No. 17-024

In the Yuma Indian Nation Supreme Court

THOMAS SMITH & CAROL SMITH

v.

YUMA INDIAN NATION

ON INTERLOCUTORY APPEAL
TO THE YUMA INDIAN NATION
SUPREME COURT

BRIEF FOR THE APPELLANTS IN SUPPORT

TEAM NUMBER 182
Attorneys

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Questions Presented

1. Whether the Yuma Indian Nation courts meet the burden of establishing the narrow exception for tribal civil jurisdiction over Thomas Smith and Carol Smith, two non-Indians. If they do find jurisdiction, whether the tribal trial court should stay this suit while the Smiths resolve this question in the Arizona federal district court.
2. Whether, despite its contractual agreement to litigate disputes in any court of competent jurisdiction, the Yuma Indian Nation, its Economic Development Corporation, and two of the Corporation's officers possess sovereign or other immunity from the Smith's suits.

Statement of the Case

Statement of the Proceedings

The Tribal Council filed suit versus the Smiths in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The tribe sought recovery of the liquidated damages amount set out in the contracts. The Smiths filed special appearances and identical motions to dismiss the tribe's suit based on lack of personal jurisdiction and lack of subject matter jurisdiction over them and this suit, and in the alternative,

for the trial court to stay the suit while the Smiths pursue a ruling in Arizona federal district court as to whether the tribal court has jurisdiction over them. The trial court denied both motions.

Claiming to continue under their special appearances, the Smiths filed answers denying the tribe's claims and counterclaimed against the Nation for money due under their contracts and for defamation for impugning their professional skills. The tribal court ordinance has rules of procedure very similar to the Federal Rules of Civil Procedure. Therefore, the Smiths also impleaded the EDC, and the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities. The Smiths made the same claims against the third party defendants as they had made against the tribe. The trial court dismissed all of the Smiths counterclaims against tribe and claims against the third party defendants due to sovereign immunity.

The Smiths filed an interlocutory appeal in the Yuma Indian Nation Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit. The Supreme Court granted the interlocutory appeal on two issues: Whether the tribe meets the narrow exception for civil jurisdiction over nonmembers, and whether sovereign or other immunity validly applies to any of the appellees.

Statement of the Facts

In 2016, the Yuma Indian Nation's Tribal Council and the Tribe's Economic Development Corporation (EDC), located in southwest Arizona, plotted to enact a tribal ordinance allowing marijuana cultivation and use on the Reservation for any purpose, despite the fact that in the very same year the State of Arizona had chosen not to pass a state-wide referendum for the legalization of recreational marijuana. R at 2. The Tribe is located within the

State of Arizona, many of its tribal members being both citizens of Arizona as well as the Tribe. Yet in the face of what the public desired, the Yuma Indian Nation legalized this drug. R at 2.

These plans for drugs sales by the Tribe did not sit well with Thomas and Carol Smith. R at 2. Both Thomas and Carol are personally against involvement in the marijuana business because they morally disagree with it. R at 2. Concerned about what the implications of a growing marijuana industry located within Arizona, Thomas Smith informed his acquaintance, the Arizona Attorney General, of the Tribe's plans. R at 2.

Such a development violates both state and federal laws. Consequently the Attorney General wrote the Tribe and their Corporation a cease and desist letter regarding the development of recreational marijuana operations. R at 2.

However, the Smiths were caught in the middle of this disagreement because both Thomas and Carol work under a contract with the Tribe to provide financial advice. R at 1, 2. It is in fact through this work for the Tribe that Thomas and Carol first heard of these plans for drug sales. R at 2. But such economic pursuits were never discussed in the original contract terms, and the Smiths are opposed to working with such an industry. R at 2.

The Smiths now have bigger worries than working with drugs, however, because the Tribe and the Corporation are enraged with them. R at 3. They have sued the Smiths for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, all for simply following their morals. R at 2, 3. The Tribe and Corporation are fighting for money from the Smiths, when there is currently no evidence that any action on the part of the State Attorney General has in any way impeded their potential profits from drug sales. R at 3.

