

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 REPLY BRIEF

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

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Filed this 4th day of November, 2024
in The Supreme Court for the State of
Alaska.

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Certificate of Service

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/s/ Jennifer Desrosiers

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ARGUMENT

INTRODUCTION

Tanana Chiefs Conference's (TCC) Reply Brief claims that 1) TCC has tribal sovereign immunity under *Ito v Copper River Native Ass'n.*, 547 P.3d 1003 (Alaska, 2024); 2) the issues raised in this case involve non-justiciable inter-tribal dispute under *Healy Lake v McKinley Bank*, 322 P.3d 866 (Alaska, 2014) and 3) Dot Lake Village ("Dot Lake") waived its sovereign immunity by inference.

TCC' reply brief is nothing more than a series of strawman arguments addressing a hypothesized case rather than the case at bar- i.e. framing the issues as if this were a case against a tribal organization by a third party seeking money damages as in *Ito*. The present case is distinguishable from *Ito* on several factual basis. This is a case by a tribe against a subordinate tribal organization seeking mandamus relief requiring that entity to comply with its bylaws. As a result, the evidentiary facts in the record do not support a finding that TCC has sovereign immunity in this case. Additionally, TCC advances an inaccurate and factually unsupported history of itself. TCC's assertion that the lower court articulated a separate and alternative basis holding that this case involved a non-justiciable inter-tribal dispute is simply false. Finally, Dot Lake Village did not waive its immunity.

I. TCC DOES NOT POSSESS TRIBAL SOVEREIGN IMMUNITY UNDER *ITO* IN THIS CASE.

TCC's brief argues that the Superior Court applied the correct test in the correct manner to find that TCC possessed sovereign immunity.¹ The Superior Court was very clear in stating that it applied a five (5) factor test described in *White v Univ. of Cal.*, 765 F.3d 1010 (9th Cir., 2014) rather than the *Breakthrough* six (6) factor test adopted in *Ito*.² TCC does not dispute this fact. Rather, TCC minimizes this omission as unimportant. However, in the context of this case, the sixth factor is of paramount importance and its omission by the Superior Court was error. Moreover, the Superior Court applied the factors incorrectly in other ways discussed below.

a) The Sixth Factor. The sixth factor mandated by *Ito* is "whether the purposes of tribal sovereign immunity are served by granting immunity."³ The

¹ Appellee's Br., at 8- 28

² Exc. 100-102 (R. 543-545) In *Ito*, this Court adopted the six (6) factor test employed in *Breakthrough* which includes (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. *Ito v Copper River Native Ass'n.*, 547 P.3d at 1022, citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010)

³ *Ito v Copper River Native Ass'n.*, 547 P.3d at 1022

sixth factor is not considered separately, but focuses the inquiry of the other five factors.⁴ As described in *Breakthrough*, this sixth factor requires the Court to consider each of the other factors focused on “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....”⁵ Whether considered separately, or used to focus the other five factors, the sixth factor clearly tips against finding that TCC has sovereign immunity in this case.

Fundamentally, this case is about tribal control over a tribal organization. Dot Lake seeks to enforce the bylaws developed by the member tribes and other members which govern the tribes’ organization. Dot Lake is not suing TCC for a money judgment but rather an injunction compelling TCC to comply with TCC’s bylaws. Consequently, the lawsuit does not risk the loss of tribal funds. Rather it seeks to insure control over tribal funds on the terms and conditions agreed upon by the members. The lawsuit seeks to preserve tribal autonomy, and self-

⁴ Id.

