

No. 17-024

In The
Yuma Indian Nation Supreme Court

THOMAS SMITH & CAROL SMITH,
Appellants/Petitioners,

v.

YUMA INDIAN NATION, et al.,
Appellees/Respondents.

**On Interlocutory Appeal To The
Supreme Court of the Yuma Indian Nation**

BRIEF OF APPELLEES/RESPONDENTS

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Counsel for Appellees/Respondents

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QUESTIONS PRESENTED

- I. Do the Yuma Indian Nation courts have personal jurisdiction and subject matter jurisdiction over Thomas Smith and Carol Smith, and should the trial court stay this suit while the Smiths seek a ruling the Arizona federal district court?
- II. Does sovereign immunity, or any other form of immunity, protect the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and Accountant from the Smiths' claims?

STATEMENT OF THE CASE

I. Statement of the Facts

Over the last decade, the Yuma Indian Nation (“Tribe”), a federal recognized tribe located in southwest Arizona, has strived to improve the prosperity of the Tribe and its citizens. R. at 1. In furtherance of this effort, in 2009, the Nation chartered the Economic Development Corporation (“EDC”) and providing a \$10 million dollar start up loan. R. at 1. The EDC is a wholly owned subsidiary and an “arm of the tribe.” R. at 2. The EDC has its own five-person board of directors, three of which must be tribal members, with the Tribe retaining authority to remove a director with a 75% vote. R. at 1. Under the EDC’s charter, it is authorized to “sue and be sued,” and Fifty percent of all EDC revenue is to go to the Tribe. R. at 2. The EDC has repaid \$2 million to the tribe. R. at 2. The charter requires tribal preference in hiring and mandates that the EDC, its board and employees are protected by tribal sovereign immunity to the fullest extent of the law. R. at 2.

Two years prior to the creation of the EDC the Tribe signed a contract with Thomas Smith, a certified financial planner and accountant, to provide YIN with as-needed financial advice related to economic development. R. at 1. Under the contract, the parties agreed to litigate all disputes in a court of competent jurisdiction, and Thomas specifically agreed to maintain absolute confidentiality regarding any tribal communications and economic

development plans. R. at 1. The parties signed the contract in Phoenix, where Thomas lives and works. R. at 1. For a decade, Thomas communicated on a near daily basis with various tribal officials including the Tribal Council. R. at 1. He submitted and presented quarterly reports to the Tribal Council at Council meetings on the reservation. R. at 1. After the Nation created the EDC, Thomas primarily communicated with EDC's CEO, and EDC's employee/accountant regarding the Nation's economic development. R. at 1.

In 2010, Thomas, with the Tribal Council's approval, entered into a contract with his sister Carol Smith, a licensed stockbroker to provide securities advice related to the Tribe's economic development. R. at 2. Carol lives and works in Portland, Oregon. R. at 2. The contract Carol signed is identical to the consulting contract between the Tribe and Thomas, and includes a provision that the parties must comply with 2007 Thomas contract. R. at 2. Carol submits monthly bills via email to the EDC CEO and EDC mails her payments. Carol provides advice directly to Thomas. Thomas in turn forwards many of these communications to EDC's CEO, EDC's accountant, and the YIN Tribal Council. R. at 2. Carol, while vacationing in Phoenix, has visited the YIN reservation on two separate occasions. R. at 2.

In 2016, the dispute arose between Smiths and the EDC over a potential marijuana operation. R. at 3. After conferring with EDC, the Tribal Council enacted an ordinance making on reservation marijuana cultivation and use legal for any purpose, which was inconsistent with Arizona's marijuana laws, as medicinal use of marijuana is legal but recreational use is not. R. at 2. The Smiths were opposed to any involvement in the potential business endeavor for personal reasons. R. at 2. Thomas later informed the Arizona Attorney General, of the Nation's economic development plans relating to marijuana. R. at 2. In response, the Attorney General wrote a cease and desist letter to the Nation and the EDC as to the development of

recreational marijuana operations. R. at. 2. The Tribal Council then initiated a breach of contract suit against the Smiths in the trial court. R. at. 3.

II. Statement of the Proceedings

The Tribal Council's suit alleged that Thomas breached the confidentiality provision in his contract in violation of fiduciary duties, and violation of their duties of confidentiality. R. at 3. The Tribe sought liquidated damages in the amount sent out in the contracts. R. at 3. The Smiths filed special appearances and moved to dismiss the suit based on lack of personal and subject matter jurisdiction, and in the alternative, they asked for the trial court to stay the suit while they pursued a ruling Arizona Federal District Court. R. at 3. The trial court denied both motions. R. at 3.

The Smiths denied the claims against them and counterclaimed for monies due under their contracts and for defamation for impugning their professional skills. R. at 3. The Smiths impleaded the EDC, the EDC's CEO and Accountant in their official and individual capacities and charged them with the same claims as against the Tribe. R. at 3. The trial court dismissed all of the Smiths' counterclaims against the tribe and the third party defendants due to sovereign immunity. R. at 3. The Smiths filed for interlocutory appeal requesting the YIN Supreme Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit. R. at 3. The Supreme Court granted the interlocutory appeal. R. at 3.

ARGUMENT

I. The laws of the Yuma Indian Nation authorize both subject matter jurisdiction over this case and personal jurisdiction over the Smiths, and there is no federal limitation on the jurisdiction of its courts in this case, thus this Court should deny the Smiths' request to stay this suit under the tribal court exhaustion doctrine.

The trial court has subject matter jurisdiction over this case since the laws of the Yuma Indian Nation authorize jurisdiction and there exists no applicable federal limitation. In

addition, the trial court has personal jurisdiction over the Smiths because the Smiths have sufficient contacts with the Tribe such that personal jurisdiction would not offend due process notions of fairness. Finally, the Smiths' requested stay is not proper especially when considered against the backdrop of the well-established tribal court exhaustion doctrine. Therefore, the Court should hold that the Yuma Indian Nation courts have subject matter jurisdiction over this case and personal jurisdiction over the Smiths and not issue of writ of mandamus to the trial court staying this suit.

A. Yuma Indian Nation courts have subject matter jurisdiction over this case as authorized under the Tribe's laws and there is no federal law limiting the exercise of that authority.

Tribal court subject matter jurisdiction over non-Indians is a matter of federal law. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa (Attorney's Process)*, 609 F.3d 927, 934 (8th Cir. 2010). However, "[t]here is no simple test for determining whether tribal court jurisdiction exists," *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989), as tribal court subject matter jurisdiction generally consists of a "complex patchwork" of *both* tribal and federal law. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc). Therefore, whenever a tribal court seeks to exercise jurisdiction over a non-Indian, an inquiry involves both the examination of whether tribal law authorizes subject jurisdiction then the inquiry turns to federal law to examine the extent of limitations placed on the tribal court's jurisdiction.

i. Yuma Indian Nation law authorizes subject matter jurisdiction in this case because the Tribal Code provides for broad civil jurisdiction and exclusive jurisdiction over disputes involving the Tribe, its officers, and employees.

