

March 27, 2019

THE REALITY OF SOVEREIGN IMMUNITY

[Agriculture \(/full-blog/category/Agriculture\)](#)

BY: SABRINA CASTILLE

In 2005, the State of Washington and the Stillaguamish Tribe of Indians agreed that the tribe would be given funds to build a revetment, or crib wall, on Stillaguamish River to protect the salmon population.^[i] The contract included an indemnification clause and a waiver of sovereign immunity. In 2014, a hill near Oso, Washington collapsed resulting in a devastating landslide across the river.^[ii] Victims sued the state, alleging that the revetment was a contributing factor in their injuries.^[iii] The state settled these claims for \$50 million in 2016.^[iv]

After receiving demands from the state, the Stillaguamish Tribe brought a declaratory action against Washington, claiming that tribal sovereign immunity barred suits for indemnity arising from the contract to construct the revetment.^[v] The District Court granted the tribe's summary judgment motion, and the state appealed.^[vi] On appeal, without reaching the merits of the sovereign immunity defense, the Ninth Circuit Court of Appeals held that the district court lacked jurisdiction^[vii] The Tribe had invoked federal question jurisdiction in filing this action, however, federal question jurisdiction is only available if the plaintiff's cause of action is based on federal law.^[viii] As such, "[n]either a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction."^[ix] The Court vacated the judgment of the district court and remanded the case with instructions to dismiss.^[x]



While this ruling leaves the state the option to file suit for indemnification, it does not seem that the claim would be very successful considering the district court already granted a summary judgment motion in favor of the tribe. The dispositive issue in granting the motion was that the tribe did not unequivocally waive its sovereign immunity.[xi]

Under the Stillaguamish constitution, a six-member Board of Directors governs the tribe. [xii]Additionally, the constitution gives the chairperson of the board “any authority delegated to him/her by the board of directors.”[xiii]At all times relevant, Edward Goodridge, Jr. was the Vice Chairperson of the board and the Tribe’s executive director.[xiv]Pat Stevenson is the tribe’s environmental engineer but is not an enrolled member of the tribe.[xv]Goodridge instructed Stevenson to approve the contract since Goodridge and the chairperson would be away.[xvi]In 2010, the board passed a resolution reaffirming the longstanding policy that any and all waivers of immunity shall only be granted by the Board of directors in writing and memorialized in the official records of the board.[xvii]The board further resolved that “no employee shall have the authority to bind the Tribe through written instruments that contain limited waivers of sovereign immunity.”[xviii]

Waiver of sovereign immunity must be unequivocal.[xix]Furthermore, there is a strong presumption against waiver.[xx]If binding, the contract would clearly waive tribal immunity. Therefore, the primary question was whether Stevenson waived the immunity on behalf of the tribe. The Tribe’s argument is that it is not bound to the contract because the Tribe did not waive sovereign immunity in writing and by resolution or a vote of the Board, in accordance with their policy.[xxi]The state contends that Stevenson was given authority by resolutions and that the tribe did not have a consistent practice or defined policy for waiving in 2005.[xxii]However, no resolution delegated the Board’s authority to waive sovereign immunity to the Chairperson for that authority to then pass to the Vice-Chairperson and be delegated to Stevenson.[xxiii]

Given that waiver of sovereign immunity must be equivocal, and there is evidence to support that waiver in this instance was not, this dismissal does not seem to increase the state’s odds.

[i]Andrew Westney, *9th Circ. Upends Ruling For Tribe In Wash. Landslide Suit*, Law360(Jan. 22, 2019, 12:13pm), <https://www.law360.com/articles/1120852/9th-circ-upends-ruling-for-tribe-in-wash-landslide-suit>

[ii]*Id.*

[iii]Barbara Grzincic, *9th Circuit revives Washington State landslide claims against tribe*, Reuters Legal(Jan. 23, 2019), <https://1.next.westlaw.com/Document/10e0647501f0911e9ab549ee938133a2b/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0>

[iv] *Id.*

[v]Stillaguamish Tribe of Indians v. Washington, No. 17-35722, 2019 WL 274040 (9th Cir. Jan. 22, 2019)

[vi]*Id.*

[vii]*Id.*

[viii]*Id.*

[ix]*Id.*

[x]*Id.*

[xi] *Stillaguamish Tribe of Indians v. Washington*, No. 3:16-CV-05566-RJB, 2017 WL 3424942, at *1 (W.D. Wash. Aug. 9, 2017), *vacated and remanded*, No. 17-35722, 2019 WL 274040 (9th Cir. Jan. 22, 2019).

[xii]*Id.*

[xiii]*Id.*

[xiv]*Id.*

[xv]*Id.*

[xvi]*Id.*

[xvii]*Id.* at *3.

[xviii]*Id.*

[xix]*Id.* at *4.

[xx]*Id.* at *5

[xxi]*Id.*

[xxii]*Id.*

[xxiii]*Id.* at *6.

Tagged: Sovereign Immunity (</full-blog/tag/Sovereign+Immunity>),
Stillaguamish Tribe (</full-blog/tag/Stillaguamish+Tribe>), Native American
Tribe (</full-blog/tag/Native+American+Tribe>), Federal Court (</full-blog/tag/Federal+Court>)

♥ 0 Likes < Share

COMMENTS (0)

Newest First [Subscribe via e-mail](#)

Preview POST COMMENT...

[Older Post](#)
Court Finds No Bias When Funding is Based
on Decisions Made (</full-blog/cooneyblog2>)

SEARCHABLE ARCHIVE (/PUBLICATION-ARCHIVE-1)

631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 [BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com) ([MAILTO:BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com))