



United States District Court

District of Arizona

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ATKINSON TRADING COMPANY,
INC., a New Mexico corporation,

Plaintiff,

vs.

LITA MANYGOATS; CASEY
WATCHMAN, Chairperson of the Navajo
Nation Labor Commission; LARSON
MANUELITO, Vice Chairperson of the
Navajo Nation Labor Commission;
JERRY BODIE; YOUNG JEFF TOM and
PHILLIP LUNA, Members of the Navajo
Nation Labor Commission,

Defendants.

No. CIV 02-1556-PCT-SMM

**MEMORANDUM OF DECISION AND
ORDER**

Pending before the Court, *inter alia*, are Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment. After considering the arguments raised by the parties in their briefing and during oral argument, the Court now issues the following rulings.

BACKGROUND

The Plaintiff, Atkinson Trading Company ("Atkinson"), owns and operates a business known as Cameron Trading Post on land which Atkinson owns in fee simple within the

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1 exterior boundaries of Navajo Nation reservation land near Cameron, Arizona¹. (Compl.
2 ¶¶ 1-2). Plaintiff Atkinson and its president, director and principal shareholder, Edwin
3 Atkinson, are not members of the Navajo Nation. (*Id.* ¶ 7). Plaintiff Atkinson operates
4 several businesses on its property, including a hotel, restaurant , cafeteria, gallery , curio
5 shop, retail store, and RV park. (*Id.* ¶ 10). Atkinson allegedly buys all of its goods, services,
6 foodstuffs, and utilities from sources off the Navajo reservation, except for those which
7 Atkinson provides for itself. (*Id.* ¶ 11). These goods and services are delivered to Atkinson's
8 property via public rights of way. (*Id.*).

9 Atkinson's business focuses on the tourist market and deals almost exclusively with
10 nonmembers of the Navajo Nation, attracted to Atkinson's facility because of its proximity
11 to the Grand Canyon. (*Id.* ¶ 29). Atkinson alleges that its sole contact with Navajo Nation
12 members on its property consists of the following: (1) members of the Navajo Nation
13 comprise a portion of Atkinson's workforce; and (2) Atkinson sells a "small amount" of
14 goods to members of the Navajo Nation. (*Id.* ¶ 32). Essentially, Atkinson has tried to limit
15 its reliance on the Navajo Nation. (*See* Compl. ¶¶ 1-2).

16 Defendant Lita Manygoats ("Manygoats") is a resident of Tuba City, Arizona, and a
17 member of the Navajo Nation. (*Id.* ¶ 3). In March 1995, Atkinson hired Manygoats as a
18 seasonal employee to work as a sales clerk in one of Atkinson's shops. (*Id.* ¶ 15). Atkinson
19 is an at will employer and does not have employment contracts with its employees. (*Id.*).
20 Although the reasons underlying Manygoats' termination are disputed, Atkinson's manager
21 informed Manygoats that she was terminated on August 10, 1995. (*Id.* ¶¶ 16-18). On August
22 21, 1995, Atkinson's manager gave Manygoats a letter setting forth the detailed reasons for
23 her termination, including an alleged outburst in front of customers and failure to show up
24 to work. (*Id.* ¶¶ 17-18).

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27 ¹ Cameron Trading Post is located on "non-Indian fee land." Non-Indian fee land is land that
28 is owned in fee simple by a non-Indian, but which falls within the exterior boundaries of a
reservation. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825 (2001).

1 On August 11, 1995, Defendant Manygoats filed a claim with the Office of Navajo
2 Labor Relations (ONLR) alleging that Atkinson had terminated her in violation of the Navajo
3 Preference in Employment Act. ("NPEA") (Compl. ¶ 19). After the ONLR declined to find
4 that Atkinson violated the NPEA, Manygoats filed a complaint with the Navajo Nation Labor
5 Commission (NNLC). (*Id.* ¶ 20).

6 Atkinson alleges that the NPEA requires employers to discriminate in favor of Navajo
7 employees and against non-Navajo employees in the terms and conditions of employment.
8 For example, the NPEA forbids employers from penalizing, disciplining, discharging, or
9 taking "any adverse action against any Navajo employee without just cause." (*Id.* ¶ 25);
10 NPEA § 4.B.8. The NPEA also requires employers to hire or promote qualified Navajos
11 ahead of non-Navajos with better qualifications; lay off all non-Navajos before terminating
12 any Navajos with respect to qualifications or seniority; and give preference to non-Navajos
13 who are legally married to Navajos. (*Id.*); NPEA §§ 4.C.1, 4.C.2, 14.A.

