

No. 17-024

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

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YUMA INDIAN NATION,  
*Plaintiff/Appellee,*  
v.

THOMAS SMITH & CAROL SMITH,  
*Defendants/Appellants.*

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**On Interlocutory Appeal**

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**BRIEF OF APPELLEE**

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TEAM 233

*Counsel for Appellee*

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## **QUESTIONS PRESENTED**

- 1) Did the Tribal Court properly exercise personal and subject matter jurisdiction over the Smiths, and, did the Tribal Court properly refuse to stay the suit pending a federal court ruling on the question of the Tribal Court's jurisdiction over the Smiths?
- 2) Does sovereign immunity, or any other form of immunity, protect the Yuma Indian Nation from the Smiths' claims and extend to the YIN Economic Development Corporation, and or the EDC CEO and accountant?

## **STATEMENT OF THE CASE**

### **I. Statement of the proceedings**

This is an interlocutory appeal of the trial court's dismissal of identical Motions to Dismiss and Counterclaims filed by defendants/appellants Thomas Smith and Carol Smith against plaintiff/appellee Yuma Indian Nation (YIN) and third-party appellees Economic Development Corporation, Fred Captain, and Molly Bluejacket.

In 2017, the YIN filed suit in Tribal Court against defendants/appellants Thomas Smith and Carol Smith, alleging breach of contract, violation of fiduciary duties, and violation of the duty of confidentiality. In a special appearance in Tribal Court, defendants/appellants Thomas Smith and Carol Smith filed identical Motions to Dismiss, citing lack of personal and subject matter jurisdiction by the Tribal Court. In the alternative, the Smiths asked the trial court to stay the Tribal Court proceedings pending resolution of a suit brought in federal court challenging Tribal Court jurisdiction over the Smiths. The trial court denied both the Motions to Dismiss and the Requests for Stay.

Purporting to continue under their special appearance, the Smiths each both filed an answer to the YIN complaint and filed a counterclaim against the YIN, seeking monies allegedly due under their contracts and damages for defamation. This counterclaim impleaded the YIN Economic Development Corporation; Fred Captain, the Chief Executive Officer of

the EDC; and Molly Bluejacket, the EDC accountant. The trial court, finding the YIN and the third-party defendants were immune to suit because of tribal sovereign immunity, dismissed the Smiths' counterclaims.

The Smiths filed this interlocutory appeal.

## **II. Statement of the facts**

In 2007, the Yuma Indian Nation signed a contract with Thomas Smith, a certified financial planner and accountant. Smith agreed to provide financial advice pertaining to economic development on the YIN reservation, located in southwest Arizona. The contract required Smith to maintain absolute confidentiality regarding all tribal communications and economic development plans and was signed by the parties at Smith's office in Phoenix, AZ.

Pursuant to the terms of the contract, Smith provided nearly daily financial advice on a variety of economic development issues to the Tribal Council as a whole; to various tribal chairs; to individual members of the Tribal Council; and, after the creation of the Economic Development Corporation in 2009, to its CEO, Fred Captain, and to its accountant, Molly Bluejacket. This advice was delivered to the reservation through phone calls, emails, written reports, and regular, in-person, presentations by Smith to the Tribal Council on the reservation.

In 2010, with the written permission of the Tribal Council, Smith signed a contract with his sister, Carol Smith, under which she was to provide him, the Tribal Council, and the EDC financial advice pertaining to stocks, bonds, and securities issues. This contract was identical in all respects to the 2007 contract. This specifically included the duty of absolute confidentiality regarding tribal communications and economic development plans.

In 2009, the Tribal Council chartered an Economic Development Corporation (EDC) under tribal commercial code. The purpose of the EDC is to promote the economic strength and prosperity of the Nation and its citizens by creating and assisting the development businesses and other economic endeavors by the Nation and its citizens. The Tribal Council invested heavily in the EDC, providing a \$10 million loan from the Nation's general fund.

The EDC corporate charter structured it as a wholly owned subsidiary of the Nation, to operate as an "arm of the tribe" in accordance with the Nation's commercial code. The EDC is to be under the direction of a five-member board of directors, who are to serve staggered terms. The Board was to at all times consist of a majority of YIN citizens with the other two seats to be occupied by either Indians not members of the Nation or by non-Indians. The Tribal Council appointed the initial board, with appointments to subsequent vacancies to be made through election by the remaining board members. The Tribal Council retained the authority to remove, with or without cause, any director at any time by a 75% vote.

The EDC charter requires the EDC to be managed by experienced business persons. It empowers the EDC to undertake a wide range of economic endeavors on behalf of the Nation while at the same time taking steps to ensure the EDC remains subordinated to the interests of the Nation. For instance, the EDC is empowered to buy and sell property in fee simple, whether on or off the reservation but is prohibited to borrow or lend money in the name of the Nation or to encumber, implicate, or alienate property belonging to the nation. Similarly, the EDC is empowered to sue and to consent to be sued but its charter specifies that the EDC, its board, and its employees are protected by sovereign immunity to the fullest extent of the law. The tribal commercial code confers tribal sovereign immunity on all tribal corporations wholly owned by the tribe. The EDC charter also requires the EDC to keep detailed financial records

and to submit them to the Tribal Council for review and approval on a quarterly basis, consistent with the Tribal Council's authority to remove directors.

In 2016, the EDC began investigating the possibility of engaging in marijuana cultivation and sales as a means of furthering economic development. The Tribal Council passed an ordinance legalizing marijuana cultivation and use on the reservation and the EDC began to develop a marijuana operation. The Nation communicated with Thomas Smith on multiple occasions about its marijuana operation plans in his role as the financial advisor for the tribe. Smith subsequently shared these communications and the nation's economic development plans with the Arizona Attorney General of the Nation's.

The Nation learned that Smith had shared these communications and its economic development plans when the Arizona Attorney General sent the Nation a cease and desist letter pertaining to the development of recreational marijuana operations. After learning that Smith had shared confidential communications and economic plans, the Nation sued Thomas Smith and Carol Smith in Tribal Court, alleging breach of contract, violation of fiduciary duty, and violation of the duty of confidentiality.

### **SUMMARY OF ARGUMENT**

This case is about defining the extent of tribal sovereignty, tribal jurisdiction and tribal sovereign immunity in the Nation and the Nation's courts. Decisions regarding tribal court jurisdiction are reviewed *de novo*. *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir.2011). Issues of tribal sovereign immunity are reviewed *de novo*. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir.2002). This Court should find that the Nation's courts have personal and subject matter jurisdiction over the Smiths, it should



not stay these proceedings while the Smiths seek a ruling in the Arizona federal district court, and that tribal sovereign immunity does protect the Nation and the EDC from the Smiths' counterclaims. Furthermore, tribal sovereign immunity extends to the EDC CEO, Fred Captain, and the EDC accountant, Molly Bluejacket, when acting in their professional capacities. Because Captain and Bluejacket interacted with the Smiths only in their professional capacities, the individual capacity counterclaims against them were properly dismissed.

