UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiff,

v.

BAYFIELD COUNTY, WISCONSIN,

Defendant.

Case No. 18-cv-828

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Red Cliff Band of Lake Superior Indians (hereafter the "Tribe" or "Band") is a successor in interest to the LaPointe Band of Lake Superior Chippewa that entered into treaties with the United States in 1837, 1842 and 1854. By virtue of those treaties, the Lake Superior Chippewa ceded approximately 14,300,000 acres of the Wisconsin portion of their homeland, for which they received about six cents per acre.[1] Today, the Band and its members reside on the 14,500-acre reservation set aside as its permanent home by treaty with the United States ("Reservation"). The Tribe and its members own land both in trust status and in fee simple, comprising about 61% of the reservation. Indians comprise 83% of the Reservation population and 87% of Reservation households are headed by Indians.

[1] https://dnr.wi.gov/topic/fishing/ceded/. All three treaties also involved cessions of land in other states, including Minnesota (1837 and 1854) and Michigan (1842).

In the exercise of its right of self-government, the Tribe has enacted 53 ordinances, including land use ordinances. Bayfield County, Wisconsin ("Defendant" or "County") seeks to reach into the Reservation to impose its land use regulations on the Tribe and its members on fee land, thus preempting the Tribe's own land use regulations and creating conflicting obligations for tribal members. The County's assertion of authority over the Tribe and its members within the Tribe's Indian country is contrary to the fundamental principles of federal Indian law discussed below. As the Ninth Circuit Court of Appeals concluded in rejecting another county's assertion of the same authority, "nothing could be more contrary to the well-established policy of leaving Indians free from state jurisdiction and control." *Gobin v. Snohomish County*, 304 F.3d 909, 918 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).

II. BACKGROUND

A. The Tribe

The Red Cliff Tribe is expressly acknowledged by the United States "to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes." 84 Fed. Reg. 1200, 1203 (February 1, 2019). Tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982). Tribal sovereignty "is dependent on, and subordinate to, only the Federal Government, not the States," *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

The "Lake Superior Chippewa" designation, which is part of the Tribe's name today, originated in the treaties of 1842 and 1854 and was intended to distinguish the bands around Lake Superior from the "Mississippi Chippewa" who had migrated westward to the Mississippi

River watershed in the 18th and 19th centuries. The Tribe is one of two successors-in-interest to the La Pointe Band[2] that signed the 1854 treaty. The Red Cliff component of the La Pointe Band during the Treaty era was led by Chief Ke-Che-Waishke ("Buffalo"), whose name appears first in the list of signatories.[3] (Affidavit of Wade Max Williams ("Williams Aff.") ¶ 5.)

For most of its history, the Tribe was governed by traditional, clan-based structures.[4] In 1936, the Tribe adopted a Constitution under the Indian Reorganization Act of 1934, 48 Stat. 984, as codified at 25 U.S.C. § 5101 et seq.[5] The Tribe today is governed by an elected nine-member Tribal Council, consisting of a Chair, Vice-Chair, Secretary and Treasurer, and five at-large members, serving staggered, two-year terms. The Tribal Council exercises executive and legislative powers. The Tribal Court exercises judicial powers. (Williams Aff. ¶ 6.)

B. The Reservation

The Red Cliff Reservation includes the northern tip of what is now Bayfield County and includes approximately 20 miles of Lake Superior shoreline. The Reservation lies within a larger area, known since the fur trade era as "La Pointe," that includes the Chequamegon peninsula, Chequamegon Bay, Madeline Island ("Moningwunakonung" to the Ojibwe) and the Apostle Islands. Ojibwe tradition identifies Madeline Island as the final destination of the

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[2] The Bad River Band of Lake Superior Chippewa Indians is the other successor in interest to the La Pointe Band. The Bad River Reservation is approximately 40 miles southeast of the Red Cliff Reservation.

[3] 10 Stat. 1112

[4] Red Cliff Band website, http://redcliff-nsn.gov/Government/history.htm; William Warren, *History of the Ojibway People*, Copyright 1984 Minnesota Historical Society Press, St. Paul; Edward Benton-Benai, *Mishomis Book*, 1988 Red School House, ch. 10.

