

No. 17-024

**In The
Supreme Court of the Yuma Indian Nation**

SPRING TERM 2018

YUMA INDIAN NATION, RESPONDENT

v.

THOMAS SMITH & CAROL SMITH, PETITIONER

ON APPEAL FROM THE YUMA INDIAN NATION TRIAL COURT

BRIEF FOR THE RESPONDENT

TEAM 193
Counsel of Record

January 8, 2018

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QUESTIONS PRESENTED

1. Do the Yuma Indian Nation (“YIN” or “Nation”) courts have jurisdiction to hear the contract dispute involving Thomas Smith and Carol Smith (“Appellants”) where the Appellants are nonmembers who entered into consensual commercial relationships with the Nation?
2. Does sovereign immunity protect the Nation, the YIN Economic Development Corporation (“EDC”), and the EDC CEO and accountant from the Appellants’ claims for monies due and for defamation?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

This appeal follows the YIN trial court’s denial of Appellants’ motions to dismiss for lack of personal and subject matter jurisdiction, as well as the Appellants’ motions to stay the suit in order to seek a ruling in Arizona federal district court. The Appellants also appeal the trial court’s dismissal of their counterclaims for monies due and for defamation, which the court found to be precluded by sovereign immunity.

II. STATEMENT OF THE FACTS

In 2007, Thomas Smith, a financial planner and accountant, entered into a contract with the Yuma Indian Nation—located in southwest Arizona. ROA at 1. The contract was signed in his office in Phoenix, Arizona. *Id.* The contract required that he maintain absolute confidentiality in matters related to tribal communications and economic development plans, and that any and all disputes arising out of the contract be litigated in a court of competent jurisdiction. *Id.* Prior to the creation of the YIN EDC in 2009, Thomas Smith provided the Nation with financial advice on economic development issues through email messages and

phone calls on a nearly daily basis. *Id.*

The YIN created the EDC under its tribal commercial code to promote the prosperity of the Nation and its citizens. *Id.* Pursuant to the Nation's inherent sovereign powers, and authorized by the code, the Nation created the EDC through a corporate charter as the YIN's wholly owned subsidiary and as an "arm-of-the-tribe." *Id.* The EDC was funded by the Tribal Council through a one-time loan of ten million dollars. *Id.* The EDC is required to keep detailed financial records and submit the records to the Tribal Council quarterly. *Id.* at 2. It is also required to pay fifty percent of its net profits to the Nation's general fund yearly, as repayment for its loans. *Id.* at 2.

The EDC is authorized to buy and sell real property in fee simple title whether it is on or off reservation. *Id.* Additionally, it is authorized to buy all forms of property, and to sue and to be sued. *Id.* However, the Tribal Council, through its charter, protects the EDC, its officials, and the Nation from unconsented litigation by mandating that the EDC, its board, and all employees be protected by tribal sovereign immunity to the fullest extent of the law. *Id.* Finally, the EDC cannot borrow or lend money, or grant or permit any liens or interests, in the name of or on behalf of the Nation. *Id.* In addition, debts incurred by the EDC cannot encumber or implicate the assets of the Nation. *Id.*

After the creation of the EDC, Thomas Smith submitted written reports to the Tribal Council on a quarterly basis, and presented the reports in person at Council meetings on the reservation. *Id.* at 1. He primarily worked and communicated with Fred Chapin, the CEO of the EDC, and Molly Bluejacket. *Id.* at 1–2. In 2010, with the permission of the Nation, Thomas Smith entered into a contract with his sister Carol Smith, a licensed stock broker who lives in Portland, Oregon. *Id.* at 2. He contracted with his sister so that she could provide

the YIN with advice regarding stocks, bonds, and securities. *Id.* at 2. The contract between Carol and Thomas Smith is the same as the YIN-Thomas contract, and it expressly requires that Carol comply with the YIN-Thomas contract. *Id.* During the course of her work, Carol Smith primarily communicated with her brother through email, mail, and phone calls to provide the Nation with advice. *Id.* He would then forward her communications to the Tribal Council, the EDC CEO, and the accountant. *Id.* Carol also submitted monthly bills via email to the CEO and received her payments from the EDC through mail. *Id.*

