
IN THE
**Supreme Court of the Yuma Indian
Nation**

YUMA INDIAN NATION,

Appellee,

v.

THOMAS SMITH AND CAROL SMITH.

Appellants.

BRIEF FOR THE APPELLANTS

Team No. 142

Counsel for Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

I. STATEMENT OF PROCEEDINGS2

II. STATEMENT OF FACTS3

SUMMARY OF ARGUMENT5

ARGUMENT..... 6

I. NATION’S TRIBAL COURT DOES NOT HAVE PERSONAL OR SUBJECT MATTER JURISDICTION OVER NON-INDIANS THOMAS AND CAROL SMITH FOR CLAIMS THAT ARE TOO FAR SEPARATED FROM THE TRIBE AND THE RESERVATION.....6

a. The Nation’s Tribal Court does not have Subject Matter Jurisdiction over Thomas and Carol Smith because the Smiths’ did not waive their right and the consensual relationship is too far separated from the Nation’s claims..7

i. Smith’s contracts do not trigger tribal subject matter jurisdiction because the Nation’s claims are too far separated from the Smiths’ conduct.8

b. The Nation’s Tribal Court does not have personal jurisdiction over Thomas and Carol Smith due to the lack of minimal contacts and because the Smiths’ conduct does not imperil the tribe9

i. The Smiths’ contracts were both completed off of the YIN reservation.....10

ii. The Smiths’ had a limited relationship with the tribe and almost no relationship with the reservation.10

ii. The Smiths’ conduct does not threaten nor impact the political integrity, the economic security, or the health or welfare of the Nation.....11

c. If the court does find tribal jurisdiction, it should stay the suit to allow the Smiths’ to seek a federal ruling on jurisdiction due to the claims separation from the YIN and the YIN reservation..... 11

II. THE NATION IS AN INDIAN NATION ENTITLED TO TRIBAL SOVEREIGN IMMUNITY AND THEREFORE, CANNOT BE SUED BY THE SMITHS’.....12

a. Doctrine of Sovereign Immunity.....12

III.	Applying the <i>Breakthrough</i> test, EDC is not entitled to tribal sovereign immunity because is not an arm of the tribe.....	13
a.	EDC is a tribal business entity created by a federally chartered business.....	14
b.	EDC is created for the purpose of assisting in economic endeavors.....	14
c.	The structure and management of EDC is largely separate from YIN.....	15
d.	The Nation intended to share tribal sovereign immunity with EDC because YIN has not clearly and unequivocally waived sovereign immunity.....	16
e.	Financial relationship between EDC and the Nation does not support extending sovereign immunity because the relationship between the two is not sufficiently close.....	17
f.	The overall purpose of tribal sovereign immunity are not served by allowing EDC to enjoy immunity from suit as an arm of the tribe.....	18
g.	EDC is a tribal entity with little to no promotion of self-sufficient, economic development, or a strong tribal government.....	18
IV.	Tribal sovereign immunity extends to the EDC CEO Fred Captain and accountant Molly Bluejacket in their official capacities but not their individual capacities...	20
a.	Extending immunity to EDC CEO and accountant in their official capacities..	20
b.	No immunity extending to EDC CEO and accountant in their individual capacities.....	21
	CONCLUSION	21

TABLE OF AUTHORITIES

Allen v. Gold Country Casino,
464 F.3d 1044 (2006).....passim

Atkinson Trading Co. v. Shirley,
532 U.S. 645, 656 (2001).....8,9

Breakthrough Mgmt. Gro., Inc v. Chukchansi Gold Casino and Resort,
629 F.3d 1173 (10th Cir. 2010)passim

Cook v. AVI Casino Enterprises, Inc.,
548 F.3d 718 (9th Cir. 2008).....20

Cf. Alden v. Maine,
527 U.S. 706 (1999).....17

Cherokee Nation v. Georgia,
30 U.S. 1 (1831)12

Elliot v. White Mountain Apache,
566 F.3d 842 (2013).....10, 11

Everette v. Mitchem,
146 F.Supp.3d (2015).....15

Granite Valley Hotel Limited Partnership v. Jackpot Junction Bingo and Casino,
559 N.W. 2d 135 (1997)12

Iowa Mut. Ins. Co. v. Laplante,
480 U.S. 9, (1987)..... 10, 11

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc,
523 U.S. 751(1998).....13

