.2d t 539-40.[3]. We conclude that disputes over interpretation of the 1984 lease agreement are collateral disputes, and
> are not so inextricably linked with the 1972 suit that initiation of the latter, in itself, constitutes consent to suit over the former.

McClendon, 885 F.2d at 631; *see also Metropolitan Water Dist. Of Southern California*, 830 F.2d 139 (9th Cir. 1987) (court's retained jurisdiction over water rights in litigation involving the United States did not constitute waiver of sovereign immunity to subsequent claims brought by third parties, not parties to the initial lawsuit); *People v. Bontrager*, 407 P.3d 1235, 1252 (Colo. 2017) (affirming disciplinary action taken against Colorado attorney for suing Ute Mountain Indian Tribe on theory that tribe waived its immunity by entering into settlement agreements to which his client was neither a party nor an expressed third-party beneficiary).

Notably, the District Court does not cite a single case where a contractual

[3] Full citation, *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987).

waiver extended to non-parties. A thorough canvas of the rich body of case law regarding waivers of tribal immunity fails to reveal a single case where immunity extended to subsequent litigation brought by unnamed non-parties, except where the waiver at issue expressly states that it is intended to apply and extend to certain third parties. That bears repeating: a thorough canvas of the rich body of case law regarding waivers of tribal immunity fails to reveal a single case where immunity extended to unnamed non-parties except where the waiver at issue expressly states that it is intended to apply and extend to certain third parties. Perhaps SPRAWLDEF will find such a case and inform this Court of its existence, but given the contrary case law below, that is doubtful. The closest case found by the Tribe is *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803 (7th Cir. 1993), which found that the tribal charter of a tribal corporation expressly waived its immunity to "with respect to *any written contract* entered into by the Corporation." *Id.* at 812 (emphasis added). No such analogous express language is present here.

A waiver of immunity regarding disputes between parties to a contract does not extend to claims brought by others, despite the fact that the claims are related to the contract that contains an immunity waiver. *See Orff v. United States*, 358 F.3d 1137, 1146 - 48 (9th Cir. 2004), *aff'd on other grounds*, 545 U.S. 596 (2005); *Marable v. United States*, 2017 WL 6541021 at *6 (S.D. Cal. 2017)("a putative third party beneficiary must demonstrate an intent of the contracting parties to grant it

enforceable rights") (emphasis in original); *Goosebay Homeowners Ass'n, LLC, v. Bureau of Reclamation,* 2013 WL 1729261 at *5, n.7 (D. Mont. 2013); *Slack v. Washington Metropolitan Area Transit Authority*, 325 F. Supp. 3d 146, 154 (D. D.C. 2018); *Meyer v. Accredited Collection Agency*, 2016 WL 379742 at *4 (S.D. Miss. 2016) (finding no waiver by the Guidiville Band to claims by entities not parties to a contract that contained an express waiver). *See also Vann v. Kempthorne*, 534 F.3d 741, 748 (D.C. Cir. 2008) (reversing district court, which had found treaty impliedly waived the Cherokee Nation's sovereign immunity to claims by third parties under the Thirteenth Amendment). There is no basis to extend the limited waiver to claims by entities not parties to the Settlement Agreement and Stipulated Judgment, such as SPRAWLDEF.

Even where the adverse party claims it is a third-party beneficiary to a contract containing an immunity waiver, federal courts have refrained from extending the waiver, except where there is an express statement of intent by the sovereign that the waiver extend to such third parties. *Bell v. City of Lacey*, 2019 WL 2578582 at *2 (W.D. Wash. 2019); *Martin v. Quapaw Tribe of Oklahoma*, 2013 WL 5274236 at *2-3 (N.D. Okla. 2013); *Muscogee (Creek) Nation v. Smith*, 940 P.2d 498, 500-501(1997) (insurance contract expressly provided that claimants may enforce contract between insurer and tribe); *see also Smith v. Central Arizona Water Conservation Dist*., 418 F.3d 1028, 1035-1036 (9th Cir. 2005); *Wilson v. Umpqua*

Indian Development Corp., 2017 WL 2838463 at*5 (D. Ore. 2005)(even where contract does provide express immunity waiver against certain third-parties, that waiver does not extend to unnamed third-parties).

There has been more development on the analogous issue of whether a foreign sovereign has waived its immunity to be sued in United States courts. In *Raccoon Recovery, LLC v. Navoi Mining and Metallurgical Kombinat*, 244 F.Supp. 1130 (D. Colo. 2002), the district court refused to find that the foreign country filing a lawsuit against one set of defendants constituted a waiver to actions by non-parties over the same subject matter. *Id.* at 1139 ("Even if the court were inclined to find an implied waiver as to the 1994 litigation initiated against the Benton defendants, a request to extend such a waiver to third parties, as in this case, should be rejected").

