

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DOT LAKE VILLAGE,
- Appellant,

vs.

DENA' NENA' HENASH d/b/a
Tanana Chiefs Conference
- Appellee

Supreme Ct. Case No. S-18599
Superior Ct Case No. 4FA-22-01388 CI

APPELLANT'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT
THE HONORABLE PATRICIA L. HAINES, PRESIDING

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Filed this 13th day of August, 2024 in
The Supreme Court for the State of
Alaska.

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Certificate of Service

I certify that a true and correct copy of the foregoing including a total of 2 pages was served via e-mail message on the 6th day of August, 2024 and believed to be completed without error from JDesrosiers@fairbankslaw.com to jamiesonb@lanepowell.com; barrett@ristrophlaw.com rustonr@lanepowell.com

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PRINCIPLE AUTHORITIES RELIED UPON

5 USC § 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.

JURISDICTIONAL STATEMENT

The Superior Court's Order Granting Defendants Motion to Dismiss was issued and circulated to the parties on November 21, 2022¹ A timely notice of appeal was filed on December 14, 2022. This Court has jurisdiction under AS 22.05.010.

LIST OF PARTIES

Appellant, Dot Lake Village, (hereinafter referred to as "Dot Lake" or "Tribe") is a federally recognized Tribal entity and Plaintiff in these proceedings below.²

Appellee, Dena' Nena' Henash d/b/a Tanana Chiefs Conference (hereinafter referred to as "TCC") is a state chartered non-profit corporation.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- 1) Did the Superior Court err in finding that Tanana Chiefs Conference (TCC) possesses sovereign immunity?

¹Exc. --- (R. 539-552)

²See Fed. Reg. Vol. 88, p. 54654 (August 11, 2023) The appearance of a Dot Lake Village on this list is determinative of federally recognized tribal status. See *John v. Baker*, 982 P.2d 738 (Alaska 1999)

2) If TCC possessed sovereign immunity, did the Court err in dismissing the suit brought by a superior sovereign entity – the Appellant?

3) If TCC possessed sovereign immunity, were TCC's actions *ultra vires* and therefore not subject to sovereign immunity?

4) Did the Superior Court err in failing to consider the genuine facts at issue relating to TCC's claim to sovereign immunity?

5) Did the Superior Court err in awarding attorney fees against Dot Lake notwithstanding the Tribe's sovereign immunity?

STATEMENT OF CASE

Dot Lake Village is a federally recognized Indian Tribe, and a member of TCC.³ TCC is a regional Alaska Native non-profit corporation organized under the laws of the State of Alaska.⁴ The Tribe alleged that on December 15, 2021 TCC's Chairman and President P.J. Simon was purportedly recalled from his office.⁵ Dot Lake alleged that it's TCC Board Member and other TCC Board members representing other tribes were not allowed to vote.⁶ Additionally, Dot Lake alleged that the number of votes allowed to be cast did not meet standards

³ Order Granting Defendant's Motion to Dismiss - Exc. 97 (R. 539)

⁴ Id.

⁵ Complaint at Exc. 33-50 (R. 554-571)

⁶ Id.

for removal of the President per the TCC Bylaws.⁷

Dot Lake's suit sought declaratory and injunctive relief against TCC: i.e. declaring that any and all actions made, or purported to have been made, by the TCC's E-Board⁸ and Full Board⁹ leading up to and removing President Simon were conducted in violation of TCC's Bylaws, were *ultra vires* and a nullity.¹⁰ Additionally, Dot Lake requested a permanent injunction prohibiting TCC from including a *bona fide* officer or director of TCC from attending or voting in a meeting of a board of which they are a member in the future.¹¹

The Superior Court dismissed the Tribe's complaint finding that TCC possessed sovereign immunity.¹² Later, the Superior Court assessed attorney fees against the Tribe and in favor of TCC in the amount of \$11,888.00, finding that the Tribe's sovereign immunity did not apply to this case.¹³

The Tribe filed a timely appeal,¹⁴ which was stayed pending issuance of

⁷Id.

⁸ Id. The E-Board meetings at issue were held on November 10, 2021, November 19, 2021 and December 3, 2021. Id.

⁹Id. The Full-Board meeting at issue was held on December 15, 2021. Id.

¹⁰ Id.

¹¹ Id.

¹²Exc. 96-109 (R. 539 et. seq.)

¹³ Order Granting Defendant's Motion for Attorney Fees - Exc. 112-116 (R. 575- 579)

¹⁴ R. 657

the decision in *Ito v Copper River Native Ass'n.*, 547 P.3d 1003 (Alaska, 2024).

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews de novo “issues of sovereign immunity” and dismissals “for lack of subject matter jurisdiction.” *Ito v Copper River Native Assoc.*, 547 P.3d, at 1009 In doing so this Court “will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.”¹⁵

II. SUMMARY.

The Superior Court’s decision below stands the law respecting tribal sovereign immunity on its head by holding that a tribe does not have immunity from claims by a regional Native consortium organized under State law, but that the consortium has immunity that would insulate the consortium from the Tribe’s claims that the consortium did not comply with its bylaws. In doing so, the Superior Court employed a discredited notion that a tribe impliedly waives its immunity by bring suit (i.e. “waiver by litigation”).¹⁶ On the other hand, the Superior Court disregarded the documented history of TCC, and misapplied the

¹⁵ Id.

¹⁶ See Exc. 112-116 (R. 575-579)

recent tests announced by this Court determining when a tribal consortium possesses sovereign immunity. Additionally, the Superior Court ignored the “superior sovereign” exception to sovereign immunity, which does not allow an arm of the tribe from asserting immunity against its authorizing tribe. And finally, the Superior Court ignored the “ultra vires” exception to sovereign immunity.

III. THE AWARD OF ATTORNEY FEES AGAINST THE TRIBE WAS ERROR.

a) Dot Lake is Immune From Claims Absent Consent. As a federally recognized tribe, Dot Lake possesses sovereign immunity. *Douglas Indian Community v Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1176 (Alaska, 2017) “Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has authorized the suit or the tribe has waived its immunity.”¹⁷ As this Court noted in *Douglas*, this common law immunity is “[a]mong the core aspects of sovereignty” possessed by tribes and “traditionally enjoyed by sovereign powers.”¹⁸ These principles were recently reaffirmed in *Ito v Copper River Native Assoc.*¹⁹ The Superior Court

¹⁷ *Douglas Indian Ass’n*, 403 P.3d at 1176 citing *Kiowa Tribe of Okla. v Mfg Techs., Inc.* 523 U.S. 751, 754 (1998).

