

Team No. 295

IN THE
**SUPREME COURT OF
THE YUMA INDIAN NATION**

THOMAS AND CAROL SMITH,
Petitioner,

v.

YUMA INDIAN NATION ET AL.,
Respondent.

**On Interlocutory Appeal from the Trial Court of Yuma Indian
Nation**

APPELLEE’S BRIEF

COUNSEL FOR APPELLEES

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Questions Presented

I. Does the Yuma Indian Nation, who has been in a decade-long consensual business relationship with the nonmember Petitioners, have personal and subject matter jurisdiction over aforementioned Petitioners in the Yuma Indian Nation courts?

II. Does sovereign immunity protect the Yuma Indian Nation, the YIN Economic Development Corporation (a commercial arm of the tribe) and/or the EDC CEO and accountant – whilst acting in their official capacity – from the Smith’s counter claim?

Statements of the Case

I. Statement of Facts

Thomas Smith entered into a contract with the Yuma Indian Nation (“YIN”) in 2007, by which Mr. Smith would provide the Nation with financial advice on an as-needed basis regarding economic development issues. The contract required Mr. Smith to maintain absolute confidentiality regarding any and all tribal communications and economic development plans. Mr. Smith accordingly provided the Nation with financial advice on a wide range of economic development issues over the following decade. During this period of time, it seems that there were no major disputes between the parties. The parties, however, had stipulated in their contract that in the event of a dispute, litigation regarding the matter would be carried out in a court of competent jurisdiction.

With the authorization of the Nation’s Tribal Council, Mr. Smith signed a contract with his sister Carol Smith (Ms. Smith) to provide financial advice as a licensed stockbroker

regarding stocks, bonds and securities. In 2016, the EDC began to research the possibility of engaging in marijuana cultivation and sales – which was at the time (and still is presently) heavily regulated in Arizona. The Yuma Tribal Council, after consulting with the EDC, decided to enact a tribal ordinance that legalized the general use and cultivation of marijuana on the reservation. After the passage of the ordinance, the EDC began to pursue the development of a marijuana operation, and consulted both Mr. and Ms. Smith a few times on the matter. Mr. Smith informed the Arizona Attorney General of the Nation's plans to develop recreational marijuana operations, which in turn, prompted the Attorney General to issue a cease and desist letter to the tribe.

The Tribal Council filed a suit against the Smiths in tribal court for breach of contract, violation of fiduciary duties and violation of their duties of confidentiality. The Smiths filed a special appearance and motions to dismiss the YIN suit based on lack of personal and subject matter jurisdiction. In the alternative, they asked the court to stay the suit while they pursued a ruling in Arizona federal district court. The trial court denied both motions. The Smiths filed answers to the YIN claims and included a counterclaim against the Nation for monies due under their contract and for defamation.

II. Statement of Proceedings

The trial court dismissed all of the Smiths counterclaims against the YIN and claims against the third-party defendants – Molly Bluejacket, Fred Captain and the YIN Economic Development Council – on the grounds of sovereign immunity.

The Smiths filed an interlocutory appeal in the Yuma Indian Nation Supreme Court requesting that the court review the motions that were denied by the lower court and that it issue a writ of mandamus ordering the trial court to stay the suit while they awaited a

decision from the Arizona federal court. The Supreme Court granted the interlocutory appeal on both issues.

Jurisdictional Statement

The Yuma Indian Nation trial court has not yet entered a judgment on the merits in this case. The trial court issued a ruling in which the court denied the Smiths' motion to dismiss for lack of personal and subject matter jurisdiction. The trial court also dismissed all of the Smiths' counterclaims against YIN and claims against third-party defendants due to sovereign immunity. Following the dismissal of their counterclaims, the request for an interlocutory appeal with this court was timely filed and granted.

Summary of the Argument

With regards to the question of personal jurisdiction, we would argue that the Smiths' ties to the nation are so thorough as to establish minimum contacts. Both Mr. Smith and Ms. Smith purposefully availed themselves of the Yuma Indian Nation for years by conducting business transaction with the tribe. In fact, their business with the Nation has been so continuous and systematic, that one could say that the Smiths are effectively "at home" in the Yuma Indian Nation. If the court were to agree with this characterization of their relationship, then the Smiths would both be subject to the general jurisdiction of the Yuma Indian Nation's tribal court. See *Daimler AG v. Bauman*, 134 U.S. 746 (2014). Yet, the Yuma Indian Nation court would also be able to exercise specific jurisdiction over this case. By establishing minimum contacts, as set forth in *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945), the Nation would unquestionably pass the constitutional test required for the tribal

court to practice jurisdiction. Moreover, when considering the fairness of bringing suit against the Smiths in tribal court, it also seems that the Nation would be able to demonstrate that litigating this case in the Yuma Nation tribal courts would comport with the fairness factors as set forth by the courts. Once again, this seems to be particularly clear in the case of Mr. Smith, who has had more frequent and direct contact with the Nation.

Once the court has established that the Yuma tribal court has personal jurisdiction over both Mr. and Ms. Smith, the Nation is also required to have subject matter jurisdiction over the matter. In *Montana v. United State*, 450 U.S. 544 (1981), the Supreme Court provided guidance in distinguishing the circumstance under which a tribal court can exercise jurisdiction over a case concerning non-Indians nonmembers. The *Montana* court ruled that generally, tribal courts do not have jurisdiction over non-Indian nonmembers except if the nonmembers (1) “...enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” or (2) “...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 v. United State*, 450 U.S. 544, 565-566 (1981). We argue that the present case meets both exceptions, thereby giving the tribal court jurisdiction over the matter.