⁵ *Breakthrough, supra*, at 1188(citations omitted)

determination because the whole purpose of tribal autonomy and self-determination is to secure tribal control over the Tribe's programs, services and functions, and requiring that TCC be governed upon the agreed upon terms and conditions, which should promote tribal autonomy and self-determination. Considering the sixth factor standing alone, there is no question that the sixth factor tips all the other five factors decidedly in favor of permitting tribes to enforce a tribal organizations bylaws, and against the tribal organization asserting sovereign immunity against its member tribes. TCC's reply brief does not really address the sixth factor and doesn't attempt to argue against this self-evident truth. When the sixth factor is used as a lens to focus the other five factors, the conclusion is more obvious: TCC should not be permitted to assert immunity against a sanctioning tribe.

b) The First Factor Through the Focus of the Sixth Factor. TCC argues that TCC 's purpose (i.e. the first factor) is to perform "core governmental functions," including providing government services and self-determination and self-governance program functions and services.⁶ Standing alone, that might sound good, however, when focused through the sixth factor the argument becomes ironic and cynical. There can be no TRIBAL self-determination over

⁶ Appellee's Br. At 10-11

core governmental functions if the tribes do not control the tribal organization. Rather, when viewed through the focusing lens of the sixth factor, (sovereign immunity, self-determination and autonomy) the assertion of immunity by a tribal organization against the Tribe undercuts the TRIBES self-determination and autonomy over core governmental functions, which tips strongly against finding that TCC has sovereign immunity.

c) **The Second Factor Through the Focus of the Sixth Factor.** TCC ignores the fact that tribes didn't create TCC in 1971 because federal recognition of Interior Alaskan tribes didn't happen until 1993.⁷ This inconvenient truth can only mean that while TCC was created by Native Alaskans, it was not created by tribes. In discussing TCC's method of creation (i.e. the second factor) both the Superior Court and TCC's brief simply misstate the basic historical facts. The record clearly establishes that TCC was incorporated in 1971, just before the enactment of the Alaska Native Claims Settlement Act (ANCSA).⁸ The Superior Court got it wrong when it found that TCC was incorporated in 1962.⁹ TCC got it wrong when it argues that TCC was incorporated after enactment of ANCSA.¹⁰

⁷ *John v Baker*, 982 P.2d 738, 749 (Alaska 1999)

⁸ Exc. 1 (R. 144) See also Exc. 10 (R. 59) 43 U.S.C. 1601 et. seq

⁹ Exc. (Decision at P. 6)

¹⁰ Appellee's Br., at 16

This is important because TCC's incorporation was clearly part of the ANCSA's implementation (as discussed in Dot Lake's Opening Brief¹¹). The record is clear that TCC was formed as a vehicle to implement ANCSA; not to provide core governmental functions such as self-determination and tribal autonomy as claimed by TCC.¹² The fact is also important because it demonstrates that TCC was "re-purposed," four years after it was incorporated to serve as an ISDEAA¹³ contractor for its members, and did not actually perform this function for tribes until tribes were recognized in 1993, twenty-two years after TCC was incorporated.¹⁴ TCC could not have been originally created to serve as an ISDEAA contractor because the ISDEAA was not enacted until 1975, which was twenty-two years after TCC was incorporated. Of course under *Ito*, "a tribe's absorption of an already operational non-tribal entity" weighs against immunity.¹⁵ The Superior Court ignored this fact, as did TCC's Brief.

¹¹ Appellant's Opening Br., at 20-21

¹² Of course, an unincorporated association named Tanana Chief existed prior to ANCSA and served as an advocate for passage of ANCSA. But this inconvenient truth also goes to the purpose of creating TCC; i.e. as a land claims movement advocate.

¹³ Indian Self-Determination and Educational Assistance Act. 25 USC 5301 et. seq. (Pub. Law 93-638; Jan. 4, 1975)

