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

STEPHEN McCOY,

Plaintiff,

-vs-

SALISH KOOTENAI COLLEGE, INC.

Defendant.

CV 17-00088-DLC

**BRIEF OF *AMICUS CURIAE*
CONFEDERATED SALISH
AND KOOTENAI TRIBES
IN SUPPORT OF
DEFENDANT’S
MOTION TO DISMISS**

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

The CSKT is a federally recognized tribe governed pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984 (25 U.S.C. § 461, et seq. (transferred to 25 U.S.C. §5101 et seq.)) (IRA). The CSKT is governed by a ten-member Tribal

Council operating under a Constitution and By-Laws adopted in accordance with § 16 of the IRA. The Tribes have also adopted an IRA § 17 Corporate Charter.

Through the Hellgate Treaty of 1855, 12 Stat. 975, the Tribes reserved to themselves a permanent homeland on what is now the Flathead Indian Reservation in northwest Montana.

Plaintiff Stephen McCoy's lawsuit against the College invokes Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. (Title VII) as a basis for this Court's jurisdiction. Plaintiff's Complaint (Doc. 1) p. 1-2. Title VII prohibits employers from engaging in discriminatory practices. However, Congress has exempted Indian tribes from the definition of "employer" as used in Title VII. 42 U.S.C. § 2000e(b). A non-profit corporation that serves as an arm of the tribe is exempt from liability under Title VII. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). Whether the College is an arm of the CSKT is determined through a five factor test set out in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014); *United States Ex Rel. Cain, et al. v. Salish Kootenai College, et al.*, 862 F.3d 939 (9th Cir. 2017). No single *White* factor is dispositive; rather it is a totality of the circumstances. How the College meets the *White* elements is a fact intensive analysis briefed in detail by the College. Brief in Support of Salish Kootenai College's Motion to Dismiss (Doc. 13) (College's

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

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

INTEREST OF AMICUS CSKT

SKC is either an arm of the CSKT or a non-Indian entity generally subject to lawsuits such as the one brought here. Should the College be found to be a non-tribal entity any lawsuit that requires payment of a significant damage award – now or in the future – could deplete the College's limited financial resources and deprive the Tribes and Tribal members of their primary source of higher education. More immediately, a holding that finds the College is a non-Indian entity jeopardizes SKC's eligibility for continued funding as a tribally controlled college under 25 U.S.C. 1801, et seq.

Interpreting *White* to require direct Tribal management of the College in order to find that SKC is an arm of the Tribes not only invites challenges to the tribal status of other subordinate enterprises established by the CSKT, it could

subject the rest of Montana's tribes (IRA tribes in particular) to similar challenges. Montana's federal courts would be continually re-litigating core principles of federal Indian law.

PROCEDURAL AND FACTUAL HISTORY

The Tribes defer to the College's recitation of the procedural and factual history relevant to its motion. College's Brief (Doc. 13) p. 5. For the purposes of this brief the Tribes simply note that the College was established under CSKT law to address the lack of post-secondary educational opportunities for Tribal members on the Flathead Indian Reservation. The College has continued to operate under its Tribal charter and by-laws. The SKC Board of Directors consists of members of the CSKT appointed by the Tribal Council and who are subject to removal by Council action. From its creation, SKC has satisfied the statutory requirements for funding under the Tribally Controlled Colleges and Universities Assistance Act, 25 U.S.C. § 1801, et seq. (Tribal College Act). References to the record cite ECF documents and numbering.

DISCUSSION

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

How the College meets each of the *White* factors is well documented in the College's Brief. The Tribes write to offer their perspective of the CSKT-SKC relationship.

Characterizing SKC as nothing more than a Montana educational non-profit that incidentally benefits CSKT members because of its geographic location misses the strong connection that has always existed between the College and the Tribes. *See*, Plaintiff's Response Brief in Opposition to Defendant's Motion to Dismiss (Doc. 22) (Plaintiff's Response) pp. 12,14. From the College's founding, the Tribes and SKC have been partners in the educational advancement of Native Americans on the Flathead Indian Reservation and the preservation of CSKT history and culture.

