82410-0

NO.: 37688-1-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

QUINAULT INDIAN NATION, ET. AL.,
APPELLANTS

v.

SEA CREST LAND DEVELOPMENT CO., ET. AL.,
RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT OF JEFFERSON COUNTY
BEFORE HONORABLE JUDGE CRADDOCK VERSER

FILED
COURT OF APPEALS
DIVISION II
08 SEP 22 AM 9:42
STATE OF WASHINGTON
BY ____
DEPUTY

REPLY BRIEF OF APPELLANT, QUINUALT INDIAN NATION, ET. AL.

Rickie Wayne Armstrong, WSBA No. 34099
Of the Office of Reservation Attorney
Quinault Indian Nation

BY: _____
Rickie Wayne Armstrong, WSBA. 34099

OFFICE OF RESERVATION ATTORNEY
QUINAULT INDIAN NATION
PO BOX 189
TAHOLAH, WA 98587
(360) 276-8210 ext. (220)

ORIGINAL

TABLE OF CONTENTS

I. **ARGUMENT** .....1.

A. **TRIBAL JURISDICTION DIRECTED AT PROTECTING THE POLITICAL INTEGRITY, THE ECONOMIC SECURITY, AND THE HEALTH AND WELFARE IS NECESSARY TO FURTHER FEDERAL INDIAN POLICY** .....1.

1. *MONTANA* AND ITS PROGENY CONTROL .....1.

2. FEDERAL POLICY SUPPORTS STRONG TRIBAL GOVERNMENTS WITH NECESSARY ACCOMPANYING TRIBAL JURISDICTION.....3.

3. APPLICATION OF *MONTANA* .....5.

4. APPLICATION OF *BRENDALE* .....8.

5. FEDERAL POLICIES DICTATE THAT QIN HAS CIVIL REGULATORY AND ADJUCIATORY JURISDICTION OVER NON MEMBER FEE LANDS ON RESERVATION .....12.

II. **CONCLUSION** .....15.

TABLE OF AUTHORITIES

I. Table of Cases

Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408 (1989) .....2, 5, 8, 9, 11.

Cabazon Band of Mission Indians v. Smith, 24 F.Supp.2d 1201 (C.D. Cal. 1998).....3.

Chickasaw Nation v. U.S., 534 U.S. 84 (2001) .....14.

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) .....4.

Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming, 670 F.2d 900 (10th Cir. 1982) .....4.

Mescalero Apache Tribe v. Rhoades, 804 F.Supp 251 (D.N.M. 1992).....3, 15.

Montana v. U.S., 450 U.S. 544 (1981) .....1, 3.

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) .....4.

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. _____(2008) .....1, 5.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U. 429 U.S. 1038 (1977) .....4.

Thomsen v. King County, 39 Wash. App. 505 (Wash. App. Div. 1), review denied, 103 Wash.2d 1030 (1985) .....5.

U.S. v. Anderson, 625 F.2d 910 (C.A. 1980) .....3.

U.S. v. Mazurie, 419 U.S. 544 (1975).....1.

U.S. v. Washington, 384 F. Supp. 312 (1974) .....6.

White Mountain Apache Tribe v. State of Ariz., Dept. of Game and Fish, 649 F.2d 1274 (1981) .....3.

II. Table of Statutes

Quinault Tribal Code Title 17 .....6.

25 U.S.C. 2201 .....3.

I. ARGUMENT

A. TRIBAL JURISDICTION DIRECTED AT PROTECTING THE POLITICAL INTEGRITY, THE ECONOMIC SECURITY, AND THE HEALTH AND WELFARE IS NECESSARY TO FURTHER FEDERAL INDIAN POLICY

1. *MONTANA* AND ITS PROGENY CONTROL

Tribal authority stems from its sovereign status, subject to Congress' plenary power. *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Tribal civil regulatory jurisdiction is governed by *Montana*. *Montana v. United States,* 450 U.S. 544 (1981). Under *Montana*, an Indian tribe has civil regulatory jurisdiction over the conduct of non-Indians when the non-member's **conduct threatens or affects the "political integrity, the economic security, or the health or welfare of the tribe."** *Id.* at 566 (emphasis added)

The Supreme Court had the opportunity to review tribal jurisdiction post-*Montana* on a number of occasions, most recently in *Plains Commerce Bank v. Long Family Land and Cattle Co.*. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. _____ ___ (2008). In every case since *Montana*, the Supreme Court has affirmed the rule of *Montana*.

