

Case No. 17-024

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IN THE  
**Yuma Indian Nation Supreme Court**

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THOMAS AND CAROL SMITH,

*Petitioners,*

v.

YUMA INDIAN NATION,

*Respondents.*

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Briefs for Respondent

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TEAM NO.: 159

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## **Statutes**

*Indian Tribal Justice Act*, 25 U.S.C. § 3601

## **QUESTIONS PRESENTED**

- 1) Does the Yuma Indian Nation have personal and subject matter jurisdiction over the Smiths who are not members of the Nation, when the Smiths entered into a consensual contract with the Nation, where both traveled to the reservation, where business was conducted on the reservation, and when the jurisdiction is related to the Nation's inherent tribal sovereignty?
- 2) Should the Court stay the suit while the Smiths seek a ruling in federal court or should the suit be allowed to proceed in tribal court?
- 3) Is the Nation and the party defendants protected from the Smiths' claims under the doctrine of sovereign immunity if Congress has not abrogated their immunity and the tribe has not waived it and if the party defendants are an "arm-of-the-tribe" furthering the activities of the Nation?

## **I. STATEMENT OF THE CASE**

### **A. Statement of the Proceedings**

In 2017 the Yuma Indian Nation filed suit against the Defendants, Mr. and Ms. Smith in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. R. at 3. In response, both Mr. and Ms. Smith filed special appearances and identical motions to dismiss the YIN suit based on lack of personal jurisdiction, lack of subject matter jurisdiction, and in the alternative for the court to stay the suit while the Smiths pursued a ruling in federal court regarding the jurisdictional issues. R. at 3. The tribal trial court then denied both of the Smiths' motions and thus, the Smiths filed answers denying the YIN claims while claiming to be still acting under their special appearances. R. at 3. Both Smiths then counterclaimed for payments due under the contract and damages for defamation. R. at 3. The Smiths impleaded the EDC, the EDC's CEO, and EDC's accountant in their official and individual capacities for the same claims they had made against the YIN. R. at 3. The trial court dismissed all of the Smith's claims and counterclaims due to sovereign immunity which the Smith's immediately appealed to the YIN Supreme Court and the Supreme Court granted an interlocutory appeal on two issues. R. at 3.

### **B. Statement of the Facts**

In 2007 the Yuma Indian Nation (YIN) signed a contract with certified financial planner and accountant, Thomas Smith, to provide financial advice to the YIN. R. at 1. Mr. Smith and the YIN signed the contract in question at Mr. Smith's office in Phoenix, Arizona where Mr. Smith also resides. R. at 1. Pursuant to the contract, disputes arising from the contract are to be litigated in a court of competent jurisdiction. R. at 1. The contract also required Mr.

Smith to keep all financial information, communications, and plans absolutely confidential. R. at 1. Mr. Smith provided financial services to the YIN from 2007-2017, and during this time he exchanged emails and telephone calls almost daily with either the YIN tribal chairs or the tribal council members. R. at 1.

In 2009 the YIN created the Economic Development Corporation (EDC) under a tribal commercial code and funded it with a one-time, \$10 million loan from the Nation's general fund. R. at 1. The code authorized the nation to create and charter public and private corporations to operate businesses on and off the reservation. R. at 1. The EDC was created under a corporate charter as a wholly owned subsidiary of the Nation. R. at 1. The EDC is authorized to both buy and sell real property in fee simple title on and off-reservation. R. at 2. The EDC could also buy any other type of property. R. at 2. Lastly, the EDC could be sued and sue, but the debts of the EDC could not saddle the assets of the YIN nor could the EDC buy or lend money on behalf of the nation. R. at 2. The charter under which the EDC was founded did not authorize the EDC to grant or permit any type of interests to attach to any assets and property belonging to the YIN. R. at 2.

After the EDC was created, the Tribal Council selected the initial five members who were to serve staggered terms with one director's term expiring and being re-elected or replaced every year. R. at 2. The Charter under which the EDC was created allowed for sitting directors to elect or re-elect a person for the expiring seat by a majority vote. R. at 1. Three of the directors must be tribal citizens, and two of the directors must be either non-Indian or citizens of another tribe. R. at 1. Lastly, the Tribal Council retained authority to remove any director for any reason at any time by a 75% vote. R. at 1.



