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March 16, 2017

VIA EMAIL
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Michael Johnson
Senior Legal Counsel
State Court Administration
125H Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
Saint Paul, MN 55155

Re: Recognition of Tribal Court Orders and Judgments – Advisory Committee Public Hearing on March 31, 2017

Dear Mr. Johnson:

I am writing to request an opportunity to make an oral statement to the Advisory Committee in opposition to the Petition of Minnesota Tribal Court/State Court Forum to Amend Rule 10. The Notice indicates that the Public Hearing will be held on Friday, March 31, 2017 beginning at 2:00 p.m. in Room 230 of the Judicial Center in St. Paul to receive testimony on the matter from interested individuals.

My comments will address, in general, the following matters:

(a) The Petition and proposed Amendment fails to address controlling United States Supreme Court precedent and misstates the law in various areas.

(b) The Petition seeks to reverse the burden of proof mandated by the United States Supreme Court when tribal adjudicatory authority is asserted over a nonmember under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

(c) The Petitioners have failed to engage in detailed fact finding regarding the functioning of tribal courts, and instead have relied upon anecdotal and summary conclusions, even at times without supporting evidence, while advancing positions and arguments that are contrary to the analysis reached by the United States Supreme Court.

(d) The Petition fails to discuss critical and controlling principles from the United States Constitution and the Minnesota State Constitution, which must guide any judicial analysis of a process that would lead to the recognition of tribal court judgments.

(e) The proposed Rule 10 change makes no differentiation between tribal court judgments or orders that involve parties that are all tribal members and those that involve nonmembers, despite the fundamental limitations placed on tribal adjudicatory authority over nonmembers by the United States Supreme Court.

(f) The anecdotal reasons cited by the Petition for the alleged need to change Rule 10, to streamline it and mandate its implementation, all involve tribal member circumstances. A modest change to Rule 10 that would address the narrow issues that involve only tribal members instead of the broad based rule change proposed to the current Rule 10, is the approach that should be considered.

(g) The current approach to recognizing tribal court orders, contained in Rule 10.02, which grants the courts discretion in determining whether to recognize a tribal court judgment, and allows the court to weigh a variety of factors, is a preferable approach to the proposed Rule 10 change.

I look forward to the opportunity to address the Committee on the proposed Petition. Please contact the undersigned if you have any questions or need additional information.

Very truly yours,

RVT:ljm

RANDY V. THOMPSON

FILE NO. ADM 09-8009

STATE OF MINNESOTA
IN THE SUPREME COURT

In Re Petition to Amend Rule 10 of the Minnesota Rules of Practice for the District Courts	))))	**RESPONSE IN OPPOSITION TO THE PETITION OF THE MINNESOTA TRIBAL COURT/STATE COURT FORUM**

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STATE OF MINNESOTA
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SUMMARY OF THE RESPONSE

The Petition to Amend Rule 10 governing the recognition of tribal court judgments in state court lacks a rigorous legal and policy analysis to support the proposed change to Rule 10. The Petition is an incomplete and misleading discussion of controlling legal precedents, relying in numerous instances on treatise summaries rather than United States Supreme Court decisions.

Unlike the effort that preceded the adoption of Rule 10 in 2003-2004, there has been a failure by the Petitioner to engage in either fact finding or an examination of available documentation, instead relying on anecdotal and summary conclusions, sometimes without supporting evidence.

Most troubling, there is an absence of discussion of the critical and controlling principles of the United States Constitution and the Minnesota State Constitution, issues and questions that must be addressed before adopting a new rule recognizing tribal court judgments.

The proposed Rule, for example, reverses the burden of proof mandated by the United States Supreme Court when tribal adjudicatory authority is asserted over a nonmember. That burden of proving jurisdiction is unequivocally on the tribe. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). The Petition never tells the reader that the

U.S. Supreme Court observed in *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) that while a tribe's adjudicative authority could not exceed its regulatory authority, the Court had avoided up to that point the decision whether those jurisdictions were coextensive. *Id.* [1]

Despite the fundamental limitations placed on tribal adjudicatory authority over nonmembers, a subject that this response will explore in detail, the proposed Rule 10 change makes no differentiation between tribal court judgments or orders that involve parties that are all tribal members and those that involve nonmembers.

The anecdotal reasons cited for the alleged need to change Rule 10, to streamline it and require recognition, all involve tribal member circumstances. Rather than a modest change to Rule 10 that would address the narrow issues that involve only tribal members, the Tribal Court/State Court Forum instead proposed a broad base rule change without examining the legal and political concerns that such a rule implicates.

The Petition comes at a time when tribes across the United States are seeking to expand their jurisdiction, both regulatory and adjudicative, over disputed "territories" and over nonmembers.[2] The state courts are open to all citizens and residents of Minnesota, including

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[1] "Finally, it is worth observing that the concurrences resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court." *Id.*

[2] For example, the Grand Portage Court of Appeals determined that the Grand Portage Band had regulatory authority over the fee land owned by Mr. Melby, and could require him to obtain a permit from the Band and meet the Band's building codes even though Mr. Melby had obtained a building permit from the County and met its building code requirements. The matter was under review by a parallel action in the Federal District Court of Minnesota when the case was resolved by a sale of the land to the Grand Portage Band. Subsequent decisions by the United States Supreme Court in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) as well as *Nevada v. Hicks* and *Plains Commerce Bank* have made clear that the Grand Portage Appellate Court had erred in its decision. *See,* Grand Portage Court of Appeals decision attached as Exhibit A. Similarly, the effort by the Leech Lake Band to regulate a power transmission line which crossed the reservation but did not cross any tribal or tribal member trust lands, was determined by Judge Donovan Frank to be outside of the jurisdiction of the regulatory efforts by the Leech Lake Band. *Ottertail Power Co. v. Leech Lake Band of Ojibwe,* 2011 WL 2490820 at *3-5.

tribes and tribal members, as courts of general jurisdiction. Any effort to adopt a rule that "streamlines" the recognition of tribal court orders and judgments, when tribal courts are not courts of general jurisdiction (*Nevada v. Hicks*, 533 U.S. at 367), must be examined in great detail. Tribal courts simply operate outside of the structure and mandates of the United States Constitution, the Bill of Rights, and the Minnesota State Constitution.

While judicial respect and cooperation between state and tribal courts are certainly reasonable goals and ideals, those goals and ideals cannot come at the price of sacrificing the constitutional rights of all Minnesota citizens and the public policy of the State of Minnesota. The Petition must respectfully be denied.

ANALYSIS AND ARGUMENT

I. Tribal Adjudicative Authority over Nonmembers is a Federal Question.

> "We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question . . .If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void."

Plains Commerce Bank, 554 U.S. at 324.

> "For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), qualified to exercise many of the powers and prerogatives of self-government, *see United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). We have frequently noted, however, that the 'sovereignty that the Indian tribes retain is of a unique and limited character.' *Id.* at 323. It centers on the land held by the tribe and on tribal members within the reservation.
>
> . . .
>
> . . .But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Montana v. United States*, 450 U.S. 544, 565 (1981). As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing. . .person[s] within their limits except themselves.' *Id.* at 209.
>
> This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity

> occurs on land owned in fee simple by non-Indians – what we have called 'non-Indian fee land.' *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., **there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes**. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648, 650, n.1 (2001).
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> . . .
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> Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it . . .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.' *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430 (1989) (Opinion of White, J.)" [emphasis added]

Plains Commerce Bank, 554 U.S. at 327-329 [emphasis added].

II. Tribal Authority Over Nonmembers is Presumptively Invalid and the Burden Rests on the Tribe to Establish One of the *Montana* Exceptions to the General Rule.

The U.S. Supreme Court, applying the principles of *Montana*, the "pathmarking case," has articulated two exceptions to the general rule that tribes may not exercise civil jurisdiction over nonmembers on their reservations, especially on non-Indian fee lands. Those exceptions are:

1. 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.

2. A tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Plains Commerce Bank, 554 U.S. at 329-330.

> "[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' *Atkinson* at 659. The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U.S. at 654. These exceptions are 'limited' ones, *id.* at 647, and

> cannot be construed in a manner that would 'swallow the rule,' *id*., at 655, or 'severely shrink' it, *Strate*, 520 U.S. at 458.
> . . .
> According to our precedents, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.' *Id* at 453. We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."

Plains Commerce Bank, 554 U.S. at 330.

The Court in *Plains Commerce Bank* went on to discuss reasons that support its rules.

> "The sovereign authority of Indian tribes is **limited** in ways state and federal authority is not." *Id.* at 340. [emphasis added]

When discussing *Montana* the second exception, the Court made this observation:

> "The conduct must do more than injure the tribe. It must 'imperil the subsistence' of the tribal community. [citing *Montana* at 566]. One commentator has noted that '[T]he elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.' . . .*Plains Commerce Bank* at 341.

Tribal courts are simply not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. at 367. In contrast, state courts are courts of general jurisdiction.

> "It is certainly true that state courts of 'general jurisdiction' can adjudicate cases invoking federal statutes. . . 'Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States,' *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)."

Nevada v. Hicks at 366.

The State of Minnesota has both criminal and some civil jurisdiction as a Public Law 280 State on all reservations and tribal trust lands in Minnesota except Red Lake and Bois Forte.

> [But even in a non-Public Law 280 State,] "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. . . . 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.' "

Nevada v. Hicks, at 361-362 [citations omitted].

Under almost all circumstances, persons with claims arising within reservations have the right and ability to utilize state and federal courts.

> "Gisela Fredericks may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [tribe].' *Citing Montana*, 450 U.S. at 566.

