

No.

In the
Supreme Court of the United States

MARY MARGARET COWAN

Petitioner

v.

TOHONO O'ODHAM NATION,
a federally recognized Indian nation,
by and through CHAIRWOMAN
VIVIAN JUAN-SAUNDERS

Respondent

On Petition For Writ of Certiorari
To The Court of Appeals of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On or about July 7, 2003, Petitioner Mary Margaret Cowan was terminated from her position as General Counsel of the Tohono O'odham Nation ("the Nation"), a federally recognized Indian nation. She filed suit against the Nation in the Superior Court of Arizona, in and for the County of Pima, alleging wrongful termination, or, in the alternative, entitlement to payment of withheld wages under the doctrine of unjust enrichment. In addition, she sought the promised reimbursement of funds she had advanced to the Nation for expenses incurred and paid by her during her employment. The Superior Court dismissed Ms. Cowan's claims on the grounds that Nation was immune from suit, and that the Arizona court did not have subject matter jurisdiction over the suit. The Arizona Court of Appeals affirmed the decision of the Superior Court, holding that Nation was immune from suit. It did not address the issue of whether the Superior Court lacked jurisdiction over Ms. Cowan's suit. The Arizona Supreme Court denied Ms. Cowan's Petition for Review of the decision of the Arizona Court of Appeals.

The questions presented for review are:

Whether the Arizona Court of Appeals erred in holding that the Nation has immunity from suit.

Whether the Arizona Superior Court erred in holding that the Arizona court lacked subject matter jurisdiction over Ms. Cowan's suit.

TABLE OF AUTHORITIES

| | <u>Page</u> | | <u>Page</u> |
|--|-------------|--|-------------|
| <u>CASES</u> | | <i>Oklahoma Tax Comm'n v. Citizen Band</i> | 11 |
| <i>C & L Enterprises v. Potawatomi Indian Tribe</i> , 32 U.S. 411, 121 S.Ct. 1589 (2001) | 13, 14, 15 | <i>Potawatomi Tribe of Okla.</i> , 111 S.Ct. 905, 498 U. S. 505 (1991) | |
| <i>Dixon v. Picopa Construction Co.</i> , 160 Ariz. 251, 258, 772 P.2d 1104 (Ariz. 1989) | 16, 18, 20 | <i>Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.</i> , 50 F.3d 560 (8th Cir. 1995) | 11 |
| <i>Fisher v. District Court of Sixteenth Judicial Dist. of Mont.</i> , 424 U. S. 382 (1976) | 23 | <i>Three Affiliated Tribes v. Wold Engineering, P. C.</i> , 476 U. S. 877, 104 S.Ct. 2267 (1986) | 8, 11 |
| <i>Inyo County v. Paiute-Shoshone Indians of the Bishop Community</i> , 123 S.Ct. 1887 (2003) | 16 | <i>United States v. U.S. Fidelity & Guaranty Co.</i> , 309 U.S. 506 (1940) | 15 |
| <i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</i> 523 U.S. 751, 118 S.Ct. 1704 (1998) | 8, 16, 20 | <i>United States v. Wheeler</i> , 435 U.S. 313, 98 S.Ct. 1079 (1978) | 19 |
| <i>Leon v. Numenka</i> , 142 Ariz. 307, 689 P.2d 566, (Ariz. App. 1984) | 21 | <i>Zucht v. King</i> , 260 U.S. 174, 176, 43 S.Ct. 24, 25 (1922) | 8 |
| <i>Martin v. Hopi Tribe</i> , No. AP-004-95 (Hopi 03/29/96) | 11, 12, 15 | <u>Statutes and Rules</u> | |
| <i>Montana v. United States</i> , 450 U. S. 544, 101 S.Ct. 1245 (1981) | 22, 23, 24 | 28 U.S.C. § 1257(a) | 8, 9 |
| <i>Nevada v. Hicks</i> , 533 U.S. 353, 121 S.Ct. 2304 (2001) | 22, 23, 24 | 28 U.S.C. § 1360 | 2 |
| | | A.R.S. § 23-352 | 2 |
| | | Ariz.R.Civ.P. 12(b)(1) | 3 |
| | | Constitution of the Tohono O’odham Nation | 3, 21 |