¹⁴ *John v Baker*, *supra*

¹⁵ *Ito*, *supra*, at 1023

The Superior Court found, and TCC's reply brief argue, that TCC's is the historical successor to the Tanana Chiefs that met with Judge Wickersham.¹⁶ While Wickersham's meeting with the Chiefs is an important precedence of early coordinated action, when viewed through the lens of the sixth factor, it is largely irrelevant with regard to the first factor. TCC admits Wickersham only met with six (6) chiefs from Tanana (or Ft. Gibbon), Crossjacket, Tolovana, Minto, Chena, and Salchaket.¹⁷ Only two of those groups (Tanana and Minto) were predecessors of existing Indian tribes and members of TCC.¹⁸ More importantly, the group with which Wickersham met comprised a very small sample of the tribes located along a small stretch of the Tanana River. TCC's service area is huge covering an area the size of Texas, with 37 member tribes and other non-tribal groups. The majority of TCC's current member tribes were excluded from the Wickersham meetings; i.e. including some Tanana River Tribes (like Dot

¹⁶ Id, at 16-17

¹⁷ "Our Story" (Tanana Chiefs Conference) (<http://www.tananachiefs.org/about/our-history/>)

¹⁸ Crossjacket, Tolovana, Chena, and Salchaket all ceased to exist prior to 1968 and have never been federally recognized as Indian tribes. See Fed. Reg. Vol. 83, p. 34863 (July 23, 2018). Compare ALASKA NATIVE AND THE LAND pp. 54-55(Fed. Field Committee for Development and Planning for Alaska, 1968) (Note: The Federal Field Committee for Development Planning in Alaska was established by Executive Order 11182, October 2, 1964 The Field Committee coordinated Alaskan economic development following the Alaska earthquake and in planning for settlement of Alaska Native Land Claims. See <https://www.presidency.ucsb.edu/documents/executive-order-11182-establishing-federal-development-planning-committees-for-alaska>). There is no evidence that these other groups were historical predecessors for any federally recognized tribe.

Lake, Healy Lake, Northway, and Tanacross), and Tribes located along the Yukon, and Kuskowim Rivers, and within the Yukon Flats. There is no evidence that the 1915 Tanana Chiefs were authorized to speak on behalf of the excluded Native groups which comprise the vast majority of TCC's member tribes.¹⁹

While TCC's relies upon Schneider's history,²⁰ nothing in Schneider suggests that the Chiefs who met with Judge Wickersham created an organization to perform central government functions on their behalf. Schneider's passages cited by TCC (as well as the remaining text) clearly demonstrate that the chiefs were in an advocacy role addressing land use

¹⁹ TCC members are listed at <https://www.tananachiefs.org/about/communities>. Compare. Fed. Reg. Vol. 83, p. 34863 (July 23, 2018). TCC's argument is a repugnant myth long used to divest tribes of their land, resources and authority. There is a long history of the United States meeting with a small subset of Indians seeking land cessions of a larger group. This tactic is described in *U.S. v Washington*, 384 F. Supp. 312 (W.D. Wash., 1974) (i.e. *Bolt* decision) in which the President authorized Governor Stevens to negotiate treaties with several Washington tribes. In doing so, Stevens appointed Indians as chiefs to represent groups whose leaders did not engage in the treaty process. *Id.*, at 355. This tradition has spawned a rule of construction providing that such treaties should be interpreted as the Indians would view the agreement. *Id.*, at 330-331. The Indian view of this tactic was best described by Chief Joseph of the Nez Pierce who stated

Suppose a white man should come to me and say, 'Joseph, I like your horses, and I want to buy them.' I say to him, 'No, my horses suit me, I will not sell them.' Then he goes to my neighbor, and says to him, 'Joseph has some good horses. I want to buy them, but he refuses to sell.' My neighbor answers, 'Pay me the money, and I will sell you Joseph's horses.' The white man returns to me and says, 'Joseph, I have bought your horses, and you must let me have them.' If we sold our lands to the Government, this is the way they were bought.

Laughy, L., 'In-mut-too-yah-lat-lat Speaks: Chief Joseph Shows His Heart' in *In Pursuit of the Nez Perces: The Nez Perce War of 1877*, at 284 (Mountain Meadow Press; 1993).

