IN THE SUPREME COURT OF THE STATE OF ALASKA

Yvonne Ito, Appellant, v. Copper River Native Association, Appellee.	)	Supreme Court No. S-17965

Trial Court Case No. 3AN-20-06229CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANHORAGE
THE HONORABLE DANI CROSBY, PRESIDING

BRIEF OF APPELLANT

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AUTHORITIES PRINCIPALLY RELIED UPON

AS 10.20.051. Members and liability of directors, officers, employees, and members.

(a) A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of the class or classes, the manner of election or appointment, and the qualifications and rights of the members of each class shall be set out in the articles of incorporation or the bylaws. If the corporation has no members, that fact shall be set out in the articles of incorporation or the bylaws. A corporation may issue certificates evidencing membership.

(b) The directors, officers, employees, and members of the corporation are not, as such, liable on its obligations.

25 U.S.C. § 5381. Definitions

…(b) Indian tribe. In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5332 Sovereign immunity and trusteeship rights unaffected

Nothing in this Act 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.

25 U.S.C. § 5396. Application of other sections of the Act

(a) Mandatory application. All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101-512 (coverage under chapter 171 of title 28, United States Code, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

(b) Discretionary application. At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title, shall be made a part of a funding agreement or compact entered into under this title. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

JURISDICTIONAL STATEMENT/PARTIES TO CASE

This is an appeal from a final judgment entered by Superior Court Judge Dani Crosby on December 2, 2020. [Exc. 201-03] The appellant is Yvonne Ito and the appellee is the Copper River Native Association (CRNA). This Court has jurisdiction per AS 22.05.010 and Alaska Appellate Rule 202.

ISSUE PRESENTED FOR REVIEW

Did the superior court err when it held, contrary to this Court's controlling precedent in *Runyon v. Association of Village Council Presidents*,[1] that CRNA was protected from suit by tribal sovereign immunity?

STATEMENT OF THE CASE

CRNA is an Alaska nonprofit corporation. [Exc. 187] It is a consortium of five federally-recognized Indian tribes in the Ahtna Region of Interior Alaska.[2] [*Id.*] CRNA "provides certain health services" to the members of its constituent tribes. [Exc. 18-19, 154-56, 187]

CRNA hired Ms. Ito in January 2018 as its Senior Services Program Director. [Exc. 187] CRNA terminated her employment in May 2019. [*Id.*]

Ms. Ito then filed suit against CRNA, alleging employment abuses and

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1 84 P.3d 437 (Alaska 2004).

2 The five villages comprising CRNA are the Native Village of Kluti-Kaah, the Native Village of Tazlina, the Gulkana Village Council, the Native Village of Gakona, and the Native Village of Cantwell. [Exc. 187]

wrongful termination. [Exc. 1-14] Her complaint asserted a single cause of action for beach of the covenant of good faith and fair dealing.[3] [Exc. 13]

On May 21, 2020, CRNA filed a motion to dismiss under Alaska Civil Rule 12(b)(1). [Exc. 15-16] CRNA argued that the superior court lacked subject matter jurisdiction over Ms. Ito's case because it was protected from suit by the sovereign immunity of its member Native villages. [Exc. 21-32]

In opposition, Ms. Ito argued that *Runyon* foreclosed on CRNA's claim of sovereign immunity. [Exc. 162-70] She noted that, per *Runyon*, an entity is not entitled to sovereign immunity unless its member tribes would be bound to pay a judgment against the entity. [*Id.*] As in *Runyon,* because AS 10.20.051(b) protects tribes from paying on any judgment against CRNA, Ms. Ito argued that CRNA did not have sovereign immunity. [*Id.*]

On October 28, 2020, the superior court granted CRNA's motion to dismiss. [Exc. 186-200] It held that CRNA was entitled to sovereign immunity for two reasons. [Exc. 186]. For one, it held that, if *Runyon* applied, CRNA has sovereign immunity because its "member tribes' funds that would otherwise

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[3] Ms. Ito alleged that she was chastised for refusing to engage in a racist firing, chastised for opposing the firing of a disabled employee, asked if she wanted to see pictures of a former employee's penis, chastised for wanting to maintain privacy about surviving breast cancer, ignored when advocating against nepotism, wrongfully fired for sticking up to CRNA's CEO, and slandered by a false story about her being investigated by the FBI. [Exc. 1-13]

be used to provide for healthcare for tribal members would be at risk in the event of an adverse judgment in this matter." [Exc. 199] Further, it also held that CRNA has sovereign immunity under 25 U.S.C. § 5381(b) of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). [Exc. 196]

The superior court entered final judgment in favor of CRNA on December 2, 2020. [Exc. 201-03] This appeal followed.

