

NO. 88482-0
NO. 67050-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES MANAGEMENT, LLC,
Respondent,

v.

NOOKSACK BUSINESS CORPORATION,
Appellant.

OUTSOURCE SERVICES MANAGEMENT, LLC'S
ANSWER TO PETITION FOR REVIEW

Lori Lynn Phillips (WSBA No. 25473)
David S. Keenan (WSBA No. 41359)
Melissa J. Anderson (WSBA No. 43659)
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Tel: (206) 839-4300

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I. INTRODUCTION

This action for breach of a loan agreement in Whatcom County Superior Court has been in a state of suspended animation for nearly two years while Petitioner Nooksack Business Corporation (the “Borrower”) attempts to escape its own express agreement and controlling authority from the United States Supreme Court, both of which confirm the Superior Court’s jurisdiction to adjudicate this dispute. As the Court of Appeals recognized, “there is no material distinction between” this case and a line of binding Supreme Court cases—including particularly *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-19, 121 S. Ct. 1589, 149 L. Ed. 623 (2001), and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754-55, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Op. at 15. *C & L* stated the operative rule: “[A]n Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless ‘Congress has authorized the suit *or the tribe has waived its immunity.*’” 532 U.S. at 414 (quoting *Kiowa*, 523 U.S. at 754) (emphasis added). The Court of Appeals correctly determined that the location of contracting did not factor into the analysis concerning sovereign immunity, and that “[t]he question as demonstrated by *C & L* and *Kiowa* is whether [the Borrower] expressly waived that immunity.”

Op. at 11. The Court of Appeals' Opinion is entirely consonant with controlling law.

First, the Court of Appeals correctly applied controlling case law in holding that "whether a court has jurisdiction where a party is entitled to tribal sovereign immunity is a question of federal law that depends on either congressional authorization *or an express waiver of the immunity by the party.*" Op. at 9-10 (emphasis added). There is no dispute that the Borrower waived its sovereign immunity, and thus the Court of Appeals correctly held that the Borrower freely and fully subjected itself to suit in a Washington court.

Second, the Court of Appeals correctly held that Public Law 280 has no bearing on this case. The Borrower invites the Court on an extended detour through statutory authority that has no applicability to analysis of immunity of a tribal sovereign. Public Law 280 does not "apply to tribes or tribal entities," and the Court of Appeals properly focused on the Borrower's waiver of sovereign immunity. Op. at 17.

Third, the Court of Appeals correctly held that Washington superior courts have jurisdiction over actions for breach of contract involving tribal sovereigns where the sovereign has waived its immunity. Op. at 6. This jurisdiction does not conflict in any way with the Enabling

Act¹ or Article 26 of the Washington Constitution, because those provisions apply to title to Indian trust lands, which are not at issue here, and because Washington courts have concurrent jurisdiction with the federal government in civil disputes where the tribal sovereign has waived its immunity.

Fourth, the Court of Appeals correctly held that tribal self-governance is not implicated here and distinguished *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). Op. at 13. The Borrower conflates different lines of Supreme Court authority and urges the Court to ignore controlling case law regarding waivers of sovereign immunity and instead analyze whether the tribe's waiver of immunity somehow infringes on its right to govern. But the Court of Appeals correctly applied binding case law regarding waiver of sovereign immunity and noted that those cases "neither abrogated nor touched on the Court's holding in *Williams*." Op. at 14.

Finally, because the rulings below present no conflict with existing law and no issues of substantial public interest that should be determined

¹ Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676.

by this Court, the Petition for Review should be denied, and the Lender² should be allowed to vindicate its right to be repaid.

II. COUNTER-STATEMENT OF THE CASE³

A. Statement of Facts

The Lender seeks to enforce a binding contract (together with related loan documents, the “Loan Agreement”) through which the Borrower borrowed \$15,315,856 in connection with the operation of its River Casino (the “Casino”) located in Deming, Washington. The Loan Agreement was the product of extensive arms-length negotiation of sophisticated parties and counsel and required performance in multiple locations throughout Washington and the United States. In addition, the Loan Agreement provides for recourse in the courts of the state of Washington and thoroughly documents the Borrower’s valid, express waiver of its sovereign immunity as a fundamental assumption of the bargain.

