

IN THE SUPREME COURT FOR THE STATE OF ALASKA

YVONNE ITO)
)
 Appellant,)
)
 v.)
) Supreme Court No. S-17965
 COPPER RIVER NATIVE)
 ASSOCIATION)
) Superior Court No. 3AN-20-06229 CI
 Appellee.)
 _____)

**BRIEF OF AMICI CURIAE ARCTIC VILLAGE COUNCIL,
ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, COUNCIL OF
ATHABASCAN TRIBAL GOVERNMENTS, MANILAQ ASSOCIATION,
SOUTHEAST ALASKA REGIONAL HEALTH CONSORTIUM,
AND UNITED TRIBES OF BRISTOL BAY**

On Appeal from the Judgment of the Superior Court,
Third Judicial District at Anchorage, the Honorable Judge Dani Crosby

Erin C. Dougherty Lynch (#0811067)
Matthew N. Newman (#1305023)
Maggie Massey (#1911098)
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, Alaska 99501
Phone: (907) 276-0680
Fax: (907) 276-2466
dougherty@narf.org
mnewman@narf.org
massey@narf.org

Attorneys for Amici Curiae

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
AUTHORITIES PRINCIPALLY RELIED UPON	vi
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. TRIBAL CONSORTIA ARE AN ESSENTIAL EXPRESSION OF TRIBAL SELF-DETERMINATION AND PROVIDE A VARIETY OF GOVERNMENTAL SERVICES TO THEIR MEMBER TRIBES	4
A. Tribal Consortia Are Expressions of Tribal Self- Determination	5
B. Federal Policy Encourages and Supports Tribal Non-Profit Consortia in Alaska	6
C. There is No One Model—Tribal Consortia Exist as Their Member Tribes Direct	8
II. RUNYON RELIES ON AN OVERSIMPLIFICATION OF THE RELATIONSHIP BETWEEN TRIBES AND THEIR CONSORTIA, DIVERGES FROM FEDERAL SOVEREIGN IMMUNITY LAW, AND UNDERMINES TRIBAL SELF-DETERMINATION	12
III. ADOPTING THE <i>WHITE</i> TEST WILL NOT LEAD TO IMMUNITY FOR ALL TRIBAL ORGANIZATIONS	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<i>Alaska Logistics, LLC v. Newtok Village Council</i> , 357 F. Supp. 3d 916 (D. Alaska 2019).....	3
<i>American Vantage Companies, Inc. v. Table Mountain Rancheria</i> , 292 F.3d 1091 (9th Cir. 2002)	13
<i>Atkinson v. Haldane</i> , 569 P.2d 151 (Alaska 1977)	3, 19
<i>Barron v. Alaska Native Tribal Health Consortium</i> , 373 F. Supp. 3d 1232 (D. Alaska 2019).....	9, 14, 16, 18
<i>Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort</i> , 629 F.3d 1173 (10th Cir. 2010)	14, 15
<i>Cole v. Alaska Island Community Services</i> , 834 Fed. Appx. 366, 367 (9th Cir. 2021)	10, 16
<i>Cook v. AVI Casino Enterprises, Inc.</i> , 548 F.3d 718 (9th Cir. 2008)	13
<i>Demontiney v. United States</i> , 255 F.3d 801, 811 (9th Cir. 2001)	3, 7
<i>Dille v. Council of Energy Resource Tribes</i> , 801 F.2d 373 (10th Cir. 1986)	12, 13
<i>Douglas Indian Association v. Central Council of Tlingit & Haida Indian Tribes of Alaska</i> , 403 P.3d 1172 (Alaska 2017)	3, 16, 18, 19
<i>Great Plains Lending, LLC v. Department of Banking</i> , No. 20340, 2021 WL 2021823 (Conn. May 20, 2021)	17
<i>Huron Potawatomi, Inc. v. Stinger</i> , 574 N.W.2d 706 (Mich. Ct. App. 1997)	13
<i>John v. Baker</i> , 982 P.2d 738 (Alaska 1999)	19, 20
<i>J.L. Ward Associates Inc. v. Great Plains Tribal Chairmen’s Health Bd.</i> , 842 F. Supp. 2d 1163 (D. S.D. 2012)	16
<i>Matyascik v. Arctic Slope Native Association Ltd.</i> , No. 2:19-cv-0002-HRH (D. Alaska Aug. 5, 2019).....	16

<i>McCrary v. Ivanof Bay Village</i> , 265 P.3d 337 (Alaska 2011)	3
<i>Michigan v. Bay Mills Indian Community</i> , 572 U.S. 782 (2014)	3, 18
<i>Native Village of Stevens v. Alaska Management. & Planning</i> , 757 P.2d 32 (Alaska 1988)	19
<i>Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991)	14
<i>Pink v. Modoc Indian Health Project, Inc.</i> , 157 F.3d 1185 (9th Cir. 1998)...	12, 13, 16, 17
<i>Runyon ex rel. B.R. v. Association of Village Council Presidents</i> , 84 P.3d 437 (Alaska 2004)	3, 4, 12, 13
<i>Simmonds v. Parks</i> , 329 P.3d 995 (Alaska 2014)	19, 20
<i>South Carolina v. Catawba Indian Tribe, Inc.</i> , 476 U.S. 498 (1986).....	13
<i>State v. Native Village of Tanana</i> , 249 P.3d 734 (Alaska 2011).....	19, 20
<i>State v. Central Council of Tlingit & Haida Indian Tribes of Alaska</i> , 371 P.3d 255 (Alaska 2016)	20
<i>Toineeta v. Andrus</i> , 503 F. Supp. 605 (W.D. N.C. 1980).....	13
<i>White v. University of California</i> , 765 F.3d 1010 (9th Cir. 2014).....	4, 14, 15
<i>Wilson v. Alaska Native Tribal Health Consortium</i> , 399 F. Supp. 3d 926 (D. Alaska 2019).....	9, 16