[5] The Tribe's initial IRA constitution was superseded by a new Constitution, also under the IRA, in 1991.

Tribe's long migration from the East.[6] From time immemorial, the rich lake fishery and abundant wild rice beds have provided a living for tribal members. The Red Cliff Band seal depicts the six traditional clans and bears the motto "Hub of the Chippewa Nation," reflecting the importance of Madeline Island and La Pointe in the Ojiwbe migration story and its continuing role as a traditional summer meeting grounds for the Ojibwe.[7]

The Reservation was established, and guaranteed to the Tribe by the United States, by the Treaty of September 30, 1854 made at LaPointe, Wisconsin ("LaPointe Treaty"). 10 Stat. 1109. The Reservation encompasses approximately 14,540 acres, including (i) 2,592.61 acres reserved for Chief Buffalo under Article II, Section 6 of the 1854 Treaty, selected and withdrawn from preemption by the General Land Office by Executive Order of President Franklin Pierce on February 21, 1856, (ii) approximately 11,520 acres added to the reservation in 1863 at the request of the Commissioner of Indian Affairs and incorporated into the 1854 treaty reservation by a joint resolution of the House and Senate in 1895, 28 Stat. 970,[8] and (iii) an additional 560 acres that the United States acquired for the Tribe in trust under Section 5 of the Indian Reorganization Act, codified at 25 U.S.C. § 5108. (Williams Aff. ¶ 7.)

Paragraph 7 of Article II of the LaPointe Treaty provided for allotment of the Reservation. Over a period of time, certain Reservation lands passed out of Indian hands, resulting in the mixed (sometimes called "checkerboard") ownership pattern common to many

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[6] Edward Benton-Benai, *Mishomis Book*, 1988 Red School House, pp. 94-102.

[7] The Tribe's seal is depicted on its website; http://redcliff-nsn.gov/. *See also* William M. Warren, *History of the Ojibway People*, Minnesota Historical Society Press 1984; Edward Benton-Benai, *Mishomis Book*, 1988 Red School House.

[8] This law provided that the added lands were "declared to be a part of said Indian reservation as fully and to the same effect as if they had been embraced in and reserved as a part of said Red Cliff Reservation by the provisions of the treaty with the Chippewa of Lake Superior dated September thirtieth, eighteen hundred and fifty-four."

reservations. In 1970, Congress created the Apostle Islands National Lakeshore, which includes not only the Apostle Islands off the shore of the Reservation but also 1541 acres of mainland lakeshore within the Reservation.[9] These lands are now under exclusive federal jurisdiction.

Notwithstanding alienation of certain lands over time, the Reservation has maintained its predominantly Indian character through the present. Ownership today falls into the following categories with the approximate acreages of each:

- Trust lands owned by the Tribe 6,331 acres
- Fee Lands owned by the Tribe 1,047 acres
- Trust or restricted fee lands owned by tribal members 1,767 acres
- Fee lands owned by tribal members 511 acres
- United States Apostle Islands Lakeshore (Federal) 1,540 acres
- Forest Fee lands owned by Bayfield County 1,500 acres
- Fee lands owned by non-Indians other than County 1,845 acres:

(Williams Aff. ¶ 12.)

Reservation lands comprise approximately 1% of the area of Bayfield County. The Tribe and its members own 74% of the Reservation, not including the federally-administered Apostle Islands National Lakeshore. The County owns approximately 10.3% of lands within the Reservation boundary, all unoccupied forest lands. Non-Indians occupy just 12.7% of the lands within the Reservation boundary. Of the 1,353 persons who reside on the Reservation, 87% are Indians. Nine-one percent of Reservation households are led by Indians. (Williams Aff. ¶¶ 13-16.)

[9] The Apostle Islands National Lakeshore was created by Pub. L. 91-424. See H.R. REP. 91-1280, 3918

The Red Cliff Tribal government offices, facilities and enterprises, including administrative buildings, health clinic, housing authority, casino, hotel, marina, etc., are all located on the Reservation. The Tribe provides a wide array of governmental services to both member and nonmember Reservation residents, including police, fire, emergency, social services, judicial services, roads, public water supply, wastewater treatment, etc. (Williams Aff. ¶ 17.)