After the creation of the EDC Mr. Smith typically communicated with either the EDC's CEO Mr. Fred Captain and the EDC's accountant Molly Bluejacket. R. at 1. Four times a year Mr. Smith prepared and submitted written financial reports to the YIN Tribal Council at the council meetings which were held on the reservation. R. at 1. In order to ensure the EDC's accountability to the Nation, the EDC is required to keep comprehensive financial records which were presented at quarterly intervals at the Council to be reviewed and approved. R. at 1. Fifty percent of any of EDC's net profits are to be paid to the YIN general fund every year. However, the EDC has only repaid \$2 million to the Nation. R. at 2. Under the charter, the EDC must apply tribal preference both when hiring new employees and contracting with outside entities. R. at 2. Sovereign immunity protects all employees and the board. R. at 2. The purpose of the sovereign immunity provision in the charter is to protect the Nation's financial future. R. at 1.

In 2010, after obtaining written permission from the Nation, Mr. Smith signed a contract with his sister Ms. Carol Smith, a licensed stockbroker. R. at 2. The contract between the Smiths was in fact, identical to the one Mr. Smith signed with the Nation the year before. It also included a provision requiring Ms. Smith to comply with the terms of the Mr. Smith/Yuma Indian Nation contract. R. at 2. Ms. Smith lives in Portland, Oregon. R. at 2. The purpose of her contract with Mr. Smith was for her to give both the YIN and Mr. Smith advice regarding financial securities through email, telephone, and postal and delivery services. R. at 2. She bills the YIN monthly via mail to the EDC's CEO Fred Captain. R. at 2. After receiving her bills the EDC mails her the payments for her services. R. at 2. Ms. Smith has also been to the reservation on two separate occasions, and Mr. Smith routinely forwards

many of Ms. Smith's communications directly to the Council, EDC CEO, and Accountant with her knowledge. R. at 2.

To boost the financial success of both the EDC and the YIN, the EDC began looking into the possibility of cultivating and selling marijuana in 2016. R. at 2. While medical marijuana is legal in Arizona, it was not yet legal for recreational use in the state of Arizona as of 2016. R. at 2. However, the YIN Tribal Council did enact an ordinance which made cultivation and use of marijuana legal for any purpose on the reservation. The EDC continued to investigate the possibility of pursuing the marijuana business venture. R. at 2. In doing so, the EDC consulted with Mr. Smith and Ms. Smith several times. R. at 2. Because of their moral beliefs, the Smiths do not agree with buying, selling, and using marijuana. R. at 2. Thus, they disagree with being remotely or indirectly involved with a budding marijuana business. R. at 2. Thus, in violation of the contract signed in 2009 between the YIN and Mr. Smith, Mr. Smith informed his personal acquaintance, the Arizona Attorney General, of the Nation's financial plans. R. at 2. As a result, the Attorney General wrote a cease and desist letter regarding the YIN's potential marijuana business on the reservation, and the YIN filed this action in tribal court. R. at 2.

## **II. SUMMARY OF THE ARGUMENT**

The Yuma Indian Nation has civil subject matter jurisdiction over the Smiths who are not members of the tribe. Under *Montana*, the Supreme Court upheld that when non-members enter into a consensual relationship with a tribe, they submit to the tribe's jurisdiction whether implicitly or explicitly. A tribe also maintains jurisdiction when the exercise of jurisdiction stems from the tribe's retained rights to preserve tribal self-government. *Montana* also governs both civil regulatory and adjudicative jurisdiction. This

gives the tribes the ability to adjudicate authority over non-member defendants. When a non-member consents to either adjudicative or regulatory jurisdiction, they consent to the other type of jurisdiction. If a tribal court has regulatory jurisdiction, they should also have adjudicative jurisdiction over non-members.

This present lawsuit fits within the adjudicative jurisdiction of the tribal court under *Montana* and its ensuing case. The contract between the Smiths and the Nation stipulated that the Smiths would keep the business dealings of the Nation confidential. When the Smiths breached this contract, the nation had an interest in protecting the financial welfare of the Tribe and its members. By contacting the Attorney General regarding the Nation's economic venture, the tribe's inherent sovereign interest in protecting the financial stability and integrity of the Tribe was implicated. The Smiths' voluntary entry into the contract with the Tribe consists of implicit consent to the adjudicatory jurisdiction of the tribal court. Through this consensual relationship, the Smiths consented to the jurisdiction of the Nation. As well, the Smiths' attack on the tribal court, fails to recognize the numerous procedural safeguards available to litigants.