²⁰ Appellee Br. at 13, 17-18 (i.e. Schneider, et.al. *THE TANANA CHIEFS: NATIVE RIGHTS AND WESTERN LAW*, (Univ. of Alaska Press, 2018))

conflicts and the need for federal services. The chiefs present at the meeting directly represented their own groups. The Schneider's history does not state that any chiefs ceded any authority to any organization to act on their behalf. Of course, the same can be said of the Chiefs from the other 35 Native groups excluded from the meeting. The historical evidence offered by TCC demonstrates that there was no historical traditional indigenous governing organization above the village/band level that possessed the authority to perform core governmental functions on behalf of the tribes. Thus, while the Chiefs-Wickersham meeting was an important historical event, it does not suggest a precedence for TCC to perform core governmental functions. Rather, in the context of this suit, TCC's argument seeks to undercut and erode tribal sovereignty, self-determination and autonomy so jealously guarded by the chiefs who met with Wickersham.

d) **The Third Factor Through the Focus of the Sixth Factor.** TCC argues that the "control factor" (third factor) favors finding sovereign immunity.²¹ TCC asserts that "TCC is entirely controlled by its constitute tribes."²² In support of that argument TCC points to the TCC bylaws. This is odd because, this lawsuit

²¹ Appellee Br., at 20

²² Id., at 21

seeks to enforce those bylaws, and TCC is asserting sovereign immunity to block the enforcement of the TCC bylaws, rendering the bylaws meaningless. Viewed through the sixth factor and in the context of this lawsuit, sovereign immunity is clearly contrary to the “purposes of tribal sovereign immunity;” i.e. tribal autonomy, sovereignty, and self-determination. Assuming that the Bylaws actually result in tribal control, TCC’s assertion of sovereign immunity in a lawsuit brought by a tribe to enforce the TCC bylaws means that there is no enforceable tribal control of TCC, which decidedly tips against the assertion of sovereign immunity.

TCC also argues that the inclusion of non-tribal entities in the TCC membership and boards is irrelevant because 1) the non-tribal members of TCC may become recognized as tribes in the future, and 2) tribes have overwhelming control over TCC.²³ The first argument is nothing more than a “would’ve, could’ve, should’ve” argument, which minimizes the reality that the non-tribal members are exactly that- not tribes. The extent that non-tribal members exercise control over TCC is a measure of diminished tribal control. As noted in Dot Lake’s opening brief, the presence of non-tribal entities in TCC’s governance system necessarily results in quantifiable reduced tribal control (i.e. 82% tribal

²³ Id., at 23.

control at the full board level, and between 66% and 22% at the E-Board level²⁴). TCC does not dispute these calculations of diminished tribal control other than to simply ignore them.

In a suit by a tribe to enforce a tribal organization's bylaws, sovereign immunity is clearly contrary to the "purposes of tribal sovereign immunity" and reduces tribal autonomy, sovereignty, and self-determination, which tip decidedly against imbuing the tribal organization with sovereign immunity under *Ito*.

e) The Fourth Factor Through the Focus of the Sixth Factor. TCC argues that tribal intent (the fourth factor) is inferred from Dot Lake's authorization of TCC to serve as its ISDEAA contractor, and that such an inference is consistent with *Ito*. But *Ito* dealt with a third party bringing suit against the tribal organization. This case deals with a suit by a tribe against the tribal organization, which clearly infers a tribe's intent to not imbue the organization with sovereign immunity. TCC suggests a myopia which only infers intent from the tribe's authorizing TCC to serve as an ISDEAA contractor, which is silent regarding litigation. TCC's myopia ignores any inference from the Tribe bringing

²⁴ Appellant Br., at 29-30

suit, which directly expresses the Tribe's intent and expectations respecting litigation. The Superior Court ignored the obvious and direct inference as to the Tribe's intent that TCC not possess immunity.