STATUTES

Act of May 1, 1936, Pub. L. No. 74-538, § 2, 49 Stat. 1250, 1250-51 (1936), 25 U.S.C. § 5119.....	13
Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301–5423).....	7
25 U.S.C. § 1601	7

25 U.S.C. § 5302(a)..... 7

25 U.S.C. § 5381(a)(5)..... 8

25 U.S.C. § 5383(c)(1)(B)..... 8

43 U.S.C. § 1606(a)..... 9

FEDERAL REGISTER

Indian Entities Recognized by and Eligible To Receive Services From the
United States Bureau of Indian Affairs 1, 10

LEGISLATIVE HISTORY

H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular
Affairs, Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049
and H.R. 17129, 90th Cong. 117 (1968) 5

S. Rep. No. 100-274 (Dec. 21, 1987) *as reprinted in* 1988 U.S.C.C.A.N. 2620
(Select Committee on Indian Affairs Report)..... 6, 7

GOVERNMENTAL PUBLICATIONS

Bureau of Indian Affairs, *Tribes/Tribal consortia in Alaska*..... 6

Bureau of Indian Affairs, *Alaska Region, Regional Indian Self-Determination
Implementation Plan FY 2015* 7

Indian Health Service, *Tribal Health Organizations* 6, 11

Indian Health Service, *Tribal Self-Governance Program*..... 7

OTHER PUBLICATIONS

Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished
Business*, 43 TULSA L. REV. 17 (2007)..... 5

BRIEFS

Answering Brief of SEARHC at 3, 2020 WL 2948077, <i>Cole v. Alaska Island Community Services</i> , 834 Fed. Appx. 366, 367 (9th Cir. 2021).....	10
Brief of Appellee State of Alaska at 39, <i>Simmonds v. Parks</i> , 329 P.2d 995 (2014).....	20
Brief of Appellants State of Alaska et al. at *47, 2013 WL 8854953, <i>Douglas Indian Association v. Central Council of Tlingit & Haida Indian Tribes of Alaska</i> , 371 P.3d 255 (Alaska 2016)	20

WEBSITES

Chugachmiut, <i>About Chugachmiut</i>	11
Council of Athabascan Tribal Governments, <i>Board of Chiefs</i>	10
Council of Athabascan Tribal Governments, <i>Exercising Tribal Powers</i>	10
Kenaitze Indian Tribe.....	5
Maniilaq Association, <i>About Us</i>	9
Native Village of Eyak, <i>Tribal Family Services</i>	11
SouthEast Alaska Regional Health Consortium, <i>About Us</i>	10
Tanana Chiefs Conference, <i>Communities in Our Region</i>	10
Tanana Chiefs Conference, <i>Our History</i>	5
Tanana Chiefs Conference, <i>Services</i>	10

AUTHORITIES PRINCIPALLY RELIED UPON

25 U.S.C. § 1601. Congressional findings

The Congress finds the following:

(1) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

(2) A major national goal of the United States is to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.

(3) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

(4) Federal health services to Indians have resulted in a reduction in the prevalence and incidence of preventable illnesses among, and unnecessary and premature deaths of, Indians.

(5) Despite such services, the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States.

25 U.S.C. § 5302(a). Congressional declaration of policy

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the

establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. § 5381. Definitions

...

(a) In general.

(5) Inter-tribal consortium

The term “inter-tribal consortium” means a coalition of two or more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

INTEREST OF AMICI CURIAE

Amicus Arctic Village Council is a federally recognized tribal government that is responsible for the health, safety, and welfare of its members.¹ Arctic Village is situated on the southern boundary of the Arctic National Wildlife Refuge, along the east fork of the Chandalar River. The Arctic Village Council exercises powers of self-governance and jurisdiction over its Neets'ąjį Gwich'in tribal citizens living within Arctic Village and is responsible for delivering governmental services to its citizens. To best deliver services to its tribal citizens, the Arctic Village Council is a member of multiple tribal service consortia in the Interior region.

Amicus Alaska Native Tribal Health Consortium (ANTHC) is a tribal consortium serving the unique healthcare needs of 229 federally-recognized Alaska Native Tribes by providing a wide range of medical, community health, and other services for more than 175,000 Alaska Native and American Indian people statewide. ANTHC has a strong interest in ensuring the application of laws that recognize tribal sovereignty and promote tribal self-determination.

Amicus Council of Athabascan Tribal Governments (CATG) is a tribal consortium founded with the vision of self-sufficient communities with a shared commitment to promoting common goals and taking responsibility for a culturally integrated economy based on customary and traditional values in a contemporary setting. CATG is a

¹ *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7557 (Jan. 29, 2021).

consortium of ten Gwich'in and Koyukon Athabascan Tribes in the Yukon Flats, each of which has a seat on CATG's Board of Chiefs.

Amicus Maniilaq Association (Maniilaq) is an tribal consortium. Maniilaq is based in Kotzebue and is controlled by 12 federally recognized Tribes. Maniilaq provides culturally relevant health, social, and Tribal governmental services to its member Tribes, which are located in villages throughout Northwest Alaska in an area of approximately 38,000 square miles.