Before the Tribe became enraged with the Smiths, Thomas and Carol had been providing them with financial advice for over 10 and 7 years, respectively. R at 1, 2. Starting in 2007, the

Tribe signed a contract with Thomas Smith for his skills as a certified financial planner and accountant. R at 1. Thomas agreed to advise the Tribe as-needed on their economic development projects, which at the time did not include marijuana cultivation and sale. R at 1. The contract was signed by both Thomas and the Tribe at Thomas' office in Phoenix, Arizona. Thomas both works and lives in Phoenix too. R at 1. Under the contract any and all disputes were to be litigated in a court of competent jurisdiction, and Thomas was to maintain absolute confidentiality only regarding tribal communications and economic development plans. R at 1.

For the past ten years Thomas has provided the Tribe with financial advice on a wide range of economic development issues over email, telephone, and then later through communications with the Corporation. R at 1. When speaking with the Corporation, Thomas communicated with Fred Captain, the CEO, and Molly Bluejacket, an employee and accountant. R at 1. Thomas would occasionally go to the Council meetings on the reservation to present his financial reports in-person. R at 1.

It was during this period, in 2009, that the Tribe created the Corporation under a commercial code to promote the prosperity of the Tribe. R at 1. The two entities were tied closely together by the governance structure and financial support the Tribal Council provided at the outset. The Council supplied the EDC with a $10 million loan from the Nation's general fund. The Tribal Council created the EDC via a corporate charter as a wholly owned subsidiary of the Nation and as an "arm-of-the-tribe." And although the EDC is to be operated by its own board of directors, the Council selected the initial board. The Tribal Council also retained the authority to remove any director for cause, or for no cause, at any time, by a 75% vote. According to the corporate charter, no debts of the EDC could encumber, or implicate in any way, the assets of the Nation. Neither may the EDC borrow or lend money in the name of, or on

behalf of, the Nation or to grant or permit any liens or interests of any kind to attach to the Nation's assets.

In 2010, with the Tribal Council's permission, Thomas signed a contract with his sister Carol Smith, who lives and works in Portland, Oregon. The contract is identical to Thomas's 2007 contract with the Nation and includes a term that both parties must comply with the Nation-Thomas contract. Carol is a licensed stockbroker. She provides her brother, the EDC, and the Nation with guidance on investments and securities. She provides her advice to her brother via email, telephone, and mail and parcel services and submits monthly bills via email to the CEO Captain. The EDC mails her payments. She visited the Nation's reservation with her brother twice. Thomas often forwards many of her pieces of advice to the Tribal Council and to Captain and accountant Bluejacket.

But now the Smiths are seeking to defend themselves in a court familiar to them and counterclaim against the angry accusations of the Tribe and its Corporation. R at 3.

Argument

I. The Tribe Fails to Meet its Burden of Establishing Civil Jurisdiction.

A. Tribal Civil Jurisdiction Over Nonmembers Is Inconsistent With the Overriding Sovereignty of the United States.

Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," but this sovereignty does not extend to jurisdiction over the Smiths in the State of Arizona. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Indian tribes, while retaining the powers of self-government, are limited due to their dependent status. *See Montana v. United States*, 450 U.S. 544, 564 (1981); *Wheeler*, 435 U.S. at 323; *Duro v. Reina*, 495 U.S.

676, 686 (1990) (overturned on other grounds); *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 171-72 (5th Cir. 2014). This dependency upon the federal government has resulted in the implicit divestiture of tribal sovereignty, specifically "involving the relations between an Indian tribe and nonmembers of the tribe." *Montana*, 450 U.S. at 564. This includes tribal jurisdiction over nonmembers. Consequently, without express congressional delegation, any exercise of tribal power beyond that which is necessary to protect tribal government or internal relations is inconsistent with tribes' dependent status.

Consequently the Yuma Indian Nation's attempt to bring the Smiths into tribal court flies in the face of precedent limiting the scope of tribal civil jurisdiction. *Montana* makes clear that tribes lack civil jurisdiction over nonmembers. *Montana*, 450 U.S. at 565. In fact, there are only two narrow exceptions to *Montana*'s general rule against tribal jurisdiction over nonmembers. These exceptions permit a tribe to "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" and "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 565-66. This suit against the Smiths falls under neither exception. The business relationship between the Smiths and the Tribe did not occur in Indian country, failing to establish a consensual relationship in which tribal jurisdiction would be foreseeable. Additionally, the alleged breach of contract and violations do not come close to the high standard for the second *Montana* exception, which necessitates the injury "imperil the subsistence of the tribal community." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 341 (2008).

