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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

STILLAGUAMISH TRIBE OF INDIANS,

Plaintiff,

v.

STATE OF WASHINGTON and ROBERT  
W. FERGUSON,

Defendants.

CASE NO. 3:16-cv-05566-RJB

ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT

This matter comes before the Court on cross motions for summary judgment filed by the defendants, State of Washington and Robert W. Ferguson (“the State”) (Dkt. 26) and the plaintiff, Stillaguamish Tribe of Indians (“the Tribe”) (Dkt. 28). The Court has considered the pleadings filed by the parties, oral argument held on August 4, 2017, and the remainder of the file herein.

The primary—and ultimately dispositive—issue before the Court is the enforceability of a sovereign immunity waiver in a contract, Salmon Project Agreement 04-1634, which was signed by Mr. Pat Stevenson, an employee and non-member of the Tribe. For the reasons

1 discussed below, the Court finds that summary judgment should be granted against the State and  
2 in favor of the Tribe, because the Tribe did not unequivocally waive its sovereign immunity.

### 3 FACTS

4 The parties agree that the facts are largely undisputed. All facts recited are either agreed  
5 or unrefuted by the record.

#### 6 **A. The Tribe, its constitution, and governing body.**

7 The Stillaguamish Tribe of Indians Tribe gained federal recognition in 1976. The Tribe is  
8 governed by its Constitution. Dkt. 27-2 (Decl. Latsinova, Ex. B). Under Article VII of the  
9 Tribe’s constitution, a six-member Board of Directors has “power and duties” “includ[ing] but  
10 not limited” to the following:

11 (b) To administer the affairs and assets of the tribe including tribal lands, funds,  
12 minerals, timber, water rights, fishing rights, and other resources under  
appropriate contracts, leases, permits, loans, or sale agreements.

13 (f) To negotiate with and represent the tribe before Federal, State, tribal, and local  
14 governments and their departments and agencies, and to advise and consult with  
representatives of the Department of the Interior of all activities of the  
15 Department that may affect the Stillaguamish Tribe.

16 (g) To appoint necessary committees.

17 (h) To have and exercise such other powers and authority necessary to fulfill its  
18 obligations, responsibilities, objectives, and purposes as the governing body of the  
tribe, except as limited by other provisions of this Constitution. . .

19 *Id.* The constitution gives the Chairperson of the Board “any authority delegated to him/her by  
20 the Board of Directors.” Dkt. 27-2 (Decl. Latsinova, Ex. B. Dkt. 27-2).

21 Mr. Shawn Yanity was Chairperson of the Board from 2004 to 2009 and 2010 to present.  
22 Dkt. 29 at 1, 2 (2<sup>nd</sup> Decl. Yanity, ¶¶1, 4). At the relevant time during 2005, Mr. Edward  
23 Goodridge, Jr. was Vice-Chairperson of the Board and the Tribe’s Executive Director. Dkt. 10 at  
24 ¶5 (Decl. Yanity).

1 **B. Salmon Project Agreement No. 04-1634 and the Centennial Grant**

2 Mr. Stevenson has been the Tribe’s Environmental Engineer for approximately 30 years.  
3 Mr. Stevenson is not an enrolled member of the Tribe and is therefore not eligible to be a  
4 Director. Dkt. 10 at ¶5 (Decl. Yanity). On April 6, 2005, Mr. Stevenson signed Salmon Project  
5 Agreement No. 04-1634. Dkt. 27-1 (Decl. Latsinova, Ex. B).

6 There is no written record, either in the form of Board meeting minutes or resolutions,  
7 that the Board considered Salmon Project Agreement No. 04-1634. Dkt. 31 (Decl. Connolly, ¶¶2,  
8 3). Mr. Stevenson testified that he “approached the executive director of the Tribe . . . Ed  
9 Goodridge, Jr.” about signing the agreement. Mr. Goodridge instructed Mr. Stevenson to sign the  
10 agreement because, per Mr. Stevenson, “it was to the point of I’m not going to be around for the  
11 next week, to go ahead and sign it.” Dkt. 27-13 at 7, 8 (Decl. Latsinova, Ex. M, 88-17-89:3).  
12 The Chairperson, Mr. Yanity, was apparently also absent. *See* Dkt. 27-13 at 11 (Decl. Latsinova,  
13 Ex. M, 104:9).