Strate v. A-1 Contractors, 520 U.S. at 459.

> "Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties [on reservation], the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights."

Nevada v. Hicks, 533 U.S. at 373.

III. Tribal Courts are Outside of the Structure and Protection of the Federal and State Constitutions and Differ from Traditional American Courts.

> "Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy. J. concurring in judgment). The Bill of Rights does not apply to Indian tribes. *See Talton v. Mayes*, 163 U.S. 376, 382-385 (1896). Indian courts 'differ from traditional American courts in a number of significant respects.' *Hicks*, 533 U.S. at 383 (Souter, J. concurring). And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See, Montana*, 450 U.S. at 564."

Plains Commerce Bank, 554 U.S. at 337.

Justice Kennedy's thoughtful and well-reasoned concurrence in the *United States v. Lara*, 541 U.S. 193 (2004), which concurrence was cited with approval by the majority in *Plains Commerce Bank* above, addresses the constitutional issues of tribal sovereignty over nonmembers squarely:

> "Were we called upon to decide whether Congress has this power [to permit tribes to prosecute nonmember Indians], it would be a difficult question. Our decision in *United States v. Wheeler*, 435 U.S. 313 (1978), which the Court cites today but discusses very little, is replete with references to the inherent authority of a tribe over its own members. As I read that case, it is the historic possession of inherent power over 'the relations among members of a tribe' that is the whole justification for the limited tribal sovereignty the Court there recognized. *Id*. at 326. It is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits. . . . To conclude that a tribe's inherent sovereignty allows it to exercise jurisdiction over a nonmember in a criminal case is to enlarge the 'unique and limited character' of the inherent sovereignty that *Wheeler* recognized. 435 U.S. at 323.
>
> Lara [a nonmember Indian], after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. *See, U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838-839 (1995) (Kennedy, J., concurring). Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. *See, Duro v. Reina*, 495 U.S. 676, 693.
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> . . .[The majority] also tries to bolster its position by noting that due process and equal protection claims are still reserved. *Ante* at 210-211. That is true, but it ignores the elementary principle that the constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted. To demean the constitutional structure and the consent upon which it rests by implying they are wholly dependent for their vindication on the Due Process and Equal Protection Clauses is a further, unreasoned holding of serious import. The political freedom

> guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights. . .
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> . . .
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> The present case, however, does not require us to address these difficult questions of constitutional dimension. Congress made it clear that its intent was to recognize and affirm tribal authority to try Indian nonmembers as inherent in tribal status. The proper occasion to test the legitimacy of the Tribe's authority, that is, whether Congress had the power to do what it sought to do, was in the first, tribal proceeding. There, however, Lara made no objection to the tribe's authority to try him. . . ."

Id. at 211-214.

Justice Souter, in his concurrence which affirmed the reasoning of the majority in *Nevada v. Hicks*, delineated the structural and constitutional issues in terms quite at odds with the Petition now before the Court to amend Rule 10:

> "The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' *Duro v. Reina*, 495 U.S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. *See*, *Talton v. Mayes*, 163 U.S. 376, 382-385 (1896); F. Cohen, Handbook of Federal Indian Law, 664-665 (1982 ed.) hereinafter Cohen ('Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes'). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. § 1302, 'the guarantees are not identical,' *Oliphant*, 435 U.S. at 194, and there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents 'jot-for-jot,' ' Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev., 285, 344, n. 238 (1998). In any event, **a presumption against tribal-court civil jurisdiction** squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be 'protected. . .from unwarranted intrusions on their personal liberty,' 435 U.S. at 210.
>
> **Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges.** Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions and

> practices,' and is often 'handed down orally or by example from one generation to another.' Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130-131 (1995). The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state and traditional law,' National American Indian Court Judges Assn. Indian Courts and the Future, 43 (1978), which would be unusually difficult for an outsider to sort out.
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> . . .
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> One further consideration confirms the point. It is generally accepted that there is **no effective review mechanism in place to police tribal courts' decisions** on matters of non-tribal law, since **tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts**. . . The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that **'[t]ribal courts are often 'subordinate to the political branches of tribal governments,'** ' *Duro, supra* at 693 (quoting Cohen, 334-335).

Nevada v. Hicks, 533 U.S. at 383-385 [emphasis added].

IV. The Petitioner has Failed to Engage in Meaningful Fact Finding and Public Hearings.

During the lead up to the 2003-2004 adoption of the current Rule 10, the Tribal Court/State Court Forum engaged in fact finding by visiting reservations and holding hearings on tribal lands where tribal members would receive notice of these proceedings and have an opportunity to speak. The result was that the Tribal Court/State Court Forum heard from many tribal members with genuine concerns regarding the independence and fairness of the tribal courts. Apparently the Tribal Court/State Court Forum chose not to repeat that process again.[3]

Instead, the Petitioner assures the Committee of the following:

> "36. Today, many who once opposed Rule 10 have changed their stance. This shift in support demonstrates the credibility the tribal courts have garnered in the public eye through diligent and fair administration of justice."

[3] The Petition states: "Ultimately the Committee recognized that it could not come to a conclusion 'about the quality of justice in tribal courts generally or in any particular proceedings' based on anecdotes presented at the hearings." *Id.*, p. 8, ¶27. But the Forum compounds the deficiency. Instead of conducting a thorough examination of tribal court files and proceedings and taking testimony from tribal members, the Forum opts to rely on either unsupported assertions or its own anecdotal "evidence" to support the Petition.

Petition at p. 10, ¶36. What is lacking is any support for that statement. The Petitioner should have engaged in fact finding from the citizens who reside in and around tribal reservations in Minnesota – both tribal members and nonmembers. The failure to conduct this type of public hearing and commentary, in areas in which everyday citizens are either subjected to or potentially subjected to tribal court activities, is a fundamental failure behind this Petition. In the absence of such hearings, one can only conclude that the views expressed by tribal members in 2003-2004 remain the operative view of Minnesota citizens who happen to be members of Indian tribes on the function, independence and fairness of tribal courts.

Similarly, the Petition assures the Committee that "tribal judiciaries typically operate with significant independence from other branches of tribal governments. *See, Cohen's Handbook*, § 4.04(3)(d), at 268-69 (stating that some tribes are passing constitutional amendments to strengthen the autonomy of tribal courts, while some tribes are establishing their independence through common law.") Petition at p. 10, ¶35. The U.S. Supreme Court found the opposite in *Nevada v. Hicks*, 533 U.S. at 385 (Souter, J. concurring). The Constitution of the Minnesota Chippewa Tribe, which the Petitioner has neglected to bring to the Committee's attention, governs the largest group of Minnesota Bands and tribal members.[4] That Constitution, attached as Exhibit B, has no provision for the establishment of a tribal court, much less any provision establishing its independence.[5] Put simply, the conclusions reached by the Petitioner are at odds with the United States Supreme Court precedent in *Nevada v. Hicks*. Even if federal law didn't mandate that the tribe bear the burden of proving that it had jurisdiction, no reasoned

[4] The White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), Grand Portage and Mille Lacs Bands.

[5] Many tribal members who spoke in opposition to the adoption of Rule 10 in 2003-04 urged the Committee to withhold recognition of tribal court judgments as a means of encouraging tribes to reform their constitutions and create independent courts.

approach should recognize tribal court judgments as presumptively valid and enforceable in state court when the majority of tribal courts in Minnesota lack the fundamental protection of constitutional independence from the political branches of government. The comments by tribal members at public hearings in 2003 and 2004 reflected those realities.

The Petition in this respect contains a contradiction between the experience of the Committee and the burden Petitioner seeks to impose upon those subject to tribal court judgments. The Petition states: "Ultimately the Committee recognized that it could not come to a conclusion 'about the quality of justice in tribal courts generally or in any particular proceedings' based upon anecdotes presented at the hearings." *Id.*, p. 8, ¶27. Despite the time and resources available, the Committee was unable to reach a conclusion about the quality of justice in tribal courts. Compare that failure to the burden on a party under the proposed Rule 10. The party against whom the judgment was entered must bear the burden of proof, under proposed Rule 10.02, that the tribal court judgment or order should not be enforced. In other words, while the Committee was unable to reach a conclusion about the quality of justice in tribal courts in 2003-2004, and while the Petitioner has not engaged in any fact finding and examination of tribal court proceedings in Minnesota or elsewhere in advancing the proposed Petition, proposed Rule 10.02 nevertheless imposes a burden on a party subject to the order or judgment to demonstrate what the Committee was unable to determine and what the Petitioner has been unwilling to explore in detail. Given that tribes enjoy sovereign immunity, and presumably tribal courts enjoy judicial immunity, how a private litigant would have an opportunity to gather the facts and information necessary to meet the burden of proof is unanswered in the Petition. The Petitioner should have done a detailed review and analysis of every tribal court in Minnesota, determining whether cases are promptly granted hearings,

whether cases are decided in a timely manner, whether political or other considerations have affected the decisions of tribal courts, and all the other factors that go into a determination of whether due process, equal protection, and other constitutional requirements are being met.

The Petitioner had the ability to require this type of access to tribal court records to conduct an analysis in order to support the proposed change to Rule 10. It chose not to do so, leaving those parties who are subject to tribal court orders and judgments to bear the burden that the Petitioner was unwilling or unable to carry in proposing this Rule change. At a minimum, the burden of proof must be reversed in proposed Rule 10 and placed upon the party advocating state court recognition of the tribal court judgment, not the individual subject to the order or judgment. But the preferred outcome is for the Petition to be denied unless and until this type of rigorous analysis is conducted, and testimony is taken from tribal members and nonmembers alike who live and reside in and around reservations, before proposing any change to Rule 10 on the recognition of tribal court judgments.