On the question of sovereign immunity, it seems clear that the Yuma Indian Nation as well as the impleaded parties (EDC and its CEO and Accountant) should be immune from the Smiths’ counterclaims. Sovereign immunity may only be abrogated either by (1) explicit congressional limitation in those specific kinds of cases or (2) an explicit waiver of immunity by the tribe. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) citing the court’s discussion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58

(1978). Since neither exception applies, then the default (under which sovereign immunity is assumed) must apply. Case law has established that sovereign immunity extends to economic arms of the tribe, the EDC in the case, and tribal officials acting in their official capacity, as was the case with EDC CEO Fred Captain and EDC Accountant Molly Bluejacket. *White v. Univ. of Cal.*, 765 F. 3d 1010, 1025 (2014).

Argument

I. Jurisdiction

1. Personal Jurisdiction

As was highlighted in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), tribes do not automatically possess sovereign authority over non-Indians. See David A. Castleman, Comment, Personal Jurisdiction in Tribal Courts, 154 U. Pa. L. Rev. 1253, 1272 n. 135 (2006). In order for the Yuma Indian Nation tribal court to hear these contract breach claims and enter judgement, it must have personal jurisdiction over defendants, subject matter jurisdiction and ensure that defendants received adequate notice. The scholarship on personal jurisdiction, in Indian tribes, strongly points to the use of federal common law personal jurisdiction practices; frequently arguing that the interpretation of the Indian Civil Rights Act (ICRA) and its due process clause should mirror that of the Fourteenth Amendment and the relevant case law. David A. Castleman, Comment, Personal Jurisdiction in Tribal Courts, 154 U. Pa. L. Rev. 1253, 1255 (2006). Assuming that notice was properly served, the next step is to determine whether the court has general or specific jurisdiction.

Personal jurisdiction may be asserted through traditional methods such as personal service of process within in the state. See *Burnhham v. Superior Court of Cal.*, 495 U.S. 604 (1990). Voluntarily appearing in court or consenting by signing a contract with a forum selection clause is also sufficient for the court in question to gain personal jurisdiction. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). While it is uncertain at this point whether service was delivered within the borders of the Yuma Indian Nation, the contract included language that states “...any and all disputes arising out of the contract would be litigated in a court of competent jurisdiction.” This statement commits both parties to litigate any dispute related to their contract in a court with the necessary jurisdictional authority. This clause is significant to our jurisdictional analysis for two reasons; (1) the clause does not preclude litigating such claims in the Yuma Indian Nation courts and (2) it does not explicitly represent the Nation’s consent to litigate such matters in U.S Federal Court. Carol and Thomas have challenged personal jurisdiction in the YIN courts by making a special appearance, while their appeal to move the case to federal court is processed. Therefore, the defendants allege that they have not consented to the jurisdiction of the Yuma Indian Nation courts. Consequently, in the following analysis we determine that the Yuma Indian Nation has jurisdiction over both defendants in this suit.

i. General Jurisdiction

General jurisdiction for individuals is determined by domicile and for corporations, it is determined by its principle place of business or place of incorporation. As a citizen domiciled in Arizona, Thomas is subject to general jurisdiction within the state. Carol is domiciled in Portland and therefore subject to general jurisdiction within the state of Oregon. As nonmembers of the Yuma Indian Nation, Carol and Thomas may likely qualify

for general jurisdiction. A forum state may exercise general jurisdiction over a defendant, if said defendant has “conduct[ed] continuous and systematic business activities there such that the defendant is ‘at home in the forum state.’” Nell Jessup Newton et al, Cohen’s Handbook of Federal Indian Law, §7.02(2) (2012). Mr. Smith’s business activities with the YIN span over the course of a decade (from 2007 to 2017) with no apparent disruptions and entailed nearly daily communications between both parties. Mr. Smith would also submit (and later present in person) quarterly reports to the tribal council at the beginning of each quarter during those ten years. It seems that given the regularity and length of business between Mr. Smith and the Yuma Indian Nation, a court would be inclined to find that Mr. Smith is in fact, “at home” in Yuma Indian Nation and its respective tribal court. While there is a strong argument for why general jurisdiction should be granted over Mr. Smith, even stronger arguments hold true for specific personal jurisdiction.

ii. Specific Jurisdiction

The test for specific personal jurisdiction normally first requires an analysis as to whether any of Rule[s] 4(k)(1)(A) - (C) apply if the suit is arising in federal court. For cases brought into state court, the state’s long-arm statute must authorize personal jurisdiction. This analysis will not be necessary given that we are working within the YIN tribal court system but we may cite to *Montana* to demonstrate that as a sovereign Indian tribe, the Yuma Indian Nation has civil jurisdiction over non-Indians in certain circumstances. These circumstances include instances where there is a significant relationship forged between the two parties or if there is a political, economic, or social interest at stake due to the nonmembers’ conduct.

Montana v. United States, 450 U.S. 544, 565-566 (1981). More on *Montana* will be discussed under the subject matter jurisdiction analysis. The Indian Civil Rights Act (ICRA) mandates that due process be granted by tribes under 25 U.S.C.S § 1302 (a)(8). Given that tribal courts often look to federal common law to analyze questions of personal jurisdiction, we will apply the federal practices to demonstrate that the YIN Supreme Court clearly has personal specific jurisdiction over both defendants. See Nell Jessup Newton et al, Cohen's Handbook of Federal Indian Law, §7.02(2) (2012).

In accordance with the constitutional analysis for specific personal jurisdiction, two elements must be satisfied. First, the court must demonstrate that the defendants have properly established minimum contacts in the forum state, which in this case would be the Yuma Indian Nation. See *Int'l Shoe Co.v. Wash.*, 326 U.S. 310 (1945). Second, the court must ascertain that personal jurisdiction over the defendants will comport with the fairness factors set out in *Burger King v. Rudzewicz*, 471 U.S. 462, 470 (1985) and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 300-301 (1980).

iii. Minimum Contacts

For this prong of the constitutional test, one must check if the minimum contacts with the forum state are such that a suit would not “offend traditional notions of fair play and substantial justice.” *Int'l Shoe Co.v. Wash.*, 326 U.S. 310, 316 (1945). To get to the heart of the question of whether the defendants have established minimum contacts within the tribal territory, the court must demonstrate that the defendants have “purposefully availed” themselves of the forum state. Actions such as soliciting business or directing activity towards the forum state are examples of purposeful availment that has been deemed sufficient to satisfy the minimum contacts requirement. See *Hanson v. Denckla*, 357 U.S.

