

IN THE YUMA INDIAN NATION SUPREME COURT

CASE NO. 17-024

YUMA INDIAN NATION,
PLAINTIFF-APPELLEE,

v.

THOMAS SMITH & CAROL SMITH
DEFENDANTS-APPELLANTS

INTERLOCUTORY APPEAL FROM THE YUMA INDIAN NATION TRIAL COURT

APPELLANT'S BRIEF

ATTORNEYS FOR APPELLANTS
TEAM ID: 136

NATIONAL NATIVE AMERICAN LAW STUDENTS ASSOCIATION
MOOT COURT COMPETITION

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QUESTIONS PRESENTED

- I. 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.
- II. 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

In 2007, the Yuma Indian Nation (“YIN”), located in southwest Arizona, signed a contract with Thomas Smith, a certified financial planner and accountant. Thomas agreed to provide the Nation with financial advice on an as-needed basis regarding economic development issues. The contract was signed by the parties at Thomas’ office in Phoenix, Arizona. Thomas lives and works in Phoenix. The contract provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction. The contract also required Thomas to maintain absolute confidentiality regarding any and all tribal communications and economic development plans.

From 2007 to 2017, Thomas provided the Nation with financial advice on a wide range of economic development issues. He exchanged emails and telephone calls on a nearly daily basis with various tribal chairs and Tribal Council members, and, after the Nation created the YIN Economic Development Corporation (“EDC”) in 2009, Thomas primarily communicated with

Fred Captain, the EDC CEO, and EDC employee/accountant Molly Bluejacket. Thomas also prepared and submitted to the YIN Tribal Council written reports on a quarterly basis and presented these reports in person at Council meetings on the reservation.

The Nation created the EDC under a 2009 tribal commercial code to promote the prosperity of the Nation and its citizens. The Tribal Council funded the EDC with a one-time \$10 million loan from the Nation's general fund. The primary purpose of the EDC is stated in the corporate charter that created it: "to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona." The commercial code authorizes the Nation, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. The Tribal Council created the EDC via a corporate charter as a wholly owned subsidiary of the Nation and as an "arm-of-the-tribe." But the EDC is to be operated by its own board of directors consisting of five people who must be experienced in business endeavors. 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. The charter provided that the sitting directors would by majority vote elect or reelect a person for the expiring seat. At all times, three of the directors have to be tribal citizens and two have to be non-Indians or citizens of other tribes. The Tribal Council retained the authority to remove any director for cause, or for no cause, at any time, by a 75% vote.

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. However, no debts of the EDC could encumber, or implicate in any way, the assets of the Nation. The EDC also does not possess the power to borrow or lend money in the name of, or on

behalf of, the Nation or to grant or permit any liens or interests of any kind to attach to the assets of the Nation. 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. Finally, fifty percent of all EDC net profits are to be paid to the YIN general fund on an annual basis. Unfortunately, due to a lack of success in its endeavors to date, the EDC has only repaid the Nation \$2 million.

The charter requires the EDC to apply tribal preference in hiring employees and contracting with outside entities. The EDC has employed an average of 25 tribal citizens full-time every year since its creation in 2009. 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. The Council included this provision, as it states in the charter, to protect the entity and the Nation from unconsented litigation and to assist in the success of the EDC's endeavors.

In 2010, with the written permission of the Nation's Tribal Council, Thomas signed a contract with his sister Carol Smith who lives and works in Portland, Oregon. The contract she and Thomas signed is identical to the one Thomas signed with the Nation in 2007 and, in fact, it includes a term that both parties are required to comply with the YIN-Thomas contract. Carol is a licensed stockbroker and was retained to give her brother, the EDC, and the YIN advice regarding stocks, bonds, and securities issues.

Carol Smith provides her advice directly to her brother via email, telephone, and postal and delivery services. She submits monthly bills via email to the EDC CEO Fred Captain and the EDC mails her payments. She visited the YIN reservation along with her brother on two occasions when she was on vacation in Phoenix. Thomas forwards many of her communications

and advice on various issues to the Nation's Tribal Council, the EDC CEO and accountant Bluejacket on many occasions.

