

CASE NO. _____

IN THE
Yuma Indian Nation Supreme Court

THOMAS SMITH & CAROL SMITH,

Petitioners,

v.

YUMA INDIAN NATION, et al.,

Respondents.

On Petition of writ of Mandamus to the Yuma Indian Nation Supreme Court

PETITION FOR WRIT OF MANDAMUS

Team Identification Number _____

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QUESTIONS PRESENTED

I. 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.

II. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

STATEMENT OF THE CASE

A. Statement of the Proceedings

The Yuma Indian Nation Tribal Council (Council) filed this action against Thomas Smith and Carol Smith in the Yuma Indian Nation (YIN) Trial Court. R. at 3. The Council alleged the Smiths breached contracts with the tribe for financial advice. R. at 3. The Council also claims the Smiths violated duties of confidentiality and fiduciary duties owed based on the contracts. R. at 3. The tribe requested only the liquidated damages amount agreed to in the contracts. R. at 3.

In response, the Smiths each filed a special appearance to challenge the YIN tribal court's personal and subject matter jurisdiction. R. at 3. The Smiths moved to dismiss the case or alternatively to stay the trial court proceedings for leave to file for declaratory judgment on jurisdiction in federal court. R. at 3. The trial court denied both motions. R. at 3. Continuing under their special appearances the Smiths filed answers, denying the claims by the Tribal Council, and counterclaimed against the Nation for money owed under their contractions and for defamation based on the claims against the Smiths for violating fiduciary duties. R. at 3.

The counterclaims against the Nation were also made against the Economic Development Corporation (EDC), the EDC's CEO Fred Captain, and accountant Molly Bluejacket by impleading all three as parties in the tribal court action. R. at 3. The tribal court dismissed all of the Smiths' counterclaims on the basis of sovereign immunity and ruled the YIN courts had

subject matter jurisdiction over the contract claims by the Nation against the Smiths. R. at 3. The Smiths then filed this interlocutory appeal challenging the jurisdiction of the tribal courts and the extension of tribal sovereign immunity to the EDC, Captain, and Bluejacket. R. at 3.

B. Statement of the Facts

Thomas Smith has advised the Yuma Indian Nation (“the Nation”) on economic development policy for the last ten years. R. at 1. Thomas advised the Tribal Council and tribal chairs on an as needed basis and after the creation of the YIN Economic Development Corporation (EDC) in 2009 provided advice through EDC officers. R. at 1. The Tribal Council approved a contract with Carol Smith, a stockbroker and Thomas’s sister, to advise the Nation and EDC on stocks, bonds, and securities issues. R. at 2. The Smiths were happy to work with the Tribal Council and the EDC until they were asked for advice on pursuing marijuana legalization and cultivation on the YIN reservation. R. at 2.

Thomas began working with the YIN in 2007. R. at 1. The tribe asked Thomas to provide advice on economic development to the tribe. R. at 1. The contract that Thomas and the Nation signed required absolute confidentiality about all economic development plans and communications with tribal officials. R. at 1. There were no choice of law or forum selection provisions in the contract, only a requirement that disputes should be litigated in a court of competent jurisdiction. R. at 1. The parties signed the contract at Thomas’s office in Phoenix, Arizona. R. at 1.

Thomas mainly communicated with Fred Captain, the EDC CEO, and Molly Bluejacket, an EDC employee and accountant, after the Nation chartered the corporate entity under its tribal code. R. at 1. Captain reported to a five-member board that controlled management of the EDC. R. at 1. The Smiths advised Captain and Bluejacket on how to achieve the entity’s purpose, to

develop “successful economic endeavors” on and around the YIN reservation in Southwest Arizona. R. at 1. The EDC was intended to provide financial support to the tribe, with fifty percent of the entity’s profits pledged to the Nation’s general fund annually, but after nearly a decade the EDC has only repaid two million dollars of a ten-million-dollar start-up loan. R. at 2.

The Arizona referendum on legalizing recreational marijuana led the EDC to investigate possible opportunities in cultivating and selling marijuana on the reservation. R. at 2. The referendum was unsuccessful, but the EDC continued to pursue marijuana operations. R. at 2. The EDC convinced the Tribal Council to legalize marijuana cultivation and use on the reservation for any and all purposes. R. at 2. The EDC communicated their intent to pursue a marijuana operation with Thomas Smith. R. at 2. The Smiths are personally opposed to marijuana use and did not want to participate in the EDC’s development of a commercial marijuana industry even if it were legal. R. at 2.

