**IN THE SUPREME COURT FOR THE STATE OF ALASKA**

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| YVONNE ITO,<br><br>Appellant,<br><br>v.<br><br>COPPER RIVER NATIVE ASSOCIATION,<br><br>Appellee. | ) | Supreme Court Case No. S-17965<br><br>Trial Court Case No. 3AN-20-06229 CI |

**ANSWERING BRIEF OF APPELLEE AHTNA' T'AENE NENE' (COPPER RIVER NATIVE ASSOCIATION)**

**APPEAL FROM THE SUPERIOR COURT THIRD JUDICIAL DISTRICT AT ANCHORAGE HONORABLE DANI CROSBY**


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CLERK OF THE COURT

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## AUTHORITIES PRINCIPALLY RELIED UPON

### 25 U.S.C. § 5321. Self-Determination Contracts

. . . .

**(d) Tribal organizations and Indian contractors deemed part of Public Health Service**

For purposes of [42 U.S.C. § 233], with respect to claims by any person, ... an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections [2] 5321 or 5322 of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees ... are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement . . . .

. . . .

**(g) Rule of construction**

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.

### 25 U.S.C. § 5332. Sovereign Immunity and Trusteeship Rights Unaffected

Nothing in this chapter shall be construed as—

**(1)** affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

**(2)** authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

**25 U.S.C. § 5381. Definitions**

**(a) In general**

In this subchapter: . . . .

**(5) Inter-tribal consortium**

The term "inter-tribal consortium" means a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

. . . .

**(8) Tribal share**

The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.

. . . .

**(b) Indian tribe**

In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

## (A) ISSUES PRESENTED ON APPEAL

The issue presented is whether appellee Ahtna' T'Aene Nene', better known as the Copper River Native Association ("CRNA"), has tribal sovereign immunity from unconsented suit in this contract matter.[1] Appellant Yvonne Ito ("Ito") argues that CRNA does not, relying on this Court's opinion in *Runyon v. Alaska Village Presidents Association*.[2] But,

(1) CRNA has tribal sovereign immunity under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5381(b).

(2) CRNA has tribal sovereign immunity under federal common law, which controls in this quintessentially federal area.[3]

(3) Under *Runyon*, CRNA has tribal sovereign immunity.

(4) To the extent *Runyon* holds otherwise, this Court should modify or overrule that opinion.

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[1] Ahtna' T'Aene Nene' is CRNA's registered name with the State of Alaska, Division of Corporations.

[2] *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 439 (Alaska 2004).

[3] *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014).

## (B) STATEMENT OF THE CASE

**1. Parties.** Appellee Ahtna' T'Aene Nene' (CRNA) is "the historic successor of the [Ahtna] Chief's Conference whose name is lost in antiquity, the traditional consultative and governing assembly of the Athabascan people of the Copper River Region from time immemorial, and [has] all the rights, duties, powers and privileges of this historic assembly."[4]

CRNA is a P.L. 93-638[5] inter-tribal consortium[6] organized as an Alaska non-profit corporation. CRNA was formed by the five federally recognized Indian tribes in the Ahtna Region of Interior Alaska: the Native Village of Kluti-Kaah, the Native Village of Gakona, the Native Village of Tazlina, the Gulkana Village Council, and the Native Village of Cantwell.[7] "Each Tribal Council elects or appoints a representative to CRNA's Board of Directors. This allows every Tribe to have an equal voice on matters related to how health

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[4] Affidavit of CRNA Board Chair Charlene Nollner ¶ 2 ("Nollner Aff.") [Exc. 154]; CRNA Articles of Incorporation, art. Fourth, § F [Exc. 37].

[5] The Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 5301–5423, was initially enacted by P.L. 93-638. The terms "ISDEAA" and "P.L. 93-638" are commonly used interchangeably to refer to this Act, as amended by Congress since its enactment in 1975.

[6] 25 U.S.C. § 5381(a)(5) defines "Inter-tribal consortium" as "a coalition of two or more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations" under P.L. 93-638.

[7] Nollner Aff. ¶ 5 [Exc. 155]; *see Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7557–58 (Jan. 29, 2021) (listing CRNA's member Tribes). CRNA's headquarters are in Kluti-Kaah, also known as Copper Center, Alaska.

services are made available to their communities. Each Director and Officer must be an Alaska Native and a tribal member of a Member Village."[8]

Appellant Ito was employed by CRNA as its Senior Services Program Director from January 2018 until May 2019.[9] Ito's duties were an integral part of CRNA's P.L. 93-638 Compact and Annual Funding Agreement with the United States:

> **3.1.17 Senior Citizens' Program** provides nutrition services to Elders 55 years of age and over, shopping assistance, passenger assistance, transportation, outreach and advocacy, information, and referral services to Elders and persons with handicaps or disabilities in communities in CRNA's area.[10]

Ito's employment was terminated when it was discovered that she had improperly charged personal vehicle expenses to CRNA.[11]

**2. Procedural History.** This is Ito's second lawsuit over her termination. Ito's first case was filed in the Superior Court, named CRNA's Chief Executive Officer as the only defendant, and alleged various tort claims.[12] CRNA removed the case to the United States District Court, as tort claims may only be brought against CRNA and its officers and

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[8] Nollner Aff. ¶ 7 [Exc. 156]; CRNA Bylaws, art. III, § 1(A) [Exc. 42].

[9] Nollner Aff. ¶ 10 [Exc. 157]; *Ito v. Copper River Native Association*, Compl. ¶ 1 [Exc. 1–2].

[10] CRNA/DHHS Annual Funding Agreement ¶ 3.1.17 [Exc. 86].

[11] Nollner Aff. ¶¶ 12–13 [Exc. 158]; *see* Compl. ¶ 30 [Exc. 7].

[12] *Yvonne Ito v. Paul Rude*, No. 3AN-20-05960 CI (Alaska Super., filed April 17, 2020).

employees pursuant to the Federal Tort Claims Act.[13] Ito immediately dismissed the removed case under Federal Rule of Civil Procedure 41(a)(1).[14]

Two weeks later, Ito filed this case.[15] Ito named CRNA itself instead of CRNA's CEO as the defendant[16] and dropped her tort claims, instead alleging a single contract claim.[17] CRNA promptly moved to dismiss under Alaska Civil Rule 12(b)(1) based on tribal sovereign immunity.[18]

In responding to CRNA's motion, Ito had "the burden to prove that tribal sovereignty d[id] not bar [her] suit, [and] failing to provide evidence contesting specific elements must result in a finding that the elements weigh in favor of sovereign

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[13] Notice of Removal at 2, *Ito v. Rude*, No. 3:20-CV-00095-JWS (D. Alaska Apr. 22, 2020), ECF No. 1 (citing 28 U.S.C. §§ 2671 *et seq.* and 25 U.S.C. § 5321(d)).

[14] Notice of Dismissal, *Ito v. Rude*, No. 3:20-CV-00095-JWS (D. Alaska Apr. 27, 2020); Fed. R. Civ. P. 41(a)(1).

[15] Compl. at 1 [Exc. 1].

[16] Presumably, CRNA was named because an employee cannot be personally liable for the breach of a contract between his employer and another employee. *E.g.*, *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 791 (Alaska 1989).

[17] Compl. ¶¶ 57-60 ("First Cause of Action – Breach of the Implied Covenant of Good Faith and Fair Dealing") [Exc. 13].

[18] Mot. to Dismiss (May 5, 2020) [Exc. 15]; *see Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1178-79 (Alaska 2017) ("Because tribal sovereign immunity serves as a jurisdictional bar under federal law, we follow the Ninth Circuit in concluding that a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is 'a proper vehicle for invoking sovereign immunity from suit.'" (quoting *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015))).

immunity."[19] CRNA presented affidavit and documentary evidence supporting dismissal.[20] Ito produced no evidence whatsoever.

**3. Decision on Motion to Dismiss.** The Superior Court granted CRNA's Rule 12(b)(1) motion. As an initial step, the Superior Court found that federal common and statutory law "grant [CRNA] the discretion to assert tribal sovereign immunity as though it were a tribe itself."[21] The Superior Court found that CRNA would qualify as "an arm of its member tribes . . . entitled to sovereign immunity" under the "non-exhaustive" five-factor test adopted by the Ninth Circuit in *White v. University of California.*[22] Under federal law, the Superior Court noted that "[t]ribal sovereign immunity extends to tribal governing bodies or entities acting as 'an arm of the tribe' as well as organizations comprised of multiple tribes."[23]

The Superior Court did not decide whether the *White* test was applicable in the Alaska courts, finding instead that the question was straightforwardly resolved by application of 25 U.S.C. § 5381(b): "Congress has expressly stated that tribal organizations such as [CRNA] 'have the rights and responsibilities of the authorizing tribe' . . . [A]s it

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[19] App. A, *Cole v. Alaska Island Cmty. Servs., Inc.*, No. 1:18-cv-00011-TMB, slip op. at 14 n.88 (D. Alaska Oct. 11, 2019), ECF No. 32, *aff'd*, 834 F. App'x 366 (9th Cir. 2021) (unpublished); *see also Pistor*, 791 F.3d at 1112.

[20] *See, e.g.*, Nollner Aff.; Exs. 1–4 [Exc. 153, 34–152].

[21] Order Granting Case Mot. No. 1, at 4 [Exc. 189].

[22] *Id.* at 5 (citing *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014)) [Exc. 190].

[23] *Id.* at 4 (quoting *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 932 (D. Alaska 2019), *appeal dismissed*, No. 19-35707, 2019 WL 7946348 (9th Cir. Dec. 30, 2019)) [Exc. 189].

is not disputed that an Indian tribe has the right to assert tribal sovereign immunity, [CRNA] is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium."[24] The Superior Court noted that "Federal legislation is binding on the States under the Supremacy Clause," and that under conflict preemption principles, 25 U.S.C. § 5381(b) defeated Ito's *Runyon* argument.[25]

Alternatively, the Superior Court found, as did the United States District Court in *Matyascik v. Arctic Slope Native Association*, that CRNA meets the *Runyon* test: "even though [CRNA's] member tribes are not parties to this lawsuit, they are 'real parties in interest' as that term is defined in *Runyon* because [CRNA's] member tribes' funds that would otherwise be used to provide for healthcare for tribal members would be at risk in the event of an adverse judgment in this matter."[26]

## (C) STANDARDS OF REVIEW

**1. Sovereign Immunity.** Sovereign immunity is a question of federal law.[27] This Court reviews issues of tribal sovereign immunity de novo.[28] "In exercising [its]

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[24] *Id.* at 10–11 [Exc. 195–196].

[25] *Id.* at 10 (citing *Allen v. State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009)) [Exc. 195].

[26] *Id.* at 14 [Exc. 199]. *Matyascik* was a similar employment case brought against a legally indistinguishable Alaska P.L. 93-638 inter-tribal consortium, the Arctic Slope Native Association. *Matyascik v. Arctic Slope Native Ass'n Ltd.*, No. 2:19-CV-0002-HRH, 2019 WL 3554687, at *5 (D. Alaska Aug. 5, 2019).

[27] *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1178 (Alaska 2017).

[28] *Id.* at 1175 (citing *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 339 (Alaska 2011)).

independent judgment, [the Court] will adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[29]

**2. Rule of Construction.** The Indian Self-Determination and Education Assistance Act expressly requires that "each provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe."[30]

**3. Precedent.** This case raises the question of whether *Runyon v. Alaska Village Council Presidents* should be modified or overruled. This Court "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[31]

**4. Failure to Raise.** Ito failed to raise her 25 U.S.C. § 5381(b) arguments before the Superior Court. "Generally, questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal."[32] The standard of review when a party raises new issues on appeal is plain error. This Court will

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[29] *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 871 (Alaska 2014) (quoting *John v. Baker*, 982 P.2d 738, 744 (Alaska 1999)).

[30] 25 U.S.C. § 5321(g).

[31] *McCrary*, 265 P.3d at 341 (quoting *Guerrero ex rel. Guerrero v. Alaska Hous. Fin. Corp.*, 123 P.3d 966, 982 n.104 (Alaska 2005)).