Maxwell v. County of San Diego
708 F.3d 1075 (9th Cir. 2013).....20

Montana v. U.S.,
450 U.S. 544 (1981)..... passim

National Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985)..... 11

Nevada v. Hicks,
533 U.S. 353 (2001)..... 8

<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978).....	6
<i>Pistor v. Garcia</i> , 791 F.3d 1104 (9th Cir. 2015).....	20, 21
<i>Plains Commerce Bank v. Long Family Land & Cattle Co.</i> , 554 U.S. 316 (2008).....	11
<i>United States v. Testan</i> , 424 U.S. 392, at 399 (1940).....	12
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	12, 16
<i>Smith v. Salish Kootenai Coll.</i> , 434 F.3d 1127 (9th Cir.2006).....	11
<i>State ex rel. Suthers v. Cash Advance and Preferred Cash Loans</i> , 205 P.3d 389 (Ct. App. Colo. 2008).....	16
<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997).....	7
STATUTES:	
25 U.S.C. § 2701(4).....	17
Indian Reorganization Act, 25. U.S.C. §477 (1934)	14
OTHER AUTHORITIES:	
<i>Cohen’s Handbook of Federal Indian Law</i> (2012).....	7, 9, 14

QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.
2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the Nation's Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The Yuma Indian Nation Tribal Council (“YIN Tribal Council”) filed suit in tribal court against Thomas Smith and Carol Smith (“Smiths”) for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. R. at 3. The YIN Tribal Council was seeking liquidated damages set out in the Smith’s contracts. *Id.* Individually, each of the Smiths’ filed special appearances and first filed motions dismissing the Tribal Council’s suit for lack of personal and subject matter jurisdiction. *Id.* The Smiths also asked the Nation’s Tribal Court to stay the suit while the Smiths’ seek an Arizona Federal District Court decision on the Nation’s Tribal Court jurisdiction. *Id.* The Smiths’ have yet to file a suit in the Arizona Federal District Court. *Id.* The Nation’s Trial Court decided that each of the Smiths’ motions failed. *Id.*

The Smith’s then filed answers denying the YIN Tribal Council’s claims. *Id.* At the same time, the Smiths’ filed counterclaims against the Nation for monies due under their contracts and for defamation. *Id.* Under the same claims, the Smiths’ interpleaded, the EDC, the EDC’s CEO Fred Captain, and the EDC accountant Molly Bluejacket. *Id.* The Nation’s Tribal Court found for the tribe and dismissed all the Smiths’ claims and counterclaims against all parties. *Id.* The Nation’s Tribal Court found that all parties were protected under sovereign immunity. *Id.*

In response to the Nation’s Tribal Court’s dismissal, the Smiths’ filed an interlocutory appeal in the Nation’s Supreme Court. *Id.* The appeal asked for the Nation’s Supreme Court to decide the present issues and asked for the court to issue a writ of mandamus ordering the

trial court to stay the suit until a federal ruling was decided. *Id.* The Nation’s Supreme Court granted the interlocutory appeal on two specific issues. *Id.*

II. STATEMENT OF FACTS

In 2007, Thomas Smith (“Thomas”) signed a contract at Thomas’ office in Phoenix, AZ with the Yuma Indian Nation (“YIN,” “Nation,” or “Tribe”), located in southwest Arizona. He provided the Nation with financial advice on an as-needed basis regarding economic development issues. Throughout his employment, Thomas Smith communicated almost daily with various people from the YIN Tribal Council and other tribal chair peoples. Thomas Smith’s contract provides that any and all disputes arising from the contract are to be litigated in a court of competent jurisdiction; such as the YIN courts. Record of Appeal at 1. Additionally, Thomas Smith’s contract requires him to maintain absolute confidentiality concerning any and all tribal communications and economic development plans. *Id.*

In 2009, the Nation’s Economic Development Corporation (“EDC”) was created via a 2009 tribal commercial code to promote the prosperity of the Nation and Nation citizens. The tribal commercial code also authorizes the Nation to create and charter public and private corporations to operate business activities on and off the reservation. *Id.*, at 2. EDC is authorized to buy and sell real property on and off the reservation, in fee simple or other forms of property and to sue and be sued. *Id.* Pursuant to the EDC charter, the board of directors and employees are entitled to tribal sovereign immunity in order to protect EDC’s business endeavors. Additionally, EDC must have tribal member preference in its employment hiring process. The purpose of EDC 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.* Every year, the Nation collects 50% of net EDC profits and

returns those profits to the Nation. EDC was created as a wholly owned subsidiary of the Nation and as an “arm-of-the-tribe,” and organized under the YIN Tribal Code, Title 11 Business Code Title. Although wholly owned by the Nation, EDC debts cannot encumber the tribe, borrow or lend money in the name or on behalf of the Nation. EDC cannot implicate any assets of the Nation, including attaching liens or interests of any kinds to Nation assets. *Id.*, at 2. Pursuant, the EDC charter the board of directors is comprised of five directors, three of which must be tribal members and two of which must be non-members. Finally, the YIN Tribal Council has the authority to remove any director with a 75% vote, with or without cause. *Id.*

In 2009 when EDC was created, the YIN Tribal Council funded EDC with a loan of \$10 million. Between 2009 and 2017, EDC has repaid \$2 million of the original loan. From 2007 to 2017, Thomas Smith assisted the Nation and then EDC with financial advice regarding a wide range of economic development issues. In addition to communicating with EDC, Thomas Smith prepared and submitted to the YIN Tribal Council written reports on a quarterly basis. Thomas Smith then presented these reports, in person, at YIN Tribal Council meetings on the reservation. In 2010, with the permission of the YIN Tribal Council, Carol Smith signed a contract identical to Thomas’ to provide the Nation and EDC with advice about stocks, bonds, and securities issues. *Id.*, 2. Although Carol Smith does not give advice directly to the Nation or EDC, Thomas Smith habitually gives Carol’s work to EDC CEO and accountant. Additionally, Carol Smith directly submits monthly bills to EDC CEO and directly receives payment from EDC. Carol works and lives in Portland, OR although she has been on the Nation's reservation twice.