Parsing the number of CSKT Tribal member students and faculty at SKC is an equally misguided exercise. Plaintiff's Response (Doc. 22) pp. 13-14. The University of Notre Dame and Carroll College are not Catholic universities because they have Catholic students and faculty. They are Catholic universities because they were established by the Church to carry out its vision and philosophy of higher education. Non-Catholics may also choose that type of educational

experience, but their attendance does nothing to diminish the nature of those schools. Similarly, SKC has grown in size and capacity over forty years, but has remained rooted in a central principle: “The mission of Salish Kootenai College is to provide quality post-secondary education for Native Americans...and perpetuate the cultures of the Confederated Tribes of the Flathead Nation.” Mission Statement of SKC, www.skc.edu/mission/ (last accessed Feb 7, 2018). SKC is “grounded in the cultures of the Selis, Ksanka, and Qlispe [Salish, Kootenai and Pend d’Orielle] people of the Flathead Nation.” *Id.* The core themes of the College echo the Tribes’ goal of self-determination – i.e. “Provide Access to Higher Education for American Indians; Maintain Quality Education for Workforce or Further Education; Perpetuate the Cultures of the Confederated Salish and Kootenai Peoples; and Increase Individual and Community Capacity for Self Reliance and Sustainability.” *Id.*

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

determination” for the Tribes. Tribal Resolution 18-050. (Amicus CSKT Exhibit 1).

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

The College has been incorporated under both Tribal and Montana law. (Discussed in College’s Brief (Doc. 13) pp. 8-13). Plaintiff’s Title VII claim hangs on this Court accepting his assertion that SKC is *only* a Montana non-profit corporation. Plaintiff’s Complaint (Doc. 1) p. 2; *See also*, Plaintiff’s Response (Doc. 22) pp. 7-11. The Tribes ask this Court to decline the invitation to hold that SKC exists solely as a function of state corporate law.

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

In *Smith*, as here, the Tribes argued that Montana corporate law does not prevent dual tribal-state incorporation of reservation-based Indian entities from retaining their tribal status. *See, Flat Center Farms, Inc. v. State Department of*

Revenue, 310 Mont. 206, 49 P.3d 578 (2002); *see also*, *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 315 Mont. 510, 68 P.3d 814 (2003).

Similarly, the fact that the tribal entity at issue in *White* was incorporated under California state law did nothing to prevent the Ninth Circuit from finding it was an arm of the tribe. *White*, 765 F.3d at 1026.

The Tribes have raised this point of law in another case involving the College now pending before the District of Montana. *See, Cain, et al. v. Salish Kootenai College, et al.*, Case No. 9:12-cv-00181-BMM, Supp. Brief of Amicus Curiae CSKT (Doc. 36) p. 5. n. 1; *and on appeal, Cain*, 862 F.3d 939 (9th Cir. 2017) Answer Brief of Intervenor-Appellee CSKT (Case No. 15-35001, DktEntry: 30-1) p. 18, n. 4.

Should this Court hold SKC is a non-Indian entity, it would do more than just legally sever the College from the Tribes. The College would again be subject to the jurisdictional uncertainty that *Smith* resolved¹. That kind of jurisdictional

¹ Were SKC ruled a non-Indian entity, *Williams v. Lee*, 358 U.S. 217 (1959) would no longer be dispositive of jurisdiction in cases where the College was the defendant. Rather, lawsuits involving the College would likely be subject to the jurisdictional analysis set out in *Montana v. U.S.*, 450 U.S. 544 (1981) particularly in cases where the lawsuit involved actions taking place on alienated fee land. This confusion is compounded by the fact that SKC sits on both tribal land and land owned in fee by the College. Moreover, in suits brought by non-member students, Tribal Court jurisdiction might be precluded entirely, even with party consent. *See, Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court had no

ambiguity conflicts with the Ninth Circuit's clear view that the exercise of CSKT law over Tribally created entities located on the Flathead Indian Reservation is an important aspect of tribal self-determination. *Smith*, 434 F.3d at 1140-41.

Moreover, SKC would be subject to suits in both state and federal courts that could have catastrophic impacts on its limited financial resources. Lawsuits challenging Tribal preference or the College's focus on CSKT culture might result in lower CSKT employment opportunities, or require a fundamental shift in the College's mission, altering its character and identity. Should the College close as a result of a lawsuit, the CSKT membership would be deprived of the only post-secondary educational institution on the Flathead Indian Reservation. The CSKT would lose an important partner in the education of its members and employees.

More immediately, a ruling from this Court that SKC is a non-Indian state entity jeopardizes the College's eligibility for the federal funding intended to develop tribal educational capacities, such as the Tribal College Act. That statute provides assistance to tribal colleges that are established by Indian tribes to primarily serve Indians. (A "tribally controlled college or university" is one that has been "sanctioned or chartered" by a tribal government, and a majority of its board of directors are Indians.) Tribal College Act, 25 U.S.C. §§ 1801(4), 1804(1).

jurisdiction over case when parties were non-Indian and suit involved tort on non-Indian land within Fort Berthold Indian Reservation).