On interlocutory appeal, the Smiths have posed two threshold issues. The first, do the YIN courts have personal and subject matter jurisdiction over the Smiths, or in the alternative, should the Tribal Trial Court stay the suit while the Smiths seek a ruling in the Arizona federal district court? The second, does sovereign immunity, or any other form of immunity, protect the YIN, the YIN Economic Development Corporation, and or the EDC CEO and accountant from the Smiths' claims?

Addressing the first question, the Supreme Court of the United States makes clear in *Montana* that Indian Tribes properly exercise civil jurisdiction over non-members in civil matters when the non-members have entered into a consensual relationship with the tribe through contract or other commercial dealings. *Montana v. U.S.*, 450 U.S. 544, 565 (1981). Both Smiths had contracts or commercial dealings with the Nation. Therefore, the Nation's courts do have personal and subject matter jurisdiction over the Smiths in this matter.

As to the alternative, the highest federal court in the nation made clear in *Nat'l Farmers Union Ins. Companies* that a federal court would be remiss if it failed to allow a full record to be developed in the Tribal Court before either it addressed the merits or any question concerning appropriate relief. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*,

471 U.S. 845, 855-856 (1985). This Court should not stay the suit while the Smiths seek a ruling in the Arizona federal district court because that would deprive the federal court of the complete record upon which the United States Supreme Court directed it to wait.

Addressing the second question, the analysis of whether tribal sovereign immunity extends to the four parties differs, but nevertheless ultimately supports the extension of immunity in each case. For the claims against the YIN itself, the doctrine of tribal sovereign immunity is not in dispute. The Supreme Court of the United States plainly states that any unconsented suit filed against a tribe, short of one with specific congressional authorization, must be dismissed. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). As to the EDC, the 9<sup>th</sup> and 10<sup>th</sup> Circuit Courts of Appeals have endorsed the six-factor *Breakthrough* test in determining sovereign immunity for a tribal corporation or entity as an arm-of-the-tribe. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010); *White v. Univ. of Cal.*, 765 F.3d 1010, 1032 (9th Cir. 2014)<sup>1</sup>. In this case, the YIN and the EDC are sufficiently related to justify the extension of immunity to the EDC under the *Breakthrough* analysis.

As to Captain and Bluejacket, the 9<sup>th</sup> Circuit has ruled that immunity should be extended to tribal employees when they are acting in their official capacities. *Maxwell* held that if a lawsuit indicates an individual in its claim for relief and does not implicate the power of the sovereign, then the suit is one brought against the individual in their individual capacity and sovereign immunity does not extend. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir.2013). Here, however, there is no evidence that Captain and Bluejacket acted outside of their tribally-authorized job descriptions. Instead, they interacted with the Smiths in

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<sup>1</sup> (The *Breakthrough* test was endorsed by the 9<sup>th</sup> Circuit in this case).

only their professional capacities, leaving them protected under the Nation’s sovereign immunity. While the Smiths claim to sue Captain and Bluejacket in both their professional and individual capacities, the only interactions between them and the Smiths were those undertaken in their professional capacities and as the tribal employees; thus, the counterclaims against them in their individual capacities was properly dismissed. Since tribal sovereign immunity extends to Captain, as the EDC CEO, and to Bluejacket, as the EDC accountant, the suit against them in their professional capacities was also properly dismissed.

In summary, the Nation’s courts do have personal and subject matter jurisdiction over the Smiths, this Court should not stay the suit while the Smiths seek a ruling in the Arizona federal district court, and tribal sovereign immunity protects the Nation and the EDC from the Smiths’ suit. Additionally, tribal sovereign immunity extends to Captain, as the EDC CEO, and to Bluejacket, as the EDC accountant, when acting in their professional capacities. Finally, because Captain and Bluejacket interacted with the Smiths only in their professional capacities the individual capacity counterclaims against them were properly dismissed.

## ARGUMENT

### **I. THE YUMA INDIAN NATION (YIN) PROPERLY EXERCISES BOTH PERSONAL AND SUBJECT MATTER JURISDICTION OVER THOMAS SMITH AND CAROL SMITH AND THE TRIBE’S SUIT AGAINST THEM SHOULD NOT BE STAYED PENDING A FEDERAL COURT RULING.**

“A decision regarding tribal court jurisdiction is reviewed *de novo*...”. *Water Wheel*, 642 F.3d at 808. For a tribe to “exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction.” *Water Wheel*, 642 F.3d at 809. A tribe’s regulatory

and adjudicative jurisdiction—and hence its subject matter jurisdiction—is inherent in its retained tribal sovereignty and extends to cases involving the conduct of non-Indians on Indian lands. *See generally, Waterwheel*, 642 F.3d at 808-809 (recognizing that inherent tribal sovereignty gives rise to lesser powers, among them the power to regulate nonmembers on tribal lands); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)(recognizing power of tribes to regulate nonmembers on tribal lands); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)(recognizing tribal regulatory power as well established). “A tribe’s regulatory authority concerns its power to regulate nonmember conduct while adjudicative authority relates to the tribal court’s jurisdictional power to adjudicate certain disputes.” *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 234 F.Supp.3d 1042, 1051 (E.D. CA. 2017). However, adjudicative authority is effectively coterminous with regulatory authority and a tribe cannot adjudicate that which it cannot regulate. *See Strate v. A-1 Contractors*, 520 U.S. 438, 442, 117 S.Ct. 1404, 1407-1408 (1997).

Indian tribes properly exercise civil jurisdiction over non-tribal members in civil matters when they have entered into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana*, 450 U.S. at 565. Alternatively, a tribe may also “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 or welfare of the tribe.” *Id.* at 566.

Any examination of “whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians” is an “examination [*that*] should be conducted in the first instance in the Tribal Court itself.” *Nat’l Farmers Union*, 471 U.S. at 855-856. Subject to a scant few exceptions, “the orderly administration of justice in the federal court will be served

by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.” *Id.* at 856.

1. **THE TRIBAL COURT PROPERLY EXERCISES SUBJECT MATTER JURISDICTION OVER THE DISPUTE BETWEEN THE SMITHS AND THE YIN BECAUSE THE DISPUTE FALLS INTO THE SECOND PRONG OF THE *MONTANA* TEST AND WITHIN THE TRIBE’S INHERENT SOVEREIGN AUTHORITY TO REGULATE.**

A tribal court’s jurisdiction arises from the tribe’s retained inherent sovereignty. *See, e.g., U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2004)(holding that a tribe’s jurisdiction, while subject to plenary power of Congress to modify, arises from the tribe’s own inherent sovereignty rather than delegated federal authority); *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001)(recognizing that Congressional modification of tribal jurisdiction constitutes an enlargement or diminution of existing inherent jurisdiction rather than the creation or grant of jurisdiction). Tribes “retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations...”. *Montana*, 450 U.S. at 565. A tribe’s subject matter jurisdiction encompasses its adjudicative and regulatory jurisdiction. *Water Wheel*, 642 F.3d at 809. A tribe’s adjudicative jurisdiction extends, at best, no further than its regulatory or legislative jurisdiction. *Strate*, 520 U.S. at 543. It remains unclear whether that adjudicative authority is coextensive with a tribe’s regulatory authority or represents some inferior quantum thereof. What is clear, however, is that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.” *Id.* (internal quotation marks omitted).

