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DIVISION ONE

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NO. 67050-6-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

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APPELLANT'S REPLY BRIEF

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I. REPLY

Outsource Services Management (“OSM”) never met its burden to establish subject-matter jurisdiction in Washington courts of its claims against the Nooksack Business Corporation (“NBC”). OSM does not directly defend the trial court’s faulty reasoning that the Nooksack Tribe could consent to subject-matter jurisdiction. OSM instead argues that Washington courts have subject-matter jurisdiction that “preexists” the enactment of PL 280 (25 U.S.C. § 1322) because they have subject-matter jurisdiction to hear contract disputes which was not “stripped away” by PL 280. *OSM’s Brief*, p. 17. According to OSM’s view, “[t]he presence of a sovereign tribal entity in this case does not alter the analysis.” *Id.* OSM’s argument sets federal Indian law jurisprudence on its head: PL 280 did not strip away state jurisdiction over Indians and Indian territory, it granted it. In the absence of such a federal grant of authority, a state court lacks any jurisdiction over Indian tribes or tribal members for controversies arising on an Indian reservation. OSM fails to present any authority that Washington courts have jurisdiction over this dispute.

OSM also downplays significant provisions of its agreements with NBC. These provisions establish that OSM wielded control over aspects of management of the Casino, making the agreements “management agreements” unenforceable as a matter of law under IGRA. The limited waiver of sovereign immunity, therefore, may not be enforced. This Court should reverse and require dismissal.

OSM does not dispute that the issues presented in this appeal are subject to *de novo* review. *OSM's Brief*, pp. 15-17. OSM also acknowledges that CR 12(B)(6) motions such as NBC's should be granted where the complaint illustrates "an insuperable bar to relief." *Id.* at 16. The two insuperable bars warranting dismissal are lack of subject-matter jurisdiction and unenforceable waivers of sovereign immunity.

A. **Washington Courts Must Independently Have Subject-Matter Jurisdiction for Any Waiver of Sovereign Immunity to Permit the Lawsuit: OSM Conflates Analysis of Subject-Matter Jurisdiction with Waiver of Sovereign Immunity.**

Washington courts cannot hear the dispute because they lack subject-matter jurisdiction. While OSM is correct that the analysis of sovereign immunity does not turn on the location of tribal activities, it is incorrect in its assertion that if sovereign immunity has been waived, the state court thereby possesses subject-matter jurisdiction. The reason for OSM's argument is clear: it is only by arguing that location does not matter that OSM can escape the preclusive effect of *Williams v. Lee*, 358 U.S. 217 (1959). Notwithstanding OSM's arguments to the contrary, this Court can not dispense with a subject-matter jurisdiction analysis and proceed only to determine the issues concerning waiver of sovereign immunity. Without *both* subject-matter jurisdiction and an effective waiver of sovereign immunity, a state court is powerless to adjudicate a matter brought by a non-Indian plaintiff against a Tribe, involving a controversy arising on an Indian reservation.

Cohen v. Little Six, Inc., an authority on which OSM relies in its

briefing, sets forth the subject-matter jurisdiction analysis that a state must perform *independently* of, and in addition to, the waiver of sovereign immunity analysis. See *Cohen*, at 380-81 (citing *Williams v. Lee*, 358 U.S. 217, 219-20 & n.4, 79 S. Ct. 269, 270 & n.4, 3 L. Ed. 2d 251 (1959)) as cited in Opening Brief, p. 21. The *Cohen* court recognized that an analysis of subject-matter jurisdiction is not limited to sovereign immunity, but *also* requires an independent analysis of the state court's jurisdiction, stating, "While sovereign immunity and lack of subject-matter jurisdiction both deprive courts of the authority to hear certain matters, they differ in that parties may waive the former jurisdictional defect, but not the latter." 543 N.W.2d 376, 378 (Minn. Ct. App. 1996), citing *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05 (8th Cir. 1994). OSM offers no authority that contradicts this analysis based on the *Williams v. Lee* case.