The Smiths were worried about possible state and federal criminal consequences from being involved with a marijuana business and Thomas contacted his acquaintance, the Arizona Attorney General, to get advice on possible criminal liability for Carol and himself. R. at 2. In the course of his conversation with the Attorney General, Thomas disclosed that the YIN EDC was investigating the possibility of developing a recreational marijuana industry on the YIN reservation. R. at 2. The Attorney General, worried about the possibility of recreational marijuana cultivation in spite of the failure of the Arizona referendum, contacted the Nation and EDC with a cease and desist letter demanding they abandon efforts to develop recreational marijuana operations within the State of Arizona. R. at 2. The cease and desist letter enraged the Tribal Council and the EDC and the Tribal Council filed claims against the Smiths the YIN tribal

court. R. at 3. The claims are based on the confidentiality provision in the contracts between the Nation and the Smiths. R. at 3.

ARGUMENT

The Tribal Council's suit against Thomas Smith and Carol Smith should be dismissed because the Yuma Indian Nation courts lack subject matter jurisdiction over the contract dispute. Alternatively, the trial court should be ordered to stay the proceedings to allow a federal district court to review jurisdiction. Tribal courts do not have subject matter jurisdiction over nonmembers unless they are within the borders of the reservation and then only under limited exceptions. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The Smiths' contracts were executed and performed outside of the YIN reservation borders, placing the subject matter of disputes beyond the jurisdiction of the YIN courts. If the case is not dismissed, the comity considerations of the tribal exhaustion doctrine should not bar federal court review of jurisdiction because this interlocutory appeal will exhaust tribal court remedies for jurisdictional challenges.

The Smiths' counterclaims against the YIN EDC should not be barred by sovereign immunity. A tribal corporate entity should not be extended tribal sovereign immunity unless it is an arm of the tribe. *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108 (Ariz. 1989). The factors used by courts to determine whether a tribal entity should be extended tribal sovereignty focus on the organizations structure, the financial and legal relationship to the tribe, and whether extending tribal sovereignty to the entity supports the purposes of tribal sovereign immunity. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294 (1996). The YIN EDC's financial and legal relationship to the Nation and the purposes of sovereign immunity weigh in favor of denying sovereign immunity to the EDC and the organizational structure only weighs slightly in favor of extending sovereign immunity to the EDC. Thus, the Smiths' claims against the EDC, EDC CEO

Fred Captain, and accountant Molly Bluejacket should not be barred by extending the Nation's immunity to the EDC.

A. The Yuma Indian Nation tribal court lacks jurisdiction over the suit against the Smiths because the requirements for jurisdiction over non-members are not satisfied and state and federal issues predominate the litigation.

The YIN tribal court lacks jurisdiction over the case filed against Thomas Smith and Carol Smith because a tribal court generally does not have jurisdiction over nonmembers of the tribe. Tribal court jurisdiction is ultimately an issue of federal law, which only allows narrow exceptions to this general rule. The YIN Supreme Court should dismiss the action against the Smiths. Alternatively, the YIN Supreme Court should order the trial court to stay proceedings to allow the District Court for the District of Arizona to determine whether the YIN tribal court has jurisdiction over the case.

The trial court must satisfy requirements for both personal jurisdiction and subject matter jurisdiction to establish jurisdiction in a case. Generally tribal courts do not have civil jurisdiction over nonmembers of the tribe. *Montana v. United States*, 450 U.S. 544, 565 (1981); see also *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The exceptions to the general rule that tribal courts lack subject matter jurisdiction over nonmembers rely on the inherent sovereignty retained by Indian tribes. *Montana*, 450 U.S. at 563–64. *Montana* made it clear that the retained sovereignty of the Indian tribes was limited to authority “to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” 450 U.S. at 564. The scope of the jurisdiction over nonmembers depends on the inherent sovereignty retained by a tribe and “the extent to which that sovereignty has been altered, divested, or diminished.” *Nat’l Farmers Union Ins. Co. v. Cow Tribe of Indians*, 471 U.S. 845, 855–56 (1985). The jurisdiction of a tribe over nonmembers

depends both on consent by the nonmember and the “tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citing *Montana*, 450 U.S. at 564.)

Underlying the exceptions to the *Montana* rule is the federal policy of encouraging tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). This policy has led the Supreme Court to allow tribal court jurisdiction over nonmembers who enter consensual relationships with the tribe or tribal members and nonmember activities on non-Indian fee land within the reservation that implicate tribal sovereignty. *Montana*, 450 U.S. at 565, 566. The cases cited by the Court in *Montana* and the subsequent cases interpreting the exceptions do not allow regulation of nonmember activity outside of reservation territory. *Plains Commerce*, 554 U.S. at 332–34. The Court has also held the adjudicative authority of tribal courts does not exceed the legislative authority the tribe possesses, unless Congress has enlarged tribal court jurisdiction. *Strate*, 520 U.S. at 440.

