IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0034

LUSTRE OIL COMPANY LLC, and
EREHWON OIL & GAS, LLC,

Plaintiffs and Appellants,

v.

ANADARKO MINERALS, INC. and
A&S MINERAL DEVELOPMENT
CO., LLC,

Defendants and Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Seventeenth Judicial District Court
County of Valley, Cause No. DV-2021-04
Honorable Yvonne Laird Presiding

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2. Whether the District Court erred in finding that A&S is an arm of the Tribes and therefore is considered the Tribes for purposes of sovereign immunity.

3. Whether the District Court erred in finding that A&S did not waive any applicable sovereign immunity.

4. Whether the District Court erred in finding that A&S was a necessary and indispensable party that could not be joined.

STATEMENT OF THE CASE

A. Introduction

This appeal challenges the District Court's decision that A&S—an entity created under Delaware law—possesses sovereign immunity as an arm of the Assiniboine and Sioux Tribes of the Fort Peck Reservation Tribes ("Tribes"). In finding that it lacked subject matter jurisdiction, the District Court committed reversible errors in three ways. First, the District Court failed to utilize well-established law from the Tenth Circuit that holds entities formed under a separate sovereign or states' laws lack sovereign immunity. Here, A&S is not formed under Tribal law and thus, as a matter of law, lacks sovereign immunity.

Second, the District Court erred in applying the Ninth Circuit's five-part test to determine if A&S is protected by immunity as an arm of the Tribes. Last, the District Court erred in holding that the Tribes and A&S had not waived A&S's sovereign immunity.

B. Underlying Dispute and Parties

The underlying case is a simple quiet title action to determine whether certain fee (i.e., non-Tribal) oil and gas leases previously owned by Anadarko Minerals Inc. ("Anadarko") or new fee leases taken by Lustre Oil Company, LLC and Erehwon Oil & Gas, LLC (collectively "Lustre") are valid. The leases previously owned by Anadarko are referred to herein as "Expired Leases" and the

leases owned by Lustre are referred to herein as "New Leases." There is no dispute over any tribal or allottee-owned oil and gas mineral leases or interests.

The Expired Leases at issue in this case were executed and agreed to by non-tribal private mineral owners who never consented to lease their minerals to the Tribes or an entity with sovereign immunity. Furthermore, the private mineral owners never agreed to lease their minerals to a Tribal entity that possessed sovereign immunity.

The Tribes expressly created A&S to protect the Tribes' assets and shift liability from the Tribes to A&S. To facilitate the alleged acquisition of the subject wells and leases from Anadarko, the Tribes intentionally transferred all such oil and gas operations from the Tribal government to A&S to operate oil and gas development activities separate and distinct from the Tribes.

C. Sovereign Immunity for Entity Incorporated Solely Under Laws of Another Sovereign

While A&S is owned by the Tribes and formed with the approval of the Tribal Executive Board ("TEB"), A&S is not formed under Tribal law. The TEB formed and authorized A&S under the laws of Delaware by its own free choice and registered it to do business in Montana as a foreign LLC. Neither the Tribes nor A&S ever incorporated A&S under Tribal law, or expressly subjected A&S to tribal law as a Tribal limited liability company ("LLC"). This Court must address whether an entity owned by the Tribes, but formed

under the laws of another sovereign state (Delaware) and which disavows its sovereign immunity, actually possesses immunity from suit in Montana state courts.

D. *White* Factors

Because the TEB formed A&S under and subject to the laws of the State of Delaware, the only way that A&S may be protected from suit in a Montana state court is under a theory of sovereign immunity known as an "arm of the Tribes." The multi-factor test from *White v. Univ. of Cal*., 765 F.3d 1010, 1025 (9th Cir. 2014), however, is used to determine if an entity created under tribal law qualifies for sovereign immunity. Under this five-factor test, this Court considers: (1) A&S's method of creation; (2) A&S's purpose; (3) A&S's management; (4) whether the Tribes intended to share sovereign immunity with A&S; and (5) A&S's financial relations with the Tribes. Based on these five factors, the Court must decide whether the District Court erred in finding that A&S is an arm of the Tribes for purposes of sovereign immunity.

E. Waiver

In documents executed under Delaware law, the TEB and Tribes expressly acknowledged that A&S—when created in 2009—lacked tribal sovereign immunity and irrevocably waived any future right to assert sovereign immunity. Specifically, the Tribes expressly acknowledged A&S's lack of

sovereign immunity when it authorized A&S to execute the Limited Liability Company Agreement of the Fort Peck Energy Company, LLC ("FPEC Operating Agreement") which was the purpose upon which the Tribes formed A&S. This Court must consider whether A&S ever enjoyed sovereign immunity as an arm of the Tribes and, if so, whether the Tribes' actions constitute a waiver of sovereign immunity.

F. Appellate Jurisdiction

This Court has jurisdiction over this appeal pursuant to M. R. App. P. 4. The District Court entered its Order on January 14, 2022 dismissing Lustre's Complaint. This was a final appealable district court order under M. R. App. P. 4. Lustre timely filed its Notice of Appeal on January 21, 2022.

STATEMENT OF FACTS

A. Background and Historical Summary

Decades ago, many private mineral owners in Valley County, Montana leased their minerals with the promise inherent in all oil and gas leases that their minerals would be developed and they would receive royalties. Appx 003 (Complaint ¶9).[1] Anadarko operated some wells on the Expired Leases years ago, but production in the field tapered off and Anadarko did not invest in boosting production. Appx 003 (Complaint ¶¶ 9 - 10).

[1] This brief uses the format Appx [page number] in citation to the page number of the relevant document included in the Appendix.

A&S acquired the Expired Leases from Anadarko as part of a settlement agreement between the Tribes, Anadarko, and the United States Environmental Protection Agency, which related to penalties resulting from an oil spill on Tribal lands within the Reservation. This settlement agreement and its underlying circumstances are completely unrelated to the New Leases at issue in this case. Appx 025 (Order at 2).

Prior to Anadarko's assignment to A&S, the Expired Leases had all terminated, because the leases produced no oil or gas and Anadarko made no royalty payments for many months. Appx 003 (Complaint ¶ 13). Many owners of mineral interests that had been leased to Anadarko signed Affidavits of Non-Production, Non-Payment and Forfeiture of Lease, attesting to the termination of the Expired Leases. Appx 003 (Complaint ¶ 15). Those same owners executed new, valid, oil and gas leases with Lustre. Appx 003 (Complaint ¶ 16). A&S refuses to acknowledge that the Expired Leases are no longer valid, which amounts to a claim adverse to Lustre's valid New Leases. Appx 004 (Complaint ¶ 20).

