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

FAWN CAIN, TANYA ARCHER, and
SANDI OVITT,

Relators and Plaintiffs,

-vs-

SALISH KOOTENAI COLLEGE, INC.,
SALISH KOOTENAI COLLEGE
FOUNDATION, ROBERT FOUTY,
individually, JIM DURGLO, individually,
RENE PEIRRE, individually, ELLEN
SWANEY, individually, LINDEN PLANT,
individually, TOME ACEVEDO,
individually, ZANE KELLY, individually,
ERNEST MORAN, individually, LUANA
ROSS, individually, CARMEN TAYLOR,
individually, ELAINE FRANK,
individually, LISA LACKNER HARMON,
individually, REBEKKAH HULEN,
individually, DAWN BENSON,
individually, and DOES 1-10,

Defendants.

CV 12-181-M-BMM

**BRIEF IN SUPPORT OF
SALISH KOOTENAI
COLLEGE'S RENEWED
MOTION TO DISMISS**

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Defendant Salish Kootenai College, Inc. (“the College”) files this brief in support of its motion to dismiss the claims against it. The Court lacks subject matter jurisdiction over the claims against the College, and Plaintiffs’ First Amended Complaint fails to state a claim upon which relief can be granted.

Plaintiffs’ Amended Complaint asserts the same claims against the College that were asserted in the original Complaint. The Court dismissed the original Complaint against the College on the grounds that the College is an arm of the Confederated Salish and Kootenai Tribes, it shares in the Tribes’ sovereign immunity, and it is not a “person” subject to suit under the False Claims Act. The Court determined that the College’s relationship with the Tribes satisfies the *White* factors, but the Ninth Circuit remanded the case for additional jurisdictional discovery and to allow the Court to apply the *White* factors based on a more developed factual record.

On November 7, 2017 the College was served with 55 discovery requests from the Plaintiffs. On December 14, 2017, the College responded to the requests, including producing to the Plaintiffs over 37,000 pages of documents. The discovery responses of the College, along with other documents supporting this motion, are being filed with the Court contemporaneously with this motion and brief. As discussed below, the record continues to support the Court’s original determination

Standard

As a court of limited jurisdiction, the federal court is presumed to lack subject matter jurisdiction unless the party asserting jurisdiction establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When a defendant moves to dismiss a case for lack of subject matter jurisdiction, the *plaintiff* has the burden of proving by a preponderance of the evidence that the court possesses jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (“When the defendant raises a factual attack [on subject matter jurisdiction], the plaintiff must support her jurisdictional allegations with ‘competent proof.’”); *U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009). Unless the plaintiff satisfies this burden, the case must be dismissed.

Analysis

The Court lacks subject matter jurisdiction over the claims against Salish Kootenai College because the College is a tribal entity that functions as an arm of the Confederated Salish and Kootenai Tribes (“the Tribes”).¹ The College therefore shares in the Tribes’ sovereign status and is not a “person” that is subject to suit

¹ The Tribes include three contemporary tribes: the Bitterroot Salish and Upper Pend d’Oreille tribes (together, the “Confederated Salish”) and the Kootenai tribe. The United States government negotiated the terms of the Treaty of Hellgate of 1855 with leaders of all three tribes, reserving the Flathead Indian Reservation for the “exclusive use and benefit of the tribes” from lands that the tribes ceded to the United States. See James Lopach, Margery Hunter Brown, and Richmond L. Clow, *Tribal Government Today: Politics on Montana Indian Reservations* 161–162 (Rev. ed. 1998); CSKT, *History and Culture* <http://www.csktribes.org/history-and-culture>.

under the False Claims Act (“FCA”). The Court also lacks jurisdiction over the state law claims, over which the tribal court retains exclusive jurisdiction. (Docs. 16 at 19–25; 26 at 13; 37 at 2.)

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the United States Supreme Court determined that states and state agencies are not “persons” subject to suit under the FCA. 529 U.S. 765, 779–80 (2000). The Court held:

The relevant provision of the FCA, 31 U.S.C. § 3729(a), subjects to liability “[a]ny person” who, inter alia, “knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.” We must apply to this text our longstanding interpretive presumption that “person” does not include the sovereign.

Id. at 780 (citations omitted). Because the “sovereign” is not a “person,” the FCA “does not subject a State (or state agency) to liability.” *Id.* at 787–88.

Vermont’s reasoning applies equally to Indian tribes and certain tribal entities. A tribe’s sovereign status “extends to arms of the tribe acting on behalf of the tribe.” *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citation omitted). Thus, a tribal entity that functions as an arm of a tribe is not a “person” subject to suit under the FCA. *United States ex rel. Cain v. Salish Kootenai College*, 862 F.3d 939, 944 (9th Cir. 2017).

Whether an entity is an arm of a tribe “turns on several factors” adopted by the Ninth Circuit in *White. Cain*, 862 F.3d at 944. The *White* factors “includ[e]:

“(1) the method of creation of the [entity]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y].” *Id.* (quoting *White*, 765 F.3d at 1025).

“The policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities” are also relevant. *Breakthrough Mgt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). These policies “include protection of the tribe’s monies, as well as preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians.” *Id.* (internal quotation marks and citations omitted); *White*, 765 F.3d at 1025 (“Indeed, ‘preservation of tribal cultural autonomy [and] preservation of tribal self-determination,’ are some of the central policies underlying the doctrine of tribal sovereign immunity.”) (quoting *Breakthrough Mgt. Grp.*, 629 F.3d at 1187).

I. The “method of creation of the economic entit[y]”

The “method of creation” of the College strongly supports the College’s and Tribes’ position that the College is an arm of the Tribes. The Tribes chartered the College, approved the incorporation of the College, and continue to sanction the

College as their sole tribal college.