The contracts in this case are between nonmembers and the Yuma Indian Nation and do not concern activity within the boundary of the reservation. The contracts cover financial services provided to the tribe using financial institution outside the reservation. The services provided to the tribe were done so remotely and the conduct at issue in the claims made against the Smiths occurred off the reservation and the tribe has no authority over nonmember activity outside of the reservation boundaries. The conduct at issue is not within the jurisdiction of the YIN tribal court. Therefore, the YIN Supreme Court should dismiss the case for lack of jurisdiction.

1. The consensual relationship between the Smiths and the Yuma Indian Nation does not satisfy the requirements for jurisdiction over non-members in tribal courts.

The first exception to the general rule barring tribal subject matter jurisdiction over nonmembers allows tribes to regulate nonmembers who enter consensual relationships with the tribe. *Montana*, 450 U.S. at 565. The Court explained the jurisdiction was limited to “regulat[ing], through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Id.* In cases following the *Montana* precedent the Supreme Court has held a tribe’s adjudicative jurisdiction is not greater than the legislative jurisdiction inherent in the retained sovereignty of a tribal government, but has declined to decide whether it is actually equal in scope. *Nevada v. Hicks*, 533 U.S. 353, 367, 374 (2001), *Plains Commerce*, 554 U.S. at 330, *Strate*, 520 U.S. at 453. Therefore, if the subject matter is beyond the legislative power of a tribe it is beyond the jurisdiction of a tribal court.

The subject matter jurisdiction of tribal courts over nonmembers based on a consensual relationship is limited to disputes arising out of that consensual relationship. *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011). A Muscogee tribal court attempted to require a law firm to return legal fees to the Thlopthlocco tribe, which the firm represented in the Muscogee tribe’s court. *Id.*, at 1146. The Tenth Circuit held that the consensual relationship between the law firm and the tribal court’s bar did not create subject matter jurisdiction over the contract between the other tribe and nonmembers. *Id.*, at 1153. Simply entering a consensual relationship with an Indian tribe does not confer general subject matter jurisdiction over claims arising between the nonmember and the tribe.

The subject matter jurisdiction over nonmembers of a tribe is limited to activities that occur on that tribe’s reservation. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake*

Superior Chippewa Indians, 807 F.3d 184, 207–08 (7th Cir. 2015) (quoting *Atkinson Trading*, 532 U.S. at 656). A financial company providing bond services for a tribe was sued in tribal court. *Id.*, at 188. The circuit court in *Stifel* held that the tribal court could not exert jurisdiction over claims not based on activities on tribal reservation land. *Id.*, at 208. The nonmembers’ multiple on-reservation meetings did not confer tribal court jurisdiction over claims that were based on activity outside of the reservation. *Id.* The court clearly foreclosed jurisdiction, “[b]ecause the tribal court action does not seek redress for any of Stifel’s consensual activities on tribal land, it does not fall within *Montana*’s first exception.” *Id.*

Tribal authority over nonmember activity within the boundaries of a tribe’s reservation must be related to a nexus between a consensual relationship with the nonmember and the on-reservation activity to be regulated. *Atkinson Trading*, 532 U.S. at 656. In *Atkinson*, the Navajo Nation attempted to recover an occupancy tax from a hotel within the boundaries of the reservation, but on non-Indian fee land.¹ *Id.*, at 648. The Court held that the guests of the hotel had no consensual relationship with the tribe and the tribe could not tax guests based on the consensual relationship between the tribe and the hotel. *Id.*, at 656.

When contract documents are executed outside reservation boundaries jurisdiction is not available in tribal courts. *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 (7th Cir. 2014). Payday loan companies under ownership or control of tribal members attempted to challenge a class action brought against them in state court by removing the case to Federal court and claiming tribal court jurisdiction. *Id.*, at 768. Despite a forum selection clause that identified the tribal court in the loan agreements, the Seventh Circuit held the tribal court could not establish jurisdiction over nonmembers that did not apply for, negotiate, or execute the loan agreements on

¹ The courts have used this term to refer to land owned in fee simple by nonmembers within the boundaries of recognized Indian reservations.

the reservation. *Id.* at 782. The court noted the tribe's sovereignty over its land and the tribe's inherent authority to regulate nonmember activity on tribal land was not implicated when nonmembers executed contracts outside the reservation. *Id.*

In the current case, the Smiths did enter into a consensual relationship with the Yuma Indian Nation by signing contracts to provide financial services to the tribe. R. at 1,2. The relationship with the tribe was governed by this contract, which included provisions requiring absolute confidentiality regarding the tribe's plans for economic development. R. at 1. Despite control of the relationship being governed by the contracts between the Smiths and the YIN, this did not confer general jurisdiction over the relationship in the YIN tribal court. The first *Montana* exception does not confer broad authority over the terms of the contract, but simply gives tribes an ability to regulate nonmember activity within the reservation and within the scope of the consensual relationship. The activities that brought rise to the dispute occurred off the reservation and the tribal court cannot establish jurisdiction over claims arising from conduct outside of reservation boundaries. Further, the fiduciary duties owed are controlled by licensing under state or federal law and do not merely arise from the consensual relationship between nonmembers and the Nation.

