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IN THE SUPREME COURT
STATE OF ARIZONA

HWAL'BAY BA:J ENTERPRISES, INC.,

Petitioner,

v.

THE HONORABLE LEE F. JANTZEN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MOHAVE,

Respondent Judge,

SARA and WILLIAM FOX,

Real Parties in Interest.

Case No. CV-19-0123-PR

Arizona Court of Appeals
Case No. 1 CA-SA 19-0059

Mohave County Superior Court
Case No. CV2018-00428
Hon. Lee F. Jantzen

RESPONSE TO PETITION FOR REVIEW

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Introduction

Sara Fox suffered grievous personal injuries during GCRC's day-to-day operation of one of its rafting trips.[1] The Hualapai Tribe had formed GCRC, but had rejected *any* right to interfere with or give *any* orders or instructions to GCRC's officers or employees on its day-to-day operations. (App081 at § 2.03).

GCRC claims it has tribal sovereign immunity for the rafting trip. But that makes no sense, because the Tribe itself had no need or right to assert tribal sovereign immunity for the injury-causing day-to-day operation over which it lacked and had disavowed any right of control. Since that immunity does not apply to the Tribe in this case, it cannot immunize GCRC. For that reason and for others set out in this Response, the Court should deny the Petition for Review.

Memorandum of Points and Authorities

1. GCRC has the burden of proving tribal sovereign immunity.

GCRC bears the burden of proving entitlement to tribal sovereign immunity by a preponderance of the evidence. *Williams v. Big Picture Loans*, 329 F.Supp.3d 248, 271 (E.D. Va. 2018); *McCoy v. Salish Kootenai College, Inc.*, 334 F.Supp.3d 1116, 1120 (D. Mont. 2018).

Courts review tribal-sovereign-immunity claims de novo. *Filer v. Tohono*

[1] As did the Petition for Review, this Response usually refers to Petitioner Hwal'Bay Ba:J Enterprises, Inc. as "GCRC," the abbreviation for Grand Canyon Resort Corporation.

O'Odham Nation Gaming Enter., 212 Ariz. 167, 169 ¶ 5 (App. 2006). The clearly-erroneous standard applies to the review of immunity-related findings of fact. *Carey v. Soucy*, 245 Ariz. 547, 552 ¶ 20 (App. 2018).

2. The rafting trip, part of GCRC's day-to-day operations, ended in catastrophe.

The Foxes agree this is a serious case for them and GCRC, the independent corporation the Hualapai Tribe created and then left solely in charge of its day-to-day operations—including the rafting trip that left Sara Fox with catastrophic injuries, including a traumatic mastectomy.

On April 17, 2016, after piloting the raft carrying the Foxes onto the Colorado River, two GCRC employees operating the raft negligently maneuvered a rapid and ejected Sara over the raft's front (bow). (App004-App005, ¶ 28). The employees then negligently failed to stop the motor and propeller, even *after* the propeller slashed into Sara. (App005, ¶¶ 29-30).

GCRC's employees only stopped the motor and propeller after Sara twice screamed for them to turn it off—while the blades were slicing into her. (App005, ¶ 31). After that, GCRC incompetently provided Wilderness First Response medical care. (App005, ¶ 32). After a long delay, Sara was helicoptered out to receive life-saving medical care at Las Vegas University Medical Center ("UMC"). (App005, ¶ 33). Because of GCRC's negligence, Sara was badly hurt, and she and her husband suffered major damages. (App005, ¶ 35). UMC's medical records

listed her injuries as including "multiple rib fractures" and "basically, a traumatic mastectomy."

GCRC breached the standard of care for the dangerous whitewater river-rafting trip in many ways, including by failing to:

- give information to customers on what to do after falling overboard;
- follow boat-capacity restrictions;
- operate the raft safely, so as not to cause passengers to fall overboard;
- carry proper medical supplies;
- train their personnel on whitewater navigation and guiding;
- drug-test and alcohol-test personnel properly;
- educate personnel in emergency medical care;
- have procedures and equipment for timely treatment and evacuation of injured passengers;
- employ proper, safe equipment; and
- use a "deadman control" or "kill switch" to stop the boat's propeller when a passenger falls overboard.