When this factor is considered through the lens of the Sixth factor, the inferred conclusion is obvious. TCC possessing sovereign immunity may promote tribal autonomy, sovereignty, and self-determination in a suit brought by a third party, but the opposite is true as to a suit brought by the Tribe. The only reasonable inference of tribal intent that may be drawn in a suit by a tribe against a tribal organization is that the tribe intends for the tribal organization to be judicially accountable. Moreover, ambiguities in federal Indian law should be construed in favor of the tribes retaining their rights. *South Dakota v. Yankton Sioux Tribe* 522 U.S. 329 (1998) In this case, the only reasonable inference of tribal intent, when viewed through the lens of promoting tribal autonomy, sovereignty and self-determination of Indian tribes is against the finding of TCC's immunity from suit brought by a tribe.

f) The Fifth Factor Through the Focus of the Sixth Factor. TCC' argument addressing the fifth factor is also a strawman argument addressing a hypothesized case rather than the case-at-bar. 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.”²⁵ TCC argues that the answer is yes,²⁶ which is absurd given that Dot Lake is not looking for a money judgment.

TCC defends this absurdity by misstating the *Ito* test. Recognizing that Dot Lake is not seeking a money judgment, TCC seeks to divert this Court’s attention away from any hypothesized money judgment and argues that the Court should consider the cost of litigation incurred by TCC.²⁷ Of course, that is not the factor as articulated in *Ito*. *Ito* solely focused upon the effect of a money judgement.²⁸ *Ito* did not address the impact of litigation costs.

TCC’s argument also misdirects the focus of this fifth factor to suggest that the Court should look at the financial impact on TCC rather than the tribe. But this Court in *Ito* considered the financial relationship factor in light of the financial impact upon the Tribe and its resources; not the impact upon the tribal organization.²⁹ This distinction becomes clearly focused through the lens of the sixth factor. When a tribe makes a decision to sue its tribal organization it is

²⁵ *Ito*, at 1025

²⁶ Appellee’s Br, at 25

²⁷ *Id.* at 26

²⁸ *Ito, supra.*, at 1026

²⁹ *Id.*

clearly making a decision about using its resources: i.e. not only the use of resources in the Tribe's possession to pay the cost of bringing the litigation but also the use of its resources in the possession of the tribal organization to defend that litigation. The whole policy of tribal sovereignty, autonomy and self-determination suggests that the Tribe is the entity that should make the decision about the deployment of its resources. Neither TCC nor the Superior Court should second guess the decision of the Tribe in considering how best it should deploy its resources including the tribal resources held by a tribal organization.³⁰

g) Dot Lake Carried The Burden Of Proof That The Superior Court Had Jurisdiction. TCC argues that the Dot Lake failed to carry the burden of establishing jurisdiction pursuant to Civ. R. 12(b)(1); i.e. proof that TCC lacks

³⁰ With all due respect, the *Ito* Court's analysis of the financial relationship between a tribe and an ISDEAA contracting tribal organization is overly simplistic in that it does not consider the federal rules and regulations governing ISDEAA contracts. In particular, the questions as to whether a judgement (or defense litigation cost) is allowable, whether the cost is born by the treasury of an authorizing tribe(s), the tribal organization's treasury, or the federal government, and whether such costs reduce services to tribal members, are much more complex. See generally 25 USC §5325. As a general matter, TCC's litigation defense costs and any judgment in the type of case-at-bar would not be necessarily allocated against an ISDEAA contract as a direct cost because the cost is not an expenditure "supportive of a contracted program." See 25 USC §5325(k)(7) & (11). Rather costs associated with a tribal organization's governance not attributable to the management or operation of a contracted program would be an indirect (contract support) cost or an unallowable cost assessable against self-generated revenues. See 2 CFR Part 200. The current contract support costs policy may be found at https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/13_IAM_7_Contract_Support_Costs_508_OIMT.pdf

