SET NO. 6

In the Court Of Appeals
State of Arizona
Division One

STEVEN ROSENBERG, M.D., an individual, Plaintiff/Appellant vs. HUALAPAI INDIAN NATION, a sovereign entity, Defendant/Appellee	1 CA-CV 08-0135 Mohave County Superior Court No. CV2007-0284

APPELLEE'S ANSWERING BRIEF

BURCH & CRACCHIOLO, P.A.
Theodore A. Julian, Jr., SBA #012765
Melissa Iyer, SBA #024844
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
Attorneys for Appellee

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Phoenix, Arizona 85014
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STATEMENT OF THE CASE

This is a negligence action filed by plaintiff Steven Rosenberg ("plaintiff" or "Rosenberg"), who hurt himself on June 22, 2005, when he fell out of a boat while rafting on the Colorado River with the Hualapai River Runners. *See* Item 1 at ¶1, 16.[1] The Hualapai Indian Nation is a federally-recognized sovereign nation which operates the Hualapai River Runners through its wholly-owned tribal enterprises, Hwal 'Bay Ba:j Enterprises, Inc. d/b/a Grand Canyon Resort Corporation. *Id.* at ¶4. Although the Complaint named other defendants in the caption,[2] only the Hualapai Indian Nation (the "Tribe") was supposedly served with the summons and complaint. *See* Item 7 at 2-3. *See also* Items 5, 6.

Despite questionable service and the fact that the superior court in Mohave County would not have jurisdiction over a sovereign Indian tribe, when faced with an Application of Entry of Default, the Hualapai Indian Nation made a limited appearance and filed a Motion to Dismiss based on lack of jurisdiction, sovereign immunity, and improper service. *See* Items 5,6,7.

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[1] References to "Item" are to the documents as itemized in the Clerk's Index of Record on Appeal.

[2] Also named but not served were: Hwal'Bay Ba:J Enterprises, Inc., Grand Canyon Resort Corporation, and Dugan Steele, along with some other fictitious individuals and entities.

The motion to dismiss was fully briefed, and the Superior Court heard oral argument on October 10, 2007. *See* Item 8 (Response); Item 11 (Reply); Item 12 (Minute Entry setting Oral Argument). After the oral argument, but before the Court ruled on the motion to dismiss, the plaintiff filed the First Amended Complaint and attached a variety of unauthenticated "exhibits" to the Complaint. *See* Item 14. Shortly thereafter, the trial court granted the motion to dismiss on the basis of tribal sovereign immunity. *See* Item 15.

The defense then moved to strike the amended complaint or, in the alternative, requested that the court dismiss the amended complaint on the same grounds, namely sovereign immunity. *See* Item 16. The plaintiff's response and the reply in support of the motion to strike addressed the question of whether the allegations in the amended complaint still failed to state a claim upon which relief could be granted. *See* Items 17, 18. The trial court ruled that both the amended complaint and motion to strike were moot, and "reaffirmed" its order granting the motion to dismiss and further ordered that the amended complaint likewise be dismissed with prejudice. Item 19.

A formal order dismissing the complaint and amended complaint was entered on January 16, 2008 and plaintiff timely noticed his appeal from that order. Items 23, 24.

STATEMENT OF FACTS

Much the same as the plaintiff attempted to distract the trial court from the dispositive legal issues by attaching witness statements and exhibits to the First Amended Complaint and including exaggerated and inflammatory allegations, the Opening Brief on appeal highlights "facts" and rehashes arguments that simply have no bearing on the core legal issues. The historical dispute between the Tribe and the Federal government regarding the boundaries of its reservation, and the compromise in the federal regulations *exempting* the tribe from any regulations regarding rafting on the Colorado River, has absolutely nothing to do with the tribe's sovereign immunity. *See* Op. Brief at 6-7. *See also* 36 C.F.R. § 7.4(b). Moreover, the description of how the accident occurred or the claims regarding the medical treatment and injuries, even if presumed to be true, have no bearing on the dispositive legal issues.

- **The Accident**

Rosenberg was a tourist from Illinois who was injured on June 22, 2005, when he fell out of a boat while rafting on the Colorado River with the Hualapai River Runners. Item 1 at ¶ 1, 16. As noted, the Hualapai Indian Nation is a federally-recognized sovereign nation, which operates the Hualapai River Runners through its wholly-owned tribal enterprises. Item 7 at 2. The Tribe operates this one-day rafting

trip *outside* the Grand Canyon National Park and is exempt from any state or federal regulation stemming from a historical dispute regarding the reservation boundary along the Colorado River as well as its status as a sovereign nation. To the extent the plaintiff alleges that the accident itself occurred "off-reservation" because the plaintiff fell out of the boat closer to the north bank rather than the south bank of the river, the court may accept this as true, because it does not change the inevitable conclusion that the state court has no jurisdiction over the Hualapai Tribe.