In 2016, the EDC convinced the Tribal Council to enact a tribal ordinance making marijuana cultivation and its use on the reservation legal for any and all purposes. *Id.* at 2. The EDC then began pursuing marijuana cultivation and sale and conferred with Thomas Smith about the matter. *Id.* at 2. Under Arizona law, marijuana is legal for medicinal use, but the state failed to pass a referendum legalizing recreational use in late 2016. *Id.* at 2. Thomas Smith, who is opposed to any marijuana business, informed the Arizona Attorney General (“A.G.”) of the Nation’s plan to cultivate and sell marijuana. *Id.* at 2. The A.G. wrote a cease and desist letter to the Nation and the EDC. *Id.* at 2. The Tribal Council filed suit against the Smiths in tribal court for violation of fiduciary duties, breach of confidentiality, and breach of contract, and sought to recover liquidated damages specified in their contracts. *Id.* at 3. The Appellants filed motions to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction under special appearance in the Nation’s trial court. *Id.* However, the motion was denied by the court. *Id.* The Appellants also requested a stay at the trial court until the Arizona Federal District Court issued a ruling on whether the tribal court’s jurisdiction was proper. *Id.*

Continuing with their special appearance, the Appellant’s filed an answer denying the

Nation's claims and counterclaiming for monies due under their contracts and for defamation. *Id.* at 2. Under tribal court ordinance rules, the Appellant's impleaded the EDC, its CEO, and its accountant in their official and individual capacities. *Id.* at 3. The tribal court dismissed all the counterclaims brought by the Appellants under the doctrine of tribal sovereign immunity. *Id.* The Appellants have now filed an interlocutory appeal to the YIN Supreme Court, challenging the dismissal and asking for a writ of mandamus ordering the tribal court to stay the suit. *Id.* The YIN Supreme Court granted the interlocutory appeal. *Id.*

SUMMARY OF THE ARGUMENT

For the following reasons, the Court should affirm the lower court's ruling in its entirety. Further, it should not stay the current suit in order to allow the Appellants to seek a ruling in Arizona district court.

First, the lower court correctly denied the Appellants' motions to dismiss for lack of subject matter and personal jurisdiction. The Nation has subject matter jurisdiction over the Appellants because both entered into consensual relationships with the Nation, which gave rise to the Nation's proper jurisdiction under the first *Montana* exception. Furthermore, given that the nature of the agreement between the Smiths and the Nation pertains to the Nation's economic development, it has a direct effect on the economic security of the Nation. For that reason, the Nation's subject matter jurisdiction is also proper under the second *Montana* exception.

The lower court also correctly held that the Nation has personal jurisdiction over the Appellants because both have sufficient minimum contacts with the Nation. Specifically, the Appellants directed their activities towards the Nation, had long term commercial relationships with the Nation, and benefited economically from those relationships. The

Nation has a strong interest in adjudicating disputes that arise from its own contracts and subjecting the Appellants to the Nation's jurisdiction would not cause them an undue burden.

Next, the Court should not stay the current suit to allow the Appellants to seek a ruling in Arizona District Court because the Appellants have not exhausted their tribal remedies, and because none of the exceptions to the tribal court exhaustion doctrine apply.

Finally, the Court should affirm the lower court's dismissal of the Smiths' counterclaims because the Nation, as a distinct political community, enjoys inherent sovereign immunity; because the Nation's sovereign immunity extends to the EDC, as an arm of the tribe; and because the Nation's sovereign immunity extends to the EDC's officials acting, as they were here, in their official capacities.

For the foregoing reasons, this Court should affirm the lower court's ruling in its entirety, and should not issue a stay on the proceedings.

ARGUMENT

I. THE YIN HAS SUBJECT MATTER AND PERSONAL JURISDICTION OVER THOMAS SMITH AND CAROL SMITH BECAUSE THEY ENTERED INTO CONSENSUAL CONTRACTUAL RELATIONSHIPS WITH THE YIN, WHICH GAVE RISE TO THE YIN'S SUBJECT MATTER JURISDICTION, AND BECAUSE BOTH HAD SUFFICIENT MINIMUM CONTACTS WITH THE YIN TO WARRANT THE EXERCISE OF PERSONAL JURISDICTION.

a. Applicable Law Includes the YIN's Constitution, Statutory Law, Common Law, And United States Federal Law.

As a threshold issue, YIN law prescribes that courts should first apply the Tribal Constitution and statutory law. YUMA INDIAN NATION ("YIN") CODE § 1-109. For matters not covered by such provisions, courts should next look to tribal common law. *Id.* Finally, where disputes are not addressed by the above sources, courts may apply any laws of the United States or any state, and any Department of the Interior regulation. *Id.*

Based on the above provision, this section addresses the issues of subject matter and personal jurisdiction under both YIN law and United States federal law.