The second prong of the *Montana* test helps identify where tribes possess authority to regulate the activities of non-members. Under that second prong, the tribe may “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 or welfare of the tribe.” *Montana*, 450 U.S. at 566. When, for instance, the activity of a nonmember within the reservation threatens or otherwise has a direct effect on the economic security of the tribe, that activity properly falls within the subject matter jurisdiction of the tribal court. Additionally, the Nation’s tribal code specifically provides that the “Tribal Courts shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Tribe...”. Yuma Indian Nation, T.C. § 1-107. This general civil jurisdiction necessarily includes subject matter jurisdiction over contract disputes, subject constraints imposed by Congress or federal common law.

In this case, the Smiths engaged in several activities impacting the economic security of the tribe. The Smiths contracted with the tribe to provide financial advice and services to the tribe to facilitate economic development within the Nation. Such economic development is a quintessential aspect of economic security and it cannot be disputed that professional financial advice has a direct effect on economic security. Therefore, the Smith’s activities are the sort of activities which, if they took place on the reservation, would fall squarely within the compass of the second prong of the *Montana* test. Consequently, a contractual dispute arising from those activities would fall within the subject matter jurisdiction of the YIN tribal courts if the locus of the contract dispute is the YIN reservation.

“In determining the locus of a contract dispute, courts generally look to (1) the place of contracting, (2) the place of the negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties,

evaluating each factor according to its relative importance with respect to the dispute.” *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 985 (9<sup>th</sup> Cir. 1983).

The precise location at which a contract is signed is informative but is not dispositive when assessing the locus of the contract dispute. While the contract between Thomas Smith and the YIN was signed in Phoenix, key events of the contract took place on the YIN reservation.<sup>2</sup> In *Stock West Corp.*, the Court held that tribal court jurisdiction is colorable when a nonmember sues a tribe alleging breach of contract and tort and the key events may have taken place on tribal lands. *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9<sup>th</sup> Cir. 1992). Here, the key events of the contract are the actual providing of financial advice to the YIN Tribal Council. While Thomas Smith regularly sent emails containing some such advice to the EDC CEO, Fred Capitan, he fulfilled his contractual obligation to the Tribal Council through in person quarterly presentations that took place on the reservation.

The record is not clear as to where the negotiation of the contracts giving rise to the current disputes took place. They almost certainly took place in a variety of locations, including Phoenix, Portland, and the reservation. However, neither the place of negotiation nor execution of the contract is dispositive. In *Tohono O’odham Nation v. Schwartz*, the Court rejected a contractor’s argument “that because the disputed contract was negotiated and executed off the Reservation, the locus of the contract dispute is off the reservation.” *Tohono O’odham Nation v. Schwartz*, 837 F.Supp 1024, 1032 (D. AZ. 1993). Instead, the court found the location of the performance of the contract to weigh most heavily in assessing the locus of the contract dispute. *Id.* Here, the place of performance was the reservation. The Smiths provided advice to the

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<sup>2</sup> The record is unclear where the Carol Smith contract was signed, whether in Phoenix or in Portland. In either case, the location of the signing, while perhaps helping to inform a decision as to the locus of the contract dispute, is not dispositive.

Tribal Council and other users within the reservation. They did so through a combination of email, phone calls, and personal presentations. The consistent factor in the performance of the contract was that the advice was received and acted upon within the reservation.

The subject matter of the contracts amongst the Smiths and the YIN is financial advice. Insofar as it is useful to consider the location of an intangible like financial advice, it seems appropriate to do so in the context of to where that advice was conveyed and where it was to be put to use. In this case, the advice provided by both Smiths was conveyed to the YIN Tribal Council inside the reservation. It was to be put to use by them within the confines of the reservation in order to facilitate tribal economic development. This strongly suggests that the location of the subject matter of the contract is properly considered to be the YIN reservation.

The place of residence of the parties to the contract is only tangentially related to contract dispute. The Smiths have not alleged any conflict of law associated with the residences of the parties that would influence the nature of the underlying dispute. Instead, the Smiths have simultaneously sought to challenge the jurisdiction of the tribal court to hear the claims against them while simultaneously asking the tribal court to hear their claim against the Nation.

Given the weight afforded to the place of performance and the location of the subject matter of the contract, it seems likely that the locus of the contract dispute is reservation. As a result, the tribal court has a colorable basis upon which to assert that the disputed activities have taken place within the reservation and therefore it has subject matter jurisdiction.

Because the second prong of the *Montana* test recognizes that tribes may exercise civil jurisdiction over the activities of nonmembers within the reservation where those activities threaten or have a direct impact on the economic security of the tribe, the YIN tribal courts properly exercise subject matter jurisdiction over these disputes.



2. **THE TRIBAL COURT SYSTEM PROPERLY EXERCISES PERSONAL JURISDICTION OVER THOMAS AND CAROL SMITH BECAUSE THE SMITHS ENTERED A CONSENSUAL RELATIONSHIP WITH THE YIN.**

The Smiths are subject to the personal jurisdiction of the YIN tribal courts because the Smiths established a consensual relationship with the YIN through commercial dealing, contracts, and other arrangements.

There is a “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.” *Montana*, 450 U.S. at 565. However, “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations....” *Id.* The *Montana* decision gives courts a two-prong test to determine whether a tribal court properly exercises civil jurisdiction over a non-member.

The first prong of *Montana* holds “[a] tribe may regulate, 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.* The “other means” contemplated in this prong specifically include the authority of the tribal courts to entertain lawsuits between the tribe or tribal members and nonmembers who have entered these consensual relations. *See, e.g., Williams v. Lee*, 358 U.S. 217, 222, 79 S. Ct. 269 (1959)(recognizing explicitly the authority of tribal courts to entertain lawsuits between members and non-members); *County of Lewis v. Allen*, 163 F.3d 509, 515 (9<sup>th</sup> Cir. 1998)(recognizing applicability of the first prong of the *Montana* test to lawsuits between a private party and the tribe.) The second prong *Montana* holds that a “tribe may also retain inherent power 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 or welfare of the tribe.” *Montana*, 450 U.S. at 566.

In this case, the tribal court properly exercises personal jurisdiction over both Smiths because they fall squarely within the compass of the first prong of the *Montana* test. Thomas Smith entered a consensual relationship with the Nation when he entered a contract to provide various commercial services to the Nation the form of financial advice on an as-needed basis. Smith’s long term contractual relationship with the Nation suffices to bring him within the personal jurisdiction of the tribal courts.

The record indicates that, in 2010, Thomas Smith, with the written permission of the Tribal Council, signed a contract with Carol Smith. The contract Carol Smith signed was identical to that between Thomas Smith and the Nation. It is not entirely clear from the record whether Carol Smith signed a contract with the YIN directly or whether her status is that of a subcontractor, with her contractual relationship with the Nation running through her brother. Ultimately, it is not necessary to divine the precise nature of the contractual relationship between Carol Smith and the Nation.

