

No. 17-024

IN THE

Yuma Indian Nation Supreme Court

YUMA INDIAN NATION,

Plaintiff/ Appellee,

v.

THOMAS SMITH & CAROL SMITH.

Defendants/ Appellants.

**Interlocutory Appeal
From the Yuma Indian Nation Trial Court**

BRIEF FOR APPELLANT

Team Identification Number: 258

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

 I. Statement of the Proceedings..... 2

 II. Statement of the Facts 3

SUMMARY OF ARGUMENT 7

ARGUMENT..... 9

 I. Standard of Review 9

 II. The Yuma Indian Nation (“YIN”) lacks subject matter jurisdiction of the claims against the Smiths because the tribe lacks civil authority to regulate the contract between the tribe and a nonmember, when the contract was signed and breached outside the reservation, on State land. In addition, YIN lacks personal jurisdiction over Carol, because the tribe does not have sufficient minimum contacts and purposeful availment to adjudicate claims against her. 9

 A. The YIN lacks subject matter jurisdiction over this claim, because the claim arises outside the reservation, on State land. 10

 B. YIN does not have personal jurisdiction to adjudicate claims against Carol in Tribal Court. 17

 C. It is not necessary to exhaust tribal remedies because it is clear that the tribe lacks jurisdiction. 19

 III. Sovereign immunity does not protect the Yuma Indian Nation, the Economic Development Corporation, or the Economic Development Corporation’s employees from suit as immunity was waived by the corporation’s charter and does not extend to the employees of the tribe. 21

 A. The Economic Development Corporation is not an “arm-of-the-tribe” and, as such, sovereign immunity does not extend to the corporation to protect it from suit 22

 B. Sovereign immunity does not extend to Molly Bluejacket or Fred Captain as they were sued under their individual capacity 25

 C. The Yuma Indian Nation waived its tribal sovereign immunity both unequivocally and clearly through the YIN EDC’s contract provisions with Carol and Thomas Smith.28

CONCLUSION..... 31

TABLE OF AUTHORITIES

CONSTITUTIONS

1 W.T.C. 1 § 1-104 (2)(a) (1989)..... 17
2 W.T.C. 1 § 2-102 (1994)..... 9

STATUTES

25 U.S.C. § 81..... 21
25 U.S.C. §1302 (a)(8)..... 17, 19

FEDERAL SUPREME COURT CASES

Atkinson Trading Co., Inc. v. Shirley,
532 U.S. 645 (2001)..... 14, 15

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,
532 U.S. 411 (2001).....27, 28, 29, 30

Cherokee Nation v. Georgia,
30 U.S. 1 (1831)..... 21

Hanson v. Denckla,
357 U.S. 235 (1958)..... 18

*International Shoe Co. v. State of Wash., Office of Unemployment Compensation and
Placement,*
326 U.S. 310 (1945)..... 18, 19

Iowa v. Mut. Ins. Co. v. LaPlante,
480 U.S. 9 (1987)..... 19

<i>Kentucky v. Graham,</i>	
473 U.S. 159 (1985).....	25
<i>Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,</i>	
523 U.S. 751 (1998).....	22
<i>Lewis v. Clarke,</i>	
137 S. Ct. 1285 (2017).....	25, 26, 27
<i>Montana v. United States,</i>	
450 U.S. 544 (1981).....	10, 11, 12
<i>Nevada v. Hicks,</i>	
533 U.S. 353 (2001).....	12, 13, 14
<i>Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.,</i>	
554 U.S. 316 (2008).....	14, 15, 19
<i>Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.,</i>	
554 U.S. 316 (2008).....	16, 18
<i>Santa Clara Pueblo v. Martinez,</i>	
436 U.S. 49	21, 22, 27
<i>Strate v. A-1 Contractors,</i>	
520 U.S. 438 (1997).....	10
<i>Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,</i>	
476 U.S. 877 (1986).....	22

FEDERAL APPELLATE COURT CASES

<i>Allen v. Gold Country Casino,</i>	
464 F.3d 1044 (9th Cir. 2006)	22, 23

<i>Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort,</i> 629 F.3d 1173 (10th Cir. 2010)	23, 24, 25
<i>Cook v. AVI Casino Enterprises, Inc.,</i> 548 F.3d 718 (9th Cir. 2008)	23
<i>Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc,</i> 569 F.3d 932 (9 th Cir. 2009)	13
<i>Smith v. Salish Kootenai College,</i> 434 F.3d 1127 (9 th Cir. 2006)	15, 16
<i>State of Mont. Dept. of Transp. v. King,</i> 191 F.3d 1108 (9 th Cir. 1999)	14, 20
<i>Stock West, Inc. v. Confederate Tribes of the Colville Reservation,</i> 873 F.2d 1221 (9 th Cir. 1989)	10
<i>Wilson v. Marchington,</i> 127 F.3d 805 (9 th Cir. 1997)	9, 13

TRIBAL CASES

<i>Monestersky v. Hopi Tribe,</i> 2002 Hopi App. LEXIS 6 at *1 (2002).....	9
<i>Redsleeve Golf, LLC v. Sequoyah Nat. Golf Club, LLC,</i> 2014 WL 11209947 (Eastern Cherokee Ct. July 9, 2014).....	23

QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation Trial Court stay the suit brought by the Yuma Indian Nation regarding breach of contract pending a ruling in Arizona Federal District Court or does the Yuma Indian Nation have personal and/or subject matter jurisdiction over Thomas Smith and Carol Smith.
2. Whether the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the Economic Development Corporation's CEO and Accountant are protected by sovereign immunity from Thomas Smith and Carol Smith's counterclaims.