Similarly, most every court facing the analogous issue has refused to find a contractual waiver of foreign governmental or sovereign immunity to extend to non-parties. *See, e.g.*, *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014); *Cargill International v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2nd Cir. 1993); *Turan Petroleum, Inc. v. Ministry of Oil and Gas of Kazakhstan*, 2019 WL5704478 at *6 (D.D.C. 2019); *Heroth v. Kingdom of Saudi Arabia*, 565 F.Supp.2d 59, 65 (D. D.C. 2008); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 25 (D. D.C. 1999); *Zernichek v. Petroleos Mexicanos (Pemex)*, 614 F.Supp. 407, 411 (S.D. Tex. 1985); *Fir Tree Capital Opportunity Capital Fund LP. V. Anglo Irish*

Bank Corp., 2011 WL 6187077 at * 8-11 (S.D.N.Y. 2011); *Human Rights in China v. Bank of China*, 2005 WL 1278542 at *6 (S.D.N.Y. 2005); *Napalitano v. Tishman Construction Corp*., 1998 WL 102789 at *2 (E.D.N.Y. 1998). When the case involves an implied waiver, courts are even more hesitant to extend the waiver in favor of third parties. *Cargill*, 991 F.2d at 1017. Such a waiver will not be implied absent strong evidence of the sovereign's intent. *Cargill*, 991 F.2d at 1017; *Maritime Ventures Int'l, Inc., v Caribbean Trading & Fidelity, Ltd.*, 689 F.Supp. 1340, 1351 (S.D.N.Y. 1988); *Human Rights in China,* 2005 WL 1278542 at *6.

The District Court's reasoning that "the petition herein is a collateral challenge to the enforceability of that (April 12, 2018 Settlement and Stipulated) Judgment," and that the Tribe consented "implicitly to modify" the Judgment, June 19, 2019 Order at 5-6 (ER I, 5-6, Doc. 59), runs counter to the overwhelming tide of case law and the rationale set forth above. The waiver in the Settlement Agreement / Stipulated Judgment allows the parties to the Settlement Agreement / Stipulated Judgment to seek to enforce its terms, but nothing therein comes remotely close to providing the required express statement that the waiver applies to a third-party, much less an assembly of environmental groups challenging whether the City of Richmond violated California's open meeting laws.

CONCLUSION

No party to the April 12, 2018 Settlement Agreement / Stipulated Judgment seeks to modify the Judgment beyond the amendments set forth in the November 19, 2019 Amended Stipulated Judgment. The Amended Stipulated Judgment renders the instant appeal moot such that an order of vacatur should issue. The City of Richmond and Upstream, both parties to the April 12, 2018 Settlement Agreement / Stipulated Judgment, are able to sue the Tribe regarding the Settlement Agreement, but the immunity waiver contained therein does not extend to SPRAWLDEF or any third party.

The District Court's Order of June 19, 2019 should be vacated and the matter should be remanded to the District Court with instructions to dismiss SPRAWLDEF's Petition.

Dated: December 16, 2019

s/ Scott Crowell

SCOTT CROWELL *(pro hac vice)*
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336
Tel: (425) 802-5369
Fax: (509) 235-5017
scottcrowell@clotag.net

SARA DUTSCHKE SETSHWAELO
CA Bar. No. 244848
KAPLAN KIRSCH ROCKWELL
595 Pacific Ave., Fl. 4

San Francisco, CA 94133-4685
Tel: (628) 209-4152
Fax: (303) 825-7005
ssetshwaelo@kaplankirsch.com

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that *GUIDIVILLE RANCHERIA OF CALIFORNIA, et al v. UNITED STATES, et al*, 704 Fed. Appx. 655 (9th Cir. 2017) is related to this appeal. Also, the District Court has identified that case on remand *Guidiville Rancheria et. al v. United States et. al.*, CV 12-1326-YGR to be a related case to this case below.

Date: December 16, 2019

s/ Scott Crowell
SCOTT CROWELL
Crowell Law Office-Tribal Advocacy Group
1487 W. State Route 89A,Suite 8
Sedona, AZ 86336
Tel.: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@clotag.net

Attorney for Respondent-Appellant Guidiville Rancheria of California

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Cir. R. 32-1 because this brief contains 5, 206 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 proportionately spaced typeface using Mac Word 2011, Times New Roman 14-point font.

Date: December 16, 2019

Crowell Law Office-Tribal Advocacy Group

s/ *Scott Crowell*
SCOTT CROWELL

Attorney for Respondent-Appellant
Guidiville Rancheria of California

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on December 16, 2019, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 16, 2019

Crowell Law Office-Tribal Advocacy Group

s/ *Scott Crowell*
SCOTT CROWELL

Attorney for Respondent-Appellant
Guidiville Rancheria of California