

John T. Harrison  
Rhonda R. Swaney  
Confederated Salish and Kootenai Tribes  
Tribal Legal Department  
P. O. Box 278  
Pablo, MT 59855  
Telephone: (406) 675-2700, ext. 1160  
Fax: (406) 675-4665  
John.Harrison@cskt.org  
Rhonda.Swaney@cskt.org

Attorneys for the Confederated Salish and Kootenai Tribes

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA, MISSOULA DIVISION**

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FAWN CAIN, TANYA ARCHER, and  
SANDI OVITT,

Relators and Plaintiffs,

-vs-

SALISH KOOTENAI COLLEGE, INC., et  
al.,

Defendants.

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CV 12-181-M-BMM

**BRIEF OF *AMICUS CURIAE*  
CONFEDERATED SALISH  
AND KOOTENAI TRIBES  
IN SUPPORT OF  
DEFENDANTS' RENEWED  
MOTION TO DISMISS**

Amicus Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (“CSKT” or “Tribes”) respectfully submit this brief in support of Defendant Salish Kootenai College’s (“SKC” or “College”) renewed motion to dismiss.

The CSKT is a federally recognized tribe governed pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984 (25 U.S.C. § 461, et seq. (transferred to 25 U.S.C. §5101 et seq.)) (IRA). The CSKT's governing body is a ten-member Tribal Council operating under a Constitution and By-Laws adopted in accordance with § 16 of the IRA. The Tribes also adopted an IRA § 17 Corporate Charter. Through the Hellgate Treaty of 1855, 12 Stat. 975, the Tribes reserved to themselves a permanent homeland on what is now the Flathead Indian Reservation in northwest Montana.

The Tribes were granted amicus status when the College filed its initial motion to dismiss. *See Cain et al. v. Salish Kootenai College, et al.*, Case No. 9:12-cv-00181-BMM, Brief of Amicus Curiae CSKT (Doc. 30). The bulk of those proceedings addressed the application of the False Claims Act, 25 U.S.C. § 3729, et seq. to sovereign Indian tribes, and the Tribes' amicus focused on several matters of federal Indian law raised by the parties. *Id.*

The remand from the Ninth Circuit asks this Court to determine a single issue of federal Indian law - whether SKC is an "arm of the tribe" under the five factor analysis adopted in *White v. University of California*, 765 F.3d 1010 (9<sup>th</sup> Cir. 2014). As an arm of the sovereign Tribes, the College would not be subject to the Plaintiff's qui tam False Claims Act lawsuit. How the College meets the *White* elements is a fact intensive analysis, and briefed in detail by the College.

Substantial jurisdictional discovery has taken place and the Court has a fully developed record.

The Court has allowed the Tribes to continue as amicus, and the Tribes respectfully submit this brief in order to assist the Court in understanding the Tribes' connection to the College and how the outcome of this case could impact the interests of the Tribes. The Tribal Council has expressed its view of the CSKT-SKC relationship in the attached Tribal Council Resolution No. 18-050. (Amicus Exhibit 1). As with its previous amicus brief, the Tribes take no position on the underlying merits of this lawsuit.

### **INTEREST OF AMICUS CSKT**

The Tribes have an interest in whether SKC is an arm of the Tribes with suits limited to the jurisdiction of the Tribal Court, or is instead a non-Indian entity generally subject to lawsuits such as the False Claims Act. Should the College be found to be a non-tribal entity any lawsuit that requires payment of a significant damage award – now or in the future – could deplete the limited financial resources of the College and deprive the Tribes and Tribal members of their primary source of higher education. A holding that states the College is a non-Indian entity could also jeopardize SKC's eligibility for continued funding as a tribally controlled college under 25 U.S.C. 1801, et seq.

Finally, interpreting *White* to require direct Tribal management of the College in order to find that SKC is an arm of the Tribes invites challenges to the tribal status of any subordinate enterprise established by the CSKT, or other tribes.