[32] *Harvey v. Cook*, 172 P.3d 794, 802 n.46 (Alaska 2007) (quoting 4 C.J.S. Appeal and Error § 292 (2007)).

find plain error "where an obvious mistake has been made which creates a high likelihood that injustice has resulted."[33]

## (D) ARGUMENT

Controlling federal law and *Runyon v. Alaska Village Council Presidents* establish that CRNA has the right to assert tribal sovereign immunity as a defense to Ito's contract claim lawsuit. CRNA did not agree to waive sovereign immunity when it employed Ito; nor does Ito allege waiver in her complaint.[34]

CRNA is a P.L. 93-638 inter-tribal consortium and is the healthcare arm of its five constituent tribal governments.[35] CRNA is part of the Alaska Tribal Health System,[36] which "carr[ies] out 'the unique tribal cooperation that has developed in Alaska to assure that all Alaska Natives have access to a comprehensive, integrated, and tribally-controlled

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[33] *D.J. v. P.C.*, 36 P.3d 663, 667–68 (Alaska 2001) (quoting *Sosa v. State*, 4 P.3d 951, 953 (Alaska 2000)).

[34] Nollner Aff. ¶ 9 [Exc. 157] ("As a matter of policy, CRNA does not and has never waived its Tribal sovereign immunity to allow employment-related claims by its current or former employees, whether against CRNA itself, against the CRNA Board, against our CEO, or against any other CRNA employee. Neither CRNA, CRNA management, the CRNA Board, nor CRNA's member Tribal governments ever waived their Tribal sovereign immunity as to Yvonne Ito or as to the types of claims contained in Yvonne Ito's complaint. CRNA never represented to Ms. Ito otherwise."); Compl. [Exc. 1–14].

[35] Nollner Aff. ¶¶ 2–5, 7 ("CRNA is controlled and managed by our five federally-recognized member Tribes.") [Exc. 154–56]; CRNA Articles of Incorporation [Exc. 35–36]; CRNA Bylaws [Exc. 39].

[36] Nollner Aff. ¶ 3 [Exc. 154]; *see also* Paul Sherry, *Health Care Delivery for Alaska Natives: A Brief Overview*, International Journal of Circumpolar Health, at 58–59 (2004), https://doi.org/10.3402/ijch.v63i0.17786; Indian Health Service, *Alaska Area*, https://www.ihs.gov/alaska/ (last visited May 12, 2021).

health care delivery system.'"[37] CRNA provides health care and social services to Indian Health Service beneficiaries in the Ahtna Region under authority of Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA" or "P.L. 93-638"),[38] the Indian Health Care Improvement Act,[39] the Alaska Tribal Health Compact,[40] and Annual Funding Agreements with the United States Secretary of Health and Human Services.[41] By providing these services to tribal members, CRNA is "participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States."[42]

CRNA operates the Robert Marshall Primary Care Clinic in Glennallen and village clinics throughout the Ahtna Region, and provides critically needed health care services to

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[37] *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 934–35 (D. Alaska 2019) (quoting Alaska Tribal Health Compact); *see* Alaska Tribal Health Compact [Exc. 60].

[38] 25 U.S.C. §§ 5301–5423.

[39] 25 U.S.C. §§ 1601–1685.

[40] Alaska Tribal Health Compact [Exc. 57–80]; 25 U.S.C. § 5384(a).

[41] CRNA/DHHS Annual Funding Agreement [Exc. 81–100].

[42] 25 U.S.C. § 5384(a). *See also* 25 U.S.C. § 1602(6) (stating that one of the policy justifications for the Indian Health Care Improvement Act is "to ensure that the United States and Indian tribes work in a government-to-government relationship to ensure quality health care for all tribal members"); Alaska Tribal Health Compact § 2(a) [Exc. 66] ("This Compact is to carry out a Self-Governance Program authorized by Title V, and is intended to transfer to tribal governments, at a tribe's request, the power to decide how federal programs, services, functions and activities (or portions thereof) shall be funded and carried out. Title V is meant to strengthen the government-to-government relationship and to uphold the United States trust responsibility for each Indian Tribe.").

Indian Health Service beneficiaries and other eligible individuals pursuant to these federal laws and government-to-government agreements with the United States.[43] These federal laws and agreements are intended by Congress, *inter alia*, "to ensure maximum Indian participation in the direction of health care services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities," and "to ensure that the United States and Indian tribes work in a government-to-government relationship to ensure quality health care for all tribal members."[44]

## I. CRNA Has Not Waived Immunity from Unconsented Suit.

Tribal sovereign immunity is "quasi-jurisdictional,"[45] its recognition is non-discretionary, and it bars unconsented suit against a tribe "irrespective of the merits" of the claims.[46] "Tribal sovereign immunity extends to tribal governing bodies or entities acting as an 'arm of the tribe' as well as organizations comprised of multiple tribes."[47]

This immunity protects tribes and tribal organizations not only against judgment, but from the burdens and costs of litigation: "tribal sovereign immunity 'is an immunity

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[43] *See* CRNA's 2020 Annual Report (June 15, 2020), https://e.issuu.com/embed.html?d=2020_annual_report_06.15.2020&u=crnative.

[44] 25 U.S.C. § 1602(3), (6) ("Declaration of national Indian health policy").

[45] *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (cleaned up) (quoting *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989)).

[46] *Pan Am. Co.*, 884 F.2d at 418; *see also Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172–73 (1977).

[47] *Wilson*, 399 F. Supp. 3d at 932 (footnote omitted).

from suit rather than a mere defense to liability.'"[48] The United States Supreme Court emphasizes that sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance."[49] Tribal sovereign immunity may only be waived by express waiver or by Congressional abrogation.[50] Waiver or abrogation cannot be implied, "but must be unequivocally expressed."[51]

Immunity from unconsented suit is a critical protection for federal, State, and tribal governments.[52] Tribal governments in particular are underfunded, have limited taxing power, and have limited revenue bases. Immunity allows tribal governments to focus limited resources—whether federally appropriated funding or from other sources—on governing and providing services to tribal members, not litigating. "[P]rotecting tribal assets has long been held crucial to the advancement of the federal policies advanced by immunity."[53]

This does not mean that individuals and organizations who do business with, are employed by, or otherwise contract with tribal organizations are without remedies. Tort claims against P.L. 93-638 tribal health consortia may be brought under the Federal Tort

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[48] *Pistor*, 791 F.3d at 1110 (quoting *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007)).

[49] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

[50] *Id.* at 788–89.

[51] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted).

[52] Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 161–66 (2004).

[53] *Douglas Indian Ass'n*, 403 P.3d at 1179 (citation omitted).

Claims Act ("FTCA").[54] Tribes and tribal organizations often waive sovereign immunity in whole or part as a matter of contract: "even with a jurisdictional bar, a tribe can still choose to waive its own immunity for transparency and accountability reasons or protect its interests when entering into a contract with another tribe by negotiating a waiver of the other tribe's immunity or some other procedure for resolving disputes."[55]

A party contracting with a tribal organization—such as Ito here—can negotiate for a waiver. In negotiations, a tribal organization can manage its financial risks, procure insurance to cover those risks at a manageable cost, and agree on dispute resolution procedures that protect the organization and are acceptable to those with whom it does business. If a waiver on terms agreeable to both parties cannot be negotiated, the other

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[54] 25 U.S.C. § 5321(d); 42 U.S.C. § 233; 28 U.S.C. §§ 2671–2680; 25 C.F.R §§ 900.180–.210 (Bureau of Indian Affairs and Indian Health Service, Subpart M, "Federal Tort Claims Act Coverage General Provisions"); *Kvasnikoff v. United States*, No. 3:16-CV-00081-SLG, 2018 WL 1309842, at *3 (D. Alaska Mar. 13, 2018); *see generally* Indian Health Service Manual, *The Federal Tort Claims Act*, Section 7, https://www.ihs.gov/riskmanagement/manual/manualsection07/ (last visited May 12, 2021); Congressional Research Service, *The Federal Tort Claims Act (FTCA): A Legal Overview*, No. R45732, https://crsreports.congress.gov/product/pdf/R/R45732 (updated Nov. 20, 2019). Congress has similarly strictly limited a party's rights and remedies to pursue contract claims against the United States by the Contract Disputes Act. 41 U.S.C. §§ 7101–7109; *see also* 48 C.F.R § 52.233-1.

[55] *Douglas Indian Ass'n*, 403 P.3d at 1179. *See, e.g.*, Def.'s Notice of Waiver of Sovereign Immunity, *Southcentral Foundation v. Alaska Native Tribal Health Consortium*, No. 3:17-cv-00018-TMB (D. Alaska filed Feb. 15, 2018), ECF No. 125-1 (ANTHC is "an inter-tribal consortium formed by federally-recognized tribes, tribally controlled P.L. 93-638 tribal organizations and inter-tribal consortia . . . . Whereas, the Consortium shares in the sovereign immunity of its participating tribes, tribal organizations and inter-tribal consortia . . . . the Board of Directors hereby waives the Consortium's sovereign immunity for the sole and limited purpose of seeking a decision from the United States District Court for the District of Alaska in *Southcentral Foundation v. Alaska Native Tribal Health Consortium*, 3:17-cv-00018-TMB.").

party can decide whether to nevertheless enter a contract with the tribal organization without a waiver in place.

In this, tribal immunity is not anomalous in our Constitutional framework. The United States and the States—including the State of Alaska—have sovereign immunity also. They have chosen to waive immunity in varying degrees, to certain causes of action, and to the extent they have decided it is in the interests of their treasuries and constituents. For example, the United States waives immunity for certain tort claims, but retains immunity for others, and requires claimants to follow a specific administrative process to assert cognizable tort claims.[56] Similarly, in the Quiet Title Act, Congress provided a limited sovereign immunity waiver permitting suits "to adjudicate a disputed title to real property in which the United States claims an interest."[57] The QTA provides the exclusive remedy for a claimant to challenge the United States' title to real property,[58] and specifically *excludes* from the immunity waiver actions to quiet title to "trust or restricted Indian lands," including Alaska Native allotments.[59]

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[56] 28 U.S.C. §§ 2671–2680.

[57] 28 U.S.C. § 2409a(a).

[58] *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

[59] *United States v. Mottaz*, 476 U.S. 834, 843 (1986) ("[W]hen the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity."); *Alaska Dep't of Nat. Res. v. United States*, 816 F.3d 580, 584–85 (9th Cir. 2016).

The same is true with the State of Alaska. "The Alaska Constitution waives absolute sovereign immunity, but retains a restricted version of immunity."[60] The Legislature has strictly limited the tort claims that may be brought against the State and its employees, in a manner similar to the United States' limitations in the FTCA,[61] and consents to contract claims only when brought through the State's prescribed administrative and judicial processes.[62] A party contracting with the State of Alaska has the choice of accepting these limitations or doing business elsewhere.[63] Notably, the State requires the converse: tribes and tribal organizations are often required to waive tribal sovereign immunity as a condition of receiving State grants or contracts.[64]

Neither Congress nor CRNA itself has waived CRNA's tribal sovereign immunity as to Ito's claims, and Ito does not and cannot credibly claim otherwise. CRNA did not do

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[60] *State v. Alaska State Emps. Ass'n, AFSCME, AFL-CIO*, 190 P.3d 720, 722 (Alaska 2008) (citing Alaska Const. art. II, § 21); *see Glover v. State, Dep't of Transp., Alaska Marine Highway Sys.*, 175 P.3d 1240, 1245–51 (Alaska 2008) (detailed history of Alaska Const. art. II, § 21, holds that § 21 is not "an absolute waiver of sovereign immunity").

[61] AS 09.50.250.

[62] *Alaska State Emps. Ass'n*, 190 P.3d at 722 (to be "cognizable," contract claims against the State must fall within the "general consent" of AS 09.50.250); *see also* AS 36.30.550–.699 (State Procurement Code, Legal and Contractual Remedies).

[63] *See, e.g.*, AS 09.50.250(1) (retaining immunity for "discretionary function[s]" and barring tort actions arising from "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused").

[64] *See, e.g.*, State of Alaska, Dep't of Health & Soc. Servs., Off. of Child.'s Servs. *Request for Letters of Interest, Permanent Families for Adoptive/Guardianship Children Program*, App. G, https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=93424 (requiring express waiver of tribal sovereign immunity to apply for state grant funding).

so here, and as a matter of policy does not waive immunity in employment contracts.[65] Absent waiver, Ito's claims are barred.