The Tribe's government agencies and enterprises employ approximately 500 persons on the Reservation. The Tribe is the largest employer in Bayfield County. The Tribe is aware of no County employee offices on the Reservation. (Williams Aff. ¶ 18.)

C. Red Cliff Band Land Use Regulations

In the exercise of its legislative authority, the Tribal Council has codified its laws by enacting a set of over 50 ordinances,[10] including many that relate to land use, such as logging and burning (Chapter 11), pollution and environmental protection (Chapter 12), leasing (Chapter 18), historic preservation (Chapter 20), water and sewer (Chapter 34), land use (Chapter 37) and flood damage reduction (Chapter 55). Chapter 4 of the Red Cliff Code of Laws ("RCCL") establishes the Tribe's court and provides the procedures for enforcement of tribal ordinances in Tribal Court.

The Tribe's Land Use Ordinance, RCCL Chapter 37, was enacted March 11, 1993 and last amended in 2003. Its purpose is described at Section 37.2:

> This Chapter is for the purpose of controlling land use within the Red Cliff Reservation boundaries for the protection of the health,

[10] The Tribe's ordinances are available at http://redcliff-nsn.gov/Government/chapters_table_contents.htm.

> safety and welfare of the people who live within the Reservation. Its aim is to encourage the most appropriate use of the land, the protection of the Reservation's economic and social stability, the promotion of orderly development on the Reservation, and the preservation of natural areas.

The ordinance provides for a Project Application and Compliance ("PAC") Review Board and a Zoning Administrator. The PAC Board is composed of the Tribe's Historical Preservation Officer, Land Specialist, Public Works Department Administrator, Natural Resources Administrator and Health Specialist. The PAC Board has the authority to review applications, hold hearings, approve or disapprove petitions for special permits and adopt regulations. The Zoning Administrator investigates violations, issues Land Use permits for projects reviewed or approved by the PAC team and makes recommendations to the PAC Board on general permits and to the Tribal Council with respect to appeals from denials. (Williams Aff. ¶ 22.)

The Land Use Ordinance divides the Reservation into ten categories of zoning districts, including four types of residential districts and districts designated commercial, agricultural, forestry, preserved, municipal/institutional, and recreational. Section 37.5. The ordinance identifies permissible uses within each district and addresses home-based businesses, setbacks, signs, etc. A property owner must apply to the PAC Board and Zoning Administrator for a land use permit "before commencing any construction of a new building or structure, or any alteration of an existing structure which will require more land area than does the existing structure, or any moving or destruction of any structure, or other change in the use of land which may potentially affect traffic patterns, population density, or otherwise impact on the adjoining physical or social environment, within the exterior boundaries of the Reservation." Section 37.8.1. The Ordinance provides a separate process for special permits for otherwise nonconforming uses and prescribes

the circumstances under which the PAC Board and Zoning Administrator may issue such permits. Section 37.9. (Williams Aff. ¶ 23.)

RCCL Section 12, Pollution and Environmental Protection, describes additional land use permits required for activities that "involve pollution, dangerous environmental activities, or environmental change." Section 37.8.1. Section 12 prohibits pollution within the Reservation and provides that "[t]he PAC Team shall recommend no permit to Tribal Council for approval under this Section unless it shall find that the activity in question will not result in injury to the physical and social environment."

Pursuant to its rule-making authority, the Red Cliff PAC has adopted Red Cliff Land Use Project Application and Compliance Review (PAC) Policy and Procedures ("Land Use Policies"). The Land Use Policies apply to any "land use project within the exterior boundaries of the reservation" and provide details regarding the land use permit process that are not included in Chapter 37. The extensive list of PAC Reviewable projects, including virtually any construction, is provided at Appendix 1 to the Land Use Policies. Section 20.2.2 of the Tribe's Historic Preservation Ordinance requires an historical or cultural survey for any Appendix 1 Project if recommended by the Tribe's Historic Preservation Office. The Land Use Policies also include a fee schedule and list of tribal codes and ordinances that the PAC reviews in connection with projects under its jurisdiction. (Williams Aff. ¶ 25.)