235, 253 (1958). As a further example, in *Calder v. Jones*, 465 U.S. 783, 790 (1984), the defendant's libelous acts against a California resident which were also directed towards California was enough to satisfy the minimum contacts test. The defendants' contracts with the Yuma Indian Nation definitively established a relationship between them and the tribe, in which the defendants served as financial advisors for the Tribal Council. Furthermore, the nature of this relationship similarly mirrors *Burger King* and *Calder* in the manner by which minimum contacts were adjudicated in each case. The first instance in which Mr. Smith formalized his relationship with the Yuma Indian Nation was when he entered into a contract with the tribe in 2007. The defendant's act of entering into a contractual agreement with the nation is clearly an act of "purposeful availment" in which he agreed to provide his financial advising services in exchange for monetary compensation. These actions are similar to those of the defendant in *Burger King* who was subject to jurisdiction in Florida for his transactions with the Burger King corporation (domiciled in Florida) as a franchisee operating and conducting business in Michigan. Mr. Smith's action also bears many similarities to the actions of the defendant in *Calder*, who committed tortious actions outside of the forum state, Mr. Smith's financial advising and other related communications were "purposefully directed" at the Yuma Indian Nation. Whether these acts were performed within the forum or outside of the confines of the Yuma Indian Nation, it is clear that the relationship was aimed at the financial body of the tribe to the extent that "purposeful availment" is present in this case. Mr. Smith's ten years of conducting business with the Tribal Council (and later EDC) means that during that period of time, Mr. Smith actively used and enjoyed the privileges that come with conducting business within the Yuma Indian Nation. The litigation in this case results from alleged injuries that "...arise out of or are

related to those activities.” *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). Thus, it is proper that the Yuma tribal courts would have the power to subject Mr. Smith to personal jurisdiction.

Ms. Smith entered a contract with Mr. Smith to provide him, the EDC, and the YIN with financial planning advice. Ms. Smith transmitted advice directly to her brother via phone, email, and mail; mediums that all fall short of face-to-face and in-person interactions. The defendant may argue that given the distant nature of these correspondences and the fact that her only direct interaction with the tribe was through the monthly bill submissions, it would be unfair to subject her to tribal jurisdiction. However, it is clear that Ms. Smith was aware of the fact that her advice would eventually be used for the benefit of the EDC. Ms. Smith continued this relationship for several years, knew who her client was, and was aware of the terms of the contract. This knowledge far outweighs the fact that the contract was technically signed between her and her brother. The defendants may note this technicality as they argue against tribal personal jurisdiction. However, this is an irrelevant point when looking at the bigger picture. It overlooks the fact that Mr. Smith, in that instance, was working at the bequest of the Nation when he signed the contract with his sister. Ms. Smith’s actions similarly mirror those of the defendants in *Burger King* and *Calder*. It is not necessary for a party to have a notable or constant physical, in-person presence within the forum to be subject to jurisdiction within the forum in question. Since the defendant has allegedly directed tortious acts towards an aggrieved party within that forum (*Calder*) and has also allegedly faltered on a contract with a plaintiff whom resides in the forum state in question (*Burger King*) she would rightfully be subject to personal jurisdiction, granted that

such jurisdiction would be considered ‘fair’. Although having done so to a lesser degree than her brother, Ms. Smith’s actions and relationship with the tribe have reached the sufficient threshold of “purposeful availment” that a court would need to demonstrate to show that the minimum contact requirement has been reached.

iv. Fairness

For this factor, we will discuss the burden on the defendant, forum state’s interest in adjudicating the dispute in question, the plaintiff’s interest in obtaining convenient and effective relief, and the shared interest of states in furthering social policies among other factors. See *Burger King v. Rudzewicz*, 471 U.S. 462, 470 (1985); See also *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). One of the primary fairness factors that should be considered is whether the defendants would foresee the possibility of being haled into court in the forum state. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). For Mr. Smith, the possibility of being haled into a tribal court is clear given that his relationship with the tribe has endured for a decade and that he corresponds with the EDC on a near daily basis. Since, the tribe has an interest in adjudicating this issue because it is an alleged breach of a contract that involves an economic entity of the tribe, it is clear that Arizona state court would also arguably have an interest in adjudicating this case because it involves a citizen of its state. One argument that could have worked in the defendants’ favors is that there was a disparity in bargaining power at the time of signing the contract. See *Burger King v. Rudzewicz*, 471 U.S. 462, 486 (1985). However, the length and frequency of the contact between the two parties makes an argument regarding the disparity of bargaining power weak for both Mr. and Ms. Smith. The greatest interest here is that of the tribe which, as a separate nation has a stake in presiding over cases that pertain to the governing of its

land. In fact, there is such an urgent need to preserve this interest that the Supreme Court has addressed it in *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, the Court held that allowing for the state of Arizona to decide a case involving non-Indian suing Navajo tribe members for money owed to the plaintiff's business – which operated in Navajo Nation – “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” *Id.* at 223. Along with having concerns about allowing sovereign tribes to govern without unnecessary intervention from U.S. state or federal governments, the tribe has an interest in presiding over this case because it involves tortious acts that may jeopardize the economic standing of the tribe. On the other hand, the interests of the United States or the court of Arizona for that matter would likely not involve much more than a desire to hear cases that involve its citizens to ensure that their rights are properly adjudicated. However, given that the Smiths had the opportunity to appeal to the YIN Supreme Court, there does not yet seem to be a deprivation of due process or any other inequitable treatment. Without a deprivation of due process that so egregiously contradicts the “fairness” factors previously discussed, the Smiths are unable to argue that the case should be transferred to the U.S. federal courts as a matter of necessity.