Instead, the first prong of the *Montana* test extends to “commercial dealings, contracts, leases, or other arrangements...”. *Montana*, 450 U.S. at 565. “There is no requirement that [a nonmember’s] commercial dealings with the [tribe] be a matter of written contract or lease actually signed by [the nonmember].” *Water Wheel*, 642 F.3d at 818. Here, the parties provided to the Nation the work produced by Carol Smith and she submitted her monthly bills directly to, and was paid by, the Nation. Regardless of whether Carol Smith was in a direct contractual relationship with the tribe, she was involved in commercial dealings with the tribe for a period of at least seven years. This involvement in commercial dealings with the tribe brings Carol

Smith squarely within the compass of the first prong of the *Montana* test and thus within the personal jurisdiction of the YIN tribal courts.

The second prong of the *Montana* test may also provide personal jurisdiction over “non-Indians on fee lands within [the] reservation when [their] 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; *see also*, *Neptune Leasing, Inc. v. Mountain States Petroleum Corp.*, 11 Am. Tribal Law 162, 167 (Navajo 2013)(holding that both prongs of the *Montana*’s test are applicable to personal jurisdiction.) In this case, the conduct in which the Smiths were engaged was the provision of economic advice to the Nation to improve the Nation’s economic prospects. It is self-evident that to provide professional economic development advice intended to improve a tribe’s economy is to engage in conduct that has some direct impact on the tribe’s economic security. As a result, the Smiths fall squarely within the second prong of the *Montana* test as well as the first and the Tribal Courts properly exercise jurisdiction over them.

Even absent the *Montana* tests, “traditional personal jurisdiction principles” may extend “personal jurisdiction over a non-Indian agent acting on tribal land.” *Water Wheel*, 642 F.3d at 805. These traditional personal jurisdiction principles have their foundation in a tribe’s inherent sovereign powers, including the power to exclude nonmembers. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333. “From a tribe’s inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land.” *Water Wheel*, 642 F. 3d at 808-809. The exercise of these powers of inherent sovereignty, and the lesser included powers that necessarily flow from them, does not require recourse to the *Montana* framework. *Neptune*, 11 Am. Tribal Law at 167-168. *Montana* does not create tribal jurisdiction. Instead,

it recognizes and, to some extent, constrains the exercise of existing tribal powers, of which personal jurisdiction over non-Indians is simply one.

Alternatively, the Smiths brought themselves within the personal jurisdiction of the YIN tribal court when they availed themselves of the tribal court as a forum in which to bring a counter-suit alleging defamation and seeking recovery of monies alleged due under their contracts. The Smiths purport to have brought their counterclaim under a continuation of the special appearance in which they challenged the jurisdiction of the YIN tribal courts to hear the case. While the former formal legal distinction between general and special appearances generally has been abolished in federal practice with the advent of Rule 12, the label “special appearance” is still sometimes used for an appearance intended to challenge the jurisdiction of the court under Rule 12b(1) or (2). *See, e.g., Orange Theatre Corporation v. Rayherstz Amusement Corporation*, 139 F.2d 871, 874 (3<sup>rd</sup> Cir. 1944); 5B Fed. Prac. & Proc. Civ. § 1344. However, the Smiths proceeded far beyond a special appearance to challenge the jurisdiction of the tribal courts. The Smiths filed an answer to the tribe’s complaint. The Smiths also filed a counterclaim for monies due under the contract and for alleged defamation.

When plaintiffs, or counterclaimants as is the case here, sue in a tribal court, they are acquiescing to the civil jurisdiction of that court. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1136 (9<sup>th</sup> Cir. 2006). In *Smith*, a nonmember plaintiff sued a tribal entity in tribal court. The nonmember plaintiff then filed an action in federal court, alleging that the tribal court lacked jurisdiction over him as a nonmember. The appellate court in *Smith* held that the nonmember plaintiff’s “agreement to invoke the jurisdiction of the tribal court fits more comfortably within the first exception” or prong of the *Montana* test and constitutes a consensual relationship despite not falling within the literal language of commercial dealings,

contracts, leases, or other arrangements. *Id.* Here, the Smiths, like the plaintiff in *Smith*, invoked the jurisdiction of the tribal court by filing suit therein. In so doing, they have brought themselves squarely within the compass of the first prong of the *Montana* test and thereby subjected themselves to the personal jurisdiction of the YIN tribal courts.

Because the Smiths were involved in consensual relationships with the YIN, whether contractual relationships, some other form of commercial dealings, or by availing themselves of the tribal court as a forum in which to bring a suit the Smiths are subject to the personal jurisdiction of the YIN tribal courts.

3. **THIS COURT SHOULD NOT STAY PROCEEDINGS WITHIN THE TRIBAL COURT PENDING THE OUTCOME OF THE SMITHS' FEDERAL SUIT BECAUSE THE TRIBAL COURT PROCEEDINGS HAVE NOT YET BEEN EXHAUSTED.**

“Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction.” *Boozer v. Wilder*, 381 F.3d 931, 934 (9<sup>th</sup> Cir. 2004)(citing *Nat’l Farmers Union*, 471 U.S. at 850-853). However, before doing so “a plaintiff must first exhaust tribal court remedies.” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9<sup>th</sup> Cir. 2009). “Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8, 107, S.Ct. 971 (1987). A scant handful of exception apply to this requirement to first exhaust tribal remedies and these were laid out in several prior cases. *See, e.g., Hicks*, 533 U.S. at 369.

Absent one of these exceptions, any examination of “whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians” is an “examination [that] should be conducted in the first instance in the Tribal Court itself.” *Nat’l Farmers Union*, 471

U.S. at 855-856; *but cf.*, *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7<sup>th</sup> Cir. 2015)(holding that exhaustion was not required when the tribal court appeared to lack subject matter jurisdiction.) It is now well established that “the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.” *Id.* at 856.

“At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.” *Iowa Mut. Ins.*, 480 U.S. at 17. The Smiths, like the plaintiff in *Iowa Mut. Ins.*, have not waited for the tribal appellate courts to review the determinations of the lower tribal court. The instructions in *Iowa Mut. Ins.* are clear, “[u]ntil appellate review is complete, the...Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.” *Id.* If this Court were to stay the proceedings as the Smiths request, it would deny the very federal court to which the Smiths would appeal “the benefit of [the tribal courts’] expertise in such matters...”. *Nat’l Farmers Union*, 471 U.S. at 857. *See also*, *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 12217, 1228 (9<sup>th</sup> Cir. 1989)(*finding that federal courts should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted.*) The Smiths have not exhausted their available tribal remedies, nor are they excused from doing so under any of the exceptions to the exhaustion requirement.

The exceptions to exhaustion are summarized concisely *Elliot* as “(1) when an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) when the tribal court action is patently violative of express jurisdictional prohibitions; (3) when exhaustion would be futile because of the lack of an adequate opportunity to challenge the

tribal court's jurisdiction; and (4) when it is plain that the tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no other purpose than delay." *Elliott*, 566 U.S. at 847 (internal quotations and alterations omitted). The Smiths have not alleged any of these exceptions are applicable here nor do any other them appear to be applicable.

Tribal court jurisdiction is not being asserted as part of an effort to harass the Smiths or in bad faith. In deciding whether this is so, a reviewing court is to "[look] to the proceeding and the court overseeing that proceeding to make its determination." *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d. 1196, 1201 (9<sup>th</sup> Cir. 2013). Here, nothing in the record suggests, nor have the Smiths alleged, that the tribal trial court, or this Court, are motivated by a desire to harass or operating in bad faith. As a result, the first exhaustion exception does not apply.