## II. Federal Statutes Establish that CRNA has Tribal Immunity from Unconsented Suit.

Congress expressly declared in 25 U.S.C. § 5381(b) that inter-tribal consortia are "Indian tribe[s]" under P.L. 93-638, and that inter-tribal consortia "shall have the rights and responsibilities of [their] authorizing Indian tribe[s]":

> In any case in which an Indian tribe has authorized . . . an inter-tribal consortium . . . to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under [P.L. 93-638, Title V], the . . . inter-tribal consortium . . . shall have the rights and responsibilities of the authorizing Indian tribe . . . . In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.[66]

As the Superior Court recognized, and as has been clear in the federal courts for more than two decades, tribal sovereign immunity is one of those "rights and responsibilities":

> Here, because Defendant raises a Civil Rule 12(b)(1) jurisdictional defense, the court may consider extrinsic evidence outside the face of the pleadings. Defendant establishes that is it an inter-tribal consortium organized under P.L. 93-638 in its memorandum supporting its 12(b)(1) motion to dismiss. Accordingly, under 25 U.S.C. § 5381(b), Defendant has the same rights as its authorizing tribes—as it is not disputed that an Indian tribe has the right to assert

[65] Nollner Aff. ¶ 9 [Exc. 157].

[66] 25 U.S.C. § 5381(b).

> tribal sovereign immunity, Defendant is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium.[67]

Ito now argues—for the first time on appeal—that 25 U.S.C. § 5381(b) should be read as only "giv[ing] consortia the *limited* 'rights and responsibilities' provided under Title V [of P.L. 93-638], and not *all* of a tribe's rights."[68] Ito did not make these arguments to the Superior Court and, in fact, did not contest CRNA's 25 U.S.C. § 5381(b) argument at all.[69] Ito therefore must show "plain error" by the Superior Court.[70] There is no error at all, much less "plain error." As discussed below, the Superior Court's decision correctly interprets the statute and is squarely in accord with federal law and this Court's decisions. That said, because Ito did not raise her § 5381(b) arguments before the trial court, this Court may affirm on that basis and need go no further.

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[67] Order Granting Case Mot. No. 1, at 11 (footnotes omitted) [Exc. 196]. *See also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188–89 (9th Cir. 1998) (finding that a consortium of Indian tribes organized as a non-profit corporation for the purposes of self-determination under P.L. 93-638 retained the sovereign immunity of its constituent tribes); *Wilson*, 399 F. Supp. 3d at 932–33, 935.

[68] Appellant's Br. at 11 (emphasis added).

[69] *See* CRNA's Mem. in Supp. of Mot. to Dismiss, at 9 [Exc. 25] ("'Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.' It 'extends to . . . organizations comprised of multiple tribes,' which possess 'the rights and responsibilities' of their constituent Indian tribes, including the tribes' rights to tribal sovereign immunity from unconsented suit." (footnotes omitted)); Pl.'s Opp'n to Def.'s Mot. to Dismiss [Exc. 162–69] (no arguments concerning 25 U.S.C. § 5381(b) whatsoever); Order Granting Case Mot. No. 1, at 11 [Exc. 196] ("[CRNA] has the same rights as its authorizing tribes—as it is not disputed that an Indian tribe has the right to assert sovereign immunity, Defendant is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium." (citing 25 U.S.C. § 5381(b))).

[70] *D.J. v. P.C.*, 36 P.3d 663, 667–68 (Alaska 2001).

Should the Court choose to consider Ito's § 5381(b) arguments, Congress has been abundantly clear that tribes are not stripped of any rights—including the right to raise sovereign immunity as a defense to unconsented suit—when tribes choose to act collectively rather than individually in P.L. 93-638 contracts and compacts.[71] Sovereign immunity "is '[a]mong the core aspects of sovereignty' possessed by tribes and 'traditionally enjoyed by sovereign powers.'"[72] Judicial recognition of the immunity dates back to *Worcester v. Georgia*, where Justice Marshall laid the keystone of federal Indian law: tribes are "distinct, independent political communities, retaining their original natural rights," including sovereign immunity.[73] As the United States District Court held in *Wilson v. Alaska Native Tribal Health Consortium*,

> Pursuant to ISDEAA, when 'an Indian tribe has authorized . . . an intertribal consortium . . . to plan for or carry out programs, services, functions or activities . . . on its behalf . . . [the] inter-tribal consortium

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[71] 25 U.S.C. §§ 5381(b), 5332.

[72] *Douglas Indian Ass'n*, 403 P.3d at 1176 (alteration in original) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)). CRNA's constituent tribes are all federally recognized. *See supra* note 7.

[73] *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 439 (Alaska 2004) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)); *see generally* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 138–39 (2004); S. Rep. No. 93-682, at 12 (1974) ("From the earliest years of the Republic, the Indian tribes have been recognized as 'distinct, independent, political communities' and as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal government, but rather by reason of their original Tribal sovereignty. Thus treaties and statutes of Congress have been looked to by the Courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers rather than as the direct source of tribal powers." (quoting Cohen's Handbook of Federal Indian Law)).

> . . . shall have the rights and responsibilities of the authorizing Indian tribe,' *which includes sovereign immunity.*[74]

This conclusion is a straightforward application of the language and purpose of P.L. 93-638. In a P.L. 93-638 consortium, multiple tribes join together to carry out core tribal governmental functions pursuant to federal statute and government-to-government agreements with the United States.[75] It would be anomalous to hold that the tribes' joint efforts to carry out these functions deprives the tribes of fundamental rights they hold individually. "'[T]he principle that Indian tribes are sovereign, self-governing entities' governs 'all cases where essential tribal relations or rights of Indians are involved.'"[76] As this Court has held, "[i]f Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we 'must do the same.'"[77]

Nor does Ito's reliance on legislative history help her argument. As Ito notes, the House Committee on Resources' Report explains that § 5381(b) enables "[tribal] consortia to participate in self-governance . . . just as a tribe would."[78] That is exactly CRNA's point—under § 5381(b), a P.L. 93-638 inter-tribal consortium is entitled to assert sovereign

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[74] *Wilson*, 399 F. Supp. 3d at 935 (alterations in original) (emphasis added) (quoting 25 U.S.C. § 5381(b)).

[75] 25 U.S.C. § 5381(a)(5) defines inter-tribal consortium: "The term 'inter-tribal consortium' means a coalition of two or more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations." (Footnote omitted.)

[76] *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999) (quoting *Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 33 (Alaska 1977)).

[77] *Id.* at 749 (quoting *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865)).

[78] Appellant's Br. at 12.

immunity from unconsented suit, just as an individual tribe participating in self-governance could.

The courts have had no difficulty applying § 5381(b) to Alaska P.L. 93-638 inter-tribal consortia. For example, in addition to *Wilson* and the other federal and state cases discussed *infra*, the Superior Court has described the legally indistinguishable Tanana Chiefs Conference ("TCC") as "exactly the type of tribal organization encompassed by P.L. 93-638," and that under § 5381(b), TCC is an "'Indian tribe[]' with the rights and responsibilities of the Indian tribes authorizing the organization," including sovereign immunity.[79]

Two other provisions of the Indian Self-Determination and Education Assistance Act also apply here: 25 U.S.C. §§ 5332 and 5321(g). In 25 U.S.C. § 5332, Congress stated expressly that:

> Nothing in [P.L. 93-638] shall be construed as-- (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; . . . .[80]

Ito's argument turns § 5332 entirely on its head. Instead of protecting the tribes' rights to sovereign immunity, Ito would diminish those rights: a tribe's choice to administer

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[79] *Beversdorf v. Tanana Chiefs Conference*, No. 4FA1701911, 2017 WL 7313414, at *2 n.10 (Alaska Super., Sep. 27, 2017) (citing 25 U.S.C. § 5381(b)); *id.* at *3 ("Alaska law has a long history of accepting and respecting claims of tribal sovereign immunity, and there is a clear trend among Alaska courts to find sovereign immunity.").

[80] 25 U.S.C. § 5332. As Ito points out, Appellant's Br. at 13, Congress specifically extended § 5332 to cover *all* P.L. 93-638 agreements, including those under ISDEAA Title V. *See* 25 U.S.C. § 5396(a) ("[25 U.S.C. §] 5332 . . . shall apply to compacts and funding agreements authorized by [ISDEAA Title V].").

its P.L. 93-638 funding through an inter-tribal consortium would strip the protection of tribal sovereign immunity from those funds. Ito would add new words to § 5381(b) and alter the statute entirely, from the "rights and responsibilities of the authorizing Indian tribe" to "*only those limited rights given by this subchapter.*" But this Court "will not add language to the statute" in order to "reach a particular result."[81]

Section 5321(g) similarly forecloses Ito's proposed re-write of the statute. In § 5321(g) Congress' codified a long-standing rule of construction that protects tribes and inter-tribal consortia contracting or compacting under P.L. 93-638 from Ito's proposed result: "each provision of [P.L. 93-638] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe."[82]

It does not take a "liberal" construction to hold, as the Superior Court did, that 25 U.S.C. § 5381(b) authorizes inter-tribal consortia such as CRNA to assert their constituent tribes' right to sovereign immunity. That is the plain meaning of the statute. Any other reading would have the effect of "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."[83] If there is

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[81] *M.M. through next friend Kirkland v. Dep't of Admin., Off. of Pub. Advoc.*, 462 P.3d 539, 547 & n.27 (Alaska 2020) (quoting *Mun. of Anchorage v. Suzuki*, 41 P.3d 147, 151 n.12 (Alaska 2002)).

[82] 25 U.S.C. § 5321(g); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

[83] 25 U.S.C. § 5332.

ambiguity in § 5381(b)—and CRNA submits that there is no ambiguity—then § 5321(g) requires that ambiguity to be resolved in CRNA's favor.[84]

Congress has spoken, and "the Constitution grants Congress' powers" that the United States Supreme Court has "consistently described as 'plenary and exclusive' to 'legislate in respect to Indian tribes.'"[85] The Superior Court's § 5381(b) conclusion was correct and should be affirmed.

## III. Federal Common Law Establishes that CRNA has Tribal Immunity from Unconsented Suit.

This Court has consistently deferred to federal law in matters of tribal sovereignty: "[b]ecause of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity."[86] This Court has consistently followed the decisions of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit in this area, recognizing that "tribal immunity 'is a matter of federal law and is not subject to diminution by the States,'"[87] and directing that the Alaska courts "take guidance from federal law" on questions regarding that immunity.[88] Ito has never contested this point,

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[84] 25 U.S.C. § 5321(g). Under the Supremacy Clause, "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[85] *Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)).

[86] *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977).

[87] *Douglas Indian Ass'n*, 403 P.3d at 1176 (quoting *Bay Mills Indian Cmty.*, 572 U.S. at 789).

[88] *Id.* at 1178.

and forthrightly recognizes that adopting her position will create a direct, insurmountable conflict between Alaska law and federal law. Indeed, Ito acknowledged that adopting her views will produce "wildly different opinions" from federal law in tribal sovereign immunity cases.[89]

The Ninth Circuit follows the long-established federal common law rule that "Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe."[90] Under federal law, inter-tribal consortia organized as nonprofit corporations have the right to assert the sovereign immunity of their constituent tribes. In the seminal *Pink v. Modoc Indian Health Project, Inc.* case, cited approvingly in *Runyon*,[91] the Ninth Circuit held that a "nonprofit corporation created and controlled by [two] federally recognized tribes" and "organized for charitable, educational, and scientific purposes and such other related purposes . . . relative to the delivery of certain services pursuant to" P.L. 93-638 was entitled to sovereign immunity.[92]

To determine whether a particular tribal entity is an "arm of the tribe," the Ninth Circuit in *White v. University of California* adopted the holistic approach taken by the

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[89] Opp'n to Mot. to Dismiss, at 7 [Exc. 168].

[90] *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citing *Miller v. Wright*, 705 F.3d 919, 923–24 (9th Cir. 2013); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Bay Mills Indian Cmty.*, 572 U.S. at 790).

[91] 84 P.3d at 440 n.8.

[92] *Pink*, 157 F.3d at 1187–88; *see, e.g., Cook*, 548 F.3d at 725 ("the settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.").