Yet, in only one case has the Court addressed a tribe's jurisdiction over land use matters. *Brendale v Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). In *Brendale*, a split court issued a confused decision whereby Indian tribes had jurisdiction over non-member fee lands in "closed", but not "open" portions of the reservation. *Id.* In reviewing whether lands were located in "closed" or "open" areas, the Court touched upon numerous factors, including: 1) the extent to which Reservation land has been alienated to non-Indians; 2) the extent to which Indians utilize the trust land they retain; 3) the size of the Reservation's non-Indian population, in an absolute sense and relative to the Indian population; 4) the incorporation of non-Indian municipalities; 5) the extent to which non-Indian local government units have established and maintain governmental infrastructure and public services; 6) the extent of private non-Indian development; and 7) the extent to which the Reservation has maintained a unique separate and independent character from the surrounding non-Indian community. *Brendale* at 440-444.

2. FEDERAL POLICY SUPPORTS STRONG TRIBAL GOVERNMENTS WITH NECESSARY ACCOMPANYING TRIBAL JURISDICTION

The federal government has declared its policy regarding Indians and Indian governments numerous times in the past twenty years with its formal policies, current laws, and rescinded past laws. The federal government moved away from the failed policies of termination and allotment many years ago, opting towards policies promoting the strengthening of tribal governments, encouragement of tribal self-sufficiency, and self-governance and self-determination. *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp 251 (D.N.M. 1992); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp 2d 1201 (C.D. Cal. 1998); *Montana v. U.S.*, 450 U.S. 544.. The federal government has a clear policy promoting the optimum use of Indian lands and Indian economic independence. *White Mountain Apache Tribe v. State of Ariz., Dept. of Game and Fish*, 649 F.2d 1274 (1981) (enjoining state regulation of on-reservation activity of non-members); *U.S. v. Anderson,* 625 F.2d 910 (C.A. 1980). Recently, the federal government passed the American Indian Probate Reform Act in an effort to further assist in its policy of Indian land consolidation, permitting Indian governments to recapture lands lost from failed past policies such as the Allotment Act. 25 U.S.C. 2201 et. seq.

The Quinault Indian Nation cannot fully implement these clearly defined federal policies, and the Nation cannot protect its economic security, its health and welfare and/or its political integrity without civil regulatory and adjudicatory jurisdiction over Sea Crest's on-Reservation activities. The U.S. Supreme Court long ago recognized that, in order to protect the health and welfare of a community, a government must be able to exercise comprehensive regulatory powers over lands within its borders. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). Over thirty years ago, the Ninth Circuit articulated an important rationale for protecting tribal control over Indian Reservations:

> [S]ubjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition and seek, under the guise of general regulations, to channel development elsewhere.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977).
Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming, 670 F.2d 900, 903 (10th Cir. 1982) (holding that tribal zoning ordinance affecting fee lands owned by non-Indians

within Indian Reservation "relates substantially to the general welfare of those living on the Reservation and reflects the Tribes' concern over the perceived threat to the rural character of the Reservation and the lifestyle of a majority of those living on the Reservation."); and *Thomsen v. King County,* 39 Wash. App. 505 (Wash. App. Div. 1), review denied, 103 Wash.2d 1030 (1985).

Without tribal jurisdiction over non-members, these federal polices are unenforceable and irrelevant. Consequently, under either a *Montana* analysis or a *Brendale* analysis, the Quinault Indian Nation has civil regulatory and adjudicatory jurisdiction over Sea Crest's activities on on-Reservation fee lands.

3. APPLICATION OF *MONTANA*

When determining whether the QIN has civil regulatory jurisdiction, this Court must focus on Sea Crest's activities and their affect on the QIN, its members, and its land. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. _____ (2008). The Court must find that Sea Crest's activities threaten the political integrity, the economic security, and the health and welfare of the Quinault Indian Nation.