- **Plaintiff Signed A Complete Release of Liability**

The plaintiff knew that the Hualapai River Runners was owned and operated by the Hualapai Indian Nation, and he even signed an "Assumption of Risk and Responsibility and Release of Liability" agreeing *not* to sue the Tribe. Item 14, Ex. 4.[3]

> **RELEASE:** In consideration of services or property provided, I, and any minor children for which I am parent, legal guardian or otherwise responsible, any heirs, personal representatives or assigns, do hereby release:
>
> THE HUALAPAI TRIBE AND ITS BUSINESS CORPORATION, HWAL'BAY BA:J ENTERPRISES, INC. DOING BUSINESS AS GRAND CANYON RESORT CORPORATION.
>
> Its council members, principals, directors, officers, agents, employees

[3] The signed Form is also attached as Appendix Ex. 1 to the Opening Brief.

and volunteers, from all liability and waive any claim for damage arising from any cause whatsoever.

I have read the foregoing acknowledgment of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights.

Id. This form may very well be redundant or unnecessary given the Tribe's unique status as a sovereign nation, but the *plaintiff's* agreement to release the tribe of liability and waive any claims against the Tribe does not mean the *Hualapai tribe* has expressly and unequivocally agreed to waive its inherent sovereign immunity, nor does it authorize Stephen Rosenberg to sue the Hualapai tribal government in Mohave County Superior Court.

◆ **Attempted Service On the Hualapai Tribe**

The original state court complaint was filed February 16, 2007. Item 1.[4] On July 10, 2007, plaintiff filed a "Notice of Service of Summons and Complaint Upon Defendant Hualapai Indian Nation." Item 4. The notice of service and affidavit stated that service of process had been accomplished on the tribe on June 12, 2007 by sending a copy by certified mail to "Post Office Box 179, Peach Springs, Arizona

[4] This is actually the third lawsuit plaintiff has filed. He first filed suit in tribal court on June 21, 2006 under Hualapai Tribal Court No. 2006-CV-072, which was voluntarily dismissed. On August 11, 2006, plaintiff filed a "First Amended Complaint" in Mohave County Superior Court (Cause CV2006-887) but never served this complaint on any of the defendants, such that the action abated under Rule 4(i), Arizona Rules of Civil Procedure. *Id.* This third Complaint was then filed. Item 1.

86434." *Id.* Ex. 1 (Haglund Affidavit). The receipt is addressed to "Charles Vaughn," but it was apparently signed by an individual named "Zephier." *Id.* There is nothing in the record to suggest who Zephier is or if he or she is authorized to accept service of process for the Haulapai Nation, nor is there any evidence that Mr. Vaughn or any member of the Tribal Council received the summons and complaint.

◆ **The Trial Court Dismissal**

As previously noted, it was after the oral argument on the motion to dismiss that plaintiff decided to file an amended complaint with a number of exhibits designed to "supplement" the oral argument and otherwise taint the trial court's consideration of the pure legal issues raised in the Rule 12 motion.[5]

Shortly after the amended complaint was filed, the trial court granted the motion to dismiss because the Hualapai Nation had sovereign immunity. Item 15. Addressing the motion to strike the amended complaint and alternative motion to dismiss the amended complaint, the trial court ruled that the amended complaint and

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[5] The attachment of unauthenticated witness statements to an Amended Complaint while the motion to dismiss is pending suggests that the only purpose was to "poison the well" both below and on appeal. Assuming immunity was not dispositive and the case could proceed, these exhibits could and should have been stricken in accordance with Ariz. R. Civ. P. 12(f). *See also Ackerman v. Southern Ariz. Bank & Trust Co.*, 39 Ariz. 488, 489, 7 P.2d 945, 945 (1932) (holding that an 85 page, single space pleading was properly stricken as "frivolous, [a] sham, and irrelevant.").

the motion to strike were moot, and the court also "reaffirmed" its first order granting the motion and further ordered that the amended complaint be dismissed with prejudice. *Id.*

ISSUES PRESENTED ON APPEAL

(1) Under the United States Supreme Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) and the Arizona Supreme Court's decision in *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968), which conclusively hold that an Indian tribe enjoys immunity from suit even for off-reservation, commercial activities, does the Hualapai Tribe enjoy sovereign immunity for its off-reservation, commercial activities?