For a period this arrangement worked harmoniously. Then in 2016, the Thomas and Carol alerted the Arizona Attorney General of the Nation's and EDC's plans to engage in marijuana cultivation and sales potentially. EDC plans also allowed marijuana on the reservation for any and all purposes. The Arizona Attorney General sent the Nation and EDC a cease and desist letter.

SUMMARY OF ARGUMENT

The Smiths' contend that the Nation's Tribal Court does not have personal or subject matter jurisdiction. Tribes do not have jurisdiction over non-Indians for claims that are away from Indian country. However, the U.S. Supreme Court has created two exceptions for tribes to express civil jurisdiction over non-Indians. *Montana v. U.S.*, 450 U.S. 544, 566 (1981).

The first exception requires a consensual relationship and the second requires harm or a direct effect on the tribe's political integrity, the economic security, or the health or welfare.

Id.

The first exception would be met because the Smiths' entered into a contractual relationship with the Nation. R. at 1,2. Yet this contract is too far separated from the Nation and the Nation's reservation which fails the first exception. The claims must be closely related to the tribe and to be of a consensual relationship. The second exception fails for the same reason as the first, the Smiths' conduct was too far separated from the Tribe.

Furthermore, the Smiths' conduct was a reaction to an already passed tribal ordinance.

Therefore the information they shared was public knowledge. Therefore, both of the *Montana* exceptions fail, and the Nation's Tribal Court does not have personal or subject matter jurisdiction over the Smiths'. *Montana*, 450 U.S. at 566.

A test containing six factors is used to determine if a tribal business is afforded the same tribal sovereign immunity as an arm of the tribe. *Breakthrough Mgmt. Gro., Inc v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). All factors combined and considered lend sufficient lead to the conclusion that EDC is not entitled to tribal sovereign immunity against suits. Tribal sovereign immunity extends to both EDC CEO and accountant in their official capacities. Such tribal sovereign immunity extends to employees' actions who act within the authority and scope of their employment. Tribal sovereign immunity does not extend to either EDC CEO and accountant in their individual capacities. When an employee is acting with their capacity and an action arises out of that conduct, and an employee is named in their individual capacity, immunity does not extend to that action.

ARGUMENT

V. NATION'S TRIBAL COURT DOES NOT HAVE PERSONAL OR SUBJECT MATTER JURISDICTION OVER NON-INDIANS THOMAS AND CAROL SMITH FOR CLAIMS THAT ARE TOO FAR SEPARATED FROM THE TRIBE AND THE RESERVATION.

No bright-line rule exists for determining when tribes have tribal jurisdiction over non-Indians. Regarding criminal jurisdiction, the U.S. Supreme Court has limited tribal authority when it comes to non-Indians that are away from Indian country. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191 (1978). However, the U.S. Supreme Court has created the *Montana* exceptions for tribes to extend civil jurisdiction over non-Indians but following the principals of *Oliphant. Montana*, 450 U.S. at 566. The leading principle is that tribes do not have inherent jurisdiction over non-Indians unless Congress has expressed stated that a tribe has such jurisdiction. *Oliphant*, 435 U.S., at 195. Congress has yet to do so in the case before us, therefore the Nation cannot act past their diminished status as a

sovereign. *Montana*, 450 U.S. at 565; *Strate v. A-1 Contractors* 520 U.S. 438, 445 (1997). *Strate* demonstrates that only Congress can authorize tribal jurisdiction over non-members. *Strate*, 520 U.S. at 445. *Montana* maintains that Indian tribes retain limited civil jurisdiction over non-Indians within Indian country. *Id.*, at 565. This limited civil jurisdiction created the *Montana* exceptions which directly applies to the case before us. *Id.* The *Montana* exceptions are: (1) for people who enter a consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) when a persons conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565. The Nation does not have subject matter jurisdiction or personal jurisdiction over the Smiths' because neither of the *Montana* exceptions *applies to this situation*.

a. The Nation's Tribal Court does not have Subject Matter Jurisdiction over Thomas and Carol Smith because the Smiths' did not waive their right and the consensual relationship is too far separated from the Nation's claims.