The tribal court also has personal jurisdiction over the Smiths as there are sufficient minimum contacts made with the forum. The Smiths availed themselves to the tribe by giving financial advice and by traveling to the reservation. Mr. Smith has also communicated on an almost daily basis with either the EDC's CEO Mr. Fred Captain or the EDC's accountant Molly Bluejacket on the telephone or by email. He has also prepared and presented many financial reports to the Council while on the reservation. Under *National Farmers Union* and *Iowa Mutual*, the Court should not stay the proceeding while the Smith's seek a ruling in a federal district court and allow litigation to continue in tribal court.

The trial court did not err when it dismissed the Smith’s counterclaims against the YIN. Both the Yuma Indian nation and the party defendants are protected under the doctrine of sovereign immunity. Tribes are domestic dependent nations with the right to promote their laws and govern their people. They remain immune from suit unless Congress abrogates their immunity or the tribe waives their immunity. Congress did not unequivocally abrogate the Nation’s immunity, and the Nation did not clearly waive their immunity. Therefore, sovereign immunity remains a viable doctrine to protect the Yuma nation from the Smiths claims. The party defendants are also protected from the Smith’s claims as they are an “arm-of-the-tribe” and claims against them are barred by the doctrine of sovereign immunity. The EDC, the CEO of the EDC, and the EDC’s accountant, were acting in their official capacity by promoting the official activities of the Nation. The EDC was created to be an “arm-of-the-tribe,” and the Nation is heavily involved in the EDC. As well, the Tribal Council in the charter stipulated that “the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law.”

The Yuma Indian Nation has personal and subject matter jurisdiction over the Smiths, The stay should be denied and the litigation continued in tribal court. As well, sovereign immunity protects the Yuma Indian Nation and all of the party defendants from the Smiths’ claims.

### **III. ARGUMENT**

#### **A. Under *Montana*, Tribal Courts have Civil Subject Matter Jurisdiction over Non-Members.**

1. Tribes Retain Civil Jurisdiction Over Nonmembers Under *Montana*.

In the landmark decision of *Montana v. United States*, the Supreme Court of the United States determined that tribes had the power to exercise civil jurisdiction over non-members on the reservation. *See Montana v. United States*, 450 U.S. 544, 545 (1981). While the same Supreme Court had ruled three years before in *Oliphant* that tribes did not have the authority to exercise criminal jurisdiction over non-Indians, the Court in *Montana* resolved this discrepancy by concluding that tribes possessed a wider range of civil authority over non-members than it did in the criminal context. *See Montana*, 450 U.S. at 565. Tribes may exercise civil jurisdiction over non-members when the exercise of jurisdiction stems from the tribe's retained rights to "set conditions on entry, preserve tribal self-government, or control internal relations" and the nonmember implicitly or expressly consented to the tribal jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008).

When a non-member enters into a "consensual relationship" with the tribe those actions are sufficient to show the non-member consented to the tribal exercise of civil jurisdiction over disputes or claims with a "nexus to the consensual relationship itself." *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). An example of this was shown in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Court held the tribe could tax non-members after the non-members entered into mineral lease agreements with the tribe even though the tribe had not explicitly consented to the tax in the lease agreement which the non-members had signed. *Id.* The Court held that the non-members should have known they were availing themselves of the possibility to the tax when they entered into the lease agreement with the tribe. *See Merrion*, 455 U.S. at 134.

## **2. Montana Governs Both Civil Regulatory and Adjudicative Jurisdiction.**

*Montana* not only governs civil regulatory jurisdiction; the United States Supreme Court has also held *Montana* governs a tribe's adjudicative authority over non-member defendants by the tribal court. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (finding the *Montana* limits on tribal regulatory are extended to the limits on the tribal exercise of adjudicative jurisdiction).

It is not logical for a tribal court only to have regulatory jurisdiction and not adjudicative jurisdiction over non-members. In many instances, the right to regulate goes hand in hand with the ability of the tribe to adjudicate and may even depend on that ability. *See United States v. Wheeler*, 435 U.S. 313, 332 (1978) (holding tribal courts are important mechanisms for protecting significant tribal interests). Likewise, the primary way to enforce tribal laws and regulations are through the tribal court systems. *Id.* Without this vital right to adjudicate, the tribe's power to regulate would be extremely shallow and the tribe would be left only with the option to enforce its laws and regulations through the courts of another sovereign. *See Wheeler*, 435 U.S. at 332.

