

IN THE SUPREME COURT
STATE OF ARIZONA

Hwal'Bay Ba: J Enterprises, Inc.

Petitioner,

v.

Honorable Lee F. Jantzen, Judge of the
Superior Court of the State of Arizona,
in and for the County of Mohave,

Respondent,

and

Sara and William Fox,

Real Parties in Interest.

Arizona Supreme Court

No. _____

Court of Appeals, Division One
No. 1 CA-SA 19-0059

Mohave County Superior Court
No. CV2018-00428

PETITIONER HWAL'BAY BA: J ENTERPRISES, INC.'S
PETITION FOR REVIEW

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I. Introduction.

In 1991, the Tribal Council of the Hualapai Indian Tribe (the “Tribe”) formed Petitioner Hwal’Bay Ba:j Enterprises, Inc. dba Grand Canyon Resort Corporation (“GCRC”) as an arm of the Tribe to create economic development opportunities, as authorized by the Tribe’s constitution. The Tribe tasked GCRC with virtually all income-producing activity for the Tribe and the maintenance of the Tribe’s most precious cultural and religious resource: access to the Colorado River and the Grand Canyon.

Real parties in interest Sara and William Fox (“Fox”) sued the Tribe and GCRC for personal injuries sustained by Sara Fox during a white-water rafting trip on the Colorado River within the boundaries of the Tribe’s reservation. The Tribe and GCRC filed a combined motion to dismiss the Complaint based on tribal sovereign immunity. The superior court granted the Tribe’s motion, but denied GCRC’s.

To protect its rights conferred by substantive federal law, GCRC filed a petition for special action in the court of appeals, and cited well-established Arizona and federal law for the proposition that special action jurisdiction was appropriate to resolve questions of immunity. Fox did not contest that jurisdiction was appropriate. Nevertheless, the court of appeals declined

jurisdiction without explanation. Thus, GCRC's immunity from suit may be permanently lost absent action by this Court.

This Petition is not only of vital importance to the Tribe, but presents an issue of critical statewide import – in particular, the relationship between Arizona courts and the 21 sovereign Indian nations that exist within this state that conduct business through tribally created entities. Further, a prior ruling of this Court in *Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 256 (1989), may require qualification. Fox relied on *Dixon* for the proposition that that commercial, off-reservation conduct of tribal enterprises is not entitled to tribal sovereign immunity. That position is untenable in light of the U.S. Supreme Court's holding in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies., Inc.*, 523 U.S. 751, 760 (1998), which unequivocally rejects that position.

II. Issues Presented.

1. Issues of sovereign immunity should be resolved at the earliest juncture in litigation, as immunity is not a mere defense to liability, but from the rigors of litigation. Thus, a person or entity denied the benefits of immunity *per se* lacks an adequate remedy via appeal. Did the court of appeals abuse its discretion in declining special action jurisdiction, where

GCRC presented a pure question of law of statewide importance, and lacked no adequate remedy via appeal?

2. A subordinate economic organization of an Indian tribe is entitled to sovereign immunity, so long as the entity carries out governmental functions and is formed as a branch of tribal government. Is an entity that is tasked with the allocation and preservation of tribal resources, job creation, and economic development—and which has been held by the tribe’s highest court to be a constitutionally created subordinate economic organization—entitled to tribal sovereign immunity?

III. Statement of Facts and Procedural History.

A. The Tribe and GCRC.

The Tribe is a federally recognized Indian tribe,¹ and is governed by a tribal constitution. *See* Constitution of the Hualapai Indian Tribe of the Hualapai Indian Reservation (the “Hualapai Constitution”), *available at* <http://hualapai-nsn.gov/wp-content/uploads/2013/07/HualapaiConstitution.pdf>. The Hualapai

¹ *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 83 Fed. Reg. 20, 4235, 4237 (Jan. 30, 2018).

Constitution invokes sovereign immunity “to its fullest extent.” *Id.* at Art. XVI, § 1 (emphasis added).