### **PROCEDURAL AND FACTUAL HISTORY**

The present motion to dismiss is a result of the Ninth Circuit remand ordered in *United States Ex Rel. Cain, et al. v. Salish Kootenai College, et al.*, 862 F.3d 939 (9<sup>th</sup> Cir. 2017). The Tribes defer to the College's recitation of the procedural and factual history relevant to its motion. For the purposes of this brief the Tribes simply note that the College was established under CSKT law to address the lack of post-secondary educational opportunities for tribal members on the Flathead Indian Reservation. The College has continued to operate under its Tribal charter and by-laws. The SKC Board of Directors consists of members of the CSKT appointed by the Tribal Council, and are subject to removal by Council action. SKC satisfies the statutory requirements for funding under the Tribally Controlled Colleges and Universities Assistance Act, 25 U.S.C. § 1801, et seq. (Tribal College Act). References to the record will be from the previous proceedings in this Court and on appeal, and will cite the ECF documents and numbering.

## DISCUSSION

### 1. There is a Strong Connection Between the Tribes and the College.

How the College meets each of the *White* factors is set out in the College's brief. The Tribes write to offer their perspective of the CSKT-SKC relationship. From the College's founding, the Tribes and SKC have been partners in the educational advancement of Native Americans on the Flathead Indian Reservation, and in the preservation of the history and culture of the CSKT.

The College has grown in size and capacity over forty years, but has remained rooted in a central principle: "The mission of Salish Kootenai College is to provide quality post-secondary education for Native Americans...and perpetuate the cultures of the Confederated Tribes of the Flathead Nation." Mission Statement of SKC, [www.skc.edu/mission/](http://www.skc.edu/mission/) (last accessed Jan 1, 2018). SKC is "grounded in the cultures of the Selis, Ksanka, and Qlispe [Salish, Kootenai and Pend d'Orielle] people of the Flathead Nation." *Id.* The core themes of the College echo the Tribes' goal of self-determination – i.e. "Provide Access to Higher Education for American Indians; Maintain Quality Education for Workforce or Further Education; Perpetuate the Cultures of the Confederated Salish and Kootenai Peoples; and Increase Individual and Community Capacity for Self Reliance and Sustainability." *Id.*

The Tribal Council views SKC as a key part of educating the Tribal citizenry and advancing the employment prospects of CSKT members. The College's continuing education opportunities bolster the Tribal workforce, and its proximity to the CSKT Tribal government complex makes attending classes a realistic option for full time employees. The College is integral to preserving CSKT history, culture, and natural resources. Simply put, SKC serves as "an instrument of self-determination" for the Tribes. Tribal Resolution 18-050. (Amicus Exhibit 1).

## **2. Holding SKC is a State Entity Could Negatively Impact the Tribes.**

The CSKT have consistently opposed Plaintiffs' contention that incorporation under Montana state law divested the College of its tribal status. Plaintiffs made that argument in this Court, and the Ninth Circuit appeal. Neither this Court, nor the Ninth Circuit found the argument compelling. To the extent Plaintiffs raise that same argument here, the Tribes again ask this Court to decline the invitation to hold that SKC exists solely as a Montana state corporation.

The same argument was raised at every stage in *Smith v. Salish-Kootenai College*, 434 F.3d 1127 (9<sup>th</sup> Cir. 2005) (*en banc*) *cert. denied*, 547 U.S. 1209 (2006). The Ninth Circuit noted the dual tribal/state incorporation of SKC in its analysis of whether SKC was a tribal entity for the purposes of a jurisdictional challenge. *Id.*, at 1129; 1134. Rather than concluding that state incorporation of

SKC deprived the College of its tribal status, the *en banc* panel affirmed the tribal status of SKC. In *Smith*, as here, the Tribes argued that as a matter of Montana corporate law, dual incorporation of reservation-based Indian entities under both tribal and Montana law had no impact on the tribal status of that entity. *See, Flat Center Farms, Inc. v. State Department of Revenue*, 310 Mont. 206, 49 P.3d 578 (2002); *see also, Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 315 Mont. 510, 68 P.3d 814 (2003) (cited in *Cain*, Case No. 9:12-cv-00181-BMM, Supp. Brief of Amicus Curiae CSKT (Doc. 36) p. 5. n. 1; *and on appeal* Case No. 15-35001, Answer Brief of Intervenor-Appellee CSKT, (DktEntry: 30-1) p. 18, n. 4).