A. Charter

Salish Kootenai College was chartered and established as “Salish Kootenai Community College” by the Tribal Council (“Council”) of the Confederated Salish and Kootenai Tribes (“Tribes”) on November 18, 1977. (Ex. 2, Excerpted Council minutes (hereafter, “Council”) SKC002701–2702;² Ex. 3, Tribal charter SKC034892–34901.) The Council certified that it was acting under the authority vested in it pursuant to § 16 of the Indian Reorganization Act, 25 U.S.C. § 476; that is, it was operating in its capacity as a constitutional government. (Ex. 3, Tribal charter SKC034893–34894.) It also certified it was acting pursuant to its powers under Article VI, Section 1(a), (t), and (u) of the Tribes’ Constitution:

(a) To regulate the uses and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to protect the health, security, and general welfare of the Confederated Tribes

(t) To delegate to subordinate boards or cooperative associations which are open to all members of the Confederated Tribes, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power[; and]

(u) To adopt resolutions or ordinances to effectuate any of the foregoing powers.

² The Council minutes are authenticated by the Affidavit of Abby Dupuis, Ex. 27. The College’s documents are authenticated by Audrey Plouffe, Vice-President of Business Affairs of the College, Ex. 29, ¶ 4.

(available at <http://csktribes.org/government/tribal-council/council-docs>).

Actions taken in a tribe's governmental capacity are protected by sovereign immunity unless the tribe or Congress expressly waived immunity. As this Court previously held:

A tribe's Section 16 constitutional entities and its Section 17 corporate entities stand "separate and distinct" and these entities may differ in the extent to which they possess tribal sovereign immunity. *Ramey Const. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); see also *White Mountain Apache Tribe*, 810 F.2d at 866 n.17 (1985). Tribal sovereign immunity may extend to a Section 16 entity that functions "as an arm of the tribe," including a for-profit or non-profit corporation chartered under state or tribal law. See *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006). A court must look to the capacity in which the tribe acts to determine its legal rights, privileges, and immunities. See *Kerr–McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).

Doc. 39 at 6.

Likewise, actions taken in a tribe's governmental capacity are cloaked with the tribe's sovereign **status**, for which the issue of "waiver" is irrelevant. *Cain*, 862 F.3d at 941. Although an entity's sovereign status is an issue of both law and fact, *id.* at 944, it would severely undermine tribal sovereignty to treat that status as an ephemeral quality that is subject to constant challenge. Absent some fundamental change in the entity's relationship to the tribe, a sovereign entity should be allowed to rely on its sovereign status, which affects its legal status under numerous laws including the FCA, Title VII of the Civil Rights Act, and the Age Discrimination

in Employment Act. *Pink v. Modoc Indian Health Proj., Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (Title VII); *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081–82 (9th Cir. 2001) (ADEA). “[T]he prejudice of subjecting [a tribe] to a subpoena” or repeated discovery regarding its sovereign status when an agency or court “does not have jurisdiction results in irreparable injury vis-a-vis the Tribe’s sovereignty.” *Karuk Tribe Hous. Auth.*, 260 F.3d at 1077.

When they chartered the College, the Tribes specifically certified they were acting in their § 16 capacity, pursuant to their Constitution. And in referencing § 1(a)(t), the Council expressly denoted the College is a “**subordinate** board[] or cooperative association[]” of the Tribes. (Emphasis added.) Under relevant precedent, such governmental action cloaked the College with the Tribes’ sovereignty.

B. “Tribally controlled college” under federal law

The Tribes’ charter and continuing sanction is essential to the College’s qualification as a “tribally controlled college or university” (“TCU”) under the Tribally Controlled Colleges and Universities Act (“TCCUA”):

A “tribally controlled college or university” means an institution of higher education which is formally controlled, or has been formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe[.]

25 U.S.C. § 1801(a)(4). The College is the Tribes’ sole tribal college, is accredited

by the Northwest Accreditation Commission (NWCCU), and is recognized as a “tribally controlled college” by the federal government. (Dept. of Edu., *Tribal Colleges and Universities*, <https://sites.ed.gov/whiaiane/tribes-tcus/tribal-colleges-and-universities/>; Ex. 4, 2016 TCU Report SKC001086 (certifying continuing sanction of Tribes.) Today, 55% percent of the College’s students are members of some 77 American Indian tribes, and another 15% are first or second generation tribal descendants. Twenty-seven percent of the tribal members are enrolled members of the Tribes themselves. (Ex. 21, Aff. Plouffe, ¶ 15.)

C. Incorporation

At the same time that it chartered the College, the Council also approved the College’s first Articles of Incorporation and Bylaws and appointed its first Board of Directors (“Board”). (Ex. 2, Council SKC002701–2702.) The College was originally incorporated under tribal law as a tribal non-profit corporation. (Ex. 3, Tribal charter SKC034895–34901.)

Incorporation gave the College a separate legal identity from the Tribes and separate day-to-day governance. This is common in tribal governmental structures. “Tribes may govern themselves through entities other than formal tribal leadership.” *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006) (en banc) cert. denied 547 U.S. 1209 (Jun. 19, 2006). *See also Am. Vantage Cos., Inc. v. Table Mt. Rancheria*, 292 F.3d 1091, 1095 n. 1 (9th Cir. 2002) (recognizing

tribes can establish corporations in various ways); Atkinson & Nilles, Off. Indian Energy & Econ. Devt, *Tribal Business Structure Handbook* chs. I–III (2008 ed.), available at [/www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf](http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf)) (same). Incorporation allows tribes to “separate[e] tribal electoral politics from the day-to-day management of business enterprises,” protecting the tribal council’s decision-making, segregating assets, and maximizing corporations’ ability to concentrate on their particular purposes. This separation is considered a “critical factor” for tribes to “promote self-governance” and economic development, Atkinson, I-1–4, “central policies” underlying tribal sovereignty, *White*, 765 F.3d at 1025.

While incorporation creates a separate legal identity and day-to-day management, it does not divest a tribal entity of its sovereign status if the entity functions as an arm of the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Pink*, 157 F.3d at 1188 (nonprofit corporation “served as an arm of the sovereign tribes” so was not an “employer” subject to suit under Title VII); *Hagen v. Sisseton-Wahpeton Community Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (tribal community college chartered by tribe as non-profit corporation was entitled to sovereign immunity); *Kendall v. Chief Leschi Sch., Inc.*, C07-5220 RBL, 2008 WL 4104021 (W.D. Wash. 2008) (corporation that operated tribe’s school district not

subject to suit under FCA). The College's corporate status does not prevent it from being an arm of the Tribes.