Tribal jurisdiction is neither supported by long-standing precedent nor the language of the very treaties which lay out the relationship between the Federal government and tribes. While treaties between tribes and the United States often fail to specifically discuss civil jurisdiction, they are clear in the many instances in which they say that the Federal government would resolve all aspects of any disputes between tribes and American citizens. *See e.g.*, Treaty with the Shawnees, art. III, 7 Stat. 26 (1786) ("Any citizen of the United States, who shall do an injury to any Indian of the nation . . . shall be punished according to the laws of the United States."). Such broad statements do not need to specify criminal or civil jurisdiction. The intent is clear: Tribes do not retain jurisdiction over nonmembers. This is especially true in instances where the activity in question does not occur in Indian country. Further detail regarding tribal jurisdiction is not laid out in the treaties because it was never contemplated by either government that tribes would be permitted to reach so far beyond their borders to obtain jurisdiction over non-consenting nonmembers.

B. Legislative History Makes Clear Congress' Intent to Narrow and Limit Tribal Civil Jurisdiction.

There is a long line of legislative history that supports a lack of tribal jurisdiction over the Smiths. Congress has made explicit the narrow set of circumstances under which a tribal court may have criminal jurisdiction over nonmembers, and even limits the potential penalties in those cases. Similarly, Congress does not intend to subject its citizens to civil courts which do not guarantee the same Bill of Rights as the Federal Government. *See* 25 USC §§ 1301-1304 (1968) (Indian Civil Rights Act). Because there are no specified circumstances or requirements under which a tribal court may subject a nonmember to civil jurisdiction, it would be a major threat to one's rights to assume tribal jurisdiction. Due to the many nuanced differences among tribal

courts across the country, it is not the job of courts to find tribal jurisdiction until Congress speaks as to what procedural and substantive requirements must be met for a tribe to preside over a nonconsenting nonmember in civil court. It is for this reason, in fact, that the Court has *never* upheld the extension of tribal civil authority over nonmembers on non-Indian land. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 333 (2008).[1]

C. *Montana* Permits Only a Narrow Scope of Tribal Civil Jurisdiction Over Nonmembers, and the Smiths Do Not Fall Under Either of These Two Exceptions.

Montana makes clear that tribal sovereignty has been divested in matters between an Indian tribe and nonmembers of the tribe. *Montana*, 450 U.S. at 564 (1981). There are only two instances in which the court would consider an exception to this rule: 1. When a nonmember enters a consensual relationship with the tribe or its members, or 2. "[O]ver 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 565-66. It is a high bar to meet either of these exceptions and the Tribe fails to do so in its claims against the Smiths.

1. The Smiths did not consent to tribal jurisdiction.

The Tribe does not meet the first *Montana* exception because the Smiths did not enter into a consensual relationship that would render tribal jurisdiction foreseeable. This narrow exception allows a tribe to "regulate, through taxation, licensing, or other means, the activities of

[1] The Supreme Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*," *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 333 (2008) (internal quotation omitted), with the exception of one case in which the Yakima Nation was permitted to restrain use of non-Indian fee land that was entirely surrounded by trust land through tribal zoning, but even this case did not allow the zoning to apply to non-Indian fee land which was primarily surrounded by other fee land. *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 432 (1989); *see also Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). Even in this limited circumstance, this was an extension of regulatory authority, not adjudicatory.

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. However, while this exception exists for tribal regulatory jurisdiction, it is even narrower and more limited for tribal adjudication. *See Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997) ("Neither case establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation."). Additionally, the presumption against tribal jurisdiction is even higher when the consensual relationship exists outside of, and off, trust land. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654 (2004). The Tribe does not seek to simply tax or regulate an on-reservation entity, but rather seeks to "swallow the rule" and stretch this exception to an off-reservation relationship that does no more than generally benefit from a business relationship which happens to be with a tribal economic corporation.

