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December 1, 2016

by email

Evelyn Fielding Lopez
Executive Director
Washington State Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

Re: Save Family Farming Complaint Against Wasserman, Strategies 360 and EPA

Dear Ms. Fielding Lopez,

This matter concerns the Swinomish Indian Tribal Community's efforts to educate the public on water quality issues and leading causes of pollution. One method by which the Swinomish Indian Tribal Community protects its federally-recognized treaty fishing rights is to promote the many benefits of clean water and to explain that runoff from some farms can harm water quality and salmon habitat. The focus of this letter is a project funded in part by a "Non-Point Pollution Public Information and Education Initiative" grant from the U.S. Environmental Protection Agency and administered by the Northwest Indian Fisheries Commission.

In an obvious attempt to gain publicity, stifle and distract public awareness of harmful agricultural practices, and impede and harass the Swinomish Indian Tribal Community in its protection of treaty fishing rights, Save Family Farming (SFF) has submitted a baseless complaint alleging that the Environmental Policy Director for the Swinomish Indian Tribal Community, our client Larry Wasserman, has violated the Fair Campaign Practices Act. In this response letter, Mr. Wasserman first explains why SFF's grass roots lobbying and political committee claims lack merit regardless of whether they are characterized as attacks on Mr. Wasserman himself or his employer, the Swinomish Indian Tribal Community. Mr. Wasserman then explains that the Fair Campaign and Practices Act does not apply to Indian tribes and officials, and that the Public Disclosure Commission lacks jurisdiction over Indian tribes and officials. For all of the reasons described in this letter, SFF's complaint and amended complaint should be recognized as being baseless and dismissed in their entirety.

I. Background and Introduction

The Swinomish Indian Tribal Community (Swinomish or Tribe) is a federally-recognized Indian tribe organized under Section 16 of the Indian Reorganization Act. 25 U.S.C. § 5123; *see* 81 Fed. Reg. 5019 (January 29, 2016). The Tribe's governing body is comprised of 11 elected

members who serve staggered five-year terms.

Since time immemorial, the Tribe and its ancestors have occupied lands and waters in northern Puget Sound, including but not limited to the Skagit and Samish River systems, numerous islands including Fidalgo, Camano, Whidbey, and the San Juan Islands, and marine waters in the vicinity.

The Tribe is an adjudicated successor-in-interest to certain tribes and bands of Indians that treated with the United States in the Treaty with the Duwamish, Suquamish, Etc., 12 Stat. 927 (1855) (Treaty of Point Elliott or Treaty); see *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978). Pursuant to the Treaty, the Tribe ceded its interest in vast areas of land in Western Washington in exchange for certain rights guaranteed by the United States in perpetuity. Among other things, these include the right to exclusively use and occupy the Swinomish Indian Reservation, located on the peninsula at the southeastern end of Fidalgo Island, and the right to engage in fishing, hunting, and gathering in the Tribe's usual and accustomed fishing areas and on open and unclaimed lands. Treaty of Point Elliott, Art. II, Art. V. The Tribe's usual and accustomed fishing areas include the Skagit and Samish Rivers and their tributaries, among other places. *United States v. Washington*, 459 F. Supp. at 1049.

The Skagit River system is the third largest river system in the Western United States. *Swinomish Indian Tribal Community v. Wash. State Dep't of Ecology*, 311 P.3d 6 (Wash. 2013). It is unique among river systems in the forty-eight contiguous states because all six species of Pacific salmon are found there. *Id.* Three of its salmonid species are listed under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA). See 50 C.F.R. § 17.11, 223.102 (bull trout, steelhead and Chinook).

Agriculture in the Skagit basin has led to declines in salmon runs, in part due to reduced water quality.¹ The decline in Skagit salmon runs adversely affects the Tribe's ability to harvest salmon and thus injures the Tribe's subsistence, culture and economy and undermines its Treaty fishing right. The Tribe has a legally protected interest in water quality and salmon habitat. See *Postema v. PCHB*, 142 Wn.2d 68, 74, 11 P.3d 726 (2000). The Swinomish's mission includes "to protect and preserve the Tribe's reservation homeland; to protect the Tribe's treaty rights both on and off of the Reservation; and to provide a safe and healthy environment for everyone living on and participating in the activities of the Swinomish." The public information initiative cited by SFF furthered the Tribe's mission by raising awareness of water quality issues relating to agriculture and by generating public support for clean water and salmon habitat.

