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5 **IN THE APPELLATE DIVISION OF THE HUALAPAI NATION**  
6 **HUALAPAI RESERVATION, ARIZONA**

7 HWAL'BAY BA:J ENTERPRISES,  
8 INC. dba GRAND CANYON WEST  
9 CORPORATION; 'SA NYU WA, INC.;  
10 THEODORE QUASULA; WALTER  
11 MILLS; KATHRYN LANDRETH;  
12 BARRY WELCH; LOLA WOOD;  
13 APRIL TINHORN; and DERRICK  
14 WHATONAME,

15 Appellants/Respondents,

16 v.

17 STEVEN R. BEATTIE,

18 Appellee/Petitioner.

App. Div. Case No.: 2008-AP-007  
Trial Court Case No.: 2008-PO-019

19 **DECISION AND ORDER**

20 Opinion by Justice Wes Williams Jr.

21 The Decision and Order previously filed in this case and dated November 13, 2008 is  
22 hereby vacated and replaced with this Decision and Order.

23 This is an employment related case filed by Appellee Steven R. Beattie who was  
24 the Chief Financial Officer for Appellants Hwal'Bay Ba:J Enterprises, Inc. dba Grand  
25 Canyon West Corporation ("HBBE") and 'Sa Nyu Wa, Inc. ("SNW") (HBBE and SNW  
26 hereafter referred to as the "Tribal Corporations"). Appellants Theodore Quasula, Walter  
27 Mills, Kathryn Landreth, Barry Welch, Lola Wood, April Tinhorn and Derrick  
28 Whatoname are members of the Board of Directors of the Tribal Corporations.

**PROCEDURAL HISTORY**

Appellee filed his "Petition for Injunction Prohibiting Harassment" against Appellants on April 3, 2008. The petition asked the Tribal Court to issue an injunction prohibiting the Appellants from a number of actions, including disturbing, annoying or harassing Appellee, or taking other adverse employment actions against him. The Tribal Court entered an ex parte order granting a temporary injunction pending a scheduled evidentiary hearing. The Appellants filed a motion to dismiss the case on May 8, 2008.

1 The Tribal Court held a hearing on May 14, 2008 at which the court denied the motion to  
2 dismiss. The Tribal Court entered a minute order on May 14, 2008 that, among other  
3 things, denied the motion to dismiss providing as the basis for the ruling the notation  
4 "Court ruled consistent with Case No. 2007 SA-023 Denying Motion to Dismiss." Case  
5 No. 2007 SA-023 refers to a prior civil case in the Tribal Court titled *Cesspooch v.*  
6 *Hwal'Bay: J Enterprises, Inc.* Following the ruling, Appellee filed numerous motions for  
7 orders to show cause and the court conducted pre-trial activities. On July 22, 2008,  
8 Appellants filed a motion for the Tribal Court to reconsider its order denying the motion  
9 to dismiss, which the Tribal Court denied on July 24, 2008. Discovery and other pretrial  
10 activities continued until this appeal was filed on July 31, 2008 and a stay was issued by  
11 the Court of Appeals on August 12, 2008.

### 12 JURISDICTION

13 The Appellants' motion to dismiss was based on the sovereign immunity of the  
14 Hualapai Tribe ("Tribe"). Appellants assert the Tribe's sovereign immunity applies to the  
15 Tribal Corporations and their officials, directors and employees. The Tribal Court denied  
16 the motion to dismiss, and denied a motion to reconsider that ruling. Appellants filed this  
17 appeal asserting that the Tribal Court's action was a "final order" on the sovereign  
18 immunity issue.

19 This Court has appellate jurisdiction over any appeal from a "final judgment or  
20 order of the Tribal Court in any civil case." Hualapai Tribe Law and Order Code §  
21 10.2.B. Appellee asserts that the Tribal Court's denial of the motion to dismiss does not  
22 constitute a "final order" as a final order is only entered at the end of litigation when the  
23 merits of a case have been decided. The parties have not referred to any provision in the  
24 Hualapai Tribe's Law and Order Code that defines "final order."