Similarly, the tribal courts are authorized to subject Ms. Smith to personal jurisdiction even in light of the fairness factors. Ms. Smith signed the contract six years before the events that gave rise to the suit and was aware of who her services were benefitting. Ms. Smith should have, therefore, reasonably foreseen being haled into a tribal court. This is especially true in light of the fact that her contract with Mr. Smith included the same regulations as that which was signed between Mr. Smith and the nation. Therefore, Ms. Smith's contract also included the clause that stipulated that the litigation of any suits arising out of the contract

would take place in a “court of competent jurisdiction.” Surely, it would be reasonable to assume that in a civil action case (rather than a criminal suit) involving a non-member, a tribe would deem its court system to be not only convenient but most importantly, sufficiently competent to hear cases regarding one of its governmental organizations and its workers. Furthermore, in the course of fulfilling the contract, Ms. Smith may have had only limited interactions with the YIN or the EDC. Nonetheless, these monthly direct correspondences along with the more frequent ones with Mr. Smith, who was in direct contact with the Nation, were substantial. These correspondences should have served as a sufficient signal that doing business with the tribe and solidifying this business relationship through a contract could reasonably subject one to personal jurisdiction in the YIN’s court system.

2. Subject Matter Jurisdiction

i. Montana Analysis

For subject matter jurisdiction purposes, federal courts hear cases involving federal questions, diversity or pendant jurisdiction, while state courts are courts of general jurisdiction. Determining whether Indian courts have subject matter jurisdiction, however, requires an analysis of the *Montana* stipulations along with a discussion of the tribal membership/citizenship of each of the parties to the suit. Another body of law that must be taken into consideration is Public Law 280 or its codified versions in 18 U.S.C.S § 1162, 28 U.S.C.S. § 1162 (1953) and 28 U.S.C.S. § 1360 (1953). The statute 28 U.S.C.S. § 1360(a) mandates that a list of six states, which does not include the forum state of Arizona, “shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country.”

Arizona, on the other hand, does not conform to Public Law 280 and the Arizona state court has been clear on its stance regarding the state's power to adjudicate over Indian affairs. In reference to Public Law 280, Arizona courts have stated precisely that Arizona does not have the power to assert subject matter jurisdiction "over transaction arising on Indian reservations." *Tohono O'Odham Nation v. Schwartz*, 837 F. Supp. 1024, 1029 (D. Ariz. 1993) citing *Nenna v. Moreno*, 132 Ariz. 565, 647 P.2d 1163-1164 (Ariz. Ct. App. 1982). Moreover, as was noted in the "fairness" factors section for the personal jurisdiction analysis, Arizona may have an interest in adjudicating tort actions brought by its citizens but it will not do so if that would ultimately entail "usurp[ing] [the] legitimate exercise of asserted tribal court jurisdiction." *Beltran v. Harrah's Ariz. Corp.*, 220 Ariz. 29, 202P. 3d 494, 36 (2008) citing *Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 529, 720 P.2d 499, 504 (1986). In light of Arizona's case law and the state's apparent distaste for Public Law 280, it is evident that the power to preside over the Smiths' claims rests squarely in the hands of the Yuma Indian Nation courts.

Montana v. United States, 450 U.S. 544, (1981) is a landmark case that is crucial to our analysis here. As a trustee for the Crow Tribe of Montana, the federal government filed a suit seeking a declaratory judgment in a quiet title action for a river in the Crow Tribe reservation. This suit was brought forth after Montana defiantly continued to regulate hunting and fishing on the reservation by issuing permits to nonmembers, despite a tribal resolution that explicitly prohibited nonmembers from participating in such activities on the reservation. This conflict raised questions of tribal jurisdiction over nonmembers, and in its decision, the Supreme Court set out a fairly comprehensive test to determine instances in which a tribe has authority over nonmembers. Furthermore, while the court in *Montana* addressed a tribe's

authority to regulate nonmembers actions on the reservation, subsequent cases have expanded this test to include activities that may not necessarily take place physically on the reservation.

The *Montana* court specified that “[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.” *Montana v. United States*, 450 U.S. 544, 565 (1981). For the purposes of analyzing the case at hand, nonmembers have consensual relationships with the tribe (or its members) if they conduct commercial dealings or enter into contracts with that particular tribe. Both Mr. and Ms. Smith voluntarily signed contracts with the Yuma Indian Nation and subsequently conducted commercial dealings with the tribe. Furthermore, even if the defendants attempt to argue that the EDC and its workers do not sufficiently represent the nation, the word “members” would still apply as at the very least, it appears that three of the five board of directors are members of the nation along with around 25 individual employees. The EDC is, at its core, an entity that was created and strives for the YIN’s commercial and economic success. By signing the contracts with the tribe, the Smiths have signed on to be part of the tribe’s and the EDC’s commercial ventures. As a result, it seems that Mr. and Ms. Smith have in fact entered into the type of consensual relationship with the Yuma Indian Nation that falls under the first *Montana* exception and thus, grants the Nation subject matter jurisdiction over the defendants.

However, the question remains, whether the activity of Mr. Smith (in this instance - his disclosure to the Arizona Attorney General of YIN’s plans to open a marijuana business) is the kind of activity that is subject to tribal regulation. In *Montana*, the court provides further

guidance to determine whether Mr. Smith's activity would be subject to tribal regulation. The court established the principle that "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on...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 v. United States*, 450 U.S. 544, 565 (1981). The conduct being examined in the case at hand is centered around Mr. Smith's disclosure to the Arizona Attorney General that the EDC (on behalf of the Yuma Indian Nation) was looking to start a recreational marijuana business. Mr. Smith's actions resulted in the Attorney General subsequently instructing the YIN to cease any plans to create any such business. The cultivation and sale of marijuana was, and still remains, a highly regulated business within the state of Arizona. Mr. Smith's conduct could potentially have a significant effect on the political integrity of the nation. Although it was not entertained in the federal court, the suit undermines the tribal court's authority to hear cases which pertains to the regulation of internal and economic affairs. Furthermore, these acts may have unnecessarily jeopardized the tribe's financial well-being. This negatively impacts the tribe's financial well-being not only because the plans to create this lucrative business were thwarted but also given that the Nation will now have to expend valuable resources in litigating this case in court. The defendant may argue that Mr. Smith's conduct merely preserved the status quo since plans were not yet underway at the time. When Mr. Smith disclosed the business plans, YIN had no active marijuana business and received no profits from any such business dealings. As such, the Smiths would argue that the tribe had no dependence on this kind of business for its economic wellbeing or security. Moreover, they may also argue that the tribe had seemingly not yet invested extensive amounts of labor, time or resources into operating a recreational