This is not to denigrate either the quality or fairness of all tribal court decisions or the honesty, fairness and legal acumen of all tribal court judges. But a rule directing the state courts to grant recognition of tribal court judgments, which tribal courts are formed not only outside the structure and protections of the United States and Minnesota Constitutions, but even without judicial independence by their own Constitution, should cause the Committee to pause and provide a mechanism by which a tribal court judgment will be carefully examined before enforcement. The presumption must be on the party advocating the enforceability of a tribal court judgment to demonstrate that it meets the requirements contained in the current Rule 10.02 before enforcing that judgment under state law, with its power and authority. The current Rule

10.02 giving the state court discretion in the enforcement of tribal court orders and judgments remains the best approach.

V. Fundamental Errors in the Analysis of the Petition.

A. Tribal Sovereignty is Limited, and Doesn't Extend in Most Cases to Tribal "Territories" – Petition pp. 2-3.

The United States Supreme Court in *Plains Commerce Bank* made clear that while tribes are "distinct, independent political communities. . .qualified to exercise many of the powers and prerogatives of self-government, . . .the sovereignty that Indian tribes maintain is of a unique and **limited** character. It centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327 [citations omitted][emphasis added].

> "By virtue of their incorporation into the American republic, [tribes have] lost the right of governing persons within their limits except themselves." *Id*. at 328.
>
> "But tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Id.*

Unless one of the two, and very narrow, *Montana* exceptions are met, tribes simply lack jurisdiction over nonmember activities taking place on the reservation. *Id.* In this sense, tribes do not have a unique kind of sovereignty that governs members **and their territories**, as asserted in the Petition, p.2. [emphasis added] The *Plains Commerce Bank* case, decided in 2008, supersedes any statement to the contrary in *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997).

B. Tribal Court Jurisdiction is Limited.

The Petition claims that "tribal courts possess expansive jurisdiction within Indian country and even some jurisdiction outside of Indian country." Petition at p. 3, ¶9. This is fundamentally contrary to the United States Supreme Court's decisions that control on this issue. Tribal court jurisdiction is very limited when it comes to non-Indians. *Nevada v. Hicks*, 533 U.S. at 374 [stating that the position taken by Justice O'Connor "would, for the first time, hold a non-

Indian subject to the jurisdiction of a tribal court."] Furthermore, tribes lack jurisdiction outside of Indian Country.

For a tribe to have jurisdiction over any land, that land must qualify as "Indian Country" under 18 U.S.C. § 1151.

> "For the Tribe to have jurisdiction over any land under the current statute it must qualify as Indian country pursuant to 18 U.S.C. § 1151. The statute defines Indian country to include all reservation land (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments 'the Indian titles to which have not been extinguished' (§ 1151(c)). . . .[B]ut if there is no reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust, § 1151(c)." [citations omitted] *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999) *cert. den.* 530 U.S. 126 (2000)

> "[The Supreme Court has] 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, 359-60 (2001)

The Petition asserts that *United States v. Lara*, 541 U.S. 193, 200 (2004) holds that tribal courts "also retain the authority to prosecute nonmember Indians under the same circumstances." Petition at p. 3, ¶10. This is **not** the holding in *United States v. Lara*. *United States v. Lara* examined whether Congress had relaxed restrictions that the political branches have, over time, based on the exercise of a tribe's inherent legal authority, when it enacted 25 U.S.C. § 1301(2) in response to the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). The issue in *Lara* was whether the federal prosecution of defendant Lara for assault on a federal officer presented a double jeopardy defense to a defendant who had first been prosecuted in tribal court. Lara argued that the action by Congress was simply an extension of federal power to the tribal government to prosecute a nonmember Indian. The Court instead determined that Congress had acted to recognize and affirm the inherent authority of a tribe to bring a criminal misdemeanor prosecution against a nonmember Indian. The Court did **not**, however, reach the issue of whether the criminal prosecution in tribal court of Mr. Lara met the constitutional requirements

of due process and equal protection. Holding that those issues were not before the Court, since Lara failed to raise them at the time of the tribal court prosecution, the Court reserved those issues for a later day. *Lara*, 541 U.S. at 209-210. Whether or not a tribal court may constitutionally prosecute a nonmember Indian remains undecided in light of the Supreme Court's decision in *Lara. See*, Justice Kennedy's discussion of that issue at pp.7-8, *supra.*

The same rationale will apply if and when a tribal court seeks to prosecute a non-Indian under the Violence Against Women Reauthorization Act of 2013 (VAWA), 25 U.S.C. § 1304 (West 2016). *See* Petition at pp. 3-4, ¶11.

VI. Proposed Rule 10 Fails to Provide Fundamental Requirements that Must be Considered Before Recognizing Tribal Court Orders.

No procedure for the recognition of tribal court judgments can omit the requirement to address due process, equal protection, and other constitutional issues, regardless of the language of the authorizing statute or any jurisdiction it purports to grant to tribal courts. Proposed Rule 10.01 is deficient in this respect.

Similarly, Rule 10.01(i) suggests that tribal court judgments are within the purview of a "Foreign-Country Money Judgment" under Minn. Stat. §§ 548.54-63. Surely the legislature could not have intended that application. Moreover, this reference exposes a fundamental omission of the Petition: the failure to recognize that state court recognition of tribal court judgments potentially exposes citizens to the enforcement by state court processes of a judgment entered by a third party within the State and Nation without the protections of the State and Federal Constitutions. *Plains Commerce Bank*, 554 U.S. at 337, citing *United States v. Lara*, 541 U.S. at 212 (Kennedy, J. concurring)

Proposed Rule 10.02(i) implies that tribes are "foreign countries." They are not. The Supreme Court nearly two centuries ago determined that tribes were "domestic dependent

nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 5 Pet. 1, 13 (1831). Chief Justice Marshall in *Cherokee Nation* went to great lengths to explain why Indian tribes were not foreign nations:

> "The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, and our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. . .
>
> . . .[Y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . .
>
> . . .They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an action of hostility."

Id. at 5 Pet. 12-13. *See also, Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 288 (1996). The proposal in Rule 10.01(i) to apply the Minnesota Uniform Foreign Country Money Judgments Recognition Act to the decision of a tribal court that is wholly within the boundaries of the Nation and a State, would not only contravene the U.S. Supreme Court's decisions on this point, but arguably create the impression that the State was attempting to contravene prerogatives that are within the power of the National Government.

Proposed Rule 10.01 must also contain an exception to the recognition of tribal court judgments based upon the public policy of the State.[6] Consider a simple example. The Mille Lacs Band asserts that the 61,000 acre reservation created by the 1855 Treaty (11 Stat. 633) still exists, despite the fact that the Band sold and relinquished the reservation in the 1864 Treaty (13

[6] The "public policy" exception is contained only in proposed Rule 10.02.

Stat. 695), and sold the right of occupancy under the Nelson Act, 25 Stat. 642 (1889). *See*, *United States v. Mille Lacs Band*, 229 U.S. 498 (1913). The official policy of the State of Minnesota is that it does not recognize the existence of the Mille Lacs Reservation. Instead, the Mille Lacs Band has a collection of trust lands subsequently acquired by the federal government for the Band. *See* attached Exhibits C through J. Under proposed Rule 10.01, if the Mille Lacs Band obtained a judgment against a non-tribal member for alleged trespass under the American Indian Agricultural Resources Management Act, 25 U.S.C. § 3713, which judgment determined that the land was within the original and continuing boundaries of the Mille Lacs Reservation, Rule 10.01 suggests that the state court would be required to recognize and enforce a judgment against the official policy of the State of Minnesota. Before recognizing a tribal court judgment, the State Courts must be allowed to consider whether the judgment is contrary to the policy of the State of Minnesota in all circumstances.

VII. The Proposed Changes to Rule 10.02 Eliminate Factors that the Court Should be Allowed to Consider.

In addition to the erroneous shifting of the burden of proof, proposed Rule 10.02 eliminates the following categories:

(6) Whether the order or judgment was obtained through a process that afforded fair notice, the right to appear and compel attendance of witnesses, and a fair hearing before an independent magistrate;

(8) Whether the order or judgment is final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order; and

(10) Any other factors the court deems appropriate in the interests of justice.

The proposed Rule 10.02 also eliminates the detailed discussion of whether there was a notice and opportunity to be heard and addresses *ex parte* situations. While arguably the changes

to (1) and (6) are subsumed under proposed 10.02(b) that the party was not afforded fundamental due process rights, greater detail in delineating what might be included in those rights is an important factor, particularly for litigants who cannot afford representation. Furthermore, any change must be accompanied by comments that would make clear that the Rule change was not intended to eliminate examination into these various issues that might be considered part of fundamental due process.

The proposed change to Rule 10.02(a)(8) would eliminate the finality requirement, meaning that temporary injunctions or other preliminary orders could be enforced in state court before there was a final decision in tribal court. This is problematic because federal courts may withhold their decision, based on the doctrine that at times requires parties to exhaust their jurisdictional claims in tribal court before bringing the claim in federal district court. *See, National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-857 (1985). While there are exceptions to those exhaustion rules, both in *National Farmers Union* and from *Strate v. A-1 Contractors*, 250 U.S. at 459-460, and n. 14, where exhaustion would serve no purpose other than delay and is therefore unnecessary (*See, Nevada v. Hicks*, 530 U.S. at 369), the exhaustion rule has never been fully repudiated. Accordingly, recognizing and enforcing tribal court orders, before there is an opportunity to have them reviewed in federal district court because of the exhaustion rule, could place the state court in the position of granting recognition of a tribal court order that was later vacated by a federal district court when it examined jurisdiction. At this point, there is simply no need to enforce orders or judgments that are not final in tribal court, especially as to nonmembers.

