

IN THE SUPREME COURT
OF THE
YUMA INDIAN NATION

THOMAS SMITH
AND CAROL SMITH,

Appellants,

v.

YUMA INDIAN NATION,

Appellee.

*On Writ of Certiorari to
the Yuma Indian Nation Supreme Court*

**BRIEF FOR APPELLEE
YUMA INDIAN NATION**

TEAM 245

*Counsel for Appellee
Yuma Indian Nation*

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QUESTIONS PRESENTED

1. Does the Yuma Indian Nation court possess personal and subject matter jurisdiction to hear the civil case by Petitioner Thomas Smith and Carol Smith against Respondent Yuma Indian Nation?
2. Does sovereign immunity, or any other form of immunity, protect Respondent Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Yuma Indian Nation (“YIN”) is located in southwest Arizona. In 2007, the YIN signed a contract with Thomas Smith (“Thomas”), a certified financial planner and accountant, to provide the YIN with financial advice regarding economic development. R. at 1. In the contract, Thomas agreed to provide YIN with financial advice on an as needed basis and agreed to maintain absolute confidentiality regarding any and all tribal communications and economic development plans. *Id.* The contract included a provision requiring any and all disputes arising from the contract be litigated in a court of competent jurisdiction. *Id.* The parties signed the contract at Thomas’ office in Phoenix, Arizona. *Id.* Thomas resides in Phoenix, Arizona. *Id.*

The YIN created the YIN Economic Development Corporation (“EDC”) through a 2009 tribal commercial code to promote the prosperity of the YIN and its citizens. *Id.* The primary purpose of the EDC, as stated in the corporate charter, was “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 YIN commercial code authorizes the YIN to create and charter public and private corporations to operate businesses on and off the reservation. *Id.*

The Tribal Council created the EDC by a corporate charter as a wholly owned subsidiary of the YIN and an “arm-of-the-tribe.” *Id.* The Tribal Council funded the EDC with a one-time \$10 million loan from the YIN’s general fund. *Id.* The EDC operated by its own board of directors consisting of five people who must be experienced in business endeavors. *Id.* The Tribal Council selected the initial board of five directors to serve staggered terms

with one director's term expiring and being reelected or replaced each year. *Id.* The charter provides that the sitting directors would by majority vote elect or reelect a person for the expiring seat. *Id.* At all times, three of the directors have to be tribal citizens and two have to be non-Indians or citizens of other tribes. *Id.* The Tribal Council retained the authority to remove any director for cause, or for no cause, at any time, by a 75% vote. *Id.*

The EDC is authorized to buy and sell real property in fee simple title on or off reservation, to buy any other types of property in whatever form of ownership, and to sue and be sued. *Id.* at 2. However, no debts of the EDC could encumber, or implicate in any way, the assets of the YIN. *Id.* The EDC also 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 on a quarterly basis to the Tribal Council for review and approval. *Id.* Finally, fifty percent of all EDC net profits are to be paid to the YIN general fund on an annual basis. *Id.* Unfortunately, due to a lack of success in its endeavors to date, the EDC has only repaid the YIN \$2 million. *Id.*

The Tribal Council also mandated in the charter that the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law. *Id.* The Council included this provision, as it states in the charter, to protect the EDC and YIN from unconsented litigation and assist in the success of the EDC's endeavors. *Id.*

Between 2007 to 2017, Thomas provided the YIN with financial advice on a wide range of economic development issues. *Id.* at 1. Nearly every day, he exchanged emails and telephone calls with various tribal chairs, Tribal Council members, the EDC CEO, Fred Captain ("Captain"), and the EDC accountant, Molly Bluejacket ("Bluejacket"). *Id.* Thomas

also prepared and submitted written reports to the YIN Tribal Council on a quarterly basis and presented these reports in person at Council meetings on the reservation. *Id.*

In 2010, Thomas signed a contract with his sister, Carol Smith (“Carol”), who lives and works in Portland, Oregon. *Id.* at 2. Their contract included a provision that both parties are required to comply with the YIN-Thomas contract. *Id.* Otherwise, it is identical to the YIN-Thomas contract. *Id.* Carol is a licensed stockbroker and was retained to give Thomas, the EDC, and the YIN advice regarding stocks, bonds, and securities issues. *Id.* Carol advised Thomas directly by email, telephone, and postal service. *Id.* Thomas forwarded many of Carol’s communications and advice on various issues to the YIN’s Tribal Council, the EDC CEO, and the EDC accountant. *Id.*

In 2016, the EDC began investigating the possibility of engaging in marijuana cultivation and sales. *Id.* The EDC conferred with the YIN Tribal Council and convinced the Council to enact a tribal ordinance making marijuana cultivation and use on the reservation legal for any and all purposes. *Id.* The EDC then began quietly pursuing the development of a marijuana operation. *Id.*

The EDC discussed this economic development plan with Thomas several times. *Id.* However, for moral reasons, Thomas and Carol were personally opposed to being involved in the marijuana operation. *Id.* Subsequently, Thomas informed the Arizona Attorney General about YIN’s plans. *Id.* As a result, the A.G. issued the YIN and EDC a cease and desist letter regarding the development of recreational marijuana operations. *Id.*

II. STATEMENT OF PROCEEDINGS

After receiving the cease and desist letter, the YIN Tribal Council sued the Petitioners in YIN Tribal Court for breach of contract, violation of fiduciary duties, and violation of their

duties of confidentiality. *Id.* at 3. As a remedy, the YIN sought recovery of the liquidated damages amount set out in the parties' contract. *Id.*

The Petitioners filed identical motions to dismiss for lack of personal jurisdiction and subject matter jurisdiction, and in the alternative, a stay of the Tribal Court proceeding while they pursue a ruling in Arizona Federal District Court as to Tribal Court jurisdiction over them. *Id.* The YIN Trial Court denied both motions. *Id.* The Petitioners subsequently filed answers denying the YIN's claims. *Id.*

The Petitioners also filed counterclaims impleading the YIN EDC and third-party defendants, Captain and Bluejacket for money due under the contracts and defamation impugning their professional skills. *Id.* The YIN Trial Court dismissed all of the Petitioners' counterclaims against the YIN and third-party defendants due to sovereign immunity. *Id.* Finally, the Petitioners filed an interlocutory appeal in the YIN Supreme Court requesting the Court decide the jurisdictional and sovereign immunity issues and issue a writ of mandamus ordering the trial court to stay the suit. *Id.*

III. CHOICE OF LAW

When deciding the applicable law for all cases, the YIN Tribal Code Court Rules specifies the Tribal Court shall apply the following in order: (a) the Tribal Constitution and provisions of statutory law adopted by the Tribe, and in matters not covered by Tribal statute, then; (b) traditional Tribal customs and usages, called Tribal common law, and, if none, then; (c) any laws of the United States or any states therein and any applicable regulation of the Department of the Interior. 1 Y.I.N.T.C. § 1-109 (2005).