Furthermore, when a non-member consents to either adjudicative or regulatory jurisdiction, (s)he consents to the other type of jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 331. The United States Supreme Court has affirmed that tribal court has adjudicative jurisdiction over non-members, and cases following *Montana* have taken the position that the tribal courts do indeed possess civil adjudicative jurisdiction over non-members' activities when those activities arise from the tribe's ability to regulate nonmembers' activities. *See Strate*, 520 U.S. at 453, 117 S. Ct. at 1413, (*quoting Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987)).

Therefore, the tribal court will have jurisdiction over non-members if the jurisdiction is related to the tribe's "inherent sovereign authority" and the non-member either implicitly or expressly consented. *Plains Commerce Bank*, 554 U.S. at 336.

3. The Underlying Tort Suit Falls Under *Montana*

The present lawsuit fits within the adjudicative jurisdiction of the tribal court under *Montana* and its ensuing case. The Smiths established a contract with the Nation and voluntarily provided financial services to the Nation. They agreed to provide financial information and advice to the Nation and its wholly owned subsidiary the EDC. They also agreed to keep any information communicated between the parties confidential. The Nation sued in tribal court because the Smiths allegedly breached the contract, violated their fiduciary duties, and violated their duties of confidentiality to the tribe during the relationship with the tribe. The Smiths' conduct, in this case, is non-member conduct which occurred while the Smiths were providing financial services to the Nation and EDC while on the reservation. *Plains Commerce Bank*, 554 U.S. at 332.

While the call to the Attorney General did not take place when the Smiths were on the reservation, the call was intimately related to the services which the Smiths were providing to the Nation. Mr. Smith had prepared and submitted written financial reports on the reservation at the council meetings which were held on the reservation approximately forty times over the ten-year period. It would not serve the purpose of the limits of *Montana* if a tribal court was unable to exercise jurisdiction over a non-member simply because that non-member placed a call off of the reservation to purposely rob the tribal court of jurisdiction over the underlying lawsuit. The conduct of calling the Attorney General directly implicated the

tribe's inherent sovereign interest in protecting the financial stability and integrity of the tribe.

In *Strate*, the United States Supreme Court found the tribal court had significant and influential control over the conduct of non-members while they were on tribal land. *Strate*, 520 U.S. at 453; *Plains Commerce Bank*, 554 U.S. at 332. In *Nevada v. Hicks*, the Supreme Court of the United States distinguished the *Strate* case and concluded the acts giving rise to the claim (mining by a non-member) occurred on tribal lands. *See Nevada v. Hicks*, 533 U.S. 353, 372 (2001). Despite the fact that the conduct of calling the Attorney General of Arizona did not technically occur on tribal lands, the events leading up to the conduct combined with the Smiths being on the reservation several times and sending the financial information to the reservation, show that there are vital tribal interests at stake that need to be protected. In *Plains Commerce Bank*, the United States Supreme Court found the tribe had an interest in protecting tribal welfare from non-members. *See Plains Commerce Bank*, 554 U.S. at 336. Here, the tribal court has an interest in protecting the financial welfare of the Nation and its members. By calling the Attorney General about the Nation's potential marijuana business venture, the Smiths' conduct threatened this tribal interest.

4. The Smiths Implicitly Consented to the Jurisdiction of the Tribal Court When They Entered into a Consensual Relationship with the Tribe.

Because the Smiths entered into the consensual relationship with the Tribe, they both implicitly consented to the jurisdiction of the tribal court. Simply entering into a consensual relationship with a tribe is enough to show that the non-member(s) consented to the jurisdiction of the tribal court. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001); *Nevada*, 533 U.S. at 372 (“private individuals” submitted to the jurisdiction of the tribal court by voluntarily entering into arrangements with the tribe).



There was an express agreement between the Smiths and the Nation in the form of a contract in which the parties agreed that Mr. Smith would provide financial information and advice to the Nation and later the EDC. This contract was identical to the one signed between Ms. Smith and Mr. Smith. The contract between the Smiths and the Nation provides that the Smiths furnish financial advice and in exchange, the Tribe would pay for these services. The contract between the Smiths and the Tribe fits perfectly into the definition of a consensual arrangement as explained in the *Montana* case. Where the Smiths made the alleged breach was allowing their personal beliefs and feeling to get in the way of their duties to Nation. If the Smiths had continued to comply with the terms of the contract and continued to comply with their duty of confidentiality, the consensual agreement between the two parties would have continued as a beneficial agreement between the parties. In the alternative, the Smiths may have also attempted to discuss their concerns regarding the marijuana operations with the Nation and try to come up with a mutually beneficial agreement instead of immediately calling the Attorney General.