¹⁸ *Id.*

¹⁹ 547 P.3d, at 1010

acknowledged this legal principle.²⁰ Thus, the Superior Court could only have entertained TCC's claim for attorney fees if the Tribe had consented to have such claim heard by the Superior Court. No such waiver existed.

The Superior Court found that Dot Lake had waived its sovereign immunity by bringing a claim for attorney fees against TCC.²¹ The lower Court's reasoned that Dot Lake impliedly waived its immunity by bringing an attorney fee's claim against TCC, thereby consenting to the Court's jurisdiction over a claim by TCC for attorney fees against Dot Lake. The Superior Court acknowledged that this "waiver by litigation" doctrine had not been considered by the Alaska Supreme Court,²² but expressed the belief that federal courts followed this rule with respect to Indian tribes.²³ The Trial Court was clearly in error on this point.

First, the lower Court's conclusion finding an implied waiver violates a core principle of the doctrine of sovereign immunity, i.e. waivers of sovereign immunity "cannot be implied but must be unequivocally expressed" . *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509

²⁰ Exc. 113 (R. 576)

²¹ Exc. 112-116 (R. 555-579)

²²Exc. 115 (R. 578)

²³ Exc. 115-116 (R. 578-579)., citing *Guidiville Rancheria of Cal. v United States*, 704 F. App'x655, 660 (9th Cir., 2017)

(1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). This Court has long acknowledged that “the immunity possessed by a tribal governing body remains intact unless surrendered in express and unequivocal terms. Moreover, because an implied waiver exception would undermine the federal concern for tribal political and economic development, a waiver of tribal immunity cannot be implied but must be unequivocally expressed.” *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229, 1249 (Alaska 1992)²⁴

The “waiver by litigation” doctrine employed by the Superior Court in this case has been rejected by the U.S. Supreme Court in *Oklahoma Tax Comm'n*, which held a “Tribe did not waive its inherent sovereign immunity from suit merely by seeking an injunction against the Commission’s proposed tax assessment.”²⁵ In *Oklahoma Tax Comm'n*, the Tribe sought injunctive relief against a State Tax Commission and the Tax Commission brought state-law counterclaims. In this case, Dot Lake also sought an injunction against TCC. TCC

²⁴ Citing *Santa Clara Pueblo v. Martinez*, at 58-59; *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-78 (8th Cir. 1985); *Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986).

²⁵ 498 U.S., 509 The Court in *Oklahoma Tax Comm'n* cited *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-513 (1940) and explained that “a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe.” “Possessing ... immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits.” *Id.*

never filed an Answer containing a claim for attorney fees. The mere fact that Dot Lake brought an injunctive and declaratory action against TCC did not waive the Tribe's immunity to a counter claim by TCC for attorney fees, which was never filed by TCC.²⁶

The lower Court found that Dot Lake “expressly” consented to a claim by TCC for attorney fees against Dot Lake, which was unsupported by the record. Specifically, the complaint states that Plaintiffs (Dot Lake) requested the following relief against Defendant (TCC)... “7) Award of full attorney fees and costs.” The Complaint does not expressly reference any claim by TCC against Dot Lake for attorney fees. The lower Court’s order fails to reference any express statement that Dot Lake consented to an attorney fee claim by TCC. As a factual matter, there is nothing in the complaint which might constitute an expressed consent by Dot Lake waiving its immunity to a claim by TCC for attorney fees, particularly given that TCC never filed an answer requesting any award of attorney fees until after dismissal of the case. The lower Court's finding that the

²⁶ See also *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding a Tribe’s voluntary participation before the IBIA is not the express and unequivocal waiver of tribal immunity in a subsequent court action.); *Yurok Tribe v. U.S. Bureau of Reclamation*, 20-cv-05891-WHO, (N.D. Cal. May. 16, 2022) (holding “a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.”)

Tribe's claim for attorney fees against TCC constituted a waiver of immunity allowing TCC's claim against the Tribe is a clear waiver by implication, which is seriously contrary to established law discussed above.

The lower Court relied upon two cases to reach its decision: i.e. *In re White*, 139 F.3d 1268 (9th Cir. 1998) and *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) in support of its conclusion. But both cases are clearly distinguishable.

Neither *White* nor *McClendon* resulted in an affirmative money recovery against a tribe as ordered by the lower Court in this case. *In re White* is a bankruptcy case in which a tribe filed a claim to collect a debt. The debt was discharged in the bankruptcy. The tribe objected arguing that the discharge was barred by based upon sovereign immunity grounds. The *White* Court held that a tribe's claim submitted in bankruptcy consented to the bankruptcy's determination as to the validity of the Tribe's claim.

On the other hand, *McClendon* actually supports Dot Lake's position that sovereign immunity bars the imposition of attorney fees. *In McClendon* the Court held that *the* waiver of sovereign immunity to litigate ownership of land in a prior lawsuit did not extend to a "collateral" dispute over a lease governing that

land.²⁷ In doing so, the Court reaffirmed the principle that “ a tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants in those actions.” *McClendon v. U.S.*, 885 F.2d at 630, citing *Squaxin Indian Tribe v. Washington*, 781 F.2d 715,723 (9th Cir. 1986)²⁸ The *McClendon* court explained that by initiating an action, a tribe “consent(s) to the court's adjudication of the merits of that particular controversy”, but that such consent was “limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.” *McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) citing *Jicarilla Apache Tribe v. Hodel*, 1821 F.2d 537, 539 (10th Cir. 1987)” In explaining its decision, the *McClendon* court distinguished *United States v. Oregon*, 657 F.2d 1009(9th Cir. 1981) which held “that Indian tribes may, in certain circumstances, consent to suit by participation in litigation.” *McClendon v. U.S.*, 885 F.2d, 631 n.2 In doing so, the *McClendon*

²⁷ 885 F.2d, at 631. The Court stated, “By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question. The initiation of the suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation, such as interpretation or enforcement of the lease agreement. *McClendon v. U.S.*, 885 F.2d 627, 631 (9th Cir. 1989) citing *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, (10th Cir. 1987)

²⁸ *Squaxin Indian Tribe* is helpful in this regard in that it held that a tribe that initiated a lawsuit to challenge state regulation and taxation of liquor to non-Indians consented to the court's determination of the state's right to regulate and tax tribal liquor sales to non-Indians but that tribe was immune from suit by state to collect taxes due.

Court noted that the tribe consented adjudication of the ownership of the land in question, but did not construe the waiver beyond that issue. *McClendon v. U.S.*, 885 F.2d at, 631.