Amicus United Tribes of Bristol Bay (UTBB) is a tribally-chartered consortium of 15 federally recognized Tribes in Southwest Alaska. UTBB was created by tribal resolutions which delegated governmental powers to UTBB to implement the Bristol Bay Regional Visioning Project, a region-wide action plan developed by Bristol Bay's tribal communities focused on improving economic development opportunities, preserving cultural and subsistence resources, and increasing educational opportunities for tribal youth. According to its Bylaws, "UTBB is organized as a consortium of tribal governments working to protect our traditional way of life and the natural resources that way of life depends upon."

Amicus SouthEast Alaska Regional Health Consortium (SEARHC) is a tribal consortium of 15 federally-recognized Tribes and is governed by a Board of Directors comprised of members designated by each constituent Tribe. In SEARHC, Southeast Alaska's Tribes have pooled together their resources to allow for the efficient and widespread provision of health care in isolated island and mainland communities. Among

the health care services SEARHC provides are medical, dental, optometry, physical therapy, behavioral health, alcohol and substance abuse, and health promotion services.

Tribal sovereign immunity, including immunity for entities that act as arms of a Tribe, is of paramount importance to the above listed Amici. Each has a duty to their tribal citizens and member Tribes to provide governmental services as directed. Tribal sovereign immunity has a significant financial impact on each Amici as it affects the amounts of limited funding that each Amici have to deliver these essential governmental services.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tribal sovereign immunity is “settled law” in Alaska.² Alaska Native Tribes are sovereign and possess immunity from suit in Alaska state courts.³ The question presented in this case is whether that sovereign immunity extends to tribal consortia—organizations comprised of and directed by those sovereign Tribes to carry out governmental functions.

Unlike larger tribal governments, such as some in the Lower 48, many Alaska tribal governments lack sufficient resources to operate and maintain full-service government

² *Douglas Indian Ass'n v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1176 (Alaska 2017) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

³ *Id.* (citing *Atkinson v. Haldane*, 569 P.2d 151, 162-63 (Alaska 1977)) (“[F]ederally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court.”); *see also McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011) (“Because Ivanof Bay is a federally-recognized tribe, it is entitled to sovereign immunity.”); *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 439 (Alaska 2004) (recognizing that Alaska Native Tribes, as sovereigns, possess immunity from suit); *Alaska Logistics, LLC v. Newtok Vill. Council*, 357 F. Supp. 3d 916, 924 (D. Alaska 2019) (reiterating that “[t]here is a strong presumption against waiver of tribal sovereign immunity.” (quoting *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001))).

agencies, such as a Tribal Department of Health or Housing Authority, to meet their citizens' needs. Through tribal consortia, Alaska Tribes create a unified entity through which they exercise collective government action, advocacy, and service delivery across small and often isolated communities. Although they provide services to citizens of several Tribes, Alaska tribal consortia play the same essential governmental role as a single larger Tribe's Department of Health or Housing Authority.

For decades, federal policy has encouraged Tribes to form such consortia to facilitate effective delivery of services to tribal citizens across Alaska. Yet the single-factor test for sovereign immunity outlined by this Court in *Runyon v. Association of Village Council Presidents*⁴ fails to adequately account for the breadth, complexity, or purpose of the relationships between Tribes and their tribal organizations. In this brief, Amici seek to provide the Court with an overview of the myriad ways in which tribal consortia in Alaska are organized to perform essential governmental functions on behalf of their member Tribes, and to encourage the Court to adopt the Ninth Circuit's multi-factor test outlined in *White v. University of California*⁵ to provide a more comprehensive, nuanced framework for Alaska courts to use when evaluating whether tribal consortia can assert the sovereign immunity of their member Tribes.

ARGUMENT

I. TRIBAL CONSORTIA ARE AN ESSENTIAL EXPRESSION OF TRIBAL SELF-DETERMINATION AND PROVIDE A VARIETY OF GOVERNMENTAL SERVICES TO

⁴ 84 P.3d at 441.

⁵ 765 F.3d 1010, 1025 (9th Cir. 2014).

THEIR MEMBER TRIBES.

A. Tribal Consortia Are Expressions of Tribal Self-Determination.

Alaska Native Tribes have long taken advantage of the benefits of joining together to create organizations to accomplish shared governmental objectives and provide services to their citizens.⁶ These organizations are known as “tribal consortia,” “regional non-profits,” or “tribal health organizations,” and their existence in Alaska pre-dates statehood.⁷

Some Tribes have chosen to administer governmental services themselves and operate their own health care, social service, and tribal programs.⁸ For some small and remote Tribes, however, economies of scale make it extremely difficult to assume all governmental services to which their citizens are entitled. These Tribes often choose to join together to form self-governing consortia across communities. These consortia are generally formed along cultural, historical, regional, and ecological bonds, and allow Tribes to pool their resources and take advantage of efficiencies of scale when providing

⁶ See Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *TULSA L. REV.* 17, 32-33 (2007) (quoting H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129*, 90th Cong. 117 (1968) (statement of Hon. Willie Hensley, a Representative in the Alaska Legislature from the 17th District, Kotzebue, Alaska)) (describing how Alaska Native Peoples created regional organizations prior to ANCSA to collaboratively address land claims, economic, and social concerns).

⁷ Tanana Chiefs Conference, *Our History*, <https://www.tananachiefs.org/about/our-history/> (describing the 1915 formalization of a group of Chiefs from the Athabascan Tribes who met with federal representatives to convey the Tribes’ social, economic, and subsistence priorities).

