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STATE OF WASHINGTON
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NO. 37688-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

QUINAULT INDIAN NATION, ET AL.,

Appellants,

v.

SEA CREST LAND DEVELOPMENT CO., ET AL.,

Respondents.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION.

The appellants (hereinafter "Quinault Indian Nation" or "QIN") obtained a default judgment against the respondents (hereinafter "Sea Crest") in the Tribal Court of the Quinault Indian Nation. The judgment was based entirely on QIN's assertion of regulatory zoning authority over Sea Crest's parcel of land, which is located within the external boundaries of the Quinault Indian Reservation. U.S. Highway 101 bisects the parcel from north to south. The parcel is adjacent to developed and inhabited property to the north, and is approximately one mile from the village of Queets on U.S. Highway 101. The parcel is easily and directly accessible by anyone. As such, the parcel is located in an "open" (as opposed to a "closed") area of the Quinault Indian Reservation.

Respondent Sea Crest Land Development, Inc., owns the parcel in fee simple. The parcel is in no way owned by QIN or any member of QIN, nor is it in any way part of QIN's trust lands. As such, the parcel falls under a category known as "nonmember fee land" as set forth in a solid line of U.S. Supreme Court cases. Under that line of cases, Montana v. United States, 450 U.S. 544 (1981), and its progeny, Indian tribes have no regulatory or adjudicative jurisdiction over nonmember fee land in an open area of an Indian reservation.

After it obtained the default judgment in tribal court, the QIN filed a petition in Jefferson County Superior Court for CR 82.5(c) recognition of the tribal court judgment. Rule 82.5(c) provides that Washington superior courts shall recognize judgments of tribal courts unless the tribal

court "lacked jurisdiction over a party or the subject matter." The trial court correctly found that the tribal court lacked jurisdiction, denied the petition for recognition of the tribal court judgment, and dismissed the superior court action. The QIN now appeals.

II. RESPONSE TO ASSIGNMENT OF ERROR.

RESPONSE TO ASSIGNMENT OF ERROR:

The trial court properly denied QIN'S CR 82.5(c) petition for recognition of a tribal court judgment and dismissed the trial court action because the underlying tribal court had no subject matter or personal jurisdiction over Sea Crest pursuant to Montana v. United States, 450 U.S. 544 (1981), and its progeny.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR:

Whether a court should deny CR 82.5(c) recognition of a tribal court default judgment where the tribal court and the Indian tribe lacked regulatory and adjudicative jurisdiction over the defendants and the subject matter pursuant to Montana v. United States, 450 U.S. 544 (1981), and its progeny, in a zoning matter because the subject property was located in an open area of the Indian reservation and owned in fee simple by non-members of the tribe.

III. STATEMENT OF THE CASE.

A. SEA CREST PROPERTY AND VICINITY.

Sea Crest Land Development, Inc., owns a tract of fee patent land, within the boundaries of the Quinault Indian Reservation, legally described as follows:

> Gov't Lot 7 of Section 27, Township 24 North; Range 13 West, Willamette Meridian, EXCEPT, Highway 101 R/W, and EXCEPT, the North 100 Feet Thereof lying West of Highway 101.

CP 573, 576.[1] In 1928, the property became one of a large number of parcels on the Quinault Indian Reservation to be conveyed to non-Indians by patent in the early part of the 20th century. CP 573, 577-78.

Some of the relevant history of the Quinault Indian Reservation is set forth in the case of Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002), as follows:

> The Quinault Reservation was established by Executive Order in 1873 pursuant to the Treaty with the Quinault. See Executive Order of November 4, 1873; 12 Stat. 971. In the century that followed, ownership of tribal lands was on a virtual see-saw. Within fifteen years of establishing the reservation, Congress enacted the General Allotment Act, which permitted the allotment of tribal lands to individual Indians and resulted in the vast majority of reservation land being allotted to individuals. Indian General Allotment Act

[1] Respondent Jack Glaubert is merely a shareholder and registered agent of Sea Crest Land Development, Inc. He has never owned any part of the property in his individual capacity. CP 574. Because of this, he is not a real party in interest, and was properly dismissed on this independent basis.