| | <u>Page</u> |
|---|-------------|
| <u>Other Authorities</u> | |
| Scott D. Danahy, <i>Licence to Discriminate: The Application of Sovereign Immunity to Employment Claims Brought By Non-native American Employees of Tribally Owned Businesses</i> , 25 Fla.St.U.L.Rev. 679 (1998) | 18 |
| Thomas P. McLish, <i>Tribal Sovereign Immunity: Searching for Sensible Limits</i> , 88 Colum. L. Rev. 173, 179, 186-91 (1988) | 15 |
| Andrea M. Seilstad, <i>The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law</i> , 37 Tulsa L. Rev. 661 (2002) | 17, 18 |

BASIS OF JURISDICTION

On January 4, 2006, the Arizona Supreme Court denied Ms. Cowan's Petition for Review of the decision of the Arizona Court of Appeals.

This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS, et al.

Public Law 280, 28 U.S.C. § 1360

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State

| State of | Indian country affected |
|------------|---|
| Alaska | All Indian country within the State. |
| California | All Indian country within the State. |
| Minnesota | All Indian country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian country within the State. |
| Oregon | All Indian country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian country within the State. |

(b) Nothing in this section shall authorize the

alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

A.R.S. § 23-352 Withholding of wages

No employer may withhold or divert any portion of an employee's wages unless one of the following applies:

1. The employer is required or empowered to do so by state or federal law.
2. The employer has prior written authorization from the employee.
3. There is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the employee.

Constitution of the Tohono O'odham Nation

Article VIII, Section 2 of the Constitution of the Tohono O'odham Nation provides:

The judicial power of Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation.

STATEMENT OF THE CASE

A. Facts Relevant to the Court's Jurisdiction

Ms. Cowan filed suit against the Nation in the Arizona Superior Court, alleging wrongful termination, or, in the alternative, entitlement to payment of withheld wages under the doctrine of unjust enrichment, as well as a claim for the promised reimbursement of funds she had advanced to the Nation for expenses incurred during her employment. On August 25, 2004, the Nation filed a Motion to Dismiss pursuant to Ariz.R.Civ.P. 12(b)(1), asserting that the Pima County Superior Court lacked subject matter jurisdiction over the Nation, and that the Nation was immune from unconsented suit. On or about October 25, 2004, Ms. Cowan filed a Response to Motion to Dismiss. The Nation filed its Reply to the Response on or about November 15, 2004. On or about December 6, 2004, the Hon. Jane L. Eikleberry granted the Nation's Motion to Dismiss. The trial court's Minute Entry dated December 6, 2004 stated:

“The Court finds that state court does not have subject matter jurisdiction over transactions which occur on an Indian reservation, the Tohono O’Odham Nation has not consented to this Court’s exercise of jurisdiction. The Court further finds the Tohono O’Odham Nation has sovereign immunity, and they have done nothing to waive that sovereign immunity.”

Ms. Cowan timely filed a Notice of Appeal on December 20, 2004. On or about August 4, 2005, the Arizona Court of Appeals upheld the dismissal of Ms. Cowan’s action. The Memorandum Decision issued by the Arizona Court of Appeals, at page 8, states: “We hold that the trial court properly dismissed Cowan’s claim on the ground that the nation was immune from suit. And because we uphold the judgment on sovereign immunity grounds, we need not address Cowan’s subject matter jurisdiction argument. We affirm the judgment of the trial court.”

Ms. Cowan timely filed a Petition for Review with the Arizona Supreme Court on September 2, 2005. On January 4, 2006, without comment, the Arizona Supreme Court denied Ms. Cowan’s Petition for Review of the decision of the Arizona Court of Appeals.

