No. 00-454

In the
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROPER ECONOMIC RESOURCE MANAGEMENT, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between non-Indians on fee land within the reservation?

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INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Proper Economic Resource Management, Inc. ("PERM") is a Minnesota non-profit corporation with approximately 1,000 members. PERM is involved in protecting and advancing the private property interests and rights of all citizens, including both members and non-members of Indian tribes. PERM is interested and involved in natural resource management policies, which balance economic growth and conservation of natural resources. PERM has a critical interest in this case because it has members who own residential, recreational and commercial land and businesses within the original boundaries of various Indian reservations in the State of Minnesota. The actions of tribal governments, whether through regulation or taxation, have impacted and have the potential to impact the fee owned lands and businesses of Minnesota citizens and the fundamental rights of individuals who are not members of tribal governments.

All parties have consented by joint written stipulation to the filing of this Amicus Brief.

SUMMARY OF THE ARGUMENT

The decision by the 10th Circuit Court of Appeals in *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000) creates substantial concern for PERM and its members because that decision failed to apply the analysis of this Court from *Montana v. United States*, 450 U.S. 544 (1981). PERM submits that this Court must reverse the 10th Circuit's decision in *Atkinson Trading*, and apply *Montana's*

[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, their members or its counsel have made any monetary contribution to the preparation or submission of this brief.

general rule that Indian tribes lack authority over non-member activity on fee lands. Because the two exceptions to *Montana's* general rule are narrowly drawn, there can be no circumstance in which tribal taxation of non-member activities is permissible unless the activity occurs on tribal lands.

The 1,000 members of PERM include persons who own residential, recreational and commercial fee land, and operate related businesses, within the boundaries of several original reservations in Minnesota. Fee land ownership in those areas resulted from the United States Congress assimilation policy, as carried out in the General Allotment Act [Dawes Act], 24 Stat. 390 (1887), as amended, 25 U.S.C. §1331, *et seq.*, and other statutes and agreements, including the Nelson Act, 25 Stat. 642 (1889). The 10th Circuit's decision in *Atkinson Trading* fails to recognize fee ownership as the determinative factor, and creates a new balancing test that would improperly expand tribal taxation authority over non-member activities contrary to *Montana* and the fundamental rights of non-members.

Fee lands owned by non-members within the boundaries of a reservation are not subject to inherent tribal sovereignty and control. Absent an express delegation of authority by Congress, tribal sovereignty over non-members is not inherent; the only exceptions are to protect tribal self-government or to control internal relations. *See South Dakota v. Bourland,* 508 U.S. 679,694-95 (1993). The Congressional policy that created fee ownership within reservations was diametrically opposed to the grant of tribal jurisdiction over non-members. The assimilation policy that created fee land ownership was designed to break up tribal relations and made tribal members and their allotted fee lands subject to state laws and taxation. *See County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251,254-56 (1992).

Minnesota has a checkerboard of fee land ownership in the original reservations. Non-members owning fee lands are threatened by tribal regulation and taxation by tribal governments in which non-members cannot participate, even if the non-member resides on the land. The resulting uncertainty damages businesses and land values. The fundamental rights of non-members, as United States citizens, are violated by tribal government regulation and taxation. Tribal regulation and taxation are divisive forces in local communities and injurious to economic development. This Court must limit tribal taxation power over non-members to activities occurring on tribal lands, consistent with this Court's decisions in *Montana* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

ARGUMENT

I. TO PREVENT CONTINUED UNCERTAINTY, *MONTANA'S* GENERAL RULE MUST BE APPLIED AND STRENGTHENED.

The original Ojibwe (Chippewa) Indian reservations in Minnesota present in a microcosm the variety of "reservations" that exist across the United States. By understanding the circumstances in Minnesota, the Court may better understand that while reservations differ, the impact of the Court's decisions on non-members owning fee land is universal. The Red Lake Reservation in Minnesota was never ceded to the United States, and except for a few minor exceptions, the aboriginal title remains in the Red Lake Band of Chippewa. White Earth Reservation is a checkerboard consisting of non-Indian and Indian owned fee lands, plus some trust lands and fee lands owned by the White Earth Band.

All other Minnesota Chippewa reservations, including the Grand Portage Reservation, the Boise Forte Reservation,

the Leech Lake Reservation and the Fond du Lac Reservation, were ceded and relinquished to the United States under the Nelson Act, 25 Stat. 642 (1889) and by agreement with the various Chippewa bands. These four "reservations" also feature a checkerboard of ownership of fee land owned by members and non-members, state, federal and local government lands, and tribal trust lands and tribal owned fee lands.[2] Tribal governments on the one hand, and non-members and state and local governments on the other, differ as to whether these four Chippewa reservations remain intact or were disestablished or diminished by the Nelson Act.

Last, the original Mille Lacs Reservation was ceded by nearly identical 1863 and 1864 Treaties with the Mille Lacs Band, 12 Stat. 1249 (1863) and 13 Stat. 693 (1864). Later the Mille Lacs Band ceded the right of occupancy under the Nelson Act. This Court held that the Mille Lacs Reservation was ceded and relinquished, and there was a "complete extinguishment of Indian title," *United States v. Mille Lacs Band of Chippewa Indians,* 229 U.S. 498,503-04 (1913), and this language is "precisely suited" to reservation disestablishment. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329,330 (1998) *citing DeCoteau v. District County Court*, 420 U.S. 425,445 (1975).

[2] The actual percentage of land ownership varies widely. Of the original Leech Lake Reservation, less than 5% was owned by the tribe or individual Indians. *See State v. Forge,* 262 N.W. 2d 341,345, n.1 (Minn. 1977). These percentages are reversed at Grand Portage, where the Grand Portage Band or its members own approximately 95% of the land, in trust or in fee. *See Grand Portage Band of Chippewa v. Melby*, Memorandum Opinion and Order, Grand Portage Band of Chippewa Tribal Court of Appeals, #99-001, Feb. 15, 2000, Amicus Appendix A-2. Nationwide, in 1990 nearly one-half of reservation residents were non-Indians. *See* Bureau of the Census, U.S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990). Two-thirds of Indian lands allotted under the Dawes Act were acquired by non-Indians. *See County of Yakima*, 502 U.S. at 255-56.

