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.

No. 1 CA-CV 08-0135

Mohave County Superior Court
No. CV-2007-0284

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Is a tribe's sovereign immunity limitless, so that it and its commercial offshoots may freely commit tortuous acts beyond the geographic boundaries of Indian country without any obligation to provide redress to its victims? In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), the United States Supreme Court held that a tribe's sovereign immunity extended to its off-reservation, commercial **contract** disputes. *Id.* However, the Court emphasized the word "contract" and, as one learned scholar noted, "[a]ll nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity." *Seielstad*, "The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty," 37 TULSA L.REV. 661 (2002). Moreover, the Court expressed concern about the very case now presented to this Court, noting that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Kiowa*, 523 U.S. at 758, 118 S.Ct. at 1705.

Kiowa was the outer boundary of tribal sovereign immunity. In the present matter, Dr. Steven Rosenberg was serious injured, while

participating in an extra-territorial commercial endeavor of the Hualapai Indian Nation, due to the gross negligence of the Tribe and its employees.

Moreover, not only does tribal immunity not extend as far as the Tribe maintains, but the Tribe waived its immunity through its conduct with Dr. Rosenberg. Prior to participating in the rafting tour, the Tribe required Dr. Rosenberg to sign an assumption of risk, a form that the Tribe now states was completely superfluous in light of their claim of sovereign immunity. In fact, as a unanimous Supreme Court stated in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001), fundamental provisions of contract law extend to tribal contracts. The maxim that a contract should be construed to "give meaning to all its terms," *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co.*, 214 Ariz. 344, 350, 152 P.3d 1227, 1233 (App. 2007), mandates that the assumption of risk be given effect, which requires a finding that the Tribe implicitly waived its immunity. *See C & L Enterprises, supra* (tribe waived its immunity by including an arbitration provision in its contract).

Accordingly, for the reasons set forth herein, Dr. Rosenberg requests that this Court reverse the trial court's finding that the Tribe is protected by the doctrine of sovereign immunity, and remand for a trial on the merits.

STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury matter. Plaintiff Steven Rosenberg was seriously injured on an excursion down the Colorado River sponsored by the Defendant, Hualapai Indian Nation. The raft that Dr. Rosenberg was in capsized due to the negligence of Appellee's employees; then, Dr. Rosenberg sustained serious injuries to his thumb and head due to the Appellees' failure to provide a basic safety feature, a "kill" switch for the engine's motor in the event of a capsize.

The accident occurred outside the geographic boundaries of the Hualapai Indian Nation. The accident was part of a commercial venture of by the tribe occurring within the sovereign boundaries of the State of Arizona. Moreover, the waiver of liability that the tribe required Dr. Rosenberg to sign clearly indicated that the tribe accepted responsibility to the extent permitted by the common law of the State of Arizona. Nonetheless, the trial court dismissed Dr. Rosenberg's complaint, holding that the Appellee was completely immune for its tortuous conduct outside of its geographic boundaries under the doctrine of sovereign immunity.

B. Course of Proceedings in the Trial Court

Dr. Rosenberg filed his original complaint against Defendants on February 16, 2007. **IR 1**. Following an application for entry of default, the Hualapai Indian Nation appeared in the matter and moved to dismiss Plaintiff's complaint. **IR 7**. Dr. Rosenberg responded, and the Tribe replied. *See* **IR 8, 11,** *respectively.*

Following oral argument on October 10, 2007, *see* **IR 12**, Dr. Rosenberg filed an amended complaint. **IR 14**. Four days thereafter, the trial court granted Defendant's motion to dismiss, holding that the Tribe was protected by sovereign immunity. **IR 15**. Specifically, the trial court held: "IT IS ORDERED granting the motion to dismiss on the grounds that the Hualapai Indian Nation is absolutely immune from suit in state court." *Id.*

Defendant moved to strike Plaintiff's first amended complaint. **IR 16**. On December 20, 2007, the trial court dismissed Plaintiff's first amended complaint, again on tribal sovereign immunity grounds, and denied Defendant's motion to strike as moot. **IR 19**. The trial issued a signed order of dismissal on January 16, 2008. **IR 23**. Plaintiff filed a timely notice of appeal on February 6, 2008. **IR 24.**

C. This Court's Jurisdiction

This is an appeal from a final, signed judgment of the trial court. **IR 23.** Accordingly, this Court has jurisdiction pursuant to A.R.S. § 12-2101(B).

STATEMENT OF FACTS

A. The Hualapai Indian Nation and Grand Canyon National Park

The Hualapai Indian Reservation was established in 1883 by executive order of President Chester A. Arthur. *See Navajo Nation v. United States Forest Service*, 408 F.Supp.2d 886, 891 (D.Ariz. 2006), *aff'd in part, rev'd in part*, 479 F.3d 1024, *reh'g granted en banc*, 506 F.3d 717 (2007). The order expressly provided that the northern boundary of the reservation was the "southern shore" of the Colorado River, and verbal descriptions of the reservation at the time indicated that it was "devoid of water." The Tribe, however, believing that the Colorado River forms the backbone of their lifeline, have maintained that their tribal boundaries extend to the middle of the Colorado River. *See generally Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (describing boundary dispute). This boundary dispute remains unresolved to the present day, with the parties essentially "agreeing to disagree."