B. Facts Material to the Questions Presented

1. Ms. Cowan’s Employment by the Nation.

On or about January 9, 1993, Ms. Cowan, a non-Native American who is not a member of the Nation, was invited to serve as General Counsel of the Nation by the late Chairman of the Nation, Josiah Moore. Ms.

Cowan became a permanent employee of the Executive Branch of the Nation in June, 1993. The terms of Ms. Cowan’s employment were governed by the Tohono O’odham Nation Personnel Policies Manual, Executive Order No. 99-01, dated April 19, 1999 (“Manual”).

2. Payment for Expenses, Unpaid Leave and Mileage.

In May 2001, Ms. Cowan was assigned by her supervisor, Tohono O’odham Nation Vice Chairman Henry Ramon, to manage the Tohono O’odham Citizenship Campaign in Washington, D.C. Vice Chairman Ramon agreed that the Nation would reimburse Ms. Cowan for any and all out of pocket expenses incurred in the execution of this work. In addition, because Ms. Cowan, due to her workload, was unable to take regularly scheduled annual leave, Vice Chairman Ramon agreed to permit Ms. Cowan to either take or be paid for all unused annual leave in excess of 240 hours per calendar year at the completion of the Tohono O’odham Citizenship Campaign. On March 1, 2003, Ms. Cowan drove to Sells, Arizona at the instruction of Vice Chairman Ramon and Vice Chairman Ramon agreed to pay the Ms. Cowan mileage at the set rate for this trip. On September 19, 2003, Ms. Cowan made a formal demand for payment of accrued annual leave, mileage and authorized out-of-pocket expenses, as approved by her supervisor.

3. Ms. Cowan’s Termination and Grievance Procedure.

In late May, 2003, Vice Chairman Henry Ramon was defeated in his bid for re-election to office. On June 2, 2003, Vivian Juan-Saunders assumed her official

duties as Chairwoman of the Tohono O'odham Nation. On June 3, 2003, Chairwoman Saunders instructed Ms. Cowan to terminate the Tohono O'odham Citizenship Campaign. Ms. Cowan complied with Chairwoman Saunders' instructions and informed Chairwoman Saunders of the professional work necessary to terminate the Campaign in a memorandum dated June 9, 2003. On July 7, 2003, Chairwoman Saunders terminated Ms. Cowan's employment with the Nation, and did not allow Ms. Cowan to complete the necessary performance of her professional obligations to the Nation, including preparation of the Campaign Finance Report. The termination was without cause, and Chairwoman Saunders gave Ms. Cowan no explanation for the termination.

On July 18, 2003, Ms. Cowan timely filed a grievance contesting the Chairwoman's action and the termination. The Nation failed to provide a written response to the Ms. Cowan's grievance within 10 days of the grievance as required by Section X(B)(1)(a) of the Manual and, thereafter, failed to comply with any of the other requirements of the Manual.

On August 27, 2003, the Nation filed a Motion to Dismiss Ms. Cowan's Grievance with the Nation's Human Resources Office. On September 29, 2003, the Nation's Human Resources Office denied the Nation's Motion to Dismiss the Ms. Cowan's Grievance and stated that the Nation's Human Resource Office "will begin the process of empaneling a grievance committee on or after October 20, 2003 unless the parties provide notice that the matter has been settled or the appeal is withdrawn." The Nation failed to empanel a grievance

committee on or after October 20, 2003 pursuant to the Ruling of the Nation's Human Resources Office. The Nation ignored its own policies and procedures, as well as the ruling of the Nation's Human Resource Office on its own Motion to Dismiss.

4. Claim for Compensation.

On or about November 7, 2003, The Nation's Attorney General David Frank instructed Ms. Cowan to prepare a Financial Report for the Tohono O'odham Citizenship Campaign. Ms. Cowan duly prepared the Report, and requested compensation for the production of the Report. The Nation failed to compensate Ms. Cowan for production of the Report. The preparation of this Report was one of the aspects of Ms. Cowan's professional obligations to the Nation the completion of which was disallowed when Chairwoman Saunders terminated her without cause or explanation.

