

No. 17-024

In the

Yuma Indian Nation Supreme Court

YUMA INDIAN NATION,

Appellee/Respondent,

v.

THOMAS SMITH, AND CAROL SMITH,

Appellants/Petitioners.

On Appeal

REPLY BRIEF FOR APPELLEE/RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Nation's courts have personal and subject matter jurisdiction over the Smiths, or in the alternative, whether the Nation's trial court should stay this suit pending a ruling on the Smiths' action in the U.S. District Court for the District of Arizona.
2. Whether sovereign immunity, or another form of immunity, protects the Nation, EDC, Mr. Captain, and Ms. Bluejacket from the Smiths' claims.

STATEMENT OF THE CASE

I. FACTS

The Yuma Indian Nation (“the Nation”) was organized pursuant to the Indian Reorganization Act (“IRA”), formerly known as 25 U.S.C. § 477.¹ This Act provides the U.S. Secretary of Interior the power to incorporate a tribal nation’s charter so that it becomes recognized as a self-governing nation.² With this recognition, the Nation maintains the right to enter into business transactions while maintaining its sovereign immunity.³ In 2005, the Nation’s Tribal Council adopted Title 1, 2, and 11 of the Winnebago Tribe of Nebraska code.⁴ Respectively, these titles cover tribal court rules, civil procedure, and business corporations, and they are part of the Yuma Indian Nation Tribal Code.⁵

Thomas Smith (“Mr. Smith”), a certified financial planner and accountant, is not a member of the Nation and resides in Phoenix.⁶ In 2007, Mr. Smith signed a contract with the Nation at his office in Phoenix, Arizona.⁷ Under this contract, Mr. Smith provided the Nation with financial advice and quarterly reports on a variety of economic issues.⁸ The contract included a choice of law clause which required any disputes between the parties be brought in a court of competent jurisdiction.⁹ Additionally, the contract required Mr. Smith to maintain “absolute confidentiality” with regard to any tribal communications or plans.¹⁰

¹ See 25 U.S.C. § 5124.

² *Id.*

³ *Id.*

⁴ R. at 3, n. 1.

⁵ *Id.*

⁶ R. at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In 2009, the Nation promulgated the YIN Economic Development Corporation (“EDC”) “as an arm-of-the-tribe.”¹¹ The EDC was established in the hopes of helping the Nation prosper economically.¹² In accordance with the commercial code of the Nation, the EDC was created through a corporate charter as a wholly owned subsidiary of the tribe.¹³ The Nation’s Tribal Counsel mandated that the EDC, its board, and its employees be protected by tribal sovereign immunity from suit.¹⁴ By extending tribal sovereign immunity to the EDC, its board, and its employees, the Nation intended to protect itself from “unconsented litigation and to assist in the success of the EDC’s endeavors.”¹⁵

The EDC’s board is comprised of five experienced business-people.¹⁶ Per the EDC Charter, three board members must be citizens of the Nation and the remaining two may be non-Indians or citizens of other nations.¹⁷ The Nation’s Tribal Council retains authority to remove board members at any time by a 75 percent vote.¹⁸ On average the EDC has 25 full-time employees per year who are the Nation’s citizens.¹⁹ Fred Captain (“Mr. Captain”) and Molly Bluejacket (“Ms. Bluejacket”) are EDC’s CEO and accountant, respectively.²⁰ Both Mr. Captain and Ms. Bluejacket frequently corresponded with Mr. Smith.²¹

For roughly ten years Mr. Smith provided financial information under his original contract.²² During that time, Mr. Smith was in near constant communication with the Nation: connecting with tribal members via phone or email almost daily, and traveled to the

¹¹ R. at 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ R. at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* at 1.

²¹ *Id.*

²² *Id.*

reservation at least every quarter.²³ After the EDC was created in 2009, Mr. Smith primarily contacted the Mr. Captain and Ms. Bluejacket.²⁴ However, prior to that date, Mr. Smith connected directly with various tribal chairs and Tribal Council members.²⁵

In 2010, Mr. Smith's sister, Carol Smith ("Ms. Smith") entered into an agreement with Mr. Smith to provide services and advice as a stockbroker for the Nation.²⁶ Ms. Smith signed a contract identical to Mr. Smith's, which included an additional section requiring both the Smiths to comply with the terms of Mr. Smith's contract with the Nation.²⁷ In the years following, Ms. Smith submitted monthly bills to the EDC, and received payments in the mail from the EDC.²⁸ Ms. Smith sent advice and communications to Mr. Smith and he passed them along to the EDC and the Nation directly.²⁹ Ms. Smith also visited the Nation's reservation on two occasions.³⁰

In 2016, the EDC became interested in marijuana cultivation as an investment.³¹ However, in Arizona marijuana is legal for medical use only.³² Still, with the approval of the Nation, the EDC began to pursue the development of a marijuana operation.³³ The EDC sought input from Mr. Smith on the issue, making him privy to its actions.³⁴ The Smiths are morally opposed to operation, and Mr. Smith chose to inform the Arizona Attorney General

²³ R. at 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ R. at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ R. at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

of the Nation's plans.³⁵ As a result, the Arizona Attorney general sent the Nation and the EDC a cease and desist letter in regards to the marijuana operation.³⁶

Based on these events, the Nation filed suit against the Smiths for breach of contract, violation of fiduciary duties, and violation of confidentiality.³⁷