In 2016, the EDC began investigating the possibility of engaging in marijuana cultivation and sales. Marijuana is legal under Arizona state law for medical use but a state-wide referendum to make marijuana legal for recreational use failed in the fall of 2016. The EDC, however, 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. The EDC began quietly pursuing the development of a marijuana operation. It conferred with Thomas Smith on this issue several times. For moral reasons, Thomas and Carol are personally opposed to being involved in any way in the marijuana business. Ultimately, Thomas informed his acquaintance, the Arizona Attorney General, of the Nation's plans. Subsequently, the A.G. wrote the Nation and the EDC a cease and desist letter regarding the development of recreational marijuana operations.

The Tribal Council and the EDC were enraged at the Smiths. Consequently, the Tribal Council filed suit versus the Smiths in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The Nation sought recovery of the liquidated damages amount set out in the contracts.

The Smiths filed special appearances and identical motions to dismiss the YIN suit based on lack of personal jurisdiction and lack of subject matter jurisdiction over them and this suit, and in the alternative, for the trial court to stay the suit while the Smiths pursue a ruling in Arizona federal district court as to whether the tribal court has jurisdiction over them. The trial court denied both motions.

Claiming to continue under their special appearances, the Smiths filed answers denying the YIN claims and counterclaimed against the Nation for monies due under their contracts and for defamation for impugning their professional skills.

The YIN court ordinance has rules of procedure very similar to the Federal Rules of Civil Procedure. Therefore, the Smiths also impleaded the EDC, and the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities. The Smiths made the same claims against the third-party defendants as they had made against the YIN.

The trial court dismissed all of the Smiths counterclaims against YIN and claims against the third-party defendants due to sovereign immunity.

The Smiths filed an interlocutory appeal in the Yuma Indian Nation Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit.

ARGUMENT

I. The Yuma Indian Nation (YIN) courts do not have personal and subject matter jurisdiction over Thomas Smith and Carol Smith.

In *Montana v. United States*, the Supreme Court established the benchmark for determining tribal authority over nonmembers.¹ *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981). This inquiry requires that three alternative bases of tribal

¹ E.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (characterizing *Montana* as the “pathmarking case” on the subject of tribes’ regulatory jurisdiction over nonmembers). *Strate* is important for declaring that the cases cited by the *Montana* Court as illustrating the two *Montana* exceptions must be seen as showing how narrow the exceptions truly are.

authority be examined: (1) “express congressional delegation,” (2) “taxation, licensing, or other means [regulating] the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements,” or (3) “conduct of non-Indians on fee lands within [the] 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.” *Strate v. A-1 Contractors*, 520 U.S. 438, 564–566 (1997).

Tribal civil jurisdiction over nonmembers has been strongly linked to the concept of inherent tribal sovereignty as articulated in *Montana v. United States*. In particular, two of the exceptions to *Montana*’s general rule, the consensual relationship exception and the threatening conduct exception, have come to be known as *Montana* exceptions 1 and 2. As the Smiths are not tribal members and their case does not fit within either of the *Montana* exceptions, the YIN courts do not have jurisdiction over their case.

A. The Smiths’ case does not fit within the first exception to *Montana*.

Montana's list of cases fitting within the first exception (the consensual relationship exception), see 450 U. S. at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over a lawsuit arising out of an on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding the tribe's permit tax on nonmembers for the privilege of conducting business within the tribe's borders; court characterized as "inherent" the tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its

borders"); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152-54 (1980) (tribal authority to tax on reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"). Measured against these cases, the Smiths' agreement to consult on financial business for the EDC presents no "consensual relationship" of the qualifying kind with the tribe itself.

The Smiths entered into contract agreements with the YIN Economic Development Corporation (EDC), and not the tribe itself. In reality, this is an exercise of the tribe's sovereignty to be able to designate out a business entity and have the forethought to create an independent development corporation. The commercial code authorizes the Nation, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate businesses on and off the reservation. The Tribal Council created the EDC via a corporate charter as a wholly owned subsidiary of the Nation and as an "arm-of-the-tribe." However, the charter makes clear that the EDC is to be operated by its own board of directors consisting of five people who must be experienced in business endeavors. 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. The charter provided that the sitting directors would by majority vote elect or reelect a person for the expiring seat. At all times, three of the directors have to be tribal citizens and two have to be non-Indians or citizens of other tribes.

