Martin S. King, Esq.
Jori Quinlan, Esq.
WORDEN THANE P.C.
321 West Broadway, Suite 300
Missoula, Montana 59802
Telephone: (406) 721-3400
Fax: (406) 721-6985
mking@wordenthane.com
jquinlan@wordenthane.com
Attorneys for Defendant Salish Kootenai College

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

STEPHEN McCOY, Plaintiff, -vs- SALISH KOOTENAI COLLEGE, INC., Defendant.	CV 17-88-M-DLC **REPLY BRIEF IN SUPPORT OF SALISH KOOTENAI COLLEGE'S MOTION TO DISMISS**

The issue before the Court is straightforward: Is Salish Kootenai College an arm of the Confederated Salish and Kootenai Tribes ("Tribes" or "CSKT") based on the *White* factors? If it is, the College shares in the Tribes' sovereign status and is not an "employer" that can be sued under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e(b); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

The preponderance of the evidence supports the Tribes' and College's

position that the College has been an arm of the Tribes since its creation by the Tribal Council 40 years ago. Plaintiff's argument to the contrary relies on inapplicable case law, contradicts relevant precedent from the Ninth Circuit and Montana Supreme Court, and ignores the fundamental purposes served by tribal colleges. Further, Plaintiff fails to address much less controvert the facts and arguments raised in the College's opening brief.

I. A motion to dismiss is the appropriate vehicle and provides the correct standard for resolving this issue.

Plaintiff contends the Court should apply a summary judgment standard. He asserts that because the jurisdictional analysis concerns a statutory element, it is intertwined with the merits of the claim. He suggests that if *any* facts would tend to weigh against a decision that the College is an arm of the Tribes—no matter how few or weak they may be—then the issue must be resolved by a jury at trial, after the merits of the case have been fully litigated. This is not the law.

Plaintiff points to no case in which the sovereign status of a defendant was adjudicated based on a summary judgment standard, much less left to a jury. Indeed, courts consistently apply a motion to dismiss standard when assessing whether an entity is an arm of a tribe, including in cases where that determination is tied to a statutory element. *E.g. Pink*, 157 F.3d at 1188.

In *Vermont Agency of Natural Resources*, the United States Supreme Court affirmed that a sovereign's exposure to suit under the language of a statute is a

jurisdictional matter that must be given priority—"since if there is no jurisdiction there is no authority to sit in judgment of anything else." 529 U.S. 765, 778–88 (2000) (reversing denial of a motion to dismiss based on whether a state entity is a "person" under the False Claims Act). Under *Vermont*, which applies equally to tribes, *U.S. ex rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939, 943 (9th Cir. 2017), a motion to dismiss under Rule 12(b)(1) is the appropriate method and standard for resolving whether an entity shares in a tribe's sovereign status.

This is consistent with *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The issue of whether a defendant is an arm of a tribe does not go to the merits of a Title VII claim—whether the plaintiff was subjected to discrimination by his employer. *Parks v. Watkins*, CIV. 11-00594 HG-RLP, 2013 WL 431950, at *5 (D. Haw. Jan. 31, 2013). The court is not assessing whether there was an employment relationship or whether discrimination occurred. It is assessing the history and relationship between the defendant entity and a third-party tribe. *White v. U. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014). These facts are not "so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits." *Augustine*, 704 F.2d at 1077. The question of subject matter jurisdiction does not "go[] to the heart" of the plaintiff's discrimination action, and a motion to dismiss standard is proper. *Parks*, 2013 WL 431950, at *5.

The Court must determine whether a preponderance of the evidence demonstrates the College is an arm of the Tribes. *Dahlstrom v. Sauk-Suiattle Indian Tribe*, 2017 WL 1064399, at *3 (W.D. Wash. Mar. 21, 2017). It is "the district court," not a jury, that must allow appropriate discovery, apply and weigh the *White* factors, and determine whether the College is an arm of the Tribes. *Cain*, 862 F.3d at 945; *White*, 765 F.3d at 1025; *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010); *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 377 (Cal. 2016). The district court is permitted to "resolv[e] factual disputes where necessary" because it does not have to decide the merits of the claim to do so. *Augustine*, 704 F.2d at 1077.

II. Method of creation

Plaintiff insists the state-incorporated College is a different entity than the tribally incorporated College, or that incorporation under state law divested the College of any sovereign status. Neither contention is supported by case law.