The tribal court exercise of jurisdiction in this case is not patently violative of express jurisdictional provisions. On the contrary, tribal law explicitly extends tribal court subject matter jurisdiction to "all civil actions arising under the Constitution, laws, or treaties of the Tribe" and tribal court personal jurisdiction to "all defendants served within territorial jurisdiction of the Courts, or served anywhere in cases arising within the territorial jurisdiction of the Tribe, and all personas consenting to such jurisdiction." Yuma Indian Nation, T.C. § 1-107. Here, it is unclear where the Smiths received service of process but it is clear that this case arises within the territorial jurisdiction of the Tribe. Moreover, the Smiths, when they sued in the tribal courts, consented to the jurisdiction of those courts. As a result, the courts' exercise of jurisdiction is not patently violative of express jurisdictional provisions.

The Smiths do not allege, nor does the record indicate, that the exhaustion of tribal remedies would be futile because of the lack of an adequate opportunity to deny the tribal

courts' jurisdiction. Rather, the contrary is apparent in the record. The Smiths filed motions with the trial court in which they challenged the jurisdiction of the tribal courts to hear this case. The trial court considered and ruled on those motions. The appellate court has granted an interlocutory appeal to consider the question of jurisdiction. The Smiths have not been denied an adequate opportunity to challenge tribal court jurisdiction and it is in no way futile for the Smiths to first exhaust potential tribal remedies before taking recourse to the federal courts.

It is not so plain that tribal court jurisdiction is lacking as to excuse exhaustion of tribal remedies as nothing more than delay. "If jurisdiction is colorable or plausible, then the exception does not apply and exhaustion of tribal court remedies is required." *Elliott*, 566 U.S. at 848 (citing *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9<sup>th</sup> Cir. 2008)). Jurisdiction is colorable or plausible when "the assertion of tribal court jurisdiction...appears to have a valid or genuine basis." *Stock West Corp. v. Taylor*, 964 F.2d at 919. Here, it is plausible, even if disputed, that tribal court jurisdiction has a valid or genuine basis in both the *Montana* exceptions because the Smiths both entered into a contract or other commercial consensual relationship with the tribe and their activities threatened or had a direct impact on the economic security of the tribe. Moreover, the Smiths' invoked tribal jurisdiction by suing in tribal court. As a result, it is not so plain tribal court jurisdiction is lacking as to make enforcement of the exhaustion requirement nothing more than delay.

Because none of the exceptions to the exhaustion requirement have been alleged or appear to be applicable, the Smiths should not be excused from the requirement to exhaust tribal court remedies and this Court should not stay tribal court proceedings pending the Smiths' action in federal court. Instead, this Court should allow the tribal court proceedings to



run to completion so as to develop the sort of full record on which any reviewing federal court will need to rely and to offer that court the benefit of this Court's expertise.

In this case, the Smiths have asked the Court to deny that it has jurisdiction over them and over these lawsuits, or, in the alternative, to stay tribal court proceedings until the federal district court decides the tribal courts' jurisdiction. The Court should do neither of these things. The tribal courts properly exercise jurisdiction over both the Smiths and these suits under the *Montana* exceptions and because the Smiths themselves have invoked the jurisdiction of the tribal courts by bringing suit in them. Granting the stay the Smiths request would have the effect of impeding the development of the full record upon which a federal court will need to rely should it review the question of jurisdiction at the Smiths' request.

**II. THE YUMA INDIAN NATION (YIN), THE YIN ECONOMIC DEVELOPMENT CORPORATION (EDC), THE EDC CHIEF EXECUTIVE OFFICER AND THE EDC ACCOUNTANT ALL ENJOY COMMON-LAW SOVEREIGN IMMUNITY FROM THE SMITHS' CLAIMS.**

“Issues of tribal sovereign immunity are reviewed de novo.” *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir.2007). Although generally “[a] district court's denial of a motion to dismiss is not a final decision within the meaning of 28 U.S.C. § 1291 . . . an adverse decision . . . denying tribal sovereign immunity as a complete defense to proceeding with the litigation” is considered a final decision for purposes of § 1291 appellate jurisdiction. *Id.* at 1089. That is because, “[a]s with absolute, qualified, and Eleventh Amendment immunity, tribal sovereign immunity ‘is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.’” *Id.* at 1090 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S.

139, 143–44, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993))(alteration in original)(emphasis omitted).

The “doctrine of tribal immunity [is] settled law” and any suit filed against a tribe absent congressional authorization or express tribal waiver must be dismissed. *Kiowa*, 523 U.S. at 756. The Nation and the EDC are so closely related that the EDC functions as an arm of the tribe and thus shares the Nation's sovereign immunity. As employees of the Nation, acting in their professional capacities, the EDC CEO and accountant enjoy the Nation’s sovereign immunity.

**1. THE YUMA INDIAN NATION (YIN) ENJOYS COMMON-LAW SOVEREIGN IMMUNITY FROM THE SMITHS’ CLAIMS.**

The Smith’s claims must be barred because the Nation is entitled to immunity as a happenstance of sovereignty, rendering them immune from lawsuits.

Indian tribes are “domestic dependent nations” that exercise “inherent sovereign authority.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (*Potawatomi*) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 17, 8 L. Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, (2004) (“[T]he Constitution grants Congress” powers “we have consistently described as ‘plenary and exclusive’” to “legislate in respect to Indian tribes”). And yet, remain “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Thus, unless and “until Congress acts, the tribes retain” their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).

Among the core aspects of sovereignty is the “common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106. Immunity is “a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).<sup>3</sup> The qualified nature of Indian sovereignty modifies that principle only by placing a tribe’s immunity, like its other governmental powers and attributes, in Congress’s hands. See *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653 (1940) (*USF&G*) (“It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit”). The “doctrine of tribal immunity [is] settled law” and any suit filed against a tribe absent congressional authorization (or a waiver) must be dismissed. *Kiowa*, 523 U.S. at 756.

In the case at hand, the Smith’s filed counterclaims against the YIN. The trial court rightfully dismissed all of these claims against the YIN due to sovereign immunity. The trial court ruled in adherence to the time-honored precedent of sovereign immunity for Indian tribes.

Therefore, given a clear precedent from the United States Supreme Court and the rightful followed of the precedent by the district court, the Smith’s claims must be barred due to the YIN’s entitlement to immunity as a happenstance of sovereignty.

**2. THE YIN ECONOMIC DEVELOPMENT CORPORATION (EDC) ENJOYS COMMON-LAW SOVEREIGN IMMUNITY FROM THE SMITHS’ CLAIMS.**

The YIN Economic Development Corporation (EDC) enjoys sovereign immunity from lawsuits due to its status as an arm-of-the-tribe. The 9<sup>th</sup> and 10<sup>th</sup> Circuit Courts of Appeal have

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<sup>3</sup> cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is “inherent in the nature of sovereignty not to be amenable” to suit without consent).

endorsed a six-part factor test when assessing whether a tribal corporation or entity is entitled to sovereign immunity as an “arm-of-the-tribe.” *White*, 765 F.3d at 1032; *Breakthrough*, 629 F.3d at 1187.