Case law commonly states that whether a tribe has waived its sovereign immunity establishes "subject-matter jurisdiction." See, e.g., *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1018, 1015-16 (9th Cir. 2007) ("[T]ribal immunity precludes subject-matter jurisdiction in an action against an Indian tribe."); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). Such quotations, prominent in OSM's brief such as at pp. 19-20, only tell half the story. Waiver of sovereign immunity is not the *only* consideration to establish subject-matter jurisdiction, especially in state court as

illustrated by *Cohen, supra*, and *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980). Such language should be considered in context. Such courts are only referring to one aspect of subject-matter jurisdiction. To paraphrase the Washington Supreme Court in its recent opinion in *ZDI Gaming, Inc. v. Washington*, No. 83745-7 (January 12, 2012), sometimes when a court uses the word “jurisdiction,” it means something else. *ZDI Gaming, Inc.* at 5 n.3, and 7 - 9. Sometimes when a court uses the word “jurisdiction” in matters involving Indian tribes, it may be referring to forum or venue, or personal jurisdiction. Other times, it may be referring to subject-matter jurisdiction.

This holds true regarding *C & L Enterprises*, which OSM incorrectly cites for the proposition that if there is a waiver of sovereign immunity, the court should be considered to have subject-matter jurisdiction without further analysis. *See, e.g., OSM’s Brief*, pp. 18-19, citing *C & L Enters.*, 532 U.S. 411 (2001). As NBC stated in its Opening Brief, pp. 26-27, the United States Supreme Court in *C & L Enterprises* did not consider the issue of subject-matter jurisdiction. Instead, because the matter involved the installation of a roof on a tribally-owned building located entirely outside the reservation, *Williams v. Lee* is not implicated and the Court’s analysis skipped over the issue of subject-matter jurisdiction and simply addressed the waiver of sovereign immunity. OSM fails to rebut this distinction and demonstrate that the issue was joined in *C & L Enterprises*. *OSM’s Brief*, pp. 18-19. OSM attempts to use *C & L Enterprises* out of context.

OSM cites other cases that also have used *C & L Enterprises* out of context, such as *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007), which OSM cites at page 19. Ironically, while the New Mexico court states it is “taking” *C & L Enterprises* “in context,” it proceeds to quote from numerous cases without regard for whether waiver of sovereign immunity or state court jurisdiction was at issue. *Doe*, 141 N.M. at 651 & n.6. Even with these mistakes, the result in *Doe* is distinguishable from this case because New Mexico premised its jurisdiction on Congressional authority granted by IGRA for state and tribes to allocate criminal and civil jurisdiction between them related to Indian gaming, which the parties had “painstakingly” done. *Id.* at 276 (parties’ compact negotiated pursuant to IGRA, 25 U.S.C. § 2710(d)(3)(c)(i) and (ii), was “a comprehensive compact, entered into in furtherance of federal legislation, and painstakingly negotiated between the tribes and the states, in which the tribes conceded state court civil jurisdiction in exchange for substantial benefits”); *see also id.* at 281 (IGRA authorized the “jurisdiction shifting” in the compact). Where an applicable federal statute has authorized the subject-matter jurisdiction, as in *Doe*, NBC agrees subject-matter jurisdiction exists. That is not the case here.

Washington case law requires an analysis of subject-matter jurisdiction and holds that such jurisdiction cannot be conferred by agreement. *See Opening Brief*, citations at pp. 15-16. OSM cites no authority to the contrary. It distinguishes only two of the cases cited by NBC, leaving the rest unchallenged. *See OSM’s Brief*, p. 17 n.4,

distinguishing *Skagit Surveyors* and *Barnett v. Hicks*, but failing to address *Dougherty*, *Wesley*, or *Voicelink*. Washington courts, moreover, have never held that a waiver of sovereign immunity alone can establish subject-matter jurisdiction in its courts over Indians or tribes or causes of action arising in Indian country. The United States Supreme Court has never so held. In *Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971), the Supreme Court disavowed concurrent jurisdiction in state court notwithstanding tribal consent where the state and tribe had not complied with PL 280. OSM's argument that this Court need not inquire into its subject-matter jurisdiction is not persuasive in light of the bedrock principle that state courts, including Washington's, must have subject-matter jurisdiction to hear a cause of action, which jurisdiction cannot be conferred by agreement. This Court must examine whether subject-matter exists, and only if it does would the Court examine whether there was a waiver of sovereign immunity.