Applying *McClendon* to the present case results in a different conclusion than reached by the Superior Court. Specifically, by initiating the lawsuit, Dot Lake clearly waived its immunity for the purposes of resolving issues related to TCC's compliance with its bylaws, but it did not waive its immunity with respect to counterclaims and collateral issues raised by TCC. TCC's claims for attorney fees against Dot Lake clearly fall into the category of collateral issues. *Ehredt v. DeHavilland Aircraft Co. of Canada*, 705 P.2d 446, 452 n.8 (Alaska 1985) (holding that attorney's fees are part of the costs of litigation and are separate from the damages related to a party's substantive claims.²⁹). As a consequence, Dot Lake's initiation of litigation on its substantive claims – the enforcement of TCC's and its collateral claim for attorney fees against TCC – did not consent to the imposition of attorney fees against the Tribe in favor of TCC. In this case, TCC's attorney fees claims was merely a collateral dispute to the underlying Dot Lake claims

²⁹ As explained in *Fisher v Kenai Peninsula Borough School District*, --- P.3d ----, 2024 WL 2498237, (Alaska, May 24, 2024). See also *Sisters of Providence In Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1008 (Alaska 2003); *Sykes v. Melba Creek Mining, Inc.*, 952 P.2d 1164, 1172 (Alaska 1998); *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, 934 P.2d 759, 761 (Alaska 1997)

seeking to enforce TCC's bylaws. At no time did Dot Lake consent to submit TCC's claims for attorney fees to the Superior Court. At most, it might be said that Dot Lake submitted to the Superior Court's determination of Dot Lake's attorney fee claims against TCC. Under *McClendon* the initiation of Dot Lake's litigation did not constitute a waiver over collateral issues (or counterclaims) respecting TCC's attorney fee claims.

Finally, even if "waiver by litigation" was applicable to this case, it should not have result in an affirmative money judgment against the tribe. A party facing damage claims brought by a Tribe may not assert a counterclaim seeking an affirmative money recovery,³⁰ but it may assert equitable recoupment or set off defenses, which are a "narrow exception" to the doctrine of sovereign immunity. *Tohono O'odham Nation v Ducey*, 174 F. Supp. 3d Supp. 1194, 1204 (D. Ariz, 2016); citing *United States v. Park Place Assocs., LTD.*, 563 F.3d 907, 932 n. 16 (9th Cir.2009). Any such successful defense does not result in an affirmative money judgment against the Tribe, and, therefore, would not pierce the tribe's immunity.³¹ This "narrow exception" does not apply in this case because the

³⁰ Supra.

³¹ *United States v. Agnew*, supra, at 514 ; see *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015), cert. denied, 136 S. Ct. 1451 (2016). (recoupment is "not a vehicle for pursuing an affirmative judgment"). *Tohono O'odham Nation v Ducey*, supra., at 1202

Tribe was not seeking an affirmative recovery of a money judgement, and did not receive a money judgment against which the attorney fee award could be applied as an off-set. Thus, this narrow exception is simply inapplicable and it was error for the Superior Court to enter an affirmative money recovery against the Tribe.

IV. THE DISMISSAL OF TRIBE'S CLAIMS AGAINST TCC WAS ERROR.

a) *Introduction.* Before this Court issued its decision in *Ito v Copper River Native Ass'n.*, 547 P.3d 1003 20 (Alaska, 2024), the Superior Court in the case-at-bar dismissed the Tribe's claims against TCC finding that TCC was immune from suit as an "arm-of-the-tribe."³² The lower Court claimed to have applied a five (5) factor test described by the 9th Circuit in *White v Univ. of Cal.*, 765 F.3d 1010 (9th Cir., 2014) rather than the six (6) factor *Breakthrough*³³ test adopted by this Court in *Ito*. In doing so, however, the lower Court applied the five (5) factors common to both the *Breakthrough* and *White* tests incorrectly and failed to consider the sixth factors embraced by *Ito*. As a result, this Court should reverse the lower Court.

³² Exc. 109 (R. 552)

³³ Exc. 100-102 (R. 543-545) See *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181, 1186-87, 1191 (10th Cir. 2010).

Moreover, neither *Ito*, nor *White*, nor *Breakthrough* involved a Tribe seeking to maintain control of its subordinate “arm.” That distinguishing fact renders *Ito* inappropriate, and the Superior Court was in error applying such principles to this case.

Finally, TCC’s actions were *ultra vires*, which precludes the defense of sovereign immunity.

b) *Ito v Copper River Native Association*. After the issuance of the Superior Court’s decision below, and during the pendency of this appeal, this Court issued its decision *Ito v Copper River Native Ass’n.*, *supra*. which overruled this Court’s prior decision in *Runyon*³⁴ and adopted a multi-factor approach evaluating “arm-of-the-tribe immunity.”³⁵ In *Ito*, this Court adopted the six (6) factor test employed in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181, 1186-87, 1191 (10th Cir. 2010).³⁶ These six factors

³⁴ In *Runyon v Association of Village Council Presidents*, 84 P.3d 437 (Alaska, 2004) this Court held that the financial insulation between a tribe and an arm-of-the-tribe organized as a state chartered corporation was dispositive as precluding the claim of immunity as the arm of the tribe, notwithstanding the fact that the entity was controlled by tribes and a judgment against the entity could have an indirect financial impact on the tribes. *Ito*, *supra*, at 1015

³⁵ *Ito*, *supra*, @ 1022

³⁶ *Id.*

include (1) purpose of the entity, (2) method of creation of the entity, (3) control of the entity, (4) tribal intent to share immunities, and (5) financial relationship between the entity and the tribe, and 6) whether the purposes of tribal sovereign immunity are served by granting immunity.³⁷ The Superior Court applied these factors incorrectly. Correctly applying these factors precludes granting immunity to TCC.

c) *The Superior Court Expressly Applied The Wrong Test Omitting The Sixth Ito Factor.* The Superior Court applied a five factor test rather than the six factor test mandated by *Ito*.³⁸ Standing alone, that fact requires reversal.

The fact that a lower Court expressly applied the wrong test requires remand. *State v. Alaska Laser Wash, Inc.*, 382 P.3d 1143, 1152 (Alaska, 2016) (Superior Court's application of wrong legal standard requires reversal); *Alsworth v. Seybert*, 323 P.3d 47, 55 (Alaska, 2014) (Superior Court's application of wrong legal standard in considering injunction requires reversal); *Native Village of Tununak v. State, Dept. of Health & Social Services*, 303 P.3d 431, 453 (Alaska 2013) (Superior Court's application of wrong legal standard in ICWA CINA

³⁷ Id.

