IN THE SUPREME COURT
STATE OF ARIZONA

Hwal'Bay Ba:J Enterprises, Inc., Petitioner, v. Honorable Lee F. Jantzen, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave, Respondent, and Sara and William Fox, Real Parties in Interest.	**Case No. CV-19-0123-PR** Arizona Court of Appeals No. 1CA-SA 19-0059 Mohave County Superior Court No. CV2018-00428 Hon. Lee F. Jantzen

AMICUS CURIAE BRIEF
IN RESPONSE TO PETITION FOR REVIEW

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I. Introduction.

Real Parties-In-Interest Sara and William Fox (collectively, "Fox") filed a Complaint against amicus curiae Grand Canyon Custom Tours, Inc. (hereinafter "GCCT") in Coconino County Superior Court, CV2017-00163, for alleged consumer fraud, negligence, loss of consortium, and punitive damages. Subsequently, Fox filed a separate Complaint against Petitioner Hwal'bay Ba:J Enterprises, Inc. d/b/a Grand Canyon Resort Corporation d/b/a Hualapai River Runners ("HRR") and the Hualapai Indian Nation ("Hualapai Tribe") in Mohave County Superior Court, CV2018-00428, for negligence, vicarious liability, negligent hiring, negligent supervision, loss of consortium, and punitive damages.

These two actions arise out of the same incident, same injury, and series of transactions, which allegedly resulted in damages suffered by Fox while on a one-day whitewater rafting tour operated by HRR on the Colorado River in the Grand Canyon. Fox purchased the one-day whitewater rafting tour through GCCT, who sold the same under a Services Agreement with HRR. A Motion to Consolidate these two actions is currently pending before both the Coconino County and Mohave County Superior Courts, awaiting a final decision on HRR's Motion to Dismiss and pending appeal.

In the Mohave County action, Petitioners filed a Motion to Dismiss, asserting that HRR enjoys sovereign immunity from this suit. While the Mohave County Court granted the motion with respect to the Hualapai Tribe, it properly denied the motion as against HRR, holding that it was not a "subordinate economic organization" entitled to such an extension of immunity. The Court of Appeals, Division One, denied HRR's Petition for Special Action.

II. Jurisdictional Statement.

Petitioners requested the special action and this Petition for Review pursuant to A.R.S. § 12-120.21(A)(4), as well as Rules 3 and 7 of the Arizona Rules of Special Action Procedure. GCCT has concurrently filed a motion for permission to participate as an amicus curiae, who has an interest in the separate but related Coconino County case, CV2017-00163, that the decision in this present case may effect. Therefore, GCCT submits this brief as an amicus curiae, pursuant to Rule 16, ARCAP, and Rule 7, Rules of Procedure for Special Actions.

III. Statement of the Issues.

Petitioners have stated the issue as whether the court of appeals abused its discretion in declining special action jurisdiction following the trial court's finding that Grand Canyon Resort Corporation d/b/a/ Hualapai River Runners is not entitled to the protections of sovereign immunity as a matter of law. The more accurate statement of the issue is whether HRR is a subordinate economic

organization entitled to the protections of sovereign immunity when it allegedly injures a patron during its operation of a whitewater rafting tour on the public highway outside of the reservation that is the navigable Colorado River in the Grand Canyon.

IV. Factual Background.

On February 21, 2016, Real Parties-In-Interest Sara and William Fox ("Fox") purchased through a website a one-day whitewater rafting tour on the Colorado River in the Grand Canyon from amicus curiae GCCT. [*See* APP003]. The one-day whitewater rafting tour was operated by HRR, while GCCT sold the tour to Plaintiff Fox pursuant to a "Services Agreement" entered into between GCCT and HRR. [*See* APP004; APP128 – APP142].