The Hualapai Constitution authorizes the Tribal Council to “establish and regulate subordinate organizations for economic and other purposes.” *Id.* at Art. V(x). Exercising that power, the Tribal Council passed a resolution in 1991 that created “a Tribal Enterprise to be known as Hwal’Bay Ba;j Enterprises, Inc.” [APP274.]² The Tribal Council approved a “Plan of Operation” which formed GCRC as a tribal entity for the governmental purposes of “creating economic development opportunities for the Hualapai Indian Tribe.” [APP071.] That document directs GCRC to promote Tribal self-governance by: “[i]mproving the *employment opportunities* for Hualapai tribal members,” “[a]ttracting ‘*clean*’ off-reservation businesses and industries to locate on the Reservation,” and “[e]stablishing *opportunities for educating tribal members* in the field of business.” [*Id.* (emphasis added).]

² Pursuant to Rule 23(d) of the Arizona Rules of Civil Appellate Procedure, the Minute Entry Order (the “Order”) appealed from is attached to this Petition. All other record documents relevant to the Court’s consideration of this Petition are appended in the Appendix (“APP”) filed contemporaneously herewith. All citations to the Appendix contain a page citation.

Perhaps unsurprisingly for an entity with governmental powers, GCRC's Plan of Operation provides Tribal Council hegemony over GCRC. The Tribal Council is the only body which may vote at shareholder meetings [*Id.* at § 3.2]; the Tribal Council has absolute discretion to appoint and remove members of GCRC's board for any cause or no cause [APP072, § 5.1; APP075, § 5.14]; and GCRC's chairman must report to the Tribal Council monthly regarding GCRC's adherence to the Tribal Council's budget. [APP076, § 5.14.] Indeed, the Tribal Council may elect to disband GCRC's board and run GCRC directly. [APP072, § 5.1] Critically, GCRC's bylaws (as imposed by the Tribal Council) require Tribal Council approval: (1) for the acquisition of *any debt*; (2) for *any expenditure of funds* greater than \$50,000; (3) to *enter into any agreement* regarding property worth more than \$50,000; and (4) to *enter into any agreement pertaining to particular entities*. [APP088 at § 7.03(a)-(e).]

The Tribe's manifest intent in creating GCRC was to extend its tribal sovereign immunity to GCRC as a subordinate economic entity. "GCRC shall be entitled to *all the privileges and immunities of the Hualapai Indian Tribe*.

GCRC and its directors, officers, employees, and agents . . . *are immune from suit.*" [APP077, § 11.1. (emphasis added).]³

In light of the foregoing, Tribal law has been settled for nearly a decade that GCRC is immune from suit under the doctrine of tribal sovereign immunity. See *Hwal'bay B:aj Enters., Inc. v. Beattie*, Hualapai Court of Appeals Case No. 2008-AP-007, at 6, [APP281]; *WD at the Canyon, LLC v. Hwal'Bay Ba:j Enters., Inc.*, Hualapai Court of Appeals No. 2015-AP-004, at 6, [APP289].⁴

B. The litigation.

Fox initiated this litigation against a number of defendants, including the Tribe and GCRC, for injuries sustained by Sara Fox during a white-water rafting trip on the Colorado River within the boundaries of the Hualapai reservation.⁵ [APP004, ¶¶ 26-27.] Both the Tribe and GCRC filed a motion to

³ To be sure, GCRC is prohibited from waiving this right of immunity "[w]ithout the prior written consent of the Tribal Council." [APP078, § 11.2.]

⁴ The cited Hualapai Court of Appeals cases are available at http://libguides.law.ucla.edu/ld.php?content_id=6938710 (*Beattie*) and http://libguides.law.ucla.edu/ld.php?content_id=34348246 (*WD at the Canyon*), respectively. For the Court's convenience, we have attached the cited cases in the Appendix to this brief, and cite to the Appendix.

⁵ Plaintiffs also sued Grand Canyon Custom Tours ("GCCT"), the travel and booking agent for their rafting trip in Coconino County Superior Court [APP05, ¶ 34.] Plaintiffs allege that GCCT was contractually obligated to notify Plaintiff of the fact that GCRC is protected by sovereign immunity, but failed to do so. [APP04, ¶25.]

dismiss the Complaint based on sovereign immunity. [APP011.] Fox argued that through a historic charter for a tribal corporation,⁶ the Tribe and GCRC had waived sovereign immunity. [APP002-003, ¶¶ 11-12.] Although the superior court granted the Tribe's motion to dismiss on sovereign immunity grounds, the court denied GCRC's motion to dismiss in an unsigned minute entry order.