14 Salmon Project Agreement No. 04-1634 (Dkt. 27-1, Decl. Latsinova, Ex. A) sets out  
15 contractual obligations of the Tribe and the Salmon Recovery Funding Board (SRFB), the entity  
16 responsible for administering the Salmon Funding Accounts for the State of Washington. In  
17 consideration for a state grant of \$497,000, the Tribe, referred to in the agreement as the  
18 “Sponsor,” was to execute a project entitled, “Steelhead Haven Landslide Remediation.”

19 Two sections of Salmon Project Agreement No. 04-1634 are pertinent to this case.  
20 Section 5, the indemnification clause, provides:

21 To the fullest extent permitted by the law, the Sponsor expressly agrees to and  
22 shall indemnify, defend and hold harmless the State . . . against all claims, actions,  
23 costs, damages, or expenses of any nature arising out of or incident to the  
24 Sponsor’s or any Contractor’s performance or failure to perform the Agreement.

*Id.* Section 41, which could be referred to as the waiver clause, provides:

1 In the cases where this agreement is between the Funding Board and a federally  
2 recognized Indian tribe, the following Governing Law/Venue applies:

- 3 A. The State of Washington agrees that it shall initiate any lawsuit . . . in  
4 Federal Court. Interpretation shall be according to the law of the State  
5 of Washington. . . The parties agree to venue in Thurston County  
6 Superior Court [in the event that the Federal Court lacks subject matter  
7 jurisdiction].
- 8 B. Any judicial award, determination, order, decree or other relief,  
9 whether in law or equity or otherwise, resulting from the action shall  
10 be bending and enforceable. Any money judgment against the Tribe,  
11 tribal officers and members, or the State of Washington . . . may not  
12 exceed the amount provided for in Section F—Projecting Funding of  
13 the Agreement.
- 14 C. The Tribe hereby waives its sovereign immunity as necessary to give  
15 effect to this section, and the State of Washington has waived its  
16 immunity to suit in state court. These waivers are only for the benefit  
17 of the Tribe and State and shall not be enforceable by any third party[.]

18 *Id.*

19 Mr. Stevenson managed the Steelhead Haven Landslide Remediation project, which took  
20 several years to complete, on behalf of the Tribe. The SRFB funds were matched with a grant  
21 from the Washington Department of Ecology (“the Centennial Grant”). Dkt. 27-18 (Decl.  
22 Latsinova, Ex. R). The then-Chairman, Mr. Yanity, signed the corresponding agreement on April  
23 18, 2005. *Id.* at 17. According to Mr. Stevenson, unlike Salmon Project Agreement 04-1634, Mr.  
24 Yanity was available to sign the Centennial Grant, “so I just had him sign it.” Dkt. 27-13 at 11  
(Decl. Latsinova, Ex. M, 104:9). Similar to Salmon Project Agreement No. 04-1634, the  
Centennial Grant has an indemnification clause, but unlike the agreement, the Centennial Grant  
does not have any immunity waiver clause comparable to Section 41. *Id.*

Approximately a year before signing Salmon Project Agreement 04-1634, Mr. Stevenson,  
as the Authorized Representative of the Tribe, submitted an Application Authorization  
Memorandum to the SRFB. Dkt. 27-16 at 2 (Latsinova Ex. P). The memorandum authorizes the

1 SRFB to “consider this application for financial assistance for the [Steelhead Haven Landslide  
2 Remediation Project].” *Id.* Under the memorandum, the Tribe “agree[s] to cooperate with the  
3 SRFB by furnishing such additional information as may be necessary to execute a SRFB Project  
4 Agreement[.]” *Id.*