³⁸ Exec., 100-102 (R. 543-545)

matter requires reversal); *Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170, 1177 (Alaska, 2002) (Application of wrong standard in denying motion for new trial required reversal) The fact that the Superior Court applied a five factor test rather than the six factor test mandated by *Ito* requires reversal.

It is anticipated that TCC will argue that the difference between the five and six factors was harmless error. This is incorrect, particularly in this case. The sixth factor mandated by *Ito* is “whether the purposes of tribal sovereign immunity are served by granting immunity.” This sixth factor is important because it does not stand as a separate factor, but focuses the analysis of the other five factors on the purpose of sovereign immunity.³⁹ Specifically, this sixth factor requires the Court to consider each of the other factors as to “whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.... Those policies include protection of the tribe’s monies, as well as preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians....”⁴⁰

³⁹ *Ito*, *supra* @ 1022

⁴⁰ *Breakthrough*, *supra*, at 1188(citations omitted)

Tribal self-determination is *ipso facto* about tribal control and autonomy over the programs, functions, services and activities formally operated by the Federal agencies serving Native American people.⁴¹ In the context of a tribal consortia, tribal control and autonomy is given force and effect through compliance with the consortia's governance bylaws, which necessarily define the method and means by which the member tribes exercise their control of a tribal consortia. In substance, tribal consortia bylaws amount to an intertribal agreement as to the terms and conditions governing the consortium and the extent of a tribes' delegation of tribal power and authority to the consortium. The bylaws necessarily define the scope of a tribe's cession of tribal authority to the consortium, as well as the reservation of tribal authority from the consortium. Thus, the assertion of immunity by a consortium to bar a tribe's legal action seeking to compel compliance with the consortium bylaws is antithetical to the notions of tribal sovereignty and self-determination because it obstructs tribal control over the consortium.

⁴¹ See *Salazar v Ramah Navajo Chapter*, 567 U.S. 282, 185-186 (2012) Congress has enacted a number of laws implementing this policy including the Indian Self-Determination and Education Assistance Act of 1975 (25 USC 5301 et. seq.- permitting transfer of operational control of Bureau of Indian Affairs and Indian Health Service to Indian tribes and tribal organizations through contracts and compacts); Native American Housing Assistance and Self-Determination Act of 1996 (25 USC 4101 et. seq. permitting transfer of operational control of Indian Housing programs to Indian tribes and Indian Housing Authorities), etc.

The Superior Court didn't consider "whether the purposes of tribal sovereign immunity are served by granting (TCC) immunity" where the Tribe is seeking enforcement of TCC's bylaws which govern the Tribe's control over TCC. Those bylaws are the method and means whereby tribe's exercise control over TCC. Barring such actions based upon immunity fundamentally eliminate or limit tribal control, autonomy and self-determination over tribal monies and programs held and operated by TCC. Granting TCC's assertion of immunity in these circumstances is antithetical to "the purposes of tribal sovereign immunity." Thus, the sixth *Ito* factor tips decidedly against granting TCC immunity in this case.

d) *TCC Is Not Immune from Suit Under Ito.* The Superior Court only applied five of the six factors expressed adopted by this Court in *Ito*. As noted above, the Superior Court failed to consider these five factors through the lens of the sixth factor, as mandated by *Ito*. But the lower Court's misconstruction of the test went much farther by misconstruing the other five factors in light of the record.

i) The Superior Court misapplied the "method of creation" factor.

The *Ito* decision explained how the “method of creation” factor should be considered as follows:

“the method of creation factor tends to focus on the law under which the entity was formed. Formation under tribal law may weigh in favor of immunity, whereas formation under state law may weigh against immunity. The circumstances leading to, and the purpose driving, the entity's formation are also relevant; the creation of an entity by a tribe weighs in favor of immunity, but a tribe's absorption of an already operational non-tribal entity may weigh against immunity, especially if the absorbed entity is commercial.⁴²

This factor has several aspects, including, formation under state/tribal law, purpose driving entities formation, and whether the tribes created the entity or whether tribes absorbed an operational non-tribal entity. The Superior Court incorrectly stated that this factor weighed in favor of sovereign immunity,⁴³ with little or no actual consideration of who and how TCC organized. As explained below, a proper consideration of these sub-factors would necessarily reach an opposite conclusion: i.e. the method-of-creation factor weighs against the application of sovereign immunity.

⁴² *Ito, supra.*, at 1023

⁴³ Exc. 101 (R. 544)

First, TCC was incorporated under state law as a non-profit corporation.⁴⁴ It is not organized under tribal law. While not dispositive, under *Ito* that fact weighs against immunity.⁴⁵

Second, the “purpose driving, and circumstances leading to” TCC’s formation weigh against immunity. As the record clearly established, TCC was incorporated as a state chartered non-profit corporation on September 27, 1971 by three Native individuals: i.e. Alfred R. Ketzler, Ruby John and Tim Wallis⁴⁶ in anticipation of the passage of the Alaska Native Claims Settlement Act⁴⁷ (ANCSA), which became law a couple of months later: i.e. in December, 1971.⁴⁸ Under ANCSA, the newly incorporated TCC had a very limited purpose: i.e. to serve as an “existing Native Association” with the power to incorporate a for-profit Regional Corporation under Alaska state law (i.e. Doyon Ltd.) that would receive land and money under the terms of ANCSA.⁴⁹ As an objective historical

⁴⁴ Exc. 1 (R. 144)

⁴⁵ *Ito, supra.*, at 1023

⁴⁶ Exc. 1 (R. 144) See also Exc. 10 (R. 59)

⁴⁷ 43 U.S.C. 1601 et. seq.

⁴⁸ *Id.*

⁴⁹ 43 U.S.C. § 1606(d). For a comparative description of the organization of these regional Native Associations, See Case, *ALASKA NATIVES AND AMERICAN LAWS*, 2d Ed., pp 338-353(UA Press, 1984) As record in these proceedings explained, prior to 1971, TCC was an unincorporated association organized in 1964 by a number of Native “people in Fairbanks and Nenana, who got together and discussed the sure and gradual loss of the Native land around the homes of people present at the meeting.” See also, Statement of Alfred Ketzler, President of Tanana Chiefs Conference. Hearings before the

fact, TCC's incorporation was not intended to create a "tribal organization"⁵⁰, rather it was incorporated as a necessary part of ANCSA implementation, and ANCSA expressly disclaimed a tribal purpose. ANCSA stated that the Settlement should occur

without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;⁵¹

Thus, it is clear that the purpose driving, and circumstances leading to TCC's formation as an unincorporated association in 1964 was to advocate for Native land claims settlement and its incorporation in 1971 was to perform a very specific task initiating implementation of ANCSA.⁵²

Third, four (4) years after TCC performed its limited role under ANCSA, TCC was repurposed by tribes and other entities to implement the newly enacted

Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, Ninety-first Congress First Session on H.R. 13142, H.R. 10193, and H.R. 14212, Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes. U.S. Government Printing Office, 1970. See (R. 59)

⁵⁰ The term "tribal organization" is a technical term within Self-Determination policy which was first defined in 1975 as a federal legal concept in the ISDEAA. See 25 USC §5304(l). Again, it is illogical to suggest that TCC was a "tribal organization" upon its creation in 1971, when the term had no meaning in federal law or policy in 1975.