STANDARD OF REVIEW

The question presented by this appeal – whether CRNA is protected by sovereign immunity – is a question of law that this Court reviews de novo, adopting the most persuasive rule in light of precedent, reason, and policy."[4]

ARGUMENT

Both of the superior court's justifications for giving CRNA sovereign immunity were legally incorrect. For one, while the superior court held that CRNA has sovereign immunity under *Runyon*, it justified this holding by applying a rule of law that is actually at odds with *Runyon*. Second, while the superior court held that CRNA has sovereign immunity under 25 U.S.C. § 5381(b) of the ISDEAA, this is belied by the plain meaning of that statute, and many other factors. These two legal errors are discussed in turn below.

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[4] *See Runyon*, 84 P.3d at 439; *Douglas Indian Ass'n v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1175 (Alaska 2017) ("We review issues of sovereign immunity de novo").

A. The Superior Court Misapplied this Court's Controlling Precedent in *Runyon*.

In *Runyon*, this Court considered if and when the sovereign immunity of Indian tribes can extend to separate entities.[5]

The decision acknowledged the obvious, that entities – such as corporations, subdivisions of tribal governments, or joint agencies formed by several tribes – can sometimes be so closely dependent upon a tribe so as to be an "arm of the tribe," and thus protected by a tribe's sovereign immunity.[6]

However, *Runyon* concluded that there were limits on when the sovereign immunity of tribes could pass to separate entities.[7] It held that, "[w]hether the entity is formed by one tribe or several, it takes on tribal sovereign immunity only if the tribe or tribes, the sources of sovereign authority and privilege, are the real parties in interest."[8]

In support, this Court found that an entity's financial relationship with a tribe is "of paramount importance."[9] It noted that, if a tribe "would be legally responsible" for an entity's obligations, the entity may indeed be an

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5 *Runyon*, 84 P.3d at 439.

6 *Id.* at 439-440.

7 *Id.* at 439-441.

8 *Id.* at 440.

9 *Id.*

arm of the tribe.[10] In contrast, it clarified that a tribe is unlikely to be a real party in interest if a judgment against an entity "will not reach the tribe's assets or if it lacks the power to bind or obligate the funds of the tribe."[11]

In light of this rule of law, this Court concluded that the specific entity at issue in *Runyon*, the Association of Village Council Presidents (AVCP), was not entitled to sovereign immunity.[12] This Court reasoned:

> Under Alaska law, the fifty-six villages of AVCP, the members of the nonprofit corporation, are not liable on the corporation's obligations. Any judgment against AVCP will be paid out of the Association's coffers alone. Even if they fall short, the villages' assets will be safe from execution. This legal insulation makes clear that AVCP is not an arm of the villages. The villages therefore are not the real parties in interest in this lawsuit. And AVCP is not entitled to the protection of the villages' tribal sovereign immunity.[13]

This reasoning left no room for doubt. If tribes are members of an entity yet are not liable for its obligations, and if tribes' assets are safe from a

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[10] *Id.* at 441.

[11] *Id.* at 440-441.

[12] *Id.* at 441.

[13] *Id.* (citations and internal quotation marks, brackets, and ellipses omitted). As authority for finding that the villages, which were members of the nonprofit corporation AVCP, would not be liable for AVCP's obligations, this Court cited AS 10.20.051(b). That statute provides that members of a nonprofit corporation are not liable on its obligations; it protects members' assets from execution, even if a nonprofit's coffers are insufficient to satisfy a judgment.

judgment against an entity, then such tribes are not real parties in interest. And, in turn, when tribes are not real parties in interest, a related entity is thus not entitled to their sovereign immunity.

The same conclusion follows in this case, as *Runyon* forecloses any CRNA claim that it is entitled to the sovereign immunity of its member tribes. Like AVCP in *Runyon,* CRNA is a nonprofit corporation under Alaska law and is a legal entity that is separate and distinct from its member villages. [Exc. 34] And like AVCP in *Runyon*, if Ms. Ito prevails in this case, CRNA's member villages will not be responsible for using their assets to pay on any judgment against CRNA.[14] Thus, CRNA's member tribes are not real parties in interest, and CRNA is not entitled to their sovereign immunity.