II. PROCEDURAL HISTORY

Following Mr. Smith's disclosure of the Nation's plans to the Arizona Attorney General, the Nation filed suit in tribal-trial court against the Smiths for breach of contract, violation of fiduciary duties, and violation of confidentiality.³⁸ The Nation seeks recovery for liquidated damages at the amount set out in the contract with the Smiths.³⁹

The Smiths filed identical motions to dismiss the Nation's suit.⁴⁰ The Smiths argued lack of personal jurisdiction and subject matter jurisdiction.⁴¹ In the alternative, the Smiths asked the tribal-trial court to stay the proceeding pending the U.S. District Court for the District of Arizona's determination regarding whether the tribal-trial court maintains jurisdiction over the Smiths.⁴² The tribal-trial court denied both of the Smiths motions.⁴³

Following the tribal-trial court's ruling on the Smiths' motions to dismiss, the Smiths filed answers denying the Nation's claims and asserted counterclaims for money owed under their contracts and for defamation.⁴⁴ Additionally, through impleader, the Smiths asserted the same claims against the EDC, as well as Mr. Captain and Ms. Bluejacket in their official and

³⁵ R. at 2..

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ R. at 3.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

individual roles.⁴⁵ The tribal-trial court dismissed the Smiths' claims against the Nation, EDC, Mr. Captain, and Ms. Bluejacket, finding each protected from suit on the basis of tribal sovereign immunity.⁴⁶

Upon the tribal-trial court's dismissal of the Smiths' claims, the Smiths filed this appeal to the Yuma Indian Nation Supreme Court, requesting review of two issues: First, whether the Nation's courts have personal and subject matter jurisdiction over the Smiths, or in the alternative, whether the Nation's trial court should stay this suit pending a ruling on the Smiths' action in the U.S. District Court for the District of Arizona.⁴⁷ Second, whether sovereign immunity, or another form of immunity, protects the Nation, EDC, Mr. Captain, and Ms. Bluejacket from the Smiths' claims.⁴⁸

The Nation respectfully requests the Yuma Indian Nation Supreme Court to affirm the tribal-trial court's ruling on both issues.

⁴⁵ R. at 3.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

SUMMARY OF THE ARGUMENT

The Yuma Indian Nation Supreme Court should affirm the tribal-trial court's ruling on the existence of subject matter and personal jurisdiction over the Smiths. The contracts between the Smiths and the Nation, authorizes the tribal court to exercise subject matter jurisdiction over non-members. Additionally, the repeated contacts between the Smiths and the Nation create the relationship necessary to establish personal jurisdiction over the Smiths. Given the tribal-trial court's proper finding of jurisdiction, it is unnecessary to stay these proceedings pending a determination by the U.S. District Court for the District of Arizona.

The Yuma Indian Nation Supreme Court should affirm the tribal-trial court's ruling that tribal sovereign immunity precludes the Smiths' counter and third-party breach of contract and defamation claims against the Nation, EDC, Mr. Captain, and Ms. Bluejacket. A nation's tribal sovereign immunity can only be abrogated by an act of Congress or waived by a nation's own clear expression of waiver. Neither abrogation or waiver apply in this case. Instead, the Nation has explicitly maintained immunity, and extended immunity to the EDC and its employees. Therefore, tribal sovereign immunity precludes the Smiths' claims.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIBAL-TRIAL COURT'S FINDINGS ON PERSONAL AND SUBJECT MATTER JURISDICTION

The Yuma Indian Nation courts have personal jurisdiction over the Smiths and subject matter jurisdiction over this dispute. Although tribal jurisdiction is limited over non-tribal members, the contracts signed and performed by the Smiths created subject matter jurisdiction over the breach of contract claims. Additionally, the Smiths' regular communication with and visits to the Nation's reservation establish personal jurisdiction over the Smiths. Finally, given that federal courts maintain a presumption allowing for exhaustion of tribal court remedies, and that fact that the tribal-trial court correctly ruled on jurisdiction, it is unnecessary and inappropriate to stay this suit while the Smiths seek a ruling in the U.S. District Court for the District of Arizona.

A. The Smiths' Contracts with the Nation are Sufficient to Establish Tribal Subject Matter Jurisdiction Over this Dispute

Mr. and Ms. Smith entered into individual contracts with the Nation that dealt directly with the economic prosperity of the tribe. As such, the Smiths established consensual relationships with the tribe sufficient to create tribal subject matter jurisdiction over any dispute dealing with those contracts. Because the Nation asserts that the Smiths violated those contracts this Court should affirm the tribal-trial court's finding of subject matter jurisdiction.

Under the Yuma Indian Nation Tribal Code, "[t]he Tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968, as amended, any specific restrictions or

prohibitions contained in federal law.”⁴⁹ Under federal law, “[t]ribal jurisdiction is limited: For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty.”⁵⁰ Therefore, “the inherent sovereignty of Indian tribes [is] limited to ‘their members and their territory’: ‘[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.”⁵¹ Consequently, although tribes are free to define the limits of its court’s subject matter jurisdiction with respect to tribal members,⁵² “Indian tribes *lack* civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions.”⁵³

First, ‘[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 dealings, contracts, leases, or other arrangements.’ Second, ‘[a] 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.’⁵⁴

i. The Smiths’ Contracts Grant the Tribal Court Subject Matter Jurisdiction Under the First Exception

Under the first exception “[t]he consensual relationship must stem from ‘commercial dealing, contracts, leases, or other arrangements.’”⁵⁵ This gives tribal courts jurisdiction when the contract forming the basis of the relationship is at the core of the dispute.⁵⁶

⁴⁹ YUMA INDIAN NATION TRIBAL CODE, tit. 1, § 1-201 (2015).

