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PREVIEW; McCoy v. Salish Kootenai College, Inc.: *How Far Does Sovereign Immunity Extend?*

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PREVIEW; *McCoy v. Salish Kootenai College, Inc.*: How Far Does Sovereign Immunity Extend?

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The Ninth Circuit Court of Appeals will hear oral argument on this matter Friday, October 25 at 9:00 a.m. in the Second Floor Courtroom of The Pioneer Courthouse in Portland, Oregon. Torrance L. Coburn will appear on behalf of the Appellant, Martin S. King will appear on behalf of the Appellee, and John Harrison will appear on behalf of the Intervenor-Appellee.

I. INTRODUCTION

This case presents the issue of whether a tribal college, incorporated under the laws of the Confederated Salish and Kootenai Tribes ("Tribe") and, subsequently, the State of Montana, may be considered an arm of the Tribe, thus benefitting from tribal sovereign immunity. The resolution of this issue will influence tribal jurisdictional questions throughout the state and the country. The Appellant, Stephen McCoy, asserts that the federal courts have federal question jurisdiction over his Title VII claims against Appellee, Salish Kootenai College, Inc. ("College") because it is not an arm of the Tribe and therefore is not immune from Title VII claims.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

The College was originally chartered and incorporated under Confederated Salish and Kootenai tribal law in 1977, and shortly thereafter, in 1978, it was incorporated under Montana law.[2] Stephen McCoy began his 23-year employment with the College in 1992 and served in several capacities over that period.[3] McCoy claims that he was subjected to a hostile work environment which

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[1] Appellant's Opening Brief at 5–6, *McCoy v. Salish Kootenai College, Inc.*, (9th Cir. Jan. 9, 2019) (No. 18-35729).

[2] Appellee's Answering Brief at 9–11, *McCoy v. Salish Kootenai College, Inc.*, (9th Cir. Mar. 11, 2019) (No. 18-35729).

[3] Appellant's Opening Brief, *supra* note 1, at 3.

culminated with his resignation in December 2016.[4] Beginning in November 2014, McCoy claims he was subjected to multiple allegations and insinuations that he made improper romantic advances towards personnel of entities the College conducts business with; he was removed from two coordinator positions he held; and he was improperly disciplined.[5]

After resigning, McCoy filed his complaint with the Montana Human Rights Bureau and the Equal Employment Opportunity Commission and subsequently received notice of his right to file an action in district court.[6] The subsequent complaint filed in the United States District Court for the District of Montana, Missoula Division, alleges sex-based discrimination under Title VII of the Civil Rights Act and the Montana Human Rights Act.[7]

The College moved for jurisdictional discovery to determine if the federal court had proper subject matter jurisdiction over the case and subsequently moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted.[8] After extensive briefing, the district court granted the College's motion to dismiss on the grounds that the College was an arm of the Tribe and shared its sovereign immunity under the five-factor test established in *White v. University of California*.[9] McCoy has appealed this decision to the Ninth Circuit Court of Appeals, and the Tribe have stepped in as an intervening party.

III. SUMMARY OF THE ARGUMENTS

Indian tribal sovereignty has a long and storied history in the United States.[10] The courts have long viewed Indian tribes as

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[4] *Id*.
[5] Complaint at 3, *McCoy v. Salish Kootenai College, Inc.*, (D. Mont. June 26, 2017) (CV 17-88-M-DLC).
[6] *Id*. at 4.
[7] *Id*. at 4–5.
[8] Salish Kootenai College's Motion to Dismiss at 1, *McCoy v. Salish Kootenai College, Inc.*, (D. Mont. Feb. 2, 2018) (CV 17-88-M-DLC).
[9] 765 F.3d 1010, 1025 (9th Cir. 2014).
[10] Dating to the original treaties entered into by the British Monarchy and the colonial Indian tribes they interacted with. *See, e.g. Worcester v. Georgia*, 31 U.S. 515, 544 (1832) (holding that the United States had succeeded all political

"domestic dependent nations that exercise inherent authority over their members and territories,"[11] and that sovereign authority and immunity extend beyond merely governmental activities, covering business activities of a tribe as well.[12] Modern jurisprudence has evolved to establish a test as to whether an entity may share in a tribe's sovereign immunity because it is conducting business as an arm of the tribe.[13]