The Tribe's land use laws and policies, as well as the Court Code providing for their enforcement, were adopted pursuant to the Tribal Council's authority under its Constitution, Article VI, Section 1(p), to "promulgate and enforce ordinances governing the conduct of persons subject to the jurisdiction of the tribe, and providing for the maintenance of law and

order and the administration of justice by establishing a reservation court and defining its duties and powers." (Williams Aff. ¶ 26.)

D. The County's Zoning Regulations[11]

The 163-page zoning code that Bayfield County seeks to impose on the Tribe and its members within the Reservation addresses many of the same interests that tribal law addresses but is more voluminous and far more onerous. In addition to prescribing lot sizes and setbacks, County regulations establish thirteen different zoning districts and dictate the permissibility of more than 150 specific types of businesses in each. Section 13-1-62. If these regulations were imposed on the Tribe, the County Planning and Zoning Committee, composed of non-Indians, would determine whether the Tribe, or a tribal member residing within the Red Cliff Reservation, could operate an archery range, bicycle shop, bowling alley, florist shop, hardware store microbrewery, printing shop, riding stable, shopping center, water reservoir, etc. on tribally owned land. Tribal members residing on fee lands would be faced with conflicting rules, procedures and fees.

III. ARGUMENT

A. The County's Assertions of Authority Over the Tribe and Its Members Establish Federal Question Jurisdiction[12]

B.

The Reservation comprises about 1% of Bayfield County's 2,042 square miles. The County is legally entitled to exercise authority over County residents, including tribal members, who reside on the 99% of the County that lies outside the Reservation. Not satisfied, the County

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[11] The County's zoning regulations are available at https://www.bayfieldcounty.org/711/Title-13---Zoning-Code

[12] The Zoning Code also includes extensive additional regulations under Title 13, Chapters 2 (Floodplain Zoning) and 3 (Shoreland and Wetland Zoning)

insists that it must also impose its will on the Tribe and tribal members on the Reservation established as their permanent home lands one and a half centuries ago. In a letter to Assistant Tribal Attorney Wade Williams dated May 4, 2016, Bayfield County Attorney Linda Coleman, responding to a proposal from the Tribe that the parties enter into a jurisdictional agreement, made the following statements:

> We disagree and decline to enter into such an agreement. While you reference the "concurrent jurisdiction" of the Tribe and the County of fee simple parcels, the United States Supreme Court has held that a county undeniably has zoning power on fee simple parcels located within reservation boundaries whereas "the governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Brendale v. Confederated Band of the Yakima*, 492 U 408 (1989).[13]
>
> Given the current directive of the Supreme Court, Bayfield County will continue to implement and enforce County zoning ordinances on fee simple parcels located within the reservation boundary. We will do so regard less of the tribal membership of the owners of such parcels.

(Williams Aff., Ex. B.)

The County was not bluffing. Red Cliff tribal member Linda Bristol received a permit from the Tribe to construct improvements on her property, located on reservation fee land. In 2017, the County sued her in the Circuit Court for Bayfield County. *Bayfield County v. Bristol*, Case No. 17 CX 30 (hereafter "Bristol Litigation"). In its Brief in Opposition to Defendant's Motion to Dismiss, the County, this time citing the Supreme Court's decision in *City of Sherrill,*

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[13] The County's position is based on gross distortion of the controlling Supreme Court decisions. The issue in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) was whether the *Yakima tribe* could zone lands owned in fee simple by *non-members* of the tribe within reservation boundaries. The Court's conclusion that that the tribe had zoning authority over one of the two non-Indian property owners directly contradicts the County's broad mischaracterization.

N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), argued incorrectly that "the Supreme Court has already ruled that fee simple properties, within reservation boundaries, even if owned by a Tribe, are subject to state jurisdiction."[14] (Williams Aff. Ex. C.)

In a letter dated July 30, 2018 to the Bureau of Indian Affairs, Bayfield County Attorney Linda Coleman objected to an application by a Red Cliff tribal member to have the government take her property, located adjacent to the Reservation, into trust, asserting that "even fee- simple parcels within reservation boundaries are subject to Bayfield County zoning." (Williams Aff. Ex. D.)