(App006, ¶ 40).

3. GCRC is not entitled to geography-based tribal immunity.

The raft ejectment and Sara Fox's injuries occurred on the Colorado River. Arizona holds title to the Colorado River's submerged lands and navigable waters. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427 (1968); 43 U.S.C. §

1311 (Land beneath navigable waters within state boundaries belongs to the respective states.). Thus, the place where GCRC's employees negligently injured Sara Fox was Arizona land, not reservation or tribal land. GCRC cannot claim any geography-related immunity.

4. The Tribe disavowed control over GCRC's day-to-day operations.

For economic purposes, a Tribe can use a "plan of operation" to create a "subordinate economic organization," like a corporation. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 6 (1971). To be a "subordinate economic organization," however, the corporation must be a "part" of the Tribe and not "exist as a legal entity separate and distinct" from the Tribe. *Id*.

When the Tribe created GCRC, it created a separate, robust corporation with an independent Board totally controlling GCRC's day-to-day operations. GCRC Board's total control over its day-to-day operations extended to the raft operators whose negligence maimed Sara Fox.

In *Dixon v. Picopa Construction Co.*, 160 Ariz. 251 (1989), this Court restricted the "subordinate economic organization" approach. Cheryl Dixon was the victim of an accident involving a truck owned by a tribal construction company operating off the reservation. *Id*. The company's corporate charter established the Tribe as sole shareholder, but provided for electing a board of directors with broad corporate powers to control all company operations and payment of dividends.

Directors and officers did not have to be tribal officials, or even tribal members; all corporate assets were held in the corporation's name, not in the tribe's name. *Id*. at 254. And the tribal corporation bought liability insurance. *Id*.

After scrutinizing the corporation's goals, activities, and contacts with tribal government, this Court decided the tribal business was "independent of any activity connected with tribal self-government or the promotion of tribal interests" and did not have close enough ties with tribal government to be considered a "subordinate economic organization" that might have a claim to tribal sovereign immunity. *Id*. at 256, 258-59.

Three other factors mattered in *Dixon*. First, as here, the tortious injury occurred outside the reservation. *Id*. at 252. Second, as here, the plaintiff was not a tribal member. *Id*. Third, as here, an "unstated factor that may have influenced the Court" was the fact that the plaintiff was not knowingly dealing with an Indian-controlled entity. William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 178 n. 50 (1994).

Dixon disagrees with the premise that 100% tribal ownership makes a business a "subordinate economic organization," instead holding "that mere ownership of a business by an Indian tribe does not necessarily make it a subordinate entity of the tribe." Brian C. Lake, *The Unlimited Sovereign Immunity*

of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone, 1996 Colum. Bus. L. Rev. 87, 96 (1996).

The Petition assumes all GCRC needs do is allege it is a tribally-created corporation formed to benefit the Hualapai Tribe, and it automatically gets tribal sovereign immunity. But the facts show GCRC is a separate, strong legal entity in total control over the day-to-day operation that maimed Sara Fox.

In fact, section 2.03 of GCRC's Bylaws adopted strict, absolute "Non-interference" over any of GCRC's day-to-day operations:

> **2.03 Non-interference.** The Board and officers have the authority to run the day-to-day operations of GCRC. The shareholder [the Hualapai Tribe] shall not interfere with or give orders or instructions to the officers or employees of GCRC with regard to the day-to-day operations of GCRC.

(App081 at § 2.03).

Thus, GCRC—not the Tribe—had sole right to control the day-to-day operation that maimed Sara Fox. The Tribe could not direct, give orders about, or interfere with GCRC's day-to-day operation. The Tribe thus cannot be liable for things over which it had no control whatsoever. As a corollary, GCRC cannot fairly or logically claim tribal sovereign immunity for a day-to-day injury-causing operation that the Tribe had *no* right or ability to control.

GCRC's liability-defeating corporate independence is also apparent because:

(1) GCRC's board of directors is separate from the tribal government.