5. Attempts at Resolution.

In addition to timely filing a grievance regarding her termination in accordance with the Manual of the Nation, Ms. Cowan presented her claims for reimbursement to the Tribal Council and made several attempts to resolve these matters directly with the Tohono O'odham Nation. These attempts included a series of correspondence requesting relief for the wrongful termination of Ms. Cowan's employment, payment for unpaid wages, reimbursement of expenses, payment of a mileage claim and compensation for preparation of the Citizenship Campaign Financial Report. These efforts include Ms. Cowan's last attempt through correspondence dated April 6, 2004. All of Ms. Cowan's attempts for direct resolution with the Nation

have been ignored by the Nation and its representatives.

ARGUMENT

I. Introduction

Final judgments rendered by the highest court of a State in which a decision could be had may be reviewed this Court by writ of certiorari where, *inter alia*, any immunity is claimed under the Constitution, treaties, or statutes of the United States. 28 U.S.C. § 1257(a). In addition, in order to reviewed this Court by writ of certiorari, a federal question must be substantial. *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 25 (1922).

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1704 (1998) the Tribe defaulted on promissory note; the respondent sued on the note in state court; and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. The trial court denied the motion and entered judgment for respondent. The Oklahoma Court of Appeals affirmed, holding Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The Oklahoma Supreme Court declined to review the judgment, and this Court granted certiorari. In addition, this Court had held that determining a jurisdictional dispute between a State and a Tribal court presents a substantial federal question justifying review. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U. S. 877, 104 S.Ct. 2267 (1986).

In the instant case, based on 28 U.S.C. § 1360 and federal common law pertaining to tribal immunity and jurisdictional disputes between State and Tribal courts, the trial court dismissed Ms. Cowan's claims on the grounds that the Arizona court did not have subject matter jurisdiction over the suit, and that the Nation was immune from suit. The Arizona Court of Appeals affirmed the decision of the Superior Court, holding that Nation was immune from suit but did not reach the question of the propriety of the state court's jurisdiction. Both the immunity and the jurisdictional present important federal questions that are reviewable by this Court.

II. The Nation Violated the Terms of the Employment Contract Between Ms. Cowan and The Nation, thereby Waiving Its Immunity From Suit.

A. The Nation violated the terms of the employment contract.

Ms. Cowan was a permanent employee of the Executive Branch of the Nation, and as such could not be terminated without cause. Manual, Section V(E)(6). Termination for cause must be carried out with an adequate basis and the concurrence of the Human Resources Officer, by delivering a written statement of the reasons for the termination to the employee. *Id.* Upon the receipt of such a statement, the employee is entitled to appeal the termination under the procedures set forth in Section X of the Manual. The Nation did not follow any of these procedures. Ms. Cowan received a letter informing her of her immediate termination. No cause or explanation was provided in the letter.

Section X of the Manual provides that a permanent employee who is aggrieved by an employment action may file a formal grievance within fifteen days after the occurrence of the action. The Manual provides for a progressive, four-tiered grievance process which in summary consists of: (1) consideration of the employee's grievance by the employee's immediate supervisor; (2) consideration of the employee's grievance by the employee's Department Head, after a conference including the involved parties; (3) consideration of the employee's grievance by a grievance committee appointed by the Human Resources Officer; and (4) the rendering of a final decision by the Chairman, upon consideration of the recommendation of the grievance committee.

None of these grievance procedures were accorded to Ms. Cowan in response to the grievance she filed. The Nation failed to timely respond to Ms. Cowan's written Grievance. The Nation filed a Motion to Dismiss Ms. Cowan's Grievance which was denied by the Nation's Human Resources Department. Thereafter, The Nation failed to empanel a grievance committee on or after October 20, 2003 pursuant to the Ruling of The Nation's Human Resources Department. As argued below, the Nation's violation of the provisions of the Manual constitute a waiver of the Nation's immunity from suit.