Even though courts have determined that the Nelson Act ceded and relinquished all the Chippewa reservations in Minnesota except Red Lake and White Earth, *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221,226-27 (1986); *Chippewa Indians of Minnesota v. United States*, 88 Ct. Cl. 1,30 (1938-39), *aff'd*, 307 U.S. 1,2 (1939), the Chippewa bands continue to assert that they have jurisdiction over their "territories" which they define to be all lands within the boundaries of the original reservations. *See e.g. Grand Portage Band v. Melby*, Amicus App. A-6, n.12, A-12. This creates uncertainty for non-members who own fee lands that non-members or their predecessors in title have owned for over a century, and on which non-members have built homes and businesses without the assistance of tribal governments.

Until recent times, tribal governments in Minnesota have not attempted to regulate or tax the activities of non-members on fee lands. *See e.g. id.* at A-2, A-3, n.8, A-12. Nevertheless, tribal governments in Minnesota, like many tribal governments across the United States, are viewing expansively the powers of tribal governments over all persons and land within the boundaries of original reservations as part of their "territory" subject to their inherent sovereign powers. *Grand Portage* held that inherent tribal sovereignty included the power to tax and regulate all commercial activity by non-members on fee lands on the reservation, and that all commercial activity by definition is "consensual." *Id.* at A-9.

This Court has previously reined in attempts to expand the power of tribal governments over non-members and fee lands by making clear that *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) were limited to "a prudential exhaustion rule." *Strate v. A-1 Contractors*, 520 U.S. 438,450 (1997). The general rule in *Montana* applies to non-member activity on fee lands, and the exceptions to *Montana* are to be narrowly read and applied. *See Strate*, 520 U.S. at 445-46. The 10th Circuit's decision in

Atkinson Trading is an erroneous attempt to expand the exceptions to *Montana's* general rule governing tribal taxation of non-member activities on fee lands.

Amicus curiae submit that *Montana's* general rule must be applied without exception to tribal taxation of non-members on fee lands. Otherwise, continued attempts by tribal governments to tax persons who do not have a voice in tribal government will continue to create uncertainty for fee owners, and negatively impact economic development in areas where economic development is sorely needed. The result will be continuing litigation expenses as these issues are tried in tribal and federal courts as tribal governments attempt to raise monies by taxing persons without a voice in tribal government. While there exists a checkerboard of land ownership within reservations, these areas are also communities. To give tribal members of the community the power to regulate and tax their neighbors who are denied participation in tribal government is both unfair and divisive.

Under the Nelson Act, except for the Red Lake and White Earth Reservations, the Chippewa reservations in Minnesota were ceded and relinquished to the United States and tribal members were encouraged to move to White Earth to take their allotments there under the General Allotment Act of 1887. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103,106-07 (1998). Band members who wished to remain on their previous reservations to take their allotments were permitted to do so, and many chose this course of action. *See State v. Forge*, 262 N.W.2d 341,346. The remaining lands were then made available for sale to non-members, and this policy generally stayed in force until the Indian Reorganization Act of 1934, 48 Stat. 984. *See Cass County*, 524 U.S. at 108. In the meantime, under the General Allotment Act and the Burke Act, 34 Stat. 182 (1906), band members who took allotments received fee patents, and many tribal members sold the lands that they owned in fee through the allotment process to non-members.

See e.g. Grand Portage, Amicus App. A-3. This process in Minnesota was remarkably similar to the pattern described by the 8th Circuit Court of Appeals in its decision in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999), *cert. denied* 120 S.Ct. 2717 (2000). Over 100 years ago there came to be a new understanding of what constituted tribal lands wherein tribes continued to exercise jurisdiction.

> "At the turn of the century, Indian lands were defined to include 'only those lands which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, opened lands that had not yet been claimed by non-Indians' *Solem*, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian Country."

Gaffey, 188 F.3d at 1022. [*citing Solem v. Bartlett*, 465 U.S. 463 (1984)].

Gaffey resolved the issue of tribal claims of jurisdiction over fee lands by determining that the Yankton Sioux Reservation, as a result of the Act of 1884, 28 Stat. 286, was diminished. The 8th Circuit held that the Yankton Sioux Reservation no longer included those lands owned in fee by non-members. *Id.* at 1030. This non-member fee land analysis applied whether the title to that land originated in a fee patent from land ceded to the United States by the Yankton Sioux Tribe, or whether the non-member's fee title to the land originated from an allotment to a tribal member. By eliminating these non-member owned fee lands from the reservation, the Yankton Sioux Reservation was greatly diminished, and the jurisdictional issues were resolved.

What *Gaffey* points to is a recognition by the 8th Circuit of the critical distinction that arises when fee land is owned by non-members. Despite the differences in the status of the various original Chippewa reservations in Minnesota, a single

common thread exists with regard to fee lands. All of the fee land owned by non-members[3] finds its origin in Congressional policies from the assimilation period, beginning with the General Allotment Act [Dawes Act] and continuing with the Nelson Act in Minnesota, and similar acts in other states, and the Burke Act. *See Cass County*, 524 U.S. at 108.

> "The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large . . . Section 6 [of the Dawes Act specified] that 'each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' 24 Stat. 390. [With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands **nor impaired the rights of those non-Indians who had**

[3] The fee land in *Atkinson Trading* is within the boundaries of the Navajo Reservation from anomalous circumstances that parallel the General Allotment Act policy. Rather than the typical patent of fee land under the General Allotment Act from the United States to a non-member of land within the original boundaries of the reservation, *Atkinson Trading* features fee lands which became surrounded by the reservation when the reservation's boundaries were extended. The fee land in *Atkinson Trading* is analogous to the vast majority of fee lands transferred under the General Allotment Act because in both circumstances there was no Congressional policy, or expectation by non-members, that the non-member fee land within a reservation's boundaries would be subject to tribal regulation or taxation.

> **acquired title to over 2/3 of the Indian lands allotted** under the Dawes Act."

County of Yakima, 502 U.S. at 254-56 [emphasis added].

> "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408,423 (1989), (J. White plurality opinion) *citing Montana*, 450 U.S. at 560, n.9.

The Report of the Commissioner of Indian Affairs, September 21, 1887, stated:

> "After patents have been delivered, the laws of descent and partition of the State or territory in which the lands are located shall apply to said lands . . .
>
> After receiving his patent every allottee shall have the benefit of and be subject to the civil and criminal laws of the State or Territory in which he may reside; and no territory shall deny any Indian equal protection of law; (*Id.* at pages 3-4, *citing* Dawes Act.)

