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SUPREME COURT
OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES MANAGEMENT, LLC,
Respondent,

v.

NOOKSACK BUSINESS CORPORATION,
Appellant.

OUTSOURCE SERVICES MANAGEMENT, LLC'S
SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Appellant Nooksack Business Corporation (“NBC”) asks this Court to do what no other court has done: override a tribal sovereign entity’s waiver of its own sovereign immunity to suit in state court on grounds that it infringes on the sovereign’s right to govern itself. NBC’s plea contradicts the simple standard articulated by the U.S. Supreme Court and every other court that has considered the issue. If a tribe clearly waives its immunity to suit, then jurisdiction in state court is proper. NBC, as an arm of the Nooksack Indian Tribe, unmistakably waived the Tribe’s immunity with respect to Respondent Outsource Services Management, LLC’s (the “Lender”) suit for breach of a \$15 million loan. Nothing more was required for the Whatcom County Superior Court to exercise jurisdiction over the Lender’s breach-of-contract suit, as the Court of Appeals recognized. NBC challenges that ruling as an impermissible intrusion on the Nooksack Tribe’s internal affairs. But no statute, case, or constitutional provision supports this challenge.

Ruling in NBC’s favor would produce two certain outcomes, each of which damages the Nooksack Tribe and every other tribe statewide. First, commercial lenders would not extend credit in Indian Country if they feared they could not enforce their rights in state court, despite a tribe’s waiver of immunity and consent to jurisdiction. Second, a ruling

for NBC would actually undermine the clear expression of its own sovereignty. A basic right of any sovereign is to determine whether it can be sued, in what forum, and for what causes of action. NBC, as an extension of the Nooksack Tribe, clearly, and irrevocably, waived its sovereign immunity. The Court of Appeals' ruling should be affirmed.

II. PROCEDURAL AND FACTUAL HISTORY

This case arises out of a straightforward breach of contract. In 2006, NBC, an arm of the Nooksack Indian Tribe, borrowed more than \$15 million from the Lender, to benefit the Tribe's Nooksack River Casino in Deming, Washington. NBC is a tribal enterprise created under Nooksack tribal law. Br. of Pet. at 3. The Nooksack Tribal Council, the governing body of the Tribe, approved the loan documents (the "Loan Agreement") through a duly authorized resolution. CP 58.

The Loan Agreement contains conventional terms that are common to virtually every lending arrangement between a commercial lender and a tribal borrower. Of particular importance, the Tribe irrevocably waived its sovereign immunity from suit and agreed that the Lender could enforce its rights by suing NBC in the United States District Court for the Western District of Washington, any court of general jurisdiction in Washington, and, only if those two forums were unavailable, in Nooksack tribal court. CP 446, 459, 466, 521, 563.

NBC defaulted on the loan four times between 2006 and 2011. The first three times, the Lender and NBC entered into forbearance agreements, each of which contained the same waiver of sovereign immunity. CP 596, 625, 655. After the fourth default, the Lender sued NBC for breach of contract in Whatcom County Superior Court. CP 380-87. NBC moved to dismiss, contending that the state court lacked jurisdiction because the suit interfered with the Tribe's internal laws and governance. CP 83-97. The Superior Court reviewed the loan documents and concluded that NBC had waived its immunity from suit and consented to state-court jurisdiction. CP 8-10. The court denied NBC's motion, and NBC appealed.

The Court of Appeals affirmed, unanimously, in all respects.¹ First, the Court of Appeals ruled that the Superior Court had jurisdiction to decide the Lender's breach-of-contract claim because the Washington Constitution authorizes superior courts to adjudicate breach-of-contract claims. Opinion at 6-7. Second, by its express waiver of sovereign immunity in the loan agreement, NBC subjected itself to suit in superior court. *Id.* at 8-13. Third, the Court of Appeals rejected NBC's argument that Washington courts lacked jurisdiction because, as NBC argued, this

¹ NBC also argued that the Loan Agreement was void as an unapproved management contract. The Court of Appeals rejected that argument, and NBC did not seek review.

action arose in Indian country and involved a suit between a non-Indian and an Indian. Opinion at 13. Regardless of where the contract was formed or performed, state-court jurisdiction over the claim did not interfere with the Tribe's internal laws and governance because the Tribe itself, through its corporate arm, waived its sovereign immunity and agreed to be sued in a Washington court. Opinion at 14. The sole jurisdictional question was whether NBC expressly and unequivocally waived its immunity from suit, not where the contract was made, performed, or breached. *Id.* at 15.