- a. The Smiths' voluntary entry into the contract with the Tribe consists of implicit consent to the adjudicatory jurisdiction of the tribal court.

The Supreme Court of the United States has indicated that there must be a required nexus to support the consent. *See Plains Commerce Bank*, 554 U.S. at 336. This requirement is satisfied if the non-member who the tribal court is seeking jurisdiction over could “reasonably have anticipated” he would be subject to the jurisdiction of the tribal court by voluntarily entering into the consensual relationship with the tribe. *Id.*

In the present case, the Smiths could have easily anticipated that by entering into the contract with the Tribe they would be subject to the jurisdiction of the tribal courts for breaching their contract. It was reasonable for the Smiths to have anticipated being subjected

to tribal jurisdiction when they both provided financial information and advice to the tribe, Mr. Smith communicated with representatives from the tribe on an almost daily basis, Mr. Smith had prepared and presented several financial statements on the reservation, and both Ms. And Mr. Smith had visited the reservation. The Smiths demonstrated a willingness to be subjected to the jurisdiction of the tribal court voluntarily entering into a consensual relationship with the tribe.

Thus, both requirements for an exercise of tribal adjudicative jurisdiction by the tribal courts are satisfied under *Montana* and its first exception. The exercise of civil jurisdiction arises from the tribe's inherent interest to protect the financial interest of the Nation and its members. By entering into a consensual relationship with the Nation, the Smiths' actions show they implicitly consented to the jurisdiction of the tribal courts arising from the consensual agreement.

5. Petitioners' Unfounded Attacks on Tribal Courts Ignore the Numerous Procedural Safeguards Available to Litigants.

The Smiths' grievances regarding the exercise of jurisdiction by the tribal courts is based on an unfounded assumption that tribal courts are less competent than the federal courts. The United States Supreme Court has consistently held that that the assumption that tribal courts are less competent is not a sound argument. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19. Moreover, the Court has held that tribal courts are sufficiently competent and are an appropriate forum for the "adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978); *Wheeler*, 435 U.S. at 332, (Tribal courts are important for protecting tribal interests."); *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud*

*Cty.*, 424 U.S. 382, 387 (1976). Indeed, those forums are the first line of defense in the protection of litigants' due process rights. *See Santa Clara Pueblo*, 436 U.S. at 67.

Not only has the United States Supreme Court found that tribal courts are both competent and appropriate forums, the federal legislature has determined that tribal courts are the correct forum for the adjudication of suits which satisfy the limits of *Montana*. Congress passed *the Indian Tribal Justice Act*, 25 U.S.C. § 3601 which provides for the support and training of the tribal court and the tribal judiciaries. *Id.* When drafting the Act, Congress stated that the tribal court systems are an important part of the tribe's interest in governing themselves and "serve as important forums for ensuring public health and safety and the political integrity of tribal governments." *Id.* § 3601(5).

In the present litigation, the Smiths have not alleged that they were deprived of the right to due process or that they had been treated unfairly in the tribal court.

Finally, when drafting the contract, the Smiths were completely free to draft a forum selection clause or a choice of law clause if they did not want to be subjected to jurisdiction in the tribal courts. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 415 (2001). The Smiths should not be permitted to avoid the consequences of their actions when they chose to enter into a consensual relationship with the Nation.

**B. The Tribal Courts have Personal Jurisdiction over the Smiths Because They had Sufficient Minimum Contacts with the Forum.**

The Tribal Court had Personal Jurisdiction over both Mr. and Ms. Smith because they each had sufficient minimum contact with the reservation. In order for a tribal court to have personal jurisdiction over a person or persons that person must have sufficient minimum contact with the forum so that suit does not offend "traditional notions of fair play and

substantial justice.” *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 820 (9th Cir. 2011) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The person who the tribal court is seeking to exercise personal jurisdiction over must have been reasonably able to anticipate that (s)he could be haled into tribal court. *See Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 820 (9th Cir. 2011). A tribal court may exercise jurisdiction over a non-member who had minimum contacts with the tribe which are sufficient enough that exercising jurisdiction over the non-member does not violate due process or “traditional notions of fair play and substantial justice.” *See Int'l Shoe Co.*, 326 U.S. at 316. The Supreme Court has indicated that tribal jurisdiction depends on what non-Indians “reasonably” should “anticipate” from their dealings with a tribe or tribal members on a reservation. *See Plains Commerce Bank*, 554 U.S. at 338.