(2) Can the assumption of risk and release form signed by the plaintiff constitute an explicit and unequivocal waiver of sovereign immunity by the Hualapai Tribe?

(3) Can the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450, *et seq*), be construed as a congressional abrogation of the Tribe's sovereign immunity when there was no § 638 Contract between the Tribe and the Federal government in this case, and the Act itself states that "[n]othing . . . shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe?"

STANDARD OF REVIEW

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. *See Linneen v. Gila River Indian Cmty*, 276 F.3d 489, 492 (9th Cir.), *cert. denied*, 536 U.S. 939 (2002); *Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 169, 129 P.3d 78, 80 (App. 2006). Once immunity is determined to exist, the questions of (1) whether the tribe has waived its immunity, *see Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001), and (2) whether Congress has statutorily waived the tribe's immunity, *see DeMontiney v. United States*, 255 F.3d 801, 805 (9th Cir. 2001), are also questions of law subject to a *de novo* review.

ARGUMENTS

I. THE HUALAPAI NATION HAS SOVEREIGN IMMUNITY.

The Opening Brief acknowledges what it must – that "[f]or nearly two hundred years, the United States Supreme Court has recognized that Indian Tribes are 'independent political communities,' worthy of . . . sovereign immunity." Op. Brief at 11. It also acknowledges that tribal immunity has been determined to extend to a tribe's off-reservation, commercial activity by the United States Supreme Court's decision in *Kiowa* and the Arizona Supreme Court's decision in *Morgan*. *See* Op. Brief at 22-26. Even still, the plaintiff obstinately refuses to accept that these

decisions unequivocally bar a lawsuit in state court against the Hualapai Nation. The Opening Brief thus urges an unprecedented, judicial abrogation of immunity, arguments which were all raised and rejected by *Kiowa* and by *Morgan* and their progeny.

A. Under *Kiowa*, Sovereign Immunity is Not Affected by Whether the Injury Arises in Contract or Tort, or On or Off the Reservation, or Through Commercial or Governmental Enterprises.

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind." The Federalist No. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). Federally recognized Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories, and "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation." *Oklahoma Tax Commissions v. Citizen Bank of Potowatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991). Accordingly, "sovereign immunity involves a right which the courts have no choice, in the absence of waiver, but to recognize." *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

Although tribal immunity has been recognized for more than 175 years, *see Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), questions regarding the

precise scope and reach of tribal immunity have generated a wealth of jurisprudence. Without exception, these cases universally uphold sovereign immunity for both torts and commercial activities, both on and off the reservation. In fact, the question of whether immunity applies to a tribe's **off**-reservation, non-governmental **commercial** activities was definitively answered by the Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998). In *Kiowa*, the Supreme Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760.

The plaintiff acknowledges that the Supreme Court ruled in the *Kiowa* case that sovereign immunity is not waived even if the tribe engages in off-reservation commercial activity, but suggests that perhaps the Hualapai tribe does not have immunity because there are few, if any, United States Supreme Court decisions decided since *Kiowa* which address the issue of sovereign immunity for commercial, off-reservation torts. *Compare* Op. Brief at 23-24 *with Kiowa*, 523 U.S. at 760. This reasoning is completely backwards: The Supreme Court cannot enumerate each factual scenario where sovereign immunity applies; sovereign immunity exists in *every* case and *every* fact pattern unless abrogated by Congress or expressly waived by the tribe. Nothing in the *Kiowa* opinion suggests otherwise. In fact, as Justice

Stevens' dissent in *Kiowa* pointed out, "nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships." *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting).

Indeed, since the Supreme Court handed down the *Kiowa* decision, plaintiffs have attempted to narrow the scope of its holding in the same manner proposed by Rosenberg here – namely, to limit its application to off-reservation, **contract** actions only. Where raised, this argument has been uniformly rejected:

> Plaintiff first claims that torts, specifically conversion, are not precluded by sovereign immunity citing the Kiowa decision--this interpretation is incorrect. **Nothing in Kiowa could be construed to limit sovereign immunity to contractual claims, in fact the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities.** The court made no distinction between tort and contract claims in applying sovereign immunity. . . . To be sure, other courts have applied sovereign immunity to tort claims.

Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (emphasis added). *See also Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 129 P.2d 78 (App. 2006) (tribe held immune from suit arising from off-reservation accident); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 67 (App. 1999) ("It appears to be settled that a tribe's sovereign immunity . . . extends to commercial activities . . . and that the immunity applies to tort claims."); *Redding Rancheria v. Superior Court*, 105 Cal.

Rptr. 2d 773, 776 (App. 2001) ("Tort suits are not excepted from the general immunity rule. . . . Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) must come from Congress.").

B. Plaintiff's Effort's to Distinguish *Morgan* Are Unavailing.

Of course, even if the U.S. Supreme Court has not addressed a fact pattern involving immunity for tort claims that occur off-reservation arising from commercial pursuits, the Arizona Supreme Court **did** decide this precise issue in *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968): "We are asked to decide if our state courts can take jurisdiction over an Indian tribe which has committed a tort while engaged in a business enterprise within this state and outside of the exterior boundaries of its reservation." In fact, the *Morgan* case is remarkably similar because it involved a boating accident that occurred on the Colorado River which was arguably outside the reservation boundary of the Colorado River Indian Tribe. The fact that the tribe allegedly committed a tort off-reservation arising out of its commercial operations in the State of Arizona was "immaterial." *Id.* at 428, 443 P.2d at 424. As the state supreme court concluded: "We hold that the Colorado River Indian Tribe, being a dependent sovereign immune from suit, cannot be subjected to the jurisdiction of our courts without its consent or the consent of Congress." *Id.* at 428, 443 P.2d at 424.

The plaintiff's only criticism of the *Morgan* case is the simple observation that the case was decided almost 40 years ago and that there have certainly been a number of cases addressing sovereign immunity since then. Actually, tribal sovereign immunity has been the law of the land for more than **175** years, as first articulated by Chief Justice Marshall in *Worchester v. Georgia*, 31 U.S.(6 PET.) 515, 557, 8 L.Ed. 483, 499 (1832). Thus, it is not surprising the Arizona Supreme Court's decision in *Morgan* has not been questioned in the last 40 years.[6]

The other cases cited by the plaintiff as being "analogous" are nothing of the sort. *See* Op. Brief at 25-26. The *Mescalero Apache Tribe* case dealt with the **State of New Mexico's** right to **tax** a tribe for it's business operations in the state. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1973). It does not

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[6]In fact, the *Morgan* case has been **cited as positive authority by numerous courts, including the Arizona Supreme Court,** *see, e.g., Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 257 772 P.2d 1104, 1110 (1989); **the Arizona Court of Appeals,** *see, e.g., Land Dept. v. O'Toole*, 739 P.2d 1360, 1363, 154 Ariz. 43, 46 (App. 1987); *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560, 703 P.2d 502, 504 (App. 1985), **the Ninth Circuit,** *see, e.g., In re Greene*, 980 F.2d 590, 593 (9th Cir. 1992); **Federal District courts,** *Elliott v. Capital Intern. Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994), **and several state courts,** *see, e.g., Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 33 (Alaska 1977); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 78 (Okla. 1985). **It was even cited with approval by Justice White of the United States Supreme Court.** *See Pueblo of Acoma v. Padilla*, 490 U.S. 1029 (1989) (White, J, dissenting from denial of certiorari). **In fact, *Morgan* contains no negative citing references at all.**

stand for the proposition that a private individual can maintain a lawsuit for damages against the tribe. *See Filer*, 212 Ariz. at 167, 129 P.2d at 78 (The fact that the Indian tribe is subject to state regulation of its liquor license does not confer a private right of action nor amount to a waiver of immunity.) In the *DeFeo v. Ski Apache Resort* case, the New Mexico court of appeals held that the tribe *did* have sovereign immunity, but commented that if the conduct had occurred off-reservation, the **District Court** may have **jurisdiction** to hear a breach of contract claim against a tribal business **registered and authorized to do business in the state.** *See DeFeo v. Ski Apache Resort,* 120 N.M. 640, 904 P.2d 1065 (App. 1995). This has nothing to do with the tribe's immunity, which is the precise issue that was later decided by the U.S. Supreme Court in *Kiowa. See Kiowa*, 523 U.S. 751.