- b. Under YIN Law, the Nation's Courts Have Civil Subject Matter Jurisdiction Over the Instant Dispute Because It Involves a General Civil Claim That Arose in Connection with Contracts Involving Persons Who Entered upon the Nation's Territory in the Furtherance of Their Contractual Duties.

YIN law asserts jurisdiction over civil actions arising under its laws and over claims involving nonmembers that enter upon its territory. YIN CODE § 1-107. The relevant statutory provision provides, “[t]he Yuma Indian Nation 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.” *Id.* It continues, “[t]he 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 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.” *Id.*

This provision serves as a sufficient basis upon which the YIN may assert its jurisdiction over Thomas Smith and Carol Smith. The contract dispute is a general civil claim. Because of the Nation's extensive Business Corporations Code, it can be assumed that the Nation likewise has a body of contract law, either statutory or common, that addresses the current dispute. *See generally* YIN CODE §§ 11-001–1307. Additionally, both Thomas Smith and Carol Smith entered upon the Nation's territory in the furtherance of their services rendered under the contract. Thus, per the requirement of the above statute, the Appellants consented to the jurisdiction of the Nation in the present action arising from that commercial

transaction. The scope of the Nation's subject matter jurisdiction over Thomas Smith and Carol Smith under federal law is addressed in the following subsection.

- c. Under United States Federal Law, the Nation's Courts Have Civil Subject Matter Jurisdiction Over the Instant Dispute Involving Nonmembers Thomas Smith and Carol Smith Because Both Parties Consented to the Nation's Jurisdiction Through Their Entrance into Commercial Arrangements with the Nation, the Performance of Which Required Their Presence on The Nation's Reservation Land.

United States federal law affirms that “tribes retain considerable control over nonmember conduct on tribal land.” *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). In addition, tribal courts may exercise civil subject matter jurisdiction in matters involving nonmembers on non-Indian land over which the tribe has authority to regulate under federal law. *Id.* at 453. In other words, a tribe's adjudicatory subject matter jurisdiction over nonmembers is coextensive of the tribe's regulatory authority. *Id.*

The scope of a tribe's regulatory authority, and therefore its adjudicatory jurisdiction, over nonmember conduct on non-Indian land is governed by *Montana v. United States*. See *id.* Whether the *Montana* framework, discussed below, applies equally to nonmember conduct that arises on Indian land remains unclear. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006). Importantly, if the *Montana* framework does not apply to nonmember conduct arising on Indian land, then there is a presumption in favor of tribal court jurisdiction, absent a competing state interest or an express congressional or Supreme Court statement. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011). Regardless of this confusion, the status of the land on which the dispute arises remains an important factor in determining whether tribal court jurisdiction is proper. *Salish Kootenai College*, 434 F.3d at 1131. This brief will apply *Montana* and its exceptions because even under this more restricted view of tribal court jurisdiction, the Nation's subject

matter jurisdiction is proper, and because this case involves action that takes place both on and off the Nation's land.

In *Montana*, the Supreme Court held that there is a presumption against tribal jurisdiction over nonmember conduct on non-Indian land. *Montana v. United States*, 450 U.S. 544, 564–65 (1981). However, this general rule is subject to two exceptions that are grounded in a recognition of the tribe's inherent sovereignty. *Id.* at 565–66. The first exception is that “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Id.* at 565. Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

i. Thomas Smith and Carol Smith Entered Into Consensual Relationships with the Nation, Thereby Subjecting Themselves to the Nation's Adjudicatory Jurisdiction.

Montana's consensual relationship exception can be established “expressly or by [the nonmember's] actions.” *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316, 337 (2008). As such, there is no requirement that a nonmember's commercial dealings with the tribe be in writing signed by the nonmember. *Water Wheel*, 642 F.3d at 818.

Invocation of this exception requires that there be a nexus between the tribe's regulatory or adjudicatory authority imposed and the consensual relationship itself. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 657 (2001). Thus, for example, the Court in *Strate*

found that the nonmember's contract with the Three Affiliated Tribes to do landscaping work was insufficient to allow the Tribes to exercise jurisdiction over a lawsuit involving a crash between another nonmember and one of the landscaper's trucks. 520 U.S. at 457. Instead, the Court stated that the Tribes, despite their relationship with the landscaping company, "were strangers to the accident." *Id.*

By contrast, the Ninth Circuit held in *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, that a tribe had jurisdiction over a dispute arising from an agreement between a nonmember corporation and a tribal corporation to develop and manage a tourist attraction development project. 715 F.3d 1196, 1206 (9th Cir. 2013). There the court emphasized that the scope of the agreement was extensive and lengthy, lasting more than eight years. *Id.* It also noted that the dispute in that case arose directly out of the agreement, rather than being only tangentially related to the suit. *Id.* at 1205.