In order to operate the oil and gas wells located on fee lands and to develop non-Tribal minerals, A&S had to obtain authorization from the Montana Board of Oil and Gas Conservation ("MBOGC") to become the designated operator of the fee wells and post a plugging and restoration bond with the State of Montana

agency. Lustre protested this request before the MBOGC and the MBOGC held a hearing on December 3, 2020. At this hearing, A&S's representative and attorney stated that any issues involving the validity of the Expired Leases would be "resolved in civil court." Appx 057 (Transcript of MBOGC hearing at 17:1-2). Further, A&S confirmed that since the Expired Leases are on fee lands, the MBOGC has jurisdiction over any wells developed pursuant to the Expired Leases.

A&S's attorney specifically addressed this jurisdictional issue at the MBOGC hearing as follows:

> MBOGC: Okay. And then one follow-up to that, where A&S is going to be operating off of tribal lands, right, which is going to be the case here, is there any BIA oversight involved in that operation?
>
> MR. WENNER [A&S's Attorney]: No, there will be no BIA oversight on those. I think – Mr. Chairman, I believe you're trying to get **a jurisdictional question** here. It is a state incorporated entity, so it's not – it is member managed by the tribes, **but it's a state corporation**. All these wells, as you correctly pointed out, are on fee land. **So under Federal law and the laws of the State of Montana this Board does have jurisdiction over those wells**, so – or else we wouldn't be here right now, we'd be talking to the Feds.

Appx 059 (Transcript of MBOGC hearing at 30:2-16). Ultimately, the MBOGC granted A&S operatorship of the fee wells, i.e., those which develop privately-owned minerals. Based on these actions, Lustre filed a quiet title action to clear the cloud on its title, caused by A&S's operation of wells on Lustre's New Leases, and A&S's refusal to acknowledge that the Expire Leases terminated.

Lustre named A&S as a defendant in the quiet title action because A&S claims an interest adverse to Lustre through the Expired Leases.

B. Formation and Operation of A&S

On March 9, 2009, the Tribes acting through the TEB enacted Resolution No. 1514-2009-03 which authorized the Tribes' attorneys to create A&S to "secure business relationships with creditable oil and gas companies…." Appx 060 (Resolution No. 1514-2009-03). The TEB also approved the Limited Liability Company Agreement of A&S Mineral Development Company, LLC ("A&S Operating Agreement"), which provides that A&S is a single member LLC, wholly owned by the Tribes, and authorized by and subject to the laws of Delaware, not Tribal law. Appx 062 (Resolution No. 2276-2009-10).

The A&S Operating Agreement contains a provision on sovereign immunity which provides that:

> Any agreements, obligations, and transactions entered into by [A&S] shall be solely for its account **and only its assets shall be subject to any claim related thereto**. In no event shall the Tribes have any obligation or be subject to any claim with respect to any agreement or transaction into which the company may enter or engage. Nothing herein contained shall be construed as a waiver or limitation of the sovereign immunity possessed and enjoyed by the Tribes as federal recognized Indian tribes, or by their officers, the members of their Executive Board, their employees and agents. (emphasis added)

Appx 072 (A&S Operating Agreement at paragraph 10.9). In other words, the TEB drafted the A&S Operating Agreement to protect the Tribes by shifting all liability to A&S.

Resolution No. 1514-2009-03 also authorized A&S to execute the FPEC Operating Agreement between the Tribes, Native American Resource Partners, LLC, and Quantum Tribal Energy Capital LLC, to develop oil and gas resources. The development of these oil and gas resources was not limited to developing oil and gas on the Reservation. Appx 060 (Resolution No. 1514-2009-03); Appx 079 (FPEC Operating Agreement, § 1.3).

Again, as part of this agreement, the TEB and Tribes agreed that A&S will not possess sovereign immunity, and it irrevocably waived any sovereign immunity that it may be construed to possess in the future. Specifically, the TEB agreed that:

> 1. The Assiniboine and Sioux Tribes hereby acknowledge that [A&S] does not and shall not be construed to possess sovereign immunity.
>
> 2. In order to remove all doubt in this regard, the Assiniboine and Sioux Tribes hereby irrevocably waive any right they otherwise might have to assert, and agree that they will not now **or in the future** assert, that [A&S] possesses sovereign immunity.
>
> 3. Further in this regard, the Assiniboine and Sioux Tribes hereby waive any sovereign immunity that [A&S] now **or in the future** may possess or may be construed to possess ....

Appx 137 (FPEC Operating Agreement Exhibit E: Acknowledgement and Waiver of Sovereign Immunity with Respect to Tribes Holding Company ("Acknowledgment and Waiver")) (emphasis added).

C. Proceedings Below

Lustre filed an action in Valley County District Court seeking a declaration that its New Leases are valid and that the Expired Leases obtained by A&S from Anadarko terminated under the plain language of those leases. Appx 004-005 (Complaint at ¶¶ 23-33).

A&S and Anadarko filed motions to dismiss under M. R. Civ. P. 12(b)(1), 12(b)(6) and 12(b)(7). The District Court granted A&S's motion to dismiss under M. R. Civ. P. 12(b)(1) finding that it lacked subject matter jurisdiction over A&S because A&S possessed sovereign immunity as an arm of the Tribes ("Order"). The District Court also granted Anadarko's motions to dismiss, and A&S's motion to dismiss under M. R. Civ. P. 12(b)(7) finding that A&S was a necessary party that could not be joined. Lustre timely appealed. Lustre appeals both orders of the District Court.

STANDARD OF REVIEW

A District Court's "determination of a motion to dismiss based on a claim of sovereign immunity is a legal question over which our review is plenary." *Bradley v. Crow Tribe of Indians*, 2003 MT 82, ¶¶ 11-12, 315 Mont. 75, 67 P.3d 306;

Thompson v. Crow Tribe of Indians, 1998 MT 161, ¶ 10, 289 Mont. 358, 962 P.2d 577 (citation omitted).

The Court reviews a district court's ruling on a motion to dismiss for lack of subject matter jurisdiction de novo. *Big Spring v. Conway (In re Estate of Big Spring)*, 2011 MT 109, ¶ 20, 360 Mont. 370, 255 P.3d 121. "A district court must determine whether the complaint states facts that, if true, would vest the court with subject matter jurisdiction." *Id*., citing *Meagher v. Butte-Silver Bow City-Cnty.*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552; *General Constructors, Inc. v. Chewculator, Inc.*, 2001 MT 54, ¶ 16 (citing *Liberty Nw. Ins. Corp. v. State Comp, Ins. Fund*, 1998 MT 169, ¶ 7, 289 Mont. 475, 962 P.2d 1167). This determination by a district court is a conclusion of law that we review for correctness. *Id*.