STATEMENT OF THE CASE

I. Statement of the Proceedings

This case comes to the Court upon grant of interlocutory appeal by the Yuma Indian Nation Supreme Court from the Yuma Indian Nation Trial Court. The Yuma Indian Nation filed suit in the Yuma Indian Nation Trial Court for breach of contract, violation of fiduciary duties, and violation of the duty of confidentiality. The Yuma Indian Nation seeks the amount of liquidated damages set in the contract made with appellants, Thomas Smith and Carol Smith. The appellants filed special appearances and identical motions to dismiss for lack of personal and subject matter jurisdiction in the trial court or, in the alternative, to stay the suit in tribal court while the appellants pursue a ruling in Arizona federal district court. The appellants' motions were denied by the trial court. The appellants then filed answers denying claims and filed counterclaims against the appellees for monies due under their contract and for defamation. Appellants also impleaded the Yuma Indian Nation Economic Development Corporation, the Economic Development Corporation's CEO Fred Captain, and the Economic Development Corporation's accountant Molly Bluejacket in both their official and individual capacities under the same claims as made against the Yuma Indian Nation. After the trial court dismissed all the appellant's counterclaims against both the Yuma Indian Nation and the third-party defendants, the appellants filed for interlocutory appeal in the Yuma Indian Nation Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the Yuma Indian Nation Trial Court to stay the suit. The Yuma Indian Nation Supreme Court granted review of two issues: (1) Whether the Yuma Indian Nation has personal and/or subject matter jurisdiction over Thomas Smith and

Carol Smith, two non-Indian contracted employees with the Yuma Indian Nation and the YIN Economic Development Corporation; and (2) whether the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the CEO and Accountant of the YIN Economic Development Corporation are protected by sovereign immunity from suit brought by Thomas Smith and Carol Smith.

II. Statement of the Facts

The Yuma Indian Nation (hereafter referred to as “YIN”), is an Indian tribe located in southwestern Arizona. [R. at 1]. In 2007, YIN signed a contract with Thomas Smith, a certified financial planner and accountant to provide YIN with financial advice regarding economic issues on an as-needed basis. *Id.* The contract required that communications and economic development plans communicated with YIN be kept confidential and that any and all disputes arising from the contract be litigated in a court of competent jurisdiction. *Id.* The contract was signed by both parties in Mr. Smith’s office in Phoenix, Arizona, where he both lives and works. *Id.*

Thomas Smith provided YIN with financial advice on various economic development issues from 2007-2017. [R. at 1]. Mr. Smith exchanged emails and telephone calls with members of the tribal council up until 2009, when YIN formed the “YIN Economic Development Corporation” (hereafter referred to as “EDC”), after which Mr. Smith primarily communicated with Fred Captain, CEO of YIN EDC, and Molly Bluejacket, employee/accountant of YIN EDC. *Id.* At this time, Mr. Smith also prepared financial reports and presented them to the YIN Tribal Council on a quarterly basis during Council meetings on the reservation. *Id.*

The EDC was created in 2009 with a one-time 10 million-dollar loan from the YIN under the tribal commercial code. [R. at 1]. The tribal commercial code authorizes YIN to create and charter both public and private corporations to pursue both on and off-reservation business. *Id.* The EDC corporate charter specifically provides that its creation is “to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona.” *Id.* The tribal council provided via corporate charter that EDC operate as a wholly owned subsidiary of and an “arm-of-the-tribe.” *Id.* The EDC, however, was operated by its own board of directors, three of which were tribal citizens and two who were non-Indian or citizens of other tribes. *Id.* The board of directors will be experienced in business and serve staggered terms. *Id.* Upon a director’s term expiration, they will either be reelected or replaced. *Id.* Within the charter, the tribal council retains the right to remove a director for cause or no cause at any point during their tenure by a 75 percent vote. *Id.* The charter also requires that the EDC apply tribal preference when hiring employees or contracting with outside entities and has employed an average of 25 tribal citizens full time since its inception in 2009. [R. at 2]. By charter, all employees are protected by tribal sovereignty to prevent unconsented litigation and to protect the success of EDC. *Id.* Furthermore, the EDC is authorized to buy and sell real property in fee simple title on or off the reservation, to buy other types of property in other forms of ownership, and to sue and be sued. *Id.*

The EDC could not borrow, lend money, or encumber the assets of the YIN. [R. at 2]. Additionally, EDC was required to keep financial records and submit them to the tribal council on a quarterly basis for review and approval. *Id.* The charter further provides that the

YIN will receive fifty percent of EDC net profits in the general fund on an annual basis. *Id.* To date, the EDC has repaid 2 million of its original 10 million-dollar loan. *Id.*

In 2010, Carol Smith, sister of Thomas Smith, signed a contract identical to Thomas Smith's original 2007 contract with written permission of the tribal council to provide YIN with advice regarding stocks, bonds, and securities issues. [R. at 2]. This contract specifically requires Carol Smith to abide by the original terms of the Thomas Smith contract. *Id.* Carol Smith lives and works in Portland, Oregon and provides her advice through her brother Thomas Smith via email, telephone, and postal delivery service. *Id.* Thomas Smith then forwarded her advice to Molly Bluejacket, the tribal council, and the EDC CEO as Carol Smith has only visited the reservation on two occasions. *Id.* Carol Smith submits her monthly bills via email to Fred Captain and the EDC then forwards her payments via mail. *Id.*

In 2016 the EDC explored the possibility of engaging in marijuana cultivation. [R. at 2]. Although marijuana is legal for medical use, it is not legal for recreational use in Arizona as a statewide referendum failed to pass in fall of 2016. *Id.* Despite the failure of this referendum, the EDC persuaded the YIN Tribal Council to enact a tribal ordinance which would make recreational use and cultivation of marijuana legal on the reservation. *Id.* After conferring with Thomas Smith several times regarding the development of a marijuana operation, Thomas Smith informed his acquaintance, the Arizona Attorney General, of EDC's plans due to his and Carol Smith's moral opposition to being involved with the marijuana business. *Id.*

Subsequently, the Arizona Attorney General wrote a cease and desist letter to the YIN and the EDC regarding the development of a recreational marijuana business. [R. at 3]. The

tribal council filed suit against Thomas Smith and Carol Smith for breach of contract, violation of fiduciary duties, and violation of their duty of confidentiality in tribal court. *Id.*

SUMMARY OF ARGUMENT

The YIN Tribal Council wish to file suit against the Smiths in Tribal Court for breach of contract. However, the Smiths request the YIN Supreme Court to stay this suit while the Smiths seek a ruling in Arizona Federal District Court for the reasons herein stated.

