In The
Supreme Court of the Yuma Indian Nation

Carol Smith & Thomas Smith,

Petitioners,

v.

Yuma Indian Nation, Yuma Indian Nation Economic Development Corp., Fred Captain, as an individual and in his official capacity, and Molly Bluejacket, as an individual and in her official capacity,

Respondents.

On appeal from the Yuma Indian Nation Trial Court

Brief for Respondents

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II. QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over the Smiths when the Smiths entered into a consensual relationship with the Yuma Indian Nation by signing a contract, off of the reservation, and when the Smiths added third-party defendants to their counterclaims.

2. Whether the Yuma Indian Nation, the Yuma Indian Nation Economic Development Corporation, Fred Captain, and Molly Bluejacket have sovereign immunity, or any other form of immunity, from the Smiths' claims considering the language of the corporate charter establishing the Economic Development Corporation and the unknown tribal status of Fred Captain and Molly Bluejacket.

III. STATEMENT OF THE CASE

a. Statement of the Facts

Thomas Smith is a certified financial planner and accountant who lives and works in Phoenix, Arizona, but is a not a member of the Yuma Indian Nation ("YIN"). R. on Appeal 1. Mr. Smith's sister, Carol Smith, is a licensed stockbroker who lives and works in Portland, Oregon, and is also not a member of the YIN. *Id.* at 2. Fred Captain is the Chief Executive Officer ("CEO") of the YIN Economic Development Corporation ("EDC"). Molly Bluejacket is the accountant for the EDC. *Id.* at 1.

In 2007, the YIN and Mr. Smith entered into a contract that required Mr. Smith provide as-needed financial advice regarding YIN's economic development, confidentiality regarding YIN's economic development plans, and confidentiality regarding any communication between YIN and Mr. Smith. *Id.* Furthermore, the contract required that any contract dispute be litigated in a court of competent jurisdiction and provided for a set amount of liquidated damages for a breach of contract. *Id.* The parties signed the contract at Mr. Smith's Phoenix office. *Id.* For the next ten years, Mr. Smith provided the YIN financial advice concerning extensive economic development issues. *Id.* He exchanged nearly daily emails and telephone calls with various Tribal Chairmen and Tribal Council members. *Id.* Mr. Smith prepared written quarterly reports and submitted the reports in person at Tribal Council meetings on the YIN reservation. *Id.*

The Tribal Code authorizes the YIN, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. *Id.* In 2009, the YIN Tribal Council created the EDC, a wholly owned subsidiary and "arm-of-the-tribe," via a corporate charter to promote the prosperity of the YIN and its citizens. *Id.* The charter states the EDC's primary purpose is: "to create and

assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona." *Id.* The charter mandates that the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law. *Id.* at 2. The Tribal Council included this provision to protect the EDC and the YIN from unconsented litigation. *Id.* Furthermore, the Tribal Council funded the EDC with a one-time $10 million loan from the YIN's general fund. *Id.* at 1. Fifty percent of all EDC net profits are to be paid to the YIN general fund on an annual basis. *Id.* at 2. To date, the EDC has repaid the YIN $2 million. *Id.*

The charter states the EDC is to be operated by its own board of directors consisting of five people who must be experienced in business endeavors. *Id.* at 1. The Tribal Council selected the initial board of directors to serve staggered terms with one director's term expiring each year. *Id.* The charter provides that the sitting directors would, by majority vote, elect or reelect a person for the expiring seat. *Id.* Three directors must be tribal citizens and two must be non-Indians or citizens of another tribe. *Id.* The Tribal Council retained the authority to remove any director for any reason by a 75% vote. *Id.*

The EDC is authorized to buy and sell real property in fee simple title on or off the reservation, to buy any other types of property in whatever form of ownership, and "to sue and be sued." *Id.* at 2. No EDC debts may encumber, or implicate in any way, the YIN's assets. *Id.* The EDC does not possess the power to borrow or lend money in the name of, or on behalf of, the YIN or to grant or permit any liens or interests of any kind to attach to the assets of the YIN. *Id.* The EDC is required to keep detailed corporate and financial records and submit them quarterly to the Tribal Council for review and approval. *Id.* The EDC must apply tribal preference in hiring employees and contracting with outside entities. *Id.*

The EDC employs, on average, twenty-five tribal citizens full-time every year since its creation. *Id.*

Since the EDC's formation, Mr. Smith has primarily communicated with EDC CEO Fred Captain and EDC accountant Molly Bluejacket. *Id.* at 1. In 2010, with the YIN Tribal Council's written permission, Mr. Smith signed a contract with Ms. Smith that required: 1) Ms. Smith provide Mr. Smith, the EDC, and the YIN advice regarding stocks, bonds, and securities issues; and 2) Ms. Smith comply with the 2007 YIN-Smith contract. *Id.* at 2.

Ms. Smith provides her advice directly to Mr. Smith via email, telephone, and postal and delivery services. *Id.* She emails Fred Captain monthly bills and is compensated by the EDC. *Id.* Ms. Smith has visited the YIN reservation on two occasions—each time with Mr. Smith accompanying her. *Id*. Mr. Smith forwards her communications and advice to the YIN Tribal Council, Fred Captain, and Molly Bluejacket. *Id.*

b. Statement of the Proceedings

In 2016, Mr. Smith shared confidential information with the Arizona Attorney General regarding a proposed tribal economic development opportunity. *Id.* Apparently, both Mr. and Ms. Smith were opposed to this economic development opportunity on moral grounds. *Id.* The Attorney General subsequently sent the YIN a cease and desist letter regarding the proposed opportunity. *Id.* Consequently, the Tribal Council filed suit against Mr. and Ms. Smith in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality and sought recovery of the liquidated damages amount set out in the contracts. *Id.* at 3.