Sea Crest spent considerable time in its brief to the court ignoring the facts, misleading the state of affairs, and minimizing its impact on the Quinault Indian Nation. The facts are Sea Crest did not obtain permits

prior to building on the Quinault Indian Reservation. *CP 234-241, 584-586.* The facts are Jefferson County took no action against Sea Crest to halt unpermitted development activities. The facts are the Quinault Indian Reservation is "closed" except for rights of way used for state highways, created in a period when federal policy allowed for such actions. *Quinault Tribal Code, Title 17..* The facts are that a great majority of the Quinault Indian Reservation, including those lands physically located in Jefferson County are trust lands. *CP 538, 543, 546.*

Unlike most residents of Washington, many residents of the Quinault Indian Reservation and the Quinault Indian Nation, derive their income from the natural resources of the Reservation; this specifically includes hunting, fishing, and brush and timber harvesting. *See U.S. v. Washington*, 384 F. Supp. 312, 375 (1974). The Nation carefully guards its resources and the development of the Reservation to ensure maximum sustainability of its natural resources. *CP 399-462.* This allows the Nation to preserve the economic security of its residents and the Nation's economic enterprises.

Here, Sea Crest's activities went unregulated by Washington state authorities and the Jefferson County Superior Court disallowed the Nation to enforce its regulations. *CP 545-552.* Sea Crest cleared a coastal bluff and carved a road from the top of the coastal bluff onto the Nation's beach. *CP 54-55, 245.* Sea Crest's activities destroyed large amounts of wildlife habitat. *CP 244, 259-260, 267-268, 546.* Sea Crest filled in wetlands. *Id.* The lost wild game caused by Sea Crest's activities cannot be captured by QIN members and used for the basic needs of their families, directly threatening the economic security and health and welfare of the tribal members and by extension, the Nation.

While Sea Crest may have ultimately filed building applications with Jefferson County, Sea Crest did not do so until it was clear that the Nation asserted its jurisdiction and would proceed to take its tribal court judgment to state court for enforcement. Sea Crest's activities show a clear disregard for the political integrity of the Nation, as well as a slap in the face of Washington authorities that were too lazy or indifferent to take action.

Further, Jefferson County laws do not protect the Quinault Indian Reservation, as they do not have any clear zoning or building regulations. *CP 537-543.* Given no other authority is willing or capable of protecting the Nation and its resources, the Nation must enact laws whereby certain uses of land are fully prohibited. In the event of a violation, the Nation must cite offenders and process offenders through the tribal court. The Nation has a clear and fair process for zoning, building, citing violators, and prosecuting violators. Sea Crest's activities have clearly harmed the political integrity of the Nation. The Nation was forced to register its judgment with a state court and proceed with this appeal.

In the present case, the Nation has jurisdiction over the matter. Sea Crest's activities do damage the economic security, health and welfare, and economic security of the Quinault Indian Nation, its members, and its Reservation.

4. APPLICATION OF *BRENDALE*

The only case decided by the Supreme Court addressing a tribe's jurisdiction over non-member fee-land matters is *Brendale*. 492 U.S. 408. Under a *Brendale* analysis, the Court's deciding factor was

whether the non-member fee land was in an "open" or "closed" area of the reservation. *Id.* Although not clearly stated in the opinion, the Court focused on: 1) the extent to which Reservation land has been alienated to non-Indians; 2) the extent to which Indians utilize the trust land they retain; 3) the size of the Reservation's non-Indian population, in an absolute sense and relative to the Indian population; 4) the incorporation of non-Indian municipalities; 5) the extent to which non-Indian local government units have established and maintain governmental infrastructure and public services; 6) the extent of private non-Indian development; and 7) the extent to which the Reservation has maintained a unique separate and independent character from the surrounding non-Indian community. *Brendale* at 440-444.

Here, all of the factors considered in *Brendale* support the QIN. First, the 200,000-plus acres encompassing the Quinault Reservation includes only 12% non-Indian fee-land. *CP 50.* The vast majority of which is forest land held by one non-Indian timber company—Anderson-Middleton. *Id.* Only about 5.8% (12,104 acres) of the Reservation lands are owned in fee by individual non-Indians, which are scattered throughout the Reservation. The land ownership pattern

is similar to that in the "closed" area of the Yakima Reservation in *Brendale*.