B. Washington Courts Lack Subject-Matter Jurisdiction Over This Lawsuit.

This Court should find that Washington courts lack subject-matter jurisdiction. They lack subject-matter jurisdiction because, though offered by PL 280, such subject-matter jurisdiction has not been implemented by Washington and the Nooksack Tribe. Where such jurisdiction can only be accepted through strict compliance with PL 280, and it is undisputed that this has not occurred, there is no subject-matter jurisdiction. *See Kennerly v. District Court of Montana, supra*. Alternatively, if PL 280 is not

implicated, the Court must determine if the exercise of civil jurisdiction will interfere with reservation self-governance pursuant to *Williams v. Lee*. Because it will, the Court should conclude there is no subject-matter jurisdiction.

1. Where PL 280 offers the necessary subject-matter jurisdiction to Washington courts, but where it is undisputed that such jurisdiction has not been invoked, there is no subject-matter jurisdiction in Washington courts.

PL 280 represents Congress's delegation to Washington (along with other states) of jurisdiction over civil actions arising on Indian lands. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 704, 58 L. Ed. 2d 740 (1979). Contrary to OSM's argument that state courts possess jurisdiction unless it was stripped by PL 280, it is black letter law that state jurisdiction does not extend to Indians in Indian country absent a federal grant of authority, such as the assumption of jurisdiction provided by the PL 280 process. *State v. Williamson*, 211 N.W.2d 182 (1973). In the absence of some other federal statutory grant, a PL 280 state cannot obtain subject-matter jurisdiction in any way other than through compliance with PL 280. *See Kennerly*, 400 U.S. at 424-30 (the Supreme Court disavowed concurrent jurisdiction in state court notwithstanding tribal consent where invocation of jurisdiction had not been accomplished pursuant to PL 280); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 884-85, 887, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

OSM does not dispute that Washington did not fully invoke the offered jurisdiction and failed to assume through PL 280 jurisdiction over civil matters arising on Indian lands involving non-Indians and Indians. The proposition is firmly established by *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, supra* (Washington validly assumed under PL 280 limited jurisdiction over ten specific areas of law). Nor does OSM dispute that the Nooksack Tribe has not consented to Washington's assumption of subject-matter jurisdiction over general civil disputes related to transactions occurring exclusively within the boundaries of the Nooksack Reservation. *State v. Cooper*, 130 Wn.2d 770, 774, 928 P.2d 406 (1996).

Thus, if this controversy is a dispute involving non-Indians and Indians, Washington courts have no jurisdiction. The Court should conclude that the dispute falls within the jurisdiction that could have been conferred by PL 280, and, therefore, there is no subject-matter jurisdiction.

PL 280 grants jurisdiction as follows:

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to

private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

25 U.S.C. § 1322(a) (emphasis added). At the same time, Congress disavowed State jurisdiction over personal property belonging to any Indian or any Indian tribe, as follows:

(b) Alienation, encumbrance, taxation, use, and probate of property. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

25 U.S.C. § 1322(b) (emphasis added).

It is not sufficient for OSM to argue that Washington courts have jurisdiction generally over contract disputes. This sidesteps the issue whether Washington courts have jurisdiction where the dispute arose on the reservation and Indians are involved or where Tribal personal property is involved. OSM argues to this Court that Washington superior courts have jurisdiction based on Article 4, Section 6 of the Washington Constitution which establishes the general jurisdiction of Washington's courts. *OSM's Brief*, p. 21. OSM cites *ZDI Gaming, Inc.*, which has no application here as it does not concern Indian tribes or the relevant statutes

but concerns Washington State's own judicial immunity in an unrelated context. *OSM's Brief*, p. 21. Nor does *ZDI Gaming* stand for the proposition, as OSM asserts, that where any sovereign – including an Indian tribe or even the United States – waives its sovereign immunity, Washington superior courts have “irreducible jurisdiction” to hear cases like this one. *OSM's Brief*, p. 3. *ZDI Gaming* addressed only the waiver of immunity by the state of Washington. Neither Article 4, Section 6 of the Washington Constitution or the *ZDI Gaming* case demonstrates that Washington courts have subject-matter jurisdiction over this dispute.

This Court instead should frame its analysis based on the relevant authorities: 1) the Enabling Act admitting Washington and Article 26 of the Washington Constitution, 2) PL 280, 3) *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), 4) *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980), and 5) *Williams v. Lee*, to determine if Washington courts have jurisdiction of this dispute. These authorities demonstrate that they do not.