⁸ See, e.g., Kenaitze Indian Tribe, <https://www.kenaitze.org/about/> (describing the Dena’ina Wellness Center and a variety of tribal and social service programs).

government services for their member Tribes, including social, educational, advocacy, and health services.⁹ Tribal consortia serve as a unified voice for their member Tribes and a mechanism through which Tribes can engage in issues affecting their communities and resources without incurring the heavy financial and administrative burden of each doing it by themselves. Alaska's geography demands creative governance solutions and tribal consortia are a practical, efficient model of tribal self-governance.

B. Federal Policy Encourages and Supports Tribal Consortia in Alaska.

The federal policy of tribal self-determination is premised upon the legal relationship between the United States and tribal governments. The right of Alaska's Tribes to govern their affairs flows from a sovereignty existing prior to their inclusion within the territorial bounds of the United States. Tribal powers of self-government are recognized by the United States Constitution, Acts of Congress, treaties, judicial decisions, and agency practice.¹⁰ "A fundamental objective of the federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members."¹¹ Federal self-determination policy is flexible and allows Tribes

⁹See Indian Health Serv., *Tribal Health Organizations* <https://www.ihs.gov/alaska/tribalhealthorganizations> (list of self-governance Tribes and Tribal Consortia that are Alaska Tribal Health Organizations with agreements with the Indian Health Services); Bureau of Indian Affairs list of self-governance Tribes/Tribal consortia in Alaska, available at <https://on.doi.gov/3mrk5h7>.

¹⁰ S. Rep. No. 100-274 (Dec. 21, 1987) *as reprinted in* 1988 U.S.C.C.A.N. 2620, **2622 (Select Committee on Indian Affairs Report).

¹¹ *Id.* at **2624

to design and deliver services “appropriate to their diverse demographic, geographic, economic[,] and institutional needs.”¹²

For decades the federal government has encouraged and supported the formation of tribal consortia in Alaska. Many of Alaska’s tribal consortia are providing services that the United States has a trust responsibility to provide to eligible Alaska Natives and American Indians.¹³ It has been federal policy for the last 40 years to enhance tribal autonomy and self-determination, and one of Congress’s key laws effectuating this policy is the Indian Self-Determination and Education Assistance Act (ISDEAA).¹⁴ Congress enacted ISDEAA to assure maximum tribal participation “and tribal control over administration of federal programs”¹⁵ for Native communities in an effort to “render such services more responsive to the needs and desires of those communities.”¹⁶ ISDEAA provides the mechanism for Tribes to assume responsibility for providing governmental services, and in so doing fosters tribal autonomy, self-sufficiency, and self-determination.¹⁷ ISDEAA

¹² *Id.* at **2625.

¹³ 25 U.S.C. § 1601.

¹⁴ Pub. L. No. 93-638, 88 Stat. 2203 (formerly codified at 25 U.S.C. §§ 450-458aaa-18) 25 U.S.C. §§ 5301-5423.

¹⁵ *Demontiney v. U.S. Dep’t of Interior*, 255 F.3d 801, 806 (9th Cir. 2001).

¹⁶ 25 U.S.C. § 5302(a).

¹⁷ Indian Health Serv., Tribal Self-Governance Program, <https://www.ihs.gov/selfgovernance/aboutus/> (recognizing that in choosing to delivery formerly federal services, Tribes “exercise their sovereignty”); Bureau of Indian Affairs, Alaska Region, Regional Indian Self-Determination Implementation Plan FY 2015, at 1 (Jan. 2015), <https://tinyurl.com/pkxzkb83> (“It is the Policy of the Alaska Region, Bureau of Indian Affairs to provide for the maximum service delivery in the processing of

likewise specifically recognizes that Tribes can create tribal organizations, including inter-tribal consortia, to function as arms of the Tribes and implement core governmental functions.¹⁸

C. There Is No One Model—Tribal Consortia Exist as Their Member Tribes Direct.

At the most fundamental level, self-determination is about Tribes' sovereign ability to create their own governance and service delivery solutions that reflect their own cultures, circumstances, priorities, and needs. Tribal consortia are formed by their member Tribes for the purpose of collectively providing governmental services that are appropriate to their demographic, regional, and economic circumstances. While there is no single template for tribal self-governance, tribal consortia are generally formed by resolutions enacted by their member Tribes.¹⁹ These resolutions authorize the consortia to provide services and advocacy on behalf of the Tribe and serve as a delegation of authority to act on the Tribe's behalf. Resolutions are specific, and can delegate authority to the consortia on a wide range

[ISDEAA] contracts submitted by the 229 Tribes/Tribal Organizations who are within the Region's jurisdiction . . .").

¹⁸ 25 U.S.C. § 5381(a)(5) ("The term "inter-tribal consortium" means a coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations." (footnote omitted)).

¹⁹ *See, e.g.*, 25 U.S.C. § 5383(c)(1)(B) ("The qualified applicant pool for self-governance shall consist of each Indian tribe that . . . has requested participation in self-governance by resolution or other official action by the governing body of each Indian tribe to be served').

or limited number of functions and activities.²⁰ Tribes typically retain control over the consortia through boards of directors that are controlled by member Tribes.

There is no one prescriptive tribal consortium model—Alaska Tribes organize themselves into consortia at the statewide, regional, and sub-regional levels. The Alaska Native Tribal Health Consortium (ANTHC) is a statewide organization that represents and provides certain healthcare services to all 229 of Alaska’s Tribes and beneficiaries.²¹ At the regional level, there are twelve tribal consortia, often referred to as the “regional non-profits.”²² In some regions, a single tribal consortia provides region-wide social services and health care services.²³ In other regions, there is a regional non-profit and a separate

²⁰ Some tribal consortia are empowered by their member Tribes to conduct government-to-government consultation with federal and state agencies. Tribal consortia often submit written comments on proposed federal actions. For example, the tribal resolutions establishing Amici UTBB explicitly designate UTBB as a political subdivision of the member Tribe and representative of the Tribe’s governmental interests, with all powers and immunities that the member Tribe possesses as a federally-recognized Tribe.