> of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq. In 1934, Congress stepped in to halt further allotment. Indian Reorganization Act, 48 Stat. 984, as amended, 25 U.S.C. § 461 et seq. Nonetheless, by the mid-1980s, 30% of the reservation's allotted land had been transferred to non-Indian ownership, with a handful of non-Indian entities owning approximately 80% of these holdings.

Id. at 648. "By 1935, the entire Reservation had been divided into 2,340 trust allotments, most of which were 80 acres of heavily timbered land." United States v. Mitchell, 463 U.S. 206 (1983).

The Sea Crest property is bounded on the west by the Pacific Ocean, and sits approximately one-half mile from the northern boundary of the Quinault Indian Reservation. CP 573, 579. Only Government Lots 5 and 6 sit between the Sea Crest property and the northern boundary of the Quinault Indian Reservation. CP 573 and CP ___ (*Declaration of Jack A Glaubert, Ex. 4).*[2] Government Lot 6, which is immediately to the north of the Sea Crest parcel, was subdivided into 21 fee patent parcels, most of which have been developed and inhabited. CP 573, 580 and CP ___ (*Declaration of Jack A Glaubert, Ex. 4).*

B. THE SEA CREST PROPERTY IS IN AN OPEN AREA OF THE QUINAULT INDIAN RESERVATION.

U.S. Highway 101 bisects the property from north to south. CP 573, 580 and CP ___ (*Declaration of Jack A Glaubert, Ex. 4).* The village

[2] Exhibit 4 of the Declaration of Jack Glaubert was inadvertently omitted from the Clerk's Papers submitted to the Court of Appeals by the Jefferson County Superior Court, and at the time of this Brief, it had not been assigned a CP number.

of Queets is approximately one mile south on Highway 101. CP 573. The settlement of resort of Kalaloch is approximately three miles to the north of the Sea Crest property. CP 585.

As can be seen on the 1970 survey of the Queets Unit of the Quinault Indian Reservation, the Sea Crest property is in the northwest corner of the reservation. CP 573-74, 579. The survey shows that it is among the vast majority of property in the Queets Unit at that time that was fee patent land resulting from allotment from the federal government in the early part of the 20th century. CP 573-74, 579. Visually, it appears that approximately 90 percent of the Queets Unit was fee patent land in 1970. CP 574, 579. As can be seen on page 67 of the Quinault Indian Nation Comprehensive Economic Development Strategy for Fiscal Year 2003-04, most of the Queets Unit was still fee patent land at that time. CP 574, 581. The QIN has not disputed these facts.

Nowhere does the QIN contend that this area, or the reservation, has ever been closed to the public, as was the "closed" area of the Yakima Indian Reservation. See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 415 (1989) ("The closed area is so named because it has been closed to the general public at least since 1972, when the bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation...."). The "Ownership Pattern" map presented as an exhibit to the Second Declaration of Jonathan Ciesla (of QIN) shows that approximately half the

Queets Unit is still fee patent land. CP 544. This is similar to the open area of the Yakima Indian Reservation, where "[a]lmost half of the land in the open area is fee land." Brendale, 492 U.S. at 416.

The QIN does not contradict the fact that Government Lot 6, which is immediately to the north of the Sea Crest parcel, was subdivided into 21 fee patent parcels, most of which have been developed and inhabited. CP 573, 580 and CP ___ (*Declaration of Jack A Glaubert, Ex. 4);* CP 537-544. In fact, the "Ownership Pattern" map shows that approximately two-thirds of the oceanfront property on the Quinault Indian Reservation is still fee patent land. CP 544. The "Ownership Pattern" map does not show a closed reservation. What it shows, by itself and in combination with the evidence presented by respondents, is that the Quinault Indian Reservation has been an open reservation, and that the Quinault Indian Nation has been gradually reacquiring fee patent lands. CP 572-586; CP 544.

C. DEVELOPMENT OF SEA CREST PROPERTY.

On or about July 19, 2007, Sea Crest Land Development, Inc., applied for a building permit at the Jefferson County Department of Community Development. The application was for a new single-family residence (a cabin). Jefferson County issued permit #BLD07-00392 on September 24, 2007. Sea Crest Land Development, Inc., has begun construction of the cabin and has been in full compliance with all the conditions of the building permit. CP 574, 582-86.