The Nooksack Tribe existed as a sovereign government with jurisdiction over its lands and its members long before Washington became a state. Upon admission as a state, Washington disclaimed state authority over Indian lands. This was required by the Enabling Act admitting Washington, see Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, which required the disclaimer of jurisdiction and set forth the affirmative requirement that “said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” *See*

Tonasket v. State, 84 Wn.2d 164, 172, 525 P.2d 744 (1974) (setting forth Enabling Act); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 479-80 n.23, 99 S. Ct. 704, 58 L. Ed. 2d 740 (1979) (same)). A disclaimer was set out in Article 26 of Washington's Constitution (Appendix A attached). It would be incorrect to conclude that, as OSM argues, Article 4, Section 6 of the Washington Constitution pertaining to the superior court's general jurisdiction includes jurisdiction over causes of action that arose on Indian reservations or over Indian lands or property where the Enabling Act and Article 26 rebut the contention. OSM offers no such authority that Washington's general civil jurisdiction extends to this dispute with NBC. If it were so, the considerable federal and state jurisprudence in this area and PL 280 would be unnecessary. Such a result is counter to the general tenet that, "Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments." *Three Affiliated Tribes*, 476 U.S. at 879.

When Congress later sought to extend to States either the requirement or option that they assume jurisdiction of criminal and civil matters arising on Indian lands (precisely because, in contrast to OSM's argument, they did not already have it), it enacted PL 280. *See Opening Brief*, pp. 16-17. Washington was an "option" state, and through the enactment of Title 37.12 RCW in 1963, Washington assumed partial civil jurisdiction, and gave tribes the option to consent to full jurisdiction. *See Washington v. Confederated Bands and Tribes of the Yakima Indian*

Nation, supra. Washington's Supreme Court held that enactment of Title 37.12 RCW was a valid abrogation of the disclaimer in Article 26, and that therefore the statute was sufficient to accept Congress's offer of subject-matter jurisdiction contained in PL 280. *Tonasket v. State*, 84 Wn.2d 164, 178-79, 525 P.2d 744 (1974). The United States Supreme Court deferred to the Washington ruling on this issue. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. at 484-85.

It is uncontested that under PL 280 and Title 37.12 RCW, Washington has never assumed a general civil jurisdiction, civil jurisdiction over contract disputes arising on Indian lands or civil jurisdiction over collateral held on Indian lands or constituting personal property of the Tribe. For this reason, this Court should conclude that Washington has no such jurisdiction. It explicitly disclaimed the jurisdiction upon statehood to comply with the Enabling Act, and never has assumed the jurisdiction. Were it to seek the jurisdiction now, tribal consent in accordance with 25 U.S.C. § 1326 would be required. *See Kennerly, supra*, 400 U.S. 423 (strict compliance with PL 280 necessary to establish subject-matter jurisdiction).

Based on this history and controlling law, this Court should conclude that the State lacks subject-matter jurisdiction over this dispute that arose on the Nooksack Reservation and concerns NBC, an Indian corporate entity, and that concerns tribal property located on the reservation.

The Court should reject OSM's argument that PL 280 is not relevant because it has been held not to apply to tribes but only to individual Indians, and that NBC should be considered as the tribe and not as an individual. *See OSM's Brief*, pp. 22-25. OSM cites *Bryan v. Itasca Cnty.*, 425 U.S. 373, 388-89, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976), which in dicta stated that "there is notably absent [from PL 280] any conferral of state jurisdiction over the tribes themselves." Neither the United States Supreme Court nor the Washington Supreme Court decided these issues. Even if PL 280 does not apply to tribes including tribal corporations like NBC, it is not solely NBC's presence as the defendant that makes PL 280 relevant. PL 280 explicitly reserved *from* state jurisdiction lawsuits concerning tribal personal property. *See* 25 U.S.C. § 1322(b). OSM's lawsuit explicitly alleges security interests in personal property located on the reservation and a right to pursue all remedies as cumulative. *See* CP 380-81 at ¶ 2 and CP 382 at ¶ 12 (alleging contracts); CP 382 at ¶ 8 (all obligations due and payable); CP 383 at ¶ 15 (alleging security for loan); CP 386 (seeking all relief proper and just); CP 396-410, 413-414 (Loan Agreement security and collateral provisions); CP 449 (lien on Pledged Assets); CP 439 at ¶ 8.1 and CP 445 at ¶ 8.23 (all remedies cumulative); CP 457 (Security provision in Promissory Note); CP 516-525 (Security Agreement). PL 280 establishes that Washington courts have no subject-matter jurisdiction of an action like this one asserting security interests in personal property located on the reservation.