### 5 **C. Board Resolutions.**

6 The parties have filed multiple Board resolutions as exhibits, but only three need closer  
7 examination.

#### 8 1. Resolution 1998/41.

9 Dated July 7, 1998, Resolution 1998/41 provides in part:

10 NOW THEREFORE BE IT RESOLVED:

- 11 1. The Stillaguamish Council hereby designates WRIA 5 as the  
12 geographic area for which a habitat restoration project list is to be  
developed. . .
- 13 2. Snohomish County and Stillaguamish Tribal Board of Directors are  
14 hereby designated as the lead entities to submit any such habitat  
restoration project lists and to seek lead entity grants that may be  
available to fulfill ESHB 2496 [Salmon Recovery Act] requirements.

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

18 (Decl. Latsinova, Ex. N). Resolution 1998/41 appears to have been attached to Centennial Grant  
19 or a related amendment thereof. Dkt. 27-18 at 30, 31 (Decl. Latsinova, Ex. R). No resolution was  
20 attached to Salmon Project Agreement No. 04-1634.

#### 21 2. Resolution 2004/65.

22 Dated August 31, 2004, Resolution 2004/65 designates Mr. Stevenson and John Drotts to  
23 be the Tribe’s “authorized representative to obtain federal and/or state emergency or disaster  
24 assistance funds.” Dkt. 27-17 (Decl. Latsinova, Ex. Q). Further, “[t]his representative is

1 authorized . . . to execute all contracts, certify completion of projects, and prepare all required  
2 documentation for funding requirements.” Dkt. 27-17 (Decl. Latsinova, Ex. Q).

3 According to Mr. Stevenson, “Resolution 2004/65 . . . has nothing to do with salmon or  
4 salmon habitat,” and instead relates to damage relief from an office flood in Fall of 2003. Dkt. 34  
5 at 2 (2nd Decl. Stevenson, ¶¶3, 4). Relatedly, a letter to the Tribe dated August 4, 2004, from  
6 State of Washington Emergency Management Division of the Military Department, requests  
7 completion of an application pursuant to the Tribe’s “interest in pursuing your eligibility for  
8 reimbursement for disaster recovery costs related to the October 2003 floods.” Dkt. 36-1 at 4  
9 (Decl. Roy Smith, Ex. A). A partially completed form designates Mr. Drotts and Mr. Stevenson  
10 as agents for the Tribe with the purpose “to obtain federal and/or state emergency or disaster  
11 funds.” *Id.* at 6.

12 3. Resolution 2010/142 and other resolutions.

13 Dated October 26, 2010, Resolution 2010/142 provides in part:

14 NOW THEREFORE BE IT RESOLVED that the [Tribe] . . . hereby restates and  
15 affirms the long-standing Tribal-Policy that any and all limited waivers of the  
16 Tribe’s sovereign immunity, whether in contracts, agreements, permits, leases,  
17 intergovernmental compacts, grants awards, or other instruments shall be granted  
18 only by the Board of Directors, shall be in writing and shall be memorialized in  
19 the official records of the Board of Directors.

20 . . .

21 BE IT FURTHER RESOLVED, that employees . . . shall have no authority to  
22 bind the Tribe through written instruments that contain limited waivers of  
23 sovereign immunity[.]

24 Dkt. 27-22 (Decl. Latsinova, Ex. V). According to Mr. Yanity, who signed Resolution 2010/142,  
“during [his] time on the Tribe’s Board, it has had a practice of authorizing limited waivers of  
the Tribe’s sovereign immunity through written Board resolutions.” Dkt. 29 at 1, 2 (2<sup>nd</sup> Decl.  
Yanity, ¶¶1, 4).