(App072, § 5.1). *Dixon*, 160 Ariz. at 256.

(2) The injury-causing raft trip was a day-to-day operation under GCRC's *sole* control.

(3) The stated intent for GCRC was that its "control and operation" would be "vested" in its board of directors. (App075, § 5.16).

(4) GCRC's Board has sole responsibility for "continuous supervision of the performance of GCRC." (App075, § 5.16D).

(5) GCRC's Board could "do everything necessary, proper, advisable, or convenient to accomplish" its corporate purposes. (App075, § 5.16).

(6) GCRC's Board has sole right to determine what powers and duties its officers exercise. (App076, § 6.1).

(7) There is no requirement that GCRC's Board Members must be members of tribal government or tribal members. (App076, § 6.1).

(8) GCCR's Board has full responsibility for managing/supervising all corporate activities, businesses, and operations, including borrowing money, making investment decisions, selecting managers, and making contracts and other commitments. (App075, §§ 5.16C and 5.16D).

(9) GCRC, and not the Tribe, indemnifies past and present officers and directors for any legal fees, penalties, and judgments. (App076, Art. VII).

(10) GCRC can merge, consolidate, reorganize, and recapitalize itself, can even reorganize itself as a tribal enterprise, and can incorporate under federal law. (App077, Art. X).

(11) GCRC can neither expressly nor impliedly make any agreement on behalf of the Tribe, obligate it, pledge any of its credit, or waive any tribal right, privilege, or immunity. (App07, Art. XIII(A), (B), & (D)).

(12) Under its "Services Agreement" with GCRC, Grand Canyon Custom Tours had to obtain liability insurance to protect GCRC—not the Tribe. That "counsels against a finding" that GCRC is a part of the Tribe. (App136). *Dixon*, 160 Ariz. at 256. After all, buying liability insurance for GCRC "is some evidence" the Tribe expected GCRC—and not itself—to be liable for its torts. *Dixon*, 160 Ariz. at 257.

Yes, the Tribe is GCRC's sole shareholder. But its status as sole shareholder is irrelevant, because if it were relevant, the "inevitable consequence would be to confer tribal immunity on every entity established by an Indian tribe, no matter what its purposes or activities might have been." *Dixon*, 160 Ariz. at 255 n. 7.

And yes, as sole shareholder, the Tribe can take drastic action, such as suspending GCRC's Board. (App072, § 5.1). But that is nothing unique to tribal sovereignty. That is a sole shareholder's right in any non-tribal-affiliated Arizona corporation. A.R.S. § 10-808 (removal of directors by shareholders).

When deciding if an entity such as GCRC is an arm of a tribe for sovereign-immunity purposes, courts have focused on: (1) the method of the entity's creation; (2) the entity's purpose; (3) the entity's structure, ownership, and management, including the amount of control the tribe exerts over it; (4) intent for the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187-88 (10th Cir. 2010); *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014).

GCRC's formal, independent governance structure, the exercise of little or no control by the Tribe, and the lack of any tribal right to manage GCRC's day-to-day operations are relevant, important factors in deciding existence of immunity. *People v. Miami Nation Ent.*, 386 P.3d 357, 373, 377 (Cal. 2016).

The Tribe's self-stated intent that GCRC is to have tribal immunity reveals little about whether GCRC was acting as an actual or virtual arm of the Tribe in the day-to-day operation that injured Sara Fox. *Id*. at 379. That is, even a "formal statement of immunity" may not be "sufficient . . . to tip the balance in favor of immunity." *Id*.

The details and significance of GCRC's corporate independence, the ban against tribal interference with and control over GCRC's day-to-day operations,

and the analysis and application of federal and state law in relation to the assertion of tribal sovereign immunity, are complex. But cutting through the complexity is the fact that the Tribe itself—in the GCRC By-Laws it created and approved—had disavowed any right to control GCRC's injury-causing day-to-day operation.

