

No. 17 – 024

YUMA INDIAN NATION SUPREME COURT

YUMA INDIAN NATION,

Plaintiff/Appellee

v.

THOMAS SMITH & CAROL SMITH,

Defendants/Appellants

On Appeal from the

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Questions presented

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.
2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

Statement of the case

A statement of the proceedings

A statement of the facts)

Summary of argument (optional)

Argument

- I. *The Yuma Indian Nation is a federally recognized tribe under 25 U.S.C. §477, thus protected by Sovereign Immunity.*

Tribes enjoy sovereign power that is granted by the federal government and established through historical Supreme Court decisions. Supreme Court Justice Marshall's opinion in *Worcester v. Georgia* (1832) shaped Indian law. *Worcester v. Georgia* (1832) 31 U.S. 515, 536 [8 L.Ed. 483, 492]. The *Worcester* decision initiated the Indian canons of construction. *Id.* Additionally, *Worcester* shaped how the United States construes its relationship with Indians. *Id.* Justice Marshall held, the Cherokee Nation constituted a nation holding sovereign powers. *Id.* Then in 1934, The Indian Reorganization Act ("IRA") was enacted to address the status of Indians. 25 USCS § 477. One of the goals of the IRA was to establish the rights of tribes to form business and other organizations. 25 U.S.C.S. § 461 et seq. The YIN is a federally recognized tribe under IRA 25 U.S.C. §477. Tribes that are federally recognized under the IRA have protections "The IRA protects tribal assets from execution to satisfy a money judgement against a tribal corporation¹". This protection is one of the benefits of tribal sovereign immunity. The YIN's sovereign immunity is established through Congressional Acts and Supreme Court decisions.

¹ 1-4 Cohen's Handbook of Federal Indian Law § 4.04

A. The YIN did not expressly waive sovereign immunity.

A tribe clearly documents a waiver of sovereign immunity. This documentation must be unequivocally expressed by the tribe “It is well settled that a waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. That expression must also manifest the tribe's intent to surrender immunity in "clear" and unmistakable terms. “*Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1014 (9th Cir. 2016).

B. Sovereign immunity was not waived by Congressional act.

Congress can waive tribal immunity. This waiver can only be abrogated through constitutional provisions “Congress may abrogate state sovereign immunity only when its intent is clearly stated and it acts pursuant to a constitutional provision granting Congress the power to abrogate.” *People ex rel. Owen v. Miami Nation Enterprises*, 2 Cal. 5th 222, 386 P.3d 357 (2016).

C. YIN Tribal Code expressly retains YIN’s sovereign immunity

The YIN Tribal Code verifies the Tribe’s intent to strictly control the waiver of sovereign immunity. The Tribe’s corporation code mandates:

Sovereign immunity of the Tribe not waived. By the adoption of this Code, the Tribe does not waive its sovereign immunity or consent to suit in any court, federal, tribal or state, and neither the adoption of this Code, nor the incorporation of any corporation hereunder, shall be construed to be a waiver of the sovereign immunity of the Tribe or a consent to suit against the Tribe in any such court. Tit. 11 ART. 1.02.

II. The YIN Economic Development Corporation is immune from suit.

A. Tribal corporations enjoy tribal sovereign immunity as “arms of the tribe”.

The YIN Economic Development Corporation is a tribally chartered corporation. A tribally chartered corporation may assert tribal immunity if it deemed an “arm of the tribe”. The “arm of the tribe” analysis is a six factor test “Regarding whether tribally affiliated entities are immune from suit, *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* adopted a six-factor test that includes (1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for them to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting them immunity. Although *Breakthrough* recognized that the financial relationship between a tribe and its economic entities

is a relevant measure of the closeness of their relationship, it rejected the notion that financial relationship or any other single factor is a dispositive inquiry. People v. Miami Nation Enters., 2 Cal. 5th 222, 222, 211 Cal. Rptr. 3d 837, 841, 386 P.3d 357, 361 (2016)

B. The EDC charter did not contain an express waiver of tribal-sovereign immunity.

Although a “sue and be sued” clause was provided in the charter of the EDC, this was not enough to waive sovereign immunity of a tribal corporation that is wholly owned by the tribe “Provision in Indian corporate charter granting power to “sue and be sued” rendered the corporation amenable to suit, despite contention that such clause was not an absolute right but rather a “power” over which the Indian community had control. Indian Reorganization Act, § 17, 25 U.S.C.A. § 477.” *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127 (D. Alaska 1978).

III. The EDC CEO is immune from suit.

A. The EDC CEO is not acting in his individual capacity.

The CEO of the EDC is immune from suit because he acted in his official capacity for the tribe “In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1287, 197 L.Ed.2d 631, 643 (2017).

B. The Action is not under the color of state law

“Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer **for actions taken under color of state law**. Officers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1287, 197 L.Ed.2d 631, 643 (2017).

IV. The EDC employee/accountant is immune from suit.

A. The employee is not the real party in interest.

“In a suit brought against a tribal employee in his or her individual capacity, for a tort committed by the employee within the scope of his or her employment, the employee, not the Indian tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1287, 197 L.Ed.2d 631, 643 (2017).

B. The employee did not waive the YIN's sovereign immunity.

An employee is not empowered to waive a tribe's immunity because an employee does not have the authority to do so. Waiver of sovereign immunity is a matter of tribal law. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006).

C. The YIN Tribal Code retains sovereign immunity for its employees.

The YIN Tribal code does not allow employees to waive sovereign immunity.

2-106 No effect upon sovereign immunity. Nothing in this Act shall be construed to be a waiver of the sovereign immunity of the Tribe, its officers, employees, agents, or political subdivisions or to be a consent to any suit beyond the limits now or hereafter specifically stated by Tribal law. Tit. 2 Art. 1.

D. The employee/accountant is protected because she is acting on behalf of a wholly owned tribal corporation.

“Employees' status as employees of tribal enterprise, rather than tribal officers or members of Business Committee, did not change sovereign immunity analysis; therefore, chief, managers, and employees' motion to dismiss based on tribal sovereign immunity was granted.” *Native Am. Distrib. v Seneca-Cayuga Tobacco, Co.* (2007, ND Okla) 491 F Supp 2d 1056, affd (2008, CA10 Okla) 546 F3d 1288, 2008-2 CCH Trade Cases P 76395.

Conclusion

The YIN, EDC, CEO, and Accountant/Employee all are protected under the Tribe's sovereign immunity.