sovereign immunity.³¹ The record clearly establishes that the Superior Court erred based upon the record of evidence. As noted above, the relevant evidence in this case is largely undisputed. The parties agree that Dot Lake authorized TCC to serve as its ISDEAA contractor, that TCC is supposed to be governed by its bylaws, which are the method and means by which the member tribes' control TCC, and that Dot Lake brought this suit to enforce those bylaws. Tribal control of TCC is disputed because non-tribal members exercise control over TCC diminishing tribal control, and TCC immunity eviscerates any enforcement of those bylaws and tribal control which bylaws may provide. The parties dispute when TCC was incorporated, but the record is clear that TCC was incorporated just before passage of ANCSA to implement ANCSA, and that it was not incorporated in 1962 as found by the Superior Court, nor incorporated after ANCSA as TCC claimed in its brief. The record clearly establishes that TCC was not incorporated to be an ISDEAA contractor, since it was incorporated prior to passage of the ISDEAA. Rather TCC was "re-purposed" from its original purpose to implement ANCSA to be an ISDEAA contractor after passage of that law. There is no question that TCC is a corporation which shields the Tribe treasury from liability. TCC's origin story is important but largely irrelevant to TCC performance of service functions. In short, Dot Lake carried its burden of

³¹ Appellee Br., at 6-7

proof that TCC does not have sovereign immunity when viewed in light of the six-factor test articulated in *Ito*.

II. EXCEPTIONS TO SOVEREIGN IMMUNITY

a) Superior Sovereign. TCC argues that the superior sovereign doctrine articulated in *Eklutna v Alaska Railroad*³² is irrelevant. That decision held that the superior sovereign exception to sovereign immunity is a matter of common law. The Court found that the common law did not apply because it had been changed by state legislature relative to the subject of the litigation. There is no state or federal law that repeals or modifies the superior sovereign doctrine applicable to this case. TCC does not address the federal case law holding that a subordinate government cannot assert immunity against the government that created it³³ other than to note the obvious fact that Dot Lake is not the United States government. But TCC does not offer any authority to suggest that a subordinate government can assert immunity against the government that created it.

³² 87 P.3d 41 (Alaska, 2004)

³³ *United States v. White Mountain Apache Tribe*, 784 F. 2d 917, 920 (9th Cir. 1986)³³; See also *Quileute Indian Tribe v Babbitt*, 18 F.3d 1456, 1559-60 (9th Cir. 1994). See also cases cited at Appellant Br. at 37 n 87

b) **Ultra Vires.** TCC argues that it is not a “legal person,” and lacking such status is not subject to the ultra vires exception to sovereign immunity applicable to tribal officials. It is black letter law that a corporate entity is a legal person distinct from its members. *Gold Dust Mines, Inc. v. Little Squaw Gold Min. Co.*, 299 P.3d 148, 159-160 (Alaska, 2012) citing *Marine Solution Servs., Inc. v. Horton*, 70 P.3d 393, 401 (Alaska 2003). Thus, it is clear that TCC is a legal person and claims to be imbued with authority to act on behalf of the tribe. In this sense, TCC claims the same derivative immunity as a tribal official. In that vein, TCC is responsible as would a tribal official when its actions are *ultra vires*.

III. HEALY LAKE V MCKINLEY BANK IS NOT RELEVANT.

TCC’s assertion that the lower court articulated a separate and independent basis holding that this case involved a non-justiciable inter-tribal dispute dismissible under *Healy Lake v McKinley Bank*³⁴ is simply false. TCC claims that the “Superior Court’s second ground for dismissal was that this matter is a non-justiciable inter-tribal dispute.”³⁵ TCC further argues that Dot Lake did not appeal nor brief the second basis for dismissal at all, thus waiving argument on that point.” TCC’s assertion is factually untrue, and is a blatant attempt to

³⁴ 322 P.2d 866 (Alaska 2014)

³⁵ Appellee’s Br. At 6

mislead this Court, which is not supported by the record in this case. Even a cursory review of the order exposes this misrepresentation.