"[W]here a motion to dismiss is based on a claim of sovereign immunity, the court must engage in sufficient pretrial factual and legal determinations to 'satisfy itself of its authority to hear the case' before trial." *Bradley*, 2003 MT at ¶ 18 (quoting *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan* , 115 F.3d 1020, 1027-28 (D.C. Cir. 1997)). Determination of whether A&S is protected by the Tribes' immunity involves a mixed question of law and fact. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010); *Buckles v. Cont'l Res., Inc.*, 2020 MT 107, ¶ 10, 400 Mont. 18, 462 P.3d 223. The legal question is which is "the appropriate test to determine whether economic

entities associated with a tribe may share in the tribe's immunity." *Breakthrough Mgmt. Grp., Inc.* 629 F.3d at 1181. Additionally, the court must make factual determinations regarding the entity claiming immunity. *Id*. This Court reviews factual findings for clear error, and the application of legal principles to those factual findings de novo. *Buckles*, 462 P.3d at 228. This Court uses a three-part test to determine clear error: "[c]lear error exists if substantial credible evidence fails to support the findings of fact, if the district court misapprehended the evidence's effect, or if we have a definite and firm conviction that the district court made a mistake. *Roland v. Davis*, 2013 MT 148, ¶ 21, 370 Mont. 327, 302 P.3d 91.

A&S's motion to dismiss "should be construed in a light most favorable to the non-moving party and should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief." *General Constructors*, 2001 MT 54 at ¶ 17 (citation omitted). "A motion to dismiss pursuant to Rule 12(b)(1), M. R. Civ. P., for lack of subject matter jurisdiction may only be granted if the complaint states no facts that would give the court jurisdiction." *Ronan Tel. Co. v. Mont. Dep't of Pub. Serv. Regul.*, 2003 ML 3160, 5, 2003 Mont. Dist. LEXIS 3340, at *3.

Where a defendant corporation cannot assert sovereign immunity because it is not an "arm of the tribe," a motion to dismiss under M. R. Civ. P. 12(b)(1) based on sovereign immunity must be denied. *Hunter v. Redhawk*

Network Sec., LLC, No. 6:17-cv-0962-JR, 2018 U.S. Dist. LEXIS 148249, at *14 (D. Or. Apr. 26, 2018).

SUMMARY OF THE ARGUMENT

Lustre makes three arguments in support of its appeal requesting this Court reverse the District Court's Order.

First, A&S does not qualify for tribal immunity as a Delaware LLC not formed under Tribal law. The Tenth Circuit Court of Appeals squarely addressed the question of whether an entity formed under state law may share tribal immunity in *Somerlott v. Cherokee Nation Distribs.,* 686 F.3d 1144 (10th Cir. 2012) . The Ninth Circuit Court of Appeals, on the other hand, has not expressly addressed tribal sovereign immunity of an entity formed solely under state law, as opposed to under tribal law. This Court should adopt the sound reasoning and analysis of *Somerlott* and find that A&S lacks sovereign immunity protection of the Tribes because the TEB made the voluntary decision to form A&S under Delaware law, thereby subjecting it to suit and liability.

Second, A&S is not protected as a sovereign entity from suit in a Montana state court as an "arm of the Tribes" pursuant to the test set forth in the Ninth Circuit's decision in *White*, 765 F.3d at 1025. Specifically under the five specific *White* factors, A&S has not met its burden to establish that it possesses sovereign

immunity as an arm of the Tribes because: (1) its method of creation as a Delaware LLC—not a Tribal entity—supports its independence as a non-Tribal entity; (2) its purpose was to shield the Tribes from liability, not share in it; (3) its management and operation is separate and distinct from that of the Tribes; (4) the Tribes did not intend in any way to share their sovereign immunity with A&S; and (5) the financial relationship between A&S and the Tribes does not support extending sovereign immunity to A&S. Review of these five factors together, in light most favorable to Lustre, establishes that the District Court erred as a matter of law in finding that A&S is an arm of the Tribes that is protected from suit as a sovereign entity.

Last, the District Court erred as a matter of law in finding that A&S's motion was not precluded by a waiver of immunity. As discussed above, A&S never enjoyed the sovereign immunity of the Tribes, so a waiver of immunity is not necessary. However, even assuming A&S possessed sovereign immunity (although it did not), A&S, the TEB, and the Tribes expressly waived any immunity that A&S might otherwise claim. Therefore, this Court should hold that the District Court has jurisdiction over A&S because it waived immunity.

ARGUMENT

I. A&S Lacks Sovereign Immunity as a Matter of Law

A. Legal Background and Standards of Review

The sovereign immunity of the Tribes is "a matter of federal law and is

not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 1703 (1998). Montana courts have, however, looked to federal court decisions as persuasive on tribal sovereignty issues and acknowledged that it is a matter of federal law. *See, e.g.*, *Thompson*, 1998 MT at ¶ 17, 289 Mont. 358, 962 P.2d at 580; *Bradley*, 2003 MT 82, ¶ 17, 315 Mont. 75, 67 P.3d 306 (citing *Kiowa Tribe of Okla.*, 523 U.S. at 756, 118 S. Ct. at 1703).

The Tenth Circuit's decision in *Somerlott* is the leading authority on this issue, i.e. the applicability of sovereign immunity for entities formed under state law, rather than tribal law. Specifically in *Somerlott*, the Tenth Circuit addressed whether the "subordinate economic entity" test applied to CND, LLC (a separate legal entity formed under the laws of Oklahoma), which claimed it shared sovereign immunity with the Cherokee Nation. *Somerlott*, 686 F.3d at 1146. The Tenth Circuit distinguished the situation from that of *Breakthrough* and held that the five-part "subordinate economic entity" test does not apply to a corporation incorporated under a separate state law system. *Id.* at 1149-50 ("CND, a separate legal entity organized under the laws of another sovereign, Oklahoma, cannot share in the Nation's immunity from suit, and **it is not necessary to apply the six-factor [Breakthrough] test**." (emphasis added)).

In addition, the concurring opinion persuasively concluded that the five-part subordinate economic entity test (also described as the arm-of-the-tribe test) does not apply to an entity incorporated under state law. The following concurrence is founded on strong legal principles and reasoning:

> But this court has never applied the subordinate economic entity test to entities incorporated under the laws of a second sovereign. And for good reason. There's no need to . . . . Looking to Oklahoma law, the answer is as apparent as it is unavoidable — telling us in clear terms that CND, LLC is indeed a "separate legal entity" from its tribal owner.

Id. at 1158 (Gorsuch concurring).

The Ninth Circuit has not specifically addressed the situation in *Somerlott* regarding an entity formed solely under state law as a specific reason to deny sovereign immunity. In both the *White* case and the *Breakthrough* case, both entities that claimed "arm of the tribe" immunity were originally incorporated under tribal law. While *White* discussed the *Breakthrough* factors, it does not utilize the *Somerlott* test because the corporate entity at issue was incorporated under tribal law. *Id.* (The Kumeyaay Cultural Repatriation Committee "was created by resolution of each of the Tribes, with its power derived directly from the Tribes' sovereign authority."). Since the Ninth Circuit has not yet addressed the specific holding in *Somerlott* regarding the issue of sovereign immunity for entities formed under state law, the Ninth Circuit has not rejected the principle set forth in *Somerlott*.