However, while *Runyon* bound the superior court to find that CRNA was not entitled to sovereign immunity, the superior court instead warped the on-point rule. While purporting to apply *Runyon*, the superior court held:

> Here, Defendant was organized by its member tribes in part to more efficiently administer and provide healthcare for tribal members. Defendant is funded in part by its member tribes, and by federal funds earmarked for tribal healthcare that would otherwise flow directly to the tribes themselves. Even if an adverse judgment in this matter would not enter against Defendant's member tribes individually, tribal assets would nonetheless be obligated to satisfy the judgment. [Exc. 198]

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[14] AS 10.20.051(b).

This explanation makes clear that, although the superior court claimed to apply *Runyon,* it truly did not. To the contrary, the superior court fixated on factors that were irrelevant to, or even in tension with, *Runyon*.

For one, the superior court improperly emphasized that CRNA was organized to provide healthcare to tribal members. However, in *Runyon*, AVCP was similarly organized to provide a number of important services to tribal members, yet none of this altered the holding.[15]

Furthermore, the superior court improperly emphasized that CRNA receives federal funds that might otherwise flow to the tribes. Again, though, nothing like this was deemed impactful to the analysis in *Runyon*, which even noted that AVCP was also the recipient of federal funds.[16]

Yet most problematic was the superior court's claim that, "[e]ven if an adverse judgment in this matter would not enter against [CRNA's] member tribes individually, tribal assets would nonetheless be obligated to satisfy the judgment. [Exc. 198] Notably, the superior court did not cite or analogize to *Runyon* in support of this point, but rather cited to *Matyascik v. Artic Slope*

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[15] *Runyon* noted that AVCP provided many social services, including Head Start. AVCP was also described as operating "a wide range of traditionally governmental programs designed to benefit the member tribes." This included TANF programs, juvenile programs, vocational rehabilitation programs, elder programs, public safety initiatives, and more. *See Runyon*, 84 P.3d at 438.

[16] *Id.* at 439.

Native Ass'n, Ltd., which is an unreported and non-binding District of Alaska case where the court explicitly declined to follow *Runyon*.[17]

There are many problems with the superior court's reasoning. First, *Runyon* controls, not *Matyascik*. Also, while both cases consider the financial relationship between tribes and other entities, such overlap in subject matter does not mean that the cases share the same legal analysis for determining *how* financial relationships give rise to sovereign immunity. To the contrary, *Matyascik* emphasizes factors – like whether an entity receives funds that might otherwise go to tribes – that are not germane to the *Runyon* test.

Further, the superior court's reformulation of the *Runyon* standard would swallow the rule. After all, a judgment against a corporation will always have some indirect financial impact on its owners, yet the superior court's new rule would mean that tribal consortia like CRNA and AVCP are *always* immune from suit. That is clearly not what this Court held in *Runyon*.

At bottom, while the superior court concluded its order by claiming that CRNA's member tribes are real parties in interest under *Runyon*, its central

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[17] Exc. 199 (citing *Matyascik v. Arctic Slope Native Ass'n, Ltd.,* No. 2:19-CV-0002-HRH, 2019 WL 3554687, at *5 (D. Alaska Aug. 5, 2019) ("[A] judgment for damages against defendant would adversely affect its member tribes because funds would be diverted from health care services. The member tribes would not be insulated from financial harm simply because they might not be directly liable for an adverse judgment.")).

justification for this was that CRNA's "member tribes' funds that would otherwise be used to provide for healthcare for tribal members would be at risk in the event of an adverse judgment in this matter" [Exc. 199]

This result, though, is simply not what *Runyon* dictates. And it is not how *Runyon* defines whether a tribe is a real party in interest. Again, under *Runyon*, the dispositive inquiry is whether CRNA's member villages would be responsible for using their assets to pay on a judgment against CRNA.[18] Here, it is uncontroverted that the tribes' assets would *not* be responsible for a judgment against CRNA; the tribes are legally insulated.[19] This means that CRNA is not entitled to sovereign immunity. Any conclusion to the contrary is one that does not, actually, rely on the binding precedent of *Runyon*.