OSM also argues to this Court that the cause of action did not arise on the reservation because the depository bank was located off the reservation and because the lender is from out of state. *OSM's Brief*, p. 28. The Court should reject the argument. OSM offers this Court no legal authority on the issue. *See id.* OSM did not argue the issue in its trial court brief, as NBC stated in its Opening Brief, p. 22, citing CP 64-82 (OSM's trial court brief devoid of argument or authority on the issue). OSM now cites as its "opposition" in the trial court a one-line response at oral argument that it "rejects" the idea the contract was performed on the reservation. *OSM's Brief*, p. 28, citing RP 25: 13-15. This conclusory statement at oral argument is insufficient. This Court should consider the issue uncontested below and unsupported by authority here. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."), citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 10.3(a)(6) (requiring citation to authority); *Tait v. Wahl*, 97 Wn. App. 765, 770 n.1, 987 P.2d 127 (1999) ("In the absence of argument and citation to authority, an issue raised on appeal will not be considered."), citing *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

The Court also should reject the argument on its merits. The location of the bank and OSM's residence does not outweigh all the facts that connect this transaction to the Nooksack Reservation and demonstrate that the cause of action arose "in Indian country," the express term in PL

280. The agreements were executed by NBC on its reservation, they concern the operation of the tribal casino on reservation land and facilitate the employment of numerous tribal members on reservation land, the revenues are obtained on reservation land, the collateral is on reservation land, NBC's offices are on the reservation and the enterprise is for the welfare and governance of the Tribe. These factors support the conclusion that the cause of action arose in Indian country.

In cases where the cause of action was held to have arisen off-reservation, the Indian defendant or the enterprise itself *were located* off-reservation, outside Indian dependent communities or beyond lands held in trust for Indians. See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973) (action arose at ski resort located wholly outside of reservation boundaries on Forest Service land). See also *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) ("Indian country" is (1) land within the limits of any Indian reservation; (2) dependent Indian communities, and (3) Indian allotments.) citing *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991); *Organized Village of Kake v. Egan*, 369 U.S. 60, 71-73, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962) (fishing enterprise conducted off-reservation subject to State regulation). See also *C & L Entrs.*, *supra* (not examining subject-matter jurisdiction where off-reservation commercial agreement in dispute); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (same).

These cases, therefore, are distinguishable. The facts of this case are sufficient to establish that the cause of action arose in Indian country. This Court should hold that where multiple events giving rise to the cause of action occurred on the reservation, the dispute arose there notwithstanding the lender's and the depository bank's locations. The lender chose to contract with NBC with full knowledge that the contract concerned the Tribe's on-reservation casino.

The subject-matter jurisdiction offered by PL 280 embraces this dispute. Because Washington and the Nooksack Tribe have not implemented civil subject-matter jurisdiction in Washington courts under PL 280, this Court should rule that it does not presently exist. In addition, because Washington has not abrogated its disclaimer of jurisdiction as to this lawsuit, and has no jurisdiction over personal property held by the Tribe, this Court has no subject-matter jurisdiction.

2. Even disregarding PL 280, Washington courts lack subject-matter jurisdiction because to assume it would interfere with the Tribe's self-governance

Even if this Court rejects the above arguments against subject-matter jurisdiction and determines that PL 280 and its surrounding history are not relevant to this lawsuit, it still must determine if it has subject-matter jurisdiction according to its case law. In *Powell*, Washington's Supreme Court stated, "It is well settled that even without the jurisdiction conferred by Congress in Public Law 280, the state may exercise some jurisdiction over some reservation conduct." 94 Wn.2d at 785. Where the

State has not “assumed jurisdiction under Public Law 280,” Washington courts next should analyze “whether the assertion of state jurisdiction would infringe the right of the . . . Tribe of Indians to make their own laws and be ruled by them.” *Id.* at 886-87. The Court listed several types of disputes where it had been determined the State had jurisdiction (reservation conduct involving non-Indians, Indians off-reservation), before isolating the issue relevant today: “The more difficult question arises in situations where, as here, both Indians and non-Indians are involved in a dispute which may have an impact on tribal property.” *Id.* at 786.¹ In such cases, Washington courts should apply the test of *Williams v. Lee*, which asks “whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” *Id.*, citing *Williams v. Lee* at 220. The Court noted that jurisdiction should only be found “up to the point where tribal self-government would be affected.”