25 In some court systems, a party may appeal only from a trial court's final decision  
26 that ends the litigation on the merits. Others will allow an interlocutory appeal, which is  
27 an appeal occurring before a final judgment on the entire case, if the appeal involves legal  
28 issues necessary to the determination of the case or collateral orders that are wholly  
29 separate from the merits of the action.

30 In this case, the parties completely briefed and argued the sovereign immunity  
31 issue. The Tribal Court denied the motion, but the decision was not based on a need for  
32 further factual development or other proceedings such as an evidentiary hearing on  
33 whether sovereign immunity applied or was waived. The Tribal Court simply denied the  
34 motion to dismiss precluding any further action on the sovereign immunity issue by the  
35 Tribal Court. Therefore the Tribal Court's order was "final" on the sovereign immunity  
36 issue.

37 A motion to dismiss based on sovereign immunity raises the issue of whether the  
38 court has jurisdiction over the case and/or defendants. The Tribal Court must make a

1 determination on jurisdiction before addressing the merits of a case. In *Steel Co. v.*  
2 *Citizens for Better Environment*, 523 U.S. 83 (1998), the United States Supreme Court  
3 directed that a federal court generally may not rule on the merits of a case prior to  
4 determining whether it has subject matter jurisdiction over the claims and personal  
jurisdiction over the parties.<sup>1</sup>

5 “Without jurisdiction the court cannot proceed at all in any cause.  
6 Jurisdiction is power to declare the law, and when it ceases to exist, the only  
7 function remaining to the court is that of announcing the fact and  
8 dismissing the cause.” *Ex parte McCardle*, 7 Wall. 506, 514, . . . (1868).  
9 “On every writ of error or appeal, the first and fundamental question is that  
10 of jurisdiction, first, of this court, and then of the court from which the  
11 record comes. This question the court is bound to ask and answer for itself,  
12 even when not otherwise suggested, and without respect to the relation of  
13 the parties to it.” *Great Southern Fire Proof Hotel Co. v. Jones, supra*, at  
14 453, . . . The requirement that jurisdiction be established as a threshold  
15 matter “spring[s] from the nature and limits of the judicial power of the  
16 United States” and is “inflexible and without exception.” *Mansfield, C. &*  
17 *L.M.R. Co. v. Swan*, 111 U.S. 379, 382, . . . (1884).

18 *Steel Co.* at 94-95.

19 In this case, the Tribal Court ruled on the motion to dismiss, finding that the  
20 sovereign immunity defense did not apply and therefore the court had jurisdiction over  
21 the defendants. The issue then becomes whether the Tribal Court’s decision can be  
22 appealed as a “final order” on the sovereign immunity defense. The United States  
23 Supreme Court, the Ninth Circuit Court of Appeals and other tribal courts have  
24 acknowledged that an appeal of a decision denying a motion to dismiss based on  
25 sovereign immunity is immediately appealable.

26 [T]he Supreme Court has held that orders denying dismissal of claims based  
27 on various types of immunities are immediately appealable. *See, e.g., Nixon*  
28 *v. Fitzgerald*, 457 U.S. 731 (1982)(President’s absolute immunity from  
damages suit based on official acts); *Mitchell v. Forsyth*, 472 U.S. 511  
(1985)(Attorney General’s qualified immunity from suit for violation of

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<sup>1</sup> While federal, state and other tribal court caselaw is not controlling on this court, it can be  
instructive on how similar issues have been addressed by other jurisdictions. Any decision that  
provides a well-reasoned discussion of any issue that is new to this court can only assist in this  
court’s development of the Tribe’s common law. Any discussion in this decision of any caselaw  
from another jurisdiction is provided simply to demonstrate how another jurisdiction addressed a  
similar issue. *See Hualapai Law and Order Code § 3.1.D* (stating where no applicable Tribal or  
federal law exists on a subject then the Tribal Court may be guided by common law as developed  
by other Tribal, federal or state courts).