marijuana business. Such assertions would undervalue the resources that the EDC has already invested in preparing for such a venture, while also completely discounting the profits that were all but guaranteed to come in once they finalized all the formalities of beginning the venture. However, the more important factor to consider is that Mr. Smith's activity effectively terminated what otherwise would have been a very lucrative business venture. By reporting this business plan, he forced the EDC and the YIN to put other economic projects on hold. Therefore, since he interfered with a potentially profitable business, the tribe contends that Mr. and Ms. Smith negatively impacted the tribe and by extension, directly affected the tribe's economic security.

ii. Marijuana

With regards to Federal Law, the Controlled Substance Act of 1970 sets national guidelines for regulating controlled substances and classifies marijuana as a Schedule I drug. If a law potentially may constrain a tribe's freedom to self-govern, "[c]ongressional intent is necessary" to determine whether the law should be applied to the tribal government. See *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

More recently, under the Obama Administration, the "DOJ released a policy statement penned by Monty Wilkinson, the Director of the Executive Office for U.S. Attorneys entitled "Policy Statement Regarding Marijuana Issues in Indian Country" (Wilkinson Memo)." Lauren Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 342 (2017). This memo effectively established the principle that both states and Indian Tribes are free to create their own policies regarding marijuana use and cultivation, so long as they abide by the eight regulations set forth in the memo. They are listed as such:

“Thus, if a state legalizes marijuana and hopes to remain free from federal enforcement activity, the state should be sure to enact a rigorous regulatory scheme that ensures that the [tribe’s] marijuana policy does not (1) make it easier for kids to get their hands on marijuana; (2) fund criminals; (3) allow [*341] marijuana to drift into another state where it is still illegal; (4) allow more dangerous drugs to be trafficked under the guise of marijuana distribution; (5) involve the use of guns; (6) encourage drugged driving; (7) allow marijuana to grow on public lands; or (8) increase the likelihood that individuals will bring marijuana onto federal property.”

Lauren Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 340-341 (2017).

The memo plainly sets forth the conditions in which federal enforcement activity would interfere with the tribe’s marijuana policy; which brings us to the conclusion that as long as the tribe does not violate the eight priorities listed above, then they would free to implement their marijuana policy as they best see fit. There is no indication that the Yuma Indian Nation’s proposed marijuana business would trigger any of the instances that would compel the federal government to intervene in their marijuana business ventures.

In *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, (1987) the Supreme Court acknowledged that “...Indian tribes had an inherent right, by virtue of tribal sovereignty, to pursue Indian gaming as a means of economic development, self-sufficiency, and independence.” Cited in Lauren Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 352 (2017). With such a strong emphasis in *Cabazon* on the rights of tribes to pursue their own economic development plans without state intervention, “[the] Court’s reasoning in reaching its conclusion is worth careful attention because it can be useful for determining how tribes might succeed in crafting marijuana programs that are free from state interference.” Lauren

Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 349 (2017).

The *Cabazon* court created an important distinction between a state's "criminal/prohibitory" laws, which are fully applicable to reservations, and a state's "civil/regulatory" laws, which were not generally applicable to reservations. Lauren Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 350 (2017). While opposing counsel may seek to characterize Arizona's current marijuana law as an instance of state "criminal/prohibitory" law that would take precedence over the YIN's own marijuana-related policies, and thus exculpate Mr. Smith from any liability for imposing an economic harm to the tribe. The Yuma Indian Nation argues that Arizona's laws regarding marijuana use are more accurately described as civil/regulatory state laws, which are not binding on Indian tribes. The general distinction between these two categories is that, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory"

Lauren Adornetto, Comment, Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States, 65 Buffalo L. Rev. 329, 350 (2017). Given that Arizona state law does allow for the sale and consumption of marijuana – although strictly only for medical purposes – then it seems that this is an activity allowed by the state but subject to intense regulation. This means that Arizona's laws concerning marijuana are merely civil/regulatory state laws that do not preempt tribal laws or ordinances. Thus, for the Yuma Indian Nation, the ordinance passed by the tribal council allowing the general use and cultivation of marijuana is the guiding law and the EDC is legally free to rely on that ordinance when proposing its business ventures.

This all goes to show that the YIN's proposed business, far from dangerous or illegal, was actually viable and quite likely lawful under the current case law. However, by disclosing that information to the Arizona Attorney General, Mr. Smith not only violated his fiduciary duties and broke the tribes' confidentiality, but he also caused for this venture to be terminated before the tribe even had an opportunity to reach out to the proper authorities and argue their case.

iii. Exhaustion of Remedies

Honoring the principle of sovereign immunity and placing limits on government intervention of Indian affairs has clearly been preserved both in the Indian Civil Rights Act (ICRA) and in federal statutes such as 25 U.S.C.S. § 1301. As written by the aforementioned statute “[a] Federal district court shall exercise jurisdiction in civil disputes, between Indians and non-Indians arising on an Indian reservation, involving federal questions, pursuant to 28 U.S.C.S. § 1331, after all available remedies have first been exhausted in tribal court, unless exhaustion would be futile.” This statute specifically addresses federal questions, which does not apply in this scenario. However, the exhaustion exception, along with other jurisdictional exemptions, have been discussed in *Nev. v. Hicks*, 533 U.S. 353, 369 (2001). The Supreme Court held in *Nev.* that the exhaustion requirement does not have to be met if the following exceptions apply:

1. “...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”
3. “where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction”

Nev. v. Hicks, 533 U.S. 353, 369 (2001); quoting *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-857, (1985).