Tenth Circuit in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*:

> In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," we examine several factors including: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."[93]

The *White* and *Breakthrough* factors provide a multi-factor approach that allows the court to comprehensively examine whether a particular organization "functions as an arm of the Tribes."[94] This approach can result in a finding that a tribal organization is not, in fact, an arm of the tribe.[95] When applying the *White* factors, however, the Ninth Circuit and the United States District Courts have had no difficulty concluding that Alaska P.L. 93-638 tribal consortia are "arms of the tribe" and are entitled to assert tribal sovereign immunity against unconsented suit. Examples follow:

(1) *Cole v. Alaska Island Community Services* was an antitrust action brought against the Southeast Alaska Regional Health Consortium ("SEARHC") by a Wrangell

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[93] *White*, 765 F.3d at 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

[94] *McCoy v. Salish Kootenai College, Inc.*, 334 F. Supp. 3d 1116, 1120 (D. Mont. 2018) (cited in *Wilson*, 399 F. Supp. 3d at 935 n.60), *aff'd*, 785 F. App'x 414 (9th Cir. 2019). The *White* test was developed after *Runyon* was decided.

[95] *See, e.g., Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *5 (D. Or. Apr. 26, 2018), *report and recommendation adopted*, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018); *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 660 (E.D. Va. 2019); *People v. Miami Nation Enters.*, P.3d 357, 379 (Cal. 2016).

pharmacist. Applying the *White* factors, both the District Court and the Ninth Circuit found that SEARHC was "an 'arm of the tribes' of Southeast Alaska." The case was dismissed based on SEARHC's assertion of tribal sovereign immunity.[96]

(2) *Barron v. Alaska Native Tribal Health Consortium* was a civil rights and employment case brought against ANTHC by a former hospital employee. The District Court dismissed after carefully reviewing federal common law on tribal sovereign immunity as expressed through, *inter alia*, *White* and *Marceau v. Blackfeet Housing Authority*.[97] The District Court concluded that "ANTHC is an entity created and controlled by Alaska Native tribes that promotes tribal self-determination and fulfills governmental functions. Accordingly, it constitutes an arm of the Alaska Native tribes that is entitled to sovereign immunity."[98]

(3) *Wilson v. Alaska Native Tribal Health Consortium* was a complex employment and federal statutory case brought against ANTHC by two former employees. The District

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[96] App. A, *Cole v. Alaska Island Cmty. Servs., Inc.*, No. 1:18-cv-00011-TMB, slip op. at 13–16 (D. Alaska Oct. 11, 2019), ECF No. 32, *aff'd*, 834 F. App'x 366, 367 (9th Cir. 2021) (unpublished) ("The district court properly dismissed Cole's claims against Southeast Alaska Regional Health Consortium and Alaska Island Community Services because those claims are barred by tribal sovereign immunity." (citing *White*, 765 F.3d at 1025; *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015))).

[97] *See generally Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006), *opinion reinstated in part, superseded in part on other grounds*, 540 F.3d 916 (9th Cir. 2008).

[98] *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019). ANTHC is the statewide tribal health consortium that co-manages the Alaska Native Medical Center in Anchorage and provides a wide range of P.L. 93-638 programs, functions, services and activities that benefit Alaska Natives and American Indians across Alaska. *See* Alaska Native Tribal Health Consortium, https://anthc.org/.

Court exhaustively and carefully reviewed the evidence in the context of each *White* factor. Ultimately, "the Court determined—relying on the *White* factors—that ANTHC is entitled to tribal sovereign immunity."[99]

(4) *Matyascik v. Arctic Slope Native Association* ("ASNA"), was a contract action by a terminated ASNA employee. The District Court first applied the *White* factors and held that ASNA met those factors. The District Court concluded that the *White* "financial relationship" factor supported sovereign immunity because ASNA's "member tribes would not be insulated from financial harm simply because they might not be directly liable for an adverse judgment," as "a judgment for damages against [ASNA] would adversely affect its member tribes because funds would be diverted from health care services."[100]

CRNA is legally indistinguishable from the Alaska P.L. 93-638 tribal consortia involved in the federal cases described above. It is entirely undisputed here that federal common law allows CRNA to assert tribal sovereign immunity against Ito's unconsented contract action.

## IV. The Superior Courts Have Followed Federal Statutes and Common Law When Considering Alaska P.L. 93-638 Consortia.

The Superior Courts have uniformly followed this Court's direction in *Douglas Indian Association* to "take guidance from federal law" on tribal sovereign immunity

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[99] 399 F. Supp. 3d at 937.

[100] *Matyascik v. Arctic Slope Native Ass'n*, No. 2:19-cv-0002-HRH, 2019 WL 3554687, at *2–5 (D. Alaska Aug. 5, 2019) (noting that the *Runyon* test was rejected by the courts in *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1164–65 (D.S.D. 2012), and *Breakthrough Mgmt. Grp.*, 629 F.3d at 1187).

questions.[101] In doing so, the Superior Courts have followed 25 U.S.C. § 5381(b) and federal common law to dismiss actions against TCC, SEARHC, and ASNA. These P.L. 93-638 tribal health consortia are legally indistinguishable from CRNA. They are consortia of federally recognized Indian tribes, organized as Alaska non-profit corporations, and provide health care to Indian Health Service beneficiaries pursuant to the Alaska Tribal Health Compact and Annual Funding Agreements with the United States.[102]

## V. P.L. 93-638 Tribal Consortia Have Sovereign Immunity Under *Runyon*'s "Financial Insulation" Test.

Although first noting that *Runyon* "has subsequently been called into question by the progeny of the circuit precedent that *Runyon* itself relief on," the Superior Court correctly found that, even under *Runyon*, CRNA's constituent tribes are "real parties in interest" in this matter and CRNA is thus entitled to assert tribal sovereign immunity.[103] That is because CRNA has been authorized by its constituent tribes to receive those tribes'

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[101] 403 P.3d at 1178.

[102] *See Beversdorf v. Tanana Chiefs Conference, Inc.*, No. 4FA1701911, 2017 WL 7313414 (Alaska Super., Sep. 27, 2017) (citing 25 U.S.C. § 5381(b) and *Douglas Indian Association*, and dismissing employment action against Tanana Chiefs Conference on the basis of tribal sovereign immunity); Order on Mot. to Dismiss [Civil Rule 12(b)(1)], *Bekkum v. Samuel Simmonds Mem'l Hosp.*, No. 2BA-15-97 CI (Alaska Super., June 19, 2015) (dismissing employment action against Arctic Slope Native Association on the basis of tribal sovereign immunity); Order re: Mot. to Dismiss, *Mattoni v. Alaska Island Cmty. Servs. Inc.*, No. 1JU-18-715 CI (Alaska Super., June 30, 2019) (dismissing employment action against Southeast Alaska Regional Health Consortium on the basis of tribal sovereign immunity).

[103] Order Granting Case Mot. No. 1, at 13–14 [Exc. 198–99] ("Even if an adverse judgment in this matter would not enter against [ASNA's] member tribes individually, tribal assets would nonetheless be obligated to satisfy the judgment." (citing *Matyascik*, 2019 WL 3554687, at *5)).

Indian Health Service funding—referred to as "tribal shares"—to carry out P.L. 93-638 programs on the tribes' behalf.[104]

*Matyascik v. Arctic Slope Native Association* (ASNA), discussed above and cited by the Superior Court, is directly on point. ASNA is the P.L. 93-638 tribal health consortium that operates the Samuel Simmonds Memorial Hospital in Utqiagvik and village clinics across the North Slope. Like CRNA, ASNA is organized as an Alaska non-profit corporation; ASNA's members are all federally recognized tribes; ASNA carries out the core governmental purpose of providing health care to American Indians and Alaska Natives pursuant to P.L. 93-638; ASNA is signatory to the Alaska Tribal Health Compact; and ASNA's constituent tribes have authorized ASNA to receive their IHS "tribal shares."[105]

The Rule 12(b)(1) evidence in *Matyascik* established that judgments against ASNA would have a direct and adverse effect on the financial interests of their member tribes, leading the District Court to conclude that, even under *Runyon*, ASNA had tribal sovereign immunity:

> Plaintiff's financial insulation argument [based on *Runyon*] ignores the fact that defendant's core funding comes from tribally-authorized federal funding that it receives on behalf of its member tribes along

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[104] CRNA's constituent tribes "have passed Tribal government resolutions authorizing CRNA to receive the Tribe's federal health care funds and provide health care services to their Tribal members." Nollner Aff. ¶ 5 [Exc. 155]. *See* 25 U.S.C. § 5388(a) (transfer of federal funds to tribes and tribal organizations pursuant to Compact and Annual Funding Agreements), (c) ("The Secretary shall provide funds under a funding agreement under this subchapter in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this subchapter.").

[105] *Matyascik*, 2019 WL 3554687, at *2–3.

> with non-federal funds that it is able to collect due to its status as an ISDEAA organization providing health care services for the tribes. In other words, defendant's funding is money that the tribes would receive directly if they chose to operate individually, as ISDEAA allows. Thus, a judgment for damages against defendant would adversely affect its member tribes because funds would be diverted from health care services. The member tribes would not be insulated from financial harm simply because they might not be directly liable for an adverse judgment.[106]

The uncontested evidence in the record here establishes exactly the same for CRNA:

> CRNA's budget is substantially based on federal funds provided to benefit its member Tribes and their Tribal members under the Compact and Annual Funding Agreement with the Secretary. CRNA does not agree that any damages are payable in this case, but if a damage award were imposed, it would be paid from our member Tribes' federal health care funding, and would have a direct and severe financial impact on our ability to provide health care services to our Tribal members. This lawsuit has already required CRNA to expend resources that it would otherwise use to support such services. A continued obligation for CRNA to defend itself in this matter will adversely impact CRNA's mission of providing the highest quality health care services possible to the Tribal communities of the Ahtna Region.[107]

The funds at risk in this matter are CRNA's constituent tribes' federal healthcare funds—their P.L. 93-638 "tribal shares." The Ahtna Region tribes are not financially insulated from litigation defense costs in this matter, let alone insulated from a judgment against CRNA. There would be a "direct and severe financial impact on [CRNA's] ability

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[106] *Id.* at *5; *accord Barron*, 373 F. Supp. 3d at 1240; *Wilson*, 399 F. Supp. 3d at 936 (under *White*'s financial relationship factor, "ANTHC's financial relationship with the tribes weighs in favor of a finding that it is 'an arm of the tribe.'").

[107] Nollner Aff. ¶ 8 [Exc. 156–57].

to provide health care services to [its] Tribal members" if judgment is entered against CRNA.[108]

Notably, *Runyon* expressly declined to "decide what financial structure *would* endow an association like AVCP with the tribes' immunity,"[109] citing to the seminal federal cases of *Pink v. Modoc Indian Health Project, Inc.* and *Dille v. Council of Energy Resources Tribes*[110] as examples of when "[t]ribal status . . . may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments."[111] That description fits CRNA perfectly.

## VI. *Runyon* is Distinguishable on its Facts.

Importantly, *Runyon* is also distinguishable on its facts. Although AVCP apparently had at least one P.L. 93-638 contract with the United States, the program at issue in *Runyon*—AVCP's Head Start program—was not part of AVCP's P.L. 93-638 programs, functions, services, or activities.[112] Head Start falls under an entirely different federal statutory scheme.[113] It is thus not "odd," contrary to Ito's argument, that *Runyon* "was not

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[108] *Id.*

[109] 84 P.3d at 441.

[110] *See Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 374–75 (10th Cir. 1986) (involving "a collective effort" by 39 tribes to manage resource development on Indian lands).

[111] *Id.* at 440 & n.8.

[112] *See* Appellants' Br., *Runyon v. AVCP*, Nos. S-10772, S-10838, 2003 WL 24048556, at *4 (Alaska Jan. 21, 2003).