Furthermore, the person over whom the tribal court is seeking jurisdiction must have committed some act which “purposefully availed” himself/herself to the “privilege of conducting activities within the forum.” *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). This “purposeful availment” test ensures that a defendant cannot be forced to defend a suit in a random jurisdiction when (s)he had little or no contacts. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289 (1980); *Burger King Corp.*, 471 U.S. at 475. Thus, a court will have personal jurisdiction over a defendant where (s)he has “continuing obligations” with the forum or its residents. *See Travelers Health Ass'n v. Com. of Va. ex rel. State Corp. Comm'n.*, 339 U.S. 643, 648 (1950). The court will have jurisdiction over a defendant if he “manifestly has availed himself of the privilege of conducting business there” and thus it would not

offend notions of fair play or justice to require the defendant to defend the suit in the forum. *See Burger King Corp.*, 471 U.S. at 476.

In the present case, the Smiths have certainly “purposely availed” themselves by providing financial information and advice to the tribe. They could have reasonably expected to be haled into tribal court regarding their contract with the Nation. Mr. Smith has been to the reservation over forty different times during the last ten years. During that time, he has prepared and presented many financial reports to the Council while on the reservation. He has also communicated on an almost daily basis with either the EDC’s CEO Mr. Fred Captain and the EDC’s accountant Molly Bluejacket on the telephone or by email. Ms. Smith has also personally been to the reservation a couple of times. Even though her contract was signed between herself and her brother Mr. Smith, she knew he was directly passing on financial information and advice she sent him to the EDC. Furthermore, the contract between the Smiths held both parties to the same standards of conduct as did the contract signed between Mr. Smith and the Nation. Both of the Smiths purposefully availed themselves by providing financial information to the Nation, sufficiently constituting minimum contacts with the forum. It would not be unreasonable to require the Smiths to defend the suit in the tribal court of the Yuma Indian Nation. Thus, the tribal courts do have personal jurisdiction over both of the Smiths because each of them has sufficient minimum contacts with the Nation.

**C. The Court Should Not Stay the Proceeding While the Smiths Seek a Ruling in a Federal District Court Because Under *National Farmers Union* and *Iowa Mutual*, the Litigation Should Proceed to Tribal Court.**

Exhaustion of tribal court remedies was first established in *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 849 (1985). *National Farmers Union* was the first case that established the doctrine of exhaustion but certainly not the last. *Id.*

Under the exhaustion doctrine, in order to determine if a tribal court has jurisdiction, the examination will need to be conducted in tribal court to examine the tribe's sovereignty and whether that sovereignty has been altered in any way. *Id.* at 855. There are four different exceptions to the general rule of Tribal Court Exhaustion.

The first three exceptions to this general rule are found in the Supreme Court Case *Iowa Mut. Ins. Co.*, 480 U.S. at 17. First, exhaustion is not required if the tribal jurisdiction is either conducted in bad faith or is asserted to harass. *See Id; Juidice v. Vail*, 430 U.S. 327, 336 (1977). Secondly, Tribal Court Exhaustion is not required when the action is in violation of specific jurisdictional prohibitions. *See Iowa Mut. Ins. Co.*, 480 U.S. at 17; *Nat'l Farmers Union Ins. Companies*, 471 U.S. at 857.

The third exception from *Iowa* states that Tribal Court Exhaustion is not required when there was not a sufficient opportunity to challenge the Tribal Court's jurisdiction and thus exhaustion would be futile. *Id.* The fourth exception to the general exhaustion rule was outlined in *Strate v. A-1 Contractors*, 520 U.S. at 459. This exception states that Tribal Court Exhaustion is not required if there is no federal grant which provides for the tribe to govern the conduct of non-members on land specifically covered by *Montana*. *Id.* *National Farmer Union* described this fourth exception as a party seeking to be relieved of tribal court jurisdiction when the jurisdiction of the tribal court is "automatically foreclosed." *See Nat'l Farmers Union Ins. Companies*, 471 U.S. at 855.

The Ninth Circuit Court of Appeals described this exception as determining whether the jurisdiction of the tribal courts over non-members is plausible not necessarily a certainty. *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009). The Court

need not make a definitive determination of whether tribal court jurisdiction exists; it need only decide whether jurisdiction is plausible. *Id.* at 849.