B. The Contract Contains a Clear Waiver of the Nation's Immunity from Suit.

As evidenced by the failure and refusal of the Nation to engage in the grievance process, that contractually mandated process is meaningless unless

the Nation has waived its immunity from suit.

Although Indian tribes possess common law immunity from suit, this immunity may be waived by a tribe. *Three Affiliated Tribes, supra*, 476 U. S. at 890. To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 111 S.Ct. 905, 498 U. S. 505, 509 (1991). While this Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of "magic words" stating that the tribe hereby waives its sovereign immunity. *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995).

In *Martin v. Hopi Tribe*, No. AP-004-95 (Hopi 03/29/96), several Indian employees of the tribe were terminated during a reorganization of their department. The employees believed that they were wrongfully terminated based on an expectation of continued employment derived from the tribe's Personnel Policies and Procedures Manual. The manual was adopted "to formalize in writing the standards of fairness and consistency which guide Hopi personnel actions." *Id.* at 7. The manual provided for grievance procedure within an employee's department followed by an appeal to an Appeals Board, whose decision was final. The Manual also stated that once the Appeals Board had rendered a final decision, "[i]f a grievant wishes to appeal to the Tribal Courts, the Tribe shall agree to be a party to the suit." *Id.* After the Appeals Board denied their grievance, the employees sought relief in the tribal court. The tribe moved to dismiss on the grounds that it had

sovereign immunity. The Appellate Court of the Hopi Tribe held that: (1) the tribe enjoyed sovereign immunity; (2) the tribe could waive its sovereign immunity through a clear statement of waiver which would be determined by looking at the language and intent of the manual; (3) via the manual, the tribal council intended to waive the tribe's immunity from suit; and (4) the tribal council made an unequivocal expression of waiver. In determining that via the manual, the tribal council intended to waive the tribe's immunity from suit, the court noted, *inter alia*:

Although the above sections do not provide an explicit statement of intent, the *emphasis on fairness and the provisions for structured review of grievances supports the belief that the Council intended grievant to have access to the Hopi Tribal Courts.*

(emphasis added). *Id.* at 8

The same emphasis on fairness and provisions for structured review of grievances are present in the instant case. The introduction by Chairman Manuel and Vice-Chairman Ramon attached to the 1999 Personnel Policies Manual states that "The Manual conforms to current requirements of employment law." The provisions of the Manual were intended to "provide uniform standards for employee conduct, discipline, and grievances." Among the purposes of the new policies is the promotion employees' "interest in a safe, appropriate work environment."

Clearly, the contractual provisions of the Manual which guaranteed Cowan access to the grievance process are meaningless if Ms. Cowan cannot enforce those provisions in court. In addition, there would be no reason for the Nation to conform its personnel policies and procedures to the "current requirements of employment law" if the Nation intended to assert the defense of tribal immunity to disputes arising out of the provisions of the Manual. Therefore, the grievance process set forth in the Manual constitutes a clear waiver of the Nation's tribal immunity.

This conclusion is supported by analogous case law in which courts have ruled that the inclusion of an arbitration clause in a contract between an Indian and a contractor can constitute a waiver of tribal immunity. In *C & L Enterprises v. Potawatomi Indian Tribe*, 532 U.S. 411, 121 S.Ct. 1589 (2001), a construction company sued the tribe to enforce an arbitration award. The Court held that the arbitration provisions in the contract constituted a clear waiver of the tribe's sovereign immunity:

Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate. Brief for Respondent 21 ("An arbitration clause is what it is: a clause submitting contractual disputes to arbitration."). The clause no doubt memorializes the Tribe's commitment to

adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See *Eyak*, 658 P. 2d, at 760 ("*[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity... The arbitration clause ... would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.*"); *Val/Del*, 145 Ariz., at 565, 703 P. 2d, at 509 (because the Tribe has "agree[d] that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity").

(emphasis added). *Id.*, 532 U.S. at 421, 121 S.Ct. at 1596. The contractual provisions of the Manual agreeing to a grievance process are analogous to provisions in contracts between Indian nations and contractors that provide for arbitration of contractual disputes.