Second, outside of the three small, primarily Indian-inhabited villages of Queets, Amanda Park and Taholah, the Reservation is largely used by the Nation and individual Indians for timber production. The Quinault people use the forestland and beaches for cultural, medicinal, ceremonial, religious, subsistence, and commercial purposes. *CP 139.* This factor indicates the Quinault people use their Reservation lands in the same manner as the Yakima Indians in the "closed" area of the Yakima Reservation.

Next, census figures from 2000 indicate a total population of 1,370 for the Quinault Reservation, of which 1,023 are American Indian or Alaska Native. *CP 139.*. There are no incorporated non-Indian municipalities on the Quinault Reservation nor are there any non-Indian governmental entities who have established or maintained infrastructure and public services. *CP 139-140.*. Aside from a few personal wells and septic tanks, the Nation provides water services and sewer services to all residents on the Reservation, and provides solid waste disposal services, cable services, police protection, fire

protection and emergency medical services to all residents on the Quinault Reservation.

The *Brendale* Court also placed emphasis on the fact that there was substantial non-Indian commercial and residential development in the "open" area of the Yakima Reservation, whereas in the "closed" area "for the most part this area consists of forests, which provide the major source of income to the Tribe." 492 U.S. at 438. On the Quinault Reservation, there are three small, primarily Indian villages. *CP 139.*. Outside of those, the Reservation is forested and used to provide the primary source of income to the Quinault Nation and its people. *Id.* . Except for a few non-Indian businesses in Amanda Park and one lumber mill on the Reservation, all businesses on the Reservation are owned by Indians or the Nation. *Id.* There are no non-Indian businesses in the villages of Queets or Taholah.

Seventh, and finally, the *Brendale* Court concluded the "open" area of the Yakima Reservation had become an integrated part of Yakima County and had lost its unique and separate identity. 492 U.S. 408. This is not so with any of the Quinault Reservation, specifically the area surrounding Sea Crest's parcel. The Quinault Reservation has

maintained a distinct and unique character as an Indian Reservation. For example, there is extensive non-Indian residential and commercial development along the Washington coast up to the Reservation boundaries, where that development stops. *CP 140*. In contrast, the 27.8 miles of Reservation coastline is pristine and generally undeveloped. *Id.* The interior of the Reservation is primarily forested and undeveloped. *CP 50.*. Quinault tribal members use the beaches and forest lands within the Reservation for recreational, ceremonial, religious, cultural, commercial and subsistence purposes. *CP 139.*

Sea Crest's flimsily-supported assertion that its land is located in an "open" areas of the Reservation is simply not supported by fact; all of the above cited facts are similar to the determinative factors used to support the *Brendale* decision that land was in a "closed" area of the Reservation. Therefore, the Court must find that the Nation has jurisdiction over Sea Crest's activities on on-Reservation fee lands.

5. <u>FEDERAL POLICIES DICTATE THAT QIN HAS CIVIL REGULATORY AND ADJUCIATORY JURISDICTION OVER NON MEMBER FEE LANDS ON RESERVATION</u>

As previously stated, the federal government has identified a number of clear federal Indian policies. These policies include promoting

strong tribal governments that are self sufficient, optimizing the use of Indian lands and economic independence, and consolidating Indian lands, recovering the losses from the failed General Allotment Act and termination and assimilation policies.

Sea Crest attempted to recount historical facts pertaining to the land ownership of its individual parcel, indicating that it was originally allotted under a past federal policy. However, Sea Crest ignores the fact that the federal government abandoned the failed policy that ultimately allowed Sea Crest to purchase its land on the reservation. Sea Crest identifies the fact that the Nation has repurchased a number of lands in the recent years, but ignores the current and long standing federal Indian land acquisition policy. Sea Crest uses these facts to demonstrate that the land is now in an "open" area of the Reservation, which is just not the case.

Sea Crest's arguments all identify federal laws and policies that have since been abandoned. The federal policies currently in existence support the Nation's position and bolster the support that Sea Crest's parcel is in a "closed" area of the Reservation. Nearly one hundred years ago when the Sea Crest parcel was originally allotted, the federal

government desired to terminate the reservation and assimilate its residents. At that time, chances are that the reservation, in areas, was "open"; however, that day has long passed and the Sea Crest Parcel is currently in a "closed" area of the Reservation. Any decision to the contrary by this court will fly in the face of current federal policy.

