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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RONALD OERTWICH, Plaintiff, v. TRADITIONAL VILLAGE OF TOGIAK et al., Defendants.	)	Case No. 3:19-cv-00082-JWS

TRIBAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS [DKT. 22]

Sovereign immunity bars this suit against the Traditional Village of Togiak ("the Tribe") and the individual tribal defendants[1] (collectively, "Tribal Defendants"). When tribal sovereign immunity is raised as a defense in a Rule 12(b)(1) motion, "'the party asserting subject matter jurisdiction has the burden of proving its existence,' *i.e*. that immunity does not bar the suit."[2] Plaintiff has failed to demonstrate that this Court has jurisdiction over the Tribal Defendants in this action. Therefore, Tribal Defendants' Motion to Dismiss (Dkt. 22) should be granted.

I. THE TRIBE IS IMMUNE FROM SUIT, AND NO EXCEPTIONS OR WAIVERS APPLY.

A. Plaintiff's "Exceptions" to Sovereign Immunity Do Not Confer Jurisdiction.

Plaintiff argues that this Court should adopt three alleged exceptions to sovereign immunity. One has been expressly rejected by the Ninth Circuit and the other two—if they are in fact exceptions—are entirely inapplicable.

1. Tort Claims. First, federal law does not recognize the so-called "tort victim exception" that Plaintiff proposes to import from a single outlier State-court decision.[3] The

[1] As noted in earlier briefing, Counsel use the term "individual tribal defendants" to include the following named defendants: Jimmy Coopchiak, Teodoro Pauk, Leroy Nanalook, Anecia Kritz, Esther Thompson, John Nick, Willie Wassillie, Herbert Lockuk Jr., William Echuck, Craig Logusak, Paul Markoff, Peter Lockuk Sr., and Bobby Coopchiak.

[2] *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting *Miller v. Wright*, 705 F.3d 919, 927–28 (9th Cir. 2013)).

[3] *See* Plaintiff's Opposition to Motion to Dismiss, Dkt. 31 ("Opp.") at 7–8.

United States Supreme Court has never recognized such an exception, and the Ninth Circuit has expressly rejected it.

In *Wilkes v. PCI Gaming Authority*, the Alabama Supreme Court held that tribal sovereign immunity did not apply in a tort action brought by a non-Indian plaintiff. [4] The decision relied heavily on a footnote from the United States Supreme Court's opinion in *Michigan v. Bay Mills Indian Community*, which in fact *declined* to create a tort-victim exception to tribal immunity.[5] The Alabama court itself stated that its invention of this exception was "contrary to the holdings of several of the United States Courts of Appeals that have considered this issue."[6] One "contrary holding" the Alabama court pointed to is the Ninth Circuit's decision in *Arizona v. Tohono O'odham Nation*, which considered the *Bay Mills* footnote and stated explicitly that there is no "tort-victim exception" under Ninth Circuit law.[7] The Circuit Court explained that *Bay Mills* had not changed the relevant law:

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[4] No. 1151312, 2017 WL 4385738 (Ala. Sept. 29, 2017), *cert. denied sub nom. Poarch Band of Creek Indians v. Wilkes*, No. 17-1175, 2019 WL 2570656 (U.S. June 24, 2019).

[5] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 n.8 (2014) ("We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.").

[6] *Wilkes*, 2017 WL 4385738 at *4 (citing *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n.8 (9th Cir. 2016)). Counsel have located no federal court decisions following the Alabama court's approach. *Wilkes* itself has not been cited by any federal court decisions or any State court decisions outside Alabama.

[7] *Id.* at *3–4 (citing *Tohono O'odham Nation*, 818 F.3d at 563 n.8).

