WINNER, BEST APPELLATE BRIEF IN THE 2023 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION*

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Questions Presented

1. Does the Minneshonka Nation retain a power of eminent domain expansive enough to apply to non-enrolled descendants, if retaining the power at all?

2. Does the Minneshonka Nation retain inherent authority to seize non-Indian fee land within the reservation based on the presence of Minneshonka Cane?

Statement of the Case

I. Statement of the Proceedings

On August 20, 2020, the Minneshonka Nation's Supreme Court ("MNSC") found Mr. Randall subject to the Minneshonka Nation's general civil jurisdiction. R. at 5. Mr. Randall is not a member of the Minneshonka Nation and his land is unrestricted fee land, yet the MNSC held "Mr. Randall is subject to Minneshonka law, as if a citizen." *Id.* This decision, in effect, allows the Tribe to condemn an easement on Mr. Randall's fee land. *Id.* at 6. Mr. Randall properly exhausted his tribal court remedies before bringing an action in the District Court seeking relief from the Minneshonka Nation's condemnation of his land. *Id.* at 7. The District Court found error "in [the MNSC's] reasoning that Mr. Randall is subject to its jurisdiction as if a tribal member." *Id.* Even so, the District Court held

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* This brief has been edited from its original form for ease of reading. The record for this brief comes from the 2023 National Native American Law Students Association Moot Court Competition problem, which can be found at https://perma.cc/453V-53UD.

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the condemnation action acceptable because Mr. Randall "consented to the jurisdiction of the Tribe" via "good relations between the Tribe and Mr. Randall." *Id.* at 8.

On July 15, 2022, the Thirteenth Circuit reversed the District Court, finding "the Minneshonka Nation lacks the power of eminent domain, because it is inconsistent with its status as a domestic dependent nation." *Id.* at 12. The Circuit Court emphasized Mr. Randall's "noncitizen" status and the history of the fee land in question, including the General Allotment Act ("GAA") and Mr. Randall's current unrestricted ownership. *Id.* at 11. Although the Circuit Court discussed the importance of Minneshonka Cane, it concluded "the legal question . . . is unconcerned with those internal tribal matters of culture." *Id.* Instead, it found the District Court erred by "proceed[ing] to the question of jurisdictional authority over Mr. Randall, a noncitizen" because the Minneshonka Nation lacks eminent domain power to begin with. *Id.* at 11–12. The Minneshonka Nation petitioned this Court for Writ of Certiorari. *Id.* at 1.

II. Statement of the Facts

On February 2, 2020, the Minneshonka Nation "voted unanimously . . . to confirm the condemnation action pertaining to Mr. Randall's property." R. at 15 (Minneshonka Nation Res. No. 04-2020); *see id*. at 18 (Minneshonka Nation Res. No. 044-2019). This action "completely prevents the continuation of the ongoing property development project" Mr. Randall "has been negotiating . . . for nearly one year." *Id.* at 8. Mr. Randall incurred significant expenses and the development project is "worth approximately $25 million." *Id.*

Mr. Randall is not a Minneshonka Nation citizen and his land is held in unrestricted fee simple. *Id.* at 5. Due to the GAA and Minneshonka Surplus Lands Act, the land in question has been in Mr. Randall's family since 1913. *Id.* It was first allotted to Mr. Randall's grandfather, who gained unrestricted ownership sometime between 1923 and 1929. *Id.* at 5, 7. The property was eventually passed on to Mr. Randall, who was "ineligible for tribal citizenship" at birth due to Minneshonka Nation membership laws. *Id.* at 5.

While Mr. Randall attended "an off-reservation boarding school" the Minneshonka Nation changed its laws to a lineal descent regime. *Id*. Despite now being eligible for citizenship, Mr. Randall has never applied for nor expressed interest in enrolling. *Id.* Accordingly, Mr. Randall cannot vote in tribal elections or serve on tribal court juries. *Id.* Further, there is no evidence that Mr. Randall receives services, such as health or economic

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support, reserved for Minneshonka citizens. *See* R. Like many allottees and noncitizens located within the reservation, Mr. Randall's non-enrollment does not hamper his active participation in the community. *Id.* at 5. He regularly attends church, courteously notifies other livestock owners when cattle roam onto his property, grows crops to sell locally, and utilizes Tribe-provided sandbags to protect his and neighboring tribal lands from flooding. *Id.* at 7–8. Overall, "relations between the Tribe and Mr. Randall are harmonious and mutually beneficial." *Id.* at 7.

The Minneshonka Nation desires to condemn Mr. Randall's property because a small amount of Minneshonka Cane happens to be on his land. *Id.* at 8. The Minneshonka Nation has a special relationship with Minneshonka Cane; though, the species has struggled to survive alongside the United States' expansion over the last few centuries. *Id.* at 3–5. To address this struggle, the Minneshonka Nation revitalized Minneshonka Cane through "widespread efforts." *Id.* at 4. For example, the Minneshonka Nation uses Cane to fight water pollution via an established Best Management Practice under the Clean Water Act ("CWA"). *Id.* Furthermore, the Minneshonka Nation invested deeply in scientific research to study and demonstrate Minneshonka Cane's "essential ecosystem services." *Id.* U.S. Fish and Wildlife Services rejected a petition to add Minneshonka Cane to the endangered species list because "[Minneshonka] Cane's economic potential . . . would foster its propagation." *Id.* at 4–5.

The Minneshonka Nation also passed Resolution No. 32-2019 granting Minneshonka Cane "Personhood Status." *Id.* at 16. In accordance with this resolution, the Minneshonka Nation identified any lands possessing Minneshonka Cane. *Id.* at 13. The identified landowners "included non-Indians, non-Minneshonka tribal citizens, as well as Minneshonka tribal citizens." *Id.* at 13–14. However, "[n]o tribal trust, individual trust, or other restricted status land was implicated." *Id.*

As a noncitizen descendant of an original allottee, Mr. Randall believes the Minneshonka Nation cannot condemn his fee land. *Id.* at 5. Although other landowners chose to consensually contract with the Minneshonka Nation regarding the Personhood Easement, Mr. Randall chose to assert his rights and challenge the taking of his land. *Id.* at 14–15.

Summary of the Argument

This case is about whether a longstanding jurisdictional rule—that tribal nations no longer retain general civil jurisdiction over the conduct of nonmembers on non-Indian fee land within a reservation—no longer

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applies. This Court can answer this question simply: tribes do not retain such jurisdiction, save for two exceptions that are not present here. *Montana v. United States*, 450 U.S. 544, 565–66 (1981). The Minneshonka Nation, an unquestionably principled and functional sovereign, seeks to expand its authority beyond the bounds clearly set by Congress and this Court's precedents. R. at 6. The colonial history of this country is shameful, and should no doubt be reckoned with; making amends to the hundreds of tribal nations whose traditional lands this country was built on is a noble goal indeed. However, that is a goal for the United States' political branches. This Court's role is to apply the law accurately and consistently. Doing otherwise risks unforeseen consequences: questioning the foundational principles of federal Indian law opens jurisdictional questions regarding the sovereign authority of 574 tribal nations. This Court should reject an approach to federal Indian law in which "five unelected judges in Washington [may] make the 'right' choice for the Tribe." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2522 (2022) (Gorsuch, J. dissenting). This Court should faithfully apply long-settled principles of federal Indian law and hold that the Minneshonka Nation does not retain authority to seize Mr. Randall's land.