⁵¹ 43 USC 1601(b)

Indian Self-Determination and Educational Assistance Act (ISDEAA).⁵³ As noted above, tribes were not involved in the formation of TCC: rather three (3) Native individuals formed TCC. As the record clearly established, TCC's original Articles of Incorporation talk about Native villages and "urban Native groups:" not tribes.⁵⁴

Of course, part of the reason that tribes did not form TCC was that there were no federally recognized tribes in Interior Alaska in 1971 when TCC was incorporated. As explained by this Court in *John v Baker*, 982 P.2d 738, 749 (Alaska 1999), prior to 1993, federal recognition of Alaska villages as Indian tribes had not occurred. It wasn't until 1993 that the Federal government issued a notice that some Alaska native villages were federally recognized Indian tribes. *Id.* To suggest that TCC was formed by federally recognized tribes in 1971 is factually inaccurate and illogical; in 1971 there would not be federally recognized tribes to form TCC for another twenty (20) years.⁵⁵ The fact that tribes were not involved in creating TCC in 1971 weighs against a finding of immunity under *Ito*.

⁵³ 25 USC 5301 et. seq. (Pub. Law 93-638; Jan. 4, 1975)

⁵⁴ Exc. 7 (R. 189 -221) (TCC Art. Of Incorporation at Art. IV(a))

⁵⁵ Of course, the federal Courts were ahead of this Court in recognizing the tribal status of Interior Alaska Native villages in *Native Village of Venetie I.R.A. Council v. Alaska (Venetie I)*, 944 F.2d 548 (9th Cir., 1991)

Equally, TCC was not organized in furtherance of the federal policy of Indian Self-Determination because the federal government did not have a policy of Indian Self-Determination in 1971. Self-Determination did not become federal policy until Congress enacted the ISDEAA in 1975, which was four (4) years after TCC's 1971 incorporation. At best, it can be said that tribes later re-purposed TCC to administer ISDEAA "programs, functions, services and activities."⁵⁶ This fact would militate against immunity under *Ito*. In the language of *Ito*, TCC is an excellent example of "a tribe's absorption of an already operational non-tribal entity" which would weigh against immunity.⁵⁷

Thus, all the sub-factors in the "method of creation" factor weigh against immunity, in direct opposition to the conclusion of the Superior Court.

ii) The Superior Court Misapplied The "Entities' Purpose" Factor. The *Ito* decision explained, "The purpose factor incorporates both the stated purpose for which the entity was created as well as evidence related to that purpose."⁵⁸ But the Superior Court relied solely upon the "stated purpose" as expressed by

⁵⁶ "Programs, functions, services and activities"- commonly referred to as "PFSA's"- is a term of art in Self-Determination which defines the scope of services for which a tribe may contract under the ISDEAA. See 25 USC § 5321(a)(1)(E)

⁵⁷ *Ito, supra.*, at 1023

⁵⁸ *Ito.*, at 1022

TCC officials, which was an incorrect application of this “entities purpose” factor.

First, the Court did not consider any expression of purpose by **tribes or tribal officials**. The Court only considered expressions of purpose as offered by TCC officials and TCC’s attorneys.⁵⁹ The *Ito* decision focuses upon the purpose of the entity as expressed by the tribes and tribal officials, rather than the self-serving statements of the entity’s officials.

Second, the Court failed to consider the second prong of this factor by failing to consider the “evidence related to that purpose.” The Superior Court relied only on TCC’s officials’ expression of purpose, and ignored other evidence of that purpose as directed by *Ito*. In doing so, the Court failed to consider that overwhelming evidence that TCC was incorporated to implement ANCSA and later re-purposed to implement self-determination policies. In other words, the Superior Court failed to consider that TCC’s purpose changed.

Third, the Superior Court clearly got its facts wrong and confused different entities when considering the purpose factor by finding that TCC was

⁵⁹ Exc. 97 (R. 544)

incorporated in 1962.⁶⁰ As noted above, this is simply wrong. TCC was incorporated in 1971.⁶¹ In 1962, Mr. Ketzler and other Native individuals organized an unincorporated association.⁶² Moreover, the Court found that this 1962 entity was the “historic successor of the Tanana Chiefs Conference, the traditional consultative and governing assembly of the Athabascan people of Interior Alaska.”⁶³ If the Superior Court was talking about this ‘62 unincorporated association, the Court’s finding is irrelevant because the status of the ‘62 unincorporated association is not the issue. Of course, the ‘71 articles of corporation, contain this “historic successor” origin-story, but the Court was clearly confused as to whether it was considering the ‘71 incorporated entity or the ‘61 unincorporated entity.

Fourth, the Superior Court did not identify any “tribal purpose” for TCC. The Court noticed that TCC’s “principle purpose for incorporation was to “secure to the Alaska Native people of TCC’s region the ‘rights and benefits to

⁶⁰ Id.

⁶¹ Exc. 1 (R. 144; 303)

⁶² Exc. 54 (R. 058) See Note 8, citing Statement of Alfred Ketzler, President of Tanana Chiefs Conference. Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, Ninety-first Congress First Session on H.R. 13142, H.R. 10193, and H.R. 14212, Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes. U.S. Government Printing Office, 1970.

⁶³ Exc. 102 (R. 545)

which they are entitled under the laws of the United States and the State of Alaska.”⁶⁴ This correctly reflects and restates a purpose articulated in TCC’s articles of incorporation, but the Articles don’t mention tribes or tribal purposes.⁶⁵ rather this is a general articulation of purpose to benefit Alaska Native people without any reference to tribes or tribal affiliation, or Alaska Native people’s status as tribal members/citizens. There is no statement in TCC’s Articles of Incorporation that TCC’s purpose was/is to represent tribes, perform tribal functions, represent tribes for any special or general purpose, or promote self-determination of the tribes.