"We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law."[8]

As even the Alabama court recognized, "tribal immunity is a matter of federal law and is not subject to diminution by the States."[9] The Ninth Circuit's decision is binding on this Court,[10] and the Alabama court's contrary decision in *Wilkes* has no application here. Plaintiff himself characterizes the Alabama court's statements as "brazen[]" and offers no reason why this Court should disregard clear Ninth Circuit precedent in favor of this nonbinding, self-acknowledged outlier.[11] The fact that the United States Supreme Court has not yet ruled on this specific question—and the simple fact that it declined to grant certiorari in *Wilkes*, as it does in thousands of cases a year—provides no justification for departing from binding Circuit precedent.[12]

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[8] *Tohono O'odham Nation*, 818 F.3d at 563 n.8 ("Plaintiffs cite a footnote in the U.S. Supreme Court's recent *Bay Mills* decision for the proposition that the doctrine of tribal sovereign immunity should not bar tort claims against an Indian Tribe at all. But in the cited footnote, the Court was discussing the principle of stare decisis, and expressly reserved decision on whether a case involving an unwitting 'tort victim' 'would present a 'special justification' for abandoning precedent,' because that case was 'not before [the Court].' We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law." (citing *Bay Mills Indian Cmty.*, 572 U.S. at 799 n.8 and *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 725 (9th Cir. 2008))).

[9] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998); *see Wilkes*, 2017 WL 4385738 at *4.

[10] *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (citing *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)).

[11] Dkt. 31 (Opp.) at 7.

[12] The Supreme Court's decision in *Lewis v. Clarke* did not address this question or alter the law in this area, as that case involved no claims against the tribe. Rather than examining the contours of tribal sovereign immunity, the decision held that tribal sovereign immunity

Even if the Tribe were not immune from Plaintiff's tort claims on the basis of sovereign immunity, Plaintiff's tort claims are barred for failure to exhaust administrative remedies under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. Plaintiff points to certain grant funds received by the Tribe,[13] but he does not address—must less contest—the evidence proffered by the Tribe demonstrating that the Tribe's governance activities are substantially supported by a self-determination compact under the Indian Self-Determination and Education Assistance Act (ISDEAA).[14] Activities conducted pursuant to an ISDEAA compact are subject to the FTCA, yet Plaintiff offers no defense for his failure to follow the FTCA's exclusive tort remedies.[15]

2. "Immovable Property." Plaintiff next asks the Court to apply the so-called immovable-property exception to sovereign immunity. This is an inapposite doctrine that the Supreme Court recently *declined* to apply to an Indian tribe.

In *Upper Skagit Tribe v. Lundgren*, the Supreme Court addressed a property dispute between the Upper Skagit Tribe and neighboring landowners regarding land that had been purchased by the Tribe.[16] After rejecting the grounds on which the Washington Supreme

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had no bearing on individual-capacity suits where the real party in interest was the individual rather than the tribe. 137 S. Ct. 1285 (2017).

[13] Dkt. 31 (Opp.) at 9.

[14] Dkt. 22 (Mot.) at 21–22; *see* Dkt. 23 (Eningowuk Affidavit) at ¶¶ 6–7.

[15] *See* Tribal Defendants' Motion to Dismiss, Dkt. 22 ("Mot.") at 20-23 (citing, *inter alia*, *Shirk v. United States*, 773 F.3d 999, 1003 (9th Cir. 2014)).

[16] 138 S. Ct. 1649 (2018).

Court had attempted to limit tribal sovereign immunity, the Court considered the immovable property exception—raised for the first time on appeal—and declined to apply it, instead remanding "to the Washington Supreme Court to address these arguments in the first instance."[17] Plaintiff now asks this Court to rely on a concurrence and a dissent in that decision to apply a doctrine that the Supreme Court itself has never applied to an Indian tribe.[18]

The immovable property exception relates to real property ownership issues, not the type of claims Plaintiff raises here. Plaintiff attempts to focus on whether the Tribe owns the lands where the challenged conduct occurred, but this is not a property dispute, and the immovable property exception is therefore inapplicable. Moreover, there is no legitimate argument that the Tribe "assum[ed] the character of a private individual" in this matter, which is the basis of the immovable property exception.[19] Plaintiff's claims relate to actions taken by the Tribe and its officials in the course of conducting core governmental functions relating to public health, safety and welfare. This exception is therefore inapplicable.

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[17] *Id.* at 1654 (describing the so-called exception as follows: "At common law, [appellants] say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign."). There are no reported decisions on remand.

[18] Dkt. 31 (Opp.) at 5–7. The concurrence actually acknowledges there is an open question as to whether certain principles might actually "afford Indian tribes a *broader* immunity" than other sovereigns regarding "actions involving off-reservation land." *Upper Skagit Tribe*, 138 S. Ct. at 1655 (Roberts, C.J., concurring) (emphasis added).