Mr. and Ms. Smith filed special appearances and identical motions to dismiss the YIN suit based on lack of personal jurisdiction and lack of subject matter jurisdiction. *Id.*

Alternatively, the Smiths moved the trial court to stay the suit while they pursued a ruling in federal district court as to whether the tribal court has jurisdiction. *Id.* The YIN trial court denied both motions. *Id.* Claiming to continue under their special appearances, the Smiths filed answers denying the YIN claims and counterclaimed against the YIN seeking the money due under their contracts and for defamation for impugning their professional skills. *Id.* The Smiths also impleaded the EDC, Fred Captain, and Molly Bluejacket in their official and individual capacities. *Id.* The Smiths made the same claims against the third-party defendants as they had made against the YIN. *Id.*

The trial court dismissed all of the Smiths counterclaims against YIN and all the claims against the third-party defendants citing sovereign immunity. *Id.* The Smiths filed this interlocutory appeal in the YIN Supreme Court. *Id.*

IV. SUMMARY OF ARGUMENT

V. ARGUMENT

a. The YIN courts have personal and subject matter jurisdiction over the Smiths.

i. Tribal Court civil jurisdiction over nonmembers.

Generally, tribes "lack authority to regulate the activities of nonmembers."[1] *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 343 (2008). Federal courts, however, will uphold tribal civil jurisdiction over nonmembers in select circumstances, including claims arising out of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing,

[1] This brief may use the terms "nonmembers" and "non-Indians" interchangeably, when referring to specific case law. The authors take note that there is a legal difference between the two terms, but such a difference is irrelevant in the current matter. This is because it is not clear whether the Smiths are non-Indian, yet it is known that they are nonmembers of the YIN.

contracts, leases, or other arrangements" or when claims arise under circumstances that threaten a tribe's sovereignty either politically or economically. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Felix Cohen summarized the legal theory behind the early bedrock of case law regarding tribal courts' right to jurisdiction over nonmembers as being derived from tribes' inherent sovereignty: Tribal "powers are subject to qualification by treaties and by express legislation of Congress, *but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government*." Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1941) (emphasis added).

The first major, modern United States Supreme Court case regarding tribal jurisdiction over nonmembers did not occur until 1959. *See* Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 245 (2005) (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)) (stating that "few cases on tribal authority had arisen during the twentieth century" until 1959 with *Williams v. Lee*).[2] In *Williams*, a non-Indian operated a store in the Navajo Nation Reservation. *Williams*, 358 U.S. at 217. The store operator brought a civil action in Arizona state court against two Navajo members to collect money for products the store operator sold the Navajo members on credit. *Id.* at 217-18. The Court cited to *Worcester v Georgia*[3] and stated that the Marshall decision noted that states cannot impose

[2] There are certain cases, not necessarily dealing with jurisdiction over non-members, that occurred before the modern era that affirmed notions of tribal sovereignty. For instance, one case enforcing the doctrine of tribal sovereignty included *Ex Parte Crow Dog*, 109 U.S. 556 (1883), where state criminal jurisdiction did not extend to Crow Dog. *See* David H. Getches & Charles F. Wilkinson, *Federal Indian Law* 279 (1982 ed.) (examining the two distinct paths that federal courts travel when ruling on tribal sovereignty—either affirming or diminishing). Furthermore, the pendulous eras of removal, allotment, assimilation, reorganization, self-government, and termination all occurred before the *Williams* decision in 1959, only a few years before the modern-day era of self-determination began.

[3] *Worcester v. Georgia*, a part of Justice Marshall's famous Marshall trilogy, held that, because tribes maintain some sovereignty and are "a distinct community, occupying its own territory," individual states cannot impose their laws on tribes "but with the assent of the Cherokees themselves or in conformity with treaties, and with the acts of Congress." *Worcester v. Georgia* 31 U.S. 515, 561 (1832).

laws on tribes unless in conformity with a treaty or Congressional act, or with the consent of the tribe. *Id.* at 219 (quoting *Worcester*, 31 U.S. at 561). No such tribal consent, treaties, or acts of Congress allowed Arizona state courts to hear civil cases like the one at issue in *Williams*, and the Court reasoned that the Navajo Tribal Courts have more appropriate jurisdiction. *Id*. at 221-22 (citing Robert W. Young, *The Navajo Yearbook* 107, 110 (1957)) (stating that no acts of Congress have extended state jurisdiction over the matter at hand and that "[t]he Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel" and "[t]oday the Navajo Courts of Indian Offenses exercise broad . . . civil jurisdiction which covers suits by outsiders against Indian defendants"). Thus, the Court ruled, Arizona state courts had no jurisdiction over the civil suit between a nonmember and Navajo tribal members regarding a transaction that occurred on tribal land because "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223.

Later, in 1975, the United States Supreme Court ruled in *United States v. Mazurie* that the Arapahoe and Shoshone tribes in Wind River Reservation could regulate the alcohol sales of non-Indians who operated a bar on private land within the reservation. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). This regulatory ability partially came from an act of Congress in 1959 whereby tribes could regulate liquor sales with tribal liquor licenses as long as the regulation was approved by the tribe, the Secretary of the Interior, and comported with state law. *Id.* at 547 n.4 (quoting Act to Eliminate Certain Discriminatory Legislation against Indians in the United States of 1953, Pub. L. 277-502, 67 Stat. 586).

Six years after *Mazurie*, however, the United States Supreme Court remanded a

decision made by the United States Court of Appeals for the Ninth Circuit that upheld tribal regulation[4] over nonmembers on private land within reservation boundaries. *Montana*, 520 U.S. at 547, 567. This case, *Montana v. United States*, is often considered the modern foundational case that all courts look to when examining civil tribal jurisdiction over nonmembers. *See Strate*, 520 U.S. at 445 (1997) ("*Montana v. United States* . . . is the pathmarking case concerning tribal civil authority over nonmembers."). In *Montana,* the Crow Tribe, relying "on the treaties which created its reservation and on its inherent power as a sovereign," sought to prohibit nonmembers' hunting and fishing within the reservation. *Montana*, 450 U.S. at 547-49. The State of Montana, to the contrary, asserted that only the State had the authority to regulate hunting and fishing of non-Indians on reservation land. *Id.* at 549.

Ultimately, the *Montana* Court found that tribes could regulate nonmembers' fishing and hunting on tribal-owned land. *Id.* at 568. The Court further found, however, that tribes could not regulate hunting and fishing on nonmember owned fee-patented lands under the specific facts that the court called the "narrow . . . regulatory issue before [the Court]." *Id.* The Court ruled that, in the situation at hand, neither treaty language, congressional intent, nor inherent sovereignty granted tribal authority over nonmembers. *Id.* Specifically, regarding inherent sovereignty, the Crow tribe had acquiesced to the State of Montana's "'near exclusive' jurisdiction over hunting and fishing on fee lands within the reservation" and thus "any argument" that the tribe made as to "whether such regulation is necessary to Crow tribal self-government is refuted" by such complicity. *Id.* at 565 n.13.