D. LITIGATION HISTORY.

On or about September 5, 2007, the QIN sued Sea Crest in the Quinault Tribal Court on a land use matter based entirely on QIN's assertion of regulatory zoning authority. CP 574. Sea Crest never submitted to the jurisdiction of the Tribal Court. CP 574. The QIN obtained a default order in the Tribal Court action. CP 574. The tribal court did not make a finding that the Quinault Indian Reservation is or has been closed to the public, nor have petitioners presented any facts that would support such a finding. CP 508-10. The default order in the Tribal Court does not contain any findings of fact. CP 508-10. On or about October 18, 2007, the QIN filed the CR 82.5(c) Petition in superior court. CP 574.

E. OWNERSHIP OF SEA CREST PARCEL.

The real property that is the subject of the underlying Tribal Court dispute is owned in fee simple solely by respondent Sea Crest Land Development, Inc., which is a non-tribal Washington corporation. CP 573-74, 576. The entire development project (construction of a cabin) is being undertaken by Sea Crest Land Development, Inc. CP 574. Neither Jack Glaubert nor Sea Crest Land Development, Inc., are members of, related to, or associated with any Indian tribe. CP 574. Neither Jack Glaubert nor Sea Crest Land Development, Inc., have entered into any type

of consensual relationship with the Quinault Indian Nation or any of its members. CP 574.

F. THERE IS NO MEMORANDUM OF UNDERSTANDING (MOU).

The QIN continues to insist on falsely asserting that a Memorandum of Understanding (MOU) between Jefferson County and QIN exists. There is no such valid MOU. CP 584-85. There was a proposed MOU that was never ratified by Jefferson County and never approved by Grays Harbor County, the third party to the proposed MOU. CP 584-85. The QIN has presented no evidence that the proposed MOU in question was ever approved by Grays Harbor County. Moreover, no valid MOU has been recorded with the Jefferson County Auditor or listed on any public agency's website as required by RCW 39.34.040.[3] CP 584-85. Indeed, the QIN never presented any evidence of a recorded or listed MOU signed by all parties.

G. SEA CREST HAS OBTAINED PERMITS FOR ALL DEVELOPMENT ACTIVITIES.

Although the following is irrelevant to the jurisdictional issue at hand, Sea Crest feels compelled to respond to QIN's erroneous characterization of Sea Crest as a rogue developer. Despite QIN's

[3] "Prior to its entry into force, an agreement made pursuant to this chapter shall be filed with the county auditor or, alternatively, listed by subject on a public agency's web site or other electronically retrievable public source." RCW 39.34.040.

statements to the contrary, Sea Crest obtained state permits and approval for well drilling, installation of power distribution components, and driveway access. CP 612-17. Also, as previously stated, Sea Crest obtained a building permit from Jefferson County. CP 574.

Contrary to the QIN's statements, Jefferson County has asserted its regulatory jurisdiction over the Sea Crest property by issuing a building permit and setting forth conditions for developing the property. CP 574, 582-86. In fact, the QIN has acquiesced in Jefferson County's assertion of jurisdiction. The QIN never objected to or appealed Jefferson County's issuance of a building permit, although zoning code provisions have been available to the QIN to do so. CP 574, 582-86.

Jefferson County imposed numerous restrictions on Sea Crest's development of the property under the Jefferson County Unified Development Code, and found that the development was consistent with the Jefferson County Comprehensive Plan and Land Use Map. CP 574, 582-86. Moreover, Sea Crest's development of the property was subject to further state restrictions pertaining to eagle management, access to U.S. Highway 101, and stormwater management. CP 574, 582-86. The QIN never objected to or participated in any other way in the Jefferson County permitting process. CP 574, 582-86.

Additionally, in the CR 82.6(c) petition, the QIN alleged that Sea Crest refused to obtain permits from the Quinault Indian Nation, and that Sea Crest refused to acknowledge the Quinault Indian Nation's sovereign

authority. CP 4. The QIN's characterization failed to accurately reflect the process that Sea Crest went through when attempting to involve the Quinault Indian Nation. CP 612-617. The trial court recognized this by deleting from the Memorandum Opinion its statement about Sea Crest "arrogantly" ignoring QIN's process. CP 553-54.