The YIN Tribal Courts must have subject matter and personal jurisdiction over the claims and the defendants in order to hear this case. The subject matter jurisdiction pertains to the YIN's adjudicative jurisdiction over the Smiths, whom are nonmembers, in a breach of contracts claim for a contract that was signed off the reservation and breached off the reservation, in State land. In order for the YIN Tribal Court to retain adjudicative jurisdiction over the matter, it must first establish that it can regulate the contract between the YIN and the Smiths. However, under the Montana rule, the YIN Tribal Court lacks regulatory jurisdiction because the contract was signed and breached outside the reservation boundaries, in State land. Without regulatory jurisdiction, the YIN Tribal Court lacks adjudicative jurisdiction and cannot hear the case.

The YIN Tribal Court cannot prove that the Smiths consented to the tribal jurisdiction nor can it prove that this case falls within the Montana rule and its exceptions. Furthermore, the YIN Tribal Court does not have personal jurisdiction over Carole, because she did not purposefully avail herself to the tribe, nor did she reach out to the YIN to sufficiently establish minimum contacts, which does not offend the traditional notion of fair play and substantial justice. The defendants concede that the YIN Tribal Court has personal jurisdiction over Thomas. However, the YIN Tribal Court does not have the required subject matter and personal jurisdictions to hear this case. Thus, it is not necessary to exhaust tribal remedies because it is clear that the YIN Tribal Court lack jurisdiction. Thus, the defendants recommend that the YIN Supreme Court should stay this suit while the Smiths seek a ruling in the Arizona Federal District Court.

In the alternative, should the Yuma Indian Nation Supreme Court determine that they have jurisdiction over the case at hand, then the YIN, EDC, EDC CEO Fred Captain, and EDC accountant Molly Bluejacket are not protected by sovereign immunity. Because

sovereign immunity was waived in the EDC charter and sovereign immunity does not otherwise extend to the employees of the EDC sued in their individual capacity, Thomas and Carol Smith may proceed with their counterclaim against YIN and all named third-parties for the monies owed under the contract with YIN EDC and defamation of their professional skills.

ARGUMENT

I. Standard of Review

The Yuma Indian Nation Trial Court dismissed the Appellants' motion to dismiss for lack of jurisdiction and found that the Appellant's counterclaims were barred by sovereign immunity. [R. at 3]. The Yuma Indian Nation shall review the Trial Court's conclusions of law de novo. *See Monestersky v. Hopi Tribe*, 2002 Hopi App. LEXIS 6 at *1 (2002) (reviewing trial court's conclusion of law de novo on appeal).

II. **The Yuma Indian Nation (“YIN”) lacks subject matter jurisdiction of the claims against the Smiths because the tribe lacks civil authority to regulate the contract between the tribe and a nonmember, when the contract was signed and breached outside the reservation, on State land. In addition, YIN lacks personal jurisdiction over Carol, because the tribe does not have sufficient minimum contacts and purposeful availment to adjudicate claims against her.**

The Tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968 [hereinafter, ICRA], as amended, any specific restrictions or prohibitions contained in federal law. 2 W.T.C. 1 § 2-102 (1994). For a Tribal Court to hear a case it must have subject matter jurisdiction under federal and tribal law, and personal jurisdiction over the defendant. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02[2], at 604 (Nell Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK]; *See also Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (Federal Courts must neither recognize nor enforce tribal judgements if tribal court did not have personal and subject matter jurisdiction or if defendant was not afforded due process); *See also Stock West, Inc. v. Confederate Tribes of the Colville*

Reservation, 873 F.2d 1221, 1227-1228 (9th Cir. 1989) (even if private contractor's consent was adequate to confer personal jurisdiction on tribal court in contract dispute with tribal corporations, the question of whether tribal court had subject matter jurisdiction would not be resolved).

A. The YIN lacks subject matter jurisdiction over this claim, because the claim arises outside the reservation, on State land.

Absent express authorization by federal statute or treaty, tribal jurisdiction over conduct of nonmembers exists only in a limited circumstance. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). As to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. *Id.* at 440. Meaning, if a tribe cannot regulate it, it cannot adjudicate it. For example, in *Montana v. United States*, the tribal court lacked the adjudicatory authority to exercise jurisdiction over nonmembers' hunting and fishing activities on fee land owned by them on the reservation, because the tribe failed to establish its regulatory authority over the activities of nonmembers on their fee lands. *Montana v. United States*, 450 U.S. 544, 545-546 (1981). Here, there is no express authorization by a federal statute or treaty, thus, in this very limited circumstance, the plaintiff will have to establish that it has regulatory authority over this claim, which it does not. The YIN lacks the authority to regulate the contract between the EDC and the Smiths, therefore, YIN lacks the authority to adjudicate the breach of contract between the two parties. The reason stems from the notion that the inherent sovereign authority of tribes is limited.