[4] Although some of the cases refer to tribal regulation, what is at stake in the situation at hand is tribal adjudication. Courts, however, have ruled that the two are analogous. *See* Strate v. A-1 Contractors, 520 U.S. 438, 440 (1997) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative [i.e. regulatory] jurisdiction.").

The *Montana* Court, however, laid out two instances where tribal civil jurisdiction over nonmembers on non-Indian fee lands would be appropriate: (1) "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) " [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 557, 565-66 (citations omitted).

Lastly, it should be noted, that throughout the United States Supreme Court case law addressing tribal civil jurisdiction over nonmembers, the analysis of subject matter and personal jurisdiction, although conceptually distinct, are often not discussed separately. *See* Joel Pruett, *Nothing Personal (or Subject Matter) About It: Jurisdictional Risk As an Impetus for Non-Tribal Opt-Outs from Tribal Economies, and the Need for Administrative Response*, 40 Am. Indian L. Rev. 131, 150–51 (2016) (citations omitted) (stating that "many cases on tribal civil jurisdiction fail to mention the concepts of personal and subject matter jurisdiction altogether, leaving this dichotomy within tribal civil jurisdiction ambiguous throughout the U.S"); *see also* Frank Pommersheim, *Tribal Justice: Twenty-Five Years as a Tribal Appellate Justice* 56 (2016) (questioning the indistinctiveness between personal and subject matter jurisdiction and asking "given that personal and subject matter jurisdiction are historically and conceptually quite distinct, how can they potentially converge and meld in Indian law without any judicial identification or exegesis?").

1. An overview of case law regarding the *Montana* consensual relationship exception.

In terms of contracts between nonmembers and members, the United States Supreme

Court has often look to the first *Montana* exception: that a tribe has civil jurisdiction over a nonmember who enters a consensual relationship with a tribal member. In *Strate v. A-1 Contractors*, the Court insinuated that a nonmember must be a party to a contract in order for a tribe to assert jurisdiction over the nonmember. *See Strate*, 520 U.S. at 441 (striking down jurisdiction between nonmember plaintiff who was injured in an automobile accident with a nonmember contract company).

Lower federal courts have also looked to the consensual relationship exception. In *First Specialty Insurance Corp. v. Confederated Tribes of the Grande Ronde Community of Oregon*, the tribe hired a nonmember investment company as its financial and investment advisor. *First Specialty Ins. Corp. v. Confederated Tribes of Grand Ronde Cmty. of Or.*, No. CIV. 07-05-K1, 2007 WL 3283699, at *1 (D. Or. Nov. 2, 2007). The investment agreement was signed at tribal headquarters on the reservation. *Id.* The investment company's CEO, Patrick Sizemore, provided investment services at the tribe's headquarters and attended hundreds of meetings with the tribal council. *Id.* The investment company and Sizemore were nonmembers. *Id.* at *4. The district court ruled that, even though the investment contract had an arbitration clause, such a clause did not bar the tribe from suing Sizemore and the investment company in tribal court because the agreement was between the tribe and "nonmembers who entered into a consensual relationship with the Tribe through a contract." *Id.*

In *F.T.C. v. Payday Financial, LLC*, an enrolled member of the Cheyenne River Sioux Tribe owned several financial lending companies located within the Cheyenne River Indian Reservation. *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 929 (D.S.D. 2013). The lending companies marketed to nonmember borrowers throughout the United States. *Id.*

at 930. The decision to approve a loan, as well as financing for the loan, all occurred on the reservation. *Id.* at 931. If a loan was approved, the borrowers never entered the reservation, but instead signed their contracts electronically. *Id.* If a borrower failed to make a payment on the loan, per the loan contract, the borrower might be subject to civil tribal jurisdiction and collection lawsuits in Cheyenne River Sioux Tribal Court. *Id.* The court ruled that *"Montana's* first exception does not textually include a requirement that the consensual relationship be formed inside the reservation." *Id.* at 937. The court ruled, however, that the initial transaction actually occurred on the reservation, citing to case law stating that "the place of a contract is the place the last act is done by either of the parties which is necessary to complete the contract and give it validity." *Id.* at 938 (quoting *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶ 12, 780 N.W.2d 55, 59) (internal quotations omitted). Because the last act of the loan application was approval, which was done on the reservation, the court ruled that the contract was actually commenced on the reservation. *Id.*

The court went further to note that "treating the nonmember's physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation." *Id.* at 939. Furthermore, the court stated that "reducing the *Montana* jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render *Montana*'s jurisdictional inquiry inapplicable to many modern-day contracts involving a reservation-based business." *Id.* at 940. *But see W. Sky Fin., LLC v. State ex rel. Olens*, 793 S.E.2d 357, 366 (Ga. 2016) ("Defendants point to one federal court that, when examining the same Western Sky loan

contract, concluded that the company's contracts with borrowers were formed on the Reservation [*FTC v. Payday Financial*] but they also acknowledge that other courts have concluded that because the borrowers did not engage in any activities inside the Reservation, tribal law does not apply.").

2. An overview of case law regarding the *Montana* inherent power exception

Lower courts have also looked to the second *Montana* exception when evaluating claims arising from contracts between members and nonmembers. In *Babbitt Ford, Inc. v. Navajo Indian Tribe*, the United States Court of Appeals for the Ninth Circuit ruled that the Navajo Tribal Courts had jurisdiction to regulate activities of a nonmember corporation stemming from a contract that was signed off of the reservation. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 590 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984). In *Babbitt*, two automobile companies near, but not within, the borders of the Navajo Reservation sold a large number of cars to Navajo members. *Id.* at 590. Many of these deals were financed through loan contracts and negotiated at the dealerships. *Id.* The loan contracts gave the dealerships the right to repossess vehicles for non-payment and at least one dealership conceded that it repossessed vehicles owned by members and located on tribal land. *Id*. The Navajo code, however, required that the car-owner members give consent before repossession. *Id.* Babbitt Ford, one of the dealerships, did not gain consent from certain members when repossessing their cars. *Id.* at 591. The court ruled that, the "fact that the contract was signed off the reservation does not foreclose" the tribe's right to regulate its affairs. *Id.* at 597. The act of repossession of the vehicles occurred on reservation land, and thus, the tribe had the power to regulate the actions of the nonmembers. *Id.*

ii. Nonmembers who assent to tribal civil jurisdiction.