⁵⁰ *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649–50 (2001).

⁵¹ *Id.* at 650-51.

⁵² *See Id.* at 650 (noting “inherent sovereignty of Indian tribes was limited to ‘their members and their territory’”).

⁵³ *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (citing *Montana v. United States*, 450 U.S. 544 (1981)) (emphasis added).

⁵⁴ *Atkinson*, 532 U.S. at 651 (quoting *Montana*, 450 U.S. at 566).

⁵⁵ *Id.* at 655 (quoting *Montana*, 450 U.S. at 565) (holding that potentially receiving benefits from the tribe is insufficient to create such a consensual relationship).

⁵⁶ *E.g. First Specialty Ins. Corp. v. Confederated Tribes of Grand Ronde Cmty. of Oregon*, No. CIV. 07-05-K1, 2007 WL 3283699, at *4 (D. Or. Nov. 2, 2007) (finding tribal jurisdiction over a consensual relationship between a financial investment advisor and a tribe based on their signed agreement).

Additionally, the contract need not be with the tribe directly, so long as the agreement is with a tribal member, or the nonmember could “have reasonably anticipated being subjected to the Tribe’s jurisdiction.”⁵⁷

By signing a contract with the Nation in 2007 Mr. Smith created a consensual relationship with the Nation. Additionally, the breach at issue is directly related to his contract signed with the Nation. While the Smiths may argue that the contract was created out of the jurisdiction of the Nation, because it was signed at Mr. Smith’s office, that fact is immaterial. The contract bound Mr. Smith to the Nation as a party, and also implicitly required that he have regular contact with the Nation’s forum. Mr. Smith further agreed to litigate any disputes arising from the contract in a competent jurisdiction.⁵⁸ Given the ongoing nature of the contract, Mr. Smith should have reasonably anticipated that this would subject him to the Nation’s jurisdiction.

Similarly, Ms. Smith knowingly signed a contract which bound her to the Nation.⁵⁹ Although Ms. Smith signed her contract with her brother, the terms bound her to the Nation as well.⁶⁰ Even if this Court determines that Ms. Smith was only bound to the EDC, the contract need not be with the tribe directly, it was with the arm-of-the-Nation. Additionally, similar to Mr. Smith, Ms. Smith should have reasonably anticipated being subjected to the Nation’s jurisdiction. Constant communication with the Nation, even in the form of bills and payment, created an ongoing consensual relationship sufficient to create subject matter jurisdiction over her as a nonmember.

⁵⁷ *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (holding that either exception was met “given the consensual nature of the relationship between the parties and the potential economic impact of the agreement” between development company and a tribe).

⁵⁸ R. at 1.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.*

ii. The Smiths' Conduct Was Sufficient to Threaten the Economic Security and Welfare of the Nation

Although this Court need not reach the second exception, because the first is directly applicable here, the Court should still find that the second exception is met.

“The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians’ ‘conduct’ menaces the ‘political integrity, the economic security, or the health or welfare of the tribe.’”⁶¹ As such, the threshold for the second exception goes beyond injury to the tribe, “it must ‘imperil the subsistence’ of the tribal community.”⁶²

As financial advisors and stockbrokers for the Nation, the Smiths were directly responsible for helping maintain the financial wellbeing of the Nation. Any breach of their contracts had the potential to affect the Nation on a large scale financially. By violating the confidentiality of their contract with the Nation, the Smiths put the Nation at odds with the State of Arizona and potentially injured the political integrity of the Nation as well.

For the foregoing reasons the Smiths’ contracts and activities are those envisioned by the *Montana v. United States* exceptions. As such this Court should affirm the tribal-trial court’s finding of subject matter jurisdiction over the Nation’s breach of contract claims.

B. The Smiths’ Continuous Contacts with the Nation Established Personal Jurisdiction

Both Mr. and Ms. Smith maintained contractual and continuous relationships with the Nation sufficient to meet the Nation’s and the U.S. Constitution’s requirements for personal jurisdiction.

⁶¹ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (quoting *Montana*, 450 U.S. at 566).

⁶² *Id.*

i. This Court May Exercise Personal Jurisdiction to the Fullest Extent Allowed by the Constitution

“The power of the Indian tribes to govern their own affairs is limited by treaty and the plenary power of Congress.”⁶³ Accordingly, under the Indian Civil Rights Act of 1968 (ICRA), Congress adopted a standard for due process within the jurisdiction of any self-governing Indian tribe.⁶⁴ In federal jurisdictions the analogous Due Process Clause of the Fourteenth Amendment defines the limits of personal jurisdiction over a nonresident defendant.⁶⁵ While, the standard for due process under the ICRA is not always the same as that under the Fourteenth Amendment,⁶⁶ it is accepted for tribes to utilize personal jurisdiction standards established by federal courts to comport with the Constitution.⁶⁷

Under the Nation’s Tribal Code:

Courts of the Tribe shall have jurisdiction over . . . [a]ny person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud . . . [as well as] [a]ny person for whom the Tribal Courts may constitutionally exercise jurisdiction.⁶⁸

Given the accepted practice of tribal courts applying the Constitutional limits of personal jurisdiction, and the similarity between the Nation’s Code and the Constitutional due process standards, this Court should apply personal jurisdiction to the fullest extent allowed by the Constitution.