C. The Tribe's Immunity is Not Coextensive With the Immunity of Other Foreign Nations.

In addition to his strained attempt to distinguish *Morgan* or to narrowly construe the holding in *Kiowa*, the plaintiff also attempts to force an analogy between tribal immunity and the immunity afforded to foreign nations pursuant to the Foreign Sovereign Immunities Act ("FSIA"). Op. Brief at 14, 20-22 ("Indian nations possess sovereign immunity equal to, but not greater than, that possessed by other sovereign nations."). While the origins of tribal sovereign immunity have often been explained

as being similar to the immunity enjoyed by other sovereign nations, tribal immunity is not identical to the immunity of foreign nations nor is it subject to any limitations that Congress may have established for claims against foreign countries in FSIA. *See* 28 U.S.C. § 1605. In fact, this identical argument was raised and rejected by the Ninth Circuit recently in *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006).

> **Allen further argues that we should analogize the purported waiver of tribal immunity to waivers of immunity under the Foreign Sovereign Immunities Act** ("FSIA"), 28 U.S.C. § 1605. That Act specifies exceptions to the immunity of foreign states, see § 1605(a), which the Tribe is not. **As we pointed out in *Richardson v. Mt. Adams Furniture*, the fact that Congress limited the immunity of foreign sovereigns simply underscores the breadth of sovereign immunity in the absence of congressional action; because Congress has not limited the immunity of Indian tribes, it retains its full force**.
>
> * * *
>
> To apply that provision to the Tribe would contravene the Supreme Court's decision in *Kiowa*, holding that tribal immunity extended to commercial activities of the tribe. FSIA also permits a waiver of immunity to be implied, see 28 U.S.C. § 1605(a)(1), while the Supreme Court permits no such implied waiver in the case of Indian tribes. **We accordingly decline Allen's invitation to apply FSIA by analogy to tribal sovereign immunity**.

Id. at 1047-48 (citations omitted) (emphasis added). *See also Filer*, 212 Ariz. at 174, 129 P.2d at 85 ("Because the Ninth Circuit cases on this point are consistent and well reasoned we will follow them."); *Kiowa*, 523 U.S. at 756 ("tribal immunity is a matter

of federal law and is not subject to diminution by the States.").

The fundamental flaw in the plaintiff's analysis of sovereign immunity is illustrated by the "analogies" offered to suggest that tribal immunity is coextensive with that enjoyed by foreign nations. The plaintiff contends that if *Kiowa* and *Morgan* are followed (as they must be), then "[t]he tribe's drivers could run red lights, drive at excessive speeds, ignore stop signs, all while leaving injured victims without any redress. The tribe could open business entities anywhere in the state without purchasing workers' compensation insurance." Op. Brief at 19. This "parade of horribles" is based on the faulty premise that immunity from suit is the same as immunity from state regulation for the tribe's off-reservation, commercial activities and even immunity from criminal conduct. Fortunately, *Kiowa* also addressed the importance of distinguishing between the two –

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . **There is a difference between the right to demand compliance with state laws and the means available to enforce them**.

Kiowa, 523 U.S. at 755 (emphasis added). *See also Filer*, 212 Ariz. at 172, 129 P.3d at 83 ("[A] state's power to regulate certain tribal activities and its ability to bring a lawsuit against a tribe in state or federal court are not necessarily co-extensive. That

is to say, sovereign immunity may bar the latter but not the former.").

Putting aside the constant refrain that the U.S. Supreme Court has expressed "displeasure" with upholding absolute tribal immunity, particularly for purely business activities or contracts off the reservation, the plaintiff does not cite to any case from any jurisdiction to explain why immunity would not exist in this case. Instead, the plaintiff is asking this Court to not only ignore binding precedent of both the United States Supreme Court and the Arizona Supreme Court, but to go one step further and judicially usurp the exclusive authority of the United States Congress, which is the only branch of government that can abrogate sovereign immunity. *See* Op. Brief at 19-20 (urging court to "draw" the "boundary" of tribal immunity). He even makes the novel suggestion that this Court has the power to do so. *See* Op. Brief at 25, n.3 (urging that courts, not Congress have power to restrict immunity). To the contrary, all courts that have considered the issue have universally concluded that if there is to be any limitation on tribal sovereign immunity, it is up to Congress, and not the courts, to decide. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); *Morgan*, 103 Ariz. at 428, 443 P.2d at 424 ("It is clear that Congress alone must determine the extent to which immunities afforded tribal status are to be withdrawn."); *Redding Rancheria*

v. Superior Court, 105 Cal. Rptr. 2d 773, 776 (App. 2001) ("Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) must come from Congress."). Thus, the Supreme Court in *Kiowa* did not confine sovereign immunity to reservations or to non-commercial activities, and concluded by stating "we defer to the role Congress may wish to exercise in this important judgment." *Kiowa,* 523 U.S. 751, 758 (1998).