The fact that tribes repurposed TCC to perform self-determination functions by passing resolutions for TCC to contract with the federal government under the ISDEAA does suggest a limited tribal purpose, but the Superior Court clearly conflated and simplified its analysis by conflating the present day TCC with its predecessors and fail to consider the actual history and changes in purposes that TCC has experienced. In this regard, the Superior Court misapplied both the stated purpose for which the entity was created as it relates to “tribes”, as well as evidence related to that purpose.”⁶⁶

⁶⁴ Id.

⁶⁵ See Exc. 2-11 (R. 191 -221; 355 - 386)

⁶⁶ *Ito.*, at 1022

iii) The Superior Court misapplied the “structure, ownership and management, including the amount of control the tribe has over the entity” factor. As with the first two factors, the Superior Court merely, stated that TCC met the third *Ito* factor in a conclusionary manner devoid of analysis.⁶⁷ In *Ito*, this Court explained,

The control factor “examines the structure, ownership, and management of the entit[y], ‘including the amount of control the Tribe has over the entit[y].’ ” Relevant considerations include “the entit[y’s] formal governance structure, the extent to which the entit[y] [is] owned by the tribe, and the day-to-day management of the entit[y].” If a tribe lacks ownership or control of an entity, or if a tribe relinquishes its authority to non-sovereign entities, this factor will weigh against immunity. Similarly, when multiple sovereigns join to create a wholly new entity, each sovereign may cede some of its sovereign authority; this may weigh against immunity to some extent. But even when an entity is controlled by multiple tribes, this factor can still weigh in favor of immunity if the tribes retain significant control of the entity.⁶⁸

The Superior Courts cursory and conclusionary consideration of this factor was dramatically inconsistent with the *Ito* analysis, and was clearly error.

There is no question that TCC and CRNA differ greatly with respect to control. In considering CRNA, this Court noted that 1) only federally recognized tribes could be members of CRNA, 2) the five member tribes retain significant

⁶⁷ Exc. 102 (R. 545)

⁶⁸ *Ito*, at 1024

control over CRNA's governance, and 3) the tribes share equally in governance to each other.⁶⁹ However, in these respects TCC and CRNA could not be more different.

First, CRNA had only five (5) members, all of which are necessarily federally recognized tribes.⁷⁰ This is not the case with TCC. TCC membership is not restricted to federally recognized Indian tribes and includes five (5) entities that are not federally recognized tribes: i.e. two (2) are state chartered non-profit corporations (Fairbanks Native Association, and Tok Native Association) and three (3) “villages” are not recognized as Indian tribes (e.g. Lake Minchumina, Medfra, and Canyon Village).⁷¹

⁶⁹ *Ito, at 1023*. This Court stated, “Only federally recognized Alaska Native tribes that meet certain criteria are eligible for membership in CRNA. The member tribes retain significant control over CRNA's governance because each member tribe's council “elects or appoints a representative to CRNA's Board of Directors,” and board members and officers must be Alaska Native, be enrolled in a member tribe, and physically reside in the Ahtna region. CRNA's bylaws provide that “[t]he affairs of the Corporation shall be governed by its board of directors.” The number of board members is equal to the number of member tribes, so each sovereign shares its governing authority equally. No entity other than the tribes has any control. Although CRNA is a multi-sovereign entity, the structure of the organization, the requirements placed on directors and their appointment, and the degree of control each tribe retains all support immunity. We therefore conclude that this factor favors immunity.”

⁷⁰ *Ito* at 1008

⁷¹ Compare the current list of TCC members found at <https://www.tananachiefs.org/about/communities> and list of Federally recognized villages at Fed. Reg. Vol. 83, p. 34863 (July 23, 2018) The appearance of an entity or its absence on the list is determinative of Dot Lake's tribal status. See *John v. Baker*, 982 P.2d 738 (Alaska 1999)

TCC's Full Board of Directors is much larger than CRNA's and contains forty-five (45) members, of which eight (8) voting directors are not directors appointed by any tribe. The Full Board includes three (3) officers (President and Vice-President, and Secretary/Treasurer) and directors appointed by non-tribal entities.⁷² Thus, of the 45 Full Board members of TCC, only 37 are appointed by federally recognized Tribes. Strictly speaking, the TCC Full Board of Directors is only 82% tribally appointed and tribally controlled.

Moreover, each of the five (5) CRNA tribes appointed directors to the board, and exercised 20% equal control of CRNA. In TCC's case, Dot Lake's director is one of 45 members, meaning that each tribe can, at a maximum, only exercise about 2% control within TCC's full board. But even that limited amount of control is not equal, because the day-to-day operations of TCC is controlled by an Executive Board; not the Full Board.⁷³

The E-Board is composed of nine (9) members.⁷⁴ None of the E-Board members were appointed by Dot Lake. Three (3) members of the E-Board are officers elected at-large, and are not directors representing any tribe: i.e. the President and Vice-President, and Secretary/Treasurer. The six (6) remaining E-

⁷² Exc. 16 (R. 212) (Bylaws Art. IV, § 2)

⁷³ Exc. 16 (R. 212) (Bylaws Art. VII, § 1)

⁷⁴ Id.

Board members are directors elected from each of TCC's subregions. It is possible that all these subregional E-Board Members could be directors appointed by tribes. However, given that five (5) of the non-tribal members are within four (4) of TCC's subregions,⁷⁵ it is also possible that directors from these non-tribal entities could be elected to serve as four (4) subregional E-Board members, in which case, the E-Board would be controlled by non-tribal entities. There are only two subregions which restrict membership to federally recognized tribes.⁷⁶ As a result, it is only required that two (2) members of the E-Board be directors be appointed by federally recognized tribes, meaning that tribes only control between 66% and 22% of TCC's E-Board, which, in turn, controls TCC day-to-day activities. At the low end, the guaranteed collective strength of all TCC's federally recognized member tribes over day-to-day operations (22%) is roughly the same amount of control each tribe in CRNA exercises (20%) over that latter entity.

Unlike CRNA, the number of TCC's board members is not equal to the number of member tribes, so each sovereign does not share its governing

⁷⁵ Lake Minchumina and Fairbanks Native Association are within the Yukon-Tanana subregion; Medfra is within the Kuskokwim subregion; Tok is within the Upper Tanana subregion; and Canyon Village is within the Yukon Flats subregion.