The proposed Rule also eliminates the catch-all category of "any other factors the court deems appropriate in the interests of justice" under Rule 10.02(a)(10). This is a mistake. For

example, this Response identified the constitutional issues delineated by Justices Souter and Kennedy that go beyond simply due process and equal protection. The proposed amendment to Rule 10 does not mention equal protection. The proposed amendment to Rule 10 also does not mention such common defenses as the qualified immunity enjoyed by police officers. The point is that no rule can anticipate every legal right, privilege, immunity, or defense that might be applicable when a state court is asked to enforce a tribal court order. Including the catch-all language in current Rule 10.02(a)(10) for "other factors the court deems appropriate in the interest of justice" assures that those matters can be addressed by a state court which is being asked to recognize a tribal court judgment.

CONCLUSION

The proposed change to Rule 10 is extraordinarily overbroad. It would potentially grant recognition to the decisions of hundreds of tribal courts across the United States, without any factual examination of the workings of those hundreds of tribal courts before adopting such a broad based Rule. As a result, sister States, who have chosen not to recognize tribal court decisions, or who have granted recognition of tribal court decisions under different or more stringent requirements, could be faced with a Minnesota state court judgment, that originated in a tribal court from that sister State, under the full faith and credit granted state court judgments. This is an unprecedented incursion into the rights and roles of sister States and the courts of those States.

The current Rule 10 allows the court discretion in deciding whether to recognize most tribal court orders or judgments. Other than the anecdotal matters involving a commitment order for a tribal court member or something similar, there has been no showing that the current Rule is unworkable or unreasonable. Rather, this is an effort to require the state courts to recognize

tribal court judgments based upon assertions regarding the jurisdiction of tribal courts, their independence, the protection of due process rights, and other factors that are simply contrary to what the United States Supreme Court has found.

The effort to shift the burden of proof from the tribe to the individual against whom the tribal court order or judgment is sought to be enforced is contrary to controlling United States Supreme Court precedent. The failure to engage in an examination of the decisions of tribal courts in Minnesota, and their processes, together with the failure to take testimony from tribal members and others that live in and around reservations in Minnesota, should be a red flag to the Committee that the Petitioner needs to do the kind of work that it seeks to impose on a party facing a tribal court order or decision, before it brings a proposal for a Rule change before the Committee and the Supreme Court.

In summary, there has been no showing that the current Rule 10 is unworkable or fails to enforce appropriate tribal court judgments and orders. The proposed change to Rule l0 fails to protect the constitutional rights of Minnesota citizens, and should be denied.

Respectfully submitted

Dated: March 16, 2017

NOLAN, THOMPSON & LEIGHTON, PLC

By: */s/ Randy V. Thompson*[7]

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[7] Mr. Thompson's curriculum vitae is attached as Exhibit K.

EXHIBIT A

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 effectively reversed by the Indian Reorganization Act of 1934.[4] The

[1] 10 Stat. 1109 (1854).

[2] 24 Stat. 388 (1887).

[3] 25 Stat. 642 (1889).

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

ENDORSED
FILED IN MY OFFICE THIS DATE 2/22/00
Authorized Signature of THE GRAND PORTAGE BAND OF CHIPPEWA TRIBAL COURT

FILED IN MY OFFICE THIS DATE-TIME
2/18/00 2:10pm
Clerk of GRAND PORTAGE BAND OF CHIPPEWA TRIBAL COURT

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 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

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[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.

[7] 34 Stat. 182 (1906).

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 land 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, 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

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[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.

[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.

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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[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 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.

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 is 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]

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

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[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 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.

Land Use Ordinance exceeds the bounds set by tribal constitutional or other positive tribal law.[12] Therefore the sole issue before the 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.

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[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.

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 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*

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

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 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.

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[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.

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 fact 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.

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 materials 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] 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 assumption that permeates the present-day

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

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

Christopher D. Anderson
Chief Justice

Mary Al Balber
Associate Justice

Frank Pommersheim
Associate Justice

EXHIBIT B

REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, MINNESOTA

PREAMBLE

We, the Minnesota Chippewa Tribe, consisting of the Chippewa Indians of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations and the Nonremoval Mille Lac Band of Chippewa Indians, in order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota in accordance with such privilege granted the Indians by the United States under existing law.

ARTICLE I - ORGANIZATION AND PURPOSE

Section 1. The Minnesota Chippewa Tribe is hereby organized under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended.

Sec. 2. The name of this tribal organization shall be the "Minnesota Chippewa Tribe."

Sec. 3. The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, and all the purposes expressed in the preamble hereof.

Sec. 4. The Tribe shall cooperate with the United States in its program of economic and social development of the Tribe or in any matters tending to promote the welfare of the Minnesota Chippewa Tribe of Indians.

ARTICLE II – MEMBERSHIP

Section 1. The membership of the Minnesota Chippewa Tribe shall consist of the following:

(a) Basic Membership Roll. All persons of Minnesota Chippewa Indian blood whose names appear on the annuity roll of April 14, 1941, prepared pursuant to the Treaty with said Indians as enacted by Congress in the Act of January 14, 1889 (25 Stat. 642) and Acts amendatory thereof, and as corrected by the Tribal Executive Committee and ratified by the Tribal Delegates, which roll shall be known as the basic membership roll of the Tribe.

(b) All children of Minnesota Chippewa Indian blood born between April 14, 1941, the date of the annuity roll, and July 3, 1961, the date of approval of the membership ordinance by the Area Director, to a parent or parents, either or both of whose names appear on the basic membership roll, provided

an application for enrollment was filed with the Secretary of the Tribal Delegates by July 4, 1962, one year after the date of approval of the ordinance by the Area Director.

(c) All children of at least one quarter (1/4) degree Minnesota Chippewa Indian blood born after July 3, 1961, to a member, provided that an application for enrollment was or is filed with the Secretary of the Tribal Delegates or the Tribal Executive Committee within one year after the date of birth of such children.

Sec. 2. No person born after July 3, 1961, shall be eligible for enrollment if enrolled as a member of another tribe, or if not an American citizen.

Sec. 3. Any person of Minnesota Chippewa Indian blood who meets the membership requirements of the Tribe, but who because of an error has not been enrolled, may be admitted to membership in the Minnesota Chippewa Tribe by adoption, if such adoption is approved by the Tribal Executive Committee, and shall have full membership privileges from the date the adoption is approved.

Sec. 4. Any person who has been rejected for enrollment as a member of the Minnesota Chippewa Tribe shall have the right of appeal within sixty days from the date of written notice of rejection to the Secretary of the Interior from the decision of the Tribal Executive Committee and the decision of the Secretary of Interior shall be final.

Sec. 5. Nothing contained in this article shall be construed to deprive any descendant of a Minnesota Chippewa Indian of the right to participate in any benefits derived from claims against the U.S. Government when awards are made for and on behalf and for the benefit of descendants of members of said tribe.

ARTICLE III - GOVERNING BODY

The governing bodies of the Minnesota Chippewa Tribe shall be the Tribal Executive Committee and the Reservation Business Committees of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations, and the Nonremoval Mille Lac Band of Chippewa Indians, hereinafter referred to as the six (6) Reservations.

Section 1. Tribal Executive Committee. The Tribal Executive Committee shall be composed of the Chairman and Secretary-Treasurer of each of the six (6) Reservation Business Committees elected in accordance with Article IV. The Tribal Executive Committee shall, at its first meeting, select from within the group a President, a Vice-President, a Secretary, and a Treasurer who shall continue in office for the period of two (2) years or until their successors are elected and seated.

Sec. 2. Reservation Business Committee. Each of the six (6) Reservations shall elect a Reservation Business Committee composed of not more than five (5) members nor less than three (3) members. The Reservation Business Committee shall be composed of a Chairman, Secretary-Treasurer, and one (1), two (2), or three (3) Committeemen. The candidates shall file for their respective offices and shall hold their office during the term for which they were elected or until their successors are elected and seated.

ARTICLE IV - TRIBAL ELECTIONS

Section 1. Right to Vote. All elections held on the six (6) Reservations shall be held in accordance with a uniform election ordinance to be adopted by the Tribal Executive Committee which shall provide that:

(a) All members of the tribe, eighteen (18) years of age or over, shall have the right to vote at all elections held within the reservation of their enrollment.[1]

(b) All elections shall provide for absentee ballots and secret ballot voting.

(c) Each Reservation Business Committee shall be the sole judge of the qualifications of its voters.

(d) The precincts, polling places, election boards, time for opening and closing the polls, canvassing the vote and all pertinent details shall be clearly described in the ordinance.

Sec. 2. Candidates. A candidate for Chairman, Secretary-Treasurer and Committeeman must be an enrolled member of the Tribe and reside on the reservation of his or her enrollment for one year before the date of election.[2] No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, until he or she has reached his or her twenty-first (21) birthday on or before the date of election.[3]

Sec. 3. Term of Office.

(a) The first election of the Reservation Business Committee for the six (6) Reservations shall be called and held within ninety (90) days after the date on which these amendments became effective in accordance with Section 1, of this Article.