SKC is eligible for, and receives, funding under the Tribal College Act. College's Brief (Doc. 13) p. 10. The relevant facts regarding that eligibility are unchanged since the *Smith (en banc)* panel observed that the Tribes established SKC under Tribal law to provide post-secondary educational opportunities for Native Americans on the Flathead Indian Reservation. *Smith*, 434 F.3d at 1129. Further, "[i]ts bylaws stipulate that each of the seven members of the Board of Directors must be an enrolled member of the Confederated Salish and Kootenai Tribes. The Council appoints the board and may remove them." *Id.* See also, College's Brief (Doc. 13) pp. 20-23. The College's most recent figures show it has a 58% Indian student enrollment, with CSKT Tribal members comprising 44% of the Indians attending SKC. www.SKC.edu/skc-fast-facts/ (last visited February 7, 2018).

Should this Court accept Plaintiff's assertion that SKC is a non-Indian entity, continued funding under the Tribal College Act becomes a questionable prospect. The Tribes are not aware of any non-Indian state institution of higher education that currently qualifies (or could qualify) for funding under the statutory requirements of the *Tribally Controlled* College and University Assistance Act (emphasis added). Loss of funding under the Tribal College Act would result in significant harm the financial health of the College.

To the extent that Plaintiff argues that incorporation of SKC under Montana law is a dispositive factor under *White*, the Tribes believe that would be a misinterpretation of the case. Such a reading would render the rest of the *White* analysis irrelevant. A court's examination would begin and end with the corporate documents. Instead, the *White* factors look to a totality of the circumstances. As previously discussed, neither the Ninth Circuit nor the Montana Supreme Court have held that the single act of incorporating under state law stripped an entity of its tribal status. Given the factual record developed here, a finding that SKC is an arm of the Tribes is clearly warranted.

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

Finally, this Court should decline to follow Plaintiff's suggestion that *White* requires pervasive Tribal Council control and management of SKC before it can be deemed an arm of the Tribes. Plaintiff's Response, (Doc. 22) pp. 14-17. Beyond this case, there are broader implications of such a holding. "Tribes may govern themselves through entities other than formal tribal leadership." *Smith (en banc)*, 434 F.3d at 1133. The CSKT has a number of subordinate boards and enterprises that are answerable to the Council but not subject to the day-to-day management of the Tribal government.

By their nature the Tribes' IRA § 17 corporations, *e.g.* Energy Keepers, Inc., (management and operation of the former Kerr Dam) and S & K Technologies (management of federal defense contracts) have an arms-length relationship to the CSKT government, and are under the day-to-day management of corporate officers and boards appointed by the Tribal Council². Similarly, the Tribally incorporated gaming and hospitality enterprises have managers and a board appointed by the Tribal Council to operate and oversee those entities. Salish and Kootenai Housing Authority, the entity established by the Tribal Council to receive federal funding under the Native American Housing and Self-Determination Act of 1996, 25 U.S.C. § 4101, et seq. has a director and board appointed by the Council. There are many other subordinate entities and business enterprises established by the Tribes to provide services for the Tribal membership and develop the economic capacity of the CSKT.³

The unique nature of federal Indian law and policy has made such arms-length entities a common, and often required, method of interaction between Indian tribes, their members, the federal government, and the outside business world. A narrow reading of the tribal control element of the *White* factors could diminish the

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

³ See the Tribes most recently posted Annual Report (2015-16). CSKT annual reports are accessible under the "Government" tab on the Tribes' website (www.cskt.org).

Tribes' ability to govern itself and serve its members through subordinate boards and enterprises. Conceivably, the Tribes could find themselves routinely litigating the status of CSKT entities such as those mentioned above. There is also a high likelihood that other Montana tribes with similarly situated tribal colleges or entities would experience the same harm from such a precedent. The Tribes respectfully ask this Court to consider the broader implications for Montana Indian country as it goes through this very fact intensive analysis of the College.

CONCLUSION

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

Dated this 19th day of April 2018.

Confederated Salish and Kootenai Tribes

/s/ John T. Harrison

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1 (d)(2)(E) I certify that this brief is no more than thirteen pages, printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; the work count calculated by Microsoft Word is 2,819 words, excluding certificate of service and certificate of compliance.

Dated this 19th day of April 2018.

/s/ John T. Harrison _____
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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Montana that the foregoing document was served electronically to all interested parties by CM/ECF on the 19th day of April 2018.

/s/ John T. Harrison _____
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