Skull Valley Health Care, LLC v. Norstar Consultants LLC, 2023 WL 4934292 (D. Utah, August 2, 2023).

- **Holding**:Tribal health care clinic, bringing an action against former employee for misappropriation of intellectual property, was an arm of the Tribe and entitled to tribal sovereign immunity against terminated employee's counterclaim for wrongful termination, but counterclaim could proceed against clinic's director and members of Tribe's executive committee named as individuals.
- **Summary**: Skull Valley Health Care, LLC ("SVHC"), originally incorporated under Utah state law, but later, and at all relevant times, incorporated under laws of the Skull Valley Band of Goshute Indians of Utah ("Tribe"), was formed to provide health care services in Toole County, Utah, pursuant to an Indian Self-Determination and Education Assistance Act (ISDEAA) contract. SVHC brought an action in state court (later removed to federal court) against a former employee, alleging the employee had illegally taken SVHC's Facebook page and changed the information on it to her own business' information. The former employee counterclaimed against SVHC and three individuals, the Tribal Chairwoman, another Executive Committee member, and the Clinic Administrator of Skull Valley, alleging wrongful termination.

  SVHC moved to dismiss the counterclaim, asserting tribal sovereign immunity. The court, applying the six-factor test outlined in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) ("*BMG*"), concluded that SVHC was an arm of the Tribe finding: (1) while lacking the tribal resolution creating SVHC, the incorporation of SVHC under tribal law supported the conclusion that SVHC was created by the Tribe acting in its governmental capacity; (2) the purpose of SVHC, providing services pursuant to an ISDEAA contact, was governmental in nature, even if services were provided to nonmembers as well as members; (3) the Tribe's Executive Committee were the sole managers of SVHC; (4) the Tribe's Chairwoman declared that SVHC had been created with the intention to extend tribal sovereign immunity to it; (5) the Tribe provided financial support to SVHC (rejecting employee's argument that lack of financial benefit to the Tribe's "general treasury" weighed against sovereign immunity); (6) SVHC promoted tribal development and tribal self-reliance, core purposes of sovereign immunity.

  The employee argued that SVHC, under the terms of its ISDEAA contract, was required to obtain liability insurance and waive any right to raise sovereign immunity as a defense. The court, citing 25 U.S.C.A. § 5321(c)(3)(A), concluded that such waiver does "not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance." Because the employee failed to provide a copy of the insurance contract or other information regarding its coverage limits, the court could not find that the Band had waived immunity, or that the abrogation of immunity in 25 U.S.C.A. § 5321(c)(3)(A) applied.

  The employee also argued that SVHC, by filing the action, had subjected itself to the jurisdiction of the court for any counterclaim. The court treated this as a "argument sounding in recoupment," and rejected such argument because the employee's claim of

wrongful termination was alleged to be in retaliation for her reporting of improper billing practices, and did not arise from the same transaction that was the basis of SVHC's Complaint, which sought damages and injunctive relief for the employee's alleged misappropriation of SVHC's Facebook page.

The employee also alleged the SVHC had impliedly waived its sovereign immunity because its Employee Policy had " either intentionally or recklessly mislead [sic] [Ms.] Moritz ... into the belief that [she] would be protected, like any private employees in the State of Utah by state and federal law." The court found the argument to be at odds with the general authority that waivers of sovereign immunity cannot be implied, but must be expressed unequivocally.

The court did allow the counterclaims against the Tribe's Chairwoman and another member of the Tribe's Executive Committee to go forward, concluding that the employee's "wrongful termination claim arises out of actions took in their official capacities," but was "not a claim against them merely because of their official capacities" (emphasis in original). The court concluded that the Clinic Administrator was not an "official" of the Band, and therefore the Tribe's sovereign immunity did not extend to him.

- **Relevant (2023) Deskbook Sections**: 7:14, 7:18, 7:20, 7:21, 7:22
- **Comment**: The court's decision allowing the counterclaim against the Chairwoman and another member of the Executive Committee seems to rely on the distinction between actions taken "within the scope of their official capacities," and suits "arising out of actions they took in their official capacities" (emphasis added). While the counterclaim named the defendants as individuals, the court did not make further inquiry as to whether the Tribe was the real, substantial party in interest, but relied only on the fact that "[t]he allegations as pleaded in Ms. Moritz's counter- and crossclaims highlight that she named them because of the actions they took while managing SVHC … [c]onsequently, the court cannot find that Chairwoman Bear and Mr. Wash are entitled to the Band's sovereign immunity."