²¹ *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 934 (D. Alaska 2019), *appeal dismissed*, No. 19-35707, 2019 WL 7946348 (9th Cir. Dec. 30, 2019).

²² These consortia pre-date the Alaska Native Claims Settlement Act and are wholly separate entities from the for-profit Alaska Native Corporations. *See* 43 U.S.C. § 1606(a); *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) (“While Alaska Native Corporations are owned and managed by Alaska Natives, they are distinct legal entities from Alaska Native tribes. . . . Unlike an Alaska Native Corporation, [the non-profit tribal health consortium] is an entity created and controlled by Alaska Native tribes that promotes tribal self-determination and fulfills governmental functions.” (citations omitted)).

²³ For example, Maniilaq Association provides health care, tribal services, and social services for the Tribes in Northwest Alaska. Maniilaq Association, *About Us*, <https://www.maniilaq.org/about-us/>.

regional tribal health organization, the former focused on social services delivery while the latter provides health care.²⁴

Alaska Tribes have also formed sub-regional tribal consortia that are governmental and service organizations that fall between tribal governments and regional tribal consortia. For example, the Council of Athabascan Tribal Governments (CATG) provides health care, natural resource, and early childhood education services to the ten federally-recognized Gwich'in and Koyukon Athabascan Tribes in the Yukon Flats region of the Interior.²⁵ These villages, such as Amici Arctic Village Council, have chosen to split their services between two tribal consortia—CATG and Amicus Tanana Chiefs Conference, which the Tribes have designated to administer a variety of other governmental services.²⁶

Tribes in each region of Alaska organize differently. For example, the Copper River region is home to eight federally-recognized Tribes. One Tribe, the Native Village of Chitina, has chosen to manage its own health care and has its own independent funding

²⁴ For example, in Southeast Alaska, Central Council of the Tlingit & Haida Indian Tribes of Alaska, provides a variety of educational, social, and economic services, while the SouthEast Alaska Regional Health Consortium (SEARHC) administers health care services. Central Council of the Tlingit & Haida is a federally-recognized Tribe, 86 Fed. Reg. 7554, 7557 (2021), and SEARHC is a tribal consortium of fifteen federally-recognized Tribes. Answering Brief of SEARHC at 3, 2020 WL 2948077, *Cole v. Alaska Island Cmty. Servs.*, 834 Fed. Appx. 366, 367 (9th Cir. 2021); Southeast Alaska Regional Health Consortium, *About Us*, <https://searhc.org/about-us/>.

²⁵ Council of Athabascan Tribal Governments, *Board of Chiefs*, <https://www.catg.org/board-members/>; *Id.*, *Exercising Tribal Powers*, <http://www.catg.org/exercising-tribal-powers>.

²⁶ Tanana Chiefs Conference, *Services*, <https://www.tananachiefs.org/services/#tribal>; *Id.*, *Communities in Our Region*, <http://www.tananachiefs.org/about/communities>.

agreement with the Indian Health Service (IHS).²⁷ Two Tribes—Chistochina and Mentasta Lake—have joined together to form Mt. Sanford Tribal Consortium (Kelt'aeni), which provides health care and advances the common interests of the two neighboring Upper Ahtna communities.²⁸ Finally, the other five Tribes in the region—Cantwell, Gakona, Gulkana, Kluti-Kaah, and Tazlina—have joined together to form Appellee Copper River Native Association (CRNA).²⁹

Tribes can also employ a hybrid model, where they administer some services themselves and then compact with one or more tribal consortia for other services. For example, the Native Village of Eyak administers its own village clinic and tribal family services program, but also designates the regional tribal consortia Chugachmiut to administer other services.³⁰

This landscape of service delivery is sovereignty in action. Tribes can choose to administer their own programs if they wish, or they can take advantage of the organizational benefits of cooperation and join together to create institutions that provide them with administrative and logistical advantages in delivering services. Tribes can also

²⁷ Indian Health Serv., Alaska Area Tribal Health Organizations, <https://www.ihs.gov/alaska/tribalhealthorganizations/> (listing the governing body of the Tribe, the Chitina Traditional Village Council).

²⁸ *Id.* (listing Mt. Sanford Tribal Consortium as having its own funding agreement with IHS).

²⁹ *Id.* (listing CRNA as having its own funding agreement with IHS).

³⁰ *Id.* (listing Native Village of Eyak as having its own funding agreement); Native Village of Eyak, *Tribal Family Services*, <https://www.eyak-nsn.gov/programs/tribal-family-services/>; Chugachmiut, *About Chugachmiut*, <https://www.chugachmiut.org/about-us/about-chugachmiut/>.

rescind their participation in a tribal consortium when that organization no longer meets the Tribe's needs. This flexibility is supported by federal policy and maximizes tribal autonomy and self-determination.

II. RUNYON RELIES ON AN OVERSIMPLIFICATION OF THE RELATIONSHIP BETWEEN TRIBES AND THEIR CONSORTIA, DIVERGES FROM FEDERAL SOVEREIGN IMMUNITY LAW, AND UNDERMINES TRIBAL SELF-DETERMINATION.