Like in *Grand Canyon Skywalk*, the instant contract dispute between Thomas Smith and the YIN is an action that arises from a direct consensual relationship of the kind envisioned in the first *Montana* exception. Pursuant to this contract, initially signed in 2007, Thomas Smith provided the Nation with financial advice for ten years through near-daily communications, and agreed to maintain confidentiality on matters regarding the Nation's communications and economic development plans. Additionally, Thomas Smith regularly presented financial reports to the Tribal Council in person on the reservation. Though the contract itself was not signed on the reservation, Thomas Smith's physical entrance onto the reservation for the purposes of meeting his contractual obligations, combined with his significant telephonic and digital communications with the Nation, indicate that the contract should be properly adjudicated in the Nation's courts.

Similarly, though Carol Smith is not party to a contract directly with the Nation, her agreement to offer stocks, bonds, and securities advice to the EDC, the Nation, and her brother would not exist but for her commercial relationship with the Nation. She was brought into the business arrangement for the sole purpose of providing the Nation with advice. Moreover, many of her contractual obligations run directly to the Nation, including the duty to maintain the Nation's confidences. This level of tethering to the Nation is sufficient to indicate that Carol Smith impliedly consented to a commercial relationship with the Nation, thereby triggering its adjudicatory authority over disputes arising from that relationship.

It could be argued that because Carol Smith did not enter into contract directly with the Nation or its members, she did not consent to the Nation's jurisdiction. This argument fails to consider that, as previously mentioned, a consensual relationship with a tribe sufficient to trigger its adjudicatory authority need not be express. *Water Wheel*, 642 F.3d at 818. The agreement at issue here provides that Carol Smith must comply with the obligations outlined in the YIN-Thomas contract. In addition, Carol Smith submits her bills directly to and is paid by the EDC, an arm and wholly owned subsidiary of the Nation. She has also visited the reservation on two separate occasions. It is safe to assume that the nature of these visits were business-oriented, arising out of Carol Smith's contractual duties, as there appears to be no other basis for her interaction with the Nation. These facts indicate that Carol had impliedly consented to the Nation's jurisdiction.

In sum, both Thomas and Carol Smith entered into commercial arrangements that created consensual relationships with the Nation, satisfying the first *Montana* exception and giving rise to the proper exercise of the Nation's adjudicatory jurisdiction.

ii. *The Present Contract Dispute has a Direct Effect on the Economic Security of the Nation.*

Montana's "direct effects" exception also supports a finding that the Nation has subject matter jurisdiction over the present dispute. As previously noted, this exception prescribes that tribes have civil adjudicatory jurisdiction over nonmembers on non-Indian land where their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This exception focuses on the "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). To fall within it, the impact on the tribe from the inability to exercise jurisdiction over a specific matter "must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989).

Employing the basis of the "direct effects" exception, though preceding *Montana* in time, the Court in *Williams* held that tribal court jurisdiction was proper over a nonmember merchant who operated a general store on the Navajo Indian Reservation. 358 U.S. at 223. The merchant initially brought suit in Arizona state court against two Navajo members for outstanding monies due for goods sold to them on credit. *Id.* at 217–18. The Court reasoned that the exercise of jurisdiction outside of the tribe under those circumstances would undermine the Navajo's authority over its own affairs and thus the right of the Navajo to govern themselves. *Id.* at 223. In the Court's view, it was "immaterial that [the] respondent [was] not an Indian." *Id.*

Post-*Montana*, the Ninth Circuit has held that the substantial economic impact of an agreement between a tribe or its members and an outside party is a sufficient basis upon

which a tribal court may assert jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at 1206. In that case, the court upheld the tribal court's assertion of jurisdiction without applying *Montana*. *Id.* at 1204. However, it wrote that even if *Montana* applied, the tribe's jurisdiction would still be proper under both of its exceptions. *Id.* at 1206. Regarding the direct effects exception, the court noted that the large potential impact of the agreement—including up to \$50 million in damages for early termination—sufficed to trigger the tribe's jurisdiction. *Id.*

Here, as in *Grand Canyon Skywalk*, the Nation's economic security is at stake. The Nation itself, rather than an individual member, entered into the contract with Thomas Smith, to which Carol Smith was later also subject. The nature of this contract bore directly on the economic vitality of the Nation. Specifically, the agreement for financial advice involved the communication of the Nation's confidential plans to develop marijuana cultivation operations, a potentially highly lucrative endeavor. The breach of this confidence, as occurred here, severely compromised the Nation's ability to proceed with this initiative, and thus, compromised the wellbeing of the Nation as a whole.