When Sea Crest received a stop work order from the Quinault Indian Nation Planning Department, Sea Crest was aware that the Quinault Indian Nation lacked regulatory jurisdiction under Montana and Brendale. CP 612-617. Nonetheless, as a matter of courtesy, Sea Crest sought meetings with the Quinault Indian Nation to determine how to go about getting the Nation's approval for the project. CP 612-617. During the course of meetings and communications, Sea Crest sought to determine the rules and criteria the Quinault Indian Nation would use for its determination of approval. CP 612-617. The QIN refused to disclose the regulations that it asserted were the basis for its position. CP 612-617.

The QIN made it clear to Sea Crest that it would oppose any development at all, and that the Nation sought to acquire Sea Crest's property after minimizing its market value by prohibiting all development opportunity. CP 612-617. (Indeed, the QIN admits in its Brief that it has "aggressively implemented its land acquisition policy." Brief of Appellant at p. 7.) At that point, Sea Crest reasonably perceived the fruitlessness of pursuing a permit from the Quinault Indian Nation. CP 612-617.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT.

The trial court properly denied the QIN's CR 82.5(c) petition for recognition of the tribal court judgment and dismissed the trial court action because the tribal court had no subject matter or personal jurisdiction over Sea Crest pursuant to Montana v. United States, 450 U.S. 544 (1981), and its progeny. In the current appeal, with the exception of introducing a new 2008 U.S. Supreme Court case, the QIN does nothing more than rehash the arguments that Sea Crest soundly rebutted in the trial court.

The new case cited by QIN, Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. ___ (2008) (Slip Op. 07-411, June 25, 2008), supports Sea Crest's legal position by following Montana and its progeny, including Nevada v. Hicks, 533 U.S. 353 (2001), Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), Strate v. A-1 Contractors, 520 U.S. 438 (1997), South Dakota v. Bourland, 508 U.S. 679 (1993), and Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408 (1989). The Brief of Appellant lacks any thorough legal analysis on the subject of tribal jurisdiction. The QIN fails to even argue the central point in tribal zoning jurisdiction cases: whether the relevant area of the reservation is "open" or "closed." This court should deny the appeal for the same reasons the trial court denied the original CR 82.5(c) Petition.

B. THE MONTANA RULE AND ITS NARROW EXCEPTIONS GOVERN THIS CASE.

The legal analysis on whether a tribal court has civil jurisdiction over a person who is not a member of the tribe starts with Montana v. United States, 450 U.S. 544 (1981). Specifically, the Montana case addressed whether a tribal court had civil subject matter jurisdiction over a nonmember of the tribe on nonmember fee land. The Supreme Court pointed out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565.

If the action involves a nonmember, the question is whether "the exercise of Tribal power is necessary to protect Tribal self-government or to control internal relations." Id. Any exercise of Tribal power beyond that is "inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." Id. at 564. The Montana court concluded that Tribal regulation of hunting and fishing by nonmembers of a Tribe on lands no longer owned by the Tribe bore no clear relationship to Tribal self-government or internal relations. Id.

The Court identified two circumstances, or exceptions, where Tribal civil jurisdiction could exist over nonmember on nonmember-owned fee land: when there is a "consensual relationship" between the nonmember and the Tribe "through commercial dealings, contracts, leases, or other arrangements," and when the conduct of the nonmember threatens

or has some direct effect on "the political integrity, the economic security, or the health or welfare of the Tribe." Id. at 566, Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997). The Supreme Court has interpreted the Montana exceptions narrowly out of concern that the exceptions might swallow the rule. Strate, 520 U.S. 438, 458-59 (1997).

As for the first exception, Sea Crest never entered into any kind of consensual relationship with the QIN. The QIN does not assert that any consensual relationship has ever existed.

The second exception is "only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." Atkinson Trading Co., Inc. v. Shirley, 523 U.S. 645, 657 n. 12 (2001). Other federal courts have noted that "the tribe's interest in the political, economic, health or welfare effects of a particular action is not enough, by itself, to meet this exception.... Otherwise, the exception would swallow the rule." See e.g. County of Lewis v. Nez Perce Tribe, 163 F.3d 509, 515 (9th Cir. 1998). The Strate court emphasized the context of the Montana rule and its exceptions:

> Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for its members.... But [a tribe's inherent power does not reach]

beyond what is necessary to protect tribal self-government or to control internal relations."

Strate, 520 U.S. at 459.