14 Defendants Casey Watchman, Larson Manuelito, Jerry Bodie, Young Jeff Tom, and
15 Phillip Luna ("Navajo Nation Defendants") are members of the NNLC and the officers of
16 the Navajo Nation government responsible for enforcing the NPEA. (*Id.* ¶ 4). Through
17 hearing proceedings, the NNLC determined that it had jurisdiction over Atkinson's
18 employment practices and that Atkinson was bound by the NPEA requirements. (*Id.* ¶ 20).
19 The NNLC thereafter held a two-day trial on the merits and found that Atkinson failed to
20 terminate Manygoats for just cause or provide her with the notice required by the NPEA.
21 (*Id.*). During the trial, Atkinson bore the burden of proof to show by clear and convincing
22 evidence that it did not violate the NPEA. (*Id.* ¶ 21). The NNLC assessed a civil fine against
23 Atkinson and awarded Manygoats back pay and attorneys' fees. (*Id.* ¶ 20).

24 Atkinson appealed the NNLC's ruling to the Navajo Nation Supreme Court. (*Id.* ¶
25 22). On January 14, 2000, the Navajo Nation Supreme Court affirmed that the NNLC had
26 jurisdiction over Atkinson and that the NPEA applied to Atkinson's employment practices,
27 but reversed the NNLC's decision on the merits and remanded the case for further
28 proceedings. (*Id.*). The Navajo Nation Supreme Court also held that the burden of proof in

1 the NPEA violated due process of law under the Navajo Nation Bill of Rights and restated
2 the burden on the challenged employer as having to prove its innocence by a preponderance
3 of the evidence, rather than by clear and convincing evidence. (*Id.*)

4 On remand, the NNLC dismissed the civil penalty against Atkinson, but upheld the
5 back pay claim and assessed attorneys' fees at a lesser amount. (*Id.* ¶ 23). Atkinson appealed
6 the NNLC's second ruling to the Navajo Nation Supreme Court on November 13, 2000. (*Id.*
7 ¶ 24).

8 While its second appeal to the Navajo Nation Supreme Court was pending, Atkinson
9 filed the current action in this Court on August 31, 2002. In its Complaint, Plaintiff Atkinson
10 alleges that the NNLC exceeded their jurisdiction by attempting to impose the NPEA on
11 Atkinson and by purporting to adjudicate Manygoats' claim against Atkinson. (Compl. ¶¶
12 28, 34). Atkinson further alleges that application of the NPEA to its business violates
13 Atkinson's rights, privileges, and immunities guaranteed under the Constitution, Treaties, and
14 federal and state laws. (*Id.* ¶¶ 21, 25, 39). Additionally, Atkinson claims that its rights to
15 due process and equal protection were violated during the course of proceedings before the
16 NNLC and Navajo Nation Supreme Court. (*Id.* ¶ 21). Atkinson seeks declaratory and
17 injunctive relief to cure such violations. (*Id.* ¶¶ 36-43).

18 On October 29, 2002, the Defendants filed a Motion to Dismiss for lack of jurisdiction
19 and also asserted claims of sovereign immunity. However, while this case was pending with
20 this Court, the Navajo Nation Supreme Court rendered its opinion affirming the NNLC's
21 decision both on jurisdictional grounds and on the merits. *Manygoats v. Atkinson Trading*
22 *Co.*, No. SC-CV-62-2000 (Nav. Nat. S. Ct. Aug. 12, 2003). Thus, the jurisdictional issues
23 presented in the Motion to Dismiss became moot, and the Motion was denied by this Court
24 on September 22, 2003.

25 Plaintiff filed a Motion for Summary Judgment on April 8, 2003. In its Motion,
26 Plaintiff asserts that the Navajo Nation did not properly exercise jurisdiction over it and that
27 tribal officials sued in their individual capacity cannot claim sovereign immunity. On
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1 October 17, 2003 the Defendants filed a Response to Plaintiff's Motion for Summary
2 Judgment and a Cross Motion for Summary Judgment. In their Cross Motion, Defendants
3 claim they are entitled to summary judgment for the same reasons they asserted in their
4 Motion to Dismiss, that this Court lacks jurisdiction and claims of sovereign immunity.

5 ISSUE

6 The Plaintiff is a non-Indian conducting a commercial retail business, on non-Indian
7 fee owned land, located within the confines of the Navajo Nation. The Plaintiff hired, and
8 later fired, a member of the Navajo Nation, and based on the employment relationship, the
9 Navajo Nation seeks to confer jurisdiction over the Plaintiff. The question presented here
10 is whether the mere happenstance of employment of a Navajo Nation member is enough to
11 confer tribal jurisdiction over a non-member, in order to enforce provisions of the Navajo
12 Preference in Employment Act? The Court finds that the employment relationship, without
13 more, is not enough to confer tribal jurisdiction over a non-member as a matter of law.