B. The Superior Court Erroneously Held that 25 U.S.C. § 5381(b) Granted Sovereign Immunity to CRNA.

The superior court's second error was holding that CRNA "is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium." [Exc. 196] The superior court based this holding entirely on a misinterpretation of 25 U.S.C. § 5381(b) of the ISDEAA, which states:

> In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities

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18 *Runyon*, 84 P.3d at 439-440.

19 *Id.*; *see also* AS 10.20.051(b).

> (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

The superior court's reading of 25 U.S.C. § 5381(b) was far too sweeping. It inflated the words "rights and responsibilities of the authorizing tribe" to include all "rights and responsibilities" whatsoever, even those that are far outside of the statute's scope. In turn, the court unduly included sovereign immunity as a right conferred by 25 U.S.C. § 5381(b). And, in turn, it held that CRNA was thus entitled to the sovereign immunity of its member tribes.[20]

However, the plain meaning of 25 U.S.C. § 5381(b) only gives consortia limited rights and responsibilities, which do not include sovereign immunity. Indeed, when 25 U.S.C. § 5381(b) gives consortia "rights and responsibilities" of an "authorizing Indian tribe," it does so in the context of a consortium carrying out programs "under this title," which is Title V of the ISDEAA.[21]

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[20] Exc. 196 ("Accordingly, under 25 U.S.C. § 5381(b), Defendant has the same rights as its authorizing tribes – as it is not disputed that an Indian tribe has the right to assert tribal sovereign immunity, Defendant is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium.").

[21] As historical context, Congress enacted the ISDEAA in 1975 via Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301 et seq.). Title I authorized the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) to contract with Indian tribes to enable them to administer services that

Thus, the "rights and responsibilities" given to consortia by 25 U.S.C. § 5381(b) are those given to tribes *under Title V of the ISDEAA*. For example, where 25 U.S.C. § 5385 gives tribes participating in Title V rights to benefit from funding agreements, 25 U.S.C. § 5381(b) gives those same rights to an authorized consortium. Or, where 25 U.S.C. § 5389 gives tribes participating in Title V rights to initiate construction projects, 25 U.S.C. § 5381(b) gives the same rights to an authorized consortium. Yet Title V includes nothing about sovereign immunity, and thus it is not one of the Title V rights that could be conferred to consortia by 25 U.S.C. § 5381(b).

The reality that 25 U.S.C. § 5381(b) gives consortia the limited "rights and responsibilities" provided *under Title V*, and not all of a tribe's rights, is

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BIA and IHS were administering. 25 U.S.C. §§ 5321-32.

In 1988, after it was clear that implementing Title I contract-by-contract was burdensome for individual tribes, Congress added Title III, authorizing select tribes to participate in a "demonstration project," where each participant could annually negotiate a single compact and funding agreement for all services it was administering. Pub. L. No. 100-472, 102 Stat. 2285 (1988). For more history of Congress's amendments to the ISDEAA, see H.R. Rep. No. 106-477 (1999) (additional views by Hon. George Miller).

Congress later enacted the Tribal Self-Governance Amendment of 2000, which added Title V. Pub. L. No. 106-260, 114 Stat. 711 (2000). This made the Title III demonstration project permanent for IHS programs, and authorized all ISDEAA "Indian tribes" to eventually participate. 25 U.S.C. §§ 5381-99. The "title" that 25 U.S.C. § 5381(b) is referring to is this Title V.

Also, section 501(a)(5) of Title V, codified at 25 U.S.C. § 5381(a)(5), made a definition for "inter-tribal consortium" that, only for Title V, was defined as "a coalition of two or more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations."

bolstered by legislative history. When the House Committee on Resources reported on Title V, the committee explained 25 U.S.C. § 5381(b) as follows:

> This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution.[22]

This commentary fixated on a specific thing: using 25 U.S.C. § 5381(b) to enable consortia to participate in self-governance under Title V just as a tribe would. In contrast, this commentary was not about a general conferral of all of a tribe's rights to a consortia, regardless of context or regardless of whether such rights were even germane to Title V's provisions.

Beyond the plain meaning and legislative history of 25 U.S.C. § 5381(b), its conferral of limited rights is also colored by 25 U.S.C. § 5332, which was passed with Title I of the ISDEAA. That provision clarifies that nothing in the ISDEAA shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe."