Henry Dawes himself made the following comment regarding the General Allotment Act:

> "I am responsible to the laws of Massachusetts alone; and so is each one of those Indians, henceforth, responsible alone to the laws of the state

in which he lives." Henry Dawes, "Proceedings of the Fifth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indians," 1887, quoted in *Americanizing the American Indians* (Francis Paul Prucha ed., Lincoln: University of Nebraska Press, 1978) p.105.

As Minnesota citizens over the last century purchased lands in these original Chippewa reservations, and built homes and businesses, they did so without any expectation that tribal governments would have any role in regulating or taxing their land or activities. *See generally Gaffey*, 188 F.3d 1022. The settled expectations of all parties were that non-members and their activities on fee lands would be subject to the state and local governments who exercised regulatory and taxing authority, the very bodies politic that these non-members participated in through election and by holding office. *See Cass County*, 524 U.S. at 107-08. Indeed, the expectation under the General Allotment Act was that even tribal members would be subject to state taxation and regulation for their activities on any tribal member fee owned land on the original reservation. *See id.* As this Court has held, while the assimilation policy that created the General Allotment Act and its progeny were ended by the Indian Reorganization Act, Congress never sought to repudiate or undo the effects of the policy that had existed during those fifty years and which had so dramatically changed the face of Indian reservation lands. *See County of Yakima*, 502 U.S. at 254-56.

What is needed is an articulation by this Court of a bright line rule that eliminates any question regarding the scope of tribal regulation over non-member activities on fee lands. This Court in *Brendale*, while badly fractured in its three opinions regarding the scope of tribal zoning jurisdiction over non-member lands, agreed uncertainty would result from case by case determinations. 492 U.S. at 430,448-49,460.

Unfortunately, the failure of the Court in *Brendale* to reach a majority opinion resulted in that outcome. The *Brendale* plurality's approach provides a bright line rule that would eliminate the litigation that continues to reach this Court on these issues.

> "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 fee land." *Id.* at 430 (J. White plurality opinion).

Amicus curiae PERM submits that the best way to bring certainty to the area of tribal taxation is to hold that *Montana's* general rule applies, without exception, to the taxation of non-member activities on fee lands.

Unless a bright line is drawn, tribal governments and tribal courts will understandably continue to attempt to expand the extent and reach of tribal powers. By limiting tribal regulatory and taxation powers to activities that occur on tribal lands, this Court will accomplish three things: (1) a clear, bright line standard will avoid the uncertainty and cost of litigation for non-members and tribal governments; (2) deference will be accorded to the Congressional intent that resulted in fee lands being owned by non-members within the boundaries of original reservations, consistent with this Court's decisions regarding the extent and reach of the powers of tribal government; and, (3) the rule will protect the fundamental rights, both civil and property, of non-members on their fee lands.

Unquestionably, many original Indian reservations in the United States represent some of the worst pockets of persistent poverty in the United States. As long as uncertainty exists regarding what rights non-members have on their fee owned lands, and how non-members may be impacted by the actions of tribal governments in which those non-members cannot participate, that uncertainty will

continue to create divisions between tribal members and non-members, and discourage the economic development and investment that will benefit both tribal members and non-members. A non-member operating a resort on a Minnesota lake within an original Chippewa reservation will be hesitant to invest in that business and expand its operations if tribal governments can impose taxes on non-member activities. Having no voice in tribal government increases the fear and uncertainty. As long as uncertainty exists, investment dollars will flow to areas in which non-member business activities cannot be diminished or impacted by tribal regulation and taxation. The value of fee owned lands and businesses will diminish, employment opportunities will decline, tourism will be impacted, and both the fee land owner and his Indian neighbors will be negatively impacted. The vast majority of Indian people live away from their reservation homelands[4] at least in part because of the lack of economic activity that can sustain them in those areas.

To avoid the uncertainty of the 10th Circuit's *Atkinson Trading* standard, this Court must hold that *Montana's* main rule applies to taxation. The 10th Circuit's decision in *Atkinson Trading* finds an "implied" consensual relationship between the petitioner's guests and the Tribe, based upon the guest's acceptance of the privilege of remaining on the reservation. Nothing distorts the first *Montana* exception more than finding that a consensual relationship can be "implied." The implied consent analysis fails to recognize that the activity being taxed is not occurring on tribal lands, but on fee lands. While the hotel guest is free to stay elsewhere, the 10th Circuit's analysis in *Atkinson Trading* further fails to recognize that the non-member landowner has no "implied consent" choice because the business location is

[4] Bureau of the Census, U.S. Department of Commerce, *We the. . . First Americans* 7(1993).

fixed. If the guests avoid "consent" and taxation by staying elsewhere, the fee owner is damaged by the business loss.

Furthermore, to find that there is "implied consent" really means that no consent at all is necessary, that no conscious decision is required to enter into a "consensual relationship" by commercial dealings, contracts, etc. with a tribe or its members. *See Montana*, 450 U.S. at 565-66. At a minimum, the first *Montana* exception requires an express decision to enter into a contractual or other consensual relationship. Moreover, the regulation or taxation must be limited to the scope of the consensual relationship. Otherwise, non-members conducting business on fee lands will be subject to claims of tribal regulation because they incidentally do a small amount of business with tribal members. State anti-discrimination laws prohibit a non-member from refusing to do business with tribal members, negating the "consent" factor. *See e.g.* Minnesota Human Rights Act, Minn. Stat. §363.01 *et seq.* As this Court made clear in *Strate*, the *Montana* exceptions must be narrowly read.

II. FEE LAND OWNERSHIP CONTROLS THE ISSUE OF TRIBAL TAXATION.

The 10th Circuit's decision in *Atkinson Trading* downplays the critical importance that fee land ownership plays in determining the issue of tribal regulatory power. Fee land ownership is more than "one factor a court should consider in applying the *Montana* framework" (App. 16a) and analyzing this Court's prior decisions concerning fee land ownership is more than "a coincidence of facts." (App. 15a.) When applying *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), to this analysis, the 10th Circuit in *Atkinson Trading* errs by relying upon the statement that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." (App. 15a, *citing Buster*, 135 F. at

952.) This approach fails to acknowledge this Court's decisions that hold that Indian tribes have a unique status as "domestic dependent nations" which lack external sovereignty powers. *See Bourland*, 508 U.S. at 695; *Strate*, 520 U.S. at 445-46; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1,17 (1832).