On April 17, 2016, GCCT transported Fox and her group to Peach Springs, Arizona, where they were then transported by HRR to the Diamond Creek put-in to the Colorado River. *Id*. In the Mohave County Complaint, Fox alleges that during the HRR's operation of the whitewater rafting trip on the Colorado River in the Grand Canyon, HRR's agents (the river guides) negligently maneuvered a rapid ejecting Mrs. Fox over the front (bow) of the raft. [*See* APP004 – APP005]. She further alleges that HRR's river guides negligently failed to stop the motor and propeller, which sliced into her body causing her catastrophic injuries. *Id*. In sum, Fox alleges that as a direct and proximate cause of HRR's and its agents' reckless

and negligent acts and omissions, she was catastrophically injured, asserting claims against them for negligence, vicarious liability, negligent hiring, negligent supervision, loss of consortium, and punitive damages. [*See* APP001 – APP010]. There is no dispute that all of HRR's and its agents' alleged reckless and negligent acts and omissions in operating the one-day whitewater rafting tour that injured Fox on April 17, 2016 took place while on the Colorado River and off of tribal lands. *Id*.

Separately, in the Coconino County Complaint, Fox alleges claims against GCCT for consumer fraud, negligence, loss of consortium, and punitive damages all arising out of the sale and operation of the same one-day whitewater rafting tour operated by HRR. A Motion to Consolidate these two separate but related actions is currently pending before both the Coconino County and Mohave County Superior Courts, while this Petition for Review of the Special Action is heard.

V. Argument.

Petitioners claim that Hwal'bay Ba:J Enterprises, Inc. d/b/a Grand Canyon Resort Corporation d/b/a Hualapai River Runners ("HRR"), a tribal corporation, enjoys sovereign immunity from this suit for damages arising out of the Petitioners' operation of the one-day whitewater rafting tour on the Colorado River in the Grand Canyon that injured Fox. Under the Arizona Supreme Court's most recent decision on these issues, *Dixon v. Picopa Construction Co.*,160 Ariz. 251,

160 P.2d 1104 (1989), HRR is not a subordinate economic organization entitled to an extension of sovereign immunity while it operates the off-reservation business of whitewater rafting tours. Furthermore, the United States Supreme Court recently rejected a similar claim of tribal sovereign immunity when an individual commits a tort off the reservation and the resultant claims are not against the Indian tribe itself. *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017).

A. HRR Does Not Enjoy Sovereign Immunity While Operating the Whitewater Rafting Tour Off Tribal Lands.

Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation. *Montana v. United States*, 450 U.S. 544, 564 (1981). The United States Supreme Court has confirmed that tribal jurisdiction does not extend "beyond what is necessary to protect tribal self-government," and tribes do not have sovereignty over navigable rivers, even those running through the middle of tribal land, like the Colorado River through the Hualapai reservation. *Id*.

Tribal employees transporting non-tribal tourists beyond the edge of tribal land, as HRR did here, do not have sovereign immunity, as the U.S. Supreme Court recently confirmed in *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017). Indian tribes do not have sovereignty over public highways running through tribal land. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). It has long been held that

navigable rivers must forever remain as public "highways." *See Martin v. Waddell*, 41 U.S. 367 (1842); *The Daniel Ball*, 77 U.S. 557 (1870); *Montana v. United States*, 450 U.S. 544, 564 (1981). Accordingly, the bed and banks of the Colorado River, up to the high water mark on the southern side, are owned by the State of Arizona, permanently held in trust for the purpose of facilitating public navigation and related activities. *See Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) ("The Colorado River has been declared navigable waters. The State of Arizona would therefore hold title to its submerged lands and navigable waters…"). In other words, HRR does not have sovereign immunity while operating and performing its only service, i.e. the whitewater rafting tour, off the reservation on the Colorado River in the Grand Canyon.

In *Lewis v. Clarke*, the U.S. Supreme Court rejected the tribal claim of sovereign immunity because the tribal employee was the real party in interest, as opposed to the tribe itself. *Lewis*, 137 S.Ct. at 1291. Ultimately, it is "[t]he identity of the real party in interest that dictates what immunities may be available." *Id*. The Court reasoned that "[t[his is a negligence action arising from a tort committed by [an individual] on an interstate highway within the State of Connecticut … and the judgment will not operate against the Tribe." *Id*. "It is simply a suit against [an

individual] to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property." *Id*.

In this case, the rafting trip in question was not on the reservation, but on a public, navigable river. HRR is in the business of selling rafting tours of the Colorado River. As a result, Fox is not precluded from seeking relief as against the unknown, individual tribal member employees or HRR itself.