Montana finds "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Id.* Neither of the Smiths is a Nation member. R. at 1. Thomas Smith's contract was signed off-reservation at his workplace in Phoenix, Arizona. R. at 1. Carol Smith's contract was also signed off-reservation. R. at 2. If the Smiths' consented to subject matter jurisdiction, then the tribe can extend jurisdiction to off-reservation. *Cohen's Handbook of Federal Indian Law* § 7.02(1)(c). The Smith's contract included a clause that provided for any and all disputes to be litigated in a court of competent jurisdiction. R. at 1. This clause is not explicit consent that would allow the Nation subject matter jurisdiction.

Thomas' duties are consistent with those of a financial planner, and there are no facts in the record that indicates otherwise. R. at 1-3. Nothing in the record shows that Thomas's contract or his work was any different than that of a financial planner or advisor. R. at 1-3. Therefore, the Nation's Tribal Court does not have Subject Matter Jurisdiction through waiver because neither of the Smiths' signed a contract that explicitly consented to tribal jurisdiction.

i. Smith's contracts do not trigger tribal subject matter jurisdiction because the Nation's claims are too far separated from the Smiths' conduct.

Tribal Courts are not tribes of general jurisdiction because of a tribes "inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). The Smiths' entered into a contract consciously with the Nation. R. at 1,2. However, the Smiths' contacts are not a consensual relationship as defined within the first of the *Montana* exceptions. *Montana*, 450 U.S. at 565. A consensual relationship within the first Montana exception is expounded upon in *Strate*, 520 U.S. at 457. In *Strate*, the court determined that a simple vehicle accident did not meet the consensual relationship. *Id.* Although the case before us does not present a simple vehicle accident, it does present us with a simple contract situation. The *Montana* definition of the first exception it states that a contract would qualify as a consensual relationship. *Montana v. U.S.*, 450 U.S. 544, 565 (1981). Yet, the Smiths' case-specific consensual relationship does not meet the first *Montana* exception. *Montana*, 450 U.S. at 565.

"A nonmember's consensual relationship in one area thus does not trigger tribal civil authority." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The Nation filed suit against both the Smiths' even though only Thomas Smith informed the Arizona Attorney General of the Nation's plans. (R. at 2.) Furthermore, the Nation had already enacted a tribal

ordinance that made marijuana cultivation and use of on the reservation completely legal. (R. at 2.) Thomas Smith informed the Arizona District Attorney about the Nation's plans which were an already enacted tribal ordinance. (R. at 2.) Nowhere in the record is there any indication of a breach of contract, breach of fiduciary duty, or violation of duties of confidentiality because the tribal ordinance was enacted before the disclosure. R. at 1-3. Therefore, a contract for advice on economic development planning issues does not constitute subject matter jurisdiction for any of the Nation's claims when there was no such behavior. In conclusion, the Nation is attempting to stretch subject matter jurisdiction to fit their claims. *Atkinson Trading Co.*, 532 U.S. at 656.

b. The Nation's Tribal Court does not have personal jurisdiction over Thomas and Carol Smith due to the lack of minimal contacts and because the Smiths' conduct does not imperil the tribe.

The case before the Nation's Tribal Court presents a tribe attempting to express civil adjudicatory jurisdiction over non-Indians away from Indian country. R. at 3. It has been established that Nation's Tribal Court does not have subject matter jurisdiction over the Smiths'. The Nation also fails to retain personal jurisdiction over the Smiths' due to the lack of minimal contacts.

If YIN Tribal Council can satisfy either *Montana* exception, it may have personal jurisdiction over the Smiths'. *Montana*, 450 U.S. at 565. In each of the *Montana* exceptions, there must be minimal contacts for the tribe to retain personal jurisdiction. *Cohen's Handbook of Federal Indian Law* § 7.02(1)(c). The YIN Tribal Council does not have personal jurisdiction because they cannot meet the minimum contacts needed for personal jurisdiction.

i. The Smiths' contracts were both completed off of the YIN reservation.

The U.S. Supreme Court has established that a tribal court should determine their own jurisdiction. *Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9, 16 (1987) In turn, this allows tribes to have jurisdiction over reservation matters. *Id.* In *Iowa Mut. Ins. Co.*, the tribe was expressing personal jurisdiction over a non-Indian on Indian country. *Id.* Similarly, the Nation is attempting to exert jurisdiction over non-Indians, but instead, the Smiths' are away from Indian country. R. at 3.

Thomas Smith's contract was signed off-reservation. R. at 1. His workplace and home were both off-reservation. R. at 1. Carol Smith's contract was signed off-reservation. R. at 2. Carol's workplace and home are also off-reservation. R. at 2. Carol Smith is not in direct contact with the tribe. R. at 2. Therefore, due to the separation from the Nation's reservation, the Smiths' contracts and their origins are not reservation issues.

ii. The Smiths' had a limited relationship with the tribe and almost no relationship with the reservation.