These six factors are: (1) the method of creation of the economic entity; (2) the purpose of the entity; (3) the structure, ownership, and management of the entity, including the amount of control the tribe has over the entity; (4) the tribe's intent with respect to the sharing of its sovereign immunity with the entity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting the entity immunity. *Id.*

The first factor, the method of creation of the YIN's EDC, weighs in favor of the extension of sovereign immunity to the EDC. In the 10<sup>th</sup> circuit case *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, the Picayune Rancheria of the Chukchansi Indians created a sub-governmental corporation called the “Chukchansi Economic Development Authority” in order to manage a casino. *Breakthrough*, 629 F.3d at 1176-77. The Court in *Breakthrough* found that the first factor in the test weighed in favor of tribal sovereign immunity extending to the Authority. *Id.* at 1191. Specifically, they point out that the Tribe had created the Authority under tribal law. Additionally, they mention the significance of the Tribe's descriptions of the Authority, describing it as an arm-of-the-tribe. *Id.* at 1191-92. A tribal resolution created the Authority under the Tribe's constitution, describing the Authority as a body corporate and politic, an instrumentality of the Tribal Government, an authorized tribal agency, wholly owned by the tribe. *Id.* at 1192.

Like the Authority in *Breakthrough*, the YIN EDC was created by the tribe under a tribal commercial code or law. The code authorizes the Tribe, pursuant to its inherent

sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. Like *Breakthrough*, here the YIN Tribal Council created the EDC through a corporate charter, describing it as a wholly owned subsidiary of the Tribe or an “arm-of-the-tribe.” The nature of the creation of the EDC, along with the description suggest that the EDC enjoys a close relationship with the Tribe. Therefore, the first factor, the method of creation of YIN’s EDC, weighs in favor of extending immunity to the EDC.

The second factor, the tribal purpose of the entity, also weighs in favor of extending immunity because the EDC was created for the prosperity of the Tribe and its citizens. The Court in *Breakthrough* found that the second factor in the test weighed heavily in favor of tribal sovereign immunity extending to the Authority. *Id.* The tribal ordinance governing the Authority was created by the Tribal Council to act on behalf of the Tribe in part by furthering the economic prosperity of the Tribe. *Id.* The Court points out how the revenue from the Authority clearly benefits the Tribe. *Id.* Fifty percent (50%) goes to tribal governmental functions, 15% for tribal economic development, 10% to the tribal trust fund and 25% is distributed among each eligible member of the tribe as per capita payments. *Id.* at 1192-93.

Much like the Authority in *Breakthrough*, the YIN EDC was created by the Tribal Council to establish and assist in the development of successful economic endeavors. Additionally, the EDC’s revenue benefits the Tribe through the annual allocation of 50% of the corporation’s net profits into the YIN general fund. The EDC charter states that at all times, the five-member (5) board of directors must consist of a three (3) tribal members, a majority. Furthermore, the EDC benefits the Tribe through its significant employment of Tribal members. The EDC is required to apply tribal preference in hiring employees and in contracting with any necessary third parties. The EDC has employed an average of 25 tribal

citizens full-time every year since its creation in 2009. Therefore, due to the clear language that the EDC was created to bolster successful economic endeavors, that at least 50% of the EDC profits end up in the Tribe's general fund annually and that the EDC employs a multitude of tribal employees, the second *Breakthrough* factor suggests that the EDC enjoys a sufficiently close enough relationship with the Tribe for immunity to be extended to it.

The third factor, which looks to the entity's structure, ownership, and management, including the amount of control a tribe has over an entity, also weighs in favor of extending immunity to the EDC for four reasons. They are the mandatory tribal majority in the Board of Directors, the established Tribal Council oversight authority, existing tribal hiring preferences and the strong history in tribal member employment within the EDC.

The Court in *Breakthrough* decided the third factor was a wash in their case due to a make-up of both tribal and non-tribal associates in the Authority. *Id.* at 1193. They pointed out that the seven Board of Directors of the Authority were Tribal members, all of which were sitting on the Tribal Council. *Id.* The Chairperson of the Tribe also acts as the Chairperson of the Authority. *Id.* However, the Chief Financial Officer of the Authority, the General Manager of the Casino, and the Chief Financial Officer of the Casino were all not tribal. *Id.* Furthermore, and significantly weighing against, the Casino had fifteen directors, twelve of whom were not tribal. *Id.*

Here, the Tribal Council selected the initial five (5) Directors of the EDC. At all times, three (3) of the directors must be tribal members and two (2) must be non-Indians or members of other tribes. Furthermore, the Tribal Council can remove any director, with or without cause, at any time, by a 75% vote. The charter requires the EDC to apply tribal preference in hiring employees and in contracting with outside entities. Also, the EDC has employed an average

of 25 tribal citizens full-time every year since its creation in 2009. Due to the mandatory tribal majority of Directors, the Tribe's oversight authority, tribal hiring preference and a strong history of tribal employment, this factor weighs in favor of extending immunity.

As for the fourth factor, a tribe's intent with respect to the sharing of its sovereign immunity, it is clear that the YIN intended for the EDC to have tribal sovereign immunity. In *Breakthrough*, the Court cited the Authority's governing ordinance, which stated that, "...the Authority shall be clothed by federal and tribal law with all the privileges and immunities of the Tribe, including sovereign immunity from suit in any state, federal, or tribal court." *Id.* at 1193-94. Furthermore, in *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, another 10<sup>th</sup> Circuit case, the Court points out that immunity is extended to an entity or a division within the Tribe when the Tribe clearly expresses so. 546 F.3d 1288, 1294 (10th Cir. 2008); *Breakthrough*, 629 F.3d at 1194.

Here, the Tribal Council expressed in the charter that sovereign immunity extended to the EDC, its Board, and to all employees. The Council included this provision to protect the entity and the Tribe from unconsented litigation and to assist in the success of the EDC's endeavors. Furthermore, the Tribal Council enacted an ordinance regulating tribal corporations, which reads in pertinent part, "[t]he sovereign immunity of the Tribe is hereby conferred on all Tribal corporations wholly owned, directly or indirectly, by the Tribe." *Yuma Indian Nation*, Tribal Code § 11-1003.3 (2005). This language shows the intent of the Nation to extend immunity to entities like the EDC. Therefore, due to the intention memorialized in the EDC charter and the plain language of the tribal code extending immunity to tribal corporations, the fourth factor weighs in favor of extending immunity to the EDC.

The fifth factor, the financial relationship between a tribe and its entity, weighs in favor of extending immunity to the EDC. The reason is in the financially substantial manner in which the Tribe is intertwined with the EDC's financial success, specifically through its initial investment in the EDC, the tribally authorized purpose of the EDC and the Tribe's dependency on the EDC's per annum payments into the Tribe's general fund.