B. HRR Is Not a "Subordinate Economic Organization" Entitled to the Extension of the Protection of Sovereign Immunity.

Notwithstanding the above, Petitioners claim that HRR is a "subordinate economic organization" to the Hualapai Tribe that enjoys the same sovereign immunity, citing various self-serving Hualapai tribal cases that have not surprisingly supported this extension of immunity. However, Arizona courts have analyzed the issue by conducting an exhaustive review of various factors to determine whether a tribal entity is really such a subordinate economic organization, with different outcomes dependent in part on the nature of the enterprise. *See Dixon v. Picopa Construction Co.,*160 Ariz. 251, 160 P.2d 1104 (1989); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 5, 480 P.2d 654, 655 (1971); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (App. 1983).

The tribal and Arizona cases that have granted such immunity have relied heavily upon the tribe's stated general purpose to "promote the economic

development of the Tribe," improving employment and educational opportunities for members, and tribal declarations that such sovereignty applies to the business entity, just as HRR argue here. However, Arizona courts have never held that the stated purpose of a tribal corporation alone is sufficient to conclude the business entity qualifies as a subordinate economic organization. Instead all relevant factors must be considered, not just the tribe's own statement of intent.

In *Shelley*, the Arizona Supreme Court determined that despite the fact that it was a for-profit company created for commercial purposes, the Fort Apache Timber Company ("FATCO") was a subordinate economic organization, citing the stated general purpose in the "plan of operation" for FATCO, tribal council oversight of the FATCO board members, sole ownership by the Apache Tribe, title to all property being held in the name of the Tribe, etc. *Shelley*, 107 Ariz. at 5-6, 480 P.2d at 655-56. Similarly, in *S. Unique*, the Arizona Court of Appeals, Division One, held that a commercial farming venture, Gila River Farms, was a subordinate economic organization for largely the same reasons as stated in *Shelley*. 138 Ariz. at 381, 674 P.2d at 1379. In both cases, all property was taken and held in the name of the Tribe itself rather than the business entity. *Id*.

More recently, the Arizona Supreme Court held in *Dixon v. Picopa Construction Co.*, that the "subordinate economic organization" doctrine allows Indian tribes to conduct their economic affairs through subordinate governmental

agencies without fear of an unintended waiver of sovereign immunity. *Dixon*, 160 Ariz. at 256-57, 160 P.2d at 1109-10. However, citing the *Shelley* and *S. Unique* cases, the Court specifically stated that the doctrine was never meant to protect entities conducting nontribal business, concluding that the "off-reservation activities at the time of the accident were independent of any activity connected with tribal self-government or the promotion of tribal interests." *Id*. at 256, 160 P.2d at 1109.

In *Dixon*, the tribal business entity had a board of directors, separate from the tribal government, which exercised full managerial control over the corporation. *Id*. It purchased general liability insurance covering its negligence, which the Court held was some evidence that the tribe expected its corporation to be liable for its own torts. *Id*. at 256-57, 160 P.2d at 1109-10. The ordinance incorporating the company indicated that it was formed solely for business purposes without any declared objective of promoting general economic development. *Id*. at 257, 160 P.2d at 1110. It was also not formed to aid the tribe in carrying out its tribal government functions, but rather was simply a for-profit corporation. *Id*. In particular, the Court stated that the tribal community "created an artificial individual, a corporation, and charged it with all the power to act 'to the same extent as natural persons might or could do,'" but concluded that such an

"artificial individual" was not a subordinate economic organization entitled to tribal immunity. *Id*. at 1111, 258.

In this case, HRR operated an off-reservation activity of a one-day whitewater rafting tour. It contracted with separate vendors, including, but not limited to, amicus curiae GCCT, to sell its tour to the public at large, including non-tribal citizens of Arizona and the United States as a whole. [*See* APP004; APP128 – APP142]. In fact, HRR prominently advertises its whitewater rafting tours outside the reservation through the internet and even on billboards in the Phoenix Sky Harbor International Airport, which reaches a very broad audience. The operations of HRR to run the off-reservation activity of a one-day whitewater rafting tour is independent of any activity connected with tribal self-government or the promotion of tribal interests, just like the construction company in *Dixon*. The whitewater rafting business was not formed to aid the Hualapai Tribe in carrying out any government function, but simply advertises, promotes and operates a for-profit enterprise.