In September 1978, the College was also incorporated under the laws of the State of Montana. (Ex. 5, State Articles SKC34902–34913.) State incorporation or dual incorporation does not divest a tribal corporation of its tribal status. *Smith*, 434 F.3d at 1129 (rejecting *Smith*'s arguments to the contrary, *see* App. Br., 2003 WL 22724261, *16). Nor does it divest an arm of the tribe of its sovereign status. Indeed, an entity may be an arm of the tribe even if incorporated solely under state law. *White*, 765 F.3d at 1025; *Breakthrough Mgt. Group*, 629 F.3d at 1187-88; *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999).

D. Subsequent amendments to Articles of Incorporation

1. Name

On September 17, 1981, the College Board approved changing the name of the College from “Salish Kootenai Community College” to “Salish Kootenai College” and directed that both the tribal and state corporate records be updated to reflect the name change. (Ex. 6, Excerpted Board minutes (hereafter, “Board”) SKC029622.) On March 7, 1983, the College formally amended its state Articles of Incorporation to reflect the name change. (Ex. 5, State Articles, SKC034912–034913.) Although no formal amendment of the College's name was filed in the

Tribes' corporate records, the Council was aware of the name change and started frequently referring to the College as "Salish Kootenai College" as early as January 29, 1982. (Ex. 2, Council SKC004229). Since then, in numerous resolutions, the Council has consistently recognized "Salish Kootenai College" as the college established by the Tribes in 1977. (*E.g.* Ex. 2, Council SKC004336 ("WHEREAS, the Tribal Council took official action declaring the establishment of the Salish Kootenai College . . ."); SKC005175–5176 ("WHEREAS, the Tribal Council, in 1977, established by charter Salish Kootenai College . . ."). *See also* Ex. 1, Demonstrative Exhibit Regarding Council Minutes (hereafter, "Demonstrative")³ § I, listing other examples.) Additionally, the Tribes' corporate records reflect the College filed annual reports using the name "Salish Kootenai College." (Ex. 7, Tribal annual reports SKC037018-37027.)

The College's Board directed the name change and that the change be reflected in both the state and tribal records, and the Tribes have recognized the tribally- and state-incorporated College as one and the same entity for 35 years.

2. Expansion of the College's powers

In 1983, the Tribal Council continued to exercise its rights as the College's incorporator when it amended the College's tribal Articles of Incorporation to

³ Because the Council minutes reflect that the College was discussed over 1400 times since 1977, a demonstrative exhibit has been prepared to assist the Court's review of relevant discussions and demonstrate the sheer number of facts that support the College's motion.

empower the College to “provide cooperative post-secondary educational services requested by Indian communities located off the Flathead Indian Reservation,” including in Western Washington. (Ex. 2, Council SKC0004969.) Although the amendment did not make its way into the Tribes’ corporate records, it is reflected as an official action of the Council in the Council minutes. The expansion of powers did not affect the College’s relationship to the Tribes: tribal sovereignty can apply to “collective efforts by Indian tribes” and to entities that provide services off the reservation. *Pink*, 257 F.3d at 1188–89.

II. The entity’s “purpose”

The Tribes established the College pursuant to their intrinsically governmental obligation “to represent, develop, protect and advance the views, interests, resources, and education of its members.” (Chartering resolutions, SKC034893, 34894; *see also* Tribes’ Const., Art. VI, § 1(a).) The Tribes recognized “there [was] a tremendous need for educational programs beyond high school” and “many of our tribal members and their families are not able to move to cities where there are colleges and vocational schools.” (*Id.*) They recognized “a need for an alternative to the forced exodus of Indian people from their home communities in search of higher education opportunities.” (Council minutes, SKC002776.)

Indeed, the tribally controlled college movement is fundamentally about

tribal autonomy, self-governance, and self-determination—“central policies” underlying the doctrine of tribal sovereignty. *White*, 765 F.3d at 1025. The Tribes, like other tribes across the nation, suffered a dramatic loss of languages and cultural traditions as their children were taken from their homes and families, forced to attend boarding schools, and forbidden their native languages and customs. See Div. of Indian Educ., Mont. Off. Pub. Instr., *Montana Indians: Their History and Location* 31–33, 36, available at http://www.montanatribes.org/links_&_resources/maps.php, select “Montana Indians: Their History and Location.” (last accessed 12/28/2017); Ex. 26, Accrediting report SKC001870. For years, the Tribes had little autonomy to direct their own affairs, which the Bureau of Indian Affairs (“BIA”) controlled. *Id.*

Gradually, the Tribes regained more control. The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA or PL 93-638) brought key changes to tribal government by authorizing certain federal agencies to enter into contracts with, and make grants directly to, federally recognized tribes rather than the BIA. ISDEAA was expressly intended to further tribal sovereignty, to scale back “the prolonged federal domination of Indian service programs,” to allow Indians “the full opportunity to develop leadership skills crucial to the realization of self-government,” and to empower Indian people to “control their relationships both among themselves and with non-Indian governments, organizations, and

persons.” PL 93-638 (S 1017). The Congress found that “true self–determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles” and that “parental and community control of the educational process is of crucial importance to the Indian people.” *Id.* Recognizing the link between “maximum Indian participation in the direction of educational . . . services to Indian communities” and tribal sovereignty, Congress directed the Secretary to report back to Congress on “a specific program, together with detailed legislative recommendations, to assist the development and administration of Indian–controlled community colleges.” *Id.*

Three years later, the Tribally Controlled Community College Act of 1978 (as amended, “TCCUA”) emerged directly out of this declared commitment to tribal sovereignty. Again, Congress expressly linked the Act to tribal self-determination:

By assisting the development of tribally controlled community colleges, the Congress will be helping Indians to help themselves in the attainment of a postsecondary education Beginning with the creation of the Navajo community college in 1968, the community college concept has been embraced by Indian tribes with an ever increasing fervor. These institutions represent a model expression of self-determination as enunciated in section 3(e) of the Indian Self-Determination and Education Assistance Act (Public Law 93-638)[.]