(b) For the purpose of the first election, the Chairman and one (1) Committeeman shall be elected for a four-year term. The Secretary-Treasurer and any remaining Committeemen shall be elected for a two-year term. Thereafter, the term of office for officers and committeemen shall be four (4) years. For the purpose of the first election, the Committeeman receiving the greatest number of votes shall be elected for a four-year term.

Sec. 4. No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony of any kind; or of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization.[4]

ARTICLE V - AUTHORITIES OF THE TRIBAL EXECUTIVE COMMITTEE

Section 1. The Tribal Executive Committee shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:

(a) To employ legal counsel for the protection and advancement of the rights of the Minnesota Chippewa Tribe; the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, or his authorized representative.

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[1] As amended per Amendment I, approved by the Secretary of the Interior on November 6, 1972.
[2] As amended per Amendment III, approved by the Secretary of the Interior on January 5, 2006.
[3] As amended per Amendment II, approved by the Secretary of the Interior on November 6, 1972.
[4] As amended per Amendment IV, approved by the Secretary of the Interior on January 5, 2006.

(b) To prevent any sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other assets including minerals, gas and oil.

(c) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Minnesota Chippewa Tribe, except where such appropriation estimates or projects are for the benefit of individual Reservations.

(d) To administer any funds within the control of the Tribe; to make expenditures from tribal funds for salaries, expenses of tribal officials, employment or other tribal purposes. The Tribal Executive Committee shall apportion all funds within its control to the various Reservations excepting funds necessary to support the authorized costs of the Tribal Executive Committee. All expenditures of tribal funds, under the control of the Tribal Executive Committee, shall be in accordance with a budget, duly approved by resolution in legal session, and the amounts so expended shall be a matter of public record at all reasonable times. The Tribal Executive Committee shall prepare annual budgets, requesting advancements to the control of the Tribe of any money deposited to the credit of the Tribe in the United States Treasury, subject to the approval of the Secretary of the Interior or his authorized representative.

(e) To consult, negotiate, contract and conclude agreements on behalf of the Minnesota Chippewa Tribe with Federal, State and local governments or private persons or organizations on all matters within the powers of the Tribal Executive Committee, except as provided in the powers of the Reservation Business Committee.

(f) Except for those powers hereinafter granted to the Reservation Business Committees, the Tribal Executive Committee shall be authorized to manage, lease, permit, or otherwise deal with tribal lands, interests in lands or other tribal assets; to engage in any business that will further the economic well being of members of the Tribe; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes, or to loan the money thus borrowed to Business Committees of the Reservations and to pledge or assign chattel or income, due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative, when required by Federal law or regulations.

(g) The Tribal Executive Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business on two or more Reservations.

(h) To recognize any community organizations, associations or committees open to members of the several Reservations and to approve such organizations, subject to the provision that no such organizations, associations, or committees may assume any authority granted to the Tribal Executive Committee or to the Reservation Business Committees.

(i) To delegate to committees, officers, employees or cooperative associations any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.

ARTICLE VI - AUTHORITIES OF THE RESERVATION BUSINESS COMMITTEES

Section 1. Each of the Reservation Business Committees shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:

(a) To advise with the Secretary of the Interior with regard to all appropriation estimates on Federal projects for the benefit of its Reservation.

(b) To administer any funds within the control of the Reservation; to make expenditures from Reservation funds for salaries, expenses of Reservation officials, employment or other Reservation purposes. All expenditures of Reservations funds under the control of the Reservation Business Committees shall be in accordance with a budget, duly approved by resolution in legal session, and the amounts so expended shall be a matter of public record at all reasonable times. The Business Committees shall prepare annual budgets requesting advancements to the control of the Reservation of tribal funds under the control of the Tribal Executive Committee.

(c) To consult, negotiate and contract and conclude agreements on behalf of its respective Reservation with Federal, State and local governments or private persons or organizations on all matters within the power of the Reservation Business Committee, provided that no such agreements or contracts shall directly affect any other Reservation or the Tribal Executive Committee without their consent. The Business Committees shall be authorized to manage, lease, permit or otherwise deal with tribal lands, interests in lands or other tribal assets, when authorized to do so by the Tribal Executive Committee but no such authorization shall be necessary in the case of lands or assets owned exclusively by the Reservation. To engage in any business that will further the economic well being of members of the Reservation; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes or to loan the money thus borrowed to members of the Reservation and to pledge or assign Reservation chattel or income due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative when required by Federal law and regulations. The Reservation Business Committee may also, with the consent of the Tribal Executive Committee, pledge or assign tribal chattel or income.

(d) The Reservation Business Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business solely within their respective Reservations. A Reservation Business Committee may recognize any community organization, association or committee open to members of the Reservation or located within the Reservation and approve such organization, subject to the provision that no such organization, association or committee may assume any authority granted to the Reservation Business Committee or to the Tribal Executive Committee.

(e) To delegate to committees, officers, employees or cooperative associations any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.

(f) The powers heretofore granted to the bands by the charters issued by the Tribal Executive Committee are hereby superceded by this Article and said charters will no longer be recognized for any purposes.

ARTICLE VII - DURATION OF TRIBAL CONSTITUTION

Section 1. The period of duration of this tribal constitution shall be perpetual or until revoked by lawful means as provided in the Act of June 18, 1934 (48 Stat. 984), as amended.

ARTICLE VIII - MAJORITY VOTE

Section 1. At all elections held under this constitution, the majority of eligible votes cast shall rule, unless otherwise provided by an Act of Congress.

ARTICLE IX - BONDING OF TRIBAL OFFICIALS

Section 1. The Tribal Executive Committee and the Reservation Business Committees, respectively, shall require all persons, charged by the Tribe or Reservation with responsibility for the custody of any of its funds or property, to give bond for the faithful performance of his official duties. Such bond shall be furnished by a responsible bonding company and shall be acceptable to the beneficiary thereof and the Secretary of the Interior or his authorized representative, and the cost thereof shall be paid by the beneficiary.

ARTICLE X - VACANCIES AND REMOVAL

Section 1. Any vacancy in the Tribal Executive Committee shall be filled by the Indians from the Reservation on which the vacancy occurs by election under rules prescribed by the Tribal Executive Committee. During the interim, the Reservation Business Committee shall be empowered to select a temporary Tribal Executive Committee member to represent the Reservation until such time as the election herein provided for has been held and the successful candidate elected and seated.

Sec. 2. The Reservation Business Committee by a two-thirds (2/3) vote of its members shall remove any officer or member of the Committee for the following causes:

(a) Malfeasance in the handling of tribal affairs.

(b) Dereliction or neglect of duty.

(c) Unexcused failure to attend two regular meetings in succession.

(d) Conviction of a felony in any county, State or Federal court while serving on the Reservation Business Committee.

(e) Refusal to comply with any provisions of the Constitution and Bylaws of the Tribe.

The removal shall be in accordance with the procedures set forth in Section 3 of this Article.

Sec. 3. Any member of the Reservation from which the Reservation Business Committee member is elected may prefer charges by written notice supported by the signatures of no less than 20 percent of the resident eligible voters of said Reservation, stating any of the causes for removal set forth in Section 2 of this Article, against any member or members of the respective Reservation Business Committee. The notice must be submitted to the Business Committee. The Reservation Business Committee shall consider such notice and take the following action:

(a) The Reservation Business Committee within fifteen (15) days after receipt of the notice or charges shall in writing notify the accused of the charges brought against him and set a date for a hearing. If the Reservation Business Committee deems the accused has failed to answer charges to its satisfaction or fails to appear at the appointed time, the Reservation Business Committee may remove as provided in Section 2 or it may schedule a recall election which shall be held within thirty (30) days after the date set for the hearing. In either event, the action of the Reservation Business Committee or the outcome of the recall election shall be final.

(b) All such hearings of the Reservation Business Committee shall be held in accordance with the provisions of this Article and shall be open to the members of the Reservation. Notices of such hearings shall be duly posted at least five (5) days prior to the hearing.

(c) The accused shall be given opportunity to call witnesses and present evidence in his behalf.

Sec. 4. When the Tribal Executive Committee finds any of its members guilty of any of the causes for removal from office as listed in Section 2 of this Article, it shall in writing censor the Tribal Executive Committee member. The Tribal Executive Committee shall present its written censure to the Reservation Business Committee from which the Tribal Executive Committee member is elected. The Reservation Business Committee shall thereupon consider such censure in the manner prescribed in Section 3 of this Article.

Sec. 5. In the event the Reservation Business Committee fails to act as provided in Sections 3 and 4 of this Article, the Reservation membership may, by petition supported by the signatures of no less than 20 percent of the eligible resident voters, appeal to the Secretary of the Interior. If the Secretary deems the charges substantial, he shall call an election for the purpose of placing the matter before the Reservation electorate for their final decision.

ARTICLE XI – RATIFICATION

Section 1. This constitution and the bylaws shall not become operative until ratified at a special election by a majority vote of the adult members of the Minnesota Chippewa Tribe, voting at a special election called by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote, and until it has been approved by the Secretary of the Interior.

ARTICLE XII – AMENDMENT

Section 1. This constitution may be revoked by Act of Congress or amended or revoked by a majority vote of the qualified voters of the Tribe voting at an election called for that purpose by the Secretary of the Interior if at least 30 percent of those entitled to vote shall vote. No amendment shall be effective until approved by the Secretary of the Interior. It shall be the duty of the Secretary to call an election when requested by two-thirds of the Tribal Executive Committee.

ARTICLE XIII - RIGHTS OF MEMBERS

All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.