Larry Wasserman is the Environmental Policy Director for the Swinomish Indian Tribal Community. He has served as the environmental policy manager for the Skagit River System Cooperative and Swinomish Indian Tribal Community from 1991 to present. He was the Tribe's project coordinator for the public education efforts at issue.

The public education effort developed to raise awareness of the enormous ecological impact of farming on water quality in the Puget Sound. In fiscal year 2011, the Tribe applied for a grant from the Northwest Indian Fisheries Commission, a consortium of twenty federal treaty

¹ See generally, Skagit Chinook Recovery Plan (Wash. Dep't. of Fish and Wildlife and Skagit River System Cooperative 2005) at 86-87. Available at <http://www.skagitwatershed.org/wp-content/uploads/SkagitChinookRecoveryPlan13.pdf>

tribes from Western Washington. The Commission's funds for the grant came from a larger grant the Commission received from the EPA. The Commission oversees and administers subaward grants. The Tribe's grant request focused on the protection of Skagit Chinook salmon, and in particular sought to provide information to community members and decision makers to support improved regulatory mechanisms and encourage better individual conservation actions. The Commission approved the grant request, and the Swinomish Senate – the Tribe's governing body – approved the grant and associated work plan. In 2012, the Tribe retained a communications consulting firm named Strategies 360 as a vendor to help develop a communications strategy. Specifically, the Tribe contracted with Strategies 360 to conduct qualitative and quantitative research to understand the challenges and opportunities surrounding public awareness of water quality issues, and then to facilitate implementation of an effective strategy to engage citizens.

From 2012 to 2015, the Tribe received continuing grants from the Commission and Strategies 360 worked as a vendor of the Tribe. Strategies 360 conducted polling to understand public awareness and positions relating to water quality, and in particular the impacts of agriculture on water quality. Strategies 360 used that information to develop a communications strategy, which involved the development of an informative website, billboards, advertisements on buses, and public radio sponsorship. The Tribe's Senate approved contracts and reviewed proposed website and billboard content. The Tribe controlled funding and decision making for the public outreach effort at all times. Mr. Wasserman served as the Tribe's project coordinator. His salary and travel were funded exclusively by the Tribe and he did not contribute any of his own funds to the public outreach initiative.

In the fall of 2015, the Tribe launched the "What's Upstream" website and associated communications outreach. Shortly thereafter, the EPA faced political pressure regarding funding directed to the Northwest Indian Fisheries Commission. Both the Northwest Indian Fisheries Commission and the EPA commenced audits of the grants relating to the public outreach at issue here. The Commission's audit has concluded with a finding of no grant violations, and the EPA audit is ongoing.

Separate from the "What's Upstream" website and associated communications, in 2015 the Tribe considered the possibility of an initiative which would increase riparian buffers on agricultural lands in order to protect water quality and salmon habitat. The initiative never proceeded beyond the early planning stages. The Tribe never finalized initiative language, gathered signatures, or filed an initiative with any office.

For advocacy on actual legislative issues, the Tribe employs a registered lobbyist named Davor Gjurasic. Mr. Gjurasic has regularly reported to the PDC in full compliance with all laws and regulations. As a result, a record of any money spent by the Tribe on lobbying is fully available to the public on the PDC's website.

In its complaint, Save Family Farming alleges that Mr. Wasserman was required to register as a grass roots campaign lobbyist under RCW 42.17A.640(2) and failed to do so.² SFF's amended complaint asserts that Mr. Wasserman unlawfully failed to register as a political committee under RCW 42.17A.205 and RCW 42.17A.235.

² SFF makes the same allegations against Dennis McLerran, who is the Regional Administrator for the U.S. Environmental Protection Agency, and Strategies 360, Inc., a public affairs firm. This letter only responds to the allegations against Mr. Wasserman.