The facts in *Buster* could not differ more from the fee lands that were transferred in *Atkinson Trading* or other fee lands transferred by the General Allotment Act and its progeny. In *Buster*, the non-members obtained their **deeds from the Creek Nation**. In *Atkinson Trading*, the fee patent issued from the United States of America. Under the General Allotment Act and its progeny, whether tribal lands were ceded to the United States and then sold to non-members, or whether the lands passed from allotment and fee patent to a tribal member and then were sold to non-members, **the fee patent originated from the United States**. Conversely, it is incorrect to say that those fee lands remained within the "territory" and "jurisdiction" of the tribal government that had ceded them to the United States. "[T]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Bourland*, 508 U.S. at 697 (*citing Montana*). This Court in *Bourland* noted that a majority of the Court in *Brendale* agreed that fee lands owned by non-members on open portions of the reservation are not subject to tribal zoning. *Bourland*, 508 U.S. at 689,695. This led the Court in *Bourland* to recognize that after *Montana* tribal sovereignty over non-member fee lands is "not inherent and cannot survive without express Congressional delegation." *Bourland*, 508 U.S. at 695, n.15. This analysis is a recognition by this Court of both the historical Congressional policy behind the General Allotment Act that led to fee lands on reservations being owned by non-members, as well as the fact that the Supreme Court's decisions necessarily evolved in light of the impact of changing Congressional policies on fee alienated reservation lands.

The "platonic notions of sovereignty" that guided Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S.(6 Pet.) 515 (1832), have lost their independent sway over time. *See County of Yakima*, 502 U.S. at 257. In 1993 this Court in *Bourland* recognized that *Brendale* stands for the proposition that an abrogated treaty right of unimpeded use and occupation by a band can no longer serve as the basis for the exercise of the lesser included power to regulate. The loss of the power to exclude carries with it the loss of tribal regulatory authority. *See Bourland*, 508 U.S. at 691, n.11. In 1997, this Court held that the "pathmaking case [*Montana*] concerning tribal civil authority over non-members" rests upon principles that support the "general proposition" advanced by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Strate*, 520 U.S. at 445. *Oliphant* found that criminal jurisdiction by a tribe over non-Indians under retained tribal sovereignty was "inconsistent with [the tribe's dependent] status." 435 U.S. at 208,212. Put simply, to the extent that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), much less *Buster*, stood for a different proposition regarding tribal taxation authority over non-member activities on fee lands, evolving Supreme Court opinions have undermined the reasoning that supported those decisions.

Buster is distinguishable because the fee ownership was from a tribal patent, not a United States patent issued pursuant to the General Allotment Act. *Merrion* concerned a severance tax on oil and natural gas removed from **tribal land** and the Jicarilla Apache Tribe Reservation was "held entirely as tribal trust property." "A tribe has no authority over a non-member until the non-member enters tribal lands...." *Merrion*, 455 U.S. at 142. *Compare Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which tribes retain unless divested of it by federal law or necessary

implication of their dependent status." *Id.* at 152. "[T]ribes retain considerable control over non-member conduct on Tribal land." *Strate*, 520 U.S. at 454. Tribal land was described as "land belonging to the tribe or held by the United States in trust . . .." *Id.* at 454, n.8. There is simply no support for the 10th Circuit's decision in *Atkinson Trading* that this Court's decision in *Merrion* must be balanced against the *Montana* test in order to determine whether tribal taxation of non-member activities on fee lands is permissible. *Merrion* concerns taxation of non-member activities on tribal lands and is not inconsistent with *Montana*.

This Court's decisions reflect an evolution necessitated by changes made to the foundation laid by Chief Justice Marshall in his Trilogy.[5] Chief Justice Marshall was attempting to determine the scope of tribal powers and sovereignty in an area in which the Cherokee Nation was a distinct community, occupying its own exclusive territory, and where state laws had no force and the Cherokee had the right to exclude non-members. *See Worcester*, 31 U.S. at 561-63. Conversely, when a tribe loses exclusive control and jurisdiction, based upon fee land transfers to non-members by patents issued by the United States, the tribe also loses regulatory and taxation power over the activities of non-members on fee lands which are or were within the boundaries of a reservation.

[5] The Marshall Trilogy is comprised of the three landmark opinions of Chief Justice John Marshall, *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

III. FEE LAND OWNERSHIP IS A CRITICAL DISTINCTION BECAUSE OF THE FUNDAMENTAL RELATIONSHIP LAND OWNERSHIP BEARS TO INDIVIDUAL LIBERTIES AND RIGHTS.

"[T]he only dependable foundation of personal liberty is the personal economic security of private property.

The teaching of history is very certain on this point. It was in the mediaeval doctrine that to kings belong authority, but to private persons, property, that the way was discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark. Where men have yielded without serious resistance to the tyranny of new dictators, it is because they have lacked property. They dared not resist because resistance meant destitution. . ..

So we must not expect to find in ordinary men the stuff of martyrs, and we must, therefore, secure their freedom by their normal motives. There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it, like the Americans' conviction that he must be able to look any man in the eye and tell him to go to hell, are the very essence of the free man's way of life."

Walter Lippmann, *The Method of Freedom*, pp. 100-102 (1934), *cited in Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171,1175, n.8 (C.A. Fed. 1994).

If private property is the foundation of American freedom, as Lippmann argues, then the relationship between fee land ownership and regulation by a tribal government in which the fee owner cannot participate bears careful scrutiny. Tribal regulation of the activities of United States citizens on their fee owned lands cannot be reconciled with the fundamental rights of that citizen to be regulated only by a government in which the individual can participate by voting and by holding elective office.

The essence of the American representative system of government is that the people of the United States are the sovereign, and this Body Politic has the power to create the constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See* John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* (Henry St. George Tucker ed., Fred B. Rothman & Co. 2000) (1899), Volume 1, p.62. The doctrine is stated by Justice Matthews in *Yick Wo v. Hopkins* as follows:

> "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."