¹ This analysis and formulation is consistent with multiple federal precedents including *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 387, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976) (rejecting exercise of state jurisdiction which would interfere with Indian self-government), reversing 303 Minn. 395, 228 N.W.2d 249 (1975); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed.2d 106 (1978) (in absence of clear Congressional authorization of state jurisdiction over civil actions, Courts should refrain from recognizing such jurisdiction where indicated to preserve tribal sovereignty and prevent unsettling a tribal government's ability to maintain authority); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179, 93 S. Ct. 1257, 1266, 36 L. Ed.2d 129, 140 (1973) (where Tribe and state could fairly claim an interest in asserting their jurisdictions, Williams test resolves conflict to protect Tribe's self-government).

Id. at 786, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973).

This Court should conclude that state assumption of jurisdiction over this dispute would infringe on the right of the Nooksack Tribe to self-govern. OSM seeks subject-matter jurisdiction directly over NBC, an arm of the Tribe. Such jurisdiction goes far beyond what *Powell* and *Williams v. Lee* permit. The Washington Supreme Court recognized that the Williams test deals “principally with situations involving non-Indians.” *Id.* at 786, citing *McClanahan*, 411 U.S. at 179. Where a party seeks to force *a tribe* to state court, interference with the Tribe’s autonomy is not a question but is established. NBC raises revenue through operation of the Casino and redistributes it for the welfare of the Nooksack Indians. This is “manifestly a governmental purpose.” See *Cohen v. Little Six, Inc.*, 543 N.W.2d at 380. See also *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 147 P.3d 1275 (2006) (Madsen concurring) (discussing governmental function of tribal corporation that should not be disturbed by state interference). The Tribe created, owns, and controls NBC to further its legitimate governmental purposes. It runs the Casino for the benefit of its people. It maintains Casino property on its reservation in order to pursue its governmental aims. If Washington courts entertained this lawsuit, it would interfere with these activities by hailing NBC, an arm of the Tribe, to a foreign court and subjecting NBC and the property and resources of NBC, and thus the Tribe, to the processes of Washington

courts instead of the processes of the Tribe. Washington jurisprudence does not permit this.

Cohen, cited by both parties, is instructive. In *Cohen*, the court concluded that the tribal corporate entity defendant was not “an Indian” over which Minnesota had subject-matter jurisdiction by federal statute pursuant to strict construction of PL 280, which is the same analysis urged by OSM. The court then analyzed whether it had subject-matter jurisdiction solely based on common law, and held that it did not because state assumption of subject-matter jurisdiction over the dispute would interfere with tribal self-governance, reasoning:

In the absence of a federal law authorizing state court jurisdiction, states may exercise jurisdiction over matters involving Indians if doing so will not infringe on their right to self-governance. *Williams*, 358 U.S. at 220, 79 S. Ct. at 270-71; *Duluth Lumber*, 281 N.W.2d at 380-82. If jurisdiction does not attach under Public Law 280 and the disputed events occurred wholly within the confines of an Indian reservation, state court jurisdiction over the matter interferes with tribal self-governance. *Duluth Lumber*, 281 N.W.2d at 382. Because we conclude jurisdiction is unavailable under Public Law 280 and the events giving rise to Cohen's cause of action transpired wholly within the reservation, we lack authority to hear the merits of this action.

Cohen at 381. OSM apparently fails to apprehend this part of the Cohen court's analysis finding that, even where PL 280 does not apply to the tribal corporate entities, the courts of Minnesota still lacked subject-matter jurisdiction of the dispute. The Minnesota court did not, as OSM would have it, simply assert subject-matter jurisdiction as part of its general civil

jurisdiction. That the tribe in *Cohen* did not waive sovereign immunity does not minimize the relevance of the *Cohen* decision to this case where subject-matter jurisdiction is concerned. In analyzing subject-matter jurisdiction, the *Cohen* court applied the *Williams v. Lee* analysis because the sovereignty of the tribe was implicated in the assumption of jurisdiction. This Court should do the same and conclude, like the *Cohen* court, that subject-matter jurisdiction is lacking.