[113] *See, e.g.*, 42 U.S.C. § 9835. It appears the underlying issue in *Runyon* was whether AVCP's Head Start Program liability insurance would cover the alleged tort claim. None

tempered in any way by any concern for 25 U.S.C. § 5381(b)."[114] That statute did not apply in *Runyon*, no party argued that it did apply, and no party even mentioned that statute in their briefing.[115] To remove any doubt, *Runyon* was a tort suit. If the plaintiffs' tort claims arose from AVCP's P.L. 93-638 contracts, *Runyon* would not have been before this Court at all. The Federal Tort Claims Act is the exclusive remedy for tort actions related to a tribal organization's P.L. 93-638 activities, and the United States District Court has exclusive jurisdiction over FTCA claims.[116]

## VII. If the Court Concludes *Runyon* Applies, *Runyon* Should be Overruled or Modified to be Consistent with Federal Law.

Ito argues that *Runyon* is controlling law, and that *Runyon* mandates that her action may proceed against CRNA. To the extent that this Court accepts Ito's premise, *Runyon* should be overruled or modified to bring Alaska law into harmony with federal law on this issue.

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of the parties advanced the "financial insulation" test the Court ultimately adopted. *See* Appellants' Br., *supra* note 112; Appellee's Br., 2003 WL 24048559 (Alaska Apr. 4, 2003); Appellants' Reply Br., 2003 WL 24048562, at *2 (Alaska June 16, 2003) ("AVCP was *required* to purchase a liability insurance policy by federal statute and regulation as a condition of receiving a Head Start grant.").

[114] Appellant's Br. at 14.

[115] *See supra* note 113.

[116] *See* 25 U.S.C. § 5321(d); 42 U.S.C. § 233; 28 U.S.C. § 2679(b)(1); Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959–60 (1990); Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989); *Walker v. Chugachmiut*, 46 F. App'x 421, 423–24 (9th Cir. 2002) (unpublished).

*Runyon*'s singular "financial insulation test" has been rejected by the federal courts, has been widely criticized,[117] and, as noted above, has not been applied by the Superior Courts in the P.L. 93-638 context.[118] This Court has reaffirmed procedural points raised in *Runyon*, and quoted it for the proposition that "protecting tribal assets has long been held

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[117] *Runyon* has been criticized for its overly narrow focus on "financial insulation," a concept that has little application to tribes that already have sovereign immunity from unconsented suit and thus do not need a corporate form for "insulation" from unconsented liability. *See, e.g.*, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1186–87 (10th Cir. 2010) (rejecting *Runyon* as "the wrong legal standard"); *People v. Miami Nation Enters.*, 386 P.3d 357, 373 (Cal. 2016) ("direct tribal liability for the entity's actions is neither a threshold requirement for immunity nor a predominant factor in the overall analysis"); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1175–76 (D.S.D. 2012) (citing *Pink*, 157 F.3d at 1187 and finding a P.L. 93-638 tribal organization similar to CRNA has tribal sovereign immunity; describing *Runyon* as using "the incorrect legal standard"); *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1110 & n.12 (Colo. 2010) (rejecting *Runyon* as misapplying governing law "in contravention of [the United States Supreme Court's decision in] *Kiowa*"); *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 280 n.28 (E.D. Va. 2018) ("Given that . . . *Runyon* represent[s] the minority approach on this issue, the Court will not follow [it] here."), *rev'd and remanded on other grounds*, 929 F.3d 170 (4th Cir. 2019); Catherine E. Polta, *Conceptualizing Corporations As Native Administrative Units*, 7 Geo. J. L. & Mod. Critical Race Persp. 297, 305 (2015) (arguing that *Runyon* established "a myopic test that belies the true relationship between tribes and their corporations[,] . . . ignores the social and legal contexts that compelled Native tribes to incorporate under Alaska statute[,] . . . [and] undermines the policy considerations it purports to embrace"). Notably, *Runyon* rested on the theory that under the Alaska Nonprofit Corporation Act, AVCP's constituent tribes "are not . . . liable . . . on the [the corporation's] obligations." 84 P.3d at 441 (alterations in original) (quoting AS 10.20.051(b)). But "[i]f, on the other hand, the tribe would be legally responsible for the entity's obligations, it may be an arm of the tribe" and thus entitled to tribal sovereign immunity. *Id.* at 440-41. In other words, *Runyon* appears to hold *non sequitur* that a tribal corporation has tribal sovereign immunity *only if* the tribe or constituent tribes have waived that immunity and agreed to be "liable . . . on [the corporation's] obligations." That would make tribal sovereign immunity an entirely illusory concept in this context.

[118] *See supra* note 102.

crucial to the advancement of the federal policies advanced by [tribal] immunity."[119] These points are entirely in accord with federal law. But the Court has never cited *Runyon* for Ito's extreme view that the Alaska courts should simply ignore federal law on whether a P.L. 93-638 tribal organization can assert sovereign immunity.[120]

Federal law is more nuanced and comprehensive than *Runyon*'s singular "financial insulation test," as the federal courts have pointedly noted.[121] The Ninth Circuit's *White* factors permit a broader, more thorough analysis of whether a given tribal organization is an "arm of the tribe" than the *Runyon* approach.[122] And, as regards *Runyon*'s focus on the

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[119] *Douglas Indian Ass'n*, 403 P.3d at 1179 (quoting *Runyon*, 84 P.3d at 440).

[120] *N.b., Runyon* was decided in 2004, at a time when tribal status in Alaska was still a subject of considerable controversy, as amicus briefing in the case indicates. *Compare* Amicus Br. of Legislative Council, 2003 WL 24048558, at *18-23 (Alaska Jan. 21, 2003) (arguing the Court should reconsider *John v. Baker*), *with* Amicus Br. of Alaska Inter-Tribal Council, 2003 WL 24048560, at *10-17, 32 (Alaska Apr. 4, 2003) (*John v. Baker* was correctly decided). *Runyon* was decided in 2004, and this Court thus did not have the benefit of reviewing *White* (9th Cir. 2014) or *Breakthrough Management* (10th Cir. 2010). State Supreme Courts that have addressed the "arm of the tribe" question in recent years have adopted multi-factor tests based on this federal approach. *See, e.g., Hwal'Bay Ba: J Enters., Inc. v. Jantzen in & for Cty. of Mohave*, 458 P.3d 102, 108 (Ariz. 2020) ("we identify and adopt six non-exclusive factors to examine in deciding whether an entity is a subordinate economic organization of a tribe, entitling it to share in the tribe's sovereign immunity"); *Miami Nation Enters.*, 386 P.3d at 371 ("setting forth the five factors of the arm-of-the-tribe test" based on *Breakthrough Management*).

[121] In *Breakthrough Management*, the Tenth Circuit flatly rejected *Runyon*'s approach as "the wrong legal standard .... Although [it] recognize[d] that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship, ... it is *not* a dispositive inquiry." 629 F.3d at 1186-87.

[122] *White*, 765 F.3d at 1025. Of relevance here, the fifth *White* factor effectively incorporates and expands the *Runyon* approach, as it looks to "the financial relationship between the tribe and the entities [asserting sovereign immunity]." *Id.*

corporate form, it has long been established in federal law that a tribal entity "that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so."[123] Substance, not form, is the inquiry under federal law.

Ito has never disputed that CRNA meets the federal standards to assert tribal sovereign immunity. Instead, Ito argued that federal common law "cannot be reconciled" with *Runyon*, and that the Superior Court was "duty-bound" to follow *Runyon* despite a clear conflict with federal law: "This is not the first time that our two court systems have reached wildly different opinions on the same legal question, and it will likely not be the last."[124] But "tribal immunity 'is a matter of federal law and *is not subject to diminution by the States.*'"[125] Federal statutes and common law hold that P.L. 93-638 tribal consortia such as CRNA are entitled to assert sovereign immunity. Reflexively applying *Runyon*'s "wildly different" approach would impermissibly diminish CRNA's federal right of tribal

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[123] *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002), *as amended on denial of reh'g* (July 29, 2002). The tribal organization in *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998), for example, was organized as a nonprofit corporation. *See also Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) ("we hold that as a tribal corporation and an arm of the Fort Mojave Tribe, ACE enjoys sovereign immunity from Cook's suit"). One federal court explained, in a suit brought against a tribal health consortium organized like CRNA as a nonprofit corporation, that because the corporation was providing "health care and related services to tribal members and member Indian tribes [it was] closer to the functions of a tribal government than a business. . . . [T]he purposes of tribal sovereign immunity would be furthered by extending the tribes' immunity to [the corporation]. Providing adequate health care to their constituents . . . is a very real concern for sovereign Indian tribes." *J.L. Ward Assocs.*, 842 F. Supp. 2d at 1176-77 (citing, *inter alia*, *Pink*, 157 F.3d at 1187).

[124] Pl.'s Opp'n to Def.'s Mot. to Dismiss, at 7 (footnote omitted) [Exc. 168].

[125] *Douglas Indian Ass'n*, 403 P.3d at 1176 (emphasis added) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014)).

sovereign immunity.[126] This Court should follow federal law in this quintessentially federal area, despite Ito's invitation to do otherwise.

The Court could decide this matter in CRNA's favor on the very limited basis that *Runyon*'s approach supports a P.L. 93-638 inter-tribal consortium's right to assert tribal sovereign immunity, since in fact it does. Nonetheless, this is an opportunity for the Court to better harmonize Alaska law with federal law and avoid forum-shopping and "races to the courthouse door" for matters involving tribal organizations. In *Douglas Indian Association*, this Court indicated its intent to avoid "a conflict with federal law when determining whether a tribe is entitled to immunity," and declined to create a divergent State law rule:[127]

> Their dispute is whether Alaska should follow this federal rule. For the reasons discussed below, we hold that under Alaska law, tribal sovereign immunity is a jurisdictional bar that may be invoked by a sovereign defendant in a Rule 12(b)(1) motion to dismiss.
>
> . . . .
>
> "[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'"
>
> . . . .

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[126] *See id. Douglas Indian Association* cites *Runyon* for the propositions "that [tribal sovereign] immunity is 'motivated in significant part by the need to ensure that tribal assets are used as the tribe wishes, without threat from litigation," *id.*, and "the 'federal policies of tribal self-determination, economic development, and cultural autonomy' are better served by leaving these decisions [to waive sovereign immunity] up to the tribes," *id.* at 1179 (footnote omitted). These points support CRNA's arguments, not Ito's.

[127] *Id.* at 1178 n.36 ("Applying a state affirmative defense rule to tribal sovereign immunity could also lead to a conflict with federal law when determining whether a tribe is entitled to immunity.").

> But we have deferred the question "whether a tribe's sovereign immunity is merely an affirmative defense or a bar to jurisdiction." Although the U.S. Supreme Court has not addressed this question directly, many federal circuit courts have indicated that tribal sovereign immunity is properly invoked as a jurisdictional bar under the federal version of Rule 12(b)(1). Douglas nonetheless argues that Alaska should follow a different rule.
>
> . . . .
>
> We instead take guidance from federal law and the Ninth Circuit's analysis in *Pistor v. Garcia*. . . . We find this [federal] analysis persuasive with respect to tribal sovereign immunity, as well as consistent with our precedent.
>
> . . . .
>
> Because tribal sovereign immunity serves as a jurisdictional bar under federal law, we follow the Ninth Circuit in concluding that a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is "a proper vehicle for invoking sovereign immunity from suit."[128]

The Superior Court understood *Douglas* as indicating "that federal *procedural* law controls in the context of tribal sovereign immunity litigation in Alaska courts," but was not "persuaded that *Douglas* stands for the proposition that the body of federal common law—including *substantive* and procedural law—preempts Alaska law when litigating tribal sovereign immunity in state courts."[129] This matter provides an opportunity for this Court to clarify the situation.

*Runyon's* continued utility is doubtful, at best, given the more nuanced and comprehensive factors later developed by the federal courts. The federal approach is "the

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[128] *Id.* at 1172–79 (footnotes omitted) (citing, *inter alia*, *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015); and quoting *Puyallup Tribe v. Dep't of Game of the State of Wash.*, 433 U.S. 165, 172 (1977)).