The *White* test, adopted from the Tenth Circuit Court of Appeals, presents five factors to be weighed in determining whether the entity is sufficiently intertwined with the tribe so as to share its sovereign immunity.[14] The factors to be weighed are: (1) the method of creation of the entity; (2) the entity's purpose; (3) the entity's structure, ownership, and management, including the amount of control the tribe has over the entity; (4) the tribe's intent to share its sovereign immunity with the entity; and (5) the financial relationship between the tribe and the entity.[15] The totality of McCoy's claims depend on whether he can show that the College fails to meet the *White* factors, overcoming the district court's finding that the College is acting as an arm of the Tribe and that its activities can be properly viewed as those of the Tribe.[16] On appeal, the Court will review the district court's dismissal for lack of subject matter jurisdiction de novo.[17]

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and territorial claims of Great Britain, including treaties with Native American tribes recognizing them as sovereign entities).

[11] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (internal quotation marks omitted).

[12] Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) (citations omitted).

[13] White v. University of Cal., 765 F.3d 1010, 1025 (9th Cir. 2014) (establishing the five-factor "arm of the tribe" test).

[14] Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010).

[15] *White*, 765 F.3d at 1025.

[16] *Allen*, 464 F.3d at 1046.

[17] Atwood v. Fort Peck Tribal Court Assiniboine, 513 F.3d 943, 946 (9th Cir. 2008).

A. Appellant's Argument

McCoy argues that none of the *White* factors weigh in favor of the College being an arm of the Tribe. [18] McCoy argues under the first *White* factor, that the law under which the entity is formed is a strong determinative factor in establishing whether an entity should be treated as an arm of an Indian tribe, and an entity being formed under the laws of a state weighs against that factor. [19] McCoy hones in on the fact that the College's Articles of Incorporation themselves state that the incorporators acted both as citizens of the United States and of the state of Montana.[20] McCoy also distinguishes the incorporation under state law from the College's incorporation under Confederated Salish and Kootenai tribal law. He claims that the College—as incorporated under Montana law—is a separate and distinct entity from the College as incorporated under tribal law.[21] He supports this by noting that the College's Montana Articles of Incorporation do not mention tribal law or reserve any rights to the Tribe, while the tribal Articles of Incorporation state that the entity may only be sued in tribal court.[22] McCoy argues that these distinctions strongly weigh against finding that the College is an arm of the Tribe.

McCoy argues that the purpose of the College is not for the benefit of the Tribe. He states that the College's Articles of Incorporation state that it was not created for the financial benefit of the Tribe, nor was it established to aid in tribal self-governance.[23] He argues that, contrarily, the College was created to benefit a greater geographic location, the Flathead Indian Reservation, which is home to a significant amount of people who are non-native or not enrolled members of the Tribe.[24] He supports these notions with the

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[18] *See generally* Appellant's Opening Brief, *supra* note 1, at 8-28.
[19] *Id.* at 9 (citing National Labor Relations Bd. v. Chapa De Indian Health Program, 316 F.3d 995, 1000 (9th Cir. 2003); People v. Miami Nation Enters., 386 P.3d 357, 372 (Cal. 2016)).
[20] *Id.* at 10.
[21] *Id.*
[22] *Id.* at 11.
[23] *Id.* at 14.
[24] Appellant's Opening Brief, *supra* note 1, at 15.

fact that less than 30% of the College's employees are tribal members, and, at most, 28% of the enrolled student body is affiliated with the Tribe.[25]

Finally, McCoy also contends that the Tribe's lack of control based on the structure, ownership, and management of the College shows that it is not an arm of the Tribe. McCoy again draws the distinction between the Montana corporation and the Tribal corporation, noting that the College, as a completely distinct legal entity from the tribally incorporated entity, grants no control to the Tribe through either the formal governance structure or through control of day-to-day activities.[26] He argues not only that there is a lack of control by the Tribe, but also that the College's Articles of Incorporation show no intent to share tribal sovereignty. He claims this omission puts the College beyond tribal control and establishes the College as a separate entity, not acting as an arm of the Tribe.[27] Consequently, it does not enjoy sovereign immunity.