In light of this language, which squarely disclaims any modifications to sovereign immunity by the ISDEAA, it would be peculiar for Congress to

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[22] H.R. Rep. No. 106-477, at 19 (1999); *see also* S. Rep. No. 106-221, at 7 (2000) (explaining the reason for the same provision in S. 979). Note that committee report was on H.R. 1167; this was the bill that would enact Title V. Note also that the relevant committee explanation concerns section 501(b); this is the bill section that would later be codified as 25 U.S.C. § 5381(b).

have later amended the ISDEAA to then significantly modify sovereign immunity, and to allow entirely new kinds of entities to gain new rights to sovereign immunity. And it would be especially peculiar for Congress to have intended such a significant expansion of sovereign immunity without ever mentioning the term "sovereign immunity" by name.[23]

Instead, when Congress added Title V to the ISDEAA, it reaffirmed the force of 25 U.S.C. § 5332 and its disclaimer of any modifications to sovereign immunity. This was made explicit by the codification of 25 U.S.C. § 5396, which, among other things, reiterated that 25 U.S.C. § 5332 would apply to all compacts and funding agreements authorized under Title V. Thus, Congress not only disclaimed modifications to sovereign immunity when passing the ISDEAA, it reiterated that disclaimer when adding Title V.

Further still, it is not as if 25 U.S.C. § 5381(b) was not in effect when *Runyon* was decided. To the contrary, 25 U.S.C. § 5381(b) was added to the United States Code in August 2000, and this Court decided *Runyon* in 2004. Yet *Runyon's* holding – that an entity cannot assert sovereign immunity as

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[23] This parallels the reasoning and observations of the U.S. Supreme Court in cases like *Chisom v. Roemer,* 501 US 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.").

an arm of a tribe unless the tribe is a real party in interest – was not tempered in any way by any concern for 25 U.S.C. § 5381(b). *Runyon* mentioned nothing whatsoever about a possible exception under the ISDEAA, which would have been a gaping exception to its otherwise blanket holding. *Runyon* was silent on such an exception even despite mentioning that AVCP itself administered contracts under the ISDEAA.[24] It would have been odd for this exception under 25 U.S.C. § 5381(b) to exist, yet for the Court not to explain it, or even so much as reference it.[25] Instead, the better explanation is that, just as was true when *Runyon* was decided, 25 U.S.C. § 5381(b) has never given sovereign immunity to consortia like CRNA.

In sum, and despite the superior court's sweeping conclusion to the contrary, 25 U.S.C. § 5381(b) does not give sovereign immunity to CRNA.

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[24] *Runyon*, 84 P.3d at 438.

[25] This Court used similar logic in its recent decision in *Ahtna, Inc. v. State,* 2021 Alas. LEXIS 26, *12-13 (Alaska March 12, 2021) ("Ahtna's attempt to distinguish the relevant statutory language is not persuasive. The statute at issue in *Paug-Vik* conveyed a right to water appropriation '[w]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued.' There is no reason Ahtna's theory — that aboriginal title meant there was no conveyance rather than an invalid conveyance curable by ANCSA — would not have applied in *Paug-Vik*. If that theory were correct, no conveyance could have occurred in *Paug-Vik* because aboriginal title would have prevented water rights from accruing in the first place. As the superior court observed, Ahtna's reading of ANCSA § 4(a) 'would only extinguish aboriginal title on land that was not encumbered by aboriginal title. Or, in other words, it would do nothing.'").

Instead, it only gives CRNA the rights and responsibilities that tribes receive under Title V of the ISDEAA. This is supported by the plain meaning of 25 U.S.C. § 5381(b). And it is supported by legislative history, other provisions of the ISDEAA like 25 U.S.C. § 5332 and 25 U.S.C. § 5396, and the conspicuous absence of any mention of such a rule of law in this Court's *Runyon* decision. While 25 U.S.C. § 5381(b) indeed gives authorized consortia the specific rights to participate in Title V of the ISDEAA just as a tribe would, it does not extend far beyond the ISDEAA and also give those consortia sovereign immunity. Nothing of the sort is contemplated by ISDEAA.

CONCLUSION

For the reasons set forth above, appellant Yvonne Ito requests that the Court REVERSE and VACATE the Final Judgment the superior court entered on December 2, 2020, and REMAND this action to the superior court for an adjudication of the merits of Ms. Ito's complaint against CRNA.

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CERTIFICATE REQUIRED BY APPELLATE RULE 513.5(C)(2)

Undersigned counsel certifies that the typeface used in this brief is 13- point (proportionally spaced) Century Schoolbook.

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