Even if certain waivers of sovereign immunity could be construed as creating subject-matter jurisdiction (which they should not be because subject-matter jurisdiction does not derive from consent), the one at issue should not be. As already argued, these limited waivers of sovereign immunity addressing venue preserve the issue of whether any of the referenced courts have subject-matter jurisdiction. *See Opening Brief*, pp. 23-24. *See also Doe v. Santa Clara Pueblo*, 141 N. M. 269, 276, 153 P.3d 644 (2007) (recognizing limited waiver where parties agreed to subject-matter jurisdiction for actions arising from gaming unless prohibited by, rather than permitted by, IGRA). Like the waivers in *Santa Clara Pueblo*, the waivers at issue here are qualified. Based on the language and structure of the limited waivers, this Court should not find Tribal intent to submit to subject-matter jurisdiction that is otherwise lacking. The Court should reverse and hold that Washington courts lack subject-matter jurisdiction.

C. **No Valid Waiver of Sovereign Immunity Can Be Found Because the Agreements Are Unenforceable Management Agreements Under IGRA Where They Vest at Least Partial Control of Management in the Lender.**

This Court should reject OSM's attempt to minimize the provisions of the parties' agreement that provide OSM at least partial control of the Casino's management. Under IGRA and case law with facts similar to the facts of this case, the agreements are void and, thus, can not provide a valid waiver of sovereign immunity.

OSM concedes, as it must, that as an arm of the Nooksack Tribe, NBC can assert sovereign immunity. *OSM's Brief*, p. 29 ("only question is whether the Borrower waived its sovereign immunity"). OSM concedes the operation of IGRA and the general proposition that certain agreements not designated management contracts can turn out to qualify under IGRA as "management contracts" that required approval. *OSM's Brief*, pp. 33-47 (attempting to distinguish its agreements from invalidated "management contracts"). OSM does not dispute that "any" management activity with respect to all or part of a gaming operation triggers IGRA as set forth in the implementing regulations and *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 423 (8th Cir. 2002). OSM recognizes that the *Wells Fargo Bank* cases from the Seventh Circuit scrutinized an agreement between a bank and tribe and found that it violated IGRA. *OSM's Brief*, pp. 44-47. To avoid dismissal of its lawsuit, OSM attempts to factually distinguish the *Wells Fargo Bank* agreement from its own. It fails.

One provision that establishes OSM's partial control over Casino operations that remains unaddressed by OSM is the provision in the Second Forbearance Agreement that *required* NBC to negotiate forbearance agreements with each of its vendors owed more than \$10,000. CP 608 § 8(b)(i). This provision alone is sufficient to establish control and direction of the business of the Casino by the lender. This represents the ability to directly interfere with and control NBC's relationship with its vendors and dictate actions that should be at management discretion.

The same section (§ 8 at CP 608-09) sets forth OSM's terms for steps NBC shall take to right the boat and the order in which it shall do it, including express timelines for action including the preparation of a written restructuring plan and a plethora of financial projections, statements and comparisons. *Id.* OSM takes the position that such provisions wielded no control over Casino operations, but these were management responsibilities that OSM dictated. Management staff was obligated to meet OSM's demands according to this Forbearance Agreement, removing from their own discretion the ability to set and prioritize tasks. IGRA's interdiction of this type of control does not apply only when times are good, and is perhaps more necessary in times of financial crisis such as occurred here. Rather than permit NBC to handle the crisis, OSM dictated its actions through the forbearance agreements and overstepped the bounds of IGRA.

OSM's control also is evident in its inclusion of the lender's legal fees and expenses in *the Casino's* operating expenses in the Second

Forbearance Agreement. *See Opening Brief*, p. 10, citing CP 607 at § 7(b)(i). Such fees are not normal operating expenses of the Casino and are only included because OSM forced NBC to include them, demonstrating its control. By defining them as such the lender has interfered with Casino operations to its financial benefit.