² Respondent Outsource Services Management (“OSM”) is a loan servicer acting on behalf of lender BankFirst, which is in receivership by the FDIC. For simplicity, OSM is referred to here as the “Lender.”

³ The Petition for Review should be denied for the reasons stated herein. If review were to be granted, however, the Lender does not concede that the Borrower has appropriately framed the issues to be decided. The relevant issue below was whether a Washington court of general jurisdiction has subject matter jurisdiction in a breach of contract case against a tribal sovereign entity where the sovereign has waived its immunity from suit.

1. The Loan Agreement Was Performed in Numerous Locations Outside of the Reservation.

The Borrower incorrectly asserts that “[i]t is uncontested that the loan documents were executed, performed and breached by NBC on the Nooksack Tribe’s reservation.” Br. of Pet. at 4. To the contrary, the Loan Agreement required performance in a number of different locations in Washington and elsewhere. The Borrower, a corporation organized under the laws of the Nooksack Tribe, CP 394, borrowed the \$15 million to operate its Casino from the Minnesota offices of BankFirst, a South Dakota state bank. CP 394; CP 453; CP 491. The Borrower agreed to deposit receipts of its Casino with Banner Bank in Washington, CP 430-31; CP 527-75, and, under the Loan Agreement, those receipts were distributed by the Depository, First National Bank & Trust Co. of Williston in North Dakota, CP 530. The Lender, based in Minnesota, acts as the loan servicer. CP 638. The loan is secured by the “Pledged Revenues” of the Casino, which specifically “shall not include . . . any trust lands or trust assets of the Borrower,” CP 538, and “[n]either the general obligation nor the full faith and credit nor taxing power of the [Tribe] is pledged,” CP 523.⁴

⁴ Certain gaming machines are also pledged as collateral. CP 516. Those machines also are not trust assets.

The Superior Court saw the flaw in the Borrower's argument that the Loan Agreement is performed entirely within the Reservation:

I'm assuming that the money went into a bank somewhere. I'm not aware of a bank on the Nooksack Indian Reservation. They put the money in a bank off the reservation and presumably payments were made to the plaintiff from a bank account that was off the reservation. How is this strictly on the reservation?

RP 20:18-24. That observation cannot reasonably be disputed. The Loan Agreement required the Borrower to deposit the Pledged Revenues in a bank outside of the Reservation, CP 533; CP 544-45, and when the Borrower repeatedly failed to do so, the Lender brought suit for breach.

2. The Borrower Expressly Waived Its Sovereign Immunity Throughout the Loan Agreement.

As a condition and fundamental assumption of the Loan Agreement, the Borrower provided "an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any Claim," and thus agreed to be sued in federal court, Washington State court, or if neither of those courts had jurisdiction, Nooksack tribal court. CP 446; CP 459; CP 466; CP 491; CP 521; CP 563. The Borrower concedes that it waived its sovereign immunity. Br. of Pet. at 4. Additionally, the Nooksack Tribal Council adopted a resolution approving the Loan Agreement. CP 58. Though the Borrower signed the Loan Agreement in 2006, it reiterated its waiver of sovereign immunity in each of three subsequent forbearance agreements, executed between January 2009 and

October 2010. CP 584; CP 612; CP 648. Moreover, as further assurance to the Lender, the Nooksack Tribal Council adopted resolutions in connection with each forbearance agreement, stating that “in particular, . . . the provisions related to [among other things] the Tribal Parties’ . . . waiving sovereign immunity . . . will continue to remain in full force and effect.” CP 596; CP 625; CP 655. General counsel for the Tribe also provided his legal opinion and assurance that “[t]he Borrower and the Tribe has each duly, expressly and irrevocably waived their respective sovereign immunity subject to and in accordance with the terms of the Forbearance Agreement, and such waiver is valid and enforceable against the Borrower and the Tribe under all laws of the Borrower, the Tribe, *the State*, and the United States against the Borrower and the Tribe.” CP 630 (emphasis added).⁵