In certain instances, courts have ruled that nonmembers can assent to tribal jurisdiction through cross claims. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1136 (9th Cir. 2006) (stating that because a nonmember defendant cross-claimed then the nonmember assented to tribal civil jurisdiction). *But see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 342 (2008) ("Seeking the Tribal Court's aid in serving process on tribal members . . . does not, we think, constitute consent to future litigation in the Tribal Court.").

iii. YIN Tribal Code addresses personal and subject matter jurisdiction over nonmembers as well as compulsory and preclusive counterclaims.

The preamble to the YIN Tribal Code states that its purpose is "for the purpose of strengthening Tribal self-government and providing for the protection of people and property on the reservation. Adoption of this Code is an exercise of inherent sovereignty of the Winnebago Tribe of Nebraska, and is undertaken by the Winnebago Tribal Council pursuant to its constitutional authority so to do." Preamble, YIN Code.

Furthermore, the YIN Code states that the tribe shall have personal 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 who commits a tortious act on or off the reservation or engages in tortious conduct within the reservation, either in person or by agent or representative, causing harm within the reservation for any civil cause of action arising from such act or conduct." Personal Jurisdiction, YIN Code § 1-104.

Other tribal courts have looked to businesses that performed services for tribes on

tribal reservations without having actual offices on the reservation. *Rosebud Housing Authority v. LaCreek Electric Cooperative*, 13 Indian L. Rep. 6030 (Rosebud Sioux Tribal Court 1986). In *Rosebud*, the court ruled it had personal jurisdiction over the LaCreek Electric Cooperative because, even though the business did not have a residence on the reservation, it provided contractual services to the reservation and had a "presence" on the reservation. *Id.* at 6032. The Rosebud Sioux Tribal Court looked to *International Shoe v. Washington* to rule that the tribe had jurisdiction to hear the breach of contract case, because the nonmember company had enough "minimum contacts" to meet personal jurisdiction requirements. *Id.* (citing *International Shoe v. Washington*, 326 U.S. 310 (1945)).

Furthermore, the Tribal Code states that tribal courts should have subject matter jurisdiction over "[c]ivil disputes and civil causes of action of any kind whatsoever" except for probate proceedings that are barred by federal law. General Subject matter jurisdiction—limitations. YIN Code § 1-106. Also, the Code states that the tribe should have exclusive jurisdiction over "all matters in which the Tribe or its officers or employees are parties in their official capacities, except as otherwise limited by federal law." Exclusive jurisdiction. YIN Code § 1-110.

The YIN Tribal Code sets out the standard for compulsory and permissive counterclaims as well. First, it states that compulsory counter claims are claims arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction." Counterclaim and cross-claim. YIN Code § 2-214. A permissive counterclaim, additionally, is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.*

iv. The Smiths are subject to civil jurisdiction in the YIN Tribal Courts.

1. The cause of action occurred on tribally-owned land.

The contract between the YIN and Thomas Smith was signed off of the reservation, at Mr. Smith's office in Phoenix, Arizona. R. on Appeal 1. Yet some courts have ruled that the geographic location of where a contract is signed is not dispositive to where the initial commercial transaction commenced. *See Payday*, 935 F. Supp. at 938 (D.S.D. 2013) (finding that, although a loan contract was signed off of the reservation, the last act—approval of the contract—occurred on reservation land and so that is where the initial transaction officially occurred). Even if the transaction was initially forged off of the reservation, courts have ruled that the geographic location of where the initial transaction occurred is irrelevant. *See Babbitt Ford*, 710 F.2d at 590 (ruling that tribal courts had jurisdiction to regulate nonmember activities that had an effect on the reservation even though the initial contract was signed off of the reservation). Furthermore, acting as an agent of the tribe, with written permission from the tribe, Mr. Smith signed a contract with his sister, Carol Smith, that was nearly identical to Mr. Smith's contract with the YIN. R. on Appeal 2. This new contract also had a clause that required the Ms. Smith to comply with the YIN-Thomas contract. *Id.*

Finally, because both Mr. and Ms. Smith visited the reservation on multiple occasions in connection with their employment with the YIN, courts have ruled that such "minimum contacts" is enough to satisfy personal jurisdiction over the Smiths. R. on Appeal 2. *See also Rosebud*, 13 Indian L. Rep. at 6032 (ruling that, although an electric cooperative did not have its place of business on the reservation, it performed significant services on the reservation to establish a "presence" on the reservation and enough "minimum contacts" to

establish personal jurisdiction). Finally, just because the Smiths' offices were off of the reservation, "ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation." *Payday*, 935 F. Supp. 2d at 940.

2. The relationship between the Smiths and the YIN satisfies the consensual relationship exception to *Montana*.

As stated earlier, it is irrelevant whether or not the transaction originally was commenced off of the reservation. Additionally, both Mr. and Ms. Smith were parties to the contract at hand. *See Strate v. A-1 Contractors*, 520 U.S. 438, 441 (1997) (striking down jurisdiction over a nonmember not party to a contract). Moreover, the YIN-Smiths contract stated all disputes were to be litigated in a court of competent jurisdiction. In *First Specialty Insurance Corporation*, the facts were almost identical to the situation at hand—a nonmember financial advisor for the tribe was subject to tribal civil jurisdiction. *First Specialty*, 2007 WL 3283699, at *4. In fact, the contract that the parties had signed in *First Specialty Insurance Corporation* even had an arbitration clause—which this contract does not have—that the court ruled was inapplicable and tribal court jurisdiction still applied. *Id.*

3. The relationship between the Smiths and the YIN satisfies the inherent sovereignty exception to *Montana*.

The situation at hand is also subject to the second *Montana* exception—" [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 557, 565-66 (citations omitted). Here, the Smiths have invited state encroachment on to tribal land by breaching their duty of confidentiality and disclosing confidential information about the tribe's future economic plans to the Arizona Attorney General. Such

disclosure invites state officials to open an investigation into tribal affairs and even physically encroach on tribal lands in the name of that investigation. In *Babbitt Ford, Inc.*, the court ruled that nonmembers who physically enter tribal lands to repossess vehicles without tribal members' consent were subject to regulation under the second *Montana* exception because such activity threated the tribes' inherent power to regulate conduct that "threatens or has some direct effect on the ... health and welfare of the tribe." *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983) (citing Montana, 450 U.S. at 566). Here the Smiths are inviting similar encroachment that would harm the tribe politically and economically.