Augmenting the list of exceptions in *National Farmers Union Ins. Cos.*, the Supreme Court flags a fourth exception: "when . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," so the exhaustion requirement "would serve no purpose other than delay." *Nev. v. Hicks*, 533 U.S. 353, 369 (2001) quoting *Strate v. A-1 Contrs.*, 520 U.S. at 459-460, and n. 14.

Here there is no evidence of bad faith on the part of the Yuma Indian Nation. The contract allowed for litigation "in a court of competent jurisdiction" and especially from the perspective of the EDC and the Tribe, the YIN courts would fit this description. For similar reasons, the second exception would not apply. This suit involves a question of contract law between the YIN and two non-members, and is a civil suit that does not have clear prohibitions but requires a more extensive analysis using the criteria set out in *Montana*. As demonstrated in the discussion on jurisdiction, the YIN has subject matter jurisdiction over the two defendants under both exceptions of the *Montana* test.

The third exception regarding the lack of opportunity to challenge the tribal court's jurisdiction would similarly not apply. Unlike in cases such as *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 12 (1987), where the plaintiff was barred from presenting interlocutory appeals, the case here is in the YIN Supreme Court and court still has not made any final judgements. Keeping in the pending litigation in the Supreme Court alone, it is clear that the defendants have not yet exhausted their remedies, and as a result this defense would fail.

The fourth exception similarly does not apply to the defendants. An analysis of the final exception elucidates why the federal court should require the Smiths to exhaust their remedies in the tribal court. This exception has been highlighted in *Elliott v. White Mountain*

Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009). The court in *Elliott* argues that if tribal jurisdiction is “colorable” or “plausible”, then the exception to the requirement of exhausting tribal court remedies as a prerequisite for a federal court hearing will not apply. See *id.* at 848. The Tribe and the EDC may argue that remedies within the tribal court have not been exhausted and thus, the defendants’ arguments have no place in federal court. Therefore, the tribe argues that the defendants must be compelled to “exhaust” their remedies in the tribal court and that such attempts would not be futile. Exhausting their remedies in the court will not be fruitless because the Tribe’s aims to prove subject matter jurisdiction would likely be both “colorable” and “plausible” to the extent that the court would require in *Elliott*. See *Id.* at 847. We have already established that the court will likely be able to demonstrate that Smiths will meet the minimum contacts and fairness requirements for personal jurisdiction. Furthermore, the Yuma Indian Nation will likely not find difficulties in prevailing on arguments regarding subject matter jurisdiction over the defendants, thereby satisfying the “colorable” and “plausible” thresholds. The threshold set out in *Elliott*, in other words, requires the court demonstrate that jurisdiction will be conceivable See *Id.* at 849. Since the case has met the requirements to satisfy both *Montana* exceptions for subject matter jurisdiction, there is substantial evidence that the court has the power to hear the case and that at the very least, jurisdiction is certainly “plausible” and “colorable”.

II. Sovereign Immunity

1. Overview

There are two theories for which we may demonstrate that the tribal court waived their sovereign immunity: 1) by stating in the contract that “any and all disputes arising out of the contract would be litigated in a court of competent jurisdiction” and 2) by bringing suit against Thomas and Carol, thereby waiving its immunity for compulsory counterclaims arising out of the action.

The court in *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 124-125 (2006) held that sovereign immunity was extended to “tribal governmental corporations.” Furthermore, in *Wright*, the Supreme Court held that employees of a governmental organization “acting in their representative capacities and within the scope of their authority” also were extended sovereign immunity.” See *Id.* at 116 also citing *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). The tribal entity in *Wright* was considered a “governmental corporation” under the Colville Tribal Code and was controlled by the Colville Business Council. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 124-125 (2006). The Yuma Indian Nation, like the Colville tribe, created the EDC under the tribal commercial code and is a subsidiary that is considered an “arm-of-the-tribe”. Under *Wright*, arguing in favor of granting sovereign immunity to the EDC would be justified.

2. Yuma Indian Nation

Tribal sovereign immunity is a necessary right that Indian tribes have long been allowed to enjoy as sovereign nations. As such, it would not be far-fetched to argue that this concept represents the heart of a tribe's governing power which allows it to act independently from the entirety of the United States' body of law. The relationship between Indian tribes and the United States federal government is that of a paternalistic trust in which the Government institutes constitutional restraints on the tribe's perpetually and inherently-held sovereign power. See Nell Jessup Newton et al, *Cohen's Handbook of Federal Indian Law*, §1(b) (2012). The states, by grant of the federal government, are allowed minimal power over the sovereign Indian nations. See Nell Jessup Newton et al, *Cohen's Handbook of Federal Indian Law*, §2 (2012). Indian tribal sovereignty is highlighted specifically in several sources including the commerce clause where the federal government recognizes these nations and their natural powers to engage in business both on and off reservations while still maintaining agency to self-govern. See Nell Jessup Newton et al, *Cohen's Handbook of Federal Indian Law*, §1(a) (2012). The Yuma Indian Nation retains this right to self-govern and to shield itself from claims through sovereign immunity. In a civil action, such as that for a breach of contract, the YIN does not lose this natural right of sovereign immunity. See *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998). Therefore, even in light of an alleged breach of contract, the Smiths would not be able to bring their claims against the Yuma Indian Nation because in this situation they still enjoy full sovereign immunity.