The fact that the Smith's have counterclaimed for monies due against the Nation lends further support to the Nation's proper jurisdiction under the second *Montana* exception. Governmental financial and development decisions, and their adjudication, are a hallmark of sovereignty. Claims against the Nation for payment of damages implicate the entirety of the Nation. As in *Williams*, such a situation is one the involves the nation's own internal affairs; thus, that the Smiths are nonmembers is "immaterial." 358 U.S. at 223.

In sum, the direct and serious economic effect on the Nation at stake here weighs in favor of a finding that tribal court jurisdiction is proper based on the second *Montana* exception.

d. The Yuma Indian Nation Has Personal Jurisdiction Over Thomas and Carol Smith Under Yuma Indian Nation Law and United States Federal Law Because Both Have Sufficient Minimum Contacts with the Nation and Because the Nation's Exercise of Jurisdiction Would Be Fair.

The Yuma Indian Nation has personal jurisdiction over “[a]ny person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.” YIN CODE § 1-104(2)(a). For litigants outside of its territory, sufficient minimum contacts with the Nation, its members, or its territory are required to exercise personal jurisdiction. *Id.* at § 2-314.

The above provision requiring sufficient minimum contacts mirrors the requirements of federal due process law; thus, the two are discussed together with the understanding that where the federal requirements are satisfied, so too will be the Nation's requirements. Under the federal framework, a court has specific jurisdiction over a defendant where two conditions are met. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980). First, where the defendant has such minimum contacts with the forum that it “should reasonably anticipate being haled into court there.” *Id.* at 297. Second, where, if a court determines that a defendant has sufficient minimum contacts with the forum, the exercise of personal jurisdiction would not “offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The condition for minimum contacts is satisfied where the contacts result from actions by the defendant to purposefully direct its activities towards residents of the forum, thereby availing itself of the rights and benefits of the forum's laws, and where the claim arises or results from those actions. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985). The condition of fair play and substantial justice depends on a court's evaluation of

several elements: the plaintiff's interest in obtaining relief in the forum, the burden on the defendant of defending suit in the forum, the interstate judicial system's interest in obtaining an efficient resolution of the suit, and the forum's interest in the case. *World-Wide Volkswagen*, 444 U.S. at 292.

In *Water Wheel*, the Ninth Circuit held that the Colorado River Indian Tribes ("CRIT") had personal jurisdiction over a nonmember defendant who was party to a lease agreement with the Tribe and who had lived on the CRIT reservation. 642 F.3d at 820. There, the court noted that, based on the lease and the nonmember having domiciled himself on the reservation, it was reasonable for him to anticipate that he would be haled into tribal court. *Id.*

As in *Water Wheel*, here, Thomas Smith's extensive relationship with the Nation is sufficient to indicate that he has availed himself of the Nation's laws. Specifically, the relationship between Thomas Smith and the Nation has spanned for ten years, and involved consistent contact throughout. Thomas Smith regularly communicates with the Nation and attends Counsel meetings where he presents financial analysis pursuant to his contractual duties. He has directed his activities towards the Nation in that he does work for and is paid directly by the Nation. Under these circumstances, Thomas Smith knew or should have known that he could be haled into the Nation's courts.

Similarly, Carol Smith has sufficient minimum contacts with the Nation to justify the Nation's personal jurisdiction over her. Carol Smith has provided the Nation with financial advice for the past seven years. She is paid by the EDC and has visited the reservation on two occasions. These contacts suffice to create the reasonable expectation that she might be haled into the Nation's courts in the event of a dispute.

Moreover, the Nation's interest in adjudicating the present dispute is strong. It entered the agreement with Thomas Smith as a sovereign nation seeking to expand its economic development, and thus should have the ability to adjudicate disputes arising from that agreement. By contrast, adjudicating the dispute in the Nation's courts would not impose an undue burden on Thomas Smith and Carol Smith. Thomas Smith lives in Phoenix, close to reservation. Though Carol Smith lives further away, her ties to her brother and the region indicate that traveling to the reservation would not be overly burdensome to her. In any event, the detriment to her is outweighed by the Nation's interest in adjudicating the dispute and by her previous actions availing herself of commercial opportunities with the Nation.

In sum, both Thomas and Carol Smith have sufficient minimum contacts with the Nation to justify its exercise of personal jurisdiction over them and doing so would not offend notions of fair plays and substantial justice.