4. The Smiths assented to tribal jurisdiction when they reacted to the tribe's claim with non-compulsory counterclaims.

Courts have ruled that a nonmember defendant that cross-claims in tribal court assents to tribal jurisdiction. See *Smith*, 434 F.3d at 1136 (stating that a nonmember defendant that cross-claimed against plaintiff assented to tribal civil jurisdiction). Here, the Smiths counterclaimed, but under Tribal Code, such claims were permissive because they added a third parties not originally in the suit—the EDC, Fred Captain, and Molly Bluejacket—whom are protected by sovereign immunity. Counterclaim and cross-claim, YIN Code § 2-214 (stating that counterclaims are not compulsory if they "require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction"). Furthermore, the counterclaim for defamation was preclusive because it did not "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.* Counterclaims that are not compulsory are analogous to cross-claims, and thus the Smiths assented to tribal jurisdiction through their non-compulsory cross-claims. See *Smith*, 434 F.3d at 1136 (stating that a nonmember defendant that cross-claimed against plaintiff assented to tribal civil

jurisdiction). Tribal jurisdiction over nonmembers that assert their right to sue members in tribal court is also in line with the first, modern case regarding civil jurisdiction over nonmembers—*Williams*. *See Williams*, 358 U.S. at 223 (stating that the appropriate venue for a nonmembers' claims against tribal members is in tribal court).

5. Federal law permits personal and subject matter jurisdiction over the Smiths, as does Tribal law.

Even though personal and subject matter jurisdiction is met here under federal law through the two *Montana* exceptions, as well as the Smiths' assent to jurisdiction, such law would be moot if the YIN's tribal law did not permit such jurisdiction. The tribe's code, however, *does* permit both personal and subject matter jurisdiction. The tribe has personal 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 who commits a tortious act on or off the reservation or engages in tortious conduct within the reservation, either in person or by agent or representative, causing harm within the reservation for any civil cause of action arising from such act or conduct." Personal Jurisdiction, YIN Code § 1-104. Both Mr. and Ms. Smith transacted and performed businesses activities for the tribe, as well as possibly breached their fiduciary duties to the YIN, arguably a tort, and are thus subject to personal jurisdiction.

As for subject matter jurisdiction, the Tribal Code states that the tribe has jurisdiction over "[c]ivil disputes and civil causes of action of any kind whatsoever" except for probate proceedings that are barred by federal law. General Subject matter jurisdiction—limitations, YIN Code § 1-106. This is not a probate proceeding; thus, the tribal court has jurisdiction. Furthermore, the code also states that the tribe should have exclusive jurisdiction over "all

matters in which the Tribe or its officers or employees are parties in their official capacities, except as otherwise limited by federal law." Exclusive jurisdiction, YIN Code § 1-110. Again, because the YIN and tribal officers acting in their capacities for the YIN are the parties to this suit, the tribal court has subject matter jurisdiction.

b. The tribal exhaustion doctrine prohibits this Court from staying this suit while the Smiths seek a ruling in Arizona Federal District Court.

i. The tribal court exhaustion doctrine.

In two cases, decided in 1985 and 1987, the United States Supreme Court established what is referred to as the "tribal court exhaustion" doctrine. The facts surrounding the first case, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, took place on the Crow Indian Reservation in Montana. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 847 (1985). On May 27, 1982, a minor—and member of the Crow Tribe—was hit by a motorcycle in the parking lot of Lodge Grass Elementary School, a state school that was located on state-owned land within the Crow Indian Reservation boundaries. *Id.* The boy, through his guardian, sued the School District, "a political subdivision" of the State of Montana, in Crow Tribal Court. *Id.* Although the Chairman of the Schoolboard was hand delivered process, no one from the School District made an appearance in tribal court. *Id.* at 847-48. Thus, on October 19, 1982, the Tribal Court ordered a default judgment of $153,000 against the School District. *Id*. A copy of the judgment was delivered to the Chairman of the Schoolboard, who then forwarded it on to the School's insurer, National Farmers Union Insurance ("National"). *Id.* at 848. National and the School District filed for a temporary restraining order in the District Court for the District of Montana, which the District Court granted and forbid the tribe from asserting jurisdiction over National and the School District. *Id.* at 848-49. The Court of Appeals for the Ninth

Circuit reversed. *Id.* at 849. The United States Supreme Court ruled that, although it had jurisdiction as a federal question—under federal common law—to whether or not a tribal court overextended its jurisdiction under 28 U.S.C. § 1331, the District Court erred in hearing the case, because National and the School Board did not exhaust their tribal court remedies. *Id.* at 857. The Court reasoned that Congress had not enacted legislation that granted federal courts exclusive jurisdiction over civil cases between tribal members and non-Indians, nor had former United States Attorneys General written such opinions.[5] *Id.* at 855. Furthermore, "[t]he risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made" and "[e]xhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 856-57. Also, "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.* at 856.

Next, in *Iowa Mutual Insurance Co. v. LaPlante*, the United States Supreme Court ruled that, in addition to federal question issues, the tribal exhaustion doctrine still exists in diversity of citizen cases as well. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1978). In

[5] This is not the case in regard to criminal jurisdiction. In 1978, in *Oliphant v. Suquamish Indian Tribe*, the United States Supreme Court ruled that federal legislation conferring federal courts jurisdiction over non-Indian offenses committed on tribal land, as well as early opinions by the United States Attorneys General, pre-empted tribal criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 198-99, 204 (1978). The United States Supreme Court has not extended this pre-emption to civil jurisdiction over non-Indians. *See Nat'l Farmers Union*, 471 U.S. at 855 ("If we were to apply the Oliphant rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would always be the only forums for civil actions against non-Indians.").