The YIN Tribal Code emphatically authorizes subject matter jurisdiction over the underlying claims. Under the Tribal Code, the Tribe's courts shall have general civil subject

matter jurisdiction over all civil disputes and causes of action “of any kind whatsoever,” TRIBAL CODE, tit. 1, § 1-106(1)(b), arising under tribal law and those originating within the Tribe’s jurisdiction. *Id.* § 1-107. Furthermore, unless limited by federal law, the Tribe’s courts have “exclusive original jurisdiction in all matters in which the Tribe or its officers or employees are parties in their official capacities” *Id.* § 1-110(1). The Tribe’s laws unquestionably provide for subject matter jurisdiction over the Smiths as this case involves civil claims stemming from consultation contracts entered into for the benefit of the tribe’s economic development. R. at 1-2. Furthermore, this case involves official capacity suits brought by and against the Yuma Indian Nation, the Tribal Council, and tribal employees arising from those contracts. R. at 3. Thus, in the present case, the jurisdiction of the Tribe’s courts turns on whether federal law limits the tribe’s civil subject matter jurisdiction over the Tribe’s claims against the Smiths.

ii. Federal law does not limit the subject matter jurisdiction of the Tribe’s courts because the underlying claim falls within the Tribe’s inherent sovereign regulatory to manage reservation affairs as well as satisfying both Montana exceptions.

Federal law limits a tribe’s adjudicatory jurisdiction to the extent that it cannot exceed the tribe’s regulatory authority, *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). The focus of tribal regulation is not necessarily on the non-Indians themselves, but on the activity or conduct of the non-Indians. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). The form of regulation at issue originates in tribal contract law as the non-Indians’ conduct stems from breach of contract claims between the Smiths and the Tribal Council. Contractual obligations are legal duties recognized and enforced under law binding the parties to perform, *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 399-40 (1934), as such, sovereigns have an inherent interest in regulating those obligations to ensure compliance

with social expectations. See Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1136-44 (2015). Therefore, the Tribe's and its courts have an interest in interpreting the scope of contractual duties and defining the obligations the parties owe to one another such as the obligation to perform contracts in good faith, fiduciary obligations, and breach of contract standards. R. at 2.

The Supreme Court has left open the question of whether tribal court jurisdiction is coextensive with its regulatory authority. See *Nevada v. Hicks*, 533 U.S. 353, 358 n.2. (2001). Lower federal courts essentially treat the two as coextensive because where tribal regulatory exists, disputes over such activities “presumptively lies in the tribal courts.” *Strate*, 520 U.S. at 453 (1997). While retaining attributes of inherent sovereignty over their members and territory, *United States v. Wheeler*, 435 U.S. 313, 323 (1978) tribes have a more limited ability to regulate the conduct of non-Indians. See *Strate*, 520 U.S. at 445. Thus, the issue of the Tribe's adjudicatory jurisdiction over this case turns on the scope of the limitations places on tribal regulation of non-Indian conduct. The federal circuits split as to the proper analysis for determining the extent that tribal sovereignty allows regulatory authority over non-Indians.

The split concerns whether the limitations on tribal regulatory authority articulated in *Montana v. United States*, 450 U.S. 544 (1981), have been expanded by *Montana's* progeny to all non-Indian activity regardless of land ownership or whether *Montana* only applies to tribal regulation of non-Indians on non-Indian fee land within the reservation. *Montana* provides that tribes presumptively do not have jurisdiction over non-Indian conduct on non-Indian land within a reservation. *Id.* at 564-66. Some circuits take the position that the *Montana's* restrictions apply regardless of land ownership under *Nevada v. Hicks*, 533 U.S. 353 (2001). See, e.g., *MacArthur v. San Juan Cty*, 947 F.3d 1057, 1069-70 (10th Cir. 2007). Hence, in those

circuits, the inquiry is simply whether the exercise of tribal authority over non-Indians satisfies the *Montana* framework. The Ninth Circuit disagrees; reasoning that a proper respect for tribes, federal policy, and Supreme Court precedent demand a more nuanced approach to tribal regulatory authority over non-Indian activity. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011) (explaining that “impermissibly broadening *Montana*’s scope beyond what any precedent requires . . . restrain[s] tribal sovereign authority despite Congress’s clearly stated feral interest in promoting tribal self-government.”).

The Ninth Circuit recognizes “two distinct frameworks for determining tribal jurisdiction over a case involving a non-tribal-member defendant.” *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017). The first being that “tribes possess inherent sovereign powers,” *Water Wheel*, 642 F.3d at 808, and from these powers stem lesser powers including the power to regulate non-Indian conduct relating to reservation affairs, *see id.* at 809 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)), except where the state has a strong competing interest overriding the tribe’s sovereign powers. *Window Rock*, 861 F.3d at 898-99 (categorizing *Nevada v. Hicks* as a narrow exception). The second being the *Montana* framework, applying only to non-Indian conduct on non-Indian land within a reservation. *Id.* at 898. In reconciling the approaches of the circuits, a two-part analysis emerges governing the subject matter jurisdiction of the Tribe’s courts in this case. First, whether the inherent sovereign authority of the Tribe alone justifies tribal regulatory authority over the Smiths. Second, whether the Tribe’s relationship with the Smiths and tribal interest satisfy justify tribal regulatory authority under *Montana*. The Tribe’s courts have jurisdiction under either rationale.

- 1. The Yuma Indian Nation’s inherent sovereign authority justifies tribal regulatory authority of the underlying action, which arose on the reservation and the Smiths’ contractual obligations concerned reservation interests.**

Tribes possess inherent authority to regulate the conduct of non-Indians affecting reservation interests, *Tohono O'adham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993), as “an essential attribute of sovereignty.” *Weeks v. Constr., Inc. v. Oglala Sioux housing Auth.*, 797 F.2d 668, 673 (8th Cir. 1986). Under the Ninth Circuit’s approach, tribal court jurisdiction over a non-Indian defendant turns on the relationship of the underlying claim to tribal land. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir. 2006). The inquiry is not regarding the precise location of where the underlying cause of action arose but whether “the cause of action brought by the[] parties bears some direct connection on tribal lands.” *Id.* at 1335. The contract’s subject matter and location of performance are the most important considerations as to whether the cause of action directly connects to tribal lands. *Williams v. Lee* involved a contract dispute between a non-Indian who sold merchandise to an Indian on tribal reservation land. 358 U.S. 217, 222 (1959). The Court upheld tribal jurisdiction because tribes have authority over their reservations and usurping the tribe of such authority would “infringe on the right of the Indians to govern themselves.” *Id.* at 223.

Subsequent cases have applied the principles of *Williams* to contracts requiring performance relating to reservation affairs. In *Wellman v. Chevron U.S.A, Inc.*, a tribal contractor sued a non-Indian corporation for breach of contract concerning work to be performed on reservation land. The court held that “if the dispute arises in Indian territory,” both parties are limited to tribal court jurisdiction in the first instance. 815 F.2d 577, 578 (9th Cir. 1987). Likewise, in *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, a tribe sued a non-Indian corporation in tribal court for breach of contract relating to two contracts where the non-Indian corporation agreed to construct a sawmill on the reservation, and provide management and marketing services for the mill. 873 F.2d 1221, 1222 (9th Cir.

1989). The contracts were negotiated off the reservation, signed on the reservation, construction performed on the reservation, but marketing for the mill occurred off the reservation. *Id.* at 1223. The court reasoned that since tribal law provided for jurisdiction, and there were no apparent federal statutory limitations, tribal court jurisdiction was clear as the “dispute arises out of the reservation can concerns tribal resources.” *Id.* at 1228.