The Grand Canyon was designated as a National Monument in 1908, and upgraded to National Park status in 1919. *See* www.nps.gov/grca/historyculture/indix.htm (official National Park Service website). It southern boundary includes, for a considerable stretch, the northern boundary of the Hualapai Indian Reservation. The Colorado River flows through the base of the Canyon.

Whitewater rafting along the Colorado River is a major activity within the Park. For the most part, whitewater raft operators are regulated by the United States Government. *See* **36 C.F.R. § 7.4(b)**. Section 7.4(b) provides that all whitewater raft operators must possess a permit issued by the Park Superintendent. The Superintendent can only issue a permit upon a determination that "the person leading, guiding, or conducting a river trip is experiencedin running rivers in white water navigation of similar difficulty, and possesses appropriate equipment. . . ." **36 C.F.R. § 7.4(b)(3)(I)**.

There is, however, one important caveat to the National Park Service's regulation of whitewater rafters within the Park. Specifically, the regulations apply only to whitewater rafters that occur "upstream from Diamond Creek at approximately river mile 226." **36 C.F.R. § 7.4(b)(1)**. As the United States Court of Appeals for the Ninth Circuit has explained, this limitation on the Service's regulation of whitewater rafters was added in

1977 specifically to accommodate the Hualapai tribe: "The Tribe's tours enter the river at Diamond Creek and operate solely downstream from this point." *Lesoeur*, 21 F.3d at 967 n.1.[1]

B. Dr. Rosenberg's Whitewater Rafting Trip

Acting through his travel agent in or near Chicago, Dr. Rosenberg and his son purchased a river tour from the Hualapai River Runners. **IR 14 ¶ 14.** On June 21, 2005, Dr. Rosenberg and his son traveled to the Hualapai Indian Reservation. *Id.* at ¶ 15. The next morning, they participated in the rafting tour conducted by the Hualapai River Runners. *Id.*

Before they were permitted to leave for the tour, the River Runners required Dr. Rosenberg and his son to sign a form entitled "Assumption of Risk and Responsibility and Release of Liability." *Id.* at ¶ 16. A true and correct copy of this form is attached to Plaintiff's First Amended Complaint as Exhibit 4, and to this brief as Attachment 1.

In this form, the tribe required the tour participants to acknowledge that "there are inherent dangers in this activity," and that they released the tribe of any liability as a result of these inherent risks. The Release specifically states that "I have read the foregoing acknowledgement of risk,

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[1] The tribe first began its whitewater tours in 1973.

assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights." Id.

Nowhere in this form does the tribe indicate that either it believes it has "sovereign immunity" and therefore, the tour participants had (according to the tribe) no "legal rights" even without executing the Release form. *Id.* at ¶ 18.

Dugan Steele was the tour guide and pilot of the boat in which Dr. Rosenberg and his son were passengers. *Id.* at ¶ 19. The Rosenbergs shared a raft with six members of the Molloy family. *Id.* The raft came with an outboard motor, which in turn was (or should have been) equipped with a "kill" switch which should be attached to the wrist of the boat's pilot, and can stop the motor instantly if needed. *See id.* at ¶ 22.

At the 232 Mile Rapids, Dugan Steele steered the boat directly towards a rock on the north side of the River. *Id.* at ¶ 20. The Rosenbergs, two guides, and two of the Molloys were thrown out of the raft. *Id.* at ¶ 21. None of the guides were using the "kill switch" for the boat's engine. The boat's motor continued running and the propeller struck both Dr. Rosenberg's head and left hand at full speed. *Id.* at ¶ 22. His sustained serious injuries. *Id.*

The 232 Mile Rapids and the location of the accident at issue was not within the geographic confines of the Hualapai Indian Reservation or Nation. *Id.* at ¶ 23.

Despite their assurances in publicity brochures, the River Runners were ill-prepared to deal with Dr. Rosenberg's injury. *Id.* at ¶ 24. In fact, it was other passengers, and not the guides, who provided assistance to Dr. Rosenberg. *Id.* One passenger described Dr. Rosenberg's treatment as follows:

> The guides, and I'm only telling you this because I was just appalled by it, he went, I said do you have a first aid kit, he needs to wrap, his hand needs to be wrapped. They found the first aid kit, or were looking for it or something, and he said yea, we have an Advil, give him an Advil. And I remember to myself, just sitting there, and I was still in shock, I was going, okay, you're kidding me, I mean, we didn't know if his airways were open at the time, I mean that was their idea of first aid.

Id. at ¶ 25.

Dr. Rosenberg sustained serious injuries to his head and hand as a result of this incident. He respectfully requests that this Court reverse the dismissal of his complaint and remand for a trial on the merits.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err as a matter of law in holding that a tribe's sovereign immunity is effectively limitless and, therefore, that such

immunity extended to the extra-territorial, commercial tortuous conduct of a tribe?

2. Did the Tribe waive its sovereign immunity by requiring all participants to sign an assumption of risk and release of liability, thereby waiving sovereign immunity to the extent of the assumption of risk and release?

3. Did Congress waive the Tribe's immunity be statutorily requiring immunity for the subjects of "self-help" contracts, including the contract which permits the Tribe to conduct its river rafting enterprise in the Grand Canyon?

ARGUMENT

I. Standard Of Review

Motions to dismiss for failure to state a claim are not favored in Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983); *Luchanski v. Congrove*, 193 Ariz. 176, 179, 971 P.2d 636, 639 (App. 1998).