In its Petition, NBC does not contend that its waiver of immunity was either insufficiently clear or improperly authorized. Instead, NBC argues that Washington Court lacks jurisdiction over the Lender's breach-of-contract claim because the dispute arose in Indian country and implicates tribal property on a reservation. Br. of Pet. at 7. NBC also asserts that the Superior Court cannot decide the Lender's claim because Washington never established civil jurisdiction over the Nooksack Tribe through Public Law 280 ("P.L. 280"). Br. of Pet. at 8-10. NBC further argues that even if P.L. 280 jurisdiction had been established, ruling on the Lender's breach-of-contract claim would infringe on the Tribe's internal laws and governance, despite the waiver of immunity by an arm of the Tribe itself. *Id.* at 11-13. On July 10, 2013, this Court granted NBC's

petition.

III. ARGUMENT

The Nooksack River Casino is one of twenty-eight tribal casinos in Washington, and the Nooksack Tribe is one of twenty-two tribes to operate a casino.² Last year, these tribal casinos generated net receipts of approximately \$2.1 billion statewide, and as of 2010, they employed more than 15,000 people.³ Washington's tribal casinos are among more than 420 tribal gaming establishments nationwide, which last year together generated revenues of \$27.9 billion.⁴ None of this would be possible without the commercial lenders and other third parties that do business with tribes—and that rely on express and irrevocable waivers of sovereign immunity to enforce their contract rights in state court.

Not surprisingly, the Indian gaming industry has grown alongside case law—developing from the United States Supreme Court—that emphasizes clarity and certainty in contracting. A tribal entity may be sued in state court if it clearly waives its sovereign immunity. It does not

² Wash. State Gambling Comm'n, Agency Overview Brochure, <http://www.wsgc.wa.gov/newsletters/brochure.pdf> (last visited Aug. 7, 2013).

³ *Id.*; Jonathan B. Taylor, *The Economic and Fiscal Impacts of Indian Tribes in Wash.*, <http://www.washingtontribes.org/pdfs/WIGA%20Taylor%20September%202012%20Web%20Version.pdf> (last visited Aug. 7, 2013).

⁴ Nat'l Indian Gaming Comm'n, *2012 Indian gaming revenues increase 2.7 percent*, dated July 23, 2013, <http://www.nigc.gov/LinkClick.aspx?fileticket=Fhd5shyZ1fM%3d&tabid=36&mid=345> (last visited Aug. 7, 2013)

matter where the contract is signed, performed, or breached. It matters only that the tribe chose to waive immunity.

NBC asks this Court to ignore this well-established precedent, and thereby jeopardize tribal gaming—and tribal sovereignty—statewide. Taken to its logical conclusion, NBC is arguing that an express waiver of sovereign immunity is unenforceable under state law, and any tribe may breach its contractual obligations with impunity. The immediate impact would be twofold.

First, it would halt the flow of commercial lending to Indian tribes across the State. As one court observed: “It is in the best interest of tribes that they be able to enter into enforceable contracts. . . . Without such contracts, many tribes would not be able to procure the financial backing that is often necessary for the creation of gaming operations.” *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005). Certainly this is true of the Nooksack Tribe, which could not have expanded and renovated its River Casino without the loan it has now breached—and without giving the clear waiver of sovereign immunity that it now says is meaningless.

Second, and even more significantly, NBC asks this Court to override the Tribe’s own waiver of sovereign immunity. Every sovereign has the power to determine the contours of its own sovereign immunity—

including when, where, and under what circumstances it may be sued.

The Nooksack Tribe exercised this prerogative to consent to suit in state court for any claim that NBC breached its Loan Agreement. In exchange, NBC received a \$15 million loan to benefit its River Casino. A ruling for NBC on appeal would strip the Nooksack Tribe—and every other tribe in Washington—of this core sovereign prerogative.

There was nothing novel or controversial about the decisions below. NBC seeks to upend settled law—endangering lending in Indian Country and denying a sovereign’s power to choose the scope and limitations of its own immunity from suit. The Court of Appeals should be affirmed.