118 U.S. 356,370 (1886).

This principle is recognized in the United States Constitution which begins "We the People...." The just powers of government over its citizens are derived only from the consent of the governed, and that consent is conditional on the right of those citizens to participate in that government

through the right of suffrage and by holding elective office. The Declaration of Independence, in paragraph 2, established this "self-evident" truth. This principle was reaffirmed by the United States Constitution and its Tenth Amendment.

These fundamental rights of United States citizens are violated when tribal governments regulate or tax the activities of non-members on their fee lands. The independence of the American Colonies from British control arose directly from their disenchantment with taxation without representation. There was a question whether tribal governments, at least prior to the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 *et seq.*, were limited by the amendments to the United States Constitution in the exercise of their sovereignty powers. *See Talton v. Mayes*, 163 U.S. 376,384 (1896) (holding 5th Amendment inapplicable.) There can be no question that United States citizens are protected by the United States Constitution and its Amendments on their own fee lands. To avoid these issues, the approach this Court has taken is to examine the source and extent of tribal power over non-members on fee lands.

As "domestic dependent nations," tribal governments can exercise only internal sovereignty powers. The people of the United States cannot properly be made subject to inherent tribal regulatory power for their activities on fee owned lands. Put another way, the ultimate sovereign, the people of the United States, cannot be made subject to regulation by tribal governments which do not, and cannot by their nature, provide non-members the fundamental rights guaranteed to the people of the United States by the United States Constitution. *Compare Oliphant*, 435 U.S. at 210. Because the source of tribal authority over non-members is not inherent, *Bourland*, 508 U.S. at 695, n.15, and cannot be inherent because of the dependent status of tribes, tribal governments lack regulatory and taxation powers over the activities of non-members on fee owned lands. Any other conclusion denies non-member landowners "the political

franchise of voting" which is the "fundamental political right . . . preservative of all rights." *Yick Wo,* 118 U.S. at 570. While the federal government's special relationship with the first Americans provides for their right of self-government and limited sovereignty as "domestic dependent nations," tribal powers are internal only unless non-member activity occurs on tribal lands. Unquestionably, non-member fee owned land in which the patent originated from the United States is not tribal land. By protecting the rights of non-members who own fee lands on reservations, this Court affirms and protects the fundamental rights and private property rights of all Americans upon which our freedom depends.

CONCLUSION

For the reasons stated above, this Court must reverse the 10th Circuit's decision in *Atkinson Trading*, and hold that taxation by Indian tribes of non-member activities occurring on fee lands is subject to *Montana's* general rule and is therefore prohibited as inconsistent with the dependent status of the Navajo Nation.

January 12, 2001

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IN THE TRIBAL COURT OF APPEALS
OF THE GRAND PORTAGE BAND OF CHIPPEWA

GRAND PORTAGE INDIAN RESERVATION — **STATE OF MINNESOTA**

Grand Portage Band of Chippewa, Through its Land Use Administrator Lawrence Bushman, Plaintiff/Appellee, vs. **Carroll Melby,** Defendant/Appellant.	**MEMORANDUM OPINION and ORDER** App. #99-001

Per Curiam (Chief Justice Anderson and Associate Justices Balber and Pommersheim).

I. Introduction

The Grand Portage Reservation was established by the Treaty of 1854.[1] The Reservation was subject to the misguided (allotment) policies of both the General Allotment Act[2] and the Nelson Act.[3] The allotment period was

[1] 10 Stat. 1109 (1854).

[2] 24 Stat. 388 (1887).

[3] 25 Stat. 642 (1889).

effectively reversed by the Indian Reorganization Act of 1934.[4] The Grand Portage Chippewa voted, along with five other Minnesota Chippewa Bands,[5] in favor of the IRA and in favor of joining together as the Minnesota Chippewa Tribe. As a result, the first contemporary Grand Portage Reservation tribal government was established in 1939 in accordance with a "sub-charter" approved by the Minnesota Chippewa Tribe. The Grand Portage Band, the Plaintiff/Appellee in this proceeding (also referred to herein as the "Band"), is currently governed by the Minnesota Chippewa Tribe Constitution (as amended) which was adopted in 1963.

The Grand Portage Band has worked effectively to reacquire allotted lands within the reservation and to maintain its land base. The Grand Portage Reservation is comprised of approximately 48,000 acres, the vast majority of which is undeveloped. Ninety-five percent (95%) of the Reservation consists of land held in trust by the United States for the Band and its members; three percent (3%) is held in fee by the Band or other governments; and only two percent (2%) is held in fee by non-Indians. Approximately 550 people live on the Reservation, of which two-thirds are Indian.

The land owned by Carroll Melby,[6] the Defendant/Appellant in this proceeding (hereinafter referred to as "Melby"), is part of that two percent of the Reservation held by non-Indians. Except for the portion bordering Lake Superior, this land is completely surrounded by Grand Portage trust land. The land owned by the Appellant was originally part of an allotment made to Joseph Godfrey

[4] 25 U.S.C. 461-479 (1934).

[5] The other Chippewa Bands include: White Earth, Leech Lake, Fond du Lac, Bois Forte, and Mille Lacs.

[6] More accurately, Carroll Melby is the managing trustee of Herbert Iver Melby Revocable Trust established by his father (now deceased) in 1967. The commercial enterprise located on this land is the Voyageurs Marina.

Montferrand, a Grand Portage Indian, by a trust patent issued on March 1, 1897 under the provisions of the General Allotment Act and the Nelson Act. A fee patent was issued to Montferrand on Sept. 14, 1911. Since this time period is less than the twenty-five year trust period specified in the General Allotment Act, it is presumed that Montferrand's fee patent was issued pursuant to the Burke Act[7] which provided - upon a finding of "competency" - for a fee patent to issue without the allotee's request and before expiration of the normal twenty-five year trust period. Montferrand's allotment was subsequently sold to S. L. Johnson, a non-Indian, in separate transactions in 1921 and 1923. The allotted lands was ultimately sold to Herbert Melby, the Appellant's (non-Indian) father in 1967. On this site, Melby operates Voyageurs Marina which has three hotel rooms, a small store, and dockage to accommodate commercial boat traffic.

The current controversy results from the Melby's decision to erect a metal building for storage and boat repair on his property. In August 1995, Melby obtained a building permit from Cook County. Melby refused to seek a building permit or variance from the Grand Portage Band, and his failure to do so violated the Band's Land Use Ordinance.[8] Melby had received notice from both the Band and Cook County about the existence of the Band's (new) Land Use Ordinance. Despite such knowledge, Melby chose not to seek a permit or variance and erected the building in 1996.