First, it is unlikely the Minneshonka Nation retains eminent domain power at all. It is unclear, at best, whether the Minneshonka Nation ever possessed eminent domain powers, much less retains them. Additionally, eminent domain power is inconsistent with the Tribe's domestic dependent nation status, partially evidenced by its similarity to other implicitly divested powers. *See Johnson v. M'Intosh*, 21 U.S. 542, 567–68 (1823); *United States v. Wheeler*, 435 U.S. 313, 326 (1978). Recognizing tribal eminent domain would also be inconsistent with longstanding federal Indian policy and threaten the promises this nation made to allottees. *See* William C. Canby, Jr., *American Indian Law in a Nutshell* 24–27 (7th ed. 2020); *infra* Section I.C.3. This Court should, therefore, affirm the holding of the Thirteenth Circuit—"the Minneshonka Nation lacks the power of eminent domain." R. at 12.

Second, Mr. Randall is not subject to the general civil jurisdiction of the Minneshonka Nation because he is non-Indian. This Court should uphold the District Court's finding that Mr. Randall's Indian status was not sufficient for the Minneshonka Nation to treat him as if a member. *Id.* at 7. It is undisputed that Mr. Randall is not a member of the Minneshonka Nation. *Id.* at 5, 7. While Mr. Randall's non-membership alone should be sufficient to remove him from the Minneshonka Nation's general civil jurisdiction, an extended analysis under the *Rogers* test produces the same

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result. *Infra* Section II.B.; *see United States v. Rogers*, 45 U.S. 567 (1846); *see, e.g.*, *United States v. Bruce*, 394 F.3d 1215, 1227 (9th Cir. 2005). While Mr. Randall possesses Minneshonka blood, he is not recognized as Indian by the Tribe or federal government. *See infra* Section II.B.2.c. The Minneshonka Nation, therefore, cannot assert general civil jurisdiction over Mr. Randall.

Third, Congress has not expressly vested such authority in the Minneshonka Nation. Neither the Minneshonka Nation nor the lower courts have identified treaty or statutory language granting the Minneshonka Nation authority to regulate nonmember fee land. *See* R.; *infra* Section III.B. Specifically, the CWA, Endangered Species Act ("ESA"), or the GAA do not vest such authority. *Id.* Consequently, the Minneshonka Nation may only assert civil jurisdiction over Mr. Randall if a *Montana* exception applies.

Finally, neither *Montana* exception applies; therefore, the Minneshonka Nation lacks jurisdiction over Mr. Randall and his unrestricted fee land. Mr. Randall does not have any consensual relationships with the Tribe or its citizens giving rise to such jurisdiction. *See Montana*, 450 U.S. at 565; *infra* Section III.C.1. Nor does Mr. Randall's proposed development imperil the health, welfare, or economic security of the Minneshonka Nation, notwithstanding the presence of Minneshonka Cane. *See Montana*, 450 U.S. at 566; *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 341 (2008); *infra* Section III.C.2. With neither *Montana* exception applying, the Minneshonka Nation cannot assert eminent domain against Mr. Randall.

Argument

I. The Minneshonka Nation Does Not Retain Eminent Domain Powers

Aside from the Minneshonka Nation's lack of jurisdiction over Mr. Randall, this Court should affirm the Thirteenth Circuit because the Minneshonka Nation lacks eminent domain powers in the first place. For the reasons detailed below, it is unlikely the Minneshonka Nation possesses such potent and expansive powers—especially over non-Indians. Accordingly, this Court should affirm the Thirteenth Circuit's decision.

A. Standard of Review

The Thirteenth Circuit held the Minneshonka Nation is a "domestic dependent nation" without eminent domain powers. R. at 12. Whether a tribe retains certain sovereign powers—including eminent domain—is a

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question of law this Court reviews *de novo*. *Nat'l Farmers Union Ins. Cos. v. Crow Tribes of Indians*, 471 U.S. 845, 852–53 (1985); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006).

B. The Minneshonka Nation Cannot Retain Powers It Never Possessed Under Its Own Property System

The Minneshonka Nation retains eminent domain as an inherent sovereign power only if the Tribe possessed that power prior to European contact. Eminent domain, the power of a government to seize the private property of a citizen for the benefit of the public, is an outgrowth of Roman law. Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 Tulsa L.R. 51, 53 (2005). While eminent domain may be an inherent sovereign power of governments influenced by Roman law, it does not follow that non-Roman property systems developed similar sovereign powers. In determining whether a particular tribe retains a power of eminent domain, this Court should consider whether the tribe ever possessed such a power under its own property system. In so doing, this Court can disrupt an unfortunate pattern of dismissing tribal property systems in favor of European ones.

Non-Indians repeatedly, and mistakenly, presume tribes did not develop legal property systems prior to European arrival. *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 542 (1823). Pre-contact, tribes developed complex property systems that differed substantially from the western property systems forcibly applied by colonists. Matthew L.M. Fletcher, *American Indian Tribal Law* 10–11 (2011). For example, the Anishinaabek had systems for resolving disputes over family property rights, including trespass. *Id.* at 11. The Makah divided land among tribal families, granting them ownership over beach sections and the materials that would wash up on their property. Vine Deloria Jr., *Indians of the Pacific Northwest: From the Coming of the White Man to the Present Day* 62 (1977).

The record contains no history or evidence of a Minneshonka inherent power of eminent domain prior to the Minneshonka Nation passing Resolution No. 044-2019. *See also* Minneshonka Tribal Code § 201. Without any evidence of a pre-existing power resembling eminent domain, the Minneshonka Nation lacks eminent domain power. While the Minneshonka Nation may apply a *statutory* power approximating sovereign eminent domain over tribal citizens, such expansive power would not extend to a non-Indian—like Mr. Randall—without it being an inherent sovereign power. *See infra* Section III.C. This Court can affirm the Thirteenth Circuit's ruling on these grounds alone.

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C. Retained Eminent Domain Powers Are Inconsistent with Domestic Dependent Nation Status

Even if the Minneshonka Nation's inherent sovereignty included eminent domain, it would have been implicitly divested by the Minneshonka Nation's domestic dependent nation status. Tribes were implicitly divested of sovereign powers "involving the relations between an Indian tribe and nonmembers of the tribe." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). Eminent domain is the exact type of implicitly divested power contemplated by *Wheeler*. First, the Marshall Trilogy—which established tribes as domestic dependent nations—specifically limited tribal powers over real property. Second, the use of eminent domain against non-Indians is like other implicitly divested powers precisely because it involves tribal relations with non-Indians. Third, the only cases that come remotely close to involving a tribal power of eminent domain do not involve real property.

1. The Marshall Trilogy Specifically Limited Tribal Powers Related to Real Property

The Marshall Trilogy—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*—provide the foundational principles of federal Indian law. Matthew L.M. Fletcher, *Federal Indian Law* 21, 30 (2016). These cases established tribes as domestic dependent nations and limited tribal sovereign relations with non-Indians, especially regarding land. *Johnson*, 21 U.S. at 568–69 (holding tribes are "without power of alienation"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Worcester v. Georgia*, 31 U.S. 515, 519 (1832). A holding that tribal nations retain an inherent sovereign power of eminent domain goes against the well-established foundations of federal Indian law.