The Montana Supreme Court has twice determined that incorporation under state law does not foreclose an entity from being, fundamentally, a tribal corporation, complete with sovereign status. *Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814, 817 (Mont. 2003); *Flat Ctr. Farms, Inc. v. State Dept. of Revenue*, 49 P.3d 578, 579 (Mont. 2002). Subsequent incorporation under state law does not cause a tribal entity to be "subsumed" by the state

corporate entity. *Koke*, 68 P.3d at 817.

Further, in *Smith v. Salish Kootenai College*, the district court and the Ninth Circuit sitting *en banc* rejected the same arguments Plaintiff makes here, based on the same evidence that is before this Court. *See* Smith's App. Br., 2003 WL 22724261, *16; Smith's Reply, 2003 WL 22724264, * 7. The Ninth Circuit found the College does business under the name "Salish Kootenai College," was originally "created as a 'tribal corporation," and "is incorporated under tribal and state law." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129, 1134, 1135 (9th Cir. 2006). The Court concluded that despite its state incorporation, the College is "a tribal entity" for purposes of civil tribal jurisdiction. *Id.* at 1135. *See also Smith v. Salish & Kootenai*, 2003 WL 24831272, *3 (D. Mont. Mar. 7, 2003) (subsequent history omitted).

Both courts considered the College's tribal Articles of Incorporation and Bylaws in addition to its state Articles. Thus they recognized that board members must be appointed by the Tribal Council, report regularly to the Tribes, and be enrolled members of the Tribes—though the state Articles do not reflect these requirements. *Id.*; *Smith*, 434 F.3d at 1129. "Contrary to Plaintiff's arguments, SKC's incorporation under the laws of the State of Montana does not eliminate SKC's connection to the [CSKT], and does not preclude its characterization as a tribal entity." *Smith*, 2003 WL 24831272, *3. Plaintiff presents no new facts to

alter this analysis.

State incorporation can weigh against finding that a corporation is an arm of a tribe. *N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1000 (9th Cir. 2003). But the factor is far from dispositive. Indeed, the sovereign entity at issue in *White* was exclusively incorporated under California law. 765 F.3d at 1025–26. The Court held this did not subject it to suit in state court or waive its sovereign immunity. *Id.*

Moreover, the Ninth Circuit has already held the College is more similar to the healthcare nonprofit in *Pink* and the community college in *Hagen*, which were arms of their tribes for sovereignty purposes, than the healthcare nonprofit in *Chapa de*. *Smith*, 434 F.3d at 1135. The same analysis can be made on the current record.

Plaintiff makes much of the fact that the state and tribal Articles of Incorporation are different and the state Articles do not reference the Tribes. But Plaintiff ignores the College's tribal charter, tribal Articles, Bylaws, and Policies, which also govern the College and affirm its close and subordinate relationship with the Tribes.

III. The College's purpose

Plaintiff does not address the fact that the fundamental purpose of tribal colleges, recognized by Congress and the Tribes, is to further tribal autonomy, self-

governance, and self-determination—"central policies" underlying the doctrine of tribal sovereignty. *White*, 765 F.3d at 1025. Additionally, Plaintiff ignores the College's tribal charter, Bylaws, Policies, Mission Statement, and other documents, which also reflect tribal purposes served by the College.

Even the purposes stated in the state Articles of Incorporation, however, support the College's position. They highlight providing educational opportunities in "Indian Culture and History" and technical assistance to "tribal agencies and institutions to assist these agencies and improve program effectiveness." Moreover, the geographical location referenced, the "Flathead Indian Reservation," is the home of and is governed by the Tribes. The Tribes reserved the Flathead Indian Reservation for the "exclusive use and benefit of the [Tribes]" from lands they ceded to the United States in the Treaty of Hellgate of 1855. *See* James Lopach et al., *Tribal Government Today: Politics on Montana Indian Reservations* 161–62 (Rev. ed. 1998); CSKT, *History and Culture* http://www.csktribes.org/history-and-culture. Thus the geographical reference supports the conclusion the College is an arm of the Tribes.

Plaintiff's contention the purpose of the College is not being fulfilled because enrollment of CSKT members is less than 50% of total enrollment is unsupported by legal authority and disregards practical reality. Regardless of what percentage of the student body CSKT members make up, the College undertakes

numerous efforts to educate tribal members, as previously described. Additionally, enrollment of Native Americans has always been greater than 50%, based on the full-time equivalency calculation prescribed for tribal colleges. 25 U.S.C. § 1801(a)(8), (b); 25 C.F.R. §§ 41.3, 41.5 (defining Indian Student Count). Given that CSKT members are a minority even on their own reserved lands, it would be impossible to operate a college for only CSKT members. *See* CSKT, Flathead Reservation Demographic and Economic Information, 7–8, *available at* https://lmi.mt.gov/Portals/135/Publications/LMI-Pubs/LocalAreaProfiles/Reservation%20Profiles/ RF13-Flathead.pdf.