The YIN Tribal Code Civil Procedure Rules specify that in all civil cases, the Tribal Court shall apply: (a) The Constitution, statutes, and common law of the Tribe not prohibited

by applicable federal law, and, if none, then; (b) the federal law including federal common law, and, if none, then; (c) the laws of any state or other jurisdiction which the Court finds to be compatible with the public policy and needs of the tribe. 2 Y.I.N.T.C. § 2-111(1) (2005). Pursuant to the above (b) and (c), no federal or state law shall be applied to a civil action if such law is inconsistent with the laws of the Tribe or the public policy of the Tribe. 2 Y.I.N.T.C. § 2-111(2) (2005). When there is no specific procedure provided by Tribal laws or Court rules, the Court may proceed in any lawful fashion not inconsistent with Tribal law, the rules of the Court, or the Indian Civil Rights Act. 2 Y.I.N.T.C. § 112 (2005).

ARGUMENT

I. THE YIN TRIAL COURT HAS PERSONAL AND SUBJECT MATTER JURISDICTION OVER THE CIVIL LAWSUIT BROUGHT BY THE YIN AGAINST THE PETITIONERS.

Federal court precedent is not technically binding on tribes as there is no federal Supremacy Clause for tribes. *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Tribes*, 34 Ariz. St. L.J. 113 (2002). Unlike what the Federal Government has over states there is no applicable Supremacy Clause which results in the Federal Government having “no legitimate claim to legal supremacy over Indian tribes.” *Id.* at 115. Although, as a practical matter, tribal courts can consider federal precedent in deciding what law to apply.

In this matter, there is no standard of review set forth in the tribal code or the record. In the Ninth Circuit, the courts view questions of Tribal Court jurisdiction as a federal question of law reviewed *de novo*. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985)). *De novo* review requires the appellate court to accept plaintiff's factual allegations as true and in a light most favorable to plaintiffs. *Oklevueha Native Am. Church*

of Hawaii, Inc. v. Holder, 676 F.3d 829, 834 (9th Cir. 2012) (citing *Kniesel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)).

A. The Yuma Indian Nation Retains its Inherent Sovereign Power to Adjudicate Civil Disputes.

The United States has consistently recognized Indian Tribes as “distinct, independent political communities, which are qualified to exercise powers of self-government.”

Worcester v. Georgia, 31 U.S. 515, 559 (1832); *see also United States v. Wheeler*, 435 U.S. 313, 322 (1978). These powers of self-government are recognized by the United States Constitution, legislation, treaties, judicial decisions, and administrative practice. *See* Cohen’s Handbook of Federal Indian Law § 4.01 (2017 ed.).

As an aspect of their self-government, “tribes possess sovereign power over both their members and their territory.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). This sovereign power includes the ability to exercise civil jurisdiction over the conduct and activities of non-Indians occurring within an Indian reservation. *Mescalero Apache Tribe*, 462 U.S. at 324; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). A tribe’s ability to establish a mechanism for resolving civil disputes arising within its territory is an important and inherent characteristic of Indian sovereignty “because it is a necessary instrument of self-government. . .” *Merrion*, 455 U.S. at 137; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).¹

The United States Supreme Court has recognized that “unless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” *Michigan v. Bay Mills Indian Cmty.*,

¹ Indian tribes have the power to make their own substantive law in internal matters in order to self-govern. *See Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations). Indian tribes also have the power to enforce that law in their own forums. *Williams v. Lee*, 358 U.S. 217 (1959).

134 S. Ct. 2024, 2030 (2014) (quoting *Wheeler*, 435 U.S. at 328 (1978)). An Indian tribes' sovereign authority can only be abrogated or weakened by federal statute through "clear. . . legislative intent." *Merrion*, 455 U.S. at 149. The powers of Indian tribes are "inherent powers of a limited sovereignty [that have] never been extinguished." *Wheeler*, 435 U.S. at 322. Instead, the Federal government has promoted tribal sovereignty by ". . . encouraging tribal self-government."² *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

There has been no Congressional action in regard to the YIN's inherent sovereign authority to govern themselves. As Congress has not acted, the YIN retain their sovereign authority to adopt tribal codes and establish Tribal Courts for the purpose of strengthening Tribal self-government and providing for the protection of its people and property on the reservation. Thus, the YIN Tribal Court can exercise its sovereign authority to adjudicate this civil cause of action in order to protect essential tribal interests.

B. The Yuma Indian Nation Tribal Code Provides the Tribal Court with Subject Matter Jurisdiction over this Civil Action.

The YIN Trial Court properly exercised subject matter jurisdiction over this civil action because the YIN Tribal Code delegated the power to adjudicate all general civil claims arising within the tribe's jurisdiction³ to the Tribal Court. The YIN Tribal Court may exercise jurisdiction in civil actions over any person or subject matter on any basis consistent with the Tribal Constitution and the Indian Civil Rights Act of 1968 notwithstanding any specific restrictions or prohibitions contained in federal law. 2 Y.I.N.T.C. § 102 (2005). Furthermore,

² Examples of Congress' intent to encourage tribal self-government include: Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1968); Indian Self Determination and the Indian Education Assistance Act of 1975, 25 U.S.C. § 450 (1975); Tribal Jurisdiction Act of 1976, 28 U.S.C. § 1362 (1962); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); and Indian Reorganization Act, 25 U.S.C. § 476 (1970).

³ "Jurisdiction" is defined as the Indian Country within the territorial jurisdiction of the Tribe. 1 Y.I.N.T.C. § 101 (2005).

the YIN Tribal Court has subject matter jurisdiction over civil disputes and civil causes of any kind.⁴ 1 Y.I.N.T.C. §106 (2005). Lastly, “[t]he YIN Tribal Courts shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Tribe, including the Tribal common law, over all general civil claims which arise within the Tribal jurisdiction, and over all transitory claims in which the defendant may be served within the Tribal jurisdiction. . .” 1 Y.I.N.T.C. § 107 (2005).