[19] *See Upper Skagit Tribe*, 138 S. Ct. at 1653.

3. Equitable Actions. Finally, Plaintiff mentions in passing that a concurring opinion by Justice Stevens once suggested that tribal sovereign immunity may not extend to suits seeking equitable relief.[20] Again, a concurrence does not create binding law, particularly in a decision where all eight other Justices signed onto the majority opinion. In subsequent decisions the Ninth Circuit has repeatedly held that suits for injunctive relief as well as monetary damages are barred by tribal sovereign immunity.[21]

B. The Tribe Has Not Waived Sovereign Immunity.

The Tribe has not waived its sovereign immunity, either as to the Tribe itself or as to the individual tribal defendants.[22] Plaintiff acknowledges that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[23] Contrary to Plaintiff's argument, the Tribe's acceptance of federal funding is not a clear and "unequivocal" waiver of sovereign immunity. It is not a waiver at all. Although Congress can condition federal funding on a waiver of sovereign immunity, such a requirement "is constitutional only if it manifests 'a clear intent to condition participation in the program

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[20] Dkt. 31 (Opp.) at 4 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 516 (1991) (Stevens., J., concurring)).

[21] *E.g.*, *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) (tribe is immune in "actions for prospective non-monetary relief" even if tribal officials may be subject to suit under *Ex Parte Young* doctrine); *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (same). Indeed, the *Ex Parte Young* doctrine advanced by Plaintiff, *see* infra at 9, would serve no purpose if tribes themselves were subject to suit for prospective relief.

[22] Dkt. 22 (Mot.) at 7–8.

[23] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)); *see* Opposition at 9 (quoting *id.*).

funded under the Act on . . . consent to waive . . . [sovereign] immunity.'"[24] Similarly, "general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity,"[25] and a sovereign "does not waive its immunity merely by accepting federal funds."[26] A Tribe's mere assent to comply with federal law when accepting federal funding, without any express waiver of sovereign immunity, does not constitute such a waiver.

Plaintiff has neither alleged nor demonstrated an express waiver of sovereign immunity by the Tribe, nor has he demonstrated that Congress intended to condition the receipt of the Tribe's federal funding on a waiver of sovereign immunity.[27] There are simply no expressions of intent to waive here—let alone the "unequivocal expressions" required by *Santa Clara Pueblo v. Martinez*.[28]

For all of these reasons, the Tribe retains its sovereign immunity from suit, and all of Plaintiff's claims against the Tribe must be dismissed. In addition, Plaintiff does not contest that he lacks a remedy against the Tribe or its officials under 42 U.S.C. § 1983 or

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[24] *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1163 (D.C. Cir. 2004).

[25] *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006).

[26] *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234, 240 (3d Cir. 2003).

[27] Plaintiff does not argue that the Tribe's acceptance of ISDEAA funding is a waiver of sovereign immunity, nor could he, as the ISDEAA expressly states that it does not constitute such a waiver. 25 U.S.C. § 5332(1). Nor does Plaintiff point to any term or condition of the Tribe's Department of Justice grant funding that would constitute such a waiver.

[28] 436 U.S. at 58.

under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302.[29] Those claims are abandoned and should also be dismissed for this independent reason.[30]

II. THE INDIVIDUAL TRIBAL DEFENDANTS ARE IMMUNE FROM SUITS FOR DAMAGES, AND THE SINGLE CLAIM FOR INJUNCTIVE RELIEF MUST ALSO BE DISMISSED.

A. The Official-Capacity Claims are Barred by Sovereign Immunity.

Plaintiff does not contest that the individual tribal defendants share the Tribe's immunity from suits for damages with respect to official-capacity claims. Crucially, all Plaintiff's claims are properly considered official-capacity claims—even those nominally pled as individual-capacity claims—because Plaintiff challenges the authority of the Tribe itself, not specific actions taken by the defendants as individuals.[31]

The Ninth Circuit has found that even claims for monetary damages to be paid by individual defendants are properly considered official-capacity claims if the damages would be "predicated on th[e] court's determination that the [action taken by the tribe itself] was improper."[32] Plaintiff has not asserted any true individual-capacity claims here.[33]

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[29] *See* Dkt. 22 (Mot.) at 23–25.