C. INDIAN TRIBES HAVE NO ZONING AUTHORITY OVER NONMEMBER-OWNED FEE LAND UNLESS THE LAND IS IN AN AREA CLOSED TO THE PUBLIC.

On the particular issue of zoning, the U.S. Supreme Court held by a 6-3 majority that the Yakima Nation had no jurisdiction to zone fee lands owned by nonmembers in the "open" area of the reservation. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinions). Four of those six justices articulated a clear, simple rule that an Indian Tribe or Nation has no authority to zone fee lands owned by nonmembers within the reservation. Id. at 421-433. Two of the six justices thought that whether a tribe has jurisdiction to zone fee lands within the reservation must be determined on a case-by-case basis. Id. at 433-437. All six justices agreed that where a tribe no longer retains the "exclusive use and benefit" of lands held in fee by nonmembers, the tribe would no longer have the authority to zone such lands. Id. at 422, 437, 444-445.

The parties in Brendale agreed on the designations of "open" and "closed" for the respective areas of the Yakima Reservation. Id. at 415. "The closed area is so named because it has been closed to the general public at least since 1972, when the bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima

Nation...." Id. at 415. In the open area of the Yakima Indian Reservation, "[a]lmost half of the land in the open area is fee land." Id. at 416.

Subsequent Supreme Court decisions on tribal jurisdiction over nonmembers on nonmember-owned fee land have confirmed that Brendale's holdings were 1) the Yakima Nation had no authority to zone in the area of the Yakima Nation that was open to the public, and 2) the Yakima Nation had authority to zone in the "closed" area of the Yakima Nation. See Atkinson Trading Co., Inc. v. Shirley, 523 U.S. 645, 657 n. 12 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 447 n. 6 (1997); South Dakota v. Bourland, 508 U. S. 679. 688 (1993). The Atkinson court rejected the argument that Indian tribes enjoy broad authority over nonmembers whenever the acreage of non-Indian fee land is miniscule in relation to the surrounding tribal land. "[W]e think it plain that the judgment in Brendale turned on both the closed nature of the non-Indian fee land and the fact that its development would place the entire area 'in jeopardy.'" Atkinson, 523 U.S. at 658, quoting Brendale, 492 U.S. at 443.

In Bourland, the court explained the holdings in Brendale and affirmed that Montana governs in tribal jurisdiction cases as follows:

> Montana and Brendale establish that, when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right ... implies the loss of regulatory jurisdiction over the use of the land by

others.

Bourland, 508 U.S. at 689. The Bourland court further explained that because significant portions of the Yakima reservation had been allotted under the General Allotment Act and had passed to nonmembers, the Brendale court concluded the "exclusive use and benefit" clause of the treaty creating the reservation was inapplicable to those lands, and "therefore could not confer tribal authority to regulate the conduct of non-Indians there." Bourland, 508 U.S. at 688-689.

In the present case, it is undisputed that the property in question is non-Indian owned fee property located in an area of the reservation that is open to the general public. It is undisputed that significant portions of this area were allotted pursuant to the General Allotment Act and passed to nonmembers. It is undisputed that approximately fifty percent of the northwest quadrant of the reservation (the Queets Unit) is still owned by nonmembers, as was the "open" area of the Yakima Indian Nation in Brendale. It is undisputed that the area of the property in question is not a "closed" area of the Quinault Indian Nation.

The Brendale case makes it clear that a tribe's lack of zoning jurisdiction over nonmember-owned property in an open area of the reservation does not affect Tribal self-government or a tribe's control of its internal relations. As such, the Quinault Indian Nation has no regulatory jurisdiction over the property.

D. INDIAN TRIBAL SOVEREIGNTY IS LIMITED BY THE TRIBE'S DEPENDENT STATUS.

A source of QIN's misunderstanding of the limits of the tribal court's jurisdiction may be found in QIN's overstatement of the Quinault Indian Nation's sovereignty. Petitioners erroneously assert that the "Nation is a sovereign government and asserts civil regulatory jurisdiction and governmental power over its Reservation lands and to ***all persons*** acting within the boundaries of said Reservation." CP 3 (emphasis added). As is clearly explained in the federal case law, that is simply not the case, especially with regard to nonmembers of the tribe.