> When a complaint is the target of a rule 12(b)(6) motion, the court must assume the truth of all of the complaint's material allegations, accord the plaintiffs the benefit of all inferences which the complaint can reasonably support, and deny the motion unless certain that plaintiffs can prove no set of facts which will entitle them to relief upon their stated claims.

Luchanski, at 179, 971 P.2d at 639. The trial court's grant of the motion to dismiss is reviewed *de novo*. *Harris v. Cochise Health Systems*, 160 P.3d 223, 230 (App. 2007).

II. Discussion

A. Introduction

1. For nearly two hundred years, the United States Supreme Court has recognized that Indian tribes are "independent political communities," *Worcester v. State of Georgia*, 31 U.S. 515, 559 (1832), worthy of the sovereign immunity afford to other sovereignties, *Turner v. United States*, 248 U.S. 354, 357-358, 39 S.Ct. 109, 110 (1919). Indeed, for decades, the Supreme Court has acknowledged that the sovereign immunities afforded Indian nations is essentially equivalent to that enjoyed by foreign nations in United States courts. *See C & L Enterprises*, 532 U.S. at 421 n. 3, 121 S.Ct. at 1595 n.3; *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-269, 117 S.Ct. 2028, 2034 (1997) *See C & L Enterprises*, 532 U.S. at 421 n. 3, 121 S.Ct. at 1595 n.3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns"); *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"); *Idaho v. Coeur*

d'Alene Tribe of Idaho, 521 U.S. 261, 268-269, 117 S.Ct. 2028, 2034 (1997); *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841-842, 109 S.Ct. 1519, 1521 (1989); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991) 838, 841-842, 109 S.Ct. 1519, 1521 (1989).

In the present matter, the Hualapai Indian Nation now contends that it is entitled to sovereign immunity greater than that afford to foreign nations. The tribe contends that its sovereign immunity trumps the public policies of the State of Arizona, within the geographic boundaries of Arizona that are outside that boundaries of the Indian nation. As set forth herein, the United States Supreme Court has never extended tribal sovereign immunity to this extent, and there is no sound policy reason to do so.

2. Moreover, the tribe's own conduct in this matter demonstrates that it has waived whatever sovereign immunity it may have had. As a precondition for participating in the raft excursion, the tribe required the trip's participants to sign a "waiver of liability," a release form explaining the inherently dangerous nature of a rafting trip. The form did not even hint that the tribe was completely immune, regardless of the egregiousness of its conduct. Now, the Hualapai Indian Nation argues that its own waiver form was completely superfluous; given its sovereign immunity, it could not be sued, even for conduct falling outside the parameters of the waiver form.

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001), a unanimous Supreme Court applied basic rules of contract law to hold that the tribe's inclusion of an arbitration clause in a contract constituted a waiver of sovereign immunity. *Id.* at 423, 121 S.Ct. at 1596-97. The same is true here. As the *C & L Enterprises* Court noted, "the common-law rule of contract interpretation [is] that a court should construe ambiguous language against the party that drafted it." *Id.* (quotation omitted). Moreover, it is well established that "a contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n.9, 854 P.2d 1134, 1144 n.9 (1993). This Court should reject the tribe's invitation to hold a part of its own contract superfluous. Rather, the tribe's contractual effort to limit the scope of its liability must be construed as a general waiver of its potential for liability. Put another way, in order not to render the waiver superfluous, the contract must be construed as a waiver of immunity, coupled with a contractual provision to limit its subsequent exposure.

3. Finally, tribal immunity can also be waived by Congress. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991). The Indian Self-

Determination and Education Assistance Act, which provides for, among other things, "self determination contracts" between the federal government and tribes with respect to economic development programs. *See* **25 U.S.C. § 450f**. The statute, however, expressly requires liability insurance for such economic development programs which, as the United States Supreme Court has noted, constitutes an express waiver of a tribe's sovereign immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758, 118 S.Ct. 1700, 1705 (1998) (noting that section 450f(c)'s mandatory liability insurance provision manifested Congress' "restrict[ion of] tribal immunity from suit in limited circumstances"). Here, the United States Government expressly contracted with the Hualapai Indian Nation, permitting it to operate a river rafting service within the Grand Canyon National Park, as a means for economic independence by the tribe. In exchange, the tribe was required to obtain – and use -- liability insurance, which it did! Thus, for this separate and independent reason, the tribe's sovereign immunity has been waived.

B. Nearly Two Hundred Years of Supreme Court Jurisprudence Demonstrates That Indian Nations Possess Sovereign Immunity Equal To, <u>But Not Greater Than</u>, That Possessed By Other Sovereign Nations.

1. Background

"The doctrine of sovereign immunity," one commentator has noted, "is a curious feature of Anglo-American jurisprudence." *Seielstad*, "The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty," 37 TULSA L.REV. 661 (2002). The doctrine is mentioned nowhere in the bedrock of American jurisprudence, the Constitution, but "widely . .. hailed in the United States as essential to the sovereignty of a nation or state." *Id.*; *see also id.* at 670 ("Devoid of any express basis in the text of the Constitution, it seems to have emerged rather from an assumption that permeates Anglo-American jurisprudence: namely, that immunity is an inherent attribute of sovereignty").