In August 1997, the Band initiated this lawsuit against Melby in the Tribal Court for his failure to comply with the Band's Land Use Ordinance. Melby did not file an answer,

[7] 34 Stat. 182 (1906).

[8] Grand Portage Band of Chippewa Indians, Ordinance 95-02 (1995). The Cook County setback requirement from Lake Superior is 50 feet, the Band's 100 feet. The building was erected approximately 90 feet from the shoreline and while satisfying the Cook County requirements, the building clearly violated the Band's Land Use Ordinance.

asserted no substantive defenses, but simply moved to dismiss for lack of jurisdiction.

At the same time, Melby filed a lawsuit against the Band and Tribal Court in federal court seeking to enjoin them from exercising any kind of jurisdiction over him. On August 13, 1998, Judge Alsop ruled against Melby[9] and directed him to exhaust his tribal court remedies in accordance with the directives of *National Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

At the Tribal Court level Melby's motion to dismiss the Band's lawsuit was heard before Judge Fineday, Chief Judge of the Grand Portage Tribal Court. After making extensive findings of fact and conclusions of law, Judge Fineday denied both Melby's motion to dismiss and the Band's motion for summary judgment.

Melby filed a proper and timely interlocutory appeal on the issue of jurisdiction and the Band timely cross-appealed the denial of its motion for summary judgment. After extensive briefing by the parties, oral argument in this matter was held before the Tribal Court of Appeals at the Grand Portage Reservation on August 6, 1999.[10]

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[9] *Melby v. Grand Portage Band of Chippewa* (DC, MN, 5th Div.) (1998). Judge Alsop also explicitly ruled that the Grand Portage Reservation was not diminished by the Nelson Act of 1889. In addition, he found no waiver of tribal sovereign immunity, but that a lawsuit seeking prospective injunctive relief against a tribal officer was permitted. He specifically dismissed the action against the Tribe and the Tribal Court.

[10] Just prior to oral argument, Melby filed an Affidavit of Conflict dated August 3, 1999 (just three days prior to oral argument) requesting that each member of the Grand Portage Tribal Court of Appeals recuse themselves because the panel was appointed by Grand Portage Reservation Tribal Council. Dean Deschampe is the Band's Land Use Administrator and a member of the Reservation Tribal Council, and Norman Deschampe is the Chairman of the Grand Portage Reservation Tribal Council. Both are Grand Portage Band members. Under Melby's

II. Issues

This appeal raises two issues, namely:

A. Whether the Tribal Court improperly denied Melby's motion to dismiss for lack of jurisdiction; and
B. Whether the Tribal Court improperly denied the Band's motion for summary judgment.

III. Discussion

A. Jurisdiction

The issue of jurisdiction is a question of law and properly reviewed *de novo*. This is the appropriate general legal standard of federal courts and most tribal courts for review of legal conclusions, and therefore this Court adopts it as the proper standard of review in this matter.[11]

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claim, because each Tribal Court of Appeals member was appointed by the Grand Portage Reservation Tribal Council, the appellate court panel must recuse themselves because of an "employment" relationship with the Grand Portage Tribal Council. In the alternative, Melby seeks to strike the affidavits of Norman Deschampe and Dean Deschampe. Aside from being procedurally defective for not being timely filed under Rule 36(c) of the Grand Portage Rules of Civil Procedure, the Motion fails as being substantively and logically deficient. Neither of the Deschampes are parties to this case in their individual or official capacities, nor as such do they serve as "employers" of the judges on this panel. The grounds presented by Melby would serve to disqualify any tribal court from functioning and, by logical extension, any state or federal court from hearing cases in which a state or federal government interest were at issue.

[11] *See e.g. Filetech S.A. v. France Telecom S.A.*, 147 F.3d 922, 930 (2nd Cir. 1998): "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." In addition, matters of tribal law are generally not subject to federal review. *Basil Cook Enterprise v. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). Oddly enough, Melby never addresses the standard of review issue - going so far as to

Analysis of tribal court jurisdiction involves a review of both tribal and federal law. In the instant case, however, there is no dispute as to whether Melby violated tribal law (for he has specifically acknowledged actions in violation of tribal law) and there is no claim that the Band's Land Use Ordinance exceeds the bounds set by tribal constitutional or other positive tribal law.[12] Therefore the sole issue before this Court is to determine whether the Band's Land Use Ordinance and its application to non-Indian land owners is permissible as a matter of federal law.

Neither the U.S. Constitution nor any act of Congress prohibits the application of the Band's Land Use Ordinance to Melby. The dispositive key is rather whether the federal common law principles articulated in *Montana v. United States*, 450 U.S. 544 (1981)[13] and applied in the one tribal zoning case decided by the Supreme Court, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 404 (1989), permit tribal jurisdiction in this matter.

Unfortunately, *Brendale* is no beacon of analytical clarity. Its three plurality opinions for two different holdings relative to the 'closed' and 'open' portions of the Yakima Reservation are something of a confused and unresolved muddle. Yet parse it we must. And in so doing, it is not difficult to conclude that the Grand Portage Reservation in its entirety is quite analogous to the 'closed' portion of the Yakima Reservation. In both the 'closed' portion of Yakima Reservation and the entire Grand Portage Reservation, less than two percent of the land is held in fee by non-Indians and the overwhelming amount of land in both cases is undeveloped wilderness. The Grand Portage Reservation is in no way comparable to the 'open' part of Yakima Reservation in which almost half the land is owned in fee by non-Indians and the population is 80% non-Indian (*Brendale* at 492 U.S. 445).

These findings nevertheless have to be refracted through the lens of the *Montana* proviso which provides:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. A tribe may also retain inherent power to

express no opinion on the matter when queried from the Bench at oral argument - and is therefore deemed to have waived any claims regarding the standard of review.