A. The Superior Court Has Jurisdiction Over This Case.

NBC concedes on appeal that it waived its sovereign immunity. Nothing more was required for the Superior Court to assume jurisdiction over this breach-of-contract action.

The U.S. Supreme Court and courts nationwide ask one question—and only this question—in determining whether a sovereign tribe may be sued in state court: did the tribe make itself amenable to suit through an explicit, unequivocal waiver of its sovereign immunity? As the Supreme Court has stated: “[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe*

of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). In *Kiowa*, the Supreme Court stressed that the tribe's waiver of immunity remains paramount regardless of whether the dispute arose inside or outside of a reservation. *Id.* Likewise, in *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. 2d 623 (2001), the state court had subject matter jurisdiction over a breach-of-contract action precisely because—and only because—the tribe had waived its sovereign immunity through an arbitration agreement.

Does a state court have subject matter jurisdiction over a breach-of-contract action involving a tribe? The answer turns entirely on whether the tribe clearly and validly waived its sovereign immunity, and nothing more. In the words of the chief justice of one state's supreme court: "The *Kiowa Tribe* case is therefore authority for the principle that the pertinent question when a state court suit has been filed against an Indian Tribe is whether that tribe waived its sovereign immunity." *Meyer & Assocs., Inc. v. Coushatta Tribe of La.*, 992 So. 2d 446, 452 (La. 2008) (affirming subject matter jurisdiction over tribe's breach-of-contract suit because tribe waived its immunity through contract's forum selection clauses). *See also, e.g., Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 81, 67 P.3d 306 (2003) (state court had subject matter jurisdiction over breach-of-

contract action against tribe because tribe clearly waived sovereign immunity); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 86 N.Y.2d 553, 563, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995) (jurisdiction in state court is proper when the tribal entity explicitly waives its immunity); *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal. App. 4th 190, 213-17, 135 Cal. Rptr. 3d 42 (2011) (tribe's waiver of sovereign immunity justified state court jurisdiction in suit for breach of casino loan agreement). NBC agreed to a dispute-resolution regime with "practical consequences" and a "real world end." *C & L*, 532 U.S. at 422. NBC chose to subject itself to suit for breach of contract in Washington courts. NBC does not dispute that its waivers of immunity are expressly stated. No more is needed for subject matter jurisdiction.

NBC gets it backward by arguing that this Court must first determine whether Congress has granted the Superior Court with necessary jurisdiction over NBC. The opposite is true. Washington's superior courts are courts of "universal original jurisdiction," and their authority to decide cases may be diminished only by the Constitution or through congressional preemption. *Young v. Clark*, 149 Wn. 2d 130, 134, 65 P.3d 1192 (2003). NBC also argues that subject matter jurisdiction cannot be conferred by agreement. Br. of Pet. at 13 (citing *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit Cnty.*, 135 Wn.2d 542,

556, 958 P.2d 962 (1998)). But *Skagit* involved an attempt to force a court of limited jurisdiction to hear a case outside of its legislatively-conferred authority. By contrast, the Whatcom County Superior Court already has general jurisdiction to hear contract disputes, and the Lender is not arguing that the Loan Agreement somehow conveys subject matter jurisdiction to a court that already has that jurisdiction.

The State Constitution contains only one relevant limitation: the amount in controversy must exceed \$3,000. Wash. Const. art. IV, § 6. The default presumption is that the “Constitution does not exclude any sort of causes from the jurisdiction of its superior courts, leaving Washington courts, by contrast with federal courts, with few constraints on their jurisdiction.” *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406, *review denied*, 173 Wn. 2d 1003, 271 P.3d 248 (2011). Because the Washington Constitution authorizes the superior courts to decide breach-of-contract claims above \$3,000, there is only one question: did NBC provide an express and properly authorized waiver of sovereign immunity? NBC does not contest that the answer is yes. The Whatcom County Superior Court therefore has subject matter jurisdiction.