Federal courts have federal question jurisdiction to enjoin the exercise of state authority contrary to federal law. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473–75, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 763 n.2, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) ("As we ruled in *Moe*, 425 U.S. 463, a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under § 1362 despite the general ban in 28 U.S.C. § 1341 against seeking federal injunctions of such laws."); *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 547 (10th Cir. 2017) (tribe's suit arose under federal law because it was "seeking injunctive and declaratory relief against state regulation (the state-court proceeding) that it claims is preempted by federal law."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F.

[14] The Supreme Court has made no such ruling. Its decision in *City of Sherrill, N.Y.*, 544 U.S. 197 was based on equitable considerations unique to that case. Indeed, the *Brendale* decision is to the contrary.

Supp. 2d 969 (W.D. Wis. 2000) (court had jurisdiction under 28 U.S.C. §§ 1331, 1362 over tribe's claim to enjoin state tax imposed contrary to federal law.)

This County's aggressive enforcement efforts violate well-established federal law protecting the right of tribal self-government. Because there are no "exceptional circumstances" in this case justifying a departure from the general rule against state regulation of Indians in Indian country, the Tribe is entitled to injunctive relief.

C. Tribes, Not States, Have Primary Jurisdiction Over Indians in Indian Country

The Red Cliff Reservation, including the fee lands whose uses the County seeks to regulate, is Indian country. 18 U.S.C. § 1151 (Indian country includes "[a]ll land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent."). Since the founding of the American Republic, "*Indian* country" has served as the legal term denoting the territory reserved for *Indian* People to exercise their aboriginal sovereign right of self-government free from state interference. *See* Trade and Intercourse Acts of 1790, Ch. 33, 1 Stat. 137, 1793, Ch. 19, 1 Stat. 329, 1796, Ch. 30, 1 Stat. 469, and 1799, Ch. 46, 1 Stat. 743, 1802, Ch. 13, §§ 3, 10, 16, 2 Stat., 139 and 1834, Ch. 161, 4 Stat. 729. The geography of Indian country has evolved over time as the federal government adopted successive conflicting policies governing Indians and their lands, including removal, reservation, allotment and self-determination. A short review of the historical background demonstrates Indian country has continued to serve as a tribal refuge from state authority throughout these changes.

Certain 1850s-era treaties, including the 1854 Treaty with the Chippewa, included provisions permitting the reservation to be "allotted," divided into 80 or 160-acre parcels and distributed to individual Indians, in place of ownership in common by all members. This idea became federal policy with the enactment of the General Allotment Act of 1887. 24 Stat. 388.

During the Allotment Era, from 1887 to 1934, approximately 90 million acres passed out of Indian hands by various means, including the expiration of restrictions and the issuance of "certificates of competency," The varied patterns of land ownership in Indian country today, including the Red Cliff fee lands the County wishes to control, are a legacy of the Allotment Policy.[15] By virtue of 18 U.S.C. § 1151, these lands remain Indian country. As such, they are free of state jurisdiction: "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998).

Congress ended the alienation of Indian lands and "repudiated" the policies of the Allotment Act when it enacted the Indian Reorganization Act of 1934. 48 Stat. 984, 25 U.S.C. § 5101 et seq. ("IRA"). *Mattz v. Arnett*, 412 U.S. 481, 496 n. 18, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). The IRA also provided for the restoration of lost tribal lands by authorizing the Secretary of the Interior to acquire lands in trust for tribes. 25 U.S.C. § 5108.