14 STANDARD OF REVIEW

15 A court must grant summary judgment if the pleadings and supporting documents,
16 viewed in the light most favorable to the nonmoving party, "show that there is no genuine
17 issue as to any material fact and that the moving party is entitled to judgment as a matter of
18 law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986);
19 *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive
20 law determines which facts are material. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248
21 (1986); see also *Jesinger*, 24 F.3d at 1130. "Only disputes over facts that might affect the
22 outcome of the suit under the governing law will properly preclude the entry of summary
23 judgment." *Anderson*, 477 U.S. at 248. The dispute must also be genuine, that is, the
24 evidence must be "such that a reasonable jury could return a verdict for the nonmoving
25 party." *Id.*; see *Jesinger*, 24 F.3d at 1130.

26 A principal purpose of summary judgment is "to isolate and dispose of factually
27 unsupported claims." *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate
28 against a party who "fails to make a showing sufficient to establish the existence of an

1 element essential to that party's case, and on which that party will bear the burden of proof
2 at trial." *Id.* at 322; *see also Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.
3 1994). The moving party need not disprove matters on which the opponent has the burden
4 of proof at trial. *See Celotex*, 477 U.S. at 317. The party opposing summary judgment "may
5 not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth
6 specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see*
7 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-88 (1986); *Brinson v. Linda*
8 *Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

9 DISCUSSION

10 "[I]ndian Tribes are unique aggregations possessing attributes of sovereignty over
11 both their members and their territory, [b]ut their dependant status generally precludes
12 extension of tribal civil authority beyond [m]embers." *Atkinson Trading Company v. Shirley*
13 532 U.S. 645, 121 S.Ct. 1825 (2001) quoting *United States v. Mauzurie* 419 U.S. 544, 557,
14 95 S.Ct. 710 (1975).

15 The jurisdictional analysis in this case is governed by the U.S. Supreme Court's
16 decision in *Montana v. United States*, 450 U.S. 544 (1981). In that seminal case, the Court
17 held that, with limited exceptions, Indian tribes lack civil authority over the conduct of
18 nonmembers on non-Indian fee land within a reservation. *Id.* at 565-66. However, two
19 exceptions apply to this general rule, extending the assertion of tribal jurisdiction over (1)
20 "the activities of non-members who enter consensual relationships with the tribe or its
21 members, through commercial dealing, contracts, leases, or other arrangements"; and (2) "the
22 conduct of non-Indians on fee lands within its reservation when that conduct threatens or has
23 some direct effect on the political integrity, the economic security, or the health or welfare
24 of the tribe." *Id.* at 565-66.

25 In their Cross Motion for Summary Judgment, the Navajo Nation Defendants present
26 two fundamental issues counseling dismissal of this case. First, Defendants urge that the
27 Navajo Nation has jurisdiction to apply the NPEA to Atkinson's employment practices at
28 Cameron Trading Post under either *Montana* exception. As such, they submit that

1 jurisdiction over the dispute arising from Atkinson's employment of Manygoats rests properly
2 and solely with the Navajo Nation judicial system. Second, the Navajo Nation Defendants
3 argue that they are entitled to sovereign immunity from the current suit. To the contrary,
4 Plaintiff argues neither *Montana* exception is met here, and therefore, NNLC officials
5 exceeded their authority by applying the NPEA to Atkinson's employment practices and
6 adjudicating Manygoats' claim. Plaintiff urges that, therefore, the Navajo Nation judicial
7 system's exercise of jurisdiction over this dispute was unlawful, that the Navajo Nation
8 Defendants are not entitled to sovereign immunity, and that the Navajo Nation cannot extend
9 its tribal civil authority over Atkinson to enforce provisions of the Navajo Preference in
10 Employment Act.

11 **A. The Navajo Preference in Employment Act**

12 The Navajo Preference in Employment Act (NPEA) was passed by the Navajo
13 legislature in 1990. The purpose of the Navajo Preference in Employment Act is:

- 14 1. To provide employment opportunities for the Navajo work force;
- 15 2. To provide training for the Navajo people;
- 16 3. To promote the economic development of the Navajo Nation;
- 17 4. To lesson the Navajo Nation's dependence upon off-Reservation sources of
18 employment, income, goods and services;
- 19 5. To foster the economic self sufficiency of Navajo families;
- 20 6. To protect the health, safety and welfare of Navajo workers; and
- 21 7. To foster cooperative efforts with employers to assure expanded employment
22 opportunities for the Navajo work force.

23 The Navajo Nation Code provides that "[i]t is the intention of the Navajo Nation Council that
24 the provisions of this Act be construed and applied to accomplish the purposes set forth
25 above." Nav. Na. Code Tit. 15 §6.02

26 Among other things, the NPEA mandates that employers give Navajo Tribal members
27 preference both before and after hiring. "An employer shall not penalize, discipline,
28 discharge nor take any adverse action against any Navajo employee without just cause. A

1 written notification to the employee citing such cause for any of the above actions is required
2 in all cases." Nav. Na. Code Tit. 15. "Irrespective of the qualifications of any non-Navajo
3 applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary
4 qualifications for an employment position:

5 1) Shall be selected by the employer in the case of hiring, promotion,
6 transfer, upgrading, recall, and other employment opportunities with respect to
7 such position; and

8 2) Shall be retained by the employer in the case of a reduction-in-force
9 affecting such class of positions until all non-Navajos employed in that class of
10 positions are laid off, provided that any Navajo who is laid-off in compliance
11 with this provision shall have the right to displace a non-Navajo in any other
12 employment position for which the Navajo demonstrates the necessary
13 qualifications.