B. The Enabling Act And P.L. 280 Do Not Limit Jurisdiction Over NBC.

NBC insists that its waiver of sovereign immunity is illusory

because its casino sits on tribal land. NBC relies on Washington's status as one of several "Disclaimer States," subject to essentially identical Enabling Acts, which Congress required as a condition of statehood. Congress required these states—which also include, among others, Idaho, Montana, North Dakota, and Oklahoma—to disclaim all right and title to Indian lands and leave these lands to Congress's absolute jurisdiction and control. *See, e.g., Organized Village of Kake v. Egan*, 369 U.S. 60, 68, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). According to NBC, the civil and criminal jurisdiction that Washington relinquished was not reclaimed in P.L. 280, and therefore the State lacks jurisdiction over disputes involving tribes in breach-of-contract actions—even where the tribe itself has waived sovereign immunity. NBC is mistaken.

1. The Enabling Act.

The Enabling Act, which is also codified at Article 26 of the Washington Constitution, does not limit the Superior Court's jurisdiction over a tribe that has waived immunity. Rather, the Enabling Act "was meant to foreclose state regulation and taxation of Indians and their lands," and does not affect state-court jurisdiction over suits involving tribes. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 149, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984). The Supreme Court in *Three Affiliated Tribes* held that the Enabling Act

did not divest the state court of subject matter jurisdiction where the tribe voluntarily availed itself of state court to pursue claims against a non-tribal company. *Id.* at 149-50. NBC likewise chose to make itself amenable to suit in Washington courts by waiving its sovereign immunity so it could benefit from the casino loan.

NBC cannot identify even one case where a court has looked to the Enabling Act to determine whether subject matter jurisdiction exists over a tribe that has waived immunity. Both *Kiowa* and *C & L* address the state-court jurisdiction of Oklahoma, which, like Washington, disclaimed authority over Indian lands on becoming a state. Neither case suggests that Oklahoma's essentially identical Enabling Act bars jurisdiction where the tribe waives sovereign immunity.

In Disclaimer States, where a tribal entity is a party, the sole question is whether it expressly waived immunity. This is true even where the challenged activity took place on tribal land. For example, in *Seneca Telephone Company v. Miami Tribe of Oklahoma*, a non-tribal utility sued the tribe for damage to the utility's underground cables, which were entirely on tribal land. 2011 OK 15 ¶ 2, 253 P.3d 53 (2011). The Oklahoma Supreme Court held that jurisdiction was lacking, but only because the tribe had not waived its immunity from suit. *Id.* ¶¶ 9-10. The court placed no weight on the fact that the land was entirely in Indian

Country. The only barrier to jurisdiction was the absence of a valid waiver of immunity. *Id.* ¶ 6. The *Seneca* court wrote: “Until such time as the parties to a contract with a tribe, condition the performance of the contract upon an express waiver of sovereign immunity, the parties must act at their own peril when dealing with the tribe.” *Id.*; see also *Dilliner v. Seneca-Cayuga Tribe Tribe of Okla.*, 2011 OK 61, 258 P.3d 516 (2011) (focusing solely on absence of valid waiver of immunity in holding that state lacked jurisdiction over former tribal employee’s breach of contract claim, which was made and performed on tribal property).

Likewise, in *Bradley v. Crow Tribe of Indians*, the Montana Supreme Court held that the tribe had unequivocally waived its sovereign immunity and therefore subject matter jurisdiction existed in state court. 315 Mont. 75, 78-83, 67 P.3d 306 (2003). The court so held even though Montana is a Disclaimer State and even though the contract involved only tribal property: a tribal member sued the tribe for breach of a contract for the planning and building of a power plant on tribal property. *Id.* at 76.

As these decisions reflect, the Enabling Act’s limited disclaimer of authority does not preclude the exercise of jurisdiction over a tribe that has chosen to waive immunity. As this Court held, the Enabling Act “was a disclaimer of proprietary rather than governmental interest,” and protects “from state proprietary interference, the title to and taxation of Indian

lands.” *Tonasket v. State*, 84 Wn.2d 164, 177-78, 525 P.2d 744 (1974); *see also Draper v. U.S.*, 164 U.S. 240, 247, 17 S. Ct. 107, 41 L. Ed. 149 (1896) (Enabling Act did not foreclose state court jurisdiction in favor of federal); *Knox v. State of Idaho*, 148 Idaho 324, 329, 223 P.3d 266 (2009) (same). Ultimately, the Enabling Act only “prohibits the state from asserting a proprietary interest in Indian lands, but does not constitute a disclaimer of state control which does not interfere with reservation self-government or impair a right granted or reserved by federal law.” *Jicarilla Apache Tribe v. U.S.*, 601 F.2d 1116, 1135 (10th Cir. 1979) (citation omitted).