B. Statement of Procedure

1. The Superior Court Found That It Had Jurisdiction.

Four years into the Loan Agreement, with the Borrower continually in default under three successive forbearance agreements, and despite numerous good-faith attempts by the Lender to negotiate a path

⁵ In addition, the Loan Agreement allowed either party to select arbitration in lieu of judicial resolution in the event of a dispute. CP 446. The Loan Agreement specifically provides for enforcement of any arbitration award “only in the courts permitted by the terms of the Loan Documents, *or if necessary for effective enforcement and consented to by the Lender*, any tribal court of the Tribe.” CP 447 (emphasis added).

forward for the Borrower, the Lender was forced to file suit to recover the \$15 million it loaned the Borrower. CP 380-87. The Borrower moved to dismiss the suit, arguing in relevant part that the Superior Court lacked subject matter jurisdiction. CP 83-97.⁶ In rejecting the Motion, the Superior Court ruled that there was nothing preventing the Borrower from waiving immunity and consenting to suit in a Washington court. CP 7-13. It then looked to the Loan Agreement and determined that, because the Borrower had in fact provided a waiver, it had jurisdiction to hear the Lender's claims. CP 8-10. The Borrower appealed.

2. The Court of Appeals Affirmed the Superior Court's Finding That It Had Subject Matter Jurisdiction.

In a thoroughly detailed thirty-four page published opinion (the "Opinion" or "Op."), the Court of Appeals affirmed the Superior Court's findings in every respect. Citing this Court and the Washington Constitution, it held that Washington courts have subject matter jurisdiction to hear contract disputes like this one and then rejected the Borrower's argument that tribal self-governance was implicated here. Op. at 6-11, 13-14. The Court of Appeals held that the Borrower had clearly waived its sovereign immunity, Op. at 12, and that there was no material

⁶ The Borrower also argued the Loan Agreement was void as an unapproved management contract under the Indian Gaming Regulatory Act. CP 89-96. The Superior Court found that the Loan Agreement was not a management contract, CP 10, and was affirmed by the Court of Appeals. Op. at 33. The Borrower does not challenge that holding.

distinction between this case and binding Supreme Court precedent allowing state courts to adjudicate contract claims involving tribal sovereign entities where the sovereign has waived immunity, Op. at 15. Finally, the Court of Appeals held that a federal law relating to limited state jurisdiction over individual Indians did not affect the jurisdiction of Washington courts over tribal sovereigns, Op. at 17-18, and rejected the Borrower's argument that the parties were attempting to confer subject matter jurisdiction via the Loan Agreement, Op. at 19.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Opinion Does Not Conflict with Settled Law.

1. The Court of Appeals Correctly Held That Jurisdiction Turns on the Waiver of Sovereign Immunity.

Under *Kiowa* and *C & L*, the Court of Appeals properly held that, “as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit *or the tribe has waived its immunity.*” Op. at 10 (quoting *Kiowa*, 523 U.S. at 754). In *C & L*, the tribal entity entered into a contract with a non-Indian company. 532 U.S. at 414-15. The contract contained an arbitration clause providing for enforcement “in any court having jurisdiction thereof.” *Id.* at 415 (internal quotation marks omitted). In addition, it had a choice-of-law clause providing for the application of Oklahoma state law. *Id.* The tribal sovereign entity breached the contract, and the non-Indian company obtained an arbitration

award, suing to enforce the award in an Oklahoma state court “of general, first instance, jurisdiction.” *Id.* at 416. As here, the tribal entity asserted that it was immune from suit in state court. *Id.* Contrary to the Borrower’s argument that *C & L* did not implicate subject matter jurisdiction,⁷ the Supreme Court rejected that very argument:

The phrase in the clause providing for enforcement of arbitration awards in any court having jurisdiction thereof, the Tribe maintains, begs the question of what court has jurisdiction. . . . The clause no doubt memorializes the Tribe’s commitment to adhere to the contract’s dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration.