⁷⁶ Yukon-Koyukuk and Lower Yukon subregions.

authority equally. Entities other than tribes have an equal or greater control over TCC as compared to tribes. Thus, if the Superior Court had properly considered the *Ito* “control” factor, it would have properly found that TCC’s structure, the requirements placed on directors and their appointment, and the degree of control each tribe was minimal and would weigh against immunity for TCC.

iv) The *Ito* Analysis Overlooked ISDEAA Provisions. The Superior Court’s consideration of the tribal intent factor was consistent with this Court’s decision in *Ito*, however, this Court should reconsider its *Ito* analysis of this factor.

In *Ito*, this Court explained, “If tribes were to create a multi-sovereign entity with no evidence that they intended to extend tribal sovereign immunity, that would weigh against immunity.” *Ito* at 1021. Notwithstanding the lack of any evidence that the CRNA tribes intended to extend immunity to CRNA, this Court inferred such delegation from evidence that “CRNA’s member tribes authorized CRNA to carry out services on their behalf under (the) ISDEAA” and statements in CRNA’s articles of incorporation that CRNA “have all the rights, duties, powers and privileges of” the tribes’ historical Chief’s Conference.⁷⁷

⁷⁷ *Ito* at 1025

In the case at bar, the Superior Court found conflicting evidence as to tribal intent to extend tribal immunities to TCC; i.e. finding evidence that Dot Lake and Alakaket expressly did not intend to delegate such immunities to TCC, while Kaltag did intend such a delegation.⁷⁸ Faced with such conflicting evidence, the Superior Court held that Dot Lake “did not expressly reserve its sovereign immunity.”⁷⁹ Having failed to do so, the Superior Court found that Dot Lake had effectively delegated immunity to TCC, which it inferred from the fact that TCC operated contracts and compacts under the ISDEAA.⁸⁰ This was similar to the inferences applied by this Court in *Ito*. Such inferences directly conflict with the terms of the ISDEAA.

The ISDEAA contains a specific disclaimer respecting sovereign immunity that was overlooked by this Court in *Ito*. Specifically, the statute provides that “nothing in this chapter (i.e. the ISDEAA) shall be construed as... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.” 25 USC § 5332 (emphasis added). Of course, delegating sovereign immunity would be a modification.

⁷⁸ Exc. 102-103 (R. 545-546)

⁷⁹ Id., (R. 546)

⁸⁰ Id.,

Thus, creating inferences related to sovereign immunity from provisions of the ISDEAA would be contrary to the ISDEAA itself. As a result, while the Superior Court followed this Court's holding that it could infer tribal intent from tribal actions under the ISDEAA, that inference violated the ISDEAA, and this Court should clarify that such inferences are not permissible upon remand.

(v) The Superior Court misapplied the "financial relationship between the tribe and the entity" factor. The Superior Court held that this factor weighed in favor of TCC having sovereign immunity because it "is in large part funded by federal funding provided to tribes to carry out programs and services in furtherance of self-governance."⁸¹ The critical question to be asked in considering this factor under *Ito* is "whether a judgment against an entity would reach the tribe's assets."⁸² This makes perfect sense in dealing with money-damage claims, and, in that case, would be entirely appropriate under *Ito* analysis of this factor.⁸³ However, this case does not seek money damages. In this case, a judgment would only expose TCC to equitable relief, not a money judgement for which tribal funds – passed through to TCC – would be liable. Thus, the critical question to be asked in considering this factor under *Ito* would

⁸¹ Exc. 102 (R. 546)

⁸² *Ito*, at 1025

⁸³ *Ito*, at 1025-1026

be answered in the negative. A judgment against TCC would not reach tribal assets. As such, in this case, the *Ito* analysis of this factor tips against TCC having immunity. The Superior Court erred in considering this factor because the lower court failed to appreciate the fact that there would be no money judgement that could reach tribal assets.

vi) Overall Analysis. As noted above, when the six *Ito* factors are properly considered, five of the six *Ito* factors weigh against finding TCC having immunity. The Superior Court ignored that TCC was incorporated in 1971 under State and not tribal law. It was not incorporated by tribes (largely because tribes had not been recognized in 1971) but was incorporated by Alaska Native individuals for the purpose of implementing ANCSA, which was about to be passed. The Superior Court ignored that TCC was subsequently repurposed to engage in implementing the ISDEAA, which was passed substantially after its incorporation. TCC is not exclusively a tribal organization, in that five of its members are not federally recognized tribal entities. Critically, TCC is not necessarily controlled by its tribes. TCC's day-to-day functions are controlled by an E-Board, which is not necessarily composed of tribal representatives. Tribes only control between 66% and 22% of TCC's E-Board. Tribes have more control over the Full Board, which meets regularly once a year and in special sessions,

however, TCC Full Board of Directors is only 82% tribally appointed and tribally controlled. There is conflicting evidence as to whether the tribes intended to delegate sovereign immunity to TCC. And no money judgement that could reach tribal assets. Finally, the assertion of immunity by a consortium to bar a tribe's legal action seeking to compel compliance with the consortium bylaws is antithetical to the notions of tribal sovereignty and self-determination because it obstructs tribal control over the consortium.

IV. EXCEPTIONS TO THE DOCTRINE OF SOVERIEGN IMMUNITY APPLY TO PRECLUDE TCC FROM ASSERTING IMMUNITY IN THIS CASE.

a) *An Arm of The Tribe May Not Assert Sovereign Immunity Against
The Tribe (A Superior Sovereign).*

i. Superior Court Did Not Rule On Issue. In the lower Court, Dot Lake asserted the "superior sovereign" exception to TCC's assertion of sovereign immunity.⁸⁴ The Superior Court dismissed the Tribe's lawsuit without addressing the issue.⁸⁵ As a result, this Court should reverse and remand for procedural and substantive reasons.

⁸⁴ Exc. 77-78 (R. 81 et. seq.)