14 3) Among a pool of applicants or candidates who are solely Navajo and
15 meet the necessary qualifications, the Navajo with the best qualifications shall
16 be selected or retained, as the case may be."

17 Nav. Na. Code Tit. 15. §6.0

18 **B. Federal Question Jurisdiction**

19 Because the Navajo Nation Defendants have argued that jurisdiction over this case
20 lies solely with the Navajo Nation judicial system, the Court must first consider its own
21 jurisdiction over this case. The Navajo Nation Defendants contend that the jurisdictional
22 issue and the merits of this case have already been resolved by the Navajo Nation Supreme
23 Court and may not be re-adjudicated in federal court.

24 The standard of review for an Indian tribal court decision deciding jurisdictional
25 issues is *de novo* on questions of federal law. *Big Horn*, 219 F.3d at 949 (9th Cir. 2000).
26 The jurisdictional issue underlying Plaintiff's suit concerns the extent to which the Navajo
27 Nation can apply tribal law to regulate the activities of non-Indians on non-Indian fee land
28 within the confines of the reservation. Such issue clearly raises a question of federal
common law under U.S. Supreme Court and Ninth Circuit precedent. *See National Farmers
Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Arizona Public Service Co. v. Aspaas*,

1 77 F.3d 1128, 1132 (9th Cir. 1995) (as amended, 1996); *FMC v. Shoshone-Bannock Tribes*,
2 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).

3 Federal courts are empowered to determine, under 28 U.S.C. § 1331, whether a tribal
4 court has exceeded the lawful limits of its jurisdiction. *National Farmers*, 471 U.S. at 853;
5 *Aspaas*, 77 F.3d at 1132. Accordingly, this Court must review *de novo* the Navajo Nation
6 Supreme Court's determination of its and the NNLC's exercise of jurisdiction *de novo* as a
7 matter of federal law. *See Big Horn*, 219 F.3d at 949.

8 Even where the district court has federal question jurisdiction to determine whether
9 a tribal court has exceeded the limits of its jurisdiction, as a general rule, it should abstain
10 from asserting jurisdiction over claims that are also pending in tribal court until the tribal
11 court has had a full opportunity to consider the basis for its own jurisdiction. *LaPlante*, 480
12 U.S. at 15; *Montana Dept. of Transp. v. King*, 191 F.3d 1108, 1114 (9th Cir. 1999).

13 In this case, as of August 12, 2003, the Navajo Nation Supreme Court determined that
14 the Navajo Nation properly exercised jurisdiction over this dispute by affirming the NNLC's
15 decision on Atkinson's second appeal. *Manygoats v. Atkinson Trading Co.*, No. SC-CV-62-
16 2000 (Nav. Nat. S. Ct. Aug. 12, 2003). Therefore, tribal exhaustion has been met and the
17 Navajo Nation Supreme Court's determination of tribal jurisdiction is now properly before
18 this Court. *See Aspaas*, 77 F.3d at 1134 (quoting *FMC*, 905 F.2d at 1314) ("[F]ederal courts
19 are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal
20 question").

21 C. Tribal Jurisdiction

22 Whether the NNLC exceeded its jurisdiction in applying the NPEA to Atkinson and
23 adjudicating Manygoats' claim depends on whether either of the two *Montana* exceptions is
24 met. The U.S. Supreme Court has consistently observed that tribal jurisdiction is limited to
25 powers expressly conferred upon tribes by federal statute or treaty, and those retained by the
26 tribe's inherent sovereignty. *See, e.g., Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50
27 (2001). The alleged source of jurisdictional power in this case, the inherent sovereignty of
28 Indian tribes, has been further limited to "their members and their territory," to the extent

1 "necessary to protect tribal self-government or to control internal relations." *Id.* at 650-51
2 (quoting *Montana*, 450 U.S. at 564).

3 In *Strate*, the Court held that the cases cited in *Montana* indicate the character of the
4 tribal interest the Court envisioned when it announced the *Montana* test. See *Williams v. Lee*
5 358 U.S. 217, 79 S.Ct. 269 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising
6 out of on-reservation sales transaction between non-member plaintiff and member
7 defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712 (1904) (upholding tribal permit
8 tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v.*
9 *Wright* 135 F. 947, 950 (C.A. 8 1905) (upholding tribe's permit tax on nonmembers for the
10 privilege of conducting business within Tribe's borders; court characterized as "inherent" the
11 Tribe's "authority...to prescribe the terms upon which non-citizens may transact business
12 within its borders.") *Washington v. Confederated Tribes of the Colville Indian Reservation*
13 447 U.S. 134, 100 S.Ct. 2069 (1980) (tribal authority to tax on-reservation cigarette sales to
14 non-members "is a fundamental attribute of sovereignty which the tribes retain unless
15 divested of it by federal law or necessary implication of their dependent status.")