The allegations against Mr. Wasserman are fundamentally flawed in multiple ways, and the complaint and amended complaint should be dismissed. Mr. Wasserman was not required to register under RCW 42.17A.640(2) because he spent no funds on grass roots campaign lobbying. SFF does not contend otherwise. Additionally, Mr. Wasserman was not engaged in grass roots lobbying as defined in RCW 42.17A.640(1). Mr. Wasserman was not required to register under RCW 42.17A.205 and RCW 42.17A.235 because he never filed a ballot proposition with an election official. Furthermore, the PDC has no authority to regulate how tribes spend their funds. The Fair Campaign Practices Act does not apply to sovereign Indian tribes or tribal officials, and the PDC lacks jurisdiction over a tribal official acting on behalf of a tribe. Tribal officials are immune from state enforcement actions. As detailed below, each of these points independently necessitates dismissal of the SFF complaints. SFF should not be allowed to utilize the state's resources on this frivolous matter.

Mr. Wasserman submits this response to the SFF complaint as a courtesy to the PDC. Mr. Wasserman does so without submitting or consenting to the jurisdiction of the PDC and without waiving any rights or defenses of himself or his employer, the Swinomish, or its officers, officials, or employees. In addition, while this letter addresses a few key facts in the SFF complaint, it is not intended to be a complete response to the numerous allegations in that complaint, many of which Mr. Wasserman denies. Mr. Wasserman and Swinomish expressly reserve the right to contest those allegations to the extent necessary.

II. Mr. Wasserman Did Not Engage in Grass Roots Lobbying.

The grass roots lobbying campaign rules do not apply to Mr. Wasserman's alleged activities because he expended no funds and because he was engaged in public education rather than campaigning. To the extent Mr. Wasserman worked with the legislature on House Bill 2352, that activity was conducted through and in coordination with a registered lobbyist in full compliance with the law.

A. Mr. Wasserman Was Not a Sponsor of a Grass Roots Lobbying Campaign.

RCW 42.17A.640(1) states:

Any person who has made expenditures, not reported by a registered lobbyist under RCW 42.17A.615 or by a candidate or political committee under RCW 42.17A.225 or 42.17A.235, exceeding one thousand four hundred dollars in the aggregate within any three-month period or exceeding seven hundred dollars within any one-month period in presenting a program to the public, a substantial portion of which is intended, designed or calculated primarily to influence legislation shall register and report, as provided in subsection (2) of this section, as a sponsor of a grass roots lobbying campaign.³

Thus, in order for RCW 42.17A.640 to apply, a minimum amount must be expended by Mr. Wasserman so that he is considered a "sponsor." Mr. Wasserman spent no funds and is not a sponsor.

³ The statute lists lower minimum expenditures, which have been increased by regulation. WAC 390-20-150. The current, larger amounts are included in the above text.

The Fair Campaign Practices Act and PDC regulations issued thereunder make clear that an individual who works for an organization is not a sponsor. In explaining the registration requirements for a grass roots campaign, the statute explains that the “sponsor” must report “all persons organizing and managing the campaign,” clearly differentiating between a sponsor organization and an individual who represents an organization. RCW 42.17A.640(2)(b). Another section of the statute states: “[i]f a person acts as an agent for another or is reimbursed by another for the payment, the original source of the payment is the sponsor.” RCW 42.17A.005(42)(a). Similarly, the required reporting form (L-6) provides that a sponsor is the “business, union, association, political organization or other entity,” and that the sponsor should separately list principal officers. WAC 390-20-125. Mr. Wasserman acted solely on behalf of the Tribe, did not expend any funds, and is not a sponsor of any campaign.

SFF is well-aware of Mr. Wasserman’s status as a Tribal employee, acknowledging at the outset of its September 14, 2016 letter to you that “Mr. Wasserman is an employee of the Swinomish Indian Tribal Community whose business address is 11404 Moorage Way, La Conner, WA 98257-0817.” Despite this knowledge, SFF misdirects the complaint at Mr. Wasserman. Because Mr. Wasserman spent no money on the alleged grass roots lobbying campaign, RCW 42.17A.640 does not apply and he is not a “sponsor.” He is not required to register with, or submit reports to, the PDC. On these bases alone, the SFF allegations regarding grass roots lobbying should be dismissed.