ARTICLE XIV – REFERENDUM

Section 1. The Tribal Executive Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Minnesota Chippewa Tribe, or by an affirmative vote of eight (8) members of the

Tribal Executive Committee, shall submit any enacted or proposed resolution or ordinance of the Tribal Executive Committee to a referendum of the eligible voters of the Minnesota Chippewa Tribe. The majority of the votes cast in such referendum shall be conclusive and binding on the Tribal Executive Committee. The Tribal Executive Committee shall call such referendum and prescribe the manner of conducting the vote.

Sec. 2. The Reservation Business Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Reservation, or by an affirmative vote of a majority of the members of the Reservation Business Committee, shall submit any enacted or proposed resolution or ordinance of the Reservation Business Committee to a referendum of the eligible voters of the Reservation. The majority of the votes cast in such referendum shall be conclusive and binding on the Reservation Business Committee. The Reservation Business Committee shall call such referendum and prescribe the manner of conducting the vote.

ARTICLE XV - MANNER OF REVIEW

Section 1. Any resolution or ordinance enacted by the Tribal Executive Committee, which by the terms of this Constitution and Bylaws is subject to review by the Secretary of the Interior, or his authorized representative, shall be presented to the Superintendent or officer in charge of the Reservation who shall within ten (10) days after its receipt by him approve or disapprove the resolution or ordinance.

If the Superintendent or officer in charge shall approve any ordinance or resolution it shall thereupon become effective, but the Superintendent or officer in charge shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of approval, rescind the ordinance or resolution for any cause by notifying the Tribal Executive Committee.

If the Superintendent or officer in charge shall refuse to approve any resolution or ordinance subject to review within ten (10) days after its receipt by him he shall advise the Tribal Executive Committee of his reasons therefor in writing. If these reasons are deemed by the Tribal Executive Committee to be insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its referral, approve or reject the same in writing, whereupon the said ordinance or resolution shall be in effect or rejected accordingly.

Sec. 2. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subjected to review by the Secretary of the Interior or his authorized representative, shall be governed by the procedures set forth in Section 1 of this Article.

Sec. 3. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subject to approval by the Tribal Executive Committee, shall within ten (10) days of its enactment be presented to the Tribal Executive Committee. The Tribal Executive Committee shall at its next regular or special meeting, approve or disapprove such resolution or ordinance.

Upon approval or disapproval by the Tribal Executive Committee of any resolution or ordinance submitted by a Reservation Business Committee, it shall advise the Reservation Business Committee within ten (10) days, in writing, of the action taken. In the event of disapproval the Tribal Executive Committee shall advise the Reservation Business Committee, at that time, of its reasons therefore.

BYLAWS

ARTICLE I - DUTIES OF THE OFFICERS OF THE TRIBAL EXECUTIVE COMMITTEE

Section 1. The President of the Tribal Executive Committee shall:

(a) Preside at all regular and special meetings of the Tribal Executive Committee and at any meeting of the Minnesota Chippewa Tribe in general council.

(b) Assume responsibility for the implementation of all resolutions and ordinances of the Tribal Executive Committee.

(c) Sign, with the Secretary of the Tribal Executive Committee, on behalf of the Tribe all official papers when authorized to do so.

(d) Assume general supervision of all officers, employees and committees of the Tribal Executive Committee and, as delegated, take direct responsibility for the satisfactory performance of such officers, employees and committees.

(e) Prepare a report of negotiations, important communications and other activities of the Tribal Executive Committee and shall make this report at each regular meeting of the Tribal Executive Committee. He shall include in this report all matters of importance to the Tribe, and in no way shall he act for the Tribe unless specifically authorized to do so.

(f) Have general management of the business activities of the Tribal Executive Committee. He shall not act on matters binding the Tribe until the Tribal Executive Committee has deliberated and enacted appropriate resolution, or unless written delegation of authority has been granted.

(g) Not vote in meetings of the Tribal Executive Committee except in the case of a tie.

Sec. 2. In the absence or disability of the President, the Vice-President shall preside. When so presiding, he shall have all rights, privileges and duties as set forth under duties of the President, as well as the responsibility of the President.

Sec. 3. The Secretary of the Tribal Executive Committee shall:

(a) Keep a complete record of the meetings of the Tribal Executive Committee and shall maintain such records at the headquarters of the Tribe.

(b) Sign, with the President of the Tribal Executive Committee, all official papers as provided in Section I (c) of this Article.

(c) Be the custodian of all property of the Tribe.

(d) Keep a complete record of all business of the Tribal Executive Committee. Make and submit a complete and detailed report of the current year's business and shall submit such other reports as shall be required by the Tribal Executive Committee.

(e) Serve all notices required for meetings and elections.

(f) Perform such other duties as may be required of him by the Tribal Executive Committee.

Sec. 4. The Treasurer of the Tribal Executive Committee shall:

(a) Receive all funds of the Tribe entrusted to it, deposit same in a depository selected by the Tribal Executive Committee, and disburse such tribal funds only on vouchers signed by the President and Secretary.

(b) Keep and maintain, open to inspection by members of the Tribe or representatives of the Secretary of the Interior, at all reasonable times, adequate and correct accounts of the properties and business transactions of the Tribe.

(c) Make a monthly report and account for all transactions involving the disbursement, collection or obligation of tribal funds. He shall present such financial reports to the Tribal Executive Committee at each of its regular meetings.

Sec. 5. Duties and functions of all appointive committees, officers, and employees of the Tribal Executive Committee shall be clearly defined by resolution of the Tribal Executive Committee.

ARTICLE II - TRIBAL EXECUTIVE COMMITTEE MEETINGS

Section 1. Regular meetings of the Tribal Executive Committee shall be held once in every 3 months beginning on the second Monday in July of each year and on such other days of any month as may be designated for that purpose.

Sec. 2. Notice shall be given by the Secretary of the Tribal Executive Committee of the date and place of all meetings by mailing a notice thereof to the members of the Tribal Executive Committee not less than 15 days preceding the date of the meeting.

Sec. 3. The President shall call a special meeting of the Tribal Executive Committee upon a written request of at least one-third of the Tribal Executive Committee. The President shall also call a special meeting of the Tribal Executive Committee when matters of special importance pertaining to the Tribe arise for which he deems advisable the said Committee should meet.

Sec. 4. In case of special meetings designated for emergency matters pertaining to the Tribe, or those of special importance warranting immediate action of said Tribe, the President of the Tribal Executive Committee may waive the 15-day clause provided in Section 2 of this Article.

Sec. 5. Seven members of the Tribal Executive Committee shall constitute a quorum, and Robert's Rules shall govern its meetings. Except as provided in said Rules, no business shall be transacted unless a quorum is present.

Sec. 6. The order of business at any meeting so far as possible shall be:

(a) Call to order by the presiding officer.

(b) Invocation.

(c) Roll call.

(d) Reading and disposal of the minutes of the last meeting.

(e) Reports of committees and officers.

(f) Unfinished business.

(g) New business.

(h) Adjournment.

ARTICLE III – INSTALLATION OF TRIBAL EXECUTIVE COMMITTEE MEMBERS

Section 1. New members of the Tribal Executive Committee who have been duly elected by the respective Reservations shall be installed at the first regular meeting of the Tribal Executive Committee following election of the committee members, upon subscribing to the following oath:

> "I, _____, do hereby solemnly swear (or affirm) that I shall preserve, support and protect the Constitution of the United States and the Constitution of the Minnesota Chippewa Tribe, and execute my duties as a member of the Tribal Executive Committee to the best of my ability, so help me God."

ARTICLE IV – AMENDMENTS

Section 1. These bylaws may be amended in the same manner as the Constitution.

ARTICLE V – MISCELLANEOUS

Section 1. The fiscal year of the Minnesota Chippewa Tribe shall begin on July 1 of each year.

Section 2. The books and records of the Minnesota Chippewa Tribe shall be audited at least once each year by a competent auditor employed by the Tribal Executive Committee, and at such times as the Tribal Executive Committee or the Secretary of the Interior or his authorized representative may direct. Copies of audit reports shall be furnished the Bureau of Indian Affairs.

ARTICLE VI - RESERVATION BUSINESS COMMITTEE BYLAWS

Section 1. The Reservation Business Committee shall by ordinance adopt bylaws to govern the duties of its officers and Committee members and its meetings.

Section 2. Duties and functions of all appointive committees, officers, and employees of the Reservation Business Committee shall be clearly defined by resolution of the Reservation Business Committee.

CERTIFICATION OF ADOPTION

Pursuant to an order approved September 12, 1963, by the Assistant Secretary of the Interior, the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe was submitted for ratification to the qualified voters of the reservations, and was on November 23, 1963, duly adopted by a vote of 1,761 for and 1,295

against, in an election in which at least 30 percent of those entitled to vote cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

(sgd) Allen Wilson, President
Tribal Executive Committee

(sgd) Peter DuFault, Secretary
Tribal Executive Committee

(sgd) H.P. Mittelholtz, Superintendent
Minnesota Agency

APPROVAL

I, John A. Carver, Jr., Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approved the attached Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota.

John A. Carver, Jr.,
Assistant Secretary of the Interior
Washington, D.C.
(SEAL) Date: March 3, 1964

STATE OF MINNESOTA
OFFICE OF THE GOVERNOR
130 STATE CAPITOL
SAINT PAUL 55155

ARNE H. CARLSON
GOVERNOR

November 27, 1995

Mr. Duane Windahl, President
Lake Mille Lacs Association, Inc.
Box 205
Wahkon, Minnesota 56386

Dear Mr. Windahl:

Thank you for your letter regarding placement of Mille Lacs Band lands into trust and establishment of the current boundaries of the Mille Lacs Reservation.