Several other factors discussed in *Shelley, S. Unique*, and *Dixon* also strongly favor a determination that HRR is not a subordinate economic organization of the Hualapai Tribe. HRR has a board of directors that is separate from the tribal government, which was not the case in *Shelley* and *S. Unique*, even though the Hualapai tribal council may exercise some restrictions and oversight.

[*See* APP112 – APP113 and the exhibits referenced therein]. Also contrary to *Shelley* and *S. Unique*, HRR takes and holds all property in its own name rather than in the name of the governmental Hualapai Tribe itself. *Id*. HRR's board of directors has broad powers to manage and develop those corporate assets. *Id*. It is also free to direct the operations of corporate activities without the Hualapai Tribe approval. *Id*. Accordingly, any judgment against HRR will not operate as against the Hualapai Tribe, nor will it require any action by, or disturb the property of, the Hualapai Tribe. *See Lewis*, 137 S. Ct. at 1291.

In addition, HRR required its vendors, like amicus curiae GCCT, to obtain insurance to protect it from liability, similar to what the corporation obtained in *Dixon*. [*See* APP004; APP128 – APP142]. There would be no need for such provisions in the Service Agreement if HRR enjoyed sovereign immunity as a subordinate economic organization to the Hualapai Tribe. Upon information, it is believed that HRR actually procured and maintains its own liability insurance for the whitewater rafting operations, although the same has not been disclosed in any action to date. Based on all the factors, not just the Hualapai Tribe's own statements, HRR is not a subordinate economic organization entitled to sovereign immunity protection.

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C. Federal Policy Underlying the Immunity Doctrine Does Not Support Immunity for HRR.

Finally, as instructed by the Arizona Supreme Court in *Dixon*, the determination of whether HRR is a subordinate economic organization must strongly consider the federal policies underlying the immunity doctrine. *Dixon*, 160 Ariz. at 258-59, 772 P.2d at 1111-12. Tribal immunity should only apply when doing so furthers the federal policies behind the doctrine for protection of tribal assets, preservation of tribal cultural autonomy and tribal self-determination, and promotion of commercial dealings between Indians and non-Indians. *Id*.

In this case, extending immunity to HRR does not further the policy of protecting tribal assets. Just as in *Dixon*, the corporation holds its own assets in its own name, so no tribal assets are in jeopardy. Also, insurance protects against corporate liability. Operating a whitewater rafting tour is a purely commercial venture that does not promote, develop, or protect tribal culture or autonomy, similar to the construction company in *Dixon*. A private action against HRR based on an off-reservation tort does not in any fashion limit the Hualapai Tribe's powers, nor the manner in which it exercises those powers, just like the community in *Dixon*.

Perhaps most importantly, granting immunity in this case to HRR does not further the policy of promoting commercial enterprise between the Hualapai Tribe and non-Indians, but would likely deter such commercial dealings. The successful

assertion of immunity in this negligence case may deter persons or entities from entering into contractual relationships with Hualapai companies like HRR. Individuals and entities will think long and hard before doing business with Tribal corporations that are immune from suit, which could actually retard the Hualapai Tribe's economic growth. As the Arizona Supreme Court stated in *Dixon*,

> Congress' provision for allowing Indian tribes to segregate themselves into governmental and commercial corporate units … arguably implies that "Congress did not intend that **all** commercial activity" undertaken by Indian entities be immune from suit… Thus Congress itself recognized that immunity may have deleterious effects on a tribe's economic development.

Id. at 259, 772 P.2d 1112 (citations omitted but emphasis in original).

The extension of sovereign immunity to HRR here does not serve the federal policies underlying the immunity doctrine.

VI. Conclusion.

Based on the most recent pronouncements by both the Arizona Supreme Court in *Dixon* and the United States Supreme Court in *Lewis*, HRR is not a subordinate economic organization when it operates an off-reservation, whitewater rafting enterprise on the Colorado River in the Grand Canyon and commits a tort that injures one of its patrons. The claims of Fox are not against the Hualapai Tribe itself, whose assets and interests are not in jeopardy by the exercise of jurisdiction over HRR. Accordingly,

amicus curiae GCCT respectfully requests that the Supreme Court confirm such state court jurisdiction over HRR and uphold the Court of Appeals denial of the Petition for Special Action and the trial court's denial of HRR's motion to dismiss.

RESPECTFULLY SUBMITTED this 23rd day of May, 2019.

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