The relationship between the defendants and the reservation is an important factor when analyzing a tribe's personal jurisdiction. *Elliot v. White Mountain Apache*, 566 F.3d 842, 848 (2013). Carol Smith did not directly contact the tribe. In fact, her communications were only forwarded from Thomas to the Tribal Council, the EDC CEO and the EDC accountant. R. at 2. Thomas on the other hand directly contacted various tribal officials. R. at 1. This contact was almost purely telephone calls, and emails. *Id.* Overall, the contacts between Carol and the tribe are almost non-existent, and the contacts between Thomas and the tribe are limited.

Regarding the YIN reservation, Carol only visited twice while on vacation in Phoenix; indicating that further separation from the reservation because Carol did not visit in her official capacity as a contracted employee/worker of EDC. R. at 2. Thomas would

present quarterly reports on reservation for the YIN Tribal Council. R. at 1. These facts are relevant because the relationship of the defendants²³ to the tribe and reservation to decide tribal jurisdiction. “Where, as here, the nonmember is a defendant in the tribal court action, ‘whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands.’” *Elliot*, 566 F.3d at 848; (citing *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1132 (9th Cir.2006)). The tribal claims are not related to the reservation.

iii. The Smiths’ conduct does not threaten nor impact the political integrity, the economic security, or the health or welfare of the Nation.

The second *Montana* exception states that the non-Indian conduct must threaten tribal political integrity, the economic security, or the health or welfare. *Montana*, 450 U.S. at 565. The second *Montana* exception fails for the same reason as the first; the claim is too far separated from the reservation. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). *Plains Commerce Bank* finds that both exceptions are rooted in same tribal sovereignty that is connected to the reservation. *Id.* The Smiths’ conduct is too far separated from the reservation. Furthermore, the conduct does not imperil the subsistence of the tribal community. *Id.* (Citing *Montana*, 450 U.S., at 566). The Smiths’ notice of an already passed tribal ordinance did not imperil the subsistence of the tribal community. *Id.*

c. If the court does find tribal jurisdiction, it should stay the suit to allow the Smiths’ to seek a federal ruling on jurisdiction due to the claims separation from the Nation and the Nation’s reservation.

National Farmers Union created the standard “that exhaustion is required before such a claim may be entertained by a federal court.” *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). Later cases found that exhaustion is only a comity and not a requirement. *Iowa Mut. Ins. Co.*, 480 U.S. at 16-17. The comity is out of respect for tribal sovereign authority to decide what the extent of their jurisdiction, exactly

what the court is doing today. The Smiths' have followed the proper practice and have not filled in federal court, which has given this court the full opportunity to review the present issues. *Id.* Therefore, the Smiths' actions are fully in line with promoting tribal self-government. *Granite Valley Hotel Limited Partnership v. Jackpot Junction Bingo and Casino*, 559 N.W. 2d 135, 137 (1997). Accordingly, if the court rejects the jurisdiction argument above, it should stay the suit to allow the Smiths' to seek a federal ruling on jurisdiction.

VI. THE NATION IS AN INDIAN NATION ENTITLED TO TRIBAL SOVEREIGN IMMUNITY AND THEREFORE, CANNOT BE SUED BY THE SMITHS'.

a. Doctrine of Sovereign Immunity

The doctrine of tribal sovereign immunity (“sovereign immunity” or “immunity”) is firmly established; beginning with the declaration that tribes are domestic dependent nations that have inherent sovereign authority over members and territories. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). “It is settled that a waiver of sovereign ‘cannot be implied but must be unequivocally expressed.’” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 58 (1978) (quoting *the United States v. Testan*, 424 U.S. 392, at 399 (1940)). The only instance that a Tribe can be party to a suit is if it clearly and unequivocally expresses a waiver of sovereign immunity or the U.S. Congress abrogates the immunity. *Id.* The Nation has not granted a waiver of its immunity to allow the Smiths' to name the Nation in a suit nor has the U.S. abrogated the Nation's immunity. Sovereign immunity has been reaffirmed in numerous cases from the U.S. Supreme Court, the 9th Federal Circuit, Arizona District Federal Court and other jurisdictions. Additionally, the YIN Tribal Code states that “Noting in this Act shall be construed to be a waiver of the sovereign immunity of the Tribe. . .” YIN Tribal

Code, Title 2, 2-106. The *Kiowa Tribe* states that ". . .we decline to revisit our case law and choose to defer to Congress. 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," thus, the Nation's sovereign immunity is not disturbed by the fact that the Smiths' case is for damages based on a breach of contract. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*, 523 U.S. 751, at 759 (1998). Therefore, the Nation has sovereign immunity from the Smiths' suit because the Nation has not waived its immunity nor has Congress abrogated the Nation's immunity.

VII. APPLYING THE *BREAKTHROUGH* TEST, EDC IS NOT ENTITLED TO TRIBAL SOVEREIGN IMMUNITY BECAUSE IT IS NOT AN ARM OF THE TRIBE.