532 U.S. at 421-22 (internal quotation marks and footnote omitted). As in *C & L*, the practical consequence here of the Borrower’s waiver of sovereign immunity is that it has subjected itself to suit for breach of contract in Whatcom County Superior Court. Numerous cases confirm that a waiver of sovereign immunity is sufficient to allow a tribe to be sued in a state court of general jurisdiction. *See Doe v. Santa Clara Pueblo*, 141 N.M. 269, 276, 154 P.3d 644 (2007) (“*C & L Enterprises* suggests that when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur,

⁷ Br. of Pet. at 12.

including state court, whether or not it has express congressional authority to do so.”);⁸ *Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 81, 67 P.3d 306 (2003) (“We have previously acknowledged . . . that Indian tribes may waive their right to sovereign immunity and consent to suit in state courts.”).⁹

There was no question in *C & L* as to whether the Oklahoma state court would have jurisdiction to hear a contract dispute—as here, a state court of general jurisdiction can certainly adjudicate such cases. Nor is there any question here that the Borrower “had sovereign immunity from suit.” Op. at 11. Rather, as the Court of Appeals recognized, “[t]he question as demonstrated by *C & L* and *Kiowa* is whether [the Borrower] expressly waived that immunity.” *Id.* The Court of Appeals found that there was “nothing ambiguous about NBC’s express limited waiver of sovereign immunity,” which the court found was “even clearer than that approved by the United States Supreme Court in *C & L*.” Op. at 12.

⁸ In *Santa Clara Pueblo*, the tribe similarly asserted that sovereign immunity should be distinguished from subject matter jurisdiction. The court rejected that argument: “We do not believe that sovereign immunity and subject matter jurisdiction are as distinct as the Pueblos argue. A waiver of immunity in state court inherently involves a state court’s subject matter jurisdiction, and immunity waiver claims are often phrased as subject matter jurisdiction claims.” 141 N.M. at 276 n.6 (citing *Kiowa*, 523 U.S. at 754).

⁹ See also *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86-87 (2d Cir. 2001) (stating that “courts consistently have [held that waiver of a sovereign’s immunity] ‘encompasses not merely *whether* it may be sued, but *where* it may be sued’”) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)); *Yavapai–Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal. App. 4th 190, 213-17, 135 Cal. Rptr. 3d 42 (2011) (holding that tribe’s waiver of sovereign immunity justified state court jurisdiction in suit for breach of loan agreement relating to casino).

In addition, the Borrower argues that the outcome in *C & L* turned on “off-reservation conduct” and that the Court of Appeals improperly ignored “where the dispute arose.”¹⁰ But the Supreme Court has never drawn “a distinction based on where the tribal activities occurred.” *Kiowa*, 523 U.S. at 754. “Tribes enjoy immunity from suits on contracts . . . whether they were made on or off a reservation.” *Id.* at 760. The location of contracting and performance does not and *cannot* enter into analysis of the question of whether the Whatcom County Superior Court has subject matter jurisdiction here. The Lender certainly disputes the Borrower’s contention that this cause of action arose entirely within the Nooksack Reservation, particularly given that the provisions of the Loan Agreement expressly provide for off-reservation performance by the Borrower.¹¹ But this issue is of no consequence here; the Court of Appeals properly held that “where the activities in this loan transaction occurred is immaterial,” *Op.* at 15, which is entirely consistent with existing precedent. The Court of Appeals correctly concluded, “In sum, there is no material distinction between the *Kiowa* and *C & L* line of cases

¹⁰ Br. of Pet. at 12-13.