D. The Tribe Did Not Waive its Immunity

The tribe's sovereign immunity is absolute and cannot be limited except by an act of Congress or the Tribe's own express and unequivocal waiver of immunity. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56 (1978) (citations omitted). Indeed, "[t]here is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001). As previously discussed, sovereign immunity is not "waived" or otherwise affected by the fact that a tribe engages in commercial activities, whether on or off the reservation, *see Kiowa,* 523 U.S. at 751; *Allen,* 464 F.3d at 1044, and the tribe does not waive its immunity merely by purchasing insurance. *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 144 Ariz. 129, 696 P.2d 223 (1985). Furthermore, any waiver of immunity "must be 'construed strictly in favor

of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (citations omitted). *See also S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*,138 Ariz. 378, 383, 674 P.2d 1376, 1381 (App. 1983) ("[A]ny waiver of immunity is to be interpreted liberally in favor of the Tribe and restrictively against the claimant.").

Plaintiff's "waiver" argument stems from a misunderstanding of the Supreme Court's decision in the *C & L Enterprises* case and the far-fetched notion that the Tribe impliedly waived its immunity when the plaintiff signed an assumption of risk and release of liability. *See C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Unlike the C&L case where the Tribe drafted and signed a contract agreeing to binding arbitration and that the judgment would be enforced under state law, in this case the Hualapai Nation did not have any contract or agreement with the plaintiff at all. The Assumption of Risk and Release was signed only by the plaintiff and amounted to a unilateral agreement by the plaintiff to waive any claim against the tribe and to release the Hualapai Nation of any liability. There is nothing in this instrument indicating that the tribal council expressly and unequivocally agreed to waive the its inherent sovereign immunity, let alone consented to be sued in state court.

In the *C & L Enterprises* case, the tribe was not only a party to the contract, it prepared the contract, and included provisions evidencing the tribe's express consent to be sued in state court. First, the contract contained an arbitration clause whereby the tribe agreed that "[a]ll claims or disputes . . . shall be decided by arbitration" and that the arbitrator's decision "shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction." Second, the tribe included a choice of law provision in its contract that expressly provided that it "shall be governed by the law of the place where the project is located," which meant that the parties both agreed to be bound by Oklahoma law and that any judgment could be enforced in state court. Thus, when the plaintiff obtained an arbitration award against the tribe and attempted to enforce it in state court, the Supreme Court in *C&L Enterprises* ruled the judgment could be enforced in state court, as agreed by the parties, and that the Tribe had waived its immunity.

In so holding, the Supreme Court did *not* judicially abrogate immunity nor conclude that immunity could be implied under construction of contract principles. Instead, the Court ruled that "a tribe's waiver must be 'clear" and that "the Tribe in this case has waived, **with the requisite clarity**, immunity from the suit C & L brought." *C & L Enters.*, 532 U.S. at 418. It was not a matter of contract construction, but rather the that fact that the tribe had, by express agreement (1)

submitted to alternative dispute resolution procedures, (2) **including the entry of judgment against it**, (3) by an Oklahoma Court, and (4) in accordance with Oklahoma law. *Id.* at 420. In this case there is not even a contract between the parties nor any instrument signed by the tribal council expressly waiving sovereign immunity and consenting to be sued in state court.

Ignoring the fact that there is no contract between the plaintiff and the Hualapai Nation, the plaintiff distorts the *C&L Enterprises* reasoning to suggest that his own waiver of liability and release of claims could somehow amount to a waiver of tribal sovereign immunity. The plaintiff seems to argue that in order for the court to "give meaning" to the assumption of risk and waiver of liability form that he signed, he must have some "valuable legal rights" to waive, otherwise the assumption of risk and waiver would be meaningless. *See* Op. Brief at 29-31. Even if the plaintiff's unilateral agreement to release the tribe of any liability is redundant or unnecessary, how could it possibly be construed *against* the Tribe to eviscerate its sovereign immunity? Plaintiff's reasoning in this regard is nonsensical.