The superior court found that GCRC, which it erroneously identified as "an Arizona Corporation," was an "individual" for purposes of Fox's claim, and that the lawsuit was not "against the tribe," despite GCRC's status as a subordinate economic entity. [Order at 2.] The superior court found that, as an individual, GCRC was not entitled to immunity for tortious conduct committed off of reservation lands based on the United States Supreme Court's holding in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). [*Id.*] The superior court also denied GCRC's motion for reconsideration. [APP242.]

C. This appeal.

Because a party wrongfully denied the application of sovereign immunity loses the substantive benefits of that right if forced to litigate at

⁶ As discussed below, that charter for a historic entity organized under Section 17 of the Indian Reorganization Act has no connection to GCRC.

all, GCRC filed a petition for special action with the court of appeals. The court of appeals declined to accept jurisdiction without explanation.

IV. Reasons Why this Court Should Grant the Petition.

This Court's holding in *White Mountain Apache Tribe v. Shelley* set forth the rule that a subordinate economic organization of a tribe is an arm of the tribe that formed it, "and as such enjoys the same immunity from suit that the TRIBE enjoys absent its consent or the consent of Congress to waive this immunity." 107 Ariz. 4, 7 (1971). GCRC has always been such a subordinate economic organization of the Tribe, and is shielded by the Tribe's sovereign immunity. *See id.*

Review is appropriate in this case for at least three reasons. First, the court of appeals abused its discretion and made a significant error of law in declining jurisdiction. ARCAP 23(d)(3). Second, the issues raised in this appeal are of statewide import regarding the jurisdiction of Arizona courts over tribal economic entities. *Id.* Finally, the application of this Court's holding in *Dixon* by the trial court was substantively incorrect. ARCAP 23(d)(3).

A. The court of appeals abused its discretion by declining jurisdiction.

“An error of law constitutes an abuse of discretion.” *State v. Bernstein*, 237 Ariz. 226, 228 ¶ 8 (2015). The court of appeals’ misapplication of federal and state law regarding the immediately appealable nature of an order rejecting a sovereign immunity defense was in error, and diminishes the protection afforded by the federal doctrine of tribal sovereign immunity.

Tribal sovereign immunity “is a matter of federal law and is not subject to diminution by the States.” *Kiowa*, 523 U.S. at 754; *Filer v. Tohono O’Odham Nation Gaming Enter.*, 212 Ariz. 167, 170 (App. 2006). Under federal law, a defense of sovereign immunity *must* be addressed as early as possible in the litigation, because the doctrine protects a party not only from liability, but from being forced to participate in litigation at all. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010). As with other types of immunity, “[t]hat entitlement would be ‘effectively lost if a case is erroneously permitted to go to trial.’” *Nuang-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Arizona courts that have reviewed similar immunity doctrines have reached the same conclusion that “a defendant who asserts an immunity *has*

no adequate remedy at law by direct appeal after trial.” Salt River Valley Water Users’ Ass’n v. Superior Court, 178 Ariz. 70, 73 (1993). Indeed, “when one is erroneously forced to stand trial, he has lost the benefit of immunity, even if he is found not liable.” Mashni v. Foster ex rel. County of Maricopa, 234 Ariz. 522, 526 ¶ 14 (App. 2014) (emphasis added); see also Samaritan Health Sys. v. Superior Court, 194 Ariz. 284, 287 ¶ 10 (App. 1998).

If GCRC is entitled to sovereign immunity, it is immune from any litigation as a matter of *federal law*, and such protection is forever lost if the case is permitted to proceed before appellate review of the denial of that right. *Peterson*, 627 F.3d at 1127. Thus, when the trial court denied GCRC’s motion to dismiss on sovereign immunity grounds, it teed up an issue for which GCRC has no adequate remedy by appeal as a matter of law. *Nuang-Tanedo*, 711 F.3d at 1140; *Salt River Valley*, 178 Ariz. at 73. The court of appeals’ declination of jurisdiction constitutes an irreversible reduction of the federal substantive right of sovereign immunity, and potentially destroys GCRC’s rights without redress. *Kiowa*, 523 U.S. at 754. In light of that error, this Court should either accept jurisdiction over the special action or, alternatively, remand to the court of appeals with instruction to exercise special action jurisdiction.