Furthermore, the consensual relationship must be private. Not every consensual relationship with tribal members or a tribe is subject to tribal jurisdiction, even if it has a nexus to the nonmember conduct at issue. In *Nevada v. Hicks*, the Court wrote that the relationship must be private. In this case, a tribal member who resided on tribal land sued state game wardens

in tribal court for damages to property caused by the wardens violating the terms of their search warrant. The wardens had a consensual relationship with the tribe in that they executed the warrant through the tribal court. However, the Court found that the relationship did not fit within the first *Montana* exception and denied that the tribal court had jurisdiction. *Nevada v. Hicks*, 533 U.S. at 360. The Smiths' relationship with the EDC is anything but private.

B. The Smiths' case does not fit within the second exception to *Montana*.

Read in isolation, the *Montana* rule's second exception (the threatening conduct exception) can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U. S., at 564. Neither regulatory nor adjudicatory authority over the marijuana incident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U. S., at 220. The *Montana* rule, therefore, and not its exceptions, applies to this case.

As the court found in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, *Montana* should therefore not be understood to vest authority in the tribe when land is used in certain ways. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of land. The inquiry thus becomes whether, and to what extent, the tribe has a protectible interest in what activities are taking place

on land within the reservation and, if it has such an interest, how it may be protected. Of course, under ordinary law, neighbors often have a protectible interest in what is occurring on adjoining property and may seek relief in an appropriate forum, judicial or otherwise. *Montana* suggests that in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, that interest does not entitle the tribe to complain or obtain relief against every use of land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. This standard sufficiently protects Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

In *Atkinson Trading Co. v. Shirley*, the Court struck down a tribal tax on guests of a nonmember's hotel located on non-Indian fee land within the reservation. 532 U.S. 645 (2001). The Navajo Nation argued that the trading post of which the hotel was a part had "direct effects" on its welfare: the Nation provided services to the trading post; the owner of the trading post was an "Indian trader"; the trading post employed almost 100 tribal members; the trading post derived business from the tourists visiting the reservation; and the trading post was surrounded entirely by tribal land. The Court rejected the Nation's argument. The [second] exception is only triggered by non-member conduct that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil

authority beyond tribal lands. 532 U.S. at 657 n. 12 (emphasis in original). In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court reiterated the limited nature of this exception: “[t]he conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that ‘the elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.’” 554 U.S. at 341, quoting Cohen §4.02[3][c], at 232 n. 220.

C. In the alternative, the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.

Any time there is a challenge to a tribe’s jurisdiction there is a federal issue, the federal court has jurisdiction to decide.

II. Sovereign immunity should not protect the Yuma Indian Nation, YIN Economic Development Corporation, or the EDC CEO and accountant from the Smiths’ claims.

A. Legal Arguments

Indian tribes possess the common-law immunity from suit that is held by other sovereign nations. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978). However, this—and other—aspects of sovereignty are subject to the “superior and plenary control of Congress.” *Id.*

As such, this sovereign immunity is not “absolute,” and “exists only at the sufferance of Congress and is subject to complete defeasance.” *U.S. v. Or*, 657 F.2d 1009, 1013 (9th Cir. 1981). However, without “congressional authorization” an Indian Nation “is exempt from suit.” *United States v. United States Fidelity & Guaranty Co.*, 60 S.Ct. 653, 656 (1940).

Therefore, Indian tribes retain a “quasi-sovereign status” regarding immunity which is not congruent to the sovereignty of states. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 106 S. Ct. 2305, 2313 (1986).

However, “in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.” *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 106 S. Ct. 2305, 2313 (1986).

The sovereign immunity of an Indian tribe attaches to a tribal official acting within the scope of her authority in her official capacity. *U.S. v. Or*, 657 F.2d 1009, 1013 (9th Cir. 1981). The Fifth Circuit has held that this immunity does not extend to tribal council members. *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 570 (5th Cir. 2001).