Although there would not seem to be any other reported case in the country that stands for this unusual theory, other litigants have certainly tried– and universally failed– to expand *C & L Enterprises* beyond its logical limits. *See e.g.*, *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 552-53 (N.M. 2004) (refusing to construe

C & L Enterprises as permitting an "inadvertent waiver" of sovereign immunity); *Meyers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, (N.D.N.Y. 2006) (Distinguishing *C & L Enterprises* and declining plaintiff's invitation to find implied waiver of immunity from employment materials). Similarly, this Court should reject plaintiff's contention that his own assumption of risk and agreement to release the Tribe constitutes an implied waiver by Hualapai Tribe of its inherent immunity as a sovereign nation.

E. Congress Did Not "Waive" or Abrogate the Sovereign Immunity of the Hualapai Indian Nation.

"A Congressional waiver of tribal immunity must [also] be unequivocal and explicit." *Filer*, 212 Ariz. at 173, 129 P.3d at 84. "[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000). When faced with a claim that Congress has statutorily waived a tribe's immunity, courts should " tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

Plaintiff correctly points out that Congress can abrogate or limit sovereign immunity, but then confuses this authority with the Indian Self-Determination and Education Assistance Act passed by Congress under Public Law 93-638. "Self-

Determination contracts" or "Section 638 contracts," as they are called, further the goal of Indian self-determination by allowing the tribes to enter into contracts with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs that otherwise might be administered by the federal government. *See* 25 U.S.C. § 450f(a) (1994). *See also Demontiney*, 255 F.3d at 805-09 (discussing purpose and provisions of the Act). These programs often include contracts pertaining to education, medical services, construction and law enforcement.

In this case the plaintiff confuses the provisions in the Federal Code allowing §638 Contract cases be prosecuted against the Federal Government, all the while ignoring that there is no §638 "self-determination" contract regarding the Hualapai River Runners.[7] *See Lesoeur v. United States*, 21 F.3d 965 (9th Cir. 1994)(The U.S. government could not be sued under the Federal Tort Claims Act for deciding *not* to regulate the river rafting activities of the Hualapai Nation).

Even if recreational rafting trips for tourists could fall within the types of

[7] Notably, there is no "self-determination" contract in the record. Rather, the Opening Brief (at 32) simply asserts that "the federal government has **obviously** entered into numerous **implicit** self determination contracts with the tribe." To the contrary, the existence of such a contract cannot be presumed under the Act. As one court explained, "the relevant contracts must be *actually* authorized by the Self-Determination Act, not just theoretically capable of being authorized." *Comes Flying*, 830 F. Supp. at 530.

public assistance programs relegated to the tribe under a "self-determination" contract between the tribe and the U.S. government, it does not amount to a congressional waiver of tribal immunity nor allow litigants to sue tribal governments in state court. To the contrary, tribes administering Section 638 contracts are deemed to have the full protection of federal law, meaning that tribal employees or contractors are *federal* employees who are part of the public health service in the Department of Health and Human Services. As such the exclusive remedy for claims against them would be under the Federal Tort Claims Act ("FTCA"). *See* 25 U.S.C. § 450f(d). "In short, the law allows persons to recover from the United States for losses arising out of the actions of employees who are working under contracts authorized by the Self-Determination Act." *Comes Flying v. United States*, 830 F. Supp. 529, 530 (D.S.D. 1993).

The plaintiff also misunderstands the provisions requiring liability insurance, believing that this might be construed as a waiver of sovereign immunity. Actually, Congress amended the Self-determination Act to require the *federal government* to obtain liability insurance for the benefit of Indian Tribes, organizations and contractors carrying out self-determination contracts. *See* 25 U.S.C. § 450f(c)(1). In fact, § 450n(1) (emphasis added) of the act expressly prohibits its provisions from being interpreted as a waiver of tribal sovereign immunity. It provides that

"**[n]othing in this subchapter shall be construed as – (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.**" *See also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188-89 (9th Cir. 1998) ("Because the ISDEAA does not effect tribal sovereign immunity, the district court was correct in holding that the ISDEAA could not confer subject matter jurisdiction.")

Finally, the Self-Determination Act provides that any civil action brought after September 30, 1990 "shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act." *See* 25 U.S.C. § 450f; Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989). Thus, even if there had been a Section 638 Contract for the Tribe to operate the Hualapai River Runners, the only action would have been a federal tort claim against the United States, not a state tort claim against the Hualapai Nation.

II. THE STATE COURT HAS NO JURISDICTION OVER THE HUALAPAI INDIAN NATION.

The Opening Brief concludes with the overly simplistic claim that the Arizona superior court would have personal and subject matter jurisdiction over a sovereign Indian tribe as long as the accident occurred "off reservation." *See* Op. Brief at 33-36.