⁶³ *Tom v. Sutton*, 533 F.2d 1101, 1103 (9th Cir. 1976) (citing *Winton v. Amos*, 255 U.S. 373 (1921)).

⁶⁴ 25 U.S.C. § 1302 (no self-governing Indian tribe shall “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law”).

⁶⁵ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

⁶⁶ *See Tom*, 533 F.2d at 1105 (noting “courts have been careful to construe the terms ‘due process’ and ‘equal protection’ as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe”).

⁶⁷ David A. Castleman, Note, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1269 (2006) (noting the Coeur D’Alene Tribe and the Rosebud Sioux Tribe both apply personal jurisdiction to the fullest extent of the Constitution).

⁶⁸ YUMA INDIAN NATION TRIBAL CODE, tit. 1, § 1-104 (2015).

ii. The Smiths are Subject to Specific Personal Jurisdiction in this Court

Under the due process standard, an out of state defendant may be subject to general or specific personal jurisdiction within a forum state.⁶⁹ A forum state may exercise general personal jurisdiction over a defendant only when the defendant's contacts with the forum are so "continuous and systematic" as to constitute a sufficient "presence" in the forum.⁷⁰ The Smith's contacts with the Nation are unlikely to meet this high burden.

However, a defendant may have sufficient "minimum contacts" with the forum state arising from, or related to, the activity at issue which may subject the defendant to specific personal jurisdiction.⁷¹ "The plaintiff bears the burden of establishing that the court has personal jurisdiction."⁷²

To clarify what suffices as "minimum contacts" that do not "offend traditional notions of fair play and substantial justice"⁷³ the Ninth Circuit⁷⁴ has developed a three-part test to determine who may be subject to specific personal jurisdiction within a forum state:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.⁷⁵

The plaintiff bears the burden of establishing part one and two.⁷⁶ If the plaintiff fails to do so, specific personal jurisdiction has not been established.⁷⁷ However if the first two prongs are

⁶⁹ *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008).

⁷⁰ *Id.*

⁷¹ *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801–02 (9th Cir. 2004) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

⁷² *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986).

⁷³ *International Shoe*, 326 U.S. at 316.

⁷⁴ It is appropriate for this Court to apply the personal jurisdiction standard defined by the Ninth Circuit Court of Appeals because the Nation's reservation is within the bounds of the Ninth Circuit.

⁷⁵ *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015).

satisfied, the burden shifts to the defendant to “present a compelling case” that the exercise of jurisdiction would not be reasonable.⁷⁸

a. The Smiths Have Purposefully Availed Themselves of the Privileges of Conducting Business in the Tribal Forum

Under the first part of the specific jurisdiction test, for cases sounding in contract, a defendant must have “purposefully avail[ed] [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁷⁹ Under “purposeful availment,” “[r]andom, fortuitous, or attenuated” contacts with the forum are insufficient to satisfy this prong.⁸⁰ The defendant must have created a “substantial connection” with the forum state, such as engaging in significant activities, or created “continuing obligations” between himself and the forum state.⁸¹

A contract may not automatically establish specific jurisdiction in a forum state, however, if performance of a contract requires one to “engage in any substantial business” in the forum, it will be sufficient.⁸² Similarly, an “ongoing relationship” as seen in *McGee v. Int’l Life Ins. Co.*, is traditionally sufficient to establish specific jurisdiction when the defendant maintains a continuing connection with the forum that relates to the breach at

⁷⁶ *Schwarzenegger*, 374 F.3d at 800.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

⁸⁰ *Id.* (internal quotations omitted).

⁸¹ *Id.* at 475-476 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957), *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950)).

⁸² *Boschetto*, 539 F.3d at 1017.

issue.⁸³ By contrast, random and fortuitous contacts with the forum state are not sufficient to constitute purposeful availment.⁸⁴

As referenced in the subject matter jurisdiction analysis, Mr. Smith signed a contract with the Nation, thereby consummating a transaction with the Nation and its forum.⁸⁵ In addition, his near constant communication with the Nation and its residents created an ongoing relationship which easily surpasses the threshold set in *McGee*. Further still, Mr. Smith traveled to the Nation at least quarterly to make presentations to tribal members.⁸⁶ Finally, given the duration and breadth of Mr. Smith's relationship with the Nation, his contacts cannot be described as random or fortuitous.

Similarly, Ms. Smith carried on a contractual relationship with the Nation for around seven years.⁸⁷ Like the insurance company in *McGee*, Ms. Smith remitted bills and received payments monthly from the EDC, which acted as an-arm-of-the-Nation.⁸⁸ This repeated contact over many years created a continuing connection to the Nation. Additionally, Ms. Smith was aware that her performance of the contract was being used to benefit of the Nation,⁸⁹ further strengthening the connection between the contract and the forum.

Given the duration and nature of the contracts between the Smiths and the Nation, the purposeful availment prong of the specific jurisdiction test has been satisfied.

⁸³ 355 U.S. at 223 (holding defendant insurance company was subject to specific jurisdiction in a dispute regarding an insurance policy being paid for, and executed in, the forum state), *see also* *Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990) (holding that defendant's contract to represent plaintiff was insufficient to establish personal jurisdiction, however, when the defendant became the beneficiary of a deed of trust over plaintiff's property in the forum state the circumstances became sufficient for personal jurisdiction).

⁸⁴ *Burger King*, 471 U.S. at 475.

⁸⁵ R. at 1.

⁸⁶ *Id.*

⁸⁷ *Id.* at 2.