The YIN Tribal Code clearly delegated the YIN Tribal Court the power to adjudicate this civil action arising out of a contractual dispute between the Petitioners and YIN. The contract between the party’s states “for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction.” R. 1. The YIN Tribal Court is a court of competent jurisdiction. Therefore, the YIN Tribal Court has the power and jurisdiction to adjudicate this civil action.

C. The Yuma Indian Nation has Personal Jurisdictional over Petitioners.

The YIN properly exercised personal jurisdiction over the Petitioners as they purposefully availed themselves to the YIN Tribal Court’s jurisdiction when they agreed to provide the YIN with financial advice regarding the tribe’s economic development. R. 1-2. Pursuant to the YIN Tribal Code:

. . . Personal jurisdiction shall exist over all defendants served within territorial jurisdiction of the Courts, or served anywhere in cases arising within the territorial jurisdiction of the Tribe, and all persons consenting to such jurisdiction. The act of entry within the territorial jurisdiction of the Courts shall be considered consent to the jurisdiction of the Courts with respect to any civil action arising out of such entry. The act of entry upon the territorial jurisdiction by an extraterritorial seller, merchant, or their agent(s) shall be considered consent by the seller or merchant or their agent(s) to the jurisdiction of the

⁴ With the exception that the YIN shall have jurisdiction over probate proceedings to the extent permitted by federal law over all of the real and personal property located within the boundaries of the jurisdiction of the Court at the time of death. 1 Y.I.N.T.C § 106 (1)(b)(i).

Courts for any dispute arising out of any sale or commercial transaction regardless of where the sale or transaction was entered into or took place.

1 Y.I.N.T.C. § 107 (2005). The Tribal Court specifically has jurisdiction over “any 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 . . .” 1 Y.I.N.T.C. § 104(2)(a) (2005).

In the present case, Petitioners knowingly and willingly entered into a contract with the YIN. In 2007, Thomas Smith signed a contract with the YIN to provide the tribe with financial advice regarding economic development. R. 1. Between 2007 and 2017, Thomas provided such advice on a wide range of economic development issues. *Id.* While performing his responsibilities, he exchanged emails and telephone calls nearly daily with various tribal chairs and Tribal Council members. *Id.* After the creation of the EDC, Smith communicated nearly every day with primarily with Captain and Bluejacket. *Id.* Lastly, Thomas prepared and submitted written reports to the YIN Tribal Council on a quarterly basis and presented these reports in person at Council meetings on the reservation. *Id.*

In 2010, Thomas signed a contract with Carol Smith. *Id.* at 2. The contract included a provision emphasizing both parties were required to comply with the original YIN-Thomas contract. *Id.* Otherwise, the contract was identical to the contract Thomas signed with the YIN in 2007. *Id.* In performance of her responsibilities, Carol provided advice directly to Thomas via email, telephone, and postal and delivery services. *Id.* Thomas would then forward Carol’s communications and advice on various issues to the YIN Tribal Council, Capitan, and Bluejacket. *Id.* Lastly, Carol submitted monthly bills by email to the EDC CEO, Capitan, and the EDC mailed her payments. *Id.*

The record is clear that Petitioners had daily business communication and provided services in accordance to their contract with the YIN. Thomas performed his terms of the contract for ten years and Carol performed her terms of the contract for seven years, until they breached the contract. Petitioners' daily and continued business activity constitutes their consent to the jurisdiction of the YIN Tribal Courts, regardless of whether much of their business activity occurred within the boundaries of the YIN reservation. The Petitioners performance of the contract had a direct connection to the YIN Tribal Council, Capitan, and Bluejacket's day to day activities as it relates to the tribe's business affairs. Moreover, the substance of the Petitioner's activity had a direct effect on YIN tribal economic development plans made on the reservation.

Next, the YIN's long arm statute provides that a defendant is subject to the jurisdiction of the Tribal Court if she submitted herself to the jurisdiction of the Courts of this Tribe either by appearance, written consent, or having voluntarily entered into sufficient contacts with the tribe, its members, or its territory to justify Tribal jurisdiction over her in accordance with the principals of due process of law and federal Indian law. 2 Y.I.N.T.C. § 314 (2005). This is consistent with the United States Supreme Court's test in *International Shoe Co. v. Washington*, which stated "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. 310, 316 (1945).

Here, Petitioners' contractual relationship with the YIN along with the business activity and the services they performed are sufficient minimum contact with the tribe to justify tribal jurisdiction. Petitioners' business activity and the services they performed relate

to the contact with the tribe and the tribe's economic planning that takes place on the reservation. The consensual relationship analysis of the *Montana* exception is "perfectly consistent with principles of personal jurisdiction." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (2006).

D. Pursuant to the *Montana* Exceptions, the YIN Tribal Court Retains Civil Adjudicative Jurisdiction over Petitioners.

In 1978, the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe* held that tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect.⁵ 435 U.S. 191, 195 (1978). Three years later, the Court in *Montana v. United States* built upon its decision in *Oliphant* in the civil context, stating that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. 544, 565 (1981). However, the Court also acknowledged that tribes enjoyed a broader range of inherent authority over non-members in civil matter. *Id.* In a "pathmarking" decision, the Court confirmed that "Indian tribes retain[ed] inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Id.* But, the Court did not believe that inherent sovereignty was a sufficient reason because it limited the tribes to regulating tribal members and tribal affairs. *Id.* at 564. The court decided that "Indian tribes retain[ed] inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" and

⁵ The Courts decision became known as the implicit divestiture doctrine. Matthew L.M. Fletcher, Federal Indian Law 538 (Jesse H. Choper, et al. eds., 2016). The areas that implicit divestiture of sovereignty has occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. *Wheeler*, 435 U.S. at 326.

conveyed two exceptions to the rule that Indian tribes did not possess authority over non-Indians within the reservation. *Id.* at 565-66.

1. The Tribal Court has jurisdiction as a consensual relationship exists between Petitioners and YIN.

The Tribal Court has jurisdiction over Petitioners because they entered into a consensual relationship with the YIN through their contractual relationship and subsequent business activity with the tribe. Pursuant to the first *Montana* exception, “[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 . . .” *Id.* at 565. A consensual relationship exists when “private individuals . . . voluntarily submit themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into.” *Nevada v. Hicks*, 533 U.S. 353, 372 (2001). Moreover, “[n]onmembers . . . who *choose* to affiliate with [tribes]” through consensual commercial dealings should “anticipate tribal jurisdiction when their contracts affect the tribe or its members.” *Smith*, 434 F.3d at 1138.