Here, the claims against the Smith’s stem from their contracts relating to the reservation’s affairs. Thomas may have worked from Phoenix but he could not fulfill his contractual obligations until the Tribe or the EDC received the information on the reservation. Similarly, although Carol communicated directly with Thomas, Thomas forwards much of Carol’s information directly to the reservation. R. at 2. Additionally, Thomas presented his information at quarterly Tribal Council meetings on the reservation. R. at 2. Furthermore, the Smiths’ contracts relate to the Tribe’s economic development, which clearly implicates reservation resources. The purpose of both the Smith’s contracts is to enhance the economic “prosperity of the Tribe and its citizens.” R. at 1. In the present case, as in *Williams, Wellman, and Stock West, Inc.*, the Tribe’s contract law is important to self-government as it regulates commercial, business, and private dealings between its members and non-Indians of the tribe. *Cf. Salish Kootenai College*, 434 F.3d at 1140 (discussing similar justifications in the context of tort law). Therefore, the Smiths’ contractual obligations originate within the reservation as such the Tribe has an interest in regulating those obligations especially when a breach creates jeopardizes the sovereign interests of the Tribe.

Finally, there are no strong competing state interests present to overcome the Tribe’s inherent sovereign authority to regulate the conduct of the Smiths. In *Nevada v. Hicks*, an Indian sued state police officers in tribal court for violations of his civil rights while the state

officers executed a search warrant on the reservation for a suspected off-reservation crime. 533 U.S. at 356-57. The Court held that the state's interests in enforcing its criminal laws for off-reservation crimes was sufficient to overcome the tribe's regulatory authority. *Id.* at 370. Here, although Arizona may have some concern that the Tribe's authorization of recreational marijuana conflicts with Arizona's marijuana laws, such concern is too attenuated to override the Tribe's interests. Unlike the state in *Hicks*, Arizona is not attempting to enforce its criminal laws against the tribe or its members, nor is the tribal court attempting to exercise adjudicative jurisdiction over Arizona or its officers because Arizona is not a party to the litigation. Therefore, there are no sufficient state interest triggering the application of *Montana*.

2. The Tribal Council's claim against the Smiths satisfies both *Montana* exceptions because the Smiths have a consensual relationship with the Tribe and the Smiths' actions compromised the Tribe's political integrity and economic security.

Alternatively, even if *Montana v. United States*, 540 U.S. 544 (1981), applies to this case, the relationship between the Smiths and the Yuma Indian Nation along with the actions of the Smiths affecting the sovereign interests of the Tribe satisfy both *Montana* exceptions. Under *Montana*, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians," on non-Indian land. *See id.* at 565. There are two recognized scenarios where tribal sovereign authority extends to activities of non-Indians, categorized as the "*Montana* exceptions." Tribes bear the burden of establishing one of the exceptions. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008).

a. The Smiths' consensual relationship with the Tribe satisfies the first *Montana* exception because the relationship was contractual and ongoing, placing a reasonable expectation that the Smiths could be haled into the Tribe's courts.

First, tribes may regulate the activities of non-Indians "who enter consensual relationships" with the tribe through contracts, commercial dealings, or other arrangements.

Montana, 450 U.S. at 565. Non-Indians can establish a consensual relationship with the tribe or its members either expressly or through their actions. *Plains Commerce Bank*, 554 U.S. at 337. Additionally, there needs to be a nexus between the tribal regulation and the consensual relationship with the non-Indian. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Furthermore, the non-Indian should reasonably anticipate litigating claims arising from the consensual relationship in tribal court. *Plains Commerce Bank*, 554 U.S. at 338. The reasonable anticipation standard is objective, not subjective. *Water Wheel*, 642 F.3d at 817. Finally, the non-Indian conduct needs to “discernibly effect” the tribe or its members. *Plains Commerce Bank*, 554 U.S. 316, 332 (2008).

The primary case cited to illustrate the first *Montana* exception is *Williams v. Lee*, 358 U.S. 217 (1959). *Williams* is the quintessential example of “private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into.” *Smith v. Salish Kootenai College*, 434 F.3d at 1136 (quoting *Hicks*, 533 U.S. at 372). The emphasis is not on the consensual relationship itself but on the foreseeability that the claim arising out of the relationship will be litigated in tribal court. In *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians*, an Indian intern sued a non-Indian corporation after being sexual assaulted by one of the corporation’s store managers while working at a store located on reservation land. 746 F.3d 167, 173 (5th Cir. 2014). The court found an “unquestionable” consensual commercial relationship between the non-Indian corporation and an unpaid tribal member intern performing limited work in exchange for job training and experience for only a brief time. *Id.* at 173. The court went on to hold that there was an “obvious nexus” between the Indian’s tort claim against the manager and tribal regulation because tribes have an interest in regulating workplace safety. *Id.* at 173.

The Smiths have a consensual relationship with the Yuma Indian Nation and EDC within the meaning of Montana's first exception. Thomas's relationship derives from his consultation contract directly between him and the Tribe to provide advice concerning the Tribe's economic development. R. at 1. For a decade, Thomas provided advice to the tribe under the contract. R. at 1. There exists an obvious nexus between the contract and the Tribe's claims against him. The contract expressly provides that Thomas was to "maintain absolute confidentiality regarding any and all tribal communications and economic development plans." R. at 1. The Tribe alleges that Thomas breached that contractual provision when he disclosed the Tribe's economic development plans relating to cultivating and selling marijuana to the Attorney General of Arizona. R. at 2. Additionally, the YIN Tribal Code expressly provides that the tribal courts have exclusive jurisdiction over suits involving the Tribe, putting Thomas on notice that he could be sued in tribal court for disputes arising out of the contract with the Tribe.

Carol's relationship with the tribe is sufficient to satisfy the consensual relationship exception. Although Carol does not have a direct contractual relationship with the tribe, Montana's second exception allows for "other arrangements." *Montana*, 450 U.S. at 565. Here, the Tribe is a third party beneficiary of the contract between her and Thomas. The relationship was formed with the consent of the Tribe, the Tribe pays her directly, and she provides advice to Thomas for the benefit of the Tribe. R. at 1. Under these circumstances, Carol's relationship with the Tribe is stronger than the consensual relationship in *Dolgenercorp, Inc.* Unlike the relationship in *Dolgenercorp, Inc.*, Carol's relationship with the tribe was paid and lasted for seven years. Thus, Carol has a sufficient consensual relationship with the Tribe. Pursuant to this relationship, her failure to perform the contract in good faith should put her on notice that

she could be sued by the Tribe and that the suit would be brought in tribal court. Like the Tribe in *Dolgenercorp, Inc.*, the Tribe has an interest in regulating the conduct of non-Indians affecting reservation affairs. Therefore, the have Smiths voluntarily engaged in a consensual relationship with tribal entities of the Tribe’s reservation sufficient to satisfy the first *Montana* exception.

b. The Smiths’ actions satisfy the second *Montana* exception because the Smiths failed breach of their contractual obligations and imperiled the Tribe’s political integrity and economic security.

Second, tribes retain inherent authority to regulate the conduct of non-Indians 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.* at 566. The focus of the second exception is not the elements of the claim at issue but a “functional view of the regulatory effect of the claim on the nonmember.” *Attorney’s Process*, 609 F.3d 927, 938 (9th Cir. 2010). Thus, an appropriate inquiry considers the context of the non-Indian conduct in light of the damage caused by the non-Indian’s conduct. *See, e.g., Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009).

The Smiths’ breach of their contractual obligations including the promise to maintain strict confidentiality regarding the Tribe’s economic development endeavors falls within the second *Montana* exception. Thomas’s disclosure of confidential information relating to the Tribe’s potential marijuana operations sparked an inter-sovereign conflict between the Tribe and Arizona. *See R.* at 2. The Tribe must now choose between potential litigation with Arizona, and exercising its rights of self-government—the very choice compromises the Tribe’s political integrity. *See Williams v. Lee*, 358 U.S. 217, 223.