⁸⁸ *Id.*

⁸⁹ *See id.*

b. The Nations Breach of Contract Claim Arises out of the Smiths' Activities in this Forum

The second part of the specific jurisdiction test requires that a claim arise out of, or result from, the defendant's forum related activities.⁹⁰ Put another way, the second prong is met when there would be no cause of action "but for" the contacts between the defendant and the forum state.⁹¹ Additionally, the contacts and the cause of action must not be too attenuated.⁹²

Here, the second prong is easily established. The Nation's claim of breach of contract is directly related to the contracts that bind the Smiths to the Nation. The Smiths' continued contact with the Nation was based on their contracts with the Nation. Without the contracts, and the relationship created by those contracts, the Smiths would not have been in a position to violate the Nation's confidence. On its face, this dispute is directly related to the contacts—i.e. the contracts—between the Smiths and the Nation. Therefore, the claim arises out of the Smiths' forum related activities.

c. It is Reasonable for the Smiths to Defend Against Suit in Tribal Court

If a plaintiff establishes the first two parts of the test, as the Nation has done here, the court must also consider if the suit offends traditional notions of fair play and substantial justice.⁹³ This "reasonableness" consideration is determined by balancing seven factors:

- (1) the extent of the defendants' purposeful injection into the forum state's affairs;
- (2) the burden on the defendant of defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) the forum state's interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;
- (6) the

⁹⁰ *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995).

⁹¹ *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007).

⁹² *See Omeluk*, 52 F.3d at 272 (holding that, because the defendant ship builder's work at issue was done outside of the forum state, the defendant's unrelated visits to the forum state, were insufficient to satisfy the "arising out of" prong).

⁹³ *Dole Food Co. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002).

importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.⁹⁴

First, the purposeful injection consideration closely resembles the purposeful availment analysis.⁹⁵ Therefore, since Mr. Smith continually visited and worked with the tribe for nearly ten years, and Ms. Smith knowingly entered into this contract, the Smiths injected themselves into the Nation's Jurisdiction.

Second, while not dispositive, the burden on the defendant is the primary concern when considering the reasonableness prong.⁹⁶ When the burden is so great that it may constitute a deprivation of due process, the burden on the defendant may overcome justifications for jurisdiction.⁹⁷ Here, the Smiths have made a motion in the U.S. District Court for the District of Arizona, which is within the same geographic region as the Nation.⁹⁸ Additionally, the Nation's tribal civil court procedures and code closely mirror that of federal court.⁹⁹ Since the Smiths' chosen alternate forum is substantially similar to the tribal court, there is little argument to be made that traveling to, or defending in, tribal court would be a burden.

Third, the sovereignty factor is generally a greater concern in cases involving international defendants.¹⁰⁰ However, since the tribal-trial court abides by similar laws and rules as those of federal courts, there is little concern that the sovereignty of Arizona is in jeopardy.

⁹⁴ *Dole*, 303 F.3d at 1114.

⁹⁵ *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1401 (9th Cir. 1986).

⁹⁶ *Caruth v Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir. 1995).

⁹⁷ *Id.* at 128-129.

⁹⁸ *R.* at 3.

⁹⁹ *See Id.*, and YUMA INDIAN NATION TRIBAL CODE, tit. 1, 2, & 11 (2015).

¹⁰⁰ *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984).

Fourth, there is a presumption that a forum state has an interest in resolving disputes concerning their citizens.¹⁰¹ Thus, this factor benefits the Nation.

The fifth factor weighs the efficiency of the forum in which the suit was brought.¹⁰² Such considerations include the location of witnesses and the evidence.¹⁰³ Here, the potential witnesses for the entirety of this case are nearly all on the Nation's reservation, including the tribal members who signed the contract with Mr. Smith, and the employees of the EDC. Little to no evidence is outside of the tribal court forum. Therefore, this factor weighs in the Nation's favor.

Sixth, the convenience of the plaintiff's home state is assumed,¹⁰⁴ and therefore, this factor benefits the Nation.

Finally, the plaintiff bears the burden of showing an alternate forum is unavailable.¹⁰⁵ Here, the U.S. District Court for the District of Arizona is an alternate forum which may hear this contract claim. However, as noted below, the Ninth Circuit favors comity to tribal courts.

With nearly all of the factors weighing heavily in the Nation's favor, the Smiths have failed to meet their burden of showing that personal jurisdiction in tribal court is unreasonable.

C. It Would be Inappropriate for the U.S. District Court for the District of Arizona to Determine Tribal Jurisdiction

“A federal court must give the tribal court a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts.”¹⁰⁶

It is true that exhaustion is required as a matter of comity, and is not required: where the

¹⁰¹ *Id.*

¹⁰² *Caruth*, 59 F.3d at 129.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987)).

tribal court so clearly lacks jurisdiction that exhaustion would only cause delay;¹⁰⁷ the dispute clearly violates “express jurisdictional prohibitions;”¹⁰⁸ or the exhaustion is motivated by bad faith.¹⁰⁹ However, barring those extreme situations, exhaustion is the standard.¹¹⁰

Here, none of the exceptions are implicated. As described above, the tribal-trial court properly found it has both subject matter and personal jurisdiction over the Smiths. To stay this proceeding pending a determination by the U.S. District Court for the District of Arizona would violate the presumption for exhaustion and cause undue delay.

For the aforementioned reasons, this Court should affirm the proper application of subject matter and personal jurisdiction by the tribal-trial court.