- i. The inherent sovereign authority of Indian tribes does not extend beyond tribal boundaries.*

The *Montana* rule pertains to the regulation of activities of nonmembers on fee land owned by them or alienated non-Indian land owned by them within the reservation, and it does not pertain to State land outside of the reservation. This is because the inherent authority of tribes does not extend outside of their respective Indian boundaries. In *Montana v. United States*, the Supreme Court held the tribe's inherent sovereignty could regulate non-Indians on reservations lands or lands held in trust for the tribes by the United States, but could not regulate activities of non-Indians on lands owned by nonmembers, unless through qualified exceptions. 450 U.S. 544, 545-546 (1981). The court reached this holding by first defining the parameters of the tribe's inherent sovereignty. The court recognized that tribes have the inherent sovereign authority to punish tribal members who violate tribal laws, to determine its memberships, regulate domestic relations among its members, and prescribe inheritance for its members, but implicit in the dependent status of Indian tribes is the limitation to determine their external relations. *Id.* at 563-564. This inherent sovereignty or exercise of tribal power could not extend past what is necessary to protect tribal self-government or to control internal relations, because it would be inconsistent with the dependent status of the tribes, unless it had express congressional delegation. *Id.* at 564. The court defined two exceptions for when a tribe can regulate the activities of nonmembers on fee land owned by them on the reservation. The court reasoned that "a tribe may retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands, and a tribe may regulate nonmembers or activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Id.* at 565. In addition, the court added that a tribe "may retain the inherent power to exercise civil authority over the

conduct of non-Indians on fee lands within its reservation when the 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. However, as a general matter, tribes do not possess authority over non-Indians who come within their borders because the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Id.* at 565. It is evident that the Supreme Court recognized this notion, because both exception includes the language that clearly sets the requirement of it being “within its reservation” or “on their reservation.”

ii. Ownership status of the land is a dispositive factor in the Montana rule and should hold significant weight when applying the Montana rule.

The ownership status of the land is a dispositive factor in this case. The Supreme Court recognized when the status of land was not a dispositive factor under the *Montana* rule. In *Nevada v. Hicks*, the Supreme Court asked if the Fallon Paiute-Shoshone Tribes of western Nevada could assert jurisdiction over civil claims against a state official who entered tribal land to execute a search warrant for evidence of an off-reservation crime. *Nevada v. Hicks*, 533 U.S. 353, 357 (2001). The court held that the tribes did not have jurisdiction over state officials coming on the reservation to investigate crimes that were committed off the reservation. *Id.* at 353-354. Simply put, tribes do not have the jurisdiction over state officials conducting official state business on the reservation. The court reasoned that principals in *Oliphant v. Squamish Indian Tribe*, drew no distinction based on the status of the land. *Id.* at 359 (the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, except to the extent necessary to protect tribal self-government or to control internal relations). Although the status of the land may be a dispositive factor in some cases, the existence of tribal ownership, alone, is not enough to support a regulatory

jurisdiction over nonmembers. *Id.* at 360 (limited to state officials investigating an off-reservation crime). Thus, the court eluded to the notion that ownership status of land is only one factor to consider in determining whether the regulation of the nonmember activities by a tribe is necessary to protect tribal self-government or to control internal relations, so that the tribe can assert tribal jurisdiction. *Id.* at 359-360.

Distinguishing the ownership status of land in the *Hicks* case with the ownership status of the land in this case, the contract and the breach of contract for the *Smiths* occurred off the reservation, whereas the state official in the *Hicks* case executed an investigation on the reservation. The difference being, *Hicks* involved a state official acting in his official capacity to investigate an off-reservation crime and here, there is no state official acting on behalf of the State's interest. The court in the *Nevada v. Hicks* limited the application of the Montana rule to the question of tribal-court jurisdiction over state officers enforcing state law. *Id.* at 376. Therefore, the status of land is a dispositive factor when generally applying the Montana exceptions and it should hold significant weight. *Compare, e.g., Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938 (9th Cir. 2009) (the courts supported the notion that the tribal jurisdiction is cabined by geography and does not extend beyond tribal boundaries and Tribal Courts are not courts of general jurisdiction, and a mere failure to affirmatively preclude tribal jurisdiction in statutes does not amount to a congressional expansion of tribal jurisdiction), *with Wilson v. Marchington*, 127 F.3d 805, 813-814 (9th Cir. 1997) (the Ninth Circuit held that the tribal court did not have jurisdiction over a personal injury action arising from a collision between a car driven by a member of the Indian tribe and a truck driven by a nonmember on a United States highway within the boundaries of an Indian reservation), *and State of Mont. Dept. of Transp. v. King*, 191 F.3d

1108, (9th Cir. 1999) (the Ninth Circuit held the tribe lacked jurisdiction to enforce an ordinance against a state for maintenance work on a state highway and the state was not required to exhaust tribal remedies before bring suit).

Because tribes do not have the inherent sovereign authority to regulate the activities of nonmember activities outside of tribal land, the YIN does not have the inherent sovereign authority to regulate the contract signed by YIN and the Smiths, including the breach of contract that occurred outside of the reservation. Here, the ownership of land status is significant and dispositive because this civil action does not involve state officials acting within their official capacity. Therefore, the location of the contract agreement between Thomas and the YIN, and the location of the breach of contract precludes the application of the Montana rule. Thus, the YIN Tribal court lacks subject matter jurisdiction.

iii. Even if the tribe can qualify the Montana Exceptions, it fails to meet the exceptions.

The Supreme Court has never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). However, if this court did apply the Montana rule, it would not pass the two exceptions under the analysis of other case laws. “These exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it.” *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 330 (2008).

The first exception is not met. A nonmember’s consensual relationship with an Indian tribe in one area does not trigger tribal civil authority over the nonmember in another area. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Montana’s consensual

relationship exception requires that the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. *Id.* at 656. Simply entering into some kind of relationship with tribes does not give the tribal courts general license to adjudicate claims involving a nonmember. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir. 2006).