B. This Petition raises issues of statewide importance.

As this Court previously held, special action jurisdiction is appropriate to address issues implicating comity between sovereign Indian tribes and Arizona courts. *See Tracy v. Superior Court*, 168 Ariz. 23, 25 (1991). The Hualapai Court of Appeals has held—twice—that GCRC is a subordinate economic organization of the Tribe entitled to sovereign immunity. Such tribal laws are “entitled to recognition on the basis of comity” by the courts of this state. *Id.* at 34.

In *Beattie*, No. 2008-AP-007, [App. 281], the Tribe’s highest court pronounced that GCRC is a “subordinate entit[y]” of the Tribe—*not* a mere tribal corporation:

The Hualapai Tribe is protected from suit by its inherent sovereignty that is recognized in its Constitution. The Tribe’s sovereign immunity may only be waived by express Tribal Council action, or as stated in the Constitution. *Id.* In this case, the Tribal Council took action to form subordinate entities (the Tribal Corporations) for economic purposes as authorized by the Constitution. The Plan of Operation for both [GCRC] and SNW recognized that the Tribal Council *created the Tribal Corporations as Tribal entities possessing sovereign immunity.*

Id. at 6, [APP286 (emphasis added and internal citations omitted).]

In an attempt to avoid the application of sovereign immunity, Fox offered a historic (1943) charter for a tribal corporation (not GCRC) that

contains a sue-and-be-sued clause. [APP002–003, ¶¶ 11–12.] But that fallow argument has been *specifically rejected* by the Tribe’s highest court. In *WD at the Canyon*, No. 2015-AP-004, [APP289], the plaintiff alleged that GCRC had waived its immunity due to the presence of a “sue and be sued” clause in the Tribe’s federal charter – just as Fox has in this case. The Hualapai Court of Appeals rejected that argument:

The federal charter that WD references was for the Tribe, not GCRC. GCRC is separately chartered by the Tribe, and has no “sue and be sued” clause in its tribal charter. *The Tribe retained its sovereign immunity notwithstanding any language in its federal corporate charter, and had full authority to share that immunity with GCRC, its wholly owned and chartered corporation.* There has been no Congressional abrogation or wavier of GCRC’s . . . sovereign immunity.

Id. at 9–10, [APP297–298 (emphasis added).]

By rejecting those holdings, the trial court disregarded this Court’s admonition that tribal court rulings are entitled to respect out of principles of comity, and improperly ignored tribal law. *Tracy*, 168 Ariz. at 25; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (“tribal courts are best qualified to interpret and apply tribal law”). Moreover, the court of appeals’ failure to address the trial court’s disregard for established law regarding tribal sovereign immunity has effectively denied GCRC a remedy. Indeed, this question affects not just the Tribe, but the twenty other sovereign Indian

tribes within Arizona, many of whom have created subordinate economic organizations to promote economic opportunities for their members. If the court of appeals' is permitted to decline to review claims of tribal sovereign immunity, all tribes will be deprived of a critical protection afforded by that doctrine.

C. The trial court's finding with respect to qualified immunity was erroneous.

The trial court erred in holding that GCRC was not a subordinate economic organization entitled to tribal sovereign immunity for at least two reasons. First, any reliance on this Court's decision in *Dixon* is misplaced, as that case is manifestly distinguishable. Second, to the extent that the trial court focused on the locus or nature of GCRC's business, as suggested to it by Fox, the U.S. Supreme Court's authority following *Dixon* precludes such an analysis.

1. GCRC is a subordinate economic organization of the Tribe and performs core governmental functions.

A close reading of *Dixon* reveals that the construction company in that case, Picopa, is completely dissimilar to GCRC. The tribe in *Dixon* organized Picopa for "general business purposes," "charged . . . with all the power to act 'to the same extent as natural persons might or could do.'" *Id.* at 254, 258.