B. District Court Erred in Finding that A&S Has Sovereign Immunity

The District Court erred in giving deference to *White* and ignoring *Somerlott*. Here, the Montana Supreme Court should adopt the Tenth Circuit's analysis and test regarding the applicability of sovereign immunity to LLCs and corporations that are formed solely under a separate state law, including Delaware. As a Delaware LLC, subject to Delaware law, this Court should hold—consistent with analysis in *Somerlott*—that A&S does not possess sovereign immunity as a matter of law. This is particularly so where, as here, the entity is engaged in transactions involving non-Tribal property not otherwise subject to Tribal jurisdiction.

1. *It is Undisputed That the TEB Formed A&S Under Delaware Law and Not Under Tribal Law*

The TEB authorized the creation of A&S under Delaware law pursuant to Tribal Resolution 1514-2009-03, dated March 9, 2009, stating "On behalf of the Tribes, the tribal attorneys will create a Delaware Limited Liability Company, to be called A&S Mineral Development Company, LLC…." Appx 060. TEB created A&S in Delaware on March 10, 2009, the day after TEB passed Tribal Resolution 1514-2009-03. Appx 140 (Delaware Secretary of State Filing). It is undisputed that A&S has never been incorporated under Tribal law, and any inference to the contrary is overcome by the Court's obligation to view facts in the light most favorable to Lustre. Thus, there is no

dispute that A&S is formed solely as a Delaware entity under Delaware state law.

2. *The District Court Erred in Finding that A&S's Organization under Delaware Law is Not Dispositive*

The District Court found that the Tenth Circuit case of *Somerlott* was not persuasive, solely for the reason that it is from the Tenth Circuit. Appx 034-035 (Order at 11-12). Instead, the District Court, relying on *MacPheat v. Mahoney*, 2000 MT 62, ¶ 20, 299 Mont. 46, 997 P.2d 753, concluded that Ninth Circuit decisions in matters of federal law should be given deference by Montana state courts. Appx 034-035 (Order at 11-12).[2]

However, *MacPheat* did not hold that all Ninth Circuit decisions should be given precedence over decisions by other federal appellate courts. Indeed, in *MacPheat*, the Montana Supreme Court concluded that a specific Ninth Circuit Court of Appeals' decision (*MacFarlane v. Ducharme*, 179 F.3d 1131 (9th Cir. 1999)) was persuasive on a particular issue because *MacFarlane* applied federal law "to the precise issue… in the case at bar." *MacPheat* at ¶ 20. The decision in *MacPheat* concluded that the Ninth Circuit case was persuasive because it was most germane, not because it was from the Ninth Circuit. *Id*.

[2] This Court has expressly looked to other federal circuit courts beyond the Ninth Circuit. *See, e.g. Bradley*, 2003 MT at ¶ 18 (relying on D.C. Circuit); *Orr v. State*, 2004 MT 354, ¶ 62, 324 Mont. 391, 412-13, 106 P.3d 100, 114 (relying on Tenth Circuit).

Accordingly, the District Court erred in determining that *Somerlott* is not persuasive, simply because *Somerlott* is not from the Ninth Circuit.

The District Court also relied on *Mark Ibsen, Inc. v. Caring for Montanans, Inc.,* 2016 MT 111, ¶ 44, 383 Mont. 346, 360, 371 P.3d 446, 455 for the proposition that "in matters of federal law Ninth Circuit decisions, while not binding, should be given deference by Montana state courts." Appx 034-035 (Order at 11-12). However, the District Court's reliance on *Mark Ibsen* is also misplaced because *Mark Ibsen* held that *all* federal court decisions are potentially persuasive, not just the Ninth Circuit. *Mark Ibsen, Inc*. at ¶ 44 ("when *federal courts* have ruled on issues substantially similar to those before us, it is proper for us to review their opinions for guidance.") (emphasis added). Like its reliance on *MacPheat*, the District Court erred in relying on the opinion in *Mark Ibsen* in rejecting the *Somerlott* analysis because it has not been adopted by the Ninth Circuit, even though the Ninth Circuit has not rejected this sound judicial principle.

In refusing to consider *Somerlott*, the District Court also erred in relying on *Hunter*, No. 6: l 7-cv-0962-JR, 2018 U.S. Dist. LEXIS 148249. The District Court noted that the *Hunter* court cited *Somerlott* but declined to apply its principle. As a threshold matter, the court in *Hunter* never rejected the *Somerlott* principle, and in fact, never discussed it. The court in *Hunter* never

addressed the argument that an entity incorporated solely under state law per se lacks tribal immunity. In *Hunter*, the entity at issue was wholly owned by a separate entity that was created under Tribal law. *Id*. at *6 (also finding that the entity was not an arm of the tribe). Furthermore, the District Court erred in relying more heavily on an Oregon Federal District Court decision than a decision from the Tenth Circuit, especially considering that the Tenth Circuit originally established the five-factor subordinate economic entity test that the District Court utilized.

The concurrence in *Somerlott* also explains best why it is more persuasive that the five-part *Breakthrough* test. Judge Gorsuch explained:

> Not only is CND's claim to immunity inconsistent with the principles of sovereign immunity and corporate law and the rationales undergirding them, it is inconsistent as well with the more particular reasons the Supreme Court has given for recognizing tribal sovereign immunity. Tribal sovereign immunity seeks "to promote the goal[s] of Indian self-government, … tribal self-sufficiency, [and] economic development." And if respect for tribal self-determination and self-sufficiency means anything, it must mean respecting and giving effect to a tribe's free choices. In this case, the Nation made a free choice to incorporate a business under Oklahoma's law, and respect for its sovereignty and autonomy should lead us to give effect to that choice.

Somerlott, 686 F.3d at 1157 (internal citations omitted).

In forming A&S, approving the FPEC Operating Agreement, and in executing the Acknowledgement and Waiver of Sovereign Immunity, the Tribes expressly established that A&S does not and will not possess sovereign immunity.

The Acknowledgement and Waiver of Sovereign Immunity states:

> The Assiniboine and Sioux Tribes hereby acknowledge that [A&S] does not and shall not be construed to possess sovereign immunity.

Appx 137. The Tribes "made a free choice to incorporate a business under" Delaware law, a business that "does not and shall not be construed to possess sovereign immunity"—and "respect for its sovereignty and autonomy should lead us to give effect to that choice." *See Somerlott*, 686 F.3d at 1157 (Gorsuch concurring), and Appx 137 (Acknowledgment and Waiver).