Under the Marshall Trilogy, tribes did not have the same sovereign relationship with the land as European powers did. *Johnson*, 21 U.S. at 567–68. Chief Justice Marshall explained that all European powers holding land title in the Americas did so under the presumption tribal nations "had no right of soil as sovereign." *Id.* at 567. Marshall held European title "overlooks all proprietary rights in the natives" and "the [European] sovereignty and *eminent domain* thus acquired, *necessarily precludes* the idea of any other sovereignty existing within the same limits." *Id.* at 567–68 (emphasis added). This is the basis of domestic dependent nation status. *Cherokee Nation*, 30 U.S. at 17 ("They occupy a territory to which we assert a title independent of their will.").

While the Marshall Trilogy stopped short of disestablishing tribal nations, it clearly limited tribal sovereign authority as it relates to land.

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Tribes were divested of various land-related powers, most notably the right to free alienability. *Johnson*, 21 U.S. at 569. It is highly unlikely tribes lost the right to alienate land but retained the right to condemn it. *Johnson* even specifies the United States' power of eminent domain necessarily eliminates any similar right held by tribes. *Id.* at 567–68. The assertion that the Minneshonka Nation retained a sovereign power of eminent domain after federal Indian law's foundational trilogy is questionable at best.

2. Eminent Domain Is Similar to Other Implicitly Divested Sovereign Powers

Tribal nations' domestic dependent nation status divested them of various sovereign powers. Tribes cannot freely alienate lands held in Indian title. *Johnson*, 21 U.S. at 569. Tribes cannot enter treaties or establish governmental relations with foreign states. *Cherokee Nation*, 30 U.S. at 17; *Worcester*, 31 U.S. at 559. Tribes do not retain criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

This is not to assert tribes lost all sovereign powers. Tribes retain, for example, prosecutorial authority over member and nonmember Indians. *Wheeler*, 435 U.S. at 326; *United States v. Lara*, 541 U.S. 193, 199–200 (2004). The distinguishing line between retained powers and divested powers is external relations with non-Indians. *Wheeler*, 435 U.S. at 326 ("These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.").

At issue here is whether the Minneshonka Nation retains sovereign powers of eminent domain over Mr. Randall—a non-Indian. *See infra* Section III.C. Power to condemn non-Indian fee land belongs with other divested powers because, like those powers, it involves tribal relations with non-Indians. While the Tribe remains free to enact eminent-domain-like statutes and enforce them against Minneshonka members, it no longer retains such powers over non-Indian fee lands.

3. Holding That the Minneshonka Nation Retains Powers of Eminent Domain Would Be Inconsistent with Longstanding Federal Indian Policy

Tribal retention of sovereign eminent domain is inconsistent with longstanding federal Indian policy, specifically the allotment era. Beginning with the GAA in 1887, allotment continued until Congress passed the Indian Reorganization Act of 1934. William C. Canby, Jr., *American Indian Law in a Nutshell* 24–27 (7th ed. 2020). Congress intended for allotment to

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eliminate all tribal powers by transferring land ownership from tribes to individual Indians. *Id.* at 24–25. So-called "surplus lands" were sold to non-Indian purchasers. *Id.* at 26. Allotment was an abject failure, yet its purpose was clear: to vest title in lands to individual Indians and surplus land purchasers. *Id.* at 24–27. Continued fee land ownership within Indian country causes many of the jurisdictional knots this Court must untie. Fletcher, *Federal Indian Law*, at 10. While the wisdom behind allotment rightfully continues to be debated in lecture halls and Congress, many allottees—like Mr. Randall—nonetheless own their land in unrestricted fee simple because of it. This history raises a simple question: why would Congress undertake a dramatic shift in policy if tribes could simply condemn and retake the land? A retained power of eminent domain would render the allotment era historical surplusage. While undoing the effects of allotment may be a worthy policy goal, such goals belong to the political branches. This Court need only consider whether a retained eminent domain power is consistent with federal Indian policy. It simply is not.

A retained power of eminent domain would also create disruptive legal absurdities. Take, for instance, Oklahoma after *McGirt v. Oklahoma*. 140 S. Ct. 2452 (2020). Prior to *McGirt*, Oklahomans mistakenly believed the Muscogee (Creek) Nation governed 135,000 acres. Robert J. Miller, *McGirt v. Oklahoma* 58 Ariz. Att'y 18, 19 (2022). After *McGirt*, the Muscogee (Creek) Nation alone governs 3.25 million acres including over 1 million non-Indians. *Id.* Oklahoma is now 43% Indian Country. *Id.* A tribal power of eminent domain in Oklahoma alone would be nothing short of incredible and would no doubt disturb "longstanding observances and settled expectations." *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 219 (2005).

D. Express Congressional Limits on Tribal Takings Do Not Create Implicit Powers of Eminent Domain

While Congress has expressly limited tribal takings, those limits do not represent a congressional affirmation of tribal eminent domain. Congress included language limiting tribal eminent domain in the Indian Civil Rights Act of 1968 ("ICRA"). ICRA imposed requirements from the Bill of Rights onto tribal nations. *See* 25 U.S.C. §§ 1301–03; Canby, Jr., *supra*, at 409. Under ICRA, tribal governments may not "take any private property for a public use without just compensation." 25 U.S.C. § 1302(a)(5). This provision mirrors the language of the Fifth Amendment of the U.S. Constitution. U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Tribal courts have used this

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language to infer congressional recognition of tribal eminent domain. *See, e.g.*, *Dennison v. Tucson Gas & Electric Co.*, 1 Navajo Rptr. 95, 98–99 (1973). This provision of ICRA, however, is best read as an explicit *limitation* on any later developed statutory power of eminent domain. Accordingly, the Minneshonka Tribal Code must conform to 25 U.S.C. § 1302(a)(5) to be valid. Reading that section of ICRA to vest or recognize an inherent tribal power of eminent domain requires too large an inference. Furthermore, interpreting this section of ICRA as a limit, rather than an affirmation of inherent sovereign power, follows from Congress's intent in applying the Bill of Rights to tribal nations. The Bill of Rights, after all, limits the powers of the federal government. *See Preamble to the Bill of Rights*, Drexel Univ., https://drexel.edu/ogcr/resources/constitution/amendments/preamble/ (last visited Dec. 20, 2022) ("[T]he States . . . expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added."). Accordingly, ICRA's language regarding takings limits, rather than recognizes, tribal powers.

E. Cases Considering Tribal Powers Somewhat Resembling Eminent Domain Are Not Persuasive Because They Do Not Involve Unrestricted Fee Land

Federal cases that consider powers arguably resembling eminent domain are not persuasive because they do not involve tribal condemnation of unrestricted fee land. Consider *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). Johnson, a non-Indian, operated a resort on trust land under a lease with the Colorado River Indian Tribes. *Id.* at 805. Johnson failed to vacate after the lease expired, and the tribe filed suit against him in tribal court for eviction and damages to land, among other claims. *Id.* at 805. The Ninth Circuit found the tribal court had jurisdiction over Johnson and affirmed his eviction. In *Water Wheel*, the tribe retained jurisdiction over Johnson because he was operating on tribal land. *Id.* at 812–13; *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) ("The Tribe has the inherent power to impose the severance tax on petitioners, whether this power derives from the Tribe's power of self-government or from its power to exclude."); *infra* Section III.C.1. Unlike eminent domain, the Tribe's eviction action did not change the ownership of the land in dispute. Further, the land in dispute was tribal trust land, not non-Indian fee land. Thus, while *Water Wheel* is an example of tribal power to force a user off trust land, it is an inapt comparison to this case.