Additionally, non-Indian conduct affecting significant tribal revenue streams imperil the economic security of the tribe. In *Water Wheel Camp Recreational Area, Inc. v LaRance*,

the court held that commercial dealings between a non-Indian and tribe giving rise to a breach of contract claim involving tribal land, which was “one of the tribe’s most valuable assets” would satisfy the second exception. 642 F.3d at 818-19. Likewise, in *Attorney Process and Investigation Services, Inc.*, the court held that non-Indian actions aimed at harming a tribe’s casino, which was the tribe’s “economic engine” threatened the economic security of the tribe. 609 F.3d at 939.

Here, the Smiths’ conduct concerning breaching the contract and their fiduciary duties to perform contractual obligations in good faith imperil the Tribe’s economic security. The Smiths’ refusal to provide advice regarding the EDC’s marijuana operations directly stifled the EDC’s economic earning by thwarting a potentially lucrative business endeavor. The Tribe has invested millions in EDC’s success and created it to “promote the prosperity of the Tribe and its citizens. R. at 1. The EDC is a valuable tribal asset that cannot succeed if the people hired to ensure its success fail to perform their contractual obligations. Therefore, the Smiths’ conduct has threatened the Tribe’s political integrity and economic security within the meaning of the second *Montana* exception.

B. Yuma Indian Nation courts have personal jurisdiction over the Smiths because the Tribe’s laws authorize personal jurisdiction and personal jurisdiction would not violate due process considerations.

The YIN Tribal Code provides for personal jurisdiction over the Smiths. The Tribe’s courts shall have personal jurisdiction over anyone consenting to jurisdiction and over any person who conducted or performed any business activity within the reservation or is involved in any civil cause of action related to such activity or contract. TRIBAL CODE, tit. 1, § 1-104(2)(b), 1-107. Additionally, the Tribe’s courts have jurisdiction over anyone served outside tribal territorial jurisdiction of the tribe who has submitted themselves to the Tribe’s

jurisdiction by voluntarily entering into sufficient contacts with the Tribe, or its territory to justify jurisdiction in accordance with the principals of due process. *Id.* at § 2-314. The YIN Tribal Code provisions governing personal jurisdiction are consistent with federal standards limiting personal jurisdiction.

The constitutional due process limitations on the ability of federal and state courts to hale defendants into court, *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985), do not similarly limit the authority of tribal courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). However, Congress has subjected tribes to due process limitations through the Indian Civil Rights Act of 1968 (“ICRA”), which provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law” 25 U.S.C. § 1302(a)(8) (2012). The language and legislative history of ICRA warrants interpreting its due process clause similarly to that of the Fourteenth Amendment. *See* David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1261-68 (2006). Indeed federal courts have adopted such an approach. *See, e.g., Water Wheel*, 642 F.3d at 820 (applying the minimum contacts analysis in the context of tribal personal jurisdiction). Therefore, unless this Court adopts a different due process interpretation of ICRA or of the Tribal Code’s due process clause, United States Supreme Court precedent governs the issue of personal jurisdiction. The Supreme Court interprets due process in the context of personal jurisdiction as requiring defendants to have sufficient “minimum contacts” with the forum so that subjecting the defendant to the forum’s jurisdiction “would not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). The inquiry consists of two steps: a minimum contacts analysis, and a fairness analysis. *See Burger King Corp v. Rudzewicz*, 471 U.S. 462, 474-78 (1985).

i. The Smiths have sufficient minimum contacts with the Tribe resulting from purposeful availment of tribal business opportunities such that they could foresee answering for related disputes arising in the Tribe's courts.

The minimum contact analysis is itself a two-step inquiry involving both the defendant's "purposeful availment" to the forum, and whether the forum could foreseeably hale the defendant into its courts. *Burger King Corp.*, 471 U.S. at 474-77. In the contractual context, defendants who "create continuing relationships and obligations with citizens of another state,' are subject to regulation and sanctions in the other [jurisdictions] for the consequences of their activities." *Id.* (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950)). Additionally, the defendant must also "reasonably anticipate" being subject to the forum's courts for disputes arising from the availing activity. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 289, 297 (1980). The defendant's relationship with the forum and the litigation are the primary considerations in the foreseeability analysis. *Keeton v. Hustle Magazine, Inc.*, 465 U.S. 770, 775 (1984). Once a defendant has sufficient minimum contacts with a forum, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp.*, 471 U.S. at 476.

The Supreme Court case of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) illustrates the minimum contact analysis in a contractual setting. *Burger King Corp* involved a contractual dispute between two Michigan business partners and a Miami corporation. *Id.* at 464. The Miami corporation sued the Michiganders in court in Florida. *Id.* at 469. The Court upheld the court's jurisdiction even though the Michiganders had never been to Florida, aside from one of partners traveling to Florida for a brief training. *Id.* at 479. The Court explained that the Michiganders had deliberately entered into a contract with the Miami corporation envisioning a continuing relationship with the corporation for anticipated financial benefit. *Id.*

at 479-80. The Court continued by stating that the contract had a substantial connection to Florida because the corporation was primarily based in Miami—the place of all the corporation’s operations and decision-making authority. *Id.* at 480-81. Thus, the Court held that the Michiganders had purposefully availed themselves to Florida and it was foreseeable that breaching the contract would cause injuries to the Miami corporation in Florida. *Id.* at 480.

The present case is substantially similar to *Burger King Corp.* The Smiths have a substantial relationship with Tribe justifying personal jurisdiction. Like the Michiganders, the Smiths voluntarily entered into contracts with the Tribe or for the Tribe’s with the expectation of a continuing relationship resulting in financial benefit. The Smiths knew the Tribe and its entities were located on the reservation—the center of the Tribe’s operations and decisionmaking authority. Thus, the Smiths like the Michiganders, have purposefully availed themselves of the forum. Additionally, the Smiths “must have known” that they would need to exhaust tribal court remedies for disputes arising out of tribal projects. *See Tohono O’odham Nation v. Schwartz*, 837 F.Supp. 1024, 1030 (D. Ariz. 1993) Therefore, the Smiths have sufficient minimum contacts with the Tribe so as to reasonably anticipate being sued in the Tribe’s courts for claims arising from their contracts.

ii. Personal jurisdiction over the Smiths would not violate traditional notions of fundamental fairness because the Tribal Council’s interest in litigating in Tribal Court is greater than the Smiths’ minimal burden.

A forum relying on a defendant’s minimum contacts to justify personal jurisdiction should ensure that jurisdiction would not violate notions of “fair play and substantial justice.” *Burger King Corp.*, 471 U.S. at 476. The primary fairness considerations are (1) burden on the defendant; (2) the forum’s interest; (3) the plaintiff’s interest; and (4) the legal system’s interest in efficiency. *See World-Wide Volkswagen Corp.*, 444 U.S. at 292. The defendant challenging

the forum's personal jurisdiction bears the burden of presenting a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 471 U.S. at 477. In the present case, the Smiths cannot bear their burden of showing that the fairness considerations weigh against denying personal jurisdiction.