EDC is not entitled to immunity from suits as an arm of the tribe because EDC fails the arm of the tribe analysis necessary for sovereign immunity to apply to a tribal business. Tribal sovereign immunity limits subject matter jurisdiction over lawsuits against tribes; if a tribal business is an arm of the tribe, that tribal business is entitled to that same sovereign immunity. *Breakthrough Mgmt. Gro.*, 629 F.3d, 1187 (10th Cir. 2010). The U.S. Supreme Court states that "the question is not whether the activity may be characterized as a business . . . but 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, at 1046 (9th Cir. 2006). *Allen* is not the only authority on applying an arm of the tribe analysis; a disjunctive six-factor test or analysis is also used in the 9th federal circuit. etc. *Breakthrough Mgmt. Gro.*, 629 F.3d at 1187. Thus, the *Breakthrough* test is the test that is used to help balance and consider all factors before making a determination.

Furthermore, "to determine whether a separate business entity is protected by the tribe's immunity, courts have looked to a variety of factors." *Cohen's Handbook*, §21.02.

Another factor courts have utilized is tribal state compacts for casinos (*Allen*, 464 F.3d 1044 at 1046). The 9th circuit uses the *Breakthrough* test: “(1) the method of the [tribal business]’ creation; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of the control the Tribe has over the [entity]; (4) whether the Tribe intended for them to have sovereign immunity; (5) the financial relationship between the Tribe and the [tribal business]; and (6) whether the purposes of tribal sovereign immunity are served by granting [it] immunity.” *Breakthrough Mgmt. Gro.*, 629 F.3d at 1191. The 9th Circuit uses the *Breakthrough* test; thus, it is the balancing test used bellow.

a. EDC is a tribal business entity created by a federally chartered business.

To determine whether sovereign immunity extends to a tribal business, the first factor in the *Breakthrough* test takes into consideration its method of creation. YIN Tribal Council obtained the authority to pass create EDC via a federal charter granted under the Indian Reorganization Act, 25. U.S.C. §477 (1934). Therefore, the EDC was properly created as a tribal business entity under a properly passed under a federal charter; weighing in favor of applying sovereign immunity to EDC.

b. EDC is created for the purpose of assisting in economic endeavors.

The second factor in the *Breakthrough* test examines the purpose of the tribal entity. The Nation’s EDC was created via a 2009 tribal commercial code for the purpose of “creating and assisting in the development of successful economic endeavors . . . on and off the reservation and in southwestern Arizona.” R. at 1. Other courts applying this factor in favor of extending immunity to tribal business entities looked favorably upon those that generated revenue for the tribal governmental services and other essential services. *Everette v. Mitchem*, 146 F.Supp.3d 720, at 724 (Maryland D. DC 2015). The difference is that *Everette* created a tribal business for the primary purpose of lending money to generate

revenue for the tribe. *Id.* However, EDC's primary purpose is to create and assist in potential economic endeavors and optimistically wait for those economic endeavors to become fruitful. R. at 1. There is no indication that the tribe has taken into account the Nation's opinion or best interests of the tribe, as other tribal business entities have. Particularly because, at best, the Nation has received only \$2 million of a \$10 million loan and 50% of EDC annual revenues. *Id.* Although this factor is not determinative for the arm of the tribe analysis, it is persuasive when combined with other factors of the *Breakthrough* test.

c. The structure and management of EDC is largely separate from the Nation

EDC is a corporation organized under YIN Tribal Code, Title 11 as a wholly owned subsidiary. EDC's organization included an initial board of five members; three that must be Nation members and two that must be non-Indian or non-Indian members, and every year a board seat is open for election. *Id.* The YIN Tribal Council has the authority to remove a board member, with or without cause at any time, via a 75% vote of the YIN Tribal Council. *Id.* The EDC board is operated by 60% Nation members and 40% non-Nation members. The only regular interaction between the board and the YIN Tribal Council is EDC quarterly financial reports submitted to the latter for review and approval. *Id.*, at 2. Regarding control, neither YIN or YIN Tribal Council exert much control over EDC; the Nation does not approve a budget, approve business plans, control economic endeavors, and not involved in normal day-to-day business operations. *See Everett v. Mitchem*, 146 F.Supp.3d at 724 (determining via the *Breakthrough* test that a nation that had exercised a lot of control over business weighs in favor of extending immunity to business). The only similarity between how this factor is treated in *Everett* and the situation here is that both have many tribal members working for the business; an average of 25 full-time EDC employees that are

Nation members since 2009. R. at 2. However, there is overwhelming support for a finding that EDC operates independently of the Nation. Independent operation and EDC's purpose indicate that EDC is not entitled to tribal sovereign immunity; the reality of the EDC is that it is operated away from the Nation with minimal oversight and the Nation is not receiving much benefit from EDC.

d. The Nation intended to share tribal sovereign immunity with EDC because the nation has not clearly and unequivocally waived sovereign immunity