1 constitutional rights); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf*  
2 & *Eddy*, 506 U.S. 139 (1993)(Eleventh Amendment immunity from suit on  
3 contract claim against "state" instrumentality). In turn, based on the  
4 Supreme Court's decisions, the Ninth Circuit has held that denials of  
5 motions to dismiss federal-court actions by various entities claiming  
6 sovereign immunity are immediately appealable under the collateral order  
7 doctrine. *See, e.g., Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 723  
8 (9th Cir. 1997)(Nigerian sovereign immunity under the Foreign Sovereign  
Immunities Act); *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir.  
1989)(action in admiralty barred by territory of Guam's inherent sovereign  
immunity).

9 The logic behind appellate jurisdiction lying in these cases is that an  
10 "essential attribute" of the immunity is "an entitlement not to stand trial."  
11 *Mitchell v. Forsyth*, supra, 472 U.S. at 525. Requiring a sovereign to defend  
12 a case through trial, without allowing it to immediately appeal, would  
13 destroy this sovereign right "to be free from the 'crippling interference' of  
14 litigation." *Marx*, 866 F.2d at 296, cited in *In re Marriage of Redfox*, supra,  
15 2000 CROW 3, ¶ 5. Thus, a lower court's denial of a motion to dismiss is, in  
effect, a "final" order with respect to a sovereign's immunity against  
standing trial, and because the damage to the sovereign can never be  
undone, it is effectively unreviewable on appeal from a final judgment  
following trial.

16 *One Hundred Eight Employees of the Crow Tribe v. Crow Tribe of Indians*, 2001 Crow  
17 Ct. App., VersusLaw Version ¶¶ 50-51.

18 A sovereign has the right and power to state when and how it may be sued, and  
19 must be free from interference from unconsented to litigation. Therefore a final decision  
20 on a claimed defense of sovereign immunity must be considered a "final order"  
21 immediately appealable because the alternative of waiting until a final decision on the  
22 merits of a case will destroy Tribal sovereignty. The Tribal Council could not have meant  
23 such a result since the Tribal Council is responsible for exercising, enforcing and  
24 protecting the Tribe's sovereignty. The Tribal Court must address a sovereign immunity  
25 defense as soon as possible, otherwise the parties will spend their time and resources on a  
26 case over which the court may not have jurisdiction. Waiting until the end of the case for  
27 a decision on the merits completely undermines and may irreversibly harm the Tribe's  
28 interests and diminish its sovereignty.

Once the Tribal Court has a sufficient factual basis to address a sovereign  
immunity defense, its ruling on a motion to dismiss must be considered final for appeal  
purposes. Therefore the Tribal Court's denial of the Appellants' motion to dismiss based  
on sovereign immunity was a final order immediately appealable.

## SOVEREIGN IMMUNITY

The United States Supreme Court has recognized numerous times that Indian tribes are immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The Supreme Court has stated, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Tribal immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9<sup>th</sup> Cir. 1991). Sovereign immunity is not a discretionary doctrine. It is the sovereign's right and an absolute bar to suit. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 n.6 (9<sup>th</sup> Cir.), rev'd in part on other grounds, 474 U.S. 9 (1985); *California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9<sup>th</sup> Cir. 1979).

A tribe's sovereign immunity also precludes any action against any tribal official when the official is acting within the scope of his authority. *Youvella v. Dallas*, 27 I.L.R. 6020, 6021 (App. Ct. Hopi Tribe 2000) ("The majority of federal, state, and tribal courts have held that where an officer is acting within the scope of his or her valid authority, the doctrine of sovereign immunity protects the officer from suit."); see also *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9<sup>th</sup> Cir. 2002); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10<sup>th</sup> Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9<sup>th</sup> Cir. 1985); *Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9<sup>th</sup> Cir. 1991); *Davis v. Littell*, 398 F.2d 83, 84-85 (9<sup>th</sup> Cir. 1968). Tribal sovereign immunity protects tribal officials because they need to be free from intimidation, harassment and the threat of lawsuits when conducting tribal business. *Youvella v. Dallas*, 27 I.L.R. at 6022. Tribal officials are protected by a tribe's sovereign immunity even if the Tribe is not a party to the action. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10<sup>th</sup> Cir. 1997).