Federal case law sets forth the limitations of Indian tribal sovereignty. "Unlike other sovereigns, Indian tribes have limited power over external affairs," as their "dependent status within [the] territorial jurisdiction [of the United States] is necessarily inconsistent with their freedom independently to determine their external relations." United States v. Wheeler, 435 U.S. 313, 326 (1978). "Limitations on tribal authority are particularly acute where non-Indians are concerned. Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2d Cir. 1996). "Inherent sovereign powers do not extend to the activities of nonmembers of the tribe." Id., quoting Montana v. United States, 450 U.S. 544, 565 (1981).

"In Montana, the most exhaustively reasoned of our modern cases addressing [retained or inherent tribal sovereignty], we observed that Indian tribe power over nonmembers on non-Indian fee land is sharply

circumscribed." Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 649-50 (2001). "Both Montana and Strate rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" Nevada v. Hicks, 533 U.S. 353, 359 (2001).

"[T]he Supreme Court's decision in Montana ... established that the dependent status of Indian tribes has implicitly divested them of power to regulate, in general, 'the conduct of non-members on land no longer owned by, or held in trust for the tribes.'" Cardin v. De La Cruz, 671 F.2d 363, 366, (9th Cir. 1982), quoting Colville Confederated Tribe v. Walton, 647 F.2d 42, 52 (9th Cir. 1981). The Supreme Court stated, "Though tribes are often referred to as "sovereign" entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of a State can have no force within reservation boundaries. ...Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." Nevada, 533 U.S. at 361 (quotations and citations omitted).

"Through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." Montana, 450 U.S. at 563. "Indian tribes which were originally fully sovereign, are now dependent on the United States...." Wheeler, 435 U.S. at 323. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the

tribe...." Montana, 450 U.S. at 564, quoting Wheeler, 435 U.S. at 313.

Like all other Indian tribes in the United States, and contrary to QIN's position, the Quinault Indian Nation does not have sovereignty or jurisdiction over all persons on the reservation. In particular, as a general rule, the Quinault Indian Nation and its agencies, including the Quinault Planning Commission, do not have jurisdiction over nonmembers on nonmember-owned fee land within the reservation.

E. IN TRIBAL JURISDICTION CASES, THE RELEVANT DISTINCTION IS BETWEEN "MEMBER" AND "NONMEMBER," NOT BETWEEN "INDIAN" AND "NON-INDIAN."

The QIN incorrectly asserts that the racial makeup of the population, as opposed to the membership makeup of the population, is relevant in tribal jurisdiction cases. The QIN quotes in its Brief the census figures of the "American Indian or Alaska Native" population on the reservation and compares them to the "non-Indian" population. Brief of Appellant, pp. 6-7. The QIN has presented no evidence of the number of QIN members, where they are located, or what land they own.

The QIN's erroneous view flies in the face of the United States Supreme Court's decisions that distinguish between "members" and "nonmembers." See e.g. Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Brendale, 492 U.S. at 426, quoting United States v. Wheeler, 435 U.S. 313, 326 (1978) ("Those cases in which the Court has found a tribe's sovereignty divested generally are those 'involving the relations between

an Indian tribe and nonmembers of the tribe.'"). Justice Souter explained, "The relevant distinction ... is between members and nonmembers of the tribe." Nevada v. Hicks, 533 U.S. 353, 377, n. 2 (2001) (Souter, J., concurring), citing Strate, 520 U.S. at 445-46. Contrary to what petitioners argue, tribal membership is what matters when determining questions of tribal jurisdiction.

F. CASES CITED IN QIN'S BRIEF FAIL TO REBUT THE PRINCIPLES OF PREVAILING SUPREME COURT LAW.

In its brief, the QIN lists several examples of cases that have applied the second exception to the Montana general rule of no tribal jurisdiction over conduct by nonmembers on fee patent land. All of these cases have important distinctions from our case, and none have any application in the present case.

First, in State of Montana v. United States E.P.A., 137 F.3d 1135 (9th Cir. 1998), the court held that regulation of water systems has a direct effect on tribal health and welfare. The court pointed out that it had previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians because a water system is a unitary resource where the actions of one user have a direct and immediate effect on other users. Id. at 1141. The case of Colville Confederated Tribes v. Walton, 647 F.2d 42 (1980), was another water rights case.