H.R. REP. 95-1558, 1-2. Congress also noted the importance of providing post-secondary education to tribal members close to their homes and that tribal colleges

can best serve the “special needs” of Indian students. *Id.*

The underlying purpose of the tribal college movement—tribal sovereignty—has not changed, as recognized both by the federal government and the Tribes. It is the Tribes’ goal “to become a completely self-sufficient society and economy,” and they recognize the College—and the right to educate their own people—as critical to this objective. (Ex. 2, Council SKC037615-37616; Ex. 8, Resolution 18-050.) *See also* E.O. 13592, 76 FR 76603 (2011) (tribal colleges are chartered “through the sovereign authority of the tribes,” strengthening tribal colleges “further[s] tribal sovereignty,” and “expanding educational opportunities [for Indian students] further[s] tribal self-determination”); G. Stull et al., Penn. Ctr. for Minority Serving Instns., *Redefining Success: How Tribal Colleges and Universities Build Nations, Strengthen Sovereignty, and Persevere Through Challenges* (2015) (available at https://repository.upenn.edu/gse_pubs/345/).

The College’s mission and vision statements reflect the commitment of the College to the Tribes. (*See* Salish Kootenai College, www.skcedu.edu/mission/; Policies, SKC001276.) Specific purposes the College serves include furthering the skills and competencies of tribal employees, educating and meeting the needs of tribal members, and preserving the languages and cultures of the Tribes. (Ex. 3, Tribal charter SKC034893–34896; Ex. 9, Policies, SKC001276–1277 (guiding principles include assisting with “the preservation of the cultures, languages,

histories, and natural environment of the Salish, Pend d'Oreille, and Kootenai people,” “provid[ing] postsecondary education opportunities for Native Americans,” “assist[ing] tribal entities and departments in staff preparation, planning, research and services according to identified needs,” and “assist[ing] the Indian community with economic development needs of the Flathead Indian Nation.”.) These goals serve the “central policies” underlying tribal sovereignty: tribal self-determination, cultural preservation, economic development, and promotion of commercial dealings between tribes and non-Indians. *White*, 765 F.3d at 1025; *Breakthrough Mgt. Grp.*, 629 F.3d at 1187.

The College provides many services that further these goals. For example, it provides workforce development and continuing education at no cost for tribal employees. (Ex. 10, Catalog SKC001758; Ex. 1, Demonstrative § II(A); Ex. 21, Aff. Plouffe, ¶ 12.) It waives the first year’s tuition for enrolled members of the Tribes who graduate from high school, as well as the second year’s tuition for enrolled members as long as they maintain a good GPA. It provides adult basic education and prioritizes enrolled members in its scholarship program. (Ex. 10, Catalog SKC001631; Ex. 1, Demonstrative § II(B); Ex. 21, Aff. Plouffe, ¶ 13.) The College also operates the tribal library, which is a designated Government Depository for tribal documents and artifacts, and helps perpetuate tribal languages and customs. (Ex. 10, Catalog SKC001632–1635, 1758; Ex. 1, Demonstrative §§

II(C), III(H)(5); Ex. 21, Aff. Plouffe, ¶ 14; Ex. 26, Accrediting report SKC001892.) It also maintains close ties with tribal elders and seeks to employ members of the Tribes as faculty. (Ex. 11, Excerpted Annual Reports SKC001233; Ex. 26, Accrediting Report SKC001870.)

The College’s curricula and programs reflect the fundamental purposes the College serves. (*E.g.* Ex. 11, Annual Report SKC037432 (offering certificate and degree programs “that are important to tribal communities” and degrees in Tribal Historic Preservation to “prepar[e] students to give back to their home communities”), SKC037449 (“all programs and courses contain Native American content needed to equip students for work in tribal settings”); Ex. 10, Catalog SKC001617, 1639 (general education requirements include Native American Studies and degrees or certificates include Tribal Governance and Administration, Indigenous Research, and Tribal Historic Preservation); Ex. 1, Demonstrative §§ II(C).)

The grants pursued by the College likewise reflect its inherently tribal purpose. (*See* Ex. 1, Demonstrative § III(D)(2).) Each grant is explicitly connected to a service of value to the Tribes, such as providing vocational education to the “large unemployed labor force” on the Reservation (ex. 2, Council SKC006855–6856); “increas[ing] [the] number of Indian nurses [to] improve the availability and quality of health care delivery to the Indian community” (*id.* SKC009130–9131,

17615–17616); purchasing materials for the Library “of need and interest to the members of the Confederated Salish and Kootenai Tribes,” for “the use of the residents of the Flathead reservation” (*id.* SKC015237-015239); and providing technical education instruction that meets “the employment needs of the tribal membership and job availability and demand identified in the CS&KT Comprehensive Economic Development Strategy (CEDS) and other tribal economic planning documents and related socioeconomic and employment data” (*id.* SKC020416–20420).

Additionally, the College is a collaborative partner for tribal departments, providing expertise and resources to the formal tribal government. As early as 1981, the Tribal Council recognized that tribal colleges helped “fulfill[] the need on the reservation for relevant training in tribal government, tribal resource management, business management, and tribal staff development.” (Ex. 2, Council SKC003962.) The College has continued to function as an integral part of the Tribes’ educational efforts, including the Education Department, Two Eagle River School, and Kicking Horse Job Corps. (*See* Ex. 1, Demonstrative III(B), e.g. Ex. 2, Council SKC003996–3997, 11908, 25771; Ex. 28, Aff. Clairmont, ¶¶ 4, 6.) The College has also entered numerous Memoranda of Agreement with the Tribes themselves as well as various tribal departments, the underlying purpose of which is to benefit the Tribes. (*See* Ex. 1, Demonstrative § III(H); Ex. 28, Aff. Clairmont,

¶¶ 4–9; Ex. 21, Aff. Plouffe, ¶ 7.)