The Tribal Council's claims for violation of fiduciary duties rest on the fiduciary duties required under state or federal law controlling the Smiths' professional licensing. The grant of regulatory authority including licensing in *Montana* did not confer jurisdiction over professional licenses not issued by the tribal government on tribal courts. This case is the mirror image of the situation in *Crowe*, where the consensual relationship between the tribal bar license and the nonmember attorney did not confer tribal court jurisdiction over a foreign contract. Similarly, the

consensual relationship created by the Smiths' contracts does not allow tribal court jurisdiction over the professional obligations under a foreign license.

None of the claims brought against the Smiths arise from on-reservation activity by the Smiths. The only activity the Tribal Council can argue violated the fiduciary duties, duty of confidentiality, or the terms of the contract is disclosing the plans for marijuana cultivation to the Arizona Attorney General. The Smiths activities on reservation are remarkably similar to those deemed insufficient for jurisdiction in *Stifel*, where claims for tribal court jurisdiction over a contract were based on a small number of on reservation meetings. The Smiths signed the contracts off-reservation. R. at 1, 2. Their daily activities under the contracts were performed off-reservation. R. at 1, 2. The disclosure of confidential communications, that the Tribal Council's claims arise from, happened off-reservation. R. at 2. The only activity related to the Smiths' contracts occurring on-reservation was quarterly reports to the Tribal Council by Thomas. R. at 2.

Tribal court jurisdiction over the claims against the Smiths is not based on a nexus of on-reservation activity and the consensual relationship with the tribe. The Tribal Council does not claim the Smiths' on-reservation conduct gives rise to their claims. Similar to the consensual relationships in *Atkinson Trading*, there is no nexus between the Smiths' on-reservation conduct and the claims brought under the contract with the tribe.

Even though the Smiths' contractual relationship with the tribe establishes consent to tribal authority, similar to the facts of *Jackson*, the Smiths did not enter the reservation to negotiate the contracts or execute any documents related to the contract. R. at 1, 2. The contracts at issue in this case do not contain forum selection provisions, they specify only that contract disputes will be litigated in a court of competent jurisdiction. R. at 1. The lack of a forum

selection should not leave jurisdiction to the tribal courts because the Smiths' contracts were not executed on the reservation. The tribal court lacks subject matter jurisdiction over claims based on those contracts.

The tribal court cannot assert jurisdiction over the off-reservation activities of the Smiths based on a contract to provide financial services. The first *Montana* exception does not confer general jurisdiction over the activities of nonmembers under consensual relationships. Tribes only retain sovereign authority over on-reservation conduct of nonmembers that creates a nexus with the consensual relationship between the nonmember and the tribe. The consensual relationship between the Smiths and the YIN Tribal Council does not confer subject matter jurisdiction over conduct outside the reservation's boundaries. There is no basis for subject matter jurisdiction in tribal court over the disclosure of tribal communications and economic development plans that did not occur on the reservation.

2. The financial advice provided to the YIN Tribal Council by the Smiths does not implicate the political integrity, economic security, or the health and welfare of the YIN and does not confer subject matter jurisdiction over contracts.

Montana's second exception to the lack of tribal authority over nonmembers allows tribes "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 566. The conduct giving rise to jurisdiction under the second *Montana* exception cannot simply injure the tribe, the subsistence of the tribal community must be endangered. *Plains Commerce*, 554 U.S. at 341 (citing *Montana*, 450 U.S. at 566). Even when such dire injury threatens tribal sovereignty, this exception also only allows tribal court jurisdiction over conduct within reservation boundaries. *Stifel*, 807 F.3d at 193. Clearly tribal governments cannot regulate nonmember conduct outside

reservation boundaries under the second *Montana* exception; therefore, the tribe's adjudicative authority does not exceed its regulatory authority, *Hicks*, 533 U.S. at 367, the tribal court cannot claim subject matter jurisdiction over claims based on off-reservation conduct.