This appears to have first received judicial acknowledgement in *Cohens v. State of Virginia*, 19 U.S. 264 (1821), where the Supreme Court observed that "t[]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id.* at 411-12. The concept that foreign nations were immune from suit in United States courts was recognized even earlier by the Supreme Court. In *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), the courts were asked to decided the ownership of a French military vessel. Declaring that the government of France was immune to the

suit, Chief Justice Marshall, writing for the Court, stated:

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137. In prevailing, the United States Attorney argued that "[i]f the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war." *Id.* at 126.

The United States Supreme Court recognized that Indian tribes were independent sovereigns twenty years thereafter, in the matter of *Worcester v. State of Georgia*, 31 U.S. 515 (1832). In *Worcester*, the Court stated:

> The Indian nations had always been considered as **distinct, independent political communities**, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, . . . **The very term 'nation,' so generally applied to them, means 'a people distinct from others.'** The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning.

Id. at 559-60 (emphasis added).[1]

In 1919, the Supreme Court formally acknowledged the obvious corollary to its conclusion that Indian nations were sovereign entities, namely, that they were also entitled to sovereign immunity. In *Turner v. United States*, 248 U.S. 354 39 S.Ct. 109 (1919), the Court held that "Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." *Id.* at 35758, 39 S.Ct. at 110.

Since *Turner*, the Supreme Court has addressed the scope and effect of this sovereign immunity on numerous occasions. Several key principles have emerged from these cases, the most importance of which, for purposes of the present appeal, is that tribal sovereign immunity is essentially co-extensive with that of foreign sovereign immunity. The Supreme Court has restated this principle on numerous occasions. *See C & L Enterprises*, 532 U.S. at 421 n. 3, 121 S.Ct. at 1595 n.3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns"); *Kiowa*, 523 U.S. at

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[1] Justice Marshall referred to tribes as "domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831). He stated:

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations.

759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-269, 117 S.Ct. 2028, 2034 (1997) ("Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity") (citation omitted); *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841-842, 109 S.Ct. 1519, 1521 (1989) (citing cases construing foreign sovereign immunity in resolving issue involving tribal immunity). In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991), the Court considered whether an Indian nation could sue a state, much as one state may sue another. In rejecting the contention, the Supreme Court expressly noted the similarities between foreign nations and Indian tribes:

> Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes

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Id. at 2.

> surrendered immunity in a convention to which they were not even parties.

Id. at 782, 111 S.Ct. at 2582-83.

Notwithstanding the foregoing Supreme Court authorities, the tribe in the case at hand argues that it is entitled to sovereign immunity greater than that enjoyed by foreign nations in our courts. Indeed, the tribe effectively argues that its sovereign immunity is limitless. Here, the conduct at issue involves (1) the commission of a tort (negligence) (2) occurring outside of the geographic boundaries of the reservation, (3) by a tribe's commercial operations. In claiming that it is nonetheless protected by sovereign immunity, the tribe is effectively maintaining its right to engage in tortuous conduct by its commercial ventures anywhere in the geographic boundaries of the United States. The 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, as any injured employees could not sue their sovereign employer.

In *Kiowa*, the Supreme Court noted that "the Court has taken the lead in drawing the bounds of tribal immunity." *Kiowa*, 523 U.S. 759, 118 S.Ct. at 1705. Plaintiff urges this Court to draw that boundary now, and declare that, with respect to tortuous conduct, an Indian nation's sovereign immunity

is no greater than that enjoyed by foreign nations.[2]

2. Foreign Nations Are Not Immune For Their Tortious Conduct, Occurring Extra-territorially, By Their Commercial Endeavors.

Although foreign nations have long enjoyed sovereign immunity in the courts of the United States, it has also long been held that such immunity is limited when the activities occurring within the territory of the United States is commercial. For example, in *Hannes v. Kingdom of Roumania Monopolies Institute*, 20 N.Y.S.2d 825 (N.Y.App. 1940), a New York appellate court explained:

> The development of the practice of states undertaking commercial activities has led to a distinction in considering the question of immunity between acts of a private nature said to be *jure gestionis* as contrasted with acts of a public nature which are *jure imperii*. Controversies in the first class are sometimes held to be subject to the jurisdiction of foreign courts, while those in the latter are not.

Id. at 833. This general rule was summarized by the Second Circuit several decades later, noting that the "commercial activities" exemption within the Foreign Sovereign Immunities Act derived from "the very large body of case law which existed in American law upon pass of the Act in 1976" and

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[2] While the scope of tribal sovereign immunity is an issue of federal law, a state court may determine whether the federal law precludes it from exercising jurisdiction over a dispute. *See, e.g., Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), *implicitly overruled by Kiowa on other grounds.*

"current standards of international law." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309-10 (2d Cir. 1981) (quotations omitted).

This general rule is embodied in the Restatement (Third) of Foreign Relations Law, which provides that:

> (1) Under international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims arising out of commercial activity.
>
> (2) Courts in the United States may exercise jurisdiction over claims against a foreign state arising out of
>
> (a) commercial activity carried on in the United States;
>
> (b) an act performed in the United States in connection with a commercial activity carried on outside the United States; or
>
> (c) an act performed outside the United States in connection with a commercial activity carried on outside the United States if the act causes a direct effect in the United States.

Restatement (Third) of Foreign Relations Law § 453. Thus, put simply, when a foreign nation conducts a commercial activity within the geographic boundaries of the United States, the foreign nation is liable for harm caused by the torts caused by this commercial activity. *Id.*; *see also Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1477 (9th Cir. 1995) (holding that the commercial activities exception to sovereign immunity included both

personal injury torts and economic torts).