The consensual business relationship between the Petitioners and YIN satisfies the first *Montana* exception. As noted above, Petitioners voluntarily entered into a contract with the YIN to provide the tribe with financial advice regarding economic development issues. R.

1. Although the contracts were signed outside of the reservation, the financial advice provided by Petitioners affected and addressed economic issues the tribe encountered. *Id.* at
2. Communication in the form of frequent email exchanges and telephone calls amongst themselves, to various tribal chairs, Tribal Council members, Captain, and Bluejacket occurred daily for ten years. *Id.* Not only was there daily communication between Petitioners and various tribal entities, but Petitioner Carol Smith also submitted monthly bills and

Petitioner Thomas Smith prepared and submitted quarterly reports to the YIN Tribal Council and attended Tribal Council meetings on the reservation to present those reports. *Id.*

Undoubtedly, the petitioners' contractual relationship with the tribe and their business activity satisfy the first *Montana* exception.

This matter is similar to one that arose in the Navajo Indian Nation. In *PacificCorp. v. Mobile Oil, Corp.*, PacifiCorp argued that the parties' contracts were outside the jurisdiction of the district court. 8 Nav. R. 378, 4 Am. Tribal Law 694 (Nav. Sup. Ct. 2003). In that case, parts of the contracts were performed within and parts were performed outside of the Navajo Nation. *Id.* at 698. Mobil's performance, payment of the Business Activity Tax charge and payment for electrical service, occurred outside of the Navajo Nation. *Id.* at 699. Meanwhile, PacifiCorp's performance and provision of the electricity occurred at Mobil's facilities within the Navajo Nation. *Id.*

The Navajo Nation Supreme Court found the district court correctly decided it had jurisdiction over the dispute as there was a significant nexus resulting from a significant portion of the performance of the contracts happening on tribal land within the Navajo Nation. *Id.* The Court held "that in situations where a contract has a sufficient nexus to activity on tribal land within the Navajo Nation, the cause of action arises there for purposes of the Navajo Nation's jurisdiction . . . [regardless of] whether the contract itself was within the Navajo Nation." *Id.*

This court should adopt the Navajo Nation Supreme Court's reasoning. Regardless of the fact that the contract between the Petitioners and the YIN was signed off the reservation, this court has jurisdiction because there is a sufficient connection between the contract and the economic activity that occurred on tribal land. Not only did Petitioners perform parts of

their responsibilities on tribal land, delivering the quarterly business reports at council meetings on the reservation, but the financial advice provided had a direct effect and significant nexus to the economic development and functioning of the YIN and the EDC on the Reservation. The YIN created the EDC, who received the advice from Petitioners, with the purpose of creating and assisting in the development of successful economic endeavors, of any legal type or business, on the Reservation. . .” R. 1.

2. There is a nexus between the parties’ consensual relationship and YIN’s breach of contract claim.

The YIN’s breach of contract claim arises out the contractual relationship between YIN and Petitioners. There must be a nexus between the consensual relationship and the lawsuit being brought in Tribal Court. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997).

In *Strate*, a suit was filed in Tribal Court by a non-Indian plaintiff against a non-Indian defendant after they were involved in a car accident on a state highway on tribal land. *Id.* at 442. Although the highway cut directly through the Fort Berthold Reservation, the state-controlled highway where the accident occurred was non-tribal land. *Id.* at 454. After applying the *Montana* test, the Court determined the dispute was “distinctly non-tribal in nature” because it “arose between two non-Indians involved in [a] run-of-the-mill accident.” *Id.* at 457. The court held that although A–1 had a “consensual relationship” with the Tribe, “Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.” *Id.* Thus, no nexus existed between the consensual relationship and the reason the action was brought in Tribal Court.

This matter differs from *Strate* as there is a direct connection between the Petitioners and YIN’s contractual relationship and the YIN’s breach of contract claim it brought before the Tribal Court. The contract between the parties explicitly required absolute confidentiality

regarding any and all tribal communications and economic development plans. R. 1. On several occasions, consistent with the terms of the contract, the YIN sought out Petitioners' advice and guidance on the development of a marijuana operation. R. 2. However, Petitioners breached the contract when they elected to inform the Arizona Attorney General of the Nation's plans to cultivate marijuana as they were personally opposed to a marijuana operation. *Id.* Subsequently, the A.G. wrote the Nation and the EDC a cease and desist letter regarding the development of recreational marijuana operations. *Id.* This prompted the YIN to bring this action in Tribal Court. An undeniable nexus exists between the parties' consensual relationship and the reason the YIN brought this action in Tribal Court. Thus, the Tribal Court has jurisdiction over Petitioners in this civil action.

3. Petitioners' breach of contract threatens and directly affects the economic security, health, and welfare of the tribe.

As a result of the Petitioners' breach of contract, there is a threat from the A.G. which has a direct effect on the YIN's economic security, health, and welfare. Under 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." 450 U.S. 544, 566 (1981). However, "the conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

In *Plains Commerce Bank*, the Court determined the sale of formerly Indian-owned fee land to a third party was considered "disappointing to the Tribe," but could not be called "catastrophic" for the tribal self-government. *Id.* The Court did not believe the land's resale

to another non-Indian hardly “imperil[ed] the subsistence or welfare of the Tribe.” *Id.* As a result, the court held the second *Montana* exception did not apply. *Id.*

This matter differs from *Plains Commerce Bank* as the tribe’s interest is different. The Tribe seeks to increase its economic resources pursuant to the Federal government’s policy of “Self Determination.”⁶ Specifically, the tribe has an interest in exploring the possibility of engaging in marijuana cultivation and sales in order to facilitate tribal economic development which is consistent with the Indian Reorganization Act.⁷ Historically, the federal government has “encouraged Indian Nations to exploit business opportunities as a means to generate revenue to pay for government services.” Fletcher, *supra*, 103.

Unlike *Plains Commerce Bank*, the YIN’s ability to explore the development of a marijuana operation for economic purposes is not merely a piece of tribal land that the tribe has or could proceed without. 554 U.S. at 341. Instead, the cultivation of marijuana presents the tribe with an opportunity to further its economic interests in the event that states legalize marijuana for medical and recreational purposes. Although the YIN has proceeded without a marijuana operation, denying the tribe the ability to explore the possibility of such an operation would certainly “interrupt” the economic security and welfare of the tribe and its tribal members. At its core, denying the YIN the possibility of exploring and pursuing business opportunities would “imperil the subsistence” of the tribal community. Here, the YIN’s ability to seek out business opportunities as a means to generate revenue is certainly necessary to “avert catastrophic consequences.”⁸ Therefore, Petitioners’ breach of contract

⁶ “[t]he strongest Congressional and Executive branch support for the development of tribal governments, reservation economies, and Indian people. . .” Fletcher, *supra*, 103.