Here, the burden on the Smiths is minimal because it would not be unjustly burdensome for them to travel to the reservation, *see McGee v. Int'l life Ins.*, 355 U.S. at 223, as Thomas traveled to the reservation on a quarterly basis for the past ten years, and Carol has traveled to the reservation on two separate occasions. R. at 1-2. The Yuma Indian Nation has an interest that all sovereigns have "in providing its residents with a convenient forum for redressing injuries inflicted by [external] actors." *Burger King Corp.*, 471 U.S. at 473. The Tribal Council's interest is in not subjecting the governing body of the Yuma Indian Nation to the authority of another sovereign. Finally, personal jurisdiction over the Smiths fulfils the legal system's interest in efficiency consistent with the policy reasons supporting the tribal court exhaustion doctrine. *See Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Therefore, the Tribe's courts have personal jurisdiction over the Smiths.

C. The Yuma Indian Nation trial court should not stay this suit because granting a stay would undermine the policy of supporting tribal court systems in violation of the tribal court exhaustion doctrine.

Allowing a stay in this case in order for the Smiths to make a premature challenge of trial court's jurisdiction unjustifiably disrupts the trial court proceedings offending the Tribe's interests in self-government. "A stay is an 'intrusion into the ordinary process of administration and judicial review,'" which is not granted as a matter of right. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations omitted). The decision to grant a stay is "an exercise of judicial discretion," *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926), and "[t]he party

requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Nken*, 556 U.S. at 434. The traditional standard guiding a court’s discretion involves the consideration of four factors: (1) a strong showing that the movant has a likelihood of success on the merits regarding the subject of the requested relief; (2) the movant is likely to suffer irreparable injury in the absence of a stay; (3) the issuance of a stay will not substantially injure the other parties; and (4) the granting of a stay serves the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The first two factors of the standard carry the most weight, and to reiterate—the movant must establish a *likelihood* of success for each—a mere possibility of success is insufficient. *Nken*, 556 U.S. at 434-35. Additionally, the considerations concerning the remaining factors merge when the government is the party opposing the stay, *id.* at 435, as in the present case. Finally, the balancing of these factors depend upon a case’s particular circumstances, *Hilton*, 481 U.S. at 777, which in this case requires considering these factors in light of with the tribal court exhaustion doctrine. The tribal court exhaustion doctrine is always an issue when considering federal review of tribal court jurisdiction prior to the tribal court having a full opportunity to develop a trial record. *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989).

i. The tribal court exhaustion doctrine requires exhaustion of tribal remedies prior to challenging tribal court jurisdiction in federal court out of respect for the Tribe and the interests of judicial economy.

The tribal court exhaustion doctrine is a well-established principle originating in comity respecting tribal courts “as the appropriate court of first impression to determine its jurisdiction.” *Grand Canyon Skywalk Development, L.L.C. v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013) (citing *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845,

856-57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987)). In formulating the doctrine over three decades ago, the Supreme Court relied upon important policy considerations still vital to the continuing tribal-federal relationship. See *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993). First, tribal exhaustion furthers long-standing federal policy of supporting tribal court systems as tribal courts serve an important role in “tribal self-government and self-determination.” *Nat’l Farmers Union Ins.*, 471 U.S. 845, 856 (1985). Second, tribal exhaustion promotes the “orderly administration of justice” by allowing the tribal court to develop a full record. *Id.* Finally, exhaustion allows tribal courts an initial opportunity to explain the “precise basis for accepting jurisdiction” providing any reviewing courts with “the benefit of their expertise in such matters.” *Id.* at 857. Fidelity to these policies requires viewing tribal court exhaustion as a prerequisite to federal review of tribal jurisdictional issues. *Grand Canyon Skywalk Development, L.L.C.*, 715 F.3d at 1200.

There are four exceptions to the tribal court exhaustion doctrine: (1) where assertion of tribal jurisdiction is conducted in bad faith; (2) the underlying action is “patently violative of express jurisdictional prohibitions”; (3) exhaustion is futile due to no opportunity to challenge the tribal court’s jurisdiction, *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999), or (4) tribal jurisdiction is so plainly lacking that exhaustion “would serve no purpose other than delay.” *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). For the bad faith exception to apply, the tribal court itself must have acted in bad faith—bad faith on the part of litigant will not suffice. *Grand Canyon Skywalk Development, L.L.C.*, 715 F.3d at 1201 (explaining that the case cited by *National Farmers* for this exception concerned the proceeding itself and the court’s oversight of the proceeding). Additionally, the express prohibition must be statutory unless case law is unambiguous as to its limitations on tribal court jurisdiction. See *Texaco*,

Inc. v. Zah, 5 F.3d 1374, 1377 (10th Cir. 1993). Finally, the “plainly lacking” exception does not apply if tribal jurisdiction is “colorable” or plausible.” *Window Rock*, 861 F.3d at 898.

ii. The Smiths cannot satisfy the traditional stay factors especially when considered in light of the tribal court exhaustion because they cannot show a likelihood of irreparable harm nor can they establish one of the tribal exhaustion exceptions.

The Smiths cannot carry their burden of showing that it is likely that the tribal court does not even have plausible jurisdiction under the traditional standard for granting a stay evaluated together with the policies and exceptions of the tribal court exhaustion doctrine. First, the Smiths cannot show a strong likelihood of succeeding on the jurisdictional issues to excuse exhaustion of tribal remedies. Second, the Smiths cannot show a likelihood of irreparable injury if they must litigate the remainder of the underlying action in tribal court. The Smiths could foresee litigating contractual disputes with the tribe in tribal court and cannot be harmed by the application of an established legal doctrine requiring the exhaustion of tribal court remedies. Thus, in order to show irreparable injury in this context the Smiths must establish one of the tribal exhaustion exceptions. *Cf. Grand Canyon Skywalk Development, L.L.C. v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1199-01 (9th Cir. 2013) (applying the tribal exhaustion exceptions to a temporary restraining order).

The Smiths cannot satisfy any of the tribal exhaustion exceptions in this case. First, there is nothing in the record to support that tribal jurisdiction is being conducted by the tribal court in bad faith. To the extent the Smiths argue the Tribal Council is acting in bad faith: “The [Tribal Council] is simply seeking to adjudicate its claims against [the Smiths] in its chosen forum—the Tribal Court.” *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 234 F.Supp.3d 1042, 1056 (E.D. Cal. 2017). Assuming *arguendo* that the Tribal Council was acting in bad faith in asserting tribal court jurisdiction because of its outrage at the Smiths, tribal

courts are capable of recognizing and punishing bad faith on the part of the litigants. *Grand Canyon Skywalk Development, L.L.C.*, 715 F.3d 1196. Second, there is no statute limiting the jurisdiction of the tribe to adjudicate the underlying claims and precedent governing the issue is not unambiguous. Third, exhaustion is not futile since the Smiths can challenge the jurisdictional ruling after the tribal court has a chance to develop a full record on issues affecting jurisdiction, such as, *inter alia*, the precise nature of the claims against Carol and interpretations of the YIN Tribal Code.

Tribal jurisdiction is not so plainly lacking that exhaustion “would serve no purpose other than delay.” The primary cases cited for this exception are *Nevada v. Hicks*, and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). As discussed, *Hicks* does not apply because there are no strong state sovereign interests at issue of the type contemplated in *Hicks*. *Strate* involved a tort suit between two non-Indians that arising from a vehicular collision occurring on non-Indian land within the reservation. 520 U.S. at 457. The Court held that the tribe was a “stranger to the accident” and the underlying claim arising from non-Indian fee land did not implicate sovereign interests. *See id.* at 441. Here, the Tribe is not a “stranger to the litigation,” the suit involves contractual obligations between the Tribe and the Smiths that implicate the Tribe’s sovereign interests of regulating reservation affairs. Thus, tribal jurisdiction over the claim is not clearly lacking to the point where the tribe’s jurisdiction is not even colorable.