There are important reasons for these limitations on sovereign immunity. Obviously, a sovereign engaging in a commercial activity is not doing so as a "act of state," but in order to expand its coffers. Thus, it is only reasonable for the sovereign to include in its financial calculus the potential harm that its activities might cause to others. As the Arizona Supreme Court stated in *Bryant v. Silverman*, 146 Ariz. 41, 703 P.2d 1190 (1985), "[t]he basic policies underlying tort law are to provide compensation for the injured victims, and to deter intentional and deliberate tortious conduct. . ." *Id.* at 46, 703 P.2d at 1195.

Sovereign immunity is a zero sum game. Any exercise of sovereign immunity generally comes at the expense of the sovereignty of another entity. The fundamental premise is that a geographic border provide the proper line for determining whose sovereignty should bend. Here, however, the Tribe insists that the sovereignty of the State of Arizona to provide for the safety and security of those within its proper boundaries must bend to the Tribe's demand for unlimited immunity. In reality, there is no sound policy reason for the Tribe's demand, and Plaintiff respectfully requests that this Court reject the Tribe's request.

3. *Kiowa* Does Not Support The Tribe's Position.

The Hualapai Indian Nation will rely upon *Kiowa, supra*, for its assertion that tribal sovereign immunity extends even to the tribe's tortuous, extra-territorial conduct by its commercial activities. *Kiowa* did not go this far, however and, in fact, it is clear that *Kiowa* reflects the outer limits of tribal immunity. Accordingly, *Kiowa* does not support the Tribe's position.

In *Kiowa,* the tribe agreed to purchase certain stock issues by Clinton-Sherman Aviation, Inc., and signed a promissory note with the plaintiff to finance the stock purchase. The tribe delivered the note to a company in Oklahoma City – off tribal land – and promised to make the payments in Okalahoma City, again, beyond tribal land.

The Supreme Court ultimately concluded that tribal sovereign immunity attached to this commercial transaction. In so doing, the Court noted that tribal sovereign immunity does possess one attribute not necessarily present in matters involving foreign nations, namely, the domestic public policy of "promot[ing tribal] economic development and tribal self-sufficiency." *Kiowa*, 523 U.S. at 757, 118 S.Ct. at 1704. In light of these concerns, the Court invited Congress to revisit the potential scope of tribal immunity. *Id.* at 758-59, 118 S.Ct. at 1705. Ultimately, the 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, 118 S.Ct. at 1705 (emphasis added).

The Court was notably silent on whether immunity extended to a tribe's commercial, extra-territorial tortuous conduct. Moreover, the language of *Kiowa* suggests that its holding reflected the outer limits of such tribal immunity. Although ultimately ruling for the tribe, the Court did so with little enthusiasm. In fact, the majority opinion took it upon itself to critique, rather than defend, its own holding:

> **There are reasons to doubt the wisdom of perpetuating the doctrine.** At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. **In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.**
>
> **These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule.** Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Id. at 758, 118 S.Ct. at 1704-05 (citations omitted; emphasis added).[3] As Professor Seieslstad noted, "All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity." *Seielstad, supra*, 37 TULSA L.REV. at 711.

Moreover, the Supreme Court has recognized the sovereignty of the States for actions occurring beyond the boundaries of Indian lands. For example, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973), the Court considered whether a tribe could be taxed for receipts at a tribal-owned off-reservation ski resort on land leased from the federal government. In holding that New Mexico's taxes were properly levied against the tribe, the Court stated:

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[3] Some courts have suggested that the Supreme Court held in *Kiowa* that the role of defining tribal immunity is exclusively a congressional task. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) ("The Court expressly declined to confine a tribe's sovereign immunity to its governmental and/or on-reservation activities, reasoning that it was for Congress, not the judiciary, to adjust the boundaries of tribal immunity"). This reasoning is not correct. The Supreme Court expressly recognized that the doctrine itself was a judicial creation, *see Kiowa*, 523 U.S. at 756-57, 118 S.Ct. at 1703-04, and that the Court itself had "taken the lead in drawing the bounds of tribal immunity," *id.* at 759, 118 S.Ct. at 1705. The Court's invitation for Congressional action was a temporal matter. The Court decided *Kiowa* in 1998, at a time when Congress was considering several bills significantly altering various aspects of tribal sovereignty, including their immunity. In fact, congressional hearings conducted, and to be conducted, with respect to such legislation were expressly discussed during oral arguments in *Kiowa*. *See Seislstad, supra*, 37 TULSA L.REV. at 711-12.

> **But tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation.** Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws, and applies as much to tribal ski resorts as it does to fishing enterprises.

Id. at 148-49, 93 S.Ct. at 1270-71 (quotation and citations omitted; emphasis added).

Moreover, at least one court has held that a tribe could be held liable for its extra-territorial, commercial tortuous conduct. In *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M.App. 1995), the New Mexico Court of Appeals held that a tribe had sovereign immunity for tortious conduct at a tribally-owned business on-reservation, but not for off-reservation tortious conduct. *Id.* at 1068.

4. In light of subsequent United States Supreme Court decisions, the Arizona Supreme Court's 1968 decision in *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) is not binding on this Court.