I share your concern about lands being taken into trust by the federal government when state and local governments have no formal input into that process. My staff have taken the initiative to raise this issue with a number of federal officials. On November 7, 1995, the United States Court of Appeals for the Eighth Circuit ruled that the statute under which lands are taken into trust status for Indians is unconstitutional. The court acknowledged that trust status has an impact on the local and state tax base. It also acknowledged that Congress should define the extent to which Indian lands should be free from local and state zoning. Although the decision leaves many questions unanswered and may be appealed, it is a step toward addressing the concerns we share.

You also asked about my position on the boundaries of the Mille Lacs Reservation. Minnesota's position has been, and is today, that the Mille Lacs Reservation was disestablished through later federal treaties and laws. The historical boundary lines of the reservation are not appropriate for use today in determining jurisdiction of the Mille Lacs Band in relation to state and local regulatory authority. Minnesota recognizes only those parcels of land that are currently held by the United States in trust for the Mille Lacs Band as coming within the Band's sovereign jurisdiction. The State retains jurisdiction and regulatory authority over all public water bodies and all land within the historical reservation boundaries that is not held in trust for the Band.

I appreciate the concern of your organization and your invitation to share my views on these complicated issues of federal law.

Warmest regards,

Arne H. Carlson

ARNE H. CARLSON
Governor

EXHIBIT C

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1002
TELEPHONE: (651) 296-6196

MIKE HATCH
ATTORNEY GENERAL

August 9, 1999

R.D. Courteau, M.D.
10961 Cove Drive
Onamia, MN 56359

Re: Mille Lacs Band's Reservation Boundary

Dear Dr. Courteau:

Thank you for your letter of July 11, 1999, concerning the Mille Lacs Band's reservation boundary.

As you may be aware, my role and that of my office on this matter is to represent executive agencies of the State of Minnesota, such as the Minnesota Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA). In the past, these agencies have addressed the Mille Lacs reservation boundary issue on a case by case basis, without deciding the difficult issue of jurisdiction in reservation boundaries. Notwithstanding this, the MPCA, the DNR and the Governor's Office have taken the position that the Mille Lacs reservation boundaries are limited to Indian trust land, which is land that is currently held by the United States in trust for the Mille Lacs Band. The state retains jurisdiction and regulatory authority over all public water bodies and all land within the historical reservation boundary that is not held in trust for the Band.

Once again, thank you for your letter and for bringing your concern to my attention.

Very truly yours,

MIKE HATCH
Attorney General
State of Minnesota

EXHIBIT D

OFFICE OF THE ATTORNEY GENERAL

State of Minnesota

ST. PAUL 55155

MIKE HATCH
ATTORNEY GENERAL

September 9, 1999

Frank Courteau
Mille Lacs County Commissioner
District 4
10654 390th Street
Onamia, MN 56359

Dear Commissioner Courteau:

I thank you for your August 25, 1999, letter.

You indicate that Mille Lacs County is considering a legal challenge to the zoning practices of the Mille Lacs Band of Chippewa Indians on tribally owned non-trust land. You ask whether this office can assist the county if the challenge results in a legal proceeding do to determine the applicability of the 1855 treaty to the boundaries of the reservation.

As you know, the position of the State of Minnesota has been that the boundaries of the reservation are limited to the "trust land" and do not include "non-trust land."

This office does act as a resource to county governments and county attorneys when they undertake difficult and complex litigation involving tribal matters. For instance, we recently sent out information to county attorneys regarding procedures utilized by the Bureau of Indian Affairs in converting fee-owned land to trust properties. Similarly, this office also acted in a supportive role to Cass County in that county's successful effort to tax tribally owned, non-trust land within the boundary of the Leech Lake reservation.

We are committed to continuing to act in a similar role to support Mille Lacs County if there is judicial review of the applicability of the 1855 treaty. We are an office of limited resources, however, and we do not have the ability to act as lead attorney on behalf of each county as it relates to such matters.

EXHIBIT E

As you perhaps know, the legislature appropriated almost two million dollars to this office as it related to the hunting and fishing dispute under the 1837 treaty. While the current tribal issues arising in the counties do not reach the cost of that litigation, it is not feasible for this office to act as lead counsel in each case. Indeed, this office would need legislative direction and appropriations, such as those appropriated in the Mille Lacs Hunting and Fishing Case, if this office were to undertake such a lead role.

We can continue, however, to act in a supportive role and you should advise your county attorney that we are available at any time to be a resource on such issues. I ask that your attorney contact Joe Majors who will advise your attorneys as they deem necessary.

Very truly yours,

Mike Hatch
Attorney General

MAH:bam

cc: Kris Eiden
Joe Majors
Ken Peterson

AG:92053, v. 1

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

525 PARK STREET
SUITE 200
ST. PAUL, MN 55103-2106
TELEPHONE: (651) 297-2040

September 20, 2001

Tom Tobin
Tobin Laws Offices, P.C.
P.O. Box 730
422 Main Street
Winner, SD 57580

Dear Mr. Tobin:

Per your request, enclosed please find the following: 1) letter of November 27, 1995, from Governor Arne Carlson to Duane Windahl, President of the Lake Mille Lacs Association, Inc.; 2) letter of August 9, 1999, from Attorney General Mike Hatch to Dr. R. D. Corteau; and 3) letter of September 9, 1999 from Attorney General Mike Hatch to Frank Corteau. Each of these three letters state the position of Minnesota state agencies regarding the boundaries of the Mille Lacs reservation. That is, that the original Treaty of 1855 reservation boundaries have been diminished. This position remains the same today.

If I can be of any further assistance, please contact me.

Sincerely yours,

KEN B. PETERSON
Deputy Attorney General

(651) 296-2731

Enclosures
AG: 512073, v. 01

EXHIBIT F

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 1800
445 MINNESOTA ST.
ST. PAUL MN 55101-2134
TELEPHONE: (651)297-2040

MIKE HATCH
ATTORNEY GENERAL

August 29, 2003

EXHIBIT G

Michael E. Gans, Clerk of Court
U.S. Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Suite 24.329
St. Louis, MO 63102

Re: *County of Mille Lacs, et al. v. Melanie Benjamin, et al.*
Eighth Circuit Court of Appeals File No. 03-2527
Trial Court File No. 02-407 JMR/RLE

Dear Mr. Gans:

This letter brief, as an amicus curiae pursuant to Fed. R. App. P. 29(a), is submitted on behalf of the Appellants' position that this Court should reverse the District Court's summary judgment in favor of Appellees and remand it for disposition on the merits.

The position of the State of Minnesota (State) is that the reservation of the Mille Lacs Band of 0jibwe is limited to land currently held in trust for its members by the United States Government. It is the State's position that it, not the Mille Lacs Band, retains jurisdiction and regulatory authority over all public water bodies and land not held in trust lying within the boundaries of the reservation established by the 1855 Treaty between the United States Government and the Mille Lacs Band of 0jibwe.

In addition to ending the contention between Band members and non-Band members living in the area, the State, for its own interests, would like the reservation boundaries issue resolved.

First among those interests is financial. According to the brief to this Court of Plaintiff First National Bank of Milaca, the Band's claim of the enlarged reservation has had an adverse impact on the market value of property that the Bank holds a security interest in within the boundaries of the enlarged reservation. (Appellant's Brief of First National Bank of Milaca at 14.) The Bank has also submitted an affidavit of a licensed appraiser who has practiced more than 20 years in the Lake Mille Lacs area, stating that the uncertainty regarding the size of the reservation has resulted in depressed market prices for property located within the boundaries established by the 1855 Treaty. (Appellant's Brief of First National Bank of Milaca at 14, 15.)

MILLE LACS HEALTH SYSTEM

Lower market values and prices will inevitably be followed by lower property tax revenues to local governments. This means over time that the state government will be required to provide more funding than it otherwise would have for provision of governmental services and education for Plaintiff Mille Lacs County as well as other local governments and school districts in the area. A decision in favor of Appellants by this Court would help minimize these anticipated state expenditures.

A second interest in resolving this matter is protection of the State's authority to regulate environmental activity within Minnesota. For example, in 1989, the Mille Lacs Band applied to the EPA for "treatment as a state" under the federal Safe Drinking Water Act for the Underground Injection Control (UIC) Program, [1] 300 U.S.C. § 300j-11, to regulate all septic tanks within the boundaries of the 1855 Treaty reservation. The Minnesota Pollution Control Agency (MPCA) opposed the application, arguing to the EPA that the boundary of the original reservation no longer exists. EPA granted treatment as a state to the Band, finding that the 1855 reservation still exists. The MPCA submitted additional information and comments, as did Mille Lacs County, Isle Harbor Township, and the City of Waukon, and requested that EPA reconsider its decision. However, in lieu of further proceedings, the Band, MPCA, and EPA entered into a Memorandum of Understanding (MOU) in 1998 describing how the three parties would work together to implement the UIC program, without deciding the issue of jurisdiction. Moreover, the State has included language in this and other such agreements relating to the reservation boundary issue that expressly preserves the positions, claims and defenses of both the State and the Band. This MOU is only a temporary accommodation, however, since it can be terminated on 30 days notice.

In addition, the Band applied for treatment as a state under the Non-Point Source Program of the Federal Water Pollution Control Act, 33 U.S.C. § 1329, in 1992. The MPCA opposed the application, arguing in comments to EPA that the boundary of the original reservation no longer exists. The application is still pending before EPA.