B. Mr. Wasserman Has Not Engaged in Grass Roots Lobbying.

SFF asserts that Mr. Wasserman’s activities constituted “grass roots campaign lobbying” which required him to register and report with the PDC. However, the materials attached to the complaint demonstrate that the work under the “Non-Point Pollution Public Information and Education Initiative” grant was to educate the public with the goal of improving water quality and fish habitat. The Tribe’s public outreach effort never focused on specific legislation or potential legislation.

The grant activities specify seven tasks: (1) test and refine messages; (2) print ads in Washington newspapers; (3) ads on social media platforms; (4) develop print, online and audio materials for outreach communications; (5) place earned media stories; (6) person to person outreach to community leaders; and (7) assess effectiveness of outreach efforts and write report. SFF Complaint, Exh. A at 3-4. The EPA considered this grant work to be a public education and outreach effort. Exhs. D (“public education effort”), G (“public education and outreach effort”) and H (“public information campaign about non-point source pollution”). The campaign has carried out the public education and outreach activities promised. None of this could be considered “intended, designed or calculated primarily to influence legislation.” The public outreach effort did not take any concrete steps to promote or oppose specific legislation and therefore did not undertake grass roots lobbying. See *Many Cultures, One Message v. Clements*, 520 F. App’x 517, 519 (9th Cir. 2013).

SFF’s complaint cites to polling activities as evidence that Mr. Wasserman was engaged in grass roots campaign lobbying. Polling is not lobbying. Polling is research. In this case, the polling was done to design effective public outreach and education. The subject matters of the polling corresponded to the subject of the grant: water quality and aquatic life. It was important to learn the public’s perspective and understanding of the issues in order to better implement the

public education and outreach program. Polling is also an important educational tool because it conveys the degree of public interest and concern. Here, the polling data is entirely available on the What's Upstream website along with literature reviews, relevant regulations, and water quality plans.⁴ The Tribe's willingness to share the polling demonstrates that the polling is an educational tool. Actual legislative campaigns do not broadcast internal poll results.

The complaint also points to the reference in the grant materials to "recommended measures," including changes in the regulatory and enforcement measures in order to protect water quality and salmon habitat. These statements do not evidence grass roots campaign lobbying. Rather, such measures could, for example, include enhanced emphasis by state and local authorities to enforce existing laws protecting water and fish. Moreover, advocacy for new or improved agency regulations is not grass roots lobbying, because such advocacy is not intended to influence legislation. *See* RCW 42.17A.005(28).

SFF also calls attention to a "contact a legislator" feature that was available on the "What's Upstream" website. This feature provided a sample generalized letter supporting clean water. The sample letter did not reference, support, or oppose any specific existing or potential legislation. Rather, it called attention to water quality issues and expressed support for reducing pollution from non-point sources associated with agriculture using riparian buffers. Riparian buffers are a well-established and common means to improve water quality, and encouraging public recognition of riparian buffers is not a proposal tailored for actual legislation.

The Tribe intended that the feature would engage the public by encouraging active synthesis of information into a letter, thereby increasing the duration of website visits and the depth of public education. The Tribe hoped that citizens would exercise their rights to notify legislators that there is support for clean water regulation in their districts, and that a record of letters generated by the website would provide a means by which the Tribe could track which regions of the state the initiative most successfully targeted. The intent was not and could not have been to influence legislation because no actual or proposed legislation ever existed. Nonetheless, out of an abundance of caution the Tribe removed the feature from the website in early 2016. This single feature on the website which only lasted for a period of months constitutes a small fraction of the "Non-Point Pollution Public Information and Education Initiative." The feature was not a "substantial portion" of the public information initiative and the initiative was not "intended, designed or calculated primarily to influence legislation." RCW 42.17A.640 does not apply.

Finally, in the amended complaint, SFF speculates that a Change.org petition evidences an intent to influence legislation. Again, SFF can provide no actual evidence to support its claims. Just as the Swinomish's public education initiative involved no proposed or actual legislation, there also was no Change.org petition. The idea for a petition never came to fruition.

As an employee of the Swinomish, Mr. Wasserman coordinated a public education effort, which included billboards, bus placards, radio announcements, and a website with extensive education materials. The purpose of these efforts was to generate public awareness for impacts to clean water and salmon habitat. Because the education efforts were not primarily intended to influence legislation, neither Mr. Wasserman nor the Swinomish has conducted grass roots lobbying.