II. TRIBAL SOVEREIGN IMMUNITY PRECLUDES THE SMITHS’ CLAIMS

This Court should affirm that tribal sovereign immunity precludes the Smiths’ counter and third-party contract and defamation claims against the Nation, EDC, Mr. Captain, and Ms. Bluejacket. Tribal sovereign immunity shields tribal nations from lawsuits by individuals, and state and federal governments. In suits against tribes, arms-of-tribes (e.g. economic development organizations), and their employees “[t]here is a strong presumption against waiver of tribal sovereign immunity.”¹¹¹ While immunity can be abrogated by Congress or waived by a tribe, in general, the presumption of sovereign immunity provides nations, and their entities and employees, the freedom and security of self-governance.¹¹² It

¹⁰⁷ *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

¹⁰⁸ *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n. 21 (1985).

¹⁰⁹ *Id.*

¹¹⁰ *See Boozer*, 381 F.3d at 935.

¹¹¹ *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001) (citing *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989)).

¹¹² *Id.*; *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968).

also encourages tribal nations to engage in innovative development projects without the fear of retaliation.

A. Tribal Sovereign Immunity Applies to the Nation

This Court should affirm the tribal-trial court's finding that the Nation enjoys immunity from suit because the Nation is an independent sovereign organized under the IRA, Congress has not abrogated the Nation's immunity, and the Nation has not waived its own immunity. This immunity precludes the Smiths' breach of contract and defamation claims against the Nation.

In general, "[t]here is a strong presumption against waiver of tribal sovereign immunity: waiver of immunity by a tribe may not be implied and must be expressed unequivocally."¹¹³ Additionally, "[i]nclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity."¹¹⁴

There are two ways in which a nation's tribal sovereign immunity may be removed: First, a nation's tribal sovereign immunity may be abrogated by an act of Congress.¹¹⁵ The principal that Congress has the power to abrogate tribal sovereign immunity is rooted in the U.S. Constitution's Commerce Clause, which states that it is the power of Congress to regulate commerce "with foreign Nations, among the several States, and with the Indian Tribes."¹¹⁶ Second, a nation may waive its own tribal sovereign immunity through a clear expression of waiver.¹¹⁷ Thus, without congressional authorization or a tribe's expressed waiver, a nation will enjoy tribal sovereign immunity from suit.¹¹⁸ To successfully sue a

¹¹³ *Sears v. Gila River Indian Community*, No. CV-12-02203-PHX-ROS, 2013 WL 5352990 at *1, *2 (D. Ariz. Sept. 25, 2013).

¹¹⁴ *Id.*

¹¹⁵ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

¹¹⁶ U.S. CONST. art. I, § 8.

¹¹⁷ *Sears*, 2013 WL 5352990 at *2.

¹¹⁸ *Id.*

nation, the moving party “bears the burden of showing waiver of tribal sovereign immunity.”¹¹⁹ In this case, the Smiths cannot show either abrogation or waiver.

The aforementioned rules for tribal sovereign immunity extend to contract law. Justice Kennedy, finding no waiver of sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, wrote:

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. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.¹²⁰

Unless Congress abrogates a nation’s tribal sovereign immunity or a nation expressly waives its own tribal sovereign immunity at the time of contract formation, in the event of a breach of contract, that Nation’s tribal sovereign immunity is not abrogated.¹²¹

Similar principals apply in tort law. Defamation is a tort defined as “[m]alicious or groundless harm to the reputation of good name of another by the making of a false statement to a third person.”¹²² In *Furry v. Miccosukee Tribe of Indians of Florida*, the Eleventh Circuit held that to determine whether tribal sovereign immunity applies it must determine “(1) whether Congress has abrogated tribal immunity or authored the type of suit at issue; or (2) whether the tribal defendants have waived their immunity.”¹²³ The court considered whether the Application of Indian Liquor Laws, 18 U.S.C. § 1161, abrogated immunity based state

¹¹⁹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-9 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).

¹²⁰ *Kiowa*, 523 U.S. at 760 (holding a tribe was entitled to sovereign immunity from a suit on promissory note which it had signed).

¹²¹ See *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953, 958 (E.D. Cal. 2009) (holding “tribal sovereign immunity applies unless [the complaining party] can show an affirmative waiver in the contract”).

¹²² *Defamation*, Black’s Law Dictionary (10th ed. 2014).

¹²³ 685 F.3d 1224, 1230 (11th Cir. 2012).

and federal tort laws, including a state dram shop act.¹²⁴ Finding no law abrogating and no tribal waiver of immunity, the court affirmed the lower court's dismissal of the tort claims.¹²⁵

Congress has enacted statutes waiving tribal sovereign immunity regarding certain disputes for water and property rights, such as the McCarran Amendment and Quiet Title Act.¹²⁶ Neither of these statutes applies to breach of contract or tort claims. Through the 1990 enactment of the Indian Self-Determination and Education Assistance Act of 1975, Congress extended the Federal Tort Claims Act (FTCA) to tribal nations.¹²⁷ The FTCA waives tribal sovereign immunity from certain tortious acts carried out by employees of a tribe or an-arm-of-a-tribe when they are also deemed employees of the Bureau of Indian Affairs.¹²⁸ In other words, if a tribe is in contract with the federal government and its employee commits a tort, that employee may not enjoy sovereign immunity. As discussed in *Locklear v. Gila River Indian Community*, proposed acts, such as the American Indian Tort Liability Act and Indian Tort Claim Procedure, which were never enacted, cannot abrogate immunity.¹²⁹

As Justice Stevens notes in his *Kiowa* dissent, Justice Kennedy's majority opinion may be unfair to unsuspecting tort victims who had "no opportunity to negotiate a waiver of sovereign immunity."¹³⁰ Unsuspecting tort victims are those who did not have a previous contractual or other form of relationship with their alleged suspect, such as claimants involved in automobile accidents who did not know the other driver.¹³¹ Yet, Justice Stevens does not find sovereign immunity unfair to those whose claims arise "out of voluntary

¹²⁴ *Id.* (citing *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1286 (11th Cir. 2001)).