Here, the YIN contracted with Thomas on an as-needed basis regarding financial advice regarding economic development. Thomas breached the confidentiality agreement of the contract because he informed the Arizona Attorney General of YIN's illegal pursuit to engage in marijuana cultivation. Thomas's consensual relationship with YIN was in the area of financial advice regarding economic development, not in the pursuit of illegal endeavors. The Montana exception requires that the tribe's regulation of the contract between the YIN and Thomas have a nexus to the financial advice contract regarding economic development. Here, the pursuit of illegal endeavors does not have a nexus to financial advice regarding economic development. In addition, the tribe should have known that the pursuit of marijuana cultivation would be problematic with the State of Arizona. A contractual relationship between the tribe and a nonmember is not enough to meet the requirements for the first exception. Therefore, YIN Tribal Court does not meet the first exception to adjudicate this claim.

The second exception is not met. "The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community; the elevated threshold of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, at 341.

The breach of contract did not injure the tribe to the point that it imperiled the subsistence of the tribal community nor did it suggest that the tribe had to avert a catastrophic consequence. The EDC was already struggling to pay back the tribe ten million-dollar loan it had received from YIN when the breach of contract occurred. In addition, the breach did not change the financial position of the tribe, because the nothing came of the marijuana cultivation operation. It is not up to this court to speculate what would have occurred if the marijuana cultivation had been successful. To allow the tribal courts to retain jurisdiction over the Smiths because their developing marijuana operation had been halted would shrink the second exception.

Thus, even if the Montana rule applied, the two exceptions would not have been meant for the reasons stated above.

iv. The Smiths did not consent to the tribal jurisdiction.

The Smiths did not consent to tribal jurisdiction. A nonmember of an Indian tribe who knowingly enters tribal courts for the purpose of filing suits against a tribal member has, by the act of filing his claims entered into a consensual relationship with the tribe within the meaning of *Montana v. United States. Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140 (9th Cir. 2006). Tribal laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 337 (2008).

Here, the Smiths did not consent to the tribal jurisdiction, expressly or by their actions, because they pursued their claims in tribal court under a special appearance. Thus, the Smiths did not form a consensual relationship by appearing in tribal court. Although,

Thomas and YIN agreed during signing of the contract that all disputes arising from the contract was to be litigated in a court of competent jurisdiction. This does not mean that Thomas consented to YIN tribal court, rather it was an agreement that the dispute be litigated in a court of competent jurisdiction, whether it be tribal court, state court, or federal court. Judgement from this court will resolve this stipulation.

B. YIN does not have personal jurisdiction to adjudicate claims against Carol in Tribal Court.¹

The Courts of the Tribe shall have jurisdiction over any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract. 1 W.T.C. 1 § 1-104 (2)(a) (1989). Personal jurisdiction shall exist over all defendants consenting to such jurisdiction and the act of entry within the territorial jurisdiction of the Courts shall be considered consent to the jurisdiction of the Courts with respect to any civil action arising out of such entry. 1 W.T.C. § 1-107 (1989). Because constitutional laws define the parameters of personal jurisdiction and because the court's exercise of personal jurisdiction must comport with due process, ICRA will define the parameters of this court's jurisdiction. COHEN'S HANDBOOK, at 604. ICRA states that "no Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty without due process of the law." 25 U.S.C. §1302 (a)(8). This section of the ICRA is intended to protect individual rights and to preserve tribal sovereignty. COHEN'S HANDBOOK, at 604. The Bill of Rights and the Fourteenth Amendment do not of their force constrain the authority of tribes or tribal courts;

¹ The Defendant party concedes that YIN has personal jurisdiction over Thomas.

rather, tribes are obliged to comply with ICRA, which contains analogous due process protections. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 491 F.3d 878, 890 (2007). For this reason, Supreme Court cases will be used to assist in defining the personal jurisdiction in this case. A state [tribe] has personal jurisdiction over a non-resident defendant, if the defendant has certain minimum contacts with the state so that maintenance of the suit does not offend traditional notion of fair play and substantial justice and that it is reasonable to require the defendant to defend the suit. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945).

Under the general rules in *Hanson v. Denckla*, Carol did not purposely avail herself to establish sufficient relevant contacts with the YIN, because she did not reach out to the YIN to sufficiently establish minimum contacts that does not offend the traditional notion of fair play and substantial justice. *Hanson v. Denckla*, 357 U.S. 235, (1958). In *Hanson*, the court ruled there was not personal jurisdiction, because the company had no office in the forum state, no activities there, and no solicitation of business in that forum, thus the cause of action did not arise out of an act done or consummated in the forum state. *Id.* at 251-253. Like the company that did not have sufficient relevant contacts in the forum state, Carol does not have sufficient relevant contacts in the YIN, because she has no office in YIN, she had no significant activities in YIN, and she did not solicit her business in that forum. Rather, Carol's work activities and her office were located in her home state of Portland, Oregon. Her business was solicited to her brother and not the YIN or the EDC, because she only communicated with her brother, she only submitted her work to her brother, and she only contracted with her brother.

The plaintiff wants to argue that the Carol availed herself to the YIN forum when she twice visited the reservation, but *International Shoe* reasoned that casual activities is not sufficient to meet the minimum contacts requirements. 326 U.S. 310, 318 (1945). Here, Carol's twice visits to the reservation were made during vacation trips, which is that of a casual presence in the forum, and not an act, sufficient enough to impose an obligation or liability. Lastly, Carol had emailed bills to the EDC CEO and received payment from the EDC as part of her contract with her brother. To subject Carol to the jurisdiction of the YIN because she sent emails to the EDC CEO and received payment for services rendered for her brother, would offend the traditional notions of fair play and substantial justice. It was not foreseeable that she could possibility get sued in YIN tribal courts because these contacts would offend the traditional notions of fair play and substantial justice. Therefore, tribal personal jurisdiction over Carol would not afford her the due process rights guaranteed under ICRA.