This Court should follow *Somerlott* because it effectuates the greatest consistency with "the principles of sovereign immunity and corporate law and the rationales undergirding them." *Somerlott*, 686 F.3d at 1157.

C. Other Jurisprudence Supports Upholding the Principles in *Somerlott*

Other courts and authorities have issued consistent holdings and analysis with *Somerlott*. For example, a Virginia federal court held that "*Somerlott*'s holding was premised entirely on the entity's incorporation under state law, which distinguished the case from others in which entities claiming to be arms of a tribe were 'organized, in some form or another, under tribal law.'" *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 273 (E.D. Va. 2018) (emphasis in original) (quoting *Somerlott*, 686 F.3d at 1149).

Likewise, an Oklahoma federal court held that the *Breakthrough* "test is inapplicable when a tribe or tribes form an entity under the law of a different

sovereign, such as a state, and the entity in question must be organized under tribal law to qualify as a subordinate economic entity." *Eaglesun Sys. Prods. Inc. v. Ass'n of Vill. Council Presidents*, No. 13-CV-0438-CVE-PJC, 2014 U.S. Dist. LEXIS 36659, at *21 (N.D. Okla. Mar. 20, 2014) (citing *Somerlott*, 686 F.3d at 1149).

North Dakota courts have come to the similar results finding that an entity incorporated under North Dakota's statutes does not enjoy tribal immunity. *Airvator Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983) ("State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians."); *see also State v. Cherokee Servs. Grp., LLC*, 2021 ND 36, ¶ 15, 955 N.W.2d 67, 73 ("When a tribal entity subjects itself to a state by organizing under the state's laws, it waives sovereign immunity.").

In conclusion, this Court should apply the standards set forth in *Somerlott* to determine whether A&S is a "subordinate economic entity" or an "arm of the Tribes." It is undisputed that A&S is formed solely under Delaware law, not Tribal law. Applying *Somerlott*, this Court should hold that A&S's creation under Delaware law establishes that it lacks sovereign immunity.

II. A&S Is Not an "Arm of the Tribes"

The District Court committed clear error of law in determining that A&S is an arm of the Tribe for purposes of possessing sovereign immunity.

A. Legal Background and Standards of Review

The Tenth Circuit originally considered the issue of corporations' tribal sovereignty in the well-known decision in *Breakthrough*, 629 F.3d 1173. The *Breakthrough* case involved the Chukchansi Economic Development Authority, a corporation chartered under tribal law. *Id.* The court in *Breakthrough* established five specific factors that should be used to determine if a tribal corporation enjoys sovereign immunity by virtue of being a "subordinate economic entity" of the Tribe. *Id.* at 1187. The Ninth Circuit later adopted the five-factor test from *Breakthrough* in *White*, 765 F.3d at 1025.

Here, the District Court considered this five-factor *White* test: (1) method of creation; (2) purpose; (3) management; (4) the Tribes' intent to share sovereign immunity; and (5) the financial relations with the Tribes. Ultimately, the purpose of this test is to serve "the central policies underlying the doctrine of tribal sovereign immunity" including: the protection of the tribe's treasury, the promotion of "tribal self-determination" and the promotion of commerce between Indians and non-Indians. *White,* 765 F. 3d at 1025; *Breakthrough,* 629 F. 3d at 1187.

B. Analysis of Each of the *White* Factors

The District Court incorrectly found that when balancing the five *White* factors, A&S is an arm of the Tribes. In examining these factors, the entity asserting sovereignty bears the burden of demonstrating that it has sovereign immunity. *McCoy v. Salish Kootenai Coll., Inc.*, 334 F. Supp. 3d 1116, 1120 (D. Mont. 2018); *see also Williams v. Big Picture Loans*, LLC, 929 F.3d 170, 176 (4th Cir. 2019). Lustre will examine the District Court's analysis of each of the *White* factors.

1. *Method of Creation*

Lustre agrees with the District Court that the first factor weighs against sovereign immunity, but believes this factor weighs very heavily against A&S. Appx 036-037 (Order at 13-14).

No one disputes that A&S was formed solely under Delaware law. Just as "formation under tribal law weighs in favor of immunity" formation in Delaware weighs against immunity. *Id*. (citing to *Williams,* 929 F. 3d at 179). The Tribes and the TEB could have incorporated A&S under tribal law—but expressly chose to incorporate under Delaware law. Importantly, they did not *also* incorporate under Tribal law.

Likewise, Lustre agrees with the District Court that the holdings in *McCoy v. Salish Kootenai Coll. Inc*., 785 F. App'x 414 (9th Cir. 2019) ("McCoy II"), affm'g

McCoy v. Salish Kootenai Coll., Inc., 334 F. Supp. 3d 1116 (D. Mont. 2018) ("McCoy I") are unpersuasive. In addition to the other reasons mentioned by the District Court, in *McCoy I* and *McCoy II*, the entity whose sovereign immunity was at issue was incorporated first under tribal law, and then almost a year later incorporated under state law in the same state as the tribe. *McCoy I*, 334 F. Supp. 3d at 1121. A&S has never incorporated under tribal law. In the few cases that have not expressly adopted the *Somerlott* principle, courts have found that incorporation under state law (and not tribal law) weighs *heavily* against a finding of sovereign immunity. *See, e.g*., *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 502, 141 Cal. Rptr. 3d 802, 810 (2012). Accounting only for the state incorporation, the first *White* factor weighs *heavily* against a finding of sovereign immunity.

Additionally, when A&S was created for participation in Fort Peck Energy Company, LLC, the Tribes and A&S expressly acknowledged that A&S would have no tribal immunity because it was being incorporated under Delaware law. Appx 137 (Acknowledgment and Waiver) and Appx 115 (FPEC Operating Agreement at § 10.16). The Tribes' and A&S's express acknowledgments precluding immunity are an essential part of A&S's formation and create a nearly irrefutable presumption against immunity under the first *White* factor. Under the *White* analysis, just forming an entity under state law weighs *heavily*

against a finding of immunity. However, since A&S's method of formation included express preclusions of immunity from the Tribes and A&S, this Court should find that the first *White* factor weighs definitively against immunity.

2. *Purpose of A&S*

The District Court erroneously found that the second factor weighs heavily in favor of immunity because the purpose of A&S was to develop Tribal resources. Appx 037-038 (Order at 14-15). This finding is not supported by the record and not applicable here because this case concerns fee minerals, not Tribal minerals.