The cases of *Strate* and *Atkinson* illustrate how narrow this first *Montana* exception is and why the Tribe fails to meet its burden of proving its application. In *Strate* a non-Indian (with Native children) tried suing another non-Indian in tribal court over a car accident which occurred on a State highway, of which the stretch in question passed through a reservation. *Strate*, 520 U.S. at 440. That stretch of highway had been leased from the Tribe by the State, with the Tribe reserving the right to construct necessary crossings. *Id.* The defendant was engaged in subcontract work on the reservation and was found to have a "consensual relationship" with the Tribe, but because the plaintiff was not a party to the subcontract and the issue was unrelated to the Tribe, the first *Montana* exception was found not to apply. *Id.* at 441.

In the same way, the Tribe has failed to meet the burden for the first *Montana* exception: consensual relationship. Not only did the alleged violation and breach occur off-Reservation, it

was far from tribal lands and not during a workday or commuting to or from the Reservation by the Smiths. It is that much farther from Indian country than *Strate*, making it even more tenuous for the Tribe to claim jurisdiction. Further, even though it is the Tribe bringing the lawsuit in this case (instead of a non-Indian), the discussion between Thomas Smith and the Arizona Attorney General was a personal, non-work-related one. This was not in furtherance of his contract and especially because Carol Smith was not a part of this conversation, it is wrong to tie this in any way to her. If *Strate*, in which the Court heavily emphasized the lack of connection to physical Indian country, found neither *Montana* exception to apply, *Montana*'s first exception certainly cannot apply to the Smiths.

Secondly, *Atkinson* further narrows the consensual relationship exception, rendering its application to the Smiths impossible. In *Atkinson*, a tribe was trying to tax nonmembers on non-Indian fee land located within a reservation. *Atkinson*, 532 U.S. at 648 (2004). Not only does *Montana* presume lack of tribal jurisdiction over nonmembers, *id.* at 647, the Court went on to hold that the limited exception for consensual relationships cannot apply to nonmembers who are located on non-Indian fee land and are merely poised to potentially receive general benefits from a tribe, *id.* at 655. These benefits includes things such as police, fire, and medical services. "If it did [include this], the exception would swallow the rule." *Id.* at 655. The Court utilized a balancing approach analyzing the specific facts of the case, including the status of the land, the nature of the powers the tribe is attempting to exercise, and the impact of that exercise upon the nonmember interests. *Id.* at 649. In considering these factors the Court prioritized the protection of the nonmembers from unjustly being called into a tribal court that does not guarantee the same protections as state and federal courts.

The Smiths' case, like *Atkinson*, does not fall under the narrow first *Montana* exception because it occurred on non-Indian land, the business relationship is more in line with the vague, general benefits the defendants in *Atkinson* were receiving, and upon balancing the impact on the Smiths versus the Tribe, the facts weigh in favor of finding against tribal jurisdiction. As mentioned above, in this case the alleged breach of contract occurred entirely off the reservation and outside of Indian country. Both *Atkinson* and *Strate* emphasize land status and that consideration is not met here. Additionally, the Smiths provide the Economic Development Corporation with financial advice, just as they would any other client. The fact this service in this instance is related to a tribal corporation instead of a non-Indian-owned corporation is a minor detail that does not alter how the Smiths conduct their business. Just as the hotel in *Atkinson* operated on non-Indian land but happened to be surrounded by tribally-owned roadways and services, the Smiths' surrounding circumstances regarding this contract are insufficient to meet *Montana*'s first exception. Finally, upon balancing the interests of the Tribe and the Smiths, the ability for the Tribe to navigate a federal court is far higher than the Smiths' ability to proceed in tribal court fairly. Tribal courts fail to provide the same removal rights to federal court, *see Nevada v. Hicks*, 533 U.S. 353, 368 (2001), and under the Tribe's ordinance its courts can apply not only the Tribal Constitution, but any "traditional Tribal customs and usages. . . . When in doubt as to the Tribal common law, the Court may request the advice of counselors and Tribal elders familiar with it." Winnebago Tribe of Nebraska tit. 1-109, http://www.winnebagotribe.com/index.php/government/tribal-court. If there is still no clear law on the matter, then the Tribal court many apply *any* laws of the United States or any states therein. *Id.* This is unpredictable and fails to meet due process requirements for the Smiths. Lastly, *Atkinson* concerned regulatory jurisdiction, and even there the court found it lacking. The

bar is higher for adjudicatory jurisdiction, leaving the Tribe that much farther from meeting its burden. For these reasons the balance falls squarely on the side of finding no tribal jurisdiction over the Smiths.