Finally, the issuance of a stay will not serve the public interest and will substantially injure the Tribal Council, the EDC, and the EDC’s CEO and Accountant. The stay is not in the public interest for the policy reasons set forth in *National Farmers*. Both the Tribe and the federal government have sovereign interests in encouraging tribal self-government and self-determination through tribal court systems. Additionally, if the Tribe must litigate in federal

court prior to exhaustion of tribal remedies the parties will have do so without a developed record which necessarily consists of additional litigation costs to re-litigate issues that the tribal court is in a better position to determine. A stay is not in the public interest and will substantially injury the other parties to the litigation. Therefore, this Court should not issue a writ of mandamus to the trial court staying this suit.

II. The Yuma Indian Nation, the YIN Economic Development Corporation, and the CEO and Accountant are all protected from suit by the Tribe's sovereign immunity which was never waived.

Sovereign immunity is “among the core aspects of sovereignty that tribes possess.” *Michigan*, 134 S.Ct. at 2027. The common law sovereign immunity possessed by the Tribe is “a necessary corollary to Indian sovereignty and self governance.” *Michigan*, 134 S.Ct. at 2030 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986). In the tribe's courts, “the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity.” *Kiowa Tribe of Okla. v. Manufacturing Tech. Inc.*, 523 U.S. 749, 760 (1998) (citing *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).

A tribe's sovereignty “implies immunity from lawsuits.” *Michigan*, 134 S.Ct. at 2039. Tribes “enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” *Kiowa*, 523 U.S. at 759. Tribal immunity “is settled law” and the judiciary has deferred to Congress in limiting the scope of tribal immunity. *Id.* at 756-59. Tribes enjoy immunity “because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy.” *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

A. Sovereign immunity bars the Smiths’ suit against the Yuma Indian Nation because Congress has not authorized the suit and the tribe has not waived its immunity.

A tribe’s sovereign immunity is limited only “where Congress has authorized the suit or the tribe has waived its immunity.”¹ *Kiowa*, 523 U.S. at 754. Abrogation of tribal sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 58. Tribal immunity “is a matter of federal law and is not subject to diminution by the States.” *Kiowa*, 523 U.S. at 756. There is a “high threshold” for a valid waiver of immunity, *Ransom v. St. Regis Mohawk Educ. & Cmty Fund, Inc.*, 658 N.E.2d 989, 995 (N.Y. 1995), and a strong presumption against waiver of tribal sovereign immunity. *Demontiney v. United States ex rel. Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). “Nothing short of an express waiver satisfies the *Santa Clara Pueblo* standard.” *Am. Indian Agric. Credit Consortium, Inc.*, 780 F.2d at 1375.

Tribes and people who enter into dealings with a tribe “long have known how to waive sovereign immunity when they so wish.” *Id.* at 1379. In *Merrion v. Jicarilla Apache Tribe*, the tribe passed a tribal resolution to waive its immunity. 617 F.2d 537 (1980). In *Merrion*, non-Indian lessees who produce oil and gas from reservation lands sued the tribe after the tribe passed an ordinance for an oil and gas severance tax. Included in the ordinance was an express consent to suits against the tribe to be settled in the United States District Court or in the tribe’s court. In addition, the ordinance was approved by the representative of the Secretary of the Interior. Given that the ordinance was an official ordinance directly from the tribe, that it specified courts in which suits could be heard, and the fact that it was approved by the Secretary of the Interior’s office, the court found the tribe had waived immunity.

¹ Here, there was no express authorization from Congress to abrogate the tribe’s immunity. Therefore, this brief discusses only a tribal waiver of immunity, of which there was none.

Here, in contrast to *Merrion*, there was no unequivocal waiver of the tribe's immunity in the contract with Thomas Smith. The tribe is governed by the Tribal Code which requires that "unless specifically waived by a *resolution adopted by the Tribe* specifically referring to such, the Tribe shall be immune from suit..." YIN TRIBAL CODE, Tit. 1, § 1-919 (emphasis added). In contrast to the tribal resolution in *Merrion*, here, the tribe did not pass a resolution affirmatively waiving the tribe's immunity. Here, even though the Tribal Code explicitly requires a resolution by the tribal council to waive immunity, as in *Merrion*, no such resolution was adopted by the tribe. While the contract provided, "for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction," R. at 1, it clearly did not meet the requirement of tribal council approval in the form of a resolution. Unlike *Merrion*, where the tribe passed an ordinance with a waiver of consent, here there was no such tribal council ordinance or resolution. While the tribe in *Merrion* also received approval from the office of the Secretary of the Interior, there is nothing comparable here. The waiver of immunity in *Merrion* is an example of a clear and unequivocal waiver of tribal immunity. That high standard is not present in this case.

Another case that shows the high bar of waiving immunity clearly and unequivocally is *Alzheimer & Gray v. Sioux Mfg Corp.*, 983 F.2d 803 (7th Cir. 1993). In *Alzheimer*, a tribal corporation contracted with a non-Indian corporation to manufacture military cloth and helmets. During negotiations, the non-Indian corporation drafted and submitted a nine-page letter of intent. Included in the letter of intent was, *inter alia*, a provision entitled "Sovereign Immunity." *Id.* at 807. This section provided that the tribe would "waive all sovereign immunity in regards to all contractual disputes." *Id.* The letter of intent also provided that Illinois state laws will be binding and that parties agree to the venue and jurisdiction of federal

and state courts within the state of Illinois. *Id.* The tribal code provided that a tribal corporation could waive immunity through its charter. *Id.* at 812. In *Altheimer*, the corporation's charter provided that sovereign immunity "is hereby expressly waived." *Id.* The court found that the language in the tribal code authorizing tribal corporations to waive immunity in their charters, the subsequent waiver in the charter, and the letter of intent with the clause expressly waiving immunity did in fact waive sovereign immunity.

Here, in contrast to *Altheimer*, the only evidence of a possible waiver of immunity, is the contract where it states that any and all disputes arising from the contract to be litigated in a court of competent jurisdiction. Although the contract includes that statement, according to the Tribal Code, any waiver of immunity *must* be approved by a tribal resolution specifically waiving immunity. Without a tribal resolution specifically waiving immunity, the contract alone was not a waiver of immunity. In *Altheimer*, there was a letter of intent, a tribal code that authorized the corporation to waive immunity, and the waiver in the charter to support the waiver of immunity. Here, there is only the language in the contract and the very specific requirement of a tribal resolution specifically waiving immunity, which was not met. Thus, without more, the language in the contract is insufficient to waive immunity.

The lineage of cases developing the bounds of immunity, "compel us to conclude that nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *Am. Indian Agric. Credit Consortium, Inc.*, 780 F.2d at 1379. Here, the tribe is bound by its Tribal Code to secure a tribal resolution explicitly waiving immunity. No such resolution exists. Thus, the tribe is protected from suit by sovereign immunity, which has not been waived.

B. Sovereign immunity bars the Smiths’ suit against the YIN Economic Development Corporation because the EDC was operating as an “arm of the tribe” and did not waive its immunity.