B. Appellee and Intervenor-Appellee's Arguments

Both the Tribe and the College (collectively "Appellees") advance the same arguments, essentially, that the College meets all aspects of the *White* test. The Appellees counter McCoy's main argument that the College is a Montana entity separate from the tribally incorporated entity with the Ninth Circuit's holdings in other suits that have been lodged against the College.[28] The Appellee's contend that these cases completely refute the separate entity theory presented by McCoy. They note that the Montana Supreme Court has recognized that a single tribal entity can be dually incorporated under state and tribal law,[29] and that, contrary to McCoy's assertion,

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[25] *Id.* at 15 (citing the College's Annual Report, ER Vol. 2, 136–51).
[26] *Id.* at 18–19.
[27] *Id*. at 21.
[28] Appellee's Answering Brief, *supra* note 2, at 7–8 (citing Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) (en banc); Smith v. Salish Kootenai Coll., CV-02-00055-M-LBE, 2003 WL 24831272, (D. Mont. Mar. 7, 2003); Cain v. Salish Kootenai Coll., Inc., CV-12-181-M-BMM, 2018 WL 2272792, (D. Mont. May 17, 2018)).
[29] *Id.* at 8 (citing Flat Ctr. Farms, Inc. v. Dept. of Revenue, 49 P.3d 578 (Mont. 2002)).

dual incorporation of a tribal entity does not cause the entity to lose its tribal status.[30] Appellees insist that the court should not follow McCoy's narrow view of incorporation, but rather, they must view the College as one entity based on the state and tribal Articles of Incorporation, Bylaws, Policies, and the College's tribal charter.[31]

The Appellees further argue that the College is an important arm of the Tribe and finding otherwise would devastate the College while potentially depriving the Tribe and the people of the Flathead Reservation from their sole source of post-secondary education.[32] The Appellees argue that the potential ramifications of finding the College to be a non-Indian entity include a flood of litigation which would be financially ruinous to the College, and the loss of key federal funding.[33]

The Appellees also focus on the control issue under the *White* test. The College establishes its qualification as a "tribally controlled college" under the Tribally Controlled Colleges and Universities Act, which requires that a tribally controlled college must be chartered by the governing body of an Indian tribe.[34] The Appellees argue that McCoy's interpretation of *White* would require pervasive Tribal Council control and management of the College. This requirement would adversely affect the recognized tribal interest that a tribe may govern through entities other than formal tribal leadership.[35] The College emphasizes the critical financial relationship the Tribe plays in obtaining funding;[36] the Tribe's intent

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[30] *Id.* (citing Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 68 P.3d 814 (Mont. 2003).
[31] *Id.* at 9.
[32] *See generally* Appellee's Answering Brief, *supra* note 2; Intervenor-Appellee Confederated Salish and Kootenai Tribes' Answering Brief (9th Cir. Mar. 11, 2019) (No. 18-35729).
[33] Intervenor-Appellee Confederated Salish and Kootenai Tribes' Answering Brief at 12 (specifically referring to the College's funding under the Tribal College Act, 25 U.S.C. §§ 1801 *et seq.*).
[34] *Id.* at 13.
[35] Intervenor-Appellee Confederated Salish and Kootenai Tribes' Answering Brief, *supra* note 32, at 13–14 (citing *Smith*, 434 F.3d at 1133).
[36] Appellee's Answering Brief, *supra* note 2, at 40–41.

for the College to share its sovereign immunity;[37] and the inability of the College to waive its sovereign immunity; among other arguments adverse to McCoy's narrow interpretation of the *White* factors.[38]

IV. ANALYSIS

A. Incorporation Under State Law and its Effect on Tribal Sovereignty

McCoy puts significant weight on the fact that the College is incorporated under the laws of Montana, but the College argues that incorporation under state law is possible while retaining its tribal status. The district court disagreed with McCoy's interpretation on this matter, citing *Smith*.[39] *Smith* dealt with a similar position advanced by McCoy here and against the same entity.[40] However, the holding in *Smith* does not provide an adequate answer to the question of tribal sovereignty, it merely drew upon several cases discussing sovereign immunity.[41] The distinction made in *Cain*[42] directed the court to address the "arm of the tribe" analysis under the *White* factors, and a subsequent non-precedential decision in that case by the district court dismissed the action in accordance with the *White* factors, notably ruling that the method of incorporation supported the College's sovereign immunity claim.[43]

The Court must determine whether the method of creation does, in fact, follow the district court's interpretation in *Cain*, or if