5. The Tribe's view of GCRC's status does not control.

It may be that, as the Petition claims, the Hualapai Court of Appeals regards GCRC as a subordinate tribal entity entitled to sovereign immunity. But that conclusion is not controlling on Arizona state courts for four main reasons:

First, the tribal-court cases did not apply the same Arizona-state-court and federal-court analysis for determining if an entity is a "subordinate economic organization." In particular, the tribal-court cases cited in the Petition failed to use the analysis the Arizona appellate courts used in *White Mountain Apache*, *S. Unique*, and *Dixon*.

Second, the analysis concerning "subordinate economic organization" in the cited tribal-court cases began and ended by declaring GCRC was created for the Tribe's economic development. Arizona appellate cases look deeper than that into the corporate structure, function, assets, operation, and control.

Third, Arizona state courts have an independent duty to determine issues of sovereign immunity affecting Arizona citizens who have suffered injuries on non-tribal land, that is, on State of Arizona land.

Fourth, existence of "tribal sovereign immunity is a question of federal common law." *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118-19 (9th Cir. 2019). "Like foreign sovereign immunity, tribal immunity is a matter of federal law." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998). This is *not* a matter of interpreting tribal law where deferring to tribal courts is advisable or even proper. This is a matter of Arizona courts construing federal law as interpreted by federal courts *and* as interpreted by Arizona appellate courts.

GCRC is not the Tribe's alter ego or projection, set up as a corporate shell for tribal operations. That is, GCRC is not a mere tribal "subordinate economic organization," with "no separate officers, no separate directors, no separate bank accounts, no separate assets, and no separate property holdings." *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 384 (App. 1983).

Instead, GCRC is a robust corporation with a strong, independent Board having total control over the whitewater-rafting day-to-day operation that injured Sara Fox. The Tribe incorporated GCRC, but GCRC is not a puppet "subordinate economic organization" entitled to claim sovereign immunity as an integral part of the Tribe.

6. The "sue and be sued" clauses help place sovereign immunity at issue.

The Tribe's status matters since GCRC is claiming that tribal sovereign

immunity applies to the off-reservation activities of a tribally-incorporated entity. The Tribe's June 5, 1943 Corporate Charter stated that the Tribe could "sue and be sued in any courts of competent jurisdiction within the United States." (App002-App003, ¶ 11; App051). And its October 22, 1955 Amended Corporate Charter stated that the Tribe could "sue and be sued in courts of competent jurisdiction within the United States." (App003, ¶ 12; App059).

Its October 22, 1955 Amended Corporate Charter recognized that the listed Tribal "corporate powers," including the power to sue and be sued, were "in addition to all the powers already conferred or guaranteed by the Tribal Constitution and By-laws." (App057). Thus, the corporate power to sue and be sued trumps, or is at least "in addition to," anything that might appear in the Tribal Constitution or in Tribal By-Laws.

The original Corporate Charter and the Amended Corporate Charter were made under § 17 of the Indian Reorganization Act of June 18, 1934, formerly codified at 25 U.S.C. § 477 (now codified at 25 U.S.C. § 5124).

The Tribe's original June 5, 1943 Corporate Charter (App047) and the October 22, 1955 Amended Corporate Charter (App054) both acknowledged the Hualapai Tribe's charter of incorporation was approved by the Secretary of the Interior *and* ratified by the Tribe under Section 17 of the Indian Reorganization Act of June 18, 1934. Thus, Judge Jantzen correctly surmised that Section 17 could

be an important factor in determining existence of sovereign immunity for GCRC, a tribally-incorporated entity.

The Ninth Circuit has held that a "sue and be sued" clause in a tribe's corporate charter waived immunity for a tribe's corporate activities, but not with respect to its governmental activities. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). Courts concur that a "sue and be sued" clause in a tribe's corporate charter may waive a tribal corporation's immunity, although that waiver is limited to activities involving the Tribe's corporate activities and does not extend to actions of the Tribe in its capacity as a political governing body. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998).

In this case, the "sue and be sued" clause in the Tribe's corporate charters supports a finding that its tribally-created corporation could be subject to suit in tort for its off-reservation day-to-day operations.