C. It is not necessary to exhaust tribal remedies because it is clear that the tribe lacks jurisdiction.

Whether a tribal court has adjudicative authority over nonmembers is a federal question. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 324 (2008). However, tribal court in which action had first been brought should be permitted to determine its own jurisdiction and comity requires that tribal remedies be exhausted before question of subject matter jurisdiction of tribal courts is addressed by federal court exercising diversity jurisdiction; exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. *Iowa v. Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). However, there are four exceptions to the exhaustion rule and one is relevant to this case at hand, and that is “when it is plain that no federal grant provides for tribal governance of nonmembers conduct

on reservation land alienated to non-Indians.” *State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108, 1115 (9th Cir. 1999) (The community had no regulatory authority to govern the State’s conduct on land covered by Montana’s main rule, the State was not required to exhaust tribal remedies). Because tribal courts cannot regulate the nonmembers, as is the case here, the exhaustion exception would be invoked.

Here, it is clear that the YIN lacks subject matter jurisdiction because YIN lacks regulatory authority to regulate activities of nonmembers arising out of State land. Like the community that had no regulatory authority to govern the State’s conduct in the *State of Mont. Dept. of Transp.* case, the YIN has no regulatory authority to govern the Smith’s conduct in this case. Therefore, an exhaustion of tribal remedies will not be required.

Although the tribe may have personal jurisdiction, it is not worth the court’s time to pursue a jurisdictional judgement for Thomas, because the tribal court must have both, subject matter jurisdiction under federal and tribal law, and personal jurisdiction over the defendant to adjudicate. As stated before, there is no federal grant that provides the YIN with the authority to regulate the Smiths. It is evidence that tribal courts are best to qualified to interpret and apply the tribal law, but it is not necessary when it is clear that tribal court will lack tribal jurisdiction. Therefore, tribal remedies need not be exhausted.

For the reasons stated above, the YIN tribal court lacks jurisdiction to hear the claim and the YIN Supreme Court should stay while the Smiths seek a ruling in Arizona Federal District Court.

III. Sovereign immunity does not protect the Yuma Indian Nation, the Economic Development Corporation, or the Economic Development Corporation's employees from suit as immunity was waived by the corporation's charter and does not extend to the employees of the tribe.

Tribal sovereignty, under both federal and tribal law, gives tribes the inherent authority to govern themselves through the creation of laws within the tribe's borders. The U.S. Supreme Court ruled in *Cherokee Nation v. Georgia* that tribes are "domestic dependent nations" thereby creating the doctrine which governs the trust relationship between the federal government and tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Under this doctrine, tribal authority to enforce laws is absolute unless the federal government extends its state or federal jurisdiction. *Id.* Tribal sovereignty may only be constrained by acts of Congress or by tribal waiver of immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Both types of waiver must be unequivocal. *Id.* Tribal sovereign immunity from suit, much like state and federal immunity from suit, limits the tribe's exposure to contract and tort liability. Therefore, tribal sovereign immunity is not a concept entirely unfamiliar to the growing number of businesses entering into on and off reservation contracts with the tribe and its enterprises. Tribal governments will oftentimes waive their immunity in specific contract situations to facilitate partnerships with non-tribal businesses. Contract-specific waivers of immunity are the norm as a more general waiver of sovereign immunity regarding property held in trust by the United States cannot occur as without approval from the Secretary of the Interior. 25 U.S.C. § 81. Section 81 of the United States Code provides that, the Secretary of the Interior shall refuse any agreement which does not include "an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action)." *Id.* Waivers of

sovereign immunity may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

A. The Economic Development Corporation is not an “arm-of-the-tribe” and, as such, sovereign immunity does not extend to the corporation to protect it from suit

Although the doctrine of tribal sovereignty has been a long-established authority of indigenous tribes to govern themselves within their borders, tribal and federal courts have attempted to clarify the bounds of this doctrine in the courts recently. One such case, *Kiowa Tribe v. Manufacturing Technologies*, held that “Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation,” *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). Not only did Kiowa determine that a tribe was entitled to sovereign immunity when pursuing commercial activities, the U.S. Supreme Court held that whether the contract was executed on or off the reservation was irrelevant. *Id.*; see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (state assumption of jurisdiction is inconsistent with federal and tribal interests in Indian self-government and autonomy). Furthermore, the Court stated that, “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). To what entities and businesses tribal sovereignty extends to was then addressed by the Ninth Circuit Court of Appeals. The Ninth Circuit extended sovereign immunity by an “arm-of-the-tribe” standard to casino in *Allen v. Gold Country Casino*, and again to another casino in *Cook v. AVI Casino Enterprises, Inc.* See *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) (casino acted as arm-of-the-tribe and was therefore entitled to tribal

sovereign immunity); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) (tribal corporation functioned as an arm-of-the-tribe and was therefore protected by sovereign immunity from suit). Therefore, if the YIN Economic Development Corporation is found to be an arm-of-the-tribe, EDC will be entitled to tribal sovereign immunity from suit.

In determining whether tribal sovereign immunity extends to a corporation, the lower federal courts have explored the “arm-of-the-tribe” test through several factors. This test looks towards whether the corporation was chartered under tribal law, whether it will further tribal self-governance, and whether the tribe intended to confer its immunity upon its inception. *See generally Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) (tribe clearly intended to share in tribal sovereign immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) (casino acted as arm of the tribe, and thus was entitled to tribal sovereign immunity); *Redsleeve Golf, LLC v. Sequoyah Nat. Golf Club, LLC*, 2014 WL 11209947 (Eastern Cherokee Ct. July 9, 2014) (LLC was not entitled to sovereign immunity in breach of contract action).