- e. The Court Should Not Stay the Current Suit to Allow the Smiths to Seek a Ruling in Arizona Federal District Court Because the Smiths Must Exhaust Their Tribal Court Remedies Before Removing to Federal District Court.

Whether a tribe may compel a nonmember to submit to its jurisdiction is a question that “must be answered by reference to federal law.” *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). Thus, the scope of tribal court jurisdiction over nonmembers is a federal question under 28 U.S.C. § 1331. *Id.* Nevertheless, tribal courts must make the first determination as to whether their jurisdiction over nonmembers in civil suits is proper. *Id.* at 856. Only after exhausting tribal court remedies can a defendant remove to federal district court to challenge the tribe's jurisdiction. *Id.* at 857.

The Ninth Circuit has said that the tribal court exhaustion doctrine serves as a prerequisite to a federal court's exercise of jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at 1200. Thus, "federal courts should not even make a ruling on tribal court jurisdiction ... until tribal remedies are exhausted." *Id.* Only if a federal court subsequently disagrees with the tribe's exercise of jurisdiction should it relitigate the merits of the dispute. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

The exhaustion doctrine is subject to the following four exceptions:

(1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule.

Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (citations omitted).

The bad faith exception requires that the tribal court itself, rather than a litigant, act in bad faith. *Grand Canyon Skywalk*, 715 F.3d at 1201. Here, there is no evidence indicating that the tribal court acted in bad faith.

There is also no evidence of an express jurisdictional prohibition, either under YIN law or federal law. On the contrary, as noted above, YIN law supports the Nation's assertion of adjudicatory jurisdiction in this case.

The futility exception, under which a party may be excused from exhausting his claims in tribal court if the tribal court does not offer adequate opportunity for litigants to challenge its jurisdiction, "applies narrowly to only the most extreme case." *Grand Canyon Skywalk*, 715 F.3d at 1203. Again, here there is no evidence that the Nation's courts have inhibited the Appellants from challenging their jurisdiction. Rather, the Nation's division

between trial court judges and Supreme Court judges such that bias in review is minimized supports a finding that the Appellants have had adequate and fair opportunity to challenge the Nation's jurisdiction. *See* YIN CODE § 1-202(4)(a).

The final exception allows for circumvention of the tribal exhaustion doctrine where it is plain that the tribal court lacked jurisdiction under the *Montana* framework. *See Grand Canyon Skywalk*, 715 F.3d at 1203. Here, as in *Grand Canyon Skywalk*, the presence of a consensual relationship under *Montana* between the Nation and the Appellants prevents the application of this exception. *Id.* at 1204.

In sum, because the tribal court exhaustion doctrine precludes such action, and because none of its exceptions apply under these circumstances, the Court should not stay the current suit to allow the Appellants to seek a ruling in Arizona District Court.

II. THE COURT SHOULD AFFIRM THE LOWER COURT'S DISMISSAL OF THE SMITHS' COUNTERCLAIMS AGAINST THE YIN BECAUSE THE NATION, AS A DISTINCT POLITICAL COMMUNITY, ENJOYS INHERENT SOVEREIGN IMMUNITY; BECAUSE THE NATION'S SOVEREIGN IMMUNITY EXTENDS TO THE EDC, AS AN ARM OF THE TRIBE; AND BECAUSE THE NATION'S SOVEREIGN IMMUNITY EXTENDS TO THE EDC OFFICIALS IN THEIR OFFICIAL CAPACITIES.

- a. The Court Should Dismiss the Appellants' Claims Against the Nation Because, as a Distinct Political Community, the Nation Enjoys Inherent Sovereign Immunity.

Indian tribes are “domestic dependent nations” that have inherent sovereign authority over their members and territories; as a result, suits against Indian nations are barred by sovereign immunity unless it is abrogated by Congress or it is clearly waived by the tribes. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969))). Thus, Indian

nations have sovereign immunity from civil suits based on contracts, whether the contracts are entered into on or off reservation, and involve commercial or governmental activities.

Kiowa v. Mfg. Techs., 573 U.S. 751, 754 (1998).