Iowa Mutual members of the Blackfeet Indian Tribe—husband and wife Edward LaPlante and Verla LaPlante—sued Iowa Mutual in the Tribal Court. *Id.* at 11. The facts of the case were that Edward LaPlante was driving a truck, for his job, in the Blackfeet Indian Reservation, but the truck jackknifed as he attempted to drive up a hill and Edward LaPlante was injured. *Id.* Edward LaPlante's employer was insured by Iowa Mutual. *Id.* at 9, 11. The LaPlantes sued Iowa Mutual for bad-faith refusal to settle in the Tribal Court, but Iowa Mutual moved to dismiss the suit for lack of subject matter jurisdiction. *Id.* at 11-12. The Tribal Court dismissed the action and ruled that "the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation." *Id.* at 12. Furthermore "[s]ince the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit." *Id.* The Blackfeet Tribe had a Court of Appeals, but its tribal code did not allow for interlocutory appeals. *Id.* Iowa Mutual filed an action in Federal District Court that it had no duty to defend the issue because the injuries sustained in the crash were outside of the coverage of the insurance policy. *Id.* at 12-13. The District Court ruled that it could not hear the case unless the Blackfeet Tribe did not exercise its exclusive jurisdiction over the matter. *Id.* at 13. The Court of Appeals for the Ninth Circuit affirmed. *Id.*

The United States Supreme Court stated that the rule in *National Farmers* requires federal courts, out of comity, to stay their hands in matters where tribal courts deserve to determine their own jurisdiction first. *Id.* at 15. And because Mutual did not appeal the decision with the Tribal Court of Appeals, the Court ruled that Mutual did not exhaust tribal remedies. *Id.* at 16-17. Furthermore, the federal diversity statute, 28 U.S.C. § 1332, like federal question of § 1331, are general grants of jurisdiction that do not intrude on tribal

sovereignty. *Id.* at 17-18.

The Court also did not agree with Mutual's argument that Mutual would suffer bias and unfair treatment in the tribal courts, or that the tribal courts are incompetent to hear the case. *Id.* at 18-19. One, non-Indians are protected from unfair treatment in the tribal courts through the Indian Civil Rights Act, 25 U.S.C. § 1302. *Id.* at 19. Next, congressional policy has been to promote, not hinder, the development of tribal courts, and thus allowing an exception for a court's incompetence is antithesis to congressional policy. *Id.* Finally, the Court ruled that the Court of Appeals for the Ninth Circuit should not have affirmed the District Court's dismissal of the suit—instead the District Court should have decided on the facts of the case whether the federal action should be stayed, pending proceedings of the Tribal Court, or if it should truly be dismissed under *National Farmers Union*. *Id.* at 20 n.13. Thus, a Tribal Court proceeding should not be stayed pending Federal Court proceedings deciding whether a Tribal Court has civil jurisdiction over a nonmember, but the opposite is true, a Federal Court proceeding should be stayed, or even dismissed, pending Tribal Court proceedings related to jurisdiction.

ii. The exceptions to the tribal court exhaustion doctrine.

The primary case of Tribal Court Exhaustion Doctrine, *National Farmers*, included several exceptions where nonmembers do not have to follow the tribal exhaustion doctrine when challenging tribal civil jurisdiction. *National Farmers Union*, 471 U.S. at 856 n.21. The *National Farmers* exceptions include: (1) when "assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith'"; (2) "where the action is patently violative of express jurisdictional prohibitions"; and (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Id. (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). Later, in 1997, the United States Supreme Court added another exception in *Strate v. A-1 Contractors*: "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana 's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Strate*, 520 U.S. at 459 n.14 (1997). Specifically, in the facts at hand in *Strate*, the Court ruled that the Tribal Court exhaustion doctrine would not apply. *Id.* In *Strate*, Gisela Fredericks, a nonmember of the Third Affiliated Tribes was involved in a traffic accident with a truck driven by another nonmember, Lyle Stockert, in the Fort Berthold Indian Reservation, in North Dakota, on a state-owned highway. *Id.* at 442-43. Fredericks, however, may have resided on the reservation at the time of the accident although the court ruled that Fredericks' residence was immaterial. *Id.* at 443 n.2. The truck Stockert was driving was owned by A-1 contractors, a non-tribal owned entity. *Id.* at 443. The Court ruled, in a unanimous opinion, that the Tribal Court did not have jurisdiction in the matter. *Id.* at 442. Later, in *Nevada v. Hicks*, the United States Supreme Court concluded that the new *Strate* exception applies to tribal member claims against state officials performing their official duties under 42 U.S.C. § 1983. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

iii. Lower federal courts' case law concerning tribal exhaustion.

The United States Supreme Court has ruled on a minimal amount of tribal exhaustion cases, but the lower federal courts have provided a larger number of cases whereby they upheld tribal court exhaustion. For instance, in *Paddy v. Mulkey*, the United States District Court for the District of Nevada ruled that Donovan Paddy, a non-member, twenty-year-employee of the Reno-Sparks Indian Colony, had to exhaust his tribal remedies before

bringing an action against his employer in federal district court. *Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1243, 1247-48 (D. Nev. 2009). In *Paddy*, Paddy was fired after taking Family Medical Leave Act ("FMLA") leave, and filed actions in both tribal court and federal court. *Id.* at 1243. The court stayed the federal suit and ruled that Paddy had to exhaust his remedies in tribal court before the federal suit could continue. *Id.* at 1247-48. *See also generally Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212 (D.N.M. 2013) (stating that nonmember consulting company for tribal corporation needed to exhaust tribal remedies for claims arising from actions, that occurred on tribal land, supposedly resulting from tortious interference with an employment agreement).

In *A&A Concrete, Inc. v. White Mountain Apache Tribe*, the United States Court of Appeals for the Ninth Circuit reiterated that tribes could determine their own jurisdiction over the property rights of non-Indians. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416 (9th Cir. 1986) (citing *Babbitt*, 710 F.2d at 592-925). In *A&A Concrete*, the White Mountain Apache Tribe, through a tribal corporation, contracted with a non-Indian construction company to supply concrete for member housing projects to be built on the reservation. *Id.* at 1413. When the tribal corporation realized the concrete the construction company had supplied for housing foundations was substandard, it sued the company for breach of contract in tribal court, as well as withheld payment to the construction company. *Id.* at 1413-14. The defendants attempted to invoke the *National Farmers* exception that the tribe's assertion of tribal jurisdiction stemmed from the tribe's motivation to either harass or conduct jurisdiction in bad faith. *Id.* at 1416 (citing *National Farmers Union*, 471 U.S. at 856 n.21). The defendants pointed to tribal code and alleged incompetency of the tribal judge. *Id.* at 1417. The court ruled that the Tribal Court was the

appropriate court to analyze the tribal code, and the tribal code even had a provision to challenge a judge's competency. *Id.* at 1416-17. Thus, the court ruled, the alleged *National Farmers* exception did not apply and tribal court remedies needed to be exhausted. *Id.* at 1418.