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No more helpful is *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013). Grand Canyon Skywalk Development ("GCSD") is a Nevada corporation that entered a revenue-sharing contract with a Hualapai tribally-chartered corporation. *Grand Canyon Skywalk Dev.*, 715 F.3d at 1199. GCSD agreed to share revenue from its operation of a glass viewing platform in the Grand Canyon. *Id.* at 1198–99. Amid a contractual dispute, the Hualapai Tribal Council invoked "eminent domain" against GCSD to "acquire GCSD's contractual interest in the Skywalk Agreement." *Id.* at 1199. GCSD sought a TRO in federal court while fighting the taking in tribal court. *Id.* The Ninth Circuit never determined whether Hualapai possessed eminent domain powers, instead affirming the lower court's finding GCSD failed to exhaust tribal remedies. *Id.* at 1206.

Grand Canyon Skywalk Dev. does little to assist the Minneshonka Nation's claim of eminent domain powers. The federal courts never reached the merits of the Hualapai's claim of eminent domain power. The court was entirely focused on the non-Indian corporation's failure to exhaust tribal remedies—a failure that Mr. Randall does not share. *See* R. at 3–6. Also, the "eminent domain" asserted by the Hualapai is entirely different from the eminent domain asserted by the Minneshonka Nation. The Hualapai seized GCSD's contractual rights—its *intangible* property. *Grand Canyon Skywalk Dev.*, 715 F.3d at 1199. Intangible property, like contractual revenue-sharing, is not the type of eminent domain likely contemplated by ancient Romans. *See supra* Section I.B. While it is questionable whether eminent domain over contractual rights is an inherent power of *any* sovereign, this Court need not consider such a question to reach the conclusion that this case offers little persuasive value. In the Marshall Trilogy, this Court clearly stated tribal nations' sovereignty over land, specifically, was greatly diminished by the arrival of European powers. *See supra* Section I.C.1. The question before the court today involves tribal inherent sovereign powers of eminent domain *over land*, not contract. Accordingly, *Grand Canyon Skywalk Dev.* simply offers no support to the Minneshonka Nation.

In sum, the Minneshonka Nation does not retain an inherent power of eminent domain. It is unclear whether the Minneshonka Nation ever possessed such a sovereign power. Assuming *arguendo* it did, it is unlikely such a power survived the Marshall Trilogy, allotment era, or implicit divestiture. A retained tribal power of eminent domain applied to unrestricted non-Indian fee lands simply does not fit with case law, federal Indian policy, the history of the Minneshonka Nation, or the history of this nation.

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II. Mr. Randall's Non-Indian Status Precludes the Minneshonka Nation's General Civil Jurisdiction

The Minneshonka Nation improperly asserted civil jurisdiction over Mr. Randall as if he was a tribal member based on his alleged Indian status. Because Mr. Randall is in fact a non-Indian, this Court should affirm the District Court's finding of error.

A. Standard of Review

The District Court held that the Minneshonka Nation did not have general civil jurisdiction over Mr. Randall "as if a tribal member." R. at 7. "The question of tribal court jurisdiction is a federal question of law," which this Court reviews *de novo*. *Smith*, 434 F.3d at 1130. Findings of fact—including whether Mr. Randall's factual circumstances render him subject to Minneshonka jurisdiction as if a tribal member—are reviewed for clear error. *Id.* Accordingly, the District Court's conclusion should only be reversed if the facts cannot support finding Mr. Randall's Indian status does not render him subject to tribal jurisdiction as if a citizen.

B. Mr. Randall Is Not an Indian Under the Rogers Two-Part Test

Mr. Randall is not Indian under the federal common law test established in *United States v. Rogers*, 45 U.S. 567 (1846). In *Rogers*, this Court began developing a common law test to determine Indian status in the absence of an express federal statute. *Id.* at 572–73. *Rogers* established tribal recognition alone was not sufficient for Indian status. *Id.* Some amount of Indian blood is required. *Id.* Courts developed *Rogers* into a two-prong test for Indian status: whether a person (1) has "some Indian blood" and (2) is recognized "by a tribe or the federal government." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).[1] The Minneshonka Nation can only assert general civil jurisdiction on fee lands within a reservation over member Indians without resorting to the *Montana* exceptions. *See Strate v. A-1 Contractors*, 520 U.S. 438, 445–46 (1997); *infra* Section III.C. Because Mr. Randall is not an Indian under *Rogers*, his non-Indian status does not allow the Minneshonka Nation to assert general civil jurisdiction over his actions on his unrestricted fee lands.

1. There is no shortage of cases throughout the lower courts repeating this test. *See, e.g.*, *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984); *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005).

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1. Mr. Randall Satisfies the First Prong of Rogers *Because He Has "Some" Indian Blood*

Mr. Randall has sufficient Indian blood to satisfy the first prong of the *Rogers* test. Mr. Randall is three-sixteenths Minneshonka. R. at 5. While there is no definitive minimum, courts have accepted less Indian blood as sufficient for the first prong. *United States v. Bruce*, 394 F.3d 1215, 1227 (9th Cir. 2005) (finding evidence of one-eighth Chippewa blood was sufficient for Indian status). While it could be argued three-sixteenths is not sufficient because it did not qualify Mr. Randall for Minneshonka citizenship at birth, the Minneshonka Nation has since changed their enrollment policy to require only lineal descent. R. at 5. There is no dispute that Mr. Randall's blood quantum currently qualifies him for tribal enrollment. *Id.* Accordingly, Mr. Randall concedes he satisfies the first prong of *Rogers* for Indian status.

2. Mr. Randall Is Not Recognized as Indian Under Rogers*' Second Prong*

Mr. Randall does not satisfy the second prong under *Rogers* and therefore is not legally Indian, much less Minneshonka. The second prong of *Rogers* asks whether Mr. Randall is recognized "by a tribe or the federal government." *Diaz*, 679 F.3d at 1187. With disagreement between the circuits, tribal enrollment should be the lone element for this prong. Barring that, the four *St. Cloud* factors should be applied exclusively in descending order of importance. These two tests ensure that tribes remain in control of their own membership. Under either of these tests, Mr. Randall is not Minneshonka.

a) Enrollment Should Be the Only Element Considered in Prong Two of Rogers

Enrollment in a federally recognized tribe should be the beginning and end of the second prong of *Rogers*. This approach provides a simple and easily applied method for determining recognition by the tribe and the federal government. Additionally, it conforms to recent case law regarding the second prong of *Rogers*. *See United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (requiring recognition or affiliation with a federally recognized tribe). This test would also prevent challenges on equal protection grounds, clearly linking Indian status to tribal self-government rather than racial groups. *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974). Finally, this approach ensures that Indian status and membership qualifications remain solely in the hands of tribal nations. Determining

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membership is one of the most important sovereign powers retained by tribal nations. *See Wheeler*, 435 U.S. at 322. Requiring a multi-factor test—as opposed to the single element test of enrollment—empowers federal courts to interpret tribal affiliation and recognition. This jeopardizes the quintessential sovereign power of tribal nations. Accordingly, the analysis should end here. Mr. Randall is not a Minneshonka citizen and therefore fails the second prong of *Rogers*.

b) Alternatively, the St. Cloud *Factors for* Rogers*' Second Prong Are Exclusive and in Descending Order of Importance*

This Court should, at most, apply the *St. Cloud* factors exclusively and in descending order. The four factors are "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988). Courts use the *St. Cloud* factors to determine whether an individual satisfies the second prong of *Rogers*. *See, e.g.*, *Bruce*, 394 F.3d at 1223–24; *Connecticut v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997). Many courts apply these factors exclusively and in declining order. *See Bruce*, 394 F.3d at 1224; *Sebastian*, 701 A.2d at 24.