In coercing the Tribe and its members within the Tribe's own Indian country, the County seeks to effectuate the repudiated allotment policy. The courts have long rejected such efforts. The issue whether allotment subjected Indians to state jurisdiction arose early. In *United States v. Celestine*, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195 (1909), the Supreme Court rejected the assertion that the passing of lands into non-Indian ownership subjected Indians to state jurisdiction: "Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also

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[15] *See Cohen's Handbook of Federal Indian Law* § 1.04.

patented, both tracts remained within the reservation until Congress excluded them therefrom." Jurisdiction, the Court concluded, lay with the federal, not state, courts. Cognizant of the Supreme Court's decisions, and eager to avoid jurisdictional ambiguities, Congress formally re-defined Indian country by statute in 1948 to include "[a]ll land within the limits of any Indian reservation under the jurisdiction of the United States, *notwithstanding the issuance of any patent*." 18 U.S.C. § 1151.[16]

In *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), the Supreme Court, rejecting the State of Arizona's claim to tax Navajos living on the Navajo reservation, affirmed the fundamental right of Indians to live on their reservations free from state regulation:

> The principles governing the resolution of this question are not new. On the contrary, '(t)he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.' *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L.Ed. 483 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. 'The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no

[16] Indian country definition also includes "informal reservations," including land acquired by the United States in trust for a tribe or tribal members under Section 5 of the Indian Reorganization Act. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993)("Our cases make clear that a tribal member need not live on a formal reservation to be outside the state's taxing jurisdiction; it is enough that the member live in Indian country. Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.")

> force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.' *Id*., at 561. …

411 U.S. at 168-69.

Citing Cohen's *Handbook of Federal Indian Law*, the Court affirmed the elementary principle that the promises of the United States to its aboriginal inhabitants actually mean something and that, within the territories expressly set aside for them, Indians are free to govern *themselves*:

> As a leading text on Indian problems summarizes the relevant law: 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.'

McClanahan, 411 U.S. at 170-71 (citing Cohen).

In *Moe*, 425 U.S. 463, the State of Montana sought to enforce a tax on personal property and cigarette vendor licensing fees against tribal members who, like the Red Cliff members the Bayfield County seeks to regulate, resided on fee lands within reservation boundaries. The State argued that tribal members were subject to state jurisdiction as a result of the provision of the General Allotment Act, codified as amended at 25 U.S.C. § 349, that, upon the issuance of issuance of fee patents, "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State." The Court flatly *rejected* Montana's equation of fee lands with state jurisdiction:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdictional purposes civil and criminal the Flathead

> Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), …We concluded that "(s)uch an impractical pattern of checkerboard jurisdiction," Ibid., was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction.

Moe, 425 U.S. at 478.

> …
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> The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:
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> …
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> "The policy of the allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act."

425 U.S. at 478-79 (quoting *Mattz*, 412 U.S. at 496 n.18).

The effects of allotment, including the ownership of certain Reservation lands by non-Indians, cannot be undone. The Allotment Era policy of eliminating tribal governments and subjecting Indians to state jurisdiction, however, has been repudiated and the Supreme Court has refused to effectuate it in the absence of clear congressional authorization:

> The State has referred us to no decisional authority and we know of none giving the meaning for which it contends to s 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands statutes discussed, for example, in *McClanahan*, 411 U.S., at 173-179, 93 S.Ct., at 1262-1266, 36 L.Ed.2d, at 136-139. … Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

Moe, 425 U.S. at 479.

The argument that the Supreme Court carefully considered and squarely rejected in *Moe* - that fee status *per se* mandates state jurisdiction - is precisely the argument that Bayfield County

continues to erroneously assert in seeking to coerce the Tribe and its members within the Red Cliff reservation.

D. Enforcement of County Zoning Regulations Against the Tribe and its Members Would Infringe the Tribe's Right of Self-Government in Violation of Federal Law

Seven years after its decision in *McClanahan*, the Court held in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), that New Mexico could not impose certain taxes on *non-Indians* operating on the White Mountain Apache Reservation. The Court articulated the broad principles limiting state encroachment into Indian country that continue to apply:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, … This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. *See, e. g., Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *McClanahan v. Arizona State Tax Comm'n, supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959).

Bracker, 448 U.S. at 142.

Both federal barriers prohibit the County from enforcing its zoning regulations against the Tribe and its members. In *Williams*, 358 U.S. at 220, the Court held that the exercise of jurisdiction by a state court over a tribal member in a dispute arising from a reservation transaction would infringe the tribe's right of self-government where the tribe had established a judiciary of its own: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. … Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." In *McClanahan*, the

Court explained that "[t]he *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *See also Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971) (state court could not exercise jurisdiction over Indians sued for debts incurred on non-Indian land within reservation.)

