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NO. 88482-0

SUPREME COURT
OF THE STATE OF WASHINGTON

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OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

PETITIONER NOOKSACK BUSINESS CORPORATION'S SECOND
SUPPLEMENTAL STATEMENT OF ADDITIONAL AUTHORITIES

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 ORIGINAL

Petitioner Nooksack Business Corporation ("NBC") pursuant to RAP 10.8 submits this Second Statement of Additional Authorities.

A. Regarding Justice Stephens' request at oral argument for authorities showing application of the infringement test established by *Williams v. Lee* to tribes themselves, NBC offers the following authorities, some of which already are cited in NBC's briefing:

UNITED STATES SUPREME COURT

1. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962) ("But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*."), where Alaska was attempting to regulate fishing activities not against individuals but as to the tribal entities and their operation of fish traps.

2. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-48, 93 S. Ct. 1267; 36 L. Ed. 2d 114 (1973), where the Mescalero Apache Tribe was involved in an off-reservation dispute, at 147-48:

At the outset, we reject -- as did the state court -- the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its

revenue laws against any **tribal enterprise** "whether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, 6 Pet. 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan v. Arizona State Tax Comm'n*, post, p. 164; *Organized Village of Kake v. Egan*, 369 U.S. 60, 71-73 (1962). **The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.** *Organized Village of Kake*, supra, at 75; *Williams v. Lee*, 358 U.S. 217 (1959); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946); *Draper v. United States*, 164 U.S. 240 (1896)." (emphasis added).

3. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-217, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), in regulatory context, where tribe was a party to review of attempted state and county regulation of on-reservation gambling, at 216:

Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[state] jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero*, 462 U.S., at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Id.*, at 334-335.¹⁹ See also, *Iowa*

Mutual Insurance Co. v. LaPlante, ante, p. 9; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (emphasis added).

And at note 18, remarking that the dissent's approach that state laws *do* apply absent an express congressional statement to the contrary "is **even less correct when applied to the activities of tribes** and tribal members within the reservations." *Id.* at 216 note 18 (emphasis added).

4. *Montana v. United States*, 450 U.S. 544, 563-68, 101 S. Ct. 1245; 67 L. Ed. 2d 493 (1981), examining through application of *Williams v. Lee* the right of litigant the Crow Tribe of Montana to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians, and concluding that the infringement test was satisfied on these facts, permitting state jurisdiction.

5. *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60, 98 S. Ct. 1670; 56 L. Ed. 2d 106 (1978), where a tribe—in this case the Santa Clara Pueblo—was a litigant, addressing whether the cause of action against the tribe existed and relating the principles of *Williams v. Lee* to suits against tribes, at 59-60:

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and

self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "[subjecting] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976), may **"undermine the authority of the tribal [court] . . . and hence . . . infringe on the right of the Indians to govern themselves."** *Williams v. Lee*, 358 U.S., at 223. A fortiori, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (emphasis added).

6. See also *Fisher v. District Court of Sixteenth*

Judicial Dist., 424 U.S. 382, 386, 96 S. Ct. 943; 47 L. Ed. 2d 106 (1976), citing *Mescalero*, a case where a tribe was a party, for the infringement test rule, at 386:

Since this litigation involves only Indians, at least the same [*Williams v. Lee*] standard must be met before the state courts may exercise jurisdiction. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173, 179-180 (1973).

OTHER FEDERAL COURTS

1. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129 (9th Cir. 2006) (“Smith's suit [against entity of Confederated Salish and Kootenai Tribes of the Flathead Reservation] is within the first exception of *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), **and the rule in *Williams v. Lee***, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). . . .”) (emphasis added).

2. *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 713-714 (10th Cir. 1989) (“State regulatory authority over Indian bingo in Indian Country depends on a determination either that federal law has not preempted state authority, **or that state regulation would not infringe on tribal self-government.**”) (emphasis added) (citing *Cabazon, supra*; *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P. C.* 467 U.S. 138, 147, 104 S. Ct. 2267, 81 L. Ed.2d 113 (1984); *White Mountain Apache Tribe*, 448 U.S. at 142; *Mescalero, supra*; and *Williams v. Lee*).

3. *Tohono O'Odham Nation and Tohono O'Odham Housing Authority v. The Honorable Jonathan H. Schwartz*, 837 F. Supp. 1024, 1030 (D. Az. 1993) (“The exercise of jurisdiction by

the state court in this instance [of a suit by a non-Indian contractor against a tribal agency] **would encroach upon tribal self-government and is thereby preempted.**") (emphasis added).

4. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1342 (Dist. S. D. 1975) ("Finally, plaintiffs urge that the commercial nature of the substantive questions of law presented in the Tribal Court action remove the case from one involving matters of tribal self-government and therefore from tribal jurisdiction. A reading of the seminal case of *Williams v. Lee, supra*, should serve to dispel that notion since *Williams v. Lee* itself involved questions of commercial law raised by alleged failure to pay for goods purchased on credit.")

STATE COURTS

1. *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 381 (Minn. Ct. App. 1996) ("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 [where tribal enterprise is the defendant] interferes with tribal self-government.").