None of the above four exceptions to the general rule of tribal court exhaustion applies to the current lawsuit. The first exception does not apply because the assertion of jurisdiction was not done in either bad faith or with the purpose to harass the Smiths. The present case involves legitimate allegations against the Smiths and suing the Smiths in tribal court was not done in bad faith. The Second exception also does not apply because there is no action by Congress that specifically divests the tribal court from exercising adjudicative jurisdiction over the Smiths. Regarding the third exception, there was ample opportunity for the Smiths to challenge the tribal court's jurisdiction, first in the trial court, secondly in the court of appeals, and finally here at the Supreme Court. Regarding the fourth and final exception, exhaustion would only cause a delay because it is clear that the tribal court does not have jurisdiction over non-members on land covered by the *Montana* rule. Therefore this exception does not apply. As demonstrated above, under *Montana*, and subsequent cases, the tribal court does have jurisdiction over the Smiths.

Thus, there are no exceptions to the exhaustion rule, and furthermore, this Court should not stay the proceeding while the Smiths seek a ruling in the federal district court and instead, the case should proceed in tribal court.

**D. The Trial Court Did Not Err When it Dismissed the Smith's Counterclaims Against the YIN and Dismissed the Claims Against the Party Defendants Because They Were all Protected Under the Doctrine of Sovereign Immunity**

Both the Yuma Indian Nation and the party defendants are protected by sovereign immunity. Therefore the trial court did not err when it dismissed the Smiths' counterclaims. The Supreme Court has determined that “the Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy . . . [t]hey may

more correctly perhaps be denominated domestic dependent nations.” *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 2 (1831). As domestic dependent nations, the tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States.” *Worcester v. State of Ga.*, 31 U.S. 515, 557 (1832).

The Supreme Court has continued to uphold the doctrine of sovereign immunity, and “Indian tribes exercise sovereignty subject to the will of the Federal Government. Sovereignty implies immunity from lawsuits.” *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2039 (2014). Because “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers,” the Yuma Indian Nation and the party defendants who act as an “arm of the tribe” are immune from the Smith’s claims. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978).

**E. The Yuma Indian Nation is Protected by Sovereign Immunity from the Smith’s Claims Because Congress has not Abrogated their Immunity and the Nation did not Waive Their Right to Sovereign Immunity**

Since Congress did not abrogate the YIN's sovereign immunity nor did the Nation itself waive their sovereign immunity, the YIN is still protected by the doctrine of sovereign immunity. The Supreme Court has set a clear precedent regarding the application of sovereign immunity and has determined that “suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905, 909 (1991). To abrogate a tribe’s immunity, it is required that “Congress's intent to abrogate a tribe's immunity must be unequivocally expressed, while



a tribe's waiver of its immunity must be clear.” *Burrell v. Armijo*, 456 F. 3d 1159, 1174 (10<sup>th</sup> Cir. 2006); see also *U.S. v. King*, 89 S. Ct. 1501, 1503 (1969) (stating “such a waiver cannot be implied but must be unequivocally expressed”). Under federal law “a tribe is subject to suit only where Congress has authorized the suit.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 1701 (1998).

In the present case, Congress has not made any legislation that applies to the claims made by the Smiths against the Nation, nor has Congress expressed an unequivocal intent to authorize the suit and abrogate the tribe’s immunity. “Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes , Congress has consistently reiterated its approval of the immunity doctrine.” *Oklahoma Tax Com'n*, 111 S. Ct. 909. Because the Yuma Indian Nation’s sovereignty was not abrogated by Congress, sovereign immunity protects the Nation against the claims brought by the Smith’s.

The Nation also never waived their immunity through the contracts they signed with the Smiths. “Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” *Id.* at 1705. Because Tribes remain immune from suits involving contracts, in order for the Nation to waive their immunity, the Nation would have needed to do so clearly when they signed the contract with the Mr. Smith. The contract, however, merely provided that disputes were to be litigated in a court of competent jurisdiction and made no mention of any waiver of sovereign immunity. The phrase “a court of competent jurisdiction,” does not present language that would demonstrate a clear waiver of the

Nation's immunity. Regarding the contract between the Nation and the Smiths, there was not a clear waiver of sovereign immunity by the Nation.