⁷ 25 U.S.C. § 477.

⁸ “th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (citing Cohen § 4.02[3][c], 232 n.220).

poses a threat and a direct effect on the YIN's economic security and welfare of the tribe, not only presently but in the future.

The Yuma Indian Nation Court has jurisdiction over YIN's breach of contract claim against Petitioners because the YIN Tribal Court: (1) maintains its sovereign power to adjudicate civil disputes; (2) has personal and subject matter jurisdiction over this particular civil dispute; and (3) retains civil adjudicative jurisdiction pursuant to the *Montana* exception. Therefore, the YIN respectfully requests this court affirm the Yuma Indian Nation Trial Court's decision to dismiss Petitioners' counter claims against the YIN, YIN EDC, Captain, and Bluejacket.

E. This Court Should Not Stay the Civil Action While Petitioners Seek a Ruling in Arizona Federal District Court because the Petitioners Must First Exhaust all Tribal Remedies.

Federal courts are "courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). The power of an Indian tribe to compel a non-Indian to submit to the civil jurisdiction of a tribal court is considered a federal question.⁹ *Nat'l Farmers Union*, 471 U.S. at 852. It is undisputed that a federal question exists with regard to the YIN's Tribal Court authority to exercise civil jurisdiction over the non-Indian Petitioners. Subsequently, the Arizona Federal District Court has the authority to determine whether the YIN Tribal Court has jurisdiction over the Petitioners in this case. However, the United States Supreme Court has required federal courts to stay these types of cases in order to allow the Tribal Court to fully litigate the issue in Tribal Court first. *Id.* at 855-57.

1. Petitioners Must first Exhaust all tribal remedies.

⁹ "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

The YIN Tribal Court should proceed with adjudicating this civil action because the Petitioners must first exhaust all tribal remedies. Exhaustion of tribal remedies is required when the Federal court is presented with a question of whether a tribal court has the authority to exercise civil subject-matter jurisdiction over a non-Indian. *Id.* at 857. Thus, the review of this matter should be conducted in the “first instance in the Tribal Court itself.”¹⁰ *Id.* at 856.

Exhaustion of tribal remedies is required for three reasons. First, as a matter of comity exhaustion promotes the federal policy of encouraging tribal self-government and self-determination. *Id.* Tribal courts have an important role in tribal self-government and the Federal Government consistently encourages their development. *Iowa Mut. Ins. Co.*, 480 U.S. at 18. Here, the YIN Tribal Court’s ability to resolve this matter demonstrates the Tribe’s ability and capacity to enact laws and manage its own affairs.

Second, exhaustion allows Tribal Courts to facilitate the “administration of justice in the federal court. . . by [developing a] full record. . . in the Tribal Court. . .” *Nat’l Farmers Union*, 471 U.S. at 856. Allowing the Tribal Court to facilitate the administration of justice will allow the Tribal Court to develop a full factual record of the proceedings and reasoning for asserting jurisdiction. Moreover, the Tribal Court will have the opportunity “to rectify any errors.” *Iowa Mut. Ins. Co.*, 480 U.S. at 16.

Third, exhaustion allows the tribal court to provide the federal court with its expertise in tribal matters. *Nat’l Farmers Union*, 471 U.S. at 857. In this matter, the Arizona Federal District Court will benefit from the Tribal Court’s judgment because the Federal Court will have the opportunity to read the opinion of the tribal judge who works directly with tribal

¹⁰ The Court’s “cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination [and that] policy favors . . . the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. *Nat’l Farmers Union*, 471 U.S. at 845.

codes, treaties, and case law. The Federal Court will also be informed on how tribal judges interpret and utilize tribal laws in combination with federal and states laws in tribal matters. This deference to the Tribal Court is consistent with the rationale underlying exhaustion and should be used in this matter.

Finally, adjudication by any non-tribal court will infringe on the tribe's law-making authority because the tribal court is best qualified to interpret and apply its tribal laws. *Iowa Mut. Ins. Co.*, 480 U.S. at 19. Until the YIN Tribal Court review is complete, the Tribal Court has not had a full opportunity to evaluate the claim and therefore, the federal courts should not intervene. *Id.* at 17. The YIN Tribal Court should proceed with adjudicating this civil action because the Arizona Federal District Court requires the Petitioners to exhaust all tribal remedies.

2. The YIN's Tribal Court jurisdiction over this action is not patently violative of an express jurisdiction prohibition.

The YIN's Tribal Court jurisdiction over this action satisfies the *Montana* test and thus, is not patently violative of an express jurisdictional prohibition. In *Montana*, the court noted that exhaustion would not be required when an action is patently violative of express jurisdictional prohibitions. 471 U.S. at 857 n.21. In *Strate v. A-1 Contractors*, the Court stated that:

When . . . 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. . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement. . . must give way, for it would serve no purpose other than delay.

520 U.S. 438, 459 n.14 (1997). The Eighth Circuit reserved the express jurisdictional prohibition exception for instances where "the very tribal *remedies* which the plaintiffs

would have had to exhaust before challenging tribal authority in federal court were preempted by express statutory provisions.” *Sprint Commc'ns Co. v. Wynne*, 121 F. Supp. 3d 893, 902 (D.S.D. 2015) (citing *Reservation Tel. Co-Op v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181, 185–86 (8th Cir. 1996)). The petitioners have the burden of making a “substantial showing . . . to invoke the . . . exception to the tribal exhaustion rule.” *Sprint Commc'ns Co.*, 121 F. Supp. 3d at 902 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 910 F. Supp. 2d 1188, 1197 (D.S.D. 2012)).

The Petitioners have not made a “substantial showing” that the YIN’s tribal remedies are preempted by any express statutory provision. Meanwhile, the YIN has demonstrated the Petitioners’ conduct is covered by the *Montana* test. Moreover, the exhaustion requirement in this matter would not cause any unnecessary delay and therefore, the express jurisdiction prohibition exception is not applicable in this matter.

3. Petitioners Seek to litigate this matter in the Arizona federal court in attempt to shield themselves from the YIN tribal laws.

Petitioners are seeking to resolve this matter in federal court in an effort to avoid tribal law and authority. The United States Supreme Court has recognized that unconditional access to the federal forum places it in direct competition with the tribal courts and thus impairs the tribal court’s authority over reservation affairs. *Iowa Mut. Ins. Co.*, 480 U.S. at 16; *see also Santa Clara Pueblo*, 436 U.S. at 59. Petitioners seek to utilize this competition amongst court forums in hopes that the federal court shields them from tribal authority.