The Tribe's enactment of land use regulations is an exercise of its right of self-government. That the County's efforts to negate the Tribe's land use regulations also infringes the Tribe's right of self-government is unmistakable and undeniable. Moreover, like the tribe in *Williams v. Lee*, the Red Cliff Band has its own judicial system. The County, of course, does not assert only the right to regulate tribal members but also the right to drag them into state court to answer for their conduct on their own lands, within their own reservation. The Supreme Court's decisions in *Williams v. Lee* and *Kennerly v. District Court* preclude this egregious infringement of the Tribe's right of self-government.

The County's infringement of the Tribe right of self-government provides a wholly sufficient basis for the Tribe's motion for summary judgment. We note, however, that the second *Bracker* barrier to the County's assertion of jurisdiction, federal preemption, also applies. State jurisdiction is pre-empted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority" and "the inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

While the regulatory interests of the State are considered under the preemption test, the Court has observed that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker,* 448 U.S. at 145. Indeed, the exercise of state authority over "on-reservation activities of tribal members," while not categorically prohibited, is permitted only in "exceptional circumstances." *Cabazon*, 480 U.S. at 214–215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332, 103 S.Ct. 2678, 2385, 76 L. Ed. 2d 611 (1983)).

The Court in *Cabazon* makes clear that "exceptional circumstances" occur, if at all, only with respect to tribal members involved in dealing with non-Indians. Citing *Moe*, 425 U.S. 463, and *Washington*, 447 U.S. 134, "[b]oth cases [that] involved nonmembers entering and purchasing tobacco products on the reservations involved," the Court observed that "[t]his case also involves a state burden on tribal Indians in the context of their dealings with non-Indians." 480 U.S. at 216.

The activities the County seeks to regulate here do not involve dealings with non-Indians but, rather, tribal members activities on their own lands within their own Reservation. An examination of "exceptional circumstances" is, therefore, unnecessary. The infringing effect of the County's zoning regulations is wholly dispositive under *Williams*, 358 U.S. 217

E. There are no exceptional circumstances justifying the imposition of County land use regulations on the Tribe and its Members within the Reservation

Even if the "exceptional circumstances" analysis were appropriate, it is obvious that the County's interest in dictating how the Tribe and its members may use the lands they own within the Reservation cannot overcome the "deeply rooted" "policy of leaving Indians free from state

jurisdiction and control," *McClanahan*, 411 U.S. at 168. There is nothing "exceptional" about the County's naked desire to exercise power over the Tribe and its members inside the Reservation.

In the only federal appellate decision that has addressed the specific issue of state zoning authority over Indians on fee land in Indian country, the Ninth Circuit ruled that Snohomish County had no authority to impose its zoning laws on members of the Tulalip Tribe with respect to their activities on fee land within the reservation. *Gobin*, 304 F.3d 909. Gobin, a tribal member, had applied to the tribe for permission to develop a 25-acre parcel he owned in fee simple. The Tribe approved the plan under its comprehensive zoning law. Gobin's plan did not meet the requirements of the county's zoning laws, however, and the county threatened to sue. Gobin brought a declaratory judgment action in federal court. The District Court ruled in his favor and the Court of Appeals affirmed.

For the reasons explained in the previous section, the Tribe believes that the Ninth Circuit should have decided the *Gobin* case based solely on the *Williams v. Lee* infringement test. In the absence of dealings with non-Indians, regulation of tribal activities on tribal lands are simply prohibited and "exceptional circumstances" justifying such regulation impossible. *Gobin* is useful, however, in demonstrating that the County's regulations are impermissible even if an incorrect, state-friendly analysis is applied.

While acknowledging the county's regulatory interests, the Ninth Circuit declined to find them sufficiently exceptional to justify the intrusion on the Tribe's sovereignty, notwithstanding that the interests asserted by Snohomish County were considerably weightier than any that Bayfield County can assert:

> Undoubtedly, the County maintains an important interest in protecting the bull trout and the salmon in Quilceda Creek, as required by the Endangered Species Act. This interest is not exceptional, however, given that the Tribes must also comply with

> the Endangered Species Act as well as its own strict laws protecting wildlife.