[129] Order Granting Case Mot. No. 1, at 7 (emphasis added) [Exc. 192].

rule that is most persuasive in light of precedent, reason, and policy."[130] Indisputably, "more good than harm would result from a departure from [*Runyon*'s] precedent" and instead applying federal law as expressed by the Ninth Circuit in this quintessentially federal context.[131]

To adopt Ito's "wildly different" conclusion would create two rules of law in Alaska. This would inexorably result in "'wasteful' litigation and an 'unseemly and destructive race to see which forum can resolve the same issues first.'"[132]

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[130] *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 339 (Alaska 2011) (quoting *Runyon*, 84 P.3d at 439); *see also supra* note 117. Although the Tenth Circuit has suggested, in *dicta* concerning a case about a state-chartered for-profit LLC, that the *Breakthrough Management* analysis does not apply to tribally owned, but state-chartered corporations, *see Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012), that *dicta* has itself criticized, *see Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 291–92 (D. Me. 2014) (analyzing and declining to apply *Somerlott*). Moreover, the better rule—and the one applicable in the Ninth Circuit—is that while state incorporation weighs against finding that a tribal organization is an "arm of the tribe" under the "method of creation" *White* factor, it is not a dispositive factor. *See Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *3 (D. Or. Apr. 26, 2018) (Corporation "was formed under state law in Oregon and Oklahoma as opposed to laws governing the Tribe. Although this fact alone is not dispositive, it is a factor weighing against a finding of sovereign immunity"), *report and recommendation adopted*, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018); *McCoy v. Salish Kootenai Coll.*, 334 F. Supp. 3d 1116, 1121 (D. Mont. 2018) ("state incorporation or dual [state/tribal] incorporation does not divest a tribal corporation of its tribal status" (citing *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1129 (9th Cir. 2006))).

[131] *McCrary*, 265 P.3d at 341 ("We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." (citation omitted)). Both prongs of this test are satisfied. *See supra* note 117.

[132] *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1023 (9th Cir. 2016) (quoting *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567 (1983)).

## (E) CONCLUSION

Ahtna' T'Aene Nene', on behalf of itself, on behalf of its five federally recognized member tribes, and on behalf of the Alaska Native and American Indian people of the Ahtna Region, respectfully requests that Ito's appeal be denied, and that it be awarded fees and costs.

Respectfully submitted this 24th day of May, 2021 at Juneau, Alaska

SONOSKY, CHAMBERS, SACHSE,
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# APPENDIX A

***Cole v. Alaska Island Cmty. Servs., Inc.*,**
**No. 1:18-cv-00011-TMB, slip op. (D. Alaska Oct. 11, 2019), ECF No. 32, aff'd, 834 F. App'x 366 (9th Cir. 2021) (unpublished)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| STEPHEN W. COLE,<br><br>Plaintiff,<br><br>v.<br><br>ALASKA ISLAND COMMUNITY SERVICES, INC. AND SOUTHEAST ALASKA REGIONAL HEALTH CONSORTIUM,<br><br>Defendant. | Case No. 1:18-cv-00011-TMB<br><br>**ORDER ON SEARHC'S MOTION TO DISMISS (DKT. 25) AND FTC'S MOTION TO DISMISS (DKT. 28)** |

## I. INTRODUCTION

The matter comes before the Court on Defendants South East Regional Health Consortium's ("SEARHC") and the Federal Trade Commission's ("FTC") separate Motions to Dismiss ("SEARHC's Motion" and "the FTC's Motion," respectively).[1] Plaintiff Stephen W. Cole opposes both Motions.[2] The motions have been fully briefed and are now ripe for resolution.[3] The parties did not request oral argument, and the Court finds that it would not be helpful. For the reasons stated below, SEARHC's Motion to Dismiss at docket 25 and the FTC's Motion to Dismiss at docket 28 are both **GRANTED**.

[1] Dkts. 25 (SEARHC's Motion) and 28 (FTC's Motion).

[2] Dkt. 31 (Response in Opposition).

[3] *See* Dkts. 25, 28, and 31. The Defendants did not file any reply, and the time in which to do so has now expired.

## II. BACKGROUND

On May 9, 2019, Plaintiff Stephen W. Cole filed his First Amended Complaint (the "Amended Complaint") against SEARHC, the FTC, Alaska Island Community Services ("AICS"), the U.S. Attorney's Office, and the Department of Health and Human Services ("DHHS").[4] The Court liberally construes Mr. Cole's filings, as is appropriate with *pro se* litigants.[5] Mr. Cole's Amended Complaint makes two broad claims: first, that the federal Health Resources & Services Administration's ("HRSA") 340B Drug Pricing Program ("340B Program")—or the entities supported by the program—violated federal antitrust laws; second, that AICS, supported by the DHHS, engaged in illegal "[r]estraint of [t]rade" practices.[6] The only relief Mr. Cole seeks is $6,336,518 in treble damages for Defendants' alleged antitrust violations.[7]

SEARHC, on behalf of itself and AICS, moves to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).[8] The United States, on behalf of the FTC, also moves to dismiss this action for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5).[9]

[4] Dkt. 20 (Amended Complaint).

[5] As noted in the Court's Order dismissing Mr. Cole's original complaint, "[t]he Court cannot refer to a prior pleading in order to make an amended complaint complete." Dkt. 17 at 2. Further, the Court informed Mr. Cole that "[a]ny claims not included in the amended complaint [would] be considered waived." *Id.* at 3. Thus, while the Court will construe Mr. Cole's Amended Complaint liberally, it does not look to his Original Complaint to supplement his claims.

[6] *Id.* at 4 and 9.

[7] *Id.* at 14.

[8] Dkt. 25.

[9] Dkt. 28.

*A. Factual Background*

Mr. Cole owns and operates Stikine Drug—a pharmacy in Wrangell, Alaska.[10] Defendant SEARHC is a regional tribal health consortium of federally-recognized Indian tribes in Southeast Alaska.[11] Defendant AICS merged into SEARHC on April 1, 2017. [12] SEARHC now operates AICS's medical clinic and AICS's pharmacy.[13]

Since Mr. Cole acquired Stikine Drug in 2002, his prescription sales have fallen.[14] Consequently, Mr. Cole claims to have lost $2,112,106 in profits between 2003 and 2017.[15] He attributes the decrease in sales to the HRSA's 340B Program.[16] Specifically, he alleges that the DHHS, through the 340B Program, benefits covered entities, like AICS, and allows them to purchase pharmaceuticals for 25–50% less than he can.[17] As a result, Mr. Cole claims covered entities receive an unfair advantage in the marketplace because they are able to offer lower prices to insurers and customers.[18]

[10] Dkt. 20 at 4–9; Dkt. 31-1 (Response in Opposition).

[11] Dkt. 26 at 4 (SEARHC's Memorandum in Support).

[12] *Id.* at 5.

[13] *Id.*

[14] Dkt. 20 at 15–20.

[15] *Id.*

[16] Public Health Service Act, § 340B, 42 U.S.C. § 256b.

[17] Dkt. 20 at 4.

[18] *Id.* at 4; Dkt.31-1.

Mr. Cole further alleges that AICS has exacerbated the loss to his business by engaging in "[r]estraint of [t]rade practices."[19] For example, Mr. Cole asserts that at an unknown date, AICS's TideLine Clinic informed Stikine Drug that it would no longer be accepting prescription refill requests by fax or phone as of October 25, 2006.[20] This, Mr. Cole claims, was intended to "drive [Stikine] out."[21] Additionally, according to Mr. Cole, AICS directed dentists at its dental clinic to send prescriptions to AICS rather than unaffiliated pharmacies like Stikine Drug.[22] Mr. Cole claims that through these, and other tactics, AICS steered customers away from his pharmacy and toward their own.[23] Relatedly, Mr. Cole presents a letter from AICS's attorney's in 2005 warning him that it may pursue a defamation action if he continued to make "inflammatory and false" statements alleging improper conduct and mishandling of federal funds by AICS employees.[24] Mr. Cole claims that this letter, and the threat of litigation contained therein, has prevented him and his customers from discussing their complaints against AICS publicly.[25]

*B. Procedural History*

Mr. Cole filed a complaint ("Original Complaint") on July 23, 2018, seeking $6,336,318 in treble damages under the Clayton Act, 15 U.S.C. § 12–27, and requesting the Court enter a

[19] Dkt. 20 at 9.

[20] *Id.* at 10.

[21] *Id.* at 9.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 13.

[25] *Id.* at 9.

declaratory judgement that the 340B Drug Program is unconstitutional.[26] Initially, Mr. Cole only named the AICS and SEARHC as defendants.[27] Although not named as a party in the Original Complaint, the United States was served a copy of the Original Complaint.[28] The United States subsequently moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.[29] This Court granted the United States' Motion to Dismiss without prejudice, giving Mr. Cole leave to amend his complaint.[30]

On May 9, 2019, Mr. Cole filed his Amended Complaint adding the U.S. Attorney's Office, DHHS, and the FTC as defendants.[31] The Amended Complaint alleges that AICS and SEARHC—acting with funds received from DHHS—committed antitrust violations in the retail pharmaceutical market.[32] The only relief Mr. Cole seeks in his Amended Complaint is treble damages totaling $6,336,518 for Defendants' alleged antitrust violations.[33] Simultaneously, Mr. Cole also filed a Motion for Authorization to Investigate requesting that the Court direct the FTC to investigate the legality of the 340B Program.[34] The Court denied Mr. Cole's motion, as the

[26] Dkt. 1 at 4,24 (Original Complaint).

[27] *Id.* at 2.

[28] Dkt. 16 at 2.

[29] *Id.* at 1.

[30] Dkt. 17.

[31] Dkt. 20.

[32] *Id.* at 4–13.

[33] *Id.* at 14. Mr. Cole did not reassert his claim requesting a Declaratory Judgment in his Amended Complaint. *Id.*

[34] Dkt. 21.

Court does not have the power to order the FTC to exercise its discretionary authority under the writ.[35]

SEARHC filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) on July 17, 2019, seeking dismissal of all claims against SEARHC and AICS.[36] Specifically, SEARHC argues that the Court lacks subject matter jurisdiction over Mr. Cole's claims because SEARHC and AICS enjoy tribal sovereign immunity from unconsented private suits.[37] The United States, on behalf of the FTC, filed a separate Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process.[38] The FTC asserts that Mr. Cole's First Amended Complaint was not delivered, thus, service was insufficient.[39] The FTC also argues that allowing Plaintiff to effect proper service would be futile because the Amended Complaint seeks relief from the FTC that the Court has already denied.[40]

Mr. Cole opposes both motions in a single response.[41] First, Mr. Cole asserts he sent his only paper copy of the Amended Complaint to the Court and requested the FTC and HHS find a copy of the complaint through the Case Management/Electronic Case Files system.[42] Second, Mr.

[35] Dkt. 42. In so denying, the Court construed Mr. Cole's request as a motion seeking a writ of mandamus. *Id.*

[36] Dkt. 25.

[37] Dkt. 26 at 1–2.

[38] Dkt. 28.

[39] *Id.* at 3.

[40] *Id.*

[41] Dkt. 31.

[42] Dkt. 31-1.

Cole restates, and attempts to clarify, his claims in his Amended Complaint and argues against their dismissal. The motions have been fully briefed and are now ripe for resolution.[43]

## III. LEGAL STANDARD

When challenged by a motion to dismiss, *pro se* filings "must be 'liberally construed,' and 'however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers . . . .'"[44] In doing so, courts must "use common sense in interpreting the frequently diffuse pleadings of *pro se* complainants."[45]

### *A. Motion to Dismiss Under 12(b)(1)*

Fed. R. Civ. P. 12(b)(1) allows parties to seek dismissal of claims over which the court lacks subject matter jurisdiction. The issue of tribal sovereign immunity is "quasi-jurisdictional."[46] When tribal sovereign immunity is properly raised in a 12(b)(1) motion, a district court is not bound to accept the plaintiff's allegations as true in resolving that issue,[47] nor is it bound by the four corners of the complaint; instead, a court may consider additional materials in resolving a 12(b)(1) motion.[48] Once a party moves to dismiss under 12(b)(1), "'the party asserting subject

[43] Dkts. 25, 28, and 31.

[44] *Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1061 (D. Alaska 2012) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

[45] *McKinney v. De Bord*, 507 F.2d 501, 504 (9th Cir. 1974).