⁴ <http://www.whatsupstream.com/our-research.html#habitat-health>

C. Any of Mr. Wasserman's Alleged Work Relating to H.R. Bill 2352 Was Conducted Through a Registered Lobbyist Who Fully Complied with All Legal Requirements.

SFF cites to a media report that a legislator worked with Mr. Wasserman on legislation (H.R. Bill 2352) to implement minimum riparian buffers. Even if true, this would not support the conclusion that Mr. Wasserman was the sponsor of a grass roots lobbying campaign. As the Swinomish Environmental Policy Director, he represents the Swinomish and employs expertise in areas of water quality. It is not surprising that he might be consulted during the drafting of the legislation, which is within his expertise and subject matter of his job. It would be absurd to require experts such as Mr. Wasserman to register as a lobbyist if they are consulted in an official capacity about a scientific area in which they have substantial expertise and experience.

Moreover, to the extent Mr. Wasserman engaged in communications with legislators as alleged in the SFF complaint, any legislative work was carried out in coordination with a registered lobbyist, Davor Gjurasic. During the time period in question, the Commission's records reflect that Mr. Gjurasic properly reported his work on water-related legislation with the Swinomish, in full compliance with RCW 42.17A.615. Work carried out by and with a registered lobbyist is by definition not "grass roots lobbying." RCW 42.17A.640(1); *see also* Executive Summary and Staff Analysis Jay Inslee for Washington - 2016 Campaign, PDC Case No. 15-065 (activities otherwise reported do not require reporting as grass roots lobbying). Any work by Mr. Wasserman and Mr. Gjurasic relating to HB 2352 or any other legislation was separate and apart from the public outreach initiative otherwise at issue in these matters and was not carried out with grant funds.

III. Mr. Wasserman Was Not a Political Committee.

SFF's amended complaint includes new allegations that Mr. Wasserman violated the requirement for a person to register and report as a political committee if that "person" has "the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17A.205; RCW 42.17A.235; RCW 42.17A.005(37). As with the previous claims, SFF's new allegations are entirely without merit.

Mr. Wasserman did not expect to, or actually, receive any contributions or make any expenditures regarding a ballot proposition. SFF provides no evidence that he did so. Furthermore, the nascent idea for an initiative referenced in the amended complaint is not a "ballot proposition." An initiative only constitutes a "ballot proposition" once it is filed with the appropriate election officer. RCW 42.17A.005(4); PDC Declaratory Order No. 6. The idea for an initiative involving stream buffers was never fully developed, let alone filed. It therefore never constituted a ballot initiative.

SFF's allegations concerning Mr. Wasserman also do not meet the "primary purpose" test set forth in *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wash. 2d 398, 427, 341 P.3d 953, 967 (2015), *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wash. App. 586, 600, 49 P.3d 894, 903 (2002), and PDC Interpretation No. 07-02. The documents submitted by SFF reflect that the public education initiative's primary purpose was not to support any initiative or legislation. Rather, the referenced idea for an initiative was "merely one means the

organization uses to achieve its legitimate broad nonpolitical goals,” and as a result the initiative idea “cannot be said to be one of the organization's primary purposes.” *State ex rel. Evergreen Freedom Found.*, 111 Wash. App. at 600.

In short, the definition for “political committee” does not apply to Mr. Wasserman. The claims regarding alleged violations of RCW 42.17A.205 and RCW 42.1A.235 must be dismissed.

IV. The Fair Campaign Practices Act Does Not Apply to Indian Tribes, and the PDC Lacks Jurisdiction Over Indian Tribes.

The Fair Campaign Practices Act does not apply to Indian tribes, and even if it did, the PDC lacks jurisdiction to enforce the Act against a sovereign Indian tribe such as the Swinomish Indian Tribal Community. The voter’s pamphlets and legislative history for the Fair Campaign Practices Act and its amendments make no mention of Indian tribes, and there is no record of the PDC ever pursuing a claim against an Indian tribe or tribal official. The PDC should continue its wise and lawful course of not seeking to regulate sovereign Indian tribes under state campaign laws.