In carrying out the Tribes’ goal to provide post-secondary education on the Reservation, the College “act[s] as more than a mere business.” *Pink*, 157 F.3d at 1188. Unlike one would expect from an independent college, every aspect of the College—from curriculum planning to grantwriting and community involvement—is purposely and directly connected to the College’s tribal charter and its obligation to carry out the Tribes’ purposes. Thus, the College’s fundamental and specific purposes demonstrate the College is an arm of the Tribes.

III. The entity’s “structure, ownership, and management, including the amount of control the tribe has over the entit[y]”

The third *White* factor also supports the College’s and Tribes’ position. The College and the Tribes are deeply interconnected and interinvolved. The Tribal Council chartered the College, named it, defined its purposes, prescribed its duties and powers, and has the sole authority to appoint directors to or remove them from the College’s Board. It regularly treats the College as part of the Tribes’ governmental structure, receives the College’s annual reports, approves its grants, supports and participates in its efforts and events, grants it special permits, represents it at the state and national level, plays a limited role in its management, and encourages its constant collaboration with various tribal departments. The College in turn provides services to the Tribes and tribal members and ensures that its curriculum and other endeavors serve the purposes defined by the Tribal

Council.

A. Governing Board

The Council delegated the responsibility of “govern[ing]” the College to the Council-appointed Board of Directors (SKC034892–34901), including “all powers necessary or convenient to effect any or all purposes for which the college is organized.” (Ex. 12, Bylaws, Art. II, SKC001107-1118; Ex. 9, Policies SKC001279–1280). However, pursuant to Article VI, § 1(t) of the Tribes’ Constitution, the Council reserved the right to “review Board actions”:

The Tribal Council shall at all times have power to prescribe such regulations, provisions and limitations as it may deem advisable, which regulations, provisions and limitations shall be binding upon any and all corporations subject to the provisions of this ordinance, and the Tribal Council shall have power to amend, repeal or modify this ordinance at pleasure.

(Ex. 3, Tribal charter, SKC034900.)

The third *White* factor does not require direct control for an entity to be an arm of the Tribes—the degree of control and the “structure” of the relationship are relevant. This acknowledges that tribes frequently create affiliated but separate entities to carry out their governmental functions. *Smith*, 434 F.3d at 1133. This does not preclude the entities from being arms of the tribe. For example, although § 17 corporations are managed by separate boards, such incorporation does not automatically waive sovereign immunity. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009). Likewise, a tribe can

designate a separate entity to serve as the tribally designated housing authority (“TDHE”), and it is considered an arm of the tribe. 25 U.S.C. § 4103(22)(C); *Karuk Tribe Hous. Auth.*, 260 F.3d at 1081–82 (statute did not apply to TDHE, which perpetuated tribal self-governance). The Tribes have established several entities that are governed by separate boards to carry out functions of the tribal government. (Ex. 28, Aff. Clairmont, ¶¶ 5–9.) A holding that separate governance divested such entities of their tribal character would jeopardize these tribal units as well as the College.

Critically, the Council’s delegation of governance over the College is required for the College to be a “tribally controlled college” under the TCCUA, which requires tribal colleges to be accredited. 25 U.S.C. § 1804. Accreditation standards mandate that colleges have a governing board and operate with “appropriate autonomy,” “[e]ven when supported by or affiliated with . . . political . . . organizations.” (NWCCU, [*Accreditation*] *Standards* Std. 2A, 2A23, www.nwccu.org/accreditation/standards-policies/standards/.) The Tribes and College are careful to preserve this “appropriate autonomy,” without which the College would lose its accreditation, its “tribally controlled college” status, and its primary funding source, the TCCUA. (*See e.g.* Ex. 6, Board SKC029513 (adopting FTE program to comply with Act), SKC029530 (amending bylaws to comply with Act), SKC029791–29792 (amending policy to protect accreditation); Ex. 13,

Audits SKC031508–31509.)

Although the Board governs the College, the Council appoints and may remove the Board members, all of whom must be enrolled members of the Tribes. (Ex. 12, Bylaws, Arts. III, X.) In the context of federal sovereignty, this has been held to show an entity is part of the government. *Lebron v. Natl. R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (“[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government.”).

The Council has fulfilled its responsibility to appoint the Board throughout the College’s 40-year history. (Ex. 1, Demonstrative § III(A).) The Tribes’ Personnel Department advertises vacant board positions in the tribally-owned newspaper, *Char-Koosta News*, and collects applicants’ letters of interest and resumes. The Council then interviews each applicant, selects its candidate of choice by secret ballot, and appoints the selected candidate to the board. (Ex. 14, Discovery Int. No. 7; Ex. 16, Board Policy.) If the Tribes did not condone the management of the College, they could influence the direction by removing board members and appointing new ones.

B. The Tribes treat the College as a component of the Tribes.

The Tribes proactively assist the College’s endeavors, treating it as more

than a “mere business.” On numerous occasions, the Tribal Council has advocated for the College at the state and federal levels on issues of importance to the College. (Ex. 1, Demonstrative § III(F).) The Council has also represented to numerous federal agencies that the College is a “tribally controlled” entity that is eligible for funding for tribes, including TCCU funds, PL 93-638 contracts, self-governance compact funds, and vocational education and library services funds set-aside for Indian tribes. (Ex. 1, Demonstrative §§ III(C), V(A); ex. 2, Council SKC012052–12053, 12055–12056 (describing College as “subsidiary non-profit educational institution” to Administration for Native Americans); SKC006855–6866, 14004-14005, 15667–15670 (describing College as “tribally established” or “tribally chartered” and “tribally controlled” in resolutions supporting funding from State and Department of Education). Similarly, the College was designated a “political subdivision” of the Tribes with the Internal Revenue Service. *See* Rev. Proc. 84-36 (including College and Salish Kootenai Housing Authority on list of “political subdivisions of tribes”). And College employees are eligible for federal employee benefits because the federal Office of Personnel Management recognizes the College as a “tribal business entity.” (Ex. 14, Discovery Responses, Int. 13.)⁴

The Tribes also claim the College in their annual reports to the tribal

⁴ The College’s independent auditors also treat the College as a “component unit” of the Tribes under Governmental Accounting Standards Board (G.A.S.B.) Statement 39. (Ex. 13, Audits SKC031513–31514.)

membership. The reports report on the College alongside the Tribes' other educational programs, list the College among other tribal departments in the Reports' Resource Directory, and highlight collaborative efforts involving the College in sections on other departments. (Ex. 15, CSKT Annual Reports SKC002145, 2149, 2150, 2164, 2169, 2170, 2173, 2176, 2179, 2180, 2196, 2203, 2208, 2212, 2215, 2216, 2219, 2231, 2242, 2243, 2249, 2259, 2262, 2265, 2269, 2284–2285, 2297, 2301, 2315, 2316, 2318, 2326, 2331, 2337, 2340, 2357, 2359, 2369, 2372, 2373, 2390–91, 2394, 2405, 2413, 2420, 2430, 2443, 2447, 2450, 2452, 2453, 2458, 2460.)