[46] *See, e.g., Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

[47] *See, e.g., Pistor*, 791 F.3d at 1112; *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

[48] *Pistor*, 791 F.3d at 1112 ("[T]he declarations presented evidence going to the question of quasi-jurisdiction, and the district court was not bound to consider only the face of the complaint.").

matter jurisdiction has the burden of proving its existence,' i.e. that immunity does not bar the suit."[49]

*B. Motion to Dismiss Under 12(b)(5)*

Under Fed. R. Civ. P. 12(b)(5), a party may move to dismiss a complaint due to insufficient service of process. "Once service is challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4."[50] "To determine whether service of process is proper, courts look to the requirements of [Rule 4]."[51] *Pro se* litigants must follow the same rules of procedure that govern other litigants.[52]

Under Fed. R. Civ. P. 4(c)(1), "[a] summons must be served with a copy of the complaint," and "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnished the necessary copies to the person who makes service." Moreover, under Rule 4(l), "[u]nless service is waived, proof of service must be made to the court." Rule 4(m) further provides that "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." "At a minimum, 'good cause' means excusable neglect."[53]

Good cause can also be demonstrated by explaining steps taken to correct deficiencies in service once a defendant notifies a plaintiff that it has not been properly served, or by evidence of

[49] *Id* (quoting *Miller v. Wright*, 705 F.3d 919, 927–28 (9th Cir. 2013)).

[50] *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

[51] *See, e.g., Cho, et al. v. UCBH Holdings, Inc.*, 890 F. Supp. 2d. 1190, 1198 (N.D. Cal. 2012).

[52] *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

[53] *Cho*, 890 F. Supp. 2d at 1198 (citing *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991)).

a plaintiff's diligence in attempting to serve a defendant.[54] The Ninth Circuit has also stated that a "plaintiff may be required to show the following factors to bring the excuse to the level of good cause: (a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed."[55]

"If there is no good cause for the delay, a court has discretion to dismiss without prejudice or to extend the time period."[56] "There is no specific test that a court must apply in exercising its discretion."[57] "Prejudice to either party is one factor that a court may consider, including statute of limitations issues."[58] "Courts may also look at whether plaintiff has substantially complied with the service requirements of Rule 4(m)."[59]

*C. Sua sponte dismissal*

Courts may dismiss a claim *sua sponte* under Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction and, until proven otherwise, cases lie outside the jurisdiction of the

[54] *See Puett v. Blandford*, 912 F.2d 270, 276 (9th Cir. 1990) (noting district court's acknowledgement of plaintiff's diligence and holding that failure to obtain proof of service was not due to plaintiff's neglect). *See also Rowell v. Ewing Bros. Towing Co.*, 471 F. App'x 597, 599 (9th Cir. 2012) (affirming district court dismissal for failure to serve where plaintiff did not show good cause for why he did not take steps to correct deficiencies in service once defendants notified him that it had not been properly served).

[55] *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (internal quotation marks omitted).

[56] *Cho*, 890 F. Supp. 2d at 1198 (citing *In re Sheehan*, 253 F.3d at 512).

[57] *Id.*

[58] *Cho*, 890 F. Supp. 2d at 1198 (citing *United States v. 2,164 Watches, More or Less, Bearing a Registered Trademark of Guess? Inc.*, 366 F.3d 767, 773 (9th Cir. 2004)).

[59] *Cho*, 890 F. Supp. 2d at 1198 (citing *Tyson v. City of Sunnyvale*, 159 F.R.D. 528, 530 (N.D. Cal. 1995)).

court.[60] A Rule 12(b)(1) jurisdictional challenge may be either facial or factual.[61] In a facial attack, the complaint is challenged as failing to establish federal jurisdiction, even assuming all the allegations are true and construing the complaint in the light most favorable to plaintiff.[62] When a claim is so defective that amendment could not possibly cure the complaint, the suit may be dismissed as frivolous without leave to amend for lack of subject matter jurisdiction.[63]

Courts may also dismiss a suit *sua sponte* for failing to state a claim under Fed. R. Civ. P. 12(b)(6).[64] Such a dismissal may be made without notice where the claimant cannot possibly win relief.[65] If claims are wholly frivolous, district courts lack subject matter jurisdiction to consider them.[66] Generally, where a pleading is defective but could be amended to state a claim, an opportunity must be afforded the *pro se* plaintiff to seek such an amendment.[67] A court need not grant leave to amend where it finds that "the pleading could not possibly be cured by the allegation of other facts."[68]

[60] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377–78 (1994).

[61] *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

[62] *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

[63] *See Scholastic Entm't, Inc. v. Fox Entertainment Grp.*, 336 F.3d 982, 985–86 (9th Cir. 2003) (stating that a judge may dismiss for lack of subject matter jurisdiction *sua sponte* without giving notice or an opportunity to amend).

[64] *See Wong v. Bell*, 642 F.2d 359, 361–62 (9th Cir.1981) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969)).

[65] *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

[66] *See Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 363–64 (2d Cir.2000).

[67] *See Lopez v. Smith*, 203 F.3d 1122, 1130–31 (9th Cir.2000) (en banc).

[68] *Id.* at 1130.

## IV. ANALYSIS

SEARHC filed a Motion to Dismiss Mr. Cole's claims against it and AICS pursuant to Fed. R. Civ. P. 12(b)(1) on July 17, 2019.[69] Specifically, SEARHC argues that it and AICS, to the extent it still exists, enjoy tribal sovereign immunity from unconsented private suits.[70] The United States, on behalf of the FTC, filed a separate Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient process.[71] The FTC asserts that Mr. Cole's First Amended Complaint was not delivered to it, thus, service was insufficient.[72] Mr. Cole opposes both motions in a single response.[73] The Court considers each motion in turn.

### *A. SEARHC and AICS are Entitled to Dismissal for Lack of Subject Matter Jurisdiction.*

SEARHC's 12(b)(1) motion wholly rests on its assertion of tribal sovereign immunity.[74] AICS merged with SEAHC in 2017, because AICS is no longer a separate entity, the Court finds whatever immunity SEARHC has from suit would also extend to AICS.[75] Tribal sovereign immunity is a creature of federal common law.[76] Entities protected by tribal sovereign immunity

[69] Dkt. at 25.

[70] Dkt. 26 at 1–2.

[71] Dkt. 28.

[72] *Id.* at 3.

[73] Dkt. 31.

[74] Dkt. 26 at 2.

[75] SEARHC has asserted that AICS merged with SEARHC in April 1, 2017, prior to Mr. Cole's suit. Dkt. 26 at 5. Mr. Cole does not dispute this. Therefore, to the extent that AICS still exists as a division of SEARHC, it shares in SEARHC's immunity from suit. *See Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1140 (N.D. Okla. 2001) ("The simple act of a tribe creating a corporate merger with a non-Indian entity, much like a contract action, is not considered a waiver of sovereign immunity.").

[76] *Id.* at 758-60 (noting that "the Court has taken the lead in drawing the bounds of tribal immunity . . . ."). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long

may not be sued by private parties.[77] Immunity generally attaches to federally-recognized tribes and entities which act as "arm[s] of the tribe[s]."[78] In some cases, tribal immunity may "extend[ ] to . . . organizations comprised of multiple tribes" or entities created by more than one tribe.[79] Tribal sovereign immunity may be waived by the tribe or may be abrogated at Congress' discretion.[80] The party asserting that the court has jurisdiction bears the burden to prove that sovereign immunity does not bar his suit.[81]

SEARHC argues that it is an "arm of the tribes" of Southeast Alaska.[82] Mr. Cole does not expressly dispute this. However, Mr. Cole states in his Amended Complaint that "SEARCH [sic] has abused their mandate and gone into non healthcare business."[83] Additionally, Mr. Cole restates his antitrust claims in his Response to SEARHC's motion.[84] Construing his assertions liberally, the Court finds that Mr. Cole contests SEARHC's assertion of immunity on two grounds: first, Mr. Cole claims that by expanding its services into the "non healthcare business," SEARHC was

been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

[77] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

[78] *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

[79] *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1237 (D. Alaska 2019) (citing *White*, 765 F.3d at 1018 and *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011)).

[80] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991).

[81] *Pistor*, 791 F.3d at 1112. There is no authority which shifts this burden in cases involving *pro se* plaintiffs.

[82] Dkt. 26 at 13.

[83] Dkt. 20 at 4.

[84] Dkt. 31-1.

not acting as an arm of the tribe during some or all of the relevant period; and second, Mr. Cole claims that tribal immunity has been abrogated in the context of antitrust suits. The Court finds each of these contentions unavailing.

1. For All Relevant Periods, SEARHC Operated as an "Arm of the Tribes" of Southeast Alaska.

The Ninth Circuit, in *White v. University of California*, identified five factors for courts to consider when determining whether an entity is entitled to tribal sovereign immunity: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."[85] If a court finds that an organization is an "arm of the tribe," it must dismiss any claims against that entity, unless Congress has abrogated tribal immunity for the cause of action at issue.[86] The Court, therefore, first considers whether SEARHC is an "arm of the tribe" under the five-factor analysis articulated in *White*.

SEARHC claims—and Mr. Cole has not disputed—that SEARHC's is an "inter-tribal consortium" comprised of fifteen federally-recognized tribes of Southeast Alaska created by tribal resolutions; that SEARHC is governed by a Board of Directors comprised of elected and appointed members from its constituent tribes; that the constituent tribes intended to share their sovereign immunity with SEARHC; and that, on behalf of the tribes, SEARHC manages funding received

[85] 765 F.3d at 1025. In *White*, the court considered whether a "Repatriation Committee" formed by resolutions of twelve tribes was entitled to share the tribes' sovereign immunity. *Id.* at 1018. Applying the five-factor test, the court held that each of the five factors was met. *Id.* at 1025. The court specifically noted, the whole purpose of the Repatriation Committee—to recover remains and educate the public—was core to the notion of sovereignty. *Id.*

[86] *See e.g., Okla. Tax Comm'n,* 498 U.S. at 509.

from the Indian Health Service.[87] Therefore, the Court finds that the first, third, fourth, and fifth *White* factors weigh in favor of finding the SEARHC, and all its divisions, is an arm of the tribes.[88]

Mr. Cole's arguments are construed to contest the second *White* factor: SEARHC's purpose.[89] As discussed in *White*, an organization whose purpose is "core to the notion of sovereignty[,]" or promotes "preservation of tribal cultural autonomy [and] preservation of tribal self-determination," is more likely to share the tribes' immunity.[90] As evidence of its purpose, SEARHC points to its Bylaws, which state as follows:

> "SEARHC is organized . . . to develop, operate and maintain health programs for Alaska Native and American Indian people in Southeast Alaska in a culturally appropriate manner; . . . to contract with the United States Government to operate health programs in Southeast Alaska under authority of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 25 U.S.C. § [5301] *et seq.*, as amended, and the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, as amended; . . . and . . . to provide health care to underserved communities in Southeast Alaska."[91]

Like the Repatriation Committee at issue in *White*, SEARHC's purpose of contracting with the federal government to provide healthcare to tribal members furthers "tribal self-determination and

[87] Dkt. 26 at 9–13.

[88] Because Mr. Cole bears the burden to prove that tribal sovereignty does not bar his suit, failing to provide evidence contesting specific elements must result in a finding that the elements weigh in favor of sovereign immunity. *Pistor*, 791 F.3d at 1112.

[89] Mr. White alleges that SEARHC has "abused its mandate." Dkt. 20 at 4. The Court construes this statement to contest that SEARHC is acting with purpose that is congruent with sovereign immunity.

[90] *White*, 765 F.3d at 1025.

[91] Dkt. 27-3 at 1.

self-governance" and "preserv[es] cultural autonomy," which are central policies to the doctrine of tribal sovereign immunity.[92]

Mr. Cole does not dispute the contents of SEARHC's Bylaws or that healthcare is an important sovereign interest. However, Mr. Cole does claim that "[SEARHC] has abused their mandate and gone into non healthcare business."[93] To support his claim, Mr. Cole attached a letter dated September 6, 2018 from Trish and Dirk White of Sitka, Alaska.[94] The letter states that SEARHC's mission statement "was modified to include ALL folks-not just Alaska Native beneficiaries" and that SEARHC's operations now included "catering/food service business, short term rental business and [ ] a transportation business."[95]

Thus, the Court must consider whether the alleged inclusion of non-healthcare commercial enterprises, or the expansion of services to non-Native Alaskan individuals, would displace tribal sovereign immunity under *White*. The Court concludes that it does not. First, past courts have recognized tribal sovereign immunity can protect enterprises that are purely commercial in nature. "The question is not whether the activity may be characterized as a business . . . but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."[96] In fact, numerous entities which carry out a predominately commercial purpose have been held to

[92] *Id. See also White,* 765 F.3d 1010; *Barron*, 373 F. Supp. 3d at 1240 (holding that Alaska Native Tribal Health Consortium's purpose of "entering into 'self-determination and self-governance agreements' . . . is 'core to the notion of sovereignty.'").