In *Runyon v. Association of Village Council Presidents*, this Court considered whether a tribal consortium was shielded from suit by its member Tribes' sovereign immunity.³¹ In a brief opinion, this Court noted that “[t]ribal status . . . may extend to an institution that is the arm of multiple [T]ribes, *such as a joint agency formed by several tribal governments*,”³² citing the Ninth Circuit's decision in *Pink v. Modoc Indian Health Project, Inc.*,³³ and the Tenth Circuit's decision in *Dille v. Council of Energy Resource Tribes*.³⁴ But the Court then held that any such joint governmental agency would lack tribal sovereign immunity—regardless of the agency's governmental function, the amount of tribal control over the agency, or other factors—if the Tribes incorporate it as a nonprofit under state law. “By severing their treasuries from the corporation,” the Court held, AVCP's member Tribes “have also cut off their sovereign immunity before it reaches

³¹ 84 P.3d 437, 440-41 (Alaska 2004).

³² *Id.* at 440 (emphasis added).

³³ 157 F.3d 1185 (9th Cir. 1998).

³⁴ 801 F.2d 373 (10th Cir. 1986).

AVCP.”³⁵ *Runyon*’s one-dispositive-factor test, however, misapprehends the relationship between Tribes and their consortia, undermines decades of federal policy supporting and promoting tribal consortia, and impairs tribal self-governance and tribal self-determination. Notably, not even the tribal consortia in *Pink* and *Dille* would pass the *Runyon* test.³⁶

Federal law has long recognized that a tribal entity “that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so.”³⁷ Substance, not form, is paramount under federal law.³⁸ This approach is evident in the Ninth Circuit’s test for

³⁵ 84 P.3d at 441.

³⁶ *Pink*, 157 F.3d at 1187 (“Modoc is a nonprofit corporation created and controlled by the Alturas and Cedarville Rancherias, both federally recognized tribes.”); *Dille v. Council of Energy Res. Tribes*, 610 F. Supp. 157, 158 (D. Colo. 1985) (“CERT is organized as a nonprofit corporation that only Indian tribes may join.”).

³⁷ *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002), as amended on denial of reh’g (July 29, 2002); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (affirming a tribal corporation to be arm of the Tribe and thus possessing sovereign immunity); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998) (concerning a tribal organization that was organized as a nonprofit corporation).

³⁸ ~~Indeed, organizing under the corporate form and possessing tribal sovereignty have never~~ been mutually exclusive. For example, in 1936 when Congress extended the Indian Reorganization Act to Alaska, it included a provision allowing Tribes to take on a corporate form to conduct government affairs. Act of May 1, 1936, Pub. L. No. 74-538, § 2, 49 Stat. 1250, 1250-51 (1936), 25 U.S.C. § 5119. This is not unique to Alaska—there are many examples of Tribes organized as federal corporations, as well as non-profit and for-profit state corporations, both before and after their recognition by the federal government. *See, e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 n.2 (1986) (noting that the Catawba Indian Tribe was organized as a non-profit corporation organized under South Carolina law); *Toineeta v. Andrus*, 503 F. Supp. 605, 607 (W.D. N.C. 1980) (noting that the Eastern Band of Cherokee was issued a corporate charter by the State of North Carolina, and operated under that charter prior to federal recognition); *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706, 707 (Mich. Ct. App. 1997) (discussing Huron

determining when tribal entities may assert tribal sovereign immunity. To determine whether an entity is an arm of a Tribe—or Tribes—for purposes of sovereign immunity, the Ninth Circuit weighs five nonexclusive factors, known as the “*White* factors”: “(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.”³⁹ An entity found to be an arm of the Tribe, or Tribes, possesses sovereign immunity and is immune from suit unless it has waived its immunity or consented to the litigation.⁴⁰

The Tenth Circuit first developed this factors-based approach in *Breakthrough*. There, the court weighed whether the Chukchansi Economic Development Authority and the Chukchansi Gold Resort & Casino were “arms” of the Picayune Rancheria of the Chukchansi Indian Tribe.⁴¹ The Tenth Circuit observed that the District Court had followed a prior court in “agree[ing] with *Runyon*’s determination that” one factor—“the financial relationship between the entity and the tribe and whether a judgment against the entity

Potawatomi’s organization as a Michigan non-profit corporation prior to federal recognition).

³⁹ *White v. Univ. of California*, 765 F.3d 1010, 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)); see also *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1239-40 (D. Alaska 2019) (applying the *White* factors to ANTHC).

⁴⁰ See *Barron*, 373 F. Supp. 3d at 1240 (quoting *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

⁴¹ *Breakthrough*, 629 F.3d at 1176-77.

would affect tribal assets”—was dispositive in determining arm-of-the-tribe immunity.⁴² The Tenth Circuit reversed, stating: “[a]lthough we recognize that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship,” prior case law “plainly demonstrates that it is *not* a dispositive inquiry.”⁴³ Instead, the Tenth Circuit articulated a multifactor test, later adopted by the Ninth Circuit in *White* and other courts across the country.

White makes apparent the shortcomings of a one-factor test based on financial relationships. There, the court held that the Kumeyaay Cultural Repatriation Committee was an arm of its member Tribes and therefore possessed sovereign immunity after employing a holistic analysis of the relationship between the Tribes and the Committee:

[T]he Repatriation Committee was created by resolution of each of the Tribes, with its power derived directly from the Tribes’ sovereign authority. The Repatriation Committee is comprised solely of tribal members, who act on its behalf. [Repatriation Committee] tribal representatives are appointed by each tribe. The process by which the Repatriation Committee designates the particular tribe to receive remains under [the] Native American Graves Protection and Repatriation Act is defined and accepted by the Tribes. The Repatriation Committee is funded exclusively by the Tribes. . . . [T]he whole purpose of the Repatriation Committee, to recover remains and educate the public, is “core to the notion of sovereignty.” Indeed, “preservation of tribal cultural autonomy [and] preservation of tribal self-determination,” are some of the central policies underlying the doctrine of tribal sovereign immunity.⁴⁴

⁴² *Id.* at 1186.