A rare, recent case that does find tribal jurisdiction over a nonmember under the first *Montana* exception was only upheld due to a split decision at the Supreme Court. In that case the business had a location on the Reservation, employed a tribal youth in its internship program, and in the process of running that program, an employee of the company allegedly molested the tribal youth *within Indian country*. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (2014). The Smiths' situation differs in a key way: None of the alleged conduct occurred in Indian country. Extending *Dolgencorp* to this case would allow the exception to swallow the rule. As *Dolgencorp* even quotes, "The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation." *Id.* at 175 (quoting *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941 (9th Cir. 2009)). *Dolgencorp* is an example of the narrow set of situations that would fall under the first *Montana* exception, but the Tribe has failed to meet its burden in this case.

2. The Smiths' actions do not threaten nor have a direct effect on the political integrity of the Tribe.

The second exception allowing a tribal court to have civil jurisdiction over a non-Indian under *Montana* is when the non-Indian's activity on Indian fee lands threatens or directly affects the political integrity of the tribe. *Montana*, 450 U.S. at 566. This exception sets an even higher bar than the first exception under *Montana* because it must both be conduct on tribal lands *and* "do more than injure the tribe, it must 'imperil the subsistence' of the tribal community. One

commentator has noted that 'the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" *Plains Commerce Bank*, 554 U.S. at 341. Such a high bar is not met through the alleged sharing of information in a single conversation by Thomas Smith.

Few cases have found for tribal jurisdiction under this extreme exception, however *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa* exemplifies the extremes necessary to find jurisdiction: a contractor was accused of "hijacking the casino, interfering with elections, and deposing the Tribe's governing council." 609 F.3d 927, 938 (8th Cir. 2010). In this case a former tribal chairman hired armed agents to enter "tribal trust land without permission of the elected governing body, stormed buildings vital to the Tribe's economy and its self government, committed violent torts against tribal members, forcibly seized sensitive information related to the Tribe's finances and gaming operations, and damaged tribal property." *Id.* at 939. This behavior was held to clearly damage the political integrity, economic security, and health and welfare of the tribe to the point of imperiling the subsistence of the tribal community. *Id.* Thus the tribe retained civil jurisdiction to adjudicate this conduct under the second *Montana* exception. *Id.* The two key factors in this decision were firstly that the "apparent purpose in raiding the Tribe's facilities was to seize control of the tribal government and economy by force," and secondly that the raid occurred on tribal trust land. *Id.* at 939-40. Both of these elements are vital to the court's decision.

The actions of the Smiths are so far from this extreme, purposeful attempt to overthrow a tribal government that it does not come close to meeting the second *Montana* requirement. The Smiths were motivated to act based on their moral beliefs, not through any malice or desire to overthrow a government. Further, regardless of the Smiths' intentions, the alleged act of sharing

this one piece of information did not harm the tribal government because currently no finances rely upon this possible marijuana cultivation. And even if it did stop the realization of such plans, the Tribe has many other routes and sources of income, and the stopping of drug sales and recreational use should in fact help the welfare of the community. The Tribe fails to prove the second requirement of this exception as well: that the activity occur on tribal lands.[2] The Smiths live and work in Arizona and Oregon, and none of the alleged conversations or breaches occurred on tribal lands. For these reasons the Tribe fails to overcome *Montana*'s rule against tribal civil jurisdiction through the second exception.

D. If the Tribal Court Finds Jurisdiction, There Is No Need for Further Exhaustion Before Seeking a Ruling in Federal District Court.