As mentioned above, Tribes and tribal business can waive sovereign immunity, but it must be clear and unequivocal. *Santa Clara Pueblo*, 436 U.S. at 58. There is a discrepancy between what the EDC has authorized and the tribal commercial code charter under which EDC was created. The charter states that the tribe does not waive sovereign immunity for business or employees. R. at 1. While the EDC authorized to sue and be sued. *Id.* Case law indicates that "immunity may be waived by a tribe's or a tribal corporation's charter containing a 'sue and be sued' clause, or by contract." *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389, at 407 (Ct. App. Colo. 2008). The sue and be sued provision may waive immunity from suit. However, the EDC sue and sued provision does not clearly and unequivocally state in the provision that it is meant to be a waiver of sovereign immunity; a waiver of sovereign immunity cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58. Additionally, YIN Tribal Council required EDC's charter to include a provision that all board members and employees were completely protected by sovereign immunity. R. at 2. This provision is clearly and unequivocally not a waiver of sovereign immunity. Therefore, the Nation intended sovereign immunity to apply to the EDC, and this factor weighs support to granting sovereign immunity to EDC.

e. The Financial relationship between EDC and the Nation does not support extending sovereign immunity because the relationship between the two is not sufficiently close.

The record states that since 2009, there has been a lack of success in EDC's endeavors; as a result, EDC has only been able to pay the Nation \$2 million of the initial \$10 million loan. R. at 2. Additionally, EDC is only required to give 50% of all EDC net profits annually to the Nation's general fund; there is no evident purpose for the funds once deposited into the Nation's general fund. *Id.* The purpose of EDC and the reality of EDC are not the same. The purpose of EDC was to take a one-time loan of \$10 million dollars, repay the Nation, assist and create successful economic development endeavors on and off the reservation. The reality is that in 8 years, EDC has only repaid the tribe 20% of the original loan and there has been a lack of success in EDC's endeavors. On the one hand, disparities between the purpose and reality are not dispositive. *Breakthrough Mgmt. Grp*, 629 F.3d at 1187. On the other hand, the closeness of EDC and the Nation's financial relationship can be used in conjunction with other *Breakthrough* test factors to make an informed decision.

Additionally, the Nation has made it clear that EDC debts will not encumber, or implicate in any way, the assets of the Nation. EDC also cannot borrow or lend money in the name of the Nation, nor permit any liens or interests of any kind on Nation assets. The *Allen* court found that the tribe's casino was an arm of the tribe because "immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen*, 464 F.3d at 1047 (quoting *Cf. Alden v. Maine*, 527 U.S. 706, at 750 (1999)). Protection of a tribe's treasury is an underlying policy of tribal sovereign immunity. Tribes would not be truly sovereign if court cases could cause insolvency of the nation. *Allen*, 464 F.3d at 1047. However, debts and liabilities of EDC cannot reach tribal financial interests or assets nor will a judgment against EDC risk

insolvency of the Nation. Although EDC cannot attach itself to the Nation in this manner, it is influential in determining the closeness of the financial relationship between the Nation and tribal business entity.

f. The overall purposes of tribal sovereign immunity are not served by allowing EDC to enjoy immunity from suit as an arm of the tribe.

Tribal sovereign immunity is reserved for Indian tribes to be free from suits that can cause insolvency of the tribe, drainage of resources, and diminished tribal self-governance. The *Allen* court determined that the overall purposes of tribal sovereign immunity were served by extending sovereign immunity to a tribal business because the tribal business's activities were so closely related to the tribe. *Allen*, 464 F.3d, 1195 (9th Cir. 2006). In this situation, EDC's business activities are not "properly deemed to be those of the tribe." *Id.* EDC largely operates without Nation oversight, has not been successful in its purpose, and cannot encumber Nation assets. R. at 2. EDC's is currently operating, unsuccessfully, for itself without promoting or encouraging tribal economic development. *Allen*, 464 F.3d 1195. Therefore, the overall purposes of tribal sovereign immunity are not served by extending immunity to EDC because it is a business that largely operates outside of tribal objectives.

g. EDC is a tribal entity with little to no promotion of self-sufficiency, economic development, or a strong tribal government.

To argue in the alternative, if the Court considers factors such as whether the tribal entity promotes self-sufficiency, economic development, or strong tribal government, EDC would fail. In *Allen*, the court stated that creation of casinos "was dependent upon government approval at numerous levels . . . including a tribal ordinance and an interstate gaming compact." *Allen*, 464 F.3d at 1046 (quoting the purpose of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701(4)). The tribe in *Allen* took great strides that amounted to very deliberate steps by the tribe and then between the tribe and state government. The *Allen*