⁴³ *Id.* at 1187 (emphasis in original).

⁴⁴ *White*, 765 F.3d at 1025 (quoting *Breakthrough*, 629 F.3d at 1188).

As explained in more detail in the Appellee Copper River Native Association and Amicus Tanana Chiefs Conference briefs, the Ninth Circuit Court of Appeals and the United States District Court for the District of Alaska take this more nuanced approach.⁴⁵ And as this Court has recognized, Alaska courts “take guidance from federal law and the Ninth Circuit”⁴⁶ in defining the contours of tribal sovereign immunity.

That *Runyon* is out of step with federal law is only half the point.⁴⁷ *Runyon* effectively removes Tribes’ ability to exercise fundamental governmental rights when

⁴⁵ See *Cole v. Alaska Island Cmty. Servs.*, 834 Fed. Appx. 366, 367 (9th Cir. 2021) (“The district court properly dismissed Cole’s claims against [SEARHC] because those claims are barred by tribal sovereign immunity.”); *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 936 (D. Alaska 2019) (dismissing claims against ANTHC because it is “an arm of the tribe” and “maintains tribal sovereign immunity” (quotation marks omitted)), *appeal dismissed*, No. 19-35707, 2019 WL 7946348 (9th Cir. Dec. 30, 2019); *Matyascik v. Arctic Slope Native Ass’n Ltd.*, No. 2:19-cv-0002-HRH, 2019 WL 3554687 at *5 (D. Alaska Aug. 5, 2019) (holding that [ASNA], which administers health and social services for eight North Slope Tribes, is “entitled to sovereign immunity because it is an arm of its member tribes”); *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) (“ANTHC is an entity created and controlled by Alaska Native tribes that promotes tribal self-determination and fulfills governmental functions. Accordingly, it constitutes an arm of the Alaska Native tribes that is entitled to sovereign immunity.”).

⁴⁶ *Douglas Indian Ass’n v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1178 (Alaska 2017).

⁴⁷ See *J.L. Ward Assocs. Inc. v. Great Plains Tribal Chairmen’s Health Bd.*, 842 F. Supp. 2d 1163, 1176–77 (D. S.D. 2012) (citing *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187 (9th Cir. 1998)) (holding that a tribal health consortium organized as a nonprofit corporation was providing “health care and related services to tribal members and member Indian tribes” that were “closer to the functions of a tribal government than a business” and that the “purposes of tribal sovereign immunity would be furthered by extending the tribes’ immunity” to the consortia. “Providing adequate health care to their constituents . . . is a very real concern for sovereign Indian tribes.”).

acting collectively. In effect, *Runyon* impairs and undercuts tribal self-governance by penalizing Tribes for their cooperation, efficiency, and creativity. It forces a Tribe to choose between its state-court sovereign immunity and exercising its self-determination.

Runyon likewise stands in contrast to decades of federal policy in which Congress and federal agencies encouraged Tribes to form tribal consortia and have recognized that tribal sovereign immunity is essential to “promote the ability of Indian tribes to control their own enterprises.”⁴⁸ *Runyon*’s overemphasis on the corporate form effectively inhibits the right of Alaska Native peoples to determine how they will manage their resources, organize and deliver their governmental services, govern their affairs, and execute their sovereignty.

III. ADOPTING THE *WHITE* TEST WILL NOT LEAD TO IMMUNITY FOR ALL TRIBAL ORGANIZATIONS.

For over a decade federal and state courts across the Nation have used multi-factor tests like the one set out in *White* to evaluate whether tribal organizations enjoy arm of the Tribe immunity,⁴⁹ and this has not led to wholesale immunity for all tribal organizations.

~~On a practical level, the *White* factors do not presuppose any outcome for a particular tribal organization. Courts must employ the factors on a case-by-case, and organization-by-organization, basis. But using a multi-factor analysis, rather than the~~

⁴⁸ *Pink*, 157 F.3d at 1188.

⁴⁹ See, e.g., *Great Plains Lending, LLC v. Dep’t of Banking*, No. 20340, 2021 WL 2021823 (Conn. May 20, 2021) (analyzing previous federal and state court decisions and adopting *Breakthrough* factors).

single *Runyon* factor, provides these courts a wider lens through which to evaluate the relationship between Tribes and their consortia. Relying on a single financial connection factor hampers Alaska courts' ability to fully evaluate whether tribal sovereign immunity should apply. Given the diversity of ways Tribes may elect to organize into consortia, the multi-factor *White* test allows courts to perform a more nuanced analysis.

As in the case at bar, tribal organizations claiming immunity must take affirmative steps to demonstrate how their organizations may meet the *White* factors. For example, in *Barron v. Alaska Native Tribal Health Consortium*, ANTHC provided the court with its Bylaws, an affidavit from its CEO setting forth ANTHC's operation, management, and purpose, and the health compact between ANTHC and the United States.⁵⁰ The court analyzed these documents against the five *White* factors in determining that ANTHC is an arm of its member Tribes possessing sovereign immunity.⁵¹

Adopting the *White* factors will not create a wave of immunity protecting all tribal organizations across Alaska. The case law demonstrates that the *White* test provides trial courts—both federal and state—with a more robust tool to help them evaluate when, and under what circumstances, a tribal consortium may have arm of the tribe immunity. Because tribal sovereign immunity is “a matter of federal law and is not subject to diminution by the States,”⁵² and Alaska courts “take guidance from federal law and the

⁵⁰ *Barron*, 373 F. Supp. 3d at 1236 & n.39.