¹¹ The Borrower argues that the Court of Appeals failed to reach its argument that this dispute arose in Indian country and its argument “that the lender never disputed that issue before the trial court.” Br. of Pet. at 16. In fact, the Lender has repeatedly stated that it “reject[s] the ‘idea the entire contract was performed within the confines of the reservation.’” Br. of Resp. at 28 (quoting RP 25:13-15).

and the reasoning that we apply to this case.” Op. at 15.¹²

2. The Court of Appeals Correctly Held That Public Law 280 Does Not Apply to a Tribal Entity.

Public Law 280 and RCW 37.12 do not apply to or restrict the jurisdiction of Washington courts to adjudicate disputes involving tribal sovereign entities. Contrary to the Borrower’s argument that the Court of Appeals failed to properly apply PL 280, the Court of Appeals engaged in an extensive analysis before correctly holding that PL 280 *does not* “apply to tribes or tribal entities.” Op. at 17. There is no merit to the argument that Washington did “not reclaim authority pertinent to this dispute” via PL 280¹³ because (1) as the Court of Appeals properly held, Washington courts have jurisdiction over contract disputes involving tribal sovereigns that have waived their immunity, and (2) PL 280 simply never applied to tribal sovereigns, and instead applies only to individual Indians.¹⁴

The Borrower continues to argue that “it is undisputed that Washington never *invoked PL 280 jurisdiction applicable to the Nooksack Tribe for this civil dispute,*” and dismisses the Opinion below as relying on

¹² The Borrower also argues that the Opinion is in conflict with the legal principle that “subject matter jurisdiction cannot be conferred by agreement or act of the parties.” Br. of Pet. at 13. Because Washington courts *start* with original jurisdiction to hear contract disputes, Op. at 7, the only question is whether the Borrower waived its sovereign immunity, Op. at 19.

¹³ Br. of Pet. at 7.

¹⁴ *See, e.g.*, 25 U.S.C. § 1321 (criminal jurisdiction); 25 U.S.C. § 1322 (civil jurisdiction).

“dicta” from the U.S. Supreme Court.¹⁵ But the Court of Appeals was on solid footing in holding that PL 280 is not relevant. *See Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 388-89, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976) (“[T]here is notably absent any conferral of state jurisdiction over the tribes themselves [in PL 280].”); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1480 (9th Cir. 1989) (holding that PL 280 “applies to disputes involving individual Indians rather than Indian tribes”). There is no conflict between settled law and the decision by the Court of Appeals.¹⁶

3. The Court of Appeals Correctly Held That the Washington Courts Have Jurisdiction to Hear Contract Disputes Involving a Sovereign That Has Waived Immunity.

The Washington Constitution “vests Washington’s superior courts with ‘original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court,’” including actions for breach of contract. *Op.* at 6 (citing *ZDI Gaming, Inc. v. State*, 173 Wn.2d 608, 616, 268 P.3d 929 (2012) (quoting

¹⁵ Br. of Pet. at 10 (emphasis added).

¹⁶ The Borrower also incorrectly argues that the Opinion conflicts with PL 280 “as to the lender’s claims to tribal personal property.” Br. of Pet. at 15. But the statute cited by the Borrower applies only to property held in trust by the United States. 25 U.S.C. § 1322(b). Moreover, (1) as stated, PL 280 does not and cannot apply to this case, because it involves a tribal sovereign entity; and (2) the loan is secured by the “Pledged Revenues” of the Casino, which specifically “shall not include . . . any trust lands or trust assets of the Borrower,” CP 538 (emphasis added), as well as gaming equipment that is not trust property, CP 516, and “[n]either the general obligation nor the full faith and credit nor taxing power of the [Tribe] is pledged,” CP 523.

Wash. Const. art. IV, § 6)). Citing the Washington Enabling Act, the Borrower argues that Article 26 of the Washington Constitution disclaimed such jurisdiction as to tribal sovereign entities and thus before a court in Whatcom County can hear this dispute, Washington must “reclaim” this lost authority.¹⁷ Br. of Pet. at 9. The Borrower’s position is incorrect, because the Enabling Act disclaimed only Washington’s interest in title to Indian lands and because the Act provided for *concurrent* jurisdiction in state and federal courts, not *exclusive* jurisdiction in the latter. The Enabling Act and Article 26 were “primarily, if not exclusively, concerned with protecting, from state proprietary interference, the title to and the taxation of Indian lands,” and “[n]owhere in these disclaimer provisions is the purely governmental function of state criminal and civil regulations either alluded to or expressly forbidden.” *Tonasket v. State*, 84 Wn.2d 164, 177, 525 P.2d 744 (1974).¹⁸ Shortly after the Enabling Act brought Washington, Montana, and other states into the

¹⁷ The Borrower did not argue in its opening brief in the Court of Appeals that the Enabling Act and Article 26 deprived Washington courts of subject matter jurisdiction, and thus waived this specific argument by raising it for the first time on reply. RAP 10.3(c); *see also Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) (“We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits. In addition, a contention presented for the first time in the reply brief will not receive consideration on appeal.” (citations omitted)).