Suits against Indian tribes are barred by Tribal sovereign immunity unless sovereignty is waived by Congress or the tribe. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Immunity from suit extends to tribal contracts involving commercial or governmental activities and for contracts made both on and off a reservation. *Kiowa Tribe*, 523 U.S. at 760.

The United States Supreme Court has repeatedly stated that any waiver of a tribe's immunity must be unequivocally expressed and cannot be implied. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978)(citing *United States v. Testan*, 424 U.S. 392, 399 (1976) which quotes *United States v. King*, 395 U.S. 1, 4 (1969). Once a Tribe's sovereign immunity is established, the burden is upon the plaintiff/petitioner to

1 prove it has been waived. "Once a sovereign has established its affirmative defense of  
2 sovereign immunity, the claimant assumes the burden of establishing that the claim falls  
3 within a legislative waiver of immunity." *Colville Tribal Enterprises Corp. v. Orr*, 5  
4 CCAR 1 (Colville Confederated Tribes Ct. App. 1998). Indian tribes have patterned their  
conduct and affairs based upon the knowledge that any waiver of their sovereign  
immunity must be unequivocally expressed and cannot be implied.

#### 5 Hualapai Tribe and the Tribal Corporations

6 The Hualapai Tribe is protected from suit by its inherent sovereignty that is  
7 recognized in its Constitution. Constitution of the Hualapai Indian Tribe of the Hualapai  
8 Indian Reservation, Arizona, Art. XVI. The Tribe's sovereign immunity may only be  
9 waived by express Tribal Council action, or as stated in the Constitution. *Id.* In this case,  
10 the Tribal Council took action to form subordinate entities (the Tribal Corporations) for  
11 economic purposes as authorized by the Constitution. *See id.* at Art. V(x). The Plan of  
Operation for both HBBE and SNW recognized that the Tribal Council created the Tribal  
Corporations as Tribal entities possessing sovereign immunity.

12 The Corporation shall be entitled to all the privileges and immunities of the  
13 Hualapai Indian Tribe. The Corporation and its directors, officers,  
14 employees, and agents while acting in the official capacities are immune  
15 from suit, and the assets and other property of the Corporation are exempt  
from any levy or execution as provided in this Article.

16 HBBE's Amended and Restated Plan of Operation § 11.1 and SNW's Plan of Operation §  
17 11.1.

18 The Tribal Council delegated to the Tribal Corporations the power to waive their  
19 immunity.

20 The Corporation is authorized to waive immunity from suit of the  
21 Corporation, the directors, officers, employees, or agents, for any particular  
22 agreement, matter or transaction as may be entered into to further the  
purposes of the Corporation.

23 HBBE's Amended and Restated Plan of Operation § 11.2 and SNW's Plan of Operation §  
24 11.2.

25 Based on the foregoing, the Tribal Corporations and the members of their Boards  
26 of Directors are protected from suit by the Tribe's sovereign immunity. The Appellants  
27 established their affirmative defense of sovereign immunity. Appellee then had the  
28 burden to establish his claim fell within a waiver of that immunity. Appellee provided no  
evidence that any such express waiver existed to allow for this suit. He did not address a  
waiver in his Petition, in his arguments to the Tribal Court, or in his response brief in this  
appeal. At oral argument on the motion to dismiss, Appellee referred to violations of

1 federal employment laws, but did not address how any such law expressly waived the  
2 Tribal Corporations' immunity from suit.