court reasoned that compliance with a federal statute and passage of a tribal ordinance for the casino “was dependent upon tribal approval at numerous levels” *Id.* The YIN Tribal Council simply used a tribal commercial code to charter and organized a corporation. The actions of the YIN Tribal Council did not require outside counsel or agreement with Arizona like in *Allen* because YIN is not attempting to open and operate a gaming venture. The *Allen* court used the state and tribal interaction to illustrate that the tribal entity “is not a mere revenue-producing tribal business.” *Id.* The Nation’s tribal commercial code has a purpose of promoting the prosperity of the Nation and its citizens, but EDC has no such stated purpose. In *Allen*, the court said the tribe's casino was an arm of the tribe and lent significant weight to the nature of the relationship of the tribe's casino and the tribe. *Id.* EDC has failed to serve its purpose of assisting and creating successful economic endeavors. The EDC does not proclaim to support a strong tribal government, in fact, the EDC is hampering the Nation’s government because the EDC owes \$8 million on a one-time loan from 2009. R. at 1. Additionally, the Nation tribal government and Nation are not the primary beneficiaries of EDC because 50% of annual profits do not go to the tribe. This split of annual benefits does not create self-sufficiency because 50% of annual profits stay with EDC; self-sufficiency may be created by having a majority of profits benefit the Nation. Therefore, should the Court choose to adopt this factor in addition or in the alternative to the *Breakthrough* test, EDC fails the arm of the tribe analysis.

The EDC is a federally chartered tribal entity, created with the purpose of creating and assisting in economic endeavors. It has a board of five directors, two non-members, and three Nation-members, with the YIN Tribal Council retaining authority to remove board members via a 75% vote. Although YIN Tribal Council intends to extend sovereign immunity to EDC,

the purpose and the reality of EDC do not lend weight to supporting extending immunity; EDC is not a successful endeavor, liabilities from EDC cannot attach to Nation assets, nor is EDC operated by the Nation. Financially, the Nation provided EDC with a one-time loan which the EDC has not even come close to repaying. Additionally, only 50% of EDC annual profits actually go back to the Nation to benefit the Nation. Next, EDC and the Nation activities are not so closely related as to be deemed the same for purposes of extending immunity to the tribal business. Finally, the reality of EDC is that it does not promote economic development, because it is failing as a business, nor does EDC promote tribal self-sufficiency because the tribe does not receive the full benefit of EDC.

VIII. TRIBAL SOVEREIGN IMMUNITY EXTENDS TO THE EDC CEO FRED CAPTAIN AND ACCOUNTANT MOLLY BLUEJACKET IN THEIR OFFICIAL CAPACITIES BUT NOT THEIR INDIVIDUAL CAPACITIES

a. Extending immunity to EDC CEO and accountant in their official capacities

Tribal sovereign immunity extends to EDC CEO and accountant because both individuals were acting within their official capacities. Sovereign immunity protects tribes from suit, and “also protects tribal employees in certain circumstances,’ [] namely, where a tribe’s officials are sued in their official capacities.” *Pistor v. Garcia*, 791 F.3d 1104, at 1110 (9th Cir. 2015) (quoting *Maxwell v. County of San Diego*, 708 F.3d 1075, at 1086 (9th Cir. 2013)). Immunity extends to EDC CEO and accountant as an officer and an employee acting within their capacity and authority as officer and employee of EDC. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, at 727 (9th Cir. 2008). Thomas communicated near daily with first YIN Tribal Council, then after 2009 with EDC CEO, and presented reports to EDC CEO. Carol communicates via email with EDC CEO to submit monthly bills. R. at 1, 2. Therefore, tribal sovereign immunity extends to EDC ECO and accountant because both

were acting within the scope of their authority and official capacities when interacting or communicating with the Smiths’.

b. No immunity extending to EDC CEO and accountant in their individual capacities

Tribal sovereign immunity does not extend to EDC CEO and accountant because they are both being sued in their individual capacities as people. “An officer sued in his individual capacity . . . cannot claim *sovereign* immunity from suit ‘so long as the relief is sought not from the [government] treasury but from the officer personally.’” *Pistor*, 791 F.3d at 1112. Sovereign immunity does not extend to employees named in their individual capacity, especially when the suit seeks money damages directly from the individually named employees; “even though they [EDC CEO and accountant] are sued for actions taken in the course of their official duties.” *Id.* The ideology is that employees cannot be sued for actions taken because of their employment, only suits arising out of actions taken in their employment. *Id.* Smiths' must prove that there has been damage that has arisen out of the EDC CEO's and accountant's actions while they were performing their employment duties. However, no such facts exist to indicate that EDC CEO and accountant have acted in a matter that has caused harm or damage to the Smiths'. Therefore, sovereign immunity does not extend to EDC CEO and accountant because they are being sued in their individual capacities for damages arising out of their employment.

CONCLUSION

For the foregoing reasons, this court should dismiss the tribal claims due to lack of personal jurisdiction and subject matter jurisdiction. Then, this court should determine that the Nation’s tribal sovereign immunity does not extend to the EDC because the EDC fails the

arm of the tribe analysis. Finally, this could should allow tribal sovereign immunity to extend to the EDC CEO and accountant in their official capacities but not their individual capacities.

Respectfully submitted,

January 2017

Counsel for Petitioner