The Mille Lacs Reservation boundary issue continues to be a lively controversy that the State has been hesitant to fully address in administrative forums such as the EPA's "treatment as a state" process because time constraints of these procedures do not allow for adequate presentation of the complex historical evidence fundamental to an analysis and review of Indian treaty disputes. The federal courts are much better suited than administrative agencies to resolving the complex issues presented in these cases.

[1] The Underground Injection Control Program regulates underground injection wells. In Minnesota, Class V wells are septic tanks that serve more than sewage and some industrial types of waste.

The "treatment as a state" issue arose as part of an EPA administrative process where the State had 30 days to "comment" on the jurisdictional aspects of the Band's application for treatment as a state to operate specific federal programs in the same manner as the state within the boundary of the Mille Lacs Reservation. 2 Again, such administrative forums are ill suited to decide issues as complex as the boundaries of an Indian reservation. Deciding reservation boundary issues involves interpretation of Indian treaties, federal statutes, a broad range of historical documents, as well as extensive discovery and use of expert witnesses. These are tools generally not available in a 30-day comment period. In addition, any review of EPA's decision would be an on-the-record review, without the opportunity to further develop the issue. State of Montana v. U.S. Environmental Protection Agency, 941 F. Supp. 945, 956 (D. Mont. 1996), aff'd 137 F.3d 1135 (9th Cir. 1998), cert. denied, 119 S. Ct. 275 (1998).

When the issue of the claimed continued existence of the 1855 reservation has arisen in other areas like law enforcement and public safety, the State has sought practical ways to address these problems through discussions, legislation, and agreements that provide a workable, though tenuous, remedy on a case-by-case basis without fully addressing the ultimate question of jurisdictional authority. These attempts often fall short of fully addressing the core issues underlying the dispute. Further, the forums for decision-making are ill-suited for a full and complete resolution of this matter. Consequently, the State's authority to regulate environmental activity within the disputed area lacks clarity.

For these reasons, the State asks that this Court rule in Appellants' behalf and remand the case to the District Court for disposition on the merits.

Sincerely yours,

KEN PETERSON
Deputy Attorney General
(651) 296-2731 (Voice)
(651) 297-1235 (Fax

2 A number of federal statutes contain 'treatment as a state' provisions. See, Federal Water Pollution Act, 33 U.S.C. § 1377(e); Safe Drinking Water Act, 42 U.S.C. § 300h-1(e); and Clean Air Act, 42 U.S.C. § 7601(d)(2). EPA has adopted rules allowing tribes to apply to operate certain federal programs in the same manner as a state in lieu of federal implementation. These rules allow 30-45 days for appropriate government entities to comment on the jurisdictional aspects of the tribe's application, such as boundaries of the reservation. See, e.g., the water quality standards program, 40 C.F.R. § 131.8(c); the NPDES permit program, 40 C.F.R. §§ 123.33 &123.61; and the dredge and fill permit program, 40 C.F.R. § 233.15, of the Federal Water Pollution Control Act; the underground injection control program of the Safe Drinking Water Act, 40 C.F.R. 145.56; and programs under the Clean Air Act, 40 C.F.R. § 49.9(c).

Office of Governor Tim Pawlenty
130 State Capitol • 75 Rev. Dr. Martin Luther King Jr. Boulevard • Saint Paul, MN 55155

March 30, 2005

EXHIBIT H

Sue Ellen Woldridge
Solicitor, Department of the Interior
1849 C Street Northwest
Room 6352
Washington, DC 20240

Dear Ms. Woldridge:

I am enclosing a copy of a 1991 letter signed by an employee on behalf of the field solicitor. The letter states an opinion regarding the boundaries for the Mille Lacs Indian Reservation. I respectfully request that you review and withdraw this letter.

The legal analysis set forth in the letter is questionable. This opinion also reflected a substantial change in the position previously taken by the Bureau of Indian Affairs, the Department, and other federal agencies.

Minnesota's position has long been, and remains today, that the 1855 Mille Lacs Reservation was disestablished through subsequent federal treaties and laws. The State retains jurisdiction and regulatory authority over all public waters and lands within the 1855 boundaries which are not held in trust by the federal government for the Mille Lacs Band.

Unfortunately, the 1991 field solicitor letter has been improperly relied upon by numerous other federal agencies. As a result, state and local governments in Minnesota have had to repeatedly address concerns from local land owners and issues regarding appropriate delineation of state and federal jurisdiction.

Thank you for your consideration of this matter.

Sincerely,

Tim Pawlenty

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155
TELEPHONE (651) 296-6196

February 6, 2007

Ms. Janice Kolb
Mille Lacs County Attorney
Courthouse Square
525 Second Street SE
Milaca, Minnesota 56353

EXHIBIT I

Dear Ms. Kolb:

I thank you for your letter dated January 16, 2007. I look forward to working with you in a cooperative spirit to serve the people of this state. You enclose several documents and expressed concern regarding the ongoing reservation boundary disputes between Mille Lacs County and the Mille Lacs Band.

As you know from your contacts with this Office over the past few years, it has long been the position of this Office that the Mille Lacs reservation boundaries are limited to the approximately 3,000-4,000 acres of land held in trust for the Band. I am not aware of any reason why my position should be inconsistent with positions of Governors Pawlenty, Ventura and Carlson, or of Attorneys General Hatch and Humphrey. I can not speak to the opinion of Deputy Attorney General Ken Peterson, whose letter is dated November 2, 2006. Neither I nor Attorney General Hatch had seen the letter before you sent it to me. Deputy Attorney Peterson resigned from the Office in December of 2006 and so I am unable to review the opinion with him.

You refer to several cases currently pending in Mille Lacs County. As you know, this Office has severe budget constraints. Since 1999 the legislature slashed the budget of this Office so many times that it now has a difficult time meeting the current demands of the state. Indeed, the Office in 1999 had 50% more attorneys and staff than it has now. As a member of the MCAA, you are aware that I have had to stretch the budget just to meet the demands of criminal appellate matters and sexual predator commitment petitions.

Again, thank you for your letter and for bringing your concerns to my attention.

Very truly yours,

LORI SWANSON
Attorney General

cc: Al Gilbert, Solicitor General
LRS/ab

STATE OF MINNESOTA

Office of Governor Mark Dayton

130 State Capitol • 75 Rev. Dr. Martin Luther King Jr. Boulevard • Saint Paul, MN 55155

April 26, 2013

EXHIBIT J

Mr. Tracy Toulou
Director
Office of Tribal Justice
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Mille Lacs Band of Ojibwe Tribal Request for Federal Concurrent Criminal Jurisdiction

Dear Mr. Toulou:

This letter responds to your March 12, 2013, notice concerning the Mille Lacs Band of Ojibwe's request for Federal concurrent criminal jurisdiction over approximately 61,000 acres of land located in Mille Lacs County.

Federal law states that the United States may accept concurrent Federal criminal jurisdiction within areas of Indian Country. The State of Minnesota's longstanding position has been, and continues to be, that the boundaries of the Mille Lacs Reservation are limited to approximately 4,000 acres of land held in trust by the federal government for the Mille Lacs Band.

Thank you for your consideration.

Sincerely,

Mark Dayton
Governor

Voice: (651) 201-3400 or (800) 657-3717 Fax: (651) 797-1850 MN Relay (800) 627-3529
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Randy V. Thompson

Nolan, Thompson & Leighton, PLC
5001 American Blvd. West, Suite 595
Bloomington, Minnesota 55437
Telephone: 952-405-7171
Facsimile: 952-224-0647
E-mail: rthompson@nmtlaw.com

Randy Thompson was born on August 27, 1951 and is a summa cum laude graduate of the University of Minnesota in 1975 and a magna cum laude graduate of William Mitchell College of Law in 1980.

Mr. Thompson has litigated cases throughout the United States. He is admitted to practice and has argued before the United States Supreme Court and the Minnesota Supreme Court. Mr. Thompson is also admitted to practice before the Federal Circuit and the Fourth, Seventh, and Eighth Federal Circuit Courts of Appeal, the Federal District Courts of Minnesota and the Eastern District of Michigan, the United States Court of Claims, and various Tribal Courts. He has been a lecturer at Continuing Legal Education Seminars.

In the area of Indian law, Mr. Thompson has represented the rights and interests of both tribal members and nonmembers in disputes and transactions with tribal governments, and has represented tribal officials in internal tribal disputes. He represented the families of nine children who were killed in the Red Lake School shooting in claims against the School District and the company providing security planning for the school.

Educational Background:
Augsburg College/University of Minnesota – 1975 Graduate – B.A. Sociology – summa cum laude
William Mitchell College of Law – 1980 Graduate – Juris Doctor – magna cum laude

Professional Employment:
Nolan, Thompson & Leighton, PLC – 1980 to the present with this firm and its predecessors; partner since 1985
Lindquist & Vennum – law clerk – 1977-80

Courts Admitted to Practice:

United States Supreme Court	April 20, 1998
United States Court of Appeals for the 8th Circuit	October 21, 1988
United States Court of Appeals for the 7th Circuit	April 21, 1989
United States Court of Appeals for the 4th Circuit	February 18, 1993
United States Court of Appeals for the Federal Circuit	November 20, 2007
United States Court of Federal Claims	August 2, 2006
United States District Court for the District of Minnesota	December 18, 1980
United States District Court, Eastern District of Michigan	November 7, 1996
Minnesota Supreme Court	October 24, 1980
Grand Portage Band of Chippewa Tribal Court	
Leech Lake Band of Ojibwe Tribal Court	
Standing Rock Sioux Tribe Tribal Court	

EXHIBIT K