Regulating nonmember conduct on non-Indian fee land within an Indian reservation is not within a tribe's authority unless it threatens or directly effects the political integrity, economic security, or health and welfare of the tribe. *Montana*, 450 U.S. at 566, *Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, (9th Cir. 2013). The nonmember in *Evans* was building a single-family home on land he owned in fee simple within the Fort Hall Indian Reservation. *Id.* at 1301. The tribal government demanded the nonmember obtain a building permit from the tribal government and that all contractors and subcontractors obtain business licenses from the tribe to operate on the reservation. *Id.* The tribe's Land Use Policy Commission filed a complaint against the nonmember land owner and contractors claiming multiple violations of tribal ordinances. *Id.* The Ninth Circuit held that the tribe had no regulatory or adjudicative authority over the claims because there was no authority over nonmembers on non-Indian fee land. *Id.* at 1306. The court rejected arguments by the tribe that it had authority over the activities under the second *Montana* exception based on zoning and regulating environmental harms. *Id.* at 1303, 1305, 1306. If tribes lack civil authority over activity on non-Indian fee land within the reservation that does not threaten tribal sovereignty, then tribes cannot assert authority over activities outside of the reservation that do not threaten tribal sovereignty.

The enforceability of freely entered commercial agreements does not raise issues of tribal sovereignty addressed under the second *Montana* exception. *Stifel*, 807 F.3d at 209. The circuit court struck down tribal court jurisdiction over bond agreements that if enforced would

cause financial consequences that the tribe claimed would threaten the tribe's ability to provide members with needed services. *Id.* The court explicitly foreclosed application of the second *Montana* exception in situations where enforcement of "freely negotiated commercial transactions" are at issue and no on-reservation nonmember activity has threatened tribal self-government. *Id.*

The second *Montana* exception does not allow tribal civil authority beyond the boundaries of a reservation or for nonmember activity that does not threaten tribal self-government. The Smiths did not conduct any activities that rise to the level of threatening tribal self-government. Their only activity on the YIN reservation consisted of presenting reports on the financial services provided by the Smiths. The actions that underlie the Tribal Council's claims did not endanger the subsistence of the tribal community. Disclosing the tribe's plans to pursue marijuana cultivation and distribution on the reservation did not injure the tribe's political integrity, economic security, or health and welfare.

Similar to the economic commercial activities on non-Indian fee land in *Evans*, the off-reservation commercial transactions with the Smiths does not threaten tribal self-government. Advice regarding off-reservation financial transactions by the tribe no more threatens the ability of Indians to make their own law and be governed by them than does constructing a single-family home on non-Indian fee land within a reservation. Both commercial activities involve various transactions, but a tribe has no authority over either when they do not occur on tribal property. The tribe's property is implicated in the current case by the financial services the Smiths provide; however, the tribe has control over the services provided by the Smiths via contract and cannot claim the Smiths control the economic security of the tribe in a way that threatens tribal self-government.

The contract between the Smiths and the Tribal Council are similar to the bond agreements at issue in *Stifel* because they are contracts made with nonmembers under state law. The contract was signed and performed on a daily basis by both Smiths off the reservation from offices in Arizona and Oregon. R. at 1, 2. The Smiths occasionally attend meetings on the reservation, but do not perform the majority of the services under the contracts on-reservation. R. at 1, 2. Disclosing potential criminal activity by the tribe does no more to harm the elements of sovereignty elicited in the second *Montana* exception than requiring a tribe to satisfy outstanding financial obligations that will reduce a tribe's ability to provide services to members. The YIN is free to pursue any number of legal avenues for increasing revenue despite the disclosure by Thomas Smith to the Arizona Attorney General.

B. The YIN trial court should stay proceedings and allow the District Court for the District of Arizona to determine jurisdiction if the Supreme Court does not dismiss for lack of jurisdiction because the tribal exhaustion doctrine is satisfied.

The tribal exhaustion doctrine requires a nonmember to exhaust all tribal remedies before bringing an action in federal court to challenge jurisdiction, giving the tribal court “the first opportunity to evaluate the factual and legal bases for the challenge.” *Nat’l Farmers*, 471 U.S. at 856. Ultimately, tribal court jurisdiction is a federal question over which federal courts have subject matter jurisdiction and only “considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court.” *Iowa Mut.*, 480 U.S. at 15 (1987). There is no need for a federal court to abstain from reviewing jurisdictional issues once tribal courts have had a full opportunity to evaluate the jurisdiction issues. *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 683 (5th Cir. 1999).

If tribal appellate court has not reviewed jurisdiction, then the tribal exhaustion doctrine requires federal courts to stay proceedings until tribal courts have had a full opportunity to

review jurisdiction. *Iowa Mut.*, 480 U.S. at 16–17. The nonmember insurance company filed an action in federal court seeking declaratory relief related to an action against the company in tribal court. *Id.* at 12–13. The tribal trial court ruled the tribal courts had jurisdiction, but the tribal code establishing an appeals court did not allow interlocutory appeals from jurisdictional rulings. *Id.* at 12. The Supreme Court ultimately ruled that the exhaustion doctrine was not satisfied and the insurance company must wait until the tribal appeals court had ruled on jurisdiction to challenge jurisdiction in federal court. *Id.* at 19.