The Smiths also advised the EDC which was created by the Nation under a commercial code authorizing the Nation to create public and private corporations pursuant to its inherent sovereign powers. The Nation created the EDC with their sovereignty in mind and did not waive their immunity in regards to the EDC. Due to the fact that Congress did not abrogate their immunity and the Yuma Indian Nation never waived their immunity, the Nation remains protected from suit under the doctrine of sovereign immunity and the ruling of the trial court should be upheld. Nothing else regarding the dealings between the Nation and the Smiths demonstrate a waiver of sovereign immunity by the Nation. Thus, the Nation did not clearly waive sovereign immunity in the current suit.

**F. The Party Defendants are Protected from the Smith's claims as They are an "Arm of the Tribe" and Claims Against Them are Barred by the Doctrine of Sovereign Immunity**

The party defendants are also protected by sovereign immunity because they are considered an arm of the tribe. "Because there is no reason to treat tribal immunity differently from state or federal immunity in this sense, tribal immunity protects tribal officials against claims in their official capacity." *Fletcher v. United States*, 116 F. 3d 1315, 1324 (10<sup>th</sup> Cir. 1997). The EDC was created by the tribal council and was meant to serve as an "arm of the tribe." In the charter of the EDC, it was mandated by the Tribal Council that "the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law." The purpose of the sovereign immunity provision in the charter was to protect the Nation's financial future. "When the tribe establishes an entity to conduct

certain activities, the entity is immune if it functions as an arm of the tribe.” *Allen v. Gold Country Casino*, 464 F. 3d 1044, 1046 (9<sup>th</sup> Cir. 2006).

The EDC was created and funded by the tribe to conduct tribal commercial business. The EDC was meant to “create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona.” Three of the directors on the board of the EDC had to be tribal citizens, and the Tribe had the authority to remove any director by a seventy-five percent vote. The EDC was therefore formed to be an “an arm of the tribe,” and the Nation made clear its intent to remain involved with the EDC after its formation. The question then becomes “whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.” *Id.* The Nation’s Tribal Council created the EDC to promote the economic interests of the Nation. Therefore, the purpose of the EDC was to pursue economic activities on behalf of the Yuma. In this particular case, the Nation met with the EDC regarding the ordinance to cultivate marijuana, and the Council agreed to enact the ordinance. There is no doubt that the Nation created and remained heavily involved in the business endeavors of the EDC, and that the activities of the EDC are “properly deemed to be those of the tribe.” *Id.*

In *Allen*, the court ruled that the Tribe’s Casino which they owned and operated, greatly benefitted the tribe. *Id.* at 1047. “[E]conomic and other advantages inure to the benefit of the Tribe . . . [i]n light of the purposes for which the Tribe founded this Casino and the Tribe’s ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe.” *Id.* The Tribe has benefitted from the creation and use of the EDC by requiring the EDC to pay fifty percent of their net profits on an annual basis to the Yuma Indian Nation general fund. The EDC has currently paid two million dollars to the Nation.

The Nation also requires the EDC to apply tribal preference in contracting with outside entities and when hiring employees. As a result, twenty-five tribal citizens had received full-time employment every year since 2009 when the EDC was created. The money and employment brought to the Nation by the EDC have greatly benefitted the Nation, and the EDC will continue to “inure to benefit the tribe.” *Id.*

The EDC’s CEO Fred Captain and the accountant Molly Bluejacket were both acting within their official capacities under the Nation. As an “arm of the tribe” both of these individuals are protected under the doctrine of sovereign immunity. “It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials . . . [a]ccordingly, a tribe’s immunity generally immunizes tribal officials from claims made against them in their official capacities.” *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10<sup>th</sup> Cir. 2008). Because “tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their *valid* authority,” Fred Captain and Molly Bluejacket are immune from the Smiths’ suit. *Burlington N.R. Co. v. Blackfeet Tribe*, 924 F. 2d 899, 902 (9<sup>th</sup> Cir. 1991). The court in *Davis v. Littell* ruled that “it can hardly be disputed that the Navajo Tribe enjoys sufficient independent status and control over its own laws and internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control.” *Davis v. Littell*, 398 F. 2d 83, 84 (9<sup>th</sup> Cir. 1968). The Yuma Indian Nation had control over the EDC and created the EDC under a tribal commercial code. The Nation is established and is able to accord privilege to its officers.

### III. CONCLUSION

The Yuma Indian Nation has both personal and subject matter jurisdiction over the Smiths, and the stay should not be granted so that the litigation can continue in tribal court. The Nation and all of the party defendants are protected from the Smiths' claims under the doctrine of sovereign immunity.