1 The record does not contain any Board meeting minutes prior to Resolution 2010/142  
2 that contain both the content of a sovereign immunity waiver and evidence of a Board resolution  
3 or vote on the issue. On more than one occasion, however, the Board voted to adopt contracts  
4 that included waivers of sovereign immunity, where entire contracts were attached to meeting  
5 minutes. Dkt. 27-4 through Dkt. 27-11, Dkt. 27-14, Dkt. 27-17 (Decl. Latsinova, Ex. D-K, N, Q).  
6 Since the adoption of Resolution 2010/142, the Board has on at least one occasion expressly  
7 voted to waive sovereign immunity and included the content of the waiver in its meeting  
8 minutes. Dkt. 27-24 (Decl. Latsinova, Ex. X).

### 9 LEGAL STANDARDS

#### 10 **A. Summary Judgment.**

11 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
12 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
13 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is  
14 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
15 showing on an essential element of a claim in the case on which the nonmoving party has the  
16 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
17 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for  
18 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
19 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some  
20 metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a  
21 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
22 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby*,

1 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
2 *Association*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The court  
4 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
5 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*  
6 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor  
7 of the nonmoving party only when the facts specifically attested by that party contradict facts  
8 specifically attested by the moving party. The nonmoving party may not merely state that it will  
9 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial  
10 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
11 Conclusory, nonspecific statements in affidavits are not sufficient, and “missing facts” will not  
12 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

13 **B. Waiver of Sovereign Immunity.**

14 As “quasi-sovereign nations,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978),  
15 Indian tribes are generally immune from suit. Tribal immunity is “needed to safeguard tribal self-  
16 governance” and to “promote economic development and tribal self-sufficiency.” *Kiowa Tribe v.*  
17 *Mfg. Techs., Inc.*, 523 U.S. 751, 757-58. There are two exceptions: “where Congress has  
18 authorized the suit or the tribe has waived its immunity.” *Id.* at 754. Under either exception,  
19 sovereign immunity can only be waived with requisite clarity. *C & L Enterprises, Inc. v. Citizen*  
20 *Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). Waiver “cannot be  
21 implied but must be unequivocally expressed.” *Id.* at 58.

22 DISCUSSION



1 **A. By its own terms, does Salmon Project Agreement No. 04-1634 clearly waive the Tribe’s**  
2 **sovereign immunity?**

3 At oral argument the Tribe conceded that Salmon Project Agreement No. 04-1634, if  
4 binding on Tribe, is sufficiently clear to waive sovereign immunity. The Court agrees. Section 5  
5 and Section 41 to the agreement support this conclusion. Under Section 41, the waiver clause,  
6 “[a]ny judicial award . . . shall be binding and enforceable” and that “[t]he Tribe hereby waives  
7 its sovereign immunity as necessary to give effect to this section[.]” Under Section 5, the  
8 indemnity clause, “[t]o the full extent permitted by law, the Sponsor expressly agrees to and shall  
9 indemnify, defend and hold harmless the State.” The terms of the agreement are not ambiguous.  
10 Together these provisions have the requisite clarity that Salmon Project Agreement No. 04-1634,  
11 if binding on the Tribe, waives the Tribe’s sovereign immunity.

12 **B. Did Mr. Stevenson, an employee and non-member of the Tribe, have the authority to**  
13 **sign Salmon Project Agreement No. 04-1634 and waive sovereign immunity on behalf of**  
14 **the Tribe?**

15 The primary question is whether Mr. Stevenson’s action signing Salmon Project  
16 Agreement No. 04-1634 on behalf of the Tribe should bind the Tribe to its terms, including the  
17 waiver of sovereign immunity.

18 The Tribe argues that it did not bind itself to the Salmon Project Agreement No. 04-1634  
19 because the Tribe did not, in accordance with its “policy,” waive sovereign immunity in writing  
20 and by resolution or a vote of the Board. In support of the policy that the Tribe maintains was in  
21 effect in 2005, the Tribe points to the declaration of Mr. Yanity, Chairperson, who vouches for  
22 the Tribe’s policy during 2005, and to Resolution 2010/142, which “reaffirms” the Tribe’s prior  
23 use of that same policy during 2005.