Defendant relies primarily upon *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 428, 443 P.2d 421, 424 (1968), a 1968 decision of the Arizona Supreme Court holding that a tribe was immune for its off-reservation tortious conduct. *Id.* In so holding, however, the Arizona high

court expressly acknowledged that it was finding that tribal immunity was beyond that enjoyed by foreign nations, explaining:

> This case demonstrates the unique legal status enjoyed by the Indian tribes. **If the alleged tort-feasor** under an identical state of facts **had been** a state or municipal government, the Federal Government, or a **foreign nation, it would have been amenable to suit in either state or federal courts.**

Id. at 428 n.1, 443 P.2d at 424 n.1 (citations omitted; emphasis added). Obviously, there has been considerable jurisprudence in this area since the *Morgan* decision in 1968, including numerous decisions of state and federal courts which cast doubt on the Court's conclusion that a tribe's sovereign is greater than that of any other sovereign on earth, including foreign nations. *See C & L Enterprises, supra; Kiowa, supra*; *cf. Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782, 111 S.Ct. 2578, 2582-83 (1991) (noting similarities between foreign sovereign and that of tribal sovereign immunity). Moreover, the *Kiowa* Court's decision demonstrates the disfavor that the U.S. Supreme Court holds for an expansive view of tribal sovereign immunity.

The decisions of the United States Supreme Court take precedence over those of the Arizona Supreme Court on issues of federal law, such as tribal immunity. *See* **U.S. Const. art. VI, cl. 2** (supremacy clause). As the Arizona Supreme Court stated in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), "when later opinions of the [United States] Supreme Court show our

constitutional interpretations to be incorrect, we must overrule them and bring our decisions into conformity with Supreme Court precedent." *Id.* at 384 n.4, 79 P.3d at 71 n.4. Here, the forty-year old decision in *Morgan* is clearly inconsistent with the considerable body of law on tribal immunity since *Morgan* was decided; accordingly, *Morgan* should not preclude a finding that the tribe is not immune in this matter.

C. The Tribe Has Waived Its Sovereign Immunity.

Even if the activities at issue fall within the outer boundaries of sovereign immunity, the Tribe has waived its immunity. In *Kiowa*, the Supreme Court clearly acknowledged that a tribe can waive its tribal immunity. *Kiowa*, 523 U.S., at 754, 760, 118 S.Ct. at 1703, 1705. The United States Supreme Court addressed the issue of contractual waiver in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001). In *C & L Enterprises*, the tribe provided a pre-printed contract to its vendors, which indicated that any disputes were subject to arbitration. When an aggrieved vendor sought to invoke the arbitration clause, the tribe sought to dismiss the dispute, claiming it was immune from suit. In a unanimous decision, the Supreme Court disagreed, declaring that the arbitration clause acted as an express tribal waiver of sovereign immunity. The Court stated:

> The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. . . . [¶] For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit.

Id. at 423, 121 S.Ct. at 1596-97.

In the present matter, Dr. Rosenberg made his arrangements to participate in the River Runners' tour several months in advance. **IR 14 ¶ 14.** When he and his son arrived at the rendezvous point for the excursion, he was asked to sign, on his behalf and that of his son, an "Assumption of Risk and Responsibility and Release of Liability." *Id.* at ¶ 16. The form stated that "[t]here are significant elements of risk in any adventure or activity associated with whitewater rafting and incidental camping," and required the signatory to acknowledge the various risks. The signatory was to absolve the Tribe of any liability as a result of this inherently dangerous activity, noting that the signatory "**may be waiving valuable legal rights.**" (emphasis added). *Id.*

Presumably, this Assumption and Release became a part of Dr. Rosenberg's contract with the tribe, and was enforceable to the extent that such forms are enforceable under general contract law principles. However, by now asserting that it is immune from suit, the Tribe acknowledges that

this part of the contract, which it drafted, was completely meaningless and highly misleading. With or without the release, the participants simply had no "valuable legal rights" to waive if Appellee is correct.

The Tribe's construction of its own contract is nonsensical. "In interpreting a contract, we attempt to reconcile and give meaning to all its terms." *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co.*, 214 Ariz. 344, 350, 152 P.3d 1227, 1233 (App. 2007). Moreover, a contract should be construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless. *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 329, 909 P.2d 393, 396 (App. 1995); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n.9, 854 P.2d 1134, 1144 n.9 (1993) ("[A] contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous").

Here, there are two possible ways of construing the contract at issue. The first is that the Tribe waived its sovereign immunity, but did so only under the terms of the Assumption and Release that it prepared and had its customers sign. This construction renders all parts of the contract meaningful.

In contrast, there is the construction of the contract offer by the Tribe. The Assumption and Release is meaningless. Its customers never had any

"valuable legal rights" to waive. The Assumption and Release was, apparently, a charade.

Under well settled legal principles, including that of the Supreme Court in *C & L Enterprises*, the proper construction is clear. This Court should hold that the Tribe waived its sovereign immunity, and remand for further proceedings, at which time the Tribe can invoke the Assumption and Release to determine its impact on liability, if any.

D. Congress Has Waived The Tribe's Sovereign Immunity.

Tribal immunity can be waived not only by the Tribe, but also by Congress. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991). Here, not only has the Tribe waived its immunity, but so has Congress.