Not all courts agree. For example, the Eighth Circuit rejects the exclusivity and order of the *St. Cloud* factors. *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009) (explaining the *St. Cloud* factors are "useful" but neither "exhaustive" or "tied to an order of importance"). Courts rejecting the *St. Cloud* approach prefer a non-exclusive set of factors resembling a totality-of-the-circumstances test because it provides "needed flexibility" in the "inherently imprecise issue of whether an individual should be considered to be an Indian." *North Carolina v. Nobles*, 838 S.E.2d 373, 378 (N.C. 2020). This is exactly why the Eighth Circuit's test should be rejected in favor of a clearly defined test. *See supra* Section II.B.2.a. Vesting Indian-status determination in non-Indian governments risks giving non-tribal governments effective control over tribal membership recognition in jurisdictional matters.[2] This is an even greater risk with a totality-of-the-circumstances test. Accepting a totality-of-the-

2. It is not insignificant that Justice Gorsuch cited *Connecticut v. Sebastian*—and by extension the *St. Cloud* factors approach—as an example of state courts making principled decisions regarding Indian status despite it being contrary to their interests. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2518–19, n.8 (2022) (Gorsuch, J., dissenting).

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circumstances test would remove the guardrails preventing non-tribal courts from making self-interested jurisdictional determinations regarding Indian status. To avoid these issues, this Court should require an exclusive application of the *St. Cloud* factors in descending order of importance.

c) The St. Cloud *Factors Indicate Mr. Randall Is Not Recognized as Minneshonka*

Applying the *St. Cloud* factors, it is clear Mr. Randall is not Indian and thus cannot be treated as a Minneshonka citizen for purposes of civil jurisdiction. The first and most important *St. Cloud* factor is enrollment in a federally recognized tribe. *St. Cloud*, 702 F. Supp. at 1461; *Zepeda*, 792 F.3d at 1113. If this factor is satisfied, it fulfills the entire prong. *Stymiest*, 581 F.3d at 764.[3] The simple fact is Mr. Randall is not an enrolled citizen of the Minneshonka Nation. R. at 5, 7, 11. Moreover, the Minneshonka Nation denied Mr. Randall citizenship at birth. *Id.* at 5. The fact that Mr. Randall is now eligible for citizenship, *id.*, does not influence this analysis at all because citizenship is a bilateral relation between tribes and an individual. 1 Cohen's Handbook on Federal Indian Law §3.03[3] (2019) [hereinafter *Cohen's*]. Accordingly, the first *St. Cloud* factor supports Mr. Randall's non-Indian status.

The second *St. Cloud* factor is "government recognition formally and informally through providing the person assistance reserved only to Indians." *St. Cloud*, 702 F. Supp. at 1461. In referring to "government," this factor is focused on federal government assistance. *Id.*; *see Bruce*, 394 F.3d at 1223 ("[T]ribal or *government* recognition as an Indian.") (emphasis added). The record contains no indication that Mr. Randall ever received funds or assistance reserved only to Indians. For example, the record does not allege that Mr. Randall has ever received Indian Health Services or emergency COVID funds reserved to tribes. Mr. Randall was arguably recognized as Indian when he was sent to an off-reservation boarding school. R. at 5. However, Mr. Randall's experience was hardly "assistance," it was cultural genocide. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 Harv. Hum. Rts. L. 47, 67–68 (2008). Considering the purposes of American Indian Boarding Schools, *id.*, Mr. Randall's forced enrollment was likely a result of his Indian parentage and federal goals of forced assimilation. It was unlikely a result of Mr. Randall's Indian status. Accordingly, the second *St. Cloud* factor

3. Notably, there is no disagreement amongst the circuit courts that membership is a simple and decisive proxy for Indian status.

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also supports Mr. Randall's non-Indian status, with misguided arguments to the contrary heavily outweighed by the absence of evidence.

The third *St. Cloud* factor is enjoyment of tribal affiliation benefits. *St. Cloud*, 702 F. Supp. at 1461. This factor also indicates Mr. Randall is non-Indian. Mr. Randall is barred from voting and cannot serve on a tribal jury despite living on the reservation. R. at 5, 7. Further, there is no evidence that Mr. Randall is entitled to any special hunting or fishing privileges. At most, Mr. Randall received assistance from the Tribe in the form of sandbags. *Id.* at 7. This assistance is hardly regular and there is no indication that the sandbags were conditioned on Mr. Randall's Indian status. The Tribe has an interest in providing emergency sandbags to all reservation landowners, regardless of Indian status, as it lowers the likelihood that floodwaters or erosion will harm neighboring tribal land. Like the second *St. Cloud* factor, the lack of evidence for this factor far outweighs meager arguments to the contrary. Accordingly, the third *St. Cloud* factor also supports Mr. Randall's non-Indian status.

Finally, the fourth *St. Cloud* factor considers "social recognition as an Indian through living on a reservation and participating in Indian social life." *St. Cloud*, F. Supp. at 1461. Notably, this is the least important *St. Cloud* factor. *Bruce*, 394 F.3d at 1224. This factor considers, among other things, participation in Indian social life and self-identification as an Indian. *St. Cloud*, 702 F. Supp. at 1461. Of the four factors, this factor leans most in favor of Mr. Randall being Indian. It does, however, point equally in favor of his non-Indian status. Mr. Randall owns fee land within the Minneshonka Nation. R. at 5. The MNSC found Mr. Randall is an "active participant" in the community but did not indicate whether Mr. Randall lives on his land exclusively or at all. *Id.* at 5. Additionally, Mr. Randall attends the local church alongside Minneshonka citizens. *Id.* at 7–8. However, there is no evidence that Mr. Randall is explicitly treated as a citizen by the community or that Mr. Randall holds himself out as Indian. *Id.* at 5, 7–8. Without such indications, there is no way to determine whether Mr. Randall's "active participation" is a result of his fee land ownership within the reservation or social recognition as an Indian. Indeed, Mr. Randall refuses to enroll in the tribe despite his eligibility. *Id.* at 5. The record contains no assertion that non-Indian fee landowners without Indian blood would not be treated similarly to Mr. Randall. It is entirely possible all fee landowners received the same support regardless of Indian status. Accordingly, the fourth *St. Cloud* factor is likely a tie, and may still weigh in favor of Mr. Randall's non-Indian status.

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In sum, Mr. Randall is not Indian. His status is most simply indicated by his lack of enrollment. While this Court need not go further, the same result is borne out under a *St. Cloud* Indian status analysis. The only evidence to the contrary falls under the least important fourth *St. Cloud* factor, which is not enough to overturn the District Court's factual determination that Mr. Randall is not Indian. Accordingly, Mr. Randall's Indian status does not render him subject to the tribe's general civil jurisdiction for actions on his unrestricted fee land.