If all levels of tribal court review have occurred the tribal exhaustion doctrine allows federal courts to entertain challenges to tribal jurisdiction. *TTEA*, 181 F.3d at 683. The tribal courts in *TTEA* had already denied an appeal challenging the trial court’s determination of jurisdiction. *Id.* at 684. The Fifth Circuit ruled that absent any further option to appeal the tribal court jurisdictional rulings the tribal exhaustion doctrine was satisfied. *Id.* The circuit court explained there was no purpose to stay federal court review of jurisdiction until after a trial. *Id.* at 683.

Unlike the situation in *Iowa Mutual*, after this court reviews the jurisdictional issues this case will have exhausted tribal court remedies on the issue of jurisdiction if the trial court’s ruling is upheld. The YIN courts allowed the interlocutory appeal of jurisdiction to the YIN Supreme Court. R. at 3. The ability to challenge the jurisdictional rulings in the YIN tribal courts will be at an end if the trial court jurisdiction is upheld. Similar to the situation in *TTEA* there is no reason for a federal court to stay its hand on the issue of tribal court jurisdiction until the trial has concluded. If the YIN Supreme Court upholds the lower court’s assertion of jurisdiction, it should order the trial court to stay proceedings until the District Court can review the jurisdictional issues.

C. THE TRIAL COURT ERRONEOUSLY DISMISSED DEFENDANT'S COUNTER CLAIMS BASED ON SOVEREIGN IMMUNITY

The three issues are (1) whether sovereign immunity protects the Yuma Indian Nation, (2) whether tribal sovereign immunity is extended to YIN EDC and (3) whether the EDC's CEO and accountant are afforded sovereign immunity. Indian Nations have traditionally been protected by sovereign immunity. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998). An arm of the tribe is protected by sovereign immunity and tribal officials acting within their official capacity and duties also share sovereign immunity. *Ransom v. St. Regis Mohawk Edn. & Community Fund*, 86 N.Y.2d 553, 559 (1995). YIN is a federally recognized Indian Nation; therefore, it is afforded sovereign immunity. EDC does not meet the required factors to be considered an arm of the tribe; therefore, EDC is not protected by extended sovereign immunity. EDC's CEO and accountant are not protected by sovereign immunity because they are not tribal officials working in a tribal capacity.

1. Yuma Indian Nation sovereign immunity

YIN is protected by sovereign immunity because the U.S. Supreme Court has held numerous times Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers, unless waived. *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003); *Kiowa*, 523 U.S. at 756. "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development, and cultural autonomy." *American Indian Agricultural Credit Consortium Inc., v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). YIN is a federally recognized tribe therefore sovereign immunity applies to them.

2. YIN Economic Development Corporation sovereign immunity

EDC is not protected by extended sovereign immunity because it does not meet the factors required to be considered an arm of the tribe. The U.S. Supreme Court has not addressed a situation where a separate entity related to an Indian tribe has been extended a tribe's sovereign immunity, but the federal and state courts have. *See Ransom*, 86 N.Y.2d at 553; *See Gavle v. Little Six*, 555 N.W.2d 284 (1996), *Cash Advance & Preferred Cash Loans v. Colo. ex rel. Suthers*, 242 P.3d 1099 (2010). Tribal sovereign immunity only extends to an entity that is an "arm" of the tribe. *Ransom*, 86 N.Y.2d at 559. To determine what an "arm" of the tribe is courts have used numerous factors, most of which have similarities. These factors are then used to characterize the degree of the tribe's relationship with the entity. *Cash Advance*, 242 P.3d at 1109. These factors have ranged from three to eleven² and all have a common theme: is the tribe deeply intertwined with the entity?

The court in *Ransom* followed by *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538 (2014). used nine factors to find out if the entity is an arm of the tribe:

[1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the subentity has the power to bind or obligate the funds of the tribe. The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

² "The source of the eleven factors used by the court of appeals is the dissent in a Washington Supreme Court case." *Cash Advance*, 242 P.3d at 1110 n.12 (citing *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389 (Colo.App.2008))

Ransom, 86 N.Y.2d at 559.

Other courts used variations, give or take a few factors. Most notably is whether Indian tribal autonomy is “furthered by the extension of immunity to the business entity.” *Gavle*, 555 N.W.2d at 294; *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 638, 84 Cal.Rptr.2d 65 (1999). The other notable factor is “whether the tribe intended for the entities to have tribal sovereign immunity.” *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1191 (10th Cir.2010); *American Property Management Corp v. Superior Court*, 206 Cal. App. 4th 491, 501 (2012).