2. *Duluth Lumber & Plywood Co. v. Delta Development, Inc. and Fond du Lac Housing Authority*, 281

N.W.2d 377, 382 (Minn. 1979), holding that even where tribal agency had waived its sovereign immunity, “[t]he question in the present case, therefore, is whether the state court would adversely affect the Chippewa Tribe's self-government by assuming jurisdiction over a civil dispute involving monies disbursed by the [tribe's] Housing Authority.”

3. *Smith Plumbing Company, Inc. v. Aetna Casualty & Surety Company and White Mountain Apache Tribe, dba Apache Development Enterprise (Intervenor)*, 720 P.2d 499, 529, 533 (Ariz. 1986) (“The presence of one of two factors renders exercise of state court jurisdiction over disputes involving Indian parties invalid: First, ‘state action infring[ing] on the right of reservation Indians to make their own laws and be ruled by them,’ [citing *Williams v. Lee*], second, federal pre-emption of state authority.”).

4. *Gavle v. Little Six*, 555 N.W.2d 284, 292 (Minn. 1996) (“Because [under the infringement test] we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity.”)

B. Regarding the issue whether tribes have authority as a dependent sovereign unilaterally to establish civil matter jurisdiction in

state courts, NBC referred the Court at oral argument to *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971) (Tribe could not by tribal resolution create state subject matter jurisdiction over its lands) (cited at Petition 10).

C. Regarding the issue whether analyses of sovereign immunity and subject-matter jurisdiction are interchangeable:

1. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-87 note 4 ("The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. **The issues are wholly distinct.** A State may waive its Eleventh Amendment immunity, and if it does, § 1362 certainly would grant a district court jurisdiction to hear the claim.") (emphasis added).

2. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986) ("We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance.").

3. *Kreig v. Prairie Island Dakota Sioux (In re: Prairie Island Dakota Sioux)*, 21 F.3d 302, 304-05 (8th Cir. 1994) (“Finally, a waiver of sovereign immunity cannot extend a court’s subject matter jurisdiction. *Weeks*, 797 F.2d at 672. We find, therefore, that sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction. . . .”). This Court cited *Weeks* (see NBC’s Supplemental Brief at 6 and 19 note 2) with approval in *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 113 (2006).¹

4. *Robles v. Shoshone-Bannock Tribes*, 876 P.2d 134,

¹ Federal cases in accord with *Weeks* include: *Stock West, Inc. v. Confederated Tribes of the Colville Reservation, Colville Reservation, Colville Business Council, Colville Tribal Enterprise Corporation, and Colville Indian Precisions Pine Corporation*, 873 F.2d 1221, 1225 note 11 (9th Cir. 1989) (“Stock West argues that since the tribe waived its sovereign immunity in [the contracts], the federal courts thus have jurisdiction. This argument is weak. Mere consent to be sued does not confer jurisdiction on any particular court.”); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian R...*, 495 F.3d 1017, 1020 (8th Cir. 2007) (“Even if an Indian tribe waives its sovereign immunity, such a waiver does not automatically confer jurisdiction on federal courts.”); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1126 (10th Cir. 1999) (“More importantly, even assuming the tribe intended to subject ASHA to the dictates of Title VII, this intent could not unilaterally create subject matter jurisdiction in the federal court.”); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503, 508 (11th Cir. 1993) (“Even though the parties’ agreement contains a limited waiver of the Tribe’s sovereign immunity, this waiver cannot grant federal court jurisdiction where it otherwise would not exist--that is, this state law breach of contract claim is not appropriate for federal court jurisdiction.”).

137 (Idaho 1994) ("However, a determination that the corporation is subject to suit [through waiver of sovereign immunity] does not end the jurisdictional inquiry. The tribal corporation may be subject to suit, but the correct forum for such suit may not be a state court.").

5. *Gavle v. Little Six, supra*, 555 N.W.2d 284, 292 (Minn. 1996) ("Because [under the infringement test] we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity.").

D. Regarding the proposition that sovereign immunity is only one aspect of sovereignty:

1. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, supra*, 476 U.S. 877 at 891, ("Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.")

E. Regarding whether state civil jurisdiction exists over *a tribe* if, as the United States Supreme Court in *Bryan v. Itasca County* observed, Congress in PL 280 withheld jurisdiction over Indian tribes versus

individual Indians, to supplement NBC's Petition at 10 note 3:

1. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, supra*, 476 U.S. at 885 (“Given the comprehensiveness of the federal regulation in this area of Indian law, our conclusion in *Three Tribes I* that Congress generally intended to authorize the assumption, not the disclaimer, of state jurisdiction over Indian country is persuasive evidence that the instant disclaimer conflicts with the federal scheme.”).

Respectfully submitted on this 18th day of February, 2014.

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2014, I caused to be served the foregoing **PETITIONER NOOKSACK BUSINESS CORPORATION'S SECOND SUPPLEMENTAL STATEMENT OF ADDITIONAL AUTHORITIES** on the following parties at the following addresses by U.S. Mail, postage first class, in addition to transmission by email:

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Subject: Re: Supreme Court No. 88482-0: Outsource Services Management, LLC v. Nooksack Business Corporation

Dear Clerk:

Attached for filing is *Petitioner Nooksack Business Corporation's Second Supplemental Statement of Additional Authorities* regarding the above-referenced matter.

Thank you,

Mary

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