III. The Minneshonka Nation Cannot Seize Mr. Randall's Land Because Tribes Do Not Have General Civil Jurisdiction Over Nonmember Fee Lands

As noted by the Thirteenth Circuit below, federally recognized tribes are legally "characterized . . . as 'domestic dependent nations.'" R. at 11 (quoting *Cherokee Nation*, 30 U.S. at 17). Due to this status and tribes' unique relationship with the federal government, tribes were divested of numerous inherent sovereign powers over time. *See Wheeler*, 435 U.S. at 323; *supra* Section I.C. In *Montana*, this Court stated the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Thus, this Court adheres to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. This general proposition is often referred to as the *Montana* rule. Providing more explicit direction, the *Atkinson* Court stated, "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 647 (2001).

There are exceptions to the *Montana* rule. First, Congress could expressly grant a tribe, via treaty or statute, authority over nonmember conduct or fee land. *Montana*, 450 U.S. at 562. Second, a situation could fall under one of the limited *Montana* exceptions:

> [(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 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

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> on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565–66. Here, no exception applies.

A. Standard of Review

Issues regarding a tribe's inherent authority to regulate nonmembers are questions of law, reviewed *de novo*. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209 (9th Cir. 2001) (citing *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995)). Accordingly, "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

B. No Treaty or Explicit Congressional Authorization Grants the Minneshonka Nation Power over Mr. Randall's Unrestricted Nonmember Fee Land

Due to the presumption tribes do not have civil authority over nonmembers on non-Indian land, this Court should first look for express treaty language or congressional authorization granting such a power. Notably, "the Supreme Court has indicated that in some circumstances congressional action or a treaty is the only means by which tribes can secure authority over nonmembers that the Court has deemed implicitly divested by virtue of the tribes' relationship to the United States." *Cohen's* § 4.03[1]. To be sure, this "matter of congressional intent" must be "established in accordance with the Indian law canons of construction." *Id.*

When invoked, these canons stipulate courts should (1) liberally construe Indian treaties and congressional acts in favor of the Tribe; (2) determine ambiguities in the Tribe's favor; (3) interpret the agreement or language as the Tribe would have understood; and (4) abrogate a Tribe's right or sovereign power only when Congress's intent was "clear and unambiguous." *Id.* § 2.02[1]; *see, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[T]reaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted for their benefit."). However, these canons "do[] not permit reliance on ambiguities that do not exist; nor . . . permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

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1. Nothing in the Record Indicates the Minneshonka Nation Has a Treaty Power to Assert Civil Jurisdiction over Mr. Randall

In *Atkinson* and *Montana*, the Court analyzed the treaties at issue. In both cases, the Court concluded that the Tribes did not possess a treaty right of authority over nonmembers on non-Indian fee land. Specifically, *Atkinson* found no applicable treaty language, 532 U.S. at 654, while *Montana* concluded the Crow Tribe possessed a treaty power to regulate nonmembers on tribal land only, 450 U.S. at 557. Here, the situation is akin to *Atkinson*—no applicable treaty language is mentioned in the record. *See* R. Certainly, the Minneshonka Nation treated with Great Britain and the United States to recognize "the boundaries of lands to remain under [its] control." *Id.* at 10. Yet the record mentions nothing more about these treaties. Without ambiguous treaty language, the Indian law canons of construction do not apply. *See Catawba Indian Tribe*, 476 U.S. at 506. Accordingly, this Court should next determine whether the Minneshonka Nation possesses inherent authority "powers [] expressly conferred upon them by federal statute." *Atkinson*, 532 U.S. at 649.

2. No Federal Statute Confers Power to Seize Mr. Randall's Land; Instead, the Relevant Statutes Are Not Applicable or Expressly Disavow Authority over Nonmembers

There are three statutes that might confer to the Minneshonka Nation the power to regulate nonmembers on non-Indian land: the CWA, the ESA, and the GAA. The environmental statutes (CWA and ESA) do not apply due to their limited scope or explicit federal decisions to exclude Minneshonka Cane. The GAA likely confirms a lack of tribal authority over nonmember land, rather than explicitly conferring a regulatory power.

a) The CWA and ESA Do Not Confer Tribal Civil Authority over Mr. Randall

First, the CWA does not apply to Mr. Randall's fee land. The record maintains, "no lands at issue in this case implicate the Clean Water Act." R. at 4. Further, "Mr. Randall's land is located abutting an artificial non-navigable lake which is not subject to state water law regulation and control." *Id.* at 8. Thus, although the Minneshonka Nation has attained Treatment-as-a-State status, developed "a Best Management Practice [] to prevent . . . pollution," and earned CWA-related accolades, *id.* at 4, the CWA does not confer to the Tribe power over Mr. Randall's unrestricted fee land. The CWA is not an issue before this Court.

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Second, the ESA also does not apply. In 2012, the Minneshonka Nation "petitioned the U.S. Fish and Wildlife Services [] to list [Minneshonka Cane] as endangered in accordance with the Endangered Species Act." *Id.* Fish and Wildlife Services declined the Minneshonka Nation's request. *Id.*; *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (stipulating courts must give significant deference to agency decisions if "based on a permissible construction of the statute"). Thus, the ESA simply does not protect Minneshonka Cane. Moreover, not only does the ESA not confer regulatory power over nonmember lands with Minneshonka Cane—the federal government *affirmatively declined* to confer such a power to the Minneshonka Nation. Recall the Indian law canons of construction do not "permit disregard of the clearly expressed intent of Congress." *Catawba Indian Tribe*, 476 U.S. at 506. In sum, neither the CWA nor the ESA provide the Minneshonka Nation with an avenue to seize or regulate Mr. Randall's unrestricted fee land.

b) The GAA Supports Reduced Tribal Civil Authority—Not Express Federal Conferral over Nonmember Fee Land

As discussed above, the GAA and Minneshonka Surplus Lands Act sought to reduce tribal civil authority. *Supra* I.C.3. Both Acts divided up tribal lands and allotted them to tribal members in restricted fee simple. *Supra* I.C.3. Typically, any restrictions could be removed via federal approval or terminated after a stipulated time frame. *Supra* I.C.3. The surplus tribal lands were often sold to non-Indian individuals or corporations. *Supra* I.C.3. The overall goal was to end tribal authority—totally—over those sections of land. *Supra* I.C.3.; *see* Canby, Jr., *supra*, at 24–27.

The GAA does not provide federal conferral of inherent authority over Mr. Randall's unrestricted fee land. Rather, the GAA reduced inherent tribal powers because the Act sought to take tribal lands and convert them into fee or non-Indian land. Although Mr. Randall's ancestor was allotted a "restricted" allotment, that status changed to "fee simple absolute" in the 1920s. R. at 5. Thus, no argument that the Tribe continues to have civil authority over Mr. Randall's allotted land due to its "status" persists. Even so, such arguments would presumably fail because the "status" of the allotment would be a matter between the federal government and Mr. Randall, not between the Minneshonka Nation and Mr. Randall. Overall, the GAA sought to destroy—not expand—inherent tribal powers over allotted or nonmember lands.