Ms. Cowan acknowledges that *Martin* and *C & L Enterprises* may be distinguished from the instant case in that both of those cases involved an express agreement to allow litigation of unresolved disputes in court. This argument would be convincing if the Nation had followed its own mandated policies and procedures. However, by ignoring the policies and procedures by which it created a contractual obligation to Ms. Cowan regarding the terms on which her employment could be terminated, and the grievance procedure by which she could have her termination reviewed, the Nation left Ms. Cowan no option for enforcement of the Nation's obligations except for court litigation. By doing so, the Nation waived its immunity from suit.

C. Finding a Waiver of the Nation's Immunity from Suit in this Case would Promote Rather Than Contravene the Federal Policies Underlying Tribal Immunity.

Relying on earlier cases that recognized the existence of tribal sovereignty, the common law doctrine of the sovereign immunity of Indian tribes was established by this Court in *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) which held that tribal governments are not subject to nonconsensual suit in tribal, state, or federal court. The key federal policies underlying the sovereign immunity of Indian tribes are protection of tribal assets, preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians. Thomas P. McLish, *Tribal Sovereign Immunity: Searching for*

Sensible Limits, 88 Colum. L. Rev. 173, 179, 186-91 (1988) cited in *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 258, 772 P.2d 1104, 1111 (Ariz. 1989). Tribal immunity should only apply when doing so furthers the federal policies behind the immunity doctrine. *Id.* In *Kiowa Tribe, supra*, 523 U.S. at 756, 118 S.Ct. at 1706 (1998), the Court declined to reverse precedent recognizing and establishing the doctrine of tribal immunity. However, the Court noted:

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance.

In his dissent in *Kiowa Tribe*, Justice Stevens argued that rule of tribal immunity applied by the majority in *Kiowa Tribe* was “unjust” and noted that “[g]overnments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.” *Id.*, 523 U.S. at 764, 118 S.Ct. at 1708. More recently, in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 123 S.Ct. 1887, 1894 (2003), Justice Stevens noted that “[m]any applications of [the doctrine of tribal immunity] are both anomalous and unjust.”

The issue of the “accountability” of Indian nations is being increasingly addressed by commentators:

Determining the appropriate scope of tribal sovereign immunity raises complex normative questions. These include questions about the ways in which tribal independence, economic viability, and self-determination should be balanced against the need for greater accountability of tribal governments. Accountability is of particular importance to individuals or entities who have been harmed by tribal governments or whose rights or other interests have been— and, absent intervention, may continue to be—unlawfully abridged.

Andrea M. Seilstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 763 (2002). Among the circumstances with respect to which judicial redress of the proper scope of tribal immunity should be contemplated is for “those who have been unlawfully or unjustly terminated from employment with tribal governments . . .” *Id.* at 764.

This commentator goes on to note that:

[T]ribes are not necessarily well-served either by rejecting altogether opportunities for judicial redress. In fact, grave harm to the long-term sustainability of tribal

sovereignty can be inflicted by tribes whose policies and officers may perpetuate abusive and discriminatory practices and where no remedies may be available at law to address these practices . . . [I]t might also discourage outside entities from contracting with the tribe for critical services or business opportunities or it may hinder tribes' ability to recruit and retain skilled and ethical employees and officers.

Id. at 775. The issue of the harm to both employees and Indian nations arising from of the assertion of tribal sovereignty to deny of judicial redress to aggrieved employees is becoming urgent as the nations employ more non-members: "In recent years, the once relatively isolated tribes have begun employing non-Native Americans at an increasingly rapid rate . . ." Scott D. Danahy, *Licence to Discriminate: The Application of Sovereign Immunity to Employment Claims Brought By Non-native American Employees of Tribally Owned Businesses*, 25 Fla.St.U.L.Rev. 679, 682 (1998).