16 The cases cited by the Supreme Court in announcing the *Montana* test, however, are
17 inapposite here. Most significant, *Williams*, *Washington* and *Morris* all deal with an "on-
18 reservation" transaction. Additionally, the *Buster* case dealt with permit taxes and used the
19 language "within the nation." An Indian jurisdictional analysis is completely different when
20 dealing with on-reservation transactions as opposed to off-Reservation transaction as present
21 here. Here, the question of tribal jurisdiction as it applies to non-member, off reservation
22 transactions, is unquestionably governed by *Montana* and its progeny.

23 As a general proposition, *Montana* established that Indian tribes lack civil authority
24 over the conduct of nonmembers on non-Indian fee land within a reservation. 450 U.S. at
25 565; see *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (applying *Montana* to both
26 regulatory and adjudicatory authority of tribes). Despite the general rule, the *Montana* Court
27 also noted two exceptional bases for tribal jurisdiction over nonmembers' activities on non-
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1 Indian fee land. *Id.* at 565-66. It is uncontested that *Montana's* general rule applies to the
2 jurisdictional inquiry in this case; the question remains whether either of its two exceptions
3 applies to allow tribal jurisdiction over Atkinson's employment practices. This Court will
4 consider the application of each exception in turn.

5 *1. Consensual Relationship*

6 First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities
7 of nonmembers who enter consensual relationships with the tribe or its members, through
8 commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

9 The Navajo Nation Defendants argue that a consensual relationship exists here
10 because Atkinson entered into a consensual employer-employee relationship with Manygoats,
11 an enrolled member of the Navajo Nation. Relying on *Cardin v. De La Cruz*, 671 F.2d 363
12 (9th Cir. 1982), and *FMC*, 905 F.2d 1311, the Navajo Nation Defendants urge that a non-
13 Indian need not enter into "leases" or "contracts" in order to initiate a consensual
14 relationship. *Cardin*, 671 F.2d at 366; *FMC*, 905 F.2d at 1314.

15 In *Cardin De La Cruz*, the Tribe sought to regulate non-Indian's activity on land
16 which, though within the reservations borders, is owned in fee by the non-Indian. *Cardin v.*
17 *De La Cruz* 671 F.2d 363 (9th Cir. 1982). According to the *Cardin* Court, the *Montana*
18 decision "established that the dependant status of Indian tribes has implicitly divested them
19 of the power to regulate, in general, the conduct of non-members on land no longer owned
20 by, or held in trust for the Tribes." *Cardin* at 366 quoting *Colville Confederated Tribe v.*
21 *Walton*, 647 F.2d 42, 52 (9th Cir. 1981).

22 *Cardin* involved a non-member grocery store owner operating his business on fee land
23 near the Quinault Indian Reservation. The store was the only one in the village, and it
24 allegedly posed a fire hazard and health risk in violation of the Tribes' s building, health and
25 safety regulations. The Ninth Circuit found that the non-member was subject to tribal
26 jurisdiction under both *Montana* exceptions. However, *Cardin* also characterized the
27 exceptions set forth in *Montana* as "broad categories in which, according to *Montana*, Indian
28 tribes retain their sovereign powers." *Cardin* at 366. Because the *Cardin* opinion does not

1 explain why a consensual relationship was found, this Court can infer that it is because the
2 *Cardin* Court was interpreting both *Montana* exceptions broadly², exceptions that the
3 Supreme Court has since narrowed. See *County of Lewis* 163 F.3d at 515 (holding that,
4 "although [they are] framed in broad terms, *Montana's* second exception is narrowly
5 construed").

6 As recently as 2001, the Supreme Court considered the meaning of the *Montana*
7 exceptions under very similar circumstances. In fact, the Plaintiff in that case was the same
8 Plaintiff in the current action. In *Atkinson v. Shirley*, the Supreme Court rejected a broad
9 reading of *Montana's* first exception, which they said "ignore[d] the dependant status of
10 Indian tribes and subverts the territorial restriction upon tribal power". *Id.* at 655. The Court
11 explained that "[t]he consensual relationship must stem from 'commercial dealing, contracts,
12 leases, or other arrangements,' and a non-members actual or potential receipt of tribal police,
13 fire and medical services does not create the requisite connection. If it did, the exception
14 would swallow the rul[e]...." *Atkinson v. Shirley*, 532 U.S. at 656.