¹⁸ Article 26, which “forever disclaim[ed] all right and title to . . . all lands . . . held by any Indian or Indian tribes,” specified that “said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States,” Wash. Const. art. XXVI, and “was a disclaimer of proprietary rather than governmental interest.” *Tonasket*, 84 Wn.2d at 178. “[A]bsolute jurisdiction meant undiminished, not exclusive jurisdiction.” *Id.* (internal quotation marks omitted).

Union, the Supreme Court held that the relevant portion of the Act did not foreclose the jurisdiction of state courts, but was intended only “to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation.” *Draper v. United States*, 164 U.S. 240, 246, 17 S. Ct. 107, 41 L. Ed. 419 (1896).¹⁹

In addition, the Supreme Court has “rarely either invoked reservations of jurisdiction contained in statehood enabling acts by anything more than a passing mention or distinguished between disclaimer States and nondisclaimer States.” *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 562-63, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983). Notably, *Kiowa* and *C & L* both involved the jurisdiction of Oklahoma state courts. As the Supreme Court noted in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 479 n.23, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979), many states other than Washington

¹⁹ See also *Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980) (“The Washington Enabling Act, 25 Stat. 676, reflects an intent that the State not tax reservation lands or income derived therefrom”); *White Mt. Apache Tribe v. Ariz. Dept. of Game & Fish*, 649 F.2d 1274, 1280 (1981) (“But Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states’ governmental or regulatory authority over that land.”); *Begay v. Kerr-McGee Corp.*, 499 F. Supp. 1325, 1327-28 (D. Ariz. 1980) (“Indian reservations in Arizona are within political and governmental boundaries of the state, and limitations on state’s jurisdiction in Enabling Act apply only to Indian lands considered as property, but do not withdraw territorial area from sovereignty of state and control of its laws.” (internal quotation marks omitted)), *aff’d*, 682 F.2d 1311 (9th Cir. 1982).

were subject to “admitting Acts requiring a disclaimer of authority over Indian lands” upon admission to the Union, including Oklahoma. Despite the fact that Oklahoma, like Washington, disclaimed authority over Indian lands upon becoming a state, nowhere in *Kiowa* or *C & L* is there any reference to such disclaimers as a barrier to state court jurisdiction where the tribal sovereign has waived immunity. While Article 26 left the federal government’s authority over Indian land undiminished, it did not divest Washington courts of concurrent jurisdiction to hear contract disputes involving tribal entities where the sovereign has waived immunity.

4. The Court of Appeals Correctly Held That This Suit Does Not Infringe on Tribal Self-Governance and That *Williams v. Lee* Does Not Apply to These Facts.

Relying on *Williams v. Lee*, 358 U.S. 217, 219-20, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), and *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980), the Borrower argues that a Washington court cannot hear a contract dispute involving a tribal entity—even if that tribal entity waived sovereign immunity and consented to be sued in Washington courts—because doing so would infringe on the tribe’s right to make laws and be ruled by them. Br. of Pet. at 11. But where there is a voluntary waiver by the tribe, there is no infringement on the rights of Indians. In fact, the refusal by a court to enforce a clause submitting to the jurisdiction of state

courts “would be to undercut the Tribe’s self-government and self-determination.” *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (N.D. Ill. 1993).²⁰