Tribal sovereign immunity protects commercial entities operating as arms of a tribe. *Memphis Biofuels, LLC. v. Chickasaw Nation Indus.*, 585 F.3d 917, 920-921 (6th Cir. 2009). Courts have stated that the proper inquiry is “whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Tribal sovereign immunity can “extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe’s immunity.” *Breakthrough Mgmt. Group, Inc., v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). “When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.” *Allen*, 464 F.3d at 1046.

The test for whether a tribal entity is acting as an arm of the tribe is varied throughout the federal circuits and state courts while the Supreme Court has been silent as to the test that should apply. The Tenth Circuit has adopted a six-factor test, which encompasses many of the factors deemed relevant by other courts, in order to determine whether there is a sufficiently close relationship between the tribe and the tribal entity to share tribal immunity. *Breakthrough Mgmt. Group*, 629 F.3d 1044. The six factors are, but not limited to: (1) their 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; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity

and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities. *Id.* at 1181.

In *Breakthrough Mgmt. Group, Inc., v. Chukchansi Gold Casino and Resort*, a tribal corporation asserted its immunity against a suit from a business training company. 629 F.3d 1044. In applying the circuit's six factor test, first, the Tenth Circuit found that the tribe had created the entity under tribal law by the tribe acting in its governmental capacity, that the entity was an instrumentality and authorized agency of the tribe, and was wholly owned by the tribe. *Id.* at 1191-92. Second, the entity created a financial benefit to the tribe, and promoted the economic development, self-sufficiency, self-determination, a strong tribal government, and the ability to provide services and benefits to tribal members. *Id.* at 1192-93. Third, looking at the structure and ownership of the entity, the entity's board members are the same members of tribal council, but twelve of the fifteen directors are not tribal members. *Id.* at 1193. As for the fourth factor, the court found it was clear that the tribe intended the entity to have sovereign immunity, as evidenced by a provision in the governing ordinance that discussed how the entity could waive sovereign immunity. *Id.* at 1193-94. For the fifth factor, discussing the financial relationship, the court found that the tribe relied on the entity to generate revenue in order to fund governmental functions. *Id.* at 1194-95. Lastly, the court found federal policies of self-determination and economic development furthered by recognizing immunity. *Id.* at 1195. The court stated, "Immunity from suit for economic entities 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.'" *Id.* (quoting *Allen*, 464 F.3d at 1047). The court ultimately found that the tribal entity was sufficiently close to the tribe to establish tribal immunity.

Here, as in *Breakthrough*, the YIN Economic Development Corporation, is sufficiently close to the tribe as to qualify as an arm of the tribe. For the first factor, examining the creation of the EDC, the EDC was created by the tribe under a tribal commercial code with the goal of “promot[ing] the prosperity of the Nation and its citizens.” R. at 1. As in *Breakthrough*, here, the tribe’s own descriptions of the entity are significant. The charter describes the EDC as “a wholly owned subsidiary of the Nation” and as “an arm-of-the-tribe.” As in *Breakthrough*, defining the EDC as a “wholly owned subsidiary” and “an arm-of-the-tribe” “naturally suggests... a close relationship to the tribe.” *Breakthrough*, 629 F.3d at 1192. This factor weighs in favor of tribal immunity. For the second factor, similar to *Breakthrough*, the EDC was created to develop successful economic endeavors. Just as in *Breakthrough*, the allocation of revenue clearly benefits the tribe. Fifty percent of EDC’s profits are to be paid to the tribe’s general fund on an annual basis. The EDC also requires tribal preference in hiring and has employed an average of twenty-five tribal citizens full-time. This factor weighs in favor of tribal immunity. As to the third factor, similar to *Breakthrough* where all the board members were tribal members, but twelve of the fifteen directors were not tribal members, the EDC requires that three of the directors have to be tribal members and two have to be non-Indians or Indians from another tribe. The Tribal Council retained the authority to remove any director by a 75% vote. The majority presence of tribal members as directors and the fact that the council has the power to remove any director shows the tribe’s control over the corporation. This factor weighs in favor of tribal immunity. For the fourth factor, just as in *Breakthrough*, it is abundantly clear that the tribe intended the EDC to share in its immunity. The charter mandates “that the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law.” The tribe further provided that the provision was

included in the charter “to protect the entity and the Nation from uncontested litigation and to assist in the success of the EDC’s endeavors.” This factor weighs in favor of tribal immunity. The fifth factor, analyzing the financial relationship between the tribe and the EDC, also weighs in favor of immunity. The EDC was created with a \$10 million loan from the tribe’s general fund. Thus far the EDC has only repaid the tribe \$2 million. The lack of repayment has a significant effect on the tribe. This factor also weighs in favor of immunity. The last factor considers whether the overall purposes of tribal sovereign are furthered by a recognition of immunity. As in *Breakthrough*, the activities of the EDC “plainly promote and fund the Tribe’s self-determination through revenue generation and the funding of diversified economic development.” 1195. This last factor also weighs in favor of tribal immunity. After weighing each of the Tenth Circuits factors of determining whether the tribal entity is sufficiently close to the tribe, it is clear the EDC is an arm of the tribe that is entitled to the tribe’s immunity.

After establishing sovereign immunity applies to the EDC, courts next look to whether EDC waived the immunity, which here it did not. As with tribes themselves, tribal entities may not be sued absent consent to be sued. *Kiowa*, 523 U.S. at 757. While courts are split on the effect of a “sue and be sued” clause, the “strong weight of authority holds that enactment of a sue or be sued clause, in and of itself, does not constitute an effective waiver of sovereign immunity.” *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 20 (1st Cir. 2000).

For a waiver to be found valid, “waivers of tribal sovereign immunity ‘must be traceable to an official government action (statute, ordinance, resolution) that expressly and unequivocally waives immunity or empowers particular officers to waive immunity.’” *Ransom v. St. Regis Mohawk Educ. & Comm.*, 658 N.E.2d at 993 (quoting William V. Vetter, *Doing*

Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity and Subject Matter Jurisdiction, 36 ARIZ.L.REV. 169, 193(1994)). In *Memphis Biofuels, LLC, v. Chickasaw Nation Industries, Inc.*, the Sixth Circuit upheld a tribe’s immunity when a contractual provision purported to expressly waive the tribe’s sovereign immunity. In *Memphis Biofuels*, a non-Indian corporation contracted with a tribal corporation for services. The parties signed a contract in which the non-Indian corporation insisted on a contractual provision purportedly expressly waiving any sovereign immunity and a representation and warranty that the waiver was valid and enforceable. Although the parties signed the contract with the waiver provision, in the drafting document, there were two comments from the tribe’s in-house lawyers that stated approval from the board of the tribal corporation was necessary to waive sovereign immunity. In addition to the lawyer’s comments, the charter that created the Indian corporation stated that waiver of sovereign immunity requires board approval. Thus, without board approval, the Sixth Circuit found the tribe’s immunity remained intact, regardless of the contractual provision that included the waiver.

Here, as in *Memphis*, there was no waiver of immunity. Like the tribal entity in *Memphis*, the EDC is required to secure a tribal resolution to effectuate a waiver. The EDC, as a wholly owned corporation of the tribe, is subject to the Tribal Code. The Tribal Code provides that a wholly owned corporation has “the power to sue and is authorized to consent to be sued ... provided ... consent is 1) explicit, 2) contained in a written contract or commercial document to which the corporation is a party, and 3) specifically approved by the board of directors of the corporation.” YIN TRIBAL CODE, Tit. 11, § 11-1003. EDC’s broad authorization to “sue and be sued” does not meet the standard of waiving immunity as required by the Tribal Code. As in *Memphis*, securing additional approval for a waiver of immunity is

required. In *Memphis* and in the present case, securing board approval is a prerequisite to waiving immunity. In *Memphis*, the required approval was not obtained and the court found the tribal entity did not waive its immunity, regardless of the contractual provision purportedly affecting a waiver. Similarly, here, the broad “sue and be sued” clause alone does not effectuate a waiver without the required approval of the board.