Under the second factor, if the entity's purpose is similar to a tribal government's purpose (e.g., promoting tribal welfare, alleviating unemployment, providing money for tribal programs), that will weigh in favor of immunity. *Warren v. United States*, 859 F. Supp. 2d 522, 540 (W.D.N.Y. 2012); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 992 (N.Y. App. 1995). Courts may look to organizational documents and resolutions to determine purpose. *Zhang v. Grand Canyon Resort Corp.*, No. 5:19-cv-00124-SVW-SP, 2020 U.S. Dist. LEXIS 38693, at *5 (C.D. Cal. Jan. 15, 2020).

The District Court, however, erroneously concluded that the A&S Operating Agreement established that the TEB formed A&S to provide revenue for tribal government by conducting oil and gas development on behalf of the Tribes. Appx 037 (Order at 14). The District Court also noted that the second purpose was "to

provide for Tribal control over oil and gas development conducted on the Reservation . . . .” Appx 038 (Order at 15). However, based on the Tribes’ own documents in the record, the District Court committed reversable errors in this determination. The TEB actually formed A&S to: (1) conduct business with creditable oil and gas companies; (2) shield the Tribes from liability; and (3) join FPEC Operating Agreement, not “to provide revenue for tribal government programs.” Appx 062 (Tribal Resolution 2276-2009-10 (A&S is able to protect the Tribes from suit)); Appx 142 (Tribal Resolution 30-864-2020-10 (A&S is “to insulate the Tribes from any direct liability . . . .”)); Appx 058 (MBOGC Transcript at 29:21-23).

By creating A&S as a Delaware LLC, the Tribes and A&S expressly acknowledged that its purpose was to *lack* sovereign immunity, and thus “secure business relationships with creditable oil and gas companies….” Appx 060 (Resolution No. 1514-2009-03). A&S agreed to be governed under the laws of Delaware, not the laws of the Tribes. Appx 071 (A&S Operating Agreement). The laws of Delaware grant state court jurisdiction over limited liability companies incorporated under Delaware law. *See* 6 Del. C. § 18-111, 6 Del. C. § 18-101, *et seq*.; *see also* 6 Del. C. § 18-201(b) (under Delaware law, an LLC “shall be a separate legal entity” subject to suit).

After the creation and execution of the A&S Operating Agreement, the TEB also issued Tribal Resolution 1514-2009-03 regarding A&S's purpose in joining the Fort Peck Energy Company, LLC. A&S executed the FPEC Operating Agreement on March 9, 2009, at which time A&S expressly acknowledged that its purpose was not to possess sovereign immunity. A&S agreed:

> **10.16 Limited Waiver of Sovereign Immunity.** As a Delaware limited liability company, the Tribes Holding Company shall not be construed as possessing sovereign immunity, and it irrevocably waives any sovereign immunity that it may be construed to possess. Attached as Exhibit E hereto is an acknowledgement of the Assiniboine and Sioux Tribes that the Tribes Holding Company possesses no sovereign immunity and a waiver of any sovereign immunity that the Tribes Holding Company may be construed to possess. Other than such acknowledgement and waiver, the Assiniboine and Sioux Tribes are not a party to this Agreement and nothing in this Agreement shall be construed as a waiver of their sovereign immunity.

Appx 115 (FPEC Operating Agreement) (emphasis added).

The Tribes even went a step further to assure the "creditable oil and gas companies" that A&S would not have sovereign immunity by executing an Acknowledgment and Waiver and delivering the same to A&S's business partners. Appx 137 (Ex. E to the FPEC Operating Agreement). That Acknowledgment and Waiver recited the purposes of A&S's formation to be "partnering with leading developers and capital providers." *Id*. It went on to acknowledge A&S's lack of sovereign immunity; and just to "remove all doubt," it waived any immunity that A&S might assert or possess. *Id*. This is

clear proof that the Tribes formed A&S primarily to be an entity that lacks sovereign immunity, thereby enticing "creditable" companies into business relationships.

A&S later confirmed that the purpose of A&S was to spin it off from the Tribes so that it is separate and distinct and so that it would reduce liability to the Tribes. Appx 144 (Tribal Resolution #30-964-2020-11) (the "Tribes have agreed to separate all tribal mineral development operations from the tribal government operations and transfer all such operations to [A&S] **to operate mineral development activities separate and distinct from the Tribes** . . . ." (emphasis added). The District Court erred in failing to recognize that the express purpose of A&S was to reduce liability to the Tribes by creating a separate entity.

At the MBOGC hearing, A&S also confirmed this underlying purpose of A&S, "The LLC is formed to reduce liability to the tribes. That's, you know, the way all LLC's are applied in the industry." Appx 058 (MBOGC Transcript at 29:21-23 - Statement of Mr. Adkins). The purpose of conducting business with private individuals without exposing the Tribes' assets to liability was also confirmed by A&S's General Manager, "Q: (By Mr. Sparks) And by forming the LLC to take on that liability; right? A: Right, yeah." Appx 159

(Madison Transcript at 82:8-10). The TEB's purpose was not to create another immune entity.

The District Court found, on the basis of Resolution No. 1514-2009-03 and the A&S Operating Agreement, that A&S was formed to "provide revenue for tribal government programs…." Appx 037 (Order at 14). The District Court further erred in finding that these documents evidenced a second purpose for A&S's formation: controlling oil and gas development within the Reservation so as to avoid environmental degradation. Appx 038 (Order at 15). Neither of the referenced documents makes any mention of raising revenue for, or funding, government programs for the Tribes. Neither document makes any mention of controlling development and protecting the environment within the Reservation. Moreover, no Tribal Resolution expressly noted that the purpose of A&S was to conduct protection of the environment. In this stage of the proceedings, Lustre is entitled to have the facts construed in the light most favorable to Lustre; this includes the stated and express purpose for which the TEB created A&S. Appx 038 (Order at 15); *General Constructors*, 2001 MT 54 at ¶17.

The District Court committed reversable error in failing to recognize that the record confirmed that the actual stated purpose of A&S's formation was to: (1) conduct business with creditable oil and gas companies; (2) shield the

Tribes from liability; and (3) join FPEC Operating Agreement. The Court should reverse this holding by the District Court.

3. *Structure, Ownership, and Management*

The third *White* factor is the structure, ownership, and management of the entity seeking immunity, including the amount of control the tribe has over the entity. Lustre does not dispute that the Tribe owns A&S and that the TEB manages A&S through Tribal resolutions. This is not unexpected for a non-immune entity that is owned and managed by a tribe. The District Court, however, erred in finding the third factor weighed in favor of immunity. Appx 038 - 039 (Order at 15-16).

Tribal Resolution #30-964-2020-11 expressly states that the "Tribes has agreed to separate all tribal mineral development operations from the tribal government operations and transfer all such operations to the A&S Mineral Development Co., LLC **to operate mineral development activities separate and distinct from the Tribes**; . . . ." Appx 144; *see also Hunter,* 2018 Dist. LEXIS 148249, at *8 ("When a tribe owns an entity, but delegates most of the control of the entity to non-tribal members, that fact weighs against a finding of sovereign immunity."). The Tribes delegated most of the control of A&S to its General Manager, Ms. Debi Madison, who is not a member of the Tribes.