There has been a longstanding argument that tribal courts provide Indians with a “shield” from non-tribal court authority. *See Laurie Reynolds, Jurisdiction in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. Rev. 359, 380 (1997). In some jurisdictions, Indian parties who objected to non-tribal adjudication were

criticized for pursuing their “special status as an Indian as a shield to protect them from off reservation obligations.” *Id.*; *see also Natewa v. Natewa*, 84 N.M. 69, 71 (1972).

Interestingly, many non-Indian parties challenge matters involving Indians or issues arising on reservations in state and federal courts. However, not one of those non-Indian parties has been accused of trying to shield themselves from tribal courts and laws. Reynolds, *supra*, at 381.

Unfortunately, in describing tribal courts one federal court went as far to disparage tribal court proceedings as “kangaroo court.” *Id.* at 380 (citing *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919, 923 (D. Mont. 1988)). In another case, the federal court refused to grant deference to the holding of the Cheyenne-Arapaho Supreme Court because it believed the tribal court could not be impartial in a case involving tribal interests. Reynolds, *supra*, at 380 (citing *Mustang Production Co. v. Harrison*, 890 F. Supp. 995, 1000 (W.D. Okla. 1995)). In order to avoid these types of misguided characterizations, the YIN Tribal Court must exercise the powers bestowed upon it by the YIN Constitution, federal and tribal statutes, treaties, and judicial decisions in adjudicating this manner.

II. UNWAIVED SOVEREIGN IMMUNITY PROTECTS THE YIN, EDC, AND THIRD-PARTY DEFENDANTS FROM THE PETITIONER’S COUNTERCLAIMS.

A. The YIN and the EDC are Immune to Suit as they did not Waive their Sovereign Immunity.

The trial court dismissal and questions of sovereign immunity are reviewed *de novo*. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The Navajo Nation Supreme Court considers sovereign immunity from suit a legal conclusion and also reviews the trial court’s legal conclusions *de novo*. *Navajo Housing Authority v. Bluffview Resident*

Mgmt. Co., 4 Am. Tribal Law 700, 706 (Nav. Sup. Ct. 2003). The YIN Tribal Constitution, and the provisions of statutory law adopted by the tribe do not address sovereign immunity or potential waivers of sovereign immunity. Therefore, the Court may look to federal court decisions but federal precedent is not binding.

Tribal sovereign immunity is a longstanding federal legal tradition. Indian tribes are recognized as “distinct, independent political communities, retaining their original natural rights” *Worcester*, 31 U.S. at 559. Indian tribes are also considered “separate sovereigns pre-existing the Constitution.” *Bay Mills*, 134 S. Ct. at 2030. *See also Talton v. Mayes*, 163 U.S. 376, 382 (1896) (noting that tribal sovereignty does not spring from the United States Constitution). As a result, Indian tribes are sovereign political bodies able to exercise “inherent sovereign authority.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

As political sovereigns, Indian tribes possess all “aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependent status.” *Wheeler*, 435 U.S. at 323. One of those aspects of sovereignty is the “common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo*, 436 U.S. at 58. This common law doctrine of sovereign immunity extends to all tribal activities, whether on-reservation or off-reservation and regardless of whether the activity is commercial or governmental in nature.¹¹ *Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 757 (1998).

¹¹ Sovereign immunity has been found to extend to tribal governments (*Bay Mills Indian Community*, 134 S. Ct. at 2030); tribal commercial entities and corporations operating on and off reservation (*Kiowa Tribe of Okla.*, 523 U.S. at 754-758; and tribal officials (*Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994)).

Today, tribal sovereignty is considered “settled law.” *Id.* at 756. An Indian tribe’s sovereign immunity extends to “suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” *Id.* at 760; *see also C & L Enter., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 414 (2001); *Bay Mills*, 134 S. Ct. at 2038-39 (declining to revisit *Kiowa Tribe of Okla.* and confirming that tribal sovereign immunity extends to commercial dealings on and off reservation).

A tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. *Oklahoma Tax Comm’n*, 498 U.S. at 509. Sovereign immunity has also been found to extend to suits stemming from compulsory counterclaims. *See United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). Supreme Court precedent could not be clearer that “a tribe’s decision to go to court doesn’t automatically open it up to counterclaims—even compulsory ones.” *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015).

The Yuma Indian Nation (YIN) is a federally recognized tribe and therefore, under federal precedent, would be protected by sovereign immunity from the Petitioners’ counterclaims. The trial court dismissed all of the Smiths counterclaims against YIN and third-party defendants due to sovereign immunity. R. 3.

The only way the YIN is not protected by sovereign immunity is if the tribe waived their sovereign immunity. An Indian tribe is immune from suit unless “Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla.*, 523 U.S. at 754. The Court has a role in sovereign immunity jurisprudence, but its role is not to render

decisions to significantly cut away at the scope of tribal sovereign immunity that tribes possess as “[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.” *Bay Mills*, 134 S. Ct. at 2037. There has been no Congressional action that could constitute a waiver of sovereign immunity and therefore, the only way the tribe’s sovereign immunity could be waived is by tribal waiver.

1. The YIN did not Waive Their Sovereign Immunity as a Waiver of Sovereign Immunity Needs to be Unequivocal.

It is settled law that “a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 58 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). An effective waiver of sovereign immunity must be clearly expressed. *Kiowa Tribe of Okla.*, 523 U.S. at 765. The YIN acted in two ways that might be construed as a waiver, but neither constitute a waiver as they were not unequivocally expressed.

First, the contracts between the YIN and Petitioners do not waive sovereign immunity. The language in the contracts between the YIN and Petitioners do not waive sovereign immunity as the waiver is not unequivocally expressed. The only language in the Thomas-YIN contract that refers to sovereign immunity is that “any and all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction.” R. 1. There is no waiver in the subsequent Carol-YIN contract as it is identical to the Thomas-YIN contract and both parties are required to comply with the Thomas-YIN contract. R. 2.