The College is often treated as a tribal department. The Council has passed dozens of resolutions demonstrating support for the College's grant applications. (Ex. 1, Demonstrative § III(D).) It appoints the College to tribal committees and sometimes even calls it a department. (Ex. 1, Demonstrative § III(B); e.g. ex. 2, Council SKC005754, 6656, 10802–10803, 11759, 11908, 21157, 21161–62, 25771.) It has at times transferred governmental programs to the College, eliminated governmental programs that the College also provided, and removed programs from the College to governmental departments. (*See* Ex. 1, Demonstrative § III(G)(I); e.g. ex. 2, Council SKC005945–5947, 6120–6121, 14821.) It has also “directed” or “encouraged” the College to undertake certain efforts and has communicated concerns to the College's board. (*See* Ex. 1,

Demonstrative § III(G)(I); e.g. ex. 2, Council SKC004289, 6967, 9866, 12460, 16756, 16758, 20616, 22152–22154.) In many ways, the Council treats the College like a department of the Tribes, while maintaining the “appropriate autonomy” required for the College to be accredited.

The Tribes have assigned important roles to the College they would not assign to an independent entity, including operating the tribal library and serving as a Government Depository. (*See* Ex. 1, Demonstrative § II(C)). For example, the Tribes’ Kootenai Culture Committee asked the Army Corps of Engineers to contract with the College to be the repository for Kootenai artifacts from Lake Koocanusa. (Ex. 21, Aff. Plouffe, ¶ 14.) The Council even had the College plan and conduct the Tribes’ constitutional convention in 1995. (Ex. 2, Council SKC012125-12126, 12136, 12197–12198, 12223–12224; Lopach, 255.)

The Council also grants the College special permits to use tribal land and other resources and to conduct research on the Reservation. (Ex. 1, Demonstrative § III(E).) While such permits are occasionally granted to non-tribal entities, the College receives such permits and privileges regularly.

The Council authorizes and encourages tribal departments to engage in constant collaboration with the College. (Ex. 1, Demonstrative § III(H); Ex. 28, Aff. Clairmont, ¶ 4–9; Ex. 21, Aff. Plouffe, ¶ 7.) Indeed, over the years, the College has played a key role in various marketing and education efforts; physical,

dental, and mental health programs; early childhood and education programs; natural resource management and research; cultural preservation endeavors; economic development planning; and transportation, road-building and other construction projects. (*Id.*) The Tribes, Tribal Health, Historic Preservation, Forestry, Department of Human Resources Development, Early Childhood Services, Natural Resources, and numerous other departments have all had Memoranda of Agreement with the College to pursue common goals. (*Id.*)

The Tribes proactively support the College's efforts in other ways as well. Councilmembers attend and are involved in the College's activities and committees, sometimes missing Council meetings to participate in those activities. (Ex. 1, Demonstrative § III(D)(1).) Tribal employees who are Board members are allowed to attend to College affairs while on the clock—a privilege afforded to only one other entity run by a Council-appointed board, the Tribes' Safety Committee. (Ex. 2, Council SKC19378–19739; Ex. 16, CSKT Policy.) The Tribes have also approved changes of duty station to allow tribal employees to attend various College events, including the College's 20-year anniversary celebration and the inauguration of a new College President. (Ex. 1, Demonstrative § III(D)(1).)

The sheer number of contacts between the Tribes and the College demonstrate that the College is an intrinsic part of the tribal government, albeit a

nonprofit corporation that operates with “appropriate autonomy” as an accredited tribal college.

C. The College recognizes its subsidiary relationship with the Tribes.

The College recognizes its subsidiary relationship with the Tribes. The Board’s policies reflect that the Board serves at the behest of the Council and the Board’s obligation is to “represent the CS & KT Council in the administration and management” of the College. (Ex. 9, Policies SKC001279–1280.) College policy requires all goals, objectives, and policies to be consistent with the guidelines established by the Tribes (*id.*), and the Board considers this in its work. (*E.g.* Ex. 6, Board SKC029516-29521, 29543–29549, 29603.) Additionally, the College’s hiring guidelines assign priority to enrolled members of the Tribes and First Generation Descendants of the Tribes. (Ex. 9, Policies SKC001286.) None of these restrictions would be necessary if the College were not a tribally controlled college.

The College reports to the Council “on a regular basis and inform[s] members of pertinent activities of the Board and progress of the college program.” (Ex. 12, Bylaws SKC001111; Ex. 1, Demonstrative § III(I).) It also regularly seeks the Council’s approval of grant applications (Ex. 1, Demonstrative § III(D)(2)), introduces important guests to the Council, and invites the Council to take part in or speak at College events (Ex. 1, Demonstrative § III(G)(3)–(4).) Historically, the

College also followed the Tribes' personnel policy, used the Tribes' legal department and accounting department, and involved the Council in the process for hiring the College President. (Ex. 21, Aff. Plouffe ¶ 10.) However, increasing attention by accreditation bodies to the maintenance of "appropriate autonomy" has led to a more arms-length relationship in these areas. (*Id.*)

The College has provided numerous services to the Tribes over the years, from road-building and gravel-hauling, to technical assistance and training, to historical and scientific research. (*See* Ex. 1, Demonstrative § III(G), (H), (J).) When asked to provide particular skill-building for tribal employees, the College has developed appropriate trainings and programs to meet the needs identified by the Tribes. (Ex. 21, Aff. Plouffe, ¶ 12; e.g. Ex. 6, Board SKC029552-29558, 29569, 29646.) Additionally, the College regularly allows the Tribes to use its facilities without charging rental fees. (Ex. 24, Facility rental log; Ex. 21, Aff. Plouffe, ¶ 9.)