In *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Econ. Dev. Auth.*, a provider of a business management training service brought action against the Chukchansi Economic Development Authority and its casino for using its training program for more than one employee, despite only paying the license fee for a single person. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). The Court developed a six factor test to determine if the Chukchansi Economic Development Authority was entitled to tribal sovereign immunity. The six factors considered were: (1) the method of the entities creation; (2) the purpose of the entity; (3) the structure, ownership, management, and amount of control the Tribe has over the entity; (4) whether the Tribe intended for the

entity to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the entity; and (6) whether the purposes of tribal sovereign immunity is served by granting the extension of immunity. *Id.*

The Tenth Circuit Court of Appeals found that the method of creation of the Chukchansi Economic Development Authority weighed in favor of the extension of sovereign immunity as the tribe had created the entity under tribal law and under its constitution. *Id.* at 1191. This led the Court to believe that the entity was created in the tribe's "governmental capacity." *Id.* at 1192. The Court, too, found the second factor to be in favor of extending sovereign immunity. The casino was created for the benefit of the tribe and could engage in various governmental functions. *Id.* Allocation of revenue from the casino was deemed to benefit the tribe with 50% going to governmental functions for health care and education with the intent to diversify its holdings "to reduce the Tribe's dependency on revenues from a Gaming Facility." *Id.* Regarding the third factor, the Court determined that the facts weighed both in favor and against the finding of immunity. The board of directors for the Chukchansi Economic Development Authority was nearly identical to the Tribal Council (weighing in favor of grant of immunity) but the Chief Financial Officer and the General Manager were non-members (weighing against the finding of immunity). *Id.* The fourth factor, the intent of the tribe to extend immunity, weighed in favor of extending immunity, too, as the Court examined the tribal ordinance which explicitly stated that the Economic Development Authority is empowered to waive sovereign immunity and to consent to judgment within a provision labeled "Sovereign Immunity." *Id.* at 1193. The Court also determined that the tribe relied heavily on the revenue of the casino to fund its government functions thereby satisfying the fifth factor. Lastly, the overall purpose of tribal

sovereign immunity (sixth factor) was deemed satisfied by examining the close relationship between tribal government actions and the Chukchansi Economic Development Authority's activities. *Id.* at 1195.

B. Sovereign immunity does not extend to Molly Bluejacket or Fred Captain as they were sued under their individual capacity

In a more recent case further defining the bounds of tribal sovereign immunity, *Lewis v. Clarke*, the United States Supreme Court found in a unanimous decision that tribal sovereignty does not apply in a suit against a tribal employee in his individual capacity and that an immunity provision may not extend sovereign immunity where it does not apply.

The identity of the “real party in interest” dictates whether immunity against suit is available. *Kentucky v. Graham*, 473 U.S. 159 (1985). If a suit is brought against a person in their official capacity, the suit should be treated as a suit against the official entity. *Id.* at 166. Similarly, a tribal employee sued in their official capacity for a tort committed while operating within the scope of employment is entitled to assert sovereign immunity on behalf of the tribe. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). Individual or “personal-capacity” suits, however, “seek to impose personal liability upon a government official for actions he takes under color state of law.” *Id.* at 165. Under a § 1983 action, the person bringing the claim must show that the individual, acting under color of state law, caused the deprivation of a federal right. *Id.* In *Lewis v. Clarke*, the Supreme Court likewise determined that a tribal employee sued in his individual capacity could not assert sovereign immunity in a tort action arising from actions taken within the scope of employment. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). The employee, not the tribe, was the real party in interest.

In *Lewis v. Clarke*, the plaintiffs were driving on the interstate when they were struck by a vehicle driven by an employee of the Tribal Gaming Authority who was transporting casino patrons off the reservation. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). The plaintiffs then filed suit against the driver employee in his individual capacity in Connecticut state court. *Id.* The employee moved to dismiss the suit for lack of subject matter jurisdiction based on tribal sovereign immunity. *Id.* The employee argued that he, as an employee of the Tribal Gaming Authority which in turn is an arm-of-the-tribe, was entitled to sovereign immunity. *Id.* The employee, acting within the scope of his duties, further argued that to not extend sovereign immunity to him as an employee of the tribe would abrogate tribal sovereign immunity in contravention to established principles of federal Indian law. *Id.* The trial court denied the employee's motion to dismiss and identified the employee, Clarke, as the real party in interest—not the Tribal Gaming Authority or the tribe. *Id.* at 1289. The Supreme Court of Connecticut, however, disagreed and reversed on the basis that the employee was acting within the scope of his employment and was therefore entitled to immunity. *Id.* at 1290. The United States Supreme Court reversed the judgment of the Supreme Court of Connecticut and held that, in a suit brought against a tribal employee in his individual capacity, the employee is the real party in interest and tribal sovereign immunity is not implicated. *Id.* at 1286.

The Court likened the action to a suit against a state official who may invoke eleventh amendment immunity if an action is brought against them as an arm of the state instrumentality, “The distinction between individual- and official-capacity suits is paramount here. 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... This is why, when

officials sued in their official capacities leave office, their successors automatically assume their role in the litigation.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). Refusing to depart from these general rules regarding the application of sovereign immunity, the Court determined that the negligence action arose out of the driver employee’s personal actions and will not require action or disturb the sovereign’s property. *Id.* at 1291. Whether the employee was acting within the scope of his duties was irrelevant.