The case of Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (1982), involved regulation

of use of tribal trust land, as opposed to fee patent land. Id. at 953, 962 (regulation of exercise of riparian rights on bed and banks of Flathead Lake owned by United States in trust for tribes). The case of Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977), addressed an issue inverse to the issue in our case, i.e. whether a state has zoning authority over Indian trust lands. Moreover, that case was decided prior to Montana and Brendale.

The Thomsen case does not help the QIN. The court in that case applied the Montana analysis and found that the state of Washington had public health regulatory jurisdiction over nonmember-owned fee property because neither of the Montana exceptions were met. Thomsen v. King County, 39 Wn. App. 505, 514, 694 P.2d 40 (1985), review denied, 103 Wn.2d 1030 (1985).

Apart from Brendale, the Knight case is the only case listed by the QIN that involved zoning of fee lands owned by nonmembers of the tribe. In Knight, the court held that the Indian tribe could exercise zoning authority over the fee land located in an area of the reservation open to the public. Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation, 670 F.2d 900, 901 (1982). The problems with the QIN relying on the Knight case are threefold.

First, the case was decided before Brendale and rested on a principle that was essentially repudiated by Brendale and other Montana-line cases. The Knight case asserted that the power to control use of non-

Indian owned land flowed from the inherent sovereign rights of self-government and territorial management. Id. at 903. The Brendale court, however, admonished that a tribe's inherent sovereignty is divested to the extent it involves relations between an Indian tribe and nonmembers of the tribe. Brendale, 492 U.S. at 425-26. Second, Brendale held that the tribe had no jurisdiction over zoning matters involving fee land owned by nonmembers in an area of the reservation open to the public, id. at 432, opposite the Knight holding. Third, in the 26 years since the decision, the Knight case has never been cited by any court as authority.

G. QIN'S IRRELEVANT ARGUMENTS.

The remainder of QIN's brief is devoted to arguments about how Sea Crest's development of its property allegedly impacts QIN's resources, how Sea Crest violated QIN's tribal regulations, and how Sea Crest allegedly failed to get permits for its development activities. As set forth above in the Statement of the Case, pp. 6, 8-9, Sea Crest has obtained permits and approval for the different phases of its development. At any rate, the details of these matters are not relevant to the legal question at hand.

This case is about whether the Quinault Indian Nation has regulatory authority in zoning matters over the Sea Crest property. The efficacy of Jefferson County's governance is not at issue. Even if it were, it is clear that Jefferson County has taken measures to ensure that development of the Sea Crest property complies with all restrictions that

are imposed on all properties in Jefferson County. CP 574, 582-86. The QIN passed up its opportunity to have a voice in, or otherwise ignored, the process of obtaining a permit through Jefferson County Department of Community Development.

H. PLAINS COMMERCE BANK FOLLOWS MONTANA AND BRENDALE.

The QIN introduces the case of Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. ___ (2008) (Slip Op. 07-411, June 25, 2008), in its Brief. That case supports Sea Crest's position by following the Montana – Brendale – Bourland – Strate – Atkinson– Hicks line of cases. In Plains Commerce Bank, the Supreme Court held that the Cheyenne River Sioux Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned. Slip Op. at 1.

The case starts its analysis by pointing out that "whether a tribal court has adjudicative authority over nonmembers is a federal question," and that "[i]f the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." Plains Commerce Bank, Slip Op. at 5. The case then explains that the sovereignty that Indian tribes retain is generally limited to "land held by the tribe and [to] tribal members within the reservation." Id. at 8, citing United States v. Mazurie, 419 U.S. 544, 557 (1975), and Hicks, 533 U.S. at 392.

The court went on to cite the general rule from Montana that tribes do not possess authority over non-Indians who come within their borders, and that the general rule "is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians. Plains Commerce Bank, Slip Op. at 9, citing Strate, 520 U.S. at 446. "Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." Plains Commerce Bank, Slip Op. at 10. "As a general rule, then, '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., quoting Brendale, 492 U.S. at 430.

As for the Montana exceptions, the court reiterated that they are "'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink it.'" Plains Commerce Bank, Slip Op. at 11, quoting Atkinson, 532 U.S. at 654, and Strate, 520 U.S. at 458. The court also reiterated that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Plains Commerce Bank, Slip Op. at 11-12, quoting Strate, 520 U.S. at 453.