According to 25 USCS § 1301, an Indian tribe is defined as "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government". As an Indian tribe, the Yuma Indian Nation retains the power of

“self-government” which they may use for “...regulating their internal and social relations” See *United States v. Wheeler*, 435 U.S. 313, 322 (1978) citing *United States v. Kagama*, 118 U.S. 375, 382 (1886). In fact, Indian tribes are granted sovereign immunity from suits on contracts without regard to whether they involved tribal government or commercial activities or if they were created within tribal territory. See *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998). Tribes may lose sovereign immunity if Congress gives authorization for the suit or if the tribe itself waives its immunity. See *Id.* Any waiver of immunity must be explicitly expressed by the tribe and here, there has been no expressed waiver of immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). As underscored in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63-64 (1978), tribal sovereignty is also protected under Title III the ICRA, 25 U. S. C. §§ 1321-1326, the law states that states do not have the power to assume an jurisdiction, criminal or otherwise, over Indian territory without first obtaining the tribe’s consent. Thus, one can argue that the principle of self-governance (and the inherent immunity that extends to tribes as sovereign nations) is such a fundamental principle that U.S federal courts have consistently sought to safeguard this doctrine and have only chosen to abrogate in the most limited of circumstances.

3. Economic Development Council

The 9th Circuit provides a five-part test to determine whether a tribal subdivision engaged in economic activities is sufficiently close to the tribe to enjoy its sovereign immunity:

“(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities;

(4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

White v. Univ. of Cal., 765 F. 3d 1010, 1025 (2014) citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

Applying this test, it is clear that the EDC is sufficiently interwoven with and connected to the tribe for it to be granted sovereign immunity. The tribe was created under the tribal code and with the goal of bolstering the "prosperity of the nation", two facts that address the first two prongs of the test and would work in favor of the argument that the EDC is a genuine arm of the tribe. Moreover, the third, fourth and fifth prongs further illustrates that the EDC is a genuine arm of the Yuma Indian Nation. The EDC is an institution that requires for the board of directors to be comprised of three YIN members and two non-members, Indian or otherwise. So, it appears that control would for the most part, be in the hands of the tribe and tribal members when it comes to making decisions regarding the EDC. The Tribal Council is in charge of electing and managing the board of directors of the organization and the EDC is mandated to pay half of its revenue to the tribe. The fact that the EDC is mandated to contribute a significant portion of its revenue to the tribe makes it is clear that the EDC is sufficiently under the control of the tribe and should accordingly be considered an "arm" of it. The tribe's central purpose behind the creation of this organization, according to its corporate charter, is to use the revenue to bring economic prosperity to both the tribe and southwestern Arizona. Thus, the EDC does not exist for its own independent purposes. Rather, it functions as a tool through which the Tribe may carry out its economic development visions across its land and the surrounding region.

The fourth prong of the test plainly works in favor of the YIN and EDC as the Tribal Council mandated by charter "that the EDC, its board, and all employees are protected by

tribal sovereign immunity to the fullest extent of the law.” On the other hand, the defendants may object to this argument by pointing out that the EDC is allegedly also authorized to “sue and be sued”. The defendants along with the court, must recognize that this type of authorization by no means should be construed to signify that sovereign immunity has been waived. Such a vague phrase that allows the EDC to be sued does not mean that all and any parties will be able to bring the organization to court. In summation, while there seems to be some mixed messaging here regarding the EDC’s sovereign immunity, application of the *White* test conclusively supports the notion that the organization is, in fact, is a true “arm” of the tribe.

For the fifth and final prong, we are tasked with interpreting the financial relationship between the tribe and the EDC. Here, the fact that the EDC is as closely related to the tribe as the YIN suggests makes it just for the court to extend the protection of sovereign immunity to the EDC. The defendants may use to suggest that there is a financial separation between the two entities by pointing out that the EDC can neither lend nor borrow money in the name of the Yuma Indian Nation, nor through its debts, “encumber” or “implicate” the nation. These facts demonstrate how the EDC operates as a supplementary financial body of the Nation without necessarily gaining all the governing privileges of the sovereign power. It is inarguably supported and monitored by the YIN, in a manner analogous to how any nation supports one of its executive departments. For persuasive authority, the NY Court of Appeals decision of *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538 (2014) offers some insight that further bolsters the argument that the EDC has been properly deemed an “arm of the tribe.” A corporation is not an arm of the tribe “[i]f a judgment against a corporation created by an Indian tribe [would] not reach the tribe's assets,

because the corporation lacks "the power to bind or obligate the funds of the tribe."

Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 550 (2014) citing *Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 559 (1995). Again, the fact that the EDC is not allowed to "implicate" the nation through its debts nor can it borrow money under the tribe's name may signal that the EDC is not fully an extension of the tribe itself. However, the defendants and the court must not forget to consider the fact that the tribe necessarily has relied on the EDC's funds for several years to bolster its economic standing. If the EDC is ever implicated and has to take a financial hit due to mismanagement issues, slow business or litigation costs, for example, the Tribe will suffer in turn. Therefore, it would be myopic to argue that judgement against the EDC would not impact the tribe's assets simply because the EDC cannot take out debts in the Tribe's name. Rather, the EDC's power to bind the Tribe's assets comes from its inherent interconnectedness to the tribe. The EDC functions primarily to finance the tribe and thus, the EDC's funds are naturally the Tribe's funds. Additionally, the defendants may attempt to argue, albeit unsuccessfully, that because the EDC has the power to buy land in fee simple both on and off the reservation, this further signals that its sovereign immunity may have been partially abrogated. However, this argument would be an overly simplistic interpretation at best. Pursuant to the Supreme Court decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), Indian land converted to fee simple loses tribal jurisdiction. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). While this may not be dispositive, this fact is illustrative of the separation between the YIN and the EDC and how the former clearly treats the latter as an interconnected entity that it would be proper to grant sovereign immunity.