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C. The Minneshonka Nation's Seizure of Mr. Randall's Land Does Not Fall Under Either Montana Exception

Because "[t]ribal jurisdiction is limited" and the Minneshonka Nation does not possess "expressly conferred" powers, it "must rely [on] retained or inherent sovereignty" to condemn Mr. Randall's fee land. *Atkinson*, 532 U.S. at 649–50. As discussed above, the *Montana* rule stands for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. However, two exceptions to the general rule exist: (1) "consensual relationships" between a nonmember and a Tribe or its members, or (2) when tribal authority is necessary to protect "the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565–66. Again, neither exception allows the Minneshonka Nation to seize Mr. Randall's unrestricted fee land.

1. No "Consensual Relationship" Exists Between Mr. Randall and the Tribe

This Court should decline to follow the District Court's reasoning that Mr. Randall is subject to Minneshonka Nation jurisdiction under the first *Montana* exception. First, this Court owes no deference to a lower court's decision due to the *de novo* standard of review. Second, the reasoning purported below, that the Tribe and Mr. Randall have "good relations," does not amount to a "consensual relationship" under *Montana*. R. at 8–9 (highlighting that Mr. Randall "consented to the jurisdiction of the Tribe" due to "the length of time during which Mr. Randall has owned property in the area, and that he has taken advantage of Minneshonka Nation's services"). The first *Montana* exception requires much more.

Montana highlights that "consensual relationships" must occur "through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Because "nonmembers . . . have no say in the laws and regulations that govern tribal territory . . . those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his[/her] actions." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 337 (2008). Furthermore, "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe *have a nexus* to the consensual relationship itself." *Atkinson*, 532 U.S. at 656 (emphasis added); *see, e.g.*, *Strate*, 520 U.S. at 440–41 (holding a corporation's "subcontract work on the reservation," which had nothing to do with the accident at issue, did not amount to a "consensual relationship").

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For example, in *Dolgencorp*, the Fifth Circuit affirmed that a corporation had a "consensual relationship" with the Mississippi Band of Choctaw Indians. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 177 (5th Cir. 2014). However, *Dolgencorp* greatly differs from Mr. Randall's situation, and is a rare application of *Montana*'s first exception. To begin with, the Dolgencorp store was located on tribal trust land,[4] *id.* at 169, not unrestricted allotted fee land like Mr. Randall's.

In *Dolgencorp*, an underage tribal member, participating in an internship program with a Dolgencorp store on the reservation, was molested by a nonmember employee. *Id.* at 170. The store "operate[d] pursuant to a lease agreement with the tribe and a business license issued by the tribe." *Id.* The Fifth Circuit held the member's "work in exchange for job training and experience . . . [was] unquestionably a relationship 'of a commercial nature.'" *Id.* at 173. Moreover, the court found "an obvious nexus" between Dolgencorp's negligent placement of the nonmember employee and its participation in the tribal internship program. *Id.* The Fifth Circuit stated, "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business." *Id.* at 173–74. Without providing a written opinion, this Court affirmed the Fifth Circuit. *See Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016).

The situation between Mr. Randall and the Minneshonka Nation is a far cry from *Dolgencorp*, or even *Strate*. There is no "consensual relationship" between Mr. Randall and the Tribe regarding the condemnation easement, nor does Mr. Randall do any "subcontract work on the reservation." In particular, there are no formal "contracts, leases, or other arrangements" as required by *Montana*. Rather, the record indicates that Mr. Randall has actively objected to an easement on his property, formally "challenged the [condemnation] action," and exhausted his tribal court remedies. R. at 8. Although Mr. Randall courteously notifies other livestock owners "when cattle roam onto" his property, has accepted gratuitous sandbags from the Tribe during times of flooding, and "attends church service" alongside tribal members, *id.* at 7–8, these actions are not nearly enough to clear the first *Montana* exception's high bar. Indeed, the *Atkinson* Court rejected a

4. The application of a *Montana* exception in *Dolgencorp*, to a situation that took place on tribal trust land, makes the precedent even more remote to Mr. Randall's case. As discussed above, the *Montana* rule and exceptions were designed for, and are typically applied to, situations involving nonmembers on fee lands within a reservation. The *Merrion* rule is typically applied to situations involving nonmembers on tribal trust lands. *See Merrion*, 455 U.S. at 149; *supra* Section I.E.

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first exception argument based on services far more established than sandbags. 532 U.S. at 655 ("[A] nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.").

Unlike *Dolgencorp*, Mr. Randall's actions are not "contracts, leases, or other arrangements" nor do they "have a nexus" to the Tribe's seizure of his fee land due to the presence of Minneshonka Cane. Equating Mr. Randall's choices—to attend church alongside tribal members or call a neighbor regarding lost cattle—to a "consensual relationship" would "swallow" the *Montana* rule. *See United States v. Cooley*, 141 S. Ct. 1638, 1645 (2021) (warning "the *Montana* exceptions are 'limited' and 'cannot be construed in a manner that would swallow the rule'"). If attending church alongside tribal members falls under the first exception's umbrella, little behavior would not.

Finally, an argument that Mr. Randall's proposed "development project" falls under the first *Montana* exception fails. There is no indication that Mr. Randall (1) is negotiating with the Minneshonka Nation, its tribal corporations, or its members or (2) has finalized "commercial dealing[s], contracts, leases, or other arrangements" for the project. *See* R. at 8. Because both elements are required, this argument clearly fails and the Minneshonka Nation cannot seize Mr. Randall's nonmember fee land under *Montana*'s first exception.

2. Mr. Randall's Proposed Conduct—On His Own Nonmember Fee Land—Does Not Imperil the Tribe

Mr. Randall's proposed conduct does not fall under the second *Montana* exception. "Because efforts by a tribe to regulate nonmembers . . . are presumptively invalid, the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions." *Att'y's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (internal quotations omitted). The second exception allows tribal "[c]ivil 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 and welfare of the tribe." *Montana*, 450 U.S. at 565–66. Although Minneshonka Cane is undoubtedly of great importance to the Minneshonka Nation, Mr. Randall's conduct is not a "drain . . . upon tribal services and resources . . . so severe that it actually 'imperils' the political integrity" of the Tribe. *Atkinson*, 532 U.S. at 657 n.12.

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Despite its seemingly broad scope, the second *Montana* exception is rarely met. To start, the Montana exceptions are "limited" and cannot be allowed to "swallow the rule." *Cooley*, 141 S. Ct. at 1645 (quoting *Plains Com. Bank*, 554 U.S. at 330). The nonmember "conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Com. Bank*, 554 U.S. at 341. The "tribal power must be necessary to *avert catastrophic consequences*" resulting from the nonmember conduct. *Cohen's* § 4.02[3][c][i], n.75) (emphasis added). Case law further demonstrates the second exception's high bar.

For example, *Sac & Fox Tribe* provides a situation that clearly "imperiled" a tribe—a nonmember corporation raiding tribal facilities located on tribal trust land "to seize control of the tribal government and economy by force." 609 F.3d at 939. The raid sought to subvert a tribal election by "return[ing] the [previous leadership] to power despite the majority's rejection of its leadership." *Id.* The Eighth Circuit classified the nonmember attack as "threaten[ing] the health and welfare of the Tribe by organizing a physical attack by thirty or more outsiders armed with batons and at least one firearm against the Tribe's facilities and the tribal members inside, including the duly elected council." *Id.* Noting the attack was "a direct attack on the heart of tribal sovereignty" and clearly "threatened the political integrity and economic security of the Tribe," the Eighth Circuit upheld the Tribe's power to regulate the nonmember under the second *Montana* exception. *Id.* at 939–40.