OSM urges this Court to find no significance in the financial documents, budgets and accounting it requires, which directs NBC's organization of the Casino finances. The lender does not merely require that the Casino open its books to the lender, but dictates the form and content of materials it demands regarding operation and budgeting of the Casino even while acknowledging that the ordinary reporting obligations of the Loan Agreement remain in effect. *See* CP 609 at § 8(b)(vi). OSM admits that it requires NBC to prepare "projections, statements, comparisons and reports" as "a condition of the forbearance agreement." *OSM's Brief*, p. 44, citing CP 608-09. This direction over the Casino's accounting demonstrates control and influence.

OSM argues that the provisions in the forbearance agreements excluding past due accounts from Operating Expenses are limited to past due Loan Agreement payments. *OSM's Brief*, p. 42, citing CP 643. The plain language is to the contrary. The provision bars including "past due accounts payable of the Borrower." In the other section referenced, clause 7(b)(vi), the Lender does address overdue loan payments as OSM states, but that does not diminish the broad prohibition in Section 7(b)(i), which clearly meddles in the Casino's ability to manage its own accounts.

NBC need not convince this Court that the agreements at issue are identical to those in *Wells Fargo*, or that there are as many instances of control evident in these agreements as in the *Wells Fargo* documents. NBC merely must show that some part of the Casino operations is controlled by the lender. That is the case. The partial control wielded by the lender especially through the forbearance agreements, which the lender wishes to dismiss as merely prudent banking measures, are sufficient to trigger the concerns of Congress that Indian welfare be protected through Commissioner review that was lacking here.

NBC argued that OSM's later-added "disclaimer" of control of the Casino, existing in the same agreements that include the terms providing such control, have no effect. *See Opening Brief*, pp. 40-41 citing CP 614. OSM fails to respond to this argument but in a footnote, apparently to circumvent space restrictions. *See OSM's Brief*, p. 47, note 18. Even the argument contained in the footnote is unpersuasive where establishing "the parties' . . . understanding that the Loan Agreement complied with the IGRA" is irrelevant to whether the agreement actually does comply.

Courts recognize that results that might be considered unfair sometimes result from the doctrine of sovereign immunity. As noted by Judge Richard Jones in his recent decision *Stillaguamish Tribe of Indians v. Pilchuck Group*, 2011 U.S. Dist. LEXIS 101222 (W.D. Wash. 2011), sovereign immunity "is a doctrine whose application frequently leads to unfair results." *Id.* at *23-24, citing, *e.g.*, *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (2009) ("This result

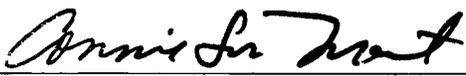
may seem unfair, but that is the reality of sovereign immunity.”); *Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, (10th Cir. 2008) (“The Supreme Court has acknowledged that tribes [can] use their immunity as a sword rather than a shield”); *Kiowa*, 523 U.S. at 758 (noting “reasons to doubt the wisdom of perpetuation the [tribal sovereign immunity] doctrine,” but recognizing Congress’s responsibility for limiting tribal immunity). As Judge Jones noted, whether a tribe’s resort to sovereign immunity to resist liability is “fair” “is not a question properly before the court.” *Id.* at 24. OSM laments its outstanding loan. But that does not alter whether Washington courts have jurisdiction over the dispute, or whether a valid waiver of sovereign immunity exists. Resolution of both issues supports the dismissal of this lawsuit.

II. CONCLUSION

This Court should reverse on *de novo* review, and dismiss OSM’s action against NBC. Washington courts’ lack of subject-matter jurisdiction is dispositive. Equally dispositive is the lack of a valid waiver of sovereign immunity because the agreements are unenforceable under IGRA.

Respectfully submitted on this day of February, 2012.

SCHWABE, WILLIAMSON & WYATT, P.C.

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APPENDIX - A

Wash. Const. Art. XXVI

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through 2011 2nd Special Session ***

CONSTITUTION OF THE STATE OF WASHINGTON

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Wash. Const. Art. XXVI (2012)

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

***Second.* That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided,* That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.**

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

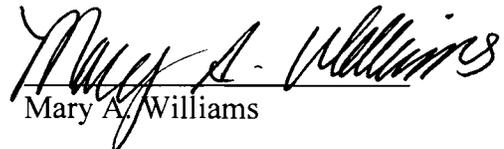
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2012, I caused to be served the foregoing *APPELLANT'S REPLY BRIEF* on the following parties at the following address:

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by:

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return receipt requested
- hand delivery
- facsimile
- electronic service
- other (specify) _____


Mary A. Williams