¹²⁵ *Id.* at 1237.

¹²⁶ Cohen's Handbook of Federal Indian Law § 7.05 (2017) (citing *United States v. Dist. Ct.*, 401 U.S. 520 (1971); and *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986)).

¹²⁷ *Shirk v. United States*, 773 F.3d 999, 1003 (9th Cir. 2014).

¹²⁸ *Id.*

¹²⁹ No. 2:12-CV-019-798-SLG, 2013 WL 12125745 at *1, *3 (D. Ariz. Apr. 5, 2013) (granting motion to dismiss for lack of subject matter jurisdiction due to nation's immunity from contract and tort claims).

¹³⁰ *Kiowa*, 523 U.S. at 766.

¹³¹ *See, e.g., Wilkes v. PCI Gaming Authority*, No. 1151312, 2017 WL 4385738 at *1, *4 (Ala. Oct. 3, 2017).

contractual relationships.”¹³² For claims arising from voluntary contractual relationships, both parties could negotiate the terms of their relationship, including whether or not to waive sovereign immunity. Regardless, courts typically honor tribal sovereign immunity because many tribes lack “the economic power to provide a just alternative.”¹³³ Preventing a tribe from entering costly litigation helps protect a tribe’s economic interests.

There are no applicable Congressional statutes that abrogate tribal sovereign immunity in this case. As in *Locklear*, the FTCA does not abrogate immunity in this case because the Smiths did not sue the Nation in conjunction with its provision of governmental services.¹³⁴ Instead, the Smiths’ suit arises only out of their contracts with the Nation.

The Nation has not waived its tribal sovereign immunity. Title 11 of the Nation’s code states, “[b]y the adoption of this Code, the Tribe *does not waive its sovereign immunity* or consent to suit in any court, federal, *tribal* or state.”¹³⁵ Thus, the Nation’s code explicitly codifies and preserves tribal sovereign immunity in federal, state, and tribal court. Tribal court includes this Court.

The Smiths may cite to Justice Stevens’s dissent in *Kiowa* to argue that it would be unfair to hold the Nation immune from its contract and defamation claims. This Court should find such an argument unpersuasive. Mr. Smith has contracted with the Nation and EDC since 2007 and 2009, respectfully.¹³⁶ Ms. Smith signed a contract with Mr. Smith in 2009, which carries the force and effect of contracting with the Nation and EDC.¹³⁷ Therefore, the

¹³² *Id.*

¹³³ *Davis*, 398 F.2d at 86.

¹³⁴ *Locklear*, 2013 WL 12125745 at *3.

¹³⁵ YUMA INDIAN NATION TRIBAL CODE, tit. 11, § 11-081 (2015) (emphasis added).

¹³⁶ R. at 1.

¹³⁷ *Id.* at 2.

Smiths had between eight and ten years to negotiate a waiver of tribal sovereign immunity. If displeased, the Smiths could have opted-out of contracting with the Nation and EDC.

Since Congress has not abrogated and the Nation has not waived immunity, and extending immunity to the Nation does not offend Justice Steven's notions of fairness, this Court should affirm the tribal-trial court's finding of immunity from suit.

B. Tribal Sovereign Immunity Applies to the EDC

This Court should find that the EDC is an arm-of-the-tribe, for which tribal sovereign immunity applies. Sovereign immunity extends to a tribal nation's government, commercial, and economic entities and activities.¹³⁸ "When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe."¹³⁹ In *Allen v. Gold Country Casino*, the Ninth Circuit held that because a casino was established under tribal law, and was owned and operated by a tribe, it was an arm of the tribe.¹⁴⁰ Similarly, in *Cook v. AVI Casino Enterprises*, a tribal casino enterprise acted as an arm-of-the-Fort Mojave Tribe because it was created pursuant to tribal law, owned and operated by the Tribe, and produced an economic benefit for the Tribe.¹⁴¹ Whether an arm-of-the-tribe or its employees can waive sovereign immunity depends on tribe-specific law.¹⁴²

Similar to the casino in *Allen*, the EDC was established pursuant to the Nation's law. The EDC was established and authorized in 2009 under the Nation's commercial code.¹⁴³ Also, like the casino in *Allen*, the EDC is owned by the Nation.¹⁴⁴ Although the EDC is operated indirectly by the Nation, instead of directly like the casino in *Allen*, the board of

¹³⁸ *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (citations omitted).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1047.

¹⁴¹ 548 F.3d 718, 726 (9th Cir. 2008).

¹⁴² *Allen*, 464 F.3d at 1047.

¹⁴³ R at 1.