Although the “competent jurisdiction” language might look like it could be a waiver as it might imply the tribe can be in a lawsuit, it is not clear enough to be unequivocal and therefore, does not constitute a waiver of sovereign immunity. Unlike in *C & L Enter.*, where the court found the Tribe waived their sovereign immunity, the contract between YIN and

Petitioners contained no arbitration agreement. 121. S. Ct. at 419. The Court in *C & L Enter.* found it persuasive that the arbitration agreement waived sovereign immunity as the Tribe agreed by express contract “to adhere to certain dispute resolution procedures.” *Id.* In agreeing to these dispute resolution procedures, the arbitration clause not only consented to arbitration but the “enforcement of arbitration awards in . . . state court.” *Id.* There is no arbitration clause here as the YIN did not agree to any dispute resolution procedures.

Secondly, the YIN did not waive their sovereign immunity through the creation of the EDC. In *Bay Mills*, the court found that the Tribe did not waive their tribal immunity in a tribal gaming ordinance creating the Tribal Gaming Commission. 134 S. Ct. at 2029. The language in *Bay Mills* creating a tribal gaming commission contained an ordinance that included among the Commission’s powers the ability to “sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity.” *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 415 (6th Cir. 2012). The compact between the state and the tribe also contained a provision within an arbitration section that said “[n]othing in this Compact shall be deemed as a waiver” of either the tribe or the state’s sovereign immunity. *Id.*

The language the court found was not a waiver in *Bay Mills* is similar to the language the YIN used to create the EDC. The ability “[t]o sue or be sued in courts of competent jurisdiction” in *Bay Mills* is nearly identical to the language in the tribal commercial code creating the EDC and authorizing it to “sue and be sued.” The YIN also included the language that the EDC was protected by sovereign immunity to the fullest extent of the law.

R. 2. In *Bay Mills*, the appellate court rejected the argument that the commercial entity’s

authority to sue and be sued was a waiver of sovereign immunity for the tribe as a “tendentious, junk drawer argument.” *Id.*

In *Navajo Housing Authority*, the Navajo Supreme Court found the Navajo Nation Code required the Navajo Housing Authority (NHA) to waive their sovereign immunity from suit in any agreement with another party and even if they failed to explicitly do so their sovereign immunity was automatically waived under the Code. 8 Nav. R. 378, 4 Am. Tribal Law 694, 706 (Nav. Sup. Ct. 2003). As a result of the automatic waiver of sovereign immunity, the court held that the NHA possessed no sovereign immunity from counterclaims. *Id.*

Navajo Housing Authority differs from our case as, unlike in the Navajo Nation, there is no YIN Code automatically waiving EDC sovereign immunity. Rather, in the charter creating the EDC, the YIN mandates that the EDC, its board, and all employees are protected from sovereign immunity to the fullest extent of the law. R. 2. In fact, it is explicitly stated in the charter that this provision was included to protect the EDC and YIN from unconsented litigation and assist in the success of the EDC’s endeavors. *Id.* The YIN did not waive their sovereign immunity or the EDC’s sovereign immunity through a creation of the tribal entity.

There is nothing in the YIN and Petitioners contracts that waives YIN’s sovereign immunity from suit as the competent jurisdiction language alone is not an unequivocal waiver of sovereign immunity. There is also nothing in the creation of the EDC that waives the YIN’s sovereign immunity from suit.

2. Any Uncertainty in Whether There Has Been a Waiver is Found in Favor of the YIN.

Waivers of sovereign immunity must be strictly construed in favor of the sovereign. *Orff v. United States*, 545 U.S. 596, 601-02 (2005). This means the language employed to

constitute a waiver must be closely examined to determine what parties, assets, claims, and in what courts the waiver has been granted. *See, e.g., Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (finding that a state’s consent to suit in its own courts is not a waiver of all sovereign immunity, including immunity from suit in federal court). As a result of the waiver being strictly construed towards the sovereign, when an Indian tribe waives its immunity it sets the limits of the waiver, and any doubts about the waiver’s scope must be resolved in favor of preserving the sovereign’s immunity. *Ramey Constr. Co. v. Apache Tribe of the Mescalero Apache Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). The YIN did not waive its sovereign immunity and if there is any uncertainty as to whether the “competent jurisdiction” language in the contract or the “sue and be sued” language in the creation of the EDC waived sovereign immunity then the conflict must be resolved in favor of the Tribe.

B. The EDC is an Arm-of-the-Tribe and is Protected from Suit as a Result of the YIN’s Sovereign Immunity.

There is no set formula for whether a particular tribal organization is an arm-of-the-tribe entitled to share the Tribe’s sovereign immunity from suit although lower federal district courts have developed tests to determine whether a tribe’s commercial entity is considered an arm-of-the-tribe and thus, protected from suit. The Tenth Circuit Court of Appeals has decided that whether an entity is entitled to sovereign immunity as an arm-of-the-tribe turns on several factors, including:

- (1) the method of creation of the [entity]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y].

United States ex rel. Cain v. Salish Kootenai College, Inc., 862 F.3d 939, 944 (10th Cir. 2017) (citing *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014)). The

Tenth Circuit has found the test from *White* is the appropriate test for determining whether an entity is an arm of the tribe as using Eleventh Amendment case law would be “anachronistic” because unlike States, the Indian tribes were not at the Constitutional Convention. *Id.*

The Tenth Circuit has also created a similar test, but added a sixth factor which is: “whether the policies underlying sovereign immunity (protection of the tribe’s monies, preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians) are served by granting immunity to the entity.” *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

If the Court decided to adopt a similar arm-of-the-tribe test as the Ninth or Tenth Circuit then the EDC would be considered an arm-of-the-tribe covered by sovereign immunity. In *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, the first part of the test as to how the entity is created looks to if the “entity is organized under the tribe’s laws or constitution rather than Federal law. . .” 658 N.E. 2d 989, 992 (N.Y. 1995) (found it persuasive that a community fund was an arm of the tribe because the fund was established to enhance the health, education, and welfare of Tribe members). If the Court adopted a test like *Ransom*, then the YIN creating the EDC through a tribal commercial code would be persuasive. R. 1. The Tribal Council created the EDC through a corporate charter as a wholly owned subsidiary of the tribe and as an arm-of-the-tribe. R. 1. The EDC is organized under the YIN laws rather than the federal governments and as such can be considered an arm-of-the-tribe.

The purpose of the EDC also shows it is an arm-of-the-tribe. The purpose of the EDC stated in the charter 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.” R.

1. The EDC is required to keep detailed corporate and financial records and submit them quarterly to the Tribal Council for review and approval. *Id.* These types of commercial activities and how they are tracked show the purpose of the EDC is to help the tribe launch successful business ventures and that the EDC was created to assist the tribe in earning revenue for the health and safety of the Tribe as they similar to and serve those of the tribal government.