This policy argument was applied in *Dixon v. Picopa Construction Co.*, *supra*, 160 Ariz. at 259, 772 P.2d at 1112:

In contrast, the federal government's policy promoting commercial dealings between Indian tribes and non-Indians is furthered by withholding immunity in this case. We realize that, here, Dixon did not voluntarily become involved with Picopa,

but we believe that an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into contractual relationships with that Indian corporation or any other Indian corporation. Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit. Note, *supra*, 88 Colum. L. Rev., at 189. This may well retard a tribe's economic growth. *Id.*

See, also, *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087 (1978), in which this Court noted that: "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between and Indian tribe and nonmembers."

Both the introductory material to the Manual, and the Executive Order establishing the Manual, cite numerous reasons why the policies and procedures contained in the Manual are in the best interests of the Nation. These policies and procedures are themselves an expression of tribal self-governance and self-determination. Depriving Ms. Cowan of access to state court to enforce her rights under the Nation's rules affirms the Chairwoman's outrageous conduct in wholly ignoring the nation's policies and procedures; this result weakens rather than strengthens tribal sovereignty.

In addition, one of the stated purposes of the policies set forth in the Manual is to ensure that "public

services are delivered to members of the Nation consistently, with the highest quality and standards” Allowing Ms. Cowan to pursue her remedies in state court for breach of the contract will promote this policy, which in turn contributes to the long-term sustainability of tribal sovereignty.

Finally, with respect to the policy of protecting tribal assets, the finding of a waiver of tribal immunity under the limited circumstances in this case will not have a detrimental overall effect on the finances of the Nation. The relief sought by Ms. Cowan is a liquidated amount for wages that she has already earned and for reimbursement of monies that she advanced on behalf of the Nation, breach of contract damages, and attorney’s fees. This is not a case involving open-ended compensatory and punitive damages which might be sought by a tort claimant. Given the greatly expanded participation of the Nation in business ventures, the Nation is not lacking in the assets necessary to pay the judgment sought by Ms. Cowan.

As noted in *Dixon*, over-zealous application of the doctrine of tribal immunity which discourages individuals or entities from contracting with the Nation may actually retard the Nation’s economic growth. In *Kiowa Tribe*, this Court acknowledged that the circumstances of Indian nations have changed drastically since the time when the doctrine of tribal immunity was thought necessary to protect tribal governments from encroachments by the States. This change is clearly reflected in the rationales and provisions of the Manual. In moving forward, Indian nations increasingly interact with non-Indian individuals, entities, and governments.

Indian nations effectively do so by contracting with skilled employees and according those employees the same rights they would have under state and federal law, as the Nation did in the Manual. In this instance, where an individual Chairwoman has deliberately chosen to violate the Nation’s own personnel policies and commitment to comply with employment law, it is not only equitable to Ms. Cowan to find a waiver of tribal immunity, but in the best interests of the Nation as well.

III. SUBJECT MATTER JURISDICTION IN STATE COURT IS PROPER.

A. Subject Matter Jurisdiction in State Court Is Proper Because the Tohono O’odham Court Does Not Have Jurisdiction Over this Suit.

Under the express terms of the Nation’s Constitution, the Tohono O’odham Court does not have subject matter jurisdiction over this suit. Subject matter jurisdiction relates to the power of a court to hear and determine a general class of cases to which a particular proceeding belongs. *Leon v. Numenka*, 142 Ariz. 307, 309, 689 P.2d 566, 568 (Ariz. App. 1984). Subject matter jurisdiction over a particular case must be specifically conferred upon an Indian court by its constitution or tribal code. *Id.*

There is no such grant in the instant case. Article VIII, Section 2 of the Constitution of the Tohono O’odham Nation provides:

The judicial power of Tohono O’odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances or applicable to the Tohono O’odham

Nation, and the customs of the Tohono O'odham Nation.

Ms. Cowan's breach of contract and state statutory claims do not arise under the constitution, laws, ordinances or customs of the Nation. Therefore, the Tohono O'odham Court does not have subject matter jurisdiction over this suit by the terms of its own Constitution and Law and Order Code.