SFF’s attacks at Mr. Wasserman personally, instead of the Swinomish Indian Tribal Community, do not change the fact that the Swinomish, and Mr. Wasserman acting in his capacity as a Tribal official, are immune from all claims asserted under RCW Chapter 42.17A.

A. The Grass Roots Lobbying and Political Committee Registration Requirements Do Not Apply to Indian Tribes or Tribal Officials.

The grass roots lobbying and political committee registration and reporting requirements only apply to a “person,” as that term is defined under RCW 42.17A.005(35). *See* RCW 42.17A.640(1); *see also* RCW 42.17A.005(37). The statutory definition of a “person” references several forms of government, including a “federal, state, or local governmental entity or agency however constituted,” but notably omits Indian tribes. RCW 42.17A.005(35). The 1972 voter’s pamphlets and other legislative history for the initial citizens’ initiative and the 1992 amendments similarly make no mention of Indian tribes. A search of the PDC website and relevant case law suggest that in its nearly 50-year history the PDC has never attempted to regulate an Indian tribe or tribal official. When tribes have submitted letters or other information to the PDC it has been as a government to government courtesy rather than as a result of PDC regulatory authority.

In Washington, where a statute fails to specifically mention Indian tribes, the statute is deemed not to apply. “Indian tribes are unique entities which do not fit into neat pigeonholes of the law. If the Legislature had intended to include this unique group within the terms of the [applicable] statute, it would have done so expressly.” *Queets Band of Indians v. State*, 102 Wash. 2d 1, 4, 682 P.2d 909 (1984); (citation omitted); *accord State v. Moses*, 145 Wash. 2d 370, 375, 37 P.3d 1216, 1218 (2002). The PDC recently denied a petition for rulemaking that would have added Indian tribes to definitions of “public funds” and “public office,” in part on the basis that the relevant statutory authority did not explicitly mention Indian tribes. *See* March 17, 2016 PDC Response to AUTO Petition for Rulemaking.

As noted above, Mr. Wasserman works for the Swinomish Indian Tribal Community, a federally recognized Indian tribe. The allegations raised by SFF are truly directed at the Swinomish. However, the requirements of RCW 42.1A.640(1), RCW 42.17A.205, and RCW 42.17A.235 do not apply to Indian tribes or their employees. Accordingly, SFF's complaint must be dismissed.

B. The PDC Lacks Jurisdiction Over Mr. Wasserman Because It Cannot Regulate Tribal Affairs and Tribal Officials Are Immune from State Enforcement Actions.

SFF appears to know that the real party in interest is the Swinomish, a federally-recognized Indian tribe. Nonetheless, SFF does not even allege that the Tribe could be subject to state law or the state's enforcement jurisdiction. Instead, in a transparent but fruitless attempt to avoid the Tribe's sovereign immunity, SFF filed a complaint against one of its officials despite no legal or factual basis to do so.⁵

1. The PDC Does Not Have Jurisdiction to Regulate How Tribes and Tribal Officials Spend Their Funds.

The State lacks regulatory jurisdiction over tribes and their members in Indian country, absent a clear treaty, executive order, or congressional expression to the contrary. The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, Section 8, cl. 3; *see also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).⁶ Thus, tribal sovereignty is "subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)). State laws are therefore not applicable to Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply, *Cabazon*, 480 U.S. at 207; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973), or where other "exceptional circumstances" exist that justify the intrusion of state regulation into tribal affairs, *Cabazon*, 480 U.S. at 215.

No treaty, federal law, or executive order authorizes Washington to apply its campaign finance regulations to tribes and tribal officials. Nor are there "exceptional circumstances" that might justify application of such laws. The existence of such extraordinary circumstances must be evaluated "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government." *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 147 (9th Cir. 1991). Here, the State has an interest in public disclosure of grass roots campaign funding, but that interest cannot justify the extraordinarily intrusive step of directly regulating a tribal official's expenditure of funds on behalf of a tribe. In this case, the expenditure of funds was designed to promote the Tribe's important interests in protecting water quality and fish habitat on and around its Reservation. This ties directly to the Swinomish's treaty right to fish in its usual and accustomed fishing grounds, which is of paramount

⁵ SFF makes a similarly transparent and futile attempt to avoid Federal sovereign immunity by naming EPA Regional Administration Dennis McLerran as an individual.