In *Breakthrough*, the Court reasoned that the evidence weighed in favor of extending immunity to the Authority concerning the fifth factor. *Breakthrough*, 629 F.3d at 1194. They pointed out that the Tribe depended heavily on the Casino, which was managed by the Authority, for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities. *Id.* at 1195. One hundred percent of the Casino's revenue went to the Authority and then to the Tribe. *Id.* Therefore, any reduction in the Casino's revenue that could result from an adverse judgment against it would reduce the Tribe's income. *Id.*

In the case at hand, the YIN Tribal Council funded the EDC with a one-time \$10 million loan from the Tribe's general fund. The entity was set up in such a way so that no debts the EDC incurs could ever encumber, or implicate in any way, the assets of the Tribe. Due to a lack of success in its endeavors to date, the EDC has only repaid the Tribe \$2 million of the \$10 million owed. Furthermore, the EDC is required to keep detailed corporate and financial records and submit them on a quarterly basis to the Tribal Council for review and approval. Also, the tribal code authorizes the EDC, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. Lastly, every year fifty percent (50%) of all EDC net profits are to be paid to the YIN general fund. Given the substantial investment the Tribe has made in the EDC, the Tribal Council's



continued oversight on the financial status of the subsidiary, the tribally authorized and codified purpose of the EDC and the Tribe's even more substantial interest in the EDC's success, the fifth factor also weighs in favor of extending immunity to YIN's EDC.

The sixth factor, whether the purposes of tribal sovereign immunity are served by extending immunity to the entity, weighs in favor of extending immunity to the EDC. The reasons are that the majority of the EDC's Directors on the Board of Directors have to be tribal members, the EDC's substantial annual deposit into the Tribe's general fund, the wellbeing of the EDC's direct effect on the Tribe's treasury and, finally, the EDC's declared objective to promote the prosperity of the Tribe and its citizens through creation and assistance in the development of successful economic endeavors.

The Court in *Breakthrough* found the purpose of sovereign immunity was served by extending immunity to the Authority. It pointed out that the Tribe and the Authority are related enough that the Authority's activities are properly deemed to be those of the Tribe itself. *Breakthrough*, 629 F.3d at 1195; *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The Court said the Authority plainly promotes and funds the Tribe's self-determination through revenue generation. *Breakthrough*, 629 F.3d at 1195; *Allen*, 464 F.3d at 1046-47; *Gavle v. Little Six*, 555 N.W.2d 284, 294-95 (Minn. 1996); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 641, 84 Cal. Rptr. 2d 65, 70 (1999). Furthermore, *Breakthrough* notes that Congress has not only expressed a strong policy in favor of encouraging tribal economic development, but extending immunity to the Authority directly protected the Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. *Breakthrough*, 629 F.3d at 1195; *Allen*, 464 F.3d at 1047. In contrast, the Court indicated cases where it has not the immunity of tribal enterprises have typically involved enterprises formed

solely for business purposes and without any declared objective of promoting a tribe's general or economic development. *Breakthrough*, 629 F.3d at 1195; *Trudgeon*, 84 Cal. Rptr. 2d at 70; *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 257, 772 P.2d 1104, 1110 (1989).

Much like the *Breakthrough* case, the evidence here shows the purpose of sovereign immunity is served by extending immunity to the EDC. The Tribe and the EDC are so closely related that the activities of the EDC are those of the Tribe itself. The charter provision requiring that a majority of the EDC directors to be tribal members supports this and shows the Tribe's domination of the entity, rendering it an arm-of-the-tribe itself. The EDC plainly promotes and funds the Tribe's self-determination through revenue generation in the fact that fifty percent (50%) of all EDC net profits are paid to the YIN general fund per annum. This annual deposit fits right in with the historic Congressional policy of extending immunity to entities that directly protect the Tribe's treasury. Lastly, the EDC is simply not an enterprise formed solely for business purposes, nor is it without any declared objective of promoting the Tribe's general tribal or economic development. The declared objective of the EDC is to promote the prosperity of the Tribe and its citizens through creation and assistance in the development of successful economic endeavors. This is consistent with the precedent for extending immunity to entities that promote a tribe's general or economic development.

Due to the tribal majority of Directors on the Board, the EDC's substantial annual deposit into the Tribe's general fund, the wellbeing of the EDC's direct effect on the Tribe's treasury and the EDC's declared purpose to promote the prosperity of the Tribe and its citizens through creation and assistance in the development of successful economic endeavors, the purposes of tribal sovereign immunity are served by extending immunity to the EDC. Therefore, the sixth and final factor weighs in favor of extending immunity to the EDC.

Considering these six factors, it is patent that the YIN and the EDC are so closely related that they should share in the Tribe's sovereign immunity.

3. **THE EDC CEO, FRED CAPTAIN, AND THE EDC ACCOUNTANT, MOLLY BLUEJACKET, ENJOY COMMON-LAW SOVEREIGN IMMUNITY FROM SUIT FOR ACTIONS TAKEN THEIR PROFESSIONAL CAPACITIES.**

EDC CEO, Fred Captain, and EDC Accountant, Molly Bluejacket, enjoy common-law sovereign immunity from the Smiths' claims in their professional capacities, but not their personal capacities. The 9<sup>th</sup> Circuit Court makes clear, “[t]ribal sovereign immunity ‘extends to tribal officials when acting in their official capacity and within the scope of their authority.’” *Linneen*, 276 F.3d at 492; *Cook v. AVI Casino Enterprises, INC.*, 548 F.3d 718, 727 (9th Cir.2008); *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir.2010). There were no interactions between Mr. Captain, nor Ms. Bluejacket and the Smiths that fall outside of their professional capacities. Therefore, Mr. Captain and Ms. Bluejacket are protected in this matter from suit through the limited extension of immunity unto their interactions with the Smiths, within the scope of their jobs working for the Tribe.

In *Miller v. Wright*, the 9<sup>th</sup> Circuit Court of Appeals held, “[a] suit against ... [a tribe's] officials in their official capacities is a suit against the tribe [that] is barred by tribal sovereign immunity.” 705 F.3d 919, 927–28 (9th Cir.2013). Furthermore, in the case *Dry v. United States*, the 10<sup>th</sup> Circuit Court of Appeals ruled, “[d]ue to their sovereign status, suits against . . . tribal officials in their official capacity ‘are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.’” 235 F.3d 1249, 1253 (10th Cir.2000) (quoting *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1997)).

In *Burrell*, the 10<sup>th</sup> Circuit ruled, “[t]ribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority. On the other hand, a tribe’s sovereign immunity *does not* extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him.” *Burrell*, 603 F.3d at 832. (italics added).

The plaintiffs in *Maxwell* alleged that paramedics from a tribal fire department were grossly negligent in treating a gunshot victim, resulting in her death. *Maxwell*, 708 F.3d at 1087. The Court found that tribal sovereign immunity would not be extended to the paramedics in their individual capacities due to the implications of the indicated party (the individuals) stated in the complaint. *Id.* at 1088. The Court adopted and applied a “remedy-focused analysis,” rejecting more “categorical” tests under which sovereign immunity extends to tribal officials sued as individuals for acts done “in their official capacity and within the scope of their authority” or that involved a policy or discretionary function. *Id.* at 1087-88. It went on to note that while individual capacity suits against low-ranking officers typically do not operate against the sovereign, they could not say this would always be the case. *Id.* at 1088. In any suit against tribal officers, a court must be sensitive to whether the judgment sought would expend itself on the tribal treasury or domain, or interfere with the tribal administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act. *Maxwell*, 708 F.3d at 1088; *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir.1992). In *Maxwell*, the plaintiff sought money damages not from the treasury but from the officers personally. *Maxwell*, 708 F.3d at 1088; *Alden v. Maine*, 527 U.S. 706, 75 (1999). Due to ‘the essential nature and effect’ of the relief sought, the sovereign is not “‘the real, substantial

party in interest.”” *Maxwell*, 708 F.3d at 1088; *Pistor v. Garcia*, 791 F.3d 1104, 1112-13 (9th Cir.2015); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945).