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[37] *Id.* at 35.
[38] *Id*. at 35–36 (citing United States ex rel. Cain v. Salish Kootenai Coll. Inc., 862 F.3d 939, 941 (9th Cir. 2017) (holding that waiver of sovereign immunity is irrelevant when a statute does not apply to the Tribes in the first place)).
[39] Order at 6, McCoy v. Salish Kootenai Coll., Inc., (D. Mont. August 10, 2018) (CV-17-88-M-DLC); 434 F.3d at 1134.
[40] 434 F.3d at 1134–35 (affirming the Tribal Court of Appeals and the district court's findings that the College is a tribal entity or an arm of the tribe).
[41] *United States ex rel. Cain*, 862 F.3d at 943–944 (quoting Kiowa Tribe of Okla. v. Mfg Techs., Inc., 523 U.S. 751, 760) (discussing the difference in application of sovereign immunity to suits in the sovereign's own courts versus suits in the courts of another sovereign).
[42] *Id.*
[43] Memorandum and Order at 3–4, *Cain v. Salish Kootenai College, Inc.*, (D. Mont. May 17, 2018) (CV 12-181-M-BMM).

it instead will adopt McCoy's separate entity interpretation. Precedent dictates the likely answer will be a finding for the College. The Ninth Circuit has consistently held that state incorporation of a tribally incorporated entity will not divest the tribal corporation of its tribal status as McCoy suggests.[44] Dual incorporation does not divest a tribal corporation of its tribal status, and, moreover, the Tribe's Tribal Council originally chartered and established the College under the authority of the Indian Reorganization Act[45] and the Tribe's Constitution.[46] The Court will likely not follow a narrow interpretation of the *White* factors, but rather view the College as a dually incorporated entity, satisfying the first *White* factor.

B. Control and Other Crucial Factors

The Tribe expressed significant concern about the implications of requiring the Tribal Council to integrate themselves into the College's governance as well as controlling day-to-day activities.[47] Instead, the amount of control required is not such a rigid and definite structure.[48] The Court will consider all relevant factors of control, and even if the College had completely outsourced its management to a nontribal third party, that alone is not enough to shift the weight against sovereign immunity.[49] However, if the Tribe neglects their governance role or fails to exercise any control or oversight, acting merely as passive owners, then the control factor would subsequently weigh against immunity.[50] That is not the case here though, where the Tribe plays an active role in the governance of the College while maintaining the balance of autonomy required to keep its accreditation.[51]

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[44] *Smith*, 434 F.3d at 1129; *Allen*, 464 F.3d at 1044.
[45] 25 U.S.C. § 476.
[46] Order, *supra* note 38, at 6.
[47] Intervenor-Appellee Confederated Salish and Kootenai Tribes' Answering Brief, *supra* note 32, at 13–15.
[48] *See* Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 922 (6th Cir. 2009).
[49] *Miami*, 386 P.3d at 373.
[50] *Id.*
[51] Order, *supra* note 38, at 9.

The Tribe adamantly protests that the College is much more than an unrelated, arm's length entity located on the Flathead Reservation.[52] Under the *White* test, the purpose of the College is scrutinized to determine whether it was created for the benefit of the Tribe or for some other purpose. The purpose is viewed in light of whether the incorporators were acting in the best interest of the Tribe when they created the entity.[53] The Appellees' argument that the College is an integral part of protecting the Tribe's culture and history, while also providing invaluable educational resources to member and non-member Indians, will also likely weigh in favor of the College being a closely related arm of the Tribe and thus protected from suit by the doctrine of sovereign immunity.

V. CONCLUSION

The delicate balance that exists in federal Indian law cannot be subject to narrow, non-inclusive interpretations of precedent established to protect the sovereignty of Indian tribes over their members, entities, and territories. In the decades preceding this case, the College has had its sovereign status challenged on more than one occasion. The courts have thus far refused to lift the protective veil of sovereign immunity from the College and allow it to be sued outside of tribal courts. So, while McCoy's claims deserve equal treatment under the law, they must be brought in a court with proper jurisdiction.

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[52] Intervenor-Appellee Confederated Salish and Kootenai Tribes' Answering Brief, *supra* note 32, at 6.
[53] *Breakthrough*, 629 F.3d at 1192.