1           The State argues that two Board resolutions gave Mr. Stevenson authority to sign Salmon  
2 Project Agreement No. 04-1634 and waive the Tribe’s sovereign immunity: Resolution 1998/41  
3 and 2004/65. Dkt. 26 at 17-20. Regarding Resolution 1998/41, the State points to the delegation  
4 of power, made without limitation to the Tribe’s Chairperson, Vice-Chairperson, and Executive  
5 Director, to “negotiate and execute” the resolution and “to submit any . . . habitat restoration  
6 project list and to seek lead entity grants that may be available.” *Id.* Regarding Resolution  
7 2004/65, the State points to language authorizing Mr. Stevenson to “execute all contracts . . . and  
8 prepare all required documentation” in connection with emergency or disaster assistance funds,  
9 where Mr. Stevenson testified that salmon recovery had reached a state of “emergency.” *Id.*

10           The State also argues that the Tribe should be estopped from arguing that it had a policy  
11 of waiving sovereign immunity prior to Resolution 2010/142, because the Tribe litigated the  
12 same issue in *Pilchuck II*, 2011 WL 4001088. Dkt. 26 at 14, 15. In the alternative, the State  
13 argues, the Tribe’s actual practice of its self-declared waiver policy prior to Resolution 2010/142  
14 was at best inconsistent and is of no value to determining the Tribe’s pattern or practice, because  
15 the Board routinely approved contracts with waivers but did not memorialize any decision to  
16 adopt the waivers by resolution or meeting minutes. *Id.* at 16, 17.

17           As a starting point, the Court notes that it is undisputed that the Tribe’s constitution gave  
18 the Board, as a unit, the plenary power to waive sovereign immunity. Further, the Court concurs  
19 with the State that the Tribe did not have a consistent practice or defined policy for waiving  
20 sovereign immunity in 2005. Mr. Yanity’s declaration that Resolution 2010/142 “reaffirmed” the  
21 policy existing in 2005 is not supported by the record, where meeting minutes fail to show that  
22 the Board directly considered waiver of sovereign immunity. However, the conclusion that the  
23 Tribe did not have a consistent practice or policy in 2005 should not cut against the Tribe,  
24

1 because there is a strong presumption against waiver of tribal sovereign immunity. *Demontiney*  
2 *v. United States*, 255 F.3d 801, 811 (9<sup>th</sup> Cir. 2001). The tie—or in this case the ambiguity—  
3 should favor the Tribe.

4         The more difficult question is whether the Resolution 1998/41 or Resolution 2004/65  
5 should be construed as authorizing Mr. Stevenson to waive sovereign immunity on behalf of the  
6 Tribe. Regarding Resolution 1998/41, the Tribe apparently interpreted the resolution to at least  
7 generally relate to the Steelhead Haven Landslide Remediation project, because the resolution  
8 was apparently attached to the Centennial Grant, and the Centennial Grant was “synchronized  
9 with” Salmon Project Agreement 04-1634. But even if Resolution 1998/41 gave Mr. Yanity  
10 authority to bind the Tribe to the Centennial Grant, which is contrary to the Tribe’s interpretation  
11 of Resolution 2010/142, Resolution 1998/41 extends authority only to three positions:  
12 Chairperson (Mr. Yanity), Vice-Chairperson (Mr. Goodridge), and Executive Director (Mr.  
13 Goodridge). Mr. Stevenson never held—and was never eligible for—any of the positions.

14         The State argues that “negotiate and execute this resolution” language should be  
15 interpreted to give the Chairperson authority to delegate their authority to any person of their  
16 choice. Not surprisingly, the Tribe rejects this interpretation. The State’s interpretation would  
17 also swallow the explicit limitation found in the resolution itself. The interpretation would render  
18 the phrase, “in her absence the Vice-Chairperson or Executive Director,” superfluous. Further,  
19 Board action elsewhere demonstrates that, at least in 2004, the Board knew how to delegate  
20 authority expressly to Mr. Stevenson. *See* Dkt. 27-17.