In this case the court should evaluate EDC using the nine factors from *Ransom* with modification of the other two notable factors. This set of factors does a good job of presenting the closeness between the tribe and the economic entity. The *Ransom* factors also highlight the importance of the financial connections. The court in *Cash Advance* reject factors involving purpose and activities of the entity. The rejection is due to their interpretation of *Kiowa*, a U.S. Supreme Court case. Contrary to the *Cash Advance* court’s belief the purpose and activities are relevant because the U.S. Supreme Court ruling in *Kiowa* was for a tribe and not an arm of the tribe. *Trugen*, 71 Cal. App. 4th at 639. An entity can get so far detached that it’s out of the tribe’s purview and can no longer be an extension of the tribe. *Id.* If this were a non-profit business then it would not be of such importance to include the financial factors.

Before further defining the intricacies of these factors its beneficial to break them up into three categories. The first category being financial and legal obligations includes three factors involving the entity’s finances and tribe’s obligations. This category is weighed the heaviest. *Runyon v. Assn. of Village Council Presidents*, 84 P.3d 437, 440 (Alaska 2004). This case’s facts

tend to weigh in favor of not extending sovereign immunity because it does not meet the factors. The second category focuses on the intent and purpose of the entity which includes three factors. This category does tilt towards extending sovereign immunity to EDC due to the entity being created under tribal law. While the third category goes to the organization and ownership of entity. This category does not favor either way because two of the factors lean towards extending sovereign immunity while the other two do not.

a. Financial and Legal Obligations

The financial and legal obligation factors are the most important when courts consider them in addition to the other factors. They tend to show the financial connection with the tribe. *Runyon*, 84 P.3d at 440. “the vulnerability of the tribe’s coffers in defending a suit against the sub-entity indicates that the real party in interest is the tribe.” *Ransom*, 86 N.Y.2d at 559. The notable factor mentioned in *Gavle*, asking whether the sovereign immunity is “furthered by the extension of immunity to the business entity.” is all encompassing of this category because furtherance of tribal sovereignty implies there are financial ties and obligations between the tribe and the economic entity. To demonstrate whether sovereignty would be furthered by extending tribal sovereignty is by evaluating these factors: whether the corporate entity generates its own revenue; whether a suit against the corporation will impact the tribe’s fiscal resources; and whether the sub-entity has the power to bind or obligate the funds of the tribe.

The EDC does generate its own revenue, 50% of that revenue is paid to the tribe on an annual basis. (R. at 2). It does not get the chance to go directly to the tribe once the revenue is generated. This distinction is pointed out in *Sue/Prior* where the court states “The test, with respect to the financial relationship factors of *Ransom*, is not the indirect effects of any liability on the tribe’s income, but rather whether the immediate obligations are assumed by the tribe”.

Here, EDC has assumed all the financial obligations and cannot indirectly effect liability of the tribe. The outcome of a suit will not impact the tribe's fiscal resources because the debts are not to implicate the assets of the nation in anyway shape or form. (R. at 2). An entity is only an arm of the tribe if a suit against that entity can damage or significantly affect the tribe's treasury.

Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir.2006); *Runyon*, 84 P.3d at 440.

Final factor in this category; EDC does not have the power to bind, lend, or borrow, in the tribe's name or on behalf of the tribe. (R. at 2). The startup investment was a one-time payment, suggesting that the tribe has no further interest in putting more money into this entity. Nor did the tribe expect collect all of their investment because the investment did not specify that it had to be paid back. EDC fails to meet the three financial factors which indicate it would further tribal sovereignty by extending it.

b. Intent and Purpose of the Entity

To find the intent and purpose of an entity the courts have asked whether the organization was created under tribal law or federal law. This factor has conflicting significance, some courts say it is very significant while others don't find it as significant. *American Property*, 206 Cal. App. 4th at 503. The Lewiston Gold Course Corporation was organized under tribal law, yet the court still held the corporation was not an arm of the tribe. *Sue/Perior*, 24 N.Y.3d at 538.

The other factor in this category is to find out if the purposes are similar to or serve those of the tribal government. In *American Property*, the court pointed out U.S. Grant LLC existed solely for profit and did not mention the economic development specifically towards the tribal members. They ultimately held U.S. Grant LLC was not an arm of the tribe.

In contrast, tribes that created entities such as a college (*see Hagen v. Sisseton-Wahpeton Comty. College*, 205 F.3d 1040 (2000)), health care facility (*See Pink v. Modoc Indian Health*

Project, 157 F.3d 1185 (9th Cir.1998)), and housing (See *Weeks Construction, Inc. v. Oglala Sioux Housing Authority* 797 F.2d 668, 671 (8th Cir. 1986)) were found to serve as functions traditionally covered by tribal government. *American Property*, 306 Cal App. 4th at 504. Lastly, the notable factor mentioned in *Breakthrough*, “whether the tribe intended for the entities to have tribal sovereign immunity.” is also included in this category because it goes to the intent of the tribe when creating the entity.