The Court’s holding that tribal sovereignty does not extend to the employee sued in his individual capacity notwithstanding, the driver employee argued that the Tribe’s indemnification statute made the Mohegan Gaming Authority the real party in interest as they were required by statute to indemnify the employee for any adverse judgment. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). The Court reasoned that the Connecticut court’s judgment would not bind the Mohegan Gaming Authority or the Tribe in any way, “The Tribe’s indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing” *Id.*

Thomas Smith and Carol Smith have sued both the EDC CEO Fred Captain and the EDC Accountant Molly Bluejacket in both their official and individual capacities. [R. at 3]. As in *Lewis v. Clarke*, whether or not tribal sovereign immunity should extend to the persons named in the suit depends on the distinction between individual and official capacity. Thomas and Carol Smith have made counterclaims against the YIN, the YIN EDC, and the above-named individual in their individual capacity to recover for monies due under their contracts and for defamation. The recovery that Thomas and Carol Smith seek is from the individuals themselves and not the sovereign as, should Ms. Bluejacket and Mr. Captain

resign from their post, these persons may not be replaced by any person occupying their official position. Defamation is the act of damaging the good reputation of someone by slander or libel. Like the tort committed in Lewis v. Clarke, defamation is a personal action committed by an individual. It does not stand to reason that Thomas and Carol Smith seek recovery from the YIN at large for defaming their professional skills. Instead, they seek to prove that the individual actions of both Ms. Bluejacket and Mr. Captain led to a harm to their professional reputations. Thomas Smith has been communicating with both individuals since 2007 and Carol Smith has been communicating with them since 2010. This close working relationship cannot simply be replaced by another individual occupying the role of CEO or Accountant to prove or disprove that a tort occurred, they must be allowed to bring their claim against the persons themselves in their individual capacity. Therefore, tribal sovereign immunity should not extend to Molly Bluejacket and Fred Captain as officials of the Yuma Indian Nation.

C. The Yuma Indian Nation waived its tribal sovereign immunity both unequivocally and clearly through the YIN EDC's contract provisions with Carol and Thomas Smith.

It is a well-known principle of Federal Indian law that tribal sovereign immunity may only be waived through Congressional abrogation or through tribal waiver. Such a waiver must be both clear and unequivocal. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The United States Supreme Court discussed what constitutes tribal waiver in a case decided nearly concurrently with *Kiowa—C & L Enterprises, Inc. v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*. In *C & L Enterprises*, the Supreme Court held that a tribe waived its sovereign immunity when it agreed to a contract containing an arbitration agreement. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411

(2001). Such provisions in a contract constitute a clear and unequivocal waiver of a tribe's sovereign immunity against suit.

In *C & L Enterprises*, the Potawatomi Nation entered into a contract with C & L to install a roof on a tribally owned building in Shawnee, Oklahoma. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The building described in the contract was neither on reservation land, nor held in trust by the Federal Government for the tribe. *Id.* The contract between the two parties contained two provisions relevant to the Supreme Court's ruling in this case. The first provision contains an arbitration clause stating that all claims or disputes between the parties "shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association...The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* (citing App. to Pet for Cert. 46). The second provision contained a choice of law provision stating that "The contract shall be governed by the law of the place where the Project is located". *Id.* at 415.

After the tribe solicited bids and retained another company to install the roof, C & L submitted an arbitration demand. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The arbitrator rendered an award in favor of C & L after which C & L filed suit in the District Court of Oklahoma County to enforce the arbitration award. *Id.* After the Court of Civil Appeals held that the tribe was immune from suit, the United States Supreme Court granted certiorari. The Court reversed and remanded holding that by clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of C & L, "The contract...is not ambiguous. Nor did

the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C& L foisted no form on a quiescent Tribe.” *Id.* at 423.

The Yuma Indian Nation waived their tribal sovereign immunity from suit through the express terms of their contract with Thomas and Carol Smith. Like the third-party contractor in C & L Enterprises, Thomas and Carol Smith are non-member third party contractors who have voluntarily entered into an agreement with the tribe for services. The services provided by Thomas and Carol Smith, too, primarily occurs off the reservation for an entity created by, but not a part of, the Yuma Indian Nation.

The contract for services with both Thomas and Carol Smith contains the identical language stating that “all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction.” [R. at 1]. This contract, much like the arbitration agreement in C & L Enterprises, contains explicit and unequivocal language that, should a dispute arise between the parties, the dispute would fall under a court of “competent jurisdiction”. After signing the original contract with Thomas Smith in 2007, the Yuma Indian Nation provided written permission through the Nation’s Tribal Council to sign an identical contract with Carol Smith for services. [R. at 2]. Over the span of three years, rather than draft a contract explicitly stating that the Yuma Tribal Courts have jurisdiction over any and all disputes arising from the contract, the Tribal Council found the provisions to be appropriate as is and gave permission to execute another contract with a different third-party. Like in C & L, the primary location of where services are rendered is an appropriate standard to determine which court has jurisdiction over the dispute. The bulk of services rendered by Thomas Smith and the entirety of Carol Smith’s services were rendered off the reservation and communicated to the Tribe via email or postal service. [R. at 2]. Thomas Smith’s place of

work is in Phoenix, Arizona and Carol Smith's place of work is located in Portland, Oregon. Therefore, it may be construed from the language of the contract and the parties work location that the appropriate venue is federal court. Therefore, the Yuma Indian Nation has waived their tribal sovereign immunity and is not immune from the counterclaims filed by both Thomas and Carol Smith.

CONCLUSION

The appellants, Thomas Smith and Carol Smith, respectfully request that this Honorable Court reverse the Yuma Indian Nation Trial Court and issue a writ of mandamus ordering the trial court to stay the suit currently pending in the Yuma Indian Nation Trial Court.

Respectfully submitted,

Team #258

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