The College's Tribal charter and by-laws state that lawsuits against SKC are limited to the CSKT Tribal Court. (*Cain*, Case No. 9:12-cv-00181-BMM, Brief in Support of Defendants' Motion to Dismiss, Exhibit A (Doc. 16-1) pp. 1-7 (Tribal Articles of Incorporation)). Should this Court hold SKC is a non-Indian state corporate entity, it would do more than just legally sever the College from the Tribes. The College would again be subject to the jurisdictional uncertainty that *Smith* resolved<sup>1</sup>. That kind of jurisdictional ambiguity conflicts with the Ninth

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<sup>1</sup> Were SKC ruled a non-Indian entity, *Williams v. Lee*, 358 U.S. 217 (1959) would no longer be dispositive of jurisdiction in cases where the College was the defendant. Rather, lawsuits involving the College would likely be subject to the jurisdictional analysis set out in *Montana v. U.S.*, 450 U.S. 544 (1981) particularly

Circuit's clear view that the exercise of tribal law over tribally created entities located on the Flathead Indian Reservation is an important aspect of tribal self-determination. *Smith*, 434 F.3d at 1140-41. Conversely, were the College deemed a non-Indian entity, it would be subject to suits in both state and federal courts that could have catastrophic impacts on the limited financial resources of the College. Lawsuits challenging SKC personnel policies or its focus on CSKT culture might result in lower CSKT employment, or require a fundamental shift in the College's mission, altering its character and identity. Should the College close as a result of a lawsuit, the CSKT membership would be deprived of the only post-secondary educational institution on the Flathead Indian Reservation. The CSKT would lose an important partner in the education of its members and employees.

More immediately, a ruling from this Court holding SKC to be a non-Indian state entity might jeopardize the College's eligibility for federal funding meant to develop tribal educational capacities, such as the Tribal College Act. That statute provides assistance to tribal colleges established by Indian tribes, and that are primarily serving Indians. Tribal College Act, 25 U.S.C. § 1804. A "tribally

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in cases where the lawsuit involved actions taking place on alienated fee land. This confusion is compounded by the fact that SKC sits on both tribal land and land owned in fee by the College. Moreover, in suits brought by non-member students, Tribal Court jurisdiction might be precluded entirely, even with party consent. *See, Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court had no jurisdiction over case when parties were non-Indian and suit involved tort on non-Indian land within Fort Berthold Indian Reservation).



controlled college or university” is one that has been “sanctioned or chartered” by a tribal government, and a majority of its board of directors are Indians. Tribal College Act, 25 U.S.C. §§ 1801(4), 1804(1).

Currently SKC meets the statutory requirements and receives funds under the Tribal College Act. (*See*, Colleges’ brief). The relevant facts regarding that eligibility are unchanged since the *Smith (en banc)* panel observed that the Tribes established SKC under Tribal law to provide post-secondary educational opportunities for Native Americans on the Flathead Indian Reservation. *Smith*, 434 F.3d at 1129. Further, “[i]ts bylaws stipulate that each of the seven members of the Board of Directors must be an enrolled member of the Confederated Salish and Kootenai Tribes. The Council appoints the board and may remove them.” *Id.* The College’s most recent figures show it has a 58% Indian student enrollment, with CSKT Tribal members comprising 44% of the Indians attending SKC. [www.SKC.edu/skc-fast-facts/](http://www.SKC.edu/skc-fast-facts/) (last visited January 1, 2018).

Should this Court follow Plaintiffs’ logic that SKC’s later state incorporation superseded the CSKT charter - thus transforming SKC into a non-Indian state entity - then future funding under the Tribal College Act becomes a questionable prospect. The Tribes are not aware of any non-Indian state institution of higher education that currently qualifies, or could qualify, for funding under the statutory requirements of the *Tribally Controlled College and University Assistance Act*

(emphasis added). Loss of funding under the Tribal College Act would greatly harm the financial health of the College.