[12] *See e.g.* Grand Portage Band Judicial Code at Title 1, Ch. II § 1 (1997) which provides:

> The jurisdiction of the Tribal Court shall extend to: . . .
> (b) All actions arising under the Land Use and Zoning Ordinance, and to all persons alleged to have violated provisions of that Ordinance, provided that the action or violation occurs within the boundaries of the Grand Portage Reservation, including all lands, islands, water, roads, and bridges or any interests therein, whether trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, within the boundaries of the Reservation, and adjacent waters of Lake Superior and lands and waters within the area ceded by the Treaty of 1854, and such other lands, islands, waters or any interest therein hereafter added to the Reservation. Hereinafter, reference to "Reservation" shall include all lands and waters described in this paragraph.

[13] Although *Montana* has become increasingly entrenched in Supreme Court Indian law jurisprudence, it is worth recalling how far it departs - without constitutional or congressional authorization - from the previous 150 years of federal Indian law which presumed tribal authority within Indian country unless expressly limited by Congress. *Montana*'s new rule created a presumption against tribal authority on fee land within the reservation, a presumption that may be overcome only by satisfying either of the prongs of the well known *Montana* proviso. This development of a federal judicial plenary power cannot pass without comment. The law is the law but it is not always just or persuasive.

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.[14]

As noted by both Justice Stevens in his fact specific (plurality) opinion and Justice Blackman's more general (plurality) opinion, zoning is necessary to protect the 'welfare of the Tribe' especially in a situation - such as Grand Portage - where the land is overwhelmingly held in trust and where the land is undeveloped. Therefore it is clear to this Court that that portion of the *Brendale* case holding tribal zoning of fee land permissible under the *Montana* proviso relative to maintaining the 'welfare' of the tribe also applies to the case at bar.

It is also instructive to recall some of the particulars of *Montana* that are not present here. *Montana* involved a discriminatory land use regulation that treated non-Indian hunting and fishing on fee land different from tribal members hunting and fishing on tribal trust land. In distinction, the Grand Portage Tribal Land Use Ordinance treats all landholders the same. Melby does not seek equal treatment but rather a 'privileged' status requiring his land to be treated differently from 98% of land on the Reservation. In addition, in *Montana*, the state stocked much of the fish and some of the game on the reservation and arguably had some legitimate interest in these 'resources', while in contrast in the instant case Melby does not (and presumably cannot) demonstrate any equivalent state and/or local interest. These observations are important in order to see - not only from that necessary conceptual view but also from a quite practical view - that the Grand Portage Band is simply seeking to treat everyone the

[14] *Montana*, 450 U.S. at 565-567.

same in the context of land use and there are no overriding state and/or local interests to the contrary.

Because of the unique facts of this case, this Court must also decide whether the 'consensual' prong of *Montana* proviso is satisfied. None of the opinions in *Brendale* take this tack but it nevertheless seems appropriate in this instance. In both *Montana* and *Brendale*, the tribes sought to regulate what we might call the 'private' use of private land, while in this case the tribe seeks to regulate (in part) the 'public', 'commercial' use of Melby's land. Melby wants to use his land differently to advance commercial and hence public use, rather than strictly private or personal use. This distinction matters. Tribes have long been recognized to have wide authority - both as a result of inherent sovereignty and the right to exclude - to regulate commercial and tax activities within the reservation. See e.g. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Williams v. Lee*, 358 U.S. 217 (1959). For example, the Grand Portage Band could clearly require Melby to have a tribal business license and/or reasonably tax his commercial activities. Engaging in commerce on the reservation clearly places that activity, whether by Indians or non-Indians, within the reach of tribal authority. Zoning regulation of commercial entities falls clearly within the sphere of inherent tribal sovereignty and/or the exercise of the right to exclude as an act of sovereignty.

In addition, Melby has participated in commerce with the Band and tribal members. This participation is exhibited by Melby's use of tribal water facilities, and, until recently, Melby's use of tribal waste disposal facilities. Commerce - as opposed to mere private residence - presupposes interaction with the community and its members and the authorization or tolerance by the sovereign to engage in such business. In a word, it is 'consensual' activity. If the Grand Portage Band cannot regulate - by non-discriminatory land use planning - commerce within the reservation, *Montana* will have been extended dangerously beyond its facts and rationale into a

situation where it threatens to swallow tribal sovereignty in its entirety. Surely that was not the intent of *Montana*, and this Court will not engage in such ill considered jurisprudence.[15]

In sum, the Grand Portage Band's non-discriminatory Land Use Ordinance violates neither federal nor tribal law and satisfies both prongs of the *Montana* proviso as being 'consensual' in nature, the violation of which would be a direct threat to the 'health and welfare' of the Band. Therefore, the Band possesses jurisdiction over the zoning controversy between the Band and Melby.

B. Summary Judgment

Having determined that the Band has regulatory jurisdiction, the Court must determine whether the Tribal Court improperly denied the Grand Portage Band's Motion for Summary Judgment.

This Court's jurisdiction to hear this appeal arises under the authority of Title 2, Rule 41(g) of the Grand Portage Judicial Code. This Court's review of Judge Fineday's Order finds that she has provided an excellent summary of the findings of facts and conclusions of law in this case, and the parties' extensive briefs have appropriately established an adequate record for this Court to determine the procedural adequacy and merits of the motion for summary judgment.

[15] To anticipate a likely query: *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) does not apply to the case at bar. That case involved a tort action resulting from a car accident involving two non-Indians on a state highway running through the Fort Berthold Reservation in North Dakota. This case is not analogous. This case does not involve a private tort between two non-Indians on a state highway but rather an attempt by the Band to regulate - inter alia - the commercial use of land on the reservation. This dispute involves the tribal sovereign directly; public commerce as opposed to a private tort; and a tiny piece of non-Indian land completely surrounded by trust land (and Lake Superior), not a state highway running through a reservation.

The Band claims that upon the affirmative finding that Melby and his land are subject to the Band's regulatory and adjudicatory jurisdiction, the Band is entitled to summary judgment as a matter of law. That decision rests upon finding in favor of the Band on two issues at dispute by the parties: that the Band's motion for summary judgment was procedurally appropriate, and that the Band is entitled to summary judgment as a matter of law.

With respect to the procedural appropriateness of the Band's motion for summary judgment, Rule 29 of the Grand Portage Rules of Civil Procedure (which resembles Federal Rule 56(a)) reads as follows:

> Any time 20 days after commencement of an action, any party may move the Court for summary judgment as to any or all of the issues presented in the case and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Despite Melby's arguments regarding lack of discovery or other claimed procedural defects in this proceeding, Rule 29 permits the filing of a summary judgment motion anytime 20 days after commencement of an action. There is no requirement in the Rule that Melby or any litigant file an Answer to the Complaint before a Motion for Summary Judgment could be made and acted upon by the Tribal Court. The Band's motion was therefore procedurally appropriate.