Further, a broad authorization of the capacity to sue and be sued does not automatically waive tribal immunity. While the EDC Charter contains a broad authorization of the capacity to sue and be sued, this is insufficient to waive tribal immunity. The charter merely explains that the EDC was an entity that had the potential to sue or be sued, provided other conditions were met, such as board approval to waive immunity.

Further, “most courts have reasoned that tribal adoption of a charter with such a clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal immunity.” *Native American Distrib. v. Seneca-Cayuga Tobacco*, 546 F.3d 1288, 1293 (10th Cir. 2008) (quoting Felix S. Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 7.05(1)(c) (Nell Jessup Newton ed., 2005)). In discussing a broad sue and be sued provision, the New York Court of Appeals stated, “the mere fact that a tribal corporation, by statute ... is empowered to ‘sue and be sued’ does not automatically subject that corporate entity to any court’s jurisdiction where jurisdiction is otherwise lacking. *Ransom*, 658 N.E.2d at 995. The court stated, “the general powers provisions of the corporation statutes are not self-executing, and express invocation of the power to sue and be sued and submission to a particular forum by official tribal action is required.” *Id.* Even if a sue and be sued clause was sufficient to waive tribal immunity, which it is not, the Tribal Code clearly requires any waiver be approved by tribal resolution.

As in *Sanchez v. Santa Ana Golf Club, Inc.*, where a sue and be sued clause was included in the corporate charter, the court found the inclusion of the clause was ineffective where additional requirements were necessary to effectuate the clause. 104 F.3d 548 (N.M.App. 2004). In *Sanchez*, a former employee sued the tribe for wrongful termination and defamation. In the charter creating the corporation, in addition to the sue and be sued clause, was the provision that mandated “that all waivers must be in the form of a resolution, which shall be duly adopted by [the] board of directors.” *Id.* at 552. Ultimately, the court found that because of the additional requirement of a resolution, the sue and be sued clause alone was insufficient to unequivocally waive immunity. The court stated, “The clause... in charter could only be made effective if certain requirements were met, and since those requirements were not met, the clause had no effect.” *Id.* Thus, the court found the tribe had not waived immunity. Here, as in *Sanchez*, additional requirements were necessary to effectuate a waiver, which were not met. To effectuate a waiver, the Tribal Code requires explicit, written approval by the board of directors of the corporation. Without this approval, as in *Sanchez*, any waiver is insufficient.

EDC’s charter includes two seemingly contradictory clauses. The charter states both that the EDC is authorized “to sue and be sued,” *and* that “the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law.” R. at 2. The inclusion of these inconsistent statements points to the conclusion that the tribe did not intend to waive sovereignty, and certainly does not meet the standard of a clear and unequivocal waiver. All ambiguities in waivers of sovereign immunity “are to be strictly construed in favor of the tribe.” *Rupp v. Omaha Indian Tribe*, 45 F.3d 1231, 1245 (8th Cir. 1995); *Sanchez v. Santa Ana Golf Club, Inc.* 104 P.3d 548, 551 (N.M.App. 2004). The charter as a whole would be contradictory if the court took the sue and be sued clause as a waiver of immunity. The charter

shows the intent of the tribe to extend its immunity to the corporation. Thus, the tribe clearly did not include the clause to waive immunity.

Thus, the YIN Economic Development Corporation is entitled to the tribe's sovereign immunity as an arm of the tribe. This immunity was not waived by Congress nor was it waived by the tribe or the tribal entity.

C. Tribal sovereign immunity bars the Smiths' suit against the Tribe's CEO and Accountant because the Tribe is the real party in interest.

A tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). Tribes necessarily exercise their sovereignty through the actions of individuals, thus, tribal sovereign immunity protects tribal officers acting within the scope of their lawful authority. *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d at 1111 (citing *Dawavendewa v. Salt River Project Agric. Improvement and Power Distrib.*, 276 F.3d 1150, 1159-61 (9th Cir. 2002). "The interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." *Native American Distrib.*, 546 F.3d at 1296 (quoting *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989)). Sovereign immunity protects the actions of tribal officers to prevent plaintiffs "from circumventing tribal sovereign immunity by simply substituting a tribal officer for the tribe. *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1111.

In an "official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v. Clarke*, 137 S.Ct. 1285, 1292 (2017). The "real party in interest is the government entity, not the named official." *Id.* The general rule "is that relief sought nominally against an officer is in fact

against the sovereign if the decree would operate against the latter.” *Native American Distrib.*, 546 F.3d at 1297 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)). “Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law.” *Lewis*, 137 S.Ct. at 1292.

Tribal sovereign immunity “extends to tribal officials when acting in their official capacity and within the scope of their authority.” *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Both the Ninth and the Second Circuits have not seen any “relevant difference between tribal employees and officials. *Cook*, 548 F.3d at 727 (citing *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004)). Thus, the CEO and Accountant are considered to be afforded the same protection as tribal officials in the immunity analysis. Here, the Smiths’ suit against the CEO and the Accountant for monies due under their contracts and for defamation would impact the sovereign tribe itself. The monies due under the contracts would impact the tribe’s finances and would come out of the tribe’s coffers, not directly from either the CEO or the Accountant.

To be protected by sovereign immunity, the action must have been taken while acting in their official capacity and within the scope of their authority. In *Ransom v. St. Regis Mohawk Educ. & Comm.*, the court found the tribal employees were protected with immunity in terminating the petitioners. Petitioners sued the tribe and tribal employees after being fired without complying with the tribe’s employment policy and procedures manual. The court found that failing to following the tribe’s manual was only, “at most... the erroneous exercise of their delegated duties.” *Ransom*, 658 N.E.2d at 995.

Here, not paying the monies due under contract, was an action taken under the position of the CEO and the Accountant in their professional, official capacities. The decision not to

make the payments was a decision made in their professional judgment in assessing whether the Smiths were entitled to the money purported to be owed. Any judgment against either the CEO or the Accountant on this point is an action against the sovereign and is forbidden by the doctrine of sovereign immunity. As in *Ransom*, any decision not to pay the Smiths monies due under their contracts would be “erroneous” at worst. Whether or not to pay the money under the contract is a decision for the CEO and Accountant to make in their official capacities.

The CEO and the Accountant are also protected under the Tribal Code, which explicitly extends immunity to “its officers and employees ... for any liability arising from the performance of their official duties.” YIN TRIBAL CODE, Tit. 1, § 1-919. Should the Court find either the CEO or Accountant liable for defamation, if immunity of the tribe is not found to extend to their benefit, personal immunity would protect them both from suit. The CEO and the Accountant, in acting in their official capacities and within the scope of their authorities, are protected by tribal sovereign immunity and immune from suit.

CONCLUSION

For all of the foregoing reasons, the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith; as such, the trial court should not stay this suit to allow the Smiths to seek a ruling in Arizona federal district court. Furthermore, sovereign immunity and other forms of immunity protect the Yuma Indian Nation, the EDC CEO and Accountant from the Smiths’ claims.

Respectfully submitted,

Team 183

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