In, *Espil v. Sells*, a nonresident, member of the Navajo Nation agreed to brokerage a property sale agreement of a ranch, located off of the Navajo Reservation, between a non-Indian corporation and the Navajo Nation. *Espil v. Sells*, 847 F. Supp. 752, 753-54 (D. Ariz. 1994). Brothers Louis and Peter Espil ("the Espils"), were non-Indians and the sole shareholders of the non-Indian corporation that sold the ranch to the Navajo Nation. *Id.* The brokers were Warren Pyle, a non-Indian, and Cato Sells, a non-resident member of the Navajo Nation. *Id.* The Espils entered into an oral agreement with Pyle and Cato to pay $600,000 if the Navajo Nation agreed to purchase the ranch. *Id.* at 754. This agreement took place off of the reservation. *Id.* There were numerous meetings on the reservation between the Espils, the brokers, and tribal council officials. *Id.* The Navajo Nation purchased the ranch, but the Espils refused to pay Pyle and Sells. *Id.* Pyle and Sells commenced an action in Navajo Tribal Court for refusal to pay under the oral agreement, the trial court ruled that the court did not have personal jurisdiction over the Espils, but upon appeal, the Navajo Supreme Court ruled that the Navajo Tribal Courts did have personal jurisdiction. *Id.* at 754-55. The Navajo Supreme Court ruled that through "minimum contacts" the tribe had personal jurisdiction over the Espils, remanded the case back to the trial court, and after a jury found against the Espils. *Id.* The Espils filed an action in District Court for the District of Arizona to enjoin the enforcement of the trial court judgment, however, the federal district court ruled that the Espils had not exhausted their tribal court remedies. *Id.* at 759-60. The

court reasoned that the "minimum contacts" analysis failed short of whether or not the contract was either formed on the reservation or in the alternative breached on the reservation. *Id.* The court ruled that, even if the Navajo Supreme Court rules that it is irrelevant where the contract was formed or where it was breached, it will still grant comity to the Navajo Supreme Court to address the merits of the trial court's ruling in an appeal. *Id.* at 760. Thus, the court denied the Espils' grant for an injunction. *Id.*

iv. The tribal court exhaustion doctrine applies to this suit.

None of the tribal exhaustion doctrine exceptions apply in this situation. First, there is no indication that "assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith.'" *National Farmers*, 471 U.S. at 856 n.21 (quoting *Juidice*, 430 U.S. at 338). Conversely, the Smiths entered into a consensual, fiduciary relationship with the YIN through a contract that included a confidentiality clause. R. on Appeal 1-2. Furthermore, nowhere have the Smiths contended that the tribe was motivated by a desire to harass them through asserting jurisdiction, nor did the tribe enter the contractual relationship in bad faith. As in *A&A Concrete, Inc.*, where the tribe entered into a contract with a construction company that eventually provided faulty concrete for housing foundation, here the YIN entered into a contract with the Smiths who eventually breached their fiduciary duties and duties of confidentiality. *A & A Concrete, Inc.*, 781 F.2d at 1413-14. Also as in *A&A Concrete, Inc.*, this Court should rule that this is not a case where the YIN is attempting to harass or has entered into a contract in bad faith, but merely a case where the Smiths breached their contracts and are subject to civil tribal court jurisdiction.

Next, this case does not fit into the exception that "the action is patently violative of express jurisdictional prohibitions." *Nat'l Farmers Union*, 471 U.S. at 856 n.21. As stated

earlier, there is sufficient federal case law sanctioned by the YIN Tribal Code that indicates the YIN Tribal Courts have jurisdiction over the Smiths. *See* Personal Jurisdiction, YIN Code § 1-104 (conferring personal jurisdiction through consensual contracts and torts; *see also* General Subject matter jurisdiction—limitations, YIN Code §1-106 (conferring subject matter over this civil dispute); Yuma Tribal Code Title 1 Article 1; 1-110 Exclusive jurisdiction, YIN Code § 1-110 (conferring exclusive jurisdiction over matters involving the tribe and tribal officials). Because the Tribal Code has such provisions, it would be inappropriate for a federal court to interpret YIN tribal law before the YIN Tribal Courts could. *See A & A Concrete, Inc.* 781 F.2d at 1416-17 (stating that the Tribal Court, not the federal court, is the appropriate venue to analyze tribal code provisions).

Next, exhaustion in this situation would *not* "be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 856 n.21. This is because the Smiths have adequate opportunity to challenge jurisdiction with this Court. Furthermore, the situation does not wield all parties as nonmembers, as in *Strate*, nor are state officials a part of this suit as in *Hicks*. *Strate*, 520 U.S. at 442; *Nevada*, 533 U.S. at 369. Thus, the YIN Supreme Court should not stay this suit until a ruling is made in Arizona Federal District Court. In fact, the opposite is true and the Arizona Federal District Court is required to stay any suit until proceedings in the YIN Tribal Court system have commenced.

Tribal exhaustion in this situation is buttressed by lower federal case law. In *Paddy*, the court ruled that, even with an FMLA action, the non-member employee of the tribe had to exhaust tribal court remedies of challenging jurisdiction before entering the federal court system. *Paddy*, 656 F. Supp. 2d at 1247-48. In *Espil*, the federal district court ruled that,

even though the defendants had challenged jurisdiction in the Navajo Supreme Court and lost, they still had to exhaust their tribal remedies in challenging the tribal trial court's jury verdict, in addition to the Navajo Supreme Court's "minimum contacts" analysis. *Espil*, 847 F. Supp. at 759-60. Here, the Smiths have not even fully challenged jurisdiction in the YIN Supreme Court and it would be inappropriate to stay this action until a federal court rules on jurisdiction, because federal courts are mandated to grant comity to tribal courts on jurisdictional challenges.

c. Sovereign immunity protects the YIN, EDC, Captain, or Bluejacket.

i. Tribal Sovereign Immunity

Sovereign immunity for tribes extends beyond covering tribal organizations concerned with safeguarding tribal self-government but also to arms of the tribe that function as economic enterprises. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) ("Respondent [suggests] we confine [this principle] to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role [of] Congress . . . ."). Such sovereign immunity may extend beyond tribal organizations to individual tribal officers working on behalf of the tribe. *See Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997) (quoting *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945)) (stating that "when the action is in essence one for the recovery of money from the state [or tribe], the state [or tribe] is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants").

