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

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STEPHEN McCOY,

Plaintiff,

-vs-

SALISH KOOTENAI COLLEGE, INC.,

Defendant.

CV 17-88-M-DLC

**BRIEF IN SUPPORT OF  
SALISH KOOTENAI COLLEGE'S  
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 Court lacks subject matter jurisdiction, and Plaintiff’s Complaint fails to state a claim upon which relief can be granted.

### **Procedural Background**

The Complaint was served on the College on September 13, 2017. McCoy, a former College employee, asserted two claims: a sex-based discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and a sex-based discrimination claim under the Montana Human Rights Act, Mont. Code Ann. § 49-2-101 et seq. McCoy asserts this Court has jurisdiction because Title VII presents a federal question. (Doc. 1, ¶¶ 1–2.)

The College moved the Court to enter a scheduling order for jurisdictional discovery because the Court lacks jurisdiction if the College is an arm of the Confederated Salish and Kootenai Tribes. The Court granted the unopposed motion, and the parties have now engaged in jurisdictional discovery.

### **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 because the College is a tribal entity that functions as an arm of the Confederated Salish and Kootenai Tribes (“the Tribes”).<sup>1</sup> The College therefore shares in the Tribes’ sovereign status and is not an “employer” that is subject to suit under Title VII. The Court also lacks jurisdiction over the state law claim because the College shares in the Tribes’ sovereign immunity and the tribal court has exclusive jurisdiction over the claim.

Title VII prohibits employers from engaging in discriminatory practices. However, Indian tribes are not “employers” who may be sued under Title VII because they are excluded from the statutory definition of “employer.” 42 U.S.C. § 2000e(b) (“The term ‘employer’ . . . does not include (1) . . . an Indian tribe. . .”).

An entity that functions as an arm of a tribe likewise “falls within the scope of the

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<sup>1</sup> 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 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>.

Indian Tribe exemption of Title VII.” *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). In *Pink*, the Ninth Circuit held the plaintiff could not bring suit under Title VII against her former employer, a nonprofit corporation organized by two tribes to provide health services to tribal members. *Id.* The corporation was excluded from the reach of Title VII because it “served as an arm of the sovereign tribes, acting as more than a mere business.” *Id.*

Whether an entity is an arm of a tribe “turns on several factors” adopted by the Ninth Circuit in *White v. University of California. United States ex rel. Cain v. Salish Kootenai College*, 862 F.3d 939, 944 (9th Cir. 2017). 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).

Also relevant are “[t]he 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.” *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*, 629 F.3d at 1187).

As discussed below, each factor demonstrates the College is an arm of the Tribes and therefore not an “employer” under Title VII.

### **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 (*see ex. 8*, Resolution 18-050; *Cain*, 9:12-cv-181, *Br. Amicus Curiae* (doc. 90)) that the College is an arm of the Tribes. The Tribes chartered the College, approved its incorporation, and continue to sanction the College as their sole tribal college.

#### **A. Charter**

Actions taken in a tribe’s governmental capacity are protected by sovereign immunity unless the tribe or Congress expressly waives immunity. *Cain v. Salish Kootenai College, Inc.*, CV 12-181-GF-BMM, 2014 WL 12738908, at \*2 (D. Mont. Dec. 3, 2014), *rev’d in part on other grounds*, 862 F.3d 939. Actions taken in a tribe’s governmental capacity are also cloaked with the tribe’s sovereign **status**, for which the issue of “waiver” is irrelevant. *Cain*, 862 F.3d at 941.



The College was chartered and established as “Salish Kootenai Community College” by the Tribes’ Tribal Council (“Council”) on November 18, 1977. (Ex. 2, Excerpted Council minutes (hereafter, “Council”) SKC002701–2702;<sup>2</sup> Ex. 3, Tribal charter SKC034892–34901.) The Council certified 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.

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

The Tribes specifically certified they were acting in their § 16 capacity,

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<sup>2</sup> The Council minutes are authenticated by the Declaration of Abby Dupuis, Ex. 27, ¶¶ 2-3. The Tribes’ Annual Reports (Ex. 15) are authenticated by Robert McDonald, Ex. 29, ¶ 4. The Tribes’ Contract and Grant list (Ex. 20) is authenticated by Martin Charlo, Ex. 30, ¶ 3. The Tribal Council’s Board Policy is (Ex. 16) is authenticated by Renee Joachim, Ex. 31, ¶ 4. The remaining documents are the College’s and are authenticated by Audrey Plouffe, Vice-President of Business Affairs of the College, Ex. 21, ¶ 4.

pursuant to their Constitution, and in referencing § 1(a)(t), expressly designated the College a “**subordinate** board[] or cooperative association[]” of the Tribes.

(Emphasis added.) Such governmental action cloaked the College with the Tribes’ sovereignty.

**B. “Tribally controlled college” under federal law**

The Tribes’ charter and continuing sanction are 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).)