Although the College is managed by a separate governing Board, the Board is appointed by the Council and reports to the Council. Besides the tribal departments and possibly some § 17 corporations, no other entity has been discussed by the Council as often as the College. (Ex. 27, Aff. Abby Dupuis, ¶ 5.) By design and in practice, the College functions as a subsidiary entity of the Tribes while operating with the "appropriate autonomy" required of a post-secondary

institution, pursuing the objectives identified by the Tribes 40 years ago.

IV. The Tribes’ “intent with respect to the sharing of their sovereign immunity”

The Tribes have demonstrated their intent to share their sovereign immunity and sovereign status with the College in numerous ways, many of which overlap with the other factors.

As previously discussed, the Tribes acted in their § 16 capacity as a governmental organization and pursuant to their Constitution when they chartered the College in 1977 to meet the higher educational needs of tribal employees and tribal members. Moreover, the Tribes expressly limited the College’s power to sue and be sued to Tribal Court. (Ex. 3, Tribal charter SKC034896.) The Tribes delegated the powers necessary to effectuate the College’s purposes to the College’s Board of Directors, but retained the power to appoint and remove the board members and dissolve the corporation. Additionally, the Tribes have promoted constant collaboration between the College and departments of the tribal government to a degree that the Tribes have never demonstrated with an independent entity.

The Tribal Council regularly recognizes the College as an entity it created to further the Tribes’ educational goals, whether advocating for the College, passing resolutions in support of the College’s grant applications, applying for funds on behalf of the College, or designating the College an entity eligible to receive funds

exclusively for tribes and organizations affiliated with and sanctioned by tribes. (Ex. 1, Demonstrative §§ III(C), (D), V(A), (B).) The Tribes sanction the College as their sole tribal college, enabling the College to receive funds for tribal colleges under section 316 of the Higher Education Act, as opposed to section 319, which provides funds to “Nontribal Institutions” that serve Native Americans. (*See* § V, *infra*.) As discussed above, Congress and tribes expressly recognize tribal colleges as an important way to further tribal sovereignty, self-determination, and self-governance.

The Tribes have also recognized the College as a tribal organization under both Title I and Title V of the ISDEAA (Public Law 93-638), the express purpose of which also is to promote tribal autonomy, self-determination, and self-governance. The Tribes have allowed the College to submit proposals for self-determination contracts in its own name and have appropriated self-governance compact funds for the College’s use. Such funds are only available for “tribal organizations” under the Act. (*See* § V, *infra*.) *See also* Rev. Proc. 84-36 (designating the College a “political subdivision” of the Tribes).

Critically, the Tribes’ Court of Appeals has recognized that the College is “the pride of the Salish-Kootenai people,” that “[e]ducating tribal members is an important component of self-government,” and that the College “is a tribal entity closely associated with and controlled by the Tribes.” Ex. 17, *Smith v. Salish*

Kootenai College, AP-99-227-CV (CSKT Ct. of Appeals 2003). The holding in no way limited the College to merely being on the same footing as a tribal member—it expressly identified the College with the Tribes’ right to “self-government.”

The tribal Court of Appeals’ holding is in keeping with other judicial and administrative decisions on the issue, which the Tribes have never contested. *See Bartell v. Am. Home Assur. Co.*, 2002 MT 145, ¶ 6, 310 Mont. 276, 278, 49 P.3d 623, 624 (describing the College as “a tribal governmental agency”); Ex. 18, *Bailey v. Salish Kootenai College*, DV-10-601 (Mont. 4th Jud. Dist. 2010) (granting College’s motion to dismiss on the basis that it is a “tribal member and agency of [the Tribes]” and the tribal court therefore had exclusive jurisdiction over the matter); Ex. 19, *St. Paul v. Salish Kootenai College, et al.*, CV-OC-2012-35190 (Tribal Ct. of Confederated Tribes of the Colville Reservation 2012) (dismissing case on the basis that the College’s sovereign immunity precluded suit against it in the foreign tribal court). The EEOC and Montana Human Rights Bureau have similarly dismissed administrative discrimination proceedings on the grounds that they lacked jurisdiction over the College because the College shared in the Tribes’ sovereign status or sovereign immunity. (Ex. 21, *Aff. Plouffe*, ¶ 9.)

Likewise, although the Ninth Circuit has determined that *Smith* decided only that the College is the equivalent of a tribal member for jurisdictional purposes, the Ninth Circuit held *en banc* in that case that the College is “sufficiently identified

with the tribe that it may be considered to be “tribal””; that “tribes may govern themselves through entities other than formal tribal leadership”; and that the College acts as “an arm of the tribe.” *Smith*, 434 F.3d at 1133–35. Although this may only be dicta, the court highlighted the governmental connection between the Tribes and the College.

Instead of contesting these determinations, the Tribes have supported and joined the College’s efforts to defend its sovereign status in both *Smith* and the present case. (*See e.g.* docs. 90 and 90-1.) Holding that the College is *not* an arm of the Tribes would fly in the face of the Tribes’ own position on this matter, and run contrary to the determinations of the numerous tribal, state, and federal agencies and courts that have consistently recognized the College as an arm of the Tribes and “the pride of the Salish-Kootenai people.”

V. The “financial relationship between the tribe and the entit[y]”

The Tribes and College are financially interconnected in numerous ways. Critically, the College would not be eligible for its primary funding source were it not for the Tribes’ charter and ongoing sanction. (Ex. 13, Audits SKC031508–31509, 31511.) Second, the Tribal Council frequently applies for funding on behalf of the College and passes the grant funds through to the College. (E.g. Ex. 1, Demonstrative §§ III(C), (H); Ex. 20, Contract and Grant List Reports (showing pass-through grant fund payments to the College from grants awarded to the

Tribes). The numerous MOAs that the College has had with the Tribes and tribal departments have also included various financial arrangements. (Ex. 21, Aff. Plouffe, ¶ 7.) The Tribes also regularly pass resolutions or provide letters in support of College grant applications, which likely enhances the College’s chance to obtain those funds. (*See* Ex. 1, Demonstrative § III(2).)