The court pointed out that "with only 'one minor exception, we have never upheld under Montana the extension of tribal civil authority over nonmembers *on non-Indian land.*'" Plains Commerce Bank, Slip Op. at 14, quoting Hicks, 532 U.S. at 659 (emphasis by court). The one minor exception, the court noted, was Brendale, which decided that a tribe could impose its zoning rules "on nonmember fee land isolated 'in the heart of

[a] closed portion of the reservation.'" Plains Commerce Bank, Slip Op. at 15, quoting Brendale, 492 U.S. at 440 (opinion of Stevens, J.).

The reason tribal authority is almost never extended to nonmember-owned fee land is rooted in the policy goals of the General Allotment Act. Congress never "intended that the non-Indians who would settle upon alienated lands would be subject to tribal regulatory authority." Plains Commerce Bank, Slip Op. at 19, quoting Montana, 450 U.S. at 560. For this reason, the Montana exceptions to the general rule of no tribal jurisdiction over nonmember-owned fee lands is extremely limited.

In order to meet the second Montana exception – conduct that "menaces the 'political integrity, the economic security, or the health or welfare of the tribe'" – "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." Plains Commerce Bank, Slip Op. at 22-23, quoting Montana, 450 U.S. at 566. "[The] elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences." Plains Commerce Bank, Slip Op. at 23, quoting F. Cohen, Handbook of Federal Indian Law §4.02[3][c], p. 232, n.220 (2005 ed.).

In the present case, the QIN cannot rebut the fact that the Sea Crest property is in an open area of the reservation. The QIN certainly has made no attempt to show that the Sea Crest property "lies in the heart of a closed portion of the reservation." Finally, the QIN makes no showing that Sea Crest's conduct "imperils the subsistence of the tribal community" or that

exercise of its tribal power is necessary to avert "catastrophic consequences." Simply put, under Brendale, the only precedent directly related to the circumstances of the present case, the QIN has no zoning authority over Sea Crest's property.

I. THE EXTENT OF THE TRIBE'S REGULATORY JURISDICTION LIMITS THE EXTENT OF THE TRIBAL COURT'S JURISDICTION.

Where the QIN lacked regulatory jurisdiction, the Quinault Tribal Court also lacked adjudicatory jurisdiction. In a unanimous decision, the United States Supreme Court made its holding perfectly clear that "as to nonmembers ... a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997). With regard to the subject matter at hand in the present case, the Supreme Court further stated:

> Subject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes ***and their courts*** with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe."

Id., quoting Montana, 450 U.S. at 565 (emphasis added).

The Supreme Court reiterated this holding in Nevada v. Hicks, 533 U.S. 353, 357-58 (2001). After quoting the above passage from Strate, the court stated that it must first determine whether the tribe had regulatory authority in order to determine whether the tribal court had adjudicative jurisdiction. Nevada, 533 U.S. at 358.

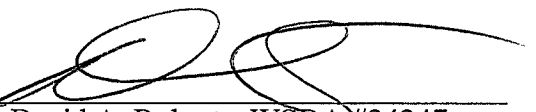
The simple fact that the Quinault Tribal Code says that the tribal court has jurisdiction does not mean that it does. The United States Supreme court clearly tells us that the Indian Tribe must have regulatory jurisdiction in order to have adjudicative jurisdiction in civil matters. In the present case, the Quinault Tribal Court had no adjudicative jurisdiction for the same reasons the QIN had no regulatory jurisdiction.

V. CONCLUSION.

The QIN's appeal should be denied and the matter dismissed with prejudice because the trial court correctly denied QIN's CR 82.5(c) petition and dismissed the superior court action because neither the QIN nor the tribal court had subject matter jurisdiction.

DATED this 20th day of August, 2008.

BEEBE, ROBERTS & BRYAN, P.L.L.C.

By 
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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

QUINAULT INDIAN NATION and QUINAULT PLANNING COMMISSION, Petitioners/Appellants, v. SEA CREST LAND DEVELOPMENT, INC., a Washington State corporation, JACK A. GLAUBERT, registered agent of SEA CREST LAND DEVELOPMENT, INC., Respondents.	No. 37688-1-II CERTIFICATE OF SERVICE

I, David A. Roberts, certify that I caused to be served by U.S. Mail, first class postage prepaid, the BRIEF OF RESPONDENT to the following:

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DATED this 20th day of August, 2008.

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