7. The *Lewis* doctrine applies to GCRC.

At the oral argument (App230-App241) on GCRC's superior-court Motion for Reconsideration (App189), the Foxes argued *Dixon* applied the same principles as *Lewis* to an entity that was not a "subordinate economic organization." (App235-App236). *Lewis v. Clarke,* 137 S.Ct. 1285 (2017). *Lewis* concerned the liability of an individual tribal-casino employee who had been driving a limousine outside of the reservation for a subordinate economic organization, in that case, a

tribal casino. *Id*. at 1289.

Collectively, *Dixon* and *Lewis* indicate that a tribal-member individual (as in *Lewis*) or a corporate artificial individual (as in *Dixon*), that is not an arm of the Tribe, is subject to state court jurisdiction for off-reservation torts.

That analysis harmonizes with *Lewis*'s conclusion that it is the individual—not the Tribe—that is the real party at interest, because "it is simply a suit against the individual to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property." *Lewis*, 137 S.Ct. at 1291. Likewise, a suit or judgment against GCRC will not diminish the Tribe's assets because the Tribe is a separate entity, with its own assets.

Judge Jantzen applied *Lewis* logically and fairly. He found that *Lewis* was "controlling" and that: "Any individual tribal member, even if working for the tribe, sued in his individual capacity in that situation, is not protected by sovereign immunity." (App190). He also specifically found that Hwal'Bay Ba:j Enterprises, Inc., doing business as GCRC, were "corporations being sued as individuals for alleged tortious conduct off the reservation." (App190). That is a reasonable application and extension of the *Lewis* doctrine.

In summary, GCRC cannot claim tribal sovereign immunity if it can be regarded as an individual and is sued as an individual, and not as an inseparable part of the Tribe. That makes logical, semantic sense.

After all, an "individual' is "a distinct, indivisible entity." *Random House Webster's Unabridged Dictionary* 974 (2nd ed. 2001). Courts regularly regard corporations as distinct, separate persons or individuals. *See, e.g., United States v. Amedy*, 24 U.S. 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable."); *Morgan v. Galilean Health Enterprises, Inc.*, 977 P.2d 357, 362 n. 16 (Okla. 1998) ("The word 'individual' includes corporations."); *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 349 (2nd Cir. 2002). (Corporations must be considered individuals.); *Cruze v. National Psychiatric Services, Inc.*, 129 Cal.Rptr.2d 65, 70-71 (App. 2003) (The word "individual" embraces corporations.).

In assessing whether a corporation is a proper party to sue, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S.Ct. at 1290. Here, the remedy is against a separate corporation controlling a day-to-day operation—not against the Tribe.

There is no indication the Tribe would pay anything if a superior-court jury finds GCRC liable and imposes damages. Even so, the "critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis*, 137 S.Ct. at 1293-94.

The Foxes sued to impose liability against GCRC as an individual corporate

entity in sole charge of its day-to-day operations. No sovereign immunity imposes a barrier to suits seeking to impose individual liability against GCRC. *Lewis*, 137 S.Ct. at 1291 (citing *Hafer v. Melo*, 502 U.S. 21, 27 (1991)).

The Supreme Court has treated suits against individual officers as "personal capacity" actions when the remedy sought is monetary damages—unless "the judgment . . . would expend itself on the public treasury or domain, or interfere with the public administration." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Here, insurance or GCRC's assets, and not tribal assets, would satisfy any money-damages judgment. Thus, under *Lewis*, Judge Jantzen correctly found the Foxes may sue GCRC in its individual capacity as a separate, distinct corporation that was in sole control of the day-to-day operation that injured Sara Fox.

Conclusion

The Foxes respectfully ask the Court to deny the Petition and award to them the reasonable costs incurred in defending against it.

DATED this 22nd day of May, 2019.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
David L. Abney
Appellate Counsel for Real Parties in Interest

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 3,486 words (by computer count); and

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Certificate of Service

On this date, this document was electronically filed with the Clerk of the Arizona Supreme Court and copies of it were electronically delivered to:

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