Finally, cross-cultural education is an appropriate purpose underlying tribal sovereignty. *Breakthrough Mgt. Grp.*, 629 F.3d at 1187. Educating tribal members has always been a fundamental purpose of the College, but the College appropriately serves other students as well, and its hiring guidelines assign priority to enrolled members of the Tribes and First Generation Descendants of the Tribes. (Ex. 9, Policies SKC001286.)

IV. Structure, ownership, and management

A. Accreditation

Plaintiff's argument that the College's "choice of accreditation" precludes it from being an arm of the Tribes would undermine the entire tribal college system and expose every tribe and tribal college to an untenable catch-22.

As previously explained, the College is a "tribally controlled college" ("TCU") under the Tribally Controlled Colleges and Universities Act ("TCCUA"). TCUs were expressly intended by Congress to further tribes' sovereignty, autonomy, and self-determination. The charter and ongoing sanction of the College by the Tribes is essential to qualification as a TCU. 25 U.S.C. §1801(a)(4). Additionally, the College must be accredited. Accreditation standards require the College to operate with "appropriate autonomy." NWCCU *Accreditation* Standards Std. 2A, 2A23.

The College is careful to preserve this "appropriate autonomy" because without it, the College would lose its accreditation. Without accreditation, it would lose its status as a "tribally controlled college" and the significant source of funding available under the TCCUA. Further, without appropriate accreditation, the College would not attract students and, without students, could no longer function as a post-secondary institution.

If Plaintiff's position were accepted as law, every TCU would be at risk for losing its sovereign status by virtue of its compliance with accreditation standards, though their express purpose is to further tribal sovereignty. Wittingly or not, Plaintiff's argument attacks the entire tribally controlled college system.

Notably, in the state sovereignty context, accreditation has never prevented the Ninth Circuit from holding that state colleges and universities are arms of the

state. *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1426 (9th Cir. 1991) (citation omitted); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *Sadid v. Idaho State U.*, 837 F. Supp. 2d 1168, 1173 (D. Idaho 2011); *Black v. Goodman*, 736 F. Supp. 1042, 1044 (D. Mont. 1990). Although these institutions are also accredited and required to maintain appropriate autonomy, the Ninth Circuit instead has recognized that "public education is a central governmental function." *Durning*, 950 F.2d at 1426. Although the tests for tribal and state sovereignty are different, it is persuasive that state colleges are recognized as arms of the states that created them. *See also Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000) (tribal college is arm of the tribe).

B. Management

Plaintiff cites a California Supreme Court case for the proposition that "day-to-day management" of an entity is relevant to the arm-of-the-tribe analysis. But Plaintiff fails to note the rest of the paragraph, in which the court made clear that day-to-day management is by no means a requirement:

> An entity's decision to outsource management to a nontribal third party is not enough, standing alone, to tilt this factor against immunity. ...[C]ontrol of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management. If the tribe retains some ownership and formal control over the entity but has contracted out its management, this factor may weigh either for or against immunity depending on the particular facts of the case. Evidence that the tribe actively directs or oversees the operation of the entity weighs in favor of immunity; evidence that the

> tribe is a passive owner, neglects its governance roles, or otherwise exercises little or no control or oversight weighs against immunity. . . .

Miami Nation Enters., 386 P.3d at 373 (internal quotation marks and citation omitted). Nor does any Ninth Circuit law suggest that day-to-day management is required. Rather, the Ninth Circuit recognizes that "[t]ribes may govern themselves through entities other than formal tribal leadership." *Smith*, 434 F.3d at 1133.

The record amply reflects that the Tribal Council has maintained an active role in the College for four decades, consistently exercised its authority to appoint College board members, and enmeshed the College in the Tribes' governmental, educational, health, scientific, and environmental programs. The Tribes are not a passive owner and have not neglected their governance roles. The structure of the College's relationship with the Tribes weighs in favor of finding the College is an arm of the Tribes.

V. The Tribes' "intent with respect to the sharing of their sovereign immunity"

Plaintiff argues this factor weighs against a finding the College is an arm of the Tribes because the state Articles are silent as to sovereign immunity; the 2016 version of the Policy Manual (but no other version) provides the College can sue and be sued in federal court as well as tribal court; and the College has executed contracts assuring it will be compliant with federal nondiscrimination laws. Each argument implies the College's sovereign immunity has been waived.