Indian nations have been found to be protected by inherent sovereign immunity over their members and territories in suits by states where states were attempting to enforce their taxes on tribes. *Oklahoma Tax*, 498 U.S. at 505. Tribal sovereignty was first recognized in *Turner v. United States*, where the Court stated that the Creek Nation tribe was recognized by the United States as a “distinct political community,” and thus had immunity from liability for damages caused by its members on the plaintiff’s property. 248 U.S. 354, 357 (1919). Although mentioned in passing in *Turner*, this doctrine has since been affirmed “with little analysis.” *Kiowa*, 573 U.S. at 754. In *Oklahoma Tax*, where the state of Oklahoma sued the Potawatomi tribe seeking to enforce its tax laws on cigarettes sold on the reservation, the Court held that the State was barred by the tribe’s sovereign immunity. 498 U.S. at 508–10. It reasoned that such a finding was warranted because Congress had indicated its support for tribal sovereign immunity through several Acts that sought to promote self-sufficiency, self-government, and economic development. *Id.*

Explicit waiver of sovereign immunity by Congress is an indispensable requirement for suits against tribes, unless the tribes themselves have consented to suits related to tribal membership. *Santa Clara Pueblo*, 436 U.S. at 58. The Supreme Court first recognized congressional plenary power in *United States v. Kagama*, where it held that “General Government” over Indian tribes was necessary for their protection. 118 U.S. 375, 384 (1886). Although *Kagama* was a criminal case that questioned the constitutionality of the Major Crimes Act, the Court, nonetheless, held that because Indian tribes are within the geographic

limits of the United States, they are wards of the nation requiring protection. *Id.* at 383–85. The Court further stated that Congress “alone can enforce its laws on all the tribes.” *Id.* at 385. As a result, inherent tribal sovereignty has been found to be subject to Congress’ plenary power and suits against tribes have been barred absent congressional authorization. *Santa Clara Pueblo*, 436 U.S. at 58.

Courts have held that, if a tribe’s sovereign immunity has been abrogated by Congress, it must do so unequivocally. *Id.* In *Santa Clara Pueblo*, a female member of the Santa Clara Pueblo and her daughter sued the tribe in federal court claiming that the tribe denied equal protection to children of female tribal members that married outside of the tribe. *Id.* at 51. The Court found that the plaintiff was barred from bringing the suit against the tribe in federal court because tribes are “distinct political communities” that have the power to make and enforce their laws. *Id.* at 55–56. The Court further emphasized that the Bill of Rights is not applicable to matters related to tribal self-government. *Id.* at 72. Accordingly, the plaintiff was prevented from bringing her claim in federal court unless Congress makes “clear its intention to permit additional intrusion.” *Id.* at 72.

Finally, persons and entities that have entered into contractual relationships with Indian tribes have been barred from suing tribes in federal court for breach of contract. *Kiowa*, 573 U.S. at 754. In *Kiowa*, the Kiowa tribe was sued for defaulting on a promissory note, related to a commercial transaction, and was sued in federal court. *Id.* at 753. The plaintiff in that case asked the Court to limit tribal immunity only to on-reservation transactions and to governmental activities. *Id.* at 754. The Court, relying on principles of foreign sovereign immunity and the difficulties it presented to Congress in implementing it,

held that tribal immunity “is a matter of federal law” and thus the plaintiff was barred from bringing the suit against the tribe. *Id.* at 759–60.

In the case at bar, there is no indication that Congress has abrogated the tribe’s sovereign immunity; therefore, the Court should uphold the YIN’s sovereign immunity and prevent the Appellants from bringing suit against the Nation. To hold otherwise would subject the Nation to unwarranted interference with its ability to govern itself, its citizens, and its businesses.

Like the plaintiff in *Kiowa*, who entered into a contractual relationship with the tribe, the Appellants in this case entered into express and implied contracts. Thomas Smith’s contract was performed both on and off the reservation and he was bound by confidentiality in any and all communications and economic development plans related to the tribe. In addition, the terms of the contract between Carol Smith and Thomas Smith were the same as the one between Thomas and the Nation. As a result, she is bound by the same duties of confidentiality as her brother. Like the decision in *Kiowa*, the Nation’s interests would be served if the Appellants are bound by their contractual obligations and barred from suing the Nation in federal court.

Because the YIN enjoys inherent sovereignty as a distinct political community, the Court should dismiss the Appellants claims against the Nation.

- b. The Court Should Affirm the Lower Court’s Dismissal of the Smiths’ Counterclaims Against the EDC Based on Tribal Sovereign Immunity Because it is an Arm of the Tribe.

“[A]n arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). If an entity functions to

operate as an arm of the tribe, courts in several instances have extended sovereign immunity to the entity. *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006).