**C. Incorporation**

At the same time it chartered the College, the Council also approved the College’s first Bylaws and Articles of Incorporation 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. Atkinson, I-1–4. This separation is a “critical factor” for tribes to “promote self-governance” and economic development, *id.*, “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) (for-profit corporation); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Pink*, 157 F.3d at 1188 (non-profit corporation); *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 False Claims Act). 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 Montana law. (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*, 629 F.3d at 1187-88.

#### **D. Subsequent amendments to Articles of Incorporation**

##### **Name**

On September 17, 1981, the College Board approved changing the College's name 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 change and started frequently referring to the College as “Salish Kootenai College” as early as January 29, 1982. (Ex. 2, Council SKC004229). 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”)<sup>3</sup> § I, listing other examples.) Additionally, the College’s annual reports to the Tribes use 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-

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<sup>3</sup> 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.

incorporated College as one and the same entity for 35 years.

### **Expansion of the College's powers**

In 1983, the Tribal Council continued to assert its rights as the College's incorporator when it amended the College's tribal Articles of Incorporation to 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.) The amendment is reflected as an official action 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 entities that provide services off reservations. *Pink*, 257 F.3d at 1188–89.

## **II. The entity's "purpose"**

### **A. Tribal colleges movement**

The tribal 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 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](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 were controlled by the BIA. *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 governments by authorizing certain federal agencies to enter into contracts with, and make grants directly to, federally recognized tribes rather than the BIA. Congress expressly intended ISDEAA to further tribal sovereignty, scale back “the prolonged federal domination of Indian service programs,” allow Indians “the full opportunity to develop leadership skills crucial to the realization of self-government,” and empower Indian people to “control their relationships both among themselves and with non-Indian governments, organizations, and persons.” PL 93-638 (S 1017).

Congress also 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 from this. 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 home and stated 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. *See* 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/](https://repository.upenn.edu/gse_pubs/345/)).

## **B. The College**

The College’s purposes mirror those of the tribal college movement. The Tribes established the College pursuant to their governmental obligation “to represent, develop, protect and advance the views, interests, resources, and education of its members.” (Ex. 3, Tribal charter SKC034894; Tribes’ Const., Art. VI, § 1(a).) They 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.*) The Tribes recognized “a need for an alternative to the forced exodus of Indian people from their home communities in search of higher education opportunities.” (Ex. 2, Council SKC002776.)

It is the Tribes’ goal today “to become a completely self-sufficient society and economy,” and they see 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.)

The College’s goals further the “central policies” underlying tribal sovereignty: self-determination, cultural preservation, economic development, and promotion of commercial dealings between tribes and non-Indians. *White*, 765 F.3d at 1025; *Breakthrough*, 629 F.3d at 1187. The College’s mission and vision

statements reflect these goals (*see* Salish Kootenai College, [www.skc.edu/mission/](http://www.skc.edu/mission/); Policies, SKC001276), as do the specific purposes the College serves. These purposes 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.) The College’s guiding principles are consistent with these purposes. (Ex. 9, Policies, SKC001276–1277.)

The services provided by the College also further these purposes. 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, Decl. 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 who maintain a good GPA. (Ex. 10, Catalog SKC001631; Ex. 1, Demonstrative § II(B); Ex. 21, Decl. 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, Decl. Plouffe, ¶ 14; Ex. 26, Accrediting report SKC001892.) It 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 also reflect these purposes. (*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).) So do the grants pursued by the College. (*See* Ex. 1, Demonstrative § III(D)(2).) Each grant is connected to a service of value to the Tribes, such as “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 [tribal] members ” (*id.* SKC015237-015239); and providing instruction that meets “the employment needs of the tribal membership and job availability and demand identified” by the Tribes (*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 Council recognized that tribal colleges help “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 entered numerous Memoranda of Agreement with the Tribes and various tribal departments, the underlying purpose of which is to benefit the Tribes (see Ex. 1, Demonstrative § III(H); Ex. 28, Decl. Clairmont, ¶¶ 4–9; Ex. 21, Decl. Plouffe, ¶ 7), and it functions as an integral part of the Tribes’ educational efforts. (See Ex. 1, Demonstrative III(B), e.g. Ex. 2, Council SKC003996–3997, 11908, 25771; Ex. 28, Decl. Clairmont, ¶¶ 4, 6.)

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.

**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 demonstrates the College is an arm of the Tribes. The College and Tribes are deeply interconnected. Although the College is managed by a separate 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,

Decl. 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 an accredited college, pursuing the objectives identified by the Tribes 40 years ago.

**A. Governing Board**

The Council delegated the responsibility of “govern[ing]” the College to the Council-appointed Board (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.) Although the Board governs the College, the Council appoints and may remove 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).