⁸⁵ See Exc. 96-109- (R. 539-552)

The Superior Court's failure to address the "superior sovereign" argument is procedural error requiring remand. Civ.R. 52(a) requires that Superior Court resolve all critical issues and disputes. *Mapco Express, Inc. v. Faulk*, 24 P.3d 531, 537-38 (Alaska 2001) (citing *Sullivan v. Subramanian*, 2 P.3d 66, 69-72 (Alaska 2000); see also *Beaulieu v. Elliott*, 434 P.2d 665, 670 (Alaska 1967))). The Superior Court's decision must be sufficient to indicate consideration was made of each significant issue, and provide the reviewing court with a clear understanding of the basis for the trial court's decision. *Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 236 n.16 (Alaska 1982) citing *Urban Development Co. v. Dekreon*, 526 P.2d 325, 328 (Alaska 1974); *Wigger v. Olson*, 533 P.2d 6, 7-8 (Alaska 1975). In the present case, the Superior Court did not address the "superior sovereign" exception to TCC's sovereign immunity claim. Clearly, it did not articulate that it had a clear understanding of the issue, nor the basis for the Court's ruling on this point. As a result, this Court does not have a sufficient record to allow review. On these grounds alone, this Court should reverse the Superior Court's decision and remand the matter. *Beaulieu v. Elliott*, 434 P.2d 665, 670 (Alaska 1967)

ii) The Tribe Is A Superior Sovereign. If the Superior Court's failure to address the "superior sovereign" argument was an implied rejection of the principle, the Superior Court committed substantive error. The doctrine of

“superior sovereign” applies in contests between superior governments and dependent government agencies. *Native Village of Eklutna v. Alaska R.R. Corp*, 87 P.3d 41 (Alaska, 2004) Essentially, the doctrine means that the instrumentality of a government may not pre-empt the prerogatives of the superior sovereign unless the superior government expressly delegates that power to the instrumentality. As applied in *Native Village of Eklutna v. Alaska R.R. Corp*, the Court held that the State Railroad did not enjoy sovereign immunity from local zoning laws unless the state legislature clearly expresses its intention to exempt the Railroad. *Id.* 49-50.

The Superior Sovereign exception to sovereign immunity is well recognized in the federal courts. The Ninth Circuit has held that “the Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers.” *United States v. White Mountain Apache Tribe*, 784 F. 2d 917, 920 (9th Cir. 1986)⁸⁶; See also *Quileute Indian Tribe v Babbitt*, 18 F.3d 1456, 1559-60 (9th Cir. 1994) This appears to be the majority rule among the

⁸⁶ See companion case, *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986)

Circuits.⁸⁷ As the Court in *Miccosukee Tribe* noted, a "superior sovereign" is not subject to the defense of tribal sovereign immunity.⁸⁸

Alternatively, TCC argued below that the well-established superior sovereign exception to tribal immunity was irrelevant citing *United States v White Mountain Apache Tribe*, supra.⁸⁹ Of course, in *United States v White Mountain Apache Tribe*, the tribe was actually enjoined from interfering from US officials because of the superior sovereign doctrine. TCC offered no legal analysis as to why the doctrine was irrelevant to a lawsuit between a tribe and an arm of the tribe.

More notably, TCC argued that Dot Lake was not a superior sovereign, while acknowledging that "TCC's sovereign immunity is an extension of the tribe's own sovereignty."⁹⁰ The fact that TCC derived any sovereign attributes

⁸⁷ See *In re Grand Jury Proceedings*, 744 F.3d 211 (1st Cir. 2014); *Reich v. Mashantucket Sand Gravel*, 95 F.3d 174, 182 (2d Cir. 1996); *National Labor Relations Board v Little River Band of Ottawa Indians*, 788 F.3d 537 (6th Cir., 2015); *U.S. v Red Lake Band of Chippewa Indians*, 827 F. 2d, 380, 383 (8th Cir. 1987) (holding that "a state may not assert sovereign immunity as against the federal government, neither may an Indian Tribe, as a dependent nation, do so." Citing *U.S. v Mississippi*, 380 U.S. 128, 140-41 (1965)); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F. 3d 1126, 1135 (11th Cir. 1999) (as explained in *Miccosukee Tribe of Indians v U.S.*, 730 F. Supp. 2d 1344 (S.D. Fla., 2010)

⁸⁸ *Miccosukee Tribe of Indians of Florida v. U.S.*, 730 F. Supp., 1348-49 (quoting *Babbitt*, 18 F. 3d, at 1459-60.)

⁸⁹ Exc. 92 (R. 112-12)

⁹⁰ *Id.*

from Dot Lake makes it an arm of the tribe, and means that Dot Lake is necessarily a superior sovereign to TCC. In this case, there is no question that Dot Lake Village is the “superior sovereign” to TCC. As a result, the “superior sovereign” exception to the doctrine of sovereign immunity would apply to allow the Tribe’s suit to proceed.

b) *TCC’s Actions Were Ultra Vires Which Preclude The Assertion of Immunity.* The complaint alleges that the TCC officials are acting *ultra vires*, which would mean that if TCC did have sovereign immunity, that immunity would not extend to officials acting *ultra vires*. *Douglas Indian Association v Central Council*, 403 P.3d 1172, 1181 (Alaska, 2017). Normally, as with *Douglas Indian Association*, the issue arises with a tribal official asserting sovereign immunity, which only applies where the Tribal official is acting within the scope of their official duties. *Ultra vires* actions – actions taken outside the official’s scope of duties, --- are not covered by the tribes’ sovereign immunity.⁹¹ This is particularly so when the claims seek declaratory and/or injunctive relief. *Oertwich v Traditional Village of Togiak*, 29 F.4th 1108 (9th Cir., 2022). In such cases, the individual person --- as distinct from their status as a tribal official – may be held subjected to declaratory and/or injunctive relief.

⁹¹ Id.

Of course, corporations like TCC are legal persons. *Burwell v Hobby Lobby Stores, Inc.* 573 U.S. 682 (2014); See also *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010) Just as a legal person serving as a tribal official may be held responsible for *ultra vires* actions, so may a subsidiary tribal corporate person be held responsible for its *ultra vires* acts.

Of course, TCC's alleged *ultra vires* actions are central to this lawsuit. Specifically, the complaint alleges numerous actions that are *ultra vires* because they violate TCC's Bylaws, such as ejecting Directors from meetings, failing to provide Directors with adequate notice, denying Directors the right to vote or otherwise participate in meeting.⁹² TCC's actions that clearly violate TCC's Bylaws are *ultra vires*, and constitute an exception to the doctrine of sovereign immunity that would allow suit for declaratory and injunctive relief.

CONCLUSION. Because the Superior Court incorrectly applied the law and based its decision on an erroneous standard, This Court should reverse that decision and remand the matter to the Superior Court.

⁹² See Complaint. Exc 33-50 (R. 554-571)

Date: August 5, 2024

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Certificate of Service

I certify that a true and correct copy of the foregoing
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

DOT LAKE VILLAGE,
- Appellant,

vs.

DENA' NENA' HENASH d/b/a
Tanana Chiefs Conference
- Appellee

Supreme Ct. Case No. S-18599
Superior Ct Case No. 4FA-22-01388 CI

CERTIFICATE AS TO TYPEFACE

I certify, pursuant to App. R. 513.5, that the aforementioned documents
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August 5, 2024

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