With respect to congressional abrogation, in 1975, Congress enacted the Indian Self-Determination and Education Assistance Act, which provides for, among other things, "self determination contracts" between the federal government and tribes with respect to economic development programs. *See* **25 U.S.C. § 450f**. The statute, however, expressly provided that for liability insurance for such economic development programs which, as the United States Supreme Court has noted, constitutes an express waiver of a tribe's sovereign immunity. *See Kiowa*, 523 U.S. at 758, 118 S.Ct. at 1705 (noting

that section 450f(c)'s mandatory liability insurance provision manifested Congress' "restrict[ion of] tribal immunity from suit in limited circumstances").

Here, the federal government has either expressly or implicitly entered into such self-determination contracts with the Hualapai tribe. The tribe has liability insurance. Since Dr. Rosenberg has not yet had the ability to engage in discovery, the underlying basis for such insurance is not yet known, but obviously, it may reflect the purchase of such insurance under section 450f. Moreover, the federal government has obviously entered into numerous implicit self determination contracts with the tribe. It has agreed not to pursue its claim of entitlement to the entire Colorado River. More specifically, the federal government has expressly agreed not to include the tribe within the scope of its regulations for whitewater raft operators, specifically carving out the section of the River bordering the Hualapai reservation.[1] The Government has done so to further the tribe's economic development through its River Runners business.

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[1] Whitewater rafting along the Colorado River is a major activity within the Park. For the most part, whitewater raft operators are regulated by the United States Government. *See* **36 C.F.R. § 7.4(b)**. Section 7.4(b) provides that all whitewater raft operators must possess a permit issued by the Park Superintendent. The Superintendent can only issue a permit upon a determination that "the person leading, guiding, or conducting a river trip is

E. Arizona Courts Have Subject Matter Jurisdiction To Consider A Personal Injury Lawsuit For Conduct That Occurred Off-Reservation, In The State of Arizona.

In dismissing Dr. Rosenberg's complaint, the trial court held that the Tribe was "absolutely immune from suit in state court." **IR 15**. While this would appear to implicate only the Tribe's argument regarding tribal sovereign immunity, the Tribe also invoked the doctrine of an Arizona court's subject matter jurisdiction. *See* **IR 8**, at pp. 3-4. Accordingly, Plaintiff briefly addresses this contention as well.

Dr. Rosenberg clearly alleged in his complaint that the accident at issue occurred off the reservation. *Complaint*, ¶ 17.[1] This is a personal

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experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment. . . ." **36 C.F.R. § 7.4(b)(3)(I)**.

There is, however, one important caveat to the National Park Service's regulation of whitewater rafters within the Park. Specifically, the regulations apply only to whitewater rafters that occur "upstream from Diamond Creek at approximately river mile 226." **36 C.F.R. § 7.4(b)(1)**. As the United States Court of Appeals for the Ninth Circuit has explained, this limitation on the Service's regulation of whitewater rafters was added in 1977 specifically to accommodate the Hualapai tribe: "The Tribe's tours enter the river at Diamond Creek and operate solely downstream from this point." *Lesoeur*, 21 F.3d at 967 n.1.

[1] Dr. Rosenberg's assertion that the accident occurred off-reservation stems from two separate factual theories. The Hualapai Indian Reservation was established in 1883 by executive order of President Chester A. Arthur. The order expressly provided that the northern boundary of the reservation was the "southern shore" of the Colorado River, and verbal descriptions of

injury lawsuit, the essence of a state trial court's civil jurisdiction. The accident at issue occurred outside the geographic boundaries of the Hualapai Indian Reservation, but within the confines of sovereign State of Arizona. This Court unquestionably has subject matter jurisdiction to consider such this type of case.

"Subject matter jurisdiction is the 'power to deal with the **general abstract question**, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power.'" *Fry v. Garcia*, 213 Ariz. 70, 73 n.2, 138 P.3d 1197, 1200 n.2 (App. 2006) (quoting *Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 81, 402 P.2d 22, 25 (1965)) (emphasis added).

> Jurisdiction does not relate to the right of the parties but to the power of the court ... [It] is an abstract inquiry, not involving the existence of an equity (right) to be enforced, nor of the right of the plaintiff to avail himself of it if it exists. It precedes these questions. . . .

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the reservation at the time indicated that it was "devoid of water." The Tribe, however, believing that the Colorado River forms the backbone of their lifeline, have maintained that their tribal boundaries extend to the middle of the Colorado River. *See generally Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (describing boundary dispute). Regardless of whether the Tribe's land includes none or the southern half of the river, Dr. Rosenberg alleges that the accident occurred in a section of the River beyond the boundaries of the Tribe.

Id. (quotations omitted). In essence, subject matter jurisdiction turns on the "what" of the lawsuit, *i.e.*, the nature of the claim, and the "where" of the lawsuit, *i.e.*, whether the alleged wrong occurred within the geographic boundaries subject to the tribunal's jurisdiction. In this case, the nature of the action is a personal injury action, that occurred outside the reservation and in Arizona. This Court unquestionably has subject matter jurisdiction.

This point was reinforced by the Washington Court of Appeals in a case analogous to that of the case at hand. *See Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 374 (Wash.App. 1996). Specifically, in *Maxa*, the plaintiff sued a local tribal business entity, alleging breach of contract. In holding that the state court had subject matter jurisdiction, the Washington appellate court explained:

> If the dispute involving the contracts **arose on the reservation**, deferral of the case to the tribal court would be appropriate. In such a case, the consensual nature of the relationship between the tribe member and nonmember, **coupled with the situs of the dispute, would place subject matter jurisdiction in the tribal court**.
>
> Mr. Maxa's complaint, however, centers on breaching conduct that occurred off reservation, in Petroleum's failure to pay employee benefits, the promissory notes and another contractual obligation. The contracts themselves were executed off reservation. If it were decided, in light of these facts, **that the action arose off reservation, the state court would have exclusive subject matter jurisdiction.**

Id. at 374 (emphasis added; citations omitted); *North Pacific Ins. Co. v. Switzler*, 924 P.2d 839, 845-46 (Or.App. 1996).