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 governmental functions. *Smith*, 434 F.3d at 1133. For example, although § 17 corporations are managed by separate boards, that does not automatically waive sovereign immunity. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009). Likewise, tribally designated housing authority (“TDHE”) can be a separate entity, but 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 (TDHE perpetuated tribal self-governance). The Tribes have established several entities that are governed by separate boards to carry out governmental functions. (Ex. 28, Decl. Clairmont, ¶¶ 5–9.) Separate governance does not divest them of their tribal character.

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/](http://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.)

The Council has appointed the Board for 40 years. (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 remove board members and appoint 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.” *Pink*, 257 F.3d at 1188–89. On numerous occasions, the Council has advocated for the College at the state and federal levels. (Ex. 1, Demonstrative § III(F).) The Council has also represented to federal agencies that the College is a “tribally controlled” entity that is eligible for funding for tribes, including TCCUA 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). The College is designated a “political subdivision” of the Tribes with the Internal Revenue Service, 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.) The College’s independent auditors also treat the College as a “component unit” of the Tribes under Governmental Accounting Standards Board Statement 39. (Ex. 13, Audits SKC031513–31514.)

In many ways, the Council treats the College like a department of the Tribes, while maintaining “appropriate autonomy.” In the Tribes’ annual reports to the tribal membership, the College appears alongside the Tribes’ other educational programs and is listed among other tribal departments in the Resource Directory. (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 Council regularly passes 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.) The Council 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 frequently.

The Council authorizes and encourages tribal departments to collaborate with the College. (Ex. 1, Demonstrative § III(H); Ex. 28, Decl. Clairmont, ¶ 4–9; Ex. 21, Decl. Plouffe, ¶ 7.) Indeed, over the years, the College has played a key role in numerous 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 other departments have all had MOAs with the College. (*Id.*)

The Tribes also assign 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, Decl. 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 Tribes proactively support the College's efforts in other ways as well. Councilmembers are involved in the College's activities and committees,

sometimes missing Council meetings to participate in them. (Ex. 1, Demonstrative § III(D)(1).) Tribal employees who are Board members may 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 demonstrates the College is part of the 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 the Board serves at the behest of the Council and its obligation is to “represent the CS & KT Council in the administration and management” of the College. (Ex. 9, Policies SKC001279–1280.) All goals, objectives, and policies are required to be consistent with the guidelines established by the Tribes (*id.*), and the Board takes this into consideration. (*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.) These restrictions would not be necessary if the College were independent.

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 guests to the Council, and invites the Council to take part in College events (Ex. 1, Demonstrative § III(G)(3)–(4).) Historically, the College also followed the Tribes’ personnel policy, used the Tribes’ legal and accounting departments, and involved the Council in the process for hiring the College President. (Ex. 21, Decl. 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, including road-building, technical assistance, and 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, Decl. 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, Decl. Plouffe, ¶ 9.)

#### **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.) They delegated the powers necessary to effectuate the College’s purposes to the Board, but retained the power to appoint and remove the board members. Additionally, the Tribes have promoted constant collaboration between the College and departments of the tribal government to a degree never demonstrated with an independent entity.

The Tribal Council 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, tribal colleges are expressly intended 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 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.” *Id.*

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 because College 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 because College's sovereign immunity precluded suit against it in foreign tribal court). The EEOC and Montana Human Rights Bureau have similarly dismissed administrative proceedings on the grounds they lacked jurisdiction over the College because the College shared in the Tribes' sovereign status or sovereign immunity. (Ex. 21, Decl. Plouffe, ¶ 9.)

Although the Ninth Circuit 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 *Smith*, *Cain*, and the present case. Holding that the College is *not* an arm of the Tribes would fly in the face of the Tribes' own position on this matter (ex. 8, Resolution 18-050), and run contrary to the determinations of the numerous tribal, state, and federal agencies and courts that have recognized the College as an arm of the Tribes.

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

The Tribes and College are financially interconnected. 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.) Additionally, the Tribal Council frequently applies for funding on behalf of the College and passes the funds through to the College. (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 the College has had with the Tribes and tribal departments have also included financial arrangements. (Ex. 21, Decl. Plouffe, ¶ 7.) The Tribes regularly pass resolutions or provide letters in support of College grant applications. (*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 receive ISDEAA funds, which 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 . . . 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

“self-determination” 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 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 provide financial contributions to the College, including donations, budget appropriations, and payments for services, products, or facilities. (Ex. 21, Decl. Plouffe, ¶ 8; Ex. 1, Demonstrative, § V(B); e.g. Ex. 2, Council

SKC003771.) Often, the MOAs the College enters into with tribal departments also include financial arrangements. (Ex. 21, Decl. Plouffe, ¶ 7.)

The Tribes lease trust land to the College and have 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 original campus sits on tribal trust land across from the Tribal Complex, and the Tribes have helped fund the purchase of fee land by the College. (Ex. 21, Decl. Plouffe, ¶ 9.) The Tribes have 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 functionally be 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. 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 2nd day of February 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 7,392.

WORDEN THANE P.C.

/s/ Martin S. King  
Martin S. King