Gobin, 304 F.3d at 917.

Unlike Snohomish County, Bayfield County cannot point to any species it believes requires its particular protection. Whatever environmental ethic the County Board of Commissioners might bring to land use issues pales in comparison with the deep reverence Red Cliff members feel for their lands, rooted in in religious traditions and hundreds of years of sustainable subsistence living. The Court also found the County's asserted need to protect the health and safety of county residents unexceptional:

> Assuring the health and safety of County citizens is also an important interest, but an unexceptional one given the County's lack of jurisdiction on other parts of the reservation. Although the County may assert its health and safety regulations if a non-Indian purchases one of Gobin's homes, such a speculative ability to regulate is insufficient to overcome the Tribes's overwhelming interests.

304 F.3d at 918.

In its communications with the Tribe, Bayfield County has so far articulated no health and safety interests. In any event, the notion that the County would better protect the health and safety of the Tribe and its citizens than would the tribal government is self-evidently absurd. The Court dismissed arguments, similar to Bayfield County's, that land transfers were somehow a significant problem:

> That Indians and non-Indians might conspire to transfer fee lands back and forth to avoid any County or tribal regulation presents a problem of enforcement best handled jointly by the County and the Tribes in furtherance of their already excellent relationship. Yet such an administrative problem presents no reason for this Court to undermine Indian sovereignty in favor of County regulation.

Gobin, 304 F.3d at 918.

Most importantly, the Court correctly refused to effectuate the repudiated policies of allotment:

> Even adding these important County interests together, they do not outweigh the Tribe's interest in self-determination. Regardless of the similarities between County and tribal land use regulations or the congenial nature of the parties' relationship, concurrent County and Tribes plenary land use jurisdiction threatens to supplant the Tribe's Ordinances (and thus its attempt at self-government) when the two regulatory regimes diverge. Such County interference with tribal self-determination is not consistent with Cabazon Band nor does it constitute a "minimal burden" like the one condoned in *Moe*, 425 U.S. at 483. Indeed, nothing could be more contrary to the well-established policy of leaving Indians free from state jurisdiction and control. *See McClanahan*, 411 U.S. at 168.

Gobin, 304 F.3d at 917–18.

The Ninth Circuit does not assume, as Bayfield County does, that any incongruities resulting from the varied ownership of Reservation lands must be resolved by extinguishing the Tribe's right of self-government in the interest of avoiding inconvenience to non-Indians. Bayfield County has identified no interests that rise to the level of those asserted by Snohomish County in the *Gobin* case.[17] Indeed, the County has never bothered to articulate *any* particular interests or concerns, other than alleged unspecified "burdens" on local government and adverse affects on non-Indian landowners. County assumptions of non-Indian priority, however, do not constitute the "exceptional" circumstances referenced in the *Cabazon* case. If they did, the Court's holding in *Cabazon* would have been different.

Like Snohomish County's regulations, Bayfield County's zoning regulations infringe the Tribe's right of self-government in two important respects. First, they impose heavy burdens,

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[17] Half the Snohomish reservation was held in fee title and 80% of its residents were non-Indian. Just 38% of the Red Cliff Reservation is held in fee title and 87% of Reservation residents are Indians

including complex applications, extensive documents, hearings, fees and restrictions on residents' ability to use their property. Second, and perhaps even more importantly, Bayfield County would have them supersede the regulations the Tribe itself has adopted to regulate its own and members' activities within the Reservation. It is difficult to imagine a more grave affront to the tribal right of self-government than the nullification of Tribe's own land use regulations and the imposition of County regulations in their place.

IV. CONCLUSION

For all of the foregoing reasons, the Tribe requests that the Court grant its motion for summary judgment, declare that the County is without authority to enforce its land use regulations against the Tribe or its members within the boundaries of the Reservation established by the Treaty of 1854 as enlarged by act of Congress in 1895, whether on fee or trust land, and permanently enjoin County from zoning or otherwise regulating lands owned by the Tribe or its members, whether in trust, restricted or fee status, within the boundaries of the Reservation.

Dated this 16th day of August, 2019.

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