21         Furthermore, even if Mr. Yanity was authorized to enter into the Centennial Grant on  
22 behalf of the Tribe under Resolution 1998/41, and it is assumed that Mr. Goodridge could  
23 delegate the same authority to Mr. Stevenson to enter into a similar contract, Resolution 1998/41  
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1 did not delegate the Board’s plenary authority to waive sovereign immunity. No terms of that  
2 resolution could be construed, even broadly, to directly authorize waiver of sovereign immunity.  
3 In the absence of any Board consideration of the issue, the resolution should be construed in  
4 favor of preserving the Tribe’s sovereign immunity. Mr. Yanity’s actions were not to the  
5 contrary when he signed the Centennial Grant. Assuming that he signed the Centennial Grant  
6 under Resolution 1998/41, the record does not show that Mr. Yanity attempted to waive  
7 sovereign immunity, because the Centennial Grant did not contain a waiver provision  
8 comparable to Section 41 of Salmon Project Agreement 04-1634. Resolution 1998/41 does not  
9 show an unequivocal waiver of sovereign immunity by the Tribe.

10 Resolution 2004/65<sup>1</sup> fares no better than Resolution 1998/41. Relying on resolution  
11 language authorizing Mr. Stevenson to “obtain federal and/or state emergency or disaster funds,”  
12 the State leans on Mr. Stevenson’s deposition testimony that salmon habitat recovery was an  
13 “emergency.” The State dismisses the fact that Mr. Stevenson denies that Resolution 2004/65 has  
14 anything do with salmon habitat recovery. According to the State, the Court should focus on  
15 interpreting the plain text of the resolution, which authorized Mr. Stevenson to execute an  
16 agreement for a project to address the “emergency” of salmon habitat recovery.

17 Other than Mr. Stevenson’s acknowledgment that salmon habitat recovery efforts  
18 addressed an “emergency,” which was an answer prompted without context, nothing in the  
19 record supports the State’s expansive interpretation of Resolution 2004/65. The record points to  
20 the opposite, where Mr. Stevenson states that the resolution related to Tribe efforts to secure  
21 relief funds for a flood in 2003. And, like Resolution 1998/41, even if Resolution 2004/65

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24 <sup>1</sup> The Tribe requests sanctions against the State for arguing the applicability of Resolution 2004/65. The request is hereby denied.

1 authorized Mr. Stevenson to enter into a contract generally, there is no evidence that the Tribe  
2 contemplated the resolution to be a blank check for a non-member employee to waive Tribe's  
3 sovereign immunity. Sovereign immunity is a different animal. Unlike other kinds of contract  
4 terms, a waiver of sovereign immunity can have severe jurisdictional consequences. With the  
5 absence of evidence to the contrary, Resolution 2004/65 was not an unequivocal waiver of  
6 sovereign immunity.

7         At oral argument and in its Reply, the State invited the Court to consider several other  
8 cases, mostly of persuasive, not binding, authority. Quoting from *Smith v. Hopland Band of*  
9 *Pomo Indian*, 115 Cal. Rptr. 2d 455, 462 (Cal.Ct. App. 2002), the State argues that because Mr.  
10 Stevenson had authority to sign Salmon Project Agreement 04-1635 generally, "it is assumed  
11 that the authority [to sign an agreement] extends to a waiver of immunity contained in the  
12 agreement." The quote is dicta, and even were it not, to reach the issue of waiver, the *Smith* court  
13 noted not only that "the person negotiating and signing the contract is authorized to do so" but  
14 also the "Tribal Council approves the contract," which is unlike this case, where the Board never  
15 considered the agreement.

16         The State also relies on *Findleton v. Coyote Valley Band of Pomo Indians*, 205 Cal. Rptr.  
17 3d 699, 714 (Ct. App. 2016), which is similarly distinguished. In that case, when faced with the  
18 question of how to interpret an ambiguous constitutional provision regarding waiver, the court  
19 looked to the tribe's conduct, which included a vote by the Tribal Council. *Id.* at 715. In this  
20 case, the Board never expressly considered whether to waive its immunity, and the person who  
21 signed the contract was not authorized to sign contracts generally on behalf of the Tribe, let  
22 alone to waive its sovereign immunity.