Reviewing these facts in the light most favorable to Lustre, the third factor does not weigh in favor of finding A&S as an arm of the Tribes.

4. *Intent to Share Immunity*

Lustre agrees with the District Court that the fourth factor weighs against sovereign immunity, but believes this factor weighs *very heavily* against A&S. Appx 025 (Order at 16-18.) The District Court held that "the Tribes did not intend to share their sovereign immunity with A&S" and while not an express waiver, "it suggests that the Tribes intended that A&S be subject to civil suit." Appx 040 (Order at 17). As this factor weighs so heavily against A&S and demonstrates a clear intent that A&S be subject to civil suit—like this case—and is more important in terms of the overall analysis, this factor should tip the scales against immunity.

The District Court relied on the A&S Operating Agreement and the FPEC Operating Agreement in holding that the Tribes did not intend to share their sovereign immunity with A&S. Appx 062 (Tribal Resolution 2276-2009-10 at 1); Appx 144 (Tribal Resolution 30-964-2020-11 at 1); Appx 058 (MBOGC Transcript at 29:21-23); and Appx 159 (Madison Transcript at 81:13-82:10).

Indeed, the TEB expressly approved A&S's approval of the FPEC Operating Agreement that states: (1) the Tribes "acknowledge that [A&S],

does not and shall not be construed to possess sovereign immunity; (2) [i]n order to remove all doubt in this regard, [the Tribes] hereby irrevocably waive any right they otherwise might have to assert, and agree that they will not now or in the future assert, that [A&S] possesses sovereign immunity"; and (3) the Tribes "hereby waive any sovereign immunity that [A&S] now or in the future may possess or may be construed to possess." Appx 137 (Acknowledgement and Waiver).

In addition, paragraph 10.9 of the A&S Operating Agreement reserves sovereign immunity for the Tribes, but not A&S. Appx 072. By expressly reserving sovereign immunity for the Tribes but not A&S when it had the clear opportunity to do so, it is abundantly clear that the Tribes did not intend to share their sovereign immunity with A&S.

The record establishes that the Tribes did not intend to share their sovereign immunity with A&S, but rather intended to separate themselves from the liabilities assumed by A&S. The District Court committed reversable error by admitting that the Tribes intended A&S to be subject to civil suit, but finding A&S to be an arm of the Tribe wholly protected by sovereign immunity.

5. *Financial Relationship Between Tribes and A&S*

The fifth *White* factor is the financial relationship between a tribe and the entity seeking immunity. If a judgment against an entity will not reach the

tribe's assets or if the entity cannot bind or obligate the funds of the tribe, that weighs against a finding of sovereign immunity. *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440-41 (Alaska 2004); *see also, Am. Prop. Mgmt. Corp*., 206 Cal. App. 4th at 506 ("The limited liability that arises from U.S. Grant, LLC's status as a California limited liability company *weighs heavily against* a finding that it is an arm of the tribe protected by sovereign immunity.").

In finding that the fifth factor weighed heavily in favor of sovereign immunity, the District Court made several reversible errors. The District Court acknowledged that there are multiple facets to this factor, including: (1) if a judgment "would reach the tribe's assets"; (2) "[i]f a significant percentage of the entity's revenue flows to the tribe…", or (3) "if a judgment against the entity would significantly affect the tribal treasury." Appx 041 (Order at 18, quoting *People v. Miami Nation Enters.,* 386 P. 3d 357, 373 (Cal. 2016); *Hwal'Bay Ba: J Enters., Inc. v. Jantzen*, 458 P. 3d 102, 110 (Ariz. 2020)).

Despite acknowledging three of the many facets of this fifth factor, the District Court focused solely on only one facet, the distribution of profits from A&S to the Tribes. Appx 041-042 (Order at 18-19). The District Court ignored the fact that a judgment against A&S will not affect the Tribes, which weighs against immunity. Appx 142 (Tribal Resolution 30-864-2020-10 (A&S is "to

insulate the Tribes from any direct liability . . . ."); *see also Runyon*, 84 P.3d at 441. The District Court also ignored the effects that a judgment against A&S would have on the tribal treasury. The District Court noted that A&S provided $184,805 to the Tribes over a three-month period. However, "because any imposition of liability on a tribally affiliated entity could theoretically impact tribal finances, the entity must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity." *Miami Nation Enters.*, 386 P.3d at 373-74.

Even though A&S bears the burden to establish that it is an arm of the Tribes, there is no evidence in the record about the Tribes' total budget, its annual revenues, its other sources of revenues, the programs that are impacted by A&S's contributions, or any other details about the impacts of A&S's finances on the Tribes. *McCoy I*, 334 F. Supp. at 1120. A&S must do more than assert that it generates some revenue for the Tribes. *Miami Nation Enters.*, 386 P.3d at 373-74. Courts have found where the financial risk is limited to the capital contributed to the entity, it does not weigh in favor of the entity being an arm of the tribe. *See*, *e.g.*, *Am. Prop. Mgmt. Corp.*, 206 Cal. App. 4th at 506. The burden is on A&S to demonstrate that it has immunity. A&S failed to meet its burden on the fifth factor, and thus, it weighs against immunity.

In sum, based on the five factors and taking into account that the Tribes never intended A&S to possess sovereign immunity or to share their sovereign immunity with A&S, this Court should reverse the Order and hold that A&S is not an arm of the Tribes.

III. The Tribes and A&S Waived Any Potential Sovereign Immunity

The District Court erred in finding that A&S had not waived sovereign immunity.

A. Legal Background and Standards of Review

This Court has recognized that Indian Tribes may waive their right to sovereign immunity and consent to suit in state courts. *Wippert v. Blackfeet Tribe*, 260 Mont. 93, 104, 859 P.2d 420, 426 (1993) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978)). Any waiver of sovereign immunity, however, "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *White*, 765 F.3d at 1026. "[A] tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law." *Wright v. Colville Tribal Enter. Corp.*, 159 Wash. 2d 108, 115, 147 P.3d 1275, 1280 (Wash. 2006); *see also Am. Prop. Mgmt. Corp.*, 206 Cal. App. 4th at 502.

B. The Tribes and A&S Expressly Waived Sovereign Immunity

The District Court held that while paragraph 10.9 of the A&S Operating Agreement and paragraph 10.16 of the FPEC Operating Agreement both

contained waivers of sovereign immunity, they were insufficient to subject A&S to suit in Montana state court by Lustre. Appx 042-44 (Order at 19-21). The District Court stated, "The waivers of sovereign immunity proved by the Tribes in the FPEC Operating Agreement corroborate this and show that the Tribes intended A&S to be subject to suit in state court." Appx 040 (Order at 17). Yet the District Court later found no waiver of sovereign immunity. Appx 042-043 (Order at 19-20). Based on the record and documents before the District Court, this conclusion is in error.