In *Lewis v. Clarke*, a tribal employee rear-ended a car while driving a tribal limousine on the clock. *Lewis v. Clarke*, 137 S. Ct. 1285, 1289 (2017). The United States Supreme Court ruled that the identity of the real party in interest dictates what immunities may be available. *Id.* at 1291. They noted that the cause of action in their case was one of negligence, rising out of a tort committed by Clarke, the tribal employee, in his individual capacity. *Id.* They went on to reason that while Clarke was a tribal employee, who was working at the time of the accident, these facts had little to nothing to do with the Tribe itself. *Id.* They concluded that a judgment against Clarke in this matter would not operate against the Tribe and; therefore, immunity could not be allowed to be extended in cases where the issue rises from an action made in one’s individual capacity. *Id.*

In the case at hand, the Smiths impleaded the EDC CEO, Captain and, EDC accountant, Bluejacket, claiming monies due under their contracts and defamation for impugning their professional skills. Despite these allegations, there is no evidence on the record that indicates the interactions between Captain, Bluejacket, and the Smiths were outside of the scope of their jobs with the EDC. Therefore, if the two tribal employees acted in their professional capacities at the time of the allegations, they are entitled to an extension of tribal sovereign immunity.

The record shows that Smiths signed identical contracts with the YIN in 2007 and 2010. Concerning Thomas Smith, the record states that he is a certified financial planner and accountant who was retained by the YIN to provide financial advice on an as-needed basis regarding economic development issues. Once the EDC was created in 2009, Thomas Smith primarily communicated with Captain, the EDC CEO, and Bluejacket, the EDC Accountant.

Concerning Carol Smith, the record shows that she is a licensed stockbroker, who was retained to give her brother (Thomas Smith), the EDC, and the YIN advice regarding stocks, bonds, and securities issues. She provided her advice directly to Thomas Smith via email, telephone, or postal and delivery services. She submitted monthly bills via email to Captain and the EDC mailed her payments. Thomas Smith often forwards her communications and advice on various issues to YIN's Tribal Council, Mr. Captain and Ms. Bluejacket.

Once Thomas Smith informed the Arizona Attorney General about YIN's plans to cultivate marijuana, the record shows that the Tribal Council and the EDC were enraged at the Smiths and filed suit in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The YIN sought recovery of the liquidated damages amount set out in the contracts.

Every interaction between the two parties occurred within the tribally authorized scope of employment set forth for Captain and Bluejacket by the YIN. Sovereign immunity applies when it has been shown that the tribe is the real, substantial party in interest. *Maxwell*, 708 F.3d at 1088; *Cook*, 548 F.3d at 727.

The Smiths' claims for monies due under their contracts and defamation damages for impugning their professional skills indicate a decision made by the Tribal Council and the EDC to end their relationship with the Smiths and litigate against them. The Tribal Council's decision to litigate after Thomas Smith breached his duty of confidentiality and informed the Arizona Attorney General of economic development activities occurring within the YIN's sovereign territory is well within the Nation's sovereign power. Captain, as the CEO of the EDC, itself subordinate to the Tribal Council, had no authority to quash that suit.

It is doubtful that Molly Bluejacket had any say in the decision to litigate against the

Smiths. Even more doubtful is the implication that she had a role in the alleged, defamation for impugning the Smiths' professional skills. If she had any role in withholding money due to the Smiths under their contracts, that decision to act or not to act would almost certainly be in adherence to an order by the EDC CEO or the Tribal Council, which, in any case, is within the tribally authorized scope of her job as the EDC accountant.

As was stated earlier, the remedy sought by the Smiths, monies due under their contracts with the Nation and damages arising from defamation for allegedly impugning their professional skills, indicates an encroachment on the functionality and sovereignty of the YIN. If allowed relief, the Smiths would be awarded monies from the tribal treasury or domain. This judgment would interfere with tribal administration by restraining their action in firing an employee for a just cause.

Therefore, because none of the interactions between Captain, nor Bluejacket and the Smiths fell outside of their professional capacities, as well as the fact that tribal sovereign immunity extends to tribal officials when acting in their official capacity, EDC CEO, Fred Captain, and EDC Accountant, Molly Bluejacket, must be protected from suit in this matter in their professional capacities. *Linneen*, 276 F.3d at 492; *Cook*, 548 F.3d at 727; *Burrell*, 603 F.3d at 832. Furthermore, there is no evidence that the actions made by Captain and Bluejacket, as indicated by the Smiths, were outside of their professional capacities, rendering the Smiths claims on the tribal employees in their individual capacity nonviable.

The Yuma Indian Nation (YIN), the YIN Economic Development Corporation (EDC), the EDC Chief Executive Officer (CEO) and the EDC accountant all enjoy common-law sovereign immunity from the Smiths' claims. Specifically, the counterclaims filed against the YIN must be dismissed because the "doctrine of tribal immunity [is] settled law" and any suit

filed against a tribe absent congressional authorization (or a waiver) must be dismissed. *Kiowa*, 523 U.S. at 756. The counterclaims filed against the YIN EDC must be dismissed because the six-factor *Breakthrough* test, which was designed to inform an inquiry into whether a tribal entity or corporation should have sovereign immunity extended to it, rendered all six factors in favor of extending immunity to the EDC as an arm-of-the-tribe in this case. *White*, 765 F.3d at 1032 (The *Breakthrough* test was endorsed by the 9<sup>th</sup> Circuit in this case); *Breakthrough*, 629 F.3d at 1187. Lastly, the counterclaims filed against EDC CEO, Fred Captain, and EDC accountant, Molly Bluejacket must be dismissed due to the fact that none of the interactions between Mr. Captain, nor Ms. Bluejacket and the Smiths fell outside of their professional capacity, as well as the fact that tribal sovereign immunity extends to tribal officials when acting in their official capacity. *Linneen*, 276 F.3d at 492; *Cook*, 548 F.3d at 727; *Burrell*, 603 F.3d at 832.

### CONCLUSION

For the foregoing reasons, the YIN courts do have personal and subject matter jurisdiction over the Smiths, the Tribal Trial Court should not have to stay the suit while the Smiths seek a ruling in the Arizona federal district court and tribal sovereign immunity does protect the YIN and the YIN EDC from the Smiths' counterclaims. Additionally, tribal sovereign immunity extends to the EDC CEO and the EDC accountant in their professional capacities. Lastly, the EDC CEO and the EDC accountant interacted with the Smiths only in their professional capacities; therefore, the individual capacity counterclaims against them must be dismissed.

Respectfully submitted,

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