If Plaintiffs continue to argue that incorporation of SKC under Montana law is a dispositive (or even relevant) factor in determining the status of SKC under *White*, the Tribes respectfully request that this Court expressly hold otherwise. The Montana Supreme Court's precedent on dual incorporation, coupled with the factual record developed in this case merit a finding that SKC is an arm of the Tribes under *White*.

### **3. A Narrow Reading of *White* Has Broad Impacts.**

Finally, if Plaintiffs urge this Court to adopt a narrow reading of *White*, and require significant Tribal Council control and management of SKC in order to be an arm of the Tribes, the CKST respectfully ask that the Court consider the broader implications of such a holding. "Tribes may govern themselves through entities other than formal tribal leadership." *Smith (en banc)*, 434 F.3d at 1133. The CSKT has a number of subordinate boards and enterprises that answer to the Council, but are not subject to the day-to-day management of the Tribal government.

By their nature the Tribes' IRA § 17 corporations, *e.g.* Energy Keepers, Inc., (management and operation of the former Kerr Dam) and S & K Technologies

(management of federal defense contracts) have an arms-length relationship to the CSKT government, and are under the day-to-day management of corporate officers and boards appointed by the Tribal Council<sup>2</sup>. Similarly, the Tribally incorporated gaming and hospitality enterprises have managers and a board appointed by the Tribal Council to operate and oversee those entities. Salish and Kootenai Housing Authority, the entity established by the Tribal Council and designated to receive federal funding under the Native American Housing and Self-Determination Act of 1996, 25 U.S.C. § 4101, et seq. has a director and board appointed by the Council. There are many other subordinate entities and business enterprises established by the Tribes to provide services for the Tribal membership and develop the economic capacity of the CSKT.<sup>3</sup>

The unique nature of federal Indian law and policy has rendered such arms-length entities a necessity. A narrow reading of the tribal control element of the *White* factors could diminish the Tribes' ability to govern itself and serve its members through subordinate boards and enterprises. Conceivably, the Tribes could find themselves routinely defending the Tribal status of CSKT entities such as those mentioned above. Further, there is a high likelihood that other Montana

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<sup>2</sup> The Tribes' § 17 corporate capacity is discussed in more detail in *Cain*, Case No. 9:12-cv-00181-BMM, Brief of Amicus Curiae CSKT (Doc. 30) pp. 7-11.

<sup>3</sup> See the Tribes most recently posted Annual Report (2015-16). CSKT annual reports are accessible under the "Government" tab on the Tribes' website ([www.cskt.org](http://www.cskt.org)).

tribes with similarly situated tribal colleges or entities would experience the same harm from such a precedent. The Tribes respectfully ask this Court to consider the broader implications for Montana Indian country as it goes through this very fact intensive analysis of the College.

### **CONCLUSION**

“The respected and successful SKC is the pride of the Salish-Kootenai people.” *Smith v. Salish Kootenai College*, 4 Am. Tribal Law 90, 95 (2003) (CSKT Tribal Court of Appeals). A finding from this Court that SKC is a non-Indian entity will reverberate through the Flathead Indian Reservation, and could imperil the future of the College. The Tribes respectfully request that this Court reject any assertion that SKC is solely a non-Indian state corporation. For the abovementioned reasons the Tribes support Defendant Salish Kootenai College’s renewed motion to dismiss, and respectfully request that this Court grant the motion.

Dated this 4th day of January, 2018.

Confederated Salish and Kootenai Tribes

/s/ John T. Harrison

John T. Harrison

Rhonda R. Swaney

Attorneys for the Confederated

Salish and Kootenai Tribes

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1 (d)(2)(E) I certify that this brief is no more than twelve pages, printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; the work count calculated by Microsoft Word is 2,655 words, excluding certificate of service and certificate of compliance.

Dated this 4th day of January, 2018.

/s/ John T. Harrison  
John T. Harrison  
Attorney for the Confederated  
Salish and Kootenai Tribes

**CERTIFICATE OF SERVICE**

The undersigned certifies that under penalty of perjury under the laws of the State of Montana that the foregoing document was served electronically to all interested parties by CM/ECF on the 4th day of January, 2018.

/s/ John T. Harrison  
John T. Harrison  
Attorney for the Confederated  
Salish and Kootenai Tribes