A federal court need only wait to decide upon the federal question of tribal court jurisdiction "until after the tribal court has had an initial and full opportunity to determine its own jurisdiction." *Strate*, 520 U.S. at 439. This waiting period is provided so that tribes may examine the larger array of statutes, treaties, and other materials relevant when determining civil adjudicatory authority. *Id.* However, once a tribal court is given a full opportunity to reflect upon these sources and make a decision, a federal court may weigh in on the situation. In doing so there is no risk of inefficiency because the tribal court has already had sufficient opportunity to make a decision and by allowing a federal court to weigh in on a jurisdictional question it may actually increase the efficiency of a case if the federal court determines no tribal jurisdiction exists before using up a tribe's resources to go through a full trial. It is for this reason, that upon making a determination as to the Yuma Indian Nation Tribal Court's jurisdiction, the Smiths should be free to request a stay and seek a ruling in Arizona federal district court. There is no

[2] *See also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2013) (finding tribal civil jurisdiction under the second *Montana* exception because the acres of forest burnt down and the regulations governing such an act "are intended to secure the tribe's political and economic well-being").

higher tribal court in this case so the requirement for "an initial and full opportunity to determine its own jurisdiction" has been satisfied.

II. Immunity of No Type, Sovereign or Otherwise, Protects Appellees in This Case.

In addition to lacking civil jurisdiction over this action, the tribe, the EDC, and the EDC's named defendant officers all lack sovereign or any other type of immunity. The tribe waived sovereign immunity for itself and for the EDC when it contractually agreed to resolve disputes arising under the contract by litigation "in a court of competent jurisdiction." Record at 1. Additionally, the tribe waived its sovereign immunity when it agreed in the EDC's charter to allow the corporation to sue and be sued, Record at 2, because the two entities are closely integrated. Moreover, and in the alternative, even if the tribe did not waive immunity, the EDC is not the type of subordinate tribal entity to which sovereign immunity applies. Finally, the EDC CEO and accountant lack immunity from suit in their official and individual capacities under the *Ex Parte Young* doctrine, *Santa Clara Pueblo v. Martinez*, and standard qualified immunity doctrine. This court should reverse the lower court and find no immunity of any type protects the appellees in this case from the Smiths' efforts to vindicate their rights.

A. The Tribe Waived Sovereign Immunity for Itself and the EDC When It Contractually Bound Itself to Litigate Disputes in a Court of Competent Jurisdiction.

1. Tribal sovereign immunity is broad, but subject to limits, waiver, or abrogation.

Like all sovereigns in our system of government, Indian tribes like the appellees possess sovereign immunity from unconsented suit, but subject to limits. The U.S. Supreme Court has reaffirmed this basic rule on multiple occasions. Tribal sovereign immunity can be waived by the

tribe or abrogated by Congress, for example. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 at 759 (1998). Tribal immunity does not apply to suits brought against tribes by the United States, nor does it shield tribal members qua members. See *United States v. Yakima Tribal Court*, 806 F.2d 380, 383 (8th Cir. 1987); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-73 (1977). Congress has the plenary and exclusive power to abrogate tribal sovereign immunity when it desires. *See, e.g., Pub. Serv. Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206 (9th Cir. 1994). Although a waiver "'cannot be implied but must be unequivocally expressed,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)), the Supreme Court readily finds such waivers when appropriate. *See, e.g.*, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Such a waiver has happened here.

2. Supreme Court case law shows the tribe's agreement to litigate in a competent court waived its immunity.

Under U.S. Supreme Court precedent, the tribe here waived its sovereign immunity when it agreed to litigate disputes arising under its contract with the Smiths in "a court of competent jurisdiction." The decision in *C & L Enterprises* should inform the outcome of this case because the facts are analogous. In *C & L*, the Court held that the tribe's agreement to arbitrate under AAA rules providing for entry of an award in any federal or state court with jurisdiction, and to apply state (that is, non-tribal) law to the contract, constituted waiver of sovereign immunity in state court to enforce the arbitration award. *C & L*, 532 U.S. at 418.