⁵¹ *Id.* at 1239-40.

⁵² *Douglas Indian Ass'n v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1176 (Alaska 2017) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S.

Ninth Circuit[]”⁵³ in defining the contours of tribal sovereign immunity, the time has come for Alaska join to federal courts in adopting the *White* test for arm of the Tribe immunity.

CONCLUSION

Historically, as federal case law has evolved, this Court has shown a willingness to reconsider its own precedent and update Alaska law accordingly, particularly when this Court’s interpretations of tribal sovereignty have diverged from federal policy and federal common law. And in *John v. Baker*,⁵⁴ *State v. Native Village of Tanana*,⁵⁵ and other cases where this Court reassessed its treatment of Tribes in light of federal law developments,⁵⁶ the warnings of dire consequences flowing from the evolution of this Court’s jurisprudence have not materialized.⁵⁷

782, 789 (2014)); *see also Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977) (“Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity . . .”).

⁵³ *Douglas*, 403 P.3d at 1178.

⁵⁴ 982 P.2d 738, 749-50 (Alaska 1999) (moving away from the Court’s decision in *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1988) and acknowledging Alaska’s Tribes as federally recognized).

⁵⁵ 249 P.3d 734, 751 (Alaska 2011) (acknowledging that “in the nearly 25 years since [the] *Nenana* decision, [the Court’s] view of . . . tribal jurisdiction has become the minority view” and that “[w]hat remains of *Nenana* must now be overruled.”).

⁵⁶ *See also Simmonds v. Parks*, 329 P.3d 995, 1007-08 (Alaska 2014) (adopting federal tribal court exhaustion doctrine).

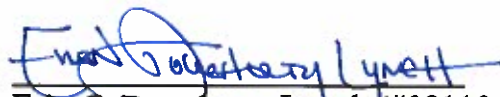
⁵⁷ For example, in *John v. Baker*, where this Court affirmed that Alaska Native Tribes had inherent sovereignty to resolve domestic disputes between members, it was suggested that “Alaska law no longer applies to every Alaskan,” and “[t]he doors of Alaska’s courts will no longer be open to all Alaskans.” 982 P.2d at 766 (Matthews, C.J. dissenting). In *Simmonds v. Parks*, this Court affirmed full faith and credit to a tribal court order despite being warned by the State of Alaska that such a ruling risked, “creating different classes of citizens in Alaska with different legal rights, based on racial factors.” Brief of State of

Though *John* and *Tanana* were domestic and child welfare cases, they, like this case, concerned fundamental tribal powers and federal policy and law. When evaluating cases that have such a profound impact on Alaska Tribes, this Court's

twin interpretive lodestars are the tribe's retained inherent sovereign powers and congressional intent to limit or modify those retained inherent powers. [This Court] follow[s] federal law by beginning from the premise that tribal sovereignty with respect to issues of tribal self-governance exists unless divested, and [it] will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.⁵⁸

Here, the court's decision in *Runyon* inhibits tribal self-governance and is contrary to Congressional intent and federal common law. Changing Alaska precedent will not result in a monumental shift, as the federal courts have been implementing the *White* factors for years. This Court should affirm the opinion of the superior court, adopt the *White* factors, and bring Alaska case law and federal case law into alignment.

Respectfully submitted this 24th day of May, 2021.



Erin C. Dougherty Lynch (#0811067)

Matthew N. Newman (#1305023)

Maggie Massey (#1911098)

NATIVE AMERICAN RIGHTS FUND

745 W. 4th Avenue, Suite 502

Alaska at 39, 329 P.2d 995 (2014). Similarly, in *State v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, this Court affirmed Alaska Tribes' inherent sovereign jurisdiction to initiate tribal child welfare proceedings, rejecting arguments by the State of Alaska that to so find would "erect[] a direct and insurmountable barrier in front of the courthouse doors" for non-Native parents and that this "denial of access to state courts rends the fabric of justice." Brief of Appellants State of Alaska et al. at *47, 2013 WL 8854953 (quotation marks omitted), 371 P.3d 255 (Alaska 2016).

⁵⁸ *Parks*, 329 P.3d at 1008 (quotation marks omitted) (citing *John*, 982 P.2d at 751-52; and quoting *Tanana*, 249 P.3d at 750).

Anchorage, Alaska 99501

Phone: (907) 276-0680

Fax: (907) 276-2466

dougherty@narf.org

mnewman@narf.org

massey@narf.org

Attorneys for Amici Curiae

CERTIFICATE OF TYPEFACE

I certify that the font used in Petitioners' Brief filed with the Court is 13 point Times New Roman, as permitted by Alaska Rules of Appellate Procedure 513.5(c)(1)(B).

Dated this 24th day of May, 2021



Jill Rush
Office Manager

FILED
STATE OF ALASKA
JULY 15 2021
JILL RUSH

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2021, a true and correct copy of **BRIEF OF AMICI CURIAE** and this **CERTIFICATE OF SERVICE** were sent by U.S. Mail to the following:

James J. Davis, Jr.
NORTHERN JUSTICE PROJECT, LLC
406 G Street, Suite 207
Anchorage, Alaska 99501

Richard D. Monkman
Nathaniel H. Amdur-Clark
SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP
302 Gold Street, Suite 201
Juneau, Alaska 99801

Nicholas Gasca
Deputy General Counsel
TANANA CHIEFS CONFERENCE
122 First Ave., Suite 600
Fairbanks, Alaska 99701



Jill Rush
Office Manager