Not surprisingly, the plaintiff cannot cite to any case in any jurisdiction where an Indian tribe could be forced to appear and defend a tort action in state court without the Tribe's express consent.[8]

While there may be circumstances where an Indian tribe may be subject to regulation by the state or federal government, including consensual agreements or intergovernmental treaties, there is nothing in the history of American jurisprudence that would confer a private right of action upon a tort claimant under these circumstances. *See Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *See also Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968) (Arizona courts could not take jurisdiction over Indian tribe for tort committed in Arizona and outside the reservation boundaries); *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.2d 78 (App. 2006) (Private party cannot sue Indian tribe in state court for alleged violation of state's liquor laws absent Congressional waiver of tribal

[8] For example, *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372 (Wash. App. 1996), involved a suit against a tribal corporation, not a direct suit against the tribe. Similarly, *North Pac. Ins. Co v. Switzler*, 924 P.2d 839, 845-46 (Or. App. 1996), involved the exercise of jurisdiction in state court over three Indian tribe members, not the exercise of jurisdiction over the tribe. As such, plaintiff's reliance on these cases is misplaced. *See* Op. Brief at 35-36.

immunity or tribe's clear waiver of immunity). As the Supreme Court explained in *McClanahan v. Tax Comm'n of Ariz.*, 411 U.S. 164, 168-180 (1973), "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.... it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement."

The only defendant purportedly served with the Summons and Complaint in Mohave County Case No. CV2007-284 was the Hualapai Indian Nation.[9] Although it would not make a difference in the outcome of this particular case, the fact that the Hualapai Tribe is the only defendant, as opposed to a wholly-owned tribal business or even a tribal employee, helps illustrate that under no circumstances could there be a private right of action against the Hualapai Indian Nation. It does not matter whether the claim arises out of tort or contract, or if either the negligence or the injury occurred on the reservation or on state land. Unless the tribe consents to state court jurisdiction and unequivocally waives its immunity from suit, the action must be dismissed for the failure to state a claim upon which relief can be granted. *Kiowa*

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[9] The Appellant's Opening Brief neglected to even mention that the underlying Motion to Dismiss was premised in part on the failure to properly serve the Hualapai Nation with the Summons and Complaint. The trial court did not specifically reach this issue because the Tribe's sovereign immunity from suit was controlling. Even still, improper/insufficient service of process is an independent basis to uphold the dismissal of the complaint.

Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751 (1998); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968); *Allen v. Gold Country Casino* case, 464 F.3d 1044 (9th Cir. 2006); *Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 129 P.2d 78 (App. 2006).

CONCLUSION

Plaintiff attempted to serve and sue a federally recognized Indian tribe for negligence that occurred on reservation lands and a personal injury accident that arguably occurred a few feet beyond the reservation boundary. It does not matter where or how this claim arose. Unless the Hualapai Indian Tribe consented to be sued in state court and clearly and unequivocally waived its sovereign immunity, the state court has no subject matter jurisdiction to hear the case. The dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of June, 2008.

BURCH & CRACCHIOLO, P.A.

By _____

Theodore A. Julian, Jr., SBA #012765
Melissa G. Iyer, SBA # 024844
702 East Osborn Road, Ste. 200
Phoenix, AZ 85014
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I, Melissa G. Iyer, do hereby certify that Appellant's Opening Brief is in compliance with Rule 14(a) of the Arizona Rules of Civil Appellate Procedure, in that it is double spaced with a proportionate spaced typeface of Times New Roman, 14 point, with a total of 6986 words.

Melissa G. Iyer
Attorney for Appellees

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, MELISSA G. IYER, do hereby certify that I am an attorney for the Appellees and that I caused to be mailed on this date to the Appellants, two (2) copies each of the foregoing Appellees' Answering Brief as follows:

Joel B. Robbins
Robbins & Curtin, P.L.L.C.
301 East Bethany Home Road, Suit B-100
Phoenix, Arizona 85012
Attorney for the Appellant

Melissa G Iyer
MELISSA G. IYER

SUBSCRIBED AND SWORN to before me this 23rd day of June, 2008, by Melissa G. Iyer.

Michele Power
Notary Public

My Commission Expires:

January 15, 2010

OFFICIAL SEAL
MICHELE POWER
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Comm. Expires January 15, 2010