The cases cited by Defendant are not to the contrary. Defendant relies primarily on *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959). However, as the United States Supreme Court reiterated in *Williams*, the absence of subject matter jurisdiction was the product of the location of the injury: on the reservation. The Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. **He was on the Reservation and the transaction with an Indian took place there.** The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223, 79 S.Ct. at 272 (emphasis added; citations omitted). This Court has subject matter jurisdiction to hear Plaintiff's complaint.[2]

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[2] Defendant is confusing subject matter jurisdiction with sovereign immunity which, as the United States Court of Appeals for the Ninth Circuit has noted, is a separate inquiry. *Powelson v. U.S., By and Through Secretary of Treasury*, 150 F.3d 1103, 1105 (9th Cir. 1998). The Ninth Circuit stated: "Thus, the relationship between sovereign immunity and subject matter jurisdiction can be summarized as follows. Sovereign immunity is grounds for dismissal independent of subject matter jurisdiction." *Id.*

CONCLUSION

For the reasons set forth herein, Plaintiff Steven Rosenberg respectfully requests that this Court reverse the trial court's finding that Defendant Hualapai Indian Nation was immune from suit under the doctrine of tribal sovereign immunity.

RESPECTFULLY SUBMITTED this 6th day of May, 2008.

By _____
Joel B. Robbins
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellant's Brief were served upon Appellee by mailing same this 6th day of May, 2008, to:

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By _____
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Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is doubled-spaced using a roman font, and contains **8,408** words, according to the "Word Count" feature of Microsoft Word.

DATED this 6th day of May, 2008.

By _____
Joel B. Robbins
Attorney for Plaintiff/Appellant

ASSUMPTION OF RISK AND RESPONSIBILITY AND RELEASE OF LIABILITY

WARNING: There are significant elements of risk in any adventure or activity associated with whitewater rafting and incidental camping including but not limited to the use of kayaks, oar boats, motorized or non-motorized (referred to herein as "activity") and the use of any related equipment.

ACKNOWLEDGEMENT OF RISKS: I realize that there are inherent dangers in this activity including but not limited to the following: 1) Changing water flow or current; 2) collision with other participants, any portion of the interior of the craft, other watercraft or natural objects, including overhanging, submerged and/or semi-submerged trees, branches, rocks and boulders; 3) inclement weather, variances and extremes of wind, weather and temperatures, the presence of insects and animals; 4) loss of control of craft, my sense of balance, physical coordination, ability to swim, and/or follow directions; 5) collision, capsizing, and sinking of the craft, which can result in wetness, injury, exposure to the elements, hypothermia, and/or drowning; 6) getting in or out of the craft; 7) travel, including hiking, portaging and travel to or from the activity.

I acknowledge that I may suffer injury or illnesses or medical emergencies in remote places where there are no available medical facilities. I realize that personal property may be lost or damaged; that certain foreseeable and unforeseeable events can contribute to the unpredictability of the risks, dangers and hazards of the activity; that wearing a helmet may be a basic precaution; and that I should ask about potential risks, dangers and hazards and recommended precautions and procedures. I acknowledge and accept that wearing a U.S. Coast Guard approved flotation device while in or upon any craft is a basic safety precaution and is required.

EXPRESS ASSUMPTION OF RISK AND RESPONSIBILITY: In recognition of the inherent risks of the activity when I and minor children for which I am responsible, will engage in, I confirm that I am (we are) physically and mentally capable of participating in the activity and using the equipment. I/We participate willingly and voluntarily and I assume full responsibility for personal injury accidents or illness, including death. I assume all responsibility for damage to or loss of personal property while participating in this activity.

I assume the risk(s) of personal injury, accidents and/or illness; and acknowledge that if, during the activity I/We experience fatigue, chill and/or dizziness, my/our reaction time may be diminished and the risk of an accident increased.

CONVENANT OF GOOD FAITH: I recognize that you, as provider of goods and/or services, will operate under good faith and fair dealing, but that you may find it necessary to terminate an activity due to forces of nature, medical necessities or other problems for the safety of myself and/or other participants. I acknowledge that no guarantees have been made with respect to achieving objectives.

AUTHORIZATION AND AGREEMENT: I hereby authorize any medical treatment deemed necessary in the event of any injury while participating in the activity. I either have appropriate insurance or, in its absence, agree to pay all costs of rescues and/or medical services as may be incurred on my/our behalf. I agree that any film or photographs of me/us as participants become your property and may be used for promotional or commercial purposes.

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

I have read the foregoing acknowledgement 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.

Participant's Name (printed): Steven Rosebary Age: 47 Date of Trip: 6-22-05

Address: 1101 Wine Meadow City: Northbrook State: Ill. Postal Code: 60062

Country: _____ Emergency contact: 1-847-758-1800 Phone No: _____

Signature: _____

If participant is under 18, the parent/legal guardian must sign

HRR 07/08/03

WEIGHT OF PARTICIPANT (FOR HELICOPTER): 180 lbs

1145498.1