With little guidance from the United States Supreme Court, the California supreme court's approach on this issue is instructive. *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357 (Cal. 2016). It has held that courts should look to the following factors to determine whether an entity is an arm of the tribe: (1) the entity's method of creation; (2) whether the tribe intended the entity to share in its immunity; (3) the purpose for which the entity was created; (4) the entity's structure, ownership, and management, and the amount of control the tribe exerts over the entity; and (5) the financial relationship between the tribe and the entity. *Id.* at 372–73.

The Court in this instance should extend the Nation's sovereign immunity to the EDC, as an arm of the tribe, by applying the five-factor test adopted by the California supreme court in *Miami Nation Enterprises*. If the Court applies these factors, it is clear that the EDC is an arm of the tribe. The EDC was created as a wholly owned subsidiary of the Nation and as an “arm-of-the-tribe,” under the Nation's tribal commercial code to promote the prosperity of the Nation. Its primary purpose was the creation and development of economic endeavors of any type, both on and off the reservation.

Even though the EDC was to be operated by an independent board of directors, it was structured to promote tribal self-government and was controlled by the Tribal Council to some degree. The selection of the initial five board members was done by the Tribal Council and required that three of the five members be tribal members. The Tribal Council also retained the power to remove board members. In addition, the EDC was required to give preference to the tribal citizens in employment and contracting with parties outside the

Nation. Furthermore, when creating the EDC, the Nation intended for the tribe to have immunity as an “arm-of-the-tribe” and mandated in its charter that employees of the EDC be protected by the Nation’s sovereign immunity to the fullest extent of the law. The Tribal Council specifically stated that such protection was to prevent unconsented litigation that could be brought both against the entity and the Nation.

Finally, the EDC was funded by the Tribal Council through a one-time loan of ten million dollars. The Council required the EDC to keep detailed financial records and submit the records to the Council quarterly. The EDC is also required to pay fifty percent of its net profits to the Nation’s general fund yearly as repayment for its loans. Furthermore, the EDC cannot borrow or lend money in the name of, or on behalf of the Nation, and no debts of the EDC can encumber or implicate the assets of the tribe. The EDC is an entity wholly owned by the Nation that was created under a tribal code which sought to protect the Nation from liability from unauthorized litigation and debts that may be incurred by the EDC.

Because all of the factors in determining whether the EDC is an arm of the tribe as laid out in *Miami Nation Enterprises* have been met, the Nation’s sovereign immunity extends to the EDC.

- c. Under United States Federal Common Law, the EDC CEO and the Accountant Acting in Their Official Capacities Are Protected from Suit Because the Tribe’s Sovereign Immunity Extends to Them.

In determining whether sovereign immunity bars suit against an official, the Supreme Court held that “courts should look to whether the sovereign is the real party in interest” and should look at not who the parties to the suit are but rather “must determine in the first instance whether the remedy sought is truly against the sovereign.” *Lewis*, 137 S. Ct. at 1291. In instances where the damages relief sought is against officers in their official capacity, the

real party in interest is the office rather than the individual. *Id.* at 1292. However, tribal officials sued in their individual capacity are not protected by tribal sovereign immunity, as the suits are against the individual not the sovereign. *Id.*

In *Lewis*, where a tribal official was sued in his individual capacity for damages for an accident that he had caused, the Court held that even though the official was acting within the scope of his duty, because the accident was caused due to negligent driving, he was foreclosed from seeking protection under the doctrine of tribal sovereign immunity. *Id.* The Court further elaborated that, the real party in interest was the official in his personal capacity rather than the sovereign, and that the suit was to recover from the individual for his personal actions. *Id.*

Unlike the suit in *Lewis*, the suit against the EDC CEO and the accountant in their official capacities, is in fact a suit for relief against the EDC, as an arm of the tribe, and the Nation. Thus, it should be barred by sovereign immunity because the real party in interest is the office. When the EDC was created, the tribal charter mandated that all employees be protected by sovereign immunity to the fullest extent of the law. This mandate was a clear requirement to protect both the entity and the Nation from unconsented suits that results in awards for damages or liquidated damages. Thus, if the suit against the officials is not dismissed it would be in contravention of the doctrine of tribal sovereign immunity and would interfere with tribal self-government.

Because the EDC CEO and accountant were acting in their official capacities in the present suit, the Nation's sovereign immunity extends to them and therefore, the claims against them should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's ruling that the Nation's subject matter and personal jurisdiction over the Appellants is proper; should not stay the suit in order to allow the Appellants to seek a ruling in Arizona District Court; and should affirm the trial court's dismissal of the Appellants' counterclaims based on the Nation's, and by extension, the EDC's and the EDC officials', tribal sovereign immunity.