3 At the oral argument held in this appeal on March 13, 2009, Appellee raised a  
4 number of arguments asserting that the Appellants' immunity had been impliedly waived.  
5 Appellee argued that the Tribal Court was established to resolve disputes arising on the  
6 Reservation and has done so for years, which creates a Tribal custom. However the  
7 Tribe's Law and Order Code, which created the Tribal Court system and recognizes  
8 Tribal custom as applicable law, specifically states that the Tribal Court cannot construe  
9 any provision of the Law and Order Code as a waiver of the Appellants' immunity except  
10 as specifically stated in Tribal law. Hualapai Law & Order Code § 1.3. Appellee also  
11 asserted that the Tribe's Constitution waives the Appellants' immunity and pointed to  
12 various Constitutional provisions to support his argument. Appellee fails to acknowledge  
13 the section of the Constitution that expressly states that the Tribe is immune from suit  
14 except to the extent that immunity is waived by the Tribal Council or as provided in the  
15 Constitution. Hualapai Constitution Art. VI, § 1. The Constitution then provides a  
16 process for waiving the Tribe's immunity in certain circumstances. Hualapai Constitution  
17 Art. VI, § 2. These Constitutional provisions would not have been needed if other  
18 Articles of the Constitution waived the Tribe's sovereign immunity as argued by  
19 Appellee.

20 Appellee also argued that prior Tribal Court caselaw determined that Tribal  
21 corporations were not protected by the Tribe's sovereign immunity. In this case, the  
22 Tribal Court order denying the motion to dismiss relied upon earlier caselaw by its  
23 reference "Court ruled consistent with Case No. 2007 SA-023 Denying Motion to  
24 Dismiss." Case No. 2007 SA-023 is a Hualapai Tribal Court case titled *Cesspooch v.*  
25 *Hwal'Bay: J Enterprises, Inc.* that denied a motion to dismiss based on sovereign  
immunity filed by HBBE. In *Cesspooch*, the Tribal Court incorrectly concluded that  
HBBE did not possess sovereign immunity due to the Court's misreading of the separate  
prior case of *Hwal'Bay Ba: J Enterprises, Inc. v. Vaughn*, SW Intertr. Ct. App. (1995). In  
*Vaughn*, the Southwest Intertribal Court of Appeals acknowledged that the Tribal  
corporation possessed the Tribe's immunity from suit and determined that the corporation  
could expressly waive the corporation's immunity, but not the immunity of the Tribe.  
The court in *Cesspooch* apparently confused the distinction between the Tribal  
corporation and the Tribe to incorrectly conclude that the Tribal corporation did not have  
sovereign immunity at all. That conclusion is incorrect as a matter of law. Therefore the  
Tribal Court in this case should not have based its denial of the motion to dismiss on the  
incorrect holding of the *Cesspooch* case.

26 Finally Appellee argued that his claims for injunctive relief should not be  
27 dismissed, but should be treated separately from any claims for monetary damages.  
28 Appellee stated that any equal protection or due process claims must be addressed by the  
Tribal Court because those rights are guaranteed in the Tribe's Constitution. Hualapai  
Constitution Art. IX. Appellee correctly states that the Tribe must not violate a person's

1 civil rights. However the Tribal Constitution does not provide a process for protecting  
2 such rights. Appellee still does not point to any action by the Tribe that provided the  
3 Tribal Court the power to address civil rights violations committed by the Tribe. An  
4 express waiver of the Tribe's sovereign immunity must exist to give the Tribal Court such  
5 jurisdiction. The difference in remedy sought, whether injunctive or monetary, does not  
6 change this result. As a policy matter, the Tribe should create a dispute resolution system  
7 to address violations of civil rights, whether through the courts or some other law  
8 applying body. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978)(stating  
tribal courts or nonjudicial tribal institutions are competent law-applying bodies that can  
vindicate civil rights). However this court does not have the power to create any such  
system.

9 Despite Appellee's valiant efforts to assert the existence of a waiver, the fact  
10 remains that no express waiver of the Appellants' immunity exists. Many courts have  
11 recognized that dismissing a case based on a sovereign immunity defense effectively ends  
12 all recourse for a litigant as no other forum may be available to address asserted  
13 violations. However the lack of an available forum cannot be the basis for diminishing  
Tribal sovereignty. Any person or entity dealing with a Tribe or Tribal entity is  
responsible for designing their affairs to address such a contingency.

14 **THEREFORE IT IS HEREBY ORDERED** that the Tribal Court's ruling on the  
Appellants' motion to dismiss is reversed. This case is hereby dismissed.

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WES WILLIAMS JR.

18 JUSTICE OF THE HUALAPAI COURT OF APPEALS

19 Dated: April 2, 2009  
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