A decision by this court, which disallows the Nation to assert its jurisdiction over Sea Crest's on-Reservation activities, is contrary to stated federal policy of strengthening tribal governments. Tribal governments, including the Quinault Indian Nation, are handcuffed to the will of outside jurisdictions should Indian tribes not have civil jurisdiction over non-member fee parcels that have such a long-lasting impact on the land. The residential units established by Sea Crest will stand for many years. Traffic to and from and use and maintenance of the Sea Crest units will have much greater negative effect on the Quinault Indian Reservation than the one-time act of building the unit. Federal policies are meaningless if courts are at liberty to render decisions that are contrary to the policy of strengthening tribal governments; hence, courts follow the canons of statutory interpretation. *Chickasaw Nation v. U.S.,* 534 U.S. 84 (2001). Canons of statutory interpretation are designed to assist judges to determine

legislative intent. *Id.* Here, the federal government declared the policy of strengthening tribal governments and self-sufficiency. *Mescalero Apache Tribe*, 804 F. Supp 251. This court must view Sea Crest activity as a whole when holding that the Nation has jurisdiction in this case in order to give federal policy effect.

Finally, the federal government has made extremely clear its policy of promoting tribal self-government and determination. The federal government intended Indian tribes to have the authority to govern their members and their lands. Under this clearest of federal policies, the Court must hold that the Nation has jurisdiction over non-member fee--land use issues. The Nation intends to exercise the authority the federal government intended it exercise when enacting the policy of self-governance and determination.

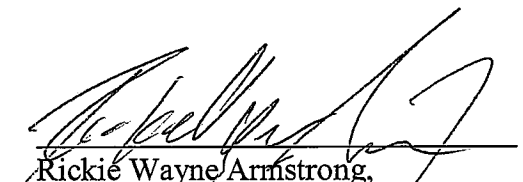
II. CONCLUSION

The QIN respectfully requests that this Court find the QIN has jurisdiction to regulate Sea Crest's building activities and recognize its tribal court order, and implement the provisions thereof. Such a decision is not only supported by Supreme Court cases, but by clear federal policies of self-governance and determination. Land use issues directly affect the

reservation lands. Sea Crest land use directly effects neighboring reservation lands and the ocean and the beaches where the Nation's members harvest fish under their Treaty and the Superior Court's refusal to recognize the Nation's tribal court order rips away the Nation's ability to govern its lands and members.

DATED this 19th day of September 2008.

Respectfully Resubmitted,



Rickie Wayne Armstrong,
WSBA No. 34099
Office of Reservation Attorney
Quinault Indian Nation
PO Box 189
Taholah, WA 98587
Ph: 360-276-8210 ext. 393
Fax: 360-276-8127
rarmstrong@quinault.org

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION II

QUINAULT INDIAN NATION and QUINAULT PLANNING COMMISSION, *Petitioner,*	CAUSE NO. 37688-1-II
v.	CERTIFICATE OF SERVICE
SEA CREST LAND DEVELOPMENT CO. INC., a Washington State corporation, JACK A. GLAUBERT, registered agent of SEA CREST LAND DEVELOPMENT, INC. *Respondent.*	

FILED
COURT OF APPEALS
DIVISION II
08 SEP 22 AM 9:42
STATE OF WASHINGTON
BY _____
DEPUTY

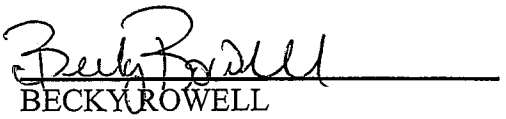
I, Becky Rowell, certify that I caused to be served by U.S. Mail, the following documents: REPLY BRIEF OF APPELLANT, to the following:

Opposing Counsel:
Beebe, Roberts & Bryan, P.L.L.C.
Attn: David A. Roberts
P.O. Box 163
Kingston, WA 98346-0163
(360) 297-4542

Office of the Reservation Attorney
QUINAULT INDIAN NATION
Post Office Box 189
Taholah, Washington 98587
(360) 276-8211

ORIGINAL

DATED this 19th day of September, 2008.



BECKY ROWELL

Office of the Reservation Attorney
QUINAULT INDIAN NATION
Post Office Box 189
Taholah, Washington 98587
(360) 276-8211