¹⁴⁴ *Id.*

directors who operate the EDC must be steered by citizens of the Nation.¹⁴⁵ Additionally, the Nation’s Tribal Council retains significant control of the board.¹⁴⁶ The board is comprised of three citizens of the Nation and two “non-Indians or citizens of other tribes.”¹⁴⁷ This Court should find the fact that two board members are not citizens immaterial for three reasons; First, the Nation’s Tribal Council mandated that “the EDC, its board and all its employees are protected by tribal sovereign immunity to the fullest extent of the law.”¹⁴⁸ Second, the Nation’s Tribal Council implemented safeguards to retain operational control of the board, such as a 75 percent vote to remove any director for any cause.¹⁴⁹ Third, how the Nation structures the EDC board is a matter of tribal self-governance and is protected by the Tribal Self Governance Act of 1994.¹⁵⁰

The Nation’s Tribal Council mandated that the EDC’s charter extend sovereign immunity to itself.¹⁵¹ This extension of tribal sovereign immunity is a safety measure designed to protect the Nation, EDC, and EDC employees from the threat of litigation, as well as to protect the Nation’s financial investment and “assist in the success of the EDC.”¹⁵² This Court should consider the presumption of tribal sovereign immunity and the Nation’s express grant of that immunity to the EDC persuasive in barring the Smiths’ third-party claims. Furthermore, the tribal-trial court properly dismissed the Smiths’ contract and defamation claims because the Smiths fail to meet their burden of showing that either Congress or the Nation waived its tribal sovereign immunity, as required by *Kiowa*.

¹⁴⁵ R. at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2.

¹⁴⁹ *Id.* at 1.

¹⁵⁰ Cohen’s Handbook of Federal Indian law §1.07 (2017).

¹⁵¹ R. at 2.

¹⁵² *Id.*

C. Tribal Sovereign Immunity Applies to Mr. Captain and Ms. Bluejacket

Finally, this Court should find that tribal sovereign immunity also applies to Mr. Captain and Ms. Bluejacket in their official capacities as EDC employees.¹⁵³ Determining whether an employee enjoys immunity from suit depends on whether the employee acted in their official capacity, the character of their position, tribe-specific law, relevant congressional statutes, and public policy considerations. To determine whether or not an employee assumes individual liability, rather than tribal sovereign immunity, courts ask whether the claim arises from personal actions.¹⁵⁴ “Tribal sovereign immunity extends to tribal employees when acting in their official capacity and within the scope of their authority but not to individual tribe members generally.”¹⁵⁵

The court in *Davis v. Littell* exemplified the employee analysis: In considering whether the Navajo Tribe’s general counsel enjoyed sovereign immunity from liability for defamation, the court first determined whether the general counsel’s position “encompasses public duties, official in character,” finding that it did.¹⁵⁶ Next, the court found that through its laws the Navajo Tribe maintained independence and control of its internal relationships. Therefore, the Tribe had authority to afford “absolute privilege to its officers.”¹⁵⁷ Finally, the court elaborated on the public policy rationale for protecting employees, which is later discussed in *Santa Clara v. Martinez*. In *Santa Clara*, the Court noted that often “although tribal officials do not share the same immunity from suit as does the tribe, they are protected

¹⁵³ The Second and Ninth Circuits have held that there is no functional difference between an officer and employee, so the terms are used interchangeably. See *Cook*, 548 F.3d at 727 (citing *Chayoon v. Chao*, 355 F.3d 141, 142 (2nd Cir. 2004)).

¹⁵⁴ *Lewis v. Clarke*, 137 S. Ct. 1285 (2017).

¹⁵⁵ *Ingrassia*, 676 F. Supp. 2d at 957 (citing *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981)).

¹⁵⁶ *Davis*, 398 F.2d at 85.

¹⁵⁷ *Id.* at 84.

from suit for policy reasons.”¹⁵⁸ The *Davis*-court held that “[t]he need for absolute privilege is in the elimination of the ‘constant dread of retaliation’ for injury committed in the course of duty.”¹⁵⁹ Satisfied that these three inquiries favored immunity, the *Davis*-court held that the general counsel enjoyed tribal sovereign immunity from suit.¹⁶⁰

This Court need not address the Smiths’ claims against Mr. Captain and Ms. Bluejacket for acting in their individual capacities; First, no contract exists between the Smiths and Mr. Captain or Ms. Bluejacket in their individual capacities. Second, no evidence has been put forward to indicate that Mr. Captain or Ms. Bluejacket defamed the Smiths or acted outside the scope of their employment with the Nation. Since any interaction between Mr. Captain or Ms. Bluejacket and the Smiths was as employees of the Nation, their individual capacity is not applicable in this case.

This Court should consider the fact that Nation’s Tribal Council mandated that the EDC’s charter extend tribal sovereign immunity to its employees as clear tribe-specific law, implemented to protect the Nation’s employees.¹⁶¹ Additionally, as a matter of public policy, to ensure the Nation and EDC continue to employ individuals willing to advance its community’s economic prosperity, this Court should maintain Mr. Captain and Ms. Bluejacket’s immunity from suit. As the Ninth Circuit described in *Davis*, immunity from suit is vital to ensuring that tribal employees do not hold back on projects out of fear of retaliation.¹⁶²

¹⁵⁸ See Theresa R. Wilson, *Nations Within A Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 120 (2000) (citing *Santa Clara Pueblo*, 436 U.S. 49 (1978)).

¹⁵⁹ *Davis*, 398 F.2d at 85.

¹⁶⁰ *Id.* (also finding it immaterial whether or not an employee is a tribal member).

¹⁶¹ R. at 2.

¹⁶² *Davis*, 398 F.2d at 85.

CONCLUSION

For the reasons stated above, Appellee/Respondent requests this Court affirm the Trial Court's dismissal of Appellants/Petitioner's claims.