[93] Dkt. 20 at 4.

[94] *Id.* at 7.

[95] *Id.*

[96] *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006).

share tribes' sovereign immunity.[97] Second, Mr. Cole cites to no authority, nor is the Court aware of any, supporting the proposition that a tribal enterprise serving non-tribal members ceases to have a substantial tribal purpose.[98] Therefore, even if the Court were obliged to take the Mr. Cole's claims as true, they would not necessarily demonstrate that SEARHC's purpose is unrelated to tribal interests. The Court finds that SEARHC's purpose, as established by the Bylaws, sufficiently supports its claim for "arm of the tribe" status.

For the foregoing reasons, the Court finds that the five factors identified in *White* weigh in favor of recognizing SEARHC as an arm of its constituent tribes. SEARHC is thus generally entitled to immunity from suit as traditionally enjoyed by sovereigns.

2. Congress Did Not Abrogate Tribal Immunity Under Any Relevant Antitrust Statutes

Because SEARHC enjoys tribal sovereign immunity from unconsented suit, the only way that Mr. Cole's suit can proceed is if Congress has abrogated tribal immunity for his claims.[99] Congressional abrogation "must be unequivocally expressed in explicit legislation."[100] Abrogation of tribal sovereign immunity may not be implied."[101]

[97] *See, e.g., Allen*, 464 F.3d at 1047 (a tribally owned casino); *Cook*, 548 F.3d at 725 (a tribally owned casino); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (tribally owned payday lending businesses).

[98] Past courts' determinations that tribal businesses serving both Indians and non-Indians alike retain sovereign immunity cuts against this proposition. *See, e.g., Allen*, 464 F.3d at 1047. Accordingly, absent some authority to the contrary, the Court is not persuaded that merely extending healthcare services to non-Indians would vitiate the benefits received by tribal members or would cease to support the tribes' sovereign interests such that SEARHC would no longer be considered an "arm of the tribe."

[99] *See e.g., Okla. Tax Comm'n,* 498 U.S. at 509.

[100] *Miller*, 705 F.3d at 926.

[101] *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) (holding that the Bankruptcy Code abrogated tribal sovereign immunity by its reference to "all foreign or domestic governments."). *See also Osage Tribe of Indians v. U.S. Dep't of Labor*, 187 F.3d 1174,

Mr. Cole brings this suit alleging violations of federal antitrust laws.[102] The Ninth Circuit has held that "federal antitrust law does not 'unequivocally express[ ] in explicit legislation' that it abrogates tribal sovereign immunity."[103] Neither the Sherman Act, 15 U.S.C. § 1, or the Clayton Act refer to tribes explicitly. Nor does either statute use definition of "person" broad enough to unequivocally include tribes by implication.[104] No other antitrust statute under which Mr. Cole could seek relief abrogates tribal sovereign immunity such that Mr. Cole's claims against SEARHC can proceed. Because SEARHC is shielded by tribal sovereign immunity and Congress has not abrogated its immunity for antitrust actions, the Court lacks jurisdiction to hear Mr. Cole's suit against SEARHC or any of its divisions.[105]

Accordingly, SEARHC's Motion to dismiss the claims against SEARHC and AICS pursuant to Fed. R. Civ. P. 12(b)(1) is **GRANTED**.

1181 (10th Cir.1999) (finding the Safe Drinking Water Act "contains a clear and explicit waiver of tribal immunity" because its definition of person includes municipalities, whose definition in turn includes Indian tribes.); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.1989) (holding that the Resource Conservation and Recovery Act of 1976 "clearly indicates congressional intent to abrogate the Tribe's sovereign immunity . . . .").

[102] Dkt. 20.

[103] *Miller*, 705 F.3d at 926 (holding that the Sherman Act and the Clayton Act did not abrogate tribal sovereignty).

[104] The Sherman Act, for example, refers only to states and foreign nations. 15 U.S.C. § 1. Likewise, the Clayton Act purports to apply to "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 12.

[105] The Sherman Act and Clayton Act create a cause of action against "persons" including corporations existing under state law. 15 U.S.C. §§ 7 and 12. Under Alaska law, where a merger takes place "the merging entity that is not the surviving entity ceases to exist," while the surviving entity assumes all the liabilities of the disappearing entity. Alaska Stat. § 10.55.206. Therefore, for purposes of an antitrust claim, this Court finds that AICS did not exist separately from SEARHC at the time Mr. Cole filed his Amended Complaint. Establishing SEARHC's immunity is therefore dispositive for both SEARHC and AICS as defendants.

*B. The FTC is entitled to dismissal for insufficient service of process*

The FTC filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process.[106] "To determine whether service of process is proper, courts look to the requirements of [Rule 4]."[107] Under Fed. R. Civ. P. 4(c)(1), "[a] summons must be served with a copy of the complaint." The FTC alleges it did not receive a copy of Mr. Cole's First Amended Complaint with the summons.[108] Mr. Cole admits that he did not send a paper copy along with his summons.[109] Therefore, under Rule 12(b)(5), service of process on the FTC was insufficient.

Where service of process is insufficient, the court may dismiss the action or allow the plaintiff an extension of time to cure defects in service. [110] "There is no specific test that a court must apply in exercising its discretion."[111] The Court is persuaded by the absence of any specific claims asserted against the FTC that it is appropriate to dismiss the FTC as a defendant rather than allowing Mr. Cole to perfect service. The Court notes that even if Mr. Cole had properly served the FTC with a copy of his First Amended Complaint, his complaint fails to raise any cognizable claims against the FTC. Even assuming all of Mr. Cole's allegations are true, and construing his claims liberally, he only attributes wrongdoing to AICS, SEARHC, and DHHS. Further, the Court has already disposed of Mr. Cole's motion to compel an FTC investigation, which is the only connection Mr. Cole's filings make between the FTC and this case.

[106] Dkt. 28.

[107] *Cho*, 890 F. Supp. 2d. 1190, 1198 (N.D. Cal. 2012).

[108] Dkt. 28 at 3.

[109] Dkt. 31-1.

[110] *Id.*

[111] *Id.*

Furthermore, as discussed below, the Court finds that allowing Mr. Cole another opportunity to amend his complaint would be futile. No additional facts could be plead that would make the FTC—a federal agency—liable for a violation of federal antitrust law. Therefore, the FTC should be dismissed with prejudice.

Accordingly, the FTC's Motion to Dismiss is for insufficient service of process **GRANTED**.

*C. The DHHS and the U.S. Attorney's Office are Entitled to Dismissal Sua Sponte*

The only remaining defendants named in Mr. Cole's First Amended Complaint are the U.S. Attorney's Office and DHHS. Neither of the U.S. Attorney's Office or the DHHS have made a motion to dismiss this action against them. However, the Court here considers dismissing DHHS and the U.S. Attorney's Office *sua sponte* for lack of subject matter jurisdiction and failure to state a claim respectively.

1. Mr. Cole's Antitrust Claim Against DHHS is Barred by Sovereign Immunity

Mr. Cole's Amended Complaint suggests that DHHS is responsible for the loss to his business by facilitating the 340B Program. [112] Although no specific claims are asserted against DHHS, Mr. Cole's allegations sound as claims in antitrust. The 340B Program, he claims, results in an unfair market advantage for certain pharmacies. [113] Mr. Cole also argues that the 340B pharmacies use DHHS funds to engage in unlawful restraint of trade practices.[114] And, the only

[112] Dkt. 20 at 4.

[113] *Id.*

[114] *Id.* at 9.

remedy Mr. Cole seeks is treble damages—an antitrust remedy.[115] Accordingly, the Court construes Mr. Cole's claims as an antitrust action against DHHS.

Courts may dismiss a claim *sua sponte* under Fed. R. Civ. P. 12(b)(1). Sovereign immunity is one basis for dismissal under Fed. R. Civ. P. 12(b)(1). [116] "It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued."[117] "A suit against a federal agency or officer which seeks relief against the sovereign is, in effect, a suit against the sovereign."[118] Therefore, sovereign immunity is implicated whenever a federal agency is sued.[119] Courts must "strictly construe in favor of the government the scope of any waiver of sovereign immunity."[120] If the plaintiff lacks a specific waiver of sovereign immunity for his claim against the United States, then the suit fails both for want of subject matter jurisdiction, and for failure to state a claim on which relief may be granted.[121]

Private antitrust claims may be brought under the Sherman Act or the Clayton Act.[122] Neither of these Acts contain a waiver of the United States' sovereign immunity. Therefore,

[115] *Id.* at 14.

[116] *Orff v. U.S.*, 358 F.3d 1137, 1142 (9th Cir. 2004).

[117] *Id.*

[118] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88 (1949).

[119] *Id.*; see *Beller v. Middendorf*, , 796–98 (9th Cir.1980), overruled on other grounds by *Lawrence v. Texas*, 539 U.S. 558 (2003).

[120] *Orff*, 358 F.3d at 1142.

[121] *Id.*

[122] *See* 15 U.S.C. §§ 1–2 and 12–27.

Mr. Cole's antitrust claims against DHHS—an agency of the United States—are barred by sovereign immunity. Furthermore, even if such waiver did exist, Mr. Cole's antitrust claims against the government fail under the plain language of those statutes. Both the Sherman Act and the Clayton Act prohibit "persons" from engaging in certain anticompetitive behaviors. "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."[123] It is well-established that the United States and its agencies cannot be an antitrust defendant. [124]

Here, Mr. Cole brings an antitrust action against DHHS, an agency of the federal government. Even if, sovereign immunity did not lie in this case, DHHS cannot be held to be liable under federal antitrust laws. DHHS is not a "person" under the relevant statutes. Therefore, Mr. Cole's antitrust claims cannot be maintained against DHHS. The Court finds that no amendment could possibly cure this deficiency.

Accordingly, Mr. Cole's claims against DHHS are **DISMISSED** pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

2. Mr. Cole's Filings are Devoid of any Claims Against the U.S. Attorney's Office

Courts may also dismiss a suit *sua sponte* for failing to state a claim under Fed. R. Civ. P. 12(b)(6).[125] Such a dismissal may be made without notice where the claimant cannot possibly win

[123] *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941).

[124] *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004) (citing *Cooper Corp.*, 312 U.S. at 604). *See also Sea-Land Serv., Inc. v. Alaska R. R.*, 659 F.2d 243, 246 (D.C. Cir. 1981) ("[a]ccordingly, we hold that the United States, its agencies and officials, remain outside the reach of the Sherman Act.").

[125] *See Wong*, 642 F.2d at 361–62.

relief.[126] Generally, if a pleading is defective but could be amended to state a claim, an opportunity must be afforded the *pro se* plaintiff to amend.[127] A court need not grant leave to amend where it finds that "the pleading could not possibly be cured by the allegation of other facts."[128]

Mr. Cole makes no claims against or which implicate the U.S. Attorney's Office. Additionally, for the reasons discussed above, there are no facts which Mr. Cole could plead which would make the U.S. Attorney's Office—a federal agency—liable for an antitrust violation.

Accordingly, the U.S. Attorney's Office is **DISMISSED WITH PREJUDICE** pursuant to Fed. R. Civ. P. 12(b)(6).

## V. CONCLUSION

For the foregoing reasons the Court **HEREBY ORDERS** as follows,

1. The Motion to Dismiss at docket 25 is **GRANTED**, and all claims against SEARHC and AICS are **DISMISSED** for lack of subject matter jurisdiction;

2. The Motion to Dismiss at docket 28 is **GRANTED**, and all claims against the FTC are **DISMISSED WITH PREJUDICE**;

3. On the Court's own motion, all claims against DHHS and the U.S. Attorney's Office are **DISMISSED WITH PREJUDICE**.

The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 11th day of October, 2019.

*/s/ Timothy M. Burgess*
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

[126] *Omar*, 813 F.2d at 991.

[127] *See Lopez*, 203 F.3d at 1130–31.

[128] *Id.* at 1130.