Other times, the Tribes have designated the College as a tribal entity that is eligible to receive funding exclusively for tribes. (Ex. 1, Demonstrative §§ III(C), V(A).) For example, the Council has designated the College a “tribally established and tribally controlled” college that is eligible to receive vocational education funds from the 1% set-aside for Indian tribes (Ex. 2, Council SKC006855-6857, 14004–14005), has authorized the College to “apply as a tribal organization with tribal support” for funding a rural campus community health center (Ex. 2, Council SKC018811–18812), and has designated the College as the entity to apply for Library Services and Construction Act funds under PL 98-480’s 1.5% set-aside for Indian tribes. (Ex. 2, Council SKC005767, 7699.)

On other occasions, the Council has designated the College as eligible to enter into PL 93-638 “self-determination” contracts and receive “self-governance” compact funds. ISDEAA funds—whether through contracts or compact agreements—are only available to tribes and tribal organizations. *See* 25 U.S.C. § 5322 (self-determination funds are for “the strengthening or improvement of tribal

government...”); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234–1235 (8th Cir. 1995) (“[T]he ISDEAA does not contemplate that a private party such as CCI can enter into a self-determination contract. . . . [T]he purpose and policy of the ISDEAA are best served if the term “Indian contractor” is limited to a tribe-related organization.”); *Demontiney v. U.S.*, 54 Fed. Cl. 780, 786, *aff’d sub nom. Demontieny v. U.S.*, 81 Fed. Appx. 356 (Fed. Cir. 2003) (same).

The Tribes have designated the College a tribal entity for various PL 93-638 contracts. (Ex. 1, Demonstrative § V(A)(1); e.g. Ex. 2, Council SKC006120–6121, 15667–15670, 27599–27600.) Indeed, the Council applied for and obtained PL 93-638 funds to “assist in the development” of the College in the first place, noting that “one of the operational goals of the Self-Determination Act is to provide resources required to train Tribal Officials and personnel in the knowledge and skills necessary to conduct and administer new programs, improve Tribal government, improve managerial capacity and improve program operations.” (Ex. 2, Council SKC002766, 3467–3468.)

Since becoming a self-governance tribe in 1994, the Council has also appropriated funds in its BIA Self-Governance Compact Budget for the College’s use. (Ex. 1, Demonstrative § V(A)(2); e.g. Ex. 2, Council SKC0019211, 10746–10747; Ex. 23, Self-Governance MOA; Ex. 22, Recent Self-Governance Compact Funding Agreements, SKC31010–31029, 31073–31082.) In fact, in 2004, the

College appropriated \$988,000 in self-governance funds for the College's Nursing Program, and in FY 2005, appropriated \$1,232,634 in self-governance funds for the construction of the College's housing for nursing students. (Ex. 23, Self-governance compact agreements; Ex. 2, Council SKC019211.)

The Tribes also frequently provide financial contributions to the College, including donations, budget appropriations, and payments for services, products, or facilities provided to the Tribes or tribal members by the College. (Ex. 21, Aff. Plouffe, ¶ 8; Ex. 1, Demonstrative, § V(B); e.g. Ex. 2, Council SKC003771.) Often, the MOUs and MOAs that the College enters into with tribal departments also include financial arrangements. (Ex. 21, Aff. Plouffe, ¶ 7.)

The Tribes also lease trust land to the College and have frequently amended the College's below-market leases to add more land to the agreements and to designate the leases for educational rather than commercial purposes. (Ex. 1, Demonstrative § V(C); Ex. 25, Lease documents SKC001257-001267, 34792-34864.) The College's original campus sits on tribal trust land across from the Tribal Complex, and the Tribes have also supported and even helped fund the purchase of fee land by the College. (Ex. 21, Aff. Plouffe, ¶ 9.) The Tribes have also permitted the College to erect transmitters on tribal land and have renewed encroachment permits at no or low cost. (Ex. 1, Demonstrative § V(C).)

Finally, as a nonprofit corporation, the College reinvests any profits into its

educational mission, furthering the objectives of the Tribes. Although the College's separate corporate structure would, by the Tribes' design, shield the Tribes' other assets from an adverse judgment, a judgment against the College would impede the Tribes' efforts to provide post-secondary education on the Flathead Reservation. Thus, a judgment against the College would act as a judgment against the Tribes themselves.

Conclusion

Applying the *White* factors, there can be no doubt that Salish Kootenai College is an arm of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Acting as a constitutional, sovereign government, the Tribes chartered the College to assist with the development of the Tribes' workforce, provide post-secondary educational opportunities to the tribal membership on the Reservation, and help preserve the Tribes' languages and cultural traditions. For 40 years, the College has done just that, reporting regularly to the Tribal Council and collaborating with tribal departments to improve governmental services.

Again and again, the Tribes have represented the College as a tribally chartered, tribally controlled entity. In turn, tribal, state, and federal agencies and courts have repeatedly recognized the College as part of the Tribes. Although governed by a separate board that is appointed by the Tribes and obligated to operate with "appropriate autonomy" as an accredited "tribally controlled college,"

the College is inextricably connected to the Tribes, from its mission, to its structure, to its funding. The Tribes have invested their own funds and federal funds in the College and have assigned important roles to the College that are essential to the Tribes' self-government. Fundamentally, "tribally controlled colleges" such as the College perpetuate tribal self-determination, self-government, and cultural preservation, "central policies" of tribal sovereignty tribal and sovereign immunity. To hold otherwise would rob the Tribes of their right to educate their own people.

DATED this 5th day of January 2018.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding the caption, Table of Contents, Table of Authorities, and certificate of compliance is 8,367.

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/s/ Martin S. King
Martin S. King