15 In their briefing and oral argument, the Defendants urged this Court to reject a rule
16 requiring non-members to expressly consent to jurisdiction. Although the Court agrees with
17 Defendants that there is no *per se* rule that a tribe must enter into a written contract or lease
18 in order to form a consensual relationship, the law clearly provides that the consensual
19 relationship must stem from "commercial dealing, contracts, leases, or other arrangements."
20 *Montana*, 450 U.S. at 565. Here, the nature of the relationship is not at issue but rather,
21 whether it alone can serve as a consent to jurisdiction.

22 Furthermore, the Defendants argue that the nexus requirement is clearly met in the
23 present case. The U.S. Supreme Court has stated that *Montana's* consensual relationship
24 exception "requires that the . . . regulation imposed by the Indian tribe have a nexus to the
25 consensual relationship itself." *Atkinson v. Shirley*, 532 U.S. at 656. In other words, a
26

27
28 ²Furthermore, the facts in *Cardin* support a finding of a direct threat to the health and safety
of the tribe, facts relevant to *Montana's* second exception. See *infra*.

1 "nonmember's consensual relationship in one area . . . does not trigger tribal civil authority
2 in another." *Id.* The Defendants argue that a nexus exists here because the regulation the
3 Navajo Courts are trying to enforce is directly related to the consensual relationship, the
4 employment of a member of the Navajo Nation. The Defendants are correct that the
5 regulation they have attempted to impose on Atkinson (the NPEA) is directly related to
6 Atkinson's employment of Navajo Nation members, the precise relationship at issue here.
7 However, while it is arguable that the nexus requirement is met, a nexus requirement analysis
8 is only necessary if the Court first finds that a consensual relationship, as contemplated by
9 the *Montana* Court, exists.

10 Plaintiff argues that its employment of Manygoats was not "consensual" for purposes
11 of *Montana*, because federal law requires Atkinson to hire qualified applicants regardless of
12 their race or ethnicity. Title VII of the Civil Rights Act prohibits employers from
13 discriminating against any individual with respect to employment decisions because of such
14 individual's race or national origin. 42 U.S.C. § 2000e-2(a). Thus, the Plaintiff must hire
15 qualified applicants irrespective of their national origin, and therefore irrespective of whether
16 the NPEA applies to it³. It is true that the Plaintiff must comply with applicable Federal and
17 State laws. However, assuming, arguendo, that compliance with those laws had no bearing
18 on its decision to hire an employee, the issue of whether the mere happenstance of
19 employment of a tribal member is a consensual relationship, and thus, sufficient to invoke
20 tribal jurisdiction, remains. The Court finds that the employment of a tribal member, by
21 itself, is not enough to invoke jurisdiction of the tribe as a matter of law. Of course, a
22 member of the Navajo Nation is free to negotiate jurisdictional issues when hired, but an
23 employer who does nothing to subject himself to tribal jurisdiction other than hiring a tribal
24 member has not expressly or impliedly consented to jurisdiction.

25

26

27 ³In *Dawavendewa v. SRP Agricultural*, the Ninth Circuit held that a hiring preference policy
28 based on tribal affiliation stated a claim for discrimination under Title VII. 154 F.3d 1117 (9th Cir.
1998).

1 The Defendants also argue that even though Atkinson and Manygoats did not enter
2 into a written employment contract, their employer-employee relationship was "consensual"
3 within the plain meaning of the word⁴. However, the Court may not simply use the plain
4 meaning definition of the word "consensual" here. Instead, the Court must determine
5 whether the relationship was "consensual" as contemplated by the Supreme Court when it
6 created the *Montana* exceptions. An employment relationship is a consensual relationship
7 in the sense that the employer consents to the employee working at the establishment, and
8 the employee consents to working at the establishment. The consent required to trigger the
9 first *Montana* exception, however, requires much more. *Montana* requires consent to
10 jurisdiction, either expressed, or implied by the parties' behavior. Here, there are no facts to
11 indicate that Atkinson consented to tribal jurisdiction when it hired Manygoats. Jurisdiction
12 mat not be assumed simply because of an employee's origin.

13 The Court is not holding that an employment relationship may never be "consensual"
14 in terms of *Montana*. If an employer contracts with an employee about jurisdiction at the
15 time of hiring, that employer might be entering into a consensual relationship in the sense
16 contemplated by *Montana*. In fact, Courts have held that tribal jurisdiction is proper where
17 employers use giving preference to tribal members as a negotiating point in contracts. *See*
18 *FMC, supra*. Here, however, Atkinson did not negotiate or enter into such an agreement with
19 the Navajo Nation. To the contrary, Atkinson has traditionally limited its reliance on the
20 Navajo Nation. (*See* Compl. ¶¶ 1-2).

21 The Defendants' make the additional argument that a consensual relationship was
22 formed when the Plaintiff hired a member of the Navajo Nation as an employee.⁵ Under this
23 analysis, every employer in the nation would consent to tribal jurisdiction by hiring a tribal

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25 ⁴ For example, Merriam-Webster defines "consensual" as, "existing or made by mutual
26 consent without an act of writing," or "involving or based on mutual consent." Merriam-Webster's
Collegiate Dictionary 245 (10th ed. 2001).