Upon our finding that the motion for summary judgment was procedurally appropriate, it is not clear that additional discovery would produce any material facts necessary to defeat the Motion for Summary Judgment. The Court must measure the Band's motion for summary judgment, combined with an analysis of Melby's undisputed actions, against the Band's Land Use Ordinance in order to determine whether the Band is entitled to summary judgment as a matter of law.

The Band's adopted Land Use Ordinance requires all land owners to apply for building permits or variances before constructing buildings or other structures within reservation boundaries. Article 12.01 of the Band's Land Use Ordinance requires that an application for a building permit be made to the Band's Land Use Administrator before any building or structure is erected, constructed, reconstructed, altered, moved or enlarged. The findings of Judge Fineday and the record before us clearly document the undisputed fact that Melby violated the terms of the Band's Land Use Ordinance by not obtaining a building permit from the Band, by not obtaining a variance from the Band's set-back requirement as set forth in the Land Use Ordinance, and by proceeding with construction of a storage building in violation of the Band's Land Use Ordinance. Melby does not dispute this. Apparently, it is Melby's belief that had he applied for a permit under the Band's Land Use Ordinance, he would have accepted the jurisdiction of the Grand Portage Band. (Defendant's Reply Brief at 3) We have already shown that the Band's jurisdiction over Melby existed notwithstanding his intentional resistance to comply with the Band's Land Use Ordinance, and Melby has shown that his intentional acts were in clear contravention of the Band's Land Use Ordinance.

Melby appears to claim exemption from the Band's Land use Ordinance by reciting facts that he planned his building, applied for and obtained a Cook County building permit,[16]

[16] It does not matter that Melby applied for and was granted a building permit from Cook County because the Band's Land Use Ordinance is not limited or affected by Cook County's actions in this matter. Furthermore, the "opinion" of jurisdictional authority provided to Melby by the Cook County Planning Director is not relevant in this case because governing law is federal and tribal law (not state law), and Melby certainly should have been aware that such an opinion would not provide conclusive authority on this issue. This Court is not sympathetic to Melby when he cites his volitional acts contrary to existing regulations as

ordered materials for his building, and paid a nonrefundable deposit before the Band adopted its zoning ordinance. This information merely serves to illustrate Melby's obvious failure to take the necessary steps to comply with the Band's Land Use Ordinance, even after he was aware of adoption of the Ordinance and its possible application to his project. Those facts do not provide a basis for Melby to show that he was not or should not be subject to the Band's Land Use Ordinance, and instead show how he took deliberate steps to avoid the requirements of the ordinance. The information does not defeat the Band's motion that it is entitled to summary judgment as a matter of law.

This Court must address Melby's claim that the mere application of the Land Use Ordinance to his activities is discriminatory in nature (Defendant's Reply Brief at 3). Melby ignores the fact that he has the same rights as any Band member or non-band member in seeking a variance under the Land Use Ordinance. It is difficult to find that the Grand Portage Band discriminated against Melby when Melby did not avail himself to exercise his right to seek a variance under the Band's Land Use Ordinance. Melby's claim of discrimination falls under the weight of the effect of his conscious choice to disregard the Band's Land Use Ordinance in its entirety. The Band's Land Use Ordinance is applicable to all landowners within the reservation boundaries, and was established to be non-discriminatory in its application. Because Melby has chosen to not adhere to its application, he has no basis to claim it is discriminatory in nature. When Melby makes other claims of discrimination or constitutional violations as a result of his lack of voting power or voice in the government establishing the ordinance, his claim of a lack of equal protection is also an untested assumption. Melby may be making an all-too-common

argument why the Court should not find jurisdiction and should not grant summary judgment in this case.

assumption that permeates the present-day view of many Indian activities such as the exercise of self-government or retained treaty rights: that a different right is a "special", unequal right that by its mere exercise discriminates against those who are not Indian. Melby's assertions in this vein are without merit. This Court finds no "special" or unequal right conferred upon Indians or non-Indians as a result of application of the Band's Land Use Ordinance. Melby cites no authority for his broad claims of discrimination or violation of constitutional rights. The Supreme Court has never upheld such claims and in fact, has often held to the contrary. *See e.g. Williams v. Lee*, 358 U.S. 217, 223 (1959) ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

Melby has also raised the argument that the Band's Motion for Summary Judgment violates Judge Alsop's August 13, 1998 Order referring this dispute to Tribal Court for the exhaustion of jurisdiction. A review of Judge Alsop's Order finds that the Order merely stayed Melby's request for an order enjoining the enforcement of the Band's Land Use Ordinance, pending exhaustion of tribal remedies on the question of the Tribal Court's jurisdiction over Melby's land and actions thereupon. Nothing in Judge Alsop's Order prohibits the Tribal Court from acting upon the summary judgment motion; expeditious resolution of this issue will significantly aid final disposition of this dispute.

By virtue of the fact that Melby did not obtain either a building permit under, or a variance from, the Band's Land Use Ordinance, it is therefore undisputed that as a matter of law Melby violated the Grand Portage Band's Land Use Ordinance. This is the classic situation that calls for summary judgment. There are no issues of material fact. Melby has repeatedly admitted that he did not comply (and does not plan on complying) with the Band's Land Use Ordinance. *See e.g. Bauer v. Albermarle Corp.*, 169 F.3d 962, 968 (5th Cir. 1999)

("This Court recently held that a summary judgment motion can be decided without any discovery"). Combined with the fact that the Band has proper jurisdiction to enforce its Land Use Ordinance in this matter, this Court hereby remands this matter to the Tribal Court for purposes of finding that the Band is entitled to summary judgment in this matter and that judgment should be entered accordingly.

IV. Conclusion

For all the above stated reasons, the Court affirms the trial court's decision recognizing tribal court jurisdiction and reverses its judgment in denying summary judgment in favor of the Band and remands so that judgment be entered accordingly.

IT IS SO ORDERED

Dated: February 15, 2000

Christoper D. Anderson
Chief Justice

Mary Al Balber
Associate Justice

Frank Pommersheim
Associate Justice