[30] *See Texas v. Lesage*, 528 U.S. 18, 22, (1999) (claim apparently abandoned by failure to address the issue in opposition brief).

[31] Dkt. 22 (Mot.) at 14–15; *see also Allen v. Smith*, 597 F. App'x 442, 443 (9th Cir. 2015); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

[32] *Allen v. Smith*, 597 F. App'x at 443; *see also Scott v. Doe*, 199 Wash. App. 1039, 2017 WL 2738761 at *5 & n.4 (dismissing suit against tribal officials because the Plaintiff's "primary argument goes to tribal authority" rather than "isolated acts by individuals").

[33] Plaintiff cites *Lewis v. Clarke* 137 S. Ct. 1285 (2017), but he ignores the real-party-in-interest test articulated in that decision. Opposition at 10. Applied to Plaintiff's claims

Indeed, Plaintiff continues to assert that all his claims arise from *the Tribe's* allegedly improper assertion of jurisdiction over him.[34] The arguments in Plaintiff's opposition only reiterate his core challenge to the scope of the Tribe's jurisdiction. All of Plaintiff's claims for damages must therefore be construed as official-capacity claims.

Official-capacity suits against tribal officers and employees are barred to the same extent that suits against a tribe are barred by tribal sovereign immunity.[35] The one exception is the *Ex Parte Young* doctrine, which "permits actions *for prospective non-monetary relief* against state or tribal officials in their official capacity to enjoin them from violating federal law."[36] But this doctrine does not permit claims for damages, and it does not, as Plaintiff incorrectly asserts, mean that "[i]ndividual suits are . . . authorized" beyond the doctrine's limited context.[37] Moreover, Plaintiffs may not use *Ex Parte Young* as a "ploy . . . to circumvent tribal sovereign immunity"; thus "a suit may be barred, even if the officer being sued has acted unconstitutionally or beyond his statutory powers, when the

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here, the real-party-in-interest test dictates that all of the individual claims be construed as official-capacity claims. *See* Dkt. 22 (Mot.) at 12-16.

[34] Dkt. 31 (Opp.) at 2-3, 8.

[35] Dkt. 22 (Mot.) at 10-16.

[36] *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012).

[37] *Compare* Dkt. 31 (Opp.) at 10; *with Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013) ("[T]o the extent the complaint seeks monetary relief, such claims are barred under *Ex Parte Young*." (citing *Salt River Project*, 672 F.3d at 1181)).

requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property."[38]

Plaintiff has asserted only one claim for injunctive relief, Count I.[39] But although Count I is nominally asserted against the individual defendants (in the heading of Count I), the text requests only that *the Tribe* be subject to declaratory and injunctive relief.[40] Any relief under Count I would therefore operate against the sovereign Tribe and is accordingly barred under *Ex Parte Young*.

All of Plaintiff's other claims for relief against the Tribal Defendants are damage claims. Those claims are plainly not covered by *Ex Parte Young* and must accordingly be dismissed as barred by sovereign immunity.[41] At most, *Ex Parte Young* might save Count I, but only as to prospective injunctive relief against the Tribe's officials in their official capacities. And even if Count I is not barred under *Ex Parte Young* it must still be dismissed for the additional reasons discussed below.

B. Any Remaining Claims Are Barred for Multiple Reasons.

1. Failure to Exhaust Tribal Court Remedies. To the extent that Plaintiff's Count I claim for prospective relief is not barred by tribal sovereign immunity, or to the extent that any of Plaintiff's claims are construed as individual-capacity claims instead of

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[38] *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002).

[39] Complaint, Dkt. 1 ("Compl.") at ¶¶ 52–55.

[40] Dkt. 1 (Compl.) at ¶ 55.