In support of its argument, TCC points to page 10-12 of the Superior Court's decision.³⁶ However, the Superior Court never stated that it was finding a separate and independent basis for dismissal under *Healy Lake v McKinley*. Rather, the Superior Court was very clear in discussing *Healy Lake v McKinley* (along with *Runyon*³⁷, and *Douglas Indian Community*³⁸) in the context of its discussion that TCC had sovereign immunity under *Runyon* (i.e. Alaska state law).³⁹ Specifically, the Superior Court discussed *Healy Lake* in the context of analyzing the purposes of tribal sovereign immunity as one of the factors to be considered under *Runyon*. The Superior Court held that, "based upon ... the core purposes of tribal sovereign immunity as expressed in *Runyon*, *Healy Lake*, and *Douglas*, the Court finds TCC is entitled to assert tribal sovereign immunity under Alaska state law."⁴⁰ Of course, *Runyon* was overturned by *Ito*.⁴¹ The fact

³⁶ Exc. 191-193

³⁷ *Runyon v Association of Village Council Presidents*, 84 P.3d 437 (Alaska, 2004)

³⁸ *Douglas Indian Community v Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172 (Alaska, 2017)

³⁹ Exc. See generally 188-194

⁴⁰ Exc. 194 (Decision at p. 13)

⁴¹ *Ito v Copper River Native Ass'n.*, 547 P.3d at 1022

that *Runyon* was overturned in *Ito* after the Superior Court's ruling renders this discussion irrelevant. This fact was clearly stated in Dot Lake's Opening Brief.⁴²

IV. DOT LAKE DID NOT WAIVE ITS IMMUNITY.

TCC continues to argue that Dot Lake waived its sovereign immunity by initiating litigation.⁴³ In doing so, TCC relies upon *In re White*, 139 P.3d 1268 (9th Cir., 1998), which is a bankruptcy case holding that by participating in a bankruptcy proceeding, an Indian tribal government "waived sovereign immunity respecting the adjudication of its claim against [the debtor]'s assets." Notably, *In re White* did not deal with an affirmative judgment against a tribe, but merely dealt with the fact that a bankruptcy court had jurisdiction over whether the tribe could assert a claim on the debtor's assets. Of course, that is very distinguishable from the case at bar, where the Court issued an affirmative

⁴² Appellant's Opening Brief, at 14. Of course, neither *Healy Lake v McKinley* nor *Douglas Indian Community* are applicable to this case. This case is about a claim brought by a tribe against a tribal organization seeking to enforce that tribal organization's bylaws and the Tribe's control over the tribal organization. *Healy Lake* dealt with a dispute between two factions of the tribe claiming to be the governing body. *Douglas Indian Community* was a dispute between two federally recognized tribes. Neither of these cases involved a dispute between a tribe and a tribal organization. As discussed elsewhere in Dot Lake's Opening Brief and this brief, those distinctions raise very different issues, and particularly with regard to the purpose of sovereign immunity as an instrument for a tribe to control its affairs.

⁴³ Appellee Br., at 40 et. al.

money judgement against the tribe. The distinction, while subtle, is important as demonstrated in *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003), which held that “a lien avoidance brought as a contested matter by a tribe in a bankruptcy case constitutes a suit and, in the absence of an unequivocal waiver of immunity in federal bankruptcy court, is subject to tribal immunity.” *Id.* at 157 The two cases demonstrate that complexity of the issue of tribal immunity in bankruptcy, which is governed by complex federal statutes, rather than common law sovereign immunity principles. In the context of this case, the better guidance maybe found in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991), in which the United States Supreme Court rejected the “waiver by litigation” doctrine. Specifically, the Court held a “Tribe did not waive its inherent sovereign immunity from suit merely by seeking an injunction against the Commission’s proposed tax assessment.” This is very similar to the present case in that Dot Lake was bringing an suit seeking an injunction. Under *Oklahoma Tax Comm'n* it was error for the Superior Court to infer a waiver of immunity as to TCC’s claim for attorney fees.

V. CONCLUSION

This Court should reverse that decision and remand the matter to the Superior Court for the reasons stated above.

Date: October __, 2024

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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

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