Under the facts of this case, the argument for waiver is even stronger than in *C & L*. Here, as in *C & L,* the tribe has agreed to be sued, that is, to have a dispute "litigated." Record at 1. But unlike in *C & L*, where the tribe agreed to arbitrate under rules that happened to include a

rule providing for entering an award in court, here the tribe more explicitly and directly agreed to go to court if necessary. Moreover, the tribe here consented to suit in "a court" having jurisdiction, meaning, logically, *any* court having competent jurisdiction. That is a broad and therefore unmistakable and unequivocal waiver of immunity. This fact, coupled with the foregoing discussion of why this court lacks jurisdiction over this matter, shows that the tribe waived its immunity to suit by agreeing to litigate.

Furthermore, the contractual provision at issue here exceeds what federal precedent demands for a tribal sovereign immunity waiver because it is more than a simple agreement that an aggrieved party will have the rights and remedies the law provides them. For example, in *Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), the court ruled that a clause providing for "rights and remedies provided by law" upon one party's contractual default did not qualify as a waiver. The provision in our case is more specific than a general call for relief. It specifies the forum must be one of "competent" jurisdiction, and contemplates the possibility of non-tribal law governing. This provision is more analogous to the one in *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), which simply specified that state or federal court would be the forum, but like our provision, was more specific than a general grant of any remedies due. This waiver, therefore, exceeds federal requirements for a waiver of sovereign immunity.

There is an important policy consideration that underlies appellants' call for the court to apply the reasoning of *C & L* and other precedents to this case. Unlike in other tribal sovereign immunity cases, the tribe here has no acted in reliance on the notion that it is immune from suit, because it agreed to litigate in the contract. But reliance is one of the concerns that has notably animated the U.S. Supreme Court in its discussions of the immunity issue, For instance, in

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014), the Court disclaimed a desire to tinker with immunity rules, reasoning that it is Congress's prerogative 'to weigh and accommodate the competing policy concerns and reliance interests' involved in the issue" of tribal sovereign immunity. *Bay Mills* at 2037–38, quoting *Kiowa*, at 759. There is no need to uphold a reliance interest in this case, and therefore less reason for the court to exercise its usual vigilance over tribal sovereign immunity waivers.

B. The Tribe Waived Its Sovereign Immunity When It Agreed The EDC, With Which It Is Closely Integrated, Can Sue And Be Sued.

1. Sue-and-be-sued clauses in the charters of subordinate entities like the EDC sometimes subject their tribal parent entities to suit as well.

As one commentator explains, the governance documents and charters of incorporation for tribal entities "whose purpose is to acquire property or to engage in commercial enterprises . . . frequently have 'sue and be sued' provisions to facilitate involvement in commerce." § 7:3.Current application of the tribal sovereign immunity doctrine—Tribal waiver, American Indian Law Deskbook § 7:3. Courts differ in their reasoning and approaches to whether these sue-and-be-sued provisions effect a waiver of immunity by the tribe because the two entities are so closely tied together has never been definitely decided. *Id.* There are eight factors courts consider in deciding whether a sue-and-be-sued provision of a sub-entity like the EDC has waived SI, with the focus principally on the degree of integration between the tribe and corporate entity. *Id.* See also William V. Vetter, *Doing Business with Indians and the Three "S"Es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 176–77 (1994).

2. The EDC and the tribe are closely integrated such that the EDC's waiver of immunity through the sue-and-be-sued clause constitutes a waiver for the tribe as well.

Here, the two are closely integrated in governance and financial matters in a myriad of ways. Record at 1-2. This integration inquiry therefore points toward an immunity waiver by the tribe. Another key consideration, although not determinative, is the extent to which any judgment may impact the tribe's treasury. American Indian Law Deskbook § 7:3. Although here the EDC charter says a judgment against the EDC cannot implicate the tribal treasury, it remains true the tribe's treasury would be indirectly impacted because the EDC is a key economic development tool for the tribe, as shown by the effort to cultivate marijuana, the $2M it's already returned to the tribe, and its general purpose and activities. Record at 2-3. Due to this tight connection between the two entities, the EDC has waived its own and the tribe's immunity both through the tribe's decision to allow the EDC to sue and be sued.

3. The U.S. Supreme Court Uses a Flexible, Practical Approach to Tribal Sovereign Immunity Waiver, and Use of Such an Approach Here Shows Waiver.