[41] Dkt. 1 (Compl.) at ¶¶ 56–70.

official-capacity claims, all of these claims must still be dismissed for failure to exhaust tribal court remedies. As the Tribal Defendants established in their Motion, in a challenge to the scope of tribal authority like the case at bar, the tribal court must be given "a 'full opportunity to determine its own jurisdiction'" before an action may proceed in federal court.[42]

Plaintiff only briefly argues that he was not required to exhaust tribal court remedies, citing *Nevada v. Hicks*.[43] But in that case the disputed action was a suit against *State* officials—not tribal officials—and the Court held that exhaustion was not required only because it was clear that the tribal court lacked jurisdiction over the State officials for actions related to enforcing State law.[44] The current case is entirely different: Plaintiff has sued *tribal* officials and his claims challenge the scope of *tribal* law. The *Hicks* exception does not apply, and Plaintiff's claims are subject to the general rule requiring exhaustion of tribal court remedies.[45]

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[42] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)); *cf. Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699–700 (8th Cir. 2019).

[43] Dkt. 31 (Opp.) at 9 (citing 533 U.S. 353, 369 (2001)).

[44] *Hicks*, 533 U.S. at 369.

[45] *See, e.g.*, *Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1246 (D. Nev. 2009) ("*Hicks* did not purport to overrule the Supreme Court's precedents establishing that a plaintiff must exhaust his tribal remedies even if tribal jurisdiction is not conclusively established.") In subsequent decisions, "the Ninth Circuit has not construed *Hicks* to require a conclusive ruling on tribal jurisdiction" in order for the exhaustion requirement to apply. *Id.* at 1247 (citing *Boozer v. Wilder*, 381 F.3d 931 (9th Cir. 2004)).

2. Official Immunity. Plaintiff does not contest that all of the Tribal officers, employees, and volunteer employees are entitled to official immunity for their actions.[46] Courts hold that tribal officers and employees are entitled to official immunity when they are acting pursuant to a "facially valid" court order, as the individual tribal defendants were here.[47] This reason, too, bars Plaintiff's claims against the individual tribal defendants.

3. Other Claims. As noted above, Plaintiff does not contest that his tort claims are barred for failure to exhaust under the FTCA, 28 U.S.C. §§ 2671-2680,[48] and that he lacks a federal court remedy for his statutory claims under 42 U.S.C. § 1983 and the Indian Civil Rights Act, 25 U.S.C. § 1302.[49] Plaintiff's claims against the individual tribal defendants must be dismissed for these reasons even if not barred for the reasons stated above.

Finally, in his opposition Plaintiff asserts for his first time that he intended to assert claims against Teodoro Pauk in his capacity as Mayor of the City of Togiak.[50] But the

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[46] Dkt. 22 (Mot.) at 16–18.

[47] *Penn v. United States*, 335 F.3d 786, 789-90 (8th Cir. 2003); *see also Engebretson v. Mahoney*, 724 F.3d 1034, 1039–40 (9th Cir. 2013) (prison officials acting in pursuance to a facially valid court order are entitled to absolute quasi-judicial immunity); *In re Roberts*, 97 F. Supp. 3d 1239, 1243 (D. Mont. 2015), *aff'd*, 693 F. App'x 630 (9th Cir. 2017) (tribal police officers entitled to qualified immunity against claims for false arrest, false imprisonment, negligent infliction of emotion distress, and constitutional violations); *Christoffersen v. State*, 242 P.3d 1032, 1035 (Alaska 2010) ("The doctrine of absolute judicial immunity extends not only to judges but to others who perform duties sufficiently related to the judicial process.").

[48] Dkt. 22 (Mot.) at 20–23.

[49] Dkt. 22 (Mot.) at 23–25.

[50] Dkt. 31 (Opp.) at 10.

complaint alleges no actions by the Mayor, nor do any of the counts against the City list the Mayor or any other City officials as defendants. Any alleged claim against Mr. Pauk in his capacity as Mayor should therefore be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

III. CONCLUSION

Tribal sovereign immunity bars Plaintiff's claims against the Tribe and the individual tribal defendants. To the extent that any claims against the Tribal Defendants are not barred by tribal sovereign immunity, they should be dismissed for failure to exhaust tribal court remedies, failure to exhaust administrative remedies for tort claims under the FTCA, lack of any statutory remedy under ICRA or section 1983, official immunity, and failure to state a claim.

Plaintiff has failed to carry his burden to establish that this Court has jurisdiction over his claims. The Tribal Defendants therefore respectfully request that Plaintiff's claims against them be dismissed in their entirety.

Respectfully submitted this 15th day of August 2019 at Anchorage, Alaska.

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