Waiver of sovereign immunity is irrelevant. The statutory determination is antecedent to the question of whether there is sovereign immunity. *Vermont*, 529 U.S. at 779. Thus waiver is not part of the analysis. "If the College is a sovereign entity to which Congress didn't intend [Title VII] to apply, the College cannot make [Title VII] apply to itself by voluntarily waiving its sovereign immunity." *Cain*, 862 F.3d at 941.

Regardless, there has been no waiver. General "sue and be sued" language in an entity's articles of incorporation or other corporate documents does not constitute a clear and unequivocal waiver of sovereign immunity. *Lineen v. Gila River Indian Community*, 276 F.3d 489, 493 (9th Cir. 2002); *Hagen*, 205 F.3d at 1044. The College's *power* to sue or be sued in either federal or tribal court is limited by whether it is subject to suit under a statute in the first place and whether its immunity has been waived in the second.

Likewise, contractual agreements with the United States government to comply with federal nondiscrimination statutes or an executive order do not clearly and unequivocally waive sovereign immunity or create a private right of action. Plaintiff mischaracterizes Executive Order 11246—Part II of which regulates government contractors—in suggesting that it subjects government contractors to a private right of action under Title VII. Section 209 lists the sanctions and penalties the federal contracting agency may pursue and does not include a private right of

action for employees. *See also Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987); *Cohen v. Ill. Inst. of Tech.*, 524 F.2d 818, 822 n. 4 (7th Cir. 1975); *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871, 876 (N.D. Cal. 1975).

VI. The financial relationship between the Tribes and the College

Citing the California Supreme Court case again, Plaintiff emphasizes the Tribes would not be directly liable for a judgment against the College. But the same court went on to hold that "direct tribal liability for the entity's actions is neither a threshold requirement for immunity nor a predominant factor in the overall analysis, and we disagree with those courts that have held as much." *Miami Nation Enters.*, 386 P.3d at 373. The Ninth Circuit also has rejected the argument that the tribal sovereignty test turns on whether the tribe is directly or functionally liable for a monetary judgment. *Cain*, 862 F.3d at 944.

Plaintiff next argues that as a nonprofit, the College does not economically benefit the Tribes or fund tribal governmental functions. The cases he cites considered moneymaking ventures, including payday lending companies (*Miami Nation Enterprises*) and a casino (*Breakthrough Management*). Courts have upheld tribes' authority to create entities to promote economic development and raise revenues. *E.g. Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). But that does not preclude tribes from creating nonprofit entities to perform important public services like providing health services (*Pink*, 157 F.3d at 1188),

repatriating cultural items or remains to tribes (*White*, 765 F.3d at 1018), or providing elementary or post-secondary education (*Kendall v. Chief Leschi Sch., Inc.*, C07-5220 RBL, 2008 WL 4104021, at *1 (W.D. Wash. Sept. 3, 2008); *Hagen*, 205 F.3d at 1043).

Although such programs may not generate profits to fund other services, they still financially benefit the Tribes. Indeed, through tuition, grants, and other fundraising, the College funds "a central governmental function"—public post-secondary education. *Durning*, 950 F.2d at 1426. As previously argued, the Tribes would be significantly impacted by a judgment against the College. The College is critical to their objective "to become a completely self-sufficient society and economy." (Ex. 2, Council SKC037615-37616; Ex. 8, Resolution 18-050.)

Plaintiff contends the leases and memoranda of agreement between the Tribes and College show merely a contractor-vendor relationship. But that is how the Tribes conduct all financial transactions with their own entities. It allows clear accounting and prevents loss of revenue streams. Moreover, the sheer number of ways the College and Tribes are contractually, strategically, and substantively intertwined emphasizes the closeness of the financial relationship.

The College's diverse funding sources demonstrate the Tribes' success in building a top-tier tribal college. As previously detailed, many of the College's revenue sources are only available to tribal entities. By obtaining other funds as

well, the College applies additional funds to the fulfillment of the Tribes' goals to educate their own members, improve tribal agencies, and preserve the Tribes' cultures and languages.

Conclusion

The record before the Court is replete with evidence showing that every *White* factor supports a finding that the College is an arm of the Tribes. Plaintiff has offered no factual or legal justification to hold otherwise.

DATED this 23rd day of March 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)(E), the undersigned certifies that the word count of the above brief, excluding the caption and certificate of compliance, is 3,233, based on the word count of the Microsoft Word program used to prepare this brief.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King