In *Filer v. Tohono O'Odham Gaming Enterprise*, the court determined (and the parties did not dispute) that sovereign immunity extended to the tribe's casino as a “subordinate economic enterprise.” *Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 169, 129 P.3d 78, 80 (Ct. App. 2006)

In *White Mountain Apache Indian Tribe v. Shelley*, the Supreme Court of Arizona found that since the tribal company in question (Fort Apache Timber Company, also known as “FATCO”) did not hold itself out as a separate entity, it possessed the same immunity from suit as the tribe. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971).

The *White Mountain* court also found that the petitioners, as officers of FATCO, are “entitled to executive immunity for their actions on behalf of FATCO which are within the scope of their respective duties as general counsel and general manager of FATCO.” *White Mountain*

Apache Indian Tribe v. Shelley, 107 Ariz. 4, 8, 480 P.2d 654, 658 (1971). However, “they are not immune from being sued individually . . . for any actions in excess of their duties as general counsel and general manager, respectively.” *Id.*

Dixon v. Picopa Construction Co. distinguished *White Mountain*: The Supreme Court of Arizona asserted that a tribal construction company’s status as a corporation “weighs heavily against a finding that [it] is a subordinate economic organization.” *Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 258, 772 P.2d 1104, 1111 (1989). The *Picopa* court emphasized that Picopa Construction Company is independent from the community: the company had obtained corporate status, had a “board of directors, *separate from the tribal government*, which exercises full managerial control over the organization.” *Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 256, 772 P.2d 1104, 1109 (1989). The court included an earlier dissent “recognizing distinction between commercial entities that are part of tribal government and those that are not.” *Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 533 n. 1, 720 P.2d 499, 508 n. 1 (Feldman, J., dissenting).

Given the existing body of case law, the YIN retains sovereign immunity in many of its functions. However, that immunity does not extend to claims in this case. Sovereign immunity should not protect the YIN; the EDC; or the EDC CEO and accountant from the Smith’s claims.

While the YIN created the EDC via a corporate charter as a wholly owned subsidiary and an “arm of the tribe,” the EDC resembles Picopa Construction Company rather than FATCO. Like Picopa Construction Company, the EDC was incorporated: the YIN set forth a corporate charter under a tribal commercial code. Also like Picopa Construction Company, The EDC has a board of directors separate from the tribal government. Two of the five EDC board members

must be non-YIN tribal members. This shows that the EDC is sufficiently independent from the community to be considered outside the “subordinate economic organization” umbrella.

While the EDC must keep detailed records and submit them to the YIN for review, the EDC still retains independent decision-making authority. The EDC has the authority to buy and sell real property in fee simple title and to buy other types of property in any type of ownership. This shows that the EDC operations are sufficiently independent from the tribe that they are not an “arm of the tribe,” but rather an independent body.

Furthermore, no debts of the EDC can encumber, or implicate in any way, the assets of the Nation. This supports the notion that the EDC is truly a separate entity in that there is an economic firewall between YIN and the corporation. Given the arrangement of the EDC, it is clearly a private, rather than public entity, and thus should not be cloaked in the immunity of the tribe.

Finally, the corporate charter allows the EDC to sue and be sued. Courts have interpreted this as a waiver of sovereign immunity.

B. Policy Arguments

If sovereign immunity extends to protect the YIN and third party defendants here, the court’s holding will have a chilling effect on business relationships. Individuals like the Smiths may be discouraged from doing business with tribal corporations because of the expansive immunity.

CONCLUSION

In conclusion, the Yuma Indian Nation courts do not have personal and subject matter jurisdiction over Thomas Smith and Carol Smith because the case does not fall under the exceptions set forth in *Montana*. In the alternative, the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court, because any time there is a challenge to a tribe's jurisdiction there is a federal issue, the federal court has jurisdiction to decide.

Furthermore, the YIN, the YIN Economic Development Corporation, and the EDC's CEO and accountant should not be shielded from the Smith's claims via sovereign immunity because the Corporation is not a "subordinate economic organization" under the *Picopa* factors.