Contrary to the Borrower’s argument that the Court of Appeals refused to analyze whether jurisdiction in this case implicates tribal self-governance, it acknowledged that “a state may not assert authority in Indian country if that would infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” Op. at 8 (quoting *Williams*, 358 U.S. at 220). But the “[a]nalysis to determine whether state courts have jurisdiction *differs if a party is a tribal entity rather than an individual Indian.*” Op. at 9 (emphasis added). In particular, the concerns expressed in *Williams* and similar cases relate to the state exercising authority in a way that undermines the tribe’s ability to make its own laws and be governed by them. Where the tribe has agreed to a waiver of immunity, however, those concerns are not implicated. The Borrower cannot on the one hand do business *as the tribal government* and on the other hand argue that it should not be subject to suit because its interests as a government are later inhibited by its own prior decision to waive

²⁰ See also *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F. Supp. 599, 607 n.5 (D. Mont. 1981) (“There are few businesses that would contract with any business arm of the tribe . . . if it suspected that it had no legal recourse against that body, or was limited to a suit in tribal court. Such a holding would cripple a tribe’s own ability to take advantage of federal projects established for their benefit, or to contract commercially with any business for any purpose.”).

sovereign immunity. The dispositive question is whether the Borrower waived its sovereign immunity, and binding precedent does not permit a court to abridge a tribe's sovereignty by undoing such a waiver, particularly where, as here, the Borrower expressly stated its intent to subject itself to suit in a Washington court. *Williams* "is both factually and legally distinguishable from this case." Op. at 13.

In sum, there is nothing in the decision of the Court of Appeals that conflicts with federal or state statutes or case law. The Borrower's petition for review under RAP 13.4(b)(1) should be denied.

B. The Opinion Does Not Raise Issues of Substantial Public Interest That Should Be Determined by This Court.

The Borrower also seeks review under RAP 13.4(b)(4), arguing that this case "involves issues of substantial public interest concerning this Court's subject matter jurisdiction where Indian tribes and lands are concerned."²¹ This argument echoes the arguments discussed above and should be rejected for the same reasons. Any policy concerns pertaining to Indian tribes and land are already addressed by the Supreme Court's prohibition on suits against tribal sovereign entities in state courts absent congressional authorization or the tribe's waiver of sovereign immunity. There is no interference with tribal sovereignty where the tribal entity

²¹ Br. of Pet. at 17.

waives immunity.²² Because of the waiver, this is not an issue of substantial public interest; instead it is an ordinary contract dispute properly heard by the Washington courts.²³

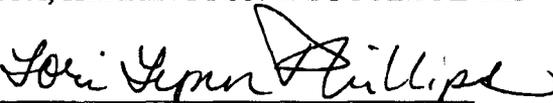
IV. CONCLUSION

Because there is no basis for review under RAP 13.4(b)(1) or 13.4(b)(4), Respondent OSM respectfully asks that the Petition be denied.

DATED this 15th day of March 2013.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

Lori Lynn Phillips (WSBA No. 25473)

David S. Keenan (WSBA No. 41359)

Melissa J. Anderson (WSBA No. 43659)

Attorneys for Respondent

²² Moreover, as discussed in Section II.A.1 and at page 12 above, the Borrower's continued insistence that this case involves solely on-reservation conduct is legally irrelevant and inconsistent with the findings of the Superior Court and the plain language of the contract.

²³ To the extent that any significant public interest is implicated by this case, it is best served by denial of the Petition for Review. "It is in the best interest of tribes that they be able to enter into enforceable contracts." *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005). "Without such contracts, many tribes would not be able to procure the financial backing that is often necessary for the creation of gaming operations," which would actually "thwart the policies underlying" the Indian Gaming Regulatory Act. *Id.* By challenging the jurisdiction of state courts to hear contract disputes where a tribal sovereign has waived its immunity, the Borrower is undermining the very policies it asserts merit this Court's consideration, and the result it advocates would impinge on the ability of tribes to enter into commercial contracts. Such a result would not be consistent with precedent or the public interest.

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Lori Lynn Philips
WSBA Bar No. 25473
lphilips@orrick.com
Tel: (206) 839-4300

MALISSA TRACEY
Legal Secretary
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 FIFTH AVENUE
SUITE 5600
SEATTLE, WA 98104
tel 206-839-4309
fax 206-839-4301
MTracey@Orrick.com

www.orrick.com
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