EDC was created under the tribal commercial code. (R. at 1). This is similar to *Breakthrough*, *American Property*, *Ransom*, and *Sue/Perior* where the court found this in favor of tribal immunity. The purpose served by EDC is stated in the corporate charter that created it: “to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona.” (R. at 1). This purpose is directed towards successful economic endeavors which translates to a for-profit business. The EDC doesn’t state anything about tribal welfare but does specifically target economic endeavors. Similar to *American Property* the business did not direct its purpose specifically towards the tribal member. This economic endeavor is not a service like a college, health care facility, or tribal housing.

Lastly, the tribe did intend to give the economic entity sovereign immunity as stated in the charter because they framed it as an “arm-of-the-tribe”. (R. at 1). Two of the three factors in this category slightly favor extending sovereign immunity to EDC.

c. Organization and Ownership of the Entity

Courts ask whether the organization’s governing body is comprised mainly of tribal officials. When there is no requirement for tribal official to be on the board it does not implicate tribal sovereignty. “The tribal government does not manage the corporation”. *Dixon*, 772 P.2d at

p.1109. Cases where the board of directors are partially made up of the tribe's council its more of a mix. For example, in *Gavle Little Six Inc. (LSI)* was required to have at least three council members on the board. In which the court ultimately held that LSI was an arm of the tribe.

The other three factors of this category are whether the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body. These factors are not found to be significant or insignificant. *Sue/Perior*, 24 N.Y.3d at 548.

EDC does not require any tribal council officials but does require that they be experienced in business endeavors. The charter requires three tribal members be on the board of directors while the other two are nontribal members. (R. at 1). In comparison with *Dixon* the directors are not officials therefore are separate from the tribal government. Whereas in *Breakthrough* or *Gavle*, the directors required tribal officials to hold the position. YIN does not have ownership of the land purchased. (R. at 2).

YIN does not have immediate control over the corporate and financial records but does review and approve of those records on a quarterly basis. (R. at 2). This is similar to *Sue/Perior* where the Lewiston Gold Course Corp's accounting activities were controlled by the tribe. That court had found this factor had slightly suggested it partakes in the Nation's Sovereign immunity. *Sue/Perior*, 24 N.Y.3d at 538. The tribe does have the power to dismiss directors from the board with a 75% vote from the tribal council. (R. at 2).

The EDC not requiring tribal council members on the board of directors and the tribe not owning EDC assets favors not extending sovereign immunity to EDC. While YIN does have final control over the accounting activities and dismissal of directors these two factors favor

extending sovereign immunity. As a category, the weight is neutral on whether EDC should be extended sovereign immunity.

d. Considering all factors together they weigh against extending sovereign immunity

Overall the facts in this case applied to the factors are very similar to *Sue/Prior*. In *Sue/Prior* three of the nine factors were in favor of the entity being included in the tribal sovereign immunity. The court held that the other six factors were in support of the conclusion that Lewiston Golf lacks sovereign immunity especially that of the heavier weighted financial factors. If the entity providing essential functions like housing, education, and health care they would have been found to be protected by tribal sovereign immunity because these are functions “traditionally shouldered by the tribal government.” *American Property*, 206 Cal. App. 4th at 491. Immunity should only apply when furthering these functions or policies towards cultural autonomy, preservation of tribal self-determination, and protection of tribal assets. *Dixon*, 772 P.2d at 1110. Even though the intent and purpose category was slightly in favor of extending sovereign immunity and the organization and ownership was neutral the intent and purpose did not outweigh the financial factors. The facts of the case at hand did not meet the factors required to be considered an arm of the tribe. Therefore, the extended sovereign immunity does not apply to EDC.

3. EDC’s CEO and accountant sovereign immunity

Sovereign immunity does not apply to EDC’s CEO or accountant. The immunity only applies to officials performing their official duties within the scope of their tribal official role. *Trudgen*, 71 Cal. App. 4th at 643. Once they go beyond the scope of their roles they are beyond the reach of tribal immunity. *Id.* In the case at hand the CEO and accountant were not YIN

council officials. The extended sovereign immunity does not apply to EDC so it will not apply to its employees either.

CONCLUSION

For the reasons stated above YIN tribal court lacks jurisdiction over the suit against the Smiths. The EDC is not an arm of the tribe therefore is not extended tribal sovereignty and because the EDC is not an arm of the tribe the CEO and accountant are not extended the sovereign immunity either. The suit against the Smiths should be dismissed for lack of subject matter jurisdiction and the Smiths' claims against the YIN EDC, CEO Captain, and accountant Bluejacket should not be barred by sovereign immunity.