⁶ *See also Worcester v. Georgia*, 6 Pet. 515, 561 (1832); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

importance to the Tribe's sovereignty, ability to prosper and right to self-government. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-344 (1983) (invalidating state attempt to regulate tribal hunting and fishing).

2. The PDC Lacks Jurisdiction to Enforce State Law Under the Well-Established Doctrine of Tribal Official Sovereign Immunity.

A tribe's sovereign immunity extends to tribal commercial and governmental activities both on and off the tribe's reservation, and it provides a defense to suits filed against them in state and federal courts. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998). Courts, including Washington courts, "have long recognized that 'tribal immunity is a matter of federal law and is not subject to diminution by the States.'" *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 141 Wn. App. 221, 226-27 (2007) (citing *Kiowa Tribe*, 523 U.S. at 756). Congress maintains the ultimate authority to decide whether, how, and where tribes may be sued, including the circumstances in which tribes may assert the affirmative defense of sovereign immunity. *Id.* Absent a tribal waiver, the state has no jurisdiction over a tribe. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977); *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) ("The issue of tribal sovereign immunity is jurisdictional in nature.").

Federal and Washington courts have repeatedly confirmed that tribal officials enjoy immunity so long as they are acting in their official capacity and within the scope of their authority. *Santa Clara*, 436 U.S. at 52; *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir 1992) (holding tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority"); *Young v. Duenas*, 164 Wn. App. 343, 349 (2011) ("Sovereign immunity extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority"); *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 112 (2006). In *Young*, the court noted that Tribal sovereign immunity cannot be circumvented by targeting a tribal official, as SFF has done here. 164 Wn. App. at 349.

At all times relevant to the SFF complaint, Mr. Wasserman served as the Environmental Policy Director for the Swinomish. The SFF complaint solely concerns Mr. Wasserman's alleged actions in his Tribal official capacity. The complaint cites to Mr. Wasserman's alleged activities conducted pursuant to a grant received by the Tribe (as subgrantee to the Northwest Indian Fisheries Commission) from EPA. The referenced grants and work plans corroborate that Mr. Wasserman acted in his official tribal capacity at all times relevant to the complaint. The grant included in SFF's complaint specifically refers to the Swinomish as the entity carrying out the grant, and references Mr. Wasserman as working as a coordinator on the Tribe's behalf. All of Mr. Wasserman's actions referenced in the SFF complaint and amended complaint are within the scope of his official Tribal duties as part of his Tribal employment. He took no actions in his unofficial or personal capacity, and SFF does not claim otherwise. Accordingly, Mr. Wasserman enjoys immunity and the PDC has no jurisdiction over him.

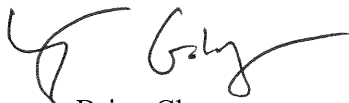
V. Conclusion

The Swinomish Indian Tribal Community's public education initiative educated the public on water quality issues in an effort to facilitate restoration of clean water, enhancement of salmon habitat, and protection of treaty fishing rights. Save Family Farming's allegations are entirely without merit and appear simply to be a means of harassment of a Tribal official who is doing no more than carrying out his official functions, and a poorly-disguised and misguided effort to deter the Tribe's protection of its Federally-reserved fishing rights. The complaint attempts to use the PDC as a tool in a long-running policy dispute and is a waste of valuable State and Tribal resources.

The grass roots lobbying requirements do not apply. Mr. Wasserman expended no funds, and the Non-Point Pollution Public Information and Education Initiative was dedicated to public outreach and education. Mr. Wasserman is not a political committee because he never filed a ballot proposition with an election official. The Fair Campaign Practices Act does not apply and the PDC lacks jurisdiction to enforce it against Mr. Wasserman because he is a tribal official who acted solely in his official capacity working for a sovereign Indian tribe. If the PDC has any concerns whatsoever regarding transparency, we note that all lobbying conducted on behalf of the Tribe was properly reported, and that the public information initiative is described in detail on the publicly accessible "What's Upstream" website, including clear identification of the grant funding sources.

For all of these reasons, the SFF complaint and amended complaint should be dismissed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian Chestnut", with a stylized flourish at the end.

Brian Chestnut
Wyatt Golding