In this case, exercising subject matter jurisdiction over a tribal entity that voluntarily and expressly waived immunity does not interfere with reservation self-government. To the contrary, refusing jurisdiction would deny the Nooksack Tribe’s sovereign choice to waive immunity in state court. The Enabling Act does not divest the Superior Court of jurisdiction in the face of the Nooksack Tribe’s express waiver.

2. P.L. 280 Is Irrelevant to State Court Jurisdiction Over NBC.

Nor can NBC identify any federal law that bars the Superior Court from exercising jurisdiction over the Lender’s breach-of-contract claim. NBC identifies just one federal law—P.L. 280—and argues only that P.L.

280 and its state analogue, RCW 37.12.010, do not establish the necessary jurisdiction. NBC misses the point. Subject matter jurisdiction exists independent of P.L. 280. The statute is irrelevant to state-court jurisdiction over a tribal entity that has waived immunity.

P.L. 280 applies to individuals, not to tribal entities like NBC. It authorizes state jurisdiction over “civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country.” 25 U.S.C. § 1322. “[T]here is notably absent any conferral of state jurisdiction over the tribes themselves” in P.L. 280. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 388-89, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1973). The law was “primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes.” *Id.* at 383. After P.L. 280 was enacted, the Washington Legislature assumed limited civil jurisdiction over disputes between individual tribal members arising in Indian Country. RCW 37.12.010; *State v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 498, 99 S. Ct. 740, 58 L. Ed. 740 (1979) (P.L. 280 responded to a perceived lack of “enforcement protections available to tribal Indians”). Tribal entities do not figure in this statutory scheme.

This Court’s decision in *State v. Clark*, -- P.3d --, No. 87376-3,

2013 WL 3864298 (Wash. July 25, 2013) (en banc) underscores why P.L. 280 does not apply. First, *Clark* addressed a search warrant in a criminal case against an individual Indian—not a civil suit against a tribal entity that had waived immunity. *Id.* at *1. Second, this Court ruled that the search warrant was lawful because Congress has not preempted the state’s inherent right to “exert its authority on reservation lands, even without statutory authorization.” *Id.* at *3. In other words, the State’s conduct was proper even without express statutory authority to execute a search warrant; *the key was the absence of any federal law preempting State action.* But the P.L. 280 analysis in *Clark* simply has no role here. Concerns about infringing on sovereignty are immaterial where, as here, the tribal entity itself has waived sovereign immunity. And Congress and the federal courts have never preempted this State’s right to hear a breach of contract claim against a consenting tribe.

Even in Disclaimer States, no court has held that P.L. 280 and its state analogues play any role in determining state-court jurisdiction over a tribal entity that waived its immunity to suit. *See supra* at III.B.1; *see also Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 114-15, 147 P.3d 1275 (2006) (deciding tribal entity’s ability to be sued without mentioning P.L. 280); *Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.*, 1994 OK 20, 896 P.2d 503, 508 (1994) (“Where, as here, state law is implicated,

governs the transaction and is invoked, and there is no infringement upon tribal self-government, there can be no barrier to state cognizance.”) (emphasis in original). Here, in no uncertain terms, NBC waived its immunity. The Nooksack Tribe’s sovereignty is not infringed because the Tribe has itself prescribed the terms under which it is subject to suit.

C. *Williams v. Lee* Is Inapposite Because The Tribe Itself Waived Immunity.

NBC fares no better when, citing *Williams v. Lee*, it insists that Washington court jurisdiction impermissibly infringes on the Nooksack Tribe’s internal laws and governance. Br. of Pet. at 11 (citing *Williams v. Lee*, 358 U.S. 217, 219-20, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)). There can be no infringement on self-government when a tribe itself waives sovereign immunity.

Under *Williams v. Lee*, a state may not assert jurisdiction over individual Indians if the state action would infringe “on the right of reservation Indians to make their own laws and be ruled by them.” 358 U.S. at 220. The *Williams*’ infringement test requires a case-by-case determination of whether the proposed state action goes so far as to affect tribal self-government. *Powell v. Farris*, 94 Wn. 2d 782, 786, 620 P.2d 525 (1980). It recognizes that tribes should be free from state intrusion to make their own laws and govern their internal affairs. *Id.* But no court

has applied the test where, as here, a Tribe itself waived its immunity.