The structure, ownership, and management also show the EDC is an arm-of-the-tribe.

The factors put forth in *Ransom* to analyze the structure, ownership, and management are:

the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body. . .

658 N.E. 2d at 992. Although the EDC is to be operated by its own board of directors, the Tribal Council selected the initial board of directors and retains the authority to remove any director for no cause, at any time by a 75% vote. R. 1. The board of directors also has requirements set forth by the charter that at all times, three of the five-person board of directors have to be tribal citizens. *Id.* These requirements make it so that the operations body consists mainly of members of the tribe. The tribal preference in hiring employees and contracting with outside entities make it so that the EDC employed 25 full-time tribal citizens every year since its creation in 2009. Also, the EDC being allowed to buy and sell real property on and off the reservation in fee simple title, and buy other forms of property, could show the tribe has the legal title or ownership of property used by the EDC. R. 2.

The fact that the Tribal Council mandated in the charter that the EDC, its board, and all employees are protected by sovereign immunity to the fullest extent of the law in order to protect the entity and the Nation from unconsented litigation shows the YIN intended to share their sovereign immunity with the EDC. Although the “sue and be sued” language could be counterintuitive to this preposition, it does not mean that the EDC cannot enjoy the YIN’s sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2029.

Also, the financial relationship between the YIN and the EDC shows the EDC is an arm-of-the-tribe. The EDC is required to pay fifty percent of all net profits to the YIN general fund annually. R. 2. Although the EDC has only repaid \$2 million to the YIN annual fund, this lack of success is not determinative of their status as an arm-of-the-tribe. *Id.*

Finally, if the Court adopted the sixth factor from the Tenth Circuit, the protection of the EDC using the YIN’s sovereign immunity serves the policy objectives of granting sovereign immunity to the tribe. Granting sovereign immunity to the EDC allows the EDC to function as an arm-of-the-tribe in pursuing business opportunities and advancement. It also allows the EDC to function for the tribal government which it was chartered to do. The Court should find that the EDC is an arm-of-the-tribe and therefore protected by the YIN’s sovereign immunity.

C. The EDC CEO and Accountant are Protected by Sovereign Immunity.

In general, “tribal officers are clothed with the Tribe’s sovereign immunity,” *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994), provided that they are “acting in their representative capacity and within the scope of their authority.” *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989). Although, in *Santa Clara Pueblo* the Supreme Court stated that “[a]s an officer of the Pueblo, petitioner Lucario Padilla is not

protected by the tribe's immunity from suit.” *Santa Clara Pueblo*, 436 U.S. at 59 (citing *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171–72 (1977));¹² *Ex parte Young*, 209 U.S. 123 (1908)).

In *Ex parte Young* the Supreme Court held that a state official could not utilize the state’s sovereign immunity to bar a claim that the official was violating the United States Constitution. 209 U.S. at 159-60. *Ex parte Young* “rests on the premise-less delicately called a ‘fiction’-that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation, and does not apply when the state is the real, substantial party in interest.” *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

Federal Supreme Court cases establish that, in the context of lawsuits against state or federal employees or entities, courts should “look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). To make this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine first, whether the remedy sought is truly against the sovereign. *Id.* (citing *Ex parte New York*, 256 U.S. 490, 500-502 (1921)). A monetary judgment against a tribal official is prohibited. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). A direct “award of damages” from the sovereign’s treasury is prohibited. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Lawsuits brought against employees in their official capacity “represent only another way of pleading an action

¹² In *Pullayup*, the Supreme Court held that sovereign immunity does not “immunize individual members of the Tribe.” 433 U.S. at 171-72.

against an entity of which an officer is an agent” and may also be barred by sovereign immunity. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985)).

The Petitioners implicated the third-party defendants Bluejacket and Captain by counterclaiming against the YIN for monies due under their contracts and for defamation for impugning their professional skills. R. 3. The Petitioners made the same claims against Bluejacket and Captain as they made against the YIN. The Petitioners seek monetary damages against the real party in interest which is the YIN and potentially the EDC.

The real party in interest is the tribe and not the employee and thus, sovereign immunity bans the suit and protects Bluejacket and Captain in their individual capacities. “Personal capacity suits . . . seek to impose individual liability upon a government officer for actions taken under state law.” *Id.* (citing *Hafer*, 502 U.S. at 25). Petitioners cannot sue Bluejacket and Captain in their individual capacity as neither Bluejacket or Captain’s actions were illegal or violated tribal law.

Although petitioners could possibly use *Ex parte Young* to sue Bluejacket and Captain in their individual capacity for injunctive relief, *Ex parte Young* is not available as they are seeking monetary damages as a remedy and the Tribe is the real party in interest. In *Bay Mills*, the court said that “tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.” 134 S. Ct. at 2035. In *Sanders v. Anoaubby*, the court held that “the relief Sanders requests-\$1 million and other trivial relief-are not available remedies under *Ex parte Young*; the doctrine is available only when a party seeks injunctive or declaratory relief.” 631 F. App’x 618, 619 (10th Cir. 2015).

The Petitioners also cannot sue Bluejacket and Captain in their official capacities. A suit against an employee in their official capacity is a suit against the sovereign. *Id.* (citing *Graham*, 473 U.S. at 165-66). Suits brought against employees in their official capacity “represent only another way of pleading an action against an entity of which an officer is an agent.” *Id.* (citing *Graham*, 473 U.S. at 165-66).

Finally, although the tribe decided to indemnify its employees in the creation of the EDC this does not convert an action against the employee into an action against the tribe. *Id.* The “critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.” *Id.* The tribe, not Bluejacket or Captain would be bound by the judgement and therefore, the tribe is the party in interest and Bluejacket and Captain are protected by sovereign immunity and cannot be sued in their individual or official capacity using *Ex parte Young*.

CONCLUSION

This Court has the personal and subject matter jurisdiction to hear the case against Petitioners and should not stay this civil action while the Petitioner seeks a ruling in Arizona Federal Court because the petitioners must exhaust all tribal remedies. Moreover, the Petitioners should not be allowed to use the Arizona Federal Court as a shield to tribal authority. Therefore, the YIN tribal court should proceed to adjudicate this civil action.

Sovereign immunity protects the YIN from any court actions brought by Petitioners against the YIN as they have not unequivocally waived their sovereign immunity. Furthermore, the EDC is also protected by sovereign immunity as an arm-of-the-tribe. The EDC CEO, Captain, and the EDC Accountant, Bluejacket, are also protected by the tribe’s sovereign immunity in both their individual and official capacities.