The decision in *C&L Enterprises* stands for the idea that particular words of art are not essential to a tribe's immunity waiver and that the any waiver provisions must be read "in their entirety and with an eye to their practical purposes." American Indian Law Deskbook § 7:3. When viewed in their entirety and with practical purposes in mind, appellants prevail on this point because absent waiver, the contract would contain no relief provisions and fail of its essential purpose. Practically speaking, the Smiths would never have agreed to a contract without

any remedies. Using the Supreme Court's approach lights a path for this court in finding for appellants and ruling that immunity does not shield the tribe in this matter.

C. Even if the Tribe Did Not Waive Sovereign Immunity in the Contract, the EDC is Not the Type of Tribal Subordinate Entity to Which Sovereign Immunity Applies.

1. Tribal subordinate entities generally receive immunity

Even if the court decides the tribe has immunity, that immunity need not extend to the EDC. In general, tribal immunity does cover subordinate entities of the tribe, such as a governmental agency or commercial entity. *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971). The EDC is clearly a commercial entity, being organized to promote the tribe's economic development. Record at 1. Whether it is tied closely enough to the tribe to gain its immunity is another question, however. The correct answer is "no." This is an argument in the alternative to be sure. Appellants argued above that that the entities were closely integrated. But an argument in the alternative, on the contingency the court does not agree with appellants' analysis above, is both permissible and a basic feature of zealous advocacy.

2. The EDC is not tied closely enough to the tribe to gain its immunity because it does not serve the tribe's sovereign interest in economic development and cannot subject its treasury to judgments.

Examining the same factors as before, with the impact on the treasury as a key inquiry, it is clear the two entities are too separate to share immunity. As delineated in the EDC's charter, it may not subject the tribe's treasury to judgments against it. Furthermore, Cohen's Handbook of Federal Indian Law lists three key considerations on whether a subordinate entity is an "arm of the tribe," and the third is whether the entity serves the sovereign interest of economic development. Under this framework, the EDC is not an "arm of the tribe" because it does not

actually serve a sovereign interest in economic development because it is performing poorly or doing little at all. Its returns to the tribe have been disappointing, amount to only $2 million so far. And the marijuana cultivation project is not yet in operation. It is therefore clear that on this ground the EDC does not count as an entity with immunity and the Smiths' countersuit against it can move forward.

D. The EDC CEO and Accountant are Subject to Suit in Their Official and Individual Capacities, Their Status as Tribal Officers Notwithstanding, Because of the rule of *Ex Parte Young* and Their Tortious Actions Outside Their Official Authority.

1. *Ex Parte Young* should extend to tribal officers in this action, barring sovereign and prosecutorial or qualified immunity for the CEO and accountant from suit in their official capacities.

Tribal immunity extends to a governing tribal council and other employees and officers of the tribe generally. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1968). But under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), plaintiffs may get around state sovereign immunity when suing states by naming individual state officers as defendants and by alleging federal law violations. Multiple circuits have extended this doctrine to permit suit against a tribal officer accused of violating federal law. See *BNSF v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007). The court here should extend the same doctrine to tribal officials including the CEO and accountant impleaded by the Smiths' counterclaims here. Although no continuing violation of federal law is alleged, the continuing violation of the Smiths' rights to avoid defamation and to recover the money owed them under the contract is an interest of the same caliber and importance. The court should therefore find Captain and Bluejacket do not gain the benefit of the tribe or the EDC's purported sovereign immunity. Such

an extension would also prevent Captain and Bluejacket from asserting prosecutorial or qualified immunity from suit in their official capacities. Cohen's Handbook of Federal Indian Law §7.05.

2. The CEO and accountant also do not have qualified immunity from suit in their individual capacities either.

Additionally, these two officers have no qualified immunity from suit in their individual capacities either because in aiding in the defaming of the Smiths and the breaching of the contract, they could not have been colorably acting within their official authority, which would not permit such torts.

III. Conclusion

This court should find that this court lacks civil jurisdiction over this action, and in the alternative, should stay the lower court's ruling while appellants seek a ruling on this question in federal district court, and should also find that no type of immunity, sovereign or otherwise, protects the appellees in this action.

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