The facts in *Williams* illustrate why it does not apply to the Lender's dispute with NBC, which is an arm of the Tribe. In *Williams*, two individual tribal members were sued in state court for their failure to pay for goods purchased on tribal land. *Williams*, 358 U.S. at 217-18. The defendants argued that jurisdiction lay only in tribal court. *Id.* The Supreme Court agreed, and explained that allowing state jurisdiction would undermine the tribal court's authority over affairs among individuals arising and occurring solely on the reservation. *Id.* at 223.

The Navajo Nation itself was *not* a party in *Williams*, which concerned a private dispute between individuals. This distinction is paramount, as the Supreme Court recognized in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). There, the tribal member sued in federal district court to challenge the actions of her tribe and its officials in a tribal citizenship dispute. *Id.* at 52-53. The *Santa Clara* Court distinguished between the exercise of jurisdiction over the tribe and jurisdiction over individual tribal officials. *Id.* at 58-59. The *Santa Clara* Court examined each issue independently and determined that the district court lacked jurisdiction over the tribe because the tribe had not waived its sovereign immunity. The Court did not mention *Williams*, but relied on the basic rule that tribes are immune from suit absent

congressional abrogation or tribal consent. *Id.* By contrast, the district court's jurisdiction over the *individual* tribal officials, necessitated infringement analysis under *Williams*. *Id.* at 59-60.

The bifurcated analysis in *Santa Clara* underscores the controlling principle: there is no challenge to tribal sovereignty when the tribe itself has consented to suit. As the Court of Appeals ruled, the "concerns regarding tribal sovereignty as expressed in *Williams*" do not apply because an arm of the Nooksack Tribe itself waived its immunity. *Id.* at 14. NBC never says *how* or *why* the Superior Court's jurisdiction over the Lender's claim infringes the Nooksack Tribe's ability to govern itself free of state intrusion. There is no infringement on the Tribe's sovereignty because the Tribe itself dictated the limitations on its sovereignty.

Upholding the waiver of immunity and consent to state jurisdiction in the Loan Agreement would bolster, rather than undermine, the Nooksack Tribe's sovereignty. NBC freely entered into the Loan Agreement, and as part of the bargain shaped the limitations of the Tribe's sovereignty. This is an inherent right of every sovereign—to decide whether it can be sued, and where, and for what. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-49, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (holding that a tribe, like any other sovereign, may waive a

sovereign power through contract).⁵ It follows that to invalidate the Superior Court's jurisdiction would, by necessity, invalidate the expression of the Nooksack Tribe's own sovereignty.

IV. CONCLUSION

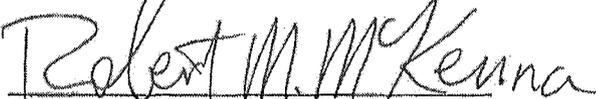
The Nooksack Tribe, though a tribal enterprise, waived its sovereign immunity and consented to the jurisdiction of Washington courts. Nothing more is needed for the Whatcom County Superior Court to hear the Lender's breach-of-contract claim. Ruling otherwise would irreparably damage tribes in Washington and their \$2.2 billion gaming industry. First, it would chill—if not freeze—commercial lending to tribes, as third-party lenders would be denied the certainty and clarity they need to enforce their contractual rights in state court. Second, it would nullify the tribes' own exercise of sovereign power, as they would be deprived of the right to determine when, where, and to what extent they can be sued. A ruling for NBC would also put this Court at odds with settled law. The Court should affirm the ruling of the Court of Appeals.

⁵ Regardless, *Williams* would not apply here as a factual matter even if NBC's understanding was correct. The Loan Agreement was not executed, performed, and breached by NBC on the Nooksack Reservation. Performance occurred not just throughout Washington but throughout the United States. As examples, the Lender that made the original was a South Dakota bank headquartered in Minnesota, CP 394, 453, 491; NBC deposited the casino's receipts at a bank outside of the Reservation, CP 463; the receipts were distributed by a bank in North Dakota, CP 530; and the loan servicer, OSM, is based in Minnesota, CP 638.

DATED this 9th day of August 2013.

Respectfully submitted,

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Please see attached Outsource Services Mgt., LLC's Supplemental Brief to be filed in the above-referenced matter. This is being filed by:

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