Further, in *FMC Corp.*, tribal regulation over a nonmember hazardous waste plant storing "millions of tons of hazardous waste on the Reservation" with "evidence of toxic, carcinogenic, and radioactive substances" met *Montana*'s second exception. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (the Ninth Circuit decided the situation also fell under the first *Montana* exception). However, a tribe's ability to regulate, via zoning laws, a single-family home on non-Indian fee land within a reservation did not. *See Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) ("The Tribes fail to show that . . . construction of a single-family house poses catastrophic risks."). Despite clear environmental threats to the community, such as "groundwater contamination" or "fire hazards," the Ninth Circuit did not find such arguments persuasive. *Id.*

This Court's only clear-cut application of the second exception involved criminal law: a tribal officer detained an intoxicated nonmember possessing several firearms and contraband inside a vehicle on the reservation. *See Cooley*, 141 S. Ct. at 1641–42. Notably, the situation in *Cooley* took place

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on a state right-of-way, rather than unrestricted nonmember fee land. *Id.* This Court held that the second *Montana* exception allows a tribal officer to temporarily detain and search a nonmember for suspected violations of state or federal law.[5] *Id.* at 1641. In particular, *Cooley* noted the "second exception . . . fits the present case, almost like a glove." *Id.* at 1643. The reasoning implicated the "health and welfare of the tribe" because "to deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats." *Id.*

Finally, via *Brendale*'s plurality decision, this Court considered the second *Montana* exception in relation to the Yakima Indian Nation's unique reservation. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). The reservation includes both tribal trust and non-Indian fee lands, but is divided into "closed" and "open" sections, with the "closed" section restricted from the general public. *Id*. at 415. The Yakima Nation sought "the authority to zone fee lands owned by nonmembers of the Tribe" within the reservation. *Id.* at 414. Four of the Justices stipulated they would simply follow the *Montana* rule and prevent zoning laws from applying to nonmembers without an exception—even in the closed section. *Id.* at 425. Two other Justices believed the nonmember's proposed development would likely fall under the second *Montana* exception. *Id.* at 443–44. They reasoned the land's location in the "closed area" and potential to destroy "cultural and spiritual values" weighed in favor of allowing tribal zoning authority. *Id.* Although *Brendale*, in part, fell under the second *Montana* exception, its application to Mr. Randall's situation is dubious at best. First, the plurality provides no clear precedent for tribal zoning of nonmember fee land. Second, there is no indication the Minneshonka Nation has "closed" and "open" sections. Finally, the Yakima Nation's proposed zoning regulations did not amount to a taking—a far greater regulatory power the Minneshonka Nation wishes to assert over Mr. Randall.

Overall, the second *Montana* exception should not apply here because Mr. Randall's proposed development does not catastrophically harm the Minneshonka Nation nor imperil the tribal community. Although Minneshonka Cane is of great importance to the Minneshonka Nation, Mr.

5. Notably, suspected violations of tribal law are not included under *Cooley*'s holding. Thus, a tribal officer is still limited to the bodies of state and federal law in a *Cooley*-like situation. Accordingly, the officer would not be able to conduct the "search and detention" based on tribal law alone. *See Cooley*, 141 S. Ct. at 1644–45.

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Randall's conduct does not threaten the political integrity, economic security, or health and welfare of the Tribe. As evidenced by the record and the abovementioned case law, this Court should reject arguments in favor of applying the second *Montana* exception.

First, the Minneshonka Cane on Mr. Randall's property has nothing to do with the Tribe's political integrity. Mr. Randall's proposed development on his nonmember fee land is a far cry from the direct assault on the Sac & Fox Tribe's government. Notwithstanding any proposed actions by Mr. Randall, the Minneshonka Nation will continue to exist, function, and be politically active as a federally-recognized Tribe. The Minneshonka Nation will continue to operate a court system, create laws, determine membership, levy taxes, punish members, wield its sovereign immunity, and even enter protection agreements over Minneshonka Cane.[6] The record clearly demonstrates that the Minneshonka Nation is effectively using its political powers to protect Minneshonka Cane via tribal resolutions, departments, and its code. In fact, using its political authority, the Minneshonka Nation already protected 99% of fee-land Minneshonka Cane. R. at 14.[7]

Second, economic security arguments also fail. The condemnation easement is meant to "prevent[] [Minneshonka Cane's] voluntary or involuntary removal or destruction." R. at 8. Therefore, the Tribe is not economically dependent on growing or preserving Minneshonka Cane, now or in the foreseeable future. The facts indicate that the Tribe's economic security was actually a catalyst for the Tribe to better protect, research, and promote Minneshonka Cane. *Id*. at 3–5. For example, the Tribe greatly invested in Best Management Practices utilizing Minneshonka Cane to prevent water pollution, as well as academic research to demonstrate Cane's environmental potential. *Id.* Moreover, Mr. Randall's development project will economically aid the Tribe. *See id.* at 8. Mr. Randall's project will likely provide housing, jobs, business opportunities, and recreational activities for tribal members. *See id.* Overall, Mr. Randall's project will likely increase business for the Tribe and other tribal business owners, rather than imperil its economic security.

Finally, Mr. Randall's situation does not fall under the health and welfare test of the second exception. As evidenced by *Cooley*, *FMC Corp.*, and *Sac & Fox Tribe*, *Montana*'s second exception requires catastrophic conduct such as violent coup-like assaults or dangerous hazardous waste

6. Recall, as a nonmember, Mr. Randall does not have the right to be politically active within the Tribe. R. at 5.

7. Further, the Tribe has presumably already protected all Minneshonka Cane on tribal trust land. R. at 14.

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regulations. The Minneshonka Nation already protected Minneshonka Cane throughout the rest of the reservation. *Id.* at 13–15 (noting Mr. Randall is the only landowner that has not voluntarily agreed to the Personhood Easement). Therefore, it is difficult to argue the Tribe's inability to condemn the small section of Mr. Randall's property would imperil the tribal community. Rather, Mr. Randall's proposed development will likely improve the Tribe's health and welfare by providing increased housing options and tribal business opportunities. Moreover, the *Brendale* plurality provides little aid to the Minneshonka Nation's argument. There is no evidence that Mr. Randall lives in a section of the Minneshonka Nation "closed" to the general public. In fact, unlike the Yakima Nation reservation, there is no evidence the Minneshonka Nation's reservation includes "closed" sections at all. Additionally, the taking of Mr. Randall's land is a far greater power than the zoning proposed in *Brendale*.

On balance, the Minneshonka Nation's ability to seize Mr. Randall's land via *Montana*'s second exception does not "fit the present case, almost like a glove." *Cooley*, 141 S. Ct. at 1643. This Court should reject any temptation to apply either *Montana* exception to Mr. Randall's situation.

Conclusion

Despite possessing some Minneshonka blood, Mr. Randall is not an enrolled citizen of the Minneshonka Nation. Since Mr. Randall is not recognized as Indian, he is not subject to the Tribe's general civil jurisdiction—including its questionably retained eminent domain powers—without a qualifying *Montana* exception. Because neither *Montana* exception applies, this Court should affirm the Thirteenth Circuit and hold the Minneshonka Nation cannot seize an easement on Mr. Randall's land.

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