4. EDC CEO and Account (Mr. Captain and Ms. Bluejacket)

Co-defendants impleaded Molly Bluejacket, in both her personal and official capacity as the EDC accountant for their cross-claims against the Yuma Indian Nation for defamation and for monies due under their contract. Ms. Bluejacket invoked the protection of sovereign immunity, but the question remains whether she is truly protected under sovereign immunity. The court in *Wright* stated that employees of a governmental organization “acting in their representative capacities and within the scope of their authority” also were extended sovereign immunity.” *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 116 (2006) citing *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); also citing *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). Making defamatory comments certainly does not fall within the scope of Ms. Bluejacket’s authority - nor were such comments part of her duties as the EDC accountant. Ms. Bluejacket can, however, argue that she was acting in her representative capacity when she made the defamatory comments against the Smiths. Her only interactions with Mr. and Ms. Smith was through their connections to the EDC. The allegedly defamatory remarks are related to the suit against the Smiths for their alleged breaches of fiduciary duties and confidentiality. Thus, having met the requirements set under *Wright*, the Yuma Indian Nation should have the power to extend their sovereign immunity to Ms. Bluejacket. The Smiths will counter this point by arguing that “tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity.” *Pistor v. Garcia*, 791 F.3d 1104, 1112 (2015). See also *Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (2013). They may even point to *United States v. James*, 980 F.2d 1314, (1992), which states that while

sovereign immunity is granted to tribes because they are independent nations, it “does not [similarly] extend to the individual members of the tribe.” *United States v. James*, 980 F.2d 1314, 1319 (1992). However, these rulings will not apply to Ms. Bluejacket nor Mr. Captain because, through their protection under the EDC and as employees of this economic entity of the tribe, they will not simply be viewed as ordinary members of the tribe. If they did not fall under that specific exception then they would not be protected by sovereign immunity, but since that is not the situation at hand, it is a moot point.

A similar argument can be made for the CEO of the EDC, Mr. Captain. Having also been impleaded in his official and individual capacities for defamation and monies owed to the Smiths, Mr. Captain should be granted sovereign immunity. The allegedly defamatory acts fell under the scope of his relationship with the Smiths, thereby strengthening any argument that the impleaded party may have regarding sovereign immunity via his position as an official of a governmental arm of the tribe.

As noted in the 9th Circuit, the Smiths cannot simply argue against the extension of tribal immunity just by “naming an officer of the Tribe as a defendant, rather than the sovereign entity.” *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983). It is a well-known principle that the sanctity of tribal sovereignty must be protected even through individuals who act as governing members of the tribe. The fact that the defendants have brought suit against Ms. Bluejacket and Mr. Captain in their individual capacities as well as their official capacities should, thus, not be interpreted as a license for bringing a suit against them. The connection between the EDC, the Tribe, and our clients is sufficiently conceivable to grant immunity.

III. Waiver of Immunity

It is crucial to understand that a simply because a tribe has decided to bring an action against another party does not mean that the defendants, in said case, are free to raise permissive counterclaims as they usually would be able to in a civil case under the FRCP 13(b). The tribe still enjoys its sovereign immunity protection from counterclaims as explained by the relevant case law. The federal court has ruled that "...a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *McClendon v. United States*, 885 F. 2d 627 (1989). Thus, the counterclaims brought against the tribe must be deemed necessary to the determination of the original action brought forth by the tribe – otherwise the counterclaims are barred from being heard because of the tribe's sovereign immunity. The question is therefore, whether the Smiths' counterclaims are necessary to decide the YIN's claim.

In *McClendon v. United States*, 885 F. 2d 627 (1989), the appellants went before the Ninth Circuit Court of Appeals to challenge the lower court's finding that it had no jurisdiction over the case. They argued that the tribal council had waived its sovereign immunity by initiating a prior suit. This offered the court an opportunity to directly address the question as to what extent a tribe waives its sovereign immunity by initiating a lawsuit. Keeping in mind the long legal history that has often been deferential to a tribe's invocation of sovereign immunity, the court in this instance decided to give such waivers a limited scope by stating that, "... a tribe's waiver of sovereign immunity may be limited to the issues

necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.” *McClendon v. United States*, 885 F. 2d 630 (1989). Thus, the McClendon court found that to broaden a court’s power to abrogate sovereign immunity would mean grossly undermining the principle of sovereign immunity and by extension, also weaken tribal autonomy.

The YIN’s action against the defendants are focused exclusively on the breach of contract and fiduciary duties that occurred when the Smiths divulged certain confidential business information to the Arizona Attorney General without the authorization of the tribe. The counterclaims brought forth by the Smiths, on the other hand, are centered around allegedly defamatory comments that were made and monies owed to them under the contract. These two sets of claims not only occurred at different points in time and under separate transactions, but they can also be adjudicated separately without any sacrifice to judicial efficiency or economy. This truly illustrates that these claims are permissive at best and are certainly not compulsory. These counterclaims are therefore merely related matters and are in no way necessary for the determination of the original set of claims. While they share the same set of underlying facts, as decided in *McClendon*, this would not be enough to find that the tribe waived its sovereign immunity with respects to the issues that the Smiths raise in their counterclaims. See *Id.* YIN’s suit against the Smiths for breach of contract and breach of fiduciary duties, does in fact, signify that the tribe waived its sovereign immunity with respect to the issues necessary to adjudicate those claims. Yet, that waiver could not be extended to include the issues that the Smiths raise in litigating either their claims for defamation or the monies owed under the contract. Under this analysis, the Smiths would be

barred from bringing these counterclaims which is the same conclusion that the YIN trial court made when examining this question. Therefore, the Yuma Indian Nation, far from having waived its immunity, still retains its legally guaranteed protection and any challenges to the contrary in this case are mistaken.

Conclusion

For all the forgoing reasons, the Yuma Indian Nation requests this Court uphold the decision of the lower court.

The Yuma Indian Nation's trial court's decision to dismiss all of the Smiths counterclaims against YIN and claims against third-party defendants due to sovereign immunity was correct and should be upheld.

The Yuma Indian Nation also requests that this court uphold the lower court's decision to deny Appellants' motion to dismiss for lack of personal or subject matter jurisdiction. The Yuma Indian Nation has both personal and subject matter jurisdiction over the Appellants.

Further, the Yuma Indian Nation respectfully requests that this Court deny Appellants' request for a writ of mandamus ordering the trial court to stay the suit pending their current federal case.