27 ⁵ The Defendants have put forth facts to show that Atkinson has hired many Navajo
28 employees. However, Defendants have failed to show how hiring multiple employees, as opposed
to hiring only one, creates a consensual relationship as opposed to hiring only one.

1 member. Similarly, if that employer terminated a tribal member, the employer would "harm"
2 the tribe and thus, again consent to tribal jurisdiction. This argument would yield a result
3 exactly opposite of the general proposition articulated by the Supreme Court: that generally,
4 Indian tribes lack civil authority over the conduct of nonmembers. See *Atkinson* citing
5 *Montana*.

6 *2. Tribe's Political Integrity, Economic Security, Health, or Welfare*

7 Under *Montana's* second exception, "[a] tribe may . . . exercise civil authority over
8 the conduct of non-Indians on fee lands within its reservation when that conduct threatens
9 or has some direct effect on the political integrity, the economic security, or the health or
10 welfare of the tribe." *Montana*, 450 U.S. at 566. Despite the direct language of this
11 exception, which provides that tribes may exercise civil authority over conduct that "has
12 some *direct effect*" on the political integrity, economic security, or health or welfare of the
13 tribe, *id.* (emphasis added), the Supreme Court has seemingly narrowed this exception to
14 encompass "nothing beyond what is necessary to protect tribal self-government or to control
15 internal relations." *Atkinson Trading*, 532 U.S. at 658-59 (internal quotations omitted);
16 *Strate*, 520 U.S. at 459. Thus, "to invoke the second *Montana* exception, the impact must be
17 'demonstrably serious and must imperil the political integrity, the economic security, or the
18 health and welfare of the Tribe.'" *Brendale v. Confederated Tribes and Bands of the Yakima*
19 *Indian Nation* 492 U.S. 408, S.Ct. 2994 (1989).

20 The Navajo Nation Defendants urge that the second *Montana* exception is met here
21 because the application and enforcement of Navajo preference laws reflects the tribe's
22 interest in combating the extreme poverty on its reservation, "due in large part to the high
23 level of unemployment of Navajos." (Defs.' Mem. Supp. Mot. Dismiss at 5). In support of
24 their contention, the Navajo Nation Defendants cite and discuss information provided in a
25 report entitled "Comprehensive Economic Development Strategy, 2000-2001, Assessment
26 of the Navajo Economy." (*Id.*; Notice of Errata, Ex. A).

27 While employment issues are related to tribal economic security and welfare, Courts
28 interpreting *Montana* have required more. In dealing with the second exception announced

1 in *Montana*, the court in *Strate* held that "Read in isolation, the *Montana* Rule's second
2 exception can be misperceived. Key to its proper application, however, is the Court's
3 Preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine
4 tribal membership, to regulate domestic relations among members and to prescribe rules of
5 inheritance for members.... But [a tribe's inherent power does not reach] beyond what is
6 necessary to protect tribal self-government or to control internal relations." 520 U.S. at 459.

7 *Strate* involved an automobile accident on a federally granted right-of-way over
8 Indian reservation land. The Court held that, absent authorization from a statute or treaty, a
9 tribe could not govern the conduct of non-members on the highway in question. See *Strate*
10 v. *A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997).

11 In contrast to *Strate*, the Ninth Circuit held in *FMC v. Shoshone* that Shoshone-
12 Bannock Tribes could enforce a Tribal Employment Rights Ordinance which required all
13 employers working on the reservation to give mandatory hiring preferences to Indians. 905
14 F. 2d 1311 (9th Cir. 1990). Similar to the case at hand, the non-member Plaintiff in *FMC*
15 challenged the Tribe's ability to enforce the Tribe's Employment Ordinance against him.
16 However, in *FMC*, the court pointed to several factors used to determine that FMC had
17 formed a consensual relationship with the Tribe and its members, factors that are noticeably
18 absent here. To name a few, FMC had "wide ranging mining leases and contracts; FMC has
19 also explicitly recognized the Tribes' taxing power' in one of its mining agreements; FMC
20 agreed to royalty payments and had entered into an agreement with the Tribes relating
21 specifically to the [Tribal Employment Rights Ordinance's] goal of increased Indian
22 Employment and training...the plant is within reservation boundaries; FMC signed numerous
23 contracts with the Tribes, including one particularly related to employment." The *FMC*
24 Court went on to say, "In sum, FMC's presence on the reservation is substantial, both
25 physically and in terms of money involved....FMC actively engaged in commerce with the
26 Tribes and so has subjected itself to the civil jurisdiction of the Tribes." *FMC* at 1314

27 In its Complaint, Atkinson alleges that it buys all of its goods, services, merchandise,
28 foodstuffs, and utilities from sources off the Navajo reservation, which are delivered to

1 Atkinson's fee land by means of public roads; that Atkinson's business deals almost
2 exclusively with tourists and other nonmembers of the Navajo Nation; and that Atkinson's
3 sole contact with Navajo Nation members on its property consists of employing, and selling
4 a "small amount" of goods to, members of the Navajo Nation. (Compl. ¶ 11, 29, 32). Thus,
5 contrary to the Plaintiff in *FMC*, Atkinson has purposefully *limited* its relationship with the
6 Tribe.