1 Another case relied upon by the State is *C & L Enterprises, Inc. v. Citizen Band*  
2 *Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). In *C&L*, the Supreme Court held  
3 that arbitration provisions within a contract constituted a clear waiver of the tribe's sovereign  
4 immunity, whereas in this case, the analysis does not turn on the clarity of the contract provision  
5 itself. (The Tribe concedes the language of waiver.) For the same reason, this case is  
6 distinguishable from *Star Tickets v. Chumash Casino Resort*, where the court's waiver reasoning  
7 relied on the language of an agreement. *Star Tickets v. Chumash Casino Resort*, No. 322371,  
8 2015 WL 6438110, at \*4 (Mich. Ct. App. Oct. 22, 2015).

9 Perhaps the most closely analogous case cited is *Luckerman v. Narragansett Indian*  
10 *Tribe*, 965 F. Supp. 2d 224, 226 (D.R.I. 2013). In *Luckerman*, an attorney sent a letter of  
11 engagement to a tribe's chief that included a term arguably waiving of sovereign immunity and  
12 concluded with a request for the recipient to notify the attorney if they did not understand or  
13 agree with its terms. The tribe relied on the attorney's services and later reneged on paying the  
14 attorney's fees by invoking sovereign immunity. *Id.* The *Luckerman* court concluded that the  
15 Tribe expressly waived sovereign immunity, where the agreement had unequivocal terms and the  
16 Tribe treated the agreement as valid. *Id.* at 228. The court distinguished a long line of cases  
17 standing for the proposition that waiving sovereign immunity cannot be implied from a tribe's  
18 engagement in commercial activity. *Luckerman* is non-binding, and in the view of this Court, its  
19 reasoning is suspect. It appears the court was attempting to fit an equitable result into a sovereign  
20 immunity hole. Even so, the case is distinguishable because of who purportedly held the  
21 authority: in *Luckerman*, the chief; in this case, Mr. Stevenson, a non-member and employee of  
22 the Tribe.

1 In summary, by its own terms Salmon Project Agreement 04/1635 clearly waives the  
2 Tribe's sovereign immunity, but the agreement is not binding on the Tribe. The agreement was  
3 not entered into with the requisite authority, because neither the Tribe's constitution, prior  
4 policies and practices, nor any resolution delegating the Board's plenary waiver power show an  
5 unequivocal waiver of sovereign immunity. Therefore, on the issue of waiving sovereign  
6 immunity, summary judgment should be granted against the State and in favor of the Tribe.

7 Because the Court finds that the Tribe did not waive its sovereign immunity, the Court  
8 does not reach the State's equitable arguments. "This result may seem unfair, but that is the  
9 reality of sovereign immunity[.]" *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*,  
10 585 F.3d 917, 922 (6<sup>th</sup> Cir. 2009).

11 The State at oral argument agreed that a finding for the Tribe on the issue sovereign  
12 immunity would effectively end the case. Therefore, by Friday, August 18, 2017, the parties  
13 should show cause, if any they have, why the case should be not be dismissed.

14 \* \* \*

15 THEREFORE, Defendant State of Washington and Robert W. Ferguson's Motion for  
16 Summary Judgment (Dkt. 26) is HEREBY DENIED. Plaintiff Stillaguamish Tribe of Indians'  
17 Motion for Summary Judgment (Dkt. 28) is HEREBY GRANTED.

18 The parties shall show cause, if any they have, by Friday, August 18, 2017, why the case  
19 should not be dismissed.

20 It is so ordered.

21 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
22 to any party appearing pro se at said party's last known address.  
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1 Dated this 9<sup>th</sup> day of August, 2017.

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3 ROBERT J. BRYAN  
4 United States District Judge

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