B. Subject Matter Jurisdiction in State Court Is Proper Because Ms. Cowan is not a Member of the Nation, and the Assertion of Jurisdiction Will not Infringe Upon the Nation's Right to Exercise Self-Governance.

Even assuming for the sake of argument that the Tohono O'odham Court has jurisdiction over Ms. Cowan's claims, the Arizona court has concurrent jurisdiction over those claims. Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-governance or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U. S. 544, 564, 101 S.Ct. 1245, 1258 (1981). What is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S.Ct. 2304, 2311 (2001), citing *Montana*, *supra*, 450 U. S. 544, 564 101 S.Ct. at 1257. See also

Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 386 (1976), holding that "[i]n litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

In *Hicks*, the Court went on to state:

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." (citations omitted).

Hicks, *supra*.

Montana preserved two exceptions to the general rule that Tribal courts do not have civil jurisdiction over non-members. The first is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” (emphasis added). *Montana, supra*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258. Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*

Neither of these exceptions applies to the instant case. The Nation has no statutes or “regulations” promulgated by the Legislative Council governing relationships between the Nation and employees such as Ms. Cowan. Even assuming that the terms of the Manual could be construed as the type of regulatory pronouncements referred to in *Hicks*, by failing to implement the grievance procedures set forth in the Manual, the Nation has clearly surrendered any regulatory rights it may have had, and rendered Ms. Cowan’s relationship with the Tribe non-consensual.

With respect to the second exception, the same policy considerations discussed above in connection with the immunity issue are applicable in the context of subject matter jurisdiction. Assertion by this Court of jurisdiction over Ms. Cowan’s claims will not threaten or directly affect the political integrity, economic security, the health or welfare of the Nation.

The Nation has forced Ms. Cowan into State Court by terminating her without cause in violation of the Nation’s own policies and procedures; refusing to pay her for work performed; and failing to reimburse her

for expenses paid for the Nation’s benefit. Under these circumstances, Ms. Cowan’s compelling interest in resolving her claims for breach of contract and wrongful termination, unpaid wages, and reimbursement of expenses, far outweigh any claimed infringement on the Nation’s right of self-governance.

IV. Conclusion

Based on 28 U.S.C. 1360 and federal common law, the Arizona Courts dismissed Ms. Cowan’s claims against the Nation on the grounds of tribal immunity and lack of subject matter jurisdiction. The denial of Ms. Cowan’s right to pursue her employment related claims in state court involves substantial federal questions that should be reviewed by this Court pursuant to 28 U.S. C. 1257(a).

The Nation expressly waived its tribal immunity through promulgating employment policies and procedures with the intent to conform with employment laws, and then deliberately violating those policies and procedures. Ms. Cowan is entitled to seek redress in state court for the Nation’s violation of its employment policies and procedures. Finding a waiver of the Nation’s tribal immunity promotes rather than contravenes the Federal policies underlying tribal immunity. The provisions of the Employee Manual are themselves an assertion of self governance. Allowing employees to enforce these provisions in state court will not only result in equity, but will strengthen the economic viability of the Nation by ensuring the Nation’s compliance with its employment policies and procedures and thereby enhancing its ability to recruit

and retain skilled employees in a competitive employment marketplace.

The state court has subject matter jurisdiction over this matter because the Nation's Constitution, and Law and Order Code, do not specifically confer jurisdiction over Ms. Cowan's claims on the Tohono O'odham Court. In addition, the state court may exercise subject matter jurisdiction over the instant suit because Ms. Cowan is not a member of the Nation, and the exercise of such jurisdiction will not infringe on tribal self-governance.

APPENDIX

Superior Court Minute Entry dated December 6, 2004

Court of Appeals Order and Memorandum Decision dated August 4, 2005

Arizona Supreme Court Order dated January 5, 2006

Note: Pursuant to Supreme Court Rules 33.1 and 14.1(i), the documents set forth in the Appendix were retyped and reproduced in the format required by the Rules.