Sovereign immunity can be waived, but it must be expressly waived and not implied. *See* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. Rev. 398,

405 (2009) ("[S]uits against tribes, including tribal officials and officers, are barred by tribal immunity absent a clear and express waiver from the tribe or a congressional abrogation of tribal sovereign immunity."). Such an express waiver can commence from congressional abrogation of sovereign immunity. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) (finding that Congress abrogated sovereign immunity in the circumstance at hand in a Bankruptcy Act provision).

Express waiver can also come from tribes with procedures set out in tribal law, such as in tribal constitutions. *See Gaming, Inc. v. Pit River Tribe of California*, No. C037661, 2002 WL 922136, at *1 (Cal. Ct. App. May 7, 2002) (stating that the Pit River Tribe of California's constitution stated that "no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose"). Tribal charters that form corporations that are an arm-of-the-tribe can include language that may seem to be an express waiver of sovereignty, such as when a tribal corporation has a right "to sue and be sued." Courts have not, however, agreed on a bright line test that such language actually waives the corporation's sovereign immunity as an arm-of-the-tribe. *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (ruling that the words "could sue and be sued" in a tribal college's charter did not waive sovereign immunity*); Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm. or Council*, No. CV 14-73-GF-BMM, 2015 WL 7776887, at *4 (D. Mont. Dec. 2, 2015), aff'd, 699 F. App'x 599 (9th Cir. 2017) (finding that a tribal corporation's charter that included the words "could sue and be sued" did not waive the corporation's sovereign immunity). *But see Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87 (2d Cir. 2001) (holding that the words "sue and be sued" in a tribal corporation's charter waived sovereign

immunity in tribal courts—but not federal).

Circumstances surrounding whether or not such words are fatal to sovereign immunity include whether or not the tribe is using immunity to "harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Kiowa*, 523 U.S. at 758.

ii. Sovereign Immunity Provision in the Tribal Code

The YIN Tribal Code also addresses the sovereign immunity of tribal corporations. The Code states that

> "A corporation wholly owned, directly or indirectly, by the Tribe shall have the power to sue and is authorized to consent to be sued in the Court, and in all other courts of competent jurisdiction, provided, however, that:
>
> 1. no such consent to suit shall be effective against the corporation unless such consent is:
>
> 1. explicit,
> 2. contained in a written contract or commercial document to which the corporation is a party, and
> 3. specifically approved by the board of directors of the corporation . . . .

Special powers, privileges and immunities of corporations wholly owned by the Tribe, YIN Code § 11-1003.

iii. Sovereign Immunity Protects the YIN, Fred Captain, and Molly Bluejacket

The YIN, along with Fred Captain and Molly Bluejacket, are immune from the Smiths' counterclaims and third-party claims. First, the United States Supreme Court has ruled that commercial enterprises of tribes are protected by sovereign immunity. *See Kiowa,* 523 U.S. at 758 (ruling that congress has not diminished tribal sovereign immunity solely to noncommercial situations). Although it is unclear whether Fred Captain and Molly Bluejacket are YIN members, such membership is irrelevant because both are tribal officials

in their capacity as EDC employees. *See Regents of the Univ. of California*, 519 U.S. at 429 (ruling that sovereign immunity extends to individual tribal officials). Furthermore, although the charter also grants that the EDC can "sue and be sued," courts have ruled that such language does not waive tribal sovereign immunity. *Eagleman*, 2015 WL 7776887, at *4 (holding that the words "can sue and be sued" in a tribal corporate charter does not waive tribal sovereign immunity.)

Moreover, the EDC is bolstered by the Tribal Code in that tribal corporations are not subject to suit unless there is an *explicit* and *written* waiver approved by the corporation's board of directors. Nowhere in the contract between the YIN and the Smiths did the EDC waive sovereign immunity expressly. Special powers, privileges and immunities of corporations wholly owned by the Tribe, YIN Code § 11-1003. To the contrary, the corporate charter that created the EDC mandated that the EDC, its board, and all employees were to be protected by tribal sovereign immunity to the fullest extent of the law. R. on Appeal 2. Neither congress, nor any other source of tribal law, has waived the YIN's sovereign immunity in this situation. *See Krystal Energy*, 357 F.3d at 1056 (finding that Congress abrogated sovereign immunity in certain bankruptcy proceedings); *see also Gaming, Inc.*, 2002 WL 922136, at *1 (ruling that a tribal constitution laid out the procedures for waiving sovereign immunity that included a majority vote of registered voters).

VI. CONCLUSION

The YIN Tribal Courts have personal and subject matter jurisdiction over the Smiths under both *Montana* exceptions. First, the Smiths entered into a consensual relationship with the tribe when they signed contracts that required them to act as fiduciaries for the tribe and maintain confidentiality about all tribal communications. Second, the Smiths invited the

Arizona Attorney General to meddle in the affairs of the tribe, which threatened the tribe both politically and economically. Furthermore, the Smiths counterclaimed and then added third-party defendants Fred Captain and Molly Bluejacket. Such counterclaims are not compulsory, and thus the Smiths have assented to tribal jurisdiction. Lastly, the YIN Tribal Code calls for personal and subject-matter jurisdiction in instances such as these.

The YIN Supreme Court should not grant a stay so that the Smiths can challenge tribal jurisdiction in federal district court. The doctrine of tribal exhaustion mandates that the opposite is true, that the federal district court—out of comity—should stay any proceedings so that tribal courts can rule on jurisdiction challenges.

And lastly, because tribes, tribal corporations, and tribal officials are protected by sovereign immunity, the YIN, the EDC, Fred Captain, and Molly Bluejacket are immune from the Smiths' counterclaims.