The plain waivers of sovereign immunity in the FPEC Operating Agreement and the Acknowledgment and Waiver are unambiguous and speak for themselves. Specifically, in the FPEC Operating Agreement, the Tribes and A&S expressly waived A&S's sovereign immunity when the TEB stated that A&S "irrevocably waives any sovereign immunity that it may be construed to possess." Appx 115 (FPEC Operating Agreement at paragraph 10.16). The Tribes and A&S further agreed in the Acknowledgment and Waiver that the Tribes "acknowledge that [A&S], does not and shall not be construed to possess sovereign immunity" and "the Tribes **hereby waive any sovereign immunity that the [A&S] now or in the future may possess** or may be construed to possess." Appx 137 (Acknowledgment and Waiver) (emphasis added).

The District Court erred by finding limitations on the waivers where none exists. Order at 21. The TEB could have incorporated the terms of the FPEC Operating Agreement by reference into the Acknowledgment and Waiver but did not. The mere mention in the recitals of the FPEC Operating Agreement does not incorporate all of its terms by reference, as incorporation by reference must be explicit and clearly communicated, not inferred. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008) ("[T]he language used in a contract to incorporate extrinsic material by reference *must explicitly, or at least precisely*, identify the written material being incorporated and *must clearly communicate* that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history.") (emphasis added).

The District Court stated, "the broad language in these waivers indicates that the Tribes did not intend them to be so limited." Appx 041 (Order at 18). Thus, The District Court erred in reading paragraph 10.14 of the FPEC Operating Agreement as a limitation on the Acknowledgment and Waiver, which does not incorporate the terms and conditions of the FPEC Operating Agreement. The Acknowledgment and Waiver is an waiver of sovereign immunity. This interpretation is consistent with the nature of A&S and the

intent of the Tribes when it created A&S to protect the Tribes from all potential liability.

IV. The Court Erred in Finding that A&S Cannot Be Joined

After ruling that A&S possessed sovereign immunity as an arm of the Tribes, the District Court held that "equity and good conscience require that this action be dismissed. Given the claims that Lustre asserts, a judgement its favor would invalidate A&S's leases and transfer title to A&S's interest in the subject mineral estates to Lustre, so A&S would be severely prejudiced . . . ." The District Court improperly used the ultimate fact and equity to conclude that denying A&S's motion to dismiss would prejudice A&S.

For a motion to dismiss, the District Court must assume all Plaintiffs' facts as true and in the light most favorable to Plaintiffs. The District Court improperly inferred that a judgment in favor of Lustre would prejudice A&S and assumed facts not yet in evidence. Further, the District Court is relying on matters outside the sovereign immunity briefing without giving Lustre a reasonable opportunity to present all the material facts. In doing so, the District Court incorrectly applied the law.

In addition, the District Court held, with no analysis or factual basis, that "Lustre may pursue an adequate remedy in tribal court if this action is dismissed . . . ." Appx 047 (Order at 24). The District Court's conclusion that Lustre could

pursue A&S in Tribal Court lacks any basis in fact or law. Neither Lustre, nor Erehwon is a Tribal entity. The fee mineral owners who leased their minerals to Anadarko (which A&S now purports to own) are not Tribal members with access to Tribal court. And even more importantly, A&S enjoys sovereign immunity in Tribal Court just as it maintains in the state courts of Montana. *See, e.g., Poplar Cmty. Org. v. Martin, d/b/a Martin Renovation*, Appeal No. 144 at 4 (Fort Peck Court of Appeals, Fort Peck Indian Reservation Assiniboine and Sioux Tribes, Wolf Point, Montana (1992)) ("Indian Tribes and their delegated entity possess sovereign immunity and any waiver of the immunity must be expressly stated and must be unequivocal.") (copy included at Appx 160-161); *see* Fort Peck Tribes Comprehensive Code of Justice, Sections 107, 110, and 1311 (Tribal sovereign immunity and lack of jurisdiction over non-Indians who are not members of the Tribes); *see also Blackfeet Indian Tribe v. Blaze Const. Inc.*, 1996 Mont. Dist. LEXIS 688, *3; *Sulcer v. Citizen Band Potawatomi Indian Tribe*, No. CIV-91-1170-C (D.C. for W.D. Okla. 1992). The District Court's conclusion that Lustre could pursue A&S in Tribal Court is in error.

V. The District Court Decision Results in Manifest Injustice

The District Court's Order creates a manifest injustice with consequences that reach far beyond the confines of the dispute between Lustre

and A&S. Notwithstanding the District Court's erroneous determination, Lustre has no recourse to Tribal Court, and in fact, no remedies anywhere unless the District Court's decision is overturned.

Lustre obtained valid oil and gas leases from non-tribal owners of private property, and thereby committed to develop the lessors' privately-owned mineral rights. The District Court's decision prevents Lustre from fulfilling its obligations to those lessors, and also forecloses all remedies for those mineral rights owners against A&S. If this Court upholds dismissal of Lustre's claims based on A&S's immunity, neither Lustre, nor the mineral owners who leased to Lustre, will have any recourse in any court in the country. This would include the rights of these mineral owners to sue under the very leases A&S purports to have with the mineral owners. They will have no means in which to protect their private property rights, ensure that they receive appropriate proceeds (royalty) from development, or prevent environmental contamination on their land as A&S would have immunity from suit in every court in Montana.

Pursuant to the District Court's decision, A&S (and other tribally-owned foreign LLCs like it) will have carte blanche to appropriate property, and there will be no recourse against them. The District Court's Order ensures that private property owners cannot sue A&S in any court. This absurd result

destroys the underpinnings of tribal sovereignty. Tribal sovereign immunity is not supposed to shield tribal corporations from liability when they enter non-tribal business transactions with non-tribal members. However, the District Court's Order will do just that if allowed to stand. The District Court's Order should be reversed and remanded so that the case may proceed to the merits; A&S should not be allowed to shield itself with the immunity of the Tribes.

CONCLUSION

Accordingly, Appellants Lustre and Erehwon respectfully request that this Court reverse the District Court's Order and remand this case to the District Court for consideration of Lustre and Erehwon' s claims on the merits.

Respectfully submitted this 2nd day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure, I hereby certify that this Appellants' Opening Brief is proportionally-spaced Times New Roman text typeface of 14 points, is double spaced and contains 9,531 words (calculated by Microsoft Word, does not exceed 10,000 words excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance).

Dated May 2, 2022

/s/ James A. Patten
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CERTIFICATE OF SERVICE

I, James Andrew Patten, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-02-2022:

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