7 Furthermore, the Court notes that if the termination of a Navajo employee were to
8 trigger the second *Montana* exception, every employer nationwide that terminated such an
9 employee would be subject to tribal jurisdiction. This result is at odds with the general
10 proposition that jurisdiction over non-members is rarely proper. Essentially, the narrow
11 exception would swallow the rule.

12 Under the second prong of the *Montana* test, this Court concludes that tribal court
13 jurisdiction over this action is not necessary to preserve the tribe's sovereignty. While
14 employment matters concerning tribal members are certainly *related* to the economic
15 security and welfare of the tribe, they do not have a *substantial* impact on the tribe as a
16 whole. Precedent requires that the issue have a substantial impact on the tribe as a
17 whole such that it poses a threat to the political integrity, economic security, health or
18 welfare of the tribe. *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. See Also *Strate* at 459
19 (holding "*Montana's* second exception grants tribes nothing beyond what is necessary to
20 protect tribal self-government or control internal relations.").

21 Furthermore, the Supreme Court has already considered the effect of Atkinson's
22 trading post on the Navajo Nation and found that the second exception was not met. In an
23 action involving the same Plaintiff and Defendants as this case, the Supreme Court said
24 "Whatever effect petitioner's operation of its trading post might have upon surrounding
25 Navajo land, it does not endanger the Navajo Nation's political integrity." *Atkinson v.*
26 *Shirley* at 659. Similarly, this Court finds that the operation of the trading post its
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1 employment of Navajo members does not threaten the political integrity of the Navajo
2 Nation.

3 C. Sovereign Immunity of Navajo Defendants

4 The Navajo Nation Defendants' next jurisdictional contention is that they are
5 entitled to sovereign immunity from suit. *See Aspaas*, 77 F.3d at 1133 (sovereign immunity
6 is jurisdictional in nature). Tribal sovereign immunity, however, does not bar a suit for
7 prospective relief against tribal officers who have allegedly acted in violation of federal law.
8 *See Santa Clara Pueblo v. Martinez*, 439 U.S. 49, 59 (1978); *Aspaas*, 77 F.3d at 1133-34.
9 Because the Court can answer the threshold question of the Navajo Nation's jurisdiction
10 under *Montana*, and has determined that the exercise of jurisdiction over the Plaintiff was
11 improper, the Court can properly rule on the issue of sovereign immunity. *See Nevada v.*
12 *Hicks*, 533 U.S. 358, 373 (2001); *MacArthur v. San Juan County*, 309 F.3d 1216, 1226 (10th
13 Cir. 2002).

14 Here, Atkinson has alleged that specific members of the NNLC violated federal law
15 by acting beyond the scope of their authority. The Court has determined that the Navajo
16 Nation does not have jurisdiction over Atkinson's employment practices at Cameron Trading
17 Post under the *Montana* doctrine. Because the NNLC members have acted beyond their
18 authority in attempting to enforce the NPEA against Atkinson, sovereign immunity does not
19 bar this suit. *See, e.g., Atkinson Trading*, 532 U.S. 645.

20 CONCLUSION

21 "[I]ndian Tribes are unique aggregations possessing attributes of sovereignty over
22 both their members and their territory, [b]ut their dependant status generally precludes
23 extension of tribal civil authority beyond [m]embers." *Atkinson Trading Company v. Shirley*
24 532 U.S. 645, 121 S.Ct. 1825 quoting *United States v. Mauzurie* 419 U.S. 544, 557, 95 S.Ct.
25 710 (1975). Here, the facts do not warrant an extension of a tribe's sovereign powers against
26 non-member Plaintiff, Atkinson Trading Company. Furthermore, in determining that the
27 exercise of jurisdiction over Plaintiff was improper, the Court finds that the Defendants have
28 acted beyond their authority in attempting to enforce the NPEA against Atkinson.

1 Accordingly, Plaintiff's Motion for Summary Judgment will be granted and Defendants'
2 Motion for Summary Judgment will be denied.

3
4 **ORDER**

5 For the foregoing reasons,

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7 **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment is **GRANTED**.

8 **IT IS FURTHER ORDERED** that the Defendants' Motion For Summary Judgment
9 is **DENIED**.

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14 DATED this 16 day of March, 2004.

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19 Stephen M. McNamee
Chief United States District Judge