The tribe had no power to remove Picopa's board, which was empowered to run Picopa independently of the tribe. *Id.* at 258. Indeed, Picopa's board could even issue new classes of corporate stock, establish pension funds, and invest those funds as it saw fit. *Id.* Importantly, this Court found that Picopa was "established for purely commercial reasons *and not in any effort to promote, develop, or protect the [tribe's] culture.*" *Id.* (emphasis supplied). Thus, this Court concluded that Picopa was not an "arm of the tribe" or a "subordinate economic organization." *Id.*

Analysis of GCRC's governing documents yields the diametrically opposite result. Unlike Picopa, GCRC was organized to aid the Tribe in carrying out its core governmental functions. The Tribe charged GCRC with "creating economic development opportunities for the Hualapai Indian Tribe," "[i]mproving the employment opportunities for Hualapai tribal members," [a]ttracting 'clean' off-reservation businesses and industries to locate on the Reservation," and "[e]stablishing opportunities for educating tribal members in the field of businesses." [APP071.] Importantly, GCRC is responsible for the management and allocation of the Tribe's most critical and fundamental religious and cultural resources—its access to the Colorado River and the Grand Canyon.

Unlike the discretion enjoyed by the board in *Dixon*, the Tribe maintains extensive control over GCRC. *See* Section II.A., *supra*. The Tribal Council can completely eliminate GCRC's board at any time, and the Tribal Council can directly operate GCRC indefinitely. [APP072, § 5.1.] The Tribal Council establishes GCRC's budget, and requires the Board to provide monthly compliance reports. [APP076, § 5.14.] Further, the Tribal Council enacts GCRC's by-laws, and must approve disposition or encumbrance of GCRC's assets. [APP076 at § 6.1, APP088 at § 7.03(a)–(e).] The Tribe's control over GCRC, and GCRC's role in carrying out governmental functions clearly show that GCRC is a subordinate economic organization of the Tribe.

Further, because GCRC is effectively the Tribe, it cannot act as an "individual" for purposes of imposing liability, and *Lewis* is inapplicable. *Compare Lewis*, 137 S. Ct. 1285 (finding sovereign immunity inapplicable to individual tribal employees) *with Shelley*, 107 Ariz. at 7 (holding that a subordinate economic organization is part of the tribe that formed it). Indeed, since *Lewis* was issued in 2017, no court has applied that case to a tribal entity or corporation.

2. GCRC's off-reservation commercial conduct is immaterial to a sovereign immunity analysis.

The trial court's reliance on *Dixon* and focus on the off-reservation nature of the GCRC's commercial activities was error. [APP238.] In *Dixon*, Picopa was engaged in proprietary (not governmental) "general business" activities beyond the tribal reservation, and tasked with no governmental functions. This Court explained that while "substantial policy considerations militate in favor of recognizing immunity when a tribe conducts tribal business through a tribal economic entity," "the doctrine was never meant to protect entities conducting non-tribal business. *Dixon*, 160 Ariz. at 256.

Dixon, however, did not have the U.S. Supreme Court's decision in *Kiowa* to aid its analysis. In *Kiowa*, the Supreme Court unequivocally held that off-reservation commercial conduct is protected by the tribe's sovereign immunity. *Kiowa*, 523 U.S. at 760; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). A proper sovereign immunity analysis does not draw "a distinction between governmental and commercial activities of a tribe." *Kiowa*, 523 U.S. at 754-55; see also *Shelley*, 107 Ariz. at 7; *Cook v. Avi Casino Enters. Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Indeed, the *Kiowa* court specifically declined to "confine [sovereign immunity] to reservations or to noncommercial activities," and instead found that the doctrine of sovereign

immunity applied even when “tribal businesses had become far removed from tribal self-governance and internal affairs.” *Id.* at 757–58.

GCRC’s role is distinguishable from that of Picopa in *Dixon*. See Section IV.C.1, *supra*. The Tribe charged GCRC with carrying out the Tribe’s economic development on and off the reservation, and imbued it with its sovereign immunity. [APP071; APP077, § 11.1.] The application of the sovereign immunity to GCRC is a matter of federal law, and “should further federal policies underlying tribal sovereignty.” *Dixon*, 160 Ariz. at 258. To the extent that the lower courts’ reliance on *Dixon* diminishes the application of sovereign immunity to tribal subordinate economic organizations, this Court should exercise jurisdiction to clarify its holding in *Dixon* in light of the Supreme Court’s decision in *Kiowa* and *Bay Millis*. See also *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1110 n.12 (Colo. 2010) (describing *Dixon*’s rationale as contrary to *Kiowa*).

V. Conclusion.

GCRC asks that the Court accept review on the issue of GCRC’s sovereign immunity defense. In the alternative, GCRC asks that the Court